IN THE SUPREME COURT OF NEW ZEALAND

SC 13/2017
[2017] NZSC 114

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

Hearing:	22 June 2017
Court:	Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	A J Ellis and G K Edgeler for Appellant V L Hardy, D J Perkins and G M Taylor for Respondent
Judgment:	1 August 2017

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no order as to costs.

REASONS

ELIAS CJ

[1] The appeal concerns an interim detention order made in respect of the appellant, Mr Chisnall, under s 107 of the Public Safety (Public Protection Orders) Act 2014.[1] The purpose of the Public Safety Act is "to protect members of the public from the almost certain harm that would be inflicted by the commission of serious sexual or violent offences".[2] For that purpose, the Act authorises continued

1 The Act is referred to throughout these reasons as "the Public Safety Act".
2 Public Safety Act, s 4(1).

detention under public protection orders of those sentenced to imprisonment for serious sexual and violent offences after they have completed their sentences if there is a "very high risk of imminent serious sexual or violent offending by the person".[3] On application by the chief executive of the Department of Corrections under s 8, the High Court may make a public protection order for the detention of an eligible person over the age of 18. Such order may be made against a person who is within six months of being released from detention after serving a determinate sentence of imprisonment for a serious sexual or violent offence (and who therefore meets the "threshold for the imposition of a public protection order" under s 7(1)).[4] The policy of the Act is public safety, not punishment,[5] and under the Act a public protection order "should only be imposed if the magnitude of the risk posed by the respondent justifies the imposition of the order".[6]

[2] Mr Chisnall was due to be released from prison on 27 April 2016 after serving sentences for qualifying offences under the Public Safety Act. In February 2016, the Parole Board determined that Mr Chisnall would be released "when a bed becomes available" at Anglican Action, an approved community support centre. The release was subject to Mr Chisnall's residing at Anglican Action and abiding by special conditions including electronic monitoring and a curfew.[7] Because the offer of accommodation at Anglican Action was withdrawn shortly before Mr Chisnall's planned release (for reasons which are not fully explained), the Parole Board revoked his parole on 6 April 2016.[8]

[3] The chief executive applied to the High Court on 15 April 2016 for a public protection order naming Mr Chisnall as respondent. In the alternative to orders under the Public Safety Act, the chief executive applied under Part 1A of the Parole

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3 Section 13(1)(b).

4 There are other possible avenues to jurisdiction in s 7 (such as being convicted for a serious sexual or violent offence outside New Zealand and returning to the country within six months of completing that sentence), but they are not relevant for present purposes.

5 Section 4.

6 Section 5(b). The Act refers to the individual against whom the order is sought as the "respondent": s 3.

7 The conditions included a curfew; residing at a specified address; prohibition from entering parks and playgrounds; electronic monitoring; restrictions on employment; and limitations on contact with children, his victims and his parents.

8 Counsel for Mr Chisnall submitted in this Court that the Parole Board was in error in thinking that release into the care of Anglican Action was no longer possible. See below at [30].

Act 2002 for an extended supervision order for Mr Chisnall with special conditions of intensive monitoring imposed under s 107IAC (which, however, have a maximum duration of 12 months).

[4] Under s 9 of the Public Safety Act, an application for public protection order must be accompanied by at least two reports prepared separately by health assessors (practising psychiatrists and registered psychologists[9]) one of whom must be a registered psychologist. Under Part 1A of the Parole Act, applications for extended supervision orders must similarly be accompanied by a report from a health assessor.[10]

[5] The applications in respect of Mr Chisnall were supported by evidence of Mr Chisnall's criminal history and the facts and sentencing notes when he was sentenced in 2006 for rape. The applications were also supported by the reports of three psychologists. Two addressed the statutory criteria for the making of a public protection order under the Public Safety Act. The third, in a report obtained earlier, assessed Mr Chisnall's suitability for an extended supervision order under the Parole Act, although the report contained information and professional assessments relevant as well to the public protection order criteria.

[6] Because it was clear that the applications for public protection order or extended supervision order had been made too late to enable them to be heard before Mr Chisnall's release date, the application filed in the High Court also sought orders to cover the position in the interim. The application sought an interim detention order under s 107 of the Public Safety Act requiring Mr Chisnall's continued detention in the prison in which he was then held. Alternatively, the chief executive sought interim detention at a separate detention facility within the Christchurch Men's Prison perimeter.

[7] In the alternative, should the Court not be prepared to make an interim detention order under s 107 of the Public Safety Act, the chief executive sought the imposition of conditions which replicated those able to be imposed on an extended

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9 Public Safety Act, s 3.
10 Parole Act 2002, s 107F(2).

supervision order. They included conditions as to residence, electronic monitoring, avoidance of particular public places (including parks, places where Mr Chisnall's previous offending had occurred) and submission to 24-hour accompaniment and monitoring if required by the Department of Corrections. The application filed in the High Court indicated that these conditions were sought "pursuant to s 107FA of the Parole Act and s 107 of the Public Safety Act". Section 107FA of the Parole Act contains the power to make an interim supervision order "before an application for an extended supervision order is finally determined". Section 107 of the Public Safety Act contains the power to "order interim detention of, or interim imposition of conditions on" a respondent "before an application for a public protection order is finally determined". (This power is only available if the person is not already compulsorily detained under an enactment.[11]) The only manner provided by s 107 for "interim imposition of conditions" such as were sought by the chief executive is under s 107(3) through suspension of an interim detention order "when the court makes an [interim detention] order" under s 107(2).

[8] As is relevant to the appeal, s 107 of the Public Safety Act provides:

> **107 Court may order interim detention of, or interim imposition of conditions on, respondent**
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> (1) This section applies when, before an application for a public protection order is finally determined, 1 or more of the following events occur:
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> (a) a respondent is released from detention:
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> …
>
> (2) The court may, on an application by the chief executive, order that, until the application for a public protection order is finally determined, the respondent is to be detained by a person, and in a place, specified in the order.
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> (3) When the court makes an order under subsection (2) (an **interim detention order**), the court may suspend that order subject to any conditions that the court thinks fit.
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> (4) An order under this section ceases to have effect when the application for a public protection order is finally determined or discontinued.

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[11] See Public Safety Act, s 107(1)(a). In such a case the proceedings for public protection order would be suspended by s 111.

[9] An "interim supervision order" is made under s 107FA of the Parole Act for the period from when the offender would be released from detention or would cease to be subject to an extended supervision order "until the application for an extended supervision order is finally determined".

[10] On 22 April 2016 Fogarty J in the High Court made an interim detention order authorising Mr Chisnall's detention at the Leimon Villas self-care unit within the perimeter fence of Christchurch Men's Prison.[12] The order has since been varied by consent to allow Mr Chisnall to be housed in the purpose-built public protection residence at Matawhaiti. Mr Chisnall continues to be detained there. The applications for public protection order and, in the alternative, for extended supervision order have not yet been heard. We were told at the hearing they are currently set down for hearing in December 2017.

[11] Mr Chisnall's appeal to the Court of Appeal against the interim detention order was dismissed on 19 December 2016.[13] He appeals with leave to this Court.[14]

[12] It was not in dispute that the threshold under s 7 for the making of a public protection order is met in the present case. At the time of the chief executive's application Mr Chisnall was detained in prison under a determinate sentence for serious sexual or violent offences and was within six months of his mandatory release date, as is required by s 7. Mr Chisnall is also eligible for an extended supervision order under Part 1A of the Parole Act. The areas of dispute at the hearing to determine whether a public protection order or, alternatively, an extended supervision order should be made are likely to centre on whether the evidence establishes on the balance of probabilities the matters on which the Court must be satisfied under s 13 of the Public Safety Act and, in the alternative, s 107I of the Parole Act before making such orders. Consideration of the application of alternative compulsory arrangements under the Mental Health (Compulsory Assessment and Treatment) Act 1992 and perhaps the Intellectual Disability

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12 *Chief Executive of the Department of Corrections v Chisnall* [2016] NZHC 784.
13 *Chisnall v Chief Executive of the Department of Corrections* [2016] NZCA 620 (Asher, Heath and Dobson JJ).
14 *Chisnall v The Chief Executive of the Department of Corrections* [2017] NZSC 50.

(Compulsory Care and Rehabilitation) Act 2003 may also arise, depending on the evidence at the hearing as to Mr Chisnall's mental health and intellectual disability.

Supervision orders under the Parole Act

[13] The extended supervision system under Part 1A of the Parole Act provides an alternative regime to orders under the Public Safety Act for public protection on the release of offenders who have served their sentences for serious sexual or violent offending but who are considered to pose a real and ongoing risk of serious further similar offending.[15] Such extended supervision orders may be made under s 107I where the court is satisfied after consideration of the health assessor's report that the offender has or has had "a pervasive pattern of serious sexual or violent offending" and there is either "a high risk that the offender will in future commit a relevant sexual offence" or "a very high risk that the offender will in future commit a relevant violent offence".[16] In relation to sexual offending, the court must additionally consider that the offender fulfils the criteria in s 107IAA(1) with respect to "intense drive, desire, or urge to commit [a relevant offence]", "predilection or proclivity", limited capacity to regulate behaviour, limited empathy with victims and other such indications of risk.[17]

[14] These criteria are comparable to those required by s 13 of the Public Safety Act before a public protection order is made but importantly do not require "very high risk of imminent serious … offending by the respondent", as is required by s 13 of the Public Safety Act before public protection orders can be made. The risk characteristics of the respondent identified in s 13(2) of the Public Safety Act (described at [34]) are also more amplified than those in s 107IAA(1) of the Parole Act.

[15] The term of an extended supervision order may not exceed 10 years and must be the "minimum period required" in light of the level of risk the offender poses, the seriousness of the harm that might be caused, and the likely duration of the risk.[18] The extended supervision order meets the risk through monitoring and the ability to

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15 Parole Act, s 107I(1).
16 Section 107I(2).
17 Slightly different factors must be considered with regard to violent offenders: s 107IAA(2).
18 Section 107I(4) and (5).

impose special conditions.[19] The conditions available under the Parole Act, although restrictive, may be contrasted with orders made under the Public Safety Act in that they do not formally include detention (although they may include 24-hour accompaniment and supervision and may require residence in a secure facility the person is not at liberty to leave).[20] They are also time-limited.[21] The grounds on which extended supervision orders can be made are less rigorous than the grounds required for public protection orders, as is described above. Applications for extended supervision order must however similarly be accompanied by a health assessor's report.[22]

[16] Part 1A of the Parole Act was substantially revised in 2014 at the same time the Public Safety Act was enacted.[23] Although distinct and addressed to different levels of risk to public safety (with the public protection order regime appropriate for those who present the highest risk), they work together to cover the range. It is therefore not unusual to find, as in the present case, that applications for orders under each of the two Acts are made in the alternative, with an extended supervision order being sought should the court determine that a public protection order is not warranted.

[17] Section 107GAA of the Parole Act makes it clear that it is the public protection order application that has priority of consideration where it is applied for. If a public protection order application has not been determined or withdrawn, the court "must not hear" the application for extended supervision order until the public protection order application has been declined. Until then, the hearing of the extended supervision order application is "contingent":

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19 Sections 107IAC, 107J and 107K.

20 Section 107IAC allows the court to impose intensive monitoring conditions. Section 107K allows the Parole Board to impose special conditions, including residential restrictions. Section 33(2)(c)(ii) provides that such restrictions may include the requirement to be at the specified residence at all times.

21 Residential restrictions and intensive monitoring conditions imposed by the Parole Board can only apply within the first twelve months of the extended supervision order: s 107K(3). Intensive monitoring conditions imposed by the court may not last for longer than 12 months, and may not be imposed on the same offender more than once, even if subject to repeated extended supervision orders: s 107IAC(4) and (5).

22 Section 107F(2).

23 By the Parole (Extended Supervision Orders) Amendment Act 2014. Prior to this, extended supervision orders were only able to be made against those convicted of certain sexual offences.

107GAA Procedure where hearing contingent on outcome of PPO application

(1) This section applies to an application for an extended supervision order made in respect of an eligible offender who is also the subject of a PPO application that has not been determined or withdrawn.

(2) For an application to which this section applies,—

(a) the sentencing court is (despite anything in section 107D) the High Court; and

(b) the sentencing court must not hear the application until—

(i) the proceeding on the PPO application [defined in the section as the application under s 8 of the Public Safety (Public Protection Orders) Act 2014] has been completed and the court has declined to make a public protection order against the offender; or

(ii) the PPO application has been withdrawn; or

(iii) the public protection order made against the offender has been cancelled as a result of a successful appeal against the order;

…

(3) The application is taken to be withdrawn if the court has made a public protection order against the offender and all avenues for appeal are exhausted or the period in which an appeal may be filed expires.

(4) Where the court has declined to make a public protection order and the court proceeds to hear the application for an extended supervision order, that application must, if practicable, be heard by the same Judge that heard the PPO application.

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Interim orders

[18] At the same time the substantive applications were made under s 8 of the Public Safety Act and s 107F of the Parole Act, the chief executive applied for interim orders under each Act until the substantive applications were determined. He applied under s 107 of the Public Safety Act for an interim detention order pending determination of the public protection order application. And he applied in the alternative for the imposition of conditions either under s 107 of the Public Safety Act or through an interim supervision order made under s 107FA of the Parole Act.

Conditions can be imposed under s 107 of the Public Safety Act only by suspending an interim detention order on the conditions imposed by the Court under s 107(3). Under both Acts, the interim orders continue only until final disposition of the substantive application for public protection order or extended supervision order.

[19] Interim supervision order applications under the Parole Act are not explicitly made subject to a provision equivalent to s 107GAA of the Parole Act making the application "contingent" on the outcome of the public protection order application. Whether equivalent sequence is the scheme of the legislation (so that an application for interim supervision order should not be heard while an application for public protection order remains undetermined) and whether interim restraint is available only under s 107 of the Public Safety Act in the meantime is a matter of controversy in the appeal.[24]

[20] Applications for interim detention order or interim supervision order are necessarily determined on a provisional view of the evidence because until the substantive hearing of the public protection order application the evidence may not yet be fully tested or countered by evidence called on behalf of the respondent. In the present case, additional reports have been commissioned by the court at the instigation of Mr Chisnall.[25] One, from Dr Barry-Walsh, is expected to respond to the reports relied on by the chief executive which go to the critical question of Mr Chisnall's risk of reoffending. It has not yet been received. A further report from psychologist Sabine Visser, addressing questions of Mr Chisnall's possible mental impairment and possible intellectual disability, has been received since the Court of Appeal decision. In response to it one of the psychologists who supported the application has made a further report. As well as these reports, it is possible that additional information in support of the application by the chief executive (whether in response to the further reports commissioned by the court or otherwise) may be put forward in support of the substantive applications. The application in its terms refers to the possibility that further evidence will be provided by the chief executive.

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[24] See below at [42] and [50]–[65].

[25] See *The Chief Executive of the Department of Corrections v Chisnall* [2017] NZHC 256; and *Chisnall v Chief Executive of the Department of Corrections* [2017] NZCA 248.

The appeal

[21] On the present appeal, Mr Chisnall does not suggest that he should be released into the community without conditions pending final determination of the public protection order. He does not oppose the making of an interim supervision order with the special conditions sought by the chief executive in his alternative application.[26] Nor is it suggested that the evidence relied on by the chief executive is so deficient on its face that the substantive application for public protection order should be summarily dismissed. At this stage, it seems that the applications for public protection order and, alternatively, extended supervision order must proceed to hearing. Rather, Mr Chisnall maintains that there was no proper basis for making the interim detention order because any risk he poses pending the substantive determination could be adequately contained by an interim supervision order with the special conditions proposed. Counsel did not distinctly address in written submissions whether such conditions are more properly imposed under s 107(3) of the Public Safety Act, although that option was identified in the chief executive's application and was considered in oral argument in response to questions from the Bench.

[22] Section 107 of the Public Safety Act provides for an application for interim detention to be made when one of a number of events occurs before an application for public protection order is finally determined. One of those events is the circumstance that the respondent to the application is released from detention (the basis for the application for interim detention of Mr Chisnall). Beyond specifying the occasion for application for interim detention order, s 107 itself gives no guidance to the court as to the basis on which such order is to be made.

[23] Fogarty J rejected the suggestion that an order could be made on a "balance of convenience" approach similar to that used when considering interim injunctions. He considered such an approach was not consistent with the scheme of the Public Safety Act.[27] It required "risk of harm analysis": "The greater the prospective harm, the more tolerance of interim restraints, pending full analysis."

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[26] See above at [7].

[27] *Chief Executive of the Department of Corrections v Chisnall* [2016] NZHC 796 at [39].

[24] In the present case the Judges in the Court of Appeal differed among themselves in their approach to s 107 of the Public Safety Act, although all agreed that the interim detention order had been properly made whichever approach was adopted.

[25] Asher and Dobson JJ pointed to the conflicting approaches in other interim restraint cases in the High Court.[28] In some, interim orders had been treated on a basis comparable to interim relief in judicial review, turning on a "wide discretion" in which matters such as "the apparent strength or weakness of an applicant's claim and all repercussions, both public and private of granting interim relief" were relevant.[29] This approach Asher and Dobson JJ regarded as insufficient to recognise the impact of an order on rights and freedoms.[30] The higher threshold set for the making of a public protection order was, they considered, the appropriate threshold too for an interim detention order. Support for this approach they considered to be provided by s 12.[31] As is discussed below at [45]–[47], that provision requires an interim detention order to be made in respect of someone who is to be assessed for suitability for treatment under the Mental Health and Intellectual Disability legislation wherever the court is "satisfied that it could make a public protection order against a respondent and it appears to the court that the respondent may be mentally disordered or intellectually disabled". Adopting a civil balancing approach was considered by Asher and Dobson JJ to open up consideration of factors relating to the respondent's personal circumstances, which they thought could not prevail once the court was satisfied that the respondent posed a very high risk of imminent offending.[32] They therefore considered that Fogarty J had been correct in the view that an interim detention order can be made only if the court is satisfied on the

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28 *Chisnall v Chief Executive of the Department of Corrections* [2016] NZCA 620 at [26]–[27]. Contrast *Chief Executive of the Department of Corrections v [W]* HC Auckland CIV-2015-404-2878, 7 December 2015 (Minute of Brewer J) at [8] with *Chief Executive of the Department of Corrections v Bradbury* [2016] NZHC 2461 at [21]–[24]; and *Chief Executive of the Department of Corrections v Martin* [2016] NZHC 275 at [38]–[39].

29 *Chief Executive of the Department of Corrections v Bradbury* [2016] NZHC 2461 at [23].

30 *Chisnall v Chief Executive of the Department of Corrections* [2016] NZCA 620 at [31]–[32].

31 At [38].

32 At [36]. Asher and Dobson JJ recognised that "extraordinary" factors, such as the respondent suffering from a terminal illness and there being alternative arrangements possible to benefit the public, might be able to be considered: at [37].

balance of probabilities that the statutory basis for the making of a public protection order has been made out.[33]

[26] Heath J preferred a "necessity" test by which an interim detention order may be made under s 107 of the Public Safety Act if the court is satisfied that it is "necessary" to protect public safety until the application for public protection order can be considered, applying a "sense of proportionality" to the decision.[34]

[27] Contrary to the view taken by the majority, Heath J considered that s 107GAA of the Parole Act was not concerned solely with the sequence of consideration of final orders but also precluded simultaneous consideration of interim detention orders and interim supervision orders.[35] On that basis he considered there would be a gap in the protection provided by the legislation if an application for interim detention order failed on the "very high standard of proof" adopted by the majority. Heath J acknowledged the force in the point made by Asher and Dobson JJ relating to the requirement that an interim detention order must be made where the court gives a direction under s 12 for assessment of the appropriateness of treatment for mental disorder or intellectual disability.[36] He thought however that the word "could", used in s 12(1), did not make it necessary for the court to "actually reach a conclusion that a public protection order should be made before invoking s 12(2)". Although Heath J did not express the approach he preferred in terms of "balance of convenience", his formulation assumes a wide discretion to hold the position in the interim rather than a judgment of immediacy of serious risk on which the majority considered that the availability of interim orders turned.

[28] In the event, the Court of Appeal was unanimous that an interim detention order was appropriate.[37] The Court agreed with Fogarty J's assessment of the reports

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33 *Chief Executive of the Department of Corrections v Chisnall* [2016] NZHC 796 at [39]; and *Chisnall v Chief Executive of the Department of Corrections* [2016] NZCA 620 at [30]–[37] and [41].

34 *Chisnall v Chief Executive of the Department of Corrections* [2016] NZCA 620 at [79]–[85].

35 At [76].

36 At [83].

37 At [57] per Asher and Dobson JJ; and at [71] per Heath J.

provided in evidence.[38] The majority concluded that the chief executive had demonstrated on the balance of probabilities that there was a very high risk of imminent serious sexual or violent offending if Mr Chisnall was released into the community,[39] although it acknowledged that the evidence remained to be tested.[40] Heath J considered that the evidence established the necessity of making an interim detention order, applying the approach he preferred.[41]

[29] Asher and Dobson JJ also agreed with Fogarty J that the possibility that the respondent might ultimately be dealt with under the Intellectual Disability Act did not affect the determination of whether interim detention was appropriate:[42]

> [F]or interim orders, the immediate safety of the community remains the paramount consideration. Ultimately, the question is whether there is a need to make an order to protect the community from the risks that the Public Safety Act is designed to manage. The fact that a person may require assessment to determine eligibility for a care order is not something that prevents an interim detention order from being made. That view is supported by s 12(2) and (3) of the Public Safety Act which contemplates the interim detention of an offender while the Chief Executive considers whether it is appropriate to seek a care order under the Intellectual Disability Act.

[30] Nor did the Court of Appeal accept that the fact that Mr Chisnall had been temporarily released into the community in the latter stages of his probation countered the evidence of high risk.[43] Such release had always been under strict supervision. The Court also considered that the preparedness of the Parole Board to consider Mr Chisnall's release into the care of Anglican Action did not undermine the assessments of risk.[44] There was in any event doubt about whether the option of release into the care of Anglican Action remained available. Although, in this Court, it is said by counsel for Mr Chisnall that the Parole Board and the Courts below were in error in the view that the offer by Anglican Action had been withdrawn, it is necessary to observe that the High Court and Court of Appeal were not provided with confirmation from Anglican Action that it was prepared to accept the placement of Mr Chisnall with it.

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38 See at [42]–[58].
39 At [57].
40 At [58].
41 At [71].
42 At [63].
43 At [64].
44 At [65].

[31] The majority in the Court of Appeal did not explicitly consider whether release conditional on the availability of intensive supervision was sufficient, in the time before final determination of the application, to mitigate the risk of Mr Chisnall's reoffending. They made no mention of s 107(3) although they took the view that the court retained a discretion under ss 107(2) and 13 which would enable it to avoid making an interim order or permanent order in extraordinary cases, such as a case of terminal illness.[45] Heath J referred to the need to "bring a sense of proportionality" to the determination, but did not discuss further why interim detention order rather than suspended order under s 107(3) was proportionate in the circumstances of the case.[46] Nor was there distinct consideration of whether an interim supervision order was available.

Approach to s 107

[32] In this Court the chief executive does not contend for the less onerous and more open-ended test preferred by Heath J when making an interim detention order. The parties are in agreement that an interim detention order can be made only if the court is satisfied that the statutory grounds for a public protection order have been made out, even though the assessment must necessarily be provisional until the substantive application can be heard.

[33] Because of the different view expressed in the Court of Appeal and in other cases where s 107 orders have been sought, it is appropriate to indicate agreement with the view that interim orders under s 107 of the Public Safety Act can be made only when the court is satisfied on the balance of probabilities of eligibility under s 7 and that the conditions in s 13 are established. That means it must be satisfied that there is "very high risk of imminent serious sexual or violent offending by the respondent" if no such interim order is made. In relation to the commission of serious sexual or violent offences by a person, "imminent" is defined in the Act to mean "that the person is expected to commit such an offence as soon as he or she has a suitable opportunity to do so".[47]

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45 At [37].
46 At [85].
47 Public Safety Act, s 3. What constitutes serious sexual or violent offending is also defined in s 3.

[34] Under s 13(2) the court may not make a finding of very high risk of imminent serious sexual or violent offending unless "satisfied that the respondent exhibits a severe disturbance in behavioural functioning established by evidence to a high level of each of the following characteristics":

> (a) an intense drive or urge to commit a particular form of offending:
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> (b) limited self-regulatory capacity, evidenced by general impulsiveness, high emotional reactivity, and inability to cope with, or manage, stress and difficulties:
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> (c) absence of understanding or concern for the impact of the respondent's offending on actual or potential victims (within the general sense of that term …):
>
> (d) poor interpersonal relationships or social isolation or both.

[35] The requirement that the court be satisfied of the elements in s 13 is commensurate with the deprivation of liberty entailed even in interim orders. We agree with Asher and Dobson JJ that the intrusion into the respondent's rights and freedoms, "and the absence of any prescribed test for interim detention orders", indicates that the test for interim orders should be that which applies to public protection orders under s 13.[48] As they say, this approach is consistent with the fact that the scheme of the legislation requires an application for substantive public protection order before an interim order can be sought, supported by the necessary reports under s 9.[49] If the evidence does not satisfy the court that the conditions for public protection order are present, insufficient justification for interim detention with its deprivation of liberty will exist. As Asher and Dobson JJ pointed out, the chief executive did not argue that this standard was impractical. The reality is that respondents subject to such applications will have given cause for concern for some time and there will be "a body of information already available that can be used to support an urgent interim application" if it is warranted.[50]

[36] I agree that this interpretation of s 107 is necessary to give to it the meaning commensurate with the protection of rights under the New Zealand Bill of Rights Act 1990, as s 6 of that Act requires. Such interpretation is also consistent with s 12

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48 *Chisnall v Chief Executive of the Department of Corrections* [2016] NZCA 620 at [32].
49 At [33].
50 At [34].

of the Public Safety Act which requires interim detention pending assessment of mental disorder or intellectual disability when the court is satisfied that it "could make a public protection order against a respondent". I do not agree with the contrary view expressed by Heath J. The requirement is as to fulfilment of the ss 7 and 13 tests for making a public protection order. The requirement of fulfilment when an interim order is sought in respect of those whose mental and intellectual status must be further investigated is a pointer to the need for the court to be satisfied similarly when interim orders are sought because the substantive hearing has not been reached.

[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. That is consistent with the policies of the Act in permitting public protection orders to be made, not for punishment, but only when "the magnitude of the risk posed by the respondent justifies the imposition of the order".[51] It is also commensurate with the human rights interests affected. And it is consistent with the scheme of the legislation which, as the majority in the Court of Appeal identified, makes it clear that interim orders are available only where proceedings for public protection orders are current and are parasitic on the application, including in respect of the evidence required to be filed in support of the substantive application.[52]

[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

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51 Public Safety Act, s 5(b).

52 *Chisnall v Chief Executive of the Department of Corrections* [2016] NZCA 620 at [33].

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.[53]

[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.

[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.[54]

[41] In the present case Fogarty J and the Court of Appeal did not distinctly address whether there was an adequate alternative option to an interim detention order. Although such distinct consideration might have been preferable and ought to be a course generally followed, I consider it is implicit in the reasons given by the High Court and Court of Appeal that they took the view that no lesser restraint was adequate to meet the risk to public safety. Indeed, I think that conclusion was inescapable on the evidence available. For the reasons further explained below, I agree with the concurrent view taken in the High Court and Court of Appeal that on

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53 See New Zealand Bill of Rights Act 1990, ss 22 and 26.

54 Sections 3 and 22.

the evidence an interim detention order was necessary to meet the risk posed by Mr Chisnall's release and that release on conditions was not available because any conditions reasonably in prospect were inadequate to meet the risk to public safety. That view is a provisional one on the evidence so far available. It is possible that the evidence at the hearing may lead to a different conclusion.

[42] I differ from other members of the Court however on the options available under the legislation where less restriction of liberty would be sufficient to manage an established risk to public safety in the interim before determination of the public protection order application. The matter is one of some difficulty and it may be that legislative clarification is desirable.[55]

[43] As appears in what follows, I take the view that if a court is satisfied on the balance of probabilities that there is very high risk of imminent serious sexual or violent offending by a respondent on release, the only alternative to interim detention under s 107(2) of the Public Safety Act is for the court to impose the conditions it considers sufficient to manage the risk to public safety after suspending an interim detention order under the powers conferred by s 107(3). The other members of the Court disagree. They are of the view that the court in such a case has the option of imposing conditions under an interim supervision order made under s 107FA of the Parole Act if it considers extended supervision with conditions is sufficient to contain the risk to public safety.

Mental disorder and intellectual disability

[44] In the remainder of these reasons I consider the basis on which less restrictive orders might be available to cope in the interim with the risk to public safety (the point on which I differ from other members of the Court) and review the facts on which I would conclude that an interim detention order was correctly made. Before

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[55] Equivalent legislation in Australia provides for a "reasonable grounds" hearing at which the court must consider whether the application has merits and, if so, what interim orders are appropriate. See Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 8; Dangerous Sexual Offenders Act 2006 (WA), s 11(3); Crimes (High Risk Offenders) Act 2007 (NSW), s 18A; Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic), s 54; Criminal Law (High Risk Offenders) Act 2015 (SA), s 9; Serious Sex Offenders Act 2013 (NT), ss 8(2)(a), 25 and 30.

doing so, it is necessary to deal with the relevance of potential application of the Intellectual Disability Act or the Mental Health Act, because it featured in argument.

[45] Mr Chisnall's intellectual status was a matter raised in the Courts below. In this Court a question about mental disorder was also raised. For the hearing of the final orders in December 2017, a report has been obtained from Ms Visser as to whether Mr Chisnall is under an intellectual disability. If so, s 12 of the Public Safety Act empowers the court to direct the chief executive to consider an order for compulsory treatment under s 29 of the Intellectual Disability Act rather than a public protection order. Equivalent provision is made in s 12 for consideration of whether a respondent should receive compulsory treatment under s 45 of the Mental Health Act rather than be subject to a public protection order where he or she is mentally disordered. It is a principle of the Public Safety Act, expressed in s 5(c), that "a public protection order should not be imposed on a person who is eligible to be detained under the Mental Health (Compulsory Assessment and Treatment) Act 1992 or the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003".

[46] While such consideration of the alternative of compulsory treatment for mental disorder or intellectual disability is being undertaken, if the court is "satisfied that it could make a public protection order against a respondent and it appears to the court that the respondent may be mentally disordered or intellectually disabled", the court "must, if the respondent is not then detained under section 107, order the interim detention of the respondent under that section".[56] There is accordingly no statutory policy against interim detention while the application of s 12 is ascertained once the court is "satisfied that it could make a public protection order against a respondent". On the contrary, the statute requires interim detention during the consideration of whether compulsory treatment under the Mental Health or Intellectual Disability legislation is more appropriate than a public protection order.

[47] There have been indications in the past that Mr Chisnall may have some intellectual disability. The Judge who sentenced him in 2006 for his most serious

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[56] Public Safety Act, s 12(1) and (3).

offending to date considered he was intellectually impaired.[57] The report from Ms Visser, received since the determination of the Court of Appeal, does not however support a finding of intellectual disability on the standards currently prescribed by the Intellectual Disability Act, although Ms Visser points out that those standards lag behind the current standards adopted by psychologists. Counsel for Mr Chisnall submits however that the report raises a question, requiring further investigation, as to whether Mr Chisnall has the recognised mental disorder of autism. If so, s 12 of the Public Safety Act prompts consideration of whether compulsory treatment under s 45 of the Mental Health Act is more appropriate than a public protection order.

[48] The foreshadowed potential reliance on mental disorder is a new development in this Court and was not subject to consideration in the lower Courts. The suggestion of mental disorder is a shift from the position taken in the Courts below that Mr Chisnall is intellectually disabled. Ms Visser's report has been the subject of a further report from a psychologist, Steve Berry, who provided one of the reports relied on by the chief executive in his application. The Berry report takes issue with the tentative indications of mental disorder.

[49] The question of mental disability is tentatively raised as requiring further investigation. On the material before the Court it is disputed. Nor is it clear whether the question of intellectual disability is still pursued by Mr Chisnall. These matters cannot be resolved in the context of the interim detention order application. They are potentially relevant to consideration of the substantive public protection order only. Since the legislation requires interim detention while consideration of alternative treatment is considered, the questions of compulsory treatment as alternative to a substantive public protection order are premature at this stage and largely irrelevant to the questions on the appeal against the interim detention order.

Interim orders pending determination of public protection order

[50] Interim orders may be made under s 107 before the application for public protection order is finally determined and when the respondent would otherwise be

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[57] *R v Chisnall* HC Wanganui CRI 2005-083-806, 29 March 2006 (sentencing notes of Miller J) at [27].

released from detention or, while being subject to supervision under the Parole Act, would cease to be subject to orders for full-time monitoring or full-time placement in the care of an agency or person. If an interim detention order is made it must specify the person by whom the respondent is to be detained and the place of detention. Equivalent legislation in Australia limits the time during which an interim detention order can continue.[58] Under s 107 however an interim order continues until the final determination of the public protection order, which may not occur for many months, as the present case illustrates.

[51] As its heading provides, s 107 of the Public Safety Act permits the High Court to order "interim detention of, or interim imposition of conditions on" the person who is the subject of the application. In my view the heading to s 107 makes it clear that these are alternative orders available to the court from the outset. That interpretation of the section in accordance with its heading is reinforced by the text of subs (3) which provides that the court "may suspend" an interim detention order "when" the court makes an order under subs (2).

[52] I am not able to agree that immediate suspension of a public protection order, subject to observance of conditions imposed when the order is made, is "counter-intuitive" and is therefore to be limited to changes of circumstance (such as terminal illness).[59] That is not the way the options are presented in s 107 read as a whole. The option provided by subs (3) of suspension of an interim detention order subject to conditions also makes good sense in the scheme of protections. The suspended order option provides leeway for a less restrictive order through imposition of conditions but is backed up by the underlying detention order which will revive if the conditions are not met. Since this Court is in agreement that an order cannot be made under s 107 unless the court is satisfied on the evidence before it that it can make a public protection order, the imminence of risk justifies the scheme of the legislation in requiring the back-up for enforcement purposes of a suspended detention order. That scheme also explains why there is no provision for

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58 See, for example, Crimes (High Risk Offenders) Act 2006 (NSW), s 18C; Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic), s 57(2); and Serious Sex Offenders Act 2013 (NT), s 11.

59 Contrast below at [87] and [91] per Ellen France J for the majority.

enforcement for breach of conditions imposed under s 107 – breach results in detention, as is commensurate with the very high risk of imminent serious offending.

[53] The scheme of the section including its heading is therefore that conditions may be imposed if they are considered to be sufficient to meet the risk identified in s 13, but that they are set up through a suspended interim detention order. The option of imposing conditions against a suspended interim detention order under this scheme is not a tack-on but something that requires consideration whenever it is necessary to impose interim restraints pending determination of a public protection order. It may also be considered as circumstances change, but is not limited to use where there is change of circumstances. That interpretation is consistent with the purpose in imposing the least restrictive outcome in accordance with the principles to which the court is required to have regard under s 5, including the direction to impose a public protection order only "if the magnitude of the risk posed by the respondent justifies the imposition of the order".[60]

[54] Not all applications for public protection order will be accompanied by an alternative application for extended supervision order. In such cases the conditions for an interim supervision order will not be present. An example is where the application for public protection order has been prompted by the lapse of intensive monitoring conditions under an existing extended supervision order.[61] Maintaining the status quo through the imposition of similar conditions in such situations may well be entirely appropriate. Yet, in the absence of a power under s 107(3) to conditionally suspend an interim detention order, there would be no basis on which a court could do so.[62] That would be an unaccountable gap in the law which does not arise if s 107(3) of the Public Safety Act is read, as I consider to be its obvious sense, to authorise the imposition of conditions. On the approach taken by other members

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60 Public Safety Act, s 5(b).

61 As occurred in *Chief Executive of the Department of Corrections v McIntosh* [2016] NZHC 1163.

62 It appears that in some such cases the High Court has adjourned the hearing of the interim detention order application on the condition that the respondent consents to a continuation of the intensive monitoring conditions beyond their statutory expiry date: see *Chief Executive of the Department of Corrections v Kerr* [2017] NZHC 139; and *Chief Executive of the Department of Corrections v Campbell* [2017] NZHC 147. That has the same practical effect as an exercise of the Court's power under s 107(3) but a less obvious jurisdictional basis.

of the Court there is no power under the Public Safety Act to impose conditions, except in narrow circumstances where there is a change of position.

[55] The sense of the Act is that, if a court in a case such as the present one is faced with alternative applications for public protection order or extended supervision order, it has two choices available. They are to make an interim detention order or to make such an order but suspend it on conditions which the court considers adequate to meet the risk but are less restrictive of liberty, as the policy of the Act requires.

Availability of interim extended supervision order

[56] If the court is satisfied that it could make a public protection order (as the Court is agreed is the basis for making an interim order under s 107), I consider that the scheme of the Public Safety Act does not leave open the option of making an interim supervision order. The higher threshold provided under the Public Safety Act means that containment of the risk pending final determination is appropriately the subject of the provisions of the Public Safety Act.

[57] The interim orders provided for in that Act in s 107 do not refer to the option of making an order for interim supervision under the Parole Act. Indeed, s 107 makes no reference to the Parole Act. Section 107 is the manner in which public protection is assured "until the application for a public protection order is finally determined". The scheme of the Public Safety Act therefore is that once the conditions for a public protection order are established on a provisional basis, any interim protection must be under s 107.

[58] This is also consistent with the distinct regimes under the two Acts. An application for public protection order under the Public Safety Act is a civil proceeding. An application for extended supervision order under the Parole Act on the other hand arises in criminal proceedings.

[59] I do not see the view I prefer as being inconsistent with the view already expressed that a public protection order (or an interim detention order) is not warranted if there is a less restrictive way to meet the risk. The management of risk

available under the Parole Act is a factor that is relevant to the determination whether the conditions for making a public protection order under the Public Safety Act are properly established. But once a court is satisfied that it can make a public protection order, any interim orders must be made under that Act, not the Parole Act.

[60] It should be noted that any conditions imposed under s 107(3) need not be more restrictive than those available under the Parole Act for extended supervision orders if the circumstances do not warrant it. The Court is not restricted in s 107(3) as to the conditions it may impose. The effect of s 107(3) is however that the conditions are underwritten by an interim detention order pending final determination of the application under the Public Safety Act. And that it seems to me is entirely consistent with the very high risk of serious sexual or violent offending of which the court has to be satisfied before making an order under s 107.

[61] This scheme of priority for the Public Safety Act, which I consider reflects and follows from the higher risk that Act deals with, is also supported by s 107GAA of the Parole Act. In this I agree with the view expressed by Heath J in the Court of Appeal.[63] If the court "must not hear" an application for extended supervision order under the Parole Act because it is "contingent on [the] outcome of [the public protection order] application" and cannot be heard until the public protection order application is resolved, then it seems to me that an interim order in the application for extended supervision order is also parked until the public protection order application is resolved. I do not agree with Asher and Dobson JJ in the Court of Appeal that the fact that s 107GAA does not refer to interim supervision orders is material.[64] Section 107GAA is concerned with the procedure which applies to an application for an extended supervision order made in respect of an offender who is also the subject of a public protection order application. An interim supervision order is made in the proceedings for an extended supervision order. In cases such as the present case where an extended supervision order has been applied for in the alternative, what the Parole Act requires is that the applications be dealt with sequentially, with questions of orders under the Public Safety Act being considered before orders under the Parole Act. That is in keeping with the greater risk to public

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63 See above at [27].

64 Contrast *Chisnall v Chief Executive of the Department of Corrections* [2016] NZCA 620 at [39].

safety in the case of those who qualify for public protection orders and interim detention orders.

[62] Here, the application for extended supervision order in its terms is a fall-back alternative, should the court decline to make a public protection order. In those circumstances questions of extended supervision order or interim supervision order do not arise on the applications before the court unless the court is not satisfied that a public protection order is warranted. If that position is reached (so that neither a public protection order nor an interim detention order is available), the application for interim extended supervision order can proceed. The process is facilitated by s 107GAA(4) of the Parole Act, which provides that "if practicable" the application for an extended supervision order is to be heard by the same judge. This scheme means that there is no gap in the legislation, such as concerned Heath J in the Court of Appeal.[65]

[63] The upshot is that, if the court is satisfied of very high risk of imminent serious sexual or violent offending, interim orders for public safety can be made only under s 107 of the Public Safety Act. The option of an interim supervision order is not available even if there is also before the court an application for extended supervision order which remains to be dealt with should the public protection order application later be dismissed or withdrawn.

[64] There is nothing in the legislative history of the interim detention order and interim supervision order provisions that prompts another interpretation. Both were enacted at the same time, but the Minister of Corrections, in speaking to the supplementary order paper by which s 107FA of the Parole Act was introduced, explained the purpose of the interim supervision order as having been to "mirror those provisions in the Public Safety (Public Protections Orders) Bill" which applied where application had been made for public protection order and the individual was "not otherwise subject to appropriate management".[66] The aim was to "minimise the risk around some of these offenders" when "special circumstances delay a full extended supervision order application". Similarly, the Explanatory Note for the

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65 See above at [27].

66 (2 December 2014) 702 NZPD 1019.

amendment identified that it was to make provision for the court "to make an interim supervision order before an application for an extended supervision order (ESO) is determined in certain cases".[67] The same amendment introduced s 107GAA. The possibility that an interim supervision order might be made where an application under the Public Safety Act for public protection order is on foot is not adverted to in s 107FA or s 107GAA of the Parole Act and is not mentioned in the parliamentary materials. The interim supervision order was introduced to "mirror" interim orders under the Public Safety Act, not to supplement it.

[65] Similarly, s 12 of the Public Safety Act provides that the court must make an interim detention order in respect of a respondent where the court has directed the chief executive to consider the appropriateness of an order under the Mental Health Act or the Intellectual Disability Act if the Court is satisfied that it could make a public protection order against the respondent.[68] This means that interim detention orders are not precluded by the policy that public protection orders should not be made against those who should receive treatment under the Mental Health Act or the Intellectual Disability Act. It is consistent with the policy that the authority under s 107 to impose interim detention applies wherever a public protection order application has not yet been determined, even if one possible outcome may be that the application will be declined because management under the Mental Health Act or Intellectual Disability Act regimes is found to be more appropriate.

The evidence before the High Court

[66] The evidence provided to the High Court included Mr Chisnall's history and pattern of offending. He was first convicted of unlawful sexual connection in 2002 when he was sentenced to 16 months' imprisonment. The offence took place in a public park with a seven-year-old boy who was a stranger to Mr Chisnall. The same year Mr Chisnall was convicted and discharged on a charge of male assaults female. Although Mr Chisnall disputes it, Dr Wilson considers the motive was likely to have been sexual. Again the assault occurred in a park and the victim was a stranger to Mr Chisnall. In 2006 Mr Chisnall was sentenced to eight years' imprisonment for

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67 Supplementary Order Paper 2014 (30) Parole (Extended Supervision Orders) Amendment Bill 2014 (195-2) (explanatory note) at 4.

68 Public Safety Act, s 12(3).

sexual violation by rape. The offence again occurred in a park and the victim was a stranger to Mr Chisnall. In 2009, while serving that sentence, he was charged and convicted of an earlier rape of a girl aged under 12. Once again, the victim was a stranger to Mr Chisnall and the offence occurred in a park. Following conviction on this charge, Mr Chisnall's effective sentence was increased to 11 years' imprisonment. These last two convictions are the qualifying offences for the purposes of the public protection order, but Mr Chisnall's earlier offending and his behavioural history discussed in the psychologists' reports is important context for the assessment of the magnitude of the risk posed by Mr Chisnall. This longstanding history from a young age is part of the reason Dr Wilson in his report described Mr Chisnall as presenting a stable risk of reoffending.

[67] As has been described, the applications made to the High Court were supported by the reports of three psychologists. A feature remarked on in the reports was the nature of Mr Chisnall's offending. It comprised sexual attacks in public places on strangers, accompanied by violence.[69] The report writers also had access to Mr Chisnall's history while a sentenced prisoner and the programmes, treatments and assessments he had undertaken over the period of his sentence. Some of the health professionals who had worked with Mr Chisnall over this period had raised concerns about his intellectual functioning. There were suggestions of mental impairment and, more recently and following the High Court and Court of Appeal hearings, mental disorder. They were said by Mr Chisnall's counsel to require consideration of application of the Intellectual Disability Act and the Mental Health Act, which would exclude the making of a public protection order. As has been discussed at [49] above, I do not consider that any further consideration that might be necessary is material when considering the interim protection order in issue here. But reported suggestions of low functioning, whether or not within the scope of the Intellectual Disability Act or the Mental Health Act, were properly part of the information available to the health professionals who assessed the risk posed by Mr Chisnall on his release.

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[69] Although apparently opportunistic, one report writer consider that the offending entailed "clear prior intent and planning".

[68] Ms Visser, who prepared the most recent report which addressed intellectual impairment (commissioned by the High Court for the substantive hearing and not available to the Courts below) assessed Mr Chisnall's IQ as falling in a range from 78–86 (the 95 per cent confidence interval), which is above the cut-off (70–75) for eligibility under the Intellectual Disability Act. But Ms Visser considered that the Act now lags behind professional views. Using modern criteria, she diagnosed Mr Chisnall with a mild intellectual disability and was of the view that he would have met the criteria for treatment under the Act when younger, but that the opportunity for treatment was missed.[70]

[69] It is not necessary to rehearse in detail the content of the three reports relied on by the chief executive. They were analysed carefully by Fogarty J in the High Court and by the Court of Appeal.[71] I summarise the conclusions, which are substantiated in the reports by references to the previous offending, Mr Chisnall's responses to the treatments he received in prison, observations of his demeanour in recounting his offending, and reactions to counselling and programmes while in prison. As is explained below at [73]–[77], I agree with the Courts below in considering that the opinions provide sufficient foundation for the assessment that is required for the purposes of the interim order, even accepting that the assessment is necessarily provisional because the evidence is yet untested and may yet be answered at the hearing on the application for protection order.

[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

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[70] When sentencing Mr Chisnall in 2006, Miller J accepted that he suffered from a mental disability but declined to order his treatment as a special care recipient under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 on the basis that he would pose a risk to other patients. The Judge did however anticipate that an application would be made at a later stage by a prison manager for Mr Chisnall to be brought under the Act: *R v Chisnall* HC Wanganui CRI 2005-083-806, 29 March 2006 (sentencing notes of Miller J) at [52]–[53]. This does not appear to have occurred.

[71] *Chief Executive of the Department of Corrections v Chisnall* [2016] NZHC 796 at [27]–[36]; and *Chisnall v Chief Executive of the Department of Corrections* [2016] NZCA 620 at [42]–[58].

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".

[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".

[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.

Was an interim detention order justified?

[73] As has been indicated, I accept the approach adopted by the majority in the Court of Appeal that the court before making an interim detention order under s 107 of the Act must be satisfied by the evidence that the conditions for the imposition of a public protection order under ss 7 and 13 of the Public Safety Act are established. The evidence is necessarily provisional, but that is inescapable in a scheme which provides for interim restraint pending full hearing. The public liberty and human rights interests entailed, as well as the policies of the Act, require careful scrutiny of the evidence put forward and its sufficiency in meeting the standards prescribed by the Act. The scheme and purpose of the legislation makes it clear that the least restrictive outcome consistent with public safety is required. Being untested, the evidence put forward by the chief executive is likely to put the case at its highest. If

it is not convincing in meeting the s 13 standards, the application for public protection order cannot succeed.

[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 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,[72] that he has limited self-control,[73] absence of concern for victims[74] and poor interpersonal relationships.[75] 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".[76] 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 restraint pending determination of the public protection order on this evidence is clear.

[75] I agree with the reasons given by the Court of Appeal in declining to accept that Mr Chisnall's supervised community releases while a serving prisoner are

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72 The psychologists were in agreement that Mr Chisnall has had "an intense drive and desire to commit … sexual offences from an early age" and that "sexually violent fantasies" have been and "will continue to be a primary coping mechanism for Mr Chisnall when stressed".

73 Mr Chisnall exhibited a long history of "general impulsivity and an inability to cope with challenge, social isolation or rejection". This had improved under a new treatment regime for his ADHD, but "the reliability of these changes is yet to be established".

74 While Mr Chisnall could "articulate an intellectual understanding of the effects of his behaviour on others", he did not present as having genuine empathy and "appeared to derive pleasure" or otherwise become "excited" during discussions of his past offending.

75 Mr Chisnall has always struggled with developing positive relationships, and in Dr Wilson's opinion exhibits character traits that "act against the development of trust and intimacy". Mr Berry was more positive, noting that: "It does appear that Mr Chisnall has learnt through treatment that meaningful relationships have value and can contribute to well-being". However, he was concerned that "the sustainability and significance of Mr Chisnall's treatment gains are un-tested in the community environment and are relatively recent".

76 *Chisnall v Chief Executive of the Department of Corrections* [2016] NZCA 620 at [45]; referring to Mr Chisnall's reported fixed ideas around deviant sexual activity, excitement in relating examples, and acknowledgement of sexual fantasies often involving violence.

evidence that he does not pose an imminent risk of serious offending.[77] They were highly controlled and provide no assurance of community safety in release on terms that are not as managed.

[76] Nor do I accept the submission that the Parole Board determination that Mr Chisnall might be released on strict conditions indicates a basis for rejecting the evidence of high risk. The Parole Board did not have the reports of Mr Berry and Dr Wilson assembled by the chief executive in support of the application for public protection order. It proceeded on the assumption that full monitoring of Mr Chisnall would be available in the Anglican Action residence. When there was no confirmation that option was available, the Board withdrew its earlier decision.

[77] I consider therefore that the Courts below were right to take the view that an interim order under s 107 was necessary because of the imminence of risk to public safety in Mr Chisnall's release. As has already been explained, I consider that s 107 is a power to prevent risk whenever a public protection order is applied for and pending its determination, whether or not there are alternatives that will ultimately come to be considered in terms of treatment for mental disorder or intellectual disability, or in the possibility of making an extended supervision order should a public protection order not be made. Unless the grounds for public protection order are not made out, an order under s 107 is the correct interim protection for public safety.

[78] For the reasons given in paragraphs [50]–[55] however I am of the view that it was necessary for the Court in considering an interim order under the Public Safety Act to consider whether the risk established would be properly contained by an order under s 107(3) through imposition of conditions and suspension of the interim detention order. That course was not undertaken. Nor did the evidence directly address whether the imposition of particular conditions and suspension of the interim detention order could be adequate to address the risk the psychologists had identified.

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[77] See above at [30].

[79] In some cases failure distinctly to address the option of conditions and suspension of an interim detention order may mean that the application will have to be returned for further consideration. In the present case, however, 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.

[80] It is highly unsatisfactory that the application for interim detention order was made at such a late stage before Mr Chisnall's release. The Judges in the Court of Appeal expressed concern that the application had been so delayed.[78] More time might have provided opportunity to explore the less restrictive option of imposition of conditions and suspension of the interim detention order. Such exploration of options would be in keeping with the policies of the Act. It is unsatisfactory that the evidence provided to the Court did not look at the options for managing Mr Chisnall safely including through appropriate conditions and suspension of the interim detention order. It does not seem adequate to take the view expressed by Ms Hardy for the chief executive that the psychologists' reports are directed only to the statutory criteria under s 13 and that the question of conditions is a matter for the Court. The Court should have evidence on the matter. The fact that the alternatives to interim detention order were not directly addressed indicates that the least restrictive option may not have been adequately assessed, as it should have been in application of s 107.

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[78] *Chisnall v Chief Executive of the Department of Corrections* [2016] NZCA 620 at [68]–[69].

[81] I have considered whether the matter should be returned to the High Court for further consideration. In the end, because there is no present indication of any realistic alternative to detention, I have concluded that the order of interim detention should remain. I would however alter the order in the High Court by reserving leave to Mr Chisnall or to the chief executive to apply for suspension of the detention order and its replacement by conditions such as those proposed as an alternative to interim detention by the chief executive.[79] Strictly speaking, the reservation of such leave is not necessary since the power under s 107(3) of the Public Safety Act can be exercised from time to time. But the approach taken to this recent statute has been I think too austere. And reservation of leave may expedite reconsideration should some realistic placement become available to Mr Chisnall before determination of the application for public protection order.

[82] I would therefore have allowed the appeal in part by varying the interim detention order made in the High Court to reserve leave to Mr Chisnall and the chief executive to apply for suspension of the order under s 107(3). I would make no order for costs.

WILLIAM YOUNG, GLAZEBROOK, O'REGAN AND ELLEN FRANCE JJ
(Given by Ellen France J)

Introduction

[83] We agree that in making either an interim detention order or a substantive public protection order, it is necessary for the court to consider the least intrusive means of managing any risk posed by the person in respect of whom the order is sought.[80] As the Chief Justice explains, that approach is consistent with the scheme of the Public Safety (Public Protection Orders) Act 2014 ("the Public Safety Act"), the policy of which is public safety, not punishment, and with the obligations under the New Zealand Bill of Rights Act 1990.[81]

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79 See above at [7].
80 Above at [37].
81 Above at [37]–[40].

[84] We agree also that in the present case, applying the test adopted by the Court of Appeal, the basis for making an interim detention order was made out and the interim order properly made.[82] We would, however, dismiss the appeal[83] because we do not consider it is appropriate to reserve leave to apply for suspension of the interim order under s 107(3) of the Public Safety Act.[84] In that respect, we differ from the judgment of the Chief Justice as to the way in which the power to suspend in s 107(3) is to be applied.

[85] In particular, we do not see the ability to suspend an interim detention order under s 107(3) of the Public Safety Act as providing a distinct option which is always to be considered by the court as an alternative to the making of an interim order. We also take the view that an interim supervision order was an available option in this case if the Court had decided not to make an interim detention order. We explain our reasons briefly below.

The ability to suspend and to make an interim supervision order

[86] We do not consider that treating the power to suspend an interim detention order as a distinct alternative to making an interim detention order is consistent with the statutory purpose or with the scheme of the Act.

[87] As to the first point, the purpose of the Public Safety Act is public protection.[85] It does not fit well with that purpose to read suspension of an order under s 107(3) as an alternative to an order under s 107(2). The particular purpose of making an interim order is to provide protection in the interim period before a final decision is made. If the criteria for making an interim order are met, the court may make the order but suspension, albeit with conditions, is a counter-intuitive response given the criteria are met. If they are not met, the order is not made.

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82 Above at [41] and [73]–[77]. We agree with the Chief Justice that the test applied by the majority of the Court of Appeal is correct: see above at [25] and [73]. We agree also with the Chief Justice that when considering making an interim detention order, the fact that the respondent might suffer from a mental disorder or an intellectual disability is not relevant: see above at [45]–[49].

83 Reflecting our view of the nature of the power to suspend an interim detention order: below at [85].

84 Compare to the approach taken by the Chief Justice above at [81]–[82].

85 Public Safety (Public Protection Orders) Act 2014 ["Public Safety Act"], s 4(1) and s 5(a).

[88] The absence of any enforcement regime for non-compliance with these conditions also tells against the use of an order under s 107(3) as a distinct alternative to an order under s 107(2).[86] A further difficulty is that the imposition of conditions such as those that may be imposed on an extended supervision order under s 107K of the Parole Act 2002 involves a substantial interference with liberty and, in some respects, a significant supervisory role particularly if intensive monitoring is imposed. Section 107(3) does not appear to provide a ready vehicle for the imposition of that type of regime.

[89] This approach to s 107 of the Public Safety Act does not mean that the least restrictive option is not considered. If 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.[87] In this sense, the schemes under the Public Safety and Parole Acts are intended to work together.

[90] If the situation arises where no alternative application for an extended supervision order is made, it will still be necessary to consider whether the risks posed can be met in some other way. But it seems unlikely that, as a matter of practice, this situation will arise.

[91] Turning then to the statutory scheme more generally, we consider the other provisions dealing with suspension (ss 111 and 139 of the Public Safety Act[88] and s 107FA(5) of the Parole Act) indicate the purpose of the power in s 107(3), that is,

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[86] In contrast, under s 107T of the Parole Act 2002 breach of the conditions attaching to an extended supervision order, without reasonable excuse, is an offence punishable by a maximum of two years imprisonment. Section 103 of the Public Safety Act creates a similar offence for breaches of the requirements of a protective supervision order (and see also s 103A dealing with the failure to comply with drug or alcohol requirements under a protective supervision order).

[87] Parole Act, s 107GAA. We endorse the observations of the Chief Justice above at [80] as to the need for these applications to be made promptly.

[88] See also s 107P of the Parole Act providing for suspension of conditions of an extended supervision order.

to deal with particular, one-off situations such as illness (either of the person to whom the interim order applies or a family member), bereavement, the need for an assessment of some sort, or some other particular situation that arises. It is the case that ss 111 and 139 of the Public Safety Act provide for suspension by operation of statute[89] but nonetheless they provide a guide to the types of situations in which suspension is seen to have a place. We consider the heading to s 107,[90] if read in light of this type of situation, does not suggest a broader, stand alone, alternative to an order under s 107(2).

[92] In *Chief Executive of the Department of Corrections v McIntosh*, the suspension power in s 107(3) of the Public Safety Act was used to deal with the particular situation that arose in that case.[91] Mr McIntosh was subject to an extended supervision order which included intensive monitoring. The intensive monitoring condition was due to expire and pursuant to s 107K(3)(ba) of the Parole Act intensive monitoring conditions may only apply within the first 12 months of the extended supervision order. An application for a public protection order was made. Because that application could not be dealt with prior to the expiry of the intensive monitoring condition, an interim detention order was sought. The interim detention order would have effectively mirrored the existing extended supervision order along with the intensive monitoring condition.

[93] In these circumstances the making of the interim detention order was not opposed. The order was made and, with the agreement of the parties, suspended subject to conditions reflecting what had been the position under the extended supervision order. The view of the parties and of Mander J appears to have been that the only way to maintain the intensive monitoring condition was to do so under a suspended interim detention order with conditions. We do not need to decide whether or not that was a correct exercise of the suspension power, but it can be said that the case does not appear to reflect a more expansive view of the power.

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89 Section 107FA(5) of the Parole Act provides for court-ordered suspension.

90 The heading of s 107 of the Public Safety Act reads: "[c]ourt may order interim detention of, or interim imposition of conditions on, respondent".

91 *Chief Executive of the Department of Corrections v McIntosh* [2016] NZHC 1163. See the discussion of this case in the judgment of the Chief Justice, above at [54].

[94] Similar issues were raised in *Chief Executive of the Department of Corrections v Kerr*[92] and *Chief Executive of the Department of Corrections v Campbell*.[93] In both cases the application for an interim detention order was adjourned. In both cases that was done on the agreed basis that Mr Campbell and Mr Kerr would remain subject to an intensive monitoring condition. That outcome was adopted as a means of avoiding the problem of the perceived inability at that point to impose a further intensive monitoring condition (both were subject to an extended supervision order).

[95] In *Kerr*, counsel for the Chief Executive had suggested to Nation J that he could follow the approach taken by Mander J in *McIntosh* and make an interim detention order and suspend it with conditions.[94] Subsequently, counsel accepted that the High Court did not have jurisdiction to impose a monitoring order at that stage. The view was that the Court could only make such an order at the same time as imposing an extended supervision order. Nation J accepted that this was the correct approach.[95]

[96] As to the other textual indicator in s 107(3) referred to by the Chief Justice,[96] the use of the word "[w]hen" before the words "the court makes an [interim detention] order", we consider that this can mean "having made", that is, as allowing the court to suspend the interim order subsequently.

[97] For these reasons, we do not consider the power to suspend in s 107(3) of the Public Safety Act operates as a distinct alternative to the making of an interim order under s 107(2) of that Act. It follows that the appeal is dismissed. As the Chief Executive did not seek costs, we make no order as to costs.

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92 *Chief Executive of the Department of Corrections v Kerr* [2017] NZHC 139.
93 *Chief Executive of the Department of Corrections v Campbell* [2017] NZHC 147.
94 *Kerr*, above n 92, at [12].
95 At [13]–[14].
96 See above at [51].