IN THE COURT OF APPEAL OF NEW ZEALAND

CA351/2009
[2010] NZCA 269

	BETWEEN	STEWART MURRAY WILSON Appellant
	AND	THE NEW ZEALAND PAROLE BOARD Respondent

Hearing: 23 March 2010

Court: Glazebrook, Ellen France and Randerson JJ

Counsel: A J McKenzie and D Goldwater for Appellant
A M Powell for Respondent

Judgment: 25 June 2010 at 2.30 pm

JUDGMENT OF THE COURT

A The appeal is dismissed for want of jurisdiction.

B Costs are reserved.

REASONS

GLAZEBROOK AND ELLEN FRANCE JJ

(Given by Ellen France J)

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Introduction

[1] Stewart Murray Wilson is serving a term of imprisonment of 21 years. This sentence was imposed on him on 15 March 1996.[1] On 16 December 2008, the Parole Board (the Board) made an order under s 107 of the Parole Act 2002 that Mr Wilson not be released before the end of his sentence. The Board must make an order under s 107 if it is satisfied that:[2]

> ... 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.

[2] The effect of the s 107 order in Mr Wilson's case is that he will remain in prison until 1 September 2012 (18 years from 15 March 1996 after allowance for days on remand, less three months).[3]

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1 *R v Wilson* HC Wellington T 104/95, 15 March 1996.

2 Section 107(3).

3 Section 107(9) of the Parole Act provides that prisoners subject to s 107 orders have an applicable release date three months before the sentence end date.

[3] Mr Wilson sought a review of the Board's decision under s 67 of the Parole Act. Judge Lovegrove on review upheld the Board's decision.[4] Mr Wilson then appealed to the High Court. In a decision delivered on 21 May 2009, French J dismissed the appeal.[5] Mr Wilson now seeks to appeal to this Court. His proposed appeal raises three issues:

(a) Does the Court have jurisdiction to hear the appeal? This issue turns on whether the proceedings are civil or criminal and on whether the right of appeal to the High Court in s 68 of the Parole Act is final.

(b) What is the test to be applied in determining whether the threshold for making an order under s 107 of the Parole Act is met? In this case the particular issue is the extent to which s 107(3) requires a comparative exercise and, if it does, what is the comparator group?

(c) Whether the s 107 test was met in Mr Wilson's case.

[4] After setting out the background, we deal with each issue in turn.

Background

[5] As we have noted, Heron J sentenced Mr Wilson on 15 March 1996 on a number of counts on which a jury had found him guilty. Heron J divided the sentences into three categories. These categories and the respective sentences are summarised in the following terms in this Court's earlier decision on Mr Wilson's challenge to the Board's jurisdiction to make the s 107 order:[6]

> (a) The first category involved what the judge called "pre-1986 offending". At least some of the offending in this category involved "serious violent offences", as defined for the purposes of the Criminal Justice Act 1985.
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> (b) The second category involved post-1986 offending, with the exception of wilful ill-treatment of a particular girl. Again,

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4 *Wilson v New Zealand Parole Board* Rolleston Prison, 11 March 2009.
5 *Wilson v Parole Board* HC Christchurch CRI-2009-409-47, 21 May 2009.
6 *Wilson v The Chief Executive of the Department of Corrections* [2009] NZCA 2 at [3] and [4].

at least some of the offending in this category involved serious violent offences.

(c) The third category involved wilful ill-treatment of the girl. That was not a serious violent offence, as defined.

[4] His Honour decided that the sentences within the first and second categories should be concurrent within each of those categories. But the sentences for the three categories should be cumulative. The lead (concurrent) sentence in the first category was a sentence of eight years' imprisonment for a rape (a serious violent offence). The lead (concurrent) sentence in the second category was ten years' imprisonment, imposed with respect to a rape count and a stupefaction count. The penalty for the third category was three years' imprisonment. Adding those together led to a sentence of 21 years' imprisonment.

[6] Under the Criminal Justice Act 1985 sentences could be remitted. This meant an offender serving a sentence imposed for certain specified offending was entitled to release after completing two-thirds of the sentence. This was subject to a power in the Board to make an order that the offender be required to remain in prison until the end of their sentence. Under the Parole Act the release date for offenders serving a finite sentence is the end of their sentence. The only relevant possibility for earlier release is parole, which becomes an option after the offender has served one-third of the sentence.

[7] As Mr Powell in his helpful submissions explains, special provision was made for prisoners like Mr Wilson who are serving long sentences imposed before the Parole Act came into force. These are referred to in the Parole Act as long term pre-cd (commencement date) sentences. The Parole Act preserves the Criminal Justice Act arrangements for long term pre-cd sentences.

[8] Mr Powell's written submissions explain that the relevant dates for Mr Wilson's sentences are as follows:

Sentence commencement	15 March 1996
Parole eligibility date	2 December 2007
Final release date (two-thirds)	2 December 2008[7]
Sentence end date	1 December 2015

[7] Mr Wilson spent 469 days in custody on remand prior to trial and sentence. This is credited against the sentence.

[9] Mr Wilson came before the Parole Board for consideration for parole in early 2008. Parole was declined. The Chief Executive of the Department of Corrections made an application under s 107 in October 2008 that Mr Wilson not be released before the end of his sentence. It was that application which was heard and allowed by the Board on 16 December 2008. Mr Wilson sought a review of that decision under s 67 of the Parole Act. The review confirmed the initial decision. At that point Mr Wilson appealed to the High Court under s 68 of the Act. The appeal was dismissed.

Does this Court have jurisdiction to hear the appeal?

The possible jurisdictional bases

[10] There are three possible avenues under which Mr Wilson could appeal to this Court. The first possibility reflects the submissions made on behalf of Mr Wilson, namely, that these are civil proceedings. If these are civil proceedings then, unless a further appeal is excluded by the terms of the Parole Act, this Court would have jurisdiction to hear the appeal under s 66 of the Judicature Act 1908. Section 66 provides for this Court to have jurisdiction to hear and determine appeals from "any judgment, decree, or order" of the High Court.

[11] The second possibility is that the decision of the Board is that of an "inferior" court. If the Board had that status then, in terms of s 67 of the Judicature Act, it would be possible for Mr Wilson to obtain leave from this Court to appeal from the decision of the High Court. Section 67(1) of the Judicature Act provides that the decision of the High Court on appeal from an inferior court is final unless a party on application obtains leave to appeal to this Court or directly to the Supreme Court.

[12] Neither party contended for this possibility. It can shortly be dismissed because the Board does not meet the definition of "inferior court" in s 2 of the Judicature Act, namely, "any Court of judicature within New Zealand of inferior jurisdiction to the High Court".[8]

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[8] The relevant principles are discussed in *Complaints Committee of the Waikato/Bay of Plenty District Law Society v Harris* [2006] 3 NZLR 755 (CA).

[13] The final possibility is that the Board's decision is criminal in nature in which case the issue is whether there is a right to seek special leave to appeal under s 144 of the Summary Proceedings Act 1957. As an alternative submission, Mr McKenzie on behalf of Mr Wilson says that an appeal with leave is available under s 144.

[14] Mr Powell for the Board submits that the proceedings are criminal in nature, meaning that s 66 does not apply. Further the Board points to a number of aspects of the statutory scheme which suggest that the decision of the High Court is in any event intended to be final. The Board says that s 144 of the Summary Proceedings Act does not apply to decisions under s 107. On this basis, Mr Powell submits the Court has no jurisdiction to hear this appeal.

[15] Leaving aside for the moment the civil/criminal categorisation, we deal first with the question of whether the Parole Act leaves room for any further appeal under s 66 of the Judicature Act.

Is the appeal to the High Court under the Parole Act the final appeal?

[16] Despite the broad scope of s 66, in *Association of Dispensing Opticians of New Zealand Inc v Opticians Board*[9] this Court identified at least three exceptions to s 66 in addition to those the section itself creates. As to the first and most general exception, the Court said that:[10]

> ... there are numerous cases where, because of the character of the decision sought to be appealed, the scheme of the relevant provisions of the statutes and rules and underlying policy considerations, particular decisions of the High Court have been held to fall outside ... the purposes of s 66.

[17] As will be apparent from our discussion, the right of appeal to the High Court for decisions under s 107 is not stated to be "final". The issue is whether it is nonetheless the final avenue of appeal.

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9 *Association of Dispensing Opticians of New Zealand Inc v Opticians Board* [2000] 1 NZLR 158 (CA) at [23] – [33]; see also *Comalco New Zealand Ltd v Television New Zealand Ltd* [1997] NZAR 145 (CA) at 146 and *The General Manager, Auckland Central Remand Prison v Mailley* [2009] NZCA 314, [2009] NZAR 649 at [23] – [24].

10 At [25].

[18] Before setting out the relevant statutory provisions, it is helpful to provide some further background. The largest part of the Parole Board's work is considering prisoners for release on parole. For these decisions, there is a right of review but no right of appeal. Only orders for recall, postponement orders or orders under s 107 can be appealed. According to statistics published by the Parole Board, in 2008/2009 there were 521 orders for recall, 13 postponement orders, nine orders under s 107 and 4273 orders granting parole.[11] We are also informed that of the current muster (as at 9 March 2009), 20 inmates have s 107 orders imposed, and a further 23 prisoners are serving long term pre-cd sentences and so are potentially eligible for an order. Any application under s 107 for the last of these inmates would have to be made on or before his final release date of 4 June 2014.

[19] The provisions relating to appeals are in Part 1 of the Parole Act, which deals with parole and other release from detention. The relevant provisions appear under the heading "Reviews and appeals from decisions".

[20] Section 67 of the Parole Act makes provision for review of decisions of the Board by the chairperson of the Board or by a panel convenor to whom the chairperson delegates the conduct of the review.[12] Some Board decisions are excluded from the review process but review is available in relation to decisions under s 107. Indeed, the right of appeal to the High Court pursuant to s 68 from decisions of the Board under s 107 is subject to a person in Mr Wilson's position first seeking review.[13] As we have said, that procedure was followed here. The reviewer has power to confirm, quash, or amend the Board's decision or to refer the matter back to the Board with a direction to reconsider and decide.[14]

[21] In terms of s 68, an appeal to the High Court is available in relation to postponement orders, orders under s 107, and final recall orders. Such appeals must be made within 28 days of the decision on a review under s 67 or whatever longer time the Court allows. The appeal can be made "on the grounds that the order ought

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11 New Zealand Parole Board "Statistics" (2009) <www.paroleboard.govt.nz>.
12 Section 67(4).
13 Section 68(2).
14 Section 67(5).

not to have been made".[15] By virtue of s 68(3), an offender remains subject to the order while the appeal is determined.

[22] The procedure on appeal to the High Court is set out in s 69 of the Parole Act. Importantly for the discussion about the applicability of s 144 of the Summary Proceedings Act, s 69 provides that the applicable procedure is that set out in various specified provisions in the Summary Proceedings Act. There is no mention of s 144.

[23] The powers of the High Court on appeal are set out in s 70 of the Parole Act. On appeal against an order under s 107, the Court may:[16]

> (a) confirm, quash, or amend the order; or
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> (b) refer the matter back to the Board with a direction to reconsider and decide the matter, in which case it must –
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> (i) advise the Board of its reasons for doing so; and
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> (ii) give the Board any directions that it thinks just concerning any aspect of the reconsideration.

[24] In our view, there are a number of features of the statutory scheme which lead to the conclusion that it was not intended there would be any further right of appeal from the High Court. Most were highlighted by Mr Powell in his written submissions.

[25] First, the jurisdiction exercised by the High Court under s 68 is appellate not original. Further, there are prescribed powers that the High Court can exercise on appeal. If this Court also has an appellate jurisdiction, it would have been expected that similar limits to the scope of any appeal rights would have been identified.

[26] Second, the procedure for appeals under the Parole Act is particularised. The Registrar, for example, is directed to set the appeal down for hearing on the first practicable date.[17] In addition, the Court is expressly permitted to have regard to any

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15 Section 68(1).
16 Section 107(1).
17 Section 69(3).

evidence that the Board could have considered.[18] It would be odd if these sorts of procedural provisions did not apply to any subsequent appeal.

[27] Third, if there was a right of appeal, it is likely the jurisdiction on appeal would be more limited. That would be the usual pattern for a second appeal for a decision made by a body like the Board especially where, as here, there is provision for an intermediate review of the decision before the matter goes to the High Court on appeal.

[28] The legislative history of the appeal rights in the Parole Act is consistent with this proposition. Section 107 first appeared in the statute book as s 107A of the Criminal Justice Act.[19] It was later re-enacted as s 105.[20] There was no right of appeal against the making of an order under the predecessor to s 107. Rights of appeal in relation to recall orders were not introduced until 1993.[21] The explanatory note to the Sentencing and Parole Reform Bill 2001, part of which became the Parole Act, noted that what is now s 68:[22]

> ... provides a right of appeal against a postponement order, and against a final recall order. The appeal is to the High Court. (Legal aid may be available for this purpose - ... .)

[29] The Ministry of Justice reported on the question of transitional arrangements for offenders subject to pre-cd sentences to the select committee considering the Bill. The Ministry dealt with a submission on "Appeal" in relation to what becomes s 107.[23] The relevant passage was as follows:

> ***Appeal***
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> The NZ Council for Civil Liberties states that a major flaw in the bill is the failure to provide for an appeal in respect of dangerous offenders dealt with under this clause. It is suggested that an appeal to the full High Court or the Court of Appeal should be provided to avoid a single High Court Judge hearing an appeal from potentially the decision of another High Court judge, and to comply with section 25(h) of the NZ Bill of Rights Act 1990.

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18 Section 69(5).

19 Section 8 of the Criminal Justice Amendment Act (No.2) 1987.

20 Section 43(1) Criminal Justice Amendment Act 1993.

21 S 107M of the Criminal Justice Act was introduced by s 43 of the Criminal Justice Amendment Act 1993.

22 Sentencing and Parole Reform Bill 2001 (148-1) (explanatory note) at 24.

23 Ministry of Justice *Sentencing and Parole Reform Bill—Report of the Ministry of Justice, Department of Corrections and Department for Courts (5)* (SE08 00 00 02) 16 January 2002.

Comment

> The effect of subclause 259(5) is that an order under this section is treated in the same way as a postponement order, and therefore has the same appeal rights and access to legal aid. This will enable an appeal to the High Court. Section 105 [the predecessor to s 107] gives no right of appeal at all. Therefore the right to appeal to the High Court is an added right for offenders. Orders under clause 259 in respect of pre-cd sentences would seem to be comparable with postponement orders and recall orders, which may also be appealed to the High Court (see clause 224). Thus we see no good reason to elevate the right of appeal to the Court of Appeal.

Recommendation

No change is proposed.

[30] Fourth, the decisions made by the Board are subject to further consideration by the Board itself. An order under s 107 must be reviewed every six months.[24] A recalled prisoner must be considered for parole within 12 months.[25] A postponement order may last longer, up to three years, but the prisoner is entitled to apply for reconsideration at any time on the grounds that there has been a significant change in his or her circumstances.[26] It would be odd given the combination of an ability to have the matter regularly reconsidered and the direction in s 67(4) to undertake reviews promptly for further rights of appeal to this Court to be added on.

[31] Finally, it is relevant that there are two other potential remedies for persons affected by s 107 orders, namely judicial review and habeas corpus, so it is not as though there is no other avenue to challenge these very important decisions. Indeed, Mr Wilson has brought habeas corpus applications challenging various decisions of the Board.[27]

[32] Mr McKenzie says it is odd that the matters could proceed along parallel tracks, namely, an appeal to the High Court and then review proceedings in that

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24 Section 107(6).

25 Section 21 of the Parole Act.

26 Section 27 of the Parole Act.

27 *Wilson v The Chief Executive of the Department of Corrections* HC Christchurch CIV-2009-409-2896, 9 December 2009; *Wilson v The Chief Executive of the Department of Corrections* HC Christchurch CIV-2008-409-2984, 11 February 2010; and *Wilson v New Zealand Parole Board* HC Christchurch CIV-2010-409-459, 22 April 2010. See also *Teina v Attorney-General* CA554/07, 25 October 2007, which was a challenge to a postponement order which reached this Court but as an appeal under the Habeas Corpus Act 2001. The appeal was dismissed and Mr Teina was advised to pursue his rights under the Parole Act.

Court. That may be a factor relevant to the discretion in any judicial review application but we do not consider it affects the extent of appeal rights.

[33] For these reasons, we consider s 66 is not applicable to decisions of the Board under s 107.

Civil or criminal?

[34] Our conclusion that there is no room for the operation of s 66 would, subject to the discussion below about the application of s 144, dispose of further appellate avenues. We go on, in any event, to consider the question of the characterisation of the proceedings. The framework for determining whether proceedings are civil or criminal in nature is discussed by the Supreme Court in *Mafart v Television New Zealand Ltd*.[28] The Court in *Mafart* emphasised the need to consider this question as a matter of substance rather than form. Elias CJ observed that it was not necessary:[29]

> ... for someone to be in jeopardy of conviction or facing sentence for an application to be properly viewed as criminal, if it is inextricably linked with criminal process.

[35] In support of his submission that the proceedings are civil in nature, Mr McKenzie emphasises that the procedure under s 107 is distinct from the underlying criminal proceedings. The Board's task is prospective in nature in that the Board is dealing with future risk. Further, Mr McKenzie notes that the Chief Executive, not the original prosecuting authority, makes the application and the decision-maker is the Board, not the original sentencing court.

[36] On the other hand, Mr Powell points out that the proceedings are entirely ancillary to the criminal proceedings that led to the imposition of the sentence. The subject matter of an application under s 107 is the same sentence, it is just that the emphasis has shifted.

[37] This is a difficult issue. We start with a consideration of the authorities. As Elias CJ noted in her dissenting judgment in *Morgan v Superintendent, Rimutaka*

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[28] *Mafart v Television New Zealand Ltd* [2006] NZSC 33, [2006] 3 NZLR 18.
[29] At [30].

Prison,[30] there is discussion in New Zealand cases which supports treating changes in the period of detention prior to sentence expiry as not amounting to a change in penalty.

[38] In *Midwood v Paremoremo Medium Security Prison*,[31] this Court was dealing with a challenge to the revocation of parole. The matter came to the Court on an application for habeas corpus. The Court said that the habeas corpus application must be "characterised as civil" rather than criminal so there was a right of appeal under s 66 of the Judicature Act.[32] The Court saw the matter as one relating to Mr Midwood's civil liberties.

[39] This Court in *Fulcher v The Parole Board*[33] addressed a complaint that it was unlawful to impose parole conditions for a period longer than the six months allowable under the legislation in place when Mr Fulcher was sentenced. The appeal was unsuccessful. Gault J did not consider the imposition of the conditions gave rise to any issue of retrospectivity. The sentence imposed was for 14 years and that was not altered in any way. What had occurred was characterised as a change "in the administration of the sentence".[34] Henry J similarly did not see any difficulty in terms of retrospectivity. Henry J referred expressly to s 105 of the Criminal Justice Act (the predecessor to s 107) as an illustration of the sorts of matters that did not impinge on the principles of retrospectivity.[35] In concluding that retrospectivity was not engaged, Thomas J attached weight to the fact that the relevant provisions were in a part of the Act headed "Administration of Full-Time Custodial Sentences".[36] Finally, although dissenting on another basis, Keith J delivering the judgment for himself and Blanchard J said that the case did not appear to involve either a penalty or a punishment as those terms were used in the context of retrospective penalties or double jeopardy.[37]

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30 *Morgan v Superintendent, Rimutaka Prison* [2005] NZSC 26, [2005] 3 NZLR 1 at [3].
31 *Midwood v Paremoremo Medium Security Prison Superintendent* [1991] 1 NZLR 442 (CA).
32 At 444.
33 *Fulcher v Parole Board* (1997) 15 CRNZ 222 (CA).
34 At 227.
35 At 231
36 At 243.
37 At 251.

[40] The issue in *Hawkins v District Prisons Board*[38] was the ability of the Board to take into account questions of general deterrence. Richardson J said this:[39]

> The Court determines the length of the sentence. To grant or refuse parole within that term cannot be construed as re-sentencing or altering the penalty. The functions of the Court and Board are different. ... The primary factor for [the Board's] consideration ... is the protection of the public.

[41] A similar point about the difference in functions was made by McMullin J for the Court in *R v Stockdale.*[40] Interestingly, in the Minute of the Court in *Hawkins* on the issue of leave to appeal to the Privy Council, the Court said it had "some reservations as to whether it is not a criminal matter, in which event this Court has no jurisdiction to grant leave". Leave was nonetheless granted.

[42] The Supreme Court in *Morgan* was considering whether entitlements to parole were part of the "penalty" faced by the offender and therefore not able to be imposed retrospectively to the disadvantage of the offender. The conclusion was that the emphasis of the provisions prohibiting retrospectivity to the disadvantage of an offender was on the maximum penalty applicable for the offence and not on the particular penalty imposed on an individual offender for the actual offending. In reaching this view, Blanchard J went on to say that he preferred not to decide whether this encompassed "the effective maximum penalty and thereby [factored] in the release date previously applicable for someone who received the maximum penalty".[41] Tipping J similarly concluded that the reference to the penalty was a reference to the maximum penalty to which an offender was liable when the offence was committed.[42] Tipping J said he preferred not to consider the appropriateness of the traditional distinction between a penalty and its administration, "[e]xcept to the extent of the concept of effective penalty or sentence".[43]

[43] Henry J agreed that Mr Morgan's appeal should be dismissed but preferred not to decide whether parole should be considered penal or administrative. Henry J noted that it is a principle of sentencing policy that the sentencer does not take

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38 *Hawkins v District Prisons Board* [1995] 2 NZLR 14 (CA).
39 At 18.
40 *R v Stockdale* [1981] 2 NZLR 189 (CA) at 191.
41 At [79].
42 At [107].
43 At [98].

release entitlements into account. Arguably, Henry J said, the inference is that they are not regarded as penal.[44]

[44] Gault J expressed general agreement with Blanchard and Henry JJ but considered that release entitlement provisions were not directed to the penalty for the offence, but rather to the consequences of the imposition of sentences of imprisonment.[45]

[45] Elias CJ (dissenting) said that "[b]oth sentence and release are essential components in identifying the penalty to which an offender is subject"[46] and, that "release entitlements are integral to the penalty imposed upon an offender".[47]

[46] A different view from that expressed by this Court in the earlier parole decisions has been taken recently in relation to extended supervision orders (ESOs). In *Belcher v Chief Executive of the Department of Corrections*[48] this Court concluded that an ESO was a punishment and its retrospective imposition breached the New Zealand Bill of Rights Act 1990. Various factors were identified as supporting this view including the fact that the triggering event is a criminal conviction; that the respondent to an ESO application is described in the Parole Act as "the offender"; that an application for an ESO is made to the sentencing court; that the right of appeal is taken from the Crimes Act; and that applications for ESOs are classified as criminal for the purposes of the Legal Services Act 2000. The various procedural safeguards were also seen as relevant to the conclusion.[49]

[47] In terms of other materials, the Select Committee considering the Sentencing and Parole Reform Bill acknowledged an element of retrospectivity in enlarging the scope of s 107 (so that a broader range of specified offences was covered than had been the case under the Criminal Justice Act):[50]

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44 At [115].
45 At [31].
46 At [5].
47 At [22].
48 *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507.
49 At [47]; see also *McDonnell v Chief Executive of the Department of Corrections* [2009] NZCA 352, (2009) 8 HRNZ 770 at [39].
50 Sentencing and Parole Reform Bill 2001 (148-2) (Select Committee report) at 27.

> The bill ... proposes to extend the categories of specified offences. ... This introduces retrospectivity, but in a limited form, as it could apply to offenders sentenced before the commencement date of the new legislation. Some offenders not currently captured by this provision may now be subject to the new clause. ... [51]

[48] Drawing these threads together, it seems to us that the authorities are not decisive on the question of the characterisation of the Board's decision under s 107 as civil or criminal.

[49] The strongest argument in favour of the criminal characterisation is that the Board's decision under s 107 is "inextricably linked" to the original sentencing decision because it is an aspect of implementation of the same sentence. In that sense, as Mr Powell put it, the sentencing and parole decisions can be seen as part of a "continuous process of criminal justice" reflected in the links between the Parole Act and the Sentencing Act 2002. Or, to adopt the *Belcher* analysis, it is important that the triggering event is the criminal conviction. In addition, two of the other factors seen as important in *Belcher* are present here. The Legal Services Act classifies proceedings before the Board under s 107 as "criminal" not civil proceedings[52] and the Parole Act refers in s 107 to "the offender".

[50] On the other hand, the sentence imposed on the offender is not altered in any way. The Board's functions have not changed in this respect from the regime considered in *Fulcher*. It is notable that the Board is the decision maker, not the sentencing court as in *Belcher*. The Board of course has to apply the criteria set out in the Parole Act to its decisions and that requires a focus on the safety of the community.[53] Finally, while there are procedural protections in place the full procedural panoply of the criminal court is not operating.

[51] In the end, if we had to decide the matter we would have concluded that the factors pointing to categorising the Board's functions in this respect as civil in character outweigh those pointing to their characterisation as criminal. This makes

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51 We note that Mr McKenzie on behalf of Mr Wilson was given the opportunity to consider whether he wished to take any issue of retrospectivity in relation to the reliance on pre-1986 offending. Mr McKenzie subsequently advised the Court that there was nothing in this point.

52 Section 6(c)(i).

53 Section 7 of the Parole Act sets out guiding principles for the Board and the "paramount consideration" in decisions relating to release is the safety of the community: s 7(1).

no difference to our decision because of our conclusions as to the effect of s 68 of the Parole Act.

Summary Proceedings Act

[52] We can deal briefly with Mr McKenzie's alternative argument, that s 144 of the Summary Proceedings Act applies. We consider it is plain that even if the proceedings are criminal in nature, s 144 does not apply.

[53] The fact the Parole Act specifically adopts some sections of the Summary Proceedings Act but not s 144 is a reasonably clear indication s 144 is not applicable. But that position also follows from the Summary Proceedings Act itself. The defendant's general right of appeal under that Act is clearly linked to the original conviction and sentence and not to subsequent actions of the Board in relation to the sentence, even if the Board's decision is "criminal" in nature.[54] Similarly, appeals on points of law relate to the determination of an information or a complaint.[55]

Conclusion

[54] To summarise our conclusions thus far, we consider s 66 of the Judicature Act is not applicable to decisions of the Board under s 107 because the decision of the High Court on appeal to that Court under s 68 is final. We also consider that s 67 of the Judicature Act does not apply to the Board as it is not a court of inferior jurisdiction. Finally, if we had to decide the matter, we would have concluded that the factors supporting a characterisation of the Board's functions under s 107 as civil outweighed those supporting a characterisation as criminal. Finally, we have concluded that s 144 of the Summary Proceedings Act does not enable an appeal with leave under that Act from decisions of the Board under s 107.

[55] Accordingly, we have reached the view this Court does not have jurisdiction to hear Mr Wilson's appeal. As the matter is not straightforward, and as we heard

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[54] Section 115 of the Summary Proceedings Act.
[55] Section 107 of the Summary Proceedings Act.

full argument on the merits, we make some observations on the substance of the appeal.

What is the test to be applied under s 107?

[56] Section 107 applies to an offender who is subject to a determinate pre-cd offence for a specified offence.[56] "Specified offences" are defined in s 107(9) and include murder or a sexual crime under Part 7 of the Crimes Act punishable by seven or more years imprisonment. The relevant specified offences in Mr Wilson's case are sexual crimes punishable by more than seven years imprisonment.

[57] The Chief Executive of the Department of Corrections may apply for a s 107 order at any time before the offender's final release date.[57]

[58] As we have noted the Board must make an order if satisfied that the offender "would", if released before the release date, "be likely to commit a specified offence" between the date of release and the applicable release date.[58]

[59] Section 107(4) and (5) provide various procedural protections. Section 107(6) requires review of s 107 orders every six months. On a review the Board must revoke the order if no longer satisfied that the s 107(3) test is met.[59]

The test adopted by the Board

[60] The Board applied the test articulated by the Prisons Parole Board in the *Secretary for Justice v M*, that is:[60]

> (1) The applicant must satisfy the board that there is a real or substantial risk of reoffending of the specified kind within the specified period if an order is not made, and that such risk is significantly greater than the risk of recidivism ordinarily attaching to such offending; and

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56 Section 107(1).
57 Section 107(2).
58 Section 107(3), s 107(9) – three months before sentence expiry.
59 Section 107(7).
60 *Secretary for Justice v M* (1996) 6 CRNZ 57 (PB) at 60.

(2) That all facts which are claimed to bear significantly upon the likelihood of reoffending or the exercise of the Board's discretion to make an order if the jurisdiction to make it is established, must be clearly proven by admissible evidence.

[61] The Board said that the risk of recidivism:[61]

> ... relates to the risk of re-offending by offenders with convictions for the specified kind of offences. It does not require the control group to have exactly the same convictions as the respondent.

[62] The reference to the composition of the control group was a response to the argument made on behalf of Mr Wilson that the comparator group comprised persons with the same convictions as Mr Wilson, that is, what was described as the "clone" group".

The approach in the High Court

[63] French J noted that, on its face, s 107(3) only requires that the Board be satisfied that the offender would be likely to commit a specified offence. The Judge observed that the section is silent about the need for a significantly greater risk. Her Honour continued:[62]

> The latter is a gloss which the Courts have imposed from logical necessity. Otherwise, orders would be made in every case involving sex offenders because all sex offenders are at high risk of re-offending.[63] Had Parliament intended all sex offenders to be the subject of an order, it would have said so. Therefore, there has to be an elevated risk; a risk that is greater than the risk of re-offending arising simply from the fact the prisoner has been convicted of sexual offending in the first place. Whether or not the test postulated in *Belcher* in relation to extended supervision orders is different from the *Secretary for Justice v M* test or replaces it, as suggested by the Crown, must in my view await further guidance from the Court of Appeal.
>
> (Footnote added.)

[64] The Judge considered that the Board was correct that, under the *Secretary for Justice v M* test, the risk for recidivism is the risk of re-offending by offenders with convictions for the specified kinds of offences and not offenders who are "exact

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61 *The Chief Executive of the Department of Corrections v Wilson* Parole Board, Rolleston Prison, 16 December 2008 at [26].

62 At [23].

63 The analysis in *R v Peta* [2007] 2 NZLR 627 (CA) at [25], [28], [46] and [47] indicates that the suggestion that all sex offenders are at high risk of re-offending overstates the position.

clones" of the appellant.[64] French J considered that the Board's expression of the test was consistent with the policy of s 107, namely, to protect the public. Her Honour took the view that the appellant's interpretation was "unduly restrictive and would ... defeat Parliament's intention".[65] French J also said that the clone test had significant practical difficulties. It would mean the Board could not assess risk on a "sensible basis" when dealing with, for example, "a situation of unique offending" or a case where "the nature of the offending was particularly appalling", as in this case.[66]

The submissions

[65] Two possible tests are advanced in the submissions.

[66] Mr McKenzie maintains that the test is that set out in *Secretary for Justice v M*. Mr McKenzie says that the test advanced in that case is two-fold. First, there must be a real or substantial risk of re-offending of the specified kind within the specified period. Secondly, that risk must be significantly greater than the risk of recidivism ordinarily attaching to such offending. In developing the submission that *Secretary for Justice v M* is the test, Mr McKenzie notes the requirement in that test that the risk be significantly greater. He says that is a high threshold.

[67] As to the comparator group, the high point of the submissions for Mr Wilson is that the comparator group is persons with Mr Wilson's criminal history (the "clone group"). Mr McKenzie acknowledged difficulties in maintaining that position but nonetheless says the risk that must be shown is significant.

[68] The respondent submits the test is either that set out in *Secretary for Justice v M* or that applying to ESOs as set out in *Belcher*. The latter test would require the Board to be satisfied that the risk of relevant offending was both real and ongoing and one that could not sensibly be ignored having regard to the nature and gravity of the likely re-offending. Mr Powell for the respondent favoured the *Belcher* test on

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64 At [24].
65 At [25].
66 At [25].

the basis that it was preferable to have one test. Mr Powell also said the *Belcher* formulation was closer to the statutory wording.

[69] Finally, Mr Powell submitted that once the Board is satisfied that there are characteristics that take the prisoner beyond the ordinary risk of recidivism, it is irrelevant how many other offenders share those characteristics.

Discussion

[70] The test from *Secretary for Justice v M* is set out above. That formulation requires a focus on the risk of re-offending being a real risk and one significantly greater than the ordinary statistical risk.

[71] By contrast, in *Belcher* this Court put the test in the following terms:[67]

> [11] The word "likely" does not, in itself, provide much guidance on the level of probability required. When used in the Crimes Act, it usually refers to what might be regarded as an "appreciable risk", a "real risk" or to "something that might well happen". In the context of the ESO legislation, it must be read in light of s 107I(1), which provides that the purpose of an ESO is to protect the community from those who:
>
> > pose a real and ongoing risk of committing sexual offences against children or young persons.
>
> Pankhurst J has treated "likely" as connoting "a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case" (see *Chief Executive of the Department of Corrections v Taha* (2005) 22 CRNZ 453 at para [31]). Panckhurst J took this language from the speech of Lord Nicholls of Birkenhead in *Re H (Minors)* [1996] AC 563 at 585. We consider that Panckhurst J was right to emphasise the seriousness of the anticipated harm but think it best to adapt the test he proposed by tying it more closely to the language of s 107I(1). So in our view, the jurisdiction depends upon the risk of relevant offending being both real and ongoing and one that cannot sensibly be ignored having regard to the nature and gravity of the likely reoffending.

[72] The statutory language under consideration in *Belcher* is almost identical in key respects to that in s 107. Section 107I(2) provides that a sentencing court may make an ESO if the court is satisfied, having considered the specified matters:

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[67] At [11].

> ... that the offender is likely to commit any of the relevant offences ... on ceasing to be an eligible offender.

[73] There is some force in the argument that it is better to have one test and, given the closeness of the statutory wording, it is hard to see why one would not. On the other hand, the approach in *Secretary for Justice v M* was effectively endorsed by the legislature. There has been no change to the test in s 107 from its equivalent in the Criminal Justice Act. Further, that is the test applied by the Board and its predecessors without any particular difficulty.

[74] On balance, because the test in *Secretary for Justice v M* has had legislative endorsement we consider that is the preferable test in the context of s 107. The fact there will be two tests is not hugely significant given the small and dwindling numbers of cases where the s 107 test will need to be applied.

Application of the test to Mr Wilson

The High Court judgment

[75] French J's conclusion on the substance of the appeal was as follows:[68]

> ... there was ample evidence before the Board on which it could find the appellant posed a real and ongoing risk in terms of *Belcher* or a significantly greater risk than that which arises from the fact of a conviction for sexual offending. The assessments, the particular features of the appellant's offending, his absence of remorse, and his refusal to engage in treatment were all relevant matters which in my view the Board was clearly entitled to take into account. As pointed out by Mr Powell, it is clear from the sentencing notes that the appellant was beyond the normal risk at the time and because of his refusal to engage in treatment, the only thing that has changed in the intervening period is that the appellant has got older.

The Board's reasoning

[76] The Board emphasised five factors influencing the conclusion that the test in s 107 had been met. The first of these factors was the nature of the offending. The Board noted that the offending extended over a 25-year period. Further, the

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[68] At [27].

sentencing Judge identified a number of common features which the Board summarised as follows:[69]

> Mr Wilson took women and girls, often their daughters, into his home. on the pretext of friendship. The victims, and there were many of them, were often vulnerable. Once a relationship was established they were subjected to cruel and degrading treatment. They were subject to assaults, indecencies and often raped. Mr Wilson then took control of their lives to an extraordinary degree, with compliance being obtained by force or threats of force.

[77] The second factor identified by the Board was that the sentencing Judge had said he would have imposed preventive detention and a minimum term of imprisonment if he had been able to do so. The Board saw this as "an indication of the risk of re-offending Mr Wilson was seen to pose at the time of sentencing".[70]

[78] The third factor relied on by the Board was that since he was sentenced, psychologists had consistently assessed Mr Wilson as posing a high risk of re-offending. The Board expressly accepted the assessment of the psychologist, Kirk Stenhouse, in that respect. The Board noted:[71]

> Specifically, we accept his assessment based on the combination of actuarial and dynamic factors, that there is a high risk of Mr Wilson committing a serious sexual offence if released before his applicable release date — and, we note for the sake of completeness, that Mr Stenhouse considered that the risk was the same whether the period under consideration was the applicable release date or the sentence end date. We also note that we agree that it would be wrong to rely upon the RoC*RoI [an acronym for risk of conviction/risk of imprisonment] alone as that test is based on the general criminal population rather than Mr Wilson's cohort of sex offenders.[72]
>
> (Footnote added.)

[79] The fourth factor noted by the Board was that Mr Wilson had done nothing to ameliorate his high risk. In this respect, the Board noted that Mr Wilson continued to deny his sexual offending and refused to engage in any form of offence related treatment. The Board took the view that unless he showed some insight into his offending, and accepted personal responsibility for his past behaviour and the "appalling impact" that it has had on his many victims, the Board "can have no

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69 At [28](a).
70 At [28](b).
71 At [28](c).
72 French J agreed with the Board on this point: at [26].

confidence that, given the slightest opportunity, the offending will not happen again".[73]

[80] Finally, the Board took the view that Mr Wilson's release plan gave no comfort in these respects. Indeed, the Board saw it as "completely inadequate".[74] Mr Wilson had no confirmed accommodation. His main support person was serving a community-based sentence and was said to have a history of mental disability. In any event, it was clear that Mr Wilson could not live with her. Enquiries about supported accommodation in the relevant area had also been unsuccessful. The Board took the view that to contain Mr Wilson's risk required accommodation with a "high level of support and oversight. Without that, the safety of the public would be in jeopardy".[75]

Discussion

[81] Mr Wilson's primary criticism is that the Board did not undertake a comparison exercise. Mr McKenzie submits that the factors identified by the Board do not assist in showing why and how Mr Wilson's risk is significantly greater than that in the comparator group.

[82] Mr Powell's written submissions support the Board's approach and are as follows:

> [72] Reduced to its essence the Parole Board had before it an offender who had committed serious sexual offences over a prolonged period, such that he attracted a finite sentence of 21 years imprisonment, 18 years of which were for sexual offences.
>
> [73] According to the evidence put before the Board over the course of a long period of incarceration he has developed neither insight nor remorse and has not sought assistance to investigate and deal with the causes of his offending.
>
> [74] In the absence of any evidence that age or ill-health had incapacitated him from committing further offences, the Parole Board's conclusion as to the likelihood that the appellant would commit further specified offences if released before the end of his sentence was irresistible.

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73 At [28](d).
74 At [28](e).
75 At [28](e).

[83] The Board had before it an affidavit from Henry Hawthorn, the General Manager of Prison Services. Annexed to Mr Hawthorn's affidavit was a report of 28 July 2008 from Mr Stenhouse, a senior registered clinical psychologist, and Kellie Shore, principal psychologist, as well as earlier reports of 13 December 2002 from David Tie (another psychologist) and Ms Shore, and a Parole Assessment Report of 12 August 2008. In addition, the Board had the sentencing remarks of Heron J.

[84] The Board heard evidence from Mr Stenhouse, who was cross-examined by Mr Wilson's counsel (Mr McKenzie), and Mr Wilson made a statement. No other evidence was filed on behalf of Mr Wilson.

[85] Mr Stenhouse said he had used a combination of actuarial risk prediction instruments and clinical assessment of dynamic risk factors to establish Mr Wilson's likelihood of sexual recidivism. Mr Stenhouse did not interview Mr Wilson because Mr Wilson refused to consent to a formal assessment.

[86] The actuarial assessments included the RoC*RoI, the Automated Sexual Recidivism Scale (ASRS) and the Psychopathy Checklist: Screening Version (PCL:SV).

[87] Mr Stenhouse explained that the RoC*RoI risk measure was an actuarial measure developed for the Department to assist in the prediction of an offender's risk of re-conviction and likelihood of re-imprisonment. This measurement is based on static predictors, which are factors unchangeable by individual effort, from criminal history information. On this test Mr Wilson was in the low/moderate risk category. However, Mr Stenhouse said that this measure has not been shown to be particularly reliable in relation to sexual offenders.

[88] The ASRS is described by Mr Stenhouse and Ms Shore in their report as a "brief actuarial instrument" which estimates "the probability of sexual recidivism among adult males who have already been convicted of at least one sexual offence against a child or non-consenting adult". This test contains seven items that, again, assess static factors relating to risk. Mr Stenhouse said that this instrument has been

found to accurately classify offenders into four risk categories from low to high risk of sexual recidivism based on the normative sample of New Zealand sex offenders. On this measure, Mr Wilson had a high score.

[89] The PCL:SV provides an actuarial probability of risk of serious violent re-offending based on New Zealand research into recidivism. Mr Stenhouse in his oral evidence noted that PCL:SV is a tool which looks at dynamic factors, "so two offenders can present quite differently in terms of their PCL:SV". Mr Stenhouse's evidence was that offenders with high scores on this instrument in New Zealand research who were released without intensive treatment were eight times more likely to re-offend and six times more likely to be re-imprisoned after release. Mr Wilson's score on this instrument was above the criteria cut-off score identified from the Department of Corrections' research. Mr Stenhouse and Ms Shore said in their report that:

> ... the New Zealand research has demonstrated that high scores on factor one of the PCL:SV (indicating affective and interpersonal deficits) provides actuarial support to the probability that an individual will commit a serious violent offence within two years of release ... .

[90] Mr Wilson was assessed as having a high score on these factor one items including an "assessed high level of superficiality, grandiosity, and deceitfulness together with a lack of empathy, remorse, or an ability to take responsibility for his actions".

[91] In terms of the dynamic risk factors, Mr Stenhouse identified a number of these that served to increase Mr Wilson's risk of sexual re-offending including anti-social tendencies and deviant sexual arousal pattern.

[92] There is no merit in Mr Wilson's criticisms of the Board's approach. All of the factors identified by the Board were relevant to the assessment required by s 107. It is also implicit in the assessment of Mr Wilson as being at a "high" risk of re-offending that the Board has compared his risk to that of others. The Board correctly identified the "other" comparator group as those with convictions for the specified kind of offences.

[93] The first factor identified by the Board, the nature of the offending, must be relevant given Mr Wilson offended seriously and in a particularly repugnant manner. There was evidence before the Board that his age on its own would not reduce the risk of Mr Wilson's re-offending.

[94] As to the sentencing Judge's assessment of risk, that must bear on Mr Wilson's static risk because there is nothing here to have altered that risk.

[95] Similarly, the fact Mr Wilson has been assessed as at a high risk for a continuous period must be relevant.[76] This aspect involves a comparative exercise at least with those who are assessed as at a medium or low risk.

[96] The fourth factor discussed by the Board was the absence of any action to ameliorate Mr Wilson's risk. Mr McKenzie emphasises that Mr Stenhouse accepted that failure to undertake treatment did not increase risk nor did denial of the offending although intensive offence-specific treatment can lower risk. The Board was, however, entitled to conclude that there must be a difference in terms of the risk prevented by an individual who has had treatment and so understands about coping mechanisms and has been taught strategies to avoid risk, and Mr Wilson who not only has largely refused to engage in these sorts of programmes but continues to deny the offending.

[97] Finally, it is axiomatic that release largely unsupported in the way proposed by Mr Wilson would add to the risk of re-offending. The application of the standard release conditions would not appreciably diminish that risk.

[98] It is plain that on either the approach in *Secretary for Justice v M* or that in *Belcher*, the Board could be satisfied the s 107 test was met.

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[76] The difficulties inherent in these sorts of risk assessments in the context of sentencing and other decisions are discussed by Susan Glazebrook in "Risky Business: Predicting Recidivism" (2010) 17 Psychiatry, Psychology and Law 88. See also the recent decisions of the United Nations Human Rights Committee in *Fardon v Australia* CCPR/C/98/D/1629/2007, 18 March 2010 and *Tillman v Australia* CCPR/C/98/D/1635/2007, 18 March 2010. The soundness or otherwise of these assessments was not directly in issue on the appeal.

Disposition

[99] The appeal is dismissed for want of jurisdiction. We would, in any event, have dismissed the appeal on its merits.

Costs

[100] Subsequent to the hearing, Mr McKenzie advised that the Legal Services Agency had declined legal aid. Mr McKenzie asked that costs be reserved.

[101] The Court was ably assisted by Mr McKenzie. Further, some of the issues raised by the proposed appeal are of general importance with relevance to other cases. In these circumstances, costs are reserved. Mr McKenzie may come back to the Court if payment is not able to be resolved with the Legal Services Agency.

RANDERSON J

[102] I am grateful to Ellen France J for preparing the principal judgment. I agree with the result. I also agree with the reasoning other than the section dealing with the characterisation of the procedure under s 107 of the Parole Act 2002.[77] I write separately to briefly set out my views on this topic.

[103] As Ellen France J has noted, the proper characterisation of the s 107 procedure is not a straightforward question. Nor is the resolution of that issue necessary for the determination of the appeal since all members of the Court agree that Mr Wilson's right of appeal to the High Court under s 68 of the Parole Act is clearly intended to be a final appeal. In these circumstances, I would have preferred not to express any view on the civil/criminal characterisation issue, but I do so now since I respectfully take a different view from the other members of the Court on this point.

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[77] At [42] – [51].

[104] As William Young P pointed out when delivering the judgment of this Court in *Belcher v Chief Executive of the Department of Corrections*:[78]

> [38] The characterisation of such a scheme as civil or criminal may be important as to whether:
>
> (a) The criminal standard of proof applies;
>
> (b) The scheme should be applied retrospectively; or
>
> (c) The restrictions/sanctions available under the scheme involve double jeopardy.

[105] And, in other cases, the proper characterisation of the procedure or application at issue may be relevant when determining the availability of appeal rights. The Supreme Court's decision in *Mafart v Television New Zealand Limited*[79] was such a case. In finding that an application for access to court records should properly be characterised as a civil proceeding (thereby giving the statutory right of appeal under s 66 of the Judicature Act 1908) Elias CJ (speaking for herself and Blanchard and McGrath JJ) held that:[80]

> In all cases it is necessary to look to the substance of the application and the order sought under it. The underlying proceedings, which provide the occasion for the application, are not determinative.

[106] And as Eichelbaum J put it:[81]

> … I would regard criminal proceedings as including applications so related to a criminal proceeding as to be subject to the same appellate limitations, or … wholly ancillary to determinations of guilt or punishment, or inextricably linked with a criminal process.

[107] The result in *Mafart* was influenced by the absence of any appeal right if the proceedings were characterised as criminal in nature. No such consideration applies in the present case.

[108] I acknowledge the substantial body of authority supporting the proposition that, in a number of contexts, decisions made by the Parole Board under the Parole Act are to be treated as matters of administration which do not engage the

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78 *Belcher v Department of Corrections* [2007] 1 NZLR 507 at 521.
79 *Mafart v Television New Zealand Ltd* [2006] NZSC 33, [2006] 3 NZLR 18.
80 At [31].
81 At [54].

provisions of the New Zealand Bill of Rights Act 1990 relating to retrospectivity of penalty or double jeopardy.[82] Prominent amongst these decisions is that of the Supreme Court in *Morgan v Superintendent, Rimutaka Prison*[83] and the decision of this Court in *Fulcher v The Parole Board.*[84] In *Morgan* the majority held that s 6 of the Sentencing Act 2002 and s 25(g) of the New Zealand Bill of Rights Act were concerned with variations in the maximum applicable penalty prescribed by law for the offence at issue and were not directed at the particular penalty imposed on an individual offender. It followed that statutory changes to the parole regime, which retrospectively removed Mr Morgan's right to be released after two-thirds of his sentence (subject to conditions and the possibility of recall) did not offend s 6 or infringe s 25(g). The Chief Justice delivered a dissenting judgment concluding that release entitlements were "integral" to the penalty imposed upon an offender and were "not properly to be characterised as matters of administration of penalty".[85] She went on to state:[86]

> Where there is a statutory regime for release from detention, the penalty suffered by the offender is determined both by the actual sentence and the statutory release provision. I do not think it matters whether the change is to a mandatory release entitlement or to eligibility for parole. That is the reality accepted in New Zealand in the minimum non-parole cases of *Poumako* and *Pora* (where the maximum available sentence did not change).

[109] As the Chief Justice noted, all members of the Court of Appeal in *Poumako*[87] and *Pora*[88] accepted that increasing the period of ineligibility for parole was a retrospective penalty.[89]

[110] The decision of this Court in *Fulcher* is discussed comprehensively in the principal judgment and does not need further elaboration. It too supports the distinction between the imposition of the sentence by the court and the administration of that sentence by the Parole Board. But this distinction cannot be applied as a universal rule, as the decision of this Court in *Belcher* demonstrated

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82 New Zealand Bill of Rights Act 1990, ss 25(g) and 26(2).
83 *Morgan v Superintendent, Rimutaka Prison* [2005] NZSC 26, [2005] 3 NZLR 1.
84 *Fulcher v The Parole Board* (1997) 15 CRNZ 222 (CA).
85 At [22].
86 At [22].
87 *R v Poumako* [2000] 2 NZLR 695.
88 *R v Pora* [2001] 2 NZLR 37.
89 At [10].

when considering the characterisation of an application for an extended supervision order.

[111] In my view, the correct approach is to look to substance rather than form. Relevant considerations include the factual context; the scheme, language and purpose of the statute at issue; the relationship of the sentence itself to the application or procedure at issue; the impact of any provisions of the New Zealand Bill of Rights Act 1990 which may be engaged; the significance of the rights at issue; the desirability of affording appropriate appeal rights; the availability of other remedies; and the impact of the decision at issue on the individual.

[112] The facts of the present case do not involve statutory amendments which have the effect of removing parole eligibility rights. But an order under s 107 of the Parole Act has a similar effect. An offender such as Mr Wilson who is detained under a long-term pre-cd sentence has the right under s 104(1) of the Parole Act to be released from detention on his final release date subject only to the possibility of an order under s 107 that he is not to be released until the "applicable release date", that is the date that is three months before the sentence expiry date. Mr Wilson was not simply eligible for parole at the discretion of the Board; he had a right to be released unless the affirmative step of seeking and obtaining an order under s 107 was taken.

[113] To put that in concrete terms, instead of having a right to be released on 2 December 2008, the effect of the order made under s 107 is that he is not to be released until 1 September 2012. Thus, Mr Wilson's effective period in prison has been extended by nearly four years in consequence of the s 107 order. I do not overlook that he is entitled to a review of the order by the Parole Board every six months.[90] But in Mr Wilson's case, for the reasons discussed in the principal judgment, any such review is likely to be futile unless there is some significant change of circumstances.

[114] Were this matter free from authority, I would have applied by analogy the reasoning of the Chief Justice in *Morgan* and found that the effect of the order under

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[90] Section 107(6) of the Parole Act.

s 107 was, in substance, to increase the effective penalty imposed on him at sentence. The majority of the Supreme Court took a different view on this point and this Court is bound by that decision. But in the present case, the Court is not directly concerned with the application of the statutory provisions considered in *Morgan*. I accept the Crown's submission that an order under s 107 is criminal in nature. As Mr Powell submitted, the making of the order is inextricably linked to the original sentence. It removes his right to parole under s 104 and extends the effective period of his sentence by nearly four years. It is also very material that the legislature chose to apply the procedure for criminal appeals under s 144 of the Summary Proceedings Act rather than the corresponding provisions in the High Court Rules for civil appeals.[91]

[115] In the end, the proper characterisation of the s 107 procedure does not decide this case. The legislature has provided a statutory right of appeal to the High Court and Mr Wilson is also able to avail himself of the remedies of habeas corpus and judicial review.

Solicitors:
Crown Law Office, Wellington for Respondent.

[91] Section 69(4) of the Parole Act.