IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2009-409-002896

BETWEEN	STUART MURRAY WILSON Applicant
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS First Respondent
AND	THE NEW ZEALAND PAROLE BOARD Second Respondent

Hearing: 9 December 2009

Counsel: A McKenzie for Appellant
T J Mackenzie for Respondents

Judgment: 9 December 2009

JUDGMENT OF FOGARTY J

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[1] Mr Stuart Wilson, a prisoner at Rolleston Prison in Christchurch, applies for the writ of habeas corpus. He lodged his application on 8 December. On receiving his application and considering earlier litigation I apprehended that he has previously had the assistance of counsel and accordingly I asked the Registrar to get in touch with Mr McKenzie to see if he would be available to assist the Court at the hearing today.

[2] Mr McKenzie has, at very short notice, as is the case with habeas corpus hearings, been able to attend today. Mr Wilson has agreed that he act as his counsel. Although I did allow Mr Wilson also to speak in support of his application.

[3] The issue as to whether or not Mr Wilson is being lawfully detained turns on a narrow point.

[4] On 16 December 2008 the Parole Board made an order under s 107 of the Parole Act 2002 that Mr Wilson not be released three months before the sentence expiry date of the sentence, with the latest sentence expiry date which is in fact 1 September 2012.

[5] Section 107 provides:

> **107 Order that offender not be released**
>
> (1) This section applies to an offender who is subject to a determinate pre-cd sentence for a specified offence (as defined in subsection (9)).
>
> (2) The chief executive may apply to the Board at any time before the offender's final release date for an order that the offender not be released before the applicable release date (as defined in subsection (9)).
>
> (3) The Board must make the order if it is satisfied that the offender would, if released before the applicable release date, be likely to commit a specified offence between the date of release and the applicable release date.
>
> (4) 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.
>
> (5) If the Board makes an order, it must state its reasons in writing and give a copy of the order and the reasons to the offender or to his or her counsel.
>
> (6) 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.
>
> (7) On a review, the Board must revoke the order if it is no longer satisfied that the test in subsection (3) is met; and if it revokes the order, the Board must determine the release conditions that will apply to the offender on release.
>
> (8) An order made under this section expires on the applicable release date, unless revoked earlier under subsection (7).
>
> (9) In this section,—
>
> **applicable release date means,—**

(a) in the case of an offender subject to a pre-cd sentence imposed for a specified offence, the date that is 3 months before the sentence expiry date:

(b) in the case of an offender who is subject to more than 1 pre-cd sentence imposed for a specified offence, the date that is 3 months before the sentence expiry date of the sentence with the latest sentence expiry date

specified offence means—

(a) murder; or

(b) a sexual crime under Part 7 of the Crimes Act 1961 punishable by 7 or more years' imprisonment; and includes a crime under section 144A or section 144C of that Act; or

(c) an offence against any of sections 171, 173 to 176, 188, 189(1), 191, 198 to 199, 208 to 210, 234, 235, or [236] of the Crimes Act 1961.

[6] Subsection (6) requires the order that the Board did make on 16 December 2008 to be reviewed at least once in every six months following the making of the order. The first review was set down for hearing in May and on 20 May it was adjourned by Judge MacDonald. The hearing took place on 8 June and the Board conducted the review and confirmed its order made on 16 December. It set a next date for the hearing of 15 December 2009. That is more than six months after 8 June, and one day short of a year of the anniversary of the order made on 16 December.

[7] For Mr Wilson, Mr McKenzie argues that s 107 should be construed strictly relying on the decisions of this Court in the cases of *Drew v Department of Corrections* HC AK A34/02, 25 June 2002, Harrison J; and *Borrell v The Chief Executive of the Department of Corrections* HC CHCH CRI 2007-409-000676, 26 March 2007, Panckhurst J.

[8] I agree that time limits which can ultimately affect the liberty of persons will normally be construed strictly. In the case of *Drew* Harrison J was considering s 107L of the Criminal Justice Act 1985 in respect of an order recalling Mr Drew and considering s 107L(1)(a):

107L Determination of application for recall
1 September 1993 to 29 February 1996

> (1) Subject to subsection (10) of this section, the Parole Board or a District Prisons Board, as the case may be, shall determine the application made under section 107I of this Act—
>
> (a) Where an interim order is made under section 107J of this Act, not earlier than 14 days, nor later than 1 month, after the date on which the offender is taken into custody pursuant to this section; ...

The requirement of not later than one month was to be applied strictly.

[9] Mr McKenzie for Mr Wilson argues here that the six month period has expired on 8 December. For the Department of Corrections, Mr Mackenzie argues that the phrase: "*once in every six months*" is tied to the making of the orders. Mr McKenzie argues that if that interpretation is right then the Board could select any day within an applicable six month period for reviewing it. He set out an argument in absurdum in support of that pointing out that on that construction of subs (6) the Board could undertake a review very quickly after making an order in the first six month period and then not undertake a review until very near the end of the second month period, leaving a gap of more than 11 months before the review. That, he said, would be contrary to the purpose of the Act and accordingly, the construction offered by Mr Mackenzie is wrong.

[10] Of course, under the Interpretation Act 1999 s 5, statutory provisions must be interpreted from the text read in light of the purpose. It seems to me that grammatically the phrase "*once in every six months following the making of the order*", (I emphasise the word "***the*** *order*"), is a reference back to the phrase "***an*** *order*" in the first line.

[11] Reading the section as a whole the order is, I am satisfied, the order made pursuant to subs (2) as defined in subs (9). On a review subs (7) provides that the Board must revoke the order in certain circumstances. Section 107 does not provide for the Board confirming an order, as apparently the Board expressed itself. What the Board does on a review is either revoke the order or does not revoke the order. On 8 June the Board did not revoke the order. Accordingly, the order that is in place at the present time is the order made on 16 December on this literal interpretation of s 107. On that basis then, once in every six months following the making of that

order on 16 December, there has to be a review. The proposed date of hearing for the review is 15 December and this is inside the second six month period.

[12] The next step in the analysis is to stand back and see whether or not this literal meaning that is consistent with the purpose. In this respect I turn back to the argument of Mr McKenzie, for Mr Wilson. On this interpretation of s 6 there is room for abuse by the Board.

[13] I agree that there is room for abuse on this interpretation of subs (6). But under the standard principles of public law this Court proceeds on the assumption that agencies delegated powers by Parliament will act in good faith and in their proper purpose. (That is the same assumption of Parliament.) Were the Board to set down a review very early in the first six month period and very late in the second six month period, that would, in my view, be an exercise of discretion in bad faith and for an improper purpose and be reviewable by this Court. For embedded in subs (6) is a discretion left by Parliament to the Parole Board to set the date for review. Subsection (6) does not specify the date for review. It simply says "*at least once in every six months*". I think it is quite clear that that textual language leaves discretion to the Board. All statutory discretions are subject to review in the High Court in the absence of other provisions which might try to prevent a statutory review.

[14] For these reasons, I do not think that the literal meaning of subs (6) needs to be displaced by a consideration of the purpose. The literal meaning can be adopted in pursuit of the obvious purpose of the provision.

[15] I then finally turn to the question as to whether or not, however, if there is an available construction from the text of subs (6) favourable to Mr Wilson that should be adopted. I do not think there is an available construction. I think the words of subs (6) are carefully chosen. The contextual argument I set out before as to the whole of s 107 makes it clear that where the Board does not revoke an order, the original order remains in place.

[16] Were this Court concerned that the literal interpretation of the text defeated the purpose the Court might consider pushing the language of subs (6) into a

construction which might even be ungrammatical in order to achieve the purpose. This is a very rare step to take and in my view is not justified. It is not justified because as I have explained there are other means available to this Court to review the Parole Board, should and, this is hypothetical only, a panel of the Board not exercise its discretion embedded in subs (6) as obviously intended to be exercised by Parliament.

[17] For these reasons the continued detention of Mr Wilson is lawful. It is not necessary to go into what would be the second part of the argument as to whether or not a failure to hold the review by 8 December warranted his release or entitled him to his release.

[18] Accordingly, the application for a writ of habeas corpus is dismissed.

[19] I should say that this is a case where it was very appropriate that Mr McKenzie appeared. He appeared at the request of the Court. The Court thinks he should be granted legal aid.

Solicitors:
A McKenzie, Christchurch, for Applicant
Raymond Donnelly & Co, Christchurch, for Respondents