SUPREME COURT OF QUEENSLAND

CITATION:	*Craig v Qld Community Corrections Board* [2004] QCA 462
PARTIES:	**PHILLIP JOHN CRAIG** (applicant/appellant) **v** **QUEENSLAND COMMUNITY CORRECTIONS BOARD** (respondent/respondent)
FILE NO/S:	Appeal No 7933 of 2004 SC No 11443 of 2003 SC No 4923 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time Judicial Review
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	Orders made 24 November 2004 Reasons delivered 3 December 2004
DELIVERED AT:	Brisbane
HEARING DATE:	24 November 2004
JUDGES:	McMurdo P, Williams JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for an extension of time within which to appeal granted** **2. Appeal allowed** **3. The order at first instance is set aside** **4. The decision of the Board on or about 19 March 2004 refusing the appellant's application for post prison community based release be set aside; and** **5. That application be remitted to the respondent for further consideration according to law**
CATCHWORDS:	ADMINISTRATIVE LAW – APPEALS FROM ADMINISTRATIVE AUTHORITIES – STATUTORY APPEALS FROM ADMINISTRATIVE AUTHORITIES TO COURTS – APPEALS FROM PARTICULAR AUTHORITIES – Queensland Community Corrections Board – where appellant applied for statutory order of review – where respondent refused application for post prison community based release – where appellant tested positive for codeine – where appellant guilty of breach of discipline

for unrelated matter – where claim that appellant authorised to use medication containing codeine – where medical information not before the Board – whether matter should be remitted for reconsideration

COUNSEL: The applicant/appellant appeared on his own behalf
S A McLeod for the respondent

SOLICITORS: The applicant/appellant appeared on his own behalf
C W Lohe, Crown Solicitor for the respondent

[1] **McMURDO P:** I agree with Mackenzie J's reasons and with the orders he proposes.

[2] **WILLIAMS JA:** I agree with the reasons for judgment of Mackenzie J and with the orders therein proposed.

[3] **MACKENZIE J:** The appellant applied for a statutory order of review under the *Judicial Review Act* 1991 in relation to a decision by the respondent to refuse his application for post prison community based release. The application had been made on 28 January 2004, and was considered by the respondent on 27 February 2004. On 5 March 2004, a letter was sent conveying the respondent's provisional conclusions to the appellant.

[4] In substance, the letter said that the appellant may still not be an acceptable risk to the community on any form of community based order. The letter referred to the appellant having achieved open security classification and transfer to open custody (at Palen Creek). It went on to state that he had been returned to secure custody (at Wolston Correctional Centre) after about six months when he had tested positive for morphine or codeine. The letter referred to the Board noting the appellant's claim that the positive test was the result of ingestion of codeine rather than illicit substances. However, it went on to state, because of the appellant's lengthy experience of incarceration, he would be aware that he was not authorised to take medication without first obtaining permission. The letter stated that he had "completely failed to demonstrate the trustworthiness or the commitment to remaining drug free" which had caused the respondent to refuse his application on a previous occasion.

[5] Additionally, the letter referred to the appellant committing a breach of discipline by possessing a lighter, on 19 December 2003, that had not been approved by the person in charge as something the prisoner may possess. The appellant was found guilty of that offence. His explanation was that when he was transferred from Palen Creek to Wolston on 9 September 2003, his property arrived at a different time. Although the evidence is imprecise as to when the property arrived, it was more than three months after his arrival at Wolston that the item was found. In his defence at the hearing before the supervisor, he said that the lighter had been issued to him at Palen Creek. He had forgotten he had it in his possession. However, he had told Correctional Officer Page that it was in his property. That was the state of the information about the lighter in the material available to the Board.

[6] The appellant sought leave at the hearing before the judge of the Trial Division, to read an affidavit by Correctional Officer Page to the effect that Correctional

Officer Page was responsible for searching the appellant's property when it arrived at Wolston Park and that the appellant had advised that there were a spoon, a coaster and the lighter somewhere in his property. For reasons that are not fully explained, Correctional Officer Page did not confiscate the property. However, according to the affidavit a message was left for the staff member on the following shift to contact him since the appellant was not to be breached because he had declared the items. However, Correctional Officer Page had heard no more until he found out that the appellant had been breached and subsequently heard that his release had been refused because of the incident.

[7] Reverting to the issue of the positive test for morphine or codeine, the appellant was not actually charged with a breach of discipline in this regard. On his admission to Wolston, a reception form was completed. One section begins with an instruction to the correctional official compiling the form to read the Medical-in-Confidence part of the medical file. In the box for "current medication" there is included a reference to panadeine. We were informed that this document was not before the respondent when the appellant's application was being considered. However, in a report prepared for the respondent there is reference to the positive urine test, the fact that he was not breached for the incident and the claim by the appellant that he did not use illegal drugs but took codeine tablets the day before his urine test. The report also notes that the previous sentence management report recorded that the opiate result could be consistent with the use of morphine or heroin.

[8] The difficulty with the approach demonstrated by the letter of 5 March 2004 is that it proceeds on the assumption that the ingestion of codeine, if that was what happened, was unauthorised. Because there was relevant information, which was not before the Board but has not been shown to be inaccessible to it, that suggests that the use of panadeine was authorised, the decision-making process is flawed insofar as it assumes that the use of the substance was unauthorised.

[9] The respondent sought to rely on the appellant's failure to draw attention to the apparent misapprehension when invited to respond, if he wished, to the letter of 5 March 2004. In some cases, that might be a critical issue but in the present case, it is not. The claim that he had ingested codeine was made. It is difficult to see what more the appellant might have done to prove that he had authority to use it. By the time of the hearing before this court, it was apparent that the appellant's timely Freedom of Information application, which resulted in a copy of the reception form being made available to him, had not been finalised before the decision by the respondent was made.

[10] For the reasons given, the appeal should be allowed and the matter remitted to the respondent for consideration according to law.

[11] There was a further complaint by the appellant that insufficient regard had been had to his greater than usual cooperation with the authorities in deciding his application. Any aspects of cooperation that the appellant wishes to emphasise when the matter is reconsidered should be raised by the appellant during the reconsideration process. So should any additional material, including the pharmacological information received by him after the adverse decision was made.

[12] The appellant also advised that he had already lodged a fresh application for post prison community based release which, as far as he is aware, has not yet been decided. He said that he had included the totality of the matters that he wished to raise in that application.

[13] The unusual and unexplained feature that the letter of 5 March 2004, conveying the respondent's provisional view to the appellant, had not been responded to by the appellant despite what, according to the appellant's case, was a clear indication that the respondent was acting upon the wrong assumption that he had not obtained permission to take the medication, has previously been mentioned. During the process of reconsideration of the remitted application or of the fresh application, it would be prudent for the appellant to ensure that he puts his case fully and corrects any misapprehensions if a similar offer is made to him to comment on a provisional decision.

[14] The appellant filed his appeal one day late and makes an application for an extension of time of one day within which to appeal. He has filed an affidavit from solicitor Chelsea Emery of Ryan & Bosscher Lawyers which states that she attempted to file the notice of appeal within the 28 day time limit but because she was acting pro bono she had no authority to pay the filing fee. In those circumstances the extension of time should be granted.

[15] I would order that the application for an extension of time within which to appeal be granted; the order at first instance is set aside and instead it is ordered that the decision of the Board on or about 19 March 2004 refusing the appellant's application for post-prison community-based release be set aside; and that application be remitted to the respondent for further consideration according to law.