IN THE COURT OF APPEAL OF NEW ZEALAND

CA79/03

	BETWEEN	JASON PAUL BURKE Appellant
	AND	SUPERINTENDENT OF WELLINGTON PRISON First Respondent
	AND	PAROLE BOARD Second Respondent
	AND	ATTORNEY-GENERAL Third Respondent

Hearing: 12 May 2004

Coram: McGrath J
Hammond J
Chambers J

Appearances: T Ellis and A Shaw for Appellant
S P France for Respondents

Judgment: 26 May 2004

JUDGMENT OF THE COURT DELIVERED BY McGRATH J

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[1] This matter comes before us as an appeal against a judgment delivered by Wild J on 4 April 2003 dismissing an application for judicial review. In the High Court the appellant had challenged the legality of his continuing detention at Wellington prison during the period since his provisional release date. The respondents are the Superintendent of that prison, the Parole Board and the Attorney-General.

Facts

[2] The background is that on 31 August 1995 the appellant was sentenced to eight years six months imprisonment for sexual offending, including rape. Under the Criminal Justice Act 1985, he became provisionally entitled to release after he had served two thirds of that sentence on 27 June 2001. On 7 May 2001 an application was made by a delegate of the Chief Executive of the Department of Corrections, under s105 of the 1985 Act, for the appellant to serve the full term of his sentence. The Parole Board heard it on 15 June 2001 and on 19 June made an order under s105(3) in the terms sought.

[3] In accordance with the requirements of s105(6) the Parole Board reviewed its orders on 5 December 2001 and again on 7 March 2002. It decided on both occasions that the order that had been made on 19 June 2001 should continue in force.

The nature of the proceedings

[4] On 3 July 2002 the appellant made an application to the High Court for a writ of habeas corpus against the Superintendent of Wellington prison, where he was detained. The Parole Board and Attorney-General were also named as respondents. The basis of what was effectively a challenge to the orders made by the Parole Board concerned the manner of its obtaining psychological reports on the appellant and the consideration of them at the Board's hearings.

[5] Section 9(3) of the Habeas Corpus Act 2001 requires that the Registrar of the High Court allocate a date for the hearing of an application for a writ of habeas corpus which is within 3 working days of it being filed. On 4 July 2002 counsel for the appellant and the respondents joined in submitting a memorandum to the High Court proposing how the habeas corpus application might proceed. Counsel for the defendants, Mr France, was of the view that the issues concerning the lawfulness of obtaining of Psychological Service reports, and their consideration by the Parole

Board, did not give rise to a question concerning the legality of the detention by the Superintendent of the prison that was properly to be determined under the habeas corpus procedure. Mr France's position, not shared by the appellant's counsel Mr Ellis, was that those questions would be more appropriately determined in judicial review proceedings against the Parole Board which challenged its decisions to order the continuing detention of the appellant. In their joint memorandum counsel indicated a shared view that it was desirable that the Court of Appeal clarify such questions concerning the scope of the writ of habeas corpus and the appropriateness of judicial review challenges in habeas corpus proceedings. Counsel accordingly invited the High Court to refuse the writ of habeas corpus to facilitate the bringing of an appeal before the Court of Appeal, with the expectation that the matters of principle of concern to both parties would then be determined by this Court.

[6] A High Court Judge considered the parties' joint memorandum, but declined to deal with the application as the parties had suggested. Following that decision, Mr Ellis decided to institute judicial review proceedings in conjunction with the application for a writ of habeas corpus. On 9 July he filed what was termed an "application for writ of habeas corpus, judicial review and declarations". The application was said to be brought under "The Habeas Corpus Act 2001, New Zealand Bill of Rights Act 1990, Judicature Amendment Act 1972, Declaratory Judgements Act 1908 and the Common Law".

[7] That application was subsequently amended on 22 August. The amended application came before Wild J for substantive hearing on 26 August 2002. On the face of the application Mr Ellis then appeared to be seeking a writ of habeas corpus and judicial review of the three orders made by the Parole Board. It would appear that, at the start of that hearing, Wild J made an inquiry of Mr Ellis as to whether the habeas corpus application was still being pursued in light of the advent of a judicial review challenge to the Parole Board's decisions. The circumstances of that inquiry are explained in a minute which Wild J issued on 26 June 2003, some time after he had delivered judgment:

> [2] At the start of the hearing before me on Monday 26 August 2002, I raised the issue of habeas corpus with counsel for the applicant, Mr Ellis. I

> inquired whether the applicant was seeking a writ of habeas corpus. My concern was that, in a proceeding commenced on 9 July 2002, the applicant was challenging the legality of his detention since 19 June 2001. Mr Ellis responded by saying that he was formally asking for a writ of habeas corpus "for strategic reasons", but was essentially seeking judicial review. After I had asked Mr Ellis to make the applicant's position clear, and after Mr Ellis had conferred with Crown counsel, he informed me in relation to the application for a writ of habeas corpus (and this is the note I made in my Bench Book) "by consent, I am asking Court not to grant one".
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> [3] Taking that to be an invitation to dismiss the application for a writ of habeas corpus by consent, I continued with the hearing as an application for judicial review only. In their submissions, counsel made no reference to habeas corpus, and nor does my judgment.

[8] The public law issues before the Court in the judicial review cause of action first concerned whether a psychopathology check list, used to evaluate the appellant by the Parole Board, should have been provided in the course of the process to a registered psychologist representing his interests. A second question addressed whether the three psychological reports used by the Board in reaching its decisions had been obtained unlawfully, in particular by infringement of the appellant's right against self-incrimination. It was also argued that the Parole Board lacked a statutory power to obtain the reports for the purpose. There was a further question as to whether the Board had given adequate reasons for its first decision.

[9] The Judge delivered a reserved judgment on 4 April 2003 in which he found against the allegations of unlawfulness and dismissed the application for judicial review. As indicated in his subsequent minute no specific mention was made in the judgment of the fate of the habeas corpus application.

[10] On 17 April 2003 Mr Ellis filed a memorandum in the High Court, seeking recall of the judgment, in which he referred back to the invitation to the Court to dismiss the habeas corpus application that was made in counsel's joint memorandum of 4 July. He submitted that the Judge had ignored an agreement between the parties as to how the habeas corpus application was to be resolved, the purpose of the agreement being to allow the matter to be considered on appeal. Mr Ellis also submitted that the Judge had not determined other issues concerning the validity of the Parole Board review decisions made on December 2001 and March 2002.

[11] Mr France filed a memorandum in reply on 5 May 2003. He submitted that the agreement between the parties recorded in the memorandum of 4 July 2002 had been overtaken by events and was no longer relevant. He did acknowledge that it would be appropriate for the Judge formally to dismiss the application for habeas corpus. He also argued that it was plain that the effect of the High Court's judgment was to dismiss challenges to the later two Parole Board decisions, although he had no objection to the Court being more explicit on that point if it wished.

[12] Mr Ellis filed a memorandum in reply on 2 June 2003 in which he indicated that the appellant would shortly be released from prison following a further Parole Board hearing (the appellant was indeed released on parole later that month.) Mr Ellis made plain that the appellant still sought recall of the High Court judgment, because "matters of principle (were) still outstanding".

[13] Regrettably, none of these memoranda found their way to the Judge until 25 June 2003. In the meantime the appellant's advisers had filed an appeal against the High Court judgment on 30 April. This led to a query from the Registrar of the Court of Appeal to Mr Ellis over whether the appeal was subject to the stipulations of urgency in s17 of the 2001 Act. That led to Mr Ellis sending a memorandum to this Court in which he complained, in strong terms, about what had earlier happened to the proceeding, and about the Parole Board's perceived failure to conduct reviews of the appellant's situation in a timely manner. He also said, however, that urgency in hearing the appeal was "not a realistic proposition and is not sought".

[14] In the minute he issued on 26 June 2003 Wild J dealt with the application for recall of his judgment. After referring to the history of the matter, including the exchange he had with counsel at the outset of the hearing on 26 August which is set out in paragraph [7] above, the Judge continued:

> [3]… If counsel would like me formally to record what happened, I will do so by minuting the amended application dated 22 August 2002 for a writ of habeas corpus:
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> > "On applicant's application, and by consent, application for writ of habeas corpus dismissed."
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> [4] I will date that minute 26 August 2002 (10a.m.).

[15] The Judge went on to acknowledge that he had not expressly dismissed the judicial review challenge to the two later Parole Board decisions, but observed that the result of his judgment was clear on the point. It had said that its effect was to hold that the applicant's detention for the whole of the period after 19 June 2001 was lawful. He saw no need to recall the judgment or to take any other step other than that he had offered, to minute the result of the habeas corpus application.

[16] What we have set out above is a sufficient summary of the facts for us to address the issues formally raised by this appeal. However, because Mr Ellis and Mr Shaw in their submissions in support of it dwelt on other collateral matters it is necessary that we briefly mention them.

[17] In his minute Wild J made some further observations expressing regret for the delay in delivering his judgment and explaining the reasons. He also referred to a brief informal exchange, concerning when the judgment might be delivered, that had taken place between him and Mr Ellis soon after the 26 August hearing. The Judge also addressed some of the criticisms that had been made by Mr Ellis in his memorandum to the Court of Appeal. The Judge sent a copy of his minute to the President of this Court. Mr Ellis then filed a further memorandum taking issue with the Judge's proposal that the High Court file be minuted. Mr France also filed a memorandum, submitting that the 26 June minute had adequately explained the position and saying that nothing further was required.

The appeal

[18] At an early stage during his argument in this Court in support of the appeal, Mr Ellis informed us that, since being released on parole in June 2003, the appellant had re-offended, and that on 30 April 2004 he had been sentenced by the High Court to preventive detention with a minimum non-parole period of six and a half years imprisonment. Recognising in advance of this hearing that such a sentence was a potential outcome, Mr Ellis had not included in his written submissions in support of the appeal argument concerning the validity of the three orders made by the Parole Board under s105 of the Act. At the hearing he confirmed this position. He also accepted that a writ of habeas corpus could no longer be issued because of the

changed basis of the appellant's detention. Mr Ellis said that he nevertheless wished to proceed with the appeal against the dismissal of the appellant's application for habeas corpus, in order that this Court might address two aspects of the proceeding. The first was what he termed the undue delay of the High Court in deciding the habeas corpus application, and the second what Mr Shaw, who appeared with Mr Ellis for the appellant, referred to as improper judicial behaviour by the High Court Judge in dealing with the application for recall. We heard detailed argument from counsel on those questions which concerned matters referred to in paragraph [15] above.

Discussion

[19] As indicated, once the Judge had established on 26 August 2002 that he was not asked to grant a writ of habeas corpus, the argument proceeded on the basis of the judicial review cause of action alone. The Judge was effectively invited by both parties to dismiss the habeas corpus application. The judicial review cause of action was dismissed on delivery of the judgment on 4 April 2003, when the Judge also apologised for the delay. By that date, at the latest, the application for habeas corpus was also dismissed. It is not necessary for us to inquire into whether it had been dismissed on the date of hearing.

[20] In mid April 2003 the appellant filed a notice of appeal to the Court of Appeal against the High Court judgment, listing 8 points of appeal which covered issues concerning both the habeas corpus application and the judicial review cause of action. At about the same time his counsel applied to the High Court for the recall of the judgment. Soon thereafter the appellant indicated that he did not seek an early fixture in the Court of Appeal. Any question of urgency presumably disappeared when in June 2003 the appellant was released from prison by order of the Parole Board. Memoranda from the parties concerning the application for recall were put before Wild J on 25 June and on 26 June he dismissed the application.

[21] We heard this appeal on 12 May this year. Mr Ellis, senior counsel for the appellant, filed written submissions in advance of the hearing, as required by court procedure. Those submissions did not challenge the correctness of Wild J's decision

on the judicial review application. Nor did the submissions argue that a writ of habeas corpus should issue. At the hearing, Mr Ellis confirmed that he did not seek to argue either of those points. Obviously it was pointless for the appeal against the dismissal of the habeas corpus application to proceed because, subsequent to Wild J's decision, the appellant had been released from prison. Mr Ellis had elected not to argue the separate questions that had been addressed by judicial review. The appellant is now, in fact, back in prison, having re-offended subsequent to his release in June 2003. The appellant does not challenge the legality of his present incarceration.

[22] In these circumstances, Mr France, for the Crown, submitted that there was no extant appeal. We agree. The only appealable points have either been abandoned or overtaken by events.

[23] Mr Ellis and Mr Shaw nevertheless submitted that, although they were no longer seeking to overturn any orders made by Wild J, this Court should make declarations:

> (a) that Wild J had been guilty of unacceptable delay in determining the application for habeas corpus and the application for judicial review; and
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> (b) that Wild J's handling of the recall application was "inappropriate, unwise and/or improper".

[24] Concerns were expressed about the proposal as to how the Court's file would be minuted in relation to the habeas corpus application and about the fact that the Judge had sent a copy of his minute of 26 June 2003 to the President of this Court. Mr France submitted that this Court had no jurisdiction to make declarations of this sort.

[25] We asked Mr Ellis and Mr Shaw to explain where they said this Court derived its jurisdiction to make declarations of the kind now requested. Neither could point to any jurisdictional basis. Mr Shaw suggested that it was not uncommon for an appellate court when delivering judgment, if it thought it appropriate, to make what he termed "a comment" critical of the judge or judges of a lower court. But the answer to that is the answer Mr France gave: this Court does

not have the role of considering complaints against the judges of other courts which are unrelated to substantive arguments that are advanced on appeal. Here there are none. We are satisfied that we have no jurisdiction to consider the complaints made about the Judge in the circumstances of this case.

[26] Lacking jurisdiction, we decline to make the declarations sought or any informal comments such as those urged on us. It is plain that the appeal itself has raised no justiciable issues. Accordingly we dismiss it.

Solicitors:
N B Dunning, Wellington for appellant
Crown Law Office, Wellington for respondents