SUPREME COURT OF QUEENSLAND

CITATION:	*Patane v. Chief Executive, Department of Corrective Services* [2003] QSC 428
PARTIES:	**PETER PATANE** (applicant) **v.** **CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIVE SERVICES** (respondent)
FILE NO:	2732 of 2003
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	17 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	13, 14 November 2003
JUDGE:	Helman J.
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – statutory order of review for remission of sentence – whether unreasonable exercise of Chief Executive's discretion *Corrective Services Act* 2000 (Qld) ss. 75, 77
COUNSEL:	S.J. Hamlyn-Harris for the applicant J.A. Logan S.C. for the respondent
SOLICITORS:	Robertson O'Gorman for the applicant C.W. Lohe, Crown Solicitor, for the respondent

[1] This is an application for a statutory order of review of a decision of the authorized delegate of the respondent made on 18 December 2002 when the applicant was refused remission of a sentence of imprisonment for ten years for armed robbery imposed in the Southport District Court on 15 May 1996 by Hanger S.J.D.C.

[2] In sentencing the applicant the learned judge said that he regarded the case as particularly serious. On 29 July 1994 the applicant had, by telephone, ordered food from a pizza shop to be delivered at night to a deserted house which was some distance from neighbouring houses. The applicant, armed with a gun or replica gun, robbed the young woman who delivered the food, detained her, and 'seriously sexually assaulted her'. He was charged with armed robbery, deprivation of liberty, and rape. A trial began but did not come to a jury verdict because, as his Honour put it, 'after it was apparent that the Crown had a very strong case', on the third day of the trial, the applicant pleaded guilty to armed robbery, deprivation of liberty, and

indecent assault with a circumstance of aggravation. The Crown accepted those pleas in discharge of the indictment and the applicant was sentenced to imprisonment for ten years for the armed robbery, for three years for the deprivation of liberty, and for eight years for the indecent assault. The sentences were to be served concurrently. His Honour referred to the applicant's premeditation, the 'cowardly sexual assault', the absence of any 'apparent indication of any remorse', the applicant's prior criminal history, and medical and psychiatric reports that had been put before him. No parole recommendation was made. The applicant applied for leave to appeal against the sentences, but on 25 October 1996 his application was refused by the Court of Appeal.

[3] The applicant, who was born on 29 June 1971, has a criminal history in addition to the offences for which Hanger S.J.D.C. dealt with him. On 31 March 1989 in the Supreme Court at Brisbane the applicant was subjected to a probation order for two years and ordered to perform 240 hours community service for two offences committed on 14 September 1988: entry of a dwelling house in the night-time with intent, and assault with intent to steal using actual violence and while in company. He was required to undergo medical, psychiatric, and psychological treatment as directed. On 18 July 1994 in the Southport Magistrates Court he was fined $150 for a minor drug offence and no conviction was recorded. Finally, in the Southport District Court on 26 November 1996 Hall D.C.J. sentenced him for two offences committed on 12 May 1995: armed robbery and assault occasioning bodily harm while armed with a dangerous weapon. In each case the dangerous weapon was a rifle. Those offences were committed while the applicant was at large with bail granted in connexion with the charges before Hanger S.J.D.C. Hall D.C.J. sentenced the applicant to imprisonment for eight years for the armed robbery and to imprisonment for one year for the assault. His Honour ordered that those sentences be served concurrently and declared that the time the applicant had been in pre-sentence custody (one year and two days, from 13 May 1995 to 15 May 1996) be deemed time already served under the sentences.

[4] The applicant seeks remission of his sentence under s. 75 of the *Corrective Services Act* 2000. Subsection 2 of that section provides, so far as it is relevant, that the chief executive may grant remission of up to one-third of a term of imprisonment if satisfied:

> (a) that the prisoner's discharge does not pose an unacceptable risk to the community; and
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> (b) that the prisoner has been of good conduct and industry; and
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> (c) of anything else prescribed under a regulation.

It was not in issue that nothing has been prescribed under a regulation. The Act applies to this case by operation of s. 268A.

[5] Section 77 provides that in deciding whether a prisoner's discharge 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 relevant remarks made by the sentencing court;

(g) any relevant medical or psychological report relating to the prisoner;

(h) any relevant behavioural report relating to the prisoner;

(i) anything else prescribed under a regulation.

[6] The decision not to grant remission to the applicant was made, as I have related, on 18 December 2002. Following a request from the applicant's solicitors, a statement of reasons for the decision were provided in a letter dated 28 February 2003 to the solicitors from the Executive Director, Operational Support Services, Department of Corrective Services, who was the authorized delegate of the respondent. In the statement of reasons the delegate set out the material he had considered. Included were: remission assessments dated 29 October 2002 signed by Ms Sue McEwan, Acting Sentence Management Coordinator, and Mr Bernie Kruhse, the Acting General Manager; the applicant's criminal history; transcripts of the sentencing remarks of Hanger S.J.D.C. and Hall D.C.J.; a report dated 25 October 2002 by Ms Raylene Grant, consultant psychologist; a Risk Needs Inventory completed on 22 August 2002; a report dated 17 March 2001 by Dr Ian Atkinson, consultant psychiatrist; a report dated 1 November 2002 by Dr Ian Curtis, consultant psychiatrist; and letters from the applicant, members of his family, and his solicitors. The delegate set out his reasons for his decision as follows:

> Section 75 of the Corrective Services Act outlines that a prisoner may be granted up to one-third remission of the term of imprisonment. I have considered those factors in section 78 in determining if whether prisoner Patane had been of good conduct and industry. I determined that prisoner Patane had been of good conduct and behaviour.
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> I then gave consideration to those factors in section 77 in determining whether prisoner Patane posed an unacceptable risk to the community
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> In considering prisoner Patane's case I noted the sentences imposed and the nature of the offences. His current offences and his criminal history include violence related offending and his current offences also include a sexual offence. I also noted that the sentencing Judges both highlighted that there were similarities between prisoner Patane's current offences and ones in his criminal history.

Given that prisoner Patane has been convicted of committing similar offences on three separate occasions over a period of approximately 6 years, I have concluded that he has demonstrated a propensity toward offending in this manner. I noted with concern that the fact that prisoner Patane was on bail for very serious offences did not serve as barrier to him committing further offences. This is indicative that he was not able to self-regulate his offending behaviour despite pending court action.

I was concerned that the psychological report dated 25 October 2002 indicated that prisoner Patane has a number of outstanding intervention needs and that these factors would contribute to the likelihood of him offending. I particularly noted that the psychologist considered that he minimised and justified his violent offending and severely minimised his sexual offending behaviour. The author of the report concluded that he was an unacceptable risk to the community and did not recommend granting remission. The Sentence Management Coordinator and General Manager concurred with this conclusion.

While I noted that the prisoner has completed the anger management and cognitive skills programs, I am concerned that he has not addressed the issues of substance abuse and sexual offending, while in custody. However, I noted prisoner Patane's version of events, described in both your letters and prisoner Patane's letter, in relation to why he refused to undertake the SOTP [Sex Offenders Treatment program] and I did not rely on his failure to undertake the SOTP in my decision-making. However, I am concerned that he has not developed skills and strategies that would assist him in not offending in this manner in the future.

I closely considered the information contained in Dr Atkinson's and Dr Curtis' reports. I took particular note of Dr Curtis' comparison over the three occasions that he has seen prisoner Patane, and his comments in relation to prisoner Patane's maturation and improvement. I was mindful of his recommendation, including his overview of the factors that would contribute towards prisoner Patane's successful re-integration. I note and concur with the comment that prisoner Patane would benefit from seeing Dr Curtis when he is in the community.

I also took into account the view of Dr Atkinson that it is possible that prisoner Patane's immature personality has matured out. However, given he is currently in a protected environment Dr Atkinson still had reservations about his ability to contain his behaviour unless closely supervised and substance free. He recommended supervised released with regular substance testing conditions.

I also noted the proposed release plans, including the previously mentioned counselling with Dr Curtis, and family support that was detailed in correspondence from prisoner Patane, his family and yourself. I also noted prisoner Patane's positive response to his resettlement leave of absence program.

I noted that you raised the issue that the escape allegations of 2001 should not be taken into account in the remission decision. While this factor was noted in the remission submission prepared by the centre, I did not rely upon this matter in the decision making process.

After considering all of the available information I formed the view that the prisoner posed an unacceptable risk to the community and therefore decided not to grant remission on his 10 year sentence.

[7] The grounds of this application are:

1. That the making of the decision was, within the meaning of s. 20(2)(e) of the Judicial Review Act 1991, an improper exercise of the power conferred upon the respondent by the Corrective Services Act 2000, in that:

   (a) the respondent took irrelevant considerations into account in the exercise of the power, within the meaning of s. 23(a) of the Judicial Review Act 1991;

   Particulars

   In forming the view, in terms of s. 75(2)(a) of the Corrective Services Act 2000, that the applicant posed an unacceptable risk to the community, the respondent took into account irrelevant considerations including –

   (i) the conclusion that the applicant has demonstrated a propensity toward offending in the manner of the offence to which the decision relates, there being no reasonable basis for the conclusion, because:-

   - the conclusion is based on events significantly in the past, namely the applicant's criminal history before he was sentenced on 15 May 1996 to the sentence of imprisonment to which the decision relates;

   - the conclusion fails to take into proper account the extent of the applicant's rehabilitation since then;

   - the conclusion fails to take into proper account the applicant's current behaviour and state of mind;

   (ii) the concern that he has not developed skills and strategies that would assist him in not offending in this manner in the future, there being no reasonable basis for such a concern, having regard to the whole of the material available to the respondent including the psychiatric assessment of Dr Ian Curtis and Dr Ian Atkinson; and

   (iii) the conclusion that the applicant posed an unacceptable risk to the community, there being no reasonable basis for the conclusion, having regard to the whole of the material available to the respondent including the psychiatric assessments of Dr Ian Curtis and Dr Ian Atkinson;

   (iv) the fact that the applicant has not taken part in a Sex Offenders Treatment Program, which fact was taken

into account by authorised delegate of the respondent because

- the author of a psychological report took the fact into account in reaching conclusions that the applicant was an unacceptable risk to the community and in declining to recommend the applicant for remission,

- the Sentence Management Coordinator and General Manager concurred with those conclusions,

and the authorised delegate took into account both the conclusions and the fact that the Sentence Management Coordinator and General Manager concurred with them in making the decision (whilst stating that he did not rely on the fact in his decision-making).

(b) the respondent failed to take relevant considerations into account in the exercise of the power, within the meaning of s. 23(b) of the Judicial Review Act 1991;

Particulars

In forming the view, in terms of s. 75(2)(a) of the Corrective Services Act 2000, that the applicant posed an unacceptable risk to the community, the respondent did not take into account relevant considerations including –

(i) the fact that the applicant has been of good conduct and industry;

(ii) that the applicant has not committed any offences or breaches of discipline for a significant period of time prior to the making of the decision; and

(iii) the psychiatric assessments of Dr Ian Curtis and Dr Ian Atkinson.

(c) the respondent exercised his discretionary power in refusing the applicant remission prisoner in accordance with a rule or policy without regard to the merits of the applicant's particular case, within the meaning of s. 23(f) of the Judicial Review Act 1991;

Particulars

In forming the view, in terms of s. 75(2)(a) of the Corrective Services Act 2000, that the applicant posed an unacceptable risk to the community, the respondent relied on the following considerations listed in s. 77 of the Act

'(c) the prisoner's past offences and any patterns of offending;' and

'(f) any remarks made by the sentencing court;'

without regard to the merits of the applicant's particular case which include

(i) the fact that the applicant has been of good conduct and industry;

(ii) that the applicant has not committed any offences or breaches of discipline for a significant period of time prior to the making of the decision; and

(iii) the psychiatric assessments of Dr Ian Curtis and Dr Ian Atkinson

(d) The exercise of the power was so unreasonable that no reasonable person could so exercise the power, within the meaning of s. 23(g) of the Judicial Review Act 1991, having regard to all the relevant facts and circumstances and the merits of the applicant's case for remission, which include

(i) the fact that the applicant has been of good conduct and industry;

(ii) that the applicant has not committed any offences or breaches of discipline for a significant period of time prior to the making of the decision; and

(iii) the psychiatric assessments of Dr Ian Curtis and Dr Ian Atkinson.

[8] Clearly enough the decision entrusted to one in the position of the delegate requires an informed and fair-minded assessment, usually balancing relevant considerations. Those considerations may properly be seen to be reduced to two: on the one hand the indications from a prisoner's history both before and after sentence that there is a substantial risk that, if granted remission, he or she would offend again before completing his or her sentence so posing an unacceptable risk to the community, and on the other hand indications that the prisoner has been so rehabilitated as to render re-offending unlikely. In the end an assessment must be made as to the side of the line on which an applicant's case falls. Human nature being what it is, the risk of re-offending can rarely if ever be completely eliminated, but the material before the decision-maker may be such that, applying common sense and ordinary human experience to that material, he or she may safely conclude that a prisoner's discharge does not pose an unacceptable risk to the community. In reaching a decision on that question a decision-maker could not properly overlook the fact that ordinary human experience shows that one who has repeatedly committed a certain kind of offence may very well be tempted to re-offend, and actually do so; nor could it be overlooked that the opportunities for wrongdoing are considerably reduced – but by no means eliminated – in prison. Further, a prisoner may be able to dissemble, appearing to have reformed without truly having done so.

[9] There will no doubt be cases in which the circumstances lead so obviously towards one or other conclusion that no reasonable person could fail to recognise that. On the other hand there will be cases – and this appears to have been one – in which

careful examination of the competing factors is required to reach a proper decision. The material before the delegate tending towards the decision he made consisted chiefly of the applicant's criminal history and the opinions of Ms Grant, Ms McEwan and Mr Kruhse. Tending towards the granting of the remission was the evidence of the applicant's having been of good conduct and industry and the reports of Drs Atkinson and Curtis.

[10] In paragraph 74 of the written outline of submissions put before me on behalf of the applicant it was asserted that the process undertaken by the delegate 'was fundamentally flawed in that it placed excessive weight on the applicant's criminal history and virtually no weight on his progress since'. In paragraph 10 of the outline the delegate's error was identified 'in essence' as follows:

> firstly, to place significance [*sic*] reliance on the psychologist's report as a reliable assessment of the applicant's current level of risk to the community;
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> secondly, to proceed on the basis – as the report would itself suggest – that the historical tests carried out by the psychologist confirmed or reinforced each other, whereas in effect they were simply different tests to assess the same historical factors;
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> thirdly, to proceed on the basis – as the authorised delegate by implication has done – that the conclusion of the psychologist not to recommend remission was confirmed or strengthened by the fact that the general manager supported that conclusion, when in fact there is no evidence that the general manager had anything additional upon which to base his own recommendation;
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> fourthly, to proceed on the basis – as the authorised delegate by implication has done – that the Offender Risks Needs Inventory for the applicant of 22 August 2002 (Exhibit LR3 – Document 13) which was considered by the authorised delegate, further reinforced the conclusions of the psychologist and the general manager, whereas it too was largely an inventory of the same historical factors.
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> fifthly, to accordingly misunderstand the material and to conclude on an erroneous basis that the applicant posed an unacceptable risk to the community if released.

In paragraph 11 it was submitted that because the delegate proceeded in that way he did not give 'proper, genuine and realistic consideration to the merits of the case' as he was required to do: *Kahn v. Minister for Immigration and Ethnic Affairs* (1987) 14 A.L.D. 291. For that reason, the argument continued, the decision of the delegate was so unreasonable that no reasonable person could so decide, alternatively, the delegate took irrelevant considerations into account (an erroneous view of the material), failed to take relevant considerations into account (a correct view of the material) and/or applied a rule or policy (the requirements of s. 77 of the *Corrective Services Act*) without regard to the merits of the case.

[11] Those submissions call for an examination of the five propositions in paragraph 10 of the applicant's written submissions.

[12] Ms Grant's report was an assessment of the then current level of risk to the community if the applicant were to be released. In it she gave as the sources of information upon which she drew: various files concerning the applicant (Professional Management, Detention, Case Management, and Medical) as well as interviews and psychometric testing on 10 and 17 October 2002. She considered two risk assessment tests, STATIC-99 and the Violence Risk Appraisal Guide (VRAG), both reliant solely on what she referred to as 'historical factors'. The former test 'was designed to assess the long-term risk of recidivism and does not assess the changes in risk, which may occur because of intervention', Ms Grant noted; adding that it 'cannot be used to evaluate whether offenders have benefited from psychological intervention'. The latter test 'predicts, with moderate reliability the likelihood of violent recidivism over a ten (10) year period', Ms Grant said; adding that it does not assess changes in the risk that may occur because of 'intervention'. The STATIC-99 test result, Ms Grant reported, was of medium to high risk. The VRAG indicated the applicant could be considered to be a 'moderate risk of violent or general recidivism in the long term', i.e., within the following ten years. Ms Grant did not confine her consideration to the tests reliant on 'historical factors'. Considered too was psychometric analysis by the Minnesota Multiphasic Personality Inventory - 2 (MMPI-2), a test designed to assess a number of major patterns of personality and emotional disorders. Ms Grant recorded that that inventory had been administered in January 1995 by Dr David Alcorn (psychiatrist), in October 1996 by Ms Joanne Williams (psychologist), and on 10 October 2002 by Ms Grant herself. She noted that one of the ten clinical scales was 'significantly elevated', its 'extreme elevation' indicating that the applicant may have 'continuing problems in dealing with authority figures'. Ms Grant added that '[m]any individuals with significantly elevated scores' on that scale tend to be 'impulsive, egocentric and more likely to engage in irresponsible behaviour'. Ms Grant referred to fifteen reports on the applicant by psychiatrists, the earliest dated 10 October 1988 and including one by Dr Curtis dated 23 August 2000 and that by Dr Atkinson dated 17 March 2001. Ms Grant did not recommend the applicant for remission, but expressed the opinion that he would be suitable for community service leaves of absence, and possibly for resettlement leaves of absence.

[13] The remission assessment dated 29 October 2002 by Mr Kruhse was to the same effect as Ms Grant's. Mr Kruhse expressed the opinion that the applicant remained an unacceptable risk to the community if released unsupervised. The document that contains Mr Kruhse's assessment, and which also contains a recommendation against the granting of remission by Ms McEwan, includes references to programs completed by the applicant (the Cognitive Skills and Anger Management programs), Community Corrections Board responses to previous applications by the applicant, the applicant's release plans (with reference to accommodation, employment, medication, supports), as well as to his criminal history and the sentencing remarks of Hanger S.J.D.C. and Hall D.C.J. and to Ms Grant's report.

[14] The Risk Needs Inventory showed a medium community risk level based on a score of 12 made up as follows:

Category	Risk Level	Consider for programs
Criminal History:	HIGH	6
Employment Potential:	LOW	0
Recreational Activities:	LOW	0

Alcohol and Drugs:	LOW	0
Relationships:	LOW	2
Violence Potential:	MEDIUM	3
Criminal Attitudes:	LOW	1

The scoring key used to arrive at the level of risk was as follows:

Scoring Key:

Extreme	+40
High	26-40
Medium	11-25
Low	0-10

[15] The applicant's history was an important part of the basis of Ms Grant's opinion and of Mr Kruhse's assessment. It was also an important component in the Risk Needs Inventory. Important though that history was there were other matters taken into account by Ms Grant and Mr Kruhse. Ms Grant had Dr Atkinson's report of 17 March 2001 in which he said it was possible that the applicant's immature personality was 'maturing out', but Dr Atkinson recorded that he continued to have 'some reservations' about the applicant's ability to contain his behaviour unless he was 'very closely supervised' and remained 'substance-abuse free'. Dr Curtis, in his report of 1 November 2002 which followed his examination of the applicant on 15 October 2002, was not of course available to Ms Grant, but it was considered by the delegate. Dr Curtis expressed the view that major positive, maturational changes had been manifest in the applicant two years before, and that, based on serial clinical observations, improvements in the applicant's personality and mental health had 'consolidated manifestly and markedly' during the previous two years. Dr Curtis reported that there were 'no psychiatric contra-indications to his release to the community'.

[16] The delegate did place some reliance on Ms Grant's report as an assessment of the level of risk that would attend the applicant's release. I am not persuaded that he erred in doing so. Ms Grant of necessity considered the applicant's history, and the results of the STATIC-99 and the VRAG risk assessment tests and referred specifically to their limitations. She also considered the results of the psychometric analyses by the MMPI-2 tests administered by others, and the last by her. There is no proper basis for concluding that she – or Mr Krushe – gave any more than due weight to the applicant's pre-custodial history. It was of great importance, but so was the applicant's custodial history. The submission that the STATIC-99 and VRAG tests and the Offender Risks Need Inventory were all based on the same data is largely – but not entirely – true because there were categories in the inventory that were not so based (e.g., employment potential and recreational activities). There is nothing unorthodox in using a number of tests applied to the same data to arrive at a conclusion. Checking of that kind is a desirable application of scientific method. I see no evidence that the delegate misunderstood the ambit or limitations of the tests or failed to consider properly the applicant's custodial history. The fact that Ms Grant, Mr Kruhse - and for that matter Ms McEwan - reached the same conclusion is a matter of some significance. In the end the delegate was required to exercise his own judgment in assessing a risk, but it is an important consideration – but not a determining one – that others with experience or expertise in such matters had reached a similar conclusion. I should add that a good deal of emphasis was placed in the submissions made on behalf of the applicant on Dr Curtis's opinion

was that there were 'no psychiatric contra-indications to [the applicant's] release to community'. In making that assessment Dr Curtis did not go beyond the limits of his expertise. The delegate, however, was required to go beyond a consideration of possible mental disorder to consider the whole picture of a possible risk presented by the applicant.

[17] I am not persuaded that the application has made out a case for a statutory order of review. The delegate assessed the competing considerations in what I perceive a well-informed and fair-minded way. What in essence the applicant seeks is a review on the merits of his application for remission, while failing to demonstrate any error in the decision-making process.

[18] I should add three further comments. First, the matters set out in paragraphs (c) and (f) of s. 77 do not constitute 'a rule or policy' as suggested in ground 1(c) of the application before me; they are no more than two on a list of matters a decision-maker is required to consider.

[19] Secondly, there is no reason not to accept the delegate's disclaimer of reliance on the applicant's failure to undertake the Sex Offenders Treatment program in making his decision.

[20] Thirdly, I wish to comment on an issue raised on behalf of the respondent: the question of the proper construction to be put upon s. 75(2) of the *Corrective Services Act.* Reliance in particular was placed on the analysis by Gummow J. in *Minister for Immigration v. Eshetu* (1999) 197 C.L.R. 611 of the difference between the review of administrative action 'by reference to the declaration and enforcement of the law which (i) determines the limits of the power in question and (ii) governs its exercise' (p.649). Cases in the second category concern the abuse of power and the presence or absence of '*Wednesbury* unreasonableness' (from what Lord Greene M.R. said in *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 K.B. 223 at pp. 229-231) may be in issue. This case, however, it was argued, was in the first category, the question being whether the delegate had properly considered whether he was satisfied that the applicant met a statutory criterion. Gummow J. referred to an analysis of the limits of questions that properly arise in case in the first category:

> … in *Buck v Bavone* [(1976) 135 C.R.R. 110], Gibbs J observed, in the course of construing the powers conferred upon a board established under the *Potato Marketing Act* 1948 (SA), that it was not uncommon for statutes to provide that a decision-maker shall or may take certain action if satisfied of the existence of certain specified matters. His Honour noted that the nature of the matters of which the authority is required to be satisfied often largely will indicate whether the decision of the authority can be effectively reviewed by the courts. His Honour continued [pp. 118-119]:
>
> '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.'
>
> This passage is consistent with the proposition 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 show that no reasonable decision-maker could have arrived at the decision in question. 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. (pp. 653-654)

[21] Beyond those limits there is no 'residual discretion' entrusted to the decision-maker, it was argued, so that the presence or absence of *Wednesbury* unreasonableness is irrelevant despite s. 32 CA(1) of the *Acts Interpretation Act* 1954, which provides that in an Act the word 'may', used in relation to a power, 'indicates that the power may be exercised or not exercised, at discretion'. Reference was made in support of the respondent's argument to the explanatory notes to the *Corrective Services Bill* 2000 in which Clause 75(2) was said to provide 'that the chief executive *must* grant remission of one third of the prisoner's term of imprisonment if the prisoner's discharge does not pose an unacceptable risk to the community and the prisoner has been of good conduct and industry' (emphasis added). The word 'must' did appear in that provision of the Bill as introduced into the Legislative Assembly, but the Bill was amended in Committee to read as s. 75(2) now provides. I find it difficult to accept that the word 'may' is not used in the ordinary sense referred to in s. 32 CA(1) of the *Acts Interpretation Act*, and so there would be no reason to resort to the extrinsic material of the explanatory notes as an aid to construction of s. 75(2) in any event: see s. 14B of the *Acts Interpretation Act*. But the acceptance or rejection of the respondent's argument will have no practical effect on the outcome of this application, because the issues for consideration are those referred to by Gibbs J. in *Buck v. Bavone*: whether there was failure to consider relevant matters, whether irrelevant matters were taken into account, and whether a decision was reached which was so unreasonable that no reasonable decision-maker could have arrived at it. (It should be noted that there was a discussion of the construction point in *Saunders v. Queensland Community Corrections Board and Anor* [2003] Q.S.C. 397.)

[22] The application will be refused.