IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 108/2023
[2024] NZSC 22

BETWEEN	TOMMY APERA PORI Applicant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Court: Ellen France, Kós and Miller JJ

Counsel: P N Allan for Applicant
C J Boshier for Respondent

Judgment: 5 March 2024

JUDGMENT OF THE COURT

A The application for an extension of time to apply for leave to appeal is granted.

B The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant has filed an application for leave to appeal from a decision of the Court of Appeal.[1] The Court dismissed his appeal against the imposition of a public protection order under the Public Safety (Public Protection Orders) Act 2014 (PPO Act).[2]

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1 *Pori v Chief Executive of the Department of Corrections* [2023] NZCA 407 (Cooper P, French and Brown JJ) [CA judgment].

2 *Chief Executive of the Department of Corrections v Pori* [2021] NZHC 2305 (Dunningham J) [PPO judgment].

Background

[2] Under s 8 of the PPO Act, the Chief Executive of the Department of Corrections may apply to the High Court for a public protection order against a person who meets the threshold for an order on the basis there is a very high risk of imminent serious sexual or violent offending by the person. The Chief Executive made an application for a public protection order in relation to the applicant.

[3] The applicant has a history of sexual offending both in the Cook Islands, where he was born, and in New Zealand. After completing a sentence of imprisonment imposed for a sexual offence against a child in 2006, an Extended Supervision Order (ESO) was imposed against the applicant in 2011. In 2017, a further ESO (with intensive monitoring) was imposed for the balance of the term of the original ESO.

[4] Where a court is satisfied a public protection order can be made but it appears that the respondent may be mentally disordered or intellectually disabled, s 12(2) of the PPO Act provides that instead of making a public protection order, the court may:

> … direct the chief executive to consider the appropriateness of an application in respect of the respondent under section 45 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or under section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

[5] During the proceedings in respect of the public protection order application, concerns were raised about the applicant's mental health, intellectual functioning and capacity.[3] Now in his early 60s, the applicant suffers from degenerative dementia. Dunningham J accordingly directed the Chief Executive to consider the appropriateness of an application under s 45 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the Mental Health Act) or under s 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.[4]

[6] Subsequently, the High Court was advised that the Chief Executive wished to continue with the application for a public protection order. In deciding to make a

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3 A litigation guardian was appointed, and appointment of a litigation guardian has continued to date.

4 *Chief Executive of the Department of Corrections v Pori* [2020] NZHC 1446 (Dunningham J) [interim detention judgment] at [62].

public protection order, the Judge found that "given the unanimity of the expert opinion, supported by evidence of ongoing offence-paralleling behaviour even while in highly supervised environments", the applicant posed a very high risk of imminent serious sexual offending.[5] The Judge also found that the applicant has a "mental disorder" as defined in the Mental Health Act.[6] Dunningham J said that meant it was necessary to decide whether to direct the Chief Executive to make an application under s 45 as "a more appropriate response" than a public protection order.[7] In determining that a public protection order was the appropriate response, the Judge considered the expert evidence as to the applicant's mental state, and the nature of the care, treatment and supervision he needed. The conclusion was that there was "no obvious benefit" to the applicant in being considered for an order under the Mental Health Act.[8]

[7] Subsequently, a prison detention order was made against Mr Pori.[9]

The proposed appeal

[8] The applicant says the proposed appeal would clarify the proper approach to s 12(2) of the PPO Act. In particular, the applicant argues s 12(2) should be interpreted in a way that gives effect to the principle in s 5(c) of the PPO Act, namely, that the court must have regard to the principle that "a public protection order should not be imposed on a person who is [relevantly] eligible to be detained under the Mental Health" Act. The applicant says this meant that the respondent had to make a formal decision about the appropriateness of an application under s 45 of the Mental Health Act. Further, the applicant argues the formal decision should be subject to review, and that the High Court should not proceed to make an order unless satisfied such a decision (that is, to make a public protection order) has been properly made. The applicant says that did not occur here as no formal decision not to pursue the pathway under the Mental Health Act was made by the Chief Executive.

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5 PPO judgment, above n 2, at [49].
6 PPO judgment, above n 2, at [61]; s 2.
7 PPO judgment, above n 2, at [61].
8 PPO judgment, above n 2, at [95].
9 *Chief Executive of the Department of Corrections v Pori* [2022] NZHC 3581 (Nation J) at [137].

[9] The applicant also argues that the High Court was acting contrary to s 5(c) by effectively requiring an order under the Mental Health Act to have an "obvious benefit" before that route would be preferred over a public protection order.

Our assessment

[10] This Court may wish at some point to consider questions about the processes required by s 12(2) and its interaction with s 5(c). However, we do not consider the present case is an appropriate one to address those issues. Essentially, this is a case where the High Court insisted on justification for not taking the alternative routes; evidence justifying the proposed approach was provided by the respondent; and that evidence was considered by the Judge.

[11] It is relevant in this respect that the Court of Appeal said it was "self-evident" that if a direction was made under s 12(2), the Chief Executive was obliged to consider the appropriateness of a s 45 application.[10] The Court also said that while there was no express statutory requirement to do so, the Chief Executive was then required to advise the Court of the reasons for preferring the public protection order application "in sufficient detail to satisfy the Court that pursuit of the public protection order application is the appropriate course."[11] The Court found this was what transpired in the present case, concluding that:[12]

> [The] evidence clearly established that Mr Pori's condition was not amenable to treatment and, as Dr Monasterio explained, he was unlikely to be detained subject to the Mental Health Act.
>
> (footnotes omitted)

[12] In any event, apart from the fact the Court did not address the point the applicant wishes to raise about judicial review, the approach taken by the Court of Appeal essentially is consistent with the processes the applicant says should apply. The judicial review point had not been fully argued and, on the Court of Appeal's approach, it was not necessary to resolve that issue.

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10 CA judgment, above n 1, at [31].

11 At [33].

12 At [36]. The Court of Appeal sought and was provided with a memorandum from counsel for the respondent which set out the expert reports obtained by the respondent and the departmental process followed.

[13] In the circumstances, the criteria for leave to appeal are not met.[13]

Result

[14] The application for leave to appeal is out of time but the delay is not lengthy and is explained. The application for an extension of time to apply for leave to appeal is granted.

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

Solicitors:
Raymond Donnelly & Co, Christchurch for Respondent

[13] Senior Courts Act 2016, s 74(2).