IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

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

CIV 2020-485-554
[2020] NZHC 3316

UNDER	the Judicial Review Procedure Act 2016
IN THE MATTER OF	an application for judicial review
BETWEEN	ALFRED THOMAS VINCENT Applicant
AND	THE NEW ZEALAND PAROLE BOARD First Respondent
	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Second Respondent
	THE ATTORNEY-GENERAL Third Respondent

CIV 2020-485-523

UNDER	the Habeas Corpus Act 2001 and the Judicial Review Procedure Act 2016
IN THE MATTER OF	an application for a writ of Habeas Corpus and the appointment of a litigation guardian
BETWEEN	ALFRED THOMAS VINCENT Plaintiff
AND	THE ATTORNEY-GENERAL First Defendant
	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Second Defendant
	NEW ZEALAND PAROLE BOARD Third Defendant

Hearing: 3 and 4 November 2020

Counsel: A J Ellis and G K Edgeler for Applicant
No appearance for the New Zealand Parole Board (abides)
A M Powell and N B de Lautour for the Chief Executive of the Department of Corrections
G M Taylor and C N Tocher for the Attorney-General

Judgment: 15 December 2020

JUDGMENT OF MALLON J

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Introduction

[1] Mr Vincent is 83 years old. He has stage five dementia and a range of other health issues. He appears not to know his name, does not talk clearly, has no self-care skills, and requires assistance for all his daily activities.

[2] For the last 52 years he has been in prison under a sentence of preventive detention. Had he not received preventive detention, the offending would have attracted a finite sentence of less than ten years.[1] He was eligible to be considered for parole after seven years.[2] He has been refused parole at least 48 times, most recently on 19 August 2019. He is apparently New Zealand's longest serving prisoner. How can this be?

[3] I consider the process which ought to have enabled his release some time ago has miscarried. He no longer represents an undue risk to the safety of the community. I also consider that Mr Vincent is arbitrarily detained in breach of s 22 of the New Zealand Bill of Rights Act 1990 (NZBORA). He should be released into a place outside of prison where he can receive appropriate care as soon as possible.[3]

[4] I set out my reasons below.

Factual background

[5] Mr Vincent was born on 22 October 1937.

[6] In 1963 and 1964 he was convicted on charges of doing an indecent act, for which he received probation and six months' imprisonment respectively. In 1966 he was convicted of permitting a boy to do an indecent act on him and received a sentence of one year and six months' imprisonment.

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1 See, for example, *R v Wealleans* [2015] NZHC 2263; *R v Casper Megchelse* [2013] NZHC 251; *R v R* HC Auckland CRI 2006-092-11084, 13 December 2007; *R v IWM* [2006] BCL 473; and *T v R* (1998) 15 CRNZ 602 (CA).

2 Criminal Justice Amendment Act 1967, s 3.

3 The specific orders I have made are set out at the end of this judgment.

[7] In 1967 and 1968 Mr Vincent offended again. He was charged with and pleaded guilty to seven charges of indecent assault. The indecencies were committed on five boys aged between 12 and 14 years, all of whom he had met through his association with one family.

[8] The indecencies on three of the boys concerned single occasions when Mr Vincent had been permitted to take each of them on a car ride for different reasons. He had stopped the car and had masturbated in front of each boy and/or had "interfered with the boy's private parts".[4]

[9] The indecencies on the other two boys occurred over a period of time. In relation to one of those boys, the offending was similar to that of the other three boys and also involved kissing him. In relation to the fifth boy, it also involved putting his penis between the boy's legs and imitating sexual intercourse, as well as performing oral sex on the boy and having the boy perform oral sex on him.

[10] When interviewed about these matters, Mr Vincent frankly admitted the behaviours and was cooperative with the Police. He said his previous sentences had done him little good as he was unable to control himself around young males.

[11] A probation report to the sentencing judge advised that Mr Vincent, then aged 30 years old, was living with his parents, to whom he paid board. He was the eldest of five children. He left school aged 15 years and had worked in a variety of largely unskilled jobs. His various employers had regarded him as a "very good worker". His parents were "hard working decent folk" who were hurt by their son's offending. However, Mr Vincent himself appeared to be "without shame or embarrassment" and said he was introduced to this type of behaviour as a boy.

[12] A medical report prepared for Mr Vincent's sentencing described his manner as "obsequious" and "over-anxious to please". Psychological testing "confirmed dull intelligence at I.Q.81". The report said he realised his wrong-doing and was fit to plead.

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4 From the summary of facts on which he was sentenced.

[13] Mr Vincent was sentenced to preventive detention on 27 September 1968. An appeal was dismissed by the Court of Appeal on 7 November 1968, the Court commenting that it was "quite satisfied" that the sentence of preventive detention "was in every way a proper one".[5]

[14] While serving his sentence, multiple psychological reports were prepared on him dating back to 1975. Mr Vincent attempted treatment at the Kia Marama Sexual Offender Treatment Unit on several occasions. He was "stood down on 4 or 5 occasions", having gained little benefit from this. He was regarded as being at a high risk of re-offending, having continual arousal in relation to young males when this was tested.

[15] In 1984, while on daytime parole (the equivalent of the release to work programme), Mr Vincent was observed with his arm around a young boy's shoulder. He was convicted of preparing to commit a crime in a public place and sentenced to "come up for sentence if called upon".

[16] In 2006 a psychologist report to his lawyer said:

> Mr Vincent remains at high risk of sexual offending against children and uses predatory behaviour with young adults. He does not pose undue risk to older adults and those who know his intentions (in the prison setting). At this age and the older he becomes he poses little risk of forcing his actions on adult victims.

[17] Dr Olive Webb, who has provided an updated report on Mr Vincent for these proceedings, has assessed Mr Vincent on several occasions. In 2014 she described Mr Vincent as being "a pleasantly garrulous elderly man who talked freely about his offences, his career in prison and his sexual experiences in prison". Mr Vincent was able to describe to Dr Webb a series of jobs that he had in prison. He was also able to describe his day and weekend leave, and that this was to the Salvation Army where he was supervised so that he did not engage inappropriately with members of the public, especially children. Mr Vincent told Dr Webb that this leave used to occur frequently but had stopped three years ago for financial reasons. He had not been out of the

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5 *R v Vincent (CA89/69)* 7 November 1968.

prison since then apart from trips to the doctor or to hospital. He had not seen his sister for over three years. He understood all his family were now dead.

[18] Over the years, Mr Vincent was considered for parole many times. In his 47th year in custody he came back before the Parole Board at a hearing on 28 August 2015. He was represented by counsel who at that stage had acted for him for over 14 years. He was declined parole on the basis that he continued to pose a high risk of sexual offending. This was on the basis of an assessment by a Corrections psychologist to this effect.

[19] The Board considered that he would need 24-hour supervision and care if he were to remain offence-free in the community and that therefore an extremely robust release plan would be needed. The Board said it would consider whether to make a postponement order (whereby consideration for parole is postponed for a period) at the next hearing. It considered there to have been "a noticeable deterioration in Mr Vincent's understanding of what is going on around him, and his offending". It directed that an independent psychiatrist assess Mr Vincent to determine whether he had the ability to instruct counsel regarding the postponement hearing.

[20] Pursuant to this direction, on 16 September 2015 Dr Deavoll, a consultant psychiatrist, assessed Mr Vincent's cognitive function, capacity to instruct counsel and whether he required a welfare guardian. Dr Deavoll described Mr Vincent as having a borderline IQ. He was independent with all of his daily activities and had been able to discuss his recent Parole Board hearing. While he appeared to be showing early stages of dementia, in Dr Deavoll's view Mr Vincent remained competent to continue his own affairs, did not require a Welfare or Property Guardian, and did not reach the threshold for aged residential care if he were in the community. Given his IQ and that he had been in prison most of his adult life, it was highly likely that he would function extremely poorly in the modern world and would need "considerable supervision and support".

[21] Dr Webb also assessed Mr Vincent in 2015. She provided a report to Dr Ellis, counsel for Mr Vincent in these proceedings, dated 23 September 2015. She considered Mr Vincent's non-verbal, perceptual reasoning and processing speed to be

essentially at the same level as in 1968. However, his verbal compression index was "especially low" and his working memory was in the "extremely low range".[6] Her report concluded:

> 10. We can be reassured that we have 47 years of evidence that whether Mr Vincent is in prison or in a supervised community setting, as long as the supervision is there, then he is compliant and safe. This should be the basis for future planning.
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> 11. The challenge, therefore, seems to be to determine the place where the appropriate level of supervision can occur.
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> 12. This question has been visited by the Parole Board on many occasions but has not led to any attempt to formulate a practical solution that will involve: identifying a service provider, setting standards for supervision and support, and providing funding.
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> 13. It seems that the Prison Service does not see its role as developing a discharge and resettlement plan.
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> 14. However, the apparent recent possibility of a long term placement with the Salvation Army needs exploring. It is not clear how that will happen, who is responsible for it or whether Mr Vincent will continue to languish for the want of someone to do this practical task on his behalf.

[22] At a hearing on 5 October 2015, the Board made a postponement order for three years. In doing so, it noted that he could be considered for release earlier than that if there were a significant change in his circumstances. It was also noted that compassionate release might be available if his health failed to such an extent as to come within the statutory criteria for such release.

[23] Dr Deavoll assessed Mr Vincent again on 20 September 2017 and provided a report dated 27 September 2017. The referral from the medical officer at Rolleston prison advised that over recent months Mr Vincent's mental state had deteriorated acutely and his cognitive function had "really declined". Staff advised that he was mixing up night and day, often required prompts to shave, wash and shower, and was incontinent. Staff also advised he spent a lot of his time colouring in and, whereas he was able to do these quite successfully a year or two ago, it was now extremely rudimentary and childlike. Mr Vincent was unable to correctly recall his age (he gave

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[6] In hindsight, Dr Webb says that the decline in his verbal reasoning skills was probably the first sign of his now diagnosed dementia.

his age as 72) or the length of time he had been in prison (he said 79 years) for Dr Deavoll. He also did "very poorly" at naming simple objects. In short, Dr Deavoll considered there had been a significant cognitive decline.

[24] Dr Deavoll considered Mr Vincent should be considered for transfer to a High Dependency Unit (HDU). If he were in the community, he would be deemed suitable for Dementia Rest Home level of care. In Dr Deavoll's view he did not have the capacity to instruct counsel were he to appear before the Parole Board. He considered the Justice Department should apply for a welfare guardian for him. He was no longer competent to appoint an enduring power of attorney.

[25] Mr Vincent continued to be considered for parole at hearings in 2018 and 2019 but was not released. Three of the Parole Board's decisions are the subject of these proceedings. In 2020 Mr Vincent applied for compassionate release. The decision declining that application is also the subject of these proceedings.

The Parole Act

[26] The Parole Board is the entity empowered by law to release prisoners serving long-term, including indeterminate, sentences of imprisonment. The governing legislation is the Parole Act 2002.

[27] When making decisions about the release of an offender "the paramount consideration for the Board in every case is the safety of the community".[7] Other principles that "must guide the Board's decisions" include "that offenders must not be detained any longer than is consistent with the safety of the community" and "they must not be subject to release conditions that are more onerous, or last longer, than is consistent with the safety of the community".[8]

[28] The Board is empowered to direct that an offender be released on parole as follows:

> **28 Direction for release on parole**

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7 Section 7(1).
8 Section 7(2)(a).

(1AA) In deciding whether or not to release an offender on parole, the Board must bear in mind that the offender has no entitlement to be released on parole and, in particular, that neither the offender's eligibility for release on parole nor anything else in this Act or any other enactment confers such an entitlement.

(1) The Board may, after a hearing at which it has considered whether to release an offender on parole, direct that the offender be released on parole.

(2) The Board may give a direction under subsection (1) only if it is satisfied on reasonable grounds that the offender, if released on parole, will not pose an undue risk to the safety of the community or any person or class of persons within the term of the sentence, having regard to—

(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.

(3) If the Board directs the release of an offender on parole, it must specify the date on which the offender is to be released, which must be a date that is—

(a) not later than 6 months after the hearing; and

(b) not a non-release day.

(4) Despite subsection (3)(b), the Board may, in exceptional circumstances, specify a date for release that is a Thursday or a Friday.

(5) The Board may revoke or amend any direction under this section at any time before the offender is released on parole, but, if it does so, the Board must hold another parole hearing as soon as practicable.

[29] When deciding whether a person poses an "undue risk", the Board "must consider both … the likelihood of further offending … and … the nature and seriousness of any likely subsequent offending".[9]

[30] Standard conditions apply to every offender who is released.[10] This puts the offender under the supervision of a probation officer.[11] Special conditions may also be imposed.[12] Such conditions can only be imposed for specified purposes, one of

9 Section 7(3).
10 Section 29.
11 Section 14(1).
12 Section 29AA.

which is reducing the risk of reoffending. Special conditions can include residential restrictions, non-association conditions and electronic monitoring.[13]

[31] The Parole Board is also empowered to direct that an offender be released on compassionate grounds as follows:

> **41 Board may direct early release on compassionate grounds**
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> (1) The Board may, on referral by the chairperson, direct that an offender be released on compassionate release on either of the following grounds:
>
> (a) the offender has given birth to a child:
>
> (b) the offender is seriously ill and is unlikely to recover.
>
> …

[32] The Board may, as part of a direction for compassionate release, impose the standard release conditions and any special conditions. An offender released on compassionate release is liable to recall as if he or she had been released on parole.

The Parole Board decisions

Assessment for August 2018 hearing

[33] On 16 July 2018 a department psychologist (Hannah Brown) provided a report for the purposes of the Parole Board assessing Mr Vincent's suitability for release. By this time, Mr Vincent was in the HDU at Rimutaka Prison and had a minimum security classification. Ms Brown noted Mr Vincent's 2017 dementia diagnosis.

[34] Ms Brown advised that she visited Mr Vincent on 13 June 2018 for 15 minutes. She observed him to be "tangential in his conversation and did not appear orientated to time, place and person". Mr Vincent appeared unable to understand the purpose of the visit and the psychologist was unable to obtain his consent to the interview. Her assessment was therefore based solely on file information and consultation with staff.

[35] As to his behaviours, Ms Brown noted:

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[13] Section 15.

> 8. File information indicated that Mr Vincent had been involved in two sexual incidents while he has been at the HDU. It appeared that these incidents were reciprocated by the other prisoner involved. Prison staff advised the writer that Mr Vincent's behaviour is easily redirected and managed. File information also indicated that Mr Vincent had been experiencing memory difficulties, such as forgetting he had consumed breakfast and lunch and was confused and disorientated at times. In addition, Mr Vincent can become upset and frustrated when he believes he ha[s] not had meals. Again, prison staff advised the writer that this behaviour is easily redirected and managed.

[36] Ms Brown noted that people with dementia often exhibit disinhibited behaviour, including sexual behaviours. In Mr Vincent's case, his disinhibited behaviour could be associated with his dementia, although he previously engaged in inappropriate sexualised behaviours towards prisoners and staff.

[37] Ms Brown referred to an assessment on 9 July 2015 that Mr Vincent shared the characteristics of a group of offenders at high risk of further sexual offending. However, Mr Vincent's "presentation has significantly changed since this last assessment, and the writer is unable to confirm this risk statement at the current time".

[38] Ms Brown said:

> 18. With regards to risk management, based on Mr Vincent's neurological decline it is apparent that likely he has, at times, no internal strategies of control for his behaviour. Therefore, it is likely that his risk could be managed through external strategies of control. Due to Mr Vincent's current fragility, and the ability for his disinhibited behaviours to be re-directed by staff, it is the writer's opinion that Mr Vincent's behaviour could be managed by a residential facility for people with Dementia.
>
> …
>
> 21. With regards to Mr Vincent's behavioural management, it is noted that disinhibited behaviours, such as inappropriate sexual behaviours are not uncommon for people with neurocognitive decline (such as Dementia). Therefore staff in a residential facility are likely able to be trained to manage behaviours, such as Mr Vincent's.
>
> 22. … It is the writer's opinion, that if the Board are inclined to grant Parole to Mr Vincent, it will be possible through external controls to manage his risk of re-offending in a residential facility in the community for people with Dementia. Staff would require appropriate training to ensure his sexualised behaviour was managed appropriately.

[39] On 16 August 2018, a Corrections representative completed a "waiver" for the upcoming Parole Board hearing on Mr Vincent's behalf. This stated that Mr Vincent did not wish to appear before the Board "due to ill health" and that he had "dementia to the point that he could not remember how to write his name below".

[40] Corrections provided a report for the Parole Board dated 18 August 2018. The report advised that very little had changed for Mr Vincent since the Board had last seen him, other than that he had been transferred into the HDU and was receiving appropriate care for his health issues. Mr Vincent did not have an address to put forward and he had not had any escorted outings on humanitarian grounds (as had been suggested by the Board). He was still displaying pre-occupation with sexual thoughts and behaviours, and there had been "several recorded instances of Mr Vincent attempting to engage in attempted sexual activity with another prisoner". The Health team would support Mr Vincent being released to a secure facility through a compassionate release application. A possible facility was identified and the manager had indicated they should be able to provide the level of supervised care he would need.

The Board's 21 August 2018 decision

[41] The Board referred to the waiver, noting that it was clearly not written by Mr Vincent and he was "in no way capable of appearing before us". The Board noted that Mr Vincent had received no treatment since the 2015 Parole Board decision and that treatment was no longer an option given his neuro-cognitive decline. The Board said:

> 7. The Board acknowledges that but it is not at a point where we can be satisfied that risk is other than undue. Furthermore, there is no available accommodation.
>
> 8. It seems to us that Mr Vincent is in need of a secure dementia care facility and we have no indication of availability.
>
> 9. We do have some concern about Mr Vincent's welfare. There has been some suggestion of compassionate release but we are satisfied that the point has not been reached in terms of section 41 of the Parole Act 2002.
>
> 10. We have decided to schedule Mr Vincent to be seen again in three months' time, that is in November 2018. We would hope that close

> consideration can be given to options for Mr Vincent. It seems clear to us that he is [in] need of significant assistance including from legal counsel.
>
> 11. Parole is declined.

Steps to assist Mr Vincent

[42] On 29 August 2018 the Manager of the Parole Board asked Ms Shone if she would be prepared to act as amicus to represent Mr Vincent at his next Parole Board hearing. The Manager advised of comments from the previous amicus about difficulties in finding something suitable for Mr Vincent in the community. The Manager commented that elderly prisoners with dementia are arguably better off in the HDU at Rimutaka which is "possibly one of the best facilities of its kind I have seen". Ms Shone advised that she would accept the appointment. At around the same time, the Prison Health team were processing an application for a welfare guardian to be appointed.

The November 2018 hearing

[43] A Corrections report dated 23 October 2018 for the Parole Board hearing in November 2018 advised that:

(a) A welfare guardian application was underway.

(b) Mr Vincent's high likelihood of further sexual related offending had not changed because "prison records indicate that Mr Vincent is still displaying a pre-occupation with sexual thoughts and sexualised behaviours" and "[s]ince he last appeared before the Parole Board, there have been several recorded instances of Mr Vincent attempting to engage in sexual activity with other prisoners".

(c) Mr Vincent had no proposed address for his release. The manager of the identified facility had indicated that they should be able to provide the supervised care he would need.

(d) GPS monitoring would be appropriate should he be released.

[44] A Parole Board hearing took place on 20 November 2018. This decision is not the subject of the judicial review proceeding. For completeness I note that parole was declined because "risk remains undue at this time in the absence of a clear release plan and proposal". The Board said the next hearing would be scheduled for May 2019. An updated psychologist report was directed.

Information for May 2019 hearing

[45] On 20 March 2019 Dr McArthur, the doctor for Mr Vincent in the HDU, advised that Mr Vincent had "advanced" dementia and had no chance of recovery. Dr McArthur also advised that Mr Vincent did not have any welfare guardian in place. Dr McArthur said Mr Vincent needed dementia level care and this was a higher level of care than that which was formally provided at the HDU. Dr McArthur said that Mr Vincent had not been recommended for placement at dementia level of care because of his history of repeated sexual offending. It was therefore "felt that other vulnerable residents in such a facility should not be exposed to the risk of repeated patterns of behaviour".

[46] On the same day, Dr McArthur completed an application to be appointed Mr Vincent's welfare guardian for all aspects of his personal health, welfare and property. I do not know if this application was ever lodged with the Family Court. In any case I understand that no appointment was made.

[47] On 8 April 2019 a Corrections psychologist (Claire Blincoe) provided an updated report for the May Parole Board hearing. Like Ms Brown, Ms Blincoe was unable to interview Mr Vincent. She observed him over a period of two hours on 7 March 2019, while also obtaining information from nursing staff. She also reviewed file information.

[48] She noted that "a number of staff members in the HDU considered the dementia has advanced in Mr Vincent's case in recent months. This included a decrease in his ability to manage daily tasks without assistance, such as eating and knowing where to use the toilet. He reportedly spent most of the time wandering around the unit quietly talking to himself.

[49] Ms Blincoe said that since July 2018 there were case notes referring to his tendencies to irritate others by invading their personal space, to display sexualised behaviour and to use aggressive words or actions towards others. The report further explained:

> The sexualised behaviour involved two incidents of pursuing sexual contact with another prisoner in July and August 2018. Those working with Mr Vincent indicated Mr Vincent and the other prisoner had been suspected of engaging one another in consensual sexual acts in the past. They reported past incidents of sexual advances had involved this same prisoner who had recently passed away. Since this man had passed away those working with Mr Vincent said they had not witnessed Mr Vincent actively pursuing other individuals for sexual contact. There had however been two recorded incidents, in March 2019, of Mr Vincent exposing and touching his genitals whilst in communal areas. Those working with Mr Vincent considered he was generally easily redirected at times when they were required to intervene in response to his behaviour. At these times Mr Vincent tended to respond to verbal prompts from staff and to allow them to guide him to another area or activity. IOMS case notes indicated Mr Vincent had used threatening language towards a healthcare assistant on one occasion in July 2018 and he reportedly swung his arm towards a healthcare assistant on a separate occasion in August 2018. Custodial and healthcare staff considered these incidents were infrequent, understandable in the context of disinhibition due to dementia and easily de-escalated.

[50] Ms Blincoe's recommendation was as follows:

> The previous psychological report to the Parole Board indicated it would be possible to manage offence-related risk via external controls in a community based residential facility for people with a diagnosis of Dementia. It was further noted that staff would require training to ensure the appropriate management of any sexualised behaviour exhibited by Mr Vincent. This recommendation is supported on the premise that an identified provider could guarantee appropriate levels of observation, understanding of and response to Mr Vincent's tendencies to seek out sexual contact with others, to wander and fall and to invade the personal space of others. Any provider would need to ensure an appropriate level of supervision; particularly if children are visiting the home. Robust plans would need to be in place indicating how to identify and respond to problematic behaviours. It is recommended that such plans are formulated as part of a robust handover process involving those who are currently supporting Mr Vincent, the identified community care provider and Community Probation Services.

[51] A Corrections report dated 18 April 2019 for the Parole Board advised:

> Unit staff advised Mr Vincent's behaviour has remained the same since the last parole hearing; whereby his sexualised behaviour along with the impact of his dementia, and deteriorating health are commonplace. The writer has noted IOMS staff notes; such as 16 October, staff reported Mr Vincent was annoying another prisoner. On 23 October, it was reported Mr Vincent

> annoyed another prisoner, who in turned knocked Mr Vincent's hat off his head. On 5 November, staff reported Mr Vincent had been warned to keep his hands to himself as he was poking and hitting other prisoners; after which he also punched the staff member in the arm and laughed jokingly. Later, on 10 November, it was reported, Mr Vincent intentionally put his leg out in the path of another prisoner and tripped him up. On 17 November, another prisoner assaulted Mr Vincent, recorded as an unprovoked attack against him.
>
> Mr Vincent has no outstanding charges listed on IOMS.

[52] The report commented that without appropriate care he was a "risk to others in the community". The report also commented that the writer had spoken with the manager of the facility (it did not say what the outcome of that discussion was). It noted that Mr Vincent had attended the Kia Marama programme on four occasions in the past but had made minimal gains. Further treatment would be difficult because of his dementia.

The 17 May 2019 decision

[53] The Parole Board noted that Ms Shone's submission was that the Board consider releasing Mr Vincent to the facility. She understood they were prepared to take him. The Board said:

> 4. This Board is concerned that really no formal release proposal to [the facility] has been presented. We would expect as a minimum there would be a multidisciplinary meeting including his GP in the prison, Robin McArthur, attending to really set out and determine this man's needs. Certainly, any proposed hospital care provider would have to attend so they are fully aware of the various features Mr Vincent presents.
>
> 5. It is very clear from the reports we have that he is continuing to focus on inappropriate sexualised behaviour. That presents risks for not only himself but any other patients of any facility he should be referred to. If one only simply refers to Dr McArthur's memorandum of 20 March, that succinctly sets out the level of care this man needs and the risks he presents.
>
> 6. Accordingly, we invite Corrections and all the relevant professionals to undertake the necessary meeting, prepare a robust release proposal addressing all the concerns that have been documented over the years and recently, and present that plan to the Board at this man's next hearing. We see a matter requiring two to three months to execute. Accordingly, we ask that Mr Vincent be seen on 19 August in person at Rimutaka Prison.

7. Obviously, he is not a candidate for parole today. That is declined. At that hearing in August we would expect to see a formalised release proposal to any hospital facility.

Information for the August hearing

[54] Corrections provided a parole assessment report for the Parole Board dated 10 July 2019. This report advised that staff had noticed a decrease in Mr Vincent's ability to concentrate on tasks, engage with people and show an awareness of his environment. This was consistent with his dementia diagnosis.

[55] As to his behaviour, the report said:

> Since his last parole appearance, Mr Vincent has not incurred any incident reports or misconduct charges. However, it has been the case for some time, and [h]is departmental records show that Mr Vincent is known to have the tendency to irritate other prisoners by invading their personal space and displaying sexualised behaviour. He is also known to be aggressive towards others and to physically poke and hit people around him; along with physically pursuing other prisoners for sexual gratification.
>
> …
>
> Mr Vincent's Dementia condition means he does not have the cognitive ability to manage his risk of harming any other people around him at any time. Departmental records show he is known to have pursued other prisoners for sexual gratification; and he continues to display sexualised behaviour, verbal and physical aggression towards other prisoners.

[56] The report discussed that the facility had been approached. The manager considered that they were "well equipped to manage Mr Vincent's care needs; including his sexualised behaviour". She assessed Mr Vincent and accepted him as a future patient. However, just prior to the reintegration meeting, she became aware of a media article about him. After consultation with the directors of the facility, they withdrew their support.

[57] The report went on to say that other suitable psychogeriatric facilities will now need to be canvassed and:

> A recent psychological report recommended that any facility being canvassed will need to be made aware that Mr Vincent is accustomed to a prison setting over a very lengthy period of time. They will also need to be able to adequately supervise Mr Vincent in communal areas at all times and he will require a plan specifically for night time supervision given nursing homes by

> nature tend to keep unlocked bedroom doors at night and he is known to wander at night. The report also suggests if Mr Vincent were to gain residency in a suitable Psychogeriatric Care facility, that staff may need to be trained to manage his sexualised behaviour and the facility will need to be able to guarantee appropriate levels of observation; and understanding of and response to Mr Vincent's tendencies to seek out sexual contact with others.

The 19 August 2019 decision

[58] The Parole Board declined to order Mr Vincent's release following the hearing on 19 August 2019. In its decision it said:

> 2. As to the current position, Mr Vincent's Alzheimer's has progressed. He is deteriorating both physically and mentally. He continues poor conduct, invading personal space, some sexualised conduct, all of which may simply be disinhibited conduct arising from his Alzheimer's. It was noted that he might be able to be released to nursing home care but there were significant dangers in his sexualised conduct.
>
> 3. The position to us seems to be summarised in the PAR [parole assessment report] where it said, "It is recommended if Mr Vincent were to gain residency in a suitable psychogeriatric care facility, the staff may need to be trained to manage his sexualised behaviour and the facility will need to be able to guarantee appropriate levels of observation and understanding of and response to Mr Vincent's tendency to seek out sexual contact with others."
>
> 4. Currently, there is no such care facility available. Nor is there any that could be identified. In the circumstances therefore, given Mr Vincent's continued conduct, we are satisfied he remains an undue risk.
>
> 5. We have made significant efforts since November 2018 to try and identify appropriate care facilities without success. None can now be identified. We think the appropriate course now is a rather longer period. We will see Mr Vincent again in just under two years time, by the end of July 2021. If further enquiries as to appropriate care facilities prove fruitful then Mr Vincent can always come back before the Board pursuant to section 26 for a further reconsideration of parole.
>
> 6. We note that in 2015 the Board suggested that an application under the Protection of Personal and Property Rights Act might be made. We understand no such application has been made. We draw it to the attention of both Corrections and his lawyer.

Application for compassionate release

[59] On 29 July 2020 Mr Vincent, through his lawyer Ms Shone, applied under s 41(1)(b) for compassionate release. The application expressed concern that little appeared to have been done to advance a release plan for Mr Vincent despite a 2007 Parole Board decision stating that it was "unacceptable to think that he is doomed to

die in prison" and Mr Vincent's health has since worsened and at an accelerated rate in recent months. The application said that Mr Vincent now required level five dementia care and his weight had fallen to 56 kg. He could walk for short distances only and he could feed himself, but needed considerable assistance.

[60] A report from the Prison Director dated 6 August 2020 was provided to the Parole Board in relation to the application. This report contained the following summary of his behaviour:

> Behaviour and attitude are described as: File notes show staff working with prisoner, to gain compliance, due to his Dementia. He does not have a great understanding of where he is and why he should do what he is told to do. Although, Vincent does things like take another prisoners walking frame, he is easy to deal with, when staff are required to take things back. Officers get him to his cell by giving him a cup of tea and a biscuit. As this settles him and enables locking to be completed. Vincent is generally quiet and smiley, with little understanding of his surroundings.

[61] The report attached medical information reports and letters and said that Mr Vincent:[14]

> …
>
> - is receiving assistance in most activities of daily living. A health staff assists him with daily showers and dressing. He requires reminding at meal times and is being supervised to prevent choking. He requires ongoing re orientation in the unit. He also can demonstrate disinhibited behaviours due to his illness but this is being managed in the unit by giving directions and by distraction. His medications are prepared and administered for him as he is not capable of self administration.
>
> - is planned to receive a supportive and secured accommodation (Dementia unit) that has 24/7 nursing care. He will be reviewed by the Hutt Valley Care Coordination on 13/6/18 for accommodation needs and other requirements needed to stay in a secured unit (Dementia unit).
>
> - is capable of mobilizing independently in the wing with supervision. He can eat and drink by himself with healthcare staff supervision but food needs to be prepared to prevent choking. He can put on clothes by himself but can do it the other way around. At times independent in toileting but also incontinent and needs to be reminded where the toilet is located.
>
> - has a life expectancy that is not known. Dementia is a progressive illness that has no treatment.

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[14] It is apparent from this summary that some of the information it records may be out of date. For example, it refers to a review on 13 June 2018 in the present tense although the report is dated 6 August 2020.

[62] One of the attachments to the report was an undated letter from Dr McArthur. This discussed that the facility was currently the only facility that provides psychogeriatric care for level five dementia. Mr Vincent would be "no more difficult than a typical resident of their facility" but they were concerned that a "media frenzy" around Mr Vincent could have a negative effect on the families of other residents.

[63] Dr McArthur went on to say that Mr Vincent:

> … currently is dependent for all of his ADL (activities of daily living), can walk independently when not too sleepy, but is at significant risk of falling and thus risking a terminal injury. … He can feed himself – he eats and drinks well most days. … Mr Vincent is not in the dying phase but he does suffer from a terminal condition (dementia and frailty). He may die suddenly due to an acute event but he could live for many more months or even years.

[64] Dr Deavoll's 29 September 2017 report was also attached.[15]

The Chairperson's 7 August 2020 decision

[65] In his decision, the Chairperson noted his gatekeeping function under s 41 of the Act. He also noted that Mr Vincent had been in prison since 1968. His decision proceeded as follows:

> 4. He currently suffers from a range of health difficulties. He has been diagnosed with moderate to severe dementia.
>
> 5. There is no evidence before me which would satisfy me that Mr Vincent currently qualifies for referral. Mr Vincent has remained mobile; he can eat and drink by himself with supervision and can dress and toilet himself.
>
> 6. As Dr McArthur said he could die suddenly of an acute event but he could live for many more months or even years. Given Mr Vincent is now 85 years of age, that assessment is unsurprising. There is no identification of any health condition from which it can be said he is likely to die within the immediate future.
>
> 7. Section 41 of the Parole Act 2002 is designed to refer for consideration of parole those persons who have a life-threatening illness, who will not recover and can be identified as being near death. Mr Vincent is not in that category.
>
> 8. There is a further difficulty. Mr Vincent, if released, would need secure care. No such secure care can be identified. In those

[15] Refer [23] above.

circumstances, he does not have an effective proposal to put before the Board for consideration of compassionate release.

9. The application is refused.

Subsequent steps

Habeas corpus and litigation guardian applications

[66] On 22 September 2020 Mr Vincent, through his intended litigation guardian, filed an application for a writ of habeas corpus, an application for the appointment of a litigation guardian (Susan Shone) or the exercise of *parens patriae* jurisdiction, along with supporting material. In accordance with s 9(3) of the Habeas Corpus Act 2001, the habeas corpus application was set down for hearing on 24 September 2020, when it came before me as duty judge.

[67] At that hearing, Ms Shone was appointed litigation guardian for certain purposes. This included for the habeas corpus application and a foreshadowed judicial review application.

[68] As to the habeas corpus application, my minute of the hearing recorded:[16]

> [9] In response to the habeas corpus application, the respondent has produced the warrant for preventive detention pursuant to which Mr Vincent is detained. For Mr Vincent, it is accepted that there is a warrant of imprisonment lawfully issued. This is not challenged. What is challenged is that his imprisonment has become arbitrary and unlawful. This appears to be a challenge to one or more "upstream" decisions of the Parole Board that have declined to order his release. Relevant to whether the habeas corpus application is the appropriate one, is the scope and application of *Manuel v Superintendent of Hawkes Bay Regional Prison* (a Court of Appeal decision), discussed in *Kim v The Prison Manager, Mount Eden Corrections Facility* (a Supreme Court decision).[17]
>
> [10] The habeas corpus application is a challenge to the lawfulness of Mr Vincent's continued detention. Pursuant to *Manuel*, an issue is whether it is capable of summary determination. Mr Ellis submits the application is capable of summary determination because it involves a narrow question of law. He accepts that question of law is "wrapped around a lot of background information" and it is necessary to have that context. He accepts the matter should be determined pursuant to a fair process and, as he put it, is not seeking

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16 *Vincent v The Chief Executive of the Department of Corrections* HC Wellington CIV 2020-485-523, 24 September 2020.

17 *Manuel v Superintendent of Hawkes Bay Regional Prison* [2005] 1 NZLR 161; and *Kim v The Prison Manager, Mount Eden Corrections Facility* [2012] NZSC 121.

> to "win by ambush". He has also signalled an appeal if the application is not successful to enable the proper scope of *Manuel* to be determined.
>
> [11] Although a habeas corpus application must be set down for hearing within three working days, it is not mandatory for the Judge to determine the application on the first allocated hearing date.[18] There are important issues involved. I proposed that the habeas corpus application hearing be adjourned to a date and heard together with an urgent judicial review (the proceeding Mr Powell submits is the appropriate one). This would provide an opportunity for the habeas corpus application to be considered in its fuller context, would provide the respondent with a fuller opportunity to respond to it, would provide a better opportunity for the Court to consider the issues, and may be assistance if the application is declined and is appealed. It would also enable the matter to be considered as a judicial review if that is the more appropriate procedure, and with the prospect of an order for relief in that proceeding if the grounds are made out.
>
> [12] The parties agreed with the course I proposed. …

[69] The habeas corpus application was accordingly adjourned to be heard with the (then yet to be filed) judicial review proceeding on 3 November 2020.

Judicial review

[70] A judicial review proceeding was filed promptly. It seeks judicial review of the Parole Board's decisions of 21 August 2018, 17 May 2019 and 19 August 2019. These decisions concerned whether Mr Vincent was to be released on parole.

[71] In relation to the 21 August 2018 decision, it is alleged that the Board erred in law by:

(a) accepting a waiver from the Department for Mr Vincent to be present or appear by counsel;

(b) hearing from the Department in writing and not from Mr Vincent;

(c) failing to take into account Mr Vincent's mental impairment; and

(d) failing to take into account and apply the NZBORA and acting contrary to those rights and s 22 of the Human Rights Act 1993.

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18 *Kim*, above, at n 17.

[72] It is alleged that, as a result, Mr Vincent's detention was an arbitrary detention (either because it aggravated an existing arbitrary detention or a new arbitrary detention commenced).

[73] Corrections are alleged to have been complicit in the breach of natural justice at the 21 August 2018 Parole Board hearing.

[74] In relation to the 17 May 2019 and 19 August 2019 decisions, it is alleged the Parole Board:

(a) took into account an irrelevant consideration by relying on reports of inappropriate sexualised behaviour when that behaviour was a symptom of his dementia and in any event did not involve unlawful conduct; and

(b) failed to take into account and apply the NZBORA.

[75] Judicial review is also sought of the Parole Board Chairperson's decision of 7 August 2020 declining Mr Vincent's application for compassionate release. It is alleged the Chairperson erred by:

(a) relying on a report from Dr McArthur which was not provided to counsel, giving rise to an unfair hearing;

(b) misinterpreting s 41;

(c) erroneously finding that Mr Vincent remained mobile, could eat and drink by himself without supervision, and could dress and go to the toilet himself;

(d) wrongly taking into account whether there was a secure facility for Mr Vincent; and

(e) failing to take into account and apply the NZBORA.

[76] It is also alleged that the decisions were irrational and unreasonable in light of Mr Vincent's dementia, the length of his detention and NZBORA.

[77] The pleadings seek various declarations including that Mr Vincent's detention since 21 August 2018 was arbitrary in breach of s 22 of NZBORA, was disproportionately severe in breach of s 9 of NZBORA, and did not treat Mr Vincent with inherent dignity and respect in breach of s 23(5) of NZBORA. They also include an order quashing the decisions and directing that Mr Vincent be housed in a care facility or hospital outside of the prison.

[78] The pleadings further allege that Mr Vincent has not been provided with adequate medical care. Pursuant to a pre-hearing direction, these allegations were not for consideration at the November hearing because of the urgency with which that hearing was scheduled, but remain on foot and are able to be pursued at a later time.[19]

Current information

[79] Dr Webb's updated report of 20 October 2020, filed for this proceeding, advises that when she visited Mr Vincent he seemed not to know his name, did not talk clearly, became cross and said "don't like it here" but nothing else was understandable. He was restless and agitated and refused to engage with Dr Webb. A prison officer advised Dr Webb that Mr Vincent cannot follow instructions, has no self-care skills, is incontinent and sometimes puts his hands in his soiled pads and soils the walls or other people, sometimes pulls his penis out and does not engage with any activities in the unit.

[80] Dr Webb's report concluded:

> a. It seems that the Parole Board has not received the correct information it needs to make a decision about Mr Vincent's situation.
>
> b. Mr Vincent has advanced dementia and is dependent on carers for every aspect of his living.
>
> c. He is mentally totally incompetent.

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[19] *Vincent v The New Zealand Parole Board* HC Wellington CIV 2020-485-554, 29 October 2020 at [1].

d. He cannot present a risk to any person.

e. His dementia occurs in addition to an array of other health problems.

f. He should again be referred to a psychogeriatric residential facility where he can receive appropriate specialised care in an appropriate safe and secure environment.

g. He will present no risk to young men or boys nor to other residents.

Habeas corpus

[81] Dr Ellis submits that it is not necessary for me to reach a decision on whether to issue a writ of habeas corpus. He remains of the view that the writ is available but considers that this Court is limited by the Court of Appeal's decision in *Manuel v Superintendent of Hawkes Bay Regional Prison.*[20] In the interests of a prompt determination, he is content for me to decide the matter at this stage on the basis of his judicial review proceeding which is able to provide Mr Vincent with appropriate relief. This is without prejudice to the possibility that the habeas corpus application will be pursued at some point if need be. I proceed on this basis.

Judicial review of the Parole Board decisions

Attorney-General's submissions

[82] The Attorney submits the Parole Board correctly applied the statutory test on each occasion and enquired into accommodation where his risk might be mitigated through supervision by trained staff. As no accommodation was identified, the Board decided to reconsider parole in 2021, unless a place became available in the interim which would warrant earlier consideration. The Attorney submits the Board's decisions were lawful and the Parole Board's conclusion on undue risk was reasonably open to it.

[83] The Attorney submits that Dr Webb's report directly contradicts some of the material before the Board. He submits that the report should be put before the Board, as the specialist body, and it is not for this Court to make that assessment for the Board.

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[20] *Manuel*, above n 17.

Undue risk and the right to be free from arbitrary detention

[84] On general principles of statutory interpretation, s 28 of the Parole Act is to be interpreted consistently with the rights affirmed in NZBORA where that interpretation is reasonably available.[21] The right to liberty and not to be arbitrarily detained are engaged here.[22] The touchstones of arbitrariness are inappropriateness, injustice, unpredictability and disproportionality.[23] A detention may be lawful at the outset but may become arbitrary with reference to these touchstones.[24]

[85] The purpose of preventive detention is to protect the community from those who pose a significant and ongoing risk to the safety of its members.[25] Preventive detention within criminal sentencing is not without its controversy. That is because it entails the loss of liberty for protective and non-punitive aims. Put another way, its rationale is concerned not with punishment for what the person did in the past, but rather for what the person might do in the future. An NZBORA consistent approach means that once the punitive period of imprisonment has been served, compelling reasons are required throughout the period of detention if it is to be maintained. Compulsory annual reviews of detention by the Parole Board, which are reviewable by this Court, have been said to satisfy this.[26]

[86] Under the Parole Act, whether the detention is to be maintained depends on the Parole Board's assessment of whether the prisoner is an "undue risk". This term contemplates that some risk is acceptable. That is because there is always some risk that an offender may offend again. The mere fact that there is some risk of reoffending is an insufficient basis on which to deprive a person of their liberty. The Act requires that risk to be assessed with reference to the likelihood of further offending and its

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21 *Zaoui v Attorney-General* [2005] 1 NZLR 577 at [35]-[36].

22 NZBORA, s 22 and International Convention of Civil and Political Rights 1966, art 9(1).

23 *Nielsen v Attorney-General* [2001] 3 NZLR 433 at [33]-[34]; *Zaoui*, above n 21, at [86], [100] and [175].

24 *Zaoui*, above n 21, at [100] and [175]. Also see *Van Droogenbroeck v Belgium* (1982) 4 EHRR 443 at [40]; Human Rights Committee, General Comment No. 35, Article 9: Liberty and Security of Person, UN Doc. CCPR/C/GC/35 (2014) at 43; and Paul Taylor *A Commentary on the International Covenant on Civil and Political Rights: The UN Committee's Monitoring of ICCPR Rights* (Cambridge University Press, Cambridge, 2020).

25 Sentencing Act 2002, s 87(1).

26 Taylor *A Commentary on the International Covenant on Civil and Political Rights*, above n 24, at 260, General Comment 35, Art 9 at 21; *Miller v The New Zealand Parole Board* [2010] NZCA 600 at [68]; *Rameka v New Zealand* (2004) 7 HRNZ 663 at [7.3].

likely nature and seriousness. An undue risk contemplates a risk (taking into account its likelihood, nature and seriousness) that outweighs the person's interests in retaining liberty.[27] There is an implicit proportionality assessment.[28] A NZBORA consistent interpretation is available with this test.

[87] Moreover, s 28(1AA) providing that a prisoner has no entitlement to release must also be interpreted consistently with the NZBORA if it can be. If a person no longer constitutes an undue risk there is no basis to maintain the detention. The purpose of the preventive detention sentence has ended. The state, having no basis to restrain the person's liberty any longer, has an obligation to release that person. That release should occur within as short a time period as is reasonable to put in place any necessary arrangements for that release. That is confirmed by the statutory requirement to specify a date for release that is not more than six months after the hearing at which the direction for release is made.[29]

[88] In the 52 years that Mr Vincent has been in prison, the Parole Board has reviewed Mr Vincent's detention at least 48 times. On each occasion, it has determined that he is not to be released. The punitive part of his sentence was over more than 40 years ago. The need for public protection must be compelling if Mr Vincent's liberty interests are to be restrained for such a significant period of time.[30] A high level of risk (as to likelihood and seriousness) is necessary if liberty is to be restricted to such a significant extent. That must be so if "undue risk" is to have a NZBORA consistent interpretation, as is required.

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27 See, for example, *Clarke v Parole Board* HC Christchurch CRI 2005-409-111, 22 July 2005 at [35].

28 At [35], *Edmonds v New Zealand Parole Board* [2015] NZHC 386 at [33]. On the principle of proportionality, see also, for example, *Saadi v United Kingdom* 47 EHRR 427 at [70], quoted in *R(Kaiyam) v Secretary of State for Justice* [2014] UKSC 66, [2015] AC 1344 at [25]: "The notion of arbitrariness … includes an assessment whether detention was necessary to achieve the stated aim. …The principle of proportionality further dictates that where detention is to secure the fulfilment of an obligation provided by law, a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty … The duration of the detention is also a relevant factor …".

29 Parole Act 2002, s 28(3)(a).

30 As it was put in the context of compulsory care orders under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, further detention requires "ongoing and sometimes increasing justification" because of the weight to be given to the liberty interest of the person detained: *RIDCA Central (Regional Intellectual Disability Care Agency) v VM* [2011] NZCA 659 at [91]. The compulsory care cases do not have an "undue risk" test, but the need for proportionality arises in both contexts.

[89] In Mr Vincent's case, the Parole Board has relied on reports of "inappropriate" behaviour. The Board has viewed this as evidence of undue risk in the absence of suitable accommodation for Mr Vincent outside the prison walls where his behaviour can be managed. It is not apparent on the face of the three decisions at issue that there has been a proper assessment of the likelihood of further offending or its nature and seriousness.

[90] The information before the Board at the time of its 21 August 2018 decision was that it was now not clear whether previous assessments that Mr Vincent was in a group of offenders at a high risk of further sexual offending were still correct because his "presentation ha[d] significantly changed since his last assessment". He had been involved in mutual sexual activity with another prisoner on two occasions. These were apparently not incidents of offending given their mutuality. He was disinhibited but such behaviour was common for people with dementia. He was "easily directed and managed". In short, Mr Vincent was behaving like an elderly man with dementia.

[91] In my view the Parole Board erred in finding that Mr Vincent constituted an undue risk to the safety of the community at this stage. The report of mutual sexual activity between prisoners at best confirmed Mr Vincent's pre-occupation with and interest in sexual activity. But the nature of the sexual activity was not explained (for example, whether he was physically able to have an erection) and Mr Vincent was disorientated as to time, place and person. How realistic was it that, as an elderly man with dementia, who was easily redirected and managed, he would have the opportunity to sexually offend against young boys or indeed anyone?

[92] The Board appears to have equated continued interest in sexual activity as equating with risk, and risk as equating with an undue risk, without more consideration. In so doing, in judicial review terms the Board failed to apply the legal test correctly, failed to take into account relevant considerations and reached an unreasonable decision. Mr Vincent needed dementia care not penal incarceration.[31] The material before the Board did not show that he remained an undue risk to the

[31] Compare with, for example, *Fitzgerald v R* [2020] NZCA 292.

community such that he should continue to be detained under his preventive detention sentence.

[93] It is true that Mr Vincent would not have been able to look after himself had he been released. The Parole Board was concerned about Mr Vincent's welfare and whether there would be an appropriate facility to release him to. But that was only a basis for declining parole if an appropriate facility was necessary to mitigate a risk that would otherwise be undue. Where the real risk was Mr Vincent's ability to look after himself, rather than a risk to the safety of the community, the proper lawful direction was to order Mr Vincent's release on a specified date that would enable arrangements to be put in place for his care.

[94] Having said that, the Parole Board scheduled another hearing in three months' time, by which stage it hoped "close consideration [could] be given to options for Mr Vincent". The practical effect of this was potentially no different than had release been granted with a postponed date at the August hearing. However, at the adjourned hearing Mr Vincent was once again determined to be an undue risk. The Board once again regarded Mr Vincent's risk as "undue" apparently because he was displaying a pre-occupation with sexual thoughts and behaviours and was "attempting" to engage in sexual activity and other behaviours. A possible address for his release had been found but the Board required a clear release plan and proposal.

[95] However, there is nothing illegal on the face of it in attempting to engage in sexual activity if the attempt was for consensual activity. Once again, there does not appear to have been an assessment that any risk of reoffending would likely involve serious offending. In any event, the assessment of "undue risk" lacks an air of unreality given Mr Vincent's age (then 81 years old), his dementia and the earlier information that he was "easily redirected and managed". In my view the Board erred in determining that Mr Vincent was an undue risk without a clear release plan and proposal. There was no longer a lawful basis for his continued detention, subject only to allowing a short period of time for arrangements to be made to transfer him into a place providing appropriate dementia care.

[96] When Mr Vincent came before the Board in May 2019, the advice to the Board included that Mr Vincent now had advanced dementia. Dr McArthur advised that Mr Vincent had not been recommended for placement at dementia level of care because it was "felt that other vulnerable residents in such a facility should not be exposed to the risk of repeated patterns of behaviour".

[97] As to those behaviours, the information reported involved Mr Vincent pursuing sexual contact with another prisoner, whom staff understood had previously engaged in consensual sexual activity with Mr Vincent on two occasions. That prisoner had since died and no other sexual advances with prisoners had been seen. Mr Vincent had exposed and touched his genitals in a communal area. Apart from that he had irritated some prisoners, invaded their personal space, poked and hit other prisoners and been involved in similar low-level incidents.

[98] The Board once again considered that Mr Vincent was not a candidate for release because of the "risks" he presented without a formalised release proposal to a hospital facility. Once again it is not apparent that the Board considered the prospect that Mr Vincent would sexually offend in any serious way as distinct from being a nuisance or annoyance to others because of his behaviours. The information before the Board did not support a conclusion that Mr Vincent presented an undue risk to the safety of the community in any realistic way. In judicial review terms, the Board failed to apply the legal test correctly, failed to take into account relevant considerations and reached an unreasonable decision in its 17 May 2019 decision.

[99] This position was put beyond doubt by the time of the next Parole Board hearing on 19 August 2019. By then Mr Vincent's dementia had further progressed, with a decrease in his ability to concentrate on tasks, engage with people and show an awareness of his environment. There had been no incident reports or misconduct charges. The manager of an appropriate care facility confirmed that they were well-equipped to manage his care needs. The issue at this stage was not whether Mr Vincent was an undue risk (he was not) and nor that his behaviours were unmanageable in a psychogeriatric facility (they were). The sole issue was the willingness of the facility to have him because of concerns about negative publicity.

[100] I therefore conclude that the challenged Board's decisions misapplied the statutory test, failed to take into account relevant considerations and were unreasonable. I consider that Mr Vincent's risk did not justify his continued detention at least from 21 August 2018 except for a limited period (a maximum of six months) while arrangements were made for his transfer.

[101] I further consider that Mr Vincent's right to be free from arbitrary detention was breached at this stage. His continued detention had become wholly disproportionate to his risk of reoffending. The fact that no-one had found an appropriate facility willing and able to provide care to Mr Vincent did not justify the continued detention. The state had restrained Mr Vincent's liberty for over 50 years and was required to facilitate his release once there was no proper basis for that restraint to continue. It had a moral duty, and possibly a legal one, to ensure he had appropriate care when he was no longer an undue risk to the safety of the community in order to facilitate his right to be free from arbitrary detention.

[102] *R(Kaiyam) v Secretary of State for Justice*, a decision of the United Kingdom Supreme Court, provides some support for a possible legal duty.[32] That case concerned prisoners who were sentenced to indeterminate imprisonment terms for public protection. They claimed that the Secretary of State had breached their rights under Article 5 (the right to liberty) of the Convention for the Protection of Human Rights and Fundamental Freedoms by not providing timely and suitable rehabilitative courses to address their risk of reoffending so as to be able to persuade the Parole Board that they should be released. The Court held that there was an implied ancillary duty under Article 5 to afford the prisoners a reasonable opportunity to rehabilitate themselves, including by the provision of rehabilitative courses and facilities in prison.

[103] It is not for this Court to direct the Crown as to how it should go about upholding Mr Vincent's right to be free from arbitrary detention.[33] It is sufficient and appropriate to provide declaratory relief, leaving it with the Crown to respond appropriately in light of the declarations I make.

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32 *R(Kaiyam)*, above n 28.

33 See, for example, *Kerr v Police* [2020] NZCA 245 at [67] and [70].

Other matters

Other NZBORA rights

[104] Counsel for Mr Vincent contends Mr Vincent's detention has breached his right "not to be subject to cruel, degrading, or disproportionately severe treatment or punishment".[34] Counsel submits that a sentence of over 52 years is grossly disproportionate to Mr Vincent's offending and risk so as to constitute disproportionately severe punishment. Counsel submits that this is all the more so when for the last four or five years he has had dementia.

[105] On the face of it, Mr Vincent's period of imprisonment could be said to be "so out of proportion to the particular circumstances as to cause shock and revulsion".[35] However I do not reach a concluded view on this for two main reasons.

[106] First, I do not do so because a sentence of preventive detention has been upheld as lawful, providing it is subject to regular review. I do not have the material before me that was relied on as warranting Mr Vincent's continued detention prior to 2015. That is because it was necessary to bring the judicial review with urgency, and to enable that to occur, the material before me was limited to that time frame.

[107] Secondly, because of that urgency, some claims were not for consideration at the November hearing. The urgent (and, as I understand it, primary) objective of the proceeding is to secure Mr Vincent's release into an appropriate care facility. Rather than delay this judgment any longer with a full consideration of the proper scope of s 9 in this context, I consider it is better to confine my decision to s 22. For the same reason, I have not considered s 23(5) of the NZBORA either.

[108] Claims left undetermined in this judgment may be pursued in due course if they are not moot.

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34 NZBORA, s 9.

35 *Taunoa v Attorney-General* [2007] NZSC 70, [2008] 1 NZLR 429 at [172], discussed in *R v Tarrant* [2020] NZHC 2192 at [138].

Compassionate release

[109] The claim for compassionate release also need not be determined. However, I accept the submission for Mr Vincent that the Chairperson adopted too narrow a test in requiring that Mr Vincent have a life-threatening illness, from which he will not recover and can be identified as being near death. That formulation involves a gloss on the statutory test of an offender who "is seriously ill and is unlikely to recover". Mr Vincent has a serious illness from which he will not recover. He was eligible for consideration for compassionate release.[36]

[110] I also accept that the Chairperson appears not to have had accurate and up-to-date information about Mr Vincent's health. In contrast with the Chairperson's decision, Mr Vincent is dependent on carers for all his daily activities, including walking to ensure he does not fall, and eating to ensure he does not choke. He is also incontinent, cannot talk clearly and is now mentally incompetent.

Natural justice

[111] It is similarly unnecessary to decide whether the Parole Board or the Chairperson breached natural justice. It is, however, of concern that an application for a welfare guardian was not progressed. I do not have all the information about that before me so I do not say more. I understand from Mr Vincent's counsel that an application is currently being progressed.

Remedy

[112] I make a declaration that Mr Vincent is currently detained arbitrarily in breach of s 22 of the NZBORA.

[113] I set aside the Parole Board's decision of 19 August 2019 as the most recent of the decisions that declined Mr Vincent's release. The Attorney-General submits that the proper remedy is to refer the matter back to the Parole Board as the specialist decision maker on parole release decisions and because Dr Webb's recent report was

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[36] Although the statutory test is not identical, in the United Kingdom release on compassionate grounds is available where a prisoner is bedridden or severely incapacitated: *Livingstone, Owen, and MacDonald on Prison Law* (5th ed, Oxford University Press, 2015) at 13.129.

not available when the Board made its 19 August 2019 decision. However, I consider this case to be one where substantive relief is appropriate. The Parole Board has had multiple opportunities to direct Mr Vincent's release but has declined to do so. As discussed above, the Parole Board erred in its assessment of Mr Vincent's risk on the material available to it when it made those decisions. Dr Webb's report puts in black and white (Mr Vincent "cannot present a risk to any person" and "will present no risk to young men or boys nor to other residents") what has been the position for some time.

[114] I make an order that Mr Vincent is to be released. This order is to lie in Court for a period of three months from the date of this judgment to enable the Crown to find somewhere for Mr Vincent to receive appropriate care on his release. I reserve leave to bring this period forward if appropriate care is found for Mr Vincent earlier than that (as I hope it is). I also reserve leave to apply to extend the three month period if it is necessary to do so in Mr Vincent's best interests. The parties are to file memoranda in two months from the date of this judgment updating the Court on the steps that are being taken to enable Mr Vincent's release into appropriate care.

[115] The order would ordinarily be subject to the standard conditions. They appear to be inappropriate given Mr Vincent's advanced dementia and frail state. The Board has the power to discharge standard release conditions with effect from a date that is less than six months after the date on which the offender is released if the offender is detained in a hospital or in a secure facility.[37] I seek submissions from the parties as to whether any of the standard conditions are relevant to Mr Vincent and whether some or all of them should be discharged by the Court. Those submissions should be filed within two months of the date of this judgment to enable me to consider them before the order releasing Mr Vincent takes effect.

[116] The matters that were part of these proceedings that have not been determined in this judgment remain on foot and may be pursued in due course if they are not moot.

[117] A telephone conference will be scheduled for a date at the end of February or early March 2021 to review the matter. The registry will advise a date.

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[37] Parole Act 2002, s 58.

[118] Costs are ordered in the applicant's favour together with disbursements. If there is any issue about quantum, the parties have leave to file brief memoranda confined to the issues in dispute within two months of the date of this judgment.

Mallon J