CASE NOTES

The Power of the Parole Board: In the Matter of an Application for Enforcement of Human Rights; Dr. Theo Yasause v Commissioner of Correctional Service, The State and The Parole Board (2021)

Dr. Eric Kwa[*]

Introduction

The Parole Board is established under the *Parole Act* 1991 (the Act).[1] The preamble of the Act spells out the main purpose of the Statute, which is as follows: "Being an Act to provide for a system of parole which will contribute to the maintenance of a just, peaceful and safe society by facilitating the reintegration of offenders into the community as law-abiding people; and for related purposes." The facilitation of the reintegration of offenders into the community is to be undertaken by the Parole Board.

Prior to 2018, the Parole Board comprised of the Secretary for Justice or his nominee, the Commissioner of Correctional Services or his or her nominee and a person appointed by the Minister.[2] In 2018, the Board comprised:

1. The Secretary for the Department of Justice and Attorney General (or his or her nominee)[3],
2. The Commissioner for Correctional Services (or his or her nominee); and
3. A medical doctor recommended by the Secretary for the Department of Health.[4]

In 2019, Dr Eric Kwa (Chairman), Commissioner Stephen Pokanis (Member), and Dr. Monica Agali (Member) were appointed by the Minister for Justice and Attorney General as members of the ninth Parole Board. The first Board was appointed in 1992 after the enactment of the *Parole Act* in 1991. The first Board comprised Mr Nicholas Kirriwom (Chairman), Mr Kepas Paon (Member), and Mr Stephen Pirina (Member).

The functions of the Board are set out in Section 7 of the Act:

> 7. Functions of the Board.
> (1) The functions of the Board are, in accordance with the provisions of this Act–
> (*a*) to consider the cases of detainees who are eligible for parole in accordance with Section 17, and applications for parole under Section 22; and

---

[*] Attorney General of Papua New Guinea and Secretary for Justice. Dr. Kwa is also, currently, the Chairman of the Parole Board of Papua New Guinea, which was a Defendant in the case, *In the Matter of an Application for Enforcement of Human Rights; Dr. Theo Yasause v Commissioner of Correctional Service, The State and The Parole Board* (2021) N9380.

[1] No.16 of 1992.

[2] Section 3 of the *Parole Act*.

[3] See *Elly v Commissioner of the Correctional Service* (2018) N7629, in relation to the Chairman of the Board.

[4] No.13 of 2018.

(*b*) to grant orders for the release of detainees on parole where appropriate; and
(*c*) such other functions as are specified or required under this Act or any other law.
(2) In the performance of its functions, the Board shall apply the following criteria: –
(*a*) the protection of the public is the paramount consideration;
(*b*) the detainee's release will cause no undue risk that he will reoffend before his sentence expires; and
(*c*) the detainee's release will contribute to the welfare and protection of the community by helping or furthering his reintegration into the community as a law-abiding person.

In the case of *In the Matter of an Application for Enforcement of Human Rights; Dr. Theo Yasause v Commissioner of Correctional Service, The State and The Parole Board*[5] the National Court was tasked to determine the exercise of the functions of the Board under Section 7 of the Act. The court was asked to explain when a prisoner was eligible to apply for parole under this provision. This paper examines the powers of the Parole Board and the decision of the National Court in the above case relating to the exercise of that power by the Board.

The Powers and Functions of the Parole Board

The Parole Board has the power under the *Parole Act* to do all things that are necessary or convenient for the performance of its functions. In the exercise of its functions, "the members of the Board have all the powers, authorities, protections and immunities conferred on a Commissioner under the *Commissions of Inquiry Act* 1951."[6] The functions of the Board are stipulated by Section 7 of the Act. Generally, the Board's primary role is to determine the cases of prisoners who are eligible for parole. In determining an application, the Board is directed under law to consider three important factors. They are:

1. The protection of the public is the paramount considerations
2. The detainee's release will cause no undue risk that he will reoffend before his sentence expires
3. The detainee's release will contribute to the welfare and protection of the community by helping or furthering his reintegration into the community as a law-abiding person.

When these three conditions are satisfied, the Board usually releases the prisoner. When one or more of these factors are unsatisfactory, the application is refused. When an application is refused, the detainee may reapply for parole after 12 months as prescribed under Section 22 of the Act. The Board has resolved that a prisoner can be allowed to apply for a third and final time if his second application is rejected by the Board. The functions of the Parole Board under this provision have been clarified in, *In the matter of Enforcement of Basic Rights under the Constitution of the Independent State of Papua New Guinea.*[7]

Type of Prisoners Eligible for Parole

There are three categories of prisoners who are eligible for parole under Section 17 of the Act.[8] These are: (1) prisoners who have been sentenced to a term of imprisonment of less than three years; (2) prisoners who have been sentenced to a term of imprisonment for more

---

[5] (2021), N9380.
[6] Section 8, *Parole Act*.
[7] *In the matter of Enforcement of Basic Rights under the Constitution of the Independent State of Papua New Guinea* (2008), N3421.
[8] Section 17, *Parole Act*.

than three years; and (3) prisoners who have been sentenced to life imprisonment and who have served more than 10 years in prison. This is simplified in the table below.

Categories of Prisoners Eligible for Parole prior to 2019 Amendment

1	Serving three years	Serve less than 12 months
2	Serving more than three years	Serve one third of sentence
3	Life sentence	Serve more than 10 years

The prisoners in the first category are eligible for parole if they have served less than one year in prison. In general, the prisoners under this category hardly apply for parole because of the short length of their incarceration. For the second category of prisoners, they must have served not less than one third of their sentence. In relation to the third category, the prisoners must have served more than 10 years of their sentence to be eligible for parole.

The amendment to the *Parole Act* in 2018, has however impacted eligibility in two ways. First, a person who is sentenced to life imprisonment will no longer be eligible for parole. And second, eligibility for all other prisoners (excluding those on death row) has now been determined at half the sentence. This means a prisoner must serve half of his or her prison sentence, before he or she is eligible for parole.

Case of Theo Yasause

The prisoner, Dr. Theo Yasause, was serving a sentence of 30 years for murder. The prisoner was a former Director General of the Clim[ate Change Office, who shot and killed the deceased with a pistol.[9] The prisoner was found guilty of murder under Section 300 of the *Criminal Code* on 28th September 2012 and sentenced on 29th November 2012 to prison for 30 years.

While in prison, Dr. Yasause had made several trips to the National and Supreme Courts seeking a number of orders, including appeal against his conviction and sentence[10], bail[11] and human rights abuse.[12] In all these cases, Dr. Yasause failed to obtain a positive result for himself.

In 2020, Dr. Yasause applied for parole, claiming that he was eligible for parole. The Parole Board (which I chaired) met on 4th October 2021 and calculated his eligibility under Section 17 and found that he was short by six months and therefore ineligible for parole application. The Board calculated Yasause's eligibility using the table below.

Period of Imprisonment	**Sentence**	**Starting date**
Length of sentence	30 years	From 02/2011
Length of period deducted (pre-sentence)	1 year 10 months (22 months	
Length of sentence suspended	Nil	
Length of sentence to be served (after deduction)	28 years two months	From 29/11/2012

9 See *State v Yasause* (2012), N4871.
10 *Theo Yasause v The State* (SCRA No 30 of 2013) (09.06.16, unreported).
11 *Yasause v Independent State of Papua New Guinea* (2014), SC1381.
12 *Yasause v Keko* (2017) N6853; *Yasause v Independent State of Papua New Guinea* (2017), N6857.

The Parole Board usually calculates the eligibility date for parole from the date of sentence to the end of the date for imprisonment; which means, the Board considered that from 29 November 2012, Dr. Yasause would serve 28 years, two months. Thus, his one third of the sentence, according to Section 17 of the Act, would be about nine years, three months. Consequently, the Board established that Dr. Yasause was short by nine months, meaning that his eligibility date would be February 2022.

When the decision of the Board was communicated to Dr. Yasause, he was not happy with this outcome. Instead of seeking a judicial review of the decision of the Board, he initiated a Human Rights proceeding in the National Court.

In his application for human rights enforcement, Dr. Yasause claimed that the Board had miscalculated his period of eligibility under the Act. Justice Cannings, sitting as the judge of the human rights track of the National Court, reviewed Dr. Yasause's application and agreed with him.

According to Cannings J, the Board should calculate the eligibility date from the head sentence (30 years) and not the reduced sentence (28 years, two months).[13] Based on this new calculation by the court, the Parole Board was ordered to meet and consider the application by Dr. Yasause on the grounds that he was already eligible for parole.

Implications of the Yasause Decision

The decision by Cannings J has wide ranging implications on the prisoners who are currently waiting to have their parole applications determined by the Parole Board. When calculating eligibility, the Parole Board applies the traditional method which is understood by the prisoners. However, with this decision, more prisoners will come forward to the Parole Board claiming that they are already eligible because of this new determination.

This decision affects the Correctional Services as well because they also use the Parole Board's calculations for eligibility to determine whether a prisoner is eligible to be released on remission under the *Correctional Services Act* 1995. Sections 117 and 120 of the *Correctional Services Act* provides the framework for the remission of prison sentence by the Commissioner of Correctional Services. These two provisions empower the Commissioner of Correctional Services to release a prisoner on remission if he or she behaves well and is thoroughly rehabilitated by the prison system. Section 120(1) of the *Correctional Services Act* empowers the Commissioner to grant a detainee remission equal to one third of the sentence. Thus, if a prisoner is sentenced to, say 10 years, and he or she is assessed by the Correctional officers, as a well behaved and reformed person, on recommendation, the Commissioner can deduct about three years from the total of 10 years. The question now would be, should the remission be calculated from the head or the reduced sentence?

Resolving the Eligibility Issue

In light of the decision by Cannings J, the Commissioner Stephen Pokanis has instructed the lawyers from the Solicitor General's Office to mount a challenge to this and other similar decisions in the Supreme Court. Hopefully the Supreme Court will clarify this issue quickly so that it will give clarity to the work of the Parole Board and the Correctional Service.

[13] See *In re Application of Enforcement of Human Rights, by Samalan Peter* (2014), N5631.

Judicial Review versus Human Rights

An important issue for resolution by the courts is the issue of whether a prisoner should seek judicial review of the decision of the Parole Board or seek the enforcement of his or her human rights. It is suggested that a prisoner is entitled to seek the enforcement of his or her human rights in the National Court where he or she is denied certain entitlements as a prisoner. This may include access to nutritious food[14]; medical treatment[15] adequate accommodation; visitation; and being informed of the decision of the Parole Board.[16]

However, it is my firm view that a prisoner is not entitled to seek the enforcement of his or her human rights where the Parole Board had taken a decision on his or her application for parole. The option available to a prisoner is to seek a judicial review of the decision of the Parole Board because the Board undertakes an administrative decision as a tribunal. As pointed out by Cannings J in the case of, *In the matter of Enforcement of Basic Rights under the Constitution of the Independent State of Papua New Guinea*:[17]

> There is a tribunal in place – the Parole Board – established by an Act of the Parliament – Parole Act 1991 – with statutory procedures and criteria to follow, which is required to do, in a careful, rigorous and fair way.

In the last couple of years, it has come to the notice of the Supreme Court that the National Court has abused its inherent power under Section 57 of the *Constitution* to make sparing decisions relating to human rights applications by prisoners. In *Independent State of Papua New Guinea v Siune*, the Supreme Court was critical of the propensity of the National Court to issue orders claiming breaches of human rights without proper regard to the facts and evidence. The Supreme Court held a similar view in *Independent State of Papua New Guinea v Tamate*.[18]

It is evident that after the tribunal – Parole Board, has made a decision; the prisoner must seek a judicial review of the decision under Order 16 of the *National Court Rules* in the National Court. An application for the enforcement of a human right cannot proceed if the prisoner has not exhausted the judicial review process under the *National Court Rules* and the *National Court Act*.

Conclusion

The powers and functions of the Parole Board - as a tribunal, set out under the *Parole Act*, are simple and easy to understand. The *Theo Yasause case*, reviewed here, however, raises three fundamental legal issues. These are: (1) eligibility period; (2) remission of sentence; and (3) challenging the decision of the Parole Board. These issues must be addressed either by the

---

14 *Alabain v Commissioner of the Correctional Service* (2020) N8576 and *Liliura v Commissioner of the Correctional Service* (2019), N7917.

15 *Mal v Commander, Beon Correctional Institution* (2017) N6710. In contrast read *Independent State of Papua New Guinea v Siune* (2021), SC2070.

16 *In re Application for Enforcement of Human Rights under Section 57 of the Constitution, by Jacob Eddie* (2014), N5735.

17 *In the matter of Enforcement of Basic Rights under the Constitution of the Independent State of Papua New Guinea* (2008), N3421.

18 *Independent State of Papua New Guinea v Tamate* (2021), SC2132.

higher court or the Parliament. Hopefully the issue of eligibility will be resolved by the Supreme Court soon. The other two issues may have to be resolved by legislative reforms.