IN THE COURT OF APPEAL OF NEW ZEALAND

CA119/2016
[2016] NZCA 504

BETWEEN	GLENN RODERICK HOLLAND Appellant
AND	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Respondent

Hearing:	6 September 2016
Court:	Miller, Courtney and Woodhouse JJ
Counsel:	M A Corlett QC and G E Schumacher for Appellant I R Murray for Respondent
Judgment:	17 October 2016 at 2.15 pm

JUDGMENT OF THE COURT

A The application for an extension of time in which to bring the appeal is granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] Glenn Holland is 71 years old and has a history of sexual offending stretching back to 1988. His earliest sexual offences were of having and attempting to have intercourse with a female under the age of 16. Subsequently his offences have mostly involved the importation or possession of sexualised photographs of children. In March 2012 Mr Holland was sentenced to a total of three years' imprisonment[1] for doing an indecent act on a child under 12 outside New Zealand[2] and knowingly possessing objectionable material.[3] These offences triggered his eligibility for an extended supervision order (ESO) under pt 1A of the Parole Act 2002. In February 2016 Judge Fraser imposed an ESO for a period of 10 years.[4]

[2] Mr Holland appeals the imposition of the ESO on the ground that the Judge wrongly concluded that Mr Holland had a pattern of serious sexual offending (one of the prerequisites for an ESO) and carried that error through to his assessment that Mr Holland posed a high risk of committing a relevant sexual offence in the future.

[3] Alternatively, Mr Holland asserts that, if the ESO was properly imposed, the duration was too long.

Statutory framework for extended supervision orders

[4] When first introduced in 2004 the ESO regime was aimed at high risk child sex offenders. Changes in 2014 broadened its scope to include high risk sex offenders generally and very high risk violent offenders.[5] The purpose of an ESO is to protect the public from offenders who, following receipt of a determinate sentence, pose a real and ongoing risk of committing serious sexual or violent offences.[6] An ESO can result in severe restrictions being placed on many aspects of an offender's life, including residence, employment, association and travel, for up to ten years and can be made more than once in respect of a particular offender.[7]

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1 *R v Holland* DC Auckland CRI-2010-004-15660, 14 March 2012 [sentencing notes].
2 Crimes Act 1961, ss 144A(1)(a) and 66.
3 Films, Videos and Publication Classifications Act 1993, s 131A.
4 *Department of Corrections v Holland* [2016] NZDC 2441 [ESO judgment].
5 Parole (Extended Supervision) Amendment Act 2004.
6 *R v Peta* [2007] NZCA 28, [2007] 2 NZLR 627 at [5].
7 Parole Act 2002, ss 15(3) and 107JA.

[5] An ESO can only be made on the application of the Chief Executive of the Department of Corrections in respect of any "eligible offender".[8] A person is an eligible offender if he or she falls within the definition contained in s 107C(1) of the Parole Act, which requires that the offender has been convicted of a "relevant offence" and is still subject to a sentence of imprisonment, release conditions or an ESO.[9]

[6] A relevant offence for the purposes of eligibility is any of the offences specified in s 107B(1), (2), (2A) or (3). These include the sexual offences created by ss 128B–143, 144A, 144C and 208 of the Crimes Act 1961. They also include any offence under the Films, Videos and Publications Classification Act 1993 (FVPC Act) that is punishable by imprisonment and where the publication that is the subject of the offence is objectionable because of its promotion or depiction of sexual conduct with children or because it exploits the nudity of children or young people.

[7] Section 107B relevantly provides that:

> (1) In this Part, **relevant offence** means any of the following:
>
> (a) an offence specified in subsection (2), (2A), or (3):
>
> …
>
> (2) In this Part, an offence against any of the following sections of the Crimes Act 1961 is a **relevant sexual offence**:
>
> (a) section 128B(1) (sexual violation):
>
> (b) section 129(1) (attempted sexual violation):
>
> (c) section 129(2) (assault with intent to commit sexual violation):
>
> (d) section 129A(1) (sexual connection with consent induced by certain threats):
>
> (e) section 129A(2) (indecent act with consent induced by certain threats), but only if the victim of the offence was under the age of 16 at the time of the offence:
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> (f) section 130(2) (incest):

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8 Parole Act, s 107F.

9 Section 107C(1).

(g) section 131(1) and (2) (sexual connection with dependent family member):

(h) section 131(3) (indecent act on dependent family member), but only if the victim of the offence was under the age of 16 at the time of the offence:

(i) section 131B (meeting young person following sexual grooming):

(j) section 132(1), (2), and (3) (sexual conduct with child under 12):

(k) section 134(1), (2), and (3) (sexual conduct with young person under 16):

(l) section 135 (indecent assault):

(m) section 138(1), (2) and (4) (sexual exploitation of person with significant impairment):

(n) section 142A (compelling another person to do indecent act with animal):

(o) section 143 (bestiality):

(p) section 144A(1) (sexual conduct with children and young people outside New Zealand):

(q) section 144C(1) (organising or promoting child sex tours):

(r) section 208 (abduction for purposes of marriage or sexual connection).

…

(3) An offence under the Films, Videos, and Publications Classification Act 1993 is also a relevant offence if the offence is punishable by imprisonment and any publication that is the subject of the offence is objectionable because it does any or all of the following:

(a) promotes or supports, or tends to promote or support, the exploitation of children, or young persons, or both, for sexual purposes:

(b) describes, depicts, or otherwise deals with sexual conduct with or by children, or young persons, or both:

(c) exploits the nudity of children, or young persons, or both.

[8] An application for an ESO must be accompanied by a health assessor's report.[10] Section 107F(2A) specifies the matters that the health assessor must

[10] Parole Act, s 107F(2).

address and what he or she can take into account for that purpose. Those matters are:

> (a) whether—
>
> > (i) the offender displays each of the traits and behavioural characteristics specified in s 107IAA(1); and
> >
> > (ii) there is a high risk that the offender will in future commit a relevant sexual offence;
>
> (b) whether—
>
> > (i) the offender displays each of the behavioural characteristics specified in s 107IAA(2); and
> >
> > (ii) there is a very high risk that the offender will in future commit a relevant violent offence.
>
> (3) To avoid doubt, in addressing any matter to be referred to in the health assessor's report, the health assessor may take into account any statement of the offender or any other person concerning any conduct of the offender, whether or not that conduct constitutes an offence and whether or not the offender has been charged with, or convicted of, an offence in respect of that conduct.

[9] The power to make an ESO is conferred by s 107I(2) which provides that:

> (2) A sentencing court may make an extended supervision order if, following the hearing of an application made under s 107F, the court is satisfied, having considered the matters addressed in the health assessor's report as set out in s 107F(2A), that—
>
> (a) the offender has, or has had, a pervasive pattern of serious sexual or violent offending; and
>
> (b) either or both of the following apply:
>
> > (i) there is a high risk that the offender will in future commit a relevant sexual offence:
> >
> > (ii) there is a very high risk that the offender will in future commit a relevant violent offence.
> >
> > …
>
> (4) Every extended supervision order must state the term of the order, which may not exceed 10 years;
>
> (5) The term of the order must be the minimum period required for the purposes of the safety of the community in light of—
>
> > (a) the level of risk posed by the offender; and

(b) the seriousness of the harm that might be caused to victims; and

(c) the likely duration of the risk.

[10] Section 107IAA identifies the factors relevant to the assessment of risk under s 107I:

> (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) 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.

[11] The terms "relevant offence" and "relevant sexual offence" are defined. The term "serious sexual offending" is not.

[12] There is no evidential burden in terms of the prerequisites required by s 107I and 107IAA. The court simply needs to be "satisfied" that the prerequisites are met, which is indicative of a state where the court comes to a judicial decision on the evidence.[11]

The psychologists' reports and the District Court decision

[13] The Judge had before him a health assessor's report from a psychologist, Ian Britton and a report from a psychologist engaged by Mr Holland, Barry Kirker. Both were cross-examined. Mr Corlett QC submitted that Mr Britton's conclusion that Mr Holland presented a high risk of committing a relevant offence in the future

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[11] *R v White (David)* [1988] 1 NZLR 264 (CA) at 268; *R v Leitch* [1998] 1 NZLR 420 (CA) at 428; and *Chief Executive of the Department of Corrections v McIntosh* HC Christchurch CRI-2004-409-162, 8 December 2004 at [20]–[21].

lacked an evidential foundation and the Judge's adoption of Mr Britton's conclusion led to error.

Mr Britton's report

[14] Before considering the risk that Mr Holland posed in terms of future offending Mr Britton canvassed Mr Holland's pattern of previous offending, noting his previous convictions and other information about his sexual interest in children.

[15] Mr Britton also considered statements that Mr Holland himself made and which he was reported to have made. Notably, Mr Holland was removed early from a short intervention programme for child sex offenders in 2013 because of his general denial of responsibility for his offending; when asked to produce an account of the offending he described the "unfortunate" events that had led to his convictions, including claims of mistaken identity, persecution by Police, Customs and Corrections in several countries and overly strict interpretations of what constitutes an objectionable image of a child.

[16] Mr Britton described Mr Holland's past offending as follows:

> Overall, Mr Holland's conviction history is considered to show a stable pattern of grooming young girls and their parents or carers in order to offend against them. This offending is both by contact offending such as actual or attempted intercourse, and frequently by producing sexual abuse images for distribution. Mr Holland considered this activity to be his principal source of income. The offending has involved producing and possessing images including the objectionable eroticisation of children in varying degrees of undress, but also highly explicit images of contact sexual offending on female children by other children and by adult males.

[17] Mr Britton used two actuarial instruments in assessing Mr Holland's risk of future offending. On the STATIC-99R, which provides an estimate of a nominal risk category based on static factors, Mr Holland was assessed as being at moderate-high risk of future sexual offending. On the Violence Risk Scale: Sexual Offender tool (VRS-SO), which assists to identify the probability of sexual recidivism based on both static and dynamic risk predictors, Mr Holland was assessed as being in the high risk category. The particular risk factors were identified as being Mr Holland's sexually deviant lifestyle, offence planning, criminal personality characteristics,

cognitive distortions, insight, use of community support, release to high risk situations, sexual offending cycle, treatment compliance and deviant sexual preference.

[18] Mr Britton also identified a further factor: Mr Holland's pattern of convictions suggested that advancing age, generally considered to reduce the risk of sexual recidivism, was not a reliable indicator of the stability or decline of his sexual interest or behaviour.

[19] Based on the various methods of assessment, Mr Britton put Mr Holland's risk of further relevant reoffending as high. He then turned to consider the factors identified by s 107IAA. In relation to Mr Holland's predilection or proclivity for serious sexual offending Mr Britton expressed the opinion that:

> … Mr Holland's offending history indicates that he has a deviant predilection for sexual activity with female children and a proclivity to produce and distribute images of such activity. This is assessed to have involved long term planning and deviant lifestyle. Mr Holland has pursued this lifestyle, despite sanctions, across countries including Russia, Latvia, Germany and Australia as well as in New Zealand.

[20] Mr Britton concluded that Mr Holland displayed all of the characteristics identified in s 107IAA. In summary, he considered that Mr Holland's persistent history of offending demonstrated an intense drive and desire to commit a relevant sexual offence, indicated a deviant predilection for sexual activity with female children and a proclivity to produce and distribute images of such activity, that he had a general deficit in terms of self-regulation, did not take responsibility for past offending and showed no remorse for it nor any understanding for or concern about the impact of the offending on his victims. Mr Britton's conclusion on the risk Mr Holland posed was that:

> It is considered that there is a high risk that Mr Holland will engage in relevant offending within ten years of release. This is considered to be most likely in the context of Mr Holland identifying a girl between the ages of approximately seven and fourteen years and arranging circumstances in which Mr Holland can photograph the girl in unclothed and sexualised poses. It is assessed that the potential victims could include previous victims or strangers, and could involve gaining the trust and consent of parents or caregivers. Such offending could include inducing the victim to engage in explicit sexual acts alone or with others and could include attempted or actual sexual intercourse, and as such could involve serious contact sexual

> offending against pre-pubescent girls. It could include the distribution of the resulting images for commercial gain.

Mr Kirker's report

[21] Mr Kirker also canvassed Mr Holland's previous offending, distinguishing between contact and non-contact offences and noting that:

> His pattern of offending has involved taking or having in his possession naked or semi-naked photographs of young females. The only contact sexual offence is from 25 years ago in Australia, of which the facts and convictions are not entirely clear. His offending has all occurred later in life, notably after the advent of sexual dysfunction.

[22] Mr Kirker also used actuarial instruments in his assessment of the future risk that Mr Holland posed. His assessment using the STATIC-2002R instrument produced a score that placed Mr Holland in the moderate risk category in relation to convicted sexual offenders. It is notable that under this instrument Mr Holland's age reduced his score and, accordingly, his risk rating. But, as Mr Britton pointed out, Mr Holland's offending has not declined with age. The STABLE-2007 test placed Mr Holland in the moderate risk range. Mr Kirker noted that Mr Holland had scored maximum on social influences, deviant sexual interests and (lack of) cooperation with supervision. Also identified as being problematic for Mr Holland were his capacity for relationship stability, emotional identification with children, concern for others, negative emotionality and problem solving skills.

[23] Based on the combined STATIC-2002R and STABLE-2007 scores Mr Kirker assessed Mr Holland as being in the moderate risk category. He noted that this was a lower assessment than that reached by Mr Britton and said that, in his opinion:

> … it was not evidenced that Mr Holland's offending has been driven by a significant sexual pre-occupation with young females, though this cannot be ruled out. It appears that if he was to reoffend the most likely offence to be committed by Mr Holland would be a non-contact sexual offence. It does seem Mr Holland is persistent and determined to continue to take photographs of young girls. He is mindful of the law when it comes to objectionable images, but deterrence factors seem likely to have limited impact on his decision-making given his distorted perspective.
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> Mr Holland has yet to accept responsibility for sexual offending. His denial of his sexual offending seems to have contributed to him continuing to place himself in risk situations, and to him not having a relapse prevention plan.

> Further, he lacks motivation to undertake treatment, which he devalues. It seems treatment would be counter-productive for Mr Holland. This situation seems unlikely to change in the next five to ten years. Additionally, neither advancing age nor declining health has been a protective factor for Mr Holland to date.

[24] Mr Kirker also recorded that Mr Holland saw himself as an artist rather than a criminal, a "persecuted victim up against the authorities and moral conservatives who did not know the difference between art and pornography".

[25] In relation to the s 107IAA factor of predilection or proclivity for serious sexual offending Mr Kirker did not consider that, with the exception of the Australian offending, the nature of Mr Holland's offending would be deemed to be serious though it could be deemed to be serious in terms of the span of years involved. He did not consider that a preference by Mr Holland for sexual contact with female children had been shown, meaning that there was insufficient evidence to indicate a predilection for proclivity for serious sexual offending. He concluded that:

> As discussed in previous sections of the report, the writer assessed Mr Holland at being of moderate risk of committing a contact sexual offence. That risk has been quantified as being much less than 50%. However, the writer acknowledges that a case can be made, as has been attempted by the Department of Corrections, that there is a high risk that Mr Holland will commit a further sexual offence in the future.

The Judge's decision

[26] The Judge reviewed both reports and the evidence, together with the submissions made on behalf of Mr Holland, which were generally to the effect that the only instances of serious sexual offending related to the 1988 offences and that, since then, any repetitive conduct marked by conviction has related only to the possession and importation of objectionable material, which was not to be regarded as serious sexual offending for the purposes of an ESO application. Mr Holland's then counsel, Mr Mansfield, emphasised Mr Holland's motivation as being to justify the "David Hamilton" style of photography rather than any sexual impulse, so that there was no adequate foundation for a conclusion that Mr Holland posed a risk of committing a relevant sexual offence in the future.

[27] The Judge rejected these submissions and Mr Kirker's view of the risk that Mr Holland posed. On the question of whether there existed a pervasive pattern of serious sexual offending for the purposes of s 107I(2)(a) the Judge held that:[12]

> [135] By any measure all of Mr Holland's offending, which is persistent and unremitting, is serious sexual offending. In all cases it involves young children who are victimised in seriously sexually abusive ways. In addition to that, the contact offending, which is not limited to being a party to an indecent assault but more serious offending as well, must also constitute serious sexual offending.

[28] He concluded that:

> [129] I have determined that there is overwhelming evidence as set out in Mr Britton's report, including his conclusion that Mr Holland has a predilection and proclivity for serious sexual offending. In the Court's view the evidence leads to that conclusion. That is based on the images and the manner of the children's poses and Mr Holland's involvement beyond just photographing. In that regard I also factor in his conviction for sexual conduct with a child outside of New Zealand. …
>
> …
>
> [132] I take issue with Mr Kirker's conclusions that Mr Holland has a moderate risk of committing a contact sexual offence. Whilst that conclusion is based on psychometric instruments in part, it is also premised on conclusions that he has reached in relation to the specific s 107IAA considerations.
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> …
>
> [133] In those respects I prefer the conclusions of Mr Britton …
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> …
>
> [138] … I determine that there is a high risk that Mr Holland will in the future commit a relevant sexual offence; i.e. an offence within the definition of s 107B(2), more particularly, as Mr Britton indicated, offending within s 107B(2)(a),(b),(i)&(p). On the evidence before the Court I agree with Mr Britton that there is a high risk that Mr Holland will engage in that offending.
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> [139] I have determined there is also a high risk of further offending as set out in s 107B(j),(k)&(l), all of which represent relevant sexual offending.

First ground of appeal: no pattern of serious sexual offending

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[12] ESO judgment, above n 4, at [135].

[29] Mr Corlett, for Mr Holland, argued that the Judge was wrong to treat the 2007 indecent assault and the 2008 importation and possession of objectionable material as relevant to whether there was a pattern of serious sexual offending. If those offences were excluded, the only serious sexual offending that would remain would be the historical convictions for sexual violation and attempted sexual violation, which could not, in themselves, establish a pattern of serious sexual offending. That would mean that this prerequisite was not satisfied and the ESO should not have been made.

Relevant offences triggering eligibility

[30] In 2007 Mr Holland, who had been living in Russia with his wife and stepdaughters, returned to New Zealand. Various items were seized on his arrival including a Maxtor hard-drive and a laptop. They contained numerous images of young children in sexualised poses. He pleaded guilty to one representative charge of knowingly possessing an objectionable publication contrary to the FVPC Act.

[31] In 2008 Mr Holland's wife arrived in New Zealand and a Western Digital hard-drive in her possession was seized. It contained sexualised photographs of young girls, including Mr Holland's stepdaughters. These included an image, taken in Russia, of one of the girls holding a man's penis. Mr Holland was convicted of being party to an indecent act as a result of arranging the pose and taking the photograph. Subsequent appeals against this conviction were unsuccessful.[13]

Mr Holland's previous convictions

[32] In 1988 Mr Holland was convicted in Australia on two charges of sexual intercourse with a female under 16 years and two of attempted sexual intercourse with a female under 16 years. This offending was described as having occurred in the context of Mr Holland escorting the victim to Sydney, with the permission of her parents, on the premise that she would undertake a modelling assignment and become a music recording artist.

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[13] *LM (CA217/2012) v R* [2013] NZCA 145; and *LM v R* [2014] NZSC 110, [2015] 1 NZLR 23.

[33] In December 1996 Mr Holland was convicted on two charges of importing objectionable goods, namely sexualised photographs of children.

[34] In July 1999 Mr Holland was convicted on one charge of possessing prohibited imports, again sexualised photographs of females under the age of 16.

[35] In March 2007 Mr Holland was convicted on one charge of importing and exporting objectionable images, these being the images on the Maxtor hard-drive referred to earlier.

Can s 107B(3) offences constitute serious sexual offending?

[36] Mr Corlett argued that an offence under s 107B(3) could not constitute "serious sexual offending" for the purposes of the criteria in 107I(2).

[37] Prior to the 2014 amendments to the Parole Act the sole criterion for an ESO was the future risk of committing a "relevant offence" i.e. that:[14]

> … the court is satisfied, having considered the matters addressed in the health assessor's report … that the offender is likely to commit any of the relevant offences referred to in section 107B(2) on ceasing to be an eligible offender.

[38] That original criterion is now reflected in the second limb of s 107I(2), the requirement in s 107I(2)(b) that there is a high risk that the offender will commit a relevant sexual offence in the future, and/or a very high risk that the offender will commit a relevant violent offence in the future. The new first limb in s 107I(2)(a) is "a pervasive pattern of serious sexual … offending".

[39] Mr Corlett characterised "serious sexual offending" as being a sub-set of the sexual offences identified in s 107B and argued that only an offence that was a "relevant sexual offence" specified by s 107B(2) could be serious sexual offending for the purposes of s 107I. It followed that, because an offence under the FVPC Act specified in s 107B(3) is not a "relevant sexual offence" under s 107B(2), it could not constitute serious sexual offending for the purposes of s 107I(2), even though the material is sexual.

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[14] Parole Act, s 107I (in force 8 July 2004 – 11 December 2014).

[40] We do not accept this argument. First, had Parliament intended to limit the type of sexual (or violent) offending that could be taken into account for the purposes of the historical perspective of the new first limb in s 107I(2)(a), it would have been a simple matter to have used the same wording as appears in s 107I(2)(b). But omitting "relevant" and using only "serious" as the qualifier indicates that a different assessment was intended; that the matters to be considered would not be limited to offences that were specified as relevant under s 107B(2).

[41] Secondly, a wider examination of pt 1A indicates that "serious sexual offending" was not intended to be interpreted as restrictively as Mr Corlett suggests. The phrase is also used in s 107IAA, which specifies the matters that the health assessor must consider. Because the Judge is required to consider the health assessor's report, these are also matters that are relevant to the Judge's assessment under s 107I(2). The factors identified in s 107IAA include whether the offender "has a predilection or proclivity for serious sexual offending". In ordinary parlance, a proclivity would encompass the concept of a pattern.

[42] Moreover, the health assessor is entitled to take into account past sexual conduct, including unproven allegations and conduct that does not actually constitute an offence.[15] It would be inconsistent, indeed pointless, to permit prior conduct that was not a relevant sexual offence within the meaning of s 107B(2) to be taken into account for the purposes of determining whether there was a risk of committing such an offence in the future if the same conduct was excluded for the purposes of considering the offender's pattern of past offending.

[43] Finally, the FVPC Act offences that constitute relevant offences under s 107B(3) are, as is apparent from the maximum penalty, capable of being viewed as serious offending;[16] for example, some instances of such offending are likely to be more serious than many cases of indecent assault, which is a specified "relevant sexual offence" under s 107B(2). It would be inconsistent, and contrary to the stated

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15 Parole Act, s 107F(3); see for example *Clark v Chief Executive of the Department of Corrections* [2016] NZCA 119.

16 Indeed, a recent decision of this Court has treated possession of child pornography as intrinsically serious in the context of s 30 of the Evidence Act 2006: *Underwood v R* [2016] NZCA 312 at [52].

intention of the ESO regime, for an offender with a pervasive pattern of sexual offences serious enough to trigger eligibility for an ESO, and potentially more serious than a specified "relevant sexual offence", to have those past offences excluded from consideration in determining whether an ESO should be made.

[44] We consider that the phrase "serious sexual offending" falls to be interpreted by reference to its ordinary meaning viewed against the purpose of this part of the Parole Act. In ordinary language "serious" means "important, grave; having (potentially) important, esp. undesired, consequences; giving cause for concern; of significant degree or amount, worthy of consideration".[17]

[45] The imposition of an ESO is, of course, a significant step that restricts an offender's freedom of movement and association for up to 10 years after he or she has served the sentence imposed for the subject offence. These consequences are regarded as justified to protect the public from future risk. Self-evidently, only offending at the higher end of the range would justify such a step. Parliament could not be taken to have contemplated that a pattern of offending at the lower end of the spectrum would justify consideration of such a potentially draconian constraint. It is, however, an assessment for the judge on the facts of the particular case.

Alternative argument: possession and creation of objectionable material is not capable of being serious sexual offending

[46] Mr Corlett advanced, as an alternative argument, that the possession and creation of objectionable material is an inherently less serious form of sexual offending and does not justify an ESO. This submission rested on the theme that ran through Mr Holland's case in the District Court and on appeal that offences that do not involve direct contact with the victim are inherently less serious than those which do, and that a distinction between them should be drawn for the purposes of considering whether there exists a pattern of serious sexual offending. Mr Corlett argued that the failure by both Mr Britton and the Judge to recognise this distinction had skewed the inquiry into whether there was a pattern of serious sexual offending and that this error was carried through to the assessment of future risk.

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[17] *The New Shorter Oxford English Dictionary* (4th ed, Clarendon Press, Oxford 1993) at 2785.

[47] Mr Corlett was particularly critical of Mr Britton's conclusion that the offending that Mr Holland was most at risk of committing in the future could include inducing the victim to engage in explicit sexual acts either alone or with others and could involve serious contact sexual offending. This was, Mr Corlett said, inconsistent with Mr Britton's view that the most likely offending for which Mr Holland was at risk was arranging circumstances in which he could photograph girls unclothed and in sexualised poses. Mr Corlett suggested that Mr Kirker's assessment was more coherent; his conclusion being that the pervasive pattern and corresponding high risk all pertained to the production and possession of objectionable material and that this was the key offending in respect of which Mr Holland was most at risk. Mr Kirker contended that parole conditions could accommodate that risk so that the risk to the community did not require the imposition of an ESO.

[48] We agree that not every case of possession and creation of objectionable material will necessarily be regarded as serious sexual offending for the purposes of s 107I(2)(a). But we do not accept that, in determining whether particular conduct constitutes serious sexual offending, there should be an arbitrary distinction drawn between offences that involve direct physical contact and those that do not. Although most sexual offences are, inherently, contact offences, there are several that do not require direct contact. The seriousness of non-contact offences is not lessened by the lack of direct contact; that depends on the circumstances of the offending in the particular case. For example, the crimes of dealing in people for sexual exploitation,[18] meeting a young person following sexual grooming[19] and organising or promoting child sex tours[20] do not involve direct physical contact yet are undeniably capable of producing serious offending. Where the true nature of the offence is the sexual abuse or degradation of a child victim captured on film, the offence is no less serious because the offender did not have direct contact with the victim. Whether the possession and creation of objectionable material constitutes serious sexual offending is an assessment to be made on the particular facts of the

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18 Crimes Act, s 98AA(1)(a)(i), (1)(d)(i), (1)(e)(i), and (1)(g)(i).
19 Section 131B.
20 Section 144C.

case and is not amenable to any fixed criteria such as whether it involved direct contact with the victim.

Did Mr Holland have a pervasive pattern of serious sexual offending?

[49] In this case the nature of the offending was evident from Judge Field's sentencing notes following Mr Holland's guilty plea to the representative count of knowingly possessing an objectionable publication contrary to the FVPC Act. On any view, the offending Judge Field described was serious sexual offending:[21]

> [4] There were some 5,000 images, and the prosecution chose to lay a representative charge containing 33 images, but each of them formed a series of photographs taken at or around the same time as the image in count 1. The images are broadly similar; they portrayed pre-pubescent girls in various states of undress, often graphically displaying their genitalia. Often one or more of the series would show yourself and your own genitalia.

[50] There was no suggestion that this description was inaccurate in any way. We do not accept that the Judge was wrong to take this offending into account in considering whether there was a pattern of serious sexual offending.

[51] In relation to the indecent act charge Mr Corlett argued that, although the offence could constitute an instance of serious sexual offending, the lack of direct evidence of Mr Holland's involvement in the indecent act itself meant that, for the purposes of assessing a pattern of offending, that conviction should be treated as merely an escalation of his creation of objectionable material.

[52] There is no merit in this submission. Mr Holland was convicted of this offence following a judge-alone trial before Judge Field. He appealed the conviction, unsuccessfully.[22] One of the grounds of appeal was that there was no proper basis for the Judge's finding that he had taken the photograph that was the subject of the charge. The Court of Appeal was satisfied that the victim's inability at trial to identify Mr Holland as having taken the photograph did not preclude that fact being proven by the other evidence, including the girl's unequivocal identification of

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21 Sentencing notes, above n 1.

22 *LM (CA217/2012) v R*, above n 13, and *LM v R*, above n 13.

him as the photographer of two cropped images that had been taken from the larger subject photograph.[23]

[53] The nature of this offending can also be understood from Judge Field's sentencing notes. The Judge, who had heard the evidence supporting the charge at trial, described the offending in terms which make plain that this was serious sexual offending:[24]

> [2] … you photographed the seven year old victim, as she then was, holding or masturbating the penis of your associate. That clearly was an indecent act to which you were a party. You are a professional photographer, and I found, in the course of the hearing, that that photograph was posed at your direction. You and the other male involved, in my view, are equally culpable.

[54] For these reasons, we reject the suggestion that Mr Holland's offending should be regarded as less serious because he photographed the act rather than participating in it.

[55] The offending that could be taken into account for the purposes of assessing whether a pattern of serious sexual offending existed therefore comprised the four offences in 1998 together with the 2007 indecent act and the 2008 importation and possession of objectionable material. In our view that history is sufficient to constitute a pattern of serious sexual offending. It is not necessary for the offences to be the same. There are important similarities between them, namely that the offending was against young girls and Mr Holland used his photographic business to create the opportunity to commit the offences.

[56] It follows from our finding regarding the seriousness of Mr Holland's previous offending that the Judge made no error in his conclusions that there was a pervasive pattern of serious sexual offending and a high risk of him committing a relevant offence in the future.

[57] Finally, we note that the fact of this risk is borne out by a complaint made to the police in November 2015 by the parents of a 12-year-old girl who were

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23 *LM (CA217/2012) v R*, above n 13, at [26].
24 Sentencing notes, above n 1.

approached by Mr Holland and an associate in a shopping mall to propose involving the girl in a music video. Mr Holland later visited the family's home. The parents became suspicious and did not take the matter any further. This episode occurred when Mr Holland was subject to an interim ESO made in June 2015.[25]

Second ground of appeal: duration of the ESO too long

[58] In fixing the duration of the ESO the Judge referred both to Mr Britton's assessment that Mr Holland posed a risk of engaging in relevant offending within ten years of release and Mr Kirker's view that Mr Holland's motivation to engage in treatment was poor and unlikely to change in the future and that his psychological profile was such that it would likely remain stable over the next ten years. The Judge acknowledged Mr Kirker's viva voce evidence, which contemplated the possibility of a lesser period as an opportunity to reassess Mr Holland's risk profile, but concluded that:[26]

> [146] Based on the view of both psychologists that there is unlikely to be any change inside of the maximum period for the protection of the community, I have determined that the minimum period required for the purposes of the safety of the community in light of the risk posed, the seriousness of the harm that might be caused to the victims, and the likely duration of the risk, is ten years.

[59] Mr Corlett submitted that the Judge gave insufficient consideration to the appropriate duration of the order and, on this aspect was affected by his conclusion as to the seriousness of the pattern of Mr Holland's previous offending. In our view there is simply no basis on which to challenge the duration of the ESO. Mr Holland is a man with a history of offending against children, who does not take responsibility for that offending, whose distorted perceptions of what is acceptable behaviour around children makes him a risk to the community and whose profile suggests that all of those characteristics will remain stable for the next ten years.

[60] As with the other arguments made on behalf of Mr Holland in this appeal it is largely predicated on the suggestion that the kind of offending Mr Holland has

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25 ESO judgment, above n 4, at [7]–[12].
26 At [146].

committed is not serious and ought not to be regarded as a significant risk for the community. We do not accept that.

Result

[61] The application for an extension of time is granted. The appeal is dismissed.

Solicitors:
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