SUPREME COURT OF QUEENSLAND

CITATION:	*Duong v South Queensland Regional Community Corrections Board* [2004] QSC 261
PARTIES:	**DANH QUANG DUONG** (applicant) v **SOUTH QUEENSLAND REGIONAL COMMUNITY CORRECTIONS BOARD** (respondent)
FILE NO:	S1867/04
DIVISION:	Trial
PROCEEDING:	Application for statutory order of review
DELIVERED ON:	19 August 2004
DELIVERED AT:	Brisbane
HEARING DATE:	14 May 2004
JUDGE:	Wilson J
ORDER:	**The application for an extension of time is dismissed.** **The application for statutory order of review is dismissed.**
CATCHWORDS:	CRIMINAL LAW – PROBATION, PAROLE, RELEASE ON LICENCE AND REMISSIONS – QUEENSLAND – where applicant convicted of various offences including robbery with circumstances of aggravation – where applicant sentenced to several concurrent terms of imprisonment – where applicant aged 18 at time of sentence - where sentencing Judge made a recommendation for parole after serving two years – where application for Post Prison Community Based Release pursuant to *Corrective Services Act* 2000 (Qld) unsuccessful. ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – GROUNDS FOR REVIEW OF DECISION – IMPROPER EXERCISE OF POWER – RELEVANT AND IRRELEVANT CONSIDERATIONS – where applicant sought statutory order of review of Community Corrections Board decision to refuse Post Prison Community Based Release – where applicant aged 19 at time of the decision – where applicant had not addressed offending behaviour sufficiently – where applicant on waiting list for Cognitive Skills Program – where applicant refused to comply with

conditions for participation in Violence Intervention Program

ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – GROUNDS FOR REVIEW OF DECISION – IMPROPER EXERCISE OF POWER – UNREASONABLENESS – where decision s refusal of Post Prison Community Based Release – where Board must balance factors in favour of release against the risk to the community from re-offending – where applicant had not addressed his offending behaviour.

ADMINISTRATIVE LAW – JUDICIAL REVIEW LEGISLATION – COMMONWEALTH, QUEENSLAND AND AUSTRALIAN CAPITAL TERRITORY – PROCEDURE ON APPLICATION FOR REVIEW – EXTENSION OF TIME – where application made well outside 28 day time limit – whether substantive application has any prospect of success.

Corrective Services Act 2000, s 134, 139
Judicial Review Act 1991, s 20(2), 23, 26
Penalties and Sentences Act 1992, s 188

Corrigan v Queensland Community Corrections Board [2004] QSC 078 followed

McQuire v South Queensland Regional Community Corrections Board [2003] QSC 414 followed

Minister for Immigration and Ethnic Affairs v Wu (1996) 185 CLR 259 applied

COUNSEL: B Marais for the applicant
SA McLeod for the respondent

SOLICITORS: The Crown Solicitor for the respondent

[1] **WILSON J**: By application filed on 26 February 2004 (and amended on 23 March 2004), the application seeks a statutory order of review of a decision of the respondent made on 28 October 2002 whereby his application for post prison community based release ("PPCBR") was declined. Further, he seeks an extension of time in which to bring the application.

[2] Because the applicant's prospects of success on the substantive application are relevant to his application for an extension of time, I shall consider the submissions on the substantive application, and then return to the application for an extension of time.

Sentencing

[3] The applicant was born on 11 July 1983. On 8 August 2001 he pleaded guilty to a number of offences committed in 1999 and 2000:

06.08.99	possession of tainted property
c 11.12.99	unlawful use of motor vehicle to facilitate the commission of an indictable offence
11.12.99	entering premises and committing indictable offence
26.03.2000	attempt to enter premises with intent unlawful use of motor vehicle possession of things used in connection with unlawful entry
31.08.2000	enter premises with intent to commit indictable offence robbery with circumstances of aggravation unlawful wounding deprivation of liberty

The sentencing judge Noud DCJ imposed concurrent terms of imprisonment on all counts. The head sentence, imposed for the offence of robbery with circumstances of aggravation, was 6 years. His Honour made a declaration that 331 days of presentence custody should be deemed time already served under the sentence, and made a recommendation for parole after 2 years.

[4] In sentencing the applicant Noud DCJ took account of a number of factors including the applicant's youth, his criminal history, that he was a juvenile on probation when some of the offences were committed, the very serious nature of the armed robbery charge, his role in the commission of the crimes, his plea of guilty, and that the sentence ought not be a crushing one. His Honour said -

> "I express the hope that you will be released at an earlier stage on parole. In my opinion, you are entitled to that, given your youth and the extent of your cooperation. But ultimately that is a matter in the control of the Parole Board and not for me to decide."

His Honour took account of the opinion of a psychologist about the severity of emotional and behavioural disturbances suffered by the applicant, and endorsed the psychologist's view that he needed regular review by mental health professionals. He directed that copies of relevant materials be sent to the prison authorities.

[5] The applicant lodged an appeal against the sentence, but abandoned it on 10 January 2002. In January 2004 he applied to have the sentence reopened on the basis that the sentencing judge had failed to take account of certain matters because -

(i) the recommended PPCBR was not reconcilable with the parole system and/or prison process in place or enforced; or alternatively

(ii) it was not reconcilable with the parole system "that [was] contra bonos mores or simply unconscionable, inequitable and not in the public interest."

In dismissing the application Noud DCJ commented -

> "I appreciate that recommendations for post-prison community based release are in no sense binding on the executive, however, may I say this: the material I have seen (which has prevented the applicant from obtaining post-prison community based release at an early stage) seems to place emphasis, amongst other things, on the seriousness of the applicant's offending. It is certainly true that he has offended in serious ways but he is also very youthful and may feel further sense of grievance if the sentence in his mind becomes a crushing one. With respect, I would suggest that his post-prison community based release be looked at in this light as well. I think from the material I have seen, it may not have been given the emphasis it deserves."

Application for PPCBR

[6] According to the applicant's Initial Sentence Plan, his Current Security Classification was "medium", and his projected progress through the prison system was as follows -

12.09.02	PPCBR Eligibility Date
10.09.04	Remitted Release Date
11.09.06	Full Time Release Date.

[7] On 30 July 2002 the applicant applied for PPCBR. The respondent considered the application at its meeting on 28 October 2002, and informed the applicant of its decision by letter dated 1 November 2002 in which it said –

> "The South Queensland Regional Community Corrections Board considered your application for post-prison community based release at its meeting on 28 October 2002.
>
> Whilst the Board considered all of the factors in favour of your release, it decided to decline your application at this time.
>
> At the time of sentencing His Honour Judge Noud stated:
>
> > 'In fact is one of the most serious offences that come before this Court and I regret to say that it a very bad instance of it, the one that you took part in and you were a significant player in the commission of these crimes, ……'
>
> and further
>
> > '…… There was a large amount of money involved and the violence, in my opinion, was very serious indeed. Even the circumstances surrounding the commission of the offence – and I am referring now to some of the details that Mr Smith, the Crown prosecutor put before the Court – indicated a deliberateness on your part and a preparedness to take part in violence ……'

> Your initial sentence plan recommended that you undertake the Cognitive Skills program and be assessed for participating in the Violence Intervention program to address your offending behaviour. You have completed the Anger Management Program and are on the waiting list for the Cognitive Skills Program. However, in September 2002 you were assessed for the VIP and while initially assessed as suitable, you were not willing to conform to the conditions of the program and subsequently found to be unsuitable for the current VIP.
>
> Until you agree to abide by the conditions of the VIP, and complete that Program and the Cognitive Skills Program, the Board is of the opinion you have not sufficiently addressed your offending behaviour. It is recommended you complete those programs and not reapply until 28 April 2003."

Unfortunately a full statement of the respondent's reasons for its decision of 28 October 2002 was not sought by the applicant. (A full statement of reasons for a subsequent decision of the respondent made on 28 July 2003 was before the Court, but its only possible relevance is to the application for an extension of time.)

Grounds of Review

[8] In his application and in further and better particulars, the applicant relied on the following grounds of review:

(a) breach of the rules of natural justice in relation to the making of the decision (*Judicial Review Act* 1991 s 20(2)(a));

(b) an improper exercise of power conferred by statute (s 20(2)(e)) in that –

(i) irrelevant considerations were taken into account (s 23(a));

(ii) relevant considerations were not taken into account (s 23(b));

(iii) a discretionary power was exercised in accordance with a policy without regard to the merits of the particular case (s 23 (f));

(iv) the exercise of power was so unreasonable that no reasonable person could so exercise it;

(c) there was no evidence or other material to justify the making of the decision (s 20(2)(h));

(d) the decision was otherwise contrary to law (s 20 (2)(i)).

***Corrective Services Act* 2000**

[9] The applicant was entitled to apply for PPCBR pursuant to s 134(1)(a)(i) of the *Corrective Services Act* 2000 which provides -

> "**134 Who may apply for other post-prison community based release orders**
>
> **(1)** A prisoner may apply, in the approved form, for a post-prison community based release order, other than an exceptional circumstances parole order, if –
>
> (a) the prisoner was sentenced to a period of imprisonment (the "**relevant period**") –
>
> (i) of any length, for an offence committed before the commencement of this section".

Pursuant to s 141 the respondent had an unconfined discretion in determining the application. I respectfully adopt what White J said in *McQuire v South Queensland Regional Community Corrections Board* [2003] QSC 414 -

> "There are no express criteria for application by a Board when considering an application for post-prison release. The discretion is unconfined except as the matter and scope of the statutory provisions will dictate what it is that must be kept in mind. An object of the *Corrective Services Act* 2000 is for 'community safety and crime prevention through humane containment, supervision and rehabilitation', s 3(1). The interests of the public must be a necessary aspect of any decision to grant release."

[10] Section 139 provides -

> "**139 Corrections board not bound by sentencing court's recommendation**
>
> When deciding whether to grant a post-prison community based release order, a corrections board is not bound by the recommendation of the court that sentenced the prisoner if the board –
>
> (a) receives information about the prisoner that was not before the court at the time of sentencing; and
>
> (b) after considering the information, considers that the prisoner is not suitable for release at the time recommended by the court."

As Douglas J observed in *Corrigan v Queensland Community Corrections Board* [2004] QSC 078-

> "This section of the current Act is not expressly limited ... by the view expressed in ...decisions [under the previous legislation] that the Board's new information should be such as to place it in a better

> position than the sentencing judge. All that is required is that the Board receive information not before the sentencing judge."

His Honour rejected a submission that he should interpret the word "information" to mean information of a type that would have compelled the Court to structure the sentence imposed differently, saying -

> "In my view that conclusion is not justified by the language of the section. That language is clear and, for good practical reasons, should be construed to allow events that have occurred since the sentence to be taken into account. It should not be limited to information in existence at the time of sentence that was not provided to the sentencing judge."

Programs

[11] The applicant's Initial Sentence Plan included recommendations that he complete a Cognitive Skills Program and then a Violence Intervention Program. He had completed neither when the respondent made its decision on 28 October 2002, although he subsequently completed the Cognitive Skills Program on 11 November 2002 and commenced the Violence Intervention Program on 5 July 2003. This Court is restricted to a consideration of matters as they stood on 28 October 2002 and to reviewing the legality of the respondent's decision rather than its merits.

[12] The applicant completed an Anger Management Program on 12 September 2002. According to the Exit Report (which was before the respondent) –

> "**1. Participation in group (including things such as completion of tasks, participation in group activities, etc):**
> Danh was a quiet participant who appeared to prefer to play the role of observer. He seemed to listen to the concepts presented and review them according to his perspective of the world. While Danh appeared to have the intellectual ability to participate in this program he appeared to become stuck on some issues and this may have limited his participation. He did however contribute when prompted.
>
> **2. Level of disclosure (when required):**
> Danh appeared to be wary of what he disclosed however did disclose some relevant information.
>
> **3. Attitude to facilitators and other group members:**
> Although not argumentative Danh appeared to disregard opinions that were contrary to his own.
>
> **4. Anger Management Plan:**
> Danh developed an adequate Anger Management Plan however he is advised to develop some more constructive self talk if he is going to reduce his risks of acting aggressively in the future. Danh did identify a range of anger triggers such as people being racist and children being hit. He then identified his previous responses to these situations and some of the consequences he had encountered from these. Danh was able to recognise the self talk he has used that has

> increased his anger however even after he was given assistance he had trouble identifying constructive self talk. He also demonstrated little awareness of his physiological cues when he is becoming angry. He may benefit from exploring these two concepts further. It is encouraging that he was able to not his own personal defence mechanisms. It is hoped that this awareness will assist Danh to take responsibility for his anger management and associated behaviour. Danh developed a range of behavioural and cognitive strategies which he stated he intends to use to assist in the management of his anger in the future. These include strategies such as time out, consequences and sequels, meditation and disputing crooked thinking.
>
> **5. Comprehension and any evidence of application of concepts and/or strategies presented:**
> Danh appeared to understand most of the cognitive concepts presented and demonstrated this through the end of module questionnaires. He appeared to struggle with affective type concepts such as identifying his feelings and awareness of physiological cues. Also Danh stated on a number of occasions that he did not have a problem managing his anger. Danh may benefit from exploring the possibility that he over controls his anger. An appreciation of the social consequences associated with inappropriate behavioural responses may be needed for providing the motivation for these changes.
>
> **6. Additional remarks and/or recommendations:**
> Overall Danh's participation appeared to be limited, however he did complete all the necessary tasks. We suggest he completes the other recommended programs as outlined in his initial sentence plan."

[13] The applicant was on the waiting list for a Cognitive Skills Program when the respondent determined his application for PPCBR.

[14] The applicant had been assessed as suitable for the Violence Intervention Program, but had been unwilling to agree to the conditions of the program. According to the report of a senior psychologist which was before the respondent –

> "Specifically, Prisoner Duong indicated that he was not willing to provide all details of his offending behaviour to VIP staff and to other members of the VIP group.
>
> Prisoner Duong did not agree to the conditions where information supplied by him would be used for research and evaluative purposes even when this information would be supplied anonymously.
>
> Prisoner Duong did not agree that any information he provided would be subjected to FOI applications and subpoenas.
>
> Prisoner Duong did not agree that if he disclosed any specific or detailed information in regards to criminal activity for which no

convictions have been made, facilitators might need to pass on this information to the relevant person/s.

Prisoner Duong also did not agree that refraining from abusive and/or violent behaviour towards any other person (including other inmates, VIP and other prison staff) was an applicable condition of consent.

Due to Prisoner's Duong unwillingness to comply with program conditions, he was found to be unsuitable for the current VIP. Therefore, Prisoner Duong will continue to have outstanding treatment needs until he agrees to abide by the conditions of the VIP."

Unit Assessment Report

[15] According to the Unit Assessment Report dated 9 October 2002 which was before the respondent, the applicant's recent behaviour had been acceptable. He was "reported to display a positive attitude and prepared to interact with staff. He [had] a small group of friends and [did] not appear to have any problems." Earlier he had been involved in three incidents, two of them classified as major and one as minor, and was under investigation for a fourth incident also described as minor. The Unit Assessment Report contained the following summary and recommendations-

"5. SUMMARY AND ASSESSMENT

- **Risk of Re-offending**

- The applicant is assessed as having a medium (18) risk of recidivism. He is a young man of 19 years serving his first custodial sentence for serious violent offences.

- The current offences are the applicant's first offences as an adult. The offences include Robbery; Unlawful wounding; Deprivation of liberty; Break and enter; Housebreaking, possession of implement; Unlawful use of motor vehicle; and Unlawful possession of stolen property. Mr Duong's juvenile criminal history would show that he commenced committing offences in 1997, however, had a crime free period of nearly two years before committing the current offences.

- CIS records indicate that Mr Duong has not been subject to any previous community based supervision. However, it is noted that the applicant was subject to Probation, supervised by the Department of Families and Community Care.

- Mr Duong stated that he committed the current offences for money. He stated that he was unemployed at the time, and needed money to start a business plan. Although Mr Duong stated that he accepts responsibility for his actions, it is the writers opinion that he does not understand the seriousness of

the offences. Mr Duong further stated that his victim (shop owner) should have recovered from emotional and physical injuries caused during the commission of the offence.

- The applicant has completed the Anger Management program, and is on the waiting list to complete the Cognitive Skills program. It was recommended that he complete the Violence Intervention Program, however, Mr Duong has been assessed as unsuitable as he is unwilling to speak about his offences.

- Mr Duong has maintained employment since his incarceration. He is currently studying English to year 10 level. He has commenced a TAFE Small Business course, however, has put that on hold until a determination on this application has been made by the Board.

- Mr Duong stated that he is willing to accept community based supervision. He is not willing to be a participant in the Home Detention Electronic Monitoring trial.

- **Viability of Post-prison Community Based Release Order Plan**

- A home assessment confirms the offer of accommodation at the applicant's parents' home at 2 Pine Road, Richlands. The report states that Mr Duong's parents would be supportive of him, and the premises have been assessed as suitable. There are no firm offers of employment for the applicant.

- The proposed accommodation would provide the applicant with his own bedroom, the telephone is connected, and it is close to public transport. The applicant would be sharing the premises with his parents and two younger siblings. Although the home assessment states that both parents would be supportive of the applicant, the psychological report notes some animosity by the applicant towards his parents, especially his father.

- It is the applicant's intention to seek employment, save some money and start his own business. The writer would express some concerns regarding the viability of this plan, given the applicant's limited education, his lack of previous experience, and his lack of skills.

6. RECOMMENDATION AND SPECIAL CONDITIONS

Electronic Monitoring

6.1 Assessed Yes

6.2 Assessment Outcome: Mr Duong stated that he would not be a willing participant in the Home Detention Electronic Monitoring trial. His reasons were not specific.

		Y	**N**
1	Is the prisoner able to reside in the trial area?	Yes	
2	There are no current DV / child protection orders against the prisoner?		No
3	The prisoner has not committed offences against potential co-residents in the last five (5) years?		No
4	Is the prisoner willing to participate in the electronic monitoring trial?		No
5	Have the conditions and operation of EM equipment been explained in full?	Yes	
6	Has the prisoner agreement been explained and signed by the prisoner?		No
7	Has the prisoner met the above technical criteria?		No

Mr Duong's application for Post Prison Community Based Release is not recommended at this time for the following reasons:

- Mr Duong is a medium classification prisoner which does not comply with Ministerial Guideline 2.2, namely, that a prisoner should achieve a low or open classification prior to approval for release.
- Mr Duong's apparent lack of empathy and remorse for his offences
- His failure to comply with the conditions of Violence Intervention Program, and consequently his inability to participate in the program. This would seem to constitute a lack of motivation to address his offending behaviour.

- Mr Duong's type and extent of offending behaviours

- Mr Duong's post-prison plan in perceived as not viable with regard to his employment ambitions.

It is recommended that the Board urge Mr Duong to complete the Cognitive Skills program, and participate in the Violence Intervention Program before being considered for PPCBR. Additionally, it is suggested that he may benefit from completing his vocational courses, and gaining skills to provide broader employment options. Upon completion of his vocational course, the most appropriate option for gradual release may be to transfer to Release to Work."

Submissions

[16] The submissions made to this Court by counsel for the applicant were somewhat discursive.

Violence Intervention Program

[17] The respondent's reliance on his non-completion of the VIP as a factor in its decision not to grant him PPCBR was attacked in several ways.

(a) It was argued that he was entitled to refuse to disclose all the circumstances of the offences both before the sentencing judge and subsequently, and that he had already been punished for taking that stance in that by declining to take advantage of s 13A of the *Penalties and Sentences Act* 1992 he had received a tougher penalty than his co-offenders who had taken advantage of the section. This, it was submitted, was a relevant consideration that the respondent had failed to take into account.

(b) Further, it was submitted that the real reason he had not undertaken the VIP course was that all the positions were full. Thus his non-participation was an irrelevant consideration which the respondent ought not to have taken into account.

(c) Finally the respondent's reliance on this factor was submitted to be so unreasonable that no reasonable person would have done so.

I do not accept these submissions.

[18] The interests of the community were a valid consideration for the respondent, and whether the applicant had sufficiently addressed his offending behaviour bore upon the risk he posed to the community if he were released on PPCBR. It is apparent from the last paragraph of the respondent's letter of 1 November 2002 that it regarded his non-completion of the VIP and the Cognitive Skills Program as indicative of his not having sufficiently addressed his offending behaviour. The matter of parity between the co-offenders was one for the sentencing judge, and not the respondent.

[19] The VIP extended over 9 months. Two programs were commenced between his sentencing and the respondent's decision - on 6 November 2001 and 27 August

2002. (The latter commenced after he made his application to the respondent.) He participated in a number of the sessions of the assessment phase of the program which commenced on 6 November 2001, but was discharged from the program because of his unwillingness to disclose details of his offending behaviour while his appeal was pending. He then sought legal advice, and by the time he decided he would make the necessary disclosure and participate in the course, all the positions were full. In these circumstances, the real reason for his non-participation was not the non-availability of a place but a conscious decision on his part. His non-participation was not an irrelevant consideration.

Unreasonableness

[20] In support of the unreasonableness argument, counsel for the applicant highlighted these facts –

- that the applicant was still only 18 years old and of limited schooling when he was presented with the conditions attaching to participation in the VIP;

- that he was being asked to disclose matters which he had not disclosed to the sentencing judge, and to do so at a time when he had an appeal against the severity of the sentence pending;

- that he had, it was submitted, already been punished for his failure to disclose, in that had he invoked s 13A of the *Penalties and Sentences Act*, he would likely have received a lesser sentence; and

- that after he obtained legal advice, he indicated his willingness to disclose such matters, but was then told no place was available.

The reasonableness of the respondent's conduct must be judged in the overall context of the decision it was called upon to make. These factors had to be balanced against the risk to the community in releasing someone who had not addressed his offending behaviour and the logistical requirements of running a course which took 9 months to complete. I am unpersuaded that the respondent's reliance on the applicant's non-completion of the VIP was affected by unreasonableness in the relevant sense.

Failure to take other relevant factors into account

[21] Counsel for the applicant submitted that the respondent had failed to take into account relevant considerations - namely, "positive and other aspects" of the sentencing remarks, the period of pre-sentence custody, and sentencing remarks in relation to the applicant's "psychiatric condition". These were matters upon which the sentencing judge relied in coming to a decision as to the appropriate level of penalty and making a recommendation with respect to PPCBR. The sentencing remarks were before the respondent, and according to its letter of 1 November 2002 it considered all the factors in favour of release. The weight it attached to various factors was a matter for it: *Minister for Immigration and Ethnic Affairs v Wu* (1996) 185 CLR 259 at 291 - 292. The respondent was not bound by the trial judge's recommendation for PPCBR in all the circumstances: *Corrective Services Act* s 139. There is no substance in this argument.

Taking other irrelevant factors into account

[22] Then it was submitted that the respondent took irrelevant considerations into account by selectively quoting from the sentencing remarks and using as a reason to refuse PPCBR factors which had already been taken into account in sentencing. This is to ignore the legitimate use made of extracts from the sentencing remarks as background for the consideration that the applicant should address his offending behaviour by undertaking courses before being granted PPCBR.

[23] It was submitted that in taking into account the applicant's non-participation in a Cognitive Skills Program, the respondent took into account an irrelevant consideration, since no place was available to him prior to its decision. The respondent knew from the Unit Assessment Report which was before it that the applicant was on the waiting list for the Cognitive Skills Program. The nub of its decision was the applicant's failure to address his offending behaviour, and his non-completion of such a program was only one aspect of it. In the circumstances its reference to non-completion of that program did not vitiate its decision either on the basis that it was an irrelevant consideration or on the basis of unreasonableness.

[24] In his Initial Sentence Plan the applicant was given a medium security classification. In the Unit Assessment Report one of the reasons given for not recommending PPCBR was -

> "Mr Duong is a medium classification prisoner which does not comply with Ministerial Guideline 2.2, namely, that a prisoner should achieve a low or open classification prior to approval for release."

In oral argument counsel for the applicant submitted that the classification criteria were flawed, and that therefore the respondent should not have taken the classification into account. I did not understand him to persist with this argument when it was pointed out that it was not the respondent that was responsible for the classification. Similarly, I did not understand him to persist with an argument based on the fact that in the Initial Sentence Plan it was stated that it would take the applicant 2 years and 3 months to progress from secure to open custody - that is, beyond the recommended PPCBR date.

Exercise of discretionary power according to policy

[25] Counsel for the applicant submitted that the respondent had exercised its discretionary power in accordance with a rigid policy only to consider applications for PPCBR every 6 months whilst taking time to process the applications, to assess prisoners and prescribe courses without regard to the possibility and likelihood that a prisoner would be able to complete such courses before his PPCBR date, and not to grant medium classified prisoners PPCBR, without taking account of the applicant's personal circumstances including his youth, his "psychiatric condition", and his lengthy presentence custody, and the positive aspects of the sentencing remarks.

[26] At the time of the respondent's decision the applicant was still very young. The respondent's short letter of 1 November 2002 contained no express reference to that important factor. It did refer to the defendant's having considered all the factors in favour of the applicant's release. As I have already noted, a full statement of reasons

was not sought. Clearly the respondent considered the sentencing remarks, and the applicant's youth was a factor which weighed heavily with the sentencing judge. While the respondent did recommend that the applicant complete the VIP and Cognitive Skills Program and not reapply until 28 April 2003, there is no substance in the submission that in doing so it rigidly applied a policy or policies without regard to the particular circumstances.

Natural Justice

[27] I had difficulty understanding the submission of counsel for the applicant based on breach of the rules of natural justice, that is, the rules of procedural fairness. It seemed to come down to this: that it was a denial of natural justice to refuse him PPCBR in circumstances where his behaviour and cooperation had been acceptable, the sentencing judge had recommended PPCBR after 2 years, and he was required to undertake and complete courses to which unreasonable conditions were attached and which were impossible to complete before his PPCBR date. However, the applicant has not demonstrated any procedural unfairness in the conduct of the application. These matters go to the merits of the respondent's decision, which, of course, this Court cannot review.

No evidence ground

[28] This ground of review was particularised in these terms –

> "Whilst the Respondent stated that it took into account the Judges sentencing comments dated 8 August 2001 and the psychologist assessment dated 30 September 2002 no assistance for the applicant's psychiatric condition was provided or considered."

That is no basis for invoking s 20(2)(h) of the *Judicial Review Act*.

Otherwise contrary to law

[29] This ground of review was particularised is these terms –

> "The decision was only made long past the Applicant's Post Prison Community-based Release Date."

The respondent was not obliged to make a decision on or before the applicant's PPCBR Eligibility Date. There is no substance in this ground.

No prospects of success

[30] In all the circumstances the applicant has not persuaded me that he has any prospects of succeeding on his application to review the respondent's decision of 28 October 2002.

[31] I have not had regard to material relating to developments beyond 28 October 2002. The applicant's counsel urged me to take account of Noud DCJ's comments on the application to reopen the sentence (which I have set out in para [5] above). However, those remarks were made subsequently to the decision sought to be reviewed and were, upon analysis, obiter dicta. It would be a matter for the respondent on a subsequent application for PPCBR whether it took account of those remarks.

[32] A considerable period of time has elapsed since 28 October 2002. The applicant has completed the Cognitive Skills Program. From the material it seems he at least started the VIP, although I do not know whether he completed it. He remains very young, and this is his first experience of prison. I have no knowledge of his recent conduct and progress towards rehabilitation. It may be that he would now have a greater chance of succeeding in an application for PPCBR than he had in 2002, and that he would be well advised to make a fresh application to the respondent.

No extension of time

[33] The application for review was made well outside the 28 day time limit prescribed in s 26 of the *Judicial Review Act*. Although the applicant has given some explanation for the delay, in the circumstances I am unwilling to grant an extension of time.

Outcome

[34] The application is dismissed. I will hear counsel on costs.