SUPREME COURT OF QUEENSLAND

CITATION:	*Boyd v Dpt Corrective Services* [2004] QCA 250
PARTIES:	**VICTOR TILO BOYD** (applicant/applicant) v **CHIEF EXECUTIVE, DEPARTMENT OF CORRECTIVE SERVICES** (respondent/respondent)
FILE NO/S:	Appeal No 4698 of 2004 SC No 625 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time/General Civil Appeal
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED EX TEMPORE ON:	26 July 2004
DELIVERED AT:	Brisbane
HEARING DATE:	26 July 2004
JUDGES:	de Jersey CJ, Davies JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for extension of time within which to appeal dismissed**
CATCHWORDS:	CRIMINAL LAW - JURISDICTION, PRACTICE AND PROCEDURE - JUDGMENT AND PUNISHMENT - SENTENCE - FACTORS TO BE TAKEN INTO ACCOUNT - MISCELLANEOUS MATTERS - REMISSION, PAROLE AND PRISONER CLASSIFICATION - where the applicant was serving a five year sentence for the offence of producing a dangerous drug - where the applicant claimed he was entitled to the maximum one-third remission of his sentence as the chief executive had not made a decision as required under Division 11 of the *Corrective Services Act* 2000 (Qld) - where the applicant had already applied for and received a direction from a judge pursuant to s 30 *Judicial Review Act* 1991 (Qld) directing the chief executive to proceed forthwith to determine the applicant's eligibility for remission pursuant to s 75 of the *Corrective Services Act* - whether the application for an extension of time should be allowed

	Corrective Services Act 2000 (Qld), s 75, s 79 *Judicial Review Act* 1991 (Qld), s 22
	Project Blue Sky Inc & Ors v Australian Broadcasting Authority (1998) 194 CLR 355, cited
COUNSEL:	The applicant appeared on his own behalf M O Plunkett for the respondent
SOLICITORS:	The applicant appeared on his own behalf C W Lohe, Crown Solicitor, for the respondent

THE CHIEF JUSTICE: I will invite Justice Davies to deliver the first judgment in this matter.

DAVIES JA: The applicant is a prisoner at Lotus Glen Correctional Centre. He is serving a sentence of five years which was imposed on 3 October 2001 for the offence of producing a dangerous drug. In fact he has been in custody for that offence since 19 August 2000. The applicant's full time release date is 18 August 2005.

If he were entitled to the maximum of one-third remission of his sentence his release date would have been 18 December 2003. The maximum of one-third remission is provided for in section 75 of the *Corrective Services Act* 2000.

That section relevantly provides:

> "(1) A prisoner is eligible for remission only if -
>
> (a) the prisoner is serving a term of imprisonment, as defined in this Act, imposed for an offence committed before the commencement of this section; and

(b) the term of imprisonment is 2 months or more; and

(c) during the prisoner's period of imprisonment, the prisoner has not been -

(i) granted leave of absence, under the *Corrective Services Act 1988*, section 61(1)(b) or (c), to engage in or seek employment; or

(ii) released, under the *Corrective Services Act 1988*, section 86, to serve a period of home detention; or

(iii) released on parole under an order made under the *Corrective Services Act 1988*, section 165; or

(iv) released under a post-prison community based release order.

(2) Subject to subsections (3) and (4), the chief executive may grant remission of up to one-third of the term of imprisonment if satisfied -

(a) that the prisoner's discharge does not pose an unacceptable risk to the community; and

(b) that the prisoner has been of good conduct and industry; and

(c) of anything else prescribed under a regulation."

It may be assumed that the applicant complied with subsection (1). Under subsection (2) it appears that the remission could be up to one-third of the term of imprisonment. It may also be assumed that neither subsection (3) nor subsection (4) apply to affect this.

Section 79 then provides:

"(1) This section applies if the chief executive is considering refusing -

(a) to grant remission; or

(b) to make a conditional release order.

(2) The chief executive must give the prisoner a notice -

(a) stating that the chief executive is considering refusing to grant remission or make the order; and

(b) outlining the reason for the proposed refusal; and

(c) inviting the prisoner to show cause, by written submissions given to the chief executive within 21 days after the notice is given, why the remission or conditional release order should not be refused.

(3) The chief executive must consider all written submissions made within the 21 days and inform the prisoner, by written notice, whether the remission or conditional release is refused."

Because a prisoner eligible for remission under section 75(1) may be granted remission of his sentence of up to one-third of the term of imprisonment, he has a reasonable expectation that, if the Chief Executive is considering refusing to grant remission he will give to the prisoner notice under section 79(2) in sufficient time to enable the prisoner to show cause before expiry of two-thirds of his sentence. That expectation was not fulfilled here.

For the same reason the Chief Executive has delayed unreasonably in making a decision he was bound to make. Accordingly, the applicant was entitled to make an application for a statutory order of review pursuant to section 22 of the *Judicial Review Act* 1991 which relevantly provides:

"(1) If -

(a) a person has a duty to make a decision to which this Act applies; and
(b) there is no law that fixes a period within which the person is required to make the decision; and

(c) the person has failed to make the decision;

a person who is aggrieved by the failure of the person to make the decision may apply to the court for a statutory order of review in relation to the failure to make the decision on the ground that there has been unreasonable delay in making the decision."

It was not until 30 January 2004 that a letter was sent to the applicant advising him that the respondent, by his delegate Mrs Diane Ryan, was considering not granting any remission and inviting him to show cause why the grant of remission should not be refused. The terms of the letter appear to comply with the terms of section 79(2).

In the meantime the Chief Executive not having acted to consider this matter by 18 December 2003, the applicant made an application for statutory order of review on 22 December 2003 based on that failure. However the order which the applicant sought in that application was one that the decision under section 79 had been made and that it could not still be lawfully made. Presumably the decision which he claimed was made was one to grant the full remission of one-third.

However the only order which, it seems, could have been made was one pursuant to section 30 of the *Judicial Review Act* directing the Chief Executive to proceed expeditiously to consider any submission by the applicant seeking to show cause under section 79 of the Act.

The application was heard by the learned primary judge on 12 February 2004 and judgment was given in this matter on 2 April 2004. The judgment was that the respondent forthwith proceed to determine the applicant's eligibility for remission pursuant to section 75 of the Act.

In making that order the learned primary judge took into account the respondent's letter of 30 January 2004.

It now appears that the applicant responded to that letter on 5 February 2004, 19 February 2004, 4 March 2004, 26 March 2004 and 5 May 2004, although none of those letters are before this Court. For on 11 May 2004 the respondent's delegate refused to grant remission of the applicant's sentence giving the following reasons:

> " In accordance with sections 75, 77 and 78 of the *Corrective Services Act 2000 (the Act)*, consideration has been given to the grant of remission in relation to charges 1 - 2 of your period of imprisonment.
>
> After considering all the relevant matters as outlined in the [sic] consider not to grant letter to you dated 30 January 2004, and the matters raised in your subsequent correspondent dated 5 February 2004, 19 February 2004, 4 March 2004, 26 March 2004 and 5 May 2004 I have decided not to grant remission

> on the basis that I am not satisfied that your discharge does not pose an unacceptable risk to the community in accordance with section 77 of the Act."

It appears that by the giving of this decision the respondent has complied with the order of the learned primary judge.

On 26 May 2004 the applicant applied for an extension of time within which to appeal to this Court from the decision of the learned primary judge. That is the application before this Court.

It is not entirely clear what order the applicant seeks from this Court if an extension of time were granted. Under the heading, "Orders sought", in the draft notice of appeal the applicant sets out what appears to be an argument supporting the conclusion that if a decision is not made under Division 11 of the Act by the time two-thirds of the prisoner's sentence has expired the full remission is deemed to have been granted. That appears to have been the applicant's contention before the learned primary judge.

There is no substance in that contention. There is nothing in the Act which would support such a construction or even one which would make the decision of 11 May 2004 invalid. See *Project Blue Sky Incorporated and Others v. the Australian Broadcasting Authority* (1998) 194 CLR 355.

There is no other basis upon which the learned primary judge's order, which has now been complied with, may be set aside.

The application for an extension of time should therefore be dismissed.

THE CHIEF JUSTICE: I agree. It is but a small burden for the Chief Executive to act in a timely way in these situations and prisoners like the applicant who are subjected to inexcusable delay may rightly feel aggrieved. But the result of this Court's intervention cannot be a grant of the remissions. Whether or not they are granted is a decision to be made even if too late by another entity being the Chief Executive and he or she will be informed by considerations beyond the province of this Court. I also would dismiss the application.

MULLINS J: I also agree that the application should be dismissed.

THE CHIEF JUSTICE: The application is dismissed.
