SUPREME COURT OF QUEENSLAND

CITATION:	*Cuzack v Queensland Parole Board* [2010] QSC 264
PARTIES:	**DAMIEN ROBERT CUZACK** (Applicant) **v** **QUEENSLAND PAROLE BOARD** (Respondent)
FILE NO:	BS 3741 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	26 July 2010
DELIVERED AT:	Brisbane
HEARING DATE:	7 July 2010
JUDGE:	Boddice J
ORDERS:	**1. The application for a statutory order of review is allowed.** **2. The decision of the respondent made on 18 December 2009 be set aside.** **3. The applicant's application for parole be referred to the respondent for further consideration and to be dealt with by the respondent according to law.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – GENERALLY – where the applicant was sentenced to nine years imprisonment for various offences including armed robbery – where the sentencing judge recommended that the applicant be eligible for release on parole after three years imprisonment – where the respondent refused the applicant's parole application, taking into account the applicant's extensive criminal history, the fact that the applicant had not completed all recommended programs and the fact that the applicant was still a high security classification – whether the respondent breached the rules of natural justice. ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – OBSERVANCE OF PROCEDURES – where ordinarily a prisoner should be classified as low security prior to parole being granted – where the respondent has a discretion to approve a prisoner for parole when they have not achieved a low security classification if a parole eligibility date has been set by a

court – whether the respondent failed to observe procedures required by law.

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – where the respondent considered the applicant's failure to complete recommended programs as new information that was not before the Court at the time of sentencing under s 192 of the *Corrective Services Act 2006* (Qld) – whether the respondent has erred in law.

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – IRRELEVANT CONSIDERATIONS – where the respondent refused the applicant's parole application, taking into account the applicant's extensive criminal history, the fact that the applicant had not completed all recommended programs and the fact that the applicant was still a high security classification – where the applicant submits that the respondent also took into account past offences that have been discontinued or dismissed – whether the respondent has taken into account an irrelevant consideration.

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – RELEVANT CONSIDERATIONS – where the applicant is required to complete certain recommended programs before he can progress to a low security classification – where the applicant has applied to participate in these programs but has been unable to do so, through no fault of his own – whether the respondent has failed to take into account a relevant consideration.

ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – APPLYING POLIY AND MERITS OF CASE – where the respondent refused the applicant's parole application in the context of encouraging him to completed recommended courses and progress to a low security classification – where the applicant is required to complete certain recommended programs before he can progress to a low security classification – where the applicant has applied to participate in these programs but has been unable to do so, through no fault of his own – whether the respondent has adhered to a rule or policy without considering the application on its merits.

Corrective Services Act 2006 (Qld) s 192
Judicial Review Act 1991 (Qld) ss 20(2), 23(f)

Australian Retailers Association & Ors v Reserve Bank of Australia (2005) 148 FCR 446
DAR v The Queensland Parole Board [2009] QSC 399
Gough v Southern Queensland Regional Parole Board [2008] QSC 222
Elias v Commissioner of Taxation (2002) 123 FCR 499
Khan & Ors v Minister for Immigration and Ethnic Affairs (1987) 14 ALD 291

Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323
Morales v South Queensland Regional Parole Board (Unreported, Supreme Court of Queensland, White J, 3 August 2007)
Petrie v Queensland Community Corrections Board [2006] QSC 188
Surinakova v Minister for Immigration, Local Government and Ethnic Affairs (1991) 33 FCR 87
Williams v Community Corrections Board (Qld) (2000) 110 A Crim R 385

COUNSEL: D R Cuzack in person
KA Mellifont for the respondent

SOLICITORS: Crown Solicitor for the respondent

[1] This is an application for a statutory order of review of the decision by the respondent on 18 December 2009 to refuse the applicant's application for parole.

[2] The applicant seeks an order that the Court set aside the respondent's decision and to order the respondent to make a decision to take into account all of the applicant's factual circumstances and according to law. The applicant relies on s 20(2)(a), (b), (e), (f) and (h) of the *Judicial Review Act 1991* (Qld) ("the JR Act") in support of his application.

[3] The grounds of the application are stated to be:

> That the applicant became eligible and suitably qualified for discharge on 4th January 2010 pursuant to the criteria set down under the *Corrective Services Act 2000*. As nothing has ensued during this sentencing which may be construed so to falsify the eligibility for release on parole, in denying the applicant discharge the respondent has failed at law in its obligations under the *Corrective Services Act 2000* and failed to appropriately follow the relevant guidelines set out for assessing such early discharge, miscarrying in its duty to apply proper weight to the applicants [sic] factual circumstances by improperly applying irrelevant and inappropriate considerations.

[4] On 4 July 2007, the applicant was sentenced in the District Court to a total of nine years imprisonment for various offences including armed robbery, unlawful use of motor vehicle and fraud. A recommendation was made that the applicant be eligible for release on parole on 4 January 2010.

Parole application

[5] The applicant made application for parole in September 2009. On 29 October 2009, the respondent advised the applicant that it was concerned that the following information and factors indicated that if the applicant was released he would pose an unacceptable risk to the community. The letter set the factors out as follows:

You are currently serving a period of 9 years imprisonment for the following offences:

Offences	Sentence	Sentence Date
Armed robbery	9 years	04 Jul 2007
Stealing-other	4 years	04 Jul 2007
Unlawful use of motor vehicles	4 years	04 Jul 2007
Fraud-other	4 years	04 Jul 2007
Dangerous driving	30 months	04 Jul 2007

In sentencing you on 4 July 2007, His Honour Judge Forno made a recommendation that you be eligible for release on parole on 4 January 2010.

You have an extensive prior criminal history spanning a period of approximately 15 years including over 50 convictions for numerous violence and property related offences and resulting in 15 custodial episodes.

The Board noted that you are currently classified high and are accommodated in the residential section at the Woodford Correctional Centre. The Board urges you to make every effort to reduce your classification and maintain stable and breach free behaviour. Further, the Board encourages you to progress beyond the residential section to a low security facility and to participate in a work camp program. This will enable you to demonstrate your self management skills in a less structured environment. The Board may then have some confidence as to your ability to comply with the conditions of a parole order.

The Board noted that an assessment of your needs indicated that you ought to participate in intervention programs notably the Pathways 1 and 2, Making Choices and a Specialised Assessment for Violence. The Parole Board Assessment Report dated 31 August 2009 advised that you completed the Pathways Program in 2008 and you have indicated your willingness to complete the outstanding intervention programs. The Board acknowledged that you are presently waitlisted for participation in the Cognitive Self Change Program and the Making Choices Program and encourages you to actively participate in these programs to gain knowledge and skills from these programs as it will assist significantly in your rehabilitation.

You have provided a letter of support from a previous employer offering a job opportunity on release. The Board took into account your history of employment both in the community and in the custodial environment together with the risk factors identified in your relapse prevention plan and encouraged you to further develop employment skills that will assist you on your release into the community.

> The Board was aware that you had made an application to appear but considered that your submissions were sufficient for it to make its preliminary determination.

The applicant was invited to make further submissions within 14 days.

[6] On 11 November 2009, the applicant provided further submissions. In those submissions, the applicant sought an extension of time to make further submissions. However, he noted:

> The fact that the CSCP and Making Choice Programs have still not [been] offered to me in all these years IS the underlining factor as to why I am still a 'HIGH' classification and not yet a 'low', in a farm environment. …
>
> My current classification is something which I have had no chance to change over the many years I have been incarcerated. I have made numerous efforts to reduce my classification by way of employment, education (uni studies), abstaining from drugs and the drug culture here in the system, participating in educational classes such as computers and abstaining from any forms of violence or violent culture here in the prison system.
>
> …
>
> My current classification is that of a 'high' partly because I have not yet been given the opportunity to participate in the two remaining intervention programs notably the Cognitive Self Change Program (CSCP) and the Making Choices Program.
>
> Over the past years I have made numerous efforts to be given the opportunity to participate in these programs, to no avail.

[7] By letter dated 30 November 2009, the Board granted the applicant a further 30 days to make additional submissions. The applicant made further submissions by letter dated 14 December 2009. In these further submissions, the applicant noted the outstanding programs are:

> … long overdue, and could have and should of been offered and completed years ago.
>
> If these programs are to offer an offender alternative thinking strategies, shouldn't these alternative strategies been offered to me earlier so that one would have sufficient time to master these new skills? And time, say to demonstrate ones [sic] understanding prior to ones [sic] eligibility date?

[8] On 18 December 2009, the respondent made a decision to decline the applicant's application for parole. The applicant was notified of that decision by letter dated 31 December 2009. This letter was in the following terms:

> The Queensland Parole Board ("the Board) considered your most recent application for a parole order at its meeting on 25 September 2009.

> The Board wrote to you on 29 October 2009 outlining the relevant features of your case to that time and inviting you to forward any new information or make such submissions you may wish concerning the matters outlined in that letter. You were given 14 days from receipt of the letter to make your submissions.
>
> At its meeting on 18 December 2009, the Board fully considered your submission. The Board took into account the contents of your Transitions Plan and your submission dated 14 December 2009 in which you address your concerns regarding program placement availability and note your willingness to complete recommended interventions.
>
> You have received all the relevant material and have had the opportunity to respond to the Board's concerns. The Board reaffirmed its concerns as documented to you in correspondence dated 29 October 2009.
>
> For the reasons set out in this letter and its previous letter to you the Board decided that you would be an unacceptable risk to the community on a parole order at this time and your application has been declined. The Board consents to you lodging a new application with the Board at any time from 18 June 2010.

[9] Following its decision to refuse the applicant's application for parole, the applicant requested a statement of reasons by letter dated 12 January 2010. On 11 February 2010, the respondent provided the applicant with a Statement of Reasons in which it gave the following as its reasons for the decision:

> 1. The Board considered your extensive criminal history of over 50 convictions and 15 offending periods for numerous violence and property related offences spanning a period of approximately 15 years. The Board noted that your criminal history included offences of a somewhat similar nature to that for which you have been imprisoned. The Board was concerned that previous court sanctions had not acted as a deterrent to your continued offending.
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> 2. The Board noted the recommendation of Judge Forno that you be eligible for release on parole on 4 January 2010. However the Board had before it, and considered information regarding assessments of your treatment needs that were not before the sentencing judge. When considering the influence substance abuse had on your extended criminal history, your progression so far through the intervention programs and your outstanding recommended intervention programs, the Board considered that you were not suitable for parole at the time set by the Court.
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> 3. The Board noted your completion of the Pathways Program (Phase 1 and 2) and the gains you achieved from participation. The Board noted your completion of the

pre-release Transitions program and the detailed Transitions Plan you submitted to the Board.

4. The Board acknowledged that you were waitlisted for participation in the Cognitive Self Change Program and noted also your willingness to participate. The Board were concerned that at the date of the Board decision, you had been unable to participate in the outstanding recommended programs through no fault of your own. The Board encouraged you to actively participate in the recommended programs as the Board considered that the knowledge of personal triggers and strategies developed from the program may assist you to lessen the risk you pose to the community.

5. The Board considered your more recent positive conduct and good order, your security classification and your educational and vocational achievements. The Board noted your concerns that your lack of ability to progress with intervention programs was tied to your remaining a high security classification. However, the Board urged you to make every effort to reduce your classification and maintain stable and breach free behaviour. Further, the Board encouraged you to progress beyond the residential section to a low security facility and to also participate in a work camp program. This would enable you to demonstrate your self management skills in a less structured environment. The Board may then have some confidence as to your ability to comply with the conditions of a parole order.

6. The Board noted the letter of support from a previous employer offering you a job opportunity on release as well as your proposed release and relapse prevention plans. The Board took into account your history of employment both in the community and in the custodial environment together with the risk factors identified in your relapse prevention plan and encouraged you to further develop employment skills whilst in custody that will assist you on your release into the community.

7. The Board was aware that you had made an application to appear before the Board but considered that your application and submissions were sufficient for it to make its determinations.

Taking into account all of the relevant factors of your case, both positive and negative, the Board formed the view that you posed an unacceptable risk to the community at that time and decided to decline your application for a parole order.

Review application

[10] The applicant provided answers to a request for further and better particulars of the application for statutory order of review. Those answers were, in substance, his

written submissions. Whilst the answers are repetitious, in summary the applicant contended:

(a) The respondent breached the rules of natural justice in that it cited his extensive criminal history as a point of concern when refusing the parole application, whereas the sentencing judge had already taken that into account when passing sentence and in fixing a parole eligibility date which has now expired. The applicant submits he is entitled to a reasonable expectation that he will receive parole in accordance with that recommendation.[1] The applicant also relied on the respondent's acknowledgement that there were outstanding recommended intervention programs he had been unable to participate in through no fault of his own, and its reliance on the fact he was still in a high security classification and was to be encouraged to progress beyond the residential section to a low security facility. The applicant contends that Ministerial Guidelines to the respondent allow it, in the exercise of its discretion, to approve a prisoner for parole notwithstanding that the prisoner is not classified as low security if that prisoner's parole eligibility date has been set by the Court.

(b) The respondent failed to observe the procedures required by law. By refusing his parole application on the basis his security classification had not changed, the respondent failed to observe the procedures set out in the Ministerial Guidelines and failed to consider the level of risk he may pose to the community. Further, the respondent erred in failing to grant his parole application by the recommended date for parole as "nothing has ensued during the sentencing which may be construed so to falsify the eligibility for release on parole".

(c) The respondent improperly exercised its power as the respondent's conclusion he was an unacceptable risk to the community was based "purely on opinion and not fact" and was made in reliance upon his extensive history, security classification and failure to complete the recommended intervention programs. Having regard to "all the positives outlined in the parole board assessment report, namely: Court recommendation, Positive pro-social support, Offer of employment, thorough release and relapse prevention plan, completion of the Pathways Program parts 1 and 2, regular attendance at NA and AA meetings and a positive home assessment", it was an unreasonable exercise of power for the respondent to contend that notwithstanding those factors, his extensive criminal history and non-completion of programs rendered him an unacceptable risk to the community.

(d) The respondent had regard to irrelevant considerations as the respondent ought not to have had regard to his continuing high security classification as a parole eligibility date had been set by the Court. Further, the respondent ought not to have had regard to his failure to complete the intervention programs as "at no point during the learned Judges' [sic] sentencing remarks did he make mention of any need to undertake courses prior to becoming eligible for parole". The applicant also contends the respondent, in citing his extensive criminal history, had regard to two separate alleged offences, one of which was dropped and the other being dismissed.

(e) The respondent failed to take into account relevant positive considerations in assessing his risk of re-offending as the respondent, whilst asserting it

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[1] *Petrie v Queensland Community Corrections Board* [2006] QSC 188, [17]; *Williams v Community Corrections Board (Qld)* (2000) 110 A Crim R 385.

had taken into account all the positive factors in his favour, found he remained an unacceptable risk to the community regardless of the fact no recidivism risk assessment had been conducted since his earlier interview in 2007. This amounted to an exercise of power in accordance with a rule or policy without regard to the merits, and was so unreasonable that no reasonable person could so exercise the power.

(f) The respondent erred in law in citing his failure to complete the necessary intervention courses as new information that was not before the Court at the time of sentencing so as to invoke the operation of s 192 of the *Corrective Services Act 2006* (Qld). The judge handing down sentence made no recommendations for completion of courses being compulsory in order to become eligible for release.

(g) There was no evidence or other material to justify the making of the decision in that the respondent cited his extensive criminal history as well as his failure to complete two courses and his remaining a high classification prisoner as reasons for refusing his application for parole in circumstances where the sentencing judge had his complete criminal history when passing sentence and setting a parole eligibility date and made no recommendations or expectations for completion of courses being compulsory in order to become eligible for release, other than mentioning his long term substance abuse which had been addressed through the programs already undertaken by the applicant. Further, the continued high classification rating is as a result of his "powerlessness" to complete courses he was prepared to undertake and should not be a determining factor in deciding whether or not to grant parole.

[11] At the hearing, the applicant filed a document headed "Further to Outline of Argument" in which he stated that since filing the application for statutory review, he has been assessed as not suitable for either of the courses he had been trying to undertake without success. He accepted this was information not available to the respondent at the time of its decision but contended it was still relevant to his application. I accept the respondent's submission that it is not relevant, and I have had no regard to this further information in determining the application for statutory review.

[12] The applicant also made oral submissions at the hearing of the application substantially in accord with his answers to the request for further and better particulars. In those oral submissions, the applicant contended his inability to undertake the further intervention programs was due to their not being offered to him rather than a refusal to undertake them and his inability to undertake those programs prevented him from progressing to the low security classification referred to by the respondent in its Statement of Reasons.

[13] The respondent contends:

(a) although the applicant relies on the taking into account of his extensive criminal history as a breach of natural justice, it is more an allegation of taking into account an irrelevant consideration in circumstances where the applicant's criminal history is a matter which can properly be taken into account as a matter relevant to an assessment of risk;[2]

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[2] *Ministerial Guidelines to the Queensland Parole Board: Resettlement Leave Programs and Parole* Orders, March 2008, Clause 2.4(d).

(b) insofar as the respondent departed from the sentencing judge's recommendation, it did so in circumstances where it had regard to the following findings of facts:

(a) During the Offender Risk Needs Inventory Revised assessment dated 6 August 2007, the Applicant identified that his offences were directly related to his continuing use of drugs and that he had reported drinking heavily after his last custodial release. Alcohol and drug abuse were identified as criminogenic needs and an assessment of his treatment needs indicated that he ought to participate in intervention programs notably the Pathways Phase 1 and 2 (high intensity substance abuse program), Making Choices and Specialised Assessment for Violence. The Special Assessment for Violence has since been replaced with the Cognitive Self Change – High Intensity Violent Offending Program, a high intensity cognitive-behavioural intervention that aims to reduce violent reconviction in high-risk adult offenders whose repetitive use of violence is part of a general pattern of antisocial behaviour and criminality.

(b) That the Applicant had maintained a high security classification during his sentence. He had previously breached prison discipline with two major breaches, however, his behaviour had greatly improved since April 2009 with no adverse reports since that time.

(c) That the Parole Board Assessment Panel noted that the Applicant did not appear to fully understand the importance of identifying high risk situations and establishing alterative actions and that the Applicant seemed to struggle when asked to explain in any detail what action he should take should the situations occur.

(c) having regard to those findings of facts and the specific notation in the respondent's reasons that it had considered information regarding the applicant's assessments of his treatment needs that was not before the sentencing judge, the respondent had properly taken into account outstanding matters which were relevant to a consideration of risk and which was information not before the Court at the time of sentencing;

(d) The weight given by the respondent to the applicant's extensive criminal history is a matter for the respondent having regard to the competing factors, and the unreasonableness ground is not met in the circumstances;

(e) the respondent properly took into account the non-completion of courses which the applicant had been willing to undertake and had requested to undertake as it was relevant to the assessment of risk and as to whether there was any outstanding treatment needs particular to the applicant;

(f) the respondent did not take into account charges which were dismissed or discontinued. The respondent set out the charges in respect of which the

parole application was being made. It did not include either of the charges referred to by the applicant. There is no evidence the respondent acted on an incorrect premise in respect of the offences for which the applicant was serving a period of imprisonment;

(g) the respondent did not act contrary to cl 6.1 of the Ministerial Guidelines in refusing the applicant parole. Clause 6.1 gives the Board a discretion to approve a prisoner for parole in specified circumstances. It does not require the respondent to grant parole to an applicant at that time;

(h) the respondent properly came to an assessment of risk and did not simply apply a policy of refusing parole on the ground that recommended programs had not been completed.[3]

[14] Although the applicant has framed his application to essentially cover most of the grounds for review in the JR Act, the central complaints of the applicant pertain to the respondent having regard to:

(a) his extensive criminal history;

(b) the courses he had not yet completed (but was waitlisted to do);

(c) his continued high security classification,

in making its decision to refuse his application for parole. He also complains about the failure to grant parole in accordance with the sentencing judge's recommendation.

[15] Before considering the applicant's contentions, it is necessary to consider the relevant legislative framework for granting or refusing parole. That framework gives the respondent a broad discretion. Whilst there are no express criteria, the task "must be the assessment of risk involved in granting the prisoner the privilege of completing part of his sentence in the community".[4] The respondent has guidelines regarding the policy to be followed by it in performing its functions.[5] Relevantly, they provide:

> 1.1 When considering whether a prisoner should be granted a … parole order, the highest priority for the Queensland Parole Board ("the Board") should always be the safety of the community.
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> …
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> 2.3 Before making a decision to grant any prisoner a … parole order, the Board should always consider the level of risk that the prisoner may pose to the community.
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> 2.4 When deciding the level of risk that a prisoner may pose to the community, the Board should have regard to all relevant factors, including but not limited to the following –
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> (a) the recommendation for parole or the parole eligibility date fixed by the sentencing court;
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> (b) the sentencing court's recommendation or comments;

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[3] Cf: *Gough v Southern Queensland Regional Parole Board* [2008] QSC 222; *DAR v The Queensland Parole Board* [2009] QSC 399.

[4] *Morales v South Queensland Regional Parole Board* (Unreported, Supreme Court of Queensland, White J, 3 August 2007), 11.

[5] *Ministerial Guidelines to the Queensland Parole Board: Resettlement Leave Programs and Parole* Orders, March 2008.

(c) the prisoner's cooperation with the authorities both in securing the conviction of others and preservation of good order within the corrections system;

(d) the prisoner's prior criminal history and any patterns of offending;

(e) the possibility of the prisoner committing further offences;

(f) any submissions made to the Board by an eligible person;

(g) the prisoner's compliance with any other previous grant of community based release …;

(h) if a … parole order has been cancelled for reasons that relate to the safety and security of the community, the Board should be satisfied that the safety factors have been resolved;

(i) if a … parole order has been cancelled because of a prisoner's unsatisfactory behaviour, the Board should not grant a further … parole order to such a prisoner unless it is satisfied that the prisoner has sufficiently addressed their unsatisfactory behaviour that caused the cancellation of the … parole order;

(j) whether there are any other circumstances that may increase the risk the prisoner presents to the community;

(k) any medical, psychological, behavioural or risk assessment report relating to the prisoner; and

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

[16] There is no substance to the applicant's contention the respondent's decision involved a breach of the rules of natural justice. The respondent gave the applicant notice of the material which it had had regard to in its provisional view that his application for parole should be declined and invited further submissions in relation thereto. It gave the applicant, at his request, an extension of time to make those submissions.

[17] The rules of natural justice required the applicant be afforded an opportunity to consider the material to be relied upon by the respondent and to make submissions in relation thereto. The applicant was aware of the material, and made submissions in relation thereto before the decision of the respondent.

[18] The respondent's reference to the applicant's extensive criminal history could not constitute a breach of the rules of natural justice as contended by the applicant. The

applicant was aware of the respondent's intention to have regard to those matters, and they were properly matters to be considered by it as they are relevant to a determination whether to grant the applicant's application for parole. Their relevance is not diminished by the fact the sentencing judge had regard to those factors when sentencing the applicant at first instance.

[19] Similarly, there is no substance in the applicant's contention the respondent's reference to the outstanding recommended intervention programs as a point of concern constituted a breach of the rules of natural justice. The applicant had notice from the respondent's letter advising of its provisional view that outstanding intervention courses were matters being considered by it and the applicant had the opportunity to make submissions in relation thereto before the respondent's decision.

[20] The applicant relies on two matters in support of his contention the respondent failed to observe procedures required by law. First, the respondent's failure to observe procedures in the Ministerial Guidelines allowing a prisoner who is not classified as low security to be granted parole in its discretion if a parole eligibility date has been set by the Court. Second, in considering that his failure to complete courses constituted information which was properly to be considered by it within s 192 of the *Corrective Services Act 2006* (Qld).

[21] There is no substance in the first of these contentions. The Ministerial Guidelines are clear, and they give the Board a wide discretion. Nothing in the material before me establishes the Board failed to exercise that discretion according to law.

[22] There is also no substance in the applicant's assertion the respondent's departure from the sentencing judge's recommended parole date constituted a failure to observe procedures required by law. A parole board is not bound by the recommendation of the sentencing court or the parole eligibility dates fixed by the court if the Board receives information about the prisoner that was not before the court at the time of sentencing and after considering that information considers that the prisoner is not suitable for parole at the time recommended or fixed by the court.[6] In its Statement of Reasons, the respondent set out a number of findings of fact in relation to the applicant's completion of programs and the Parole Board Assessment Panel finding that the applicant did not appear to fully understand the importance of identifying high risk situations and establishing alternative actions. Those are matters which were not before the sentencing judge and are matters which properly fall within the term "information about the prisoner" that was not before the Court at the time of sentencing.

[23] Although the applicant has as a separate ground for review a contention the respondent improperly exercised its power, a perusal of the basis of that contention indicates that it is intimately connected with his assertions that the respondent failed to have regard to relevant considerations and/or had regard to irrelevant considerations and/or exercised its power without proper regard to the merits of the applicant's case and/or otherwise erred in law and/or made a decision against the evidence. Each of these grounds focuses on the respondent's reliance upon the applicant's failure to complete the recommended courses for which he had been waitlisted, and his continued high security classification.

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[6] *Corrective Services Act 2006* (Qld) s 192.

[24] Reliance upon relevant or irrelevant considerations as a ground of judicial review essentially involves a consideration of whether a decision-maker has properly applied the law.[7] Where, as here, the discretion inferred on decision-maker is in broad terms, it is generally a matter for the decision-maker to decide what is relevant and what is not.[8]

[25] To the extent that the applicant's submissions in respect of these grounds contends the respondent paid too little or too much attention to particular factors, the applicant must fail in making out a case for improper exercise of the power on the basis of taking account of irrelevant considerations or failing to take account of relevant considerations. The weight to be given to relevant considerations are matters for the decision-maker.[9]

[26] However, there is substance in the applicant's contention that the respondent failed to have regard to a relevant consideration, namely, that the applicant's continued high security classification was a consequence of his inability to (through no fault of his own) complete the recommended programs necessary for re-classification to low security or a farm environment.

[27] The applicant, in his submissions to the respondent, had specifically highlighted his inability to move to a low security classification without first completing the recommended courses for which he had been waitlisted but had been unable to undertake through no fault of his own. These matters were not properly canvassed or addressed by the respondent. Instead, the respondent, in both its letters of 29 October 2009 expressing its preliminary view, and in its Statement of Reasons, encouraged him to "actively participate" in the recommended programs and "to make every effort to reduce your classification".

[28] Whilst it is true that in its Statement of Reasons the respondent specifically acknowledged the applicant had been unable to complete these recommended courses through no fault of his own, the respondent referred to the outstanding recommended intervention program as one of the factors it considered rendered him not suitable for parole at the time set by the Court.[10] Further, it recommended he undertake those outstanding programs and progress through the system to a low security classification or a farm environment. In so doing, the respondent made no reference to the fact that the non-completion of these course affected his ability to progress through those security classifications.

[29] Whilst the fact the applicant had not completed these programs and remained on a high security classification may be relevant factors in the consideration of an assessment of risk, a proper consideration of the merits of the application required the respondent to consider the circumstances that the applicant had no control over whether he completed those programs and his inability to do so was a reason for his continuation as a high security classification.[11] This is particularly so where no evidence was led to contradict his assertion that he would not achieve a low security classification or a work program without first completing these courses.

[30] The respondent's failure to have regard to whether the applicant could properly progress to a low security classification when he was unable to undertake

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7 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 348.
8 *Australian Retailers Association & Ors v Reserve Bank of Australia* (2005) 148 FCR 446, 577.
9 *Elias v Commissioner of Taxation* (2002) 123 FCR 499, 511.
10 Affidavit of Sue Travers filed 29 June 2010, 183.
11 Cf *Gough v Southern Queensland Regional Parole Board* [2008] QSC 222.

recommended programs through no fault of his own amounted to a failure on the respondent's part to have proper regard to the circumstances in favour of the grant of parole. The respondent's failure to do so constituted a failure to consider the applicant's application on its merits and amounted to a breach of s 23(f) of the JR Act.

[31] Further, the respondent's reference to the applicant being an unacceptable risk to the community in the context of encouraging him to complete recommended courses (which he could not complete through no fault of his own) and progress through the system to a low security classification, connotes adherence to a rule or policy that all recommended programs be completed and a low security classification be achieved regardless of the circumstances of the particular applicant. This is particularly so where, as here, the applicant's recommended eligibility date had passed and he had had no breaches within the system for well over 12 months. The application by the decision-maker of a rule or policy in making its decision rather than a genuine consideration of the application on its merits, amounts to a breach of the requirements of a decision-maker to "give proper, genuine and realistic consideration to the merits of the case and be ready in a proper case to depart from any applicable policy …".[12]

[32] The conclusion that the applicant has established a basis under the JR Act to set aside the decision under review makes it strictly unnecessary to consider the applicant's contentions that the decision was so unreasonable that no reasonable person could so exercise that power. That is a difficult ground to establish.[13] Although arguable, I am not satisfied the applicant has made this ground out in the present case as it cannot be said reasonable minds could not reasonably differ.

[33] It is ordered that the decision of the respondent made on 18 December 2009 be set aside and the applicant's application for parole be referred to the respondent for further consideration and to be dealt with by the respondent according to law.

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12 *Khan & Ors v Minister for Immigration and Ethnic* Affairs (1987) 14 ALD 291, 292; cited with approval in Surinakova *v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 33 FCR 87, 98.

13 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.