IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CRI 2006-409-000067

PETER WAYNE RYDER

v

THE NEW ZEALAND PAROLE BOARD

Hearing: 6 April 2006

Appearances: P N Allan for Appellant
S B Edwards for Respondent

Judgment: 7 April 2006

JUDGMENT OF FOGARTY J

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[1] The appellant was convicted of the murder of a ten year old child, who was in his care at the time of the offence. He served 12 years of his life sentence before being released on parole, to the Salisbury Street Foundation in Christchurch, on a residential programme. It is common ground that he did not comply with the rules of that programme. As a result of not complying with the rules Mr Ryder was not allowed to stay on the programme. Accordingly he was susceptible to being recalled to prison by reason of the application of s 61(e)(iii).

[2] The general manager of the Probation Offence Services made an application to recall Mr Ryder to prison. The application for interim recall was then made, and was accepted and order made. There was then a hearing before the Parole Board as to whether a final order should be made or not.

[3] At that hearing Mr Ryder argued that as an alternative to being re-incarcerated that he be released to live with his partner. At that time his partner had two of her children living with her. They were boys. The boys were then aged 14-15 and 12-13 years. The relationship does not appear to be of a long duration because both boys have known Mr Ryder for about 12 months as of 3 March 2006.

[4] The Board was concerned about the risk of releasing Mr Ryder into a household with two young boys. This was against a background of the occasion of the offence in the first place and the Board's knowledge of Mr Ryder's propensity to become angry when frustrated. The Board took the view that at this time there was a risk to the safety of the community still pertaining. In the context, that was a risk of concern for the boys' welfare if Mr Ryder was released into the home of his partner.

[5] The conclusions of the Parole Board were as follows:

> It is our view that the grounds that have been given in the application have all been made out, and accordingly, this Board would issue the final order for recall. As some emphasis has been made in relation to an alternative programme, it is fair for the Board to have made some comment. First, this board would not approve. In fact it would be a dereliction of its duty to the public at large to approve or grant conditions to allow him to live with his said partner at this time.
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> One, there are children involved in that house. Second, there is no report to the Board as to where the house is situated, what are the circumstances within the house, circumstances within the neighbourhood and the like. It would be totally wrong for the Board to leap into making orders at this time to release him into the custody, as it were, to his partner. Reports from independent, and I emphasise independent, sources would be the very least requirement. We do not have any doubt that the witnesses that were called on behalf of the Respondent are all very well intentioned. But the duty of the Board goes a lot further than that.
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> It deals with the community at large. It deals with the public at large and has to be satisfied from many points of view that the ultimate destination on parole is satisfactory overall. We do not have that information at this time and could not act as was requested by the Respondent in relation to his alternative plan.

[6] This decision was reviewed. The reviewer did not find any error of law by the Board in making its decision.

[7] The matter now comes on appeal to this Court. The appeal is by way of rehearing but it is nonetheless an examination of the exercise of a discretion by the Parole Board.

[8] The decision of the Board has to be tested against the provisions of s 66 of the Parole Act 2002 which provides:

> **66 Board may make final recall order**
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> (1) The Board may make a final recall order recalling an offender to continue serving his or her sentence in a prison if, following a hearing on a recall application, it is satisfied on reasonable grounds that 1 or more of the grounds for recall in section 61 have been established.
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> (2) When deciding whether to make a final recall order in respect of an offender who is currently detained, the Board must make the decision as if the offender were not detained.
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> (3) On making a recall order, the Board must issue a warrant in the prescribed form for the arrest of the offender and for the offender to resume serving his or her sentence in a prison.
>
> (3A) If a warrant is issued under subsection (3) in respect of an offender who is not currently detained, a member of the police may at any time arrest the offender, whether or not the member has possession of the warrant, for the purpose of returning the offender to a prison to resume serving his or her sentence.
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> (4) If the Board refuses a recall application,—
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> (a) the Board must direct the offender's release from custody under any warrant issued under section 63(1) (if applicable); and
>
> (b) any release conditions or detention conditions that were suspended resume (subject to paragraph (c)); and
>
> (c) the Board may vary or discharge any conditions imposed by the Board that apply to the offender, without the need for an application under section 56.

[9] Section 66(1) requires a two stage analysis. First, the Board must be satisfied that one or more grounds of recall in s 66(1) have been established (that was not disputed here). Second, the Board then has to exercise a discretion whether or not to make a final recall. This discretion is exercised with the knowledge that if the Board refuses a recall application then pursuant to s 66(4) the Board must direct the offender's release from custody.

[10] Because the alternative to a recall is release s 7(1) applies:

> **7 Guiding principles**
>
> (1) When making decisions about, or in any way relating to, the release of an offender, the paramount consideration for the Board in every case is the safety of the community.

[11] The other two subsections of s 7 are:

> (2) Other principles that must guide the Board's decisions are—
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> (a) that offenders must not be detained any longer than is consistent with the safety of the community, and that they must not be subject to release conditions or detention conditions that are more onerous, or last longer, than is consistent with the safety of the community; and
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> (b) that offenders must be provided with information about decisions that concern them, and be advised how they may participate in decision-making that directly concerns them; and
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> (c) that decisions must be made on the basis of all the relevant information that is available to the Board at the time; and
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> (d) that the rights of victims (as defined in section 4 of the Victims' Rights Act 2002) are upheld, and submissions by victims (as so defined) and any restorative justice outcomes are given due weight.
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> (3) When any person is required under this Part to assess whether an offender poses an undue risk, the person must consider both—
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> (a) the likelihood of further offending; and
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> (b) the nature and seriousness of any likely subsequent offending.

[12] Although it was not directly argued before me, I have little doubt that s 7(2) also applies to a s 66 consideration.

[13] Mr Allan for the appellant also contended that s 7(3) applied and in that context he also referred to s 66(2). He argued that when assessing whether an offender will pose undue risk the Board must consider whether a risk which has been identified will be capable of being managed by appropriate release conditions before forming a judgment as to whether there is undue risk.

[14] There are a number of provisions in the Parole Act which use the undue risk standard. See for example s 28(2):

> **28 Direction for release on parole**
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> …
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> (2) The Board may give a direction under subsection (1) only 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—
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> (a) the support and supervision available to the offender following release; and
>
> (b) the public interest in the reintegration of the offender into society as a law-abiding citizen.

[15] I have no doubt that on many occasions the standard of undue risk needs to be applied by the Board, only after having regard to the conditions which can be imposed on the release, before making a final judgment as to whether there is undue risk.

[16] Mr Allan went on to argue that there was an error of law on the part of this Board when applying s 66(1), because the Board did not examine whether the risk to the children of the partner could be appropriately managed by release conditions. He argued until that exercise had been completed the Board could not apply the criterion in s 7 and until they were able to complete the s 7 considerations they were not able to make a decision as to final recall.

[17] Ms Edwards for the Crown appropriately conceded that the Board could have adjourned the hearing as to whether to make a final recall order and commissioned reports in order to explore the merit of releasing Mr Ryder to the residence of his partner. But she argued that there was no obligation on the Board to do this.

[18] Section 66 does not expressly refer to the undue risk test. In my view while s 7(1) clearly applies, s 7(3) only applies when the Board is required to assess whether the offender does pose an undue risk. In this particular context the question resolves to this: was the Board required by the terms of s 66 or any provision of the Parole Act to assess whether Mr Ryder posed an undue risk if placed with his partner, when he was opposing a final recall order?

[19] In this particular case there was no question of the offender being able to be released back to the Salisbury Street Foundation.

[20] I do not think the Board were required there and then to assess the merit of the placement suggested by the offender, Mr Ryder, of living with his partner. There is a distinction between having the power to do so and being required to do so. The Board did have the power to do so. The reference in s 66(4)(c) to varying or discharging conditions, and the cross reference to s 56, make it plain that the Board could consider a different placement. But there is nothing in s 66(4) which obligates the Board to consider fully any new destination for release posed to the Board.

[21] Because I find that the Board had no requirement to consider the alternative of placement with the partner, at the time of considering the final recall order, there is no error of law in the decision of the Board. It follows the decision of the Board cannot be said to have been wrong.

[22] The reviewing Judge did observe that the Board could go on now to consider Mr Ryder for release on parole pursuant to s 26, so that Mr Ryder does not have to wait for another 12 months before parole is revisited. Mr Ryder has the power under s 26(2) to apply now to the Board to exercise its discretion under subs (1) to so consider him for parole. If he makes this application there is then an opportunity for the Board to commission the independent reports that it properly considers necessary before forming a judgment on undue risk as it might apply upon the release of Mr Ryder to the home of his partner.

[23] For these reasons I am satisfied that the appeal cannot succeed. The appeal is dismissed.

Fogarty J

Solicitors:
FS Legal, Christchurch, for Appellant
Crown Law Office, Wellington, for Respondent