NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY COMPLAINANTS/PERSONS UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE SUPREME COURT OF NEW ZEALAND

SC 136/2016
[2017] NZSC 161

BETWEEN	GLENN RODERICK HOLLAND Appellant
AND	THE CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing:	3 October 2017
Court:	Elias CJ, William Young, Glazebrook, O'Regan and Ellen France JJ
Counsel:	W C Pyke for Appellant C A Brook and R K Thomson for Respondent
Judgment:	27 October 2017

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS
(Given by Glazebrook J)

Introduction

[1] In March 2012 Mr Holland was sentenced to three years imprisonment for doing an indecent act on a child under 12 outside New Zealand[1] and 12 months imprisonment (to be served concurrently) for knowingly possessing objectionable material in terms of s 131A of the Films, Videos, and Publications Classification Act 1993 (the Classification Act).[2] These offences meant he was eligible for an extended supervision order (ESO) under Part 1A of the Parole Act 2002. In February 2016 Judge Fraser imposed an ESO for a period of 10 years.[3]

[2] Mr Holland's appeal against the imposition of that order was dismissed by the Court of Appeal on 17 October 2016.[4] On 8 June 2017 this Court granted Mr Holland's application for leave to appeal against the decision.[5] The approved questions were:[6]

(a) whether offences against the Classification Act set out in s 107B(3) of the Parole Act are relevant only to eligibility for an ESO; and

(b) if they are only relevant to eligibility, whether the ESO should have been imposed.

Background

[3] Mr Holland has a history of sexual offending and possession of child pornography. This includes:

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1 Pursuant to ss 132(3) and 144A of the Crimes Act 1961.
2 *R v Holland* DC Auckland CRI-2010-004-15660, 14 March 2012.
3 *Department of Corrections v Holland* [2016] NZDC 2441.
4 *Holland v Chief Executive of the Department of Corrections* [2016] NZCA 504 (Miller, Courtney and Woodhouse JJ).
5 *Holland v The Chief Executive of the Department of Corrections* [2017] NZSC 86.
6 Leave to appeal on other questions set out at [6] of the leave judgment was declined: see at [8] of that leave judgment.

(a) sexual offending in 1988 against a 13 year old girl in Australia;[7]

(b) importing child pornography in 1996;[8]

(c) possessing child pornography in 1999;[9]

(d) sexual conduct in 2007 with a child outside of New Zealand (directing and photographing a seven year old female holding or masturbating the penis of an associate);[10]

(e) two convictions for importing child pornography in 2007;[11] and

(f) possession of objectionable publications in 2008. This was a representative charge describing some 30 images of females approximately 10 years of age and younger, naked and partially naked, displaying their genitalia. Mr Holland was visible in at least one of the photographs, which were taken by a camera of the same make and model as his. The hard drive contained some 5000 objectionable images overall.[12]

[4] In addition, while he was subject to an interim supervision order Mr Holland and an associate, who was also a convicted child sex offender, approached a 12 year old girl at a shopping mall. Mr Holland asked whether she would like to participate in a recording contract opportunity. Mr Holland met the girl's parents to discuss photographing her. After researching Mr Holland and learning of his offending history, the girl's parents reported him to the police. On a search of Mr Holland's home more objectionable images were found.[13]

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7 Two counts of oral sexual intercourse and four counts of attempted digital penetration with a person under 16: see *Holland v The Queen* (1993) 68 A Crim R 176 (HCA) at 177.

8 On his entry into New Zealand, Mr Holland's computer was found to contain images of nude children in sexualised poses.

9 These offences also involved photographs of naked or semi-naked young girls in sexualised positions.

10 This is the offending for which he received three years imprisonment referred to above at [1].

11 Mr Holland was visible in two of the 23 images reviewed by the Classifications Office. His computer contained approximately 400 objectionable images.

12 This is the Classification Act offence referred to above at [1].

13 See *Police v Holland* [2015] NZDC 24386.

The legislation

[5] The ESO regime was first enacted in 2004.[14] It applied to high risk child sex offenders. In 2014, it was expanded to cover high risk sexual offenders generally and very high risk violent offenders.[15]

[6] To be an "eligible offender" for an ESO, under s 107C of the Parole Act, an offender must have been convicted of a "relevant offence". Relevant offence is defined in s 107B(1)(a) as including an offence described in ss 107B(2), (2A) and (3). It also, under s 107B(1)(d), includes an offence committed overseas that would come within subss (2) and (2A) had it been committed in New Zealand.

[7] Section 107B(2) defines a relevant sexual offence as being offences under ss 128B–143, 144A, 144C and 208 of the Crimes Act 1961. Section 107B(2A) lists various offences that are relevant violent offences. Section 107B(3) includes as a relevant offence an offence under the Classification Act if it is punishable by imprisonment and if the publication is objectionable because it does any or all of:

> (a) promotes or supports, or tends to promote or support, the exploitation of children, or young persons, or both, for sexual purposes:
>
> (b) describes, depicts, or otherwise deals with sexual conduct with or by children, or young persons, or both:
>
> (c) exploits the nudity of children, or young persons, or both.

[8] Section 107I(2) deals with when an ESO can be imposed on an eligible offender:[16]

> A sentencing court may make an extended supervision order if, following the hearing of an application made under section 107F, the court is satisfied, having considered the matters addressed in the health assessor's report as set out in section 107F(2A), that—
>
> (a) the offender has, or has had, a pervasive pattern of serious sexual or violent offending; and
>
> (b) either or both of the following apply:

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14 Parole (Extended Supervision) Amendment Act 2004, s 11.

15 Parole (Extended Supervision Orders) Amendment Act 2014, ss 6 and 7.

16 Prior to 2014, a court had to be satisfied only that an offender was "likely" to commit a relevant offence.

(i) there is a high risk that the offender will in future commit a relevant sexual offence:

(ii) there is a very high risk that the offender will in future commit a relevant violent offence.

[9] If these conditions are met, the sentencing court may impose an ESO for a period of up to 10 years.[17]

Submissions

[10] Mr Holland does not dispute that he was an eligible offender under s 107C. He also accepts that the offences under the Classification Act are relevant for assessing whether there was a high risk he could commit a relevant sexual offence under s 107I(2)(b)(i). He submits, however, that offences under the Classification Act should not be taken into account for the purpose of assessing whether there is a pervasive pattern of serious sexual offending under s 107I(2)(a) because they are not relevant sexual offences as defined in s 107B(2). Nor do they come within the plain meaning of the phrase "sexual offending". He submits that Parliament has carefully set out two pre-requisites for the imposition of ESOs and, in light of the New Zealand Bill of Rights Act 1990 (Bill of Rights), these must be construed strictly given the significant incursion into liberty an ESO represents. In his submission, the requirement to establish a pervasive pattern of serious sexual offending is essentially a filter to require a significant level of offending before the imposition of an ESO can be considered.[18]

[11] The Chief Executive submits that Mr Holland's submission is not supported by the plain words used or the regime's purpose. He points out that "serious sexual … offending" is a different phrase from the specifically defined "relevant sexual offence" and that those two different phrases are used in s 107I(2)(a) and s 107I(2)(b)(i). In addition, Mr Holland's interpretation would deprive the court of relevant material as it would mean that his overseas convictions could not be considered as part of a pattern of "serious sexual … offending" because they are not listed in s 107B(2). Further in this case, given Mr Holland's active participation in

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17 Parole Act 2002, s 107I(4). The conditions of an ESO are set out in s 107J.

18 The requirement for a pervasive pattern of serious sexual offending was introduced in 2014 by s 15(2) of the Parole (Extended Supervision Orders) Amendment Act.

the Classification Act offences, he could have been charged with an offence that is listed as a relevant sexual offence under s 107B(2). It would be arbitrary to deprive a court of obviously relevant material merely because of a decision to charge under the Classification Act rather than the Crimes Act. The Chief Executive submits that it is not possible to interpret the provisions to conform with the Bill of Rights.[19]

Our assessment

[12] The ordinary meaning of the term sexual offending as it is used in s 107I(2)(a) would encompass the type of offending against the Classification Act committed by Mr Holland because of the underlying sexual exploitation of children involved. This is particularly so because, as the Chief Executive highlighted, Mr Holland actively participated in the making of many of the images which were the subject of the Classification Act offences.

[13] The scheme of the legislation reinforces the view that the phrase sexual offending should be given its ordinary meaning. The term sexual offending must be construed in light of the ESO regime as a whole. It would be very odd if the offending against the Classification Act could be taken into account for eligibility and assessing risk but not for assessing whether there is a pervasive pattern of serious sexual offending. That would deprive the court of clearly relevant material at one stage of the assessment.

[14] Further, we accept the Chief Executive's submission that, if it was only relevant sexual offending as defined in s 107B(2) that could be taken into account, then that would have been made clear in the legislation. Instead, two different phrases were used. It would also be odd, as the Chief Executive points out, if offences committed overseas could not considered and that a charging decision could deprive the court of material relevant to its assessment.

[15] Turning now to the Bill of Rights, s 5 provides that, subject to s 4, the rights and freedoms contained in the Bill of Rights can be "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic

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[19] The Chief Executive refers to the Court of Appeal's decision in *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 in this regard.

society". Section 6 of the Bill of Rights requires that whenever legislation "can" be given a meaning consistent with the rights and freedoms affirmed, "that meaning shall be preferred to any other meaning". Under s 4, if a rights-consistent interpretation is not possible, legislation inconsistent with the Bill of Rights must still be applied.[20]

[16] The ESO regime was considered by the Court of Appeal in *Belcher v Chief Executive of the Department of Corrections*.[21] All of Mr Belcher's relevant offending had occurred before the introduction of the regime. The Court of Appeal held that the ESO regime as it was in 2004 created a retrospective penalty contrary to ss 25 and 26 of the Bill of Rights.[22] The Chief Executive had not, in that case, sought to show that the retrospective nature of the ESO regime was justified under s 5 of the Bill of Rights.[23] The Court of Appeal rejected Mr Belcher's submission that the legislation could be given a meaning consistent with the rights in s 26 of the Bill of Rights.[24] It took the view that there was no other meaning which could be given to the provisions to avoid their retrospective effect. The Court was accordingly obliged by s 4 to apply the ESO regime despite the breach of s 26.

[17] In his report on the ESO regime as extended in 2014, the Attorney-General, the Hon Christopher Finlayson, concluded that the introduction of review requirements meant that the regime now complied with s 22 of the Bill of Rights (relating to arbitrary detention). He reported, however, that the regime was still in breach of s 26 of the Bill of Rights in that it imposed a retrospective double penalty.[25]

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20 The relationship between ss 4, 5 and 6 was considered by this Court in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

21 *Belcher*, above n 19.

22 At [47]–[49]. That conclusion accorded with the view taken by the then Attorney-General, the Hon Margaret Wilson, in her report to Parliament under s 7 of the Bill of Rights: Margaret Wilson "Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision) and Sentencing Amendment Bill" [2003] AJHR E63. Her report related to those offenders whose qualifying offences occurred before the introduction of the ESO regime.

23 At [57].

24 At [53]–[56].

25 Christopher Finlayson "Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Parole (Extended Supervision Orders) Amending Bill" [2014] AJHR J4.

[18] In the present case, neither party seeks to challenge the approach taken in *Belcher* and in the report of the Attorney-General on the 2014 amendments. We are accordingly not asked to determine whether it is correct and thus assume, without deciding, that it is. Rather, Mr Holland argues that the narrower interpretation of s 107I(2)(a) he urges on the Court is an available one which this Court is obliged to prefer under s 6 of the Bill of Rights. That is because it limits the application of the ESO regime to those whose pervasive pattern of offending is based on commission of relevant offences as defined in s 107B(2) and thus limits those who are subject to a regime that is not compliant with the Bill of Rights.

[19] For the reasons already given, we do not accept that the narrow meaning is one that "can" be given to s 107I(2)(a). The text and purpose of the ESO regime do not allow it. The narrow interpretation would deprive the court of highly relevant material in the factual inquiry whether there is a pervasive pattern of serious sexual offending. It would risk creating distortions in treatment between defendants in similar positions and unnecessary complexity. Nor does it answer the breach of the rights in s 26. The argument is not for a rights-consistent interpretation of the ESO regime but for restriction of its application to some offenders on a basis that would set up anomalies and for which there is no justification in the text or purpose of the legislation.

[20] This means that the first approved question must be answered in the negative. The second approved question thus falls away. If the offences under the Classification Act[26] are taken into account alongside the convictions set out at [3](a) and (d) above,[27] this shows a pervasive pattern of serious sexual offending.[28]

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[26] The offences set out above at [3](b) and (c) were we assume under the Customs and Excise Act 1996. We do not need to decide whether these would be able to be taken into account but there is a good argument they could be because by their nature they would be counted as serious sexual offending in terms of the ordinary meaning of the term and the scheme of the legislation as a whole: see above at [13].

[27] We do not need to decide whether the Classification Act offences could be taken into account if there had been no active participation by Mr Holland.

[28] The Chief Executive submitted that Parliament intended a broad enquiry into a "pervasive pattern of serious sexual offending" which does not just include convictions. In this regard the Chief Executive refers to s 107F(3). We do not need to decide whether this broader material can be taken into account, either directly or as background, as it was not necessary in this case to have regard to anything other than Mr Holland's convictions.

Result

[21] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent