



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

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MEDIA RELEASE

ATTORNEY-GENERAL and ANOR v CHISNALL

(SC 26/2022)

Hearing in the Supreme Court 2.15pm Monday 17 October — Tuesday 18 October

CASE HISTORY SYNOPSIS

This synopsis is provided to assist in understanding the history of the case and the issues to be heard by the Court. It does not represent the views of the panel that will hear the appeal in the Supreme Court. The synopsis does not comprise part of the reasons for the judgment of the Court of Appeal. A direct link to the judgment is included at the end of this synopsis.

Glossary

ESO = Extended supervision order

PPO = Public protection order

Public Safety Act = Public Safety (Public Protection Orders) Act 2014

Background

A sentencing court may make ESOs pursuant to pt 1A of the Parole Act 2022. The court must be satisfied that the eligible offender has (or has had) a pervasive pattern of serious sexual or violent offending, and that there is a high risk the offender will in future commit a relevant sexual offence and/or there is a very high risk the offender will in future commit a relevant violent offence.

The High Court may make PPOs pursuant to s 13 of the Public Safety Act. The High Court must be satisfied on the balance of probabilities that the threshold for a PPO has been met and there is a very high risk of imminent serious sexual or violent offending once the person is released into the community from prison or, in any other case, the person is left unsupervised.

Both regimes are for the purpose of public protection and enable (among other things) the supervision and/or detention of a person who, after completing a sentence for sexual or violent



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offending, is assessed as presenting a high or very high risk of committing further sexual or violent offending.

Procedural history

Mr Chisnall has multiple convictions for sexual offending and was due for release from prison in April 2016 after serving an 11-year sentence. After many procedural steps he was made subject to a final PPO on 27 January 2021. While subject to an interim protection order pending reconsideration of an application against him for a PPO, he applied to the High Court for declarations that the ESO and PPO regimes are inconsistent with various rights provided by the New Zealand Bill of Rights Act 1990 (the Bill of Rights). The provisions of the Bill of Rights that were the main focus of the application were s 25(g) (freedom from an increased penalty between the commission of an offence and sentencing) and s 26(2) (freedom from second penalty). Other provisions of the Bill of Rights that were under consideration included ss 9, 22, 23(5), 25(a), (c) and (d), and s 26(1).

Under s 5 of the Bill of Rights, the rights and freedoms contained in that Act “may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. The essential issue for the Court was whether the ESO and PPO regimes impose an unjustifiable penalty (and therefore an unjustified breach of a right contained in the Bill of Rights).

The High Court found that an ESO is penal in nature, and a PPO is presumptively not a penalty. To the extent that an ESO was unjustified, the Court made the following declaration:

Section 107C(2) of the Parole Act 2002 is inconsistent with section 26(2) of the New Zealand Bill of Rights Act 1990, to the extent that it permits the retrospective application of section 107I(2) of the Parole Act 2002.

Mr Chisnall appealed to the Court of Appeal, arguing that the High Court erred by failing to declare that the Public Safety Act and s 107I(2) of the Parole Act are inconsistent with s 26(2) of the Bill of Rights, and that both the ESO and PPO regimes are inconsistent with the other provisions of the Bill of Rights mentioned above. The Attorney-General cross-appealed, arguing that the High Court erred in finding that an ESO is penal in nature and therefore erred in making the above declaration.

The Court of Appeal allowed Mr Chisnall’s appeal and dismissed the Attorney-General’s cross-appeal. It found that ESOs and PPOs are penal in nature. To the extent that the regimes were unjustified, the Court made the following declarations:

- (a) Part 1A of the Parole Act 2002 is inconsistent with s 26(2) of the New Zealand Bill of Rights Act 1990, and that inconsistency has not been justified under s 5 of that Act.



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- (b) The Public Safety (Public Protection Orders) Act 2014 is inconsistent with s 26(2) of the New Zealand Bill of Rights Act 1990, and that inconsistency has not been justified under s 5 of that Act.

This appeal

The Supreme Court granted the Attorney-General leave to appeal, and Mr Chisnall leave to cross-appeal, on the following two approved questions:

- (a) Whether the Court of Appeal was correct to make declarations that Part 1A of the Parole Act 2002 [extended supervision orders] and the Public Safety (Public Protection Orders) Act 2014 [public safety orders] are inconsistent with s 26(2) of the New Zealand Bill of Rights Act 1990 [the Bill of Rights]; and
- (b) Whether the Court of Appeal was correct not to make declarations that extended supervision orders and public safety orders are inconsistent with ss 9, 22, 23(5), 25(a), (c) and (d), and 26(1) of the Bill of Rights.

The Court acknowledged that the Attorney-General does not seek to challenge the finding that ESOs and PPOs are penal in nature for the purposes of the protection in s 26(2) of the Bill of Rights against the imposition of a second penalty. Rather, the argument in support of the appeal will focus on the appropriateness of making the declarations when, on the case for the Attorney-General, the discretionary powers to make ESOs and PPOs can and must be interpreted consistently with the Bill of Rights.

Viewing of hearing

The courtroom is open to the public for viewing.

This hearing of the appeal will be live-streamed. Details about access to the live-stream and the conditions of access will be posted on the [Courts of New Zealand website](#) shortly before the hearing. No recording is permitted.

Contact person:

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High Court decision: [\[2019\] NZHC 3126](#) (28 November 2019).

Court of Appeal decisions: [\[2021\] NZCA 616](#) (22 November 2021); and [\[2022\] NZCA 24](#) (22 February 2022).

Supreme Court leave decision: [\[2022\] NZSC 77](#) (22 June 2022).