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 77/2021
[2021] NZSC 142

BETWEEN	LLOYD ALEXANDER MCINTOSH Applicant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Court: William Young, O'Regan and Williams JJ

Counsel: A J Bailey for Applicant
B C L Charmley for Respondent

Judgment: 27 October 2021

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant has been subject to two successive extended supervision orders (ESOs) each for the maximum period of 10 years. The first ESO was imposed after Mr McIntosh had completed a prison sentence for sex offending, after a hearing in which the imposition of an ESO was not opposed, but its duration was. The first ESO commenced on 15 March 2005.[1] It expired on 29 April 2015.[2] The second ESO was

---

1 *Chief Executive of Department of Corrections v McIntosh* HC Christchurch CRI-2004-409-162, 8 December 2004.

2 The first ESO did not expire until 29 April 2015 because the applicant was subject to two short sentences of imprisonment during this period.

imposed in May 2015, but took effect from the expiry of the first ESO.[3] The granting of the second ESO was also not opposed.

[2] When an offender has been subject to an ESO for 15 years, the sentencing court must conduct a review of the ESO and either confirm or cancel it.[4] In the applicant's case, this review was undertaken in November 2020 and the second ESO was confirmed by the High Court in a judgment delivered on 3 December 2020.[5]

[3] The applicant appealed to the Court of Appeal against the confirmation of the second ESO, but his appeal was dismissed.[6]

[4] The applicant now seeks leave to appeal to this Court against the Court of Appeal judgment. The applicant raises four points which he seeks to pursue on appeal if leave is granted.

[5] The first relates to the interpretation of s 107IAA(1)(d) of the Parole Act 2002.

[6] Section 107RA of the Parole Act provides that a court undertaking a review of an ESO may confirm the ESO only if it is satisfied that there is a high risk that the offender will commit a relevant sexual offence within the remaining term of the order or a very high risk that the offender will commit a relevant violent offence within the remaining term of the order.[7] It is the former criterion which is in issue in this case.

[7] Under s 107IAA(1), a court may determine that there is a high risk that an offender will commit a relevant sexual offence only if it is satisfied that four requirements are met. One of these, set out in s 107IAA(1)(d), is that the offender:

> displays either or both of the following:
>
> (i) a lack of acceptance of responsibility or remorse for past offending:

---

3 *Chief Executive Department of Corrections v McIntosh* [2015] NZHC 999.
4 Parole Act 2002, s 107RA.
5 *Chief Executive of the Department of Corrections v McIntosh* [2020] NZHC 3184 (Dunningham J) [HC judgment].
6 *McIntosh v Chief Executive of the Department of Corrections* [2021] NZCA 218 (Gilbert, Simon France and Edwards JJ) [CA judgment].
7 Parole Act, s 107RA(6).

(ii) an absence of understanding for or concern about the impact of his or her sexual offending on actual or potential victims.

[8] The High Court Judge accepted that the applicant had acquired a degree of understanding about the impact of his sexual offending on actual victims, had accepted responsibility for his offending and had shown a degree of remorse to the health assessors who had reported to the Court.[8] However, she considered that s 107IAA(1)(d) should be interpreted so as to require that the acceptance of responsibility or remorse for past offending, or understanding for or concern about the impact of sexual offending on victims, had to be at a level that was sufficient to operate to materially reduce the risk that the offender would commit a relevant sexual offence in the future.[9]

[9] That interpretation was upheld by the Court of Appeal. It said that, when interpreting s 107IAA(1)(d), the focus must be on whether the offender's acceptance of responsibility, remorse, understanding or concern are material in the sense that they are present to a sufficient degree to mitigate the risk the offender poses.[10] It considered that Parliament could not have intended that *any* degree of presence of the protective characteristics set out in s 107IAA(1)(d), no matter how limited and whether or not in any way operative to mitigate the risk, would preclude a person from being assessed as high risk.[11] It rejected the submission made on behalf of the applicant that it was irrelevant whether the offender's level of acceptance, remorse, understanding or concern would have any protective effect against the risk the offender would commit a relevant sexual offence.[12]

[10] The applicant wishes to pursue in this Court the same argument as he advanced in the Court of Appeal.

[11] The applicant argues that as s 107IAA applies to every application for an ESO, every application to cancel an ESO and every review of an ESO, the interpretation of the provision is a matter of general or public importance.[13] He argues that, as the Court

---

8 HC judgment, above n 5, at [45].
9 At [40].
10 CA judgment, above n 6, at [23].
11 At [23].
12 At [26].
13 Senior Courts Act 2016, s 74(2)(a).

of Appeal judgment is now the leading judgment on the interpretation of s 107IAA(1)(d), leave should be granted so that his argument that any degree of acceptance of responsibility, remorse, understanding or concern is sufficient to rule out a finding that the criterion in s 107IAA(1)(d) is met can be addressed by this Court.

[12] While we accept that the proper construction of the section is a matter of significance, we do not consider that the argument the applicant wishes to raise has sufficient prospects of success to justify a further appeal to this Court on this point.

[13] The second point the applicant wishes to raise relates to the definition of "relevant sexual offence" in s 107B(2) of the Parole Act. That definition sets out a list of offences. The High Court Judge mistakenly thought that offences under the Films, Videos, and Publications Classification Act 1993 were included in this list.[14] The Court of Appeal accepted this was an error but considered that it had no material effect on the outcome because the applicant had never committed any offence under the Films, Videos, and Publications Classification Act and no one considered there was any prospect he might do so in the future.[15] The applicant wishes to contest that finding in this Court. We do not see it as meeting the criteria for leave: the mistake was identified, no clarification of the law is required and, for the reasons given by the Court of Appeal, the error was inconsequential in the present case. The point is specific to the present case so no matter of general importance arises and there is no appearance of a miscarriage.[16]

[14] The health assessor who was called by the respondent to provide the required report under s 107F relied in part on actuarial tools which refer to the risk of committing sexual offending. The actuarial tools are calibrated by reference to a class of offending that is broader than the concept of "relevant sexual offence" which, as mentioned earlier, is defined by reference to a list of offences in s 107B(2) of the Parole Act. The Court of Appeal accepted the broader scope of offending to which the actuarial tools apply, but did not see this as preventing the tools from contributing to the assessment of the risk that an offender will commit a relevant sexual offence in the

---

14 HC judgment, above n 5, at [13].
15 CA judgment, above n 6, at [31]–[32].
16 Senior Courts Act, s 74(2)(a) and (b).

future, alongside all of the other evidence that is available to the court.[17] While the report writer drew on actuarial tools in reaching a conclusion that there was a high risk that the applicant would commit a relevant sexual offence, she also applied her clinical judgement in relation to the applicant himself.

[15] Again, we do not consider this raises any matter of general or public importance and we see no risk of a miscarriage arising if leave is not given on this point.

[16] The health assessor called by the applicant concluded that the relevant risk was in the "moderate-high to high risk" range, so there was some degree of consensus among the experts on this. The applicant argues that the Court of Appeal was wrong to conclude that the High Court Judge's assessment was not flawed because she failed to confine her attention to relevant sexual offences when assessing the applicant's risk.[18] This is the third point he wishes to pursue if leave is given.

[17] We see this point as specific to the present case and, having considered the argument and the reports that were before the High Court Judge, we are satisfied that there is no risk of a miscarriage in the event that leave on this point is declined.

[18] The fourth point the applicant wishes to raise relates to the health assessors who gave evidence in the High Court. As mentioned, one health assessor concluded the applicant was at high risk of committing a relevant sexual offence while the other considered he was in the "moderate-high to high risk" range. The applicant wishes to argue that the Court of Appeal was wrong to reject his submission that the High Court Judge had erred because she did not set out the reasons for which she rejected the latter view that the risk was in the "moderate-high to high risk" range.

[19] We see this point as specific to the present case and raising no matter of general or public importance. What the statute requires is that the judge be "satisfied" that the offender is at high risk of committing a relevant sexual offence. As the Court of Appeal said, the Judge was well-justified on the evidence to be satisfied that there was

---

17 At [35].
18 At [37].

a high risk in the present case.[19] For that reason, we do not see any risk of a miscarriage arising.

[20] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

[19] At [41].