IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA200/2018
[2019] NZCA 510

BETWEEN	MARK DAVID CHISNALL Appellant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing:	27 November 2018 (further material received 24 December 2018)
Court:	Miller, Cooper and Clifford JJ
Counsel:	A J Ellis and G K Edgeler for Appellant D J Perkins and L Dittrich for Respondent
Judgment:	23 October 2019 at 1 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The public protection order is quashed.

C The matter is remitted to the High Court for reconsideration in accordance with this judgment.

D The interim detention order made by the High Court, as amended, is in full force and effect pending further order of that Court.

E The respondent is to pay the appellant costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] The appellant, Mark David Chisnall, was sentenced in March 2006 to eight years' imprisonment on a single charge of rape.[1] Whilst serving that term of imprisonment Mr Chisnall was sentenced to a cumulative term of three years' imprisonment for an earlier rape. Mr Chisnall's finite sentences of imprisonment were to end on 1 May 2016. On 15 April 2016 the respondent, the Chief Executive of the Department of Corrections (the Chief Executive), sought a public protection order (PPO) under the Public Safety (Public Protection Orders) Act 2014 (the Public Safety Act), or alternatively an extended supervision order (ESO) under the Parole Act 2002. At the same time, the Chief Executive applied for interim orders under both those Acts.

[2] The Chief Executive's application for an interim detention order under the Public Safety Act was granted by the High Court on 22 April 2016.[2] Appeals against that order were subsequently dismissed by this Court[3] and, following a grant of leave,[4] the Supreme Court.[5]

[3] The Chief Executive's substantive application for a PPO was heard by the High Court in early December 2017. On 14 December that year Wylie J granted that application.[6]

[4] Mr Chisnall now appeals that decision. His appeal is advanced on two grounds:

(a) Wylie J was wrong to conclude that the statutory prerequisites for the making of a PPO had been established in Mr Chisnall's case.

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1 *R v Chisnall* HC Wanganui CRI-2005-083-806, 29 March 2006.
2 *Chief Executive of the Department of Corrections v Chisnall* [2016] NZHC 796 [Interim detention order (HC)].
3 *Chisnall v Chief Executive of the Department of Corrections* [2016] NZCA 620 [Interim detention order (CA)].
4 *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 50.
5 *Chisnall v Chief Executive of the Department of Corrections* [2017] NZSC 114, [2018] 1 NZLR 83 [Interim detention order (SC)].
6 *Chief Executive of the Department of Corrections v Chisnall* [2017] NZHC 3120 [Public protection order (HC)].

(b) Even if that were not the case Wylie J should, instead of making a PPO, have made an ESO, subject to intensive monitoring for one year, an outcome Mr Chisnall consented to in the High Court and before us.

PPOs and ESOs

[5] Offenders released from prison on parole are automatically subject to standard parole release conditions.[7] They may also be made subject to special parole release conditions by order of the Parole Board. Special conditions impose further restrictions on the person's liberty. Those conditions may only remain in force up to six months after the offender's statutory release date, generally the last day of the full term of the offender's sentence of imprisonment.[8]

[6] PPOs and ESOs are made, on the application of the Chief Executive, by the High Court. ESOs may also be made by the District Court, again on the Chief Executive's application. They may, in general terms, be imposed on eligible offenders who will complete the full period of their finite term of imprisonment for a serious sexual or violent offence and who are, therefore, not able to be made subject to parole release conditions long term.[9] The primary purpose of both orders is to protect the community from what the Chief Executive must establish is the very high or high risk of sexual or violent reoffending by an eligible offender.[10] The Chief Executive establishes that risk by demonstrating to the Court that the eligible offender demonstrates a range of specific characteristics.[11]

[7] Both PPOs and ESOs, amongst other things, impose restrictions on where the offender must reside, and their freedom of movement. A PPO is more restrictive than an ESO. That is, in summary:

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7 Parole Act 2002, s 29.

8 Sections 29(3) and 29AA(3).

9 Public Safety (Public Protection Orders) Act 2014 [Public Safety Act], s 7(1), the "threshold" test; and Parole Act, s 107C, definition of "eligible offender".

10 Parole Act, s 107I(1)–(2); and Public Safety Act, ss 4(1) and 13(1).

11 Before imposing a public protection order (PPO) the court must — among other requirements — be satisfied that the respondent exhibits a severe disturbance in behavioural functioning established by evidence of characteristics set out at s 13(2) of the Public Safety Act. Similarly, before imposing an extended supervision order (ESO) the court must determine the necessary high or very high risk of reoffending exists by reference to the characteristics set out as s 107IAA of the Parole Act.

(a) A person subject to a PPO must stay in specially designated buildings and adjacent land (residences) located in prison precincts. Such persons, known as residents, are in the legal custody of the Chief Executive and are subject to a range of ongoing restrictions and rules set out in the Public Safety Act.[12] There is no time limit to the period for which a PPO may apply. Such orders must, however, be reviewed on an annual basis by the review panel constituted under the Public Safety Act, and every five years by the High Court, on the mandatory application of the Chief Executive.[13]

(b) A person subject to an ESO is, just like an offender released on parole, subject to a range of standard conditions.[14] The standard conditions place a person under the supervision of a probation officer and require residence at an approved residential address. The Parole Board has power to impose special conditions on the same terms as it may do so by way of special parole release conditions, such as electronic monitoring. In addition, the Chief Executive, when applying for the imposition of an ESO, may also apply to the sentencing court for an order that it impose what is known as an intensive monitoring condition on the offender.[15] Such a condition requires the offender to submit to being accompanied and monitored for up to 24 hours a day. ESOs have a maximum term of 10 years. An intensive monitoring condition may only be imposed during the first 12 months of an ESO.[16]

Mr Chisnall and his offending

[8] Mr Chisnall's personal and offending history was summarised by this Court in 2016 as follows:[17]

> [3] Mr Chisnall was born on 5 March 1986. The various reports that we will refer to in due course show that he had a troubled background. His mother

[12] Public Safety Act, s 21; and see generally pt 1 sub-pts 2–3.
[13] Sections 15 and 16.
[14] Parole Act, ss 107J–107JA.
[15] Section 107IAB.
[16] Section 107IAC(3).
[17] Interim detention order (CA), above n 3 (footnote omitted).

found him to be a very difficult child and Mr Chisnall alleges that he suffered physical abuse as a child. He was described in the reports as being aggressive through kindergarten and school with regular involvement in assaults. He had learning difficulties. There were issues with drugs and he has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). There is also a reference in the reports to an occasion of a very serious assault on his mother when Mr Chisnall broke her jaw and tried to strangle her. The reports disclose that when he was 10 he watched a pornographic movie in which women were raped and killed, which led to an interest in movies depicting rape and violence. Mr Chisnall has reported that he was sexually preoccupied from that age.

[4] In 2001 when he was 14 or just 15 he raped an eight-year-old girl in a park in a small Taranaki town. The offending was not at that point revealed and he was not sentenced in relation to this event until 31 July 2009.

[5] Some days after the offending against the eight-year-old girl, Mr Chisnall induced a seven-year-old boy to perform oral sex on him. He was immediately charged in relation to this offence. He was convicted of unlawful sexual connection and sentenced to one year and four months' imprisonment with leave to apply for home detention.

[6] While he was on bail for those offences he was convicted and discharged for assaulting a 20-year-old female stranger. The victim reported that Mr Chisnall had said to her "you are coming with me" and when she said no he hit her on the head with a stick. She managed to run away and find help. Mr Chisnall has consistently denied this attack had a sexual intent, and he was not formally charged with a sexual offence. In 2004 when Mr Chisnall was living with caregivers, he admitted to them that he had been peeping and peering at a woman in a hotel room. He reported experiencing anger and sexual preoccupation that led to his offending.

[7] In 2005 when Mr Chisnall was aged 18 he had been waiting by a park to be collected to go to work. He saw a woman in her early 20s running past him. He grabbed the victim from behind and, using physical force to silence her, attempted to force her to perform oral sex. When she refused Mr Chisnall became enraged and twisted her head forcing her to submit. He then raped her. She was left traumatised and injured. Mr Chisnall has acknowledged this offending and he says that he was stimulated by the violence involved. He pleaded guilty to this offending and was sentenced by Miller J to eight years' imprisonment, a sentence which took into account his guilty plea and youth. The Judge refused a Crown request that he be sentenced to preventive detention. He also declined to make a compulsory care order under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 …

[9] Mr Chisnall's interim order was made by the High Court on the basis of reports from three psychologists. In the Supreme Court and when assessing whether the precondition of very high risk of imminent serious sexual offending was satisfied,

Elias CJ summarised those three reports, and what she took from them, in the following way:[18]

> [70] Of the three reports provided with the application, the first was provided by Ms Laws on 28 August 2015 and was addressed to the prospect of an extended supervision order, not the elevated standard required for the public protection order now in issue. Ms Laws concluded that there was "at least a high risk of Mr Chisnall committing a further relevant sexual offence while in the community". This included a risk of significant violence in connection with sexual assault or sexual violation. Ms Laws thought it unlikely, based on his past behaviour, that Mr Chisnall would be able to implement effective coping strategies even with the support of a "wrap around service".
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> [71] The second report was provided by Mr Berry on 11 March 2016. Mr Berry was of the view that, although Mr Chisnall had demonstrated "significant improvements in a number of areas of functioning related to his risk of reoffending", the "sustainability and significance of Mr Chisnall's treatment gains are un-tested in the community environment and are relatively recent". He considered that "intensive external monitoring is essential as a minimum requirement to manage his risk of reoffending". Mr Berry noted that "electronic monitoring is considered a good measure to mitigate risk and … Mr Chisnall has signed an agreement to consent to electronic monitoring".
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> [72] The final report was prepared by Dr Wilson on 22 March 2016. Dr Wilson concluded that Mr Chisnall exhibited "a very high and stable risk of further serious re-offending that is regarded as imminent". In coming to this conclusion, Dr Wilson noted that, on one measure of psychopathy, those with Mr Chisnall's score had demonstrated a 73 per cent re-imprisonment rate in the five years after release.

[10] She concluded:

> [74] Here, the evidence was carefully considered against the statutory standards by Fogarty J and by the Court of Appeal. I agree with their analysis and conclusion that, on the balance of probabilities, there is a very high risk of imminent serious sexual or violent offending by Mr Chisnall if he is released from detention. The evidence of the health professionals and Mr Chisnall's history as disclosed in the evidence indicate that he exhibits a severe disturbance in behavioural functioning to a high level in terms of drive to commit serious sexual offending with violence, that he has limited self-control, absence of concern for victims and poor interpersonal relationships. The improvements acknowledged in Mr Chisnall's behaviour during his imprisonment were countered by some indications that the Court of Appeal accurately considered to be "ominous". They were in any event in circumstances where he was given no opportunity to offend and are, for the reasons given by the psychologists, not a safe predictor of his behaviour if such opportunity were to arise given his long-term impulses to offend when the opportunity presents and his poor self-control. The case for interim

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[18] Interim detention order (SC), above n 5.

> restraint pending determination of the public protection order on this evidence is clear.
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> (Footnotes omitted.)

[11] Elias CJ delivered the leading judgment, on which the Court was unanimous save in one respect. The Chief Justice considered that the High Court had erred by not considering whether the risk established would be properly contained by suspending an interim order under s 107(3) of the Public Safety Act.[19] That is, the Chief Justice took the view that, at the stage of an application for an interim order, the Court could make such an order, but immediately suspend it on conditions that the Court was satisfied would meet the identified risk in the meantime. The majority did not consider that to be an option.[20] In all other respects, both as to the approach to the legislation overall, and its application to the particular facts as they related to Mr Chisnall at the time, the Court was unanimous.

The challenged High Court decision

[12] Wylie J had before him the original reports of the three psychologists, and updating reports from each of them. This Court had earlier directed that a forensic psychiatrist in private practice, Dr Justin Barry-Walsh, also provide a report. That had been done, and the report was available to Wylie J. In addition, each of those four health assessors gave evidence and was cross-examined.

[13] For very similar reasons to those of the Courts that considered Mr Chisnall's challenge to his interim order, Wylie J first found that he was satisfied Mr Chisnall displayed the s 13(2) characteristics to a high level.[21]

[14] Turning to the s 13(1) assessment, namely whether there was "a very high risk of imminent serious sexual or violent offending by the respondent", the Judge first noted that Mr Chisnall himself accepted he posed a high risk of future serious sexual offending: that acceptance was implicit in his acknowledgement that it would be appropriate for the Court to make an ESO, subject to a year's intensive monitoring.

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19 At [50]–[55] and [78].
20 At [85]–[91].
21 Public protection order (HC), above n 6, at [81].

The question for the Judge was, therefore, whether he also posed a *very* high risk of *imminent* serious sexual offending.[22]

[15] The Judge first considered the counter-factual, that is the factual context by reference to which that risk was to be assessed. Given that Mr Chisnall was not then "detained in a prison", but subject to an interim detention order, the Judge concluded that factual context was if Mr Chisnall were to be left unsupervised.[23] The counter-factual was not, as had been argued for Mr Chisnall, what the situation would be if Mr Chisnall was released subject to an ESO with an intensive monitoring condition. Whether there was a satisfactory risk management approach, short of a PPO, was a factor to be considered when the Court made its discretionary assessment whether or not to make a PPO. We agree that is the correct approach. That approach is not challenged in this appeal.

[16] The Judge then assessed the expert evidence, noting that the various actuarial risk measurement tools could only take matters so far.[24] What was required was judicial assessment and judgment in each individual case. He concluded:

> [114] Having considered all of the available evidence, I am satisfied that Mr Chisnall poses a very high risk of imminent serious sexual offending were he to be released into the community unsupervised. The assessments performed using the actuarial tools point to this. So do additional matters personal to Mr Chisnall which are not reflected in the assessments obtained using those tools. All experts were concerned at the risk Mr Chisnall poses, and I accept the evidence, particularly of Dr Wilson and Mr Berry that the risk of serious sexual reoffending is very high and imminent in the sense discussed at [82]–[87]. Accordingly, I consider that I have jurisdiction to make a PPO against Mr Chisnall.

[17] The issue then became one of whether, in his discretion, he should make a PPO. Counsel for Mr Chisnall emphasised the breadth of that discretion which they submitted reflected the significance, in a civil rights context, of PPOs. The submission for the Crown was that the discretion was essentially a residual one, only to be exercised in exceptional circumstances.

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22 At [83].
23 At [93].
24 At [94].

[18] The Judge concluded, referring to s 5(b) of the Public Safety Act, that a PPO was "an order of last resort, to be imposed only if the magnitude of the risk posed by the respondent" justified its imposition.[25] Therefore, the availability of an alternative, less restrictive restraint under the Parole Act, such as an ESO with intensive monitoring as Mr Chisnall had consented to, was a matter of some significance in determining whether or not to grant a PPO.

[19] The Judge was not persuaded, however, that such an ESO would be sufficient to mitigate the very high risk that Mr Chisnall posed.[26] The Judge had no doubt Mr Chisnall required further treatment if his risk was to be mitigated.[27] The evidence suggested such treatment could not be dealt with over a 12-month period. Intensive monitoring could only be imposed for a period of 12 months, and only once. Mr Chisnall had not responded well to treatment in the past. The Judge was not confident he would make sufficient progress, even with intensive treatment, during the period that any intensive monitoring condition could be in place. On that basis, the Judge concluded that it was not appropriate to exercise his discretion to refuse to make the order.[28]

Appeal

[20] Mr Chisnall's appeal was advanced on two fronts. First, Mr Ellis argued — anticipating the arguments that will be made in the separate inconsistency challenge Mr Chisnall is making — that given (i) the importance of affected NZ Bill of Rights Act 1990 (NZBORA) rights, (ii) relevant international obligations of New Zealand, and (iii) the limits on expert evidence as to characteristics and risk, it was, as a general proposition, simply not possible to ever conclude that the statutory criteria of "very high risk of imminent serious sexual offending" existed. We are not considering the issues raised in Mr Chisnall's inconsistency proceedings. Moreover, there has already been a finding in the High Court, upheld by this Court and the Supreme Court, that in respect of Mr Chisnall there is a "very high risk of imminent serious sexual offending".

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25 At [118].
26 At [119].
27 At [120].
28 At [125].

Accordingly, we do not consider the conclusion Mr Ellis invited is one which, in these proceedings, is open to us.

[21] The second front, advanced by Mr Edgeler, addressed the specifics of the High Court decision. Mr Edgeler noted that — as Elias CJ had observed — it might be considered that the evidence available to the courts when considering the interim detention order would represent the high point of the Chief Executive's case.[29] Moreover, as the Chief Justice had also observed, the Court's conclusion at the interim order stage was necessarily provisional because the evidence was then untested and might be answered at the hearing on the substantive application for a PPO.[30] On that basis:

(a) The first question was whether the evidence before the High Court provided a proper basis for Wylie J's conclusion as to a very high risk of imminent offending.

(b) The second was whether the Judge had approached the exercise of the discretion to make a PPO in a legally correct manner.

[22] Mr Edgeler's submission was that the evidential position in the High Court on the Chief Executive's substantive application had — as the Chief Justice recognised it might — changed materially from that before the Courts at the interim stage.[31] During the High Court hearing, the experts themselves had recognised the limitation on the conclusions that could be drawn based on actuarial analysis of the risk of further offending. As a matter of principle, those assessments did not address Mr Chisnall's individual circumstances. Nor would any overall statistical measure of assessed risk of future offending ever approach the "very high" standard set by the statute. The expert witnesses had also recognised during cross-examination the limitations on their ability as clinical professionals to make the determination the statute required the Court to make.

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29 Interim detention order (SC), above n 5, at [73].
30 At [69].
31 At [20].

[23] In addition, and of relevance particularly to the issue of imminence, was Mr Chisnall's relatively short criminal history. Mr Edgeler noted that Mr Chisnall had not offended for nearly two years following his release from prison in 2003. On that basis, it was suggested, we could not conclude his risk was to offend imminently after release. It might be some time before the subjective factors of which were the prompt for his offending coincided with a set of external circumstances which provided an opportunity to offend.

[24] On that basis, Mr Edgeler urged the conclusion that the Judge had been wrong to conclude that there was in Mr Chisnall's case a very high risk of imminent serious sexual offending.

[25] Mr Edgeler's approach to the discretion provided for by s 13 reflected what he saw to be the implications of the Chief Justice's analysis when upholding the interim detention order. Mr Edgeler drew our attention to the following remarks in particular:

> [38] The availability of extended supervision orders and interim supervision orders as alternative means of monitoring risk is a factor that bears on whether the more restrictive public protection order (and interim detention order pending its determination) is appropriate. The policy of the Public Safety Act expressed in its purpose and the principles contained in s 5 emphasise that orders made under it are not punitive and are directed at public safety. The high threshold set by the legislation for public protection orders and the availability of less intrusive means of protecting public safety in orders under the Parole Act indicate a legislative scheme that the "very high risk of imminent serious sexual or violent offending by the respondent" is risk which cannot be acceptably managed by conditions under an extended supervision order or interim supervision order. The Public Safety Act is to be interpreted and applied in the context of human rights obligations protective of liberty and suspicious of retrospective penalty.
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> [39] The text of s 13 and the definition of "imminent" links the risk which is to be addressed by the orders to provision of opportunity through removal of restraint. The Judge must be satisfied not only that the risk is a high one but that it is likely to occur if the opportunity arises. Under the definition the person must be expected to commit a serious sexual or violent offence as soon as he or she has suitable opportunity to do so. The criteria in s 13(2) indicate that "imminent" in this context is not a purely temporal assessment but one linked to opportunity. The order is aimed at preventing the opportunity arising where the Judge is satisfied that an offence of the type is likely to be committed by the respondent when he or she has suitable opportunity.
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> [40] If conditions can be put in place without detention that would remove the opportunity or restrict it to an extent that there is no longer very high risk of imminent offending of the type, then a public protection order or an interim detention order ought not to be made. That is clear from the scheme of the

> legislation and is consistent with the protections contained in the New Zealand Bill of Rights Act.
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> (Footnotes omitted.)

[26] In considering the discretion, Mr Edgeler argued the Judge had failed to take account of:

(a) First, the ability of the Chief Executive to apply for a PPO before the end of the one-year period of intensive monitoring.

(b) Secondly, the alternative ability of the Chief Executive to seek ongoing restrictions on Mr Chisnall under the Parole Act at the end of the period of intensive monitoring which, Mr Edgeler submitted, would achieve a functionally equivalent protective effect.

[27] The Judge had, therefore, failed to take account of relevant considerations and accordingly had exercised his discretion unlawfully.

[28] In response, the Chief Executive submitted, as regards the threshold tests, that the evidential basis for the High Court's decision was materially stronger than had been the case when the interim detention order was being considered.

[29] On the question of discretion, the Chief Executive agreed with the Judge's judicial assessment that a PPO was required from the outset, as it were, of Mr Chisnall's post-imprisonment supervision. The Judge could not be said to have made that discretionary conclusion wrongly. Rather, his judgment showed that he had carefully considered the option of an ESO with an intensive monitoring condition, and had decided that it would not appropriately address Mr Chisnall's very high risk of imminent serious sexual offending.

Analysis

Mr Chisnall's risk of reoffending

[30] In our view the evidence adduced in the High Court did not, contrary to Mr Edgeler's argument, undermine the conclusion as to Mr Chisnall's very high risk

of imminent serious sexual offending that had been reached in the context of the interim detention order. Neither did it, contrary to the Chief Executive's argument, materially strengthen the evidential basis for that order.

[31] That said, there was no real challenge to the conclusion reached by Wylie J, by reference to the statutory characteristics, that Mr Chisnall exhibits a severe disturbance in behavioural functioning. Given the very minor differences between the relevant characteristics required for an ESO and those for a PPO, Mr Chisnall's acceptance he may properly be made subject to an ESO *with intensive monitoring* in practical reality establishes that.

[32] We also agree for the reasons given by Wylie J, and by each Court in the interim order proceedings, that were Mr Chisnall to be released unsupervised into the community there would be a very high risk of imminent serious sexual offending by him.

[33] In reaching that conclusion the relevant counterfactual is of Mr Chisnall being released, unsupervised, into the community. Whether the risk of offending is "imminent" is to be assessed in that context. We acknowledge the reservations expressed by the health assessors on their ability to determine imminence, given various characteristics and limitations of the assessment tools they use for that purpose. But, as Wylie J observed, what is called for here is judicial assessment informed by expert advice. It is not the task of the experts to reach the conclusion required of the court.

[34] We refer to the observations of Elias CJ which we have set out at [25]. As the Chief Justice put it, the Judge must be satisfied "not only that the risk is a high one but that [an offence] is likely to occur if the opportunity arises". An offender must be expected to commit a serious sexual offence "as soon as he or she has suitable opportunity to do so". Imminence is not a purely temporal assessment, but one linked to opportunities. The assessment of imminence is to be determined by reference to a situation which would arise when the subject of the application "has suitable opportunity".

[35] In that context, the views expressed by the experts of the significance, for the risk of Mr Chisnall reoffending, of him not having the controls and support provided by, for example, ongoing supervision under the Parole Act, are significant. It is in that context that the reference to a person being expected to commit a relevant offence "as soon as he or she has a suitable opportunity to do so" is to be applied. The opportunistic nature of Mr Chisnall's previous offending is a factor of considerable persuasive power in our conclusion that Wylie J was correct to conclude that condition was met. Put another way, it may be that Mr Chisnall would not offend for some time following his release; but if so, it would be because the opportunity had not presented itself.

A PPO or an ESO?

[36] We therefore turn to the Judge's assessment of whether he should make the PPO and, in that context, the significance of the possibility of subjecting Mr Chisnall, in the first instance, to an ESO combined with intensive monitoring for the statutory maximum period of 12 months.

[37] In considering that question the Judge reasoned that, whilst Mr Chisnall was prepared to agree to an ESO with an intensive monitoring condition, such a condition would have a maximum duration of 12 months.[32] There was no ability to extend that condition, and the Court could not impose that condition more than once even if an offender is subject to repeated ESOs.[33] There was no doubt Mr Chisnall required further, and ongoing intensive supervision and monitoring, if his risk was to be monitored. There could be no guarantee that he would respond to any treatment he might receive during the 12-month period. He had not responded in the past and the Judge could not be confident that he would make sufficient progress, even with intensive treatment, during the period that any intensive monitoring condition would be in place.[34] Conditions that could subsequently be imposed under an ESO would not protect against further offending to the same extent as an intensive monitoring condition. On that basis the imposition of a PPO was appropriate.

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32 Public protection order (HC), above n 6, at [119].
33 Parole Act, s 107IAC(5).
34 Public protection order (HC), above n 6, at [120].

[38] In our view, and with respect, that is to approach the question in the wrong way. The question is not whether, at the end of the 12-month period, Mr Chisnall's position would be such that his risk would at that point be able to be managed by an ESO with the then available special conditions, which would be less stringent than intensive monitoring. Rather the question is, as we think the Supreme Court's decision shows, whether for that 12-month period Mr Chisnall's risks could not be properly managed by an ESO with an intensive monitoring condition.

[39] As Elias CJ made clear, as a matter of principle the Court should scrutinise the possibility of making an ESO before making a PPO:[35]

> [37] I accept the further submission made on behalf of Mr Chisnall that the Public Safety Act requires the court in making an interim detention order under the Act to be satisfied on the balance of probabilities not only that the statutory criteria for making a public protection order have been provisionally made out but that the risk to public safety cannot be sufficiently met by less restrictive options to interim detention. …
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> [38] The availability of extended supervision orders and interim supervision orders as an alternative means of monitoring risk is a factor that bears on whether the more restrictive public protection order (and interim detention order pending its determination) is appropriate.

[40] The majority reiterated the point in the context of interim applications:[36]

> If [the court was] satisfied that the risk could be met by, for example, any existing parole conditions, no interim detention order would be made. Or, if the court considered an interim supervision order would be sufficient, the court would decline to make an interim detention order and then make an interim supervision order. We do not see the statutory scheme as preventing that option. Rather, the scheme provides for the sequence in which these applications are to be addressed with priority, in a timing sense, allocated to the public protection order regime. In this sense, the scheme under the Public Safety and Parole Acts are intended to work together.

[41] Section 7(1)(b) of the Public Safety Act expressly provides that a person who is or has been subject to an ESO, together with an intensive monitoring condition, also meets the threshold test. Such a person may be made subject to a PPO when, for example, the 12-month period of intensive monitoring comes to an end. Although intensive monitoring is only available for a 12-month period, it is possible other

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35 Interim detention order (SC), above n 5.

36 At [89] (footnote omitted).

arrangements that may effectively manage the offender's reoffending risk will become apparent during that initial 12-month period.

[42] It follows, therefore, that where the High Court is considering a substantive application for a PPO, a similar approach is to be taken. That is, the Court is to consider the alternative of an ESO. That it must do so indicates that, notwithstanding that the risk threshold for a PPO has been established, the statutory scheme envisages that the Court could be satisfied that the (lesser) controls provided by an ESO may nevertheless be sufficient to manage that risk.

[43] Arriving at such a conclusion may not, however, be a straightforward matter for the Court. The reason for that lies in important differences between ESOs and PPOs, the conditions for them to be imposed and the role that the Court plays in their imposition.

[44] Whilst both PPOs and ESOs are imposed by the Court, and have the function of protecting the public from a high risk of reoffending, from the point of view of the Court that is in many ways where the similarity ends.

[45] A PPO is imposed by the Court, after the required risk assessment. Every PPO has as its central — fixed — feature the detention of the resident in a secure, "behind the wire" residence. We understand that there is only one such facility in New Zealand currently, Matawhāiti residence located in the precincts of Christchurch Men's Prison. Matawhāiti occupies approximately a one-hectare site situated outside the prison itself but surrounded by a four-metre electric fence. The degree of risk management provided by such a residence is reasonably obvious.

[46] Residents, though detained, are not prisoners. Nevertheless, the Chief Executive has the legal custody of every resident including when, with approval, a resident is absent from the residence, for example to undergo or receive medical treatment, to attend a rehabilitation program or for humanitarian reasons.[37] When so absent, the resident must be escorted and supervised by specially designated

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[37] Public Safety Act, s 20.

staff members, corrections officers or police employees.[38] The Chief Executive has a range of further controls available under the Public Safety Act, including powers to monitor telephone communications, restrict visits, conduct searches and to place residents in seclusion or under restraint.[39] Most restrictively of all, the Court may on the application of the Chief Executive order a person subject to a PPO to be detained in a prison instead of a residence.[40]

[47] Before making an ESO the Court must also make the relevant risk assessment.[41] Having made that assessment, when imposing an ESO the statutory scheme requires no further decision from the Court, subject only to the possibility of the Court ordering the Board to impose an intensive monitoring special condition.

[48] Before the Board may release an offender on parole the Board must also make a risk assessment decision. It must be satisfied on reasonable grounds that the offender, if released on parole, will not pose an undue risk to the community *within the term* of their sentence, having regard to the support and supervision available to the offender when on parole and the public interest in reintegrating the offender as a law-abiding citizen.[42]

[49] Once those initial risk assessment decisions are made, the statutory frameworks for ESOs and parole release conditions are largely identical. Set standard conditions are enumerated in the Parole Act at s 107JA for ESOs, and s 14 for parole. Both sets of standard conditions are largely identical, and reflect the fundamental requirement for an offender to live at an approved address, under the supervision of a probation officer (i) whose consent is required before the offender may shift from that address and (ii) who may require the offender to observe restrictions on their employment and personal associations and to take part in rehabilitative and reintegrative needs assessments.

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38 Section 26(3).
39 Part 1, sub-pt 4.
40 Part 1, sub-pt 6.
41 That is, there is a high or very high risk of the offender committing a relevant sexual or violent offence in the future: Parole Act, s 107I(2)(b)(i) and (ii).
42 Section 28(2).

[50] The Parole Board is also given a broad power to impose "special conditions". As regards parole release special conditions, s 15(1) provides:

> The Board may (subject to subsections (2) and (4)) impose any 1 or more special conditions on an offender.

[51] Section 29AA(1) confirms the breadth of that general power. It provides:

> In releasing an offender on parole, the Board may impose any special conditions on that offender that the Board specifies.

[52] In the case of ESOs, s 107K(1) provides:

> At any time before an extended supervision order expires or is cancelled … the Board may, on an application by the chief executive or a probation officer, impose on the offender any special condition that the Board is entitled to impose under section 15.

[53] The Board's power to impose special conditions is, in both instances, constrained first therefore by the limits within s 15 itself. That is, by subss (2) and (4):

> (2) A special condition must not be imposed unless it is designed to—
>
> (a) reduce the risk of reoffending by the offender; or
>
> (b) facilitate or promote the rehabilitation and reintegration of the offender; or
>
> (c) provide for the reasonable concerns of victims of the offender; or …
>
> (4) No offender may be made subject to a special condition that requires the offender to take prescription medication unless the offender—
>
> (a) has been fully advised, by a person who is qualified to prescribe that medication, about the nature and likely or intended effect of the medication and any known risks; and
>
> (b) consents to taking the prescription medication.

[54] The Parole Act then recognises specific special conditions and, at the same time, imposes limits upon them. Given the terms of s 107K(1), the availability of those special conditions, and the applicability of those restrictions, apply equally to special conditions that may be imposed on ESOs.

[55] Section 15(3) provides an inclusive list of such conditions, including conditions relating to the offender's place of residence, residential restrictions and conditions requiring the offender to participate in a programme. That term "programme" is defined in s 16(c) to include:

> (c) placement in the care of any appropriate person, persons, or agency, approved by the chief executive, such as (without limitation)—
>
> (i) an iwi, hapu, or whanau:
>
> (ii) a marae:
>
> (iii) an ethnic or cultural group:
>
> (iv) a religious group, such as a church or religious order:
>
> (v) members or particular members of any of the above.

[56] Section 33(2) stipulates the consequences of the imposition of residential restrictions in the following way:

> (2) An offender on whom residential restrictions are imposed is required—
>
> (a) to stay at a specified residence:
>
> (b) to be under the supervision of a probation officer and to co-operate with, and comply with any lawful direction given by, that probation officer:
>
> (c) to be at the residence—
>
> (i) at times specified by the Board; or
>
> (ii) at all times:
>
> (d) to submit, in accordance with the directions of a probation officer, to the electronic monitoring of compliance with his or her residential restrictions:
>
> (e) to keep in his or her possession the licence issued under section 53(3) and, if requested to do so by a constable or a probation officer, must produce the licence for inspection.

[57] The apparent unrestricted ability to require an offender to be at a specified residence at all times is qualified in a variety of ways by the rest of s 33. For example, subss (3)–(5) provide that requirement may only be imposed for a maximum period of 12 months and that, notwithstanding such a requirement, an offender may with

the approval of a probation officer leave that residence for a variety of purposes, such as to engage in or seek employment, and to attend training or rehabilitative or reintegrative activities and so on. Section 107K(3)(bb) further provides, as regards the special conditions of an ESO:

> (bb) any condition requiring the offender to participate in a programme (as referred to in section 15(3)(b)) must not—
>
> (i) require that the offender be, or result in the offender being, supervised, monitored, or subject to other restrictions, for longer each day than is necessary to ensure the offender's attendance at classes or participation in other activities associated with the programme; or
>
> (ii) require the offender to reside with, or result in the offender residing with, any person, persons, or agency in whose care the offender is placed; …

[58] As we understand matters, the power of the Board to require an offender to live at the residence in which a programme is being conducted is the closest, in effect, to detention in a residence under a PPO. That said, it is important to remember there are no institutional residences (that is, ones run by the Chief Executive) for prisoners on parole or for offenders subject to an ESO.

[59] The one special condition that may apply to an ESO, but not to parole release conditions, is that of intensive monitoring. Section 107IAC(2) explains that such a condition is one requiring "an offender to submit to being accompanied and monitored, for up to 24 hours a day, by an individual who has been approved, by a person authorised by the chief executive, to undertake person-to-person monitoring". On the Chief Executive's application, the Court may make an order requiring the Board to impose such a condition. The duration of that condition, which must be specified by the Court, may be no longer than 12 months.[43]

[60] Thus it can be said that whilst the terms of the Public Safety Act inform the Court of the degree of control provided by a PPO, the same is not the position under the Parole Act for an ESO. Other than as regards intensive monitoring, the conditions attaching to an ESO are determined by the Parole Board. Put simply,

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[43] Parole Act, s 107IAC(3).

therefore, the Court may well — unless provided by the Chief Executive or the Parole Board with the specific special conditions upon which an ESO, if ordered, will apply — have considerable difficulty deciding that an offender's risk, which would justify the imposition of a PPO, can nevertheless safely be managed under an ESO.

[61] That difficulty was faced by the Supreme Court when it considered Mr Chisnall's appeal against the interim detention order the High Court originally made. Elias CJ reasoned, when concluding that an ESO with intensive monitoring (which she considered could be imposed by a suspended interim detention order[44]) was not the appropriate means of managing Mr Chisnall's risk, as follows:[45]

> In the present case … I am of the view that on the evidence before the Court there is no basis for the view that suspension of the interim detention order and the imposition of conditions is a realistic option. The identified risk was great and no basis for considering it might appropriately be managed by suspension and conditions was provided. On the evidence before the Court Mr Chisnall is highly likely to offend if the opportunity presents itself. That means the opportunity for offending has to be precluded by his full-time control, as is achieved by the interim detention order. Although placement in another institution under strict supervision might provide equivalent protection, no such option has been properly identified. Mr Ellis suggests that conditions of release could require that Mr Chisnall reside at Anglican Action and be closely monitored. But whether Anglican Action is both prepared to accept Mr Chisnall and in a position to carry out the necessary intensive monitoring is quite unknown on the evidence before the Court.

[62] The majority simply concurred that "the basis for making an interim detention order [that is, an interim PPO] was made out and the interim order properly made".[46] Given, however, the majority had concluded an interim supervision order (that is, an interim ESO) should generally be made in place of an interim detention order if it was the least restrictive option,[47] the implication is they too considered an interim supervision order with intensive monitoring was unsatisfactory.

[63] Details of where an offender will live and how they will be monitored will substantially assist the Court in assessing whether an ESO will be, in the words of Elias CJ, "a realistic option".[48] In *McCorkindale v Deputy Chief Executive of the*

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44 Interim detention order (SC), above n 5, at [54].
45 At [79].
46 At [84].
47 At [89].
48 At [79].

Department of Corrections, this Court recently considered the suitability of an ESO which had not been fully explored in the High Court.[49] Mr McCorkindale was appealing a PPO imposed by the High Court. That PPO was applied for in substitution for an existing ESO which Mr McCorkindale had consented to, and which was — the Court was told — successfully managing the risk of his reoffending.[50] However, residential conditions applying to that ESO became unlawful following amendments to the ESO regime in 2014, and although they were re-imposed for 12 months pursuant to an intensive monitoring condition, the Deputy Chief Executive applied for a PPO when that condition expired.[51]

[64] After the hearing of that application, but before the Court gave its decision, the Deputy Chief Executive applied for a variation to that existing ESO, seeking conditions to replace the intensive monitoring condition that was no longer available. That application was made to address Mr McCorkindale's ongoing management in the event the PPO application was declined. That application was granted by the Parole Board, and provided for Mr McCorkindale to be placed in the care of an agency approved by the Department of Corrections between the hours of 7 am and 11 pm daily, to participate in a reintegration programme within those hours as directed by a Probation Officer and to be subject to electronically monitored residential restrictions between 11 pm and 7 am.[52] The High Court, without itself having considered the ability of the varied, and lawful, ESO to manage Mr Chisnall's ongoing risk, or having had the advantage of evidence from health assessors on that point, granted the Chief Executive's application for a PPO.[53]

[65] On appeal, this Court reasoned:[54]

> [19] A PPO can only be justified if the court is satisfied that the next most restrictive option is not adequate to mitigate the defined risk. The next step-down option, which the parties agree is the revised ESO ordered by the Parole Board on 30 August 2017, was not addressed in the evidence or in the submissions before the High Court. A PPO cannot be justified unless that option can be excluded. In these circumstances, we are satisfied that the

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49 *McCorkindale v Deputy Chief Executive of the Department of Corrections* [2019] NZCA 369.
50 At [1].
51 At [6].
52 At [14].
53 *Deputy Chief Executive of the Department of Corrections v McCorkindale* [2017] NZHC 2536.
54 *McCorkindale v Deputy Chief Executive of the Department of Corrections*, above n 49 (footnote omitted).

> appropriate course is to quash the PPO and remit the application to the High Court to enable this issue to be explored fully.

[66] Likewise, we are not able to properly consider a possible ESO for Mr Chisnall without assessing the terms on which it would be made. Nor was the High Court able to do so, as those terms were not before it either.

[67] We did, at the hearing of the appeal, seek from counsel some certainty as to the details of the ESO which, if ordered by the Court, would result. At the time counsel were unable to do so. We sought additional submissions from counsel on the point. The best counsel were able to do was to suggest interim special conditions, though these did not specifically identify an agency or organisation that might take Mr Chisnall, and draw our attention to the conditions of a number of ESOs with intensive monitoring conditions that had been imposed on other high risk offenders. So, whilst we think Wylie J erred in the approach he took, we are in no better position than the Supreme Court was to conclude that, given Mr Chisnall's circumstances, his assessed risk can be managed by an ESO even with an intensive monitoring special condition.

[68] In these circumstances we consider the appropriate way to respond to Mr Chisnall's appeal is to allow it, to quash the PPO made by the High Court and to remit the matter back to that Court for reconsideration. As this Court held in *McCorkindale*, quashing the PPO has the effect of automatically enlivening the original interim detention order.[55] That conclusion follows from the fact that the order was to be in effect until the Chief Executive's application for a PPO was "finally determined", which will not have occurred if the PPO is quashed and the application is remitted back to the High Court.[56] Moreover, the original interim detention order must be reanimated to ensure there is no gap or hiatus in the degree of supervision, which would be contrary to the statutory scheme.[57] The interim detention order of

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55 At [20].
56 Interim detention order (HC), above n 2, at [46].
57 *R (CA4642018) v Chief Executive of the Department of Corrections* [2019] NZCA 60 at [36].

Fogarty J,[58] as subsequently amended,[59] is therefore now in full force and effect until the application for a PPO is finally determined or until further order of the High Court.

[69] We recognise that considerable time has now passed since we heard this appeal. On the other hand, without appropriate certainty as to the terms of an alternate ESO, it is difficult for the Court to conclude other than Mr Chisnall is to remain a resident at Matawhāiti in terms of the High Court's PPO.

Result

[70] We allow the appeal and quash the PPO made by the High Court.

[71] The matter is remitted to the High Court for reconsideration in accordance with this judgment.

[72] The interim detention order made by the High Court, as amended, is in full force and effect pending further order of that Court.

[73] Leave is reserved for counsel to approach us, should the implementation of that approach give rise to unanticipated difficulties.

[74] The Chief Executive is to pay Mr Chisnall costs for a standard appeal on a band A basis and usual disbursements. We certify for second counsel. Costs in the High Court are to be determined in that Court.

Solicitors:
Crown Law Office, Wellington for Respondent

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58 Interim detention order (HC), above n 2.

59 We understand that the order was amended in January 2017 to enable Mr Chisnall to move to Matawhāiti. This amendment, and any others which may have been ordered, naturally apply to the reanimated order.