IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-Ā-TARA ROHE

CIV-2017-485-764
[2018] NZHC 955

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER OF	an application for judicial review
BETWEEN	PHILLIP JOHN SMITH Applicant
AND	THE NEW ZEALAND PAROLE BOARD Respondent

Hearing: 16 April 2018

Counsel: Plaintiff in Person
Defendants abide
R May as Amicus Curiae

Judgment: 7 May 2018

JUDGMENT OF SIMON FRANCE J

Introduction

[1] Mr Smith is a sentenced prisoner subject to a term of life imprisonment. He has long served the mandatory parole period of the sentence and now, in the ordinary course of things, comes up for biennial consideration for parole. The last decision of the Parole Board (the Board) declining him parole, 30 June 2017, is the subject of these proceedings.[1] That decision was the subject of an unsuccessful review application under the Parole Act 2002.[2]

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1 *Re Phillip John Smith* Decision of the New Zealand Parole Board, 30 June 2017 [*2017 decision*].
2 *Re Phillip John Smith: a review* Review decision of the New Zealand Parole Board, 2 August 2017.

[2] Mr Smith seeks orders that quash the decision and require the Board to retake it in accordance with law. The focus of the proceeding is on the Board's processes. In particular, it is said that the Board failed to have regard to or consider mandatory relevant material – first, Mr Smith's own release proposals, and second the concept of proportionality. The latter is said to be an obligation on the Board to satisfy itself that there are no options less than imprisonment that will achieve the necessary degree of risk prevention. Mr Smith also seeks broader declarations about the applicability of the principle of proportionality to parole decisions.

Facts

[3] Mr Smith was sentenced in August 1996 to life imprisonment for murder.[3] A minimum non-parole period was imposed. In March 2014 parole was declined, but support was given to the use of re-integrative measures including release to work and overnight temporary releases.[4] Mr Smith was on such a temporary release in November 2014 when he absconded, and fled overseas. He was eventually located and returned to New Zealand.

[4] Mr Smith was considered for parole in December 2015.[5] At that time, there were unresolved charges over his absconding. The Board noted that in considering release, regard must be had to the support and supervision that would be available to Mr Smith in the community. It was noted none had been provided because Mr Smith considered the prospects of parole sufficiently remote to make it unnecessary to do so. The Board also reviewed the psychological assessments and risk predictions, noting they were assessed as high for general and violent reoffending, and medium/high for child sex reoffending. Parole was declined but the Board did not make a postponement order.

[5] Mr Smith was next considered for parole on 26 June 2017.[6] This was earlier than when contemplated in 2015. However, Mr Smith had by now served the mandatory component of a sentence imposed in relation to his absconding, and parole

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3 *R v Smith* HC Wellington T23/96, 16 August 1996.
4 *Re Phillip John Smith* Decision of the New Zealand Parole Board, 31 March 2014.
5 *Re Phillip John Smith* Decision of the New Zealand Parole Board, 2 December 2015.
6 *2017 decision*, above n 1.

needed to be considered in relation to that sentence. At the June 2017 hearing Mr Smith was represented by counsel. By way of fresh information, the Board had:

(a) a Parole Assessment Report, this being a document prepared by Corrections for parole hearings;

(b) an "addendum Psychological Assessment Report" which updated previous assessments; and

(c) submissions from Mr Smith. Appended to these were a Release Plan and Relapse Prevention Plan prepared by Mr Smith for the Board's consideration.

[6] It is common ground that Mr Smith requested the hearing and decision be deferred for six months for him to have further counselling, and for responses/comments to be obtained from the Department of Corrections on his two Plans. The Board understood this to mean Mr Smith was not seeking parole on this occasion. Mr Smith disputes that was his stance, saying if there was no deferral he was seeking immediate parole, and that anyway the Board was obligated to make a parole decision once it rejected the adjournment proposal. The Board did make a decision on parole, but its content reflects this underlying belief that Mr Smith was not seeking parole, or at least was accepting that it was not a realistic option at this point.

[7] It is convenient to immediately resolve the issue of Mr Smith's position at the hearing. It is clear that Mr Smith was not advocating for immediate parole. This extract from discussions at the hearing makes that plain:[7]

> CONVENOR:
> I can understand why you shouldn't say that because really what you're advancing to us is that we should be considering just when we should see Mr Smith again and that parole is obviously not on the table for consideration today.

[7] Emphasis added.

> MR TUCK:
> *And that's exactly right, so this is just a when*. It's in June to when? I'm saying in the strongest possible terms that it should be six months. There are a lot of advantages not only just to the prisoner but also to the Corrections Department to ensure that with a very timely focussed (inaudible)

[8] The discussion thereafter at the hearing focused on Mr Smith's six month adjournment proposal. As an illustration, it was proposed by the psychologist that Mr Smith needed to undertake what is known as the STURP course – Special Treatment Unit Rehabilitation Programme. Mr Smith seemed to accept this course was needed. It is a nine-month course, and Mr Smith had not yet been assessed for it. The Panel Convenor noted the obvious timing difficulties if parole was to be considered again in six months. He also identified that Mr Smith's proposal to overcome this was to undertake one-on-one counselling which Mr Smith believed could be completed more quickly than the STURP course and have the same effect. Later questioning confirmed Mr Smith had not discussed the feasibility of this alternative method to the formal STURP course with psychological services.

[9] I further note a direct question to Mr Smith commenced with the proposition that the meeting that day was "largely about timing rather than actual risk". Mr Smith did not disagree. Accordingly, I conclude the position was that Mr Smith accepted he could not present a tenable case for obtaining parole at that time, but was keen to have the Board agree to his accelerated plan which would see him parole ready six months hence.

Board's decision

[10] The Board recounted Mr Smith's history, acknowledgements by Mr Smith made at the previous parole hearing and the Board's support at that time for enrolment in the violence programmes being discussed. The Board had also at that time supported a return by Mr Smith (subsequent to the absconding) to re-integrative activity whenever departmental policies allowed that.

[11] The updated psychological report was then considered. The Report recorded that Mr Smith had now been screened, as a consequence of which he was assessed as a high priority for psychological services to address his needs. There had previously

been two barriers to entering the STURP programme – his security classification (now lowered) and Mr Smith's choice to be a segregated prisoner. It was thought, however, the latter status could now be accommodated.

[12] This psychological report assessed Mr Smith's overall risk as high in relation to general, sexual and violent reoffending. It was recommended Mr Smith first undertake programmes targeted at violence, after which reassessment should be made concerning whether further sexual offending intervention was needed.

[13] The Board next focused on the submissions made on Mr Smith's behalf, including reference to his one on one counselling proposal in place of the STURP course. The Board considered the six month adjournment proposal but rejected it, essentially because it would not be possible for Mr Smith to do what is needed within that timeframe for the Board to be satisfied his risk would not be undue. The decision concludes:[8]

> 21. As in all cases the paramount consideration for us is the safety of community. Given the offending history we are not prepared to be other than extremely cautious in the light of the current psychological opinion.
>
> 22. We accept it and the recommendations. We expect the necessary intervention to take some time and we expect a gradual integration phase to follow.
>
> 23. We feel unable to accommodate Mr Tuck's submission for a six month stand-down period for the necessary work.
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> 24. In our view, until the recommended intervention is completed within the prison structure, followed by the necessary period of re-integrative activity, risk will be undue.
>
> 25. We will schedule Mr Smith to be seen again in May 2019 for the further consideration of parole. We can offer no assurances whatsoever about any outcome from that hearing. Indeed, we have given some thought to the question of a postponement order. We are not ourselves taking that matter any further but it may be that such consideration will be given at some stage in the future. For that to occur, of course, Mr Smith will need to be given the appropriate notice required by the statute.
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> 26. Risk is undue and parole is declined.

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8 *2017 decision,* above n 1.

The Board did not expressly refer then, or elsewhere, to the two plans prepared by Mr Smith.

Review grounds

[14] Mr Smith advances three primary propositions:

(a) the principle of proportionality applies and this means the Board is obligated to consider whether alternatives to prison would suffice. This reflects the rule of minimum possible intrusion into the liberty of the person;

(b) the Board is obligated to have regard to mandatory relevant considerations and failed to do so. These were matters raised in Mr Smith's plans, and also s 22 of the New Zealand Bill of Rights Act 1990 (BORA) (right not to be arbitrarily detained); and

(c) the Board erred in law by failing to actually consider Mr Smith for parole.

[15] The challenge is solely to the decision-making process. Mr Smith does not claim the outcome to be unreasonable or otherwise in breach of his rights. Mr Smith advances his claim for proportionality analysis within the context of seeking a broad declaration concerning the applicability of the principle of proportionality to all parole decisions. I prefer, however, to focus initially on Mr Smith's case and whether proportionality has been considered. It can then be assessed whether a fuller discussion of the role of proportionality in parole decisions is needed. Approached from this viewpoint, and accepting the implications as Mr Smith would have them of the principle of proportionality being applicable, the proportionality proposition becomes a submission that the Board failed to consider whether there was a less intrusive way than imprisonment for Mr Smith's risk to be managed. That less intrusive way was the Release Plan submitted by Mr Smith. Seen this way, it is a further head of failure to consider relevant matters.

Failure to have regard to relevant considerations

[16] The pleadings advanced six matters which it is said the Board was obligated to consider and failed to do so. One is not now pursued. Another is s 22 of BORA, and for reasons given in *Miller v New Zealand Parole Board*, I do not consider there was any obligation to expressly advert to it.[9] The scheme of the Parole Act is designed to give effect to obligations that arise in order to ensure detention is not arbitrary.[10] Most notably is the requirement for regular periodic reviews, but others such as the least restrictive conditions rule also touch on it.[11] To apply the Act is to inherently have regard to s 22 of BORA.

[17] The four remaining pleaded matters said to have been ignored are the Appendices to Mr Smith's submissions.[12] The four appendices amounted to a package designed to show that Mr Smith's risk is not as great as being claimed by psychologists and that structures can be put in place that would allow him to live in the community and not pose an undue risk:

(a) a penile plethysmograph (PPG) a test done in 2011. This assessment tested Mr Smith's response to sexual stimuli and Mr Smith submits the results suggest a lower risk of further sexual offending;

(b) a "risk factors and early warning signs" document that appears to be a collation by Mr Smith of the attitudes that have been previously identified as making him a risk of committing a particular type of offence, and a list of the indicia that Mr Smith recognises are a warning that the risk factor may be present. The final column is then a list of how Mr Smith thinks he can avoid the risk factor, such as by controlling his anxieties;

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9 *Miller v New Zealand Parole Board* HC Wellington CRI-2004-485-37, 11 May 2004.
10 Parole Act 2002, s 7(2)(a).
11 Sections 7(2)(a) and 21.
12 To these four alleged omissions, I add the principle of proportionality.

(c) a relapse prevention plan that appears to have similar content. Its core proposition is that Mr Smith will live a balanced life style that avoids excess stress. The document identifies a series of lifestyle problems, and high risk situations, and then identifies the coping skills that Mr Smith possesses to deal with these; and

(d) the release plan which, as its name suggests, sets out where Mr Smith would propose to live, what conditions he would be subject to, and what support networks would be available to him.

[18] In the ordinary course of events one would expect the Parole Board not only to consider this material but also to explain in its decision, at least in general terms, why its implementation would not mean Mr Smith would not pose an undue risk if released into the community. This was not, however, an ordinary situation as the closing paragraphs of Mr Smith's submission illustrate:

> 53. Mr Smith proposes that a non-custodial measure can be achieved with a high level of supervision and support; including residential restrictions, electronic monitoring and a 24 hour Department of Corrections minder;
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> 54. Mr Smith seeks a 6 month adjournment to be heard on his release proposal. He requests that the Parole Board requests reports from the Department of Corrections for residential restrictions, electronic monitoring and a 24 hour Department of Corrections minder. He further seeks a recommendation for a fresh referral to Salisbury House, and for support for his accommodation and ongoing treatment there;
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> 55. In the interim, Mr Smith seeks a strong recommendation from the Board that he commence the recommended STURP treatment one-on-one with a Department of Corrections psychologist. He proposes that if his parole is subsequently granted, he can continue that treatment, and any such other treatment, one-on-one in the community.

[19] Mr Smith was not advancing his release package in support of immediate release. Rather, he was giving notice of how, in his opinion, parole could be achieved in a shortened timeframe. Mr Smith was in effect asking for Parole Board buy-in, including support for him in the interim receiving the equivalent of a STURP care programme through counselling. Mr Smith believed this could be done and would be equally as effective as STURP.

[20] The Board's decision to accept the recommendation of the departmental psychologist, including the risk assessment, rendered much of Mr Smith's plans moot in that the assessed risk was considerably greater than that submitted by Mr Smith. The corresponding need for greater interventions made his six month proposition untenable. With that conclusion, much but not all of the material he had submitted lost immediate impact because it was premised on a six month package that would lead to a parole ready Mr Smith then reappearing before the Board. I also note there are aspects of Mr Smith's plans which, even if the Board was supportive, were not in the Board's control. For example, the Parole Board may recommend a prisoner be placed on a programme but cannot direct it to happen.

[21] This is not to say that Mr Smith's material had no relevance, nor that it was ignored. Aspects of Mr Smith's submission were directed at the risk he presently presented. This was relevant to both adjournment and immediate release. In particular, Mr Smith's focus on the PPG test results, and his relapse prevention plan were part of the proposition advanced that Mr Smith's risk in relation to violence and sexual offending was not as high as the actuarial measures might suggest.

[22] The Board did consider this submission, but rejected it. The Board's consideration of the competing risk assessments was primarily in the context of assessing whether a six month timeframe was realistic, but logically it is a consideration equally applicable to the immediate parole decision. If there was no prospect the risks could be addressed satisfactorily in six months, then self-evidently they told against any immediate release.

[23] Inherent in Mr Smith's submission is a complaint that the Board did not address his contrary submissions. I accept there is some merit in that. When accepting the advice of the psychologist, the Board's reasoning as to why it therefore rejected Mr Smith's contrary position on risk is sparse. It may be that the Board has previously explained its reliance of actuarial based risk assessment, but at least a reference to those explanations would make the present decision more complete.

[24] That said, I acknowledge that Mr Smith's submission about the risk he posed was somewhat optimistic. The June 2015 Corrections Department psychological report found him to be a high risk of general and instrumental violence, and medium-high risk of further child sexual offending. The 2017 report found him to be a high risk of general and violent reoffending, albeit with dishonesty offences the most likely. It also assessed him as high risk of sexual reoffending with prepubescent boys, and noted that the Te Piriti post treatment report indicated there were still outstanding treatment needs. There were no contrary expert assessments.

[25] It is also incorrect to say that other aspects of Mr Smith's Plans were not considered. The 2017 Corrections Department psychological report, which the Board clearly considered, had an entire section devoted to Mr Smith's release plan. It is there noted that none of his accommodation proposals are supported by Community Probation Services. Further, discussions with Mr Smith's sister were detailed in the context of explaining why it was considered his claimed support network was not as established as contended. The report also commented on the second of Mr Smith's plans, his safety plan, noting that while it was robust there were areas where it needed strengthening. In adopting, as it does, the 2017 psychological report's assessment and recommendations, the Board to this extent had considered Mr Smith's plans.

[26] Further, in terms of whether the Board failed to consider relevant matters, at [16] of the Board's decision it is noted:[13]

> 16 Mr Tuck also commented on the level of support and supervision in the community and said that a six month adjournment would provide sufficient time to prepare reports from the Department of Corrections minder. He said a recommendation for a fresh referral to Salisbury House and for support for his accommodation and ongoing treatment at Salisbury House may well be of assistance to the Board.

Although this is attributed to Mr Tuck's submissions, the matters there addressed are in fact found at page 2 of Mr Smith's Release Plan under the heading of "Supervision and Monitoring".

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13 *2017 decision*, above n 1.

[27] This analysis also answers, for the present decision, Mr Smith's submissions concerning the principle of proportionality. His proposition, as I understand it, is that when assessing parole the Board is required to explain why a less intrusive community based package would not achieve the same aims. Although not expressed in that language, that is what the Parole Board has done. In this regard, it can be noted:

(a) the Board had advice on Mr Smith's accommodation options;

(b) similarly, it had advice that the support networks he relied upon were not sufficiently established;

(c) the Board indicated it wants Mr Smith, after the necessary immediate intervention programmes, to again be exposed to progressive reintegration. This was the approach taken previously, and indeed what was happening when Mr Smith absconded. The Board had indicated in 2015 that it would support progressive reintegration resuming once departmental policy allows. In 2017, it is made plain that the Board considers progressive reintegration to be a necessary part of Mr Smith's release plans;

(d) Mr Smith was questioned at the hearing about the feasibility of one-on-one counselling as an available and viable alternative to the nine month STURP course. Mr Smith accepted he had not made any inquiries about it with psychological services. To this extent it was not a proposal with any concrete basis; and

(e) finally, against that background, there is the Board's acceptance of the assessments that Mr Smith remains a high risk of general, sexual and violent offending.

[28] In my view, these factors illustrate that the Board has considered the viability of Mr Smith's risk being sufficiently managed in the community. This is the only option to imprisonment (i.e. no parole). The assessment amounts, in substance, to the

same assessment that the principle of proportionality would require, albeit without having formally gone through the recognised steps.

[29] In conclusion on the failure to have regard to relevant considerations, with one exception of the PPG test results, I consider the matters raised by Mr Smith were considered, albeit not always expressly.

[30] As for the PPG test, it is a risk assessment tool directed specifically at sexual reoffending by measuring response to stimuli. The particular test was conducted in 2010. There have been other assessments since, but it seems (as I understand it from Mr Smith) that the 2010 test was only recently part of Mr Smith's file so had not previously been commented on in other assessments. Mr Smith advises he has been assessed by an independent psychologist who has had regard to it and it is now available to departmental psychologists.

[31] I do not consider the Parole Board in 2017 erred by not having regard to this 2010 test. The Board is entitled to expect expert assistance on the significance of the test, and for report writers to factor the result into the risk assessments they make. It is not for the Board to specifically and separately interpret it. The fact it is a test conducted seven years and several assessments ago weakens the suggestion it was a relevant consideration for the Board on this occasion.

[32] As earlier noted, Mr Smith sought an internal review of the Board's decision under s 67 of the Parole Act. Mr Smith draws support for his proposition that relevant matters were not considered from the conclusions of the reviewer which he fairly characterises as being a conclusion that these matters were not considered, but did not have to be because they were not relevant. My conclusion differs in that in my view there were aspects of this material that were relevant to the Board's decision on whether parole would be allowed at that time. However, unlike the reviewer, I have reached the view the Board has considered them.

Ground two – the principle of proportionality

[33] The concept of proportionality is well established as a necessary inquiry when considering limits on fundamental rights. Its role can be seen in the formulation set out by Tipping J in *Hansen v R*:[14]

> (a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
>
> (b) (i) is the limiting measure rationally connected with its purpose?
>
> (ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
>
> (iii) is the limit in due proportion to the importance of the objective?

[34] This approach is drawn from the jurisprudence of the Canadian Supreme Court.[15] A similar staged test has emerged from jurisprudence concerning the European Convention on Human Rights:[16]

> 1. Whether the legislative objective is sufficiently important to justify limiting a fundamental right.
>
> 2. Whether the measures designed to meet the legislative objective are rationally connected to it.
>
> 3. Whether the means used to impair the right or freedom are no more than is necessary to accomplish the objective. (This is the 'necessity question'.)
>
> 4. Whether a fair balance has been struck between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. (This is sometimes called 'narrow proportionality'.)

[35] Mr Smith advances two propositions. The first is that the doctrine of proportionality applies to parole decisions. The second is that it is an error meriting quashing of a decision if the reasoning of the Board does not reflect this proportionality methodology. This second point is essential to Mr Smith's case because he eschews any challenge to the decision itself. It is not pleaded or alleged

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14 *Hansen v R* [2007] NZSC 7, [2007] 2 NZLR 1 at [104].

15 *R v Oakes* [1986] 1 SCR 103 (SCC).

16 William Wade and Christopher Forsyth *Administrative Law* (11th ed, Oxford University Press, Oxford, 2014) at 307.

that the negative parole decision breaches his rights. Rather, it is said that the failure to use proportionality methodology is itself an error.

[36] The first proposition is no doubt in a general sense correct,[17] but in my view adds nothing to the statutory scheme. The structure and purpose of the scheme is to produce decisions that represent a proportionate balance between the safety of the community, and the right of an offender not to be detained in prison for community safety reasons any longer than necessary.[18] If the Parole Act is properly applied, the decision to decline parole for safety reasons will be a reasonable limit. (Depending on one's approach, this proposition could be differently stated as the decision to decline parole will mean the detention is not arbitrary.)

[37] That the statutory scheme inherently involves a proportionality assessment is manifest from the key provisions which set out principles that expressly require a minimum intrusion approach, albeit under what could be seen as a modified definition of minimum, i.e. "undue". The provisions are s 28(2) and s 7 of the Parole Act. Particular note should be taken of s 28(2)(a), and also s 7(3)(b):[19]

> (2) The Board may give a direction under subsection (1) [that a person be released on parole] 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—
>
> (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.

…

> **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.

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17 It was recently observed in *Ericson v New Zealand Parole Board* [2017] NZHC 536 at [39] that proportionality was "an appropriate consideration".

18 See Parole Act 2002, s 7.

19 Emphasis added.

(2) Other principles that must guide the Board's decisions are—

(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 that are more onerous, or last longer, than is consistent with the safety of the community; and*

(b) that offenders must, subject to any of sections 13 to 13AE, be provided with information about decisions that concern them, and be advised how they may participate in decision-making that directly concerns them; and

(c) that decisions must be made on the basis of all the relevant information that is available to the Board at the time; and

(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.

(3) When any person is required under this Part to assess whether an offender poses an **undue risk**, the person must consider both—

(a) the likelihood of further offending; and

(b) *the nature and seriousness of any likely subsequent offending*.

[38] Three observations can be made. First, "undue" is a concept that inherently involves a proportionality assessment. The New Zealand Oxford Dictionary defines "undue" as "excessive, disproportionate".[20] Second, s 7(2)(a) is a proportionality requirement. Third, the need in s 7(3)(b) to focus on the nature and seriousness of likely offending emphasises that it is not every risk of offending that will justify ongoing incarceration.

[39] In my view the Board did undertake a proportionality assessment, albeit it was not expressed in terms of the staged inquiries identified above. The scheme of the Act itself requires proportionality reasoning. Where the possibility of parole is real, it is difficult to imagine how that decision can be made without having regard to the option of managing the risk in the community. That is after all the parole decision, and the only two options are parole (community) or no parole (continued imprisonment).

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[20] "Undue" in Tony Deverson and Graeme Kennedy (ed) *The New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2005) at 1228.

[40] This makes it unnecessary to consider the second of Mr Smith's propositions, namely that it is a reversible error not to undertake proportionality reasoning, even if the decision consequently made without a proportionality analysis does not in fact breach any protected human right.

[41] The alternative view to that advanced by Mr Smith is that the only relevant proportionality inquiry is whether the outcome itself breaches the proportionality principle, in that a fundamental right is being unreasonably limited. The strongest statement of this approach is by the House of Lords in *R (SB) v Governors of Denbigh High School* where it was held that compatibility with the European Convention was a matter of outcome not process.[21]

[42] Two decisions of this Court are relied on by Mr Smith for a different approach. In *Television New Zealand Ltd v West* Asher J recognised an obligation on the Broadcasting Standards Authority not only to consider BORA concerns but to address them in the decision.[22] His Honour further noted that care must be taken to ensure undue formalism was not imposed on decision makers, but I accept the decision imposes a specific reasons requirement.

[43] More recently in *Smith v Attorney-General*,[23] Wylie J quashed a decision of a prison manager for failure to have regard to s 14 of BORA (freedom of expression). The error was assessed as a failure to have regard to a mandatory consideration and merited quashing the decision, regardless of whether the decision itself represented a reasonable limit on the right.

[44] The decision in *Smith* is reviewed, and acclaimed, by Professor Geiringer in her article "Of hairpieces and heresies".[24] The article acknowledges that one can read the operative provisions of BORA as contemplating a results inquiry in the same way *Denbigh High School* does, but submits that better outcomes will be achieved by a

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21 *R (SB) v Governors of Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 at [31].
22 *Television New Zealand Ltd v West* [2011] 3 NZLR 825 (HC) at [95] and [104]–[105].
23 *Smith v Attorney-General* [2017] NZHC 463, [2017] 2 NZLR 704 I note that Wylie J's decision has recently overruled in *Attorney-General v Smith* [2018] NZCA 24.
24 C Geiringer *Of hairpieces and heresies* [2017] NZCJ 232.

requirement that the decision articulate on its face the decision maker's reasonable limit analysis (under s 5 of BORA).

[45] Although for reasons given I consider the issue does not arise for parole decisions, if wrong in that I favour the results based analysis. Better quality decision making is an unimpeachable aim, and it can be argued requiring better reasons will advance that aim. On the other hand, it can legitimately be said that the real concern is that basic rights are not interfered with more than is necessary and justified. I am not convinced that it is correct to impeach a decision by reference to a person's basic rights without inquiring whether that basic right has in fact been unjustifiably limited. That said, I acknowledge different views can be taken. Professor Geiringer notes, for example, that the equivalent human rights documents in Victoria and Australian Capital Territory contain an express requirement of proper consideration.[25]

[46] The context here is different from that being considered by Wylie J in *Smith*. Although both decisions arise in a prison context, the statutory power there was largely unfettered by the legislation itself. By contrast, the Parole Act contains its own detailed scheme, aimed, I consider, at ensuring a proportionate decision. The Board is required each time to consider all relevant material, and each time to apply all the principles previously indicated. One of those principles is minimal intrusion. I doubt that the system will be aided by imposing a requirement of a set reasoning methodology, especially given the myriad of different circumstances that will confront the Board.

Ground three – error of law

[47] Under this heading Mr Smith advances the proposition that the Board failed to actually consider whether he should be released on parole. The contention is made that the Board assumed Mr Smith's agreement to not being presently fit for release, considered and rejected his proposal for a six month adjournment, but did not thereafter truly fulfil its obligation to itself make a decision under s 28 of the Parole Act. Mr Smith draws in aid comments made by the Convenor at the hearing that parole was "not on the table".

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[25] At 235.

[48] For the reasons already given, this ground of review must fail. The Board on the face of the decision plainly does make a decision. Further, it is clear why it has reached the decision it has, namely the level of risk Mr Smith is assessed as presenting, the need for further interventions (violence) and assessments (sexual offending) and the need, subsequent to all that, for gradual reintegration back into the community. The Board has not made the claimed error of law.

Conclusion

[49] I accept the concept of proportionality is relevant to parole decisions but decline to make a declaration to that effect. The Parole Board is obligated to apply the statutory scheme which in my view inherently has proportionality built in at various points. I see no role for a declaration. On the particular case I consider the Parole Board did consider all relevant matters.

[50] The applications are accordingly declined.

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Simon France J