



**Supreme Court of New Zealand
Te Kōti Mana Nui**

1 AUGUST 2017

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

***MARK DAVID CHISNALL v THE CHIEF EXECUTIVE OF THE
DEPARTMENT OF CORRECTIONS***

(SC 13/2017) [2017] NZSC 114

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

The Supreme Court has dismissed an appeal by Mr Chisnall against the making of an interim detention order detaining him under the Public Safety (Public Protection Orders) Act 2014 after his release from prison.

The interim order was made because an application, as yet undetermined, has been made for a public protection order with respect to Mr Chisnall. Such orders authorise continued detention after the date of release of those convicted of qualifying serious sexual or violent offences where the court is satisfied on the balance of probabilities that the person concerned poses a “very high risk of imminent serious sexual or violent offending”. Those subject to public protection orders are detained in secure residences under the management of the Department of Corrections. The orders continue until further order of the court.

The Court has concluded unanimously that the High Court and Court of Appeal were correct to conclude on the evidence that an interim detention order was necessary to meet the risk that Mr Chisnall posed, being a “very high risk of imminent serious sexual or violent offending”, if released unsupervised from prison. The Supreme Court was also unanimous that the risk could not properly be met by the imposition of conditions of release either under the Public Safety Act or the Parole Act 2002.

Mr Chisnall was convicted of serious sexual offending and given an effective sentence of 11 years' imprisonment. He was due to be released from prison on 27 April 2016 on the expiry of his sentence.

On 15 April 2016, the Chief Executive of the Department of Corrections applied for a public protection order in respect of Mr Chisnall under the Public Safety Act.

As an alternative to a public protection order, the Chief Executive of the Department of Corrections applied under Part 1A of the Parole Act for an extended supervision order against Mr Chisnall, with intensive monitoring conditions. Extended supervision orders can be made in respect of those who have completed sentences for serious qualifying offences where the court is satisfied that the person has "a pervasive pattern of serious sexual or violent offending" and there is "a high risk that the offender will in future commit a relevant sexual offence" or "a very high risk that the offender will in future commit a relevant violent offence". Extended supervision orders do not formally entail detention but can involve intensive monitoring and require residence at a specified address, conditions which are in substance deprivation of liberty. Extended supervision orders cannot be made for a term of more than 10 years and intensive monitoring conditions lapse after 12 months.

The applications made by the Chief Executive were supported by reports from three psychologists directed at the statutory criteria for orders under the Public Safety Act and the Parole Act.

The Chief Executive applied for interim orders to cover the period between Mr Chisnall's date of release and the hearing of applications for orders under the Public Safety Act or the Parole Act. Both Acts provide for the making of interim orders.

The interim order first sought by Chief Executive was an order for the interim detention of Mr Chisnall under s 107(2) of the Public Safety Act. Such interim detention orders authorise detention by a person and in a place specified in the order.

In the alternative, should the court not agree to make an interim detention order, the Chief Executive asked that strict conditions of release be imposed on Mr Chisnall on an interim basis either under s 107(3) of the Public Safety Act or under s 107FA of the Parole Act. Section 107(3) of the Public Safety Act allows a court to suspend an interim detention order subject to conditions imposed by the court. Section 107FA of the Parole Act empowers the court to impose an interim supervision order including with the special conditions available under an extended supervision order.

Mr Chisnall opposed the making of an interim detention order under the Public Safety Act but was prepared to agree to interim supervision with intensive monitoring conditions.

In the High Court, Fogarty J ordered Mr Chisnall's interim detention under s 107 of the Public Safety Act. The Judge accepted that an order for interim detention would not be appropriate unless the Court was satisfied on the balance of probabilities that there was a preliminary case made out on evidence for making a final public protection order. On the evidence before him, including the reports from three psychologists assessing Mr Chisnall's risk of reoffending, the Judge was satisfied that Mr Chisnall posed a "very high risk of imminent serious sexual or violent offending" and that the order was properly available. The Court of Appeal agreed with the High Court's analysis.

Mr Chisnall appealed with leave to the Supreme Court. In earlier decisions of the High Court there had been suggestions that a lower "balance of convenience" would justify the making of an interim order. That had not been the approach taken in the present case in the High Court and Court of Appeal and was not the position taken by the parties to the present appeal. It was accepted by them that the approach taken in the High Court and endorsed by the Court of Appeal was correct. The dispute in the present appeal turned rather on whether the evidence supported the conclusion that the basis for making a public protection order was established. In part that turned on whether lesser restriction such as through the imposition of conditions under an interim supervision order was sufficient to meet the risk posed by Mr Chisnall's release and precluded the conclusion that he posed a "very high risk of imminent serious sexual or violent offending" if not subject to an interim detention order. It was also argued that the possibility of Mr Chisnall's intellectual disability or mental disorder made interim detention inappropriate.

The Supreme Court has accepted unanimously that the approach adopted in the High Court and Court of Appeal was correct and that earlier High Court decisions based on a balance of convenience should not be followed. The Supreme Court has held that a court considering an application for interim detention order must be satisfied on the basis of the evidence available at the interim hearing that a public protection order could properly be made. That requires the court to accept that the evidence available establishes on the balance of probabilities that the person poses a "very high risk of imminent serious sexual or violent offending" which requires the imposition of an interim detention order.

The Court accepted Mr Chisnall's submission that less restrictive options to interim detention must always be considered because of the human rights interests affected. Such options included release subject to strict conditions, such as may be imposed under the Parole Act on extended supervision orders.

The Supreme Court differed however on the basis on which conditions can be imposed if the court considers that such conditions will be adequate to meet the very high risk of imminent serious sexual or violent offending. William Young, Glazebrook, O'Regan and Ellen France JJ, in reasons given by Ellen France J, considered that such conditions could be imposed by making an interim supervision order under the Parole Act pending determination of the public protection order application under the

Public Safety Act. They did not agree with the minority position that conditions could be imposed under s 107(3) by suspending an interim detention order. The majority did not view s 107(3) as providing, at least in the ordinary course, an alternative to an interim detention order under s 107(2) and considered that if an interim detention order was otherwise justified, it could not properly be immediately suspended under s 107(3). Section 107(3) is, on this view, a provision which permits response to change of circumstances after an interim detention order had been put in place. Elias CJ, on the other hand, considered that once the court was satisfied that a public protection order was warranted because the person posed a very high risk of imminent serious sexual or violent offending, any conditional release was required by the scheme of the Act to be on the basis of suspension of an interim detention order under s 107(3). On this view, the option of an interim supervision order is not available pending determination of the public protection order but s 107(3) provides an alternative by permitting the interim detention order to be suspended subject to conditions.

The Court was unanimous in the conclusion that the risk shown on the evidence could not be adequately met by imposition of conditions but required the making of an interim detention order. The decision of the Court of Appeal was therefore affirmed and the appeal was dismissed.

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