IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2023-409-231
[2024] NZHC 613

IN THE MATTER	of an application for judicial review pursuant to the Judicial Review Procedure Act 2016
BETWEEN	RAYMOND WAHIA RATIMA Applicant
AND	THE NEW ZEALAND PAROLE BOARD Respondent

Hearing: 1 November 2023

Appearances: R G R Eagles for Plaintiff
M S Smith for Defendant

Judgment: 20 March 2024

JUDGMENT OF PRESTON J

This judgment was delivered by me on 20 March 2024 at pm,
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date……

Introduction

[1] Mr Raymond Ratima applies for judicial review of a decision of the New Zealand Parole Board (Board) that denied him parole.

[2] Mr Ratima is serving a sentence of life imprisonment imposed in September 1992, on seven counts of murder. Three of the seven victims were his children and the other four were members of his extended family. Mr Ratima was sentenced to lesser concurrent terms for killing an unborn child and the attempted murder of an extended family member.

[3] In 2002, Mr Ratima first became eligible for parole. He has subsequently appeared on 14 occasions before the Board. On the most recent application, on 28 October 2022, the Board again declined to direct Mr Ratima's release on parole.

[4] Mr Ratima argues that there was a breach of natural justice by the inclusion on the panel of a psychiatrist who had, in 1992, prepared reports for the Court on Mr Ratima's mental state including his future dangerousness. Mr Ratima also contends that the decision wrongly took into account irrelevant information and/or was unreasonable having regard to the manner in which the Board conducted the hearing.

[5] Mr Ratima seeks by way of relief a direction for rehearing by a differently constituted panel, and a declaration that that Board member should not be involved in future Parole Board hearings of Mr Ratima's case.

Background

[6] The Board must operate in panels of at least three members, one of whom must be a panel convenor or the chairperson.[1] At the 28 October 2022 hearing the Board comprised the chairperson and three other board members including psychiatrist Professor Brinded.

---

1 Parole Act 2002, s 115.

[7] Section 118 of the Parole Act 2002 (Act) addresses the issue of bias. It provides as follows:

> **118 Avoiding actual or perceived bias**
>
> (1) The chairperson must ensure that no person involved in a parole panel hearing reviews a decision of that panel.
>
> (2) The chairperson must, if he or she becomes aware that a member has, or may be perceived as having, bias for or against an offender, require the member to excuse himself or herself from—
>
> (a) participating in a panel that considers an application by or relating to the offender; and
>
> (b) making, or participating in making, any other decision under this Act that relates to the offender

Professor Brinded's prior involvement: psychiatric reports

[8] In 1992, Professor Brinded provided three reports to the Court in his then capacity as director of the Regional Forensic Psychiatric Service. The expert reports were prepared pursuant to s 121(2)(b)(i) of the Criminal Justice Act 1985.[2]

[9] The first two reports were prepared prior to plea: an interim report on 9 July 1992 addressing Mr Ratima's fitness to plead and a full psychiatric report on 30 July 1992 considering the issue of insanity and Mr Ratima's mental state at the time of the offending. In the 30 July report Professor Brinded advised his expert opinion that Mr Ratima was not suffering from a psychiatric illness at the time of the offending and that he knew the nature and quality of his actions. The report included the following passages:

> … It would appear that the tragedy which took place occurred due to the personality of the defendant and the manner in which he sought to resolve his own feelings of isolation, rejection and increasing desperation over his domestic situation. ...

---

[2] Section 121 has been repealed. This section was the predecessor to s 38 of the Criminal Procedure (Mentally Impaired Persons) Act 2003.

> In summary therefore I believe that Mr Ratima was not mentally ill at the time of the alleged offences nor before them. I believe that it is Mr Ratima's personality structure and functioning that has led to these homicides taking place. I believe the constellation of personality factors that have most contributed to these events are the defendant's borderline intellectual capacity, his continued sense of rejection, his poor interpersonal skills, certain anti-social personality traits, and a narcissistic sense of entitlement to control the lives of his wife and children which led to a significant enmeshment within the family relationships and intense feelings of possessiveness and jealousy. Of particular importance in people displaying narcissistic personality traits, is their potential to react to criticism with feelings of humiliation, shame and at times rage, a strong sense of entitlement and therefore unreasonable expectations of others and their frequent lack of empathy and inability to recognise and experience how other people feel. They are often also preoccupied with feelings of envy or jealousy. I am of the opinion that these factors have been the significant contributors to the tragic events that have led to these charges when they were combined with the desperate domestic upheaval as perceived by the defendant following his separation from his wife and children.

[10] Mr Ratima subsequently pleaded guilty to the offending and Professor Brinded prepared a third report for the Court dated 3 September 1992, for sentencing. This report was prepared at the request of the Crown prosecutor. It addressed the issue of future dangerousness, as follows:

> … I have been asked by Mr Grant Burston from the Crown Solicitors Office, to write a further letter to the Court expressing some views regarding the assessment of dangerousness of the defendant in this case, paying particular attention to the question of parole for the defendant in some ten years time.
>
> Whilst prediction of dangerousness is always difficult, prediction of dangerousness over a ten year period is particularly fraught with difficulty. However to simplify the matter where possible there are certain issues that we would examine in psychiatry as the best possible pointers in the admittedly inconsistent practice of the prediction of dangerousness. It would appear that the most important factors to consider are what the exact circumstances were for the offender at the time of the violent activity and then, at the time of release to re-examine these circumstances in order to see to what degree they had changed. The types of issues examined would be the presence or absence of a treatable psychiatric disorder, personality functioning of the individual, the social circumstances of the offending, the relationship of the offender to other people involved in the violent offences, and the offenders own views as to what had occurred and the reasons for it. It would therefore be apparent that the closer that circumstances are at the time of reassessment to the situation that was present at the time of the offending, then the greater likelihood in my opinion there would be of further violence. This would be the case whether the period between offending and assessment were six months or indeed ten years.

> As stated in my report to the Court of 30th July 1992, I do not believe that Mr Ratima was suffering from a psychiatric disorder at the time of the alleged offences. This being the case, it is unlikely that any definitive psychotropic medication is likely, during the course of Mr Ratima's incarceration, to alter his mental state to any great extent. This is because the explanation for his offending, as expressed in my opinion, lies firmly in the area of personality traits and personal beliefs rather than in mental disorder that can be changed through treatment. Alteration or amelioration of personality traits and personality functioning is not something that is achieved through medication but is something that at times can be achieved, only through long term psychotherapy or counselling. By long term I mean over a period of years. It is often hard to find facilities within Mental Health Services that will provide this type of intensive ongoing treatment, let along finding it within the Prison Service. When assessing future dangerousness, one often arrives at the "worst possible scenario" in order to evaluate what the greatest risk situation would be. In this case it is evident that there is no medication that will significantly alter Mr Ratima's thinking or attitude and that the intensive long term counselling that might in some ways ameliorate it, may indeed be difficult to provide in the prison setting. Furthermore, nothing will change the fact that his three children are now dead although it is possible that his attitude to this may be helped through the aforementioned counselling. Other members of his family with whom Mr Ratima has remained intensely angry, remain alive and could certainly in the worst scenario be viewed as being potentially at risk in the future.
>
> In summary therefore and in accordance with the previously described methods of assessing dangerousness, it is quite possible that many of the personality factors, views held by the defendant and the intense domestic situation, may remain largely unchanged during a period of incarceration of the defendant. If this were the finding at times of future assessment, then it would appear that the potential for future dangerousness would be high. It would be very important that, when assessments are done over the years to come, that it is not merely assumed that time alone will necessarily rectify this problem or causes the level of future dangerousness to be decreased. I believe the defendants future potential for dangerousness must be regarded as high if he does not receive significant help in changing the psychological and social situation within which he acted out so disastrously.

The reports are in the record

[11] Professor Brinded's 1992 reports formed part of the record before the Board. Prior to the October 2022 hearing Professor Brinded had sat as a member of seven earlier Boards considering Mr Ratima for parole, between 2006 and 2021. The first time at which he sat was 14 years after the murders. Of those hearings, on the first three occasions Mr Ratima was not represented by counsel. At the following four occasions he was, but by different counsel on each occasion. It is unclear from the previous decisions whether Professor Brinded had at any of those hearings expressly identified the fact of his involvement in assessing Mr Ratima during 1992.

Reports' authorship identified in counsel's submissions

[12] The reports were identified in counsel's written submissions for Mr Ratima's at the Board hearing. In context of the observation that Mr Ratima must be one of the most examined prisoners in Canterbury, and was subject of reports from nine different authors, counsel noted:

> The first psychologist who was extensively involved with Mr Ratima was Doctor Phil Brinded who authored three reports, dated 9 1992, (sic), 30 July 1992 and 3 September 1992. The last of those reports indicated that the explanation for the offending lay firmly in the area of personality traits and personal beliefs, rather than a mental disorder which could be changed through treatment.

[13] The written submissions then traversed multiple other aspects of the reports which followed in historical sequence and highlighted the most recent parole assessment report and addendum reports with positive recommendations for consideration for parole.

[14] Counsel's written submissions also addressed the concerns of the Board at the previous hearing in relation to Mr Ratima's understanding of the circumstances under which he had come to commit the murders and the risks arising from those circumstances. Counsel advised:

> … Mr Ratima has given considerable further thought to risks which he might experience, including consideration as to how the murders arose. He has given Counsel a lengthy narrative about that and is able to engage with the board in respect to it.
>
> …
>
> **1992 Events**
>
> As mentioned, Mr Ratima has given considerable thought to what happened in 1992. He has developed an understanding of his own behaviour [before recounting summary of Mr Ratima's behaviour]

Conduct of the hearing

[15] The hearing took place by AVL. The Board sat in Wellington, Mr Ratima was at Rolleston Prison and his counsel in Invercargill.

[16] At the outset of the hearing the panel convenor, chairperson Sir Ron Young introduced the Board members including Professor Brinded.

[17] Part way into the hearing, after a member of the Board identified the views of persons the panel had spoken to about the offending and the Chairperson had questioned Mr Ratima, Professor Brinded questioned Mr Ratima. The discussion began as follows:

> PB Kia ora Mr Ratima.
>
> R Hi.
>
> PB You, you'll remember that ah, we met before many times in slightly different circumstances to the Parole Hearing. Um, as um, your counsel, um, said in his submission, um I wrote three reports um, for the Court in 1992 immediately after the killings, I came and saw you in prison, ah, and um, had an interview with you about what had happened. Um, and he, um, your counsel states that the last of um, the reports indicated that the explanation for the offending laid firmly in the area of personality traits and personal beliefs, rather than a mental disorder. Um, that that's the way we call it too, um, at the time. Do you remember meeting me in the prison?
>
> R Um, yes I do sir. Um, remember something cos I needed to be, to be precise…
>
> PB Absolutely, yeah, that's right. Um, you actually at that time gave me a pretty clear, um, description of what had happened sequentially, ah, in terms of um, the killings. You were pretty clear about it then, um, I can understand it may over time have ah, become a little more confused in your mind, but you were pretty clear then. What I want to talk to you about is um, really what Sir Ron is um, been asking you about and that is you told us um, and it is very consistent with what you told me all those years ago, that um, you were homeless, you were um, upset that the agencies that you'd been to weren't helping you, um, that all of things you've already said um, so there's a lot of external things you've described. However, there are many young men out there whose marriages go wrong, ah, who have a Protection Order against them, um, who find themselves in um, really sort of poor circumstances but nobody does what you did. How, how do you account for that?

[18] No objection was raised by Mr Ratima or his counsel to Professor Brinded's participation as a member of the panel, either at the outset or during the hearing. In oral submissions at the close of the hearing, counsel referred to the 1992 reports and to Professor Brinded's questions at the hearing, commenting: "…. which I thought were quite reasonable to put to Mr Ratima …a good question to ask".

[19] The Board declined parole. Mr Ratima exercised his right of review.[3] This raised the issue of apparent bias arising from Professor Brinded's inclusion on the panel.

[20] The review confirmed the Board's decision. In relation to the ground of apparent bias, the reviewer Mr N Trendle discussed the common law test for bias and s 118 of the Act as follows:

> The previous involvement of a panel member with an offender, and particularly one of the specialist members, such as a psychiatrist, is not uncommon. *Where it occurs, the matter is initially raised with the offender and counsel. Unless the offender is comfortable with the panel member concerned participating in the hearing, he or she stands aside.* With Professor Brinded, his involvement with and reporting on Mr Ratima in 1992 was a matter of record. From a review of the decisions, the question of bias had never been an issue.
>
> Professor Brinded was a member of the Board for Mr Ratima's third parole hearing on 29 June 2006. He was again a panel member for the next two hearings in 2007 and 2008. The hearing on 28 October this year was the eighth hearing that he had been a member of the Board considering Mr Ratima for parole. He had not been a member on the other five occasions.
>
> *Although it was open for Mr Ratima or for counsel to indicate a preference that Professor Brinded not take part in the hearing if they felt some concern at his participation, they did not do so. While that, in itself, would not address an issue of bias,* in the context of the matters referred to, this is not a case where "a fair-minded, lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the decision he or so is required to make": *Wong v Parole Board* [2017] NZHC 2098 at [40]. Section 118 of the Parole Act was not engaged. The hearing on 22 October 2022 was not tainted.
>
> (emphasis added)

Grounds of review

[21] Against that background I address the grounds of review.

Bias / Waiver

[22] Mr Ratima's first ground of review is that there was a breach of the rules of natural justice and of s 118 of the Act as the decision is vitiated by apparent bias. Mr Eagles submits Professor Brinded's involvement, having prepared three reports at

---

3 Parole Act, s 67.

the time of the 1992 murders examining Mr Ratima's offending, his mental state and his future risk, created an appearance of bias as the professor would have been privy to information from his 1992 dealings with Mr Ratima and "[t]here is no way of knowing what [he] might have said to other Parole Board members" in considering the decision. The professor did not disqualify himself and took an active part in the hearing.

[23] Mr Eagles says there was no informed waiver by or on his behalf and nor could there be so having regard to the circumstances of the hearing and Mr Ratima's educational limitations and borderline IQ, identified in one of the 1992 reports. The Chairperson did not act in accordance with the express terms of s 118 to require Professor Brinded to excuse himself from participating in the panel and, if that provision imports the concept of waiver (which is denied), on the facts no waiver was given.

[24] Mr Smith for the Board submits Mr Ratima waived any bias arising from Professor Brinded's prior involvement. Counsel notes the multiple prior occasions in which Professor Brinded had sat without objection from Mr Ratima, or his counsel when represented. It is submitted waiver can be inferred as neither Mr Ratima nor his counsel objected at the outset of the hearing, at the point at which Professor Brinded "proactively disclosed" his prior involvement before questioning Mr Ratima, or even at the conclusion of the hearing when counsel made oral submissions and commented positively on some of the professor's questions.

Was there apparent bias?

[25] The common law test for bias is well-known. Apparent bias arises when a decision maker has some personal or professional relationship with a party or witness, or a prejudice against or preference towards a particular party or result, or a pre-disposition leading to a pre-determination of the issues.[4] The test is whether a fair-

[4] Philip Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Thomson Reuters, Wellington, 2014) at 1076, adopted in *R v Gan* [2016] NZHC 2031 at [8]. The 5th edition of this text was published in 2021. The same comments regarding apparent bias are made at 25.5.4.

minded, lay observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the decision he or she is required to make.[5]

[26] I consider that the involvement of Professor Brinded upon the panel triggered the appearance – or perception – of bias. He prepared the Court reports in 1992 in his capacity as an expert. That entails impartiality and professional disinterest and there is no suggestion or indeed foundation to suggest any actual bias. I accept Mr Smith's submission that prior involvement in the criminal justice process involving an offender will not necessarily raise an issue of apparent bias sufficient to trigger s 118. That will be a context specific enquiry. However, I also note that the Board's described procedure in such cases expressly responds to the issue of apparent bias. It suggests that the Board recognises that in most, if not all, such cases apparent on perceived bias will arise by virtue of the fact of prior involvement, alone.

[27] Here, there is force in Mr Eagles' submission that it might be inferred in the circumstances that the professor was in possession of information from his multiple assessments of Mr Ratima in 1992, which extended beyond that set out in his reports. Given their content, and in particular the third report prepared at the request of the prosecutor to address future dangerousness, a fair-minded lay observer might reasonably apprehend that the professor might not bring an impartial mind to the parole decision making process. Accordingly, I consider s 118(2) was triggered. I did not apprehend Mr Smith to argue otherwise on the facts. The issue rather is whether Mr Ratima waived that apparent bias.

Was there an effective waiver by or on behalf of Mr Ratima?

[28] The respondent argues an implied waiver can be inferred. The common law concept of waiver is well understood in the civil context in respect of adversarial proceedings undertaken in breach of the rule against apparent bias. It arises where there is no express statutory obligation to remove bias. The Court must be satisfied that the person waiving was aware of all the material facts, of the consequences of the

---

5 *Muir v Commissioner of Inland Revenue* [2007] NZCA 334, [2007] 3 NZLR 495 at [61] – [62] and *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 at [3].

choice available to him or her and given a fair opportunity to reach an unpressured decision.[6]

[29] The Act has a bias provision, in s 118 as noted at [7] above. The language of the section is clear. Section 118(2) is an express direction to the chairperson who *must*, on becoming aware of the presence or perception of bias, *require* a panel member to recuse him or herself and take no part in the proceeding. There is no waiver provision, within s 118 or elsewhere in the Act.

[30] Mr Eagles submitted this provision required the Chairperson to ensure the professor did not sit. Mr Smith did not concede the professor should not have sat but argued that if s 118 was triggered it imports the common law concept of waiver. Although Parliament had not expressed it, the concept of implied waiver may be read into the bias provision. Mr Eagles contends it would be wrong to read down the bias provision in the special circumstances of parole hearings, where there is no prior notice of panel membership and prisoners will often be unrepresented. I was informed from the bar that counsel are unaware of any authorities engaging with this issue on the interpretation of s 118(2).

[31] The reviewer in his decision indicated that it is not uncommon that parole hearings include professionals, particularly psychologists and psychiatrists, who have prior involvement with the offender. I note where this happens Mr Trendle described that an *express* waiver enquiry occurs: the "matter" is "initially raised" with the offender and counsel and unless the offender is "comfortable with" the panel member concerned participating, he or she stands aside. This procedure, described as the Board's invariable practice where apparent bias arises, did not occur here. On its face it is arguable that even that procedure does not sit easily with the express terms of s 118(2). A plain reading of s 118 appears to place an absolute duty upon the Chair to eliminate any actual or apparent bias from the hearing and does not include any waiver procedure.[7] At an inquisitorial parole hearing with no prior notice of panel

---

6 *Sisson v Canterbury District Law Society* [2011] NZCA 55 at [39], citing *Smith v Kvaerner Cementation Foundations Ltd* [2006] EWCA Civ 242, [2007] 1 WLR 370 (CA).

7 Legislation Act 2019, s 10(1).

membership any such waiver might be vitiated by an immediate and apparently impromptu enquiry requiring decision by the (prospective) parolee.

[32] However, it is neither necessary, nor appropriate on the facts before me and in the absence of full argument, to determine whether s 118 imports the concept of waiver as, for the reasons set out below, I am satisfied that there was no sufficient waiver by Mr Ratima.

The professor had sat (many times) before without apparent objection

[33] I do not consider that Mr Ratima's implied waiver at the October 2022 hearing may be inferred from the fact that Professor Brinded had sat on previous panels without apparent objection.

[34] The professor sat on seven of the 14 previous panels.[8] All the decisions are in the record. Mr Ratima was unrepresented at his first six hearings, between 2003 and 2008. The third, fourth and fifth of these included Professor Brinded. The third hearing, and first time the professor participated, took place on 29 June 2006, some 14 years after the murders and Professor Brinded's examinations of Mr Ratima. At the November 2008 hearing, when for the first time Mr Ratima appeared with counsel, Professor Brinded again sat.

[35] As counsel for the Board identifies, there is no record indicating any objection to the professor's involvement at any previous hearing. However, nor is there any indication that the issue of apparent bias was raised at any time, either pursuant to s 118 of the Act or otherwise. Further, there is no indication from the record that the procedure which the reviewer stated is the Board's invariable practice to address apparent bias, ever took place. Had there been so, one might expect this to be recorded, especially given the clear terms of s 118(2) and as Mr Ratima was unrepresented for the first six hearings including the first three at which the professor sat. As Mr Ratima's counsel notes, his educational limitations and borderline intelligence were a matter of record.

---

8 The professor sat on hearings in June 2006, June 2007, June 2008, November 2008 (the first occasion on which Mr Ratima was represented by counsel), February 2015, September 2017 and September 2021 prior to the October 2022 hearing.

[36] When he began his questioning Professor Brinded acknowledged that, as Mr Ratima's counsel had identified in his written submissions, he had met Mr Ratima in prison. He asked him whether he remembered him, Mr Ratima said he did. However, it is not apparent from the record whether any such conversation had ever occurred between Professor Brinded and Mr Ratima at previous hearings. It might be inferred from the exchange which here occurred that it had not done so.

[37] Further, Mr Eagles submits the prisoner (and counsel) receive no prior notification of panel membership ahead of the hearing. Counsel says, and I accept, that he was taken somewhat by surprise and did not immediately register that Professor Brinded was the previously noted Dr Brinded author of the 1992 reports. Counsel and Mr Ratima were in two different locations, both attending by AVL. Even if Mr Ratima was aware of Professor Brinded's prior involvement and remembered him, including from seeing him at previous hearings, there is nothing to suggest Mr Ratima was aware at the outset of the hearing of the consequences of the choice available to him, that is that he could (on this occasion) raise an objection to the professor's involvement or, importantly, that he was provided a fair opportunity to reach an unpressured decision.

[38] For similar reasons I consider no waiver can be inferred from the omission to object at the outset of the hearing, after the Chairperson briefly introduced all members by name. Mr Eagles submits while he recognised Professor Brinded he did not initially realise he was the report writer of the 1992 reports, which had been briefly cited in written submissions. There was no exchange of the type described as the Board's practice to address the perception of bias.

[39] Nor did that occur during the hearing when the professor began questioning Mr Ratima. Mr Smith suggests this was a "proactive disclosure". Read in context it appears, rather, as a responsive acknowledgement that he was the author of the 1992 reports which had been identified in counsel's written submissions. The professor did identify some material facts, referring to meeting in prison at the time immediately after the killings and, when asked if he remembered the professor, Mr Ratima said that he did. This was immediately followed by questioning. It occurred well into the hearing. Even had this exchange met the Board's described practice, which would have entailed an enquiry of Mr Ratima whether he was "comfortable with" the

professor's continued involvement on the panel, it would have been too late to constitute a fully informed, unpressured and therefore effective waiver.

[40] In the circumstances I am not satisfied that Mr Ratima must have been aware of the consequences of the choice available to him, to object to the professor's involvement. There was no pause, for example for counsel and client to confer and the AVL mode did not permit any non-verbal or whispered communication as might arise in the round table situation of an in-person parole hearing.

[41] I do not consider there was any opportunity to reach an unpressured decision to raise an objection for apparent bias at this juncture of the hearing.

[42] Finally, Mr Smith submitted waiver can be inferred from counsel's positive comments near the end of the hearing about some of the professor's questions. I am not persuaded the comments amount to waiver by counsel on behalf of his client or that they suggest a strategic election by counsel not to raise the issue. As noted, counsel had no prior indication of the composition of the panel. This was an hour and a half long hearing with no pause for conference with client, in which the questioning was robust, sequential and fluent. The issue of apparent bias was not raised by the Chair or Professor Brinded at the outset. By the point at which the professor expressly discussed his prior involvement, I accept the Board chair had exercised strong leadership of the discussion. In short, the circumstances were a world away from a long cause hearing such as in *Auckland Casino* and the authorities there discussed, where the strategic election of counsel will be held as waiver, even in circumstances of an "agonising choice".[9]

[43] The apparent bias arising from Professor Brinded's inclusion on the panel was not waived by Mr Ratima. In this respect there was a breach of natural justice and relief should be granted.

---

9 *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142 (CA) at 151-152.

Did the Board take into account irrelevant considerations?

[44] The second issue on review is whether the Board wrongly took into account irrelevant considerations by considering the views of persons who were not legal victims" of Mr Ratima's offending.[10]

[45] As the decision records, the Board began the hearing with a detailed summary for Mr Ratima of its discussions with "a number of victims" of his offending. The transcript identifies one as "the sister of one [Mr Ratima's] victims" and records the Board had stated it had met with 11 members of family of those killed, which had led the Board to understand that "even the younger generation among the whānau were still traumatised".

[46] As this ground was not pleaded in the statement of claim the evidence for the Board did not identify the persons referred to as victims nor address whether those persons might fall within the general definition of "victim" in s 4(1) of the Act.[11] However, it is not necessary to resolve those issues to determine this ground. At least one of the persons described as victims in the transcript, the sister of one of Mr Ratima's victims, was entitled to make submissions or give information to the Board, under s 50A of the Act, as falling within the extended definition of "victim" in s 4(1) of the Victims' Rights Act 2002.[12] The extended definition relevantly defines "immediate family" of a victim as follows:[13]

> **Immediate family**, in relation to a victim,—
>
> (a) Means a member of the victim's family, whanau, or other culturally recognised family group, who is in a close relationship with the victim at the time of the offence; and

---

10 Parole Act, s 4(1) and see Victims' Rights Act 2002, s 4(1). This issue was not pleaded as a review ground in the statement of claim but was addressed in written submissions and counsel for the Board also addressed the issue in written submissions.

11 Victims' Rights Act, s 32B.

12 Section 4(1).
(iv): a member of the immediate family of a person who, as a result of an offence committed by another person, dies or its incapable, unless that member is charged with the commission of, or convicted or found guilty of, or pleads guilty to, the offence concerned; …

13 Section 4(1).

(b) To avoid doubt, includes a person who is—

(i) the victims' spouse, civil union partner, or de facto partner; or

(ii) the victim's child, or step-child; or

(iii) the victim's brother or sister or step-brother or step-sister; or

(iv) a grandparent of the victim

[47] Further, even if the other "members of family" the Board spoke with did not fall within the extended definition, they were entitled with the Board's leave, to be heard as support persons of the victim under s 49(4)(c) of the Act.

[48] In any event, the Parole Board may receive and take into consideration whatever information it thinks fit, whether or not admissible as evidence in a court of law, under s 117(1). Section 117A confers the power on the Board to regulate its own procedure as it thinks fit. There is no doubt the Board was entitled to receive information from persons not falling within the extended definitions of "victim". There is no basis to suggest that the impact of Mr Ratima's offending on whānau of his multiple victims was an irrelevant consideration to the Board's decision.

Unreasonableness

[49] Mr Ratima's third ground of challenge is that the approach that members took in the hearing and the decision they reached was unreasonable, having regard to certain comments made by Board members during the hearing and the way in which it was conducted. Mr Ratima argues the Board adopted "an accusatory and reproachful approach" that paid "little attention" to assessing release risk.

[50] First, Mr Ratima identifies as unreasonable comments made by the Parole Board Chair during an exchange:

(a) suggesting that Mr Ratima ought not to pursue an application for parole at all as what he did was "so extreme";

(b) saying to Mr Ratima "you can't hide behind the law", pressing him to accept the point of view of families of the victims; and

(c) insisting that it was important for Mr Ratima to understand "the depth of [the family's feelings]".

[51] It is necessary to set out the exchange in full, including the contested passages:

> **RY** Do you understand their view that really the only way from their perspective that you can at least acknowledge what they have gone through is to stay in prison?
>
> **R** I can...I can understand their perspective sir, yes.
>
> **RY** What do you think of that?
>
> **R** Um, I think that um, you know it, it would depend on that individual's um, you know his empathy, his ...the work that he does, um, over the, over the amount of years, ah...in incarceration and addresses his offending and ensuring that you know, the first and foremost is, is, is the victims and the pain that they're going through. But you know, acknowledging that and um, you know I...that has been, you know at the forefront of you know my life for the last 30 years, and you know, I absolute aroha for ah, all those victims and you know, I'd um, you know I've, I've been in this environment here before and you know I, I cannot e...e...e...express enough, you know, what I've taken from those families.
>
> **RY** Yeah, but just going back to what I ask you – their view is that, that the right cost of what you did because it's *so extreme* and the right acknowledgement to them as victims for what you did is to stay in prison. There has...the proper level of acknowledgement.
>
> **R** Yeah, yeah absolutely.
>
> **RY** And so I was wondering what you thought of that idea.
>
> **R** Um, yeah, um, look, um, it is the victims' view I can respect their point of view and it's really all I can say about that sir.
>
> **RY** Yeah. But obviously by seeking parole you don't accept that that is the proper...I'm not saying it is [00:14:13] but I think it's important that you understand the depth of their feeling. And, but you don't accept that obviously is the appropriate level ...
>
> **R** Yeah, yeah, I accept that. I accept that absolutely sir.
>
> **RY** No, no, but you don't Mr Ratima because you're seeking parole. I'm not saying you shouldn't but I'm just trying to get, to help you understand their level of continuing hurt. So that...as I said they say you shouldn't be applying for parole, you shouldn't be seeking, and you are. And so clearly you don't accept that that level of contrition is required.
>
> **R** Um...I'm here because the law tells me that I can apply for ...

RY No, no, you *can't hide behind the law* Mr Ratima, you are entitled to apply, of course you are, and I'm not saying it's wrong to do so, but do you understand what their point of view, which obviously you don't accept, they say you just should not be asking.

RE I think it's clear Your Honour that he, he's ...

RY ...Mr Eagles ...

RE ...he does understand.

RY ...you can't intervene. It's...this is not a Court case.

RE I mean are these questions really reasonable?

RY Well that's for me to judge and if you are happy with...unhappy with them subsequently you take it further.

R Absolutely I agree with the victims that I should never be released.

RY Well I, I'm not saying you should, but it is important that you understand *the depth of their feelings*. And the second point that I make to you Mr Ratima is given the threat you made immediately after, making to your wife and your father-in-law, they remain extremely fearful of you. Do you understand that?

R I understand that sir, yes. Um, that statement was made out of um, the ...because of the, you know state of mental um, mind that I was in at the time and you know, I absolutely regret saying that, and should not have said that, it was spur of the moment um, statement made and I apologise for that.

(emphasis added)

[52] Mr Ratima also challenges the Board's consideration of the details of his offending and its triggers, as part of its forward-looking risk assessment. The challenge in this regard alleges that the Parole Board:

(a) unreasonably revisited the offending and why Mr Ratima did it;

(b) unreasonably explored with him the complex background factors which led to his offending; and

(c) unreasonably adopted an accusatory and reproachful approach that paid little attention to the primary purpose of assessing risk.

[53] Mr Eagles submitted there was little utility in pressing Mr Ratima vigorously 32 years after the offending, and that it is difficult to understand the purpose of the Board querying Mr Ratima when expert psychologists have traversed these matters with him, although counsel accepts that at different times Mr Ratima had shown unwillingness to discuss the offending with psychologists.

[54] Mr Smith submitted, and I accept, the questioning must be assessed in context of the transcript read fairly as a whole and that all of the matters addressed by the Board were relevant to its fundamental risk enquiry under s 28(2) of the Act. In determining whether Mr Ratima would pose an undue risk if released on parole, the Board was required to consider both the likelihood of future offending and its nature and seriousness. In Mr Ratima's case, this was a particularly challenging task. An exchange between the Chair and Mr Ratima demonstrates the Board's approach and its rationale for enquiring into the offending, its background and Mr Ratima's understanding of its triggers:

> **RY** But do, do you understand Mr Ratima that the reason...I'm not just asking this to make it difficult for you, we're trying to understand that you understand what are the triggers of this offending.
>
> **R** Yeah absolutely.
>
> **RY** You then went on to kill your own children.
>
> **R** I did sir.
>
> **RY** Now obviously that's incredibly extreme isn't it?
>
> **R** Absolutely.
>
> **RY** And so we're searching to try and understand why you did that.
>
> …
>
> **RY** So Mr Ratima, the reason why I talk to you about this is cos as you know when we talked last time we were concerned that there wasn't really a clear identification of the reasons why you offended, cos it seems to be common ground you weren't mentally ill, ah, and this is obviously an extreme situation, and so one of the, as you know, the work that's done in prison with people who commit crime have to try and find out why they did it is the first step, because it's only when you know why you did it can you get, ah, identify the high risk situations you have and therefore develop strategies to deal with those. If you say; well look these are the reasons why I did this, and so these are the things I've got to work on to try and avoid them happening in the future or at least have the skills to deal with them if they do occur

again. And so that's why we've been troubled by this Mr Ratima. Do you understand that, that we've never, you don't know what, apparently why you killed them particularly not your children or indeed merely the others who were just sort of peripheral members and certainly not involved in the kind of core dispute with you. You killed a young boy who...I can't see he had anything to do with anything. You killed it seems ah, deliberately an unborn child. Again, so none of this seemed to have anything really to do with your family dispute. And so that's why we, we're not just doing it to you know, cause you discomfort and repeat these things, we're doing it cos it goes to the core of risk and why you should, whether or not you should or shouldn't be released.

R Yeah absolutely.

…

RY The marriage is in trouble, that you're asked to leave, you leave and then you describe the circumstances that you get yourself in to. Correct?

R Sir, yeah.

RY Okay. So one of the high risks situations for you is going to be if any future relationships fall over.

R No

RY Is that in your safety plan?

R Um, yeah absolutely.

…

PB Yeah. Okay. The one issue, the one problem um, which of course is a major one, um, I'll just find it Mr Ratima. And it, it relates back to what I was saying about um, whilst you've unfortunately found yourself in, in, in very um, difficult circumstances just prior to the killings, that um, other people find themselves in those circumstances too, but nobody does what you did. Um, which then calls in to question how on earth could Mr Ratima have done that, what is it about him that allowed him to do that. And having given us the risk assessment the psychologist says, um, says that you remain of moderate um, risk, and then it says limitations to the risk assessment are acknowledged, given the severity and rarity of Mr Ratima's offences. They're basically saying well whilst he comes up as moderate on um, on the risk assessment tools we use, his offending is so unusual, he's such an unusual man because of that, that we can't really give a, ah, risk assessment as accurate. You see what they're getting at?

R Yes sir.

PB Yeah. I guess that's what we wrestle with on the Board, you know trying to make a fair and reasonable decision. Um, your case is more difficult than virtually any. I, I personally feel um, an absolute tragedy seeing your victims, um, and don't feel very different seeing you, cos of the situation you're in, um, which is a very difficult one. So I acknowledge that, um, but anyway that, that's our job, we've got to make that decision. So thank you Mr Ratima for talking with me.

R Thank you sir.

[55] The question why Mr Ratima reacted in 1992 to the situation he faced in such an extreme way as to murder seven people and an unborn child was clearly relevant to the Board's assessment of his future risk if confronted with a similar situation or stressors, including as might arise in Mr Ratima's self-declared partnership of the last six years. It was also particularly important to try to understand these issues because the specialist report writers had noted the limited utility of the risk assessment tools usually deployed, given the scale and seriousness of the offending and the duration of Mr Ratima's incarceration. The Board described it this way in their decision:

> To the Board none of these circumstances really convincingly explains the murder of seven people and the murder of an unborn child. Many families are in the kind of situation, tragically described by Mr Ratima when a relationship ends. Often a protection order is sought, one of the partners typically a male is frustrated with an inability to obtain access to the children and so there can be angry confrontations. But Mr Ratima's killing of seven people plus the unborn child takes it out of the realm of the ordinary and well beyond that.
>
> The fact that these killings are so out of the ordinary is why … although in the psychological reports various [risk assessment tools] indicate Mr Ratima is at a moderate risk of reoffending, the extent and circumstances of his offending take his offending right outside any real capacity of those instruments to properly assess his risk.

[56] I accept some of the questioning from the Chair, viewed in isolation, had an accusatory tone. However, the transcript is to be read as a whole and I do not consider the decision is unreasonable as a result. There was a proper basis for the Board to explore with Mr Ratima the issues relevant to future risk in a frank and direct manner, noting that he was entitled to so respond. Mr Ratima's counsel had identified that he was in a position to engage with the Board about his future risks, how the murders arose and that he had developed an understanding of his behaviour. The enquiry into his insight into the offending was consistent with the Board's inquisitorial function

and it was reasonable for the Board to test robustly these issues with him.[14] They are patently relevant to the assessment of the efficacy of Mr Ratima's rehabilitation and of his re-integration prospects.

[57] Further, while the Parole Assessment and addendum reports were favourable, I do not accept they were a "far more appropriate" avenue of enquiry for the Board then those areas which the Board concentrated on in the hearing as Mr Eagles submits. The Board's process is an accretive one. It must have regard to all sources of relevant information and it is evident from the discussion the Board had regard to the positive reports of Mr Ratima's progress, including Corrections' assessment that he is now on a re-integrative pathway.

[58] Essentially, Mr Ratima's complaint in this regard is a challenge on the merits: that the Board did not "pay adequate heed" to the positive reports. As Katz J noted in *Wong v The New Zealand Parole Board,* there is a restricted role for judicial review in the parole context.[15] Once the Board makes the risk assessment the Act requires, there is a relatively limited ability to challenge it in judicial review proceedings, and no provision for a full merits based review by this Court.[16]

[59] The paramount consideration for the Board in every case is the safety of the community.[17] The information before the Board included the specialist reports, the most recent of which acknowledged the "understandable caution" signalled by the Board in its previous decisions given the nature and severity of Mr Ratima's offending and the enduring impacts for his victims, whānau and wider community, and the limitations of the risk measurement tools. I accept, as Mr Smith's submits, that in these circumstances, the exercise of the Board's judgement was more acute than in the usual case and assessment of undue risk was particularly complex. As I have found, the Board was entitled to take into account the issues of Mr Ratima's insight into his offending, its triggers and future risk factors. That assessment was an integral part of the Board's decision; especially given the report writers' appropriate caution and

---

14 *Wong v New Zealand Parole Board* [2017] NZHC 2098, at [46].

15 *Wong v New Zealand Parole Board*, above n 14, citing *Ericson v New Zealand Parole Board* HC Wellington CIV-2010-485-1912, 2 March 2011; *Edmonds v New Zealand Parole* [2015] NZHC 386.

16 *Wong v New Zealand Parole Board*, above n 14, at [18].

17 Parole Act, s 7(1).

deference to the Board's judgement. Indeed, it would have been an error of law had the Board abdicated its discretion to exercise its judgement to the writers of any of the reports before it.[18]

[60] The information before it within the specialist reports, from persons affected and importantly from Mr Ratima himself and his supports were all relevant. The weight to be attached to the information was a matter for the Board.

[61] I am not persuaded the Board adopted an unreasonable approach, or that the decision reached was otherwise unreasonable based on the information before it.

Relief

[62] Mr Ratima sought by way of relief a direction for a re-hearing before a Parole Board with different membership. At the hearing, counsel advised that Mr Ratima wished to reserve his right whether to seek re-hearing and whether there should be any direction for updating information, as he may wish to rest on the reports which were before the Board.

[63] Additionally, Mr Eagles sought a declaration that Professor Brinded should not sit on Mr Ratima's future parole hearings as Mr Ratima does not consent to this. I do not consider a declaration is necessary given my decision in this case. I note, in this regard, Mr Ratima does not contend that any of the Board's previous decisions in his case was wrong and counsel expressly disavowed any suggestion of actual bias on the part of Professor Brinded.

Conclusion

[64] I have found Professor Brinded's inclusion on the panel gave rise to apparent or perceived bias. The apparent bias was not waived by Mr Ratima.

[65] I have not upheld Mr Ratima's claim that the Board wrongly took into account information or that its decision was otherwise unreasonable.

---

[18] *Va'a v Chief Executive, Department of Labour* HC Wellington AP312/97, 2 April 1998 at 9-10.

[66] I **direct**:

(a) Mr Ratima is entitled to a re-hearing before a differently constituted Board not including Professor Brinded;

(b) Mr Ratima, through counsel, should notify the Board whether he wishes to seek a re-hearing;

(c) should Mr Ratima seek a re-hearing, counsel is also to confirm whether Mr Ratima seeks updated reports and, if so, such reports are to be prepared prior to the hearing.

Costs

[67] I have found in favour of Mr Ratima on one of the three grounds for relief but have not upheld the other two grounds.

[68] As Mr Ratima is legally aided, the Board did not seek costs. In the circumstances it may be appropriate that costs lie where they fall. If counsel takes a different view this should be set out by memorandum to be filed within **five** working days of issue of this Judgment, and leave is reserved to the respondent to file reply memorandum, within a further **five** working days.

……
Preston J

Solicitors:
Eagles, Eagles & Redpath, Invercargill

Copy to:
M S Smith Barrister, Wellington