SUPREME COURT OF QUEENSLAND

CITATION:	*Sica v Attorney-General for the State of Queensland* [2021] QSC 309
PARTIES:	**MASSIMO SICA** (respondent/applicant) **v** **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant/respondent)
FILE NO/S:	BS No 302 of 2021
DIVISION:	Trial Division
PROCEEDING:	Application for a Statutory Order of Review
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	26 November 2021
DELIVERED AT:	Brisbane
HEARING DATE:	19 August 2021; additional written submissions on behalf of Mr Sica dated 24 August 2021; supplementary written submissions on behalf of the Attorney-General (Qld) dated 26 August 2021
JUDGE:	Burns J
ORDER:	**THE ORDER OF THE COURT IS THAT:** **1. The application for a statutory order of review filed on behalf of the applicant, Massimo Sica, on 7 January 2021 and amended on 23 August 2021 is dismissed.** **2. The applicant, Massimo Sica, pay the respondent, Attorney-General for the State of Queensland, the costs of the application for a statutory order of review (including the application to dismiss the proceeding filed on 16 July 2021) to be assessed on the standard basis.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – DECISIONS TO WHICH JUDICIAL REVIEW LEGISLATION APPLIES – EXCLUDED DECISIONS – where an applicant for a statutory order of review was convicted of three counts of murder in 2012 – where the applicant was unsuccessful in appealing his convictions to the Court of Appeal – where the applicant petitioned the Governor of Queensland for a pardon – where, in the

alternative, the applicant requested the Attorney-General (Qld) to refer his petition to the Court of Appeal under s 672A of the *Criminal Code* (Qld) – where the Governor declined to pardon the applicant – where the Attorney-General decided not to refer the applicant's petition to the Court of Appeal – where the applicant applied under Part 3 of the *Judicial Review Act* 1991 (Qld) for a statutory order of review of the Attorney-General's decision not to refer his case to the Court of Appeal – whether the applicant has standing to apply for a statutory order of review of the decision of the Attorney-General not to refer his case to the Court of Appeal – whether the applicant was a person whose interests were adversely affected by the decision of the Attorney-General not to refer his case to the Court of Appeal – whether the decision of the Attorney-General not to refer the applicant's case to the Court of Appeal was a decision of an administrative character made under an enactment — whether the decision of the Attorney-General not to refer the applicant's case to the Court of Appeal was otherwise amenable to review under Part 5 of the *Judicial Review Act* 1991 (Qld)

CRIMINAL LAW – APPEAL AND NEW TRIAL – PARDON, COMMUTATION OF PENALTY, REFERENCE ON PETITION FOR PARDON AND INQUIRY AFTER CONVICTION – REFERENCE TO COURT – where an applicant for a statutory order of review was convicted of three counts of murder in 2012 – where the applicant was unsuccessful in appealing his convictions to the Court of Appeal– where the applicant petitioned the Governor of Queensland for a pardon – where, in the alternative, the applicant requested the Attorney-General (Qld) to refer his petition to the Court of Appeal under s 672A of the *Criminal Code* (Qld) – where the Governor declined to pardon the applicant – where the Attorney-General decided not to refer the applicant's petition to the Court of Appeal – where the applicant applied under Part 3 of the *Judicial Review Act* 1991 (Qld) for a statutory order of review of the Attorney-General's decision not to refer his case to the Court of Appeal – whether the applicant has standing to apply for a statutory order of review of the decision of the Attorney-General not to refer his case to the Court of Appeal – whether the applicant was a person whose interests were adversely affected by the decision of the Attorney-General not to refer his case to the Court of Appeal – whether the decision of the Attorney-General not to refer the applicant's case to the Court of Appeal was a decision of an administrative character made under an enactment — whether the decision of the Attorney-General not to refer the applicant's case to the Court of Appeal was otherwise amenable to review under Part 5 of the *Judicial Review Act* 1991 (Qld)

Criminal Code Act 1899 (Qld), s 672A
Judicial Review Act 1991 (Qld), s 4, s 7, s 20, s 41, s 43, s 44, s 48, s 54, s 57
Uniform Civil Procedure Rules 1999 (Qld), r 569

Attorney-General (Cth) v Ogawa (2020) 384 ALR 474
Barton v The Queen (1980) 147 CLR 75
Brisbane City Child Care Pty Ltd v Kadell [2020] QCA 181
Cairns City Council v Commissioner of Stamp Duties [2000] 2 Qd R 267
Clyne v Evans (1984) 2 FCR 515
de Freitas v Benny [1976] AC 239
Griffith University v Tang (2005) 221 CLR 99
Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd [2008] QCA 83
Kirk v Industrial Court (NSW) (2010) 239 CLR 531
Mauloni v Fraser [2007] 1 Qd R 563
Maxwell v The Queen (1996) 184 CLR 501
Meizer v Chief Executive, Department of Corrective Services [2005] QSC 351
Minister for Immigration and Multicultural and Indigenous Affairs v SBAN [2002] FCAFC 431
Osland v Secretary, Department of Justice (2008) 234 CLR 275
Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd (2018) 264 CLR 1
Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd (in liq) [2010] Qd R 322
R v Sica [2012] QSC 184
R v Sica [2014] 2 Qd R 168
Rasmussen v Sutton [2003] 1 Qd R 538
SBBS v Minister for Immigration and Multicultural and Indigenous Affairs (2002) 194 ALR 749
Secretary to the Department of Justice v Osland (2007) 26 VAR 425
SZFDE v Minister for Immigration and Citizenship (2007) 232 CLR 189
Taylor v O'Beirne [2009] QSC 395
Von Einem v Griffin (1998) 72 SASR 110
Waratah Coal Pty Ltd v Nicholls [2013] QSC 68
Wingfoot Australia Partners Pty Ltd v Kocak (2013) 252 CLR 480

COUNSEL: J D Johnson (sol) for the respondent/applicant, Mr Sica
GA Thompson QC SG and F Nagorcka for the applicant/respondent, Attorney-General for the State of Queensland

SOLICITORS: Johnsons Solicitors for the respondent/applicant, Mr Sica
GR Cooper, Crown Solicitor for the applicant/respondent,

[1] After a trial lasting 80 days before Byrne SJA and a jury, Massimo Sica was convicted on 3 July 2012 of three counts of murder. He was sentenced to life imprisonment on each count, with a non-parole period of 35 years.[1] Mr Sica subsequently appealed his convictions, but that appeal was dismissed by the Court of Appeal on 2 September 2013.[2] He did not apply for special leave to appeal to the High Court of Australia.

[2] In April 2019, Mr Sica petitioned the Governor of Queensland for a pardon in relation to each of his convictions. In the alternative, he requested the Attorney-General (Qld) to refer his convictions to the Court of Appeal pursuant to s 672A of the *Criminal Code* (Qld). His petition, as well as his request in the alternative, were declined and Mr Sica was notified about that outcome by correspondence in late 2020.

[3] On 7 January 2021, an application for a statutory order of review was filed on behalf of Mr Sica by which he seeks to set aside the Attorney-General's decision not to refer his case to the Court of Appeal. He also seeks an order from this court that the whole of his case be referred to the Court of Appeal.

[4] On 16 July 2021, an application was filed on behalf of the Attorney-General for an order pursuant to s 48(1)(a) of the *Judicial Review Act* 1991 (Qld) dismissing Mr Sica's application on the sole ground that it would be inappropriate to allow the proceeding to continue. Under the umbrella of this application, the Attorney-General contends that Mr Sica does not have standing to bring his application, that the decision of the Attorney-General not to refer his case to the Court of Appeal is not a decision to which Part 3 of the *Judicial Review Act* applies and that, in any event, the application is bound to fail.

[5] During the hearing of the Attorney-General's application, an instanter application was made on behalf of Mr Sica for leave to amend his application to expand the relief sought to include a claim in the alternative for prerogative orders quashing the decision of the Attorney-General not to refer his case to the Court of Appeal and requiring her to consider Mr Sica's request for referral "according to law". Leave was granted and, on 23 August 2021, an amended application was filed and served. It is common ground that the Attorney-General's application to summarily dismiss this proceeding is to be decided by reference to the application as amended.

[6] Section 48(1)(a) of the *Judicial Review Act* confers a general power on the court to stay or dismiss an application if the court considers it inappropriate to permit a proceeding to continue or to grant the application. The power has been described as a broad one,[3] and may be exercised by the court on its own motion.[4] It has been called in aid to, amongst other things, end a proceeding which concerned a decision

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1 *R v Sica* [2012] QSC 184.

2 *R v Sica* [2014] 2 Qd R 168. None of the grounds argued on the appeal against Mr Sica's convictions concerned the conduct of the trial, the summing up, or the verdicts; the grounds were confined to complaints about the outcome of a number of pre-trial applications.

3 *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd* [2008] QCA 83, [57].

4 *Judicial Review Act* 1991, s 48(3).

that was not subject to the *Judicial Review Act*[5] and where the court determined that the application was "doomed to fail".[6] The provision is not to be read down by reference to paragraphs (b), (c) and (d) of s 48(1). Instead, it should fully operate according to its terms, subject only to the constraint that the inappropriateness must relate either to the continuation of the proceeding or to the granting of the application.[7] The power is not confined to cases where error is demonstrated; s 48(1)(a) can be pressed into service even if error on the part of the decision-maker is shown, for example, where there is good reason for otherwise not allowing the proceeding to continue or for not granting the relief sought.[8] Plainly, a clear case will be required before the court may conclude that an application should be stayed or summarily dismissed, but this is one such case.

[7] Mr Sica's application (in both its original and expanded form) faces several obstacles and each, in my view, is insuperable. For the reasons that follow, and adopting the language of s 48(1)(a) of the *Judicial Review Act*, it would be inappropriate to permit this proceeding to continue.

[8] The obvious starting point is the decision of the Court of Appeal in *Holzinger v Attorney-General (Qld)*.[9] There, an applicant for judicial review had been found guilty of three counts of rape and four counts of indecent treatment of a child under the age of 16 years. After unsuccessfully exercising his right to appeal, he petitioned the Governor for a pardon and, like this case, also requested that his petition be referred to the Court of Appeal by the Attorney-General under s 672A of the *Criminal Code.* His petition was refused by the Governor and the Attorney-General decided not to refer the case to the Court of Appeal. The applicant then filed an application under the *Judicial Review Act* for a review of the Attorney-General's refusal to refer his case. His application was subsequently removed from the trial division and heard in the Court of Appeal.

[9] The Court (Sofronoff P and Morrison and Mullins JJA) held that the decision of the Attorney-General was not susceptible to judicial review. After examining the character and ambit of the pardoning power preserved by s 672A of the *Criminal Code*, the following was said:

> "[49] In order to be amenable to review under the *Judicial Review Act* 1991, the Attorney-General's decision not to refer the case must be a 'decision of an administrative character'[10] made under an enactment and the applicant must be a person aggrieved by the decision because he is a person 'whose interests are adversely affected by the decision'.[11]
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> [50] A decision by the Attorney-General to present an *ex officio* indictment or to enter a *nolle prosequi* or, indeed, to instruct that civil proceedings be commenced, is not a decision of a kind to

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5 *Cairns City Council v Commissioner of Stamp Duties* [2000] 2 Qd R 267, 275 [33]; *Waratah Coal Pty Ltd v Nicholls* [2013] QSC 68, [94]; *Meizer v Chief Executive, Department of Corrective Services* [2005] QSC 351, [11].

6 *Rasmussen v Sutton* [2003] 1 Qd R 538, 545 [20].

7 *Brisbane City Child Care Pty Ltd v Kadell* [2020] QCA 181, [55].

8 Ibid.

9 *Holzinger v Attorney-General (Qld)* [2020] 5 Qd R 314.

10 *Judicial Review Act*, s 4.

11 *Judicial Review Act*, s 7(1).

which the adjective 'administrative' easily applies. One reason why that may be so is that, unlike the usual 'administrative decision',[12] a decision to commence litigation does not create rights, does not extinguish rights, does not impose liabilities, and does not impose a legal disability. It is a decision to invoke the jurisdiction of a court. The right that is to be vindicated by judicial process, or the liability that is sought to be declared, is a pre-existing right or liability, with immaterial exceptions.[13] As the Full Court of the Federal Court said in *Clyne (No 2)*,[14] and as the High Court observed in *Osland*,[15] a petition of mercy is not based upon a claim of legal right but is an appeal to an executive discretion originating in the royal prerogative.[16]

[51] This view of the discretion is consistent with the view expressed by Gibbs ACJ and Mason J in *Barton* as follows:

> 'The provision made by s 5 [which conferred power to present an *ex officio* indictment] is very different from an ordinary administrative discretion conferred by statute. The section is a self-contained provision the scope of which is unaffected by any other provisions in the statute. It imposes no duty on the Attorney-General to consider whether a prosecution shall be instituted… i.e. by information in the name of the Attorney-General or other officer duly appointed for the purpose. The provision does not limit or restrict the Attorney-General in any way in the consideration which he may give to a particular case. And because the language leaves the Attorney-General at large in deciding what course he shall take, it makes his decision immune from judicial review.'[17]

[52] In *Maxwell v The Queen*[18] Gaudron and Gummow JJ observed that, while the prosecutorial discretion has, in earlier times, been regarded as part of the prerogative of the Crown, it is now necessary to acknowledge the existence of the Office of the Director of Public Prosecutions as a statutory office and that some formerly common law discretions are now conferred by statute.[19] Nevertheless, and despite the statutory source of the power, their Honours held that some decisions are, of their nature, not susceptible to judicial review. Their Honours included in this catalogue decisions to prosecute, to enter a *nolle prosequi*, to proceed *ex officio*, whether to present evidence and the choice of criminal charges. These are steps that the Attorney-General may take or not as she chooses, unconstrained by any accompanying duty. The reason why decisions of that kind, although made under an enactment, are not susceptible to review under the *Judicial Review Act* 1991 is that the decisions are not of an administrative character. They do not, of their own force and effect, 'confer, alter or otherwise affect legal rights or obligations' but, rather, they invoke the jurisdiction of a

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12 Such as a decision to refuse a statutory permit or to deport an alien.
13 Such as changes in status.
14 *Clyne v Evans* (1984) 2 FCR 515, 524.
15 *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, [47].
16 *Cf.* also Lord Diplock in *de Freitas v Benny* [1976] AC 239, 247.
17 *Barton v The Queen* (1980) 147 CLR 75, 94.
18 *Maxwell v The Queen* (1996) 184 CLR 501.
19 *Maxwell v The Queen* (1996) 184 CLR 501, 534.

> court to vindicate pre-existing rights and liabilities.[20]
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> [53] For the same reasons, the applicant in this case is not a person whose interests have been affected. Having no right to a pardon,[21] the Governor's refusal to pardon the petitioner and, as part of the consideration of the petition of mercy, the Attorney-General's refusal to refer the case, affect no interest of the petitioner."

[10] On the hearing of the dismissal application in this case, it was submitted by Mr Johnson on behalf of Mr Sica that *Holzinger* could be distinguished on its facts, but I do not agree. The case is directly on point and the statements of principle extracted in the preceding paragraph bind me. I am therefore obliged to follow and apply them. Indeed, Mr Johnson rightly acknowledged this very proposition at the hearing.[22] As the Court explained, a person only has standing to apply for a statutory order of review under Part 3 of the *Judicial Review Act* (or, for that matter, an order of review under Part 5) if he or she is a person whose interests are "adversely affected" by the decision.[23] On the authority of *Holzinger*, the decision of the Attorney-General not to refer Mr Sica's case to the Court of Appeal under s 672A of the *Criminal Code* "affect[ed] no interest of the petitioner".[24] It follows that Mr Sica has no standing to apply for review under Part 3 of the *Judicial Review Act.*

[11] Furthermore, and again on the authority of *Holzinger*, the decision of the Attorney-General not to refer Mr Sica's case to the Court of Appeal is not a decision to which Part 3 of the *Judicial Review Act* applies. That is because the jurisdiction is limited to "decision[s] of an administrative character" made under an enactment.[25] Such a decision must "itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment".[26] A decision not to refer a case to the Court of Appeal under s 672A of the *Criminal Code* simply does not meet that description.[27] Such decisions do not, of their own force and effect, "confer, alter or otherwise affect legal rights or obligations but, rather, they invoke the jurisdiction of a court to vindicate pre-existing rights and liabilities".[28]

[12] The next issue is this. Although Mr Sica's application in its original form was made under Part 3 of the *Judicial Review Act*, it would still have been necessary to consider whether any of the grounds relied on by him are capable of supporting a grant of relief under Part 5, for example, for an order in the nature of certiorari.[29] That is because, by r 569 of the *Uniform Civil Procedure Rules* 1999 (Qld), where an application for a statutory order of review is made and it is found that the decision to which the application relates is not a decision that is amenable to an

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20 *Cf. Griffith University v Tang* (2005) 221 CLR 99, [79]-[80], [89].

21 See *Clyne v Evans* (1984) 2 FCR 515 and *Osland v Secretary, Department of Justice* (2008) 234 CLR 275.

22 To be clear, Mr Johnson accepted that I was bound to follow and apply *Holzinger* but reserved his client's right to challenge its correctness elsewhere.

23 *Judicial Review Act*, ss 7(1), 44. And see *Holzinger v Attorney-General (Qld)* [2020] 5 Qd R 314, [49].

24 *Holzinger v Attorney-General (Qld)* [2020] 5 Qd R 314, [50]-[53].

25 *Judicial Review Act*, ss 4, 20. And see *Holzinger v Attorney-General (Qld)* [2020] 5 Qd R 314, [49].

26 *Griffith University v Tang* (2005) 221 CLR 99, [89].

27 *Holzinger v Attorney-General (Qld)* [2020] 5 Qd R 314, [52].

28 Ibid.

29 *Uniform Civil Procedure Rules* 1999 (Qld), r 569; *Taylor v O'Beirne* [2009] QSC 395, [52].

order for a statutory order of review under the *Judicial Review Act*, the court may nevertheless order the proceeding to continue as though it was an application under Part 5 if any relief or remedy mentioned in s 43 of the Act[30] would have been available had the application been one for review.[31] In any event, the obligation on the part of this court to consider Part 5 relief was put beyond doubt when the amended application was filed. As earlier recorded (at [5]), that expanded the relief sought to include a claim for prerogative orders in the nature of certiorari (an order "quashing the decision not to refer the whole of the case of the Court of Appeal pursuant to s 672A of the *Criminal Code"*) and mandamus (an order "directing the Attorney-General to consider the applicant's request for referral according to law").

[13] Section 41(2) of the *Judicial Review Act* preserves this court's jurisdiction to grant any relief or remedy by way of a writ of mandamus, prohibition or certiorari, although the power to issue the prerogative writs themselves has been abolished: s 41(1). Despite the contrary submissions made on behalf of Mr Sica, I am not persuaded that there is a separate source of power outside the *Judicial Review Act* to grant prerogative relief. In this regard, the decision of the High Court in *Kirk v Industrial Court (NSW)*[32] does not assist Mr Sica. Although it confirmed this court's constitutionally entrenched supervisory jurisdiction to grant prerogative relief for jurisdictional error, a power that is expressly preserved by s 41(2), that does not necessarily mean that the court has some reserve of power outside the Act to grant prerogative relief.[33]

[14] That said, the immediate difficulty with Mr Sica's claim to relief under Part 5 mirrors one of the fundamental difficulties with his claim to relief under Part 3, that is to say, he is not someone who is "adversely affected" by the decision of the Attorney-General not to refer his case to the Court of Appeal. For that reason, Mr Sica does not meet the standing requirement to make an application under Part 5.[34]

[15] The next difficulty arises because of the nature of the relief to which Mr Sica claims he is entitled under Part 5. One of the orders sought in the amended application is an order quashing the decision of the Attorney-General not to refer the whole of the case to the Court of Appeal. Whilst such a claim is unmistakeably in the nature of certiorari, and even though relief of that kind is preserved under the *Judicial Review Act*, the function of such an order is to "remove the legal consequences, or purported legal consequences, of an exercise or purported exercise of power which has, as at the date of the order, a discernible or apparent legal effect upon rights".[35] However, a decision not to refer a petitioner's case to the Court of Appeal pursuant to s 672A of the *Criminal Code* could have no discernible or apparent legal effect upon rights and, for that reason, certiorari is simply not available.[36] The other order sought in the amended application is in the nature of mandamus. It is for an order

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30 Section 43 of the *Judicial Review Act* provides for application to be made, relevantly, for some types of prerogative orders.

31 *Mauloni v Fraser* [2007] 1 Qd R 563, [10]; *Taylor v O'Beirne* [2009] QSC 395, [52].

32 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

33 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, [97]-[99]; *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1, [29].

34 *Judicial Review Act* s 44.

35 *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1, [28].

36 *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, [25]; *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1, [28]; *Holzinger v Attorney-General (Qld)* [2020] 5 Qd R 314, [50] and [53].

directing the Attorney-General to consider the request for referral according to law. However, mandamus will not be available because, to the extent the Attorney-General had any duty to consider the petition and decide whether to refer Mr Sica's case to the Court of Appeal, that duty has been discharged.[37]

[16] There are accordingly insurmountable problems with Mr Sica's application, regardless of whether relief is sought under Part 3 or Part 5 of the *Judicial Review Act*. Moreover, even if those problems did not exist, the grounds advanced on his behalf to support the relief claimed are in my view incapable of doing so.

[17] It is also useful to once again refer to *Holzinger*. There, like here, the applicant sought judicial review on grounds of procedural unfairness, exercising a discretionary power without regard to the merits of an individual case, unreasonableness, failure to take into account relevant considerations and making a decision without evidence[38] but, with one possible exception, the exercise of the power in s 672A of the *Criminal Code* was found not to be judicially reviewable on any of those grounds.[39]

[18] The possible exception to this general proposition concerns what has been described as "bad faith or improper motive" and elsewhere as "bad faith or fraud". To explain, after the Court in *Holzinger* held that any proposition to the effect that the Attorney-General was bound to refer a case to the Court once it had been shown that there was a reasonably arguable miscarriage of justice was "misconceived",[40] the Court turned to a consideration of a number of "other fundamental problems" with the application.[41] After doing so, the Court expressed agreement with the reasons of the Full Court of South Australia in *Von Einem v Griffin*[42] and with the reasons of Bongiorno AJA (with whom Ashley JA agreed) in *Secretary to the Department of Justice v Osland*.[43] In *Von Einem*, Prior J reasoned that, to allow judicial review of a decision on the part of the Attorney-General of South Australia to advise the Governor of that State not to refer a case to the Full Court would involve an intrusion by the court into the executive sphere before observing by way of dicta that, if "bad faith or improper motive" were made out, it might be appropriate to quash the improper exercise of discretion and require a reconsideration.[44] In *Osland*, Bongiorno AJA observed that the question whether the prerogative of mercy is exercised or not is entirely within the province of the Sovereign advised by the executive government. His Honour further observed that no question of legal rights is involved and no reasons need be given for such a decision. His Honour then said, "The decision itself is not reviewable, nor are the reasons, motives, or intentions of the Crown's representative".[45]

[19] To these apparently conflicting observations may be added dicta (going in support

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37 *Holzinger v Attorney-General (Qld)* [2020] 5 Qd R 314, [41], [42] and [120].

38 Adopting the summary contained in *Attorney-General (Cth) v Ogawa* (2020) 384 ALR 474, [84]. They are otherwise set out in *Holzinger v Attorney-General (Qld)* [2020] 5 Qd R 314, [37].

39 *Holzinger v Attorney-General (Qld)* [2020] 5 Qd R 314, [54]–[66]. And see *Attorney-General (Cth) v Ogawa* (2020) 384 ALR 474, [87].

40 *Holzinger v Attorney-General (Qld)* [2020] 5 Qd R 314, [58].

41 *Holzinger v Attorney-General (Qld)* [2020] 5 Qd R 314, [63].

42 *Von Einem v Griffin* (1998) 72 SASR 110.

43 *Secretary to the Department of Justice v Osland* (2007) 26 VAR 425.

44 *Von Einem v Griffin* (1998) 72 SASR 110, 114.

45 *Secretary to the Department of Justice v Osland* (2007) 26 VAR 425, [126].

of the rider expressed by Prior J in *Von Einem*) which appears in the judgment of the Full Federal Court in *Attorney-General (Cth) v Ogawa*.[46] In that case, the applicant sought judicial review of a decision of the Attorney-General (Cth) to recommend to the Governor-General that she not be pardoned, as well as a related decision not to refer the matter to the Court of Appeal of this court under s 672A of the *Criminal Code*. The primary judge held that, although the Governor-General's decision not to grant the applicant a pardon was not judicially reviewable, the same could not be said for the Attorney-General's advice to the Governor-General. The primary judge also found that the Attorney-General's decision not to refer the case to the Court of Appeal was made in error. Relief in the form of a declaration and orders in the nature of certiorari and mandamus was granted, but all of this relief was set aside by the Full Court of the Federal Court. In doing so, the Full Court expressed the view that it should follow *Holzinger* unless persuaded that it was plainly wrong. On this point, the following observations were made:

> "Dr Ogawa has understated the scope and effect of the Court of Appeal's dismissal of the judicial review application before it. Not only did the Court hold that there was no obligation on the Attorney-General to refer a case if it is reasonably arguable that there was a miscarriage of justice, the Court considered and dismissed each of the particular judicial review grounds raised by the applicant. As noted above, the grounds of judicial review included procedural unfairness, exercising a discretionary power without regard to the merits of an individual case, unreasonableness, failure to take into account relevant considerations and making a decision without evidence. We accept the Attorney-General's submission that, in these circumstances, *Holzinger* stands for the proposition that the Attorney-General's referral decision is not amenable to judicial review on any of these grounds. Those grounds are, in substance, indistinguishable from the grounds relied upon by Dr Ogawa. **That is not to say that judicial review would not be available for bad faith or fraud**, but those grounds were not raised either in *Holzinger* or here. Deference to the decision of the Court of Appeal in *Holzinger* indicates that the availability and ambit of judicial review is severely limited. It is certainly not a decision which is plainly wrong."[47] [Emphasis added]

[20] Despite these observations, and with great respect to those who have expressed a contrary view, I am by no means persuaded that there is a bad faith[48] exception. I would have thought there are powerful reasons why the courts should firmly abstain from enquiring into the reasons, motives or intentions of the Crown's representatives regarding the exercise of the prerogative of mercy. But this is an application to summarily dismiss Mr Sica's proceeding and, as such, I should not only take the material in support at its highest, I must adopt the most favourable view of the applicable law when considering that material. Taking that approach, and leaving to one side Mr Sica's lack of standing under the *Judicial Review Act* (whether under Part 3 or Part 5) as well as the unavailability otherwise of the prerogative relief claimed by him, I am prepared to assume that a bad faith exception does exist but, even then, the particulars relied on by Mr Sica (whether considered alone or in aggregation) are incapable, either directly or inferentially, of making good that exception.

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46 *Attorney-General (Cth) v Ogawa* (2020) 384 ALR 474.

47 *Attorney-General (Cth) v Ogawa* (2020) 384 ALR 474, [84].

48 The expression, "bad faith", is used compendiously to include the *Von Einem* formulation ("bad faith or improper motive") and the *Ogawa* formulation ("bad faith or fraud").

[21] In that regard, the amended application advances eight particulars to support what is broadly alleged to be an "absence of good faith" and, on the hearing of the application, it was common ground[49] that the corollary to that, an allegation of "bad faith", should be understood as an allegation of personal fault or dishonesty on part of the decision-maker.[50] Poor decision-making or mere errors of fact or law will be insufficient to ground a finding of bad faith.[51] Indeed, the circumstances in which the court will find that a decision-maker has acted in bad faith can be expected to be rare and extreme.[52] Otherwise, it is useful to keep in mind that the relevant enquiry is directed to the state of mind of the decision-maker[53] and that it is the ultimate decision which must be shown to have been taken in bad faith.[54]

[22] The first and second particulars concern the conditions under which Mr Sica was temporarily incarcerated. It is alleged that, within two weeks of the presentation of Mr Sica's petition to the Governor, he was kept in maximum security on "inadequate grounds and in harsh and inhumane conditions" for three months "without proper justification". The Attorney-General is not the responsible minister for the management and administration of prisons and, so, even if this allegation is true, it could hardly support a finding of bad faith on her part.

[23] The third particular alleges "extraordinary delay in dealing with the petition". Again, such an allegation is incapable of supporting an inference of bad faith. To the contrary, it suggests that what appears to have been a voluminous body of material in support of the petition was given proper consideration.

[24] The fourth particular alleges a failure on the part of the Attorney-General to "respond to reasonable requests for access to evidence and witnesses". This allegation is quite incapable of supporting an inference of bad faith. There is no obligation on the part of the Attorney-General to allocate resources of the State to facilitate the preparation of a petitioner's case.

[25] The fifth particular alleges failures on the part of the Attorney-General to "respond to numerous reasonable offers in writing to confer on any matters arising from the petition and supporting documents" and "failing to give the applicant [a] reasonable opportunity to deal with adverse material". This seems to be an allegation of denial of procedural fairness, a ground which the Court in *Holzinger* held was not reviewable[55] but, that aside, it is incapable of supplying even inferential proof of bad faith.

[26] The sixth particular alleges a failure to notify Mr Sica of the decision in a timely

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49 Transcript 1-22, l8.

50 *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 194 ALR 749, [43].

51 *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 194 ALR 749, [45]; *Minister for Immigration and Multicultural and Indigenous Affairs v SBAN* [2002] FCAFC 431, [8]; *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd (in liq)* [2010] Qd R 322, [44], [45] and [51].

52 *SBBS v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 194 ALR 749, [44]; *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189, [13].

53 *Minister for Immigration and Multicultural and Indigenous Affairs v SBAN* [2002] FCAFC 431, [8]-[10]; *Queensland Bulk Water Supply Authority v McDonald Keen Group Pty Ltd (in liq)* [2010] Qd R 322, [45].

54 *Minister for Immigration and Multicultural and Indigenous Affairs v SBAN* [2002] FCAFC 431, [8].

55 *Holzinger v Attorney-General (Qld)* [2020] 5 Qd R 314, [37].

way but any delay in doing so says nothing about the Attorney-General's state of mind at the time when the decision not to refer was made.

[27] By the seventh particular, an attempt is made by Mr Sica to make something of the contents of a letter from the Official Secretary to the Governor notifying Mr Johnson of the fate of Mr Sica's petition as well as the feature that the Governor, when Chief Justice of this court, determined a pre-trial application against Mr Sica. As to the first circumstance, it is alleged that the Governor was involved "in the decision-making process contrary to established convention"[56] and, as to the second, the allegation seems to be that the Governor may have been predisposed against Mr Sica because he determined one of the pre-trial applications. These allegations are nonsense, if not scandalous. Far from being revealing of any irregularity, the correspondence is perfectly consistent with a consideration of the petition in accordance with the practice discussed in *Holzinger*. There is also nothing that can rationally be made of the feature that the Governor once presided over a pre-trial application concerning Mr Sica and, in any event, that could do nothing to contribute to a finding of bad faith on the part of another person, that is to say, the Attorney-General.

[28] By the last particular it is alleged that "the grounds of the petition and the evidence supporting those grounds are such that no reasonable person acting objectively and in good faith could have" decided not to refer the case. This is an allegation of unreasonableness and *Holzinger* stands as authority for the proposition that decisions under s 672A are not reviewable on that ground.[57] In addition, even if the petition was based on compelling grounds, it cannot be inferred from its refusal that the Attorney-General was motivated by bad faith.

[29] It follows that, even if there is a bad faith exception, such an allegation could not be sustained on the particulars advanced in this case.

[30] For completeness, I add the following observations:

(a) One of the orders sought by the applicant was that this court refer his case to the Court of Appeal. There is no jurisdiction to make such an order and such an order would, in any event, "impermissibly constitute a judicial command to the executive to institute proceedings in the criminal jurisdiction of the Court of Appeal of Queensland";[58]

(b) In argument, Mr Johnson advanced a number of submissions on behalf of Mr Sica to the effect that bad faith could be inferred through a refusal on the part of the Attorney-General to give reasons. Not only is there no obligation on the part of the Attorney-General to give reasons,[59] it does not follow from the fact reasons were not given that the petition was given inadequate consideration, let alone that the decision of the Attorney-General not to refer it was actuated by bad faith. In this regard, it is to be observed that while a

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56 The "established convention" appears to be a reference to the practice in Queensland discussed in *Holzinger* whereby, on receipt of a petition, the Attorney-General would ask her department to consider it and make recommendations in relation to it. On occasion, the advice of the Crown Solicitor will also be sought. The Attorney-General then advises the Premier, who, ultimately tenders advice to the Governor: *Holzinger v Attorney-General (Qld)* [2020] 5 Qd R 314, [10].

57 *Holzinger v Attorney-General (Qld)* [2020] 5 Qd R 314, [54]-[62].

58 *Holzinger v Attorney-General (Qld)* [2020] 5 Qd R 314, [119].

59 *Holzinger v Attorney-General (Qld)* [2020] 5 Qd R 314, [38].

petitioner such as Mr Sica might principally rely on legal arguments, there is a whole range of "non-legal factors" that could bear upon the formulation of advice to the Governor;[60]

(c) In response to the application to dismiss, Mr Johnson attempted to tender a copy of the petition and supporting documents, along with documents that were said to evidence jury irregularities in relation to Mr Sica's trial. The tender was objected to and the question whether that material should be received in evidence was reserved.[61] Mr Johnson submitted that the material should be received and considered by the court because, in effect, it demonstrates the strength of Mr Sica's claim to a pardon. The problem with these submissions is that, at best, this material could only go to proof of a claim that the Attorney-General's decision was unreasonable. As just discussed above (at [28]), unreasonableness is not available as a ground of review. Mr Johnson's submissions also ignore the other fundamental problems with this application. I therefore decided not to receive the material in evidence.

[31] For these reasons, it would be inappropriate to allow Mr Sica's application to continue. It will be dismissed with costs.

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60 *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, [12]; *Holzinger v Attorney-General (Qld)* [2020] 5 Qd R 314, [61].

61 The documents were marked for identification. The petition and supporting documents were marked "MFIA" and the jury irregularity documents were marked "MFIB" and, also, made the subject of a sealing order.