

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2008-404-4873

UNDER the Judicature Amendment Act 1972
IN THE MATTER OF a decision under the Parole Act 2002
BETWEEN BAILEY JUNIOR KURARIKI
Plaintiff
AND AJIT SINGH, MANAGER OF MT EDEN
PRISON
Defendant

Hearing: 4 August 2008

Appearances: Jeremy Sutton and Peter Webb for Plaintiff
Mark Woolford for Defendant

Judgment: 4 August 2008

JUDGMENT OF HARRISON J

SOLICITORS

Sinsia Law (Auckland) for Plaintiff
Meredith Connell (Auckland) for Defendant

COUNSEL

Jeremy Sutton; Peter Webb

Introduction

[1] Mr Bailey Kurariki was convicted of manslaughter following a trial before a jury in this Court on 8 September 2003. He was then 12 years of age. He was sentenced to a term of seven years imprisonment. His final release date, allowing for time served before conviction, is 18 September 2008.

[2] The Parole Board ordered Mr Kurariki's release on parole on 5 May 2008: s 21(1) Parole Act 2002. The order was subject to 12 special conditions. The sixth was a prohibition on use or possession of alcohol and/or illicit drugs (the latter is a discrete crime; the former is lawful activity).

[3] The Chief Executive Officer of the Department of Corrections applied to the Parole Board on 25 July 2008 for a final order recalling Mr Kurariki to a penal institution to continue serving his sentence: s 60. The nominated grounds were twofold. One was that Mr Kurariki posed an undue risk to the safety of the community; the other was that he had breached his release conditions: ss 61(a) and (b). The application for an order for final or permanent recall is scheduled for hearing on 11 August 2008.

[4] Contemporaneously with that application, the Chief Executive Officer applied for an interim order for Mr Kurariki's recall: s 62. The only ground relied upon was that Mr Kurariki posed an undue risk to the safety of the community. The application was granted by Judge Deobhakta, a Panel Convenor of the Parole Board, on the same day. The interim recall order is not accompanied by reasons. Mr Kurariki, through his counsel, Mr Jeremy Sutton, now applies for a writ of habeas corpus: that is, for an order for immediate release on the ground that he is being unlawfully detained. As I am bound to determine the application urgently, I am delivering an oral judgment.

Jurisdiction

[5] A threshold issue arises. Does this Court have jurisdiction to determine the substance of Mr Kurariki's challenge to the lawfulness of the Parole Board's

decision by granting him the remedy of a habeas corpus against a separate party, albeit another Crown body, the Manager of Mt Eden Prison? Or should the challenge have been brought, as Mr Mark Woolford for the Manager submits, by way of an urgent application to judicially review the Parole Board's decision?

[6] In the short time available Mr Sutton has found only one authority directly on point. In *Gennaoui v Monk* [2000] NZAR 348 Panckhurst J issued a writ of habeas corpus revoking both an interim order for recall made by the Chairman of the District Prisons Board, under previous legislation, together with a warrant effecting it. The Judge found for the applicant on the ground that the interim order was made *ex parte* without evidence capable of meeting the statutory threshold: at [11]. Counsel apparently assumed in that case, as did the Court, that habeas corpus was the appropriate route.

[7] Mr Woolford is correct that the differences between the two processes are important. The terms of the Habeas Corpus Act 2001 codify the procedural requirements and reaffirm the historic and constitutional purpose of the writ 'as a vital means of safeguarding individual liberty': s 5(a). The Act is designed to make better provision for restoring the liberty of a person unlawfully detained by establishing an effective procedure and the expeditious determination of an application: s 5(b). Unlawful detention provides the jurisdictional basis for challenge: s 6.

[8] Accordingly, an application for habeas corpus must be accorded priority and urgency, taking precedence over all other matters before the Court; the Registrar is bound to allocate a date for a hearing within three working days of filing the application: s 9. The provisions relating to determination are pivotal: s 14:

(1) If the defendant fails to establish that the detention of the detained person is lawful, the High Court must grant as a matter of right a writ of habeas corpus ordering the release of the detained person from detention.

(2) A Judge dealing with an application must enquire into the matters of fact and law claimed to justify the detention and is not confined in that enquiry to the correction of jurisdictional errors...

[9] The Court of Appeal has recently discussed the differences between the remedies of habeas corpus and urgent judicial review in this context: *Manuel v Superintendent of Hawkes Bay Regional Prison* [2005] 1 NZLR 161. While noting that the registry is normally able to organise urgent hearings of applications for judicial review where the liberty of a subject is in question (frequently in refugee and immigration cases), the Court said this: at [49]:

A person who detains another can fairly be expected to establish, effectively on demand, the legal justification for the detention. In cases involving imprisonment or other statutory confinements, this will involve the production of a relevant warrant or warrants or other documents which provide the basis for the detention. We accept that apparently regular warrants (or other similar documents) will not always be a decisive answer to a habeas corpus application. But it will be a rare case, we think, where the habeas corpus procedures will permit the Court to inquire into challenges on administrative law grounds to decisions which lie upstream of apparently regular warrants. This is particularly likely to be the case where the decision maker is not the detaining party. There may not be a bright line which distinguishes between those arguments which are available on habeas corpus applications and those which can only be deployed (if deployed at all) in judicial review proceedings. Nonetheless we see the test as coming down to whether the arguments in issue are properly susceptible to fair and sensible summary determination. If they are, they can be addressed in habeas corpus proceedings. If not, they must be held over for evaluation in judicial review proceedings. In such proceedings, an application for interim relief (including release from custody) would be dealt with urgently and the Judge dealing with such an application would be in a position to give directions as to the future conduct of the litigation to ensure prompt substantive determination.

[10] Mr Woolford relies on this statement. He appears on instructions from the Manager of Mt Eden Prison but not the Parole Board. He submits that this case does not fall into the rare category allowed for by *Manuel*. He says the process of judicial review would permit this Court access to the Parole Board's file and to exercise a type of discretion which is excluded by habeas corpus.

[11] However, I am satisfied that this case does fall into the rare category. In my judgment habeas corpus is the appropriate vehicle for challenging the lawfulness of the interim recall decision by the Parole Board which underpinned an apparently lawful warrant to arrest Mr Kurariki. While, as Mr Woolford points out, the detaining and decision making bodies are different, I am satisfied that the argument in issue, namely the lawfulness of the Panel Convenor's decision, is discrete. It is properly susceptible to fair and summary determination.

[12] Moreover, the Panel Convenor acted ex parte. Mr Kurariki had no right to be heard. A peremptory decision made by the Parole Board justifies an equally peremptory approach to its lawfulness where the result is to deprive a citizen of his liberty. In my judgment the remedy of habeas corpus is a valid, indeed appropriate, vehicle for challenging this category of decision-making.

Application for Recall

[13] The factual basis for the Chief Executive Officer's application for recall is found in an affidavit sworn by a senior probation officer at Manukau. The relevant passages state as follows:

5. ... the said Bailey Kurariki on 10 July 2008 while reporting separately to his supervising Probation Officer, Danny Tauroa, and treating psychologist, Ellen Mullan, strongly appeared to be under the influence of an illicit drug. His mood was noticeably different in that he seemed more on edge and more restless at the outset and during both sessions. His supervising Senior Probation Officer reported he was 'unusually cheerful at the outset but became edgier throughout discussion'. Physically his pupils in his eyes appeared very constricted. When asked if he was under the influence by both supervising Probation Officer and treating psychologist Bailey denied any drug use and explained he was 'happy he received good news about his learner's licence'. Both Danny Tauroa and Ellen Mullan were not convinced by his explanation of his alerting mood swings and appearance.
6. ... Bailey Kurariki was issued a written warning by his supervising Senior Probation Officer Danny Tauroa on 11 July 2008, warning Bailey Kurariki of the consequences involved if he were to be suspected of being under the influence again. His supervising Senior Probation Officer reviewed the content of the warning with Bailey Kurariki in that it was important for him to note if he was suspected of using illicit drugs or alcohol again. Community Probation & Psychological Services would lodge a recall application with the New Zealand Parole Board...
7. ... on 22 July 2008 Senior Probation Officer Danny Tauroa picked up Bailey Kurariki from his home address at 3.00 pm to transport him to a WINZ appointment. Danny Tauroa reported Bailey Kurariki's behaviour and presentation to be similar to that of 10 July 2008. His mood altered frequently, noticeably more elevated than usual. Bailey Kurariki wore dark sunglasses which was unusual given the wet weather. Bailey Kurariki's WINZ case manager also noted his appearance to be 'unusual'.

8. ... Bailey Kurariki denied having taken any illicit drugs. He reported he had a cold. Again his supervising Senior Probation Officer was not convinced by his explanation.
9. ... Bailey Kurariki has agreed to undertake an Alcohol and Drug assessment and this is being arranged to take place from Monday 28 July 2008.
10. ... at the time of Bailey Kurariki's previous offence of manslaughter, he was strongly under the influence of cannabis. His suspected drug use is of serious concern given his history and it is believed that he has breached his condition of not using illicit drugs which presents a risk to the community at large.

[14] As noted, an order for interim recall was made on 25 July. Mr Kurariki provided a bodily sample for analysis at Mt Eden Prison on 28 July. An ESR analyst's certificate issued on 1 August confirmed that Mr Kurariki had tested positive for cannabis use.

Decision

[15] The Panel Convenor's interim order required that Mr Kurariki be detained in custody pending determination of the Chief Executive's application for final recall: s 63. As noted, the order was made without reasons. It provided, as one of its grounds, the Convenor's satisfaction that Mr Kurariki was likely to abscond before determination of the application for final recall. The Chief Executive Officer had not even relied on that ground to support the application for interim or final recall.

[16] The Panel Convenor was bound to make an interim order if he was satisfied that Mr Kurariki 'posed an undue risk to the safety of the community'. The statute requires him to be 'satisfied on reasonable grounds'. In legal terms, the Convenor was obliged to exercise his judgment by making up his mind on the available evidence and reaching a judicial decision. He did not have to be satisfied beyond reasonable doubt. He did, however, require some or a reasonable evidential foundation for his decision: see *R v White (David)* [1988] 1 NZLR 264 (CA) at 268; *R v Leitch* [1998] 1 NZLR 420 (CA) at 428; *King v Parole Board* (2006) 22 CRNZ 882, Keane J; *Shortland v New Zealand Parole Board Auckland District HC AK CRI 2007-404-366* 17 December 2007 (unreported) Asher J at [34]-[35].

[17] However, ordering interim recall is not a rubber stamping process. It requires a discernible judicial evaluation. Nor should the decision be made lightly. Suspicion is not enough: *Gennaoui* at [11]. The purposes of the Parole Act reinforce this requirement. The paramount consideration is the safety of the community. Balanced against it, however, are the principles that an offender must not be detained any longer than is consistent with the safety of the community and that release conditions should not be more onerous nor last longer than is consistent with that state of safety: s 7(2)(a).

[18] In particular, when assessing whether a person poses an undue risk the Parole Board must consider both the likelihood of further offending and the nature and seriousness of any likely subsequent offending: s 7(3).

[19] In this case the Panel Convenor relied upon hearsay evidence in the nature of suspicion. Mr Woolford submits that the material provided a satisfactory basis for the Panel Convenor to conclude that Mr Kurariki was or had been consuming illicit drugs. Implicit in his submission is that the information does not have to meet the requirements of the strict rules of evidence or be admissible in law. He says that both the senior probation officer and the treating psychologist were experienced professionals and their opinion was capable of providing the necessary evidential foundation. He points to the ESR's subsequent confirmation of those suspicions.

[20] Mr Woolford may be correct. It is unnecessary for the purposes of this judgment for me to decide that point. What is more important, however, is assuming that the senior probation officer's suspicions were correct, did they provide a sufficient evidential foundation for concluding that Mr Kurariki's consumption of cannabis posed an undue risk to the safety of the community? In this context an undue risk is one which is justifiable, inappropriate or excessive; that is, something beyond an ordinary risk.

[21] In support of the Panel Convenor's decision, Mr Woolford says that risk assessment is very much the Parole Board's primary focus. In this case he says it can be inferred that the Panel Convenor had access to Mr Kurariki's file. That would contain psychologist reports and other professional assessments. Additionally the

Panel Convenor would be entitled to draw his own conclusion that the prohibition imposed by the Parole Board earlier in 2008 against consumption of illicit drugs was imposed in the interests of community safety. Mr Woolford points out that the Panel Convenor would have been aware of the nexus between consumption of illicit drugs and serious crime.

[22] Judicial experience confirms the general validity of that submitted nexus. However, there is a world of difference between the effects of a Class A drug like methamphetamine and a Class C drug such as cannabis. The antisocial violent propensities of the former are well and frequently documented. But the latter is disinhibiting and is rarely linked with serious criminality these days. That conclusion is reflected by Parliament's positioning of the crime of possession or use of cannabis at the bottom of the scale of criminal severity.

[23] In my judgment much more was required to provide an evidential foundation for concluding that Mr Kurariki's consumption of cannabis posed an undue risk to the community's safety. The probation officer attempted to draw this link by referring to Mr Kurariki's commission of the crime of manslaughter while 'strongly under the influence of cannabis'. The probation officer's opinion is of necessity hearsay and provides no direct or first-hand knowledge of events.

[24] But even if Mr Kurariki was under the influence of cannabis when he committed the crime of manslaughter at the age of 12, there was no evidence before the Panel Convenor that that factor contributed to or aggravated the crime. And even if that link was established, there is no apparent or arguable nexus between Mr Kurariki's consumption of cannabis many years later and the presentation of an undue risk to community safety. Significantly even the probation officer did not go so far as to express an opinion that the risk presented by Mr Kurariki's cannabis use was undue or out of the ordinary.

[25] The Panel Convenor was bound to consider both the likelihood of further offending and the nature and seriousness of any subsequent offending. Mr Kurariki had been released into the community for a little more than two months before recall. The Chief Executive presented no evidence that he had physically harmed, assaulted

or even threatened another party while at liberty. Other cases illustrate what might constitute an undue risk justifying recall, whether at an interim or permanent stage.

[26] In *Manuel* the parolee, who was released on parole nine years into a term of life imprisonment for murder, was convicted of dishonesty, violence and drunken driving offences within two years after release. He was also charged with assaulting a female. In *King* the parolee was also released while serving a sentence of life imprisonment for murder. While on parole he was charged with sexual violation, common assault, assault with intent to injure and threatening to kill. And in *Shortland* the parolee, again serving a term of life imprisonment for murder, was arrested within five years of his release on charges of assaulting a female and assault with a weapon. In all cases the validity of the Parole Board's decision that the parolee posed an undue risk to community safety was upheld on appeal or review. But self-evidently all are in a different factual league from this case.

[27] In my judgment there was no rational basis for the Panel Convenor to link evidence of Mr Kurariki's consumption of cannabis with presentation of an unjustifiable, excessive or unacceptable risk to the community's safety. Indeed, given his apparent compliance with the other 11 conditions of release, there is nothing to show that Mr Kurariki posed any risk to community safety at all when he was recalled.

[28] Accordingly I am satisfied that the decision was unlawful and lacked a reasoned or reasonable basis. I declare that Mr Kurariki is held unlawfully in Mt Eden Prison. I direct that a writ issues against the Superintendent to release him immediately. All conditions imposed upon Mr Kurariki's release by the Parole Board on 5 May 2008 are reinstated until further order of the Parole Board.

[29] However, while I have found that the Panel Convenor acted unlawfully in ordering Mr Kurariki's interim recall, I express my confidence that the Parole Board will exercise its discretionary powers to determine the Chief Executive's application for an order for final recall with the necessary degree of objectivity and fairness and in accordance with its statutory obligation to give paramount weight to the safety of the community.

[30] In concluding I wish to express my appreciation to Mr Sutton and Mr Woolford for their comprehensive submissions made at short notice. There will be no order as to costs.

Rhys Harrison J