SUPREME COURT OF QUEENSLAND

CITATION:	*Killick v Southern Qld Regional Parole Board* [2014] QSC 143
PARTIES:	**JOHN KILLICK** (applicant) v **SOUTHERN QUEENSLAND REGIONAL PAROLE BOARD** (respondent)
FILE NO:	5864 of 2014
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	2 July 2014
DELIVERED AT:	Brisbane
HEARING DATE:	26 June 2014
JUDGE:	Martin J
ORDER:	**Application dismissed**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – PROCEDURE AND EVIDENCE – EXTENSION OF TIME – GENERALLY – where the applicant sought review of a decision by the respondent to seek a warrant for his return to prison – where the applicant was liable to be returned to prison in any event – where the application was nearly 16 years out of time – whether an extension of time should be granted *Acts Interpretation Act* 1954, s 38(4) *Corrective Services Act* 1988, s 189 *Judicial Review Act* 1991, s 46
CASES:	*Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149; [1996] HCA 44, cited *Killick v The Commissioner of Police New South Wales* [2014] NSWSC 781, cited *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28, applied *R v Killick* (2002) 127 A Crim R 273; [2002] NSWCCA 1, considered
COUNSEL:	J Crowley for the applicant

A Scott for the respondent

SOLICITORS: Peter Shields Lawyers for the applicant
GR Cooper, Crown Solicitor for the respondent

[1] On 21 August 1998 the Brisbane Regional Community Corrections Board[1] made a decision to apply for a warrant for the arrest of the applicant. Sixteen years later the applicant comes before the court seeking an order in the nature of certiorari quashing that decision. The applicant also seeks an order for an extension of time in which to make this application. In the application for review, interlocutory relief was sought staying the warrant which issued in 1998, but both parties agreed to treat this hearing as the final hearing.

[2] The respondent applies under s 48 of the *Judicial Review Act* 1991 ("the Act") for an order that the application be dismissed because it is out of time and the applicant has no arguable case.

[3] Neither party made any submissions about the transitional provisions of the *Corrective Services Act* 2000 or the *Corrective Services Act* 2006 nor what effect, if any, they might have on the availability of this remedy. I will proceed on the basis, apparently assumed by both parties, that the respondent is responsible for the decision made in 1998.

Background

[4] In January 1992 the applicant was convicted in the District Court and sentenced to two and a half years imprisonment with a recommendation for immediate release on parole. That parole was granted on 19 February 1992 and was to expire on 30 July 1994. On the same day that parole was granted, the applicant was granted permission to live outside Queensland on condition that he report to the New South Wales Probation and Parole Service.

[5] The applicant breached his parole conditions. On 14 May 1993 a letter was forwarded by the respondent's predecessor to the officer in charge of the Warrant Bureau at Police Headquarters. To that letter was attached a warrant for apprehension issued by the predecessor to the respondent. There is no evidence as to what occurred with respect to that warrant.

[6] A further warrant issued on 24 August 1998 pursuant to s 189 of the *Corrective Service Act* 1988 (the 1988 Act).

[7] The applicant was not arrested under the warrant issued in 1998 until this year. In his affidavit he says:

> "15. On or about 26 August 1998 I was living with my partner in Canberra. Two federal police came to the door and told me that there was a Queensland warrant out for my arrest because my Queensland parole had been cancelled back in May 1993.
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> …
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> 17. They did not arrest me on (sic) at the time. I felt concerned about the possibility of leaving my partner and I felt that no

[1] A predecessor of the respondent.

> matter what I did I would end up in jail. As such I went on the run."

[8] To say that he "went on the run" is something of an understatement. In October 1998 he entered the Commonwealth Bank at Mittagong, armed with a pistol and wearing a cap, a wig and a stocking over his face. He threatened staff and customers with the pistol and ordered the customers to lie down on the floor. After making further demands he was handed $32,500 and he left the bank. On 20 January 1999 he entered the National Bank at Bowral, again wearing a wig, and produced a loaded pistol from a bag and pointed it in the direction of staff and customers. This time he took $23,000. He was convicted in the District Court of New South Wales for those and other offences. The sentencing judge intended to impose head sentences totalling 28 years and non parole periods totalling 15 years. On appeal, when the applicant was unrepresented, the sentence was reduced effectively to 23 years and he was released on parole on 15 April 2014.

[9] Upon his release on parole, New South Wales police arrested him in execution of the 1998 warrant. The respondent unsuccessfully opposed his extradition from New South Wales to Queensland[2].

Delay in making this application

[10] Section 46 of the Act provides:

> **Time of making application**
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> (1) Subject to any other enactment, an application for review must be made—
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> (a) as soon as possible and, in any event, within 3 months after the day on which the grounds for the application arose; or
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> (b) if the court extends the period of 3 months—before the end of the extended period.
>
> (2) If the relief sought in an application for review is a certiorari order in relation to any judgment, order, conviction or other proceeding, the day on which the grounds for the application arose is, for the purposes of subsection (1), taken to be the day of the making of the judgment, order, conviction or other proceeding.

[11] Neither party made any submission about whether the decision made by the respondent comes within the description in s 46(2) of a "judgment, order, conviction or other proceeding". There is an issue anterior to the arguments raised by both parties, namely, whether certiorari is available in any event. I will deal with this later.

[12] The applicant became aware no later than August 1998 that a warrant had issued. He was at large until, at least, January 1999. He was sufficiently aware of his circumstances to write a four page letter (dated 7 September 1998) to the "Director General, Brisbane Corrective Services" in which he:

(a) admits being aware of the warrant having been issued,

(b) sets out his history of imprisonment and living arrangements since release,

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2 *Killick v The Commissioner of Police New South Wales* [2014] NSWSC 781.

(c) says he was told by New South Wales police "not to worry about parole", and

(d) says: "I am prepared to hand myself in to authorities with a lawyer if you insist."

[13] The three month period for making an application under the Act expired before the applicant was imprisoned in New South Wales. The applicant has not provided any explanation for waiting 16 years to make this application. He was, of course, incarcerated for much of that time but he does not say that was the cause of the delay.

[14] The applicant was aware of the consequences of being returned to Queensland to serve his sentence. In his submissions to the New South Wales Court of Criminal Appeal he asked the court to take that into account in his appeal against sentence. Smart AJ (with whom O'Keefe J agreed) dealt with that submission in this way[3]:

> "43 The applicant complained that the judge did not take into account that with the extradition he will serve a sentence of 30 years 8 months (including the time he spent in custody before his escape) and not just 28 years 2 months. The applicant reminded the Court of his age. If he is released on parole in New South Wales at the expiration of 15 years he will be 72 years of age. At that point having to serve a further 2½ years would be harsh. When considering the question of totality regard must be had to the present intention of the Queensland authorities to extradite the applicant to serve about 2½ years for an offence committed in 1984. There are no State boundaries when considering the question of totality: *Mill v The Queen* (1988) 166 CLR 59 at 67. Allowance has to be made for the long deferment of a sentence.
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> 44 While the head sentences on the various separate offences total 28 years, the law as to the accumulation of sentences and the sentencing structure adopted by the judge will result in the actual head sentences imposed in succession amounting to a total of 22 years. This is because each second and subsequent sentence imposed commences at the expiration of the non-parole period of the previous sentence. The statutory provisions are reviewed later. **This factor has to be taken into account when considering the present intention of the Queensland authorities to extradite the applicant. The remarks of the judge do not suggest that he took into account adequately the present intentions of the Queensland authorities**.
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> 45 The applicant stressed that he was likely to serve the whole of his sentence in maximum security and that the gaol authorities would not consider lowering his security after some years because of his escape and the warrant for his extradition. Prisoners who have escaped are usually held in tighter security for a number of years. Having regard to the applicant's age and health, this will impact upon him and the effect will be worse as he grows older. The judge expressed in detail his view that the applicant was

[3] *R v Killick* (2002) 127 A Crim R 273.

> unlikely to try to escape again. Unfortunately by his escape[4] the applicant brought a severer form of punishment upon himself. The Court is aware that gaol classifications are reviewed from time to time even for prisoners who have escaped." (emphasis added)

[15] The re-adjustment of the sentences imposed on the applicant is consistent with the court taking into account, among other things, the time he would spend in a Queensland prison upon release from a New South Wales prison.

[16] While I accept that being incarcerated presents considerable obstacles to making an application of this kind I do not accept that the applicant has satisfactorily explained his failure to seek an order in the period after he became aware of the warrant and before he was imprisoned for the New South Wales offences. As for the period of imprisonment, he gave no evidence of any attempt to make an application or anything which prevented him making an application. In the absence of any satisfactory explanation for the delay I refuse the application for an extension of time. It follows that the substantive application must be refused. Should I have erred in making that order, I will consider the other submissions.

Availability of relief

[17] The applicant submits that the "warrant relied on to justify the extradition is invalid because it was issued out of time." This argument is based on a number of matters, starting with s 189 of the 1988 Act. It provided:

> **"189.(1)** Where—
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> (a) a prisoner is released on parole pursuant to section 182 and the parole is cancelled or suspended by order of the Queensland Community Corrections Board or cancelled pursuant to section 187—that board or a member thereof; or

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[4] The "escape" referred to was described by Smart AJ elsewhere in his reasons:

> 11 "Prior to going into custody on 20 January 1999 the applicant was in a de facto relationship with Lucy Dudko. Thereafter she visited him at the Silverwater Correctional Centre frequently and they also exchanged telephone calls. On 8 March 1999, using the name Schwartz she hired a helicopter for a half hour flight over the Sydney Olympic site at Homebush. After a number of other bookings which were aborted she ultimately hired a helicopter capable of carrying two passengers for a flight at 9.15am on 25 March 1999. At 8.50am that day the applicant telephoned Dudko on her mobile telephone. She was in the Canterbury-Bankstown area,. The call lasted 26 seconds. At 9am the applicant and the prisoners from his pod were allowed out on to the prison oval. They were to be there from 9am to 10am.
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> 12 About 9.05 am Dudko arrived at the helicopter base at Bankstown Airport and paid for the intended flight. She stated that her boyfriend was not present. She arranged with the pilot to visit the Olympic site and Sydney Harbour. Once airborne and over the Olympic site she asked the pilot if she could have a look at the Silverwater gaol complex. As they flew past the gaol she produced a pistol, pointed it at the pilot's head and instructed him to land on the oval. As the helicopter landed the applicant ran to the helicopter and climbed in the side door. Dudko handed the applicant a rifle which he pointed at the pilot's head. Dudko instructed him to take off. He did so. The applicant complied with the pilot's insistence that the gun be pointed away from his head.
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> 13 A prison guard fired shots which hit the helicopter but did not stop it. As they flew away from the gaol Dudko directed the pilot to fly to Macquarie University. Eventually he landed in Christie Park near the University. Killick told the pilot to turn off the helicopter which he did. The pilot was then tied up by the applicant and Dudko.

> (b) a prisoner is released on parole pursuant to an order of the Queensland Community Corrections Board and the parole is cancelled or suspended by order of that board or cancelled pursuant to section 187—that board or a member thereof; or
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> (c) a prisoner is released on parole pursuant to an order of a regional community corrections board and the parole is cancelled or suspended by order of any such board or cancelled pursuant to section 187—any regional community corrections board or a member thereof;
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> may (whether or not a warrant has been issued under section 188) apply to a magistrate for a warrant directed to all police officers to apprehend the prisoner and convey the prisoner to a prison there—
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> (d) in a case where the prisoner's parole is cancelled—to serve the unexpired portion of the term of imprisonment or detention to which the prisoner was sentenced;
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> (e) in a case where the prisoner's parole is suspended—to be kept in custody for so long as the order suspending the prisoner's parole remains in force;
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> and a magistrate may issue such a warrant."

[18] It was submitted that the absence of a time limit for the taking of the actions referred to in s 189 meant that the provisions in s 38(4) of the *Acts Interpretation Act* 1954 should be applied, namely:

> "(4) If no time is provided or allowed for doing anything, the thing is to be done as soon as possible, and as often as the relevant occasion happens."

[19] The applicant argues that, because the warrant did not issue until some five years after the cancellation of parole, it did not issue "as soon as possible" and is therefore invalid.

[20] There are a number of problems with this argument. First, it relates to the warrant, whereas the application for review concerns the decision to seek a warrant. I was not referred to any legislative requirements concerning any time constraints on the making of such a decision. That is enough to defeat the argument.

[21] Secondly, if the argument is otherwise relevant, the applicant has not demonstrated that non-compliance with s 38(4) of the *Acts Interpretation Act* invalidates the warrant. As was said in *Project Blue Sky v Australian Broadcasting Authority* [5]:

> "[91] An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there can be discerned a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. …"

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5 (1998) 194 CLR 355.

[22] At the time that the application for the warrant was made, s 190(1) of the 1998 Act provided:

> **"190.(1)** Upon the cancellation of a prisoner's parole, the original warrant of commitment or other authority for the prisoner's imprisonment or detention shall again be in force and no part of the time between the prisoner's release on parole and the prisoner recommencing to serve the unexpired portion of the prisoner's term of imprisonment or detention, other than the period (if any) during which the prisoner was kept in custody consequent upon the prisoner's parole being suspended, shall be regarded as time served in respect of that term."

[23] Upon the cancellation of the applicant's parole he immediately became liable to serve the balance of his unserved sentence. That liability is not dependent upon the issue of a new warrant and, for the applicant to succeed on his argument, it would require an order that defeated the clear intention that a breach of parole results in a return to gaol. It follows that, even if the issue of the warrant was "issued out of time" that does not mean that it was invalid.

Is certiorari available, in any event?

[24] The applicant did not seek to establish that the decision to seek a warrant had a discernible legal effect[6]. There are many authorities to the effect that certiorari will not issue where the decision does not have such an effect.

[25] Finally, the applicant has not demonstrated that the respondent, in making the decision to apply for a warrant, committed a jurisdictional error or that there is an error of law on the face of the record. Certiorari is not available in the absence of those circumstances.

Order

[26] The application is dismissed. I will hear the parties on costs.

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6 See *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149 at 174.