**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA616/2020**
**[2022] NZCA 507**

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| BETWEEN | WILLIAM GEORGE MOSEN<br>Appellant |
| AND | CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS<br>Respondent |

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| Hearing: | 22 August 2022 |
| Court: | Cooper P, Mallon and Wylie JJ |
| Counsel: | Appellant in person<br>M R Bott as counsel to assist the Court<br>B C L Charmley and J B Watson for Respondent |
| Judgment: | 25 October 2022 at 4.00 pm |

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**JUDGMENT OF THE COURT**

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**A The application for an extension of time to appeal is granted.**

**B The application for leave to adduce fresh evidence is granted.**

**C The appeal is allowed.**

**D The extended supervision order is cancelled.**

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**REASONS OF THE COURT**

(Given by Mallon J)

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## Introduction

[1] Mr William Mosen has a history of violent offending. On 3 July 2020 the District Court imposed an extended supervision order (ESO) on him for a period of five years, being satisfied that he had a pervasive pattern of serious violent offending and a very high risk of committing a further relevant violent offence.[1] The ESO was subject to standard and special conditions intended to address his risk and protect the community from that risk.

[2] Mr Mosen now appeals this decision. He says the Judge did not interpret the statutory criteria for an ESO consistently with the New Zealand Bill of Rights Act

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1 *Department of Corrections v Mosen* [2020] NZDC 11123.

1990 (BORA). He says that a BORA-consistent interpretation of the "very high risk" criterion is a risk that is "almost unavoidable" and involves an "immediate threat to public safety". He says that he does not meet this criterion.

[3] Mr Mosen's appeal is out of time.[2] The appeal was initially filed in the High Court. Shortly before it was scheduled to be heard, counsel realised that the appeal was filed in the wrong court.[3] A notice of appeal was then promptly filed in this Court. The contention on this appeal is that a "recalibrated" approach to the statutory criteria for an ESO is necessary in light of this Court's decision in *Chisnall v Attorney General*, delivered in November 2021.[4] The correct approach to the statutory criteria for an ESO in light of *Chisnall* is an important one. It is therefore appropriate to hear this appeal although it was brought out of time. We grant an extension of time to appeal.

[4] Mr Mosen also seeks leave to adduce the report of Ms Sabine Visser, a registered psychologist, on this appeal.[5] The respondent opposes the application on the basis the report is not fresh nor cogent. Ms Visser had the opportunity to interview Mr Mosen for three hours in late January 2022. While her report is not fresh, it provides the most recent assessment of Mr Mosen. Her report is also in large measure consistent with the reports and evidence considered in the District Court and provides additional commentary on them. It is in the interests of justice to consider it, especially when an ESO imposes substantial restrictions on a person's liberty and imposes a limit on the right affirmed in the BORA not to be subject to a second penalty.[6] We are satisfied the respondent is not prejudiced by this. We grant leave to adduce the evidence.

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2 Court of Appeal (Criminal) Rules 2001, r 107R(2); and Criminal Procedure Act 2011, s 248(2).
3 See Parole Act 2002, s 107R.
4 *Chisnall v Attorney General* [2021] NZCA 616, [2022] 2 NZLR 484. As we discuss later, at [25] below, in *Department of Corrections v Gray* [2021] NZHC 3558 at [23], the High Court considered a recalibrated approach was necessary.
5 Court of Appeal (Criminal) Rules, r 12B.
6 New Zealand Bill of Rights Act 1990, s 26(2).

## Background

*Personal circumstances*

[5] Mr Mosen had a difficult and dysfunctional upbringing. His father was a "Skin Head", was violent and drank excessively. Mr Mosen suffered neglect and at times was not clothed or fed by his parents. He was removed from his family by what was then Child, Youth and Family Services before he was five years old. He then suffered from emotional, physical and sexual abuse in the welfare homes in which he was placed. When he was 13 or 14 years old, he lived with his grandmother for around a year. After that, he lived on the streets until he became subject to custodial sentences.

[6] Mr Mosen had very little schooling and was illiterate, although has made progress on his education during periods of imprisonment. He does not have a history of stable employment. During his teens, he formed an association with the skinhead culture. He became the president of a group known as the "Nazi Rodents". He began using alcohol and drugs in his early teens. From a young age he was using intravenous opiates and stole property to fund this. He was on methadone when in prison and resumed his opiate use on release. He reported having ceased using methadone since 2017.

[7] Mr Mosen is now 41 years old. He has spent most of his adult life in prison. He is recently married.

*Conviction history*

[8] In 1997, at 16 years old, Mr Mosen appeared in the Youth Court for an assault, burglaries, and other dishonesty offending. The following year he appeared in the District Court for burglaries and cannabis offending and received his first sentence of imprisonment. Appearances in the District Court and sentences of imprisonment

continued thereafter, predominantly for burglaries and other dishonesty offending,[7] violent offending[8] and breach of release conditions.[9]

[9] Details about some of the offending are not available. However, from the information that is available, the following is the most relevant:

(a) 2000: wounding with intent to cause grievous bodily harm — Mr Mosen and an associate went to a house wearing army-style clothing and balaclavas, and were armed with a loaded cut-down shotgun. They waited for the owner of the house to come outside. When he did, they fired a shot at his dog and then at him. The owner was hit on the upper left side of his body. Mr Mosen was sentenced to five years' imprisonment for this offending, along with charges of unlawful possession of a pistol, burglary, theft, and shoplifting committed on other dates of that year.

(b) 2003 to 2009: various assaults, including:

(i) 2007: male assaults female, which involved choking a woman for several seconds and for which he received a six-month sentence of imprisonment.

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7 Mr Mason's Youth Court appearances were for offending including multiple burglaries, a theft and a robbery. In the adult jurisdiction he has convictions for burglary (1998 x 11, 2000 x 2, 2010 x 1 and 2017 x 1), theft (2000 x 2 and 2009 x 1), shoplifting (1999 x 1, 2000 x 3, 2008 x1 and 2010 x 3), receiving stolen property (1998 x 1 and 1999 x 1) and unlawfully getting onto a motorcycle (2019 x 1).

8 Including aggravated robbery (2010 x 1); wounding with intent to do grievous bodily harm (2000 x 1); injuring with intent (2019 x 1); male assaults female (2007 x 1); assault (2008 x 3 and 2009 x 1); assault of a police officer (2008 x 2 and 2009 x 2); threats to kill (2009 x 2); possession of a knife (2000 x 1 and 2008x 1); unlawful possession of a pistol or firearm (2001 x 1, 2020 x 2 and 2021 x 1); possession of an offensive weapon (2008 x 1, 2017 x 1 and 2018 x 1); and behaving or speaking threateningly (2007 x 1, 2019 x 1 and 2021 x 1).

9 Including breach of release conditions (2007 x 2, 2010 x 5 and 2018 x 4); breach of standard conditions (2017 x 2); breach of interim supervision order (ISO) and ESO (2018 x 1, 2021 x 1 and 2022 x 2); breach of parole (1999 x 1); and escaping from a penal institution (2003 x 1). He also has convictions for wilful damage (1998 x 1, 2005 x 1, 2007 x 1, 2008 x 2, 2009 x 1 and 2017 x 1); intentional damage (2009 x 1); contravening a protection order (2000 x 1 and 2008 x 2); possession of cannabis or cannabis oil (1999 x 1, 2000 x 2, 2005 x 1 and 2018 x 1); possession of methamphetamine (2018 x 1); and various driving offences (2005 x 3, 2007 x 2 and 2018 x 1).

(ii) 2008: two counts of assaulting a police officer, for which he received a cumulative four-month sentence of imprisonment as part of sentencing for other offending.

(iii) 17 April 2009: assaulting a police officer, threatening to kill, unlawfully taking a car, and intentionally damaging property, for which, along with an earlier charge of threatening to kill in January 2009, he received a sentence of one year and 12 months' imprisonment.

(iv) 24 May 2009: assaulting a prison officer by hitting him in the face, for which he received a six-month sentence of imprisonment concurrent on his sentence for the April offending.

(c) 29 August 2010: aggravated robbery — Mr Mosen entered a supermarket with a sawn-off shotgun, held his finger on the trigger while pointing it directly at the heads of several employees, and took $1,994.60 from them. He was subject to release conditions at the time. He was sentenced to four years and six months' imprisonment and received his first strike warning for this offending.[10]

(d) 6 January 2013: injuring with intent to cause grievous bodily harm — while serving his sentence for the aggravated robbery, Mr Mosen and a co-offender attacked a fellow prisoner in the exercise yard, with Mr Mosen kicking and punching the victim to the head and body. Mr Mosen was sentenced to two years and six months' imprisonment and received a final strike warning for this offending.[11]

(e) 21 October 2017: possession of an offensive weapon and wilful damage — this offending took place three months after his release from prison. He was sentenced to supervision but was subsequently sentenced to

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10 Sentencing Act 2002, s 86B.
11 Section 86C.

imprisonment for breaching his release conditions, burglary and unlawfully being in an enclosed area in December 2017.

(f) 2018: four counts of breach of release conditions, and one count each of possession of cannabis plant, possession of methamphetamine, and breach of an interim supervision order (ISO),[12] for which he received short-term sentences of imprisonment.

(g) January/February 2019: two counts of breach of an ISO.

(h) 5 July 2019: possession of a shotgun and cartridges, and unlawfully getting into a car — in March 2020 Mr Mosen was sentenced to 22 and a half months' imprisonment for this offending.

(i) 13 December 2019: injuring with intent to injure — this related to a fight with a cellmate when Mr Mosen was in prison. Mr Mosen was initially told the incident would be dealt with internally by the Department of Corrections but he was subsequently charged. On 21 January 2021 he was sentenced to one year and three months' imprisonment concurrent on his sentence for the 2019 offending.

[10] Following the ESO, Mr Mosen's conviction history has involved:

(a) 2021: breach of an ESO, speaking threateningly and unlawful possession of a pistol.

(b) 2022: two counts of breach of an ESO.

*Custodial history*

[11] Custodial records indicate that as at July 2017 Mr Mosen had accumulated over 280 incident reports, of which over 70 resulted in misconduct reports. Most of these were for breaking rules or being in defiance of them. Ten were for threatening or

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12 See [12] below.

abusing other prisoners or staff and four were for fighting with other prisoners. These included the injuring with intent conviction in 2013, referred to at [9](d) above, and Mr Mosen punching a prison officer in the face when he was irritated that the shower was not working properly. He has spent periods with a "maximum" security classification but at other times has had "high" and "low" classifications.

*ESO application history*

[12] In anticipation of Mr Mosen's release from prison and the expiry of release conditions, the respondent applied for an ESO in July 2017. Pending the substantive hearing of that application, an ISO was imposed on 5 February 2018.[13] As a result of his further offending in 2017 and 2018, Mr Mosen received further sentences of imprisonment and the ESO application was not determined until 23 March 2020. When the application was considered, a five-year ESO was imposed by consent.[14]

[13] On 9 April 2020 the Judge set aside the ESO because, on further consideration, he was concerned that one of the requirements for an ESO, that the offender has "persistent harbouring of vengeful intentions", may not have been satisfied.[15] He sought further information on that factor from the psychologists.[16] In the meantime, the ISO was reinstated.[17]

[14] Following a further hearing on 5 June 2020, an ESO was imposed for five years on 3 July 2020.[18] In addition to the standard conditions, the special conditions included: to live at an approved address; not to stay overnight elsewhere without approval; not to have contact with any victim of the offending; not to possess or consume alcohol or drugs; to undertake assessment, treatment or counselling; to disclose any intimate relationship that commences, terminates or resumes; not to reside in or travel into Whanganui; not to be near or visit any gang premises; to submit to and comply with electronic monitoring; not to have contact with anyone

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13 *R v Mosen* DC Whanganui CRI-2017-083-1608, 5 February 2018.
14 See *Department of Corrections v Mosen* DC Palmerston North CRI-2017-083-1608, 9 April 2020 [Minute of Judge G M Lynch setting aside the Extended Supervision Order made 23 March 2020] at [1].
15 At [2]–[3], [7]–[9] and [13], referring to Parole Act, s 107IAA(2)(a)(iii).
16 At [15].
17 At [13].
18 *Department of Corrections v Mosen*, above n 1, at [130] and [142].

under 16 years old without approval; and to attend a psychological assessment to the probation officer's satisfaction.

*Current circumstances*

[15] Mr Mosen filed an affidavit in support of his appeal advising that he was then living in his car. This was because he could not live with his wife, as she lives with her son, who is under 16 years of age. He has lived in other approved addresses but those arrangements came to an end for various reasons. He said:

> 11. I have done the right steps in keeping myself safe yet I feel [an] ESO is setting me up to fail. I also feel that my wife … has sacrificed and helped me through all these setbacks that have been inflicted on me by probation and that I only wish to live a happier and healthier life with my new family.
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> 12. Growing up I felt like I had nothing and was nothing, I felt I could not trust anyone. I now have a wife, and want a chance to live with the person I love and trust, as a normal person within a family.
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> 13. I would like for this ESO to go away.

[16] Ms Mahinarangi Wynard, Mr Mosen's probation officer, filed two affidavits updating the Court after the hearing of the appeal. She explained the circumstances leading to Mr Mosen choosing to reside in his car even though there was an approved address available to him. He lived in his vehicle for four nights, at which point his wife offered her sister's address to him. This address was approved and Mr Mosen had been living there for a few weeks as at 29 August 2022.

[17] In the second updating affidavit, Ms Wynard advised that on 30 August 2022 Mr Mosen was required to leave the address for two weeks because his wife's sister was going to be hosting family, including minors, during that time. Ms Wynard arranged for Mr Mosen to stay in a cabin. The owner of the property consented to Mr Mosen living there subject to several conditions, including that he not consume alcohol or drugs. On 2 September 2022, the owner withdrew her consent. This followed an incident on 1 September when Mr Mosen was speeding in his car in a dangerous manner up and down the road and in and out of her driveway, and verbally abused her.

[18] Ms Wynard directed Mr Mosen to undergo an alcohol and drug test on 2 September 2022. He attended the office that day but failed to provide a specimen for the drug test in the allocated time. He was charged with breaching his ESO by failing to undergo a testing procedure when required to do so. The summary of facts refers to three previous ESO breaches in the past year, including one for using methamphetamine and another for failing to submit to a drug test.

**Statutory regime**

[19] Part 1A of the Parole Act 2002 provides for ESOs. A person who has committed a "relevant violent offence" is eligible for an ESO if they remain subject to a sentence of imprisonment, release conditions, or an extant ESO.[19] Mr Mosen's conviction for aggravated robbery is a relevant violent offence.[20]

[20] Following a hearing and consideration of the matters addressed in a health assessor's report under s 107F, the court may make an ESO if satisfied that:[21]

> (a) the offender has, or has had, a pervasive pattern of serious … violent offending; and
>
> (b) either or both of the following apply:
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> …
>
> (ii) there is a very high risk that the offender will in future commit a relevant violent offence.

[21] Under s 107F, the health assessor's report must address:[22]

> …
>
> (b) whether—
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> (i) the offender displays each of the behavioural characteristics specified in section 107IAA(2); and
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> (ii) there is a very high risk that the offender will in future commit a relevant violent offence.

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19 Parole Act, s 107C(1)(a).
20 Section 107B(2A)(o).
21 Section 107I(2).
22 Section 107F(2A).

[22] Section 107IAA(2) provides:

> (2) A court may determine that there is a very high risk that an eligible offender will commit a relevant violent offence only if it is satisfied that the offender—
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> (a) has a severe disturbance in behavioural functioning established by evidence of each of the following characteristics:
>
> (i) intense drive, desires, or urges to commit acts of violence; and
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> (ii) extreme aggressive volatility; and
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> (iii) persistent harbouring of vengeful intentions towards 1 or more other persons; and
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> (b) either—
>
> (i) displays behavioural evidence of clear and long-term planning of serious violent offences to meet a premeditated goal; or
>
> (ii) has limited self-regulatory capacity; and
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> (c) displays an absence of understanding for or concern about the impact of his or her violence on actual or potential victims.

[23] We will address the evidence and what the Judge held on each of the above ESO criteria later in this judgment. We turn first to consider Mr Mosen's argument on the "very high risk" criterion in light of this Court's decision in *Chisnall*.

*Interpretation of the statutory regime in light of* Chisnall v Attorney-General

[24] In *Chisnall* this Court held that the ESO regime imposes limits on the right not to be punished again for an offence, as affirmed by s 26(2) of the BORA.[23] As this is a right of fundamental importance, any departure requires strong justification.[24] The most concerning features of the ESO regime are the significant restrictions of movement and association, electronic monitoring and the potential for detention at home.[25] The severe restrictions are based on the legislature's view that, without those restrictions, the offender would constitute a danger to the public. While Parliament is

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23 *Chisnall v Attorney General*, above n 4, at [177].
24 At [190].
25 At [223].

entitled to implement the regime, the evidence before the Court did not show that the limits the regime imposes on the right not to be subject to a second penalty is demonstrably justified.[26] Importantly, however, the Court said that it was "not a case where there is any doubt about the purpose of the legislation, or its meaning".[27] The Court granted a declaration of inconsistency with the BORA.[28]

[25] Subsequent decisions have considered how an application for an ESO should be approached in light of *Chisnall*. In *Department of Corrections v Gray*, Cooke J considered that a degree of recalibration may be necessary in the Court's approach to the statutory test.[29] He took the view that the presumption of innocence was "clearly" engaged because the Court was being asked to predict whether future offending would be committed.[30] His approach was to interpret the "very high risk" criterion as one involving "an immediate risk of something that is highly likely to happen" if the ESO is not granted.[31] This approach required the Court "to be sure that further violent offending will be committed by the [offender] in the immediate future" as "more medium term risks introduce greater degrees of temporal uncertainty".[32] The Judge considered that an "immediate threat to public safety [is] needed before such orders are justified".[33] He noted that this had implications for health assessor reports, which usually assess risk over five and 10-year periods.[34]

[26] Mr Bott, counsel assisting, submits this Court should follow the *Gray* interpretation of the "very high risk" criterion. We agree that the statutory criteria

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26 At [225]–[226].
27 At [216].
28 *Chisnall v Attorney-General* [2022] NZCA 24, (2022) 13 HRNZ 107.
29 *Department of Corrections v Gray*, above n 4, at [23].
30 At [21]. This is a controversial point. A division of this Court in *Wilson v Department of Corrections* [2022] NZCA 289 at [17] subsequently also took the view that an ESO "clearly engaged" the presumption of innocence. However, this is contrary to the earlier view of this Court in *McDonnell v Department of Corrections* [2009] NZCA 352, (2009) 8 HRNZ 770 at [39]–[40]. The Court then held it was inappropriate to treat an application for an ESO as being analogous with the bringing of a fresh charge against the offender. Rather, it was analogous with the sentencing process which follows conviction. The presumption of innocence was therefore inapplicable. Similarly and earlier, the Human Rights Commission by majority held in *Rameka v New Zealand* (2003) 7 HRNZ 663 at [7.4] that the presumption of innocence had no application to a sentence of preventative detention because no new charge to attract that presumption had been laid.
31 At [23].
32 At [24].
33 At [24].
34 At [24].

should be interpreted as consistently with the BORA as possible.[35] However, that interpretation must be one that is open on the words of the statute in light of Parliament's intention.[36] In our view, the *Gray* approach is not open because:

(a) The statutory requirement is a "very high risk" that the offender "will in future" commit a relevant violent offence.[37] There is no temporal requirement in that test.

(b) The fact that an ESO may be made for up to 10 years contemplates that the risk may relate to offending within a 10-year time frame.[38]

(c) The criterion of "displays behavioural evidence of clear and long-term planning of serious violent offences to meet a premeditated goal"[39] indicates that an ESO is available for those whose risk relates to violence that has involved "long-term planning". That kind of risk is not one that would necessarily give rise to an "immediate" risk.

[27] We therefore do not agree that a "very high risk" that the offender will in the future commit a relevant violent offence means an immediate threat to public safety. We note that there is no suggestion in two decisions of this Court subsequent to *Gray*, *R (CA586/2021) v R* and *Wilson v Department of Corrections*, that any recalibrated interpretation of the statutory criteria is appropriate, albeit they were concerned with the ESO criteria where the risk related to sexual offending.[40] We consider that the "very high risk" criterion relates not to the imminence of the risk but its likelihood. The high bar this criterion sets reflects the public safety justification that is required to be met before a person is subjected to the limits on their freedom of movement and association that an ESO entails.

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35 New Zealand Bill of Rights Act, s 6.

36 *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [90]–[92] per Tipping J. See also at [252] per McGrath J; and *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [281] per William Young J.

37 Parole Act, s 107I(2)(b)(ii).

38 See ss 107A(b) and 107I(4).

39 Section 107IAA(2)(b)(i).

40 *R (CA586/2021) v Department of Corrections* [2022] NZCA 225; and *Wilson v Department of Corrections*, above n 30.

[28] In *Gray*, the Judge also took the view that, because the making of an ESO is ultimately discretionary, a court should not make an ESO unless it is a demonstrably justified limitation on the offender's rights.[41] Applying the *R v Hansen* methodology on whether a limit on a right is demonstrably justified,[42] the Judge considered it was necessary to evaluate whether the ESO as proposed, including its terms and conditions, properly protects the public from the very high risk, and that the restrictions do no more than is reasonably necessary to achieve that protection.[43]

[29] We do not agree that application of the *R v Hansen* methodology is required. The issue was considered by the Supreme Court in *D (SC 31/2019) v New Zealand Police* in relation to the statutory power to make a registration order under the Child Protection (Child Sex Offender Government Agency Registration) Act 2016.[44] The Court accepted that such an order limited the rights to freedom of movement, association and expression.[45] The power was discretionary in that the Court "may order" registration if it was satisfied that the offender posed a risk to the life or sexual safety of a child or children.[46]

[30] Two members of the Court held that, although the power was discretionary, it did not require a court to undertake the *R v Hansen* analysis to determine whether registration was demonstrably justified in the particular case. Rather, a "simpler proportionality analysis", involving balancing the values of the BORA right at issue against the statutory objectives of the legislation, was appropriate.[47] The power to order registration should be interpreted in accordance with s 6 of the BORA. That meant the level of risk the offender posed must be of sufficient gravity to justify the making of the registration order with the consequent impacts on the rights of the offender.[48]

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41 *Department of Corrections v Gray*, above n 4, at [22].
42 *R v Hansen*, above n 36, at [104] per Tipping J.
43 *Department of Corrections v Gray*, above n 4, at [25].
44 *D (SC 31/2019) v New Zealand Police*, above n 36.
45 At [88] per Winkelmann CJ and O'Regan J. See New Zealand Bill of Rights Act, ss 14, 17 and 18.
46 At [20] per Winkelmann CJ and O'Regan J; and Child Protection (Child Sex Offender Government Agency Registration) Act 2016, s 9(2).
47 At [100]–[101] per Winkelmann CJ and O'Regan J. Glazebrook J at [263] approached the matter similarly. Ellen France J at [149]–[151] considered that there was little room for the discretion to operate if the statutory criteria was met. William Young J at [293] and [296] was of a similar view to Ellen France J.
48 At [101] per Winkelmann CJ and O'Regan J.

[31] Applying this approach to the ESO regime, if the statutory criteria are met, a court must balance the right not to be subject to a second penalty (that is, being subject to an ESO when a person has served their sentence for a violent offence) against the statutory purpose to protect the public from the very high risk that an offender will commit a relevant violent offence. Put more simply in *R (CA586/2021) v R*, and as adopted in *Wilson v Department of Corrections*, "strong justification" is required for an ESO and this is the "lens" through which this Court must assess whether the Judge erred in making the order.[49]

**This case**

*Health assessment reports before the District Court*

[32] In the District Court, Judge Northwood had before him a health assessment report from Mr Jimmie Fourie, a registered psychologist with the Department of Corrections. Mr Fourie's report was dated 5 July 2017 and was updated in an addendum dated 26 April 2019, which was provided due to the period of time that had elapsed since the 2017 report. The Judge also had before him a memorandum dated 8 May 2020 that was provided in response to the District Court's request for further information on the "persistent harbouring of vengeful intentions" criterion.

[33] The Judge also had a report from Mr Nick Lascelles, a registered clinical psychologist engaged by defence counsel, dated 3 December 2019, and a supplementary report dated 28 April 2020 that was provided in response to the District Court's request for further information on the "persistent harbouring of vengeful intentions" criterion.

[34] Both psychologists gave evidence and were cross-examined at a hearing before the Judge.

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[49] *R (CA586/2021) v Department of Corrections*, above n 40, at [53]; and *Wilson v Department of Corrections*, above n 30, at [19]–[20].

*Pervasive pattern of serious violence*

[35] The Judge was satisfied that Mr Mosen had a pervasive pattern of serious violent offending.[50] He noted that Mr Mosen's violent criminal history extended over 20 years and featured serious offending, including two counts of wounding with intent to cause grievous bodily harm, unlawful possession of a pistol, and aggravated robbery.[51] He also referred to Mr Mosen's convictions for assault and that Mr Forrie's report of Mr Mosen's behavioural issues in prison outlined that Mr Mosen had been disciplined for assault and other similar occurrences.[52]

[36] This conclusion was well open to the Judge and was not challenged on appeal. We note the slight error the Judge made in referring to two convictions for wounding with intent to cause grievous bodily harm when there was one such offence (in 2000) and a later offence of injuring with intent to cause grievous bodily harm (in 2013). Those two offences were serious. The former involved firing a shot from a loaded firearm directly at a person. The latter involved punches and kicks to the victim's head and body. The aggravated robbery (in 2010) involved Mr Mosen pointing a loaded shotgun with his finger on the trigger at several people. All of this offending is serious because of the risk to life it entailed. His convictions for assault were for dangerous offending (involving choking) or showed no respect for authority and law enforcement (involving assaults on police officers). In recent times Mr Mosen has been found in unlawful possession of firearms and has also been convicted for injuring with intent to injure a prisoner.

*Intense drive, desires or urges to commit acts of violence*

[37] The Judge was satisfied that Mr Mosen had the characteristic of an "intense drive, desires or urges to commit acts of violence".[53] He referred to Mr Fourie's view that Mr Mosen has an intense drive to commit acts of violence that can be triggered by specific but highly likely environmental and idiosyncratic factors.[54] He also

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50 *Department of Corrections v Mosen*, above n 1, at [41], referring to Parole Act, s 107I(2)(a).
51 At [39].
52 At [40].
53 At [52], referring to Parole Act, s 107IAA(2)(a)(i).
54 At [49].

referred to Mr Lascelles' view that Mr Mosen has demonstrated urges to commit violence through to the present day.[55]

[38] Mr Fourie's view was based on Mr Mosen's regular pattern of violence or threats of violence, limited time in the community since adolescence, limited interpersonal function and pro-violence cognitions (as indicated by his custodial history), and the absence of specialist treatment to equip him with alternative strategies to cope during challenging times.

[39] Mr Lascelles' view was also based on the frequency and persistence of Mr Mosen's convictions for violence and aggressive conduct in prison, and that Mr Mosen expressed thoughts of harming Mr Lascelles during their interview. Mr Lascelles did, however, make the point that Mr Mosen's intense drive was typically evidenced through threats, intimidatory behaviour and destruction of property, as opposed to more serious violent offences.

[40] Mr Bott contends that this criterion is not made out because Mr Fourie described Mr Mosen's intense drive as "latent at the time of the assessment". Latency was contrary to the *Gray* view that a very high risk must involve a characteristic that creates an immediate risk.[56] Mr Bott also submits that the criterion must relate to an intense drive to commit a "relevant violent offence". He refers to Mr Lascelles' comment that Mr Mosen's intense drive has typically been evidenced in offending of a lesser kind. Similarly, Ms Visser's report notes that most of Mr Mosen's violence has been at the lower end of the scale.

[41] We have already discussed that we do not accept that an immediate risk to commit a violent offence is necessary to meet the criterion. The test is whether there is a very high risk that the offender will in the future commit a relevant violent offence. An intense drive to commit "acts of violence" is but one of the factors the Judge must be satisfied of before he or she can be satisfied of the very high risk of a future

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55 At [51].
56 *Department of Corrections v Gray*, above n 4, at [23].

"relevant violent offence".[57] An intense drive may be present even if it is not presently externally manifested and is unleashed only if conducive circumstances arise.[58]

[42] We also do not accept that the intense drive must be one to commit a "relevant violent offence". Parliament has specified that the intense drive must relate to committing "acts of violence".[59] It has not specified any particular violent act. The fact that the intense drive typically manifests in violent acts of a non-serious kind is relevant to the overall assessment of whether there is a very high risk of Mr Mosen committing a "relevant violent offence". However, it is also the case that Mr Mosen's intense drive sometimes manifests in violent acts of a serious kind. The aggravated robbery, and wounding or injuring with intent to cause grievous bodily harm convictions are evidence of this.

[43] We consider the Judge did not err in finding this criterion was satisfied.

*Extreme aggressive volatility*

[44] The Judge was satisfied that Mr Mosen had the characteristic of "extreme aggressive volatility".[60]

[45] The Judge relied on Mr Fourie's view that: Mr Mosen's criminal and custodial records indicate an "array of threats of extreme aggression"; his aggressive behaviour in a custodial setting seemed to be an established interpersonal style; he resorted to intimidation when his needs and demands were not met, especially in relation to custodial staff and police; his volatility was exacerbated by withdrawal from methadone and physical symptoms associated with this; and he had some periods when he had not displayed volatility.[61]

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57 Parole Act, s 107IAA(2)(a)(i).
58 *Department of Corrections v Alinizi* [2016] NZCA 468 at [27]. See also *Department of Corrections v Wilson* [2016] NZHC 1082 at [33] and [35].
59 Parole Act, s 107IAA(2)(a)(i).
60 *Department of Corrections v Mosen*, above n 1, at [57], referring to Parole Act, s 107IAA(2)(a)(ii).
61 At [53].

[46] The Judge also referred to Mr Lascelles' view that Mr Mosen's behaviour in custody in the two years prior to 2019 demonstrated aggressive volatility that was part of a longer-term pattern, although there were also periods of relative calm.[62]

[47] The Judge's conclusion on this criterion was not challenged on appeal. We consider the Judge did not err in reaching it. Mr Mosen's history demonstrates he has this characteristic. Even in the context of the highly regulated prison environment, his record shows an array of threats of extreme aggression which have sometimes resulted in physical violence.

*Persistent harbouring of vengeful intentions to one or more other persons*

[48] Mr Fourie concluded in his 2017 report that he was not aware of information to suggest that Mr Mosen has demonstrated "a persistent pattern of rumination or holding persistent vengeful intentions towards one or more persons".[63] He remained of this view in his 2019 addendum report. When directed by the Judge to address this issue further, he closely examined Mr Mosen's custodial misconduct and incident reports. He said:

> 8 In the writer's opinion, Mr Mosen's abusive and threatening behaviour towards individuals is a persistent way in which he behaves when he perceives his needs have not been met. This behaviour could be explained as a maladaptive strategy by Mr Mosen attempting to exert agency and control over matters that are important to him. Mr Mosen appears to lack the nuanced skills to tolerate frustration and problem solve effectively in these situations, he has demonstrated a persistent behavioural pattern of being reactive and impulsive to such perceived situational threats. The repeated nature of this behaviour is a typical way in which Mr Mosen is dealing with these situational problems rather than a persistent desire to cause harm. In the writer's opinion, examination of behavioural problems in the custodial environment has failed to find evidence that Mr Mosen has a pattern of ruminating on perceived injuries and harbouring intentions to harm others seen by him as responsible. Further, Mr Mosen has demonstrated that when given time and space to calm down he has deescalated rather than built up resentment.
>
> 9 … In the writer's opinion, at times, Mr Mosen displays threatening, aggressive, abusive and violent behaviour towards one or more persons, and this has been a persistent way of behaving. This behaviour is not considered … to be a vengeful desire to cause harm but rather the result of poor self-regulation and problem solving

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62 At [55].
63 Referring to s 107IAA(2)(a)(iii).

> that, at times, has escalated to physical harm being inflicted on others. The writer cannot conclude with certainty that Mr Mosen is keeping feelings or thoughts of harming others in his mind for long periods of time. It is rather considered by the writer to be reactive and in the moment when he expresses these harmful intentions.
>
> 10 Therefore, the writer is of the opinion that Mr Mosen does not display persistent harbouring of vengeful intentions towards one or more persons.

[49] Mr Lascelles' 2019 report also said that Mr Mosen did not "elicit any indication of persistent vengeful intentions toward any specific people or class of people". His 2020 report said:[64]

> 7. In revisiting this issue, I have looked further at what is meant by terms that seem key to the item, vengeful and persistent. The term vengeful is defined in the Online Cambridge Dictionary as "*expressing a strong wish to punish someone who has harmed you or your family or friends*", while persistent is defined as "*lasting for a long time or difficult to get rid of*".
>
> 8. Mr Mosen has a long-term pattern of threatening behaviour in the context of feeling wronged by others and experiencing brief but intense anger. This has been directed at people such as custodial staff, a Probation Officer, other prisoners and peers in the community. It included myself, as Mr Mosen disclosed thoughts of strangling me during interview while experiencing anger about questions put to him. However, these episodes seem to be typically brief and I am not aware of Mr Mosen evidencing long term stable intentions of harming specific persons.
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> 9. It is for the Court to decide the intention and meaning of the criterion of "persistent harbouring of vengeful intentions". If it requires demonstrating that the person has held the desire to harm or punish one or more specified persons over an extended period of time, Mr Mosen would not seem to reach that threshold.
>
> 10. However, Mr Mosen does demonstrate a persistent pattern of briefly harbouring vengeful intentions toward a range of other people. In terms of situational factors, he is prone to perceiving threat of harm from others, which is not limited to expecting to be physically attacked. Mr Mosen also can respond with intense anger when he perceives that he is being slighted, disrespected, or thwarted in some way.

[50] The two psychologists gave further evidence about this at the hearing before the Judge. Mr Fourie considered that Mr Mosen resorts to violence when his needs were not met, his response is reactive, and it is not to punish or harm someone but it

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64 Footnotes omitted and original emphasis.

is his way of problem solving. Mr Lascelles said there is a pattern of exaggerated responses to the perception of threat. During his interview, Mr Mosen began to see Mr Lascelles as the enemy and had thoughts of wanting to harm him. Mr Lascelles considered that Mr Mosen harbours his intentions "for seconds or minutes and then it dissipates as quickly as it arises". Mr Lascelles said "there is persistence in a pattern continuing over time but not the persistent harbouring towards one or more persons".

[51] The Judge reviewed this evidence and some High Court cases.[65] He concluded that the harbouring of vengeful intentions need not be persistent in the sense of longstanding. Rather, it was enough that the vengeful intentions have been persistent in the sense that they have occurred on more than one occasion.[66] He considered this fitted with the purpose of an ESO because a tendency to harbour vengeful intentions against persons was particularly dangerous, especially in combination with the other s 107IAA(2)(a) characteristics.[67] On the basis of the psychologists' evidence, the Judge considered that Mr Mosen persistently harboured vengeful intentions for short periods of time. The Judge therefore found this criterion was satisfied.[68]

[52] Mr Bott submits this interpretation was wrong and not BORA-consistent. He says Mr Mosen's violence is reactive rather than motivated by vengeance. Mr Mosen does not harbour vengeful intentions towards any identifiable person.

[53] The respondent supports the interpretation the Judge took. The respondent submits that "persistent" can mean frequent and repetitive rather than just long-held and consistent. Moreover, Mr Mosen's vengeful intentions are persistent in that they are recurring, even though they are only briefly held at the time they manifest.

[54] We accept that "persistent" can mean frequent and repetitive rather than just long-held. Dictionary definitions include "enduring" and "constantly repeated",[69] "incessantly repeated" and "unrelenting",[70] and "lasting for a long time or difficult

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65 *Department of Corrections v Mosen*, above n 1, at [88]–[111].
66 At [120].
67 At [122].
68 At [126]–[128].
69 Lesley Brown (ed) *Shorter Oxford English Dictionary* (5th ed, Oxford University Press, Oxford, 1993) at 2167.
70 *Collins English Dictionary* (13th ed, HarperCollins Publishers, Glasgow, 2018) at 1487.

to get rid of".[71] However it is the phrase "persistent harbouring of vengeful intentions" as whole that must be given meaning. The ordinary meaning of "harbouring" is to "maintain secretly",[72] "to think about or feel something, usually over a long period"[73] and "to hold especially persistently".[74] "Vengeful" means a person "wanting or inclined to take vengeance",[75] "desiring revenge",[76] or "expressing a strong wish to punish someone who has harmed you or your family or friends".[77] Together the phrase means to maintain or have in one's mind for a long time or recurringly a strong wish to take revenge on someone or to punish someone for the harm they are perceived to have done.

[55] We consider that this interpretation is consistent with *Department of Corrections v Wilson*.[78] In that case, Venning J referred to evidence that the offender, Mr Wilson, had been "ruminating" about his girlfriend going out with his sister and had feelings of jealousy and anger which had led to his violent attacks on a number of people.[79] Mr Wilson acknowledged that another instance of offending was the culmination of hostile rumination towards the victim's family. He also acknowledged that he struggled to control his thoughts and feelings and that he was concerned he might act violently or explode because of negative ruminations about others. An attack on a fellow prisoner was preceded by an expression of a desire to harm him and waiting for a moment to act.

[56] Similarly, in *Department of Corrections v McCord*, Davison J said:[80]

> [58] The applicant submits that McCord's past offending illustrates that he does possess this characteristic of persistent harbouring of vengeful intentions. Having regard to his conduct whereby he acted violently towards both his intimate partners in respect of whom he had developed feelings of sexual jealousy, and also towards others in response to feeling disrespected, I am satisfied that he does possess this characteristic. The violence he has exhibited in those circumstances was not reactive and an immediate response to a

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71 "Persistent" Cambridge Dictionary <www.dictionary.cambridge.org>.
72 *Collins English Dictionary*, above n 70, at 892, definition of "harbour".
73 "Harbouring" Cambridge Dictionary <www.dictionary.cambridge.org>.
74 "Harbor" Merriam-Webster <www.merriam-webster.com>.
75 Brown, above n 69, at 3517.
76 *Collins English Dictionary*, above n 70, at 2200.
77 "Vengeful" Cambridge Dictionary <www.dictionary.cambridge.org>.
78 *Department of Corrections v Wilson*, above n 58.
79 At [39].
80 *Department of Corrections v McCord* [2017] NZHC 744.

> particular situation, but rather it appears to have been the result of rumination and a subsequent acting out of a vengeful intention.

[57] Again similarly, in *Department of Corrections v Paul*, where the offender accepted that an ESO of 10 years should be imposed, Mander J referred to the offender's "reported intermittent periods of engaging in violent ruminative ideation which appears to have been in response to perceptions that he is at risk of harm from others".[81]

[58] In the District Court, the Judge was referred to two other High Court decisions.[82] In those cases, the Court were satisfied the criterion was met even though the vengeful intention was not targeted at any particular individual.[83] In *Department of Corrections v Amohanga*, the ESO was not opposed by the offender and the evidence that could support the vengeful intention was only briefly referred to.[84] In *Department of Corrections v Paniora*, as the Judge noted, one psychologist referred to the offender's "potential to seek revenge through violence, and identifies such conduct in his past offending" and the other was of the view that the offender was intensely motivated to be violent, including for revenge.[85]

[59] We consider that Mr Fourie's evidence does not support a conclusion that Mr Mosen has the characteristic of "persistent harbouring of vengeful intentions towards one or more persons".[86] Mr Fourie said that Mr Mosen acts reactively and impulsively out of frustration and because of poor problem-solving skills.

[60] We also consider that Mr Lascelles' evidence does not support Mr Mosen having the characteristic either. He gave the example of Mr Mosen wanting to strangle him because he did not like the questions. That is a vengeful intent but, given its very short duration, does not qualify as "persistent harbouring" of that intent in and of itself. Mr Lascelles also referred to a long-term pattern of threatening behaviour in the

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81 *Department of Corrections v Paul* [2017] NZHC 1294 at [26].

82 *Department of Corrections v Amohanga* [2017] NZHC 1406; and *Department of Corrections v Paniora* [2018] NZHC 1505.

83 See *Department of Corrections v Amohanga*, above n 82, at [35] and [55]; and see generally *Department of Corrections v Paniora*, above n 82, at [28] and [32].

84 *Department of Corrections v Amohanga*, above n 82, at [4] and [26]–[30].

85 *Department of Corrections v Paniora*, above n 82, at [14] and [19], as cited in *Department of Corrections v Mosen*, above n 1, at [109].

86 Parole Act, s 107IAA(2)(a)(iii).

context of feeling wronged by others and experiencing brief but intense anger. We consider the brevity of this intense anger is more consistent with impulsive frustration that takes its form as violence rather than "persistent harbouring of a vengeful intention". Mr Mosen does not ruminate or hold onto thoughts of obtaining revenge for a perceived lack of response to his needs or demands. His reactive threats and violence are better captured by the "intense … urges to commit acts of violence" and the "extreme aggressive volatility" criteria.[87] We consider the additional "persistent harbouring of a vengeful intention" characteristic has not been shown.

[61] For completeness, we note that this conclusion is supported by Ms Visser. She considers Mr Mosen's violent responses are mostly driven by reactive short-term responses related to past trauma and lack of control.

*Behavioural evidence of clear and long-term planning of serious violent offences to meet a premeditated goal*

[62] The Judge was satisfied that Mr Mosen displayed this behavioural evidence.[88] He referred to the views of both psychologists that Mr Mosen's relevant violent offences showed evidence of planning to commit the crime but any planning probably occurred over relatively shorter periods.[89] The Judge did not explain why he was nevertheless satisfied of this criterion. This is of no moment, however, because s 107IAA requires that the Court be satisfied either of this criterion or the next criterion ("limited self-regulatory capacity").[90] There is no doubt that this next criterion was met.

*Limited self-regulatory capacity*

[63] The Judge was satisfied that Mr Mosen had limited self-regulatory capacity.[91] That conclusion was supported by the evidence of both Mr Fourie and Mr Lascelles. The Judge recorded that Mr Fourie had noted that Mr Mosen's rapid reoffending following releases from prison illustrated his limited self-regulatory capacity,

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87 Section 107IAA(2)(a)(i) and (ii).
88 *Department of Corrections v Mosen*, above n 1, at [61], referring to Parole Act, s 107IAA(2)(b)(i).
89 At [59].
90 Parole Act, s 107IAA(2)(b).
91 *Department of Corrections v Mosen*, above n 1, at [64], referring to Parole Act, s 107IAA(2)(b)(ii).

even though there were some intermittent, but unstable, improvements in this area.[92] The Judge's conclusion on this is not challenged on appeal. We consider the Judge did not err in reaching it.

*Absence of understanding or concern about the impact of his violence*

[64] The Judge was satisfied that this criterion was met.[93] This conclusion was supported by the psychologists' evidence.[94] It is not challenged on appeal.

*Very high risk of committing a relevant violent offence in the future*

[65] Because the Judge found the criteria in s 107IAA was established, it was open to him to determine that there was a very high risk that Mr Mosen would commit a relevant violent offence.[95] The Judge noted what the psychologists had said about this and concluded that he was satisfied about it.[96]

[66] We have found that one of the criterion in s 107IAA(2) is not met. That section provides that the Court may determine there is a very high risk that the offender will commit a relevant violent offence only if it is satisfied of the specified criteria. Our conclusion that the criterion of "persistent harbouring of vengeful intentions" is not met means it is not open to us to be satisfied that there is a very high risk that Mr Mosen would commit a relevant violent offence. We nevertheless review the evidence on this.

[67] Mr Fourie's view was as follows:

> 21 In summary, based on a multi-method assessment of Mr Mosen's risk of further relevant re-offending using RoC*Rol, VRS and PCL:SV ratings, it is considered that there is a High risk of Mr Mosen committing a further relevant offence. However, noted clinical factors including his very-high rate of prison misconducts, his risk to commit a relevant offence could increase to Very High given specific

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92 At [62].

93 At [68], referring to Parole Act, s 107IAA(2)(c). See *Department of Corrections v Alinizi*, above n 58, at [13] setting out a three-step process involving: (i) determining whether the offender has, or has had, a pervasive pattern of sexual or violent offending; (ii) making specific findings as to whether the offender meets the criteria in s 107IAA; and (iii) if those criteria are met, determining the risk of the offender committing a relevant offence.

94 See at [65]–[67].

95 Parole Act, s 107I(2)(b)(ii).

96 *Department of Corrections v Mosen*, above n 1, at [42]–[48] and [129].

idiosyncratic and environmental factors. In particular, Mr Mosen has reverted rapidly to relevant offending in the presence of destabilisers (relationship difficulties) in order to get drugs. Mr Mosen also has limited prosocial and stable values, goals or support and has had no treatment to develop effective coping strategies. In summary, the likelihood of Mr Mosen shifting from High to Very-High would seem to be almost certain.

…

33 Mr Mosen's offending includes five convictions for relevant violent offences. Mr Mosen is considered to be at high risk for violent re-offending. However, given specific idiosyncratic and environmental factors Mr Mosen's risk will escalate to very-high. Future situations where his risk will be very-high include a relapse into drug abuse and more specifically the associated financial difficulties to sustain his drug addiction. In the event that Mr Mosen remains a recipient of a methadone prescription, his risk could escalate to very high if problems arise with his methadone prescription. Likely problems could be the availability of prescribed methadone or if he is provided more than one day's supply, for instance over a weekend, and he consumes it all at once. Interpersonal conflict and personally distressing events would exacerbate these potential periods of acute risk. … Mr Mosen presents with a number of high end and complex needs and his current release plan is not considered sufficient to mitigate his risk. Paramount to successful reintegration and mitigating his risk will be Mr Mosen's attitude towards the support services, including the Probation Service and his willingness to engage. Mr Mosen's anti-authority attitudes and [beliefs] are considered a major obstacle in his engagement with these support services.

[68] Mr Fourie remained of this view in his addendum report.

[69] Mr Lascelles' view was as follows:

49. In summary, I generally concurred with Mr Fourie's scoring of the risk instruments. Based on the information available to me, and my interview with Mr Mosen, I scored both the PCL:SV and the VRS slightly higher than Mr Fourie. In my view, Mr Mosen's risk of further offending leading to reimprisonment is very high, with breaches of conditions of release being consistent with his history both in the community and his consistent rule breaking in prison.

50. Mr Mosen's high to very high risk of further violent offending is also well established in my view. However, it is the nature of any future violence that is less clear, particularly in regard to the relevant violent offending described by the Extended Supervision legislation. The most likely violent offence in the short term is expected to involve some form of threatening behaviour, through a verbal means or a physical display of intimidation.

> 51. Mr Mosen's capacity for more serious violence is expected to emerge in certain specific circumstances and scenarios. Two key risk scenarios in my view are:
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> a. Conflict or perception of threat by a peer is likely to result in Mr Mosen reacting impulsively to "neutralise" [the] perceive[d] threat and feeling entitled to act by strongly held beliefs supporting such behaviour. This is as opposed to avoiding or managing conflict through more peaceful means. Mr Mosen's resolve to remain part of the Skinhead culture, his prominent tattoos, and reputation are all likely to increase his risk of coming into serious conflict with others.
>
> b. If Mr Mosen relapses into illicit drug (or methadone use), and is temporarily unable to access a supply, he will be strongly motivated to carry out acts of impulsive violence to obtain funds or drugs directly. This may involve the use of weapons, and place members of the public at risk.

[70] We certainly accept that there is a very high risk of Mr Mosen offending again for the reasons the psychologists give. However, we agree with Mr Lascelles that it is less clear that this offending will be of a relevant violent offence. This is also Ms Visser's view. Mr Mosen's last relevant violent offence was in 2013. He has, however, spent much of the time since then in the controlled prison environment. Of most concern is that, following the ESO and his time in the community, he has continued to offend by having unlawful possession of firearms, and has refused to provide specimens for drug testing as he is required to do. Drug taking and possession of firearms is a risky and potentially lethal combination, particularly if he does not have the money to pay for drugs.

[71] On the other hand, it is clear that Mr Mosen finds the ESO restrictions frustrating. He wants to get on with his life with his wife. Ms Visser is of the opinion that the ESO is more likely to create a situation where Mr Mosen offends due to those frustrations. His history shows that he responds to situations where he does not have control, such as a custodial setting, with rebellion. Mr Mosen's anti-authority attitudes present a major obstacle in his engagement with the support services that are available to him under an ESO. Ms Visser considers that Mr Mosen can change, and that he wants to, but this will require time for him to develop a therapeutic relationship with a psychiatrist.

*Is an ESO strongly justified?*

[72] We consider that an ESO would have been strongly justified if Mr Mosen met all the criteria for being of a very high risk that he would commit a relevant violent offence. The need for public safety would outweigh Mr Mosen's right to be free from a second penalty and justify some limits on his freedom of movement and association. But the statutory criteria have not all been met.

**Term**

[73] Mr Bott submits the Judge did not assess whether a five-year term was necessary and proportionate to justify the limitations on Mr Mosen's rights. However, the Judge concluded on the basis of the psychologists' reports and evidence that five years was "the minimum period" to address the risks and that he "would have been open to imposing a higher term, given the pessimistic outlook for Mr Mosen's ability to address issues of violence".[97] This conclusion was open to him on the evidence. For example, Mr Fourie said that, in order to address the root causes of Mr Mosen's offending, Mr Mosen would require intensive psychological treatment for two to three years, with pre-treatment work before that (assuming he would be willing to engage in such work). Mr Lascelles said Mr Mosen is at high to very high risk of violent offending during the next five years. We therefore do not accept Mr Bott's submission. We would have upheld the five-year term if we had found that the criteria for an ESO were established.

**Result**

[74] The application for an extension of time to appeal is granted.

[75] The application for leave to adduce fresh evidence is granted.

[76] The appeal is allowed.

[77] The ESO is cancelled.

Solicitors:
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97 *Department of Corrections v Mosen*, above n 1, at [141].