NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA258/2023
[2023] NZCA 564

BETWEEN	COREY REUBEN Appellant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing:	25 July 2023
Court:	Miller, Moore and Palmer JJ
Counsel:	S J Fraser for Appellant S C Carter and N J Ellis for Respondent
Judgment:	15 November 2023 at 2.00 pm

JUDGMENT OF THE COURT

A The appeal is allowed.

B The extended supervision order is quashed.

C The application for name suppression is declined.

REASONS OF THE COURT

(Given by Palmer J)

Summary

[1] On 2 May 2023, in the District Court at Wellington, Judge B Davidson imposed an extended supervision order (ESO) on the appellant, Mr Corey Reuben, for two years.[1] Mr Reuben appeals. He also applies for name suppression.

[2] We hold that, on the evidence before the Court and having regard to the limitation of rights inherent in an ESO, Mr Reuben is not at high risk of committing further relevant sexual offences. We uphold the appeal and quash the ESO. We dismiss the application for name suppression.

What happened?

Offending

[3] Mr Reuben, now aged 23, has a history of sexual offending:

(a) [Redacted

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(b) Around 5.30 pm on Friday 24 November 2017, in a supermarket in Lower Hutt, Mr Reuben pulled his penis out of his shorts and swung it around for two seconds, while in close to proximity to two female members of the public, including a young girl. He was convicted of doing an indecent act in a public place.[2]

(c) That night, around 1 am on Saturday 25 November 2017, Mr Reuben followed, grabbed, and assaulted a woman on Allenby Terrace in central Wellington. He started choking her, pushed her to the ground, knelt on her, and pulled his penis out. He masturbated and ejaculated into her mouth, and over her hair and clothing. He took her wallet and

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1 *Chief Executive Department of Corrections v Reuben* [2023] NZDC 8109 [District Court judgment] at [63].

2 Crimes Act 1961, s 125. Maximum penalty of two years' imprisonment.

cellphone. He was convicted of sexual violation by unlawful sexual connection, injuring with intent to injure, and theft.[3] We refer to the sexual violation offending as the index offending.

[4] On 20 July 2018, Mr Reuben pleaded guilty to the 2017 charges. He was sentenced to four years' imprisonment for the index offending and, concurrently, to 12 months' imprisonment for the indecent act, 12 months' imprisonment for injuring with intent to injure, and nine months' imprisonment for theft.[4] Judge P J Butler noted Mr Reuben, then aged 18, had significant mental health problems, had no home or community support, and suffered from substance abuse and a binge-drinking pattern.[5]

[5] Around 2 pm on 22 June 2021, at his cell window in Rimutaka Prison, Mr Reuben made a masturbating action to a woman standing outside the wing. He then smiled at her, exposed his penis, and masturbated. He pleaded guilty to a charge of doing an indecent act in a public place after accepting a sentencing indication on 18 May 2022.[6] He was ordered to come up for sentence if called upon. However, the Judge noted that, if an ESO was not granted, Mr Reuben would be sentenced to supervision for this offending.

[6] While he was in custody from 2017 to 2021, Mr Reuben is recorded by the Department of Corrections as indecently exposing himself to prison staff, nursing staff, and other health professionals at the prison 44 times. Corrections thought that was likely an underestimation. Mr Reuben explained to the District Court that it was true, was always to female staff and "the main reason was boredom, but also sexual arousal or low mood, and interest in how the targeted staff member would respond".[7] He said he was sometimes laughed at, sometimes ignored, and on 16 occasions given a misconduct. He claimed one of the therapists engaged in sexual behaviour with him.

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3 Sections 128(1)(b), 128B(1), 189(2) and 223(c). Each offence carries a maximum penalty of imprisonment for 20, five, and one year respectively.
4 *R v Reuben* [2018] NZDC 14849 at [22]–[23].
5 At [16].
6 Crimes Act, s 125(1). Maximum penalty of two years' imprisonment.
7 District Court judgment, above n 1, at [22].

Application and release

[7] On 6 September 2021, before Mr Reuben's release date from prison on 29 November 2021, the Department of Corrections applied for an ESO for five years. Until it was heard, an interim supervision order (ISO) was granted, by consent, on 23 November 2021. Post-release conditions applied to Mr Reuben until 28 May 2022.

[8] The application for an ESO was supported by two reports from a health assessor, Mr Lance Thompson, dated 26 July 2021 and 23 September 2022. Mr Reuben's opposition to the ESO application was supported by a report from Mr Alexander Skelton dated 26 January 2022.

[9] Since his release, while subject to the conditions of the ISO, Mr Reuben has lived with his partner. He has a son with her, has had employment training, has family in the area, and is supported by a local marae. He has complied with the conditions of the ISO.

Decision under appeal

[10] The District Court heard the evidence of Mr Thompson and Mr Skelton in relation to the ESO application on 18 July 2022. The hearing was adjourned to allow for an updated report from Corrections, which was completed on 20 March 2023. On 2 May 2023, Judge Davidson held that the criteria of imposing an ESO were met.[8] He held an ESO would be justified for three and a half years so, given the ISO had been in place for a year and a half, he imposed an ESO for a further two years.[9] The special conditions included:

(a) to attend psychological and alcohol and drug assessments and attend, participate and complete any recommended treatment as directed by a Probation Officer;

(b) to submit to electronic monitoring; and

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8 District Court judgment, above n 1, at [56]–[57].
9 At [62]–[63].

(c) to remain at his approved address between 9 pm and 6 am every day except with prior written approval of a Probation Officer.

Law of extended supervision orders

[11] The Parole Act 2002 provides, relevantly:

> **107I Sentencing court may make extended supervision order**
>
> (1) The purpose of an extended supervision order is to protect members of the community from those who, following receipt of a determinate sentence, pose a real and ongoing risk of committing serious sexual or violent offences.
>
> (2) A sentencing court may make an extended supervision order if, following the hearing of an application made under section 107F, the court is satisfied, having considered the matters addressed in the health assessor's report as set out in section 107F(2A), that—
>
> (a) the offender has, or has had, a pervasive pattern of serious sexual or violent offending; and
>
> (b) either or both of the following apply:
>
> (i) there is a high risk that the offender will in future commit a relevant sexual offence:
>
> …

[12] The standard conditions of the ESO under ss 107J and 107JA include requirements to report to a probation officer, to obtain consent of the probation officer before moving to a new residential address or obtaining new employment or associating alone with a person under 16, to allow the collection of biometric information, to take part in a rehabilitative needs assessment if and when directed to do so by a probation officer, and not to associate with or contact victims.

[13] In *Chief Executive, Department of Corrections v Alinizi*, this Court set out the three-step process for determining whether an ESO should be made:[10]

> (i) the Court must determine whether the offender has, or has had, a pervasive pattern of serious sexual or violent offending;
>
> (ii) the Court must make specific findings as to whether the offender meets the qualifying criteria set out in s 107IAA; and

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

(iii) if those criteria are met the Court must make a determination about the risk of the offender committing a relevant sexual or violent offence.

[14] In *Mosen v Chief Executive of the Department of Corrections*, this Court considered a human rights challenge to the ESO regime and held:[11]

> [31] … [I]f 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 his sentence for a relevant [sexual] offence) against the statutory purpose to protect the public from the very high risk that an offender will commit a relevant [sexual] offence. Put more simply ... "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.

[15] This Court also said in *Kiddell*:[12]

> [27] Finally, an ESO engages BORA-protected rights. This Court has previously held that the ESO regime creates a retrospective double penalty, so contravening s 26 of the New Zealand Bill of Rights Act 1990, but nonetheless must be given effect under s 4 of that Act. The Supreme Court has recognised that the Parole Act's statutory purpose requires that courts not be denied clearly relevant information when deciding whether an offender is eligible under s 107I for an ESO. But when deciding whether to make an ESO, and for how long, courts must recognise that the order may impinge substantially upon the offender's freedom of movement and association. These rights must be borne in mind when deciding both whether the offender has or had the necessary pervasive pattern of serious sexual offending and whether the offender presents a high risk of future serious relevant offending.

[16] The District Court here quoted the passage from *Mosen* quoted above and explicitly proceeded on the basis that there must be a strong justification for an ESO.[13]

[17] Mr Fraser, for Mr Reuben, submits as a stand-alone issue that there is no strong justification for an ESO here. Mr Reuben has spent over a year in the community without any allegations of sexual offending. The Court had other, less restrictive, options available which were not addressed, including supervision for a minor charge. But it imposed no penalty for them. Strong justification is not suspicion or an inference that there might be serious offending if circumstances change.

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11 *Mosen v Chief Executive of the Department of Corrections* [2022] NZCA 507 (footnote omitted).
12 *Kiddell v Chief Executive of the Department of Corrections* [2019] NZCA 171 (footnotes omitted).
13 District Court judgment, above n 1, at [10].

[18] Ms Carter, for Corrections, acknowledges the limitations imposed by an ESO and the importance of refraining from imposing secondary penalties or infringing upon rights unless there is a strong justification to do so. She submits there is strong justification for an ESO, given expert evidence of high risk of offending, the serious nature of the index offending, and the repeated and persistent serious sexual offending that occurred even when in custody.

[19] The ESO regime as enacted by Parliament restricts a person's rights and freedoms even though they have already served a sentence for their relevant crimes. It is based on there being a pervasive pattern of serious sexual offending and a high risk of the person committing a further relevant sexual offence. We examine below whether those two requirements are satisfied here. The current case law makes clear that, in doing so, we must bear in mind the impact of the ESO on rights and freedoms.

Issue 1: Is there a pervasive pattern of serious sexual offending?

Law

[20] The first step is to determine whether the offender "has, or has had, a pervasive pattern of serious sexual or violent offending" under s 107I(2)(a). Section 107H(2) provides that a court considering an application for an ESO may receive and take into account any evidence or information that it thinks fit for the purpose of determining the application, whether or not it would be admissible in a court of law. Appellate courts have held on a number of occasions that, accordingly, the court is not confined to considering offending that has resulted in convictions.[14]

[21] We note that we can find nothing explicit in the legislative history which explains why s 107I(2)(a) extends to an offender who "has had" a pervasive pattern of offending. The requirement to determine that an offender "has, or has had a pervasive pattern of serious sexual or violent offending" was not introduced into the Parole Act until 2014.[15] As discussed recently by Te Aka Matua o Te Ture | The Law

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[14] See, for example, *Holland v Chief Executive of the Department of Corrections* [2016] NZCA 504 at [42] affirmed in *Holland v Chief Executive of the Department of Corrections* [2017] NZSC 161, [2018] 1 NZLR 771 [*Holland* (SC)] at [13]; *Kiddell*, above n 12, at [22]; and *Wardle v Chief Executive of the Department of Corrections* [2017] NZCA 298 at [39].

[15] Compare Parole Act 2002, s 107I(2) (as at 8 July 2004) and Parole Act 2002, s 107I(2) (current version).

Commission, it is probable that the introduction of ESOs was a direct response to concerns of the Department of Corrections about certain individuals who were due to be released from sentencing.[16] It is likely the change to the test in 2014 was also reactionary.[17] As the Commission reports, there is no research or clear reasoning to support the test in s 107I(2)(a).[18] But the wording of the text of the Act is clear and its meaning was not disputed by either of the parties here.

[22] In 2017, in *Wardle v Chief Executive of the Department of Corrections*, this Court stated:

> [44] Seen on its own, the conduct for which Mr Wardle was convicted in 1993 is not serious compared with the range of potential sexual offending. However, given that it was the first sexual offending of which Mr Wardle was convicted, the penalty imposed was not insignificant. The fact that the serious offending of 1995 followed within a comparatively short time and also involved young complainants may, in retrospect, be seen as part of a pattern. The pattern further developed in 2008 with a further indecent assault on a much younger complainant. Although not as significant as what occurred in 1995, this was still a significant indecent assault. By this stage, its seriousness was aggravated by Mr Wardle's past history.
>
> [45] This was then followed by the 2012 offending, which again involved a significant indecent assault. The complainant was not as young as Mr Wardle's previous complainants, but there was again a significant age disparity, of about 35 years. By this stage, Mr Wardle's past history was a seriously aggravating factor. In all the circumstances, we consider that Mr Wardle has a pervasive pattern of serious sexual offending that commenced in 1993.

[23] Also in 2017, in *Holland v Chief Executive of the Department of Corrections,* the Supreme Court stated:[19]

> [13] The scheme of the legislation reinforces the view that the phrase sexual offending should be given its ordinary meaning. The term sexual offending must be construed in light of the ESO regime as a whole. It would be very odd if the offending against the Classification Act could be taken into account for eligibility and assessing risk but not for assessing whether there is a pervasive pattern of serious sexual offending. That would deprive the court of clearly relevant material at one stage of the assessment.

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16 Te Aka Matua o Te Ture | Law Commission *Hapori whānui me te tangata mōrea nui: he arotake o te mauhere ārai hē me ngā ōta nō muri whakawhiu | Public safety and serious offenders: a review of preventive detention and post sentence orders* (NZLC IP51, 2023) at [1.27].

17 See (3 July 2014) 700 NZPD 19217; and (2 December 2014) 702 NZPD 1027.

18 Te Aka Matua o Te Ture, above n 16, at [8.36].

19 *Holland* (SC), above n 14.

[24] In 2019, in *Kiddell v Chief Executive of the Department of Corrections*, this Court held:[20]

> [23] Sixth, a pervasive pattern is one that is sufficiently characteristic of the offender to serve as a predictor of future conduct. We make several points about this:
>
> (a) In ordinary usage, to be pervasive is to be present throughout. The adjective is here used in connection with the behaviour of a person, and the legislation also identifies certain relevant traits or characteristics: an intense drive to commit relevant sexual offences, a predilection for serious sexual offending, limited self-regulatory capacity and an absence of responsibility or an absence of understanding of victim impact. It is for these reasons that we have defined a pervasive pattern simply, as a pattern that is characteristic of the offender.
>
> (b) The pattern must be sufficiently pervasive to serve as a predictor of future conduct; we adopt that purposive standard because the pattern determines whether the offender is susceptible to an ESO.
>
> (c) In ordinary usage "pattern" connotes regularity but a pattern may take any form or sequence. A pattern that includes relevant but less serious conduct may be found pervasive.

[25] This approach has been applied in other relevant judgments of this Court:

(a) In *Talatofi v Chief Executive of the Department of Corrections,* this Court held that two incidents of serious sexual offending in 1992 and 2014/2015 did not constitute a pattern that was pervasive.[21] They were not "characteristic of Mr Talatofi such that they [served] as a predictor of future conduct".[22] The Court held that less serious offending in 1989, in which the sexual component could have been incidental, and in 2009, which was primarily violent, were not part of the pattern.[23]

(b) In *Taakimoeaka v Chief Executive of the Department of Corrections,* this Court held that there was a unifying theme or pattern in two serious episodes of offending by rape, unlawful sexual connection, and attempted unlawful sexual connection in 2005 and by unlawful sexual

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20 *Kiddell*, above n 12, at [23] (footnotes omitted).
21 *Talatofi v Chief Executive of the Department of Corrections* [2021] NZCA 258 at [40]–[41].
22 At [40].
23 At [36].

connection, assault with intent to commit rape, and indecent assault in 2013.[24] It held that was sufficiently pervasive to serve as a predictor of Mr Taakimoeaka's future conduct.[25]

(c) In *Chief Executive of the Department of Corrections v Coleman*, this Court held that two serious episodes of offending (by indecent assault in 2011 and sexual exploitation of a person with a significant impairment in 2014) showed a pattern of Mr Coleman forcing himself on young women.[26] His subsequent offending was more minor. The Court held that the minor offending reinforced the pattern of serious offending in 2011 and 2014.[27]

Evidence

[26] Mr Thompson noted in his report of 26 July 2021 that Mr Reuben's behaviour in prison included "a pervasive, ongoing pattern of sexual exposure". This, together with his known offending and his engagement with Wellstop, a programme designed to support people who have demonstrated harmful or concerning sexual behaviour, as a teenager, suggested to Mr Thompson that Mr Reuben had "a lifespan pattern of problematic and likely compulsive sexualised behaviour". Mr Thompson noted of the index offending:

> 12 The author would note that although this was the sole instance of known contact offending there are shared precipitants and behavioural similarities between this series of offences and his noncontact offending. Specifically, in both his contact and noncontact offending some level of proximal planning was evident. In the index offence he followed the victim to a secluded area and forcibly subdued her then stole her phone in an apparent attempt to avoid being reported. In his prison-based sexually harmful behaviour he would wait until he believed he was visible to one or two female victims before he would expose himself, often masturbating as in his index relevant offence. In at least one instance a male custodial officer arrived when he had expected a female officer and he had accidentally exposed himself to them. In this instance he stated he had expected a female officer.

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24 *Taakimoeaka v Chief Executive of the Department of Corrections* [2021] NZCA 467 at [29].
25 At [29].
26 *Chief Executive of the Department of Corrections v Coleman* [2021] NZCA 528 at [19].
27 At [19].

[27] Mr Thompson's evidence on Mr Reuben's patterns of offending, in the context of assessing future risk, was:

> Q. Now you mentioned, and this is just to break down your last comment, you mentioned the singular range and it appeared that you were discussing the index offending relative to the indecent exposure. Are you able to just break that down more in terms of your comment about there being shared risk factors?
>
> A. Mr Reuben has engaged in a lifelong pattern of either problematic harmful sexual behaviour throughout his life. It has been quite entrenched and although it may appear that the index contact offence is different in some ways to the exposure based offending, there are a number of shared features that go along with it and the risk factors that underly [sic] them are very similar. So I would see this as a series of points in a pattern, rather than being distinct behaviours in of themselves. So in my assessment, I have looked at the clinically relevant and research based risk factors that are able to give us an estimate of future likelihood of offending and believe that they are shared across the behaviours.
>
> Q. So your analysis is that the fact of a matter being an indecent exposure per se, is not the critical factor. The critical factor is what are the underlying similar shared risk presentations?
>
> A. Yes. I would consider the index contact offence to be a more severe version of an overall pattern of behaviour rather than being clear and distinct from the broader range of harmful sexual behaviour that has been displayed.
>
> …
>
> Q. In terms of potential risk moving forward of serious sexual offending are you able to make any comment as to whether that would – the risk is – specifically pertains to contact or non-contact offending or is that not the right way to frame that question?
>
> A No. I – my clinical position is that you cannot distinguish between the two based on the shared risk factors and the overlap between the risk factors. The way that I conceptualise Mr Reuben's behaviour is that the raw pattern of harmful sexual behaviour is largely consistent and quite coherent. It does form a pattern but that the contact index offence was sort of the height of that. It was the apex. The risk measures as they stand don't allow you to pull apart the risk for specific subtypes of sexual offending.

District Court decision on pervasive pattern

[28] The District Court held that "serious sexual offending" is to be given its ordinary meaning having regard to the purposes of the ESO regime, is not limited to

contact offending, and may include non-contact offending.[28] It held that "[r]epeated lower-level offending can be regarded as serious sexual offending".[29] It concluded:

> [24] … Mr Reuben's indecent exposure and masturbation (both in public and prison) is so prevalent that in combination with the index offending a pervasive pattern of serious sexual offending is demonstrated. It is worthy of note that he has exposed himself, and at times masturbated, in various settings including prison, health interviews, at a supermarket and in public during the index offending itself. The pattern emerges from the ongoing similarity in conduct. No one specific instance of exposure or masturbation would be enough but, in my view, a clear pattern emerges from its enduring and repeated nature. As a result it is a pervasive pattern of serious sexual offending.

Submissions

[29] Mr Fraser submits the pattern was not of serious sexual offending. Low level indecent exposure to prison staff is not serious sexual offending. There is only one instance of serious sexual offending in Mr Reuben's history. The cases of *Wardell* and *Kiddell* both involved children, which is more serious. Finding a pervasive pattern of serious offending here would set a new precedent. One serious event and a clump of low-level events do not make a pervasive pattern. The index offending was serious but was a long time ago relative to his life to date. Mr Reuben has had treatment since then and is older and there have been no allegations of any offending since he has been out of prison.

[30] Ms Carter submits that Mr Reuben's conduct shows a pervasive pattern of serious sexual offending. The enduring and repeated nature of the incidents in a supermarket, a prison cell, and during health appointments heightens those incidents to that of serious offending and a clear pattern has emerged. There are repeated instances of masturbation which escalated in the index offending. The Judge was correct to find a pervasive pattern of serious sexual offending.

Pervasive pattern of serious sexual offending

[31] Whether the overall pattern of offending that is characteristic of an offender is of serious sexual offending is determined by assessing the pattern as a whole. As this Court held in *Kiddell*, a pattern that includes relevant but less serious conduct can be

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28 District Court judgment, above n 1, at [20].
29 At [20].

found to be pervasive. Whether it does or not, depends on the particular nature and circumstances of the pattern of the individual offender. This is a matter of judicial evaluation.

[32] The cases of *Wardle*, *Holland,* and *Kiddell* involved sexual offending against children and/or young people. In that context, the less serious offending did not detract from the overall patterns in those cases being of serious sexual offending. In *Taakimoeaka* two episodes of serious offending constituted a pattern. In *Talatofi*, two serious incidents did not constitute a pervasive pattern and two incidents of less serious offending did not make a difference to that conclusion. In *Coleman*, two serious episodes of offending constituted a pattern of the offender forcing himself on young women and more minor offending reinforced that.

[33] Here, we accept that Mr Reuben has demonstrated a pattern of problematic, harmful sexual behaviour throughout his life. On one occasion in 2017, preceded by a more minor incident, Mr Reuben quickly gravitated to serious sexual offending. There have been many other occasions since that offending when minor incidents have not gravitated to serious offending. That suggested that the impulse to offend continued. If those incidents in prison carried the potential to gravitate to more serious offending, they could not do so because of institutional constraints.

[34] Mr Thompson's expert evidence is that the index offending was a more severe version of an overall pattern rather than being distinct from the broader range of harmful sexual behaviour. He considered the pattern was largely consistent and quite coherent. Some level of planning was present in both the serious offending and the less serious incidents. On the basis of Mr Thompson's opinion, and the nature and frequency of the prison incidents, we consider Mr Reuben has had a pattern of serious sexual offending up until his release from prison on 29 November 2021.

[35] Accordingly, and having regard to the limitation of rights inherent in an ESO, we conclude that the Judge was correct that Mr Reuben "has had" a pervasive pattern of serious sexual offending. The requirement of s 107I(2)(a) is satisfied.

Issue 2: is there a high risk of future sexual offending?

Law

[36] For an ESO to be imposed, s 107I(2)(b)(i) requires the Court to be satisfied that there is a high risk that the offender will in future commit a relevant sexual offence. Section 107IAA expands upon the matters of which the Court must be satisfied when assessing whether there is a high risk of committing future sexual offending:

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

Evidence

[37] Mr Thompson's opinion was that Mr Reuben met each of the thresholds in s 107IAA(1)(a)–(d). The following paragraph encapsulates Mr Thompson's assessment of Mr Reuben's risk in his report of 22 September 2022:

> 34. Consideration of empirically validated risk measures including changes made since the last period of assessment indicate that Mr Reuben continues to present with a Well Above Average risk of sexual reoffending. As previously indicated, this would most likely present as indecent exposure directed towards females of a broad array of ages. However, given his index offence involved contact offending this cannot be ruled out in future if Mr

> Reuben's personal circumstances deteriorate. In the author's opinion this risk would be amplified in the context of use of synthetic cannabis, alcohol, or other disinhibiting substances. Mr Reuben currently has limited internal skills to manage his risk of reoffending and would be best supported through external risk mitigation strategies and supports who are well versed in his risk and safety plan. Although his current circumstances have significantly stabilised they revolve around a very limited number of key supports including his Probation Officer who will no longer be working with him once off sentence. The author would reiterate that his assessed mental health diagnoses and well documented behaviour across time continue to be relevant and the individual treatment he has accessed has not yielded the insight or self-regulatory strategies necessary to independently mitigate his risk. As previously indicated, it would appear his oppositionality and personality structure/trauma impair his willingness to adhere to rules, expectations, and in many cases support. This has likely contributed to his current lack of motivation for further treatment alongside a sense of abandonment following the premature cessation of recent risk-relevant treatment.

[38] In that report, Mr Thompson also stated:

> 27. Overall, when change made through risk-related intervention is taken into account alongside his recent stabilisation in personal circumstances Mr Reuben continues to fall within the Level IVb, Well Above Average range. Further, it is the opinion of the author that much of the observed and reported stabilisation in his personal circumstances appears to be supported by his current partner and engagement with his Probation Officer rather than his own ability to mitigate his assessed risk level. This opinion is based on his criminal history, assessment of his behaviour in prison and upon release, review of his overall support structure, assessment of his progress and retention of risk-related intervention, and noted behavioural indicators. Although this risk is most likely to manifest in the form of non-relevant offences as his index offence is relevant it remains a part of his repertoire. Should he experience a significant period of decompensation (particularly if he were to be disinhibited by substances) his risk of a relevant offence is likely to increase.

[39] Mr Skelton's opinion, however, was:

> 82. Although Cory is currently assessed at a well above average risk of sexual offending, the predicted sexual risk is for indecent exposure and not contact sexual offending. Cory has not demonstrated an intense drive or predilection for *relevant* or serious sexual offending, he accepts responsibility, has shown remorse for his contact sexual offence, and is equipped to avoid further sexual offending. Accordingly, in this case, the writer does not support the imposition of an Extended Supervision Order.

District Court decision

[40] The District Court held the s 107IAA factors were demonstrated:

> [38] I conclude Mr Reuben continues to display an intense drive, desire, or urge to commit a relevant sexual offence. If destabilised and if his prosocial

support mechanisms collapse there is a high risk his drive, desire, or urge will again manifest itself. It is vital, as Mr Thompson notes, to appreciate that his pervasive non-contact sexual offending occurred where his access to victims was limited by various enforced controlling factors (a prison environment); in other words the intensity of his drive, desire or urge was curbed by the daily restrictions of prison life.

…

[43] This aspect [of a predilection or proclivity for serious sexual offending] is made out. Clearly Mr Reuben has, at the very least, an inclination towards what I conclude is serious sexual offending; repeated exposure and masturbation over a long period of time. This shows an inclination towards wrongdoing.

…

[46] Again, I see this criteria [of limited self-regulatory capacity] as made out. What must be borne in mind is that this criteria focuses on Mr Reuben's self-regulatory capacity (ie. internal to him).

[47] It does not focus on external regulatory controls. It is clear that Mr Reuben has responded to several external controls, but it cannot be said that these, at this stage, have of themselves reduced his personal regulatory capacity. I would see that as a much longer process.

…

[50] Again, in my view, this criteria [of lack of acceptance of responsibility or remorse or an absence of understanding about the impact of his offending] is made out. At best Mr Reuben has shown some acceptance of responsibility or remorse for the index offending, but continues to display an absence of understanding or concern about the impact of his other sexual offending on actual or potential victims.

[51] In summary, I conclude Mr Reuben displays an intense drive to commit a relevant sexual offence; he has an inclination towards serious sexual offending (repeated exposure and masturbation); his self-regulatory capacity particularly in relation to such offending is limited although he has responded well to external regulatory controls; while showing some acceptance of responsibility or remorse for the index offending he has an absence of consideration for actual and potential victims of his exposure and masturbation.

[41] The District Court's overall assessment of risk noted:

[53] It is very clear that Mr Reuben has made genuine progress since his release on parole and the imposition of the ISO. This progress includes his relationship, the birth of his son, employment training, whanau and community support, continued therapy sessions, remaining largely offence free and largely adhering to various conditions.

[42] The Court quoted Mr Thompson's conclusion that Mr Reuben had a "Well Above Average" risk of sexual reoffending, which would most likely be indecent exposure but contact offending "cannot be ruled out in future if Mr Reuben's personal circumstances deteriorate".[30] The conclusion also identified that the risk would be amplified through drug or alcohol use and his current circumstances, while stable, revolve around a very limited number of key supports including the Probation Officer who would no longer work with him after the sentence is complete.

[43] The Judge considered that Mr Reuben still poses a high risk of committing a relevant sexual offence for seven reasons:

> 56.1 his sexual offending, including the index offending, spans a period in excess of 5 years from March 2016 to July 2021. It includes both contact and non-contact offending. His non-contact offending has largely occurred in circumstances where his contact risk is reduced by external controls (prison/supermarket). Despite this his non-contact offending has continued and in the presence of prison and health workers whose very presence might be expected to curb and control such offending;
>
> 56.2 his index offending was very serious, forcing oral sex in a random way on a vulnerable member of the public;
>
> 56.3 the index offending occurred following various precursors destabilising his life;
>
> 56.4 he is still relatively young; his relationship is still relatively brief; he has a young child; such circumstances are stressful and difficult and must carry a risk of destabilising;
>
> 56.5 Mr Thompson concludes he remains well above average risk of committing a relevant sexual offence;
>
> 56.6 virtually all his risk management is external;
>
> 56.7 his self-regulatory capacity is limited and largely untested.

Submissions on risk

[44] Mr Fraser acknowledged that a court may find there is a high risk of offending even if expert evidence does not suggest that, but submits that should not normally be the case. Here, neither psychologist was conclusive in considering that the criteria for being at high risk of offending were clearly met. One expert said Mr Reuben was not

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30 At [54].

at high risk and the other used words such as "well above average" and contact offending "cannot be ruled out" if his circumstances deteriorated. This is not the identification of a high risk. It is speculative and conditional. He emphasises that Mr Reuben has not offended at all while he has been with his partner. The indecent exposure incidents at prison were not relevant sexual offences.

[45] Ms Carter submits that the Judge was correct that each of the criteria in s 107IAA of the Act are met, due to Mr Reuben's significant history, repeated sexual offending, and Mr Thompson's conclusions. The exercise is forward-looking. The lack of offending since release reflects the support provided by probation officers and his partner. Further serious sexual offending is a real possibility if Mr Reuben's established prosocial support mechanisms collapse. The Judge properly had regard to the restrictive environment Mr Reuben had been in since the index offending. This case is analogous to *Kiddell* where most of the offending was non-contact but a defendant's history indicated he would escalate to contact offending if the victim does not resist.

High risk

[46] In his first report, Mr Thompson concluded that Mr Reuben presented a "Well Above Average" risk of committing a further relevant sexual offence, which would most likely take the form of exposure-based offending. He considered contact offending "must be considered an ongoing potential outcome of his enduring risk". His second report effectively reiterated that while noting that Mr Reuben's personal circumstances had stabilised.

[47] Although a health assessor's report is useful evidence in helping the court to assess the risk the offender poses, the decision still lies with the judge — not the health assessor.[31] The Judge here gave seven reasons for finding that Mr Reuben still presents a high risk of committing a relevant sexual offence. Each of those points is accurate: Mr Reuben's sexual offending spanned more than five years; his non-contact offending continued in prison; his index offending was very serious following

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[31] See *McDonnell v Chief Executive of the Department of Corrections* [2009] NZCA 352, (2009) 8 HRNZ 770 at [46] citing *Barr v Chief Executive of the Dept of Corrections* CA60/06, 20 November 2006 at [32].

destabilisation of his life; he is still relatively young and having a young child can be stressful; Mr Thompson concludes his risk is well above average; virtually all Mr Reuben's risk management is external; and his self-regulatory capacity is limited and largely untested.

[48] However, we do not agree that, individually or together, those points lead to the conclusion that Mr Reuben currently displays an intense drive, desire, or urge to commit a relevant sexual offence.[32] With that requirement not satisfied, the conditions for imposing an ESO under s 107IAA are not met. But even if those conditions were met, we do not consider the Court could be satisfied he poses a high risk of committing a relevant sexual offence. The reasons for both of those conclusions are the same.

[49] By the time of the District Court ESO decision in May 2023, Mr Reuben had not committed any sexual offence, contact or non-contact, since he was released from prison in November 2021. His circumstances are stable. There is always a risk circumstances will change. But ss 107I(2)(b)(i) and 107IAA requires assessment of whether there "is" a high risk. The Court is concerned with Mr Reuben's current risk, not his potential future risk.

[50] Furthermore, the expert psychological evidence of Mr Thompson concerns a well above average risk which relates to exposure offending. But the exposure-based offences here are not "relevant" offences as defined by s 107B of the Act. Mr Thompson's expert evidence does not suggest that Mr Reuben is at high risk of committing a relevant sexual offence, which is what ss 107I(2)(b)(i) and 107IAA(1) require. The expert psychological evidence of Mr Skelton does not support an ESO at all. The Judge's findings that there is a high risk if certain conditions occur in the future, and that Mr Reuben has an inclination to serious sexual offending, are not sufficient. Neither is Ms Carter's submission that serious sexual offending "is a real possibility" equivalent to there being a high risk.

[51] Having regard to the limitation of rights inherent in an ESO, we do not consider that the evidence before the Court supports a finding that Mr Reuben is currently at high risk of committing a relevant sexual offence.

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[32] Parole Act, s 107IAA(1)(a).

Issue 3: name suppression

[52] Mr Reuben seeks name suppression for the appeal under s 200(2)(a) of the Criminal Procedure Act 2011.[33] That requires, relevantly, that the Court must be satisfied that publication would be likely to cause extreme hardship to Mr Reuben or a person connected with him. Mr Fraser submits that it can be inferred that publication of his name is likely to cause extreme hardship to himself, his partner, and his son.

[53] Ms Carter opposes name suppression.

[54] Extreme hardship is a high threshold for the applicant to meet, connoting a very high level of hardship.[34] That is required to avoid dilution of the strong presumption in favour of open justice and to provide adequate protection for freedom of expression.[35]

[55] There is no evidence from a medical professional or anyone else of what the nature or extent of the extreme hardship here is said to be. Mr Reuben has offered insufficient evidence to show he or his family will experience extreme hardship. Even if there were extreme hardship, the competing public interest militates against suppression. Mr Reuben's name was not suppressed in the original sentencing decision. As Mr Fraser acknowledges, there is already material about him on the internet in relation to the index offending. There is public interest in the circumstances of the ESO being publicly available. There are no grounds for it to be suppressed here.

Result

[56] The appeal is allowed.

[57] The extended supervision order is quashed.

[58] The application for name suppression is declined.

Solicitors:
Crown Solicitor, Wellington for Respondent

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33 Section 200 of the Criminal Procedure Act 2011 applies by virtue of s 107G(10) of the Parole Act.
34 *Robertson v Police* [2016] NZCA 7 at [48]–[49].
35 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [2].