



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

D (SC 31/2019) v NEW ZEALAND POLICE

(SC 31/2019) [2021] NZSC 2

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Anonymisation

The appellant’s name has been anonymised in the judgment. The Court has also recalled and reissued its earlier leave judgment in anonymised form.¹

Introduction

The appeal concerned the interpretation and application of s 9 of the Child Protection (Child Sex Offender Government Agency Registration) Act 2016 (the Registration Act). Under s 9(1) of the Registration Act, where a court sentences a person to a non-custodial sentence for a qualifying offence, the court may order that the person be placed on the Child Sex Offender Register (a registration order). The Registration Act came into force on 14 October 2016.

Background

The appellant pleaded guilty to two offences under the Films, Videos, and Publications Classification Act 1993. One of the offences related to the possession of child pornography, a “qualifying offence” for the purposes of the Registration Act. This offending occurred in May 2016, before the Registration Act came into force. The appellant was sentenced to nine months’ home detention (a non-custodial sentence) in January 2018. The District Court also made a registration order under s 9(1) of the Registration Act.

¹ See the reasons for anonymisation in *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2 at [136]–[147] per Winkelmann CJ and O’Regan J (with whom Glazebrook J agreed at [265] and Ellen France J agreed at [159]) and [312]–[315] per William Young J.

The appellant appealed the making of the registration order to both the High Court and Court of Appeal. Both appeals were dismissed, and the registration order was upheld. The appellant was granted leave to appeal to the Supreme Court.

Issues on appeal

The appeal raised two primary issues.

The first was whether the Registration Act applied to the appellant at all, given he committed the qualifying offence before the Act came into force. Section 6(1) of the Sentencing Act 2002 provides that where the penalty for an offence has been varied between the time the offence was committed and the time of sentencing, the offender is entitled to the benefit of the lesser penalty. Subsection (2) provides that the offender is entitled to the benefit of the lesser penalty despite any other enactment or rule of law. The same right is conferred on everyone charged with a criminal offence by s 25(g) of the New Zealand Bill of Rights Act 1990.

The second issue was whether a registration order should have been made in the appellant's case (assuming the Registration Act applied). This issue required the Court to consider the correct approach when a court is deciding whether to make a registration order under s 9 of the Registration Act. Argument on this issue focused on the relevance of the New Zealand Bill of Rights Act to decisions under s 9.

The Supreme Court's decision

By a majority, comprising Winkelmann CJ, O'Regan and Ellen France JJ, the Supreme Court has allowed the appeal and quashed the registration order made in the District Court under s 9(1) of the Registration Act.

Does the Registration Act apply to the appellant?

On the first issue, Winkelmann CJ, O'Regan and Ellen France JJ held that s 9 of the Registration Act does not apply to offenders such as the appellant who committed a qualifying offence before the Act came into force but were convicted and sentenced after that date. They found that the Registration Act is not sufficiently clear to displace the presumption against retrospective penalties in s 6 of the Sentencing Act in relation to offenders in this category. The appellant was therefore not eligible to be placed on the register. This was sufficient to allow the appeal and quash the registration order made against the appellant.

In contrast, William Young and Glazebrook JJ considered that s 9 of the Registration Act applies to all offenders convicted of a qualifying offence and sentenced to a non-custodial sentence after the Act came into force, irrespective of when the offence was committed (as well as all those convicted before and sentenced after). In their view, this is the only available interpretation of s 9.

Should a registration order have been made?

Although a majority had already held the appellant was not subject to the Registration Act, members of the Court went on to explain how s 9 would operate had it found otherwise.

Winkelmann CJ, Glazebrook and O'Regan JJ held that the exercise undertaken by the court when considering making a registration order is a two-stage process. First, the court must be

satisfied that the offender poses a real or genuine risk to the lives or sexual safety of a child or children generally. Second, the court must be satisfied this risk is of sufficient gravity to justify the making of a registration order with the consequent impacts on the rights of the offender.

William Young and Ellen France JJ considered that where an offender is sentenced to home detention and poses a real or genuine risk to the safety of children, there will not be a great deal of scope for the court to exercise its discretion against making a registration order. They do not read into s 9 a requirement that an order cannot be made unless the sentencing judge regards the incidents of a registration order as proportionate to the particular risks posed by the offender.

On the facts of the case, Winkelmann CJ and O'Regan J considered that the appellant still poses a real risk to the sexual safety of children. However, they considered that this risk was not of sufficient gravity to justify the making of a registration order. They would have accordingly allowed the appeal even if they had found that the Registration Act applies to the appellant.

Glazebrook J applied the same approach as Winkelmann CJ and O'Regan J but reached a different result. In her view, the registration order was proportionate to the level of risk that the appellant posed at the time of sentencing and the serious harm that would result from any repeat of the offending. She would have dismissed the appeal.

William Young J also considered that the appellant posed a real or genuine risk at the time of sentencing. On his approach, this was a sufficient basis for the making of a registration order. He would have dismissed the appeal.

Given her view that the Registration Act does not apply to the appellant, Ellen France J did not consider it necessary to express a view as to whether a registration order should have been made under her approach to s 9 if the Act did apply.

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