

**IN THE HIGH COURT OF NEW ZEALAND
TAURANGA REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TAURANGA MOANA ROHE**

**CRI 2021-070-004281
[2023] NZHC 1254**

UNDER the Judicial Review Procedure Act 2016

IN THE MATTER OF An application for a judicial review of a
decision made under the Corrections Act
2004

BETWEEN ADRIAN JOHN REWIRI
Applicant

AND SERCO NEW ZEALAND LIMITED
Respondent

Hearing: 25 May 2023

Appearances: C W J Stevenson for the Applicant
J Scragg & E Greig for the Respondent
R W Jenson for the Crown
D Jones for the Department of Corrections

Judgment: 25 May 2023

JUDGMENT OF TAHANA J

This judgment was delivered by me on 25 May 2023 at 5.30pm

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Registrar/Deputy Registrar

Solicitors/Counsel:
Crown Solicitors, Pollett Legal Ltd, Hamilton
Duncan Cotterill, Wellington
Pipitea Chambers, Wellington

Introduction

[1] Mr Adrian Rewiri is currently serving a sentence¹ at Auckland South Corrections facility (ASCF), which is managed by Serco New Zealand Ltd (Serco). Mr Rewiri also faces active charges for murder and being an accessory to murder.²

[2] Mr Rewiri applies to judicially review Serco's refusal to grant his application for temporary removal to visit his terminally ill mother at her home in Tokoroa. The application was originally framed as a compassionate bail application, but in circumstances where Mr Rewiri is a sentenced prisoner, the Court invited Mr Rewiri to amend his application.

[3] Serco deny that Mr Rewiri's application was wrongly declined.

Background

[4] Mr Rewiri's mother has been diagnosed with metastatic pancreatic cancer and is under hospice care.

[5] On 3 May 2023, Mr Rewiri applied for temporary removal to visit his mother at her home in Tokoroa. A doctor's certificate was provided to Serco confirming his mother's diagnosis.

[6] The Chief Executive of the Department of Corrections has delegated power to the Prison Director of ASCF to determine applications for temporary removal.

[7] The acting Prison Director, Mr Gerald Smith, received Mr Rewiri's application on 9 May 2023. The application was accompanied by:

- (a) a recommendation from a prison supervisor that it be declined because of Mr Rewiri's active charges; a previous violent incident; and his position as president of a faction within the Mongrel Mob;

¹ Mr Rewiri is serving a sentence of seven years and nine months for drug related offending, with a sentence end date of 28 January 2027.

² Crimes Act 1961, ss 167(a), 172 and 66(1)(b).

- (b) an email from the intelligence team indicating they did not support the application but supported skype calls as an alternative;
- (c) an email from the cultural team indicating that it was in support of the “best viable option;”
- (d) an email from the case management team indicating they did not support the application but supported skype calls as an alternative; and
- (e) a structured dynamic assessment for case management (SDAC).

[8] Mr Smith deposes that he considered the application and the attached materials and declined the application based on the following factors:

- (a) The recommendations of the case management and intelligence teams;
- (b) The active charges;
- (c) Mr Rewiri’s history of violating release privileges. Mr Smith was aware of two prior attempts to escape custody in 2006 and 2012;
- (d) The proposed private residence, which was not secure from the point of view of controlling entry of others (in contrast to a hospital or hospice);
- (e) Mr Rewiri’s recent nomination as the president of the “Bounds” faction of the Mongrel Mob; and
- (f) The recent violent incident (on 13 April 2023) that Mr Rewiri was involved with at the prison involving other gang members.

[9] Mr Smith also deposes that Mr Rewiri had been involved in five misconducts and 11 incidents since arriving at the prison in 2021. A security classification review form also records 23 file notes relating to compliance.

Relevant law

[10] Section 62 of the Corrections Act 2004 (the Act) provides that:

62 Temporary release from custody or temporary removal from prison

- (1) This section applies to every prisoner who is a member of a class of prisoners specified in regulations made under this Act as a class of prisoners who may be—
 - (a) temporarily released from custody under this section; or
 - (b) temporarily removed from prison under this section while remaining in custody under the control or supervision of an officer, staff member, or probation officer during the period of removal.
- (2) The chief executive may give authority for the temporary release from custody or temporary removal from prison of a prisoner to whom this section applies—
 - (a) for any purpose specified in regulations made under this Act that the chief executive considers will facilitate the achievement of 1 or more of the following objectives:
 - (i) the rehabilitation of the prisoner and his or her successful reintegration into the community (whether through release to work (including self-employment), to attend programmes, or otherwise);
 - (ii) the compassionate or humane treatment of the prisoner or his or her family;
 - (iii) furthering the interests of justice; or
 - (b) in any circumstances that, in the opinion of the chief executive, are exceptional and that will facilitate the achievement of 1 or more of the objectives described in paragraph (a).
- (3) In exercising the powers conferred by subsection (2), the chief executive must consider—
 - (a) whether the release or removal of the prisoner might pose an undue risk to the safety of the community while the prisoner is outside the prison;
 - (b) the extent to which the prisoner should be supervised or monitored while outside the prison;
 - (c) the benefits to the prisoner and the community of removal or release in facilitating the reintegration of the prisoner into the community;

- (d) whether removal or release would undermine the integrity of any sentence being served by the prisoner.

[11] This Court considered the application of s 62 of the Act in *Watson v Department of Corrections*.³ That case concerned Mr Scott Watson who had been convicted of murder. He had been temporarily released to visit his mother while she was dying on more than one occasion. Mr Watson then applied to attend the funeral of his mother, and that application was declined. The Court held that while s 62(2) provides that the Chief Executive has discretion as to whether to release a prisoner on compassionate leave, it is a fundamental principle of public law that discretionary powers can only be exercised for the purposes for which they are given.

[12] In that case, the Court was not satisfied that Mr Watson would pose any undue risk to the safety of the community. It was also clear that he would be under constant supervision during transit and during the funeral. None of the factors in s 62(3) appeared to apply and the Court did not consider that attending his mother's funeral undermined the integrity of his life sentence.

[13] The Court was not satisfied that the intense media attention justified declining Mr Watson's request. The Court ordered that the Chief Executive or one of their authorised delegates give authority for the temporary removal of Mr Watson from prison for the purposes of attending the funeral of his mother, subject to conditions.

Analysis

[14] Mr Rewiri's mother is dying. At the hearing, Mr Stevenson indicated that she has now been transferred to the hospice in Hamilton.

[15] Given the circumstances, I do not consider that the procedural form of the application should deny the application being heard on an urgent basis.⁴

³ *Watson v Department of Corrections* HC CHCH CIV-2012-409-002780 [18 December 2012].

⁴ Counsel for Serco rightfully note that the usual procedure for judicial review is that it must be commenced by statement of claim and notice of proceeding in accordance with rule 30.3 of the High Court Rules 2016.

[16] Mr Stevenson submits that Serco did not provide reasons for the decision and while Mr Rewiri was told that the application was declined, he was not given the reasons. That no reasons were provided is reflected in the form of the application, which does not articulate any grounds of review other than reasons had not been provided.

[17] When I questioned counsel for Serco as to whether they had instructions as to why Mr Stevenson's queries to Serco had remained unanswered, counsel indicated that "privacy" was given as a reason. Mr Stevenson is Mr Rewiri's counsel and is entitled to request a response on behalf of his client. The delay in providing reasons is unsatisfactory in circumstances where time is of the essence given Mr Rewiri's mother is dying.

Was there a duty to give reasons?

[18] Counsel for Serco accept that while there is no express statutory duty to give reasons, as a matter of natural justice in the present context, there ought to be reasons for a decision and those reasons ought to be made available, at least on request.

[19] I note that Serco's policy governing temporary removal⁵ expressly states:

7.4 If the application is declined, the Prisoner is advised of any reasons for the refusal.

[20] Prisoners have a legitimate expectation that Serco will act in accordance with its policy. Reasons for the refusal should have been provided to Mr Rewiri. This is particularly so where his mother is terminally ill and time is of the essence. Further, Mr Rewiri's counsel contacted Serco requesting a response so that the appropriate application could be made to the Court. I consider that Serco should have provided reasons to Mr Rewiri and his counsel. Had this occurred, the appropriate application to the Court could have been made sooner.

⁵ 04.01 Temporary Removal Kohuora Auckland South Corrections Facility.

Did the Prison Director fail to take into account relevant considerations?

[21] Clearly there are compassionate reasons for Mr Rewiri's temporary removal. A dying mother should be able to see her son before she passes. The Prison Director however, must consider the factors in s 62(3) in determining whether to give authority for temporary removal of a prisoner.

[22] The reasons recorded for declining the application are:

Active charges, Recent incident involving other gang members. Not supported via case management. Not received police RFI. At this time site declines application but will support Skype call.

[23] The Prison Director also had before him the information provided by other staff including a prison supervisor, the case management team, the intelligence team and the cultural team. Other than the cultural team, which supported the "best viable option", the other teams did not support approving the application.

[24] Mr Stevenson submits that the Court should not read in reasons that are not included within the recorded reasons (as set out above) and that the Prison Director failed to consider the factors set out at s 62(3)(b),(c) and (d) of the Act.

[25] Section 62(3) requires that the Prison Director must consider:

- (a) whether the release or removal of the prisoner might pose an undue risk to the safety of the community while the prisoner is outside the prison;
- (b) the extent to which the prisoner should be supervised or monitored while outside the prison;
- (c) the benefits to the prisoner and the community of removal or release in facilitating the reintegration of the prisoner into the community; and
- (d) whether removal or release would undermine the integrity of any sentence being served by the prisoner.

[26] While the reasons do not expressly refer to the factors set out in s 62(3), they do record factors that are relevant to s62(3)(a), namely, whether there is an undue risk to the safety of the community while Mr Rewiri is outside the prison. Those factors include the history of Mr Rewiri's escape attempts and a violent incident in prison.

[27] Serco submits that it did consider the extent to which Mr Rewiri should be supervised or monitored while outside the prison by considering his previous escape history and the fact he would be visiting a private residence. The Prison Director does not however, appear to have considered what security would be required if Mr Rewiri was removed - only that there was a risk of escape and security issues with a private residence. No consideration appears to have been given to the extent of security that might be required. I accept Mr Stevenson's submission that the extent of any security is relevant to the potential risk to safety. That however, does not appear to have been considered, only that Mr Rewiri was a safety risk.

[28] Serco submits that s 63(3)(c) is not relevant and relies on *Watson* where Fogarty J said it "seems to not apply."⁶ In that case, Mr Watson had been sentenced to life imprisonment. Mr Stevenson submits that s 63(3)(c) is a mandatory consideration and cannot be ignored. The language of s 63(3) is clear and there is no discretion that allows the Prison Director to ignore it. Although I accept it may be more relevant to a prisoner who is closer to release, this however, does not mean s 63(3) is irrelevant to prisoners who have longer to serve. I accept Mr Stevenson's submission that the impact on Mr Rewiri of not seeing his mother before she dies may be relevant to his future reintegration into the community. The Prison Director's failure to consider s 63(3)(c) is an error.

[29] The Prison Director did not consider s 63(3)(d) - whether removal would undermine the integrity of any sentence being served. Serco say that this factor can only count against Mr Rewiri's removal. It does however, need to be considered and it may not count against removal given Mr Rewiri would remain in the custody of prison staff and his removal would be limited to visiting his dying mother in the hospice.

⁶ At [13].

[30] For the reasons set out above, I do consider that there was an error in the Prison Director failing to consider the factors in s 62(3)(b)(c) and (d). There is some force in Mr Stevenson's submission that the sole focus was on the risk to safety without consideration of the other factors.

[31] Importantly, there has been a significant change in circumstances in that Mr Rewiri's mother has now been transferred to the Hamilton hospice. This is clearly a relevant factor as the Prison Director noted that a hospital or hospice is more secure than a private residence, which suggests that this would be relevant to the risk to safety. I acknowledge that this factor is not relevant to whether the Prison Director erred but it would be relevant to any future decision.

[32] For these reasons, I am of the view that the Prison Director erred in declining Mr Rewiri's application for temporary removal. The Prison Director was required to have regard to the matters set out at s 63(3)(b)(c) and (d) and failed to do so.

Appropriate relief

[33] Serco urged the Court not to make a mandamus order as the circumstances are not the same as in *Watson*. In that case, the Court made a mandamus order because time was of the essence (the funeral was the next day) and it was not realistic to refer the decision back for further consideration. Further, there was evidence that there would have been a temporary order, but for the likely intense media attention. Transit conditions had also been developed with the Department of Corrections.⁷

[34] Serco also submits that transit conditions need to be made by persons with the requisite skills, expertise and knowledge and that it is inappropriate for the Court to intervene by way of mandamus order.

[35] Here, the medical evidence is that Mr Rewiri's mother may have up to two months but she has now been transferred to hospice so that suggests there is less time, but how much is unknown.

⁷ At [5] and [18].

[36] I accept Serco's submission that it is appropriate that the decision be remitted back to the Prison Director to reconsider. Serco has the appropriate expertise to determine the appropriate supervision arrangements if Mr Rewiri is to be granted temporary removal.

[37] I therefore remit the decision back to Serco to reconsider on an **urgent basis**. There is a risk that Mr Rewiri's mother could pass away and in those circumstances, it is appropriate that a decision is made within **24 hours**.

Tahana J