NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA162/2023
[2023] NZCA 549

BETWEEN	BASIL STEVEN MIST Appellant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing: 27 July 2023

Court: Mallon, Moore and Palmer JJ

Counsel: A J Bailey for Appellant
S C Baker and S R Lamb for Respondent

Judgment: 6 November 2023 at 12 pm

JUDGMENT OF THE COURT

A The application for leave to appeal out of time is granted.

B The application for leave to file a post-hearing memorandum is granted.

C The appeal is dismissed.

REASONS OF THE COURT

(Given by Moore J)

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Introduction

[1] On 26 August 2022, Cooke J made an extended supervision order (ESO) with an intensive monitoring condition (IMC) against Basil Mist.[1] Despite consenting to the orders being made in the Court below, Mr Mist now appeals the making of the ESO on the basis that the Judge gave insufficient reasons for finding that the grounds for making the order were made out and, in any event, there was no evidence, or no sufficient evidence, to support such a finding.

[2] Mr Mist also applies for leave to file the appeal out of time and leave to file a post-hearing memorandum, both of which we grant in the interests of justice. Although at 111 working days the delay was not insignificant, we are satisfied an extension is justified in view of the restrictions on liberty imposed by an ESO.

Background

[3] Mr Mist was sentenced in 2003 on a raft of serious violent and sexual charges, committed when he was aged between 17 and 20.

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1 *Department of Corrections v Mist* [2022] NZHC 2178 [Decision under appeal].

[4] The victim of the violent offending was his late 17-year-old partner. Their relationship was marred by domestic violence culminating in her death in March 2002. Mr Mist was convicted of her manslaughter and a representative charge of male assaults female following a trial by jury. He had earlier pleaded guilty to a separate, representative charge of male assaults female.

[5] The sexual offending was committed against five young girls, aged between seven and 15. It covered the period from October 1998 to January 2002. Mr Mist's partner, the victim of the violent offending, was involved with him as a party in more than one of the sexual offences. Mr Mist was convicted of six sexual charges following a trial by jury. These comprised two representative charges of sexual conduct with a young person aged 12 to 16, two charges of sexual violation by rape, and two charges of sexual violation by unlawful sexual connection.

[6] Mr Mist's end sentence, imposed on 16 August 2007 following four years of appeals across the senior courts, was 20 years' imprisonment with a minimum period of imprisonment of 10 years.[2]

[7] Mr Mist was later convicted (in 2009) of a single charge of assault while in prison. Importantly for present purposes, he did not complete any treatment programmes offered in the two decades he spent in prison. A year before his release he indicated a desire to participate in the Te Piriti Special Treatment Unit rehabilitation programme. However, he was not enrolled following advice from the Department of Corrections (Corrections) that there was insufficient time to complete the course.

[8] On 4 March 2022, in anticipation of Mr Mist's release, Corrections applied for an ESO and the imposition of an IMC.[3] For the ESO, Corrections sought the maximum 10-year term and for the IMC a term of 12 months. The applications were supported by a psychological report dated 22 September 2021 authored by registered psychologist, Ruth Pracy. Mr Mist consented to both applications.

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2 *R v Mist* [2007] NZCA 352. The Supreme Court had earlier overturned a sentence of preventive detention on the basis that such a sentence could not be imposed to someone of Mr Mist's age: *Mist v R* [2005] NZSC 77, [2006] 3 NZLR 145.

3 Parole Act 2002, ss 107F and 107IAC.

[9] When the applications were called on 26 August 2022, the Judge determined that they should be granted. On 30 August 2022 he delivered his reasons.[4]

Statutory framework

[10] The power to make an ESO is contained in s 107I of the Parole Act 2002 (the Act). That section provides:

> **107I Sentencing court may make extended supervision order**
>
> (1) The purpose of an extended supervision order is to protect members of the community from those who, following receipt of a determinate sentence, pose a real and ongoing risk of committing serious sexual or violent offences.
>
> (2) A sentencing court may make an extended supervision order if, following the hearing of an application made under section 107F, the court is satisfied, having considered the matters addressed in the health assessor's report as set out in section 107F(2A), that—
>
> (a) the offender has, or has had, a pervasive pattern of serious sexual or violent offending; and
>
> (b) either or both of the following apply:
>
> (i) there is a high risk that the offender will in future commit a relevant sexual offence:
>
> (ii) there is a very high risk that the offender will in future commit a relevant violent offence.
>
> (3) To avoid doubt, a sentencing court may make an extended supervision order in relation to an offender who was, at the time the application for the order was made, an eligible offender, even if, by the time the order is made, the offender has ceased to be an eligible offender.
>
> (4) Every extended supervision order must state the term of the order, which may not exceed 10 years.
>
> (5) The term of the order must be the minimum period required for the purposes of the safety of the community in light of—
>
> (a) the level of risk posed by the offender; and
>
> (b) the seriousness of the harm that might be caused to victims; and
>
> (c) the likely duration of the risk.

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4 Decision under appeal, above n 1.

[11] In assessing the risk under s 107I(2)(b), the court is required to be satisfied that four additional features are present. In relation to sexual offending these are listed in s 107IAA(1):

> **107IAA Matters court must be satisfied of when assessing risk**
>
> (1) A court may determine that there is a high risk that an eligible offender will commit a relevant sexual offence only if it is satisfied that the offender—
>
> (a) displays an intense drive, desire, or urge to commit a relevant sexual offence; and
>
> (b) has a predilection or proclivity for serious sexual offending; and
>
> (c) has limited self-regulatory capacity; and
>
> (d) displays either or both of the following:
>
> (i) a lack of acceptance of responsibility or remorse for past offending:
>
> (ii) an absence of understanding for or concern about the impact of his or her sexual offending on actual or potential victims.
>
> …

Decision under appeal

[12] The Judge began by noting that Mr Mist's counsel, Ms Goodlet, had filed a number of memoranda explaining the steps taken by Mr Mist in relation to Corrections' applications. These included the engagement of an independent psychologist to provide advice and discussions with Ms Goodlet on the effect of both the ESO and IMC.[5] The Judge stated that Mr Mist "decided to consent to the applications after this advice".[6]

[13] The Judge went on to state that, in Mr Mist's case, the jurisdiction to make an ESO arose under s 107I(2) because there had been a pervasive pattern of serious sexual offending and a high risk that he would in future commit a relevant sexual offence.[7]

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5 Decision under appeal, above n 1, at [2].
6 At [2].
7 At [6].

[14] The Judge noted that, where the orders are not opposed, the court is still required to satisfy itself of the pre-requisites under the Act and set out the basis on which it is so.[8] The fact of consent, however, which the Judge regarded in the present case was fully informed, brought a different perspective to the question of whether the ESO is demonstrably justified and was a relevant consideration when assessing whether the order should be made on the terms sought.[9] The Judge also considered it was significant that Mr Mist could apply to discharge the ESO under s 107M if he came to view the limitation of his rights as no longer justified.[10]

[15] The Judge accepted, on the basis of the comprehensive psychological report prepared for Corrections by Ms Pracy, that Mr Mist was at high risk of committing further serious sexual offences upon release in the absence of an ESO.[11] He also concluded that it was highly likely Mr Mist would offend violently, noting he had no personal or community support, nor a possible release address.[12]

[16] The Judge went on to state:

> [15] For the reasons identified in Ms Pracy's report I also accept that each of the necessary matters identified in s 107IAA are present.

[17] The Judge was thus satisfied that an ESO ought to be put in place on standard conditions for a period of 10 years from 4 January 2023, together with an IMC for the first 12 months.[13]

Approach on appeal

[18] An appeal against the imposition of an ESO is treated, insofar as applicable with the necessary modifications, as an appeal against sentence.[14] This Court must only allow the appeal if satisfied that for any reason there was an error in the sentence imposed, and that a different sentence ought to be imposed.[15]

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8 At [8].
9 At [10].
10 At [11].
11 At [12].
12 At [14].
13 At [16].
14 Parole Act, s 107R(2).
15 Criminal Procedure Act 2011, s 250(2).

Grounds of appeal

[19] For Mr Mist, Mr Bailey's focus was relatively confined. He concentrated on two aspects of Cooke J's decision: first that the Judge's reasons as set out at [15] of the judgment under appeal were insufficient to explain why he was satisfied that each of the four s 107IAA factors had been met; and, secondly, that the Judge's finding Mr Mist had "limited self-regulatory capacity" was not founded or available on the evidence.

Leave to file post-hearing memorandum

[20] The hearing before this Court took place on 27 July 2023. The following day, Mr Bailey filed an application for leave to file a post-hearing memorandum. Leave is opposed by the respondent.

[21] The post-hearing memorandum deals with two separate but interrelated issues. The first concerns the competence of previous counsel. The second concerns what Mr Bailey describes as erroneous information in the decision under appeal.

[22] Addressing waiver first, Mr Mist's position, as described in a supporting affidavit, is that it was not until he contacted Mr Bailey to seek a variation of the conditions of his ESO that he was advised that the materials filed by the respondent did not establish the prerequisites for making an ESO. Mr Mist asserts that he had not previously received such legal advice. Despite this he has attempted to advance his appeal without relying on allegations against his previous counsel; focusing instead on the adequacy of the Judge's reasoning and the availability of an ESO on the evidence.

[23] Mr Baker, for the respondent, maintains that the appeal necessitates a waiver of privilege from Mr Mist, in part out of fairness to his former counsel Ms Goodlet. He says that there is no way for this Court to allow the appeal without it reflecting on Ms Goodlet, even impugning her reputation, in circumstances where she has not had an opportunity to respond.

[24] As to the issue of erroneous information, twice in the decision under appeal, the Judge refers to Mr Mist instructing and taking advice from an independent psychologist before consenting to the ESO and IMC.[16] Mr Bailey submits, to the contrary, that Mr Mist never met with an independent psychologist for the purposes of the High Court proceeding. He attaches an email sent by Ms Goodlet to Ms Brindley, an independent psychologist, in which she writes:

> I note you were to meet with Mr Mist on or about 8 August. …
>
> Mr Mist assures me that he has fully considered the position and he now no longer wishes to oppose the intensive monitoring condition.
>
> I gave him the opportunity of continuing to meet with you on 8 August and, as a part of your report, I advised that you would be in a position to really fully canvass with Mr Mist his views on this condition. However, he was adamant that he wishes to no longer oppose the condition and with respect doesn't need to meet with you.

[25] Mr Bailey submits that the respondent continues to rely on the erroneous information that Mr Mist had met with an independent psychologist by pressing the importance of the Judge's earlier discussion (summarised above at [12]–[15]) for the purposes of interpreting the Judge's conclusion on the s 107IAA matters (at [16] above). He says that this Court during the hearing made comments which were at least arguably supportive of this approach. Moreover, while Mr Bailey's submission was that if the appeal was allowed the correct approach would be to remit the matter back to the High Court for reconsideration, he expressed some alarm at this Court's suggestion at the hearing that it might make its own assessment of Mr Mist's self-regulatory capacity. Mr Bailey's concern is that if the Court followed that course it might do so based on inaccurate information prejudicial to the appellant.

[26] Mr Bailey suggests that both of his concerns could be remedied by Mr Mist giving a limited waiver of legal privilege in respect of his communications with Ms Goodlet,[17] but only to the extent necessary to enable her to:

(a) respond to paragraph eight of Mr Mist's affidavit (that is, his claim that he had not previously received legal advice that the evidence did not establish the grounds for making an ESO); and

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16 Decision under appeal, above n 1, at [2] and [7].
17 Evidence Act 2006, s 65.

(b) confirm whether Mr Mist met with, or received advice from, an independent psychologist.

[27] We are satisfied the broader interests of justice favour the granting of leave to file the post-hearing memorandum but that no waiver of privilege is necessary for the Court to properly determine the appeal.

[28] As Mr Baker submits, and Mr Bailey accepted during the course of argument, the appellant was on notice prior to the filing of written submissions that the respondent considered a waiver appropriate in the circumstances. The respondent's written submissions were consistent with that stance. Mr Baker's position at the hearing could not have come as any surprise. Despite this, the appellant resolved to advance the appeal without reliance on competency of counsel grounds and maintained that a legal waiver was not necessary. Against that background the respondent's position is that it is now too late for the appellant to change tack.

[29] We agree. The appeal was advanced and argued on the adequacy of the Judge's reasoning and the availability of an ESO on the material before the Court. Details of advice given by Mr Mist's previous counsel have limited relevance to and bearing on the issues engaged in this appeal. Inquiries of the kind proposed risk complicating and further delaying the determination of this appeal.

[30] As to the alleged factual error, we do not consider this takes the appeal any further. We are guided in this respect by the six memoranda filed by Ms Goodlet on behalf of Mr Mist, which the Judge referred to in his decision.[18] These set out a clear timeline regarding Mr Mist's instructions to consent to the orders being made and the engagement of an independent psychologist. The memorandum of 26 May 2022 records that although arrangements were being made for Mr Mist to meet with the psychologist for the purpose of completing the report, that had not yet taken place. Subsequent memoranda make no mention of any such meeting. The email from Ms Goodlet provides some explanation as to why that may not have happened; Mr Mist saw no reason for such a meeting given his intention to consent to the orders.

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[18] Decision under appeal, above n 1, at [2].

[31] A more detailed summary of the timeline revealed in the memoranda supports the conclusion that from an early point Mr Mist intended to consent to the ESO:

(a) On 30 March 2022, after reviewing disclosure and discussing the purposes, principles and function of an ESO with counsel, Mr Mist instructions were that he did not oppose the order; in fact he believed it would assist him with support, rehabilitation and reintegration in the community.

(b) On 6 April 2022, Mr Mist confirmed that he still consented to the ESO. However, he opposed the respondent's application for an IMC and instructed counsel to obtain an independent psychological report to advise on the appropriateness or otherwise of this condition.

(c) As noted earlier, on 26 May 2022, Ms Goodlet confirmed that an independent psychological assessment report was being undertaken. Mr Mist confirmed that he still consented to the ESO.

(d) On 27 June 2022, counsel advised the Court that she had taken updated instructions from Mr Mist on 23 June that he would consent to the imposition of an IMC in addition to the ESO. He had discussed the practicalities and logistics of the condition "at length" with his case manager, and now believed that it would be of benefit to him.

(e) On 25 August 2022, counsel confirmed that this was still the position.

(f) On 26 August 2022, in oral submissions before the Judge with Mr Mist present by way of audio-visual link, Ms Goodlet stated:

> He was interested more in the intensive monitoring condition and we've spent some time you'll see from the process of this case looking at that. We did retain an independent psychologist and Mr Mist has had a lot of discussions with his very experienced case manager just outlining what the condition will mean for him…

[32] Although there is no express mention of Mr Mist ever taking advice directly from the psychologist, on the materials before him this was an understandable, albeit now apparently incorrect, assumption on the part of the Judge. The question is whether this additional evidence makes a material difference. For several reasons we are not satisfied it does.

[33] First, the Judge did not explicitly state that Mr Mist had met with the psychologist. He stated that Mr Mist "agrees, after taking advice from an independent psychologist and counsel, that such orders will help in providing him with the assistance he will need to avoid re-offending".[19] That statement needs to be read in the context of counsel's memoranda, the effect of which was that Mr Mist's consent was informed, a finding which the Judge explicitly made.[20]

[34] Secondly, this appeal is concerned with the imposition of the ESO, not the IMC. Mr Mist's initial concern, and the reason he instructed counsel to obtain an independent psychological report, was because he opposed the IMC. There is no evidence that he ever opposed the ESO, until now. To the contrary, it was confirmed in each subsequent memorandum that he consented to the ESO.

[35] Thirdly, while it may be best practice and desirable, there is no requirement for an offender to obtain advice from an independent psychologist before consenting to an ESO or IMC. That despite efforts to do so Mr Mist did not ultimately meet with a psychologist does not somehow vitiate his consent to the ESO or IMC. We query whether it would have made a material difference to the Judge's analysis had Mr Mist done so. He had several discussions with counsel and with his "very experienced case manager",[21] following which he came to the view that both orders were not only appropriate but beneficial.

[36] Fourthly, we do not consider that making the ESO hinged on Mr Mist's consent. The Judge was plainly aware that consent, while a relevant circumstance when assessing whether the ESO order should be made, was not the end of the

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19 At [7].
20 At [10].
21 These were the words used by Ms Goodlet in oral submission before the Judge.

inquiry.[22] He noted that it remains necessary for the court to satisfy itself that the statutory prerequisites for the making of an ESO are met. The Judge determined they were met on the basis of the comprehensive health assessor's report. Whether the Judge's reasoning in that respect was sufficient is a separate question to which we shall shortly return.

[37] Finally, if this Court considers the Judge's reasons were inadequate, there is no requirement to remit the matter back to the High Court for reconsideration. An appeal against the imposition of an ESO is treated as an appeal against sentence; the appeal court also has the option to consider the matter afresh.[23] In this event, the validity or otherwise of Mr Mist's initial consent to the ESO, or the extent to which it could be characterised as informed, becomes irrelevant. However, Mr Mist's consent to the IMC could in theory remain relevant, for example demonstrating that he appreciated his own shortcomings in relation to the risk analysis. At any rate, we do not propose to rely on Mr Mist's consent to the IMC in the event this Court undertakes the ESO assessment afresh.

[38] Although we grant leave to file the post-hearing memorandum we do not consider there is any value in making further inquiries of Ms Goodlet or receiving further evidence on the point.

[39] We now turn to the substantive issues raised on this appeal.

Did the Judge give sufficient reasons?

[40] This Court has long observed that the making of an ESO is a judicial decision and not that of the health assessor.[24] Furthermore, the Court has warned against automatic deference to health assessor reports. On this topic in *Barr v Chief Executive of the Department of Corrections* the Court said:[25]

> [32] We wish to make it clear, however, that first instance Judges need not accept it as necessary, or right, to rubber stamp opinions of health assessors advanced by the Department of Corrections in ESO applications. … What is

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22 Decision under appeal, above n 1, at [8]–[10].
23 *R v Peta* [2007] NZCA 28, [2007] 2 NZLR 627 at [2]; and Criminal Procedure Act 2011, s 251.
24 *Grieve v Chief Executive of the Department of Corrections* (2005) 22 CRNZ 20 (CA) at [15].
25 *Barr v Chief Executive of the Department of Corrections* CA60/06, 20 November 2006.

> required is a careful assessment of all the historical and current factors, along with expert opinions of others, bearing in mind that an ESO can have substantial ongoing impact on an offender who has already completed the sentence imposed by the Court for the offending. The risk of re-offending has to be such that cannot properly be ignored when viewed against the gravity of likely re-offending. Naturally, every case requires individual judgement and assessment. Jurisdiction to make the ESO arises only if there is a real and ongoing risk of committing relevant sexual offences.

[41] More particularly, in *R v Peta*, the Court said:[26]

> [8] The Judge's decision to impose an ESO must be made on the basis of the test set out in s 107I(2) in light of the factors set out in s 107F(2)(a) – (d) and any other relevant factors. The effect of that statutory test is that the jurisdiction for making an ESO depends on the risk of relevant offending being both real, ongoing and one that cannot sensibly be ignored having regard to the nature and gravity of the likely reoffending (see *Belcher v Chief Executive of the Department of Corrections* [2007] 1 NZLR 507 at para [11]).

[42] Whether or not the evidence of the health assessor is accepted, it is crucial that the Judge making the order undertakes an individualised assessment and provides full reasons for any conclusion reached. In *Peta* it was put this way:

> [56] An ESO has the potential to place major restrictions on the freedom of movement and freedom of association of an offender…. This makes it even more important than in the ordinary course of cases for a Judge, when imposing an ESO, to explain clearly to the offender why such an order is being made. This entails more than a mere reference to the health assessor's report. More importantly, however, a health assessor's report should not merely be rubber-stamped…. The fact that the reasons given by the Judge were so sparse gives rise to concern that this is what happened in this case.
>
> [57] A Judge is, of course, perfectly entitled to accept the evidence of a health assessor, particularly in a case where no contrary evidence has been presented. It must, however, be explained why the evidence was accepted and why that leads, on an individualised assessment, to the conclusion that the statutory test for the imposition of an ESO is met. In a case where there is a history of serious sexual offending, where no countervailing factors are identified and where the ASRS and SONAR assessments and any individualised risk factors suggest a high risk of reoffending against children, the Judge's reasons can be relatively brief. However, in a case like Mr Peta's which has some unusual features, the analysis should, in our view, have been much more extensive. …

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[26] *R v Peta*, above n 23.

[43] In *Chief Executive, Department of Corrections v Alinizi*, this Court set out a three-step process for determining whether an ESO should be made:[27]

> (i) the Court must determine whether the offender has, or has had, a pervasive pattern of serious sexual or violent offending;
>
> (ii) the Court must make specific findings as to whether the offender meets the qualifying criteria set out in s 107IAA; and
>
> (iii) if those criteria are met the Court must make a determination about the risk of the offender committing a relevant sexual or violent offence.

[44] As previously noted, Mr Bailey's main concern on appeal surrounds step two. The Judge's reasons for being satisfied of the four s 107IAA mandatory requirements were recorded in a brief, single paragraph. However, that paragraph should not be read in isolation and out of context. It was preceded by a discussion of Ms Pracy's assessment and a determination that Mr Mist was at high risk of committing further serious sexual offending on release, if he was not subject to the significant controls of an ESO and the intensive monitoring afforded by an IMC. The Judge quoted from Ms Pracy's report where she observed that based on static and dynamic risk factors, Mr Mist shares the characteristics of a group of men at high risk of sexual and violent offending. In the absence of personal support, community support and a possible release address, the Judge concluded that it was highly likely Mr Mist would sexually and violently offend again. The Judge also referred to Ms Goodlet's efforts in working with Corrections on the practicalities of any IMC and Mr Mist's apparent acceptance that he would benefit from it.

[45] Given the evidence that Ms Goodlet had invested considerable time and energy into liaising with Corrections and explaining the consequences of the orders to Mr Mist — who agreed they would be in his best interests and consented to them being made — it is understandable the Judge adopted the approach he did. Moreover, the analysis when orders are consented to may not need to be quite so comprehensive as it would if contested, though it must still address each statutory criterion. The question for us is whether viewed in that context, the Judge's reasoning was sufficient.

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[27] *Chief Executive, Department of Corrections v Alinizi* [2016] NZCA 468 at [13].

[46] We accept that the Judge did turn his mind to the specific s 107IAA matters. Earlier in his judgment, he had noted that the court was required to be satisfied of them.[28] At [15] the Judge said that he accepted, on the basis of the reasons in Ms Pracy's report that "each of the necessary matters" in s 107IAA were present. However, we consider that more was required even though the Judge understood Mr Mist to have given his informed consent to the ESO. While it was open to the Judge to accept Ms Pracy's evidence on these points, he was required by virtue of the comments in *Peta* to explain why that evidence was accepted and why that led, on an individualised assessment, to the conclusion that the statutory test for the imposition of an ESO was met.[29] This is also important having regard to this Court's decision in *Chisnall v Attorney-General* and the implications for such an order in terms of s 26(2) of the New Zealand Bill of Rights Act 1990, notwithstanding Mr Mist's consent.[30] We consider, for example, that it was crucial for the Judge to address why he was satisfied that Mr Mist displayed limited self-regulatory capacity because parts of Ms Pracy's report on this point were arguably inconclusive. However, an explanation of why Ms Pracy's evidence was accepted on all four of the s 107IAA matters was required.[31]

[47] We are satisfied that the Judge's failure to address and make specific findings on each of the s 107IAA factors in turn amounts to an error. To allow the appeal, we must also be satisfied that a different sentence, in this case either an ESO of a different term or no ESO at all, should be imposed. For that reason we are required to undertake the three-step process set out above afresh, albeit with a greater focus on the narrow grounds of appeal advanced by Mr Mist.[32]

[48] We also wish to record at the outset that we do not propose to assess Mr Mist's eligibility for an ESO on the basis of his risk of violent offending, but only as to his risk of relevant sexual offending. The position under the Act is "either or both".[33] Although there is some overlap, risk of violent offending is assessed against a different

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28 Decision under appeal, above n 1, at [8].
29 *R v Peta,* above n 23, at [57].
30 *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484.
31 *Chief Executive, Department of Corrections v Alinizi*, above n 27, at [13(ii)].
32 Namely, whether each of the four s 107IAA factors is satisfied, and in particular whether Mr Mist has limited self-regulatory capacity.
33 Parole Act, s 107I(2).

criteria to that for sexual offending.[34] The court must also be satisfied that there is a "very high risk" that the offender will in future commit a relevant violent offence, as compared to a "high risk" of sexual offending.[35] Although the health assessor's report covers both, the focus in the High Court and on appeal has been Mr Mist's risk of sexual offending. In any event, it is unnecessary for this Court to make specific findings on Mr Mist's risk of violent offending given our findings on his risk of sexual offending. It is to that analysis we now turn.

Does Mr Mist have a pervasive pattern of serious sexual offending?

[49] This is the first broad criterion that we must be satisfied of under s 107I(2)(a). It requires a historical assessment of conduct past.[36]

[50] Mr Mist sexually offended against five victims in little over three years. The latter stages of the offending occurred while Mr Mist was serving a non-custodial sentence for aspects of the earlier. It was offending of the most serious kind, including sexual violation by rape and sexual conduct with a young person. Some of the charges were representative. The victims were each younger than he, one as young as seven years' old. At the time he was in his late teens. He took steps to isolate the victims, including by inviting them into his home and locking them in a room. On occasions he supplied them with alcohol and drugs before threatening that they had to "pay their way". On other occasions threats of violence were used to secure compliance, including holding a knife to one victim's throat. He also forced some of his victims to watch him engage in sexual activity with his partner.

[51] We have little trouble in concluding that the nature, extent and duration of the above amounts to a pervasive pattern of serious sexual offending for the purposes of s 107I(2)(a). Indeed, we did not understand Mr Bailey to dispute this.

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34 Section 107IAA.
35 Section 107I(2)(b).
36 *Chief Executive of the Department of Corrections v Bradbury* [2016] NZHC 2816 at [31(a)].

Is there is a high risk that Mr Mist will commit a relevant sexual offence?

[52] This is the second broad criterion that we must be satisfied of under s 107I(2)(b). It is a predictive exercise.[37] The assessment of risk is undertaken by reference to the four prerequisites in s 107IAA(1), each of which must be satisfied before an order for an ESO can be made. We address each of these in turn.

Does Mr Mist display an intense drive, desire, or urge to commit a relevant sexual offence?

[53] There can be no dispute that Mr Mist showed an intense drive to commit a relevant sexual offence, primarily involving underage victims, at the time of the offending. It progressed from offending in the home environment against victims who were known to him or his partner, to offending against a stranger in public. The risk of detection did not appear to deter him from reoffending, nor his conviction and sentence for sexual offending.

[54] Although more than two decades have since passed, we accept Ms Pracy's evidence that Mr Mist's intense drive to commit a relevant sexual offence persists. Of note is that Mr Mist himself continues to report a high sexual drive in prison, albeit not as high as at the time of his offending. Ms Pracy attributes this to the fact Mr Mist has limited access to sexual stimuli and to suitably aged victims susceptible to coercion.

[55] It is also relevant that Mr Mist continues to deny and minimise aspects of his offending, despite taking responsibility for other aspects. In general, he is said to downplay the level of violence and somewhat shift responsibility. As this Court held in *Alinizi*:[38]

> [36] In our view the general approach adopted in *CJW, Wrigley and Chief Executive of the Department of Corrections v Rimene* is sound and we consider that a Court is likely to be satisfied that the statutory prerequisite in [s 107IAA(1)(a)] is present where there is nothing to suggest that such a trait formerly present no longer subsists. A court will very likely come to such a conclusion where, as here, an offender categorically denies the sexual offending for which he was convicted and as a consequence has been unwilling to undertake treatment to discuss sexual offending.

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37 At [31(b)].

38 *Chief Executive, Department of Corrections v Alinizi*, above n 27.

[56] While Mr Mist's failure to fully accept responsibility for his offending does not rise to the level of categorical denial, the fact that he has not undertaken any treatment to address his risk of sexual offending is concerning.

[57] In these circumstances, we are satisfied that Mr Mist displays an intense drive, desire, or urge to commit a relevant sexual offence.

Does Mr Mist have a predilection or proclivity for serious sexual offending?

[58] The terms "predilection" and "proclivity" are used disjunctively in the Act.[39] They are also undefined. As such, the courts have previously adopted the dictionary definitions and placed them in context: "predilection" being a preference or particular liking for serious sexual offending; "proclivity" referring to an inclination toward something considered morally wrong, such as sexual offending.[40]

[59] Ms Pracy found that Mr Mist's repeated sexual offending supports the presence of an inclination to sexually offend against young female victims between seven and 15, as evidenced by his relationship and sexual contact with young girls while in an intimate relationship. We adopt that finding here and add the following.

[60] Mr Mist selected victims who were either situationally or inherently vulnerable on account of their age or surroundings. His offending is hypothesised by Ms Pracy to provide him with a level of power and sexual gratification in a world where he has often felt vulnerable and disconnected from others. There is nothing on the information before us to suggest that these desires or feelings have declined.

[61] Given his present situation, as Ms Pracy notes, it is yet to be determined whether Mr Mist's preference in sexual partners has changed as he has matured. Re-entering the community as a 42-year-old adult, however, the power imbalance in

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39 Parole Act, s 107IAA(1)(b).

40 *Chief Executive of the Department of Corrections v Bradbury,* above n 36, at [66], citing *Chief Executive of the Department of Corrections v Wrigley* [2015] NZHC 1712 at [44]. See also *Holland v Chief Executive of the Department of Corrections* [2016] NZCA 504 at [41] in which this Court described proclivity as "in ordinary parlance … encompass[ing] the concept of a pattern".

situations like those for which he was convicted would be heightened as would the level of potential gratification such offending could provide.

[62] We are thus easily satisfied that Mr Mist has a predilection or proclivity for serious sexual offending.

Does Mr Mist have limited self-regulatory capacity?

[63] Mr Bailey submitted that Ms Pracy's report did not provide a basis for the Judge to be satisfied that Mr Mist had limited self-regulatory capacity at the time the judgment was issued. This was the primary focus of Mr Bailey's submissions.

[64] The section of the report discussing self-regulatory capacity in relation to sexual offending is reproduced in full below:

> Mr Mist's sexual and violent offending shows clear evidence of a limited self-regulatory capacity in the past. Specifically, his sexual offending is considered to show limited sexual self-regulation. The evidence regarding impulsivity is mixed. His sexual offending sometimes appears somewhat planned, and/or a result of premeditated opportunism (with planning or structuring of his life supporting repeated exposure to situations in which opportunistic offending can occur). Mr Mist reported substance use in the community and that this had tended to make him angry. On occasion, his sexual offending occurred in the presence of/with the involvement of his then-partner.
>
> Mr Mist's behaviour in prison shows improved self-regulation with regards to emotions, impulses, and aggression. It is unclear whether this is due to the absence of potential triggers/stimuli, the impact of a structured environment, or behavioural change on the part of Mr Mist. He is able to describe some basic strategies for emotional/anger management.
>
> Overall, Mr Mist's self-regulatory capacity appears improved within a structured environment with limited victim access. In the community significant self-regulatory difficulties were evident. His self-regulation within the community has not been tested for a significant period.

[65] Mr Bailey submitted that aspects of the above, if anything, operated against a finding of limited of self-regulatory capacity. More than once Ms Pracy referred to evident improvements in self-regulatory capacity, albeit observed in the structured environment of prison. In the absence of an express finding that 20 years after the index offending Mr Mist's presentation was unchanged, the Judge's finding on this criterion called for speculation.

[66] With respect, we do not accept these submissions.

[67] Mr Mist evidently had deficits in self-regulatory capacity when he committed the offending. He reports significant childhood abuse and neglect, which Ms Pracy opines very likely impacted his self-regulation, social skills and empathy. He is now in a structured environment in which self-regulatory capacity is difficult to properly assess because the opportunities for him to exhibit a lack thereof are limited. Therefore, while Mr Mist's behaviour in prison is reported to show improved self-regulation, the question of these deficits remaining dormant but remerging upon his release represents, in our view, a significant risk.

[68] We are reinforced in this view by the fact that Mr Mist has declined to engage in intensive intervention designed to address his risk of sexual recidivism, or any treatment at all for that matter, in the two decades he has been incarcerated. This increases the likelihood that his improved self-regulation reflects his environs and the lack of exposure to potential victims rather than true behavioural change.

[69] This Court has on multiple occasions held that the variable use of the word "displays" in the Act does not import a requirement that the particular traits and behavioural characteristics be externally manifested at the time of application; only that they are currently possessed.[41] As it went on to state in *Alinizi*:[42]

> [28] Were it otherwise the task of proving those requirements could be rendered quite impossible in circumstances where as s 107F(3) anticipates the source of evidence may rely on self-reporting. …

[70] Ms Pracy grapples with this difficulty in her report, noting:

> The ongoing presence of a number of risk factors is difficult to assess. … [R]isk factors relating to sexual deviancy/pre-occupation are heavily reliant on self-report, particularly as regards perpetrators with child victims when they are in prison.

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41 *Chief Executive, Department of Corrections v Alinizi*, above n 27, at [27]; *Chief Executive of the Department of Corrections v CJW* [2016] NZHC 1082 at [33]–[34]; *Chief Executive of the Department of Corrections v Rimene* [2015] NZHC 2721; and *Chief Executive of the Department of Corrections v Wrigley*, above n 40.

42 *Chief Executive, Department of Corrections v Alinizi*, above n 27.

[71] Nonetheless, she finds "ongoing evidence of the presence of a number of risk factors, particularly interpersonal deficits, within the custodial environment". She also notes that Mr Mist has limited insight into a number of these risk factors, which may impact his ability to manage them. As in *Chief Executive of the Department of Corrections v Wrigley*, the absence of family or friends who can assist Mr Mist in that regard must be given some weight in this assessment.[43] He has no personal support other than two friends acquired in prison. His release plan is assessed as insufficient to assist him in managing his risk of reoffending.

[72] In the absence of a high level of external monitoring and rehabilitative support, we are not satisfied that Mr Mist's progress with regard to self-regulatory capacity would be sustained upon his release. On the contrary, we consider that Ms Pracy's report, read in the context of relevant case law, provides a sufficient basis on which to conclude that Mr Mist has limited self-regulatory capacity. It follows we are satisfied that this criterion is satisfied.

Does Mr Mist display a lack of remorse and/or an absence of understanding or concern about the impact of his offending?

[73] These are described as "protective characteristics".[44] The underlying assumption is that an offender who is able to understand the harmful effects of their offending is less likely to cause such effects to others in future.[45]

[74] Ms Pracy's findings on this criterion in relation to Mr Mist's sexual offending are reproduced in full below:

> Mr Mist has taken responsibility for some of his sexual offending; and has denied or minimised other aspects. In the past he has also justified such offending. Past assessors have commented on incongruence between expressed shame, taking responsibility, and his affect within the interviews. In interviews for this assessment Mr Mist reported being assaulted for showing emotion as a child and thus learning to suppress these, and he showed subtle emotions in session. This may explain the previous observations and would also appear consistent with the assessment of personality.
>
> Overall, Mr Mist is considered to have shown limited remorse and mixed responsibility for past offending. In general, he appears to tend to downplay

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43 *Chief Executive of the Department of Corrections v Wrigley*, above n 40, at [48].
44 *McIntosh v Chief Executive of the Department of Corrections* [2021] NZCA 218 at [22].
45 *P(CA388/2018) v Chief Executive of the Department of Corrections* [2018] NZCA 599 at [53].

> the level of violence, shift responsibility somewhat, and continues to deny some of his sexual offending, while taking responsibility for other aspects.

[75] These findings suggest that Mr Mist displays at least a limited degree of remorse and some understanding of the impact of his offending, as opposed to a complete "lack" or "absence". Under relevant case law, however, this does not preclude a finding that s 107IAA(1)(d) is satisfied.[46] As noted in *McIntosh v Chief Executive of the Department of Corrections*:[47]

> … [T]he absence (or lack) of these characteristics are indicia of high risk offenders only because these protective characteristics mitigate this risk. The focus must therefore be on whether the acceptance of responsibility, remorse, understanding or concern are material in the given case in the sense that they are present to a sufficient degree to mitigate the relevant risk. Parliament cannot have intended that any degree of presence of these protective characteristics (no matter how limited and whether or not in any way operative to mitigate the risk), would preclude a person from being assessed as being at high risk. Such an interpretation would plainly be inconsistent with the statutory purpose of public protection.

[76] We do not consider that Mr Mist's remorse and understanding is present to such a degree to materially mitigate the risk of him committing a relevant sexual offence in future. The position may have been different if Mr Mist had undertaken treatment designed to mitigate his risk of sexual recidivism. As it stands, we are not satisfied that his remorse and understanding are yet at a level where they would act as protective factors against potential future victims.[48] This criterion is therefore satisfied.

Conclusion

[77] For the reasons already given, we are satisfied that each of the four mandatory requirements in s 107IAA are met. When taken together, these lead us to the clear conclusion that Mr Mist presents a high risk of committing a relevant sexual offence in future.[49] This, coupled with our finding that Mr Mist has a pervasive pattern of

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46 *McIntosh v Chief Executive of the Department of Corrections*, above n 44, at [23]; and *Chief Executive of The Department For Corrections v Douglas* [2016] NZHC 3184 at [82]–[84].

47 *McIntosh v Chief Executive of the Department of Corrections*, above n 44, at [23].

48 At [28].

49 Parole Act, s 107I(2)(b).

serious sexual offending, means that the statutory criteria for making an ESO have been established.[50]

[78] This Court has previously said that where an offender meets this high threshold, it will often be appropriate to confirm the ESO given the overarching statutory purpose of public protection.[51] We are satisfied that such an order was appropriate in all the circumstances of this case. It logically follows that the Judge did not err in making the ESO.

[79] That leaves the question of term. While 10 years is the maximum term available for an ESO,[52] we consider it to be the minimum term required in this case for the safety of the community in light of the level of risk posed by Mr Mist, the seriousness of harm that might result and the likely duration of the risk.[53]

[80] As the Judge noted,[54] it remains open to Mr Mist at any time to apply to vary or discharge the ESO.[55] This observation was echoed by Ms Pracy in her report when she noted that it will be possible to provide further guidance regarding risk once Mr Mist has spent time in the community. As at the time of imposition,[56] however, we are satisfied that he poses the requisite risk and an ESO is appropriate.

Result

[81] The application for leave to appeal out of time is granted.

[82] The application for leave to file a post-hearing memorandum is granted.

[83] The appeal is dismissed.

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50 Section 107I(2)(a).
51 *McIntosh v Chief Executive of the Department of Corrections*, above n 44, at [49].
52 Parole Act, s 107I(4).
53 Section 107I(5). See also *R v Peta*, above n 23, at [9].
54 Decision under appeal, above n 1, at [11].
55 Parole Act, ss 107O and 107M.
56 *R v Peta*, above n 23, at [14].