IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA589/2021
[2023] NZCA 407

BETWEEN	TOMMY APERA PORI Appellant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing:	27 April 2023 (further submissions received 12 May 2023)
Court:	Cooper P, French and Brown JJ
Counsel:	M Starling and P N Allan for Appellant C J Boshier for Respondent
Judgment:	30 August 2023 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B There is no order as to costs.

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] Under s 8 of the Public Safety (Public Protection Orders) Act 2014 (the PPO Act), the Chief Executive of the Department of Corrections may apply to the High Court for a public protection order (PPO) against a person who meets the

threshold for such an order on the ground that there is a very high risk of imminent serious sexual or violent offending by the person. The Chief Executive made such an application in respect of Mr Pori.

[2] Where a Court is satisfied that it could make a PPO against a respondent but it appears to the Court that the respondent may be mentally disordered or intellectually disabled, s 12(2) of the PPO Act provides:

> The court may, instead of making a public protection order, direct the chief executive to consider the appropriateness of an application in respect of the respondent under section 45 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or under section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.

In a judgment dated 25 June 2020 (the first judgment), Dunningham J directed the Chief Executive to consider the appropriateness of an application under ss 45 or 29.[1]

[3] Subsequently the High Court was advised that the Chief Executive wished to proceed with the PPO application. In a judgment dated 3 September 2021 (the second judgment), Dunningham J made a PPO in respect of Mr Pori.[2] Mr Pori appeals that decision.

[4] Although the appeal is ostensibly against the decision to make the PPO, as we explain below the focus of Mr Pori's complaint is the alleged inadequacy of the process adopted by the Chief Executive in response to the Judge's direction under s 12(2) in the first judgment.

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1 *Chief Executive of the Department of Corrections v Pori* [2020] NZHC 1446 [First judgment] at [62].

2 *Chief Executive, Department of Corrections v Pori* [2021] NZHC 2305 [Second judgment] at [100].

Context for the appeal

Mr Pori

[5] Mr Pori, who is in his early 60s, was born in the Cook Islands. He was convicted of a number of criminal offences in the Cook Islands, including rape and assault on a child during a sexually motivated break-in of a house at night.

[6] In 2006, in New Zealand, Mr Pori entered a nine-year-old girl's bedroom and sexually offended against her by digitally penetrating her. Following completion of a five-year sentence for that offending, in 2011 an extended supervision order (ESO) was imposed on Mr Pori. Although that ESO had not expired, in 2017 the Chief Executive sought a new ESO with a direction for intensive monitoring (IM) for the maximum statutory period of 12 months. The new ESO was made for seven years so as not to extend the total time that Mr Pori would be subject to an ESO.[3] At the same time the Court made an order requiring the imposition of an IM condition for a period of 12 months.[4]

The PPO application

[7] On 28 May 2020 the Chief Executive applied under s 104 of the PPO Act for a PPO in respect of Mr Pori. He also sought an order pursuant to s 107 that Mr Pori be subject to an interim detention order (IDO), to have effect until the application for a PPO could be heard, and an order under s 85 that Mr Pori be detained in a prison instead of in a residence.

[8] In the first judgment, the Judge found that Mr Pori met the jurisdictional threshold for the imposition of a PPO (and therefore an IDO) set out in s 7(1)(b) of the PPO Act.[5] The Judge was also satisfied, at least on a provisional basis, that Mr Pori met the threshold for such an order because he was at very high risk of imminent serious sexual offending, having regard to the four behavioural

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3 *Department of Corrections v Pori* [2017] NZHC 3082 at [31]. Pursuant to s 107P(1) of the Parole Act 2002, time had ceased to run on the 2011 order during the time in which Mr Pori was imprisoned for subsequent offending. As such, the 2011 order was not due to expire until 2024.

4 *Department of Corrections v Pori*, above n 3, at [34]–[36].

5 First judgment, above n 1, at [11].

characteristics set out in s 13(2) of the PPO Act.[6] The Judge granted the application for an IDO and ordered that it be served at the Matawhāiti residence, located on the grounds of Christchurch Men's Prison, which is a purpose-built facility designed to house individuals who are subject to a PPO.[7]

The s 12(2) direction

[9] During the hearing of the IDO application concerns were raised about Mr Pori's mental health and intellectual ability, raising the possibility that under s 12 of the PPO Act Mr Pori should be subject to care and supervision under different legislation. For that reason the Judge directed the Chief Executive to consider the appropriateness of an application in respect of Mr Pori under s 45 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 (the Mental Health Act) or under s 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 (the IDCCR Act).[8]

[10] The case on appeal did not contain documentation evidencing the steps taken by the Chief Executive consequent upon the Judge's direction under s 12(2) of the PPO Act. Following discussion at the hearing of the appeal, in response to our request Ms Boshier (who appeared for the Chief Executive) filed a memorandum dated 5 May 2023 in which she explained what had transpired following that direction:[9]

> 3. From the Court record, it is apparent:
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> a. Following the 24 June 2020 hearing for an interim detention order, reports were received by the Department from:
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> i. Elizabeth Waugh (in relation to whether Mr Pori met criteria under the [IDCCR Act]); and
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> ii. Dr Rudi Kritzinger (in relation to whether Mr Pori met the criteria under the Mental Health Act).
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> b. The Department had already been exploring options under the IDCCR and Mental Health Acts, prior to the s 12 direction. Ms Waugh's second report was commissioned by the Department prior to June 2020, and Ms Waugh then

6 At [12], [28] and [33]–[34].
7 At [61].
8 At [62].
9 Footnotes omitted.

instructed Dr Kritzinger. Dr Kritzinger, in his report, references Ms Waugh's referral letter, dated 29 May 2020.

c. These reports were filed with the Court alongside a memorandum of counsel for the Chief Executive dated 31 July 2020.

d. The matter was called before Van Bohemen J on 3 August 2020. Counsel appearing for the Chief Executive advised the Court that, the reports having been received and considered, the application for the PPO was to continue. His Honour's Minute records:

> [7] Mr White, who appeared for the Chief Executive at the call, said that production of the reports referred to in Ms Boshier's memorandum had not changed the Chief Executive's intention to seek a PPO because there were difficulties about where Mr Pori could be safely cared for if orders were sought under other legislation. However, the Chief Executive was continuing to assess the various options.

4. Counsel is conscious that the instructions received from the Department are not on the court file. However, for completeness, it can be confirmed:

a. The Chief Executive was updated via email on the making of the interim detention order and provided with Dunningham J's judgment on 25 June 2020;

b. A meeting was then held between the Chief Executive and Steven Rendall, Principal Advisor from the National High Risk Team, on 30 June 2020; and

c. Instructions were received which resulted in counsel's 31 July 2020 memorandum and the confirmation at the 3 August 2020 hearing that the application would proceed.

The judgment under appeal

[11] The Judge recorded that since the making of the IDO evidence had been prepared on whether Mr Pori met the criteria for being the subject of an order under the Mental Health Act or the IDCCR Act and, if so, whether that was preferable to him being made subject to a PPO.[10] She noted that the evidence concluded that Mr Pori did not have an intellectual disability, as defined in the IDCCR Act, but was of

[10] Second judgment, above n 2, at [14].

low average intelligence. However there was some evidence he suffered from a "mental disorder" as defined in the Mental Health Act.[11]

[12] The key issue for determination identified by the Judge was whether it was more appropriate to:

(a) direct the Chief Executive pursuant to s 12 of the PPO Act to make an application under s 45 of the Mental Health Act; or

(b) make a PPO which would effectively retain the status quo.[12]

[13] The Judge first considered whether Mr Pori met the criteria for the imposition of a PPO. She noted that he met the threshold test in s 7(1)(b) of the PPO Act as he was over the age of 18 and subject to an ESO with IM.[13] She proceeded to address each of the four behavioural characteristics set out in s 13(2), concluding that all those characteristics were present.[14] The Judge concluded that given the unanimity of the expert opinion, supported by evidence of ongoing offence-paralleling behaviour even while in highly supervised environments, she had no hesitation in finding Mr Pori posed a very high risk of imminent serious sexual offending.[15]

[14] The Judge then turned to address the evidence concerning whether Mr Pori suffered from a mental disorder. She concluded:

> [61] On balance, the expert evidence is that Mr Pori does meet the criteria in the Mental Health Act of having a "mental disorder" and I accept that conclusion. Consequently, I need to consider whether I should direct the Chief Executive to make an application under s 45 of the Mental Health Act, as a more appropriate response to the concerns raised by Mr Pori's behaviour, than making a PPO.

[15] After a careful review of the submissions of counsel and the expert evidence, the Judge concluded there was no obvious benefit to Mr Pori being considered for an order under the Mental Health Act.[16] The Judge declined to direct the Chief Executive

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11 At [14].
12 At [15].
13 At [16].
14 At [20]–[39].
15 At [49].
16 At [95].

to make an application under the Mental Health Act,[17] and proceeded to make a PPO which was to be served at Matawhāiti.[18]

The evolution of the appeal

[16] The notice of appeal against the second judgment, dated 29 September 2021, specified the following ground of appeal:

> [T]he High Court erred by declining to direct the chief executive of the Department of Corrections to consider the appropriateness of an application in respect of the respondent under section 45 of the Mental Health (Compulsory Assessment and Treatment) Act 1992 or under section 29 of the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 under s 12 of the Act.

A judgment was sought on appeal quashing the PPO and directing the Chief Executive to consider an application under s 12 of the PPO Act.

[17] In Mr Pori's original submissions dated 21 March 2023 it was contended that the appeal essentially boiled down to how the discretion available to the Court under s 12 ought to be approached. It was submitted that, because Mr Pori is mentally disordered, the High Court should have "directed" pursuant to s 12(2) that the Chief Executive apply under s 45 of the Mental Health Act and have that process followed prior to deciding whether a PPO should issue.

[18] However the Chief Executive's submissions of 4 April 2023 drew attention to the fact that in *Chisnall v Attorney-General*,[19] which was released approximately two and a half months after delivery of the second judgment, this Court ruled that, if the Chief Executive decides that a s 45 application would not be appropriate, there is no power for the Court to nevertheless "direct" that an application be made. The Court said:[20]

> [159] The principle stated in s 5(c) is that a PPO should not be imposed on a person who is eligible to be detained under the statutes applicable in the case of mentally disordered or intellectually disabled persons. This merely reflects the power given by s 12(2) of the Act for the Court to order the Chief

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17 At [99].
18 At [100]–[101].
19 *Chisnall v Attorney-General* [2021] NZCA 616, [2022] 2 NZLR 484.
20 Footnotes omitted and emphasis added.

> Executive to consider making an application under those statutes. That power is exercisable where the Court is satisfied that a PPO could be made against a respondent, and it appears to the Court that the respondent may be mentally disordered or intellectually disabled. But the fact that such diversion is possible does not assist in the assessment of the nature of a PPO when it is made. *Further, the Court has no power to direct the Chief Executive to make an application under the relevant statutes. The Chief Executive may choose not to do so, in which case we infer there could be a further application for a PPO.* In the meantime, the respondent would remain subject to an interim detention order.

[19] A supplementary submission for Mr Pori dated 13 April 2023 accepted that the approach contended for in the original submissions was in error in two respects:

> i. It is now accepted that the Court did in fact make a s 12 referral earlier on in the process; and
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> ii. It is further accepted that s 12 does not empower the Court to direct the chief executive to make an application under s 45 [of the Mental Health Act] only to direct that they consider making such an application.

[20] It was submitted for Mr Pori that the preferred interpretation of s 12 (said to be consistent with *Chisnall*) is:

> i. If, pursuant to s 12(2), the Court directs the Chief Executive to consider the appropriateness of an application under s 45 then that consideration must properly take place; and
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> ii. Given the importance of the decision, the decision of the Chief Executive is likely to be amenable to Judicial Review (or at least require some sort of process to take place); and
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> iii. The Court ought not proceed to make a final decision on whether a PPO should issue without being first satisfied that [its] direction has been complied with properly.

[21] It was Mr Pori's case that the Chief Executive's process had miscarried for the reason that no formal decision was ever made on the appropriateness of an application under s 45 of the Mental Health Act, notwithstanding that the Chief Executive was directed by the Court to consider it.

Issue on appeal

[22] With the benefit of the supplementary submission for Mr Pori, the oral argument at the hearing and the written submission in response to Ms Boshier's

memorandum, we consider that the primary issue on the appeal reflects the proposition in item (iii) of Mr Pori's interpretation of s 12,[21] which we would rephrase in this way:

> Having made a direction under s 12(2) of the PPO Act, does the High Court have an obligation to be satisfied that the Chief Executive has given proper consideration to making an application under s 45 of the Mental Health Act or s 29 of the IDCCR Act?

[23] However, before addressing that question, we will first consider as a preliminary issue the nature of the application, purportedly pursuant to s 12, which the Judge addressed in the second judgment.

A preliminary issue

[24] In the light of *Chisnall* it is now common ground that the High Court does not have jurisdiction to direct the Chief Executive to "make" an application under either ss 45 or 29. The Court's power is limited to directing the Chief Executive to "consider the appropriateness" of such an application. However it appears to be the case that at the hearing in July 2021 both parties assumed that the Court had the power to direct that an application in fact be made. Certainly the judgment reads as if the Judge was of that view.

[25] As earlier mentioned,[22] having noted the nature of the direction in the first judgment, the Judge identified the key issue for determination in the second judgment as including whether it was appropriate to "direct" the Chief Executive "to make an application under s 45".[23] Then, in the course of considering whether there was an adequate alternative option to a PPO, the Judge stated:

> [61] On balance, the expert evidence is that Mr Pori does meet the criteria in the Mental Health Act of having a "mental disorder" and I accept that conclusion. Consequently, I need to consider whether I should direct the Chief Executive to make an application under s 45 of the Mental Health Act, as a more appropriate response to the concerns raised by Mr Pori's behaviour, than making a PPO.

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21 At [20] above.
22 At [12] above.
23 Second judgment, above n 2, at [15].

[26] Subsequently the Judge described Mr Pori's application as seeking such a direction:

> [84] This leaves the alternative proposed on Mr Pori's behalf, of directing the Chief Executive to make an application under s 45 of the Mental Health Act. The Chief Executive submits that a compulsory treatment order under that Act is not available for Mr Pori and would, in any event, result in a placement which would be significantly more restrictive for him.

Finally, in the Judge's conclusion, reference was again made to a power to direct the Chief Executive to make an application under the Mental Health Act pursuant to s 12 of the PPO Act.[24]

[27] In the course of oral submissions Ms Boshier contended that the Judge's statements referred to above were simply instances of imprecise terminology. She suggested that, contrary to the wording of the judgment, the Judge was not entertaining a direction that the Chief Executive "make" an application but was merely revisiting on a second occasion a potential direction that the Chief Executive "consider" the making of such an application.

[28] We are unable to accept that interpretation of the judgment. When referring to the direction made in the first judgment, on two occasions the Judge explicitly described the nature of the direction as being to "consider the appropriateness" of an application under the other statutory provisions.[25] By contrast, we consider that the direction which the Judge had in contemplation in the second judgment was a direction that the Chief Executive "make" an application. Indeed that was the order she was expressly invited by Mr Pori to make. Finally, we read the Chief Executive's written submissions as recognising that all parties proceeded on the footing that the Court was empowered to direct that an application under the Mental Health Act should actually be made.

[29] For these reasons we consider that in the second judgment the Judge did entertain the prospect of a direction that the Chief Executive "make" an application under s 45 of the Mental Health Act. As both parties now accept,[26] that was not an

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24 At [99].
25 At [13] and [54].
26 See [24] above.

order which the Judge had jurisdiction to make. In the event, however, the Judge declined to make such a direction. In those circumstances it is unnecessary for this Court to make any order in respect of that aspect of the judgment under appeal.

Before determining a PPO application must the High Court be satisfied that the Chief Executive has complied with any relevant s 12(2) direction?

[30] As noted above,[27] Mr Pori's preferred interpretation of s 12 comprised three propositions:

> i. If, pursuant to s 12(2), the Court directs the Chief Executive to consider the appropriateness of an application under s 45 then that consideration must properly take place; and
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> ii. Given the importance of the decision, the decision of the Chief Executive is likely to be amenable to Judicial Review (or at least require some sort of process to take place); and
>
> iii. The Court ought not proceed to make a final decision on whether a PPO should issue without being first satisfied that [its] direction has been complied with properly.

[31] As to the first, it is self-evident that if the Court gives a direction to the Chief Executive under s 12(2) then the Chief Executive must give consideration to the appropriateness of an application under ss 45 or 29.

[32] Unfortunately we have not had the benefit of full submissions on the second proposition. We make clear that that is not the fault of counsel but simply the consequence of the way this appeal has evolved. In these circumstances it is not appropriate to express even a provisional view. Nor is it necessary to do so in light of our view on the third proposition, to which we now turn.

[33] There is no express requirement in the PPO Act for the Chief Executive to make a report to the High Court concerning the process of consideration undertaken in response to a direction by the Court under s 12(2). However if, following appropriate consideration of the potential applications, the Chief Executive concludes that it is appropriate to maintain the PPO application, we consider that the

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[27] At [20] above.

Chief Executive must inform the Court of the reasons for that decision in sufficient detail to satisfy the Court that pursuit of the PPO application is the appropriate course.

[34] That is what transpired in this case. We have noted above the steps taken following the direction in the first judgment.[28] In the second judgment the Judge addressed the Chief Executive's explanation in this way:

> [55] In a memorandum to the Court dated 31 July 2020, Ms Boshier, for the Chief Executive, noted that:
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> (a) Mr Pori had been assessed, a neuropsychiatric report completed by Dr Rudi Kritzinger, and a copy of that provided to counsel for Mr Pori;
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> (b) an opinion had been obtained from Ms Waugh, a clinical psychologist, regarding whether Mr Pori meets the criteria of the IDCCR;
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> (c) while Mr Pori had been assessed as not meeting the criteria of the IDCCR Act, the report revealed complex issues.
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> [56] Dr Kritzinger's report addressed the applicability of the Mental Health Act to Mr Pori's circumstances. In it, he agrees with Ms Waugh's assessment that Mr Pori suffered "significant cognitive impairments", and there was a deterioration in the more recent neuropsychological profile in 2019 compared to the earlier assessment. A recent MRI demonstrated he suffered a number of acquired brain injuries. However, in terms of the possibility that Mr Pori would qualify for an order under the Mental Health Act, Dr Kritzinger considered the cognitive impairments were not indicative of an underlying psychosis or mood disorder and so "there is probably not a role for the Mental Health Act from a treatment perspective". Furthermore, given "the behavioural and cognitive impairments Mr Pori presents with are due to significant previous brain injuries and therefore most likely enduring and not amenable to psychological and psychopharmacological interventions", such an order was not warranted. …

[35] The Judge also referred to the evidence of Dr Monasterio for Mr Pori:

> [85] Dr Monasterio gave evidence that while Mr Pori may meet the test under the Mental Health Act for a mental disorder, there was no secure or highly specialised neuropsychiatric facility that was able to provide the therapeutic environment required for the treatment of his conditions. In Dr Monasterio's opinion:
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> > … it is unlikely that he would be made subject to a compulsory treatment order of the Act that would detain him in hospital for any substantial period because the facilities that are available for him to be detained to are not going to be substantially beneficial for the

[28] At [10] above.

> management of his condition, that's the difficulty. … he is unlikely to be detained long-term subject to that order. … in my view he is unlikely to be detained subject to the Mental Health Act as he is presenting at the moment.

[36] The Judge concluded[29] that the evidence clearly established that Mr Pori's condition was not amenable to treatment and, as Dr Monasterio explained, he was unlikely to be detained subject to the Mental Health Act.[30] Hence the Judge proceeded to determine the PPO application.

[37] In our view the process followed in this case demonstrates that the provision by the Chief Executive to the Court of an appropriate explanation for the decision to proceed with the PPO application constitutes both an appropriate safeguard for and a legitimate precursor to progressing with a PPO application.

[38] In conclusion we consider that, on the filing of the memorandum of counsel of 31 July 2020 and the subsequent confirmation at the 3 August 2020 hearing of the Chief Executive's view that it was preferable to proceed with the PPO application, the proper course for the Court was to determine that application. The Court's decision to make a PPO is not susceptible to challenge on the ground that there was a failure by the Court to be satisfied that its s 12(2) direction had been appropriately acted upon.

Result

[39] The appeal is dismissed.

[40] As the appellant is legally aided, there is no order as to costs.

Solicitors:
Raymond Donnelly & Co, Christchurch for Respondent

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29 Albeit in the course of considering whether to make a further s 12(2) direction.
30 Second judgment, above n 2, at [90].