SUPREME COURT OF QUEENSLAND

CITATION:	*McGrane v Queensland State Parole Board* [2012] QCA 1
PARTIES:	**JAMES McGRANE** (appellant) **v** **QUEENSLAND STATE PAROLE BOARD** (respondent)
FILE NO/S:	Appeal No 4966 of 2011 SC No 13762 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 February 2012
DELIVERED AT:	Brisbane
HEARING DATE:	24 August 2011
JUDGES:	Fraser and White JJA and North J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR RELATING TO FACTS – where the appellant applied for a statutory order of review of the respondent's decision to refuse his application for parole – where the appellant argued that the respondent's decision was based upon a number of factual matters which did not exist – where the appellant argued that the primary judge erred in finding that the respondent's decision was not based upon a failure by the appellant to respond to the parole board's concerns in relation to his relapse prevention plan, the false premise that the appellant's relapse prevention plan had not changed from previous parole applications, or a belief that the appellant displayed "addictive behaviour", and that there was no denial of procedural fairness – where the appellant also argued that the primary judge failed to rule upon his argument that there was no evidence to substantiate a belief that the appellant was not "versed" in a relapse prevention plan – whether the primary judge erred in finding that this ground of review was not established ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – APPLYING POLICY AND MERITS OF CASE – where the appellant argued below that

the Board acted in accordance with policy and without regard to the merits of his case because they required him to be given a lower security classification and to remain in residential accommodation as a precondition for parole being granted – where the appellant argued that the primary judge did not rule upon his argument that the respondent failed to consider the merits of his relapse prevention plan, and that the primary judge did not refer in any substantial manner to his argument that his security rating was irrelevant – where the appellant argued the primary judge erred in finding that the respondent did consider the appellant's submissions that he had been unfairly treated by management at Wolston Correctional Centre – where the appellant argued the primary judge failed to consider his argument that a favourable psychologist's report demonstrated that the respondent failed to consider the merits of his case – whether the primary judge erred in finding that this ground of review was not established

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – BAD FAITH – where the appellant argued that his previous parole applications displayed a change in approach by the respondent in relation to relapse prevention planning and residential accommodation requirements, and varying emphasis on his breach history, which suggested that the respondent was acting in bad faith – where the primary judge found that the respondent had not changed its position but was being more explicit about the matters and that any change in emphasis was not sufficient to infer bad faith – whether the primary judge erred in finding that this ground of review was not established

Corrective Services Act 2006 (Qld), s 12, s 13, s 227, sch 1
Judicial Review Act 1991 (Qld), s 20(1), s 20(2)(e), s 20(2)(h), s 23(d), s 23(f), s 24(b)

McGrane v Queensland State Parole Board [2010] QSC 209, cited
McGrane v Queensland State Parole Board [2011] QSC 121, affirmed

COUNSEL: The appellant appeared on his own behalf
S A McLeod for the respondent

SOLICITORS: The appellant appeared on his own behalf
Crown Law for the respondent

[1] **FRASER JA:** On 20 May 2011, a judge of the trial division dismissed the appellant's application for a statutory order of review pursuant to s 20(1) of the *Judicial Review Act* 1991 (Qld) of the respondent's decision to refuse the appellant's application for parole.

[2] The primary judge set out the history of the matter in detail in the following passage:[1]

> "[2] On 18 June 2010 McMurdo J delivered judgment in the matter of *McGrane v Queensland State Parole Board* [[2010] QSC 209]. That was an application for judicial review of a decision by the respondent to refuse the applicant parole on 25 September 2009. McMurdo J set aside the decision of the Parole Board. He ordered the Parole Board to reconsider the application for parole, which was the subject of its decision of 25 September 2009. McMurdo J summarised the factual background to this matter as follows:
>
> > '[3] The applicant has been in prison since 1986, when he was convicted of the offences of murder and rape. He had pleaded guilty to the offence of rape, but not guilty to the murder on the grounds of diminished responsibility. By now he has served the 15 years imprisonment imposed for the rape offence and he is serving the life term imposed for the offence of murder. He was 17 years of age when he went to prison in 1986. Thus he has been in prison for the whole of his adult life. He has effectively no employment experience. He has undertaken tertiary studies whilst an inmate and has been awarded by the University of Southern Queensland a Degree of Bachelor of Information Technology, an Associate Degree of General Studies and a Post-Graduate Diploma in Personal Financial Planning, and he has successfully undertaken a course entitled Volunteer Tutoring in Literacy.
> > [4] His many unsuccessful applications for parole are summarised within the Parole Board Assessment Report which was written for the subject decision. That indicates that there were at least five, and perhaps more, applications from 2002 to 2008. …
> > …
> > [7] … it is necessary to say something of the history of the applicant's imprisonments. In his first few years in prison, he committed a number of serious offences. There were three counts of wilful damage, for two of which he was sentenced to two years imprisonment. There were four counts of assault committed at various times in 1989 and 1990 for which he received various sentences ranging from four months to 18 months imprisonment. He was sentenced to 12 months imprisonment for preparing to escape from lawful custody in 1989 and another term of six months for a further count of wilful damage committed in 1992. But after then, there were apparently no offences or disciplinary

[1] *McGrane v Queensland State Parole Board* [2011] QSC 121 at [2] - [7].

> breaches until March 2007 when he received what is described is a major breach for offensive language directed at an education officer. Then in March 2008 he committed a breach of prison discipline by conduct described as fashioning a sharp implement and having that in his possession. And in January and February 2009 he committed further disciplinary breaches, involving fighting with a prisoner and using abusive and threatening language towards a corrective services officer.
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> [8] The applicant progressed to be accommodated in the residential section of Wolston Correctional Centre between December 2003 and March 2005. But he was transferred from there to what is described as secure accommodation, due to what a memorandum signed by an officer within the prison described as "poor employment and behaviour issues". It may be noted that this did not involve a criminal offence or breach of a disciplinary rule. And within that same record, there is a note by another officer which appears to query that reference to poor behaviour, because the applicant had been assessed at that time as having "acceptable institutional conduct". …'

[3] It is necessary to explain the basis for McMurdo J's decision that the September 2009 decision of the Parole Board ought be reconsidered. McMurdo J extracted the essential reasoning of the Parole Board in refusing the applicant's request for parole in September 2009 as follows:

> '17. The Board's paramount concern is the safety of the community and it wished to see your successful transition from custody to the community, with the minimum of disturbance and stress. The Board noted your prior period of in [sic] residential accommodation within a high security facility and your loss of that privilege due to negative behaviour. The Board considered that your achievement again of an accommodation progression within the centre to a residential environment and a reduction in your security classification would be highly desirable in your case. The Board would not be confident that you had lowered your risk of re-offending, and enhanced your ability to be self sufficient in the community, until you had demonstrated stable and responsible behaviour over a period of time in progressively less supportive and restrictive environments.
>
> 18. The Board noted your submission dated 21 May 2009, and your statement that "*residential has absolutely no relevance to your preparation for release*". The Board is of the view that this is [a]

> highly desirable step in terms of your reintegration process. The Board would not be confident that you have lowered your risk of re-offending, and enhanced your ability to be self sufficient in the community, until you have demonstrated stable and responsible [breach-free] behaviour over a period of time in progressively less supportive and restrictive environments. It would also present the Board with increased confidence as to your ability to comply with the requirements of a parole order.'

[4] McMurdo J found that the Parole Board had failed to consider an argument advanced to it by the applicant that he had no more than a theoretical possibility of being housed in a low security facility. That argument proceeded on the basis of a notice issued to prisoners by the General Manager of the Wolston Correctional Centre on 27 September 2006 to the effect:

> 'From 27 September 2006, any offender convicted of an offence listed in Schedule one of the *Corrective Services Act 2006* will not be eligible for transfer to a low security facility.
>
> Offenders who has [sic] been convicted of a Schedule one offence who are currently accommodated at a low security centre will remain at that centre, subject to appropriate behaviour and operational requirements.'

[5] One of the offences listed in Schedule 1 to the *Corrective Services Act* 2006 (Qld) is the offence of rape, so that notwithstanding the applicant had served the full sentence of 15 years for rape, the notice still in its terms applied to him. The essential reasoning of McMurdo J in his decision of 16 March 2010 was:

> '[22] The respondent's decision was upon the premise that with good behaviour the applicant might proceed to the lower classification so that he should apply himself to achieving that position before being paroled. The applicant's case, which may or may not have been correct in fact, was that this was no more than a theoretical possibility and that his parole should not be delayed on this account. I am unable to see that the respondent considered that case. For example, there was nothing written by the respondent to the effect that it was to be rejected as lacking any evidence or as being contrary to what was known to the respondent to be true.
>
> [23] It was necessary for the respondent to consider that claim by the applicant. It was true that the discretion to be exercised here was a broad one, for

> which there were no expressed statutory criteria. But in this case, as appears from the Statement of Reasons, the respondent's reasoning was upon an essential premise that there was a potential for the applicant to be re-classified to a low security facility. Because that premise was challenged by the applicant, it was not open to the respondent to assume its correctness and to disregard, without considering the matter, the applicant's contention.
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> …
>
> [27] The result is that the applicant has demonstrated a ground to review this decision. By failing to consider whether it was impossible for the prisoner to be re-classified, whilst at the same time reasoning upon the premise of that possibility, the respondent failed to consider a matter which was an essential consideration.' (footnotes omitted)

[6] Unfortunately, the Parole Board did not simply reconsider its decision of 25 September 2009 as it was ordered to do. The reason seems to be that two weeks after McMurdo J heard his application, on 30 March 2010, Mr McGrane applied again for parole and on 17 June 2010, the day before McMurdo J delivered his decision on the Parole Board's September 2009 decision, the Parole Board wrote to the applicant advising him that consideration was being given to not granting his application for parole on the grounds that he may pose an unacceptable risk to the community. The applicant was invited to make further submissions.

[7] The Parole Board met on 16 July 2010 and rescinded its preliminary consideration, of which it had notified the applicant on 17 June 2010. It apparently felt obliged to do so because of the decision of McMurdo J, although in fact the decision did not oblige it to do this. On 16 July 2010 the Parole Board then considered the applicant's current (March 2010) application. As a consequence, on 2 August 2010 the Parole Board wrote to the applicant advising him that consideration was being given to not granting his application for parole on the basis that he may pose an unacceptable risk to the community. He was invited to make further submissions. The Parole Board received further submissions from the applicant on 20 July 2010 and 31 August 2010. On 24 September 2010 the Parole Board made a decision refusing the applicant's application for parole. In response to a request from the applicant, reasons dated 26 November 2010 were sent to him."

[3] The appellant's arguments in the trial division were based upon three main grounds of review in the *Judicial Review Act*. Insofar as it is relevant to the appellant's case, that Act provides:

"**20 Application for review of decision**

(1) A person who is aggrieved by a decision to which this Act applies may apply to the court for a statutory order of review in relation to the decision.

(2) The application may be made on any 1 or more of the following grounds—

…

(e) that the making of the decision was an improper exercise of the power conferred by the enactment under which it was purported to be made;

…

(h) that there was no evidence or other material to justify the making of the decision;

…

23 Meaning of *improper exercise of power* (ss 20(2)(e) and 21(2)(e))

In sections 20(2)(e) and 21(2)(e), a reference to an improper exercise of a power includes a reference to—

…

(d) an exercise of a discretionary power in bad faith; and

…

(f) an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of the particular case; and

…

24 Decisions without justification—establishing ground (ss 20(2)(h) and 21(2)(h))

The ground mentioned in sections 20(2)(h) and 21(2)(h) is not to be taken to be made out—

(a) unless—

(i) the person who made, or proposed to make, the decision was required by law to reach the decision only if a particular matter was or is established; and

(ii) there was no evidence or other material (including facts of which the person was or is entitled to take notice) from which the person could or can reasonably be satisfied that the matter was or is established; or

(b) unless—

(i) the person who made, or proposes to make, the decision based, or proposes to base, the decision on the existence of a particular fact; and

(ii) the fact did not or does not exist."

Decision without justification

[4] In relation to this ground, the primary judge referred to the factual matters raised by the appellant in support of his application and held that, as none of the matters raised were prescribed by law as a pre-condition to the respondent's decision, s 24(a) was inapplicable in the appellant's case. As a result, her Honour found that, to succeed in obtaining an order for review under s 24(b), the appellant "must show that the Board based its decision on the existence of a particular fact, when that fact did not exist."[2]

[5] The primary judge went through each of the factual matters raised by the appellant and considered whether they met the test under s 24(b). Her Honour held as follows:[3]

> "[13] The first factual matter the applicant raises under this head is the respondent's expressed concerns about the applicant's relapse prevention plan. In the reasons for its decision made 25 September 2009, the respondent said this about the applicant's then relapse prevention plan:
>
> '16. The Board acknowledged the detail of your relapse prevention and release plan, but believed that a comprehensive release plan must address your needs sufficiently to stabilise you in the community and give you the best chance to avoid reoffending. The Board was concerned that:
>
> - Your proposed accommodation of participating in the Ozcare Supported Parole Program had not been approved by the Ozcare manager at this time;
> - You provided no information that you had an offer of work, however you did detail that you have completed a number of qualifications, are registered with Career Employment Australia and intend to seek employment through the assistance of Centrelink, to assist in this endeavour. The Board recognises employment as a significant factor in reducing reoffending.'
>
> [14] In its letter to the applicant of 17 June 2010 the Board said:
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> 'The Board considered the relapse prevention plan that you submitted. However the Board concluded that your plan was inadequate to inhibit your offending behaviour having regard to the circumstances of your offending behaviour, features that are personal to you both at the time of offending and now and to the apparent triggers that lead [sic] to offending behaviour by you.
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> Specifically, the Board noted in the PBAR that your plans for release have not differed from your

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2 [2011] QSC 121 at [12].

3 [2011] QSC 121 at [13] - [23].

> previous parole application submitted in 2009. In considering your plan the Board was not convinced that you have sufficiently responded to its major concerns which are the triggers that led to your major offences and protective factors in relation to this type of offence. These remain largely unaddressed.'

[15] The applicant seems correct in saying that it was unfair to criticise him (in the letter of 17 June 2010) for not responding to the respondent's concerns when those concerns had not been expressed in its previous reasons for decision made on 25 September 2009. However, as noted above, the letter of 17 June 2010 was withdrawn by the respondent. Its reasons for decision dated 26 November 2010 do, however, deal with similar concerns:

> '6. The Board determined that the relapse prevention plan which you submitted was inadequate to inhibit your offending behaviour. The Board noted that your plan does not sufficiently identify the triggers that led to your offences, nor the protective factors in relation to your offences. In addition, the Board noted that your current plans had not differed from your previous parole application, which was submitted in 2009.
>
> 7. The Board determined that your release plan was inadequate. The Board noted the comments contained in the Parole Board Assessment Report dated, 19 May 2010, which included; "The panel raised concern regarding the offender's limited identified professional support and the need for the offender to have a strong and varied professional support available given the amount of time he has spent incarcerated."
>
> It is recommended that offender McGrane seek further and varied professional supports prior to his release to ensure his successful reintegration into the community. The panel do acknowledge that the limited support available is the direct result of the lengthy incarceration period; however believe the offender can obtain stronger professional support prior to his release.
>
> 8. The Board concurred with the panels' [sic] observations and recommendations, and encourage [sic] you to further develop your release plan.
>
> 9. The Board encourages you to continually reassess and update your relapse prevention and release plans. This demonstrates to the

> Board that you are continuously aware of your triggers and protective factors and instils confidence in the Board that you intend on [sic] evolving and maintaining the plans, whether you are in custody or within the community.'

[16] It can be seen that the respondent has not based the decision under challenge on a failure by the applicant to respond to its concerns in relation to his relapse prevention plan.

[17] However, the applicant also points to the fact that the Board's reasons for decision say, at paragraph 6 (above), that his current relapse prevention plans are not different from those on his previous (2009) application. One of the difficulties is that although the term 'relapse prevention plan' is used as though it were a term of art, it is nowhere defined. In this case it is certainly true to say that the material put before the respondent Board by the applicant in train of his 2010 application differed from that put before it in train of his 2009 application. In particular, his letters of 8 May 2010 and 13 May 2010 addressed his employment plans, qualifications and psychological support plans if released in a way that was different from, and was more up to date than, his plans as they were in 2009. Nonetheless, I do not think that the respondent Board could be said to have based its decision on the fact that the plans had not changed. As can be seen from the extract above, this was more an additional comment which the Board noted in train of an overall determination that the applicant's relapse prevention plan was inadequate.

[18] I can see that the applicant might think that this overall criticism of his relapse prevention plan in the reasons for decision of 26 November 2010 represented a 'change in the goalposts' when the Board's reasons from 2009 are considered. Nonetheless, that change was flagged to the applicant in the Board's letter to him of 2 August 2010 so that he was given an opportunity to address what was, in reality, a new concern on behalf of the Board. I cannot see that the Board's change in attitude between 2009 and 2010 is a legitimate base for any administrative remedy.

[19] As part of putting Mr McGrane on notice of its changed attitude, in its letter of 2 August 2010, the respondent Board said:

> 'Within a short period of time following a release from custody, you may be immersed with [sic] experiences, people and situations that have in the past contributed to your offending, addictive behaviour and also your incarceration. It would reassure the Board and give it greater confidence if you can become versed in a plan to assist you to remain crime free thus reducing your risk of

> reoffending against future victims and the community as a whole.'

[20] The applicant says that this paragraph indicates that the Board thought he was not versed in a relapse prevention plan and that that was not so. I do not see anything in this point different from that dealt with at paragraph [17] above.

[21] The second complaint that [the] applicant makes under the, 'decision without justification' head, is that the respondent Board seems to have taken into account that he had 'addictive behaviour', when, in fact, he had none. It was conceded by the Crown on the application that there is no evidence that the applicant has at any time had addictive behaviour. The offending words occur in the letter of 17 June 2010, which was withdrawn, and in its replacement of 2 August 2010 (extracted above), which was only a preliminary consideration of the application, not part of the reasons for decision. I therefore do not see that the Board has based its decision on the existence of any 'addictive behaviour' of Mr McGrane within the meaning of s 24(b)(i) of the Act.

[22] The third matter of which the applicant complains under the, 'decision without justification' head, is that the Board, in its letter of 17 June 2010, referred to the history of the applicant's breaches during the time of his incarceration and commented, 'If you are unable to maintain acceptable behaviour in a highly structured environment [the Board] has no cause to be confident that you would uphold normal parole conditions.' As noted above, the letter of 17 June was withdrawn, and in any case, like the letter of 2 August 2010, did not form part of the Board's decision. In the Board's reasons for decision of 26 November 2010, the Board said of the same breach history:

> '2. The Board took into consideration that although many of these breaches and incidents are recorded in the early part of your sentence, recent breaches and incidents are recorded in 2009 for physical altercations with other prisoners and using inappropriate language towards Corrective Services staff.
>
> 3. The Board noted that you have continued to use aggressive, inappropriate behaviour during your period of imprisonment. The Board were [sic] concerned that you demonstrated this behaviour while in a high security facility, subject to an intensive level of supervision. The Board had little confidence you would not display this behaviour should you be released to the community, with minimal supervision.'

[23] The applicant's point was that the Board's decision was made on the basis of something of which there was no evidence – the conclusion that he would not comply with a parole order.

> The opinion of the Board as to the applicant's likely behaviour on parole is not a fact within the meaning of s 24(b)(ii) of the Act and accordingly, this ground of complaint is not within s 24(b) of the Act."

[6] The appellant argued that the primary judge erred in finding that the Board did not base its decision on a failure by the appellant to respond to its concerns in relation to his relapse prevention plan. The appellant referred to her Honour's acknowledgment that the respondent's letter of 17 June 2010 had been withdrawn, and pointed out that the respondent's subsequent letter of 2 August 2010 was in substantially identical terms. The appellant is correct in his submission that the respondent's subsequent letter was nearly identical to its withdrawn letter, however, as the primary judge found,[4] the statement of reasons dated 26 November 2010 reveals that the Board did not base its decision on a failure by the appellant to respond to its concerns in relation to his relapse prevention plan.

[7] In relation to that finding of the primary judge, the appellant submitted that he was denied procedural fairness because "in no where previous to that statement of reasons did the Respondent state the reasons why the Applicant should change his relapse prevention plan." The substance of the appellant's complaint in this regard was that the respondent's concerns as to the appellant's relapse prevention plan were vague, and that he was unable to address those concerns "if he is not provided with specific information." There is no substance in that argument. As the primary judge pointed out,[5] the respondent had flagged its concerns in the 2 August 2010 letter.

[8] The appellant also argued that the primary judge erred in finding that the respondent did not base its decision on the apparently false premise that the appellant's relapse prevention plan had not changed from his previous parole application. The appellant submitted that the respondent "seemed to place a significant weight on this premise". The primary judge's reasons for rejecting the same submission[6] are compelling.

[9] The appellant submitted that the primary judge failed to rule upon his argument that there was no evidence to substantiate the respondent's alleged belief that the appellant was not "versed" in a relapse prevention plan. In that regard, her Honour referred to earlier findings with respect to the appellant's argument that there was no evidence to support the finding that the appellant's relapse prevention plan had not changed.[7] The appellant argued that the respondent's belief that he was not "versed" in a relapse prevention plan was "quite separate" to the earlier argument, and therefore required a separate ruling. That is not so. The reasons for the respondent's decision[8] refer to the relapse prevention plan being inadequate. The reference in the 2 August 2010 letter[9] to the appellant becoming "versed" in such a plan was not repeated in the decision. In any case, the primary judge was correct in treating that reference as merely a different way of conveying the respondent's concern about the inadequacy of the plan.[10]

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4 [2011] QSC 121 at [15] - [16].
5 [2011] QSC 121 at [18] - [19].
6 [2011] QSC 121 at [15] - [17].
7 [2011] QSC 121 at [19] - [20], referring to [17].
8 Quoted by the primary judge at [2011] QSC 121 at [15].
9 Quoted by the primary judge at [2011] QSC 121 at [19].
10 [2011] QSC 121 at [20], with reference to the last sentence at [17].

[10] The appellant also contended that the primary judge erred in finding that the respondent did not base its decision upon a belief that the appellant displayed "addictive behaviour". Her Honour referred to the Crown's concession that there was no evidence that the appellant had ever had addictive behaviour, but held that such behaviour was only referred to in the respondent's preliminary letters and not in its reasons for decision. As a result, the primary judge held that the respondent did not base its decision on the existence of such behaviour.[11] The appellant argued that the respondent's final decision relied upon its preliminary letter, and the decision was, therefore, based upon a matter which was unsupported by evidence. In fact, the decision did not incorporate any reference to the earlier suggestion of addictive behaviour.

Exercise of a discretionary power in accordance with a rule or policy without regard to the merits

[11] In relation to this ground, the primary judge held as follows:[12]

> "[26] The applicant puts forward three factual matters which he says each demonstrate the respondent Board acted, in accordance with policy, without regard to the merits of his case: the Board's requirement that he be given a lower security classification; the Board's requirement that he remain in residential accommodation, and the Board's consideration of a psychologist's (Palk's) assessment.
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> [27] The first two matters are closely connected and are related to the matters considered by McMurdo J in his decision of 18 June 2010. In its reasons for decision of 26 November 2010, the respondent Board noted that the applicant was not able to progress to a low security correctional centre and, for the purpose of considering the application for parole, expressly disclaimed reliance upon the ministerial guidelines (see s 227 of the *Corrective Services Act*) to the extent they recommended progression to a low security correctional centre as a precursor to parole being granted. However, the Board still took it as a factor against the applicant that his security classification was high. This classification is a separate matter to the applicant's ability to progress to a low security centre and the Board took into account that, although the applicant is eligible to receive a low security classification, he has not done so, and referred to the fact that his history of breaches may influence his security classification.
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> [28] The applicant contends it is irrelevant what his security classification is, because it cannot change his current accommodation options or conditions. The decision of the respondent Board recognises that the applicant's classification cannot influence his accommodation options, and I do not think there is any demonstrable error in this regard.
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> [29] The applicant also says that it is wrong for the respondent Board to equate his security classification with his

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11 [2011] QSC 121 at [21].

12 [2011] QSC 121 at [26] - [32].

institutional behaviour because the Corrective Services Department Sentence Management Procedures show that the date at which an offender is eligible to progress to a lower security classification is established on the basis of: length of sentence; nature of offence, and risk to the community, assessed within something called the Progression Matrix, which is an appendix to the Sentence Management Procedures. I note that ss 12 and 13 of the *Corrective Services Act* do not mandate institutional behaviour as a criterion to be considered in fixing or reviewing a prisoner's security classification. However, having regard to the Progression Matrix, it appears that the applicant, even bearing in mind that his sentence was for life and he was classified as high risk, was eligible to be classified at a lower classification after 20 years, which of course he has served. The applicant put before the Board concerns that he had been unfairly prevented from obtaining a low security classification. The Board considered those concerns and rejected them. Whether that consideration is right or wrong on the merits is irrelevant to an application such as this. I do not see that the applicant has shown a basis for review in this regard.

[30] So far as accommodation, rather than classification is concerned, on 15 September 2009 the applicant was moved into residential accommodation within a high security facility. In its reasons of 26 November 2010, the Board clearly regarded that move as in the applicant's favour and encouraged the applicant to maintain accommodation in the residential area so as to demonstrate to the Board an ability to behave appropriately in a less restrictive environment.

[31] The applicant says that, effectively the Board is requiring him to live in residential accommodation for a longer period than he has, but failing to take into account that he has not been able to move to residential accommodation earlier because he has been unfairly treated by the management at Wolston Correctional Centre. However, it is apparent from paragraph 10 of the reasons for decision of 26 November 2010, that the Board did consider, but rejected, the submission from the applicant that he had been unfairly denied accommodation in the residential section of the prison prior to 15 September 2009.

[32] Associated with this submission, is a submission by the applicant that there is very little difference between the high security residential accommodation and the accommodation in which he was prior to 15 September 2009, so that the Board is wrong to consider time spent in the residential section of Wolston Correctional Centre as something that gives it confidence in the applicant's ability to cope in a less structured environment. I do not regard the applicant's submission in this respect as establishing a reviewable error within the meaning of s 23(f) of the Act. It was not urged that

> the point amounted to taking into account an irrelevant consideration, and it seems to me not to amount to an irrelevant consideration."

[12] The appellant argued that the primary judge did not rule upon his argument that "the Respondent has at least not duly considered the merits of the Applicant's relapse prevention plan". The appellant also contended that the primary judge "did not refer in any substantial manner" to his argument that his security rating was irrelevant. In fact, the primary judge did consider the appellant's argument that the respondent had not considered the merits of the plan,[13] which were advanced to her Honour under the bad faith ground, and his argument that his security rating was irrelevant.[14] I agree with her Honour's reasons about those issues.

[13] The appellant also argued that the primary judge erred in finding that the respondent did take into account, and rejected, submissions made by the appellant that he had not been able to move into residential accommodation earlier because he had been unfairly treated by the management at Wolston Correctional Centre. The appellant submitted that there was ample evidence of the alleged unfair treatment, and that the primary judge erroneously assumed that, because the respondent stated that it considered the matter, it genuinely did so.

[14] In that respect, the respondent stated in paragraph 10 of the 26 November 2010 reasons for decision:

> "10. The Board considered the judgment of Justice McMurdo of 18 June 2010. As stated in the Board's letter to you of 2 August 2010, the Board recognises that your security classification, and placement/accommodation are separate issues. The Board has noted your submissions in relation to your security classifications and sentence management, in particular that you claim that your sentence management has not been properly facilitated. The Board, despite your assertions in this regard does not accept that you are unfairly prevented from achieving a low security classification. Particular features of your custodial behaviour including the negative incidents and breaches set out above objectively demonstrate that there is evidence of poor behaviour on your part which may influence decisions regarding your security classification, separate to any decision of the Board, to maintain you at a high security classification. The Board is satisfied based on the material before it that it is possible for you to progress your high security classification to a low security classification. The Board also noted that the materials provided by you revealed that complaints raised by you regarding your sentence management, including computer access and your return from the residential section of the Centre to a more restrictive environment, were considered by management at the Centre, outside agencies and the Director-General of the Department. Such complaints were not accepted."

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13 [2011] QSC 121 at [17], [38].

14 [2011] QSC 121 at [27] (noting that this argument was closely connected with the residential accommodation issue), [28].

The primary judge correctly regarded that paragraph as evidence that the respondent did genuinely consider the appellant's submissions that he had been unfairly treated.[15]

[15] The appellant submitted that the primary judge also failed to rule upon his arguments that the respondent failed to consider the merits of his case because a psychologist's report stated that the appellant "needs to demonstrate that he can manage his communication and emotional difficulties in a group situation, ideally in work place situations", and he had engaged in prison employment which demonstrated that requirement. The appellant also pointed out a number of positive comments made by the psychologist in relation to the appellant's: participation in programs; development of a "comprehensive relapse prevention plan"; development of "solid community support"; "low-moderate" risk of re-offending; cooperation with rehabilitation and considerable maturation in recent years; and "thorough understanding of his offence related risk factors".

[16] The primary judge did rule upon those arguments, under the bad faith ground.[16]

Exercise of discretionary power in bad faith

[17] In relation to this ground, the primary judge held as follows:[17]

> "[35] The applicant acknowledged that it would be difficult to show bad faith on the part of the respondent. Nonetheless, he points to a number of factual matters from which he says, either individually or together, I should conclude that the Board is not acting in good faith in dealing with his applications for parole.
>
> [36] The first factual matter is in relation to his living in residential accommodation. The applicant points to statements made by the respondent Board in the past, such as in December 2006, 'It is important that you progress to the residential area of the centre.' His submission is that now he has managed to be transferred to the residential area, the respondent Board has changed its requirements: it now says that he needs to remain in residential for a significant period of time in order to demonstrate stable behaviour in a less supervised environment. I do not accept that the respondent has changed its position, it was clear in its reasons for its 2009 decision that it wanted to see the applicant in a less restrictive environment for a period of time – see the extract at [13] above. The Board may now be more explicit about the matter, but this is understandable in response to the changed circumstances of the applicant.
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> [37] The second factual matter the applicant raises in relation to his bad faith point is based on the comment the Board made in its letter of 17 June 2010 as to it not having confidence that he would comply with a parole order, and its associated reference

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15 [2011] QSC 121 at [31].
16 [2011] QSC 121 at [38].
17 [2011] QSC 121 at [35] - [39].

to his breach history. The applicant points to the fact that there was significant material before the Board that the applicant's behaviour has been acceptable and argues that his breach history is aged, and consists of breaches which are not significant in number or severity. The applicant says he has been in residential accommodation and demonstrated stable behaviour there since 15 September 2009 but, in effect, is not being given credit for this. The applicant submits that this indicates that the respondent Board's original stated concern that he should spend time in residential accommodation to demonstrate stable behaviour in a less restrictive environment was not genuine. As noted above, the comment as to ability to comply with the requirements of a parole order was made in a letter which has been withdrawn. Nonetheless, comments similar to it are made in the reasons for decision of 26 November 2010, and they are extracted above. In the absence of extrinsic material bearing upon the issue, there is nothing in the evolving nature of the respondent Board's comments from which I would infer a lack of good faith.

[38] The applicant's third factual point is similar to the second and relates to what he perceives to be the changed requirements of the respondent Board in relation to his relapse prevention plan. As noted above, I think the applicant is correct in detecting quite a different approach by the Board to relapse prevention planning between the reasons for refusing parole in 2009 and the reasons for refusing parole in 2010. The applicant relies upon this change, and also upon the positive comments made by the psychologist Palk, as to the relapse prevention plan which the applicant has prepared. The applicant says the psychologist Palk's comments appear to have been discounted, or at least not given as much weight as they could have been, by the respondent Board. It is evident that the applicant has put a lot of work into preparing a relapse prevention plan and he said in argument that he was quite devastated when he found that, in its reasons of 26 November 2010, the Board concluded that his plan was inadequate to inhibit his further offending. This is against the background that the decision in 2009 did not tie the Board's concerns as to the risk of reoffending to his relapse prevention plan, but made other criticisms of his relapse prevention plan, which the applicant thought he had overcome. There is nothing in the type of concerns raised by the respondent Board which causes me to think that their actions are other than in good faith. So far as natural justice is concerned, as noted above, the applicant was given notice on 2 August 2010 that the Board considered his relapse prevention plan inadequate, and notice of the (changed) reasons why. The applicant's concerns are understandable, but they do not amount to an indication of lack of good faith.

[39] The last factual matter raised by the applicant under this head is also associated with the second discussed above. The

> applicant argues that the reasons of 26 November 2010 put far more emphasis on what the Board refers to as, 'a significant record of adverse prison behaviour' than have prior decisions when, in fact, the applicant has not had any breach recorded against him since 2009 and has, since the 2009 application for parole, managed to secure residence in the residential section of the correctional centre and remains there without a breach recorded against him. The applicant argues that this renewed emphasis on behaviour which was more proximate in time to, say, the 2009 refusal of parole, is an indication of bad faith. He says that, in effect, it is an indication that the Board has no real reason to refuse him parole, but is simply bolstering its decision with concerns which have not assumed this importance in the past. I think it is fair to say on the material before me that the Board has always been concerned with the applicant's breach history while he has been incarcerated. There may be a difference in emphasis in the 2010 decision, but it is not one which causes me to infer that the respondent Board is acting in bad faith."

[18] The appellant argued that the primary judge erred in finding that the respondent had not "changed its position" with respect to requiring the appellant to live in residential accommodation, but that the respondent was merely being "more explicit about the matter" in light of the changed circumstances of the appellant. However, in the decision of September 2009 the respondent had flagged its concern that the appellant needed to demonstrate stable behaviour in less supportive and restricted environments "over a period of time".[18]

[19] The appellant also complains that the primary judge accepted many of his arguments concerning the change in approach to relapse prevention planning between the refusal of parole in 2009 and the refusal of parole in 2010, and remarked that his concerns were "understandable", but nonetheless held that there was no lack of good faith on the part of the respondent. The appellant contends that the primary judge failed to deal with his two alternative arguments that the respondent failed to consider the merits of his relapse prevention plan and that he was denied procedural fairness as a result of the vagueness of the respondent's concerns. These arguments substantially repeat those previously discussed at [7] and [12] of these reasons.

[20] The appellant also submitted that the primary judge erred in finding that the respondent had "always been concerned with the applicant's breach history while he has been incarcerated", and that any difference in emphasis between the 2010 refusal of parole and earlier refusals was not such as to cause her Honour to infer that the respondent was acting in bad faith. In support of this argument, the appellant submitted that in a preliminary decision notice sent to him on 11 December 2006 in relation to a previous application for parole, the respondent did not mention his breach history.

[21] In fact, in the 11 December 2006 letter the respondent wrote that its previous letters of 7 March 2006 and 19 April 2005 "should be read as part of this letter"; and in the

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[18] Paragraph 17 of that decision, quoted at [2011] QSC 121 at [3].

19 April 2005 letter, the respondent wrote that it had taken into account in the appellant's favour "your breach free status since your last application". The respondent noted in its 26 November 2010 decision that recent breaches and incidents were recorded in 2009.[19] The differences between the appellant's breach history as at November 2010 and his breach history as at December 2006 explained that aspect of the change in emphasis in the respondent's decisions. In any case, the change in emphasis was not a sufficient basis for finding that the respondent had acted in bad faith.

Order

[22] The appeal should be dismissed.

[23] **WHITE JA:** I have read the reasons of Fraser JA and agree with those reasons and the order proposed by his Honour.

[24] **NORTH J:** I have read the reasons of Fraser JA and agree with those reasons and the order proposed by his Honour.

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[19] Paragraph 2 of the decision, quoted at [2011] QSC 121 at [22].