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

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MEDIA RELEASE

ATTORNEY-GENERAL AND ANOTHER v MARK DAVID CHISNALL
(SC 26/2022) [2024] NZSC 178

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.

What this judgment is about

This judgment is about whether the extended supervision order (ESO) and public protection order (PPO) regimes are inconsistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 (the Bill of Rights).

What is a declaration of inconsistency?

When legislation cannot be given a meaning that is consistent with the Bill of Rights, the courts may make a declaration of inconsistency. A declaration is not a review of Parliament's legislative choices, but rather the court exercising its duty under the Bill of Rights to assess whether limitations on rights are justified. Parliament has recognised this power and has its own processes to respond. It is important to note that a declaration does not invalidate the law—the statute in question remains in full force and effect. Nor will it affect the current orders applying to Mr Chisnall in this case.

Background

The ESO and PPO regimes are post-sentence orders under the Parole Act 2002 and the Public Safety (Public Protection Orders) Act 2014 respectively. They apply to people who, having committed certain categories of offences in the past, are assessed as posing a high, or very high, risk of serious sexual or violent offending in future. Orders are made by a court, on the application of the Chief Executive of Ara Poutama Aotearoa | the Department of Corrections, following consideration of reports prepared by health assessors relevant to that risk.

The standard conditions attached to an ESO are largely the same as parole conditions. Special conditions amounting to detention can also be imposed, including intensive monitoring and residential restrictions for up to 24 hours a day. A PPO allows for the detention of a person, potentially for life, in a building on prison grounds. Neither regime provides for an absolute right to rehabilitation or therapeutic support.

An ESO or PPO can be made even when the offence making the person eligible was committed before the regimes were enacted—in other words these orders can be made "retrospectively". This was considered necessary to manage the risk posed by offenders who had committed offences before the regime had been enacted—and who posed a real and ongoing risk of similar offending in future.

Mr Chisnall's claim

The respondent (and cross-appellant), Mr Chisnall, was retrospectively subjected to a PPO and, more recently, an ESO. He seeks a declaration that the ESO and PPO regimes are inconsistent with the following rights in the Bill of Rights:

- the right to be free from a second penalty (s 26(2));
- the right to be free from a retrospective conviction (s 26(1));
- the right to a fair trial (s 25(a), (c) and (d));
- the right not to be arbitrarily detained (s 22);
- the right not to be subject to cruel and disproportionate punishment (s 9); and
- the right to be treated with dignity and humanity while deprived of liberty (s 23(5)).

Lower Courts

The High Court Judge issued a declaration that the ESO regime was inconsistent with s 26(2) of the Bill of Rights in that it imposed a second penalty, but only when it operated retrospectively. In all other instances, an ESO could be a justified limitation on that right. As for the PPO regime, the Judge was satisfied that it was not penal in nature, and therefore did not limit the s 26(2) right.

The Court of Appeal found that each of the ESO and PPO regimes imposed a second penalty—an unjustified limitation upon the s 26(2) right. It issued further declarations in respect of the ESO regime as it applied non-retrospectively, and in respect of the entire PPO regime. The Court did not address the other rights pleaded by Mr Chisnall.

The Attorney-General appealed to the Supreme Court and Mr Chisnall cross-appealed.

Submissions

In this Court, Mr Chisnall continued to argue that declarations should be issued for the other rights pleaded (listed above). He did not challenge that protecting the public from the risk of serious violent or sexual offending is an important objective. Instead, counsel for Mr Chisnall argued that the regimes cannot be justified for the purposes of s 5 of the Bill of Rights because there are other less intrusive alternatives available.

The Attorney-General accepted that both the ESO and PPO regimes impose a second penalty for the purposes of s 26(2). However, it was argued, it is for the court determining applications

for an ESO or PPO, not the court considering a declaration of inconsistency, to ensure that the any limitations on rights are justified. This is because, the Attorney-General said, the power to make an ESO or PPO is discretionary and must be exercised consistently with the Bill of Rights. The Attorney-General argued that the one exception to this–the retrospective application of the regimes–is a justified limitation.

Supreme Court decision

A majority of the Supreme Court comprising Winkelmann CJ, O'Regan, Williams and Kós JJ has allowed the appeal in part and dismissed the cross-appeal. They found inconsistency with the right to be free from a second penalty (s 26(2)) in connection with the application of the entire PPO regime, but parts only of the ESO regime.

Declarations of inconsistency where the legislation confers a discretion

The majority rejected the Attorney-General's argument that the regimes are discretionary. If the relevant level of risk is met, a judge is required to make orders under the regime to manage that risk. Indeed, the Attorney-General did not identify any case in which the statutory risk threshold had been met but the orders were declined (at [94]–[99], [104]).

The majority also confirmed that the Court of Appeal was correct to take a regime-based analysis. The operation of the ESO and PPO regimes is sufficiently standard to enable consideration of rights consistency beyond the facts of an individual case. The exceptions to this are ss 9 and 23(5), which are best determined on a case-by-case basis (at [100]–[103]).

Whether the ESO and PPO regimes limit rights

The first issue for the Court was whether the ESO and PPO regimes limit the relevant rights. The majority found that the ss 9 and 23(5) rights may be infringed by the ESO and PPO regimes in certain circumstances, but Mr Chisnall did not provide evidence establishing a limitation on these rights in his case (at [167]–[168]).

The majority further found the rights in ss 26(1) and 25(a), (c) and (d) are not engaged by the ESO and PPO regimes as the regimes do not entail retroactive *criminalisation* of conduct—the qualifying conduct was already criminal at the time of the offending (at [156]–[157]).

The majority considered the s 22 right may be engaged by legislation retrospectively imposing a penalty amounting to detention. However, that was not the basis of the argument before this Court, so no conclusion was reached (at [162]–[164]).

As for the right to be free from a second penalty, the majority concluded that the ESO and PPO regimes constitute a second penalty and so are a limit on s 26(2) (at [138] and [169]).

Whether the limitation on rights is justified

The second issue for the Court was whether the limitations on s 26(2) could be "demonstrably justified in a free and democratic society" for the purposes of s 5 of the Bill of Rights. The majority noted that the regimes serve a very important social purpose. However, the rights infringed are also of high importance and, in some cases, the infringement significant. Subjecting individuals to punitive regimes, potentially for life, on the basis of offending for

which they have already been punished, because of predictions of their risk of future offending, is an extraordinary and truly exceptional measure for a society to implement (at [253]–[254]).

The majority divided its conclusions on justification into four categories:

	Prospective	**Retrospective**
Non-detention part of the ESO regime	(1) Justified	(2) Justified
PPO regime and detention-authorising part of ESO regime	(4) Not justified	(3) Not capable of justification

The *prospective application of the non-detention authorising part of the ESO regime* (ie, the standard conditions) is justified. The objective of public protection is sufficiently important, and the limitation rationally connected and proportionate to that objective. The majority indicated that particular conditions may not be appropriate in every case but made no finding due to a lack of argument and evidence (at [208]–[210], [230] and [256]–[258]).

The *retrospective application of the non-detention authorising part of the ESO regime* is also justified. While the regime would be less rights intrusive if it did not apply retrospectively, this would not achieve the purpose of the legislation (at [201]–[204], [231] and [259]–[260]).

The *retrospective application of the PPO regime and of the detention-authorising part of the ESO regime* (ie, the intensive monitoring and/or residential restrictions) is not capable of justification as it entails a limitation on the core of the s 26(2) right. This is consistent with case law to the effect that retrospective criminal detention cannot be justified (at [146]–[148] and [169]).

The *prospective application of the PPO regime and of the detention-authorising part of the ESO regime* is not justified. Drawing on the evidence provided and overseas jurisprudence, the majority considered that other plausible options exist which are likely to be less rights intrusive. It is for Parliament to construct the model, but the Court considered any such model would be based around the following three pillars:

a) achieving public protection by the least restrictive means possible for each offender;
b) minimising the punitive impact of the restrictions on the offender; and
c) requiring mandatory provision of rehabilitation designed to meet the needs of the offender (including where indicated, therapeutic treatment).

The majority found the ESO and PPO regimes do not reflect these three pillars, and insufficient justification was given for this more rights-intrusive model. In this regard, the ESO and PPO regimes unjustifiably limit the right in s 26(2) of the Bill of Rights (at [235]–[244], and [261]–[262]).

In reaching this conclusion, the majority noted that it had been constrained by the Attorney-General's decision not to provide evidence to justify the regimes for the purpose of s 5 (beyond evidence relating to their retrospective application) (at [191] and [214]).

Dissenting reasons

Glazebrook J would not have made a declaration of inconsistency. She considered first, that the issue is better characterised as a clash of rights between those of potential victims and those of the person detained but the appeal had not been argued on that basis; secondly, that the PPO regime in its current form is capable of being rehabilitative and therapeutic; and thirdly, it would be better to wait for the final recommendations of the review of the regimes by Te Aka Matua o te Ture | the Law Commission before considering whether to make a declaration (at [271]–[274]).

Result

The appeal is allowed in part and the cross-appeal is dismissed. The Court will issue declarations of inconsistency with s 26(2) of the Bill of Rights in respect of the entirety of the PPO regime and the detention-authorising aspects of the ESO regime, retrospective or otherwise. The declaration will not include the aspects of the ESO regime that do not authorise detention, in other words, the standard conditions. The Court has sought submissions from the parties on the exact wording of these declarations.

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