



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

7 May 2024

MEDIA RELEASE

R (SC 64/2022) v CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS

(SC 64/2022) [2024] NZSC 47

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.

SUPPRESSION

Publication of the name, address, occupation or identifying particulars of the appellant is prohibited by s 201 of the Criminal Procedure Act 2011 and pursuant to ss 107RA and 107G of the Parole Act 2002, as well as by the suppression order made by the High Court which remains in force.

Publication of the names, addresses, occupations or identifying particulars of any complainants is prohibited by s 203 of the Criminal Procedure Act.

WHAT THIS JUDGMENT IS ABOUT

This appeal is about the relationship between extended supervision orders (ESOs) and compulsory care orders (CCOs) under the relevant legislation. An ESO allows the imposition of parole-like conditions on high-risk sexual or serious violent offenders. A CCO provides for compulsory care in a designated facility for certain individuals with an intellectual disability, including those declared unfit to stand trial. The appellant, R, is subject to both orders. He challenges the legality of the ESO, which was made on the application of the respondent Chief Executive. Three questions arose for consideration by this Court. First, does the statutory scheme permit concurrent ESO and CCOs? Secondly, could GPS monitoring be imposed under a CCO? Thirdly, how might the New Zealand Bill of Rights Act 1990 (the NZBORA) affect the exercise of the courts’ powers of review of the continuation of an ESO? Procedural issues arising in the appeal have, however, limited full examination of the issues.

BACKGROUND

R is 69 years old, and has spent most of his life in institutional care. He has an intellectual disability and has been found unfit to stand trial. He is prone to sexually offend against women and girls. The first such allegation was made when he was 14. For the most part he has been dealt with as a special patient in mental health facilities. He has a tendency to escape from secure care.

R is presently subject to both an ESO, made in 2017 under the Parole Act 2002, and a CCO, made in 2019 under the Criminal Procedure (Mentally Impaired Persons) Act 2003 and governed by the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (the IDCCR Act). In July 2022, under the CCO, he was moved from a secure facility into supervised care, where he remains. The conditions of the ESO are suspended while the CCO remains in force, with the exception of an electronic monitoring condition which allows the respondent to track R's location using a GPS monitoring bracelet in order to monitor his compliance with his whereabouts and curfew conditions. The CCO, which R does not oppose, is therefore the primary order governing his day-to-day life.

PROCEDURAL HISTORY

Under s 107RA of the Parole Act, the High Court must review R's ESO every five years and, following the review, either confirm the ESO or cancel it. On 31 August 2021, the Court confirmed R's ESO on the basis that he continued to pose a high risk of committing further sexual offences and that the ESO was needed in the event the CCO came to an end.

On 29 March 2022, the Court of Appeal dismissed R's appeal and upheld the confirmation of the ESO, albeit on different grounds to the High Court. Although the ESO was not strongly justified by reason of the future protection it offered, it was providing important flexibility in R's care arrangements by allowing the imposition of conditions not available under the CCO alone. The coexistence of the orders could therefore be justified by the combination of public safety measures and broader care options it enabled.

On 11 April 2023, the Supreme Court granted R leave to appeal the decision of the Court of Appeal. The approved question was how the NZBORA affects the exercise of the court's discretion to renew an ESO when the individual concerned is also subject to a CCO.

SUBMISSIONS

R submitted that an ESO cannot lawfully be imposed on an individual who is already subject to a CCO, because the penal nature of an ESO is inconsistent with the care and rehabilitation focus of the IDCCR Act. He further submitted that even if the orders could run concurrently, the ESO was unlawful in this case for two reasons. First, the ESO was confirmed while a public protection order (PPO) application was still unresolved—a result which would have been barred under the Parole Act had the applications been made in a different order. Secondly, the ESO constituted an unjustified limit on his rights under ss 9, 19, 22 and 26 of the NZBORA. Counsel for R also submitted orally that electronic monitoring could in fact be imposed under the CCO on a liberal interpretation of the IDCCR Act.

The respondent abandoned its original argument that the ESO was necessary to protect the public from the risk of R re-offending in favour of a submission that the ESO was instead substantially liberty-enhancing and therefore rights-affirming for R. This was a rights-based adaptation of a secondary argument advanced orally by the respondent in the Court of Appeal.

The respondent submitted electronic monitoring could not be imposed under a CCO alone. The respondent also sought leave to adduce updating evidence on R's CCO conditions shortly before the hearing, in support of its revised argument.

SUPREME COURT DECISION

The Supreme Court has unanimously allowed R's appeal. The review of his ESO is remitted to the High Court for reconsideration in light of the Court's judgment and any further evidence adduced in the High Court.

A key argument underpinning the decisions of the High Court and the Court of Appeal was abandoned by the respondent. Counsel for R had not had the opportunity to obtain his informed instructions regarding the respondent's new evidence. Nor were they able to test the evidence by cross-examination. Further, R's position on the respondent's revised argument had not been adequately informed or articulated. On that basis, the Court concluded that the appeal should be formally allowed; that the review should be remitted to the High Court for reconsideration; and that it was ultimately unnecessary to address the approved question on which leave was granted. Given this result, the Court granted the respondent leave to adduce the updating evidence.

The Court addressed two specific matters raised by the parties. First, it held that it is possible for an ESO and a CCO to be imposed concurrently, though s 107P of the Parole Act automatically suspends ESO conditions while a CCO is in place, subject to reactivation of individual conditions by the Parole Board. Further, there was nothing to prevent the respondent making an ESO application before a PPO application and having the ESO renewed thereafter. The validity of the ESO could not be challenged on this basis. Secondly, the Court questioned whether the IDCCR Act could be read so as to permit the imposition of electronic monitoring under a CCO, but declined to express a final view on that matter (or on the related question of whether electronic monitoring could be used with a care recipient's informed consent).

As to the approved question, the Court acknowledged the possibility that the use of electronic monitoring under an ESO might practically allow R greater freedom than would be available under the CCO alone, counter-intuitive though that might appear. However, it noted that such an object may not fall within the purpose for which the ESO regime was enacted, which is to protect the public from the risk of further serious sexual or violent offending, and that the restrictions created by imposing an ESO must still be demonstrably justified in a free and democratic society, given s 5 of the NZBORA. Ultimately, these issues needed to be evaluated against the background of properly tested facts.

RESULT

R's appeal has been allowed and the proceeding is remitted to the High Court for reconsideration in light of the Supreme Court's judgment and any further evidence adduced in the High Court. Pending that Court's decision, R remains subject to the ESO.

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