IN THE COURT OF APPEAL OF NEW ZEALAND

CA3/05

BETWEEN	PETER NEIL CAMPBELL Appellant
AND	THE SUPERINTENDENT, WELLINGTON PRISON Respondent

Hearing: 4 February 2005

Court: Anderson P, McGrath and O'Regan JJ

Counsel: D Watt for the Appellant
V Sim and J Foster for the Respondent

Judgment: 14 February 2005

JUDGMENT OF THE COURT

The appeal against the High Court's refusal of the appellant's habeas corpus application is dismissed.

REASONS

(Given by McGrath J)

[1] This is an appeal against a judgment delivered by MacKenzie J in the High Court at Wellington on 14 December 2004 refusing an application by the appellant, a sentenced prisoner, for a Writ of Habeas Corpus.

Introduction

[2] In the High Court the appellant argued that there was no continuing lawful basis for his detention at Wellington Prison. The central issue was whether an order made by the Parole Board on 4 May 2003, that the appellant not be released until three months prior to the expiry date of the full term of his sentence, remained in effect as the lawful basis for his continuing detention.

Background

[3] On 2 April 1993 the appellant was sentenced in the High Court at Auckland to an effective period of imprisonment of eight years three months on charges of rape, sexual violation by unlawful sexual connection and indecent assault on a boy aged under twelve years. On 10 May 1995 he was sentenced in the High Court to a further term of imprisonment of six years, on a charge of rape, to be cumulative on his earlier sentence. His total sentence is accordingly 14 years three months imprisonment. Under provisions of the Criminal Justice Act 1985, which continue in effect under the Parole Act 2002, the appellant was required to serve two thirds before reaching his "final release date" under that Act. That date was established in judicial review proceedings brought in the High Court. In a judgment delivered on 20 June 2002 Paterson J held the appellant's final release date to be 20 October 2002.

[4] On 4 June 2002 the general manager of the Public Prisons Service in the Department of Corrections, acting on behalf of the Chief Executive, applied under s 105 of the 1985 Act for an order that the applicant not be released until his "applicable release date," the effect of that being that he would be required to serve all but three months of the full term of his sentence, so that he would not be released until 1 April 2007.

[5] On 4 March 2003 the Parole Board granted the Chief Executive's application. There were reviews of the Board's order, as required by the 2002 Act, on 27 August 2003 (adjourned to 24 September 2003), 17 December 2003 and 26 May 2004. In

each case it was decided that the earlier decision of the Parole Board that the applicant should not be released before his applicable release date, should remain in effect.

[6] There have been challenges in earlier High Court proceedings, by way of applications for habeas corpus, to the various determinations of the Parole Board which it is unnecessary for us to traverse in this judgment.

[7] On 16 August 2004 the Parole Board reheard the original application by the Department for an order under (now) s 107 of the 2002 Act. We were informed that this followed legal advice to the Board in relation to the fact that its decision of 4 March 2003 had been taken with a person who was not a member of the Board participating in the process. The Parole Board's decision on the rehearing was given on 10 December 2004. The Board then made the order sought on the s 107 application.

Legislative provisions

[8] The Parole Act 2002 was brought into force on 30 June 2002. Its provisions replaced those in Part VI of the 1985 Act dealing with administration of custodial sentences (s 3). Part 1 of the 2002 Act deals with parole and other release from detention. Subpart 4 of Part 1 (which includes s 107) deals with transitional arrangements for offenders serving sentences imposed prior to the Act's commencement date. The appellant is covered by these provisions. At the time the 2002 Act came into effect the application made under s 105 of the 1985 Act had not been determined by the Board. The 2002 Act provided that it had to be dealt with under s 107 of the 2002 Act.

[9] Section 107 of the 2002 Act operates by way of exception to general provisions in that Act whereby an offender must be released by the offender's final release date which, in relation to a sentence of imprisonment imposed before the Act's commencement date, continues to be that determined under the 1985 Act. The section applies to an offender who is subject to a sentence of imprisonment for a fixed term for a specified offence, which includes sexual crimes punishable by seven

or more years imprisonment. Under s 107(2) the Chief Executive may apply to the Parole Board for an order that the offender not be released before the applicable release date. This is defined in s 107(9) as three months before the sentence expiry date. The Board must make the order sought if satisfied that the offender would, if released earlier, be likely to commit a specified offence between the date of release and the applicable release date (s 107(3)). It must give written reasons for its decision (s 107(5)).

[10] Section 107(4) stipulates procedural requirements of the Board in dealing with the application:

> A copy of the application under subsection (2), and a copy of any report submitted to the Board, must be given to the offender at least 14 days before the application is to be considered, and the offender must be given an opportunity to appear before the Board and state his or her case in person or by counsel.

[11] Section 107(6) requires that, following the making of an order under s 107, there are regular reviews of the offender's position by the Board. It provides:

> An order made under this section must be reviewed by the Board at least once in every 6 months following the making of the order, and subsection (4) applies to every review, with all necessary modifications.

[12] On a review the Board must revoke the order if it is no longer satisfied that, if released before the applicable release date, the offender would be likely to commit a specified offence between the date of release and that date. Section 107(8) provides that:

> An order made under this section expires on the applicable release date, unless revoked earlier under subsection (7).

[13] Finally, a significant consequence of the bringing of an application under s 107 by the Chief Executive is that an offender may not be released until the application is determined (s 104(3) of the 2002 Act). A similar provision appeared in the 1985 Act (s 90(3)).

High Court judgment

[14] In the High Court the appellant claimed that his procedural rights under s 107 had been breached with the consequence that the s 107 order no longer had effect. He said that the review of the order, under s 107(6), which should have been undertaken within six months of 26 May 2004, had not taken place. The hearing on 16 August 2004 was in the nature of a rehearing of the original application and not the review required by the Act.

[15] The Parole Board records before the Court indicated that the procedural requirements of s 107(4) of the Act had not been met in relation to the hearing on 16 August, whether it was a rehearing of the application or a review of the order in effect, in that 14 days notice of the hearing had not been given to the appellant. The appellant had been given written notice of the 16 August hearing on 5 August 2004. As well, a report from a psychologist in the Department of Corrections was considered by the Board at the hearing but had not been made available 14 days in advance to the appellant as required by subs (4).

[16] In his oral judgment dismissing the application, MacKenzie J observed that, albeit in the course of a rehearing of the original application rather than a review of the existing order, it was clear that on 16 August 2004 the Parole Board had focussed on the appellant's contemporary situation. This meant that all matters relevant to a review as at that date, under s 107, would have been canvassed before the Board. In particular, up to date reports on the appellant had been obtained and provided to the Board, although one adverse to the appellant was not provided within the required time.

[17] MacKenzie J concluded that there had not been full compliance with the statutory procedural requirements. He decided that the consequences of non-compliance turned on whether the appellant was being unlawfully detained and noted in that respect that, under s 107(8), an order made expired only if it was revoked under s 107(7), following a review. Until any such revocation it remained in force. The Judge reasoned from this that the failure to conduct a review within six

months of that undertaken on 24 May 2004 did not make subsequent detention pursuant to the s 107 order unlawful. A contrary conclusion would have flown in the face of s 107(8), which provided that an order continued in effect until the applicable release date unless it was revoked. MacKenzie J observed that, in any event, there had been in many respects substantial, if not strict, compliance by the Board with the requirements of the section.

[18] Finally, the Judge pointed out that judicial review proceedings might still be open to decide whether the steps taken in August were sufficient to give rise to adequate consideration of the issues that would be addressed on a review.

[19] For these reasons he dismissed the application for habeas corpus.

Argument on appeal

[20] When the appellant applied to the High Court for habeas corpus on 8 December 2004 he asserted that he was "now wrongfully detained by the respondent". In a memorandum accompanying the application his counsel elaborated on the basis of his alleged wrongful detention by reference to the nature of the Parole Board's hearing on 16 August 2004. Counsel said that because this was a de novo hearing of the original application by the Chief Executive under s 107, it was not the review of the order which the Board was bound to undertake, under s 107(6), within six months of the review on 24 May 2004. There having been no review of the order by 24 November 2004, it was the appellant's contention that there had been no lawful basis for his detention since that date. He argued that the failures to comply with the requirements of 14 days notice of the hearing, and prior provision of the psychologist's report, had the same effect.

[21] The broad argument of the appellant in this Court was that the High Court Judge's interpretation of s107 and in particular s 107(8) was wrong. Mr Watt made two central points in his written submissions. First, he argued that there was a conflict between s 107(6) and (8) of the Parole Act, which should be resolved by holding that the latter does not override the obligations imposed by the former. If that were accepted, s 107(8) would not preclude the Court from granting a writ of

habeas corpus where there had been a failure by the Board to comply with s 107(4) or (6) before either making an order that an applicant serve the whole of his sentence, or deciding not to revoke an existing order.

[22] Mr Watt's second and related argument was that continuing compliance with the procedural mechanism set out in s 107(6) was essential to a valid decision to make a s 107(6) order. Failure to review the applicant's detention each six months, he said, made the continuing detention unlawful, and s 107(8) did not provide otherwise.

[23] On this basis the appellant contended that the lack of strict compliance with s 107 invalidated the s 107 order and made the subsequent detention of the appellant, beyond his final release date, ultra vires and unlawful.

[24] Mr Watt also invoked the interpretative direction in s 6 of the New Zealand Bill of Rights Act 1991 in support of this argument. The rights relied on in the submissions were the right not to be arbitrarily detained (s 22) and the right to natural justice (s 27(1)). Section 23(c) of course gives a right to be released from detention on an application for habeas corpus if the detention is found to be unlawful.

[25] Ms Foster, for the respondent, supported the reasoning of the High Court Judge. She relied on s 107(8), saying that it expressed a statutory intention that procedural breaches would not result in the release of a prisoner prior to the applicable release date. In the case of any failure to meet the requirement for six monthly review, the appropriate remedy was an order in the nature of mandamus directing the Parole Board to hold the review hearing. Counsel also took issue with the applicant's proposition that the order made under s 107 ceased to exist once it was shown that there had been procedural breaches of s 107. She said that was contrary to the scheme and purpose of the section.

Decision

[26] Unfortunately the Parole Board's written decision following the 16 August 2004 hearing was not delivered until 10 December 2004. We were told that it was handed to counsel for the appellant immediately prior to the commencement of the habeas corpus hearing before MacKenzie J on 14 December 2004. It appears on its face to be a decision on a rehearing of the s 107 application, as counsel maintained, and it also seems clear that there was no Parole Board process expressly addressed to reviewing the s 107 order during the six month period since the last review on 26 May 2004. The Judge said that there was considerable force in the submission that there was a difference between the two processes and that the appellant and his advisor may have been misled as to the nature of the hearing on 16 August.

[27] The Judge also found that there was a lack of strict compliance with s 107(4) in relation to the notice given to the appellant of the hearing on 16 August and the provision to him of the report on his situation by the Department of Corrections' Psychological Service. The written notice of the hearing on 16 August was given on 5 August 2004. It is not precisely clear when the psychologist's report was provided to the appellant's counsel. It is dated 13 August and obviously cannot have been provided before then.

[28] It does not, however, invariably follow from the demonstration of an irregularity in Parole Board proceedings that orders made or confirmed in such proceedings will cease to have effect.

[29] Subject to any particular statutory provision, the correct approach to determining the consequences of such errors is that stated by Cooke J in *Burr v Blenheim Borough Council* [1980] 2 NZLR 1, 4 as follows:

> When a decision of an administrative authority is affected by some defect or irregularity and the consequence has to be determined, the tendency now increasingly evident in administrative law is to avoid technical and apparently exact (yet deceptively so) terms such as void, voidable, nullity, ultra vires. Weight is given rather to the seriousness of the error and all the circumstances of the case. Except perhaps in comparatively rare cases of

> flagrant invalidity, the decision in question is recognised as operative unless set aside. The determination by the Court whether to set the decision aside or not is acknowledged to depend less on clear and absolute rules than on overall evaluation; the discretionary nature of judicial remedies is taken into account.

[30] The application of this principle in this case raises some procedural problems. Although the appellant's application for habeas corpus was based on his wrongful detention, to establish that ground it was first necessary for him to impugn the existing order of the Parole Board under s 107 requiring that he not be released from prison until three months before his sentence expiry date. Until that order should be set aside it provides a lawful basis for his detention. As indicated, to achieve that result it was necessary for the appellant in the High Court to establish, not only that there were irregularities in the Board's procedures under s 107, but that the nature of the effect of the defects on the process is such that the orders should be set aside. This is a matter of evaluating the impact of the procedural errors in all the circumstances of the case in light of the statutory provision. Ultimately in this case it was a matter for the Court's discretion what relief should be appropriate.

[31] Accordingly the High Court, having found that there were irregularities, had to evaluate their significance in all the circumstances to decide if it was appropriate to quash the order made on 10 December 2004. MacKenzie J, in effect, did that in relation to the Board's failure to review the s 107 order prior to 24 November 2004. He concluded that the procedure adopted by the Board at the hearing on 16 August had focussed on the situation of the appellant at the time of the hearing. Up to date reports on the appellant had been obtained and addressed. The Board appeared to have canvassed at the hearing, and in its decision had addressed, matters relevant to a review, albeit in the context of a fresh hearing of the application. In those circumstances, its failure to undertake a review within the required time was no more than a technical irregularity. It had been open for the appellant to raise any questions concerning the key issue of his likelihood of reoffending on release on parole, during the hearing that the Board did conduct. Accepting that what happened was irregular, these circumstances certainly do not warrant an order of the Court setting aside the s 107 order made by the Board.

[32] Mr Watt was unable to point to any particular problems arising from the short notice of the hearing on 16 August. It is not precisely clear from the record when the report of the Department's psychologist was provided to the appellant and Mr Watt accepts it may have been provided two or three days before the hearing on 16 August.

[33] There are also evidential difficulties in relation to the complaint concerning the failure to provide the departmental psychologist's report within the required time. While Mr Watt maintained to us in oral submissions that the appellant was disadvantaged by the late receipt of the report, no evidence was put to the Court by the appellant as to the circumstances at the Parole Board hearing. It is clear that no adjournment was sought by Mr Watt at the time. It is also apparent from the Board's decision that a forensic psychiatrist gave evidence at the hearing for the appellant, as did the Department's psychologist, and that both professional witnesses were cross-examined. On the limited material before us concerning the effect of late receipt of the report, there is insufficient information to warrant the Court granting the unusual remedy of setting aside the Board's decision of 10 December 2004.

[34] As indicated, the statutory context is important in deciding what are to be the consequences of irregularities in the Board's procedures on an application for judicial review. Sections 104(3) and 107(8) indicate that there is a general statutory policy that offenders should be detained beyond their final release date while decisions of the Board concerning the application of s 107 remain to be taken. Often this policy will influence the High Court's decision on whether to quash s 107 orders which are irregular and which need to be reconsidered, with the result that the prisoner is released on the final release date. We should, however, make plain that we do not consider that s 107(8) precludes the Court from granting a remedy that quashes an order made under s 107 in an appropriate case. Nor do we see any internal inconsistency in the section or other ambiguity requiring us to consider the Bill of Rights. Section 107(8) provides that an order expires on the applicable release date unless it is previously revoked by the Board under s 107(7). That assumes there is a valid order. The provision has no application to an order which the Court has concluded should be quashed on account of the seriousness of the departures from statutory requirements in the making or reviewing of it. The scheme

of s 107, when read with s 104, is likely in most cases involving irregularities to indicate that a rehearing of the defective application or review procedure is required with detention continuing until that is resolved.

[35] In recent years this Court has indicated on several occasions that where the crucial question arising in a citizen's claim of wrongful detention concerns the validity of an administrative decision authorising that detention, the appropriate method of seeking judicial intervention is by an application to the High Court for judicial review (rather than for habeas corpus). In judgments such as *Manuel v Superintendent of Hawkes Bay Prison* [2005] NZLR 161 and *Bennett v Superintendent of Rimutaka Prison* [2002] 1 NZLR 616 the Court has emphasised that the judicial review procedure affords an effective, flexible and expeditious process for securing release from unlawful detention. Where a considered judicial examination and evaluation of facts concerning the validity of an administrative decision is necessary to establish the unlawfulness of the detention, it is more suitable than the very important but essentially summary procedure of habeas corpus.

[36] The present case provides a prime example. Had the appellant proceeded by way of judicial review, filing supporting affidavits addressed to the circumstances said to result in the invalidity of the orders made by the Parole Board, and joining it as a party which would respond, it would have been possible for the High Court and this Court on appeal to ascertain all relevant facts and evaluate the overall significance of the defects of procedure alleged and proved. The case in the end was unsuitable for determination by the summary procedure of a habeas corpus application, as the degree of judicial evaluation of the circumstances that the case required could not be effectively undertaken in that process.

[37] MacKenzie J suggested that a judicial review proceeding might still be possible following his dismissal of the habeas corpus application. That might technically be so. It will, however, be apparent from our discussion of the circumstances of the present case and its merits so far as they can be ascertained, that our judgment should not be read as encouraging the appellant to take that step. The appellant does however have the right to have the s 107 order against him reviewed by the Parole Board each six months. If he still believes that the late receipt of the

departmental psychologist's report prior to the review on 16 August 2005 disadvantaged him at the Board's hearing, he will be able to address that concern at a further review hearing before the Board. We consider it would be appropriate for the Board to convene a review hearing promptly should the appellant seek one.

Outcome of appeal

[38] In this proceeding no basis has been shown, however, for a Court to hold that the appellant's current detention is wrongful or that the decisions currently in force should be set aside. The appeal is accordingly dismissed. There will be no order for costs.

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