SUPREME COURT OF QUEENSLAND

CITATION:	*Johnson v Parole Board of Queensland* [2020] QSC 108
PARTIES:	**RODNEY JOHN JOHNSON** (applicant) **v** **PAROLE BOARD OF QUEENSLAND** (respondent)
FILE NO/S:	BS No 2729 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 May 2020
DELIVERED AT:	Brisbane
HEARING DATE:	5 February 2020
JUDGE:	Bradley J
ORDER:	**The application for judicial review is dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – UNREASONABLENESS – where the applicant is serving life sentences for murder and attempted murder – where the applicant became eligible for parole in 2009 and has made five applications for a parole order – where the applicant has been of good behaviour since 2008 and in residential accommodation since 2014 – where the applicant has completed all available custodial programs to address risk factors linked to his offending behaviour – whether the respondent's decision to decline the applicant's fifth application was so unreasonable that no reasonable person would decline the application ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – RELEVANT CONSIDERATIONS – FAILURE TO CONSIDER – where the applicant completed numerous custodial programs to address risk factors linked to his offending behaviour – where the facilitators of one of the programs produced a report detailing the applicant's involvement in the program – where the report contained conclusions which were favourable to the applicant – whether the respondent failed to consider the report ADMINISTRATIVE LAW – JUDICIAL REVIEW –

GROUNDS OF REVIEW – FETTERING DISCRETION – where the respondent commissioned psychiatric assessments of the applicant – where those assessments were, in general terms, unfavourable to the applicant – where reports produced by prison authorities were more favourable to the applicant in some respects – whether the respondent inflexibly applied a policy to adopt the conclusions of the psychiatric assessments

Corrective Services Act 2006 (Qld), s 3, s 242E
Judicial Review Act 1991 (Qld), s 20, s 23

Allianz Australia Insurance Ltd v Cervantes (2012) 61 MVR 443, cited
Calanca v Parole Board Queensland [2019] QSC 34, cited
Calanca v Queensland Parole Board [2013] QSC 294, applied
Flegg v Crime and Misconduct Commission [2014] QCA 42, cited
Gough v Southern Queensland Regional Parole Board [2008] QSC 222, cited
Khan v Minister for Immigration and Ethnic Affairs (1987) 14 ALD 291, applied
Kioa v West (1985) 159 CLR 550, cited
Mahoney v Chief Executive, Department of Transport and Main Roads (2014) 206 LGERA 302, applied
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, cited
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332, cited
Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611, cited
R (Munjaz) v Mersey Care NHS Trust [2006] 2 AC 148, cited
Re Drake and Minister for Immigration and Ethnic Affairs (No 2) (1979) 2 ALD 634, cited

COUNSEL: The applicant appeared on his own behalf
W R Ness for the respondent

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

[1] Rodney John Johnson has applied for judicial review of the decision of the Parole Board of Queensland (the **Board**) to refuse to grant his application for a parole order. He contends the Board's decision was affected by an improper exercise of power because the refusal was unreasonable, the Board failed to take relevant considerations into account, and applied a rule or policy without regard to the merits of his case. He also contends there was a breach of the rules of natural justice. He seeks an order setting aside the Board's decision under the *Judicial Review Act* 1991 (Qld) (the **JR Act**).

Background

[2] On 10 March 1997, Mr Johnson pleaded guilty to the murder of his partner and three of the four children of her earlier marriage, and to the attempted murder and the rape of the fourth child of that marriage. The offences were committed on 27 November 1995. He used a hammer to inflict head injuries on all the victims. The child he raped and attempted to murder was also scalded with boiling water. The learned sentencing judge, Mackenzie J, noted:

> "The killings were committed against a background of domestic violence, and the killings of the children are, on a fair view of the material that has been put before me, an extension of that argument with your wife and perhaps her family. It was not because of any compassion on your part that Maxine survived. On the contrary, she, it seems to me, displayed considerable courage and resourcefulness after the initial attack by pretending to be dead to escape further attacks and trying unsuccessfully to escape, only to be further attacked. You added to her terror, suffering and degradation by raping her, pouring hot water on her, and taking her to rooms where her mother and siblings were obviously already dead. After you had finished she lay injured and helpless and at the mercy of natural processes for five days before she was discovered. She was conscious for at least part of that time, and no doubt suffered greatly.
>
> She has suffered residual injuries as a result of what you did to her. She has a mild left-sided hemiplegia; this affects her walking and her arm and hand functions on the left-hand side. She suffers a partial seizure disorder and impairment of cognition and scarring. Not surprisingly she suffers severely in terms of psychological effects of the event.
>
> It has also had profound effects on other members of the extended family, as is indicated by the victim impact statements which have been placed before me.
>
> These were savage and brutal crimes. I say for the assistance of the community correctional authorities that I see no reason why you should be released from prison unless and until it is clear beyond doubt that you are not a threat to anyone.
>
> The sentences that I will impose will be concurrent because there is no provision for cumulative sentences."[1]

[3] Mr Johnson was convicted on all counts. He was sentenced to life imprisonment on each of the four counts of murder and the one count of attempted murder, and sentenced to serve 14 years' imprisonment on the count of rape. The court declared that Mr Johnson had served 401 days in custody in respect of the offences before the date on which he was sentenced.

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1 Affidavit of Kylie Mercer filed 4 September 2019, exhibit KM-22. All exhibits referred to below are also exhibits to Ms Mercer's affidavit.

[4] On 3 February 2009, having served 13 years in custody, Mr Johnson became eligible for parole.[2] Between 19 September 2013 and 3 September 2018, he made a number of applications for a parole order. Each was refused. The subject of this application is the Board's decision to refuse Mr Johnson's most recent application for a parole order (the **parole application**), which he made on 3 September 2018 and the Board refused on 2 April 2019.

[5] The Board first considered the parole application on 13 December 2018. On 18 December 2018, the Board sent a letter to Mr Johnson advising him that it had formed a preliminary view that he would pose an unacceptable risk to the community if released at that time, and inviting him to provide further submissions and documents.[3] Mr Johnson did not provide any further submissions or documents to the Board.

[6] On 30 December 2018, he requested a statement of reasons from the Board.[4] From this, it appears Mr Johnson took the Board's preliminary view as a decision to refuse the parole application.

[7] On 24 January 2019, Mr Johnson filed an application in the Court of Appeal for an extension of time within which to appeal against his conviction and sentence from 1997. If an appeal has been made to a court against the conviction or sentence to which a period of imprisonment relates, a prisoner cannot apply for a parole order until the appeal is decided.[5] The Board took the view that by seeking to appeal, Mr Johnson became ineligible to apply for a parole order. On 25 February 2019, the Board advised Mr Johnson that the parole application had been cancelled on this basis.[6]

[8] Mr Johnson discontinued his application to extend the time to appeal against his conviction and sentence. The Board agreed to reconsider the parole application and invited Mr Johnson to make further submissions by 29 March 2019.[7]

[9] Mr Johnson did not make any further submissions.

[10] On 2 April 2019, the Board decided to refuse the parole application. On 3 April 2019, the Board advised Mr Johnson of its decision. The Board had also decided that he must not make a further application for a parole order (other than an exceptional circumstances parole order) before 2 April 2020, without the Board's consent.[8]

[11] On 5 August 2019, the Board responded to Mr Johnson's 30 December 2018 request for a statement of reasons. The Board asserted that the "decision of 13 December 2018 was not a final and operative decision" to which the JR Act applied.

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2 At the time he was sentenced, s 166(1)(a) of the then *Corrective Services Act* 1988 (Qld) provided that a prisoner serving a term of life imprisonment was not eligible for parole until the prisoner had been detained for a period of 13 years.

3 Exhibit KM-3.

4 Exhibit KM-5; JR Act, s 32(1).

5 *Corrective Services Act* 2006 (Qld) (**CSA**), s 180(2)(b).

6 Exhibit KM-9.

7 Exhibit KM-8.

8 Exhibit KM-4; CSA, s 193(5)(b).

However, the Board provided Mr Johnson with a statement of reasons relating to its 2 April 2019 decision to refuse the parole application (the **statement of reasons**).[9]

Grounds of Review

[12] Mr Johnson contends that the Board's decision to refuse the parole application constituted an improper exercise of power.[10] He advances three separate arguments. First, he says no reasonable decision-maker could have decided to refuse the parole application.[11] Second, he says the Board did not take relevant considerations into account.[12] Third, he says the Board inflexibly applied a policy without regard to the merits of his case.[13]

[13] Mr Johnson also alleges a breach of the rules of natural justice occurred in the making of the decision to refuse the parole application.[14]

Unreasonableness

[14] Mr Johnson's first ground for review is that the Board's decision was unreasonable in the sense that it could not have been the result of the reasonable exercise of the Board's decision-making power.

[15] The Board is established by the *Corrective Services Act* 2006 (Qld) (the **CSA**).[15] One of its functions is to decide applications for parole orders, such as that made by Mr Johnson.[16] The Board is required to decide to grant or refuse the parole application.[17] This statutory power given to the Board is to be exercised reasonably.[18] The standard of reasonableness is "indicated by the true construction of the statute".[19] The purpose of corrective services is "community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders".[20] The reasonableness of an exercise of the Board's power to grant or refuse an application for a parole order may be assessed against that purpose. More broadly, a decision of the Board would be unreasonable if it lacked "an evident and intelligible justification"[21] when "all relevant matters were considered".[22]

[16] On this basis, there will have been an unreasonable exercise of power where the resulting decision is one for which no logical basis can be discerned.[23] In *Flegg v*

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9 Exhibit KM-6.
10 JR Act, s 20(2)(e).
11 JR Act, s 23(g).
12 JR Act, s 23(b).
13 JR Act, s 23(f).
14 JR Act, s 20(2)(a).
15 CSA, s 216.
16 CSA, s 217(a).
17 CSA, s 193(1).
18 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 (***Li***) at 362 [63] (Hayne, Kiefel and Bell JJ), citing *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36, *Kruger v Commonwealth* (1997) 190 CLR 1 at 36, *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 (***Eshetu***) at 650 [126] and *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429 at 433 [15].
19 *Li* at 364 [67] (Hayne, Kiefel and Bell JJ).
20 CSA, s 3(1).
21 *Li* at 367 [76] (Hayne, Kiefel and Bell JJ).
22 *Flegg v Crime and Misconduct Commission* [2014] QCA 42 at [3] (McMurdo P).
23 *Eshetu* at 640 [101] (Gaudron and Kirby JJ).

Crime and Misconduct Commission,[24] Gotterson JA explained that a challenge on the unreasonableness ground is:

> "not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which the Court disagrees even though that judgment is rationally open to the decision-maker."

[17] The challenge to the Board's decision on this unreasonableness ground requires a consideration of the Board's decision against the background of the statutory power, any guidance for its exercise, the material before the Board and the reasons provided by the Board.

Guidelines

[18] The Minister has made guidelines about policies to help the Board perform its functions pursuant to s 242E of the CSA (**Ministerial Guidelines**).[25] The Ministerial Guidelines include the following "guiding principles":

> "1.2 When considering whether a prisoner should be granted a parole order, the highest priority for [the Board] should always be the safety of the community.
>
> 1.3 As noted by Mr Walter Sofronoff QC in the Queensland Parole System Review '*the only purpose of parole is to reintegrate a prisoner into the community before the end of a prison sentence to decrease the chance that the prisoner will ever reoffend. The only rationale for parole is to keep the community safe from crime.'* With due regard to this, [the Board] should consider whether there is an unacceptable risk to the community if the prisoner is released to parole; and whether the risk to the community would be greater if the prisoner does not spend a period of time on parole under supervision prior to the fulltime completion of their prison sentence."[26]

[19] As to "suitability", the Ministerial Guidelines state:

> "2.1 When deciding the level of risk that a prisoner may pose to the community, [the Board] should have regard to all relevant factors, including but not limited to, the following—
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> a) the prisoner's criminal history and any patterns of offending;
>
> b) the likelihood of the prisoner committing further offences;

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24 [2014] QCA 42 at [16], citing French CJ in *Li* at 351 [30].

25 The guidelines relevant to the Board's consideration of the parole application are the *Ministerial Guidelines to Parole Board Queensland* dated 3 July 2017.

26 As Mr Johnson is serving several life sentences, the benefits of a graduated release ahead of a full-time release date are less compelling considerations: *Calanca v Queensland Parole Board* [2013] QSC 294 at [32] (Margaret Wilson J) .

c) whether there are any other circumstances that are likely to increase the risk the prisoner presents to the community (including any of the factors set out in section 5.1 of these guidelines);

d) whether the prisoner has been convicted of a serious sexual offence or serious violent offence or any of the offences listed in [s 234(7) of the CSA];

e) the recommendation for parole, parole eligibility date, or any recommendation or comments of the sentencing court;

f) the prisoner's cooperation with authorities both in securing the conviction of others and preservation of good order within prison;

g) any medical, psychological, behavioural or risk assessment report relevant to the prisoner's application for parole;

h) any submissions made to [the Board] by an eligible person registered on the Queensland Corrective Services (QCS) Victims Register;

i) the prisoner's compliance with any other previous grant of parole or leave of absence;

j) whether the prisoner has access to supports or services that may reduce the risk the prisoner presents to the community; and

k) recommended rehabilitation programs or interventions and the prisoner's progress in addressing the recommendations."

[20] The Ministerial Guidelines also include the following about "Release to parole":

"5.1 When considering releasing a prisoner to parole, [the Board] should have regard to all relevant factors, including but not limited to the following—

a) Length of time spent in custody during the current period of imprisonment;

b) Length of time spent in a low security environment or residential accommodation;

c) Any negative institutional behaviour such as assaults and altercations committed against correctional centre staff, and any other behaviour that may pose a risk to the security and good order of a correctional centre or community safety;

d) intelligence information received from State and Commonwealth agencies;

e) length of time spent undertaking a work order or performing community service;

f) any conditions of the parole order intended to enhance supervision of the prisoner and compliance with the order;[27]

g) appropriate transitional, residential and release plans; and

h) genuine efforts to undertake available rehabilitation opportunities."

[21] As Bowskill J observed in *Calanca v Parole Board Queensland*:[28]

> "The language used in the current s 242E is consistent with the ordinary meaning of 'guidelines' in the context of administrative decision-making, as non-binding rules or standards, providing general indications to help the decision-maker in exercising their discretion. It is clear from s 242E that the Guidelines do not fetter the exercise of the otherwise broad discretion of the Board, in the sense that the Guidelines do not prescribe or limit how the Board's discretion under s 193 is exercised. But that does not mean the Guidelines can be ignored. The Guidelines are properly to be regarded as a relevant factor and, because they are expressly contemplated by the legislation, must be taken into account by the Parole Board. The formulation of guidelines for administrative decisions, particularly decisions such as those made by the Parole Board which affect personal liberty, promotes values of consistency and rationality in decision-making, whilst still upholding the ideal of justice in the individual case on its merits."

[22] The Board should give great weight to the Ministerial Guidelines and depart from them with great care.[29]

Risk to the community

[23] After consideration of the relevant matters, including those in paragraphs 2.1 and 5.1 of the Ministerial Guidelines, the Board is required to form an opinion about the risk the prisoner would pose to the community if released on parole.

[24] Forming a view about the risk to the community involves considerations including the degree of likelihood of the applicant offending and the seriousness of the consequences should the risk eventuate. To form a view about whether a particular

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27 In [5.3] of the Guidelines, the Board is advised that, pursuant to s 200(2) of the CSA, it should consider an electronic monitoring condition in a parole order for any prisoner granted parole. In [5.5] and [5.6], the Board is advised that careful consideration should be given to restricting access to means that enable active and participatory publishing and interaction between the prisoner and individuals over the internet and to personal introductory systems by which the prisoner can find and contact individuals to arrange a date, with the object of developing a personal, romantic or sexual relationship, when it grants parole, particularly for sex offenders, other serious violent offenders and prisoners serving a life sentence.

28 [2019] QSC 34 at [57] (citations omitted).

29 *R (Munjaz) v Mersey Care NHS Trust* [2006] 2 AC 148 at 189 [21] (Lord Bingham).

applicant for parole poses a risk that is unacceptable, the Board must balance the legitimate competing interests of the applicant and the public. The Board must weigh the reasonableness and importance of community safety and crime prevention, which may be advanced by continued detention, in light of the applicant's common law right to liberty.[30] It is for the Board to decide whether there is sufficient public risk to justify leaving the applicant in gaol or whether there is any less restrictive and reasonably available way to achieve that purpose through a parole order. The Board's power is to be exercised for the statutory purpose of corrective services, namely "community safety and crime prevention through humane containment, supervision and rehabilitation of offenders". For each application, the Board decides whether the grant or refusal of a parole order would better achieve that purpose.

The Board's decision and reasons

[25] On considering Mr Johnson's parole application, the Board formed the opinion that Mr Johnson poses an unacceptable risk to the community.

[26] In the statement of reasons, the Board identified 12 findings of fact, the last of which was its conclusion that Mr Johnson poses an unacceptable risk to the community and is not suitable for parole at this time. The other facts found were:

> "1. You are currently serving a term of life imprisonment for the offences of murder and attempted murder. Concurrent with this term of imprisonment, you served a term of 14 years' imprisonment for the offence of rape.
>
> 2. You became eligible for release on parole on 3 February 2009.
>
> 3. Your criminal history commenced in 1977 when you were 21 years of age and includes a previous conviction in 1984 for the offence of carnal knowledge of a girl under the age of 13 years.
>
> 4. You are assigned a high security classification.
>
> 5. You progressed to residential accommodation in March 2014 and have remained accommodated in residential at Wolston Correctional Centre since that time.
>
> 6. You have incurred no adverse incidents since 2008.
>
> 7. You have maintained employment whilst in custody.
>
> 8. You have completed the following programs to address risk factors linked to your offending behaviour:
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> - the Getting Started: Preparatory Program (GSPP), completed 17 February 2012;
>
> - the High Intensity Sexual Offending Program (HISOP), completed 15 January 2013;

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30 *Attorney-General (Qld) v Sutherland* [2006] QSC 268 at [30] (McMurdo J). From 1 January 2020, the Board should also consider the statutory right to liberty under the *Human Rights Act* 2019 (Qld), ss 11(1), 13(1), (2)(b)-(e), 29(1), 30(1).

- the Sexual Offending Maintenance Program (SOMP), competed 25 November 2013;
- the Getting SMART program, completed 10 June 2011;
- the Ending Offending program, completed 25 January 2013;
- the Ending Family Violence program, completed 2 May 2013;
- the Resilience program, completed 14 November 2017; and
- the SOMP, completed 6 June 2018.

9. You have no outstanding program recommendations, with the exception of the recommendation that you complete the SOMP in the community upon any release to parole.

10. You have been assessed as posing a moderate risk of committing further offences of violence and a moderate to high risk of sexual recidivism.

11. You do not have suitable accommodation in the community for the purpose of parole supervision."

[27] In the statement of reasons, the Board explained its reasons in 38 paragraphs. These included the following:

"1. The Board took into account a number of factors in your favour, including that you have progressed to residential accommodation, have maintained a significant period of acceptable custodial behaviour, are employed in custody, and have competed a number of programs to address risk factors linked to your offending behaviour.

7. The Board reviewed the completion reports for the abovementioned programs (where available) and identified the following notable observations of the relevant program facilitators.

8. The Board had regard to the HISOP completion report dated 27 March 2013 wherein the program facilitator reported:

> *Prisoner Johnson would benefit from strengthening his understanding of the underlying factors in his offending pathway, the interplay between these factors and how they connect to his high risk factors.*

9. Additionally, the Board noted the program facilitators' opinion that you were unable to adequately identify issues that you may face upon release to a parole order into the community, with the exception of hostility from your community.

10. The Board noted that in the completion report for [the Ending Family Violence program] dated 28 May 2013 the program facilitators identified that when discussing your history of domestic violence, you exhibited some level of minimisation.

11. Further, the Board noted the facilitators' suggestion that whilst you intellectually understood concepts, you needed to work on developing an emotional and personal connection with those concepts. The Board noted that this suggestion was consistent with observations of the HISOP program facilitators

12. … The Board considered the SOMP completion report dated 20 December 2013 wherein it was recorded:

> *… prisoner Johnson reported not experiencing any negative feelings or stress since his completion of HISOP. Whilst this may be the case, it seems somewhat unrealistic and may indicate a lack of insight or disclosure in relation to his experience of negative emotions.*
>
> *…*
>
> *… it is difficult to determine how well prisoner Johnson has internalised the skills he has developed throughout his participation in HISOP.*

13. The Board had regard to the SOMP completion report dated 24 July 2018 and noted that you were considered to have completed the program to a satisfactory degree. The Board specifically had regard to the following observations of the program facilitators:

> *Prisoner Johnson discussed several factors were areas of ongoing development following his time in HISOP, including his communication skills, emotional management and coping skills, and general problem solving.*

14. The Board noted that you had evidenced some improvement in these areas.

16. Having considered all available information, the Board noted that you had no outstanding recommendations for custodial-based programs at the time of its decision. However, the Board did identify that the SOMP completion reports dated 20 December 2013 and 24 July 2018 both contained recommendations that you complete the SOMP in the community upon any future release to parole."

[28] In its statement of reasons, the Board identified other factors it considered in making the decision that releasing him on a parole order would subject the community to an unacceptable level of risk. These included assessments by Dr Palk, a forensic psychologist, and Dr Sundin, a psychiatrist, about the risk of Mr Johnson reoffending, the risk factors linked to his offending behaviour, his insight and his victim empathy.

[29] Amongst the matters from Dr Palk's report, the Board included the following in the statement of reasons:

> "20. The Board noted that Dr Palk assessed you as posing a moderate risk of committing further offences of violence [on the VRAG and HCR-20 measures].
>
> 21. The Board noted Dr Palk's opinion that although you do not meet the criteria to be classified as a psychopath, you have a history of entrenched antisocial tendencies and of using violence to solve problems.
>
> 22. Further, the Board had regard to Dr Palk's view that available psychological evidence suggests that you are strongly inclined to being intermittently explosive and justifying your violent behaviour as being a response to racism or being offended. The Board noted that, based on this evidence, Dr Palk formed the opinion that you suffer from an intermittent explosive disorder and an alcohol use disorder, which were in remission at the time of assessment as a result of your imprisonment.
>
> 23. The Board noted Dr Palk's opinion that you meet the criteria for antisocial personality disorder with features of narcissism and a sense of entitlement.
>
> 26. The Board noted that … you have expressed a desire to form another intimate relationship when you are released. The Board considered the following opinion of Dr Palk in relation to the increased risk you wold pose if you formed such a relationship:
>
> > *… due to the very serious nature and circumstances of the offences he would be at high risk for violent offences if he ever entered into another intimate relationship.*
>
> 28. Further, the Board took into account the following observations of Dr Palk:
>
> - *He experienced difficulty in accepting that he committed the murders and rape due to feelings of revenge … he half-heartedly accepted that revenge may have been a reason. He could not explain why he raped the 10 year old victim.*
> - *The writer gained the impression that at the time of the offences he felt a sense of entitlement to attack members of his family due to the false allegations made against him.*
> - *Although he explained he thought about the offences everyday he did not seem to understand his natural daughter was a victim and he did not seem to express any compassion for the surviving victim.*

- *Although he has completed a number of rehabilitation programs he still displays evidence of impaired empathy and an inability to fully appreciate the impact of his release on his natural daughter and the surviving victim.*"

[30] The Board included the following in the statement of treasons based on the matters reported on by Dr Sundin:

> "32. The Board noted that Dr Sundin assessed you as posing a moderate risk of future violence and a moderate to high risk of sexual recidivism.
>
> 33. The Board also noted Dr Sundin's opinion that you have a Mixed Personality Disorder with an admixture of paranoid, antisocial and avoidant personality traits.
>
> 34. The Board took into account the opinion of Dr Sundin that you demonstrated a lack of insight and expressed some negative attitudes at the time of assessment.
>
> 35. The Board noted Dr Sundin's view that, from a risk management perspective, you were at risk from exposure to destabilisers, stress and potentially a lack of personal support. In particular, Dr Sundin noted the following problematic factors:
>
> - your rudimentary capacity for empathy;
> - your lack of a real appreciation for the motivations to the rape component of your index offence;
> - your continued denial of revenge as a motivation for the index offence;
> - your minimisation of key elements in the index offence;
> - your continued focus and displacement of responsibility onto the victim's [sic] extended family;
> - your emotional detachment and defensiveness around examination of your own motivations within the index offence;
> - your past history with antisocial acts, particularly including acts of deceitfulness;
> - your history of avoidant emotional coping and emotional detachment within relationships;
> - your prejudicial history in childhood and adolescence with an insecure transient lifestyle; and
> - your experience of childhood abuse and modelling of violence within intimate partner relationships."

[31] The Board also considered the sentencing remarks of Mackenzie J, extracted above, the availability of suitable accommodation and all available parole conditions.

Conclusion on unreasonableness ground

[32] Although it is to consider the matters identified in the guidelines, giving the highest priority to the safety of the community, the Board is not compelled to grant parole to a prisoner who has served any particular length of time in custody or in residential accommodation, who has completed any particular number (or all) of the available recommended rehabilitation programs or who has been of good behaviour for any particular length of time.

[33] The Board must form an opinion on the risk to the community posed by each applicant prisoner. This is not limited to ticking boxes on a screen to confirm the applicant's length of time in custody, security classification or accommodation and the programs they have completed. For an applicant who has committed serious violent offences, sexual offences and is serving a life sentence, the Board's opinion ought to be informed by credible evidence about the applicant's rehabilitation and the likelihood of the applicant committing such serious offences if released. The completion of programs is obviously significant. No doubt, great care and professional expertise has been employed in the formulation and delivery of the programs. However, according to the material before the Board, the effect of the programs on the applicant is of the greater significance. Rehabilitation that reduces the risk to the community posed by a serious violent offender or a sexual offender needs the important element of internal change, in sense of the development of an understanding by the offender of the pathways to offending, the triggers that lead along that path and the steps that the offender can take, in terms of internal thinking, understanding and self-control, that might best assist the offender to avoid a relapse to behaviour that risks the commission of serious violent or sexual offences.

[34] The reservations noted by the Board in the program facilitators' completion reports and in the reports of Dr Sundin and Dr Palk address this point. In the case of Mr Johnson, they identify that participation – in the fullest sense – is more important than attendance. After he completed all but the last of the programs, Dr Sundin assessed Mr Johnson "as posing a moderate risk of future violence and a moderate to high risk of sexual recidivism". Two and a half years later, after he had completed all of the programs, Dr Palk assessed Mr Johnson "as posing a moderate risk of committing further offences of violence".

[35] The matters in the statement of reasons, noted above, make it impossible to conclude that the Board's decision lacked an evident and intelligible justification when all the relevant matters were considered. Others, including Mr Johnson, may consider the Board gave insufficient consideration to some parts of the completion reports or gave excessive consideration to some of the other matters there identified or to opinions expressed in the reports of Dr Sundin and Dr Palk. However, the Board's decision was rationally open on the relevant material before it for consideration.

Failure to Take Relevant Considerations into Account

[36] A decision may be set aside where the decision-maker failed to take into account a consideration that it was bound to consider in making the decision.[31] Mr Johnson's second ground of review asserts that the Board made such an error.

[37] If the matter was one that the Board was obliged to take into account, then the only question is whether or not the Board did so. As Basten JA observed in *Allianz Australia Insurance Ltd v Cervantes*:[32]

> "How it is to be taken into account and what weight it is to be accorded in all the circumstances are matters within the authority of the decision-maker. Thus, assuming for present purposes that the assessor was bound to take into account the particular statement set out above, he could do so by dismissing it, by giving it little weight, or by giving it decisive weight."

[38] In his further and better particulars of the application, Mr Johnson refers to observations of program facilitators about his participation and contends that the Board "failed to consider the contents of Mr Johnson's HISOP exit report".

[39] The statement of reasons records that the Board "reviewed the completion reports" for the programs Mr Johnson had completed "where available". The Board made specific mention of having regard to the completion reports for four of the programs, including the HISOP completion report dated 27 March 2013. The statement of reasons, at paragraph 8, includes an extract from the HISOP completion report and notes the program facilitator's opinion.[33] The Board has not overlooked the matter in making its decision.

[40] In the circumstances I am not satisfied that the Board failed to take into account the HISOP exit report.

[41] Mr Johnson may think the Board gave insufficient weight to the comments of the facilitator in the exit report about the improvement in his motivation and engagement with the program as it progressed. However, that is a matter going to the merits of his parole application and not a ground for judicial review.[34]

Inflexible Application of Policy

[42] In his further and better particulars, Mr Johnson contended that:

> "… the Board inflexibly applied a policy to follow the commissioned psychiatric opinion, without considering alternate views expressed by other experts who have worked with Mr Johnson. The statement of reasons indicates that the Board has placed sole reliance on Dr Sundin's report, without any reference to the opinions expressed by the program delivery officers at Wolston Correctional Centre."

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31 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39 (Mason J, Gibbs CJ and Dawson J agreeing).

32 (2012) 61 MVR 443 at 448-449 [16] (McColl and Macfarlan JJA agreeing).

33 See paragraph [27] of these reasons.

34 *Mahoney v Chief Executive, Department of Transport and Main Roads* (2014) 206 LGERA 302 at 317 [39] (Gotterson JA, McMurdo P and Applegarth J agreeing).

[43] A decision-maker may, as a matter of law, adopt a policy to guide the exercise of a discretionary power, provided the policy is consistent with the statute.[35] A policy will not be consistent with statute where, for example, it does not allow the decision-maker to take into account relevant considerations.[36] A policy may be inferred from the reasons for a decision, even when no written policy is in existence.[37]

[44] If the Board had a policy of commissioning psychiatric opinions, then adopting their conclusions without considering the merits of any alternative views before the Board, that policy would almost certainly be inconsistent with the statute. It appears Mr Johnson contends that the Board, applying a policy, failed to take into account the opinions expressed by the program delivery officers, which were relevant considerations.

[45] As noted above, in the statement of reasons the Board referred not only to the report by Dr Sundin, but also:

(a) The HISOP completion report dated 27 March 2013;

(b) The SOMP completion report dated 20 December 2013;

(c) The SOMP completion report dated 24 July 2018;

(d) The Ending Family Violence completion report dated 28 May 2013; and

(e) The Psychological Report prepared by Dr Palk dated 3 October 2017.

[46] The reports at (a) to (d) above were prepared and signed by the program delivery officers and senior program delivery officers at Wolston Correctional Centre.

[47] In the statement of reasons the Board also recorded that:

> "27. … Specifically, the Board had regard to information contained within the Parole Board Assessment Report which indicated that during your parole panel interview you appeared to be reserved in displaying victim empathy when recounting your offences, though demonstrated empathy in some circumstances. The Board noted that it was also observed that you appeared to *somewhat minimise and justify the offending when considered outside of the context of cultural considerations.*"

[48] Given the range of reports considered by the Board, including a report of the parole panel interview, I am unable to conclude that the Board applied the policy asserted by Mr Johnson or followed Dr Sundin's opinion without considering alternate views expressed by other experts who have worked with Mr Johnson. There is no evidence to support a conclusion that the Board had such a policy.

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35 *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634 (***Re Drake (No 2)***) at 640 (Brennan J), citing *Stringer v Minister of Housing and Local Government* [1970] 1 WLR 1281 at 1298 (Cooke J).

36 *Re Drake (No 2)* at 640 (Brennan J).

37 See *Gough v Southern Queensland Regional Parole Board* [2008] QSC 222 at [74]-[78] (Applegarth J).

[49] The evidence does not allow a conclusion that the Board did not discharge its obligation to give "proper, genuine and realistic consideration to the merits of the case".[38]

Natural justice

[50] A relevant decision may be set aside in circumstances where a person whose rights or interest are affected by the decision was not afforded natural justice. As the Board was performing a public function in considering the parole application, the court may infer that the Board was required to perform its function fairly. The steps required to act fairly vary according to the circumstances and the matter to be decided.[39] This was a particularly important matter, involving Mr Johnson's continued detention or his (perhaps conditional) liberty.

[51] In his further and better particulars, Mr Johnson identifies five passages from Dr Sundin's report about:

(a) Mr Johnson's rating on the Hare Psychopathy Rating Scale;

(b) Mr Johnson's lack of history of contact with psychiatrists, psychologists, counsellors or social workers prior to his incarceration;

(c) Mr Johnson showing no history of a major mental health condition;

(d) Mr Johnson's past problems with alcohol; and

(e) Dr Sundin's difficulty clarifying the nature of Mr Johnson's personality structure.

[52] Mr Johnson then contends:

> "Now in respect to Dr Sundin's assessment within 2 hours is questionable with the abovementioned. A breach of the rules of natural justice and if [so] s 20(2)(a) of the [JR Act]."

[53] This appears to be a complaint that the Board should have afforded less weight to the opinions of Dr Sundin. It goes to the merits of the Board's decision and not to the procedure.

[54] Mr Johnson does not identify any aspect of the Board's decision-making process that involved a possible denial of natural justice. As noted above, the Board provided Mr Johnson with its preliminary view and invited him to make any submissions and submit any documents for the Board to consider. When consideration of the parole application resumed, again the Board invited Mr Johnson to make any further submissions. No complaint is made that Mr Johnson had inadequate time to effectively prepare and make further submissions or to submit further documents. The CSA specifies a period in which the Board is expected to make a decision on a parole application.[40]

[55] In the circumstances, I am not satisfied that the Board's decision was affected by any breach of the rules of natural justice.

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38 *Khan v Minister for Immigration and Ethnic Affairs* (1987) 14 ALD 291 at 292 (Gummow J).

39 *Kioa v West* (1985) 159 CLR 550 at 612 (Brennan J).

40 Ordinarily, the Board must make a decision within 120 days: CSA, s 193(3)(b).

Mr Johnson's underlying theme

[56] An underlying theme in Mr Johnson's application is his evident concern that having been in custody for many years since he became eligible to apply for parole, having been of good behaviour, in residential accommodation for the past six years, and having completed all the available rehabilitation programs, he ought to be granted parole.

[57] None of the reports by Dr Sundin, Dr Palk and the program facilitators foreclosed the prospect that Mr Johnson's circumstances could change to reduce the risk posed to the community. Nor did any conclude that he could not influence those circumstances to bring about such a change. The Board encouraged Mr Johnson "to continue to internalise the learnings" from his involvement in the programs. This indicates the Board did not form a view that there would never be a change in Mr Johnson's circumstances that would support a further application for release on a parole order. One might think the reports of Dr Sundin and Dr Palk would be a sound basis for the corrective services authorities to support Mr Johnson's rehabilitation by facilitating professional assistance, perhaps through case management by a correctional psychologist coordinating with counsellors, program delivery officers, cultural liaison officers, Queensland Health staff and external service providers, as appropriate.

Disposition

[58] Mr Johnson has not established any of the grounds on which he challenges the Board's decision to refuse the parole application. In the circumstances, Mr Johnson's application for judicial review of the Board's decision should be dismissed.