IN THE COURT OF APPEAL OF NEW ZEALAND

CA341/2016
[2017] NZCA 250

BETWEEN	STANLEY ALLEN GILMOUR Appellant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing: 14 February 2017

Court: Harrison, Winkelmann and Asher JJ

Counsel: WGC Templeton for Appellant
D J Perkins and M J McKillop for Respondent

Judgment: 14 June 2017 at 11 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Winkelmann J)

Introduction

[1] The Parole Board is charged, by statute, with the duty of considering offenders for release on parole.[1] The paramount duty for the Board in making these decisions is the safety of the community — it may only release an offender on parole

[1] Parole Act 2002, s 21(1).

if satisfied on reasonable grounds the offender will not pose an undue risk to the community or any individual or class of people.[2] The Department of Corrections provides the Board with a range of information to assist the Board in performing this duty. Section 43(1)(c) of the Parole Act 2002 is the focus of this appeal. It requires the Department to provide a report to the Board but provides no detail as to its required content. Mr Gilmour is dissatisfied with the Department's fulfilment of its s 43(1)(c) duty to provide a report in respect of a particular prisoner, P. Mr Gilmour believes that the Department failed to pass to the Board information that he, then a probation officer, had collected or generated which was relevant to P's risk of reoffending and to the safety of the community.

[2] Mr Gilmour contends that, while there is no description of the content of the s 43(1)(c) report in the Parole Act, as a matter of statutory interpretation it is plain it should include all material that the Department has, or of which it is aware, which would assist the Board in its assessment of risk in relation to the offender. Mr Gilmour seeks a declaration that in "every statutory report filed with the Board under s 43(1)(c) of the Parole Act 2002 [the Department] should address as a relevant matter for the Board's consideration and assessment whether an offender might pose an undue risk to the safety of the community or any person and the offender's likelihood of reoffending".[3] He contends on appeal that the High Court was wrong to decline to make that declaration.

The preparation of the s 43(1)(c) report for P

[3] Although we do not intend to consider grounds of appeal relating to factual findings of Ellis J (because those findings are not relevant to this appeal), a brief description of the events that led Mr Gilmour to issue these proceedings is useful as it assists in understanding the essence of Mr Gilmour's argument.

[4] In this case the offender P was serving a sentence of three years and nine months' imprisonment for causing grievous bodily harm with intent to injure. His first parole hearing was scheduled for January 2014. In September 2013 his prison-based case manager began preparing the s 43(1)(c) report for Mr P's January

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2 Section 28(2).

3 He seeks the declaration pursuant to s 3 of the Declaratory Judgments Act 1908.

parole hearing. She completed the summary of P's progress toward addressing his rehabilitative and reintegrative needs during his sentence. She obtained information from P as to his release proposal including programmes he intended to complete in prison prior to his parole; his proposed release address, employment and financial information, relationships and whānau support; and issues relating to his victim. The information was collated and then transmitted to the particular Community Corrections centre which was local to the address where P intended to reside when released from prison. Mr Gilmour was the probation officer allocated to assist in the preparation of the report.

[5] Mr Gilmour completed a draft report which canvassed in detail earlier offending by P. It commented, adversely, on P's progress with rehabilitation, identifying rehabilitative needs that had not been met. Mr Gilmour set out matters he considered should be attended to before release, concluding that "[t]he Probation Service do not support the application for [parole] due to the limited amount of work recorded and completed specifically related to the index offending, past offending of similar nature, and/or psychological evaluation".

[6] The principal case manager for P was concerned as to the content in the report prepared by Mr Gilmour, and in particular that:

(a) Mr Gilmour's contribution contained irrelevant and duplicated information already before the Board, in particular in relation to P's offending history;

(b) the contribution omitted relevant information about programmes P had already completed in prison; and

(c) Mr Gilmour expressed his own views regarding P, at times using language which was derogatory and "unprofessional".

[7] Although some changes were discussed with Mr Gilmour and agreed to, ultimately he refused to make all changes requested, later leaving the employ of Community Corrections. The report was rewritten and submitted to the Board for

the January 2014 hearing. At that point the Board declined parole and sought further information, including a psychologist's report. Six months later following a July 2014 hearing before the Board, P was released on parole. In February 2015, after further criminal assaults, he was recalled to prison.

[8] Mr Gilmour was aggrieved that the report he drafted was not passed to the Board. He believed the Board was thereby deprived of "all relevant information available at the time" — what the Board is required to have when deciding whether to grant parole. He claims the Department was obliged to pass on his report, containing as it did important information in relation to P, including details of his earlier offending not otherwise before the Board, the views of other agencies as to parole and the suitability of the address it was proposed P would live at and, finally, his own view that P should not yet be released on parole.

Judgment of Ellis J

[9] The issue addressed by Ellis J in the High Court was whether the s 43(1)(c) report is required to address whether an offender might pose an undue risk to the safety of the community or any person and their likelihood of further offending.[4] The Judge noted that the Parole Act is silent on the content of a s 43(1)(c) report.[5] Whilst accepting that the Parole Act is essentially concerned with risk and risk assessment,[6] she said the provisions of the Parole Act make clear that it is the Board and no other who is expressly charged with assessing risk and with making parole decisions.[7] There is nothing in the Parole Act to suggest that the Department, probation officers or any of the other persons or entities required to report under s 43 have an advisory or recommendatory role in that regard.[8] She accordingly declined to issue a declaration.[9]

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4 *Gilmour v Chief Executive of Department of Corrections* [2016] NZHC 1352 at [44].
5 At [45].
6 At [46].
7 At [48].
8 At [49].
9 At [51].

Statutory and administrative context

Statutory framework

[10] The Board is constituted as a specialist body charged with making decisions in connection with the parole of sentenced prisoners.[10] Board members are appointed by the Governor-General on the recommendation of the Attorney-General.[11] Before recommending a person for appointment to the Board, the Attorney-General must be satisfied that the person has:[12]

> (a) knowledge or understanding of the criminal justice system; and
>
> (b) the ability to make a balanced and reasonable assessment of the risk an offender may present to the community when released from detention; and
>
> (c) the ability to operate effectively with people from a range of cultures; and
>
> (d) sensitivity to, and understanding of, the impact of crime on victims (as defined in section 4 of the Victims' Rights Act 2002).

[11] Section 7 of the Parole Act sets out a number of principles by which the Board must be guided when making decisions in connection with the release of sentenced prisoners. Section 7(1) provides that "the paramount consideration for the Board in every case is the safety of the community". Significant also is s 7(2)(c) which provides, as one of the guiding principles, "that decisions must be made on the basis of all the relevant information that is available to the Board at the time".

[12] The Board, in order to fulfil its statutory functions, naturally has regular contact with the Department. One of the purposes of the corrections system "is to improve public safety and contribute to the maintenance of a just society by … providing information to the ... Board to assist [it] in decision-making".[13] Section 43 of the Parole Act, the subject matter of this appeal, requires the Department to provide information to the Board as follows:

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10 See generally Parole Act, s 109.
11 Section 111(1).
12 Section 111(3).
13 Corrections Act 2004, s 5(1)(d).

43 Preparation for hearings

(1) When an offender is due to be released at his or her statutory release date, or to be considered by the Board for parole, the Department of Corrections must provide the Board with—

(a) copies of all relevant information relating to the offender's current and previous convictions, including (for example) sentencing notes and pre-sentence reports; and

(b) if the offender has engaged in any restorative justice processes, any reports arising from those processes; and

(c) in the case of an offender detained in a prison, a report by the Department of Corrections; and

…

(e) in the case of an offender currently detained in, or on leave from, a hospital, a report from the responsible clinician (or the most suitable other health professional to provide such a report) concerning the offender and any care programmes that the hospital has put, or intends to put, in place for the offender; and

(ea) in the case of an offender currently detained in, or on leave from, a secure facility, a report from the compulsory care co-ordinator concerning the offender and the care and rehabilitation plan that has been, or is to be, put in place for the offender; and

(f) in the case of an offender currently detained in a social welfare residence (as described in section 11), a report from the chief executive of the department for the time being responsible for the administration of the Children, Young Persons, and Their Families Act 1989.

[13] There are also other sections which require the Department to provide information to the Board on request. For example, s 34(1) provides that the Board must request and obtain a report from the Chief Executive of the Department before imposing residential restrictions on an offender. Section 34(2) details the matters such a report is to address:

34 Prior report on suitability of residential restrictions

…

(2) The matters are as follows:

(a) the nature of the offence or offences for which the offender is currently serving a sentence of imprisonment or has previously been convicted:

(b) the likelihood that the residential restrictions will prevent further offending on the part of the offender:

(c) the likelihood that the offender's rehabilitation and reintegration will be assisted by residential restrictions:

(d) the suitability of the proposed residence, including the safety and welfare of the occupants of the residence where the offender is to reside.

[14] As well as providing information to the Board, the Department is obliged, by the terms of s 110 of the Parole Act, to provide administrative and training support to enable the Board to perform its functions efficiently and effectively.

Administrative arrangements

[15] The Department and the Board have entered into two memoranda of understanding. Each record that the purpose of the memorandum is to provide:

> … the framework for the ongoing relationship between the parties, for the Department to provide the administrative and training support required by the Board, and for the Board to perform its functions efficiently and effectively.

[16] Each of the 2008 and the replacement 2012 memorandum have a schedule detailing the Department's responsibilities, including the responsibility to provide information to the Board about offenders in prison who are to be considered for parole. The schedule to the 2008 memorandum requires the Department to provide the following information to the Board:

> **Provision of information and reports in accordance with section 43(1) of the Parole Act 2002 including:**
>
> Copies of all relevant information relating to the offender's current and previous convictions. This will include Judge's sentencing notes, summary of facts, pre-sentence reports and any specialist reports completed by the Department at the time of sentence.
>
> A Parole Report in terms of section 43(1)(c). This report is to cover the offender's progress towards the goals identified in their individual sentence plan.
>
> Psychological and any other specialist reports that may have been requested by the Board. It is however acknowledged that some reports (e.g. forensic psychiatric reports) may not be automatically provided by the Department. The Board may make its own arrangements to receive such reports.

[17] The detail in the schedule to the 2012 memorandum is considerably reduced. Under the heading "Information to the Board: Offenders in prison to be considered for parole", the schedule states as follows:

> Section 43 of the Parole Act requires that the [Department] must provide the Board in all cases copies of all relevant information relating to the offender's current and previous convictions including sentencing notes and pre-sentence reports. In addition a report on the offender's progress in prison and recommendations on release.

Parole assessment reports and parole officers

[18] The Department calls the report it provides under s 43(1)(c) the parole assessment report (PAR). In compliance with the 2012 memorandum of understanding, the PAR provides the Board with information about the offender's:

(a) response to rehabilitative interventions/treatment and reintegration activities during the course of their sentence;

(b) response to previous parole orders and community-based sentences if applicable;

(c) current risks;

(d) rehabilitative needs (offending factors such as alcohol and drug use, and anger management), and plans for how these have been or can be addressed;

(e) reintegrative needs and in particular accommodation, employment, finance, relationships, community supports, victim issues and health care, and plans to meet those; and

(f) proposed special conditions of release and proposed length of conditions.

[19] The PAR is prepared using a standard template. Its production is driven primarily by the case management staff based at the prison in which the offender is

incarcerated. The case manager interviews the offender and completes a draft proposal for release. That draft proposal is then sent to the Community Corrections service, which allocates the file to a probation officer in the service area in which it is anticipated the offender will reside upon release. Content is contributed to the report by the probation officer. At some point, content is also contributed by facilitators/instructors who run rehabilitative and reintegrative programmes, custodial staff and psychologists. Ultimately, a principal case manager pulls this material together, signing the final version of the PAR as the "departmental representative".

[20] Probation officers are appointed by the Chief Executive of the Department under the provisions of the Corrections Act 2004.[14] They have many functions including providing reports and information that a court, the Board or a prison manager may require under any enactment; supervising offenders released on parole; and ensuring that conditions of parole are complied with.[15] The Chief Executive may issue guidelines and instructions to probation officers and has issued such guidelines in connection with the preparation of PARs.[16] These guidelines describe tasks to be undertaken. The guidelines do instruct corrections staff to take various steps to assess risk, but this is for the purpose of enabling the staff member to provide the information in the PAR set out in [18] above.

Argument on appeal

[21] There are two preliminary matters as to the scope of this appeal which can quickly be cleared away. One of Mr Gilmour's criticisms of Ellis J's judgment is that she mischaracterised the relief he seeks, recasting the declaration sought as to what a s 43(1)(c) report is "required" to contain. Mr Templeton for Mr Gilmour was firm in his submission that he sought a declaration as to what a s 43(1)(c) report "should rather than is required to address". But we consider that the Judge was correct to recast the relief sought in that manner. We accept counsel for the Department Mr Perkins' submission that the Courts are not, when exercising this jurisdiction, concerned with what might be considered advisable as a matter of sound

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14 Corrections Act, s 24.
15 Section 25(1).
16 Section 196(1).

public administration. When a court exercises its jurisdiction to issue a declaratory order as to the proper construction of a statute, it is concerned to declare what the law requires.

[22] Other criticisms of Ellis J's judgment relate to her characterisation of the events surrounding the preparation and content of the PAR for P. Those are arguments we do not propose to address. The issue on appeal is purely one of statutory interpretation and arguments in connection with P's case do not assist us with that issue.

[23] That leaves Mr Gilmour's primary ground of appeal — that the Judge was wrong to find that s 43(1)(c) does not require the Department to address the issue of undue risk in the report it provides under that paragraph. Mr Templeton argues that consideration of the overall statutory scheme leads inevitably to the conclusion that the Department should do so. This flows from the guiding principles described above; that safety of the public is the paramount consideration; and that the parole decision must be based upon all relevant information available at the time. Parliament gave the Board a wide discretion to receive all types of information, whether admissible evidence or not, that it "thinks fit".[17] On that basis, genuinely held risk and safety assessments obtained by the Department in the course of a specific investigation are relevant information for the Board, and should be passed to it.

[24] This conclusion is reinforced, he argues, by s 28(2) of the Parole Act which provides that the Board may only direct that an offender be released on parole:

> (2) … if it is satisfied on reasonable grounds that the offender, if released on parole, will not pose an undue risk to the safety of the community or any person or class of persons within the term of the sentence, having regard to—
>
> (a) the support and supervision available to the offender following release; and
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> (b) the public interest in the reintegration of the offender into society as a law-abiding citizen.

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[17] Parole Act, s 117(1).

[25] If the Board may only make a decision to release an offender on parole if satisfied that the offender will not pose an undue risk, it is clear, Mr Templeton submits, that all relevant "risk" information available on the crucial issues of "safety of the community or person or class of persons" should be included in the PAR.

[26] Mr Templeton further submits that it is significant that the guidelines provided to parole officers specifically require them to address "risks". For example, they require that parole officers recommend special conditions to be imposed upon the offender to manage the risk of reoffending, and to facilitate the rehabilitation and reintegration of the offender or provide for the reasonable concerns of the victim. He notes that before a probation officer can propose "special conditions" as to reducing risk, the officer must first assess "risk" in order to be able to assist the Board in its design of those special conditions.

[27] Mr Templeton says the interpretation of s 43(1)(c) he contends for also flows from the guiding principle in s 7(3) of the Parole Act:

> **7 Guiding principles**
>
> …
>
> (3) When any person is required under this Part to assess whether an offender poses an **undue risk**, the person must consider both—
>
> (a) the likelihood of further offending; and
>
> (b) the nature and seriousness of any likely subsequent offending.

He argues that the phrase "any person" in s 7(3) includes probation officers.

[28] Mr Templeton submits that the memoranda of understanding do not assist the interpretive task as their purpose is only to set out the basis upon which administrative support is provided, and not to regulate the flow of information between the Department and the Board. Moreover, an understanding reached between the Department and the Board cannot help with statutory interpretation.

Analysis

[29] The issue in this appeal is concerned with the correct statutory interpretation of s 43(1)(c). The principles to be applied when interpreting a statute are not in dispute. Text and purpose are the key drivers of statutory interpretation. Even if the meaning of the text appears to be plain, it should always be considered against purpose.[18]

[30] As the Judge observed, the starting point is the words of the statute. Section 43(1)(c) does not stipulate the content of the report. We agree with the Judge that this omission is properly construed as deliberate. It is to be contrasted with the other provisions in the Parole Act, such as s 43(1)(a) and (b) and s 34, where the information or matters to be addressed are described in detail.

[31] We also note that some of the content which Mr Gilmour argues s 43(1)(c) obliges the Department to include in the report is required by other provisions of the Parole Act. Section 43(1)(a) requires that the Department pass on information relating to current and previous convictions. Similarly, the Department is required to pass on information in relation to restorative justice — relevant to the Board's assessment of the offender's remorse and insight into their offending.[19] Issues of suitability regarding a proposed residential address, including the likelihood it will prevent further offending and its suitability, are issues to be addressed by the Department under s 34 of the Act.

[32] As Mr Perkins submits, s 43(1) as a whole tends to demonstrate the matters which are not required to be canvassed in a s 43(1)(c) report — those which are separately required under s 43(1)(a) and (b) — and also indicates that Parliament has deliberately chosen not to prescribe the content of other reports to be provided.

[33] As to the broader scheme of the Parole Act, Mr Templeton is correct in his submission that the assessment of risk lies at the heart of the task the Board must undertake. However, the provisions he relies upon emphasise it is the Board, and not

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[18] *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22] per Tipping J.

[19] Parole Act, s 43(1)(b).

the Department and certainly not any individual parole officer or case manager, whose task it is to undertake that risk assessment. Section 7 sets out the guiding principles for the Board in reaching decisions as to the release of offenders on parole. Section 28(2) imposes a mandatory statutory obligation on the Board relating to the Board's legal ability to make a decision releasing an offender. Add to this the required qualifications for Board membership, which include skills and ability in risk management.[20]

[34] Mr Templeton argues the phrase "any person" in s 7(3) includes probation officers, and it therefore follows that probation officers must address the matters set out in s 7(3) and provide the product of that consideration to the Board. However, the Parole Act is explicit in respect of those who are required to assess the issue of undue risk and when they are required to do so. There are two scenarios in which it is envisaged that parole officers may make an assessment of "undue risk".[21] These circumstances are explicitly defined and are limited in nature. They are in no way relevant to the s 43(1)(c) report. We do not see how this subsection assists Mr Templeton.

[35] We therefore consider that the overall statutory scheme is inconsistent with any requirement that the Department form and convey a view to the Board concerning the related issues of undue risk and risk of reoffending.

[36] We also see nothing in the statutory scheme which supports Mr Templeton's submission, based on the premise that Mr Gilmour's report is relevant information, that the Department is under a specific duty to pass on all "relevant information" without exercising its own judgement as to what is relevant: s 43(1) contains no such obligation. Mr Templeton says that this flows from the Board's duty, imposed by s 7(2)(c) (see at [11] above), to consider all relevant information that is available to the Board at the time. But s 7(2)(c) is plain in its intent. The Board's obligation is to consider information made available to it, or which it obtains, if that information is relevant. It does not, by its terms, impose a discrete obligation upon the Department

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20 Parole Act, s 111(3)(b).

21 Sections 60(2) and 61(a); and s 107P(3)(a).

to pass on all "relevant information". The Department's duties are separately prescribed by s 43.

[37] The Parole Act expressly sets up a relationship of cooperation and support between the Board and the Department. While the Department will be the primary source of most of the relevant information as detailed elsewhere in the Parole Act (such as offending history and sentencing notes, and the information the Board can request as to a proposed parole address), the Parole Act is deliberately silent on the information to be included in the s 43(1)(c) report: it leaves that decision for the Department's judgement. What the Department includes in the s 43(1)(c) report is left for it to determine, but as Mr Perkins submits, that determination will be shaped by its general appreciation of the Board's needs and expectations. Based on the current memorandum of understanding, this will include the rehabilitative and reintegrative activities undertaken by the individual offender while in prison, and their needs if released into the community.

[38] For the reasons we have set out above, it was open to the Department to view the information Mr Gilmour complains was not conveyed to the Board (his own assessment of risk) as not relevant to the Board's task.

[39] We do not see that this interpretation creates the potential for troubling gaps in the information before the Board. The Board, as the expert body, is the best judge of what is relevant and what it needs, and s 43(1)(c) allows flexibility to the Board and Department to reach an administrative arrangement which ensures that the Board receives that information.

[40] We agree that the memoranda cannot shape the interpretation of the Parole Act, but they do illustrate just how the Department and Board have worked together in relation to the provision of relevant information, an approach we consider Parliament intended when it omitted a description of required content for the s 43(1)(c) report.

[41] We also do not consider that the Department's guidelines issued to parole officers can affect the statutory obligation imposed upon the Department by

s 43(1)(c). Departmental practice cannot affect statutory interpretation. In any case, they do not assist Mr Gilmour's case. Although the guidelines require some risk assessment work to be undertaken, this is for the purpose of providing the Board with the information set out at [18] above and not for the purpose of passing on to the Board the probation officer's own view of whether the offender would pose an undue risk if released. To conclude, we see no error in the Judge's approach to this issue of statutory interpretation. The interpretation for which Mr Gilmour contends is not supported by the text or purpose of the Parole Act. To require the Department to address in its s 43(1)(c) report whether an offender might pose an undue risk to the safety of the community and the offender's likelihood of reoffending cuts across the scheme and purpose of the Act. It risks supplanting the role of the Board as expert decision-maker.

[42] The appeal is dismissed.

Costs

[43] Mr Templeton argues that there should be no award of costs as the litigation raised issues of public importance by bringing clarity to what PARs should contain. However, we accept Mr Perkins' submission that there is no evidence of a lack of clarity. We do not consider that there is any basis to reduce the order of costs on the basis that the appeal raised issues of public interest.

Result

[44] The appeal is dismissed. The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Sellar Bone & Partners, Auckland for Appellant
Crown Law Office, Wellington for Respondent