NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 31/2018
[2018] NZSC 51

BETWEEN	DAVID RAYMOND LEWIS Applicant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Court:	Elias CJ, O'Regan and Ellen France JJ
Counsel:	A J Bailey for Applicant R K Thomson for Respondent
Judgment:	13 June 2018

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted in 2012 on a number of charges of historical sexual offending involving two victims during the periods 1976 to 1982 and 1994 to 1996. He was imprisoned for six and a half years. His offending meant that he was an eligible offender in terms of s 107C of the Parole Act 2002 and thus a person against whom an extended supervision order (ESO) could be made.

[2] On 10 August 2017, the District Court made an ESO against the applicant for a period of seven years.[1]

[3] The applicant appealed to the Court of Appeal, raising two grounds of appeal. The first was that the District Court Judge had no jurisdiction to make an ESO. The second was that, if the District Court did have jurisdiction, the Judge had been wrong to find that there was a high risk that the applicant would commit a relevant sexual offence, such a finding being a necessary pre-requisite to the making of an ESO. The Court of Appeal rejected both of these grounds.[2]

[4] The applicant now seeks leave to appeal against the Court of Appeal decision, but only on the jurisdiction point.

[5] The argument which the applicant wishes to make if leave is granted can be summarised as follows:

(a) The respondent may apply for an ESO against an "eligible offender". The applicant accepts that he is an eligible offender.[3]

(b) The application must be accompanied by the report of a health assessor.[4]

(c) The health assessor's report must address (among other things) whether "there is a high risk that the offender will in future commit a relevant sexual offence".[5]

(d) Section 107B of the Parole Act defines three different terms, "relevant offence", "relevant sexual offence" and "relevant violent offence". In essence, "relevant sexual offence" means a sexual offence involving physical contact between the offender and the victim. It is a subset of

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1 *Chief Executive of the Department of Corrections v Lewis* [2017] NZDC 16804 (Judge O'Driscoll) [*Lewis* (DC)].
2 *Lewis v Chief Executive of the Department of Corrections* [2018] NZCA 99 (Brown, Brewer and Collins JJ) [*Lewis* (CA)].
3 As defined in s 107C of the Parole Act 2002.
4 Section 107F(2).
5 Section 107F(2A)(a)(ii).

the broader term "relevant offence" which also includes relevant violent offences and some offences under the Films, Videos, and Publications Classification Act 1993.

(e) The applicant argues that, while the health assessor's report made reference to "relevant offending" and "sexual offending", it did not clearly address whether the applicant would in the future commit a *relevant sexual offence*. He also argues that, when the health assessor was cross-examined in the District Court, she was vague about the statutory terms, "relevant offence" and "relevant sexual offence".

(f) The District Court had jurisdiction to make an ESO only if it was satisfied that the applicant had a pervasive pattern of serious sexual offending and that there was a high risk that the applicant would in future commit a relevant sexual offence. The District Court Judge could come to this view only after "having considered the matters addressed in the health assessor's report as set out in s 107F(2A)".[6]

(g) Because, in the applicant's submission, the health assessor's report did not address the question "whether … there is a high risk that the offender will in future commit a relevant sexual offence", the Judge could not have considered "the matters addressed in the health assessor's report as set out in s 107F(2A)", because that matter was not addressed in the health assessor's report.

(h) Thus, the Judge did not have jurisdiction to make the ESO.

[6] The Court of Appeal rejected this argument on the facts, upholding the District Court's assessment that the health assessor had, in fact, addressed the question as to whether there was a high risk that the offender would in future commit a relevant sexual offence.[7] It came to that conclusion after considering carefully the health

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6 Section 107I.

7 *Lewis* (DC), above n 1, at [77]–[92]; *Lewis* (CA), above n 2, at [25]–[34].

assessor's report and her answers to questions in cross-examination in the District Court.

[7] The applicant argues that ensuring that courts considering the making of an ESO "robustly scrutinise whether a Health Assessor's Report addresses the relevant statutory criteria" is a matter of general and public importance. Thus, he argues, it is in the interests of justice that leave to appeal be granted.[8]

[8] We accept that it is a matter of importance that a health assessor preparing a report to be provided to the court considering whether to make an ESO carefully addresses the statutory criteria. It is equally important that a Judge considering whether to make an ESO is vigilant to ensure that this occurs. However, we see the present case as turning on a question of interpretation of the health assessor's report and her evidence in the District Court, a question on which the District Court and Court of Appeal reached concurrent findings. In effect, we are being asked to act as a second Court of Appeal on the question of interpretation of the health assessor's report, which is not this Court's function. We do not see any risk of a miscarriage of justice arising if we do not give leave in the present case.

[9] For these reasons, the application for leave to appeal is dismissed.

Solicitors:
Patient & Williams, Christchurch for Applicant
Crown Law Office, Wellington for Respondent

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8 Senior Courts Act 2016, s 74(2); Supreme Court Act 2003, s 13(2).