# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Naehu v Parole Board Queensland* [2023] QSC 16 |
| PARTIES: | **JARED PETER NAEHU**<br>(applicant)<br>**v**<br>**PAROLE BOARD QUEENSLAND**<br>(respondent) |
| FILE NO/S: | BS 5999/22 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 21 February 2023 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 7 November 2022 |
| JUDGE: | Justice Kelly |
| ORDER: | **1. The application is dismissed.**<br>**2. I will hear the parties as to costs.** |
| CATCHWORDS: | ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – where the applicant applied for parole – where the respondent refused the application for parole – where the applicant sought a statutory order of review in respect of the refusal on the grounds that the applicant had a legitimate expectation of being granted a parole order – whether the applicant was accorded procedural fairness in the decision-making process<br><br>ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – RELEVANT CONSIDERATIONS – FAILURE TO CONSIDER – where the applicant applied for parole – where the respondent refused the application for parole – where the applicant sought a statutory order of review in respect of the refusal on the grounds that the respondent failed to consider the particular circumstances of his offending and criminal history – whether the respondent failed to consider the applicant's particular circumstances<br><br>ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – IMPROPER PURPOSES – where the applicant applied for parole – where the respondent refused the application for parole – where the |

applicant sought a statutory order of review in respect of the refusal on the grounds that the decision was based on a rule or policy that the applicant must complete a sexual offender intervention programs in order to obtain parole – where the applicant did not complete any such program because he maintained his innocence in respect of the index offending – whether the respondent made the decision in accordance with a rule or policy without regard to the merits of the case

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – UNREASONABLENESS – where the applicant applied for parole – where the respondent refused the application for parole – where the applicant sought a statutory order of review in respect of the refusal on the grounds that the decision was so unreasonable that no reasonable person could so exercise the power – whether the decision was so unreasonable that no reasonable person could exercise the power

*Corrective Services Act 2006* (Qld), s 3(1) s 180(1), s 193, s 194(1)(b), s 217(a), s 242E
*Human Rights Act 2019* (Qld), s 32(1), (4)
*Judicial Review Act 1991* (Qld), s 20, s 23

*Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564
*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223
*Batts v Department of Corrective Services; Fogarty v Department of Corrective Services* [2002] QSC 206
*Buck v Bavone* (1976) 135 CLR 110
*Calanca v Parole Board of Queensland* [2019] QSC 34
*Chief Commissioner of Police v McCann* [2015] VSCA 362
*Felton v Queensland Corrective Services Commission* [1994] 2 Qd R 490
*Fogarty v Department of Corrective Services* [2002] QSC 206
*Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675
*Kioa v West* (1985) 159 CLR 550
*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24
*Minister for Immigration and Border Protection v Eden* (2016) 240 FCR 158
*Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332
*Minister for Immigration v Khadgi* (2010) 190 FCR 248
*Minister for Immigration v Wzarh* (2015) 256 CLR 326
*Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173
*Queensland Parole Board v Pangilinan* [2015] QCA 35
*Re Minister for Immigration and Multicultural Affairs; Ex*

*parte 'A'* (2001) 185 ALR 489
*Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2001) 214 CLR 1
*Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332
*S10/2011 v Minister for Immigration and Border Protection* (2012) 246 CLR 636
*South Australia v O'Shea* (1987) 163 CLR 378
*SZDXZ v Minister for Immigration and Citizenship* [2008] FCAFC 109
*Wigginton v Queensland Parole Board* [2010] QSC 59
*Wiskar v Queensland Corrective Services Commission* [1998] QSC 279
*Yeo v Queensland Corrective Services Commission* (unreported, Dowsett J, 13 February 1998)

COUNSEL: The applicant appeared on his own behalf
C Templeton for the respondent

SOLICITORS: The applicant appeared on his own behalf
Parole Board Queensland for the respondent

**An application for a statutory order of review**

[1] The applicant is on remand serving a sentence of 10 years and six months. By an application dated 12 November 2020 ("the application"), he applied for parole. On 8 November 2021, the respondent ("the Board") made a preliminary decision to refuse the application. By a letter dated 29 November 2021, the Board advised the applicant of its preliminary decision and the reasons for that decision. The applicant then provided further submissions dated 16 December 2021 and 17 December 2021. On 24 January 2022, the Board made a final decision to refuse the application ("the decision"). By a letter dated 27 January 2022, the applicant was advised of the decision. The applicant requested a statement of reasons. The Board's statement of reasons is dated 8 April 2022 ("the statement of reasons").

[2] On 24 May 2022, the applicant filed an application for a statutory order of review in relation to the decision. The grounds advanced were further developed by further and better particulars filed 4 July 2022 and the applicant's written submissions filed 20 September 2022.

[3] The broad grounds for review may be identified as follows:

(a) the applicant was denied procedural fairness;

(b) the decision involved an improper exercise of power;

(c) the decision was otherwise unreasonable.

**The applicant's offending**

[4] The applicant was sentenced on two occasions. On 12 October 2017, he was sentenced in the District Court after having been found guilty of two counts of torture, one count of rape, one count of assault occasioning bodily harm whilst armed, two counts of deprivation of liberty and one count of common assault. On 3 November 2017, he was sentenced in the Supreme Court following his pleas of guilty to two counts of possessing a dangerous drug in excess of two grams and three counts of possessing a dangerous drug.

[5] The District Court offending occurred in 2016, when the applicant was around 31 years of age. The female complainant was about 29 or 30 years of age. The pair were in a relationship. When visiting New Zealand, a man had taken sexual advantage of the complainant. She returned to Australia and told the applicant. He became irate and the initial offending involved the applicant acting towards the complainant as follows. He took her into a bathroom, had her take her clothes off and made her shower whilst he violently rubbed her face, arms, body and legs with a kitchen scourer. He forced the scourer into her vagina. He spat on the complainant, called her degrading names and threatened to burn her with a lighter. He flicked cigarettes at her and slapped her. The ordeal lasted for hours, during which time he attempted to hang himself with an electrical cord.

[6] About a month later, the applicant took a meat cleaver and repeatedly hit the complainant on her back and arms. Her left little finger was fractured. The applicant made the complainant take her clothes off and walk whilst she was on all fours, like a dog. He drove her to their friends' place and, once there, made her walk whilst she was on all fours and made degrading and humiliating comments about her. He then drove the complainant to her father's house and made her walk naked up to the house whilst she was on all fours. The applicant inserted a sex toy in the complainant's mouth, took her into the street and began yelling words to the effect that the complainant was available for sex. A further month later, the applicant made the complainant sit naked on a tiled floor for hours. He put a knife under her feet and told her to stand on her toes. Later, he would hand her a syringe containing methylamphetamine and tell her to inject him "to finish [him] off".

[7] The relevant passages of the District Court sentencing remarks may be set out as follows:

> "On any view, these offences were appalling, humiliating, degrading and disgraceful.
>
> You have had a problem with drugs for most of your adult life.
>
> You have been in pre-sentence custody now for about 17 months. During that time you completed a number of courses and have also resumed your religious beliefs.
>
> … There is no doubt that your offending had a very severe negative physical, emotional and financial impact upon her and had a significant impact on her mother and also adversely affected her father. Your actions towards the complainant are likely to negatively impact her for many years to come …."

[8] The applicant was sentenced by the District Court judge as follows:

(a) On the count of rape, nine years' imprisonment.

(b) On the first count of torture, six years' imprisonment.

(c) On the second count of torture, five years' imprisonment.

(d) On the count of assault occasioning bodily harm whilst armed (with the meat clever), four years' imprisonment.

(e) For each of the counts of common assault and deprivation of liberty, two years' imprisonment.

[9] All periods of imprisonment were to be served concurrently. Taking into account time served in pre-sentence custody, a period of 502 days which was not declarable, the applicant's parole eligibility date was fixed as 11 November 2020.

[10] The Supreme Court offending had occurred in May 2016 and involved the possession of 75.59 grams of methylamphetamine, 2.784 grams of cocaine, 443 grams of cannabis, 1.534 grams of MDMA and 8.082 grams of testosterone.

[11] The relevant passages of the Supreme Court sentencing remarks may be set out as follows:

> " … this is a significant quantity of drugs … it is serious criminal offending; particularly, given your criminal history. That criminal history sets out that you have convictions previously for drug offences. And that criminal history, which is some five pages, involves assault occasioning bodily harm, as well as unauthorised dealing in shop goods. There are also numerous breaches on that criminal history. Of greatest concern is the fact that on the 12th of October 2017 you were convicted and sentenced in the District Court for a number of offences, including rape, which was [a] domestic violence offence, as well as torture."

[12] The Supreme Court judge sentenced the applicant as follows:

(a) on the two counts of possessing a dangerous drug in excess of 2 grams, a cumulative period of imprisonment of 18 months, meaning that the period of 18 months commenced at the end of the period of imprisonment that the applicant was already serving;

(b) on the three counts of possession, 6 months' imprisonment.

[13] The applicant's parole eligibility date was fixed as 11 May 2021.

**The application, the decision-making process and the statement of reasons**

[14] The application was accompanied by a handwritten submission, references and supporting documents. The application evidenced that the applicant had completed a number of programs whilst on remand including Getting Started, Short Substance Intervention ("SSI") and Low Intensity Substance Intervention ("LISI").

[15] The preliminary decision was made on 8 December 2021. The effect of the preliminary decision was that the Board had formed a preliminary view that the risk of harm posed by the applicant to the community was unacceptably high at the time of the preliminary decision.[1] By a detailed, 12 page letter dated 29 November 2021, the Board advised the applicant of the preliminary decision, the reasons for it and invited the applicant to provide further written submissions and any further supporting documents before a final decision was made. The primary purpose of the 29 November 2021 letter was expressed to be "to inform [the applicant] of the adverse factors which were noted by the Board, in order to give you an opportunity to address them before a final decision is made in relation to your application". [2]

[16] The 29 November 2021 letter advised the applicant that the Board had considered factors which supported the applicant's release to the community. Those factors included that the applicant had:

(a) completed a number of programs whilst on remand being Getting Started, SSI and LISI;

(b) completed numerous AEVET courses on remand;

(c) been gainfully employed on remand;

(d) provided a clean urinalysis test on 22 January 2020;

(e) provided several letters of support; and

(f) provided a Release and Relapse Prevention and Management Plan.

[17] The 29 November 2021 letter advised that the Board had had regard to the Ministerial Guidelines issued to the Board ("the Guidelines"). In particular, the Board noted that the applicant's criminal history began when he was 18 and spanned 7 pages. The letter stated "Your criminal history demonstrates a consistent pattern of offending, which notably escalates from low-level offending against public order and property to your index offending which consisted of serious violent and sexual offences in a domestic setting".

[18] The primary reason for the Board's preliminary decision was expressed in these terms:

> " … you continue to have outstanding treatment needs in relation to violence, sexual offending and substance abuse. These outstanding treatment needs remain as such, due in no small part, to your limited insight into your offending behaviour."[3]

[19] The 29 November 2021 letter noted that the Board had regard to the applicant's version of the District Court offending provided during his parole interview and as detailed in the Parole Suitability Assessment dated 12 February 2021. That explanation differed significantly from the facts as described in the District Court sentencing remarks. In particular, the applicant denied the rape, physical violence and torture and engaged in victim blaming. The Board noted that the Getting Started

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1 Affidavit of Michael Byrne KC filed 8 August 2022 (CFI 7), Exhibit bundle p 35
2 Ibid p 26
3 Ibid p 62 [9].

report described the applicant as having limited understanding of the background factors which may have contributed to his sexual offending, accepting minimal responsibility for his offending and demonstrating no specific empathy for the complainant.

[20] The Getting Started report contained the following extracts:[4]

> "[The applicant] reported being convicted for rape for using 'a scourer to clean her out' after finding out the victim had been 'sleeping around'. He demonstrated insight into his emotions at the time of the sexual offending describing that he felt 'betrayed and hurt'. [The applicant] advised he pleaded not guilty, however acknowledged that using the scourer inside the victim was defined as rape. [The applicant] advised he felt bad about his behaviour as he had 'never touched a woman in violence before'.
>
> [The applicant] presented with levels of denial of harm done to the victim; minimised the offending by stating 'I just cleaned her out' and omitted the level of violence used; and displayed victim blaming, stating 'she was sleeping around'; and 'she had betrayed and hurt him'. He displayed further justification through reporting that the victim had manipulated his parents, saying 'you can come after me, but not my family'. [The applicant] also externalised blame to substance use stating 'I had a cocktail of substances in me'; 'I hadn't slept for three days'. He identified his behaviour as being 'out of control' claiming that he was unable or unwilling to remove himself from the situation … Overall [the applicant] provided a selective version of the sexual offending and presented with limited insight into his sexual offending behaviour … It is noted that [the applicant's] disclosure of events varied significantly from official documentation".

[21] The Getting Started report ended with a heading "Participant's Comment & Feedback on Program Experience & Outcomes". Beside that heading was written "I acknowledge the harm done to the victim, but don't agree with the way things have been explained".[5] The Getting Started report had apparently been signed and dated by the applicant under an acknowledgement that he had read the Getting Started report or had it read to him.[6] The 29 November 2021 letter noted that the Board was concerned by the applicant's comments in the Getting Started report.

[22] The 29 November 2021 letter also outlined the following matters which had contributed to the formation of the Board's preliminary view. The applicant had made an early exit from a Medium Intensity Sexual Offending Program ("the MISOP") and had categorically denied the sexual offending component of his offending. By reason of the applicant's early exit from the MISOP, he remained an untreated sexual offender. The applicant's offending demonstrated a need for violence intervention programs. The applicant had not completed any interventions to address the violent nature of the index offending. As such, the applicant remained

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4 Ibid p 105
5 Ibid p 107
6 Ibid p 107

an untreated violent offender. Whilst the applicant had completed the SSI and LISI, he had a significant history of substance abuse and substances had played a critical role in his offending which suggested that he should engage in higher intensity substance intervention programs.

[23] The 29 November 2021 advised that the Board had considered the risks posed to the community by releasing the applicant on parole and compared the situations where he had completed, and not completed, the MISOP, violence and higher intensity substance abuse intervention programs. The Board considered that, due to the link between the applicant's substance abuse and his violent and sexual offending, the risk he posed to the community was likely to be less after he had completed the recommended programs. The Board noted that completing recommended programs was not a requirement for release on parole but would, in the circumstances of this particular application, provide the Board with more confidence to determine that the risks posed to the community had been adequately mitigated. The Board concluded that until the applicant was able to demonstrate more insight into his offending, the Board could not be confident that he would comply with parole order conditions and not pose an ongoing risk to the community.[7]

[24] In response to the 29 November 2021 letter, the applicant provided further submissions dated 16 December 2021 and 17 December 2021.

[25] At its meeting on 24 January 2022, the Board made the decision and refused the application. On 8 April 2022, the Board provided a statement of reasons for the decision.

[26] As to the decision:

(a) the Board had regard to the following further material submissions made by the applicant:

(i) in 2018 he had applied to participate in a Cognitive Self-Change Program ("CSCP") and was waitlisted. He had then transferred to another correctional centre where the CSCP had been conducted more frequently. After his transfer to the new correctional facility, he was advised that the CSCP was no longer offered at that facility.

(ii) he had applied to participate in a Domestic Violence course but was denied entry as it was a speciality program for First Nations offenders;

(iii) he was unable to complete a Domestic Violence program because spaces were very limited.

(iv) he had applied to participate in "the MISOP" because he believed there was a Domestic Violence element within the course;

(v) he believed he had been falsely accused and convicted of sexual offences and did not see a need for him to complete sexual offending aspects of a program;

(vi) he was removed from MISOP because he maintained innocence in relation to the sexual offences of which he had been convicted.

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7 Ibid p 64 [25]

(vii) the District Court judge had refrained from imposing a Serious Violent Offender classification against him and he believed this gave rise to adverse inferences about the victim's evidence;

(viii) the comments attributed to him in the Getting Started report were fabricated;

(b) The Board had regard to the positive aspects of the application, including but not limited to the applicant's suitable accommodation, custodial employment and recent clean urinalysis sample.

(c) The Board considered the applicant's submissions and supporting documents and determined that there was no information contained in them which would sufficiently alleviate the Board's concerns as identified in the 29 November 2021 letter.

(d) The Board remained of the view that the applicant had outstanding treatment needs for his violent behaviour, substance abuse and sexual offending. His needs were informed by his criminal history, limited insight into his offending and the Getting Started report. The Board did not accept that the statements attributed to the applicant in the Getting Started report were a complete fabrication by the author of the report.

(e) The Board considered whether the applicant and the community would benefit from the applicant having a longer term of community supervision and whether the standard (including GPS monitoring) or any other conditions could be reasonably imposed that would reduce the level of risk. The Board considered that the level of risk could not be mitigated by way of parole order conditions.

[27] The Board ultimately refused the application and consented to the applicant lodging a new application for parole six months from the date of the decision or upon commencement of the MISOP or an equivalent intervention program. The Board advised the applicant that he would be eligible for parole on 24 July 2022 or upon commencement of such a program.

**Legislative context for the decision and the application**

[28] The Parole Board is established under s 216 of the *Corrective Services Act 2006* (Qld) ("the Act"). A function of the Board is to decide applications for parole orders.[8] A prisoner may apply for a parole order after having reached their parole eligibility date.[9] The power to decide a parole application is conferred on the Board by s 193. The power of the Board to release a prisoner on parole is then set out in s 194(1) which relevantly provides that the Board may, by a parole order, release an eligible prisoner (essentially a prisoner who has reached their parole eligibility date) on parole.[10] It has been observed that the Board's discretionary power to grant or refuse an application for parole is broad and unfettered and the Act does not specify the criteria for making a decision under s 193.[11] However, the power is to be

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8 Section 217(a) of the Act.
9 Section 180(1) of the Act.
10 Section 194(1)(b) of the Act.
11 *Calanca v Parole Board of Queensland* [2019] QSC 34 at [54] (per Bowskill J).

exercised having regard to the subject matter, scope and purpose of the Act.[12] The purpose of the Act is "community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders".[13]

[29] Section 20 of the *Judicial Review Act 1991* (Qld) ("the JR Act") relevantly provides:

> **20 Application for review of a 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 –
> (a) that a breach of the rules of natural justice happened in relation to the making of the decision;
> (b) that procedures that were required by law to be observed in relation to the making of the decision were not observed;
> (c) ...
> (d) …
> (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
> (f) …

[30] Section 23 of the JR Act then provides:

> **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 –
> (a) taking an irrelevant consideration into account in the exercise of a power; and
> (b) failing to take a relevant consideration into account in the exercise of a power; and
> (c) an exercise of a power for a purpose other than a purpose for which the power is conferred; and
> (d) an exercise of a discretionary power in bad faith; and
> (e) an exercise of a personal discretionary power at the direction or behest of another person; 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
> (g) an exercise of a power that is so unreasonable that no reasonable person could so exercise the power; and
> (h) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and

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12 *Wigginton v Queensland Parole Board* [2010] QSC 59 at [26]; *Queensland Parole Board v Pangilinan* [2015] QCA 35 at [19].

13 Section 3(1) of the Act.

(i) any other exercise of power in a way that is an abuse of the power.

[31] An application for a statutory order of review is not a merits review. Fundamentally, such an application is confined to the legality of the decision and whether the decision was one which the decision-maker was authorised to make.[14] Where the decision under review is discretionary, it is relevant to bear in mind the remarks of Gibbs J in *Buck v Bavone*:[15]

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

**Procedural Fairness**

[32] The applicant's further and better particulars define this ground as follows:

> "Certain basic legal principles are required by nature, or so obvious that they should be applied universally without needing to be enacted into law by a legislator. Natural justice operates on the principles that a person has the right to better themselves which includes healing themselves whether it be from illness or addiction and that a person of good intent should not be harmed. The applicant has shown good faith and intent as exampled by the successful completion of intervention programs and clear urine tests.
>
> The applicant has a "Legitimate Expectation" of being granted a parole order"

[33] The reference to a legitimate expectation was perhaps intended to call in aid the following observations of Mason J in *Kioa v West*:[16]

> "The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention…

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14 *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 at [23] (per French CJ, Bell, Keane and Gordon JJ).

15 (1976) 135 CLR 110 at 118-119.

16 (1985) 159 CLR 550, 584-5.

> Where the decision in question is one for which provision is made by statute, the application and content of the doctrine of natural justice or the duty to act fairly depends to a large extent on the construction of the statute. … What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject-matter, and the rules under which the decision-maker is acting…
>
> In this respect the expression 'procedural fairness' more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, i.e. in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protects or permits to be taken into account as legitimate considerations… The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?"

[34] Since *Kioa*, the term "legitimate expectation" has largely been abandoned.[17] In *S10/2011 v Minister for Immigration and Border Protection*,[18] the joint judgment[19] noted that the phrase "either adds nothing or poses more questions than it answers and thus is an unfortunate expression which should be disregarded."[20] The phrase has also been described as apt to direct attention to the merits of a particular decision rather than to the character of the interests affected by the exercise of the decision-making power.[21] In *Minister for Immigration v Wzarh*,[22] the joint judgment[23] observed:

> "The 'legitimate expectation' of a person affected by an administrative decision does not provide a basis for determining whether procedural fairness should be accorded to that person or for determining the content of such procedural fairness. It is sufficient to say that, in the absence of a clear, contrary legislative intention, administrative decision-makers must accord procedural fairness to those affected by their decisions. Recourse to the notion of legitimate expectation is both unnecessary and unhelpful. Indeed, reference to the concept of legitimate expectation may well distract from the real question: namely, what is required in order to

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17 *S10/2011 v Minister for Immigration and Border Protection* (2012) 246 CLR 636, 658 (Gummow, Hayne, Crennan and Bell JJ); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2001) 214 CLR 1, 20 [61]-[63], 27-28 [81]-[83] (McHugh and Gummow JJ), 36-38 [116]-[121], (Hayne J) 45-48 [140]-[148] (Callinan J).

18 (2012) 246 CLR 636.

19 Gummow, Hayne, Crennan and Bell JJ

20 *S10/2011 v Minister for Immigration and Border Protection* (2012) 246 CLR 636, 658 (Gummow, Hayne, Crennan and Bell JJ).

21 *South Australia v O'Shea* (1987) 163 CLR 378, 411 (Brennan J).

22 (2015) 256 CLR 326 at 335 [30]

23 Kiefel, Bell and Keane JJ

> ensure that the decision is made fairly in the circumstances having regard to the legal framework within which the decision is made".

[35] In the present case, it was not seriously in contest that the Act required the Board to afford natural justice or procedural fairness to the applicant when making the decision. The real issue for consideration is what did procedural fairness require of the Board when making the decision? In *Re Minister for Immigration and Multicultural Affairs; Ex parte 'A'*,[24] Kirby J said:

> "In Australia, it is a basic principle of the common law rules of natural justice that a person whose interests are likely to be affected by an exercise of power will be afforded a fair opportunity to respond to information or relevant material adverse to that person's interests which the repository of the power proposes to take into account in deciding upon its exercise. In short, a person should ordinarily be afforded the opportunity to provide evidence or material to rebut information or material tendered against that person's interests. As well, the person should be afforded the opportunity of persuading the decision maker, by oral or written submissions, as to the significance of the adverse evidence or material and the way in which it might be reconciled with the person's claim."

[36] In *Ainsworth v Criminal Justice Commission*,[25] the joint judgement (Mason CJ, Dawson, Toohey and Gaudron JJ) said:

> "It is not in doubt that, where a decision-making process involves different steps or stages before a final decision is made, the requirements of natural justice are satisfied if 'the decision-making process, viewed in its entirety, entails procedural fairness'."

[37] In Aronson, Groves and Weeks, Judicial Review of Administrative Action and Government Liability,[26] the learned authors observe:

> "…the duty to disclose adverse information as an aspect of notice requires decision makers to provide information about an intended course of action, or proposed decision, in sufficient detail to enable a person affected to properly exercise the right to be heard. The information disclosed may canvas all of the issues upon which the final decision is based. Adequate disclosure might sometimes also require explanation of key issues, such as why the decision maker believes that some disclosed matters are important or why some more serious outcomes are being considered. The more disclosure reveals about possible outcomes, so far as that it is permissible, the more it may resemble a statement of reasons (particularly if that disclosure is accompanied with information). In such cases, the distinction between notice that a decision *may* be made and why it *was* made may easily blur, but the conceptual distinction between the two remain."

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24 (2001) 185 ALR 489, 498 [43].
25 (1992) 175 CLR 564, 578.
26 Lawbook Co, 2017, 6th ed at [8.420] p 627.

[38] The procedure pursued by the Board was procedurally fair to the applicant. The procedure materially involved providing the applicant with notice of the Board's preliminary views, the reasons for those views and an opportunity to provide further submissions and material directed to those views. The applicant's fundamental concern appears to be with the merits of the decision and his "expectation" that he would be granted parole. The reference in his particulars to his good faith, intent, completion of programs and submission of clear urine tests are matters that fundamentally are concerned with the merits of the application. No basis has been established for impugning the decision on the basis that it was unlawful because it did not provide procedural fairness.

**Improper Exercise of Power**

[39] This ground is raised in the further and better particulars and the applicant's written submissions. The ground may be broken down into two substantive complaints.

[40] The first complaint is that the Board failed to take into account a relevant consideration in deciding the application, namely the lack of a pattern of sexual offending in the applicant's criminal history and the particular circumstances of the index offending. The second complaint is that the Board made the decision in accordance with a rule or policy without regard to the merits of this particular case.

[41] I have considered each complaint in turn.

***Failure to take into account a relevant consideration***

[42] In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,[27] Mason J observed:[28]

> "The ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he is *bound* to take into account in making that decision…
>
> What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors… are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act.
>
> …
>
> Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision…

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27 (1986) 162 CLR 24.
28 (1986) 162 CLR 24, 39-41.

> The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator…
>
> It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power."

[43] Whether a decision-maker has considered all relevant considerations is a question of fact,[29] which must be proved by the applicant on the balance of probabilities.[30]

[44] In *Calanca v Parole Board Queensland*,[31] Bowskill J observed:[32]

> "[The Board's] discretionary power to grant or refuse an application for parole is broad and unfettered, in the sense that the *Corrective Services Act* does not specify the criteria for making a decision under s 193. However, the scope of [the Board's] discretionary power to grant or refuse an application for parole is to be exercised having regard to the subject matter, scope and purpose of the *Corrective Services Act*. The purpose of the Act is 'community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders' (s 3(1))".
>
> …
>
> Section 242E of the Act provides that the Minister "may make guidelines about policies to help the parole board in performing its functions… 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."

[45] The applicant referred to paragraph 2.1 of the Guidelines[33] which relevantly state:[34]

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29 *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675, 680 (Barwick CJ); *Minister for Immigration v Khadgi* (2010) 190 FCR 248, 273 [71].

30 *SZDXZ v Minister for Immigration and Citizenship* [2008] FCAFC 109 [25]; *Chief Commissioner of Police v McCann* [2015] VSCA 362 [58]; *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675.

31 [2019] QSC 34.

32 [2019] QSC 34 [54]-[57].

33 Affidavit of Michael Byrne KC filed 8 August 2022 (CFI 7), Exhibit MB-11.

> "2.1 When deciding the level of risk that a prisoner may pose to the community, the Parole Board Queensland should have regard to all relevant factors, including but not limited to, the following –
>
> (a) the prisoner's prior criminal history and any patterns of offending …"

[46] Having referred to the Guidelines, the applicant submitted that there was, as a matter of fact, no pattern of sexual offending in his criminal history and the Board failed to take into account that his convictions did not come about due to random acts but rather occurred in a domestic situation with specific triggering factors involving a specific person.[35] The applicant further submitted that the fact that his criminal history began with low level property and drug offences added weight to his argument that if the sexual offences occurred, they were not compulsive or habitual but rather came about under a specific set of circumstances.[36]

[47] In the preliminary decision, the Board expressly noted that it had had regard to the Guidelines.[37] The Board also referred to the applicant's criminal history. The Board did not find that there was a pattern of sexual offending discernible from the applicant's criminal history. Rather, the Board formed a view, on the facts, that the criminal history demonstrated "a consistent pattern of offending, which notably escalates from low-level offending against public order and property, to your index offending which consisted of serious violent and sexual offences in a domestic setting".[38] This finding of fact acknowledged that the index offending was an escalation from offending in the earlier parts of the criminal history and had occurred in a domestic setting. After making this finding of fact about what was revealed by the criminal history, the Board then considered the relevant parts of the District Court and Supreme Court sentencing remarks.

[48] It may be accepted that the Board was obliged to take into account paragraph 2.1 of the Guidelines. However, the Board did have regard to paragraph 2.1 and did take into account "the applicant's criminal history and any patterns of offending". The Board found, as a matter of fact, that the applicant's history demonstrated "a consistent pattern of offending, which notably escalates from low-level offending against public order and property, to your index offending which consisted of serious violent and sexual offences in a domestic setting".[39] That was a finding of fact which the Board was entitled to make and it is not now open to the applicant, on this application, to reargue the merits of his case by seeking to place a different interpretative emphasis upon his criminal history. In any event, the Board was clearly astute to the fact that the index offending was an escalation which had occurred in a domestic context. The finding that the index offending was an escalation, implicitly acknowledged that it was not replicated in the earlier history. It was up to the Board to give whatever weight it saw fit to this factual matter. It has

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34 Affidavit of Michael Byrne KC filed 8 August 2022 (CFI 7), Exhibit MB-11, p 73.
35 Applicant's outline of submissions filed 20 September 2022 (CFI 8) [14].
36 Applicant's outline of submissions filed 20 September 2022 (CFI 8) [15].
37 Affidavit of Michael Byrne KC filed 8 August 2022 (CFI 7), Exhibit MB-3, p 26.
38 Ibid p 28
39 Ibid p 28

not been demonstrated that the Board failed to take into account a relevant consideration.

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

[49] The applicant provided particulars of this ground as follows:

> "[The Board] has based [its] decision on rule or policy without considering the applicant's specific circumstances. By insisting that the applicant complete programs that are clearly not available to him [the Board] is making it impossible for the applicant to ever be granted a parole order"

[50] The applicant's submission was couched in terms that the Board "relied heavily" on the applicant's non-completion of "various intervention programs". The submission was further developed in these terms: "The applicant submits that he has always maintained his innocence to the sexual offences convictions. It is corrections policy that none of the sex offender's programs can be completed unless guilt is admitted. By the [Board's] stance of requiring the applicant to complete this program prior to granting parole, effectively puts the applicant in the position of never being able to be granted a parole order" (sic).[40] In this regard, the applicant referred to *Batts v Department of Corrective Services; Fogarty v Department of Corrective Services*[41] and cases cited therein.[42]

[51] In *Batts v Department of Corrective Services; Fogarty v Department of Corrective Services*, Dutney J considered two applications for judicial review which concerned rejected remission applications made by two prisoners, Batts and Fogarty, who were incarcerated for sexual offences. The applications were similar but not identical. Batts' application for judicial review was dismissed. Fogarty's application for judicial review was successful. Section 75 of the *Corrective Services Act 2000* (Qld) as considered in *Batts* required the decision-maker to be relevantly satisfied that "the prisoner's discharge does not pose an unacceptable risk to the community" and "the prisoner has been of good conduct and industry". Section 77 then specified mandatory considerations relevant to the determination of risk to the community.

[52] Batts had never admitted the offence for which he was incarcerated and had never undertaken the sexual offenders' treatment program offered at his correctional centre. Admission to that course was predicated on the offender admitting the offending and desiring to address the behaviour that constituted the offending. Dutney J identified the question on Batt's application as being "Was he refused remissions because he had refused to admit his commission of the offences for which he was convicted and consequently ineligible to undertake the sexual offenders' treatment program or demonstrate remorse for the offences or empathy with the victims?"[43]

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40 Applicant's outline of submissions filed 20 September 2022 (CFI 8) [16].

41 [2002] QSC 206.

42 *Yeo v Queensland Corrective Services Commission* (unreported, Dowsett J, 13 February 1998); *Felton v Queensland Corrective Services Commission* [1994] 2 Qd R 490; *Wiskar v Queensland Corrective Services Commission* [1998] QSC 279.

43 *Batts v Department of Corrective Services; Fogarty v Department of Corrective Services* [2002] QSC 206 [13]

[53] His Honour then relevantly reasoned:[44]

> "To refuse to grant remissions solely on the basis that there has been no admission of guilt or a failure to undertake a particular course is an entirely improper exercise of the relevant power… A refusal on this basis is unacceptable because it fails to consider, in the case of the particular applicant, whether or not he is in terms of s 75(2) (a) an unacceptable risk to the community. Rather, it focuses narrowly on two factors which may or may not in the particular case bear upon the relevant question of whether the applicant poses an unacceptable risk. It is, of course, trite that any decision to release an offender carries with it some risk of re-offending. To be unacceptable the risk to the community must go beyond the ordinary risk attendant upon any unsupervised release."

[54] Dutney J ultimately reasoned that the material in *Batts* did not demonstrate that the decision to refuse Mr Batts' remission was made "solely on the basis of a policy not to release untreated sex offenders and not on factors personal to Mr Batts".[45] Rather, the reasons of the decision-maker revealed that the decision-maker had regard to "a history of denial in respect of different incidents" which extended beyond the index offending.[46]

[55] A case referred to in *Batts* is *Wiskar v Queensland Corrective Services Commission.* In that case, Williams J set aside a decision to refuse remissions on the ground that the decision had failed to have regard to a relevant circumstance, namely, the particular circumstances of the applicant.[47] Williams J relevantly observed:[48]

> " … what is necessary is that there be an assessment by the decision maker of the magnitude of the risk so far as the particular applicant is concerned. It is not simply a matter of applying guidelines. As his Honour noted it is not sufficient merely to say that the applicant denies or refuses to admit his guilt … :
>
> > 'It is clear that what must be considered are the circumstances in which the denial has been made, and it must be considered against the applicant's background and conduct. To focus narrowly upon his refusal to acknowledge guilt, accompanied by the consequence that he has not undergone a relevant program would, in my view, be an inappropriate approach because of its over-simplification of the complexities involved in the situation.'"

[56] In *Wiskar*, the decision-maker's statement of reasons had included a general statement to the effect that "research indicates that sexual offenders who refuse to enter into any form of treatment are more likely to commit further offences than

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44 Ibid [14], [34].

45 *Batts v Department of Corrective Services; Fogarty v Department of Corrective Services* [2002] QSC 206 [23].

46 *Batts v Department of Corrective Services; Fogarty v Department of Corrective Services* [2002] QSC 206 [18], [21], [34].

47 [1998] QSC 279.

48 *Wiskar v Queensland Corrective Services Commission* [1998] QSC 279 [14], citing *Yeo v Queensland Corrective Services Commission* (unreported, Dowsett J, 13 February 1998).

those who have completed recommended programs" and, otherwise. had not engaged in an assessment of the risks associated with the applicant.[49]

[57] In the present case, the Board did not refuse the application merely because the applicant was denying his guilt or had refused to participate in certain programs. Rather, the Board's reasoning paid careful and considered regard to the applicant's particular circumstances and the offending of which he had been convicted. That reasoning involved consideration of the applicant's criminal history, the factors which had led to his historical and index offending, the nature of the index offending and the applicant's conduct since being place on remand. One matter which apparently loomed large in the Board's reasoning was the applicant's lack of insight. That lack of insight appeared in a context where the applicant was acknowledging some of the acts the subject of the offending. The Board's decision-making proceeded on the basis of factual findings, which the Board was entitled to make, about what the applicant had said about the offending in various programs and interviews. Relevantly, on the Board's assessment of the material before it, the applicant had admitted part of the offending conduct, namely that which involved serious sexual violence involving the use of the scourer, but without any recognition of wrongdoing. The applicant appeared to be characterising that conduct as "technically" constituting rape. The Board was also mindful that the applicant had outstanding treatment needs in respect of violent behaviours and addiction. He had not completed preferred programs in those areas. His participation in those programs was seen as desirable to reduce the risks posed by any grant of parole. The applicant made a faint, undeveloped submission to the effect that the Board's conduct had infringed his rights under the *Human Rights Act 2019* (Qld). It suffices to say that the Board's decision-making process and reasoning did not in any way infringe or impinge upon the applicant's rights under s 32(1) and (4) of that Act.

[58] No basis has been established for the contention that the Board applied a policy without regard to the particular circumstances of the applicant's case.

**The decision was otherwise unreasonable**

[59] The applicant submitted that the decision was "so unreasonable that no reasonable person could so exercise the power" within the meaning of s 23(g) of the JR Act.[50] The ground remained unparticularised. There were no specific errors in reasoning or logic identified in support of this ground.

[60] In *Associated Provincial Picture Houses Ltd v Wednesbury Corp*,[51] Greene MR observed:[52]

> "It is true to say that if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming and, in this case the facts do not come anywhere near anything of that kind."

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49 *Wiskar v Queensland Corrective Services Commission* [1998] QSC 279 [13], [17].
50 Applicant's outline of submissions filed 20 September 2022 (CFI 8) [22].
51 [1948] 1 KB 223.
52 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

[61] In *Minister for Immigration and Border Protection v Eden*,[53] the Court observed that:

> "There are two contexts in which the concept of legal unreasonableness may be employed. The first involves a conclusion after the identification of a recognised species of jurisdictional error in the decision-making process, such as failing to have regard to a mandatory consideration, or having regard to an irrelevant consideration. The second involves an "outcome focused" conclusion without any specific jurisdictional error being identified: *Li* at [27]-[28] (French CJ), [72] (Hayne, Kiefel and Bell JJ); *Singh* at [44]; *Stretton* at [6] (Allsop CJ).

[62] There is an area of "decisional freedom" within which "reasonable minds may reach different conclusions about the correct or preferable decision"[54] and "a decision-maker has a genuinely free discretion."[55] In terms of unreasonableness as an "outcome focused" conclusion, in *Minister for Immigration and Citizenship v Li*,[56] Hayne, Kiefel and Bell JJ observed:[57]

> "Lord Greene MR's oft-quoted formulation of unreasonableness in *Wednesbury* has been criticised for 'circularity and vagueness' as have subsequent attempts to clarify it. However, as has been noted, *Wednesbury* is not the starting point for the standard of reasonableness, nor should it be considered the end point. The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision – which is to say one that is so unreasonable that no reasonable person could have arrived at it – nor should Lord Greene MR be taken to have limited unreasonableness in this way in his judgment in *Wednesbury*. This aspect of his Lordship's judgment may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified."

[63] In the same case, French CJ observed that "the requirement of reasonableness 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 a court disagrees even though that judgment is rationally open to the decision-maker."[58]

[64] In the present case, the Board made a considered decision which fully exposed its reasoning. That reasoning was premised upon a careful consideration of the facts, including facts found by the Board, which are not the subject of any valid challenge on this application. Viewed as a whole, the rationale for the decision was evident

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53 (2016) 240 FCR 158.
54 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 351 [28] (Brennan J).
55 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 363 [60] (Hayne, Kiefel and Bell JJ).
56 (2013) 249 CLR 332.
57 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 364 [68].
58 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 351 [30].

and justifiable on the basis of the material before the Board. The ground has not been established.

**Orders**

1. The application is dismissed.

2. I will hear the parties as to costs.