EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS]

IN THE DISTRICT COURT
AT PALMERSTON NORTH

I TE KŌTI-Ā-ROHE
KI TE PAPAIOEA

CRI-2017-083-001608
[2020] NZDC 11123

DEPARTMENT OF CORRECTIONS
Applicant

v

WILLIAM GEORGE MOSEN
Respondent

Hearing:	5 June 2020
Appearances:	Mr Carter for the Applicant Mr Parsons for the Respondent
Judgment:	3 July 2020

JUDGMENT OF JUDGE B NORTHWOOD

Introduction

[1] The Chief Executive of the Department of Corrections ("Corrections") applies for an extended supervision order (ESO) under the Parole Act 2002 ("the Act") against Mr Mosen. The application is brought pursuant to s 107F of the Act.

[2] The application is brought on the basis that Mr Mosen is an eligible offender within the meaning of s 107C of the Act. Corrections submits that the grounds for making an ESO, in s 107I of the Act, are met. Corrections submit that

(a) Mr Mosen has, or has had a pervasive pattern of serious violent offending, and

(b) There is a very high risk that Mr Mosen will in future commit a relevant violent offence.

[3] The application is opposed, on the basis that there is insufficient evidence to support the contention that Mr Mosen had the characteristic of "persistent harbouring of vengeful intentions towards 1 or more persons"[1]. Establishment of this test is a mandatory consideration when deciding if there is a very high risk that Mr Mosen will in future commit a relevant violent offence.

[4] Mr Mosen's case is that the insufficiency of evidence on this aspect means that the application cannot succeed and must be declined.

Procedural History

[5] The application is dated 10 October 2017.

[6] The application came before Judge Lynch on 23 March 2020. The Judge granted the application with Mr Mosen's consent. An ESO made was for five years. Reasons were to follow. In due course, the Judge concluded that he had "fallen into error". His Honour was concerned about the sufficiency of evidence that Mr Mosen had the characteristic of "persistent harbouring of vengeful intentions towards one or more persons".

[7] The application was called again before Judge Lynch on 9 April 2020.The ESO was set aside with the consent of the applicant. The Judge asked the two psychologists who had prepared reports addressing the issues Mr Mosen has with violence, to review their opinions on the "persistent harbouring of vengeful intentions" issue and revisit them if need be.

[8] The application came before me for hearing on 5 June 2020.

[1] Section 107IAA(2)(a)(iii).

Mr Mosen's circumstances – criminal history

[9] Mr Mosen's criminal history commenced with notations in the Youth Court in Whanganui in November 1997. He was dealt with by the Youth Court on charges of robbery (x2) and common assault.

[10] On 1 May 2001, Mr Mosen was sentenced by the District Court at Whanganui on charges of wounding with intent to cause grievous bodily harm, and unlawful possession of pistol.

[11] On 18 January 2008, Mr Mosen was sentenced by the District Court at Whanganui on a charge of assault on a female. Later that year, on 28 August 2008, he was dealt with on charges of possession of a knife, common assault, two charges of assault on police, and two charges of contravening a protection order.

[12] On 31 March 2009, at Whanganui, Mr Mosen was sentenced on two charges of common assault and one charge of possession of an offensive weapon.

[13] On 4 September 2009, also at Whanganui, he was sentenced on charges of assault on police and threatening to do grievous bodily harm (x2).

[14] Relevantly for present purposes, Mr Mosen was sentenced to four years and six months imprisonment on 22 November 2010 by the Court at Whanganui, on a charge of aggravated robbery.

[15] That conviction related to the events of Sunday 29 August 2010. At about 8.23 pm, Mr Mosen went to the front entrance of a Super Value Supermarket in Whanganui. He was disguised. He had a sawn-off shotgun in a bag. This incident involved Mr Mosen brandishing the firearm at staff in the store and yelling at them. His finger was on the trigger during the incident. At one point, he grabbed hold of a male staff member, and held the shotgun close to his head. He pointed the shotgun at another staff member, demanding she put money in a bag. He demanded a third staff member lie on the floor, with the gun aimed at her. She did so. Mr Mosen eventually ran out of the store, with $1994.60 in the bag. He told the police that "I wanted to buy some drugs".

[16] On 19 March 2014, Mr Mosen was sentenced by the District Court at Palmerston North on a charge of injuring with intent to cause grievous bodily harm. That offence occurred on 6 January 2013. He was sentenced to two years and six months imprisonment, to be served cumulatively on the sentences imposed in Whanganui on 22 November 2010. Mr Mosen and a co-defender (Mr Spittal) were sentenced prisoners. The two men planned the attack on the victim. They encouraged the victim to go into the exercise yard. Mr Spittal was initially involved with a kick, but Mr Mosen joined in kicking and punching the victim to the head and body several times. Mr Spittal then took Mr Mosen away from the scene, indicating that the violence inflicted was enough.

[17] The offences of injuring with intent to cause grievous bodily harm (s 189(1) Crimes Act 1961) and aggravated robbery (s 235 Crimes Act 1961) are relevant violent offences for the purposes of s 107B of the Act. It is his convictions for those offences, in 2010 and 2014 that make Mr Mosen an eligible offender for the purposes for s 107C of the Act.

Mr Mosen's circumstance – psychological reports

[18] I have considered the following psychological assessments of Mr Mosen:

(a) Health assessment report to National Commissioner Corrections Services (5 July 2017), by [assessor 1] ("[assessor 1] 2017").

(b) Addendum health assessment report to National Commissioner Corrections Services (26 April 2019), by [assessor 1] ("[assessor 1] 2019").

(c) Memorandum to the Court (8 May 2020), by [assessor 1] ("[assessor 1] 2010").

(d) Confidential psychological report (3 December 2019), by [assessor 2] ("[assessor 2] 2019").

(e) Psychological report (28 April 2020), by [assessor 2] ("[assessor 2] 2020").

[19] The reports offer additional information about Mr Mosen's circumstances.

[Assessor 1] (2017)

[20] [Assessor 1] outlined Mr Mosen's history of violent offending. He noted that a pre-sentence report dated 19 November 1998 stated that "Mr Mosen was described by the police at the time as one of the most problematic criminals in the Whanganui area …". His family history of was described as violent and abusive. He used a variety of drugs and offending to support his drug habit.

[21] He was sentenced to five years imprisonment on 1 May 2001 by Judge A J Becroft. Mr Mosen and a friend went into a house wearing army style camouflage uniforms and full faced balaclavas. Mr Mosen was armed with a loaded cut-down shotgun. Mr Mosen fired the gun at a dog, but misfired. Shortly afterwards, Mr Mosen fired again in the direction of the victim, hurting him in the left side of his upper body.

[22] Mr Mosen has consistently posed a challenge to prison authorities. Custodial records indicate that since his first term of imprisonment in 1998 Mr Mosen has accumulated over 200 incident reports, of which, 70 resulted in misconduct reports. A common assault offence committed on 24 May 2009 was for hitting a prison officer in the face.

[23] Mr Mosen presented with a "belief system that condones the use of threats of violence and actual physical violence as a means of intimidation to serve his needs". He noted that other individual features directly related to his violence is his substance addiction and being reliant on substances as a coping strategy.

[Assessor 2] (2019)

[24] [Assessor 2] met with Mr Mosen at Rimutaka Prison on 11 October 2019. Mr Mosen presented as a 38-year-old man, whose engagement at interview varied significantly. He eventually agreed to participate and repeatedly included [assessor 2]

in his expressions of resentment towards those in the criminal justice system who have wronged him in some manner.

[25] [Assessor 2] noted that Mr Mosen formed an association with a skin-head culture during his teens and has consistently associated with those involved in offending and substance abuse. He noted that Mr Mosen currently reported having no sources of prosocial support in the community. He did not accept that he had responsibility for obtaining such support.

[26] Mr Mosen disclosed being "president" of a group of skin-heads known as the "Nazi Rodents". While Mr Mosen said that most were in prison, he wanted to support the remaining members to avoid imprisonment.

[27] [Assessor 2] noted that Mr Mosen denied holding animosity towards other ethnicities, saying he did not judge or call names. He described his involvement with skin-heads as "a way of life" rather than a gang. Mr Mosen discussed his admiration for the Nazi system of concentration camps and medical experiments.

[28] [Assessor 2] had access to largely the same prison service incident and misconduct reports as [assessor 1]. He noted the reports for aggression, threatening behaviour, possession of a homemade weapon, and fighting with another prisoner.

The ESO regime

[29] The purpose of an ESO is to protect the community from those who pose a real or ongoing risk of committing serious sexual or violent offences.[2]

[30] The thresholds for making an ESO are set out in s 107I(2) of the Act. The Court may make an order:

> … if the Court is satisfied, having considered the matters addressed in the health assessors report … that
>
> (a) the offender has, or has had, a pervasive pattern of serious sexual or violent offending; and

[2] Section 107I(1).

(b) …

(ii) there is a very high risk that the offender will in future commit a relevant violent offence.

[31] As noted above at [17], Mr Mosen's convictions for aggravated robbery and injuring with intent to cause grievous bodily harm are relevant violent offences. The term "relevant violent offence" is defined in s 107B.

[32] When assessing the risk that an eligible offender will commit a relevant violent offence, the Court must consider the factors in s 107IAA(2) of the Act. The Court must be satisfied that the offender:

…

(a) has a severe disturbance in behavioural functioning established by evidence of each of the following characteristics:

(i) intense drive, desires, or urges to commit acts of violence; and

(ii) extreme aggressive volatility; and

(iii) persistent harbouring of vengeful intentions towards 1 or more other persons; and

(b) either—

(i) displays behavioural evidence of clear and long-term planning of serious violent offences to meet a premeditated goal; or

(ii) has limited self-regulatory capacity; and

(c) displays an absence of understanding for or concern about the impact of his or her violence on actual or potential victims.

[33] The Court of Appeal in *Chief Executive, Department of Corrections v Alinizi*, set out a three-step process to be followed by the Court once it has established that an offender is an eligible offender.[3] Those three stages are:

(a) First, the Court must determine whether the offender has, or has had, a pervasive pattern of serious sexual or violent offending;

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

(b) Second, the Court must make specific findings as to whether the offender meets the qualifying criteria set out in s 107IAA; and

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

[34] Establishment of the qualifying criteria set out in s 107IAA (in this case, the qualifying criteria relating to violence) inform the Court as to whether there is a very high risk that the offender will in future commit a relevant violent offence.[4]

[35] It is against this structural backdrop that I turn to consider the matters that must be established before the Court may make an ESO. However, of the mandatory considerations under s 107IAA, only one is in contest between the parties. In written submissions, dated 27 May 2020, Mr Parsons, for Mr Mosen, said that:

> The issue is whether the mandatory factor… "persistent harbouring of vengeful intentions towards one or other persons" is made out.

[36] Mr Parsons did not oppose the proposition that the other mandatory factors were made out. Having said that, the Court must be nevertheless satisfied that they are made out before an order can be made.

[37] The eventual focus of this judgment will be on whether there is enough evidence of persistent harbouring of vengeful intentions towards one or more other persons.

Is there a pervasive pattern of serious violent offending?[5]

[38] In addition to the forensic reports outlined above, [assessor 1] and [assessor 2] gave evidence on 5 June 2020.

[39] As outlined above, Mr Mosen has a history of violent criminal offending, dating back over 20 years. Some of those offences were serious. They include

[4] Section 107I(2)(b)(ii).
[5] Section 107I(2)(i).

wounding with intent to cause grievous bodily harm (x2), unlawful possession of a pistol and aggravated robbery.

[40] In addition, he has been convicted of other assaults and relevant offences. The reports, particularly the [assessor 1] (2017), report outlines Mr Mosen's behavioural issues in prison and instances where he has been disciplined for assaults, and other similar occurrences.

[41] I am satisfied that Mr Mosen has had a pervasive pattern of serious violent offending. I arrive at this conclusion based on an assessment of Mr Mosen's criminal history but also from the review of his violent behaviour documented in the reports and evidence.

Is there a very high risk that Mr Mosen will in future commit a relevant violent offence?[6]

[Assessor 1] (2017)

[42] [Assessor 1], in his 2017 report, detailed the use of actuarial instruments to assess the clinical risk factors, and to establish the risk that Mr Mosen would commit further relevant violent offences while in the community. [Assessor 1] outlined the way the actuarial risk measures delivered in practice and provided an appendix which included more detail of the instruments used.[7]

[43] [Assessor 1] concluded, that based on a multimethod assessment of Mr Mosen's risk of relevant offending (using the three actuarial instruments):

> … there is a high risk of Mr Mosen committing a further relevant offence.

[44] [Assessor 1] noted that clinical factors including his very high rate of prison misconducts and his risk to commit a relevant offence, could increase to very high depending on specific idiosyncratic and environmental factors.

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[6] Section 107I(2)(b)(ii).

[7] The instruments detailed by [assessor 1] were RoC*Rol, the Violence Risk Scale (VRS) and the Psychopathy Checklist; Screening Version (PCL; SB).

[Assessor 2] (2019)

[45] [Assessor 2] was unable to finish exploring all relevant risk areas with Mr Mosen. This is because Mr Mosen ended the interview prior to its completion. [Assessor 2] therefore reviewed the evidence for [assessor 1]'s scoring of the risk assessment alongside more recent information than [assessor 2] had obtained.

[46] [Assessor 2] noted [assessor 1]'s reliance on the three actuarial instruments, commenting that all three are appropriate to the task of evaluating Mr Mosen's future risk of violent offending. He however pointed out the risk must be interpreted with caution. He did say, however, that the instruments and research supporting their efficacy remain very useful.

[47] In reviewing [assessor 1]'s conclusions, [assessor 2] concluded that there had been an underrepresentation of the strength of risk factors (insight into violence; community support; release to high risk situations). However, [assessor 2]'s differences of opinion do not alter the risk assessment created in this case.

[48] [Assessor 2] generally concurred with [assessor 1]'s scoring of the risk instruments. [Assessor 2] concluded:

> In my view, Mr Mosen's risk of further offending leading to reimprisonment is very high, with breaches of conditions of release being consistent with his history, both in the community and his consistent rule breaking in prison.

The s 107IAA factors – intense drive, desires and urges to commit acts of violence[8]

[49] [Assessor 1] (2017) observed Mr Mosen offending and custodial history indicates a regular pattern of physical violence and threats of violence spanning approximately 20 years. His custodial history provides evidence of his limited interpersonal functioning and pro-violence cognitions. His opinion was that Mr Mosen does have an intense drive triggered by specific but highly likely environmental idiosyncratic factors.

[8] Section 107IAA(2)(a)(i).

[50] In his 2019 report, [assessor 1] pointed out that Mr Mosen has been involved in physical fights while in custody, as well as being involved in physical confrontations in the community, but these have not resulted in additional convictions. [Assessor 1] notes that he has declined psychological intervention to assist him to modify his inclination to commit acts of violence or make threats of violence. [Assessor 1]'s opinion therefore remained unchanged.

[51] [Assessor 2] (2019) generally concurred with [assessor 1]. He concluded that the frequency and persistence of these incidences over time are evidence of intense drive to commit acts of violence. Specifically:

> Mr Mosen demonstrates urges to commit violence through to the present, as evidenced by his report of thoughts of harming me during the interview.

[52] I am satisfied that Mr Mosen has the characteristic of an intense drive, desires or urges to commit acts of violence.

The s 107IAA factors – Extreme aggressive volatility[9]

[53] In his 2017 report, [assessor 1] noted that Mr Mosen's aggressive behaviour in a custodial setting seems to be an established interpersonal style. He said that Mr Mosen resorts to this to intimidate others into serving his needs and when his demands are not met. This is more so the case in his interaction with authority figures, such as custodial staff and the police. Mr Mosen's criminal and custodial records indicate an "array of threats of extreme aggression which have not necessarily resulted in extreme physical violence". His volatility is exacerbated by withdrawal from methadone and physical symptoms associated with withdrawal. Mr Mosen has had some periods when he has not displayed volatility.

[54] [Assessor 1] maintained this position in his 2019 report.

[55] [Assessor 2] (2019) concluded that Mr Mosen's behaviour in custody during the past two years demonstrates aggressive volatility. This is part of a longer-term

[9] Section 107IAA(2)(a)(ii).

pattern, although there had been periods of relative calm and absence of overt aggression.

[56] [Assessor 2] (2019) observed that Mr Mosen has a significant history of serious violent acts in the community, but that these are more related to short-term planning than stemming from volatility.

[57] I am satisfied that Mr Mosen has the characteristic of extreme aggressive volatility.

The s 107IAA factors – Persistent harbouring vengeful intentions to one or more persons[10]

[58] This is the contentious point between the applicant and respondent. I deal with this point in detail later in this judgment.

The s 107IAA factors – Clear and long-term planning[11]

[59] [Assessor 1] (2017) reported that Mr Mosen's relevant violent offences show evidence of planning to commit the crimes. He noted precautionary steps through concealment during the offence as well as measures to avoid detection. The violent offences had a clear premeditated goal of financial rewards. [Assessor 1] was uncertain as to whether the planning could be considered long-term. On balance, he concluded that any planning probably occurred over a relatively shorter periods like hours or days at the most. [Assessor 1] maintained this opinion in his 2019 report.

[60] [Assessor 2] (2019) concurred with [assessor 1]'s opinion. He agreed the planning is more likely to have occurred over hours or days.

[61] I am satisfied that Mr Mosen displays evidence of clear and long-term planning of serious violent offences to meet a premeditated goal.

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[10] Section 107IAA(2)(a)(iii).
[11] Section 107IAA(2)(b)(i).

The s 107IAA factors – Self regulatory capacity [12]

[62] [Assessor 1] (2017) concluded, that Mr Mosen has limited self-regulatory capacity. He pointed to Mr Mosen's rapid reoffending following previous releases from prison, for both violent and non-violent offences. He did point however, to some intermittent but unstable improvements in this area. However, positive periods should not necessarily be viewed as a reduction in Mr Mosen's overall risk, but rather given the right circumstance, environment and support, he has some capacity to self-regulate.

[63] [Assessor 2] largely agreed with this conclusion, pointing out that Mr Mosen's adulthood has been marked by significant limitations in his capacity for self-regulation.

[64] I am satisfied that Mr Mosen has the characteristic of limited self-regulatory capacity.

The s 107IAA factors – An absence of understanding or concern about the impact of his violence[13]

[65] [Assessor 1] (2017) reported that Mr Mosen's longstanding and repeated use of violence, intimidation tactics with threats of violence and verbal tirades to satisfy his needs, indicate a lack of meaningful understanding or lack of concern about the impact of his actions. He maintained this opinion in his 2019 report.

[66] The premature end to [assessor 2]'s interview with Mr Mosen prevented enquiry into his current understanding or concern for the impact of his violent offending on actual or potential victims. [Assessor 2] pointed to Mr Mosen's perception of being victimised and mistreated by authority and his close interest in atrocities committed by Nazi doctors in concentration camps during World War II. He pointed to a concerning absence of empathy for the victims of those events.

[67] [Assessor 2] generally concurred with [assessor 1]'s opinion.

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[12] Section 107IAA(2)(b)(ii).
[13] Section 107IAA(2)(c).

[68] I am satisfied that Mr Mosen displays an absence of understanding for or concern about the impact of serious violent offences on actual or potential victims.

Persistent harbouring of vengeful intentions towards 1 or more other persons

[69] I turn to consider the matter of difference between the parties – that is, whether there is enough evidence that Mr Mosen persistently harbours vengeful intentions towards one or more persons. If I am not satisfied that this limb is made out, then the application must be declined.

[70] This topic is dealt with under the following headings-

(a) Reports and Evidence

(b) Authority

(c) Submissions

(d) Discussion and Conclusion

Reports and Evidence

[71] [Assessor 1] concluded (2017) that Mr Mosen did not present with harbouring of vengeful intentions to one or more persons. [Assessor 1] said that Mr Mosen has, in the past, had specific vengeful intentions against individuals, usually because of financial debts accrued with illegal dealing in prison.

[72] [Assessor 1] said that these intentions are not considered to be currently present. Mr Mosen denied resentment towards a person who shot him in 2008. He said that he deserved the wrath of the other person.

[73] [Assessor 1] concluded that despite Mr Mosen's gang affiliation and highly visible white supremacy facial tattoos, that he does not have a vengeful intention towards other races.

[74] [Assessor 1] returned to this point in his 2019 report. He held the same opinion. He said that he did not see any information that indicates that Mr Mosen explicitly supports the notion that he was better than the persons from another race or religion, and nor did he harbour a vengeful intention to persons from a different race or religion.

[75] This aspect was revisited by [assessor 1] in his 2020 report, at the request of the Court, when the ESO made on 23 March 2020 was set aside.

[76] [Assessor 1] reviewed information available relating to Mr Mosen, with a close inspection of his custodial misconduct and incident reports and case notes. [Assessor 1] corresponded with Mr Mosen's case manager and custody staff. Mr Mosen was not interviewed.

[77] [Assessor 1] noted that Mr Mosen's behaviour presents prison services with serious challenges, which resulted in a maximum-security classification. Since 2019 Mr Mosen had received an array of custodial reprimands in the form of incident and misconduct reports. These were principally for damaging prison property, being abusive to staff, as well as disobeying orders. He had also received four incident reports of making threats towards staff, as well as three incident reports of fighting with other prisoners. In one incident, Mr Mosen threw liquid through his door flap which connected with a staff member's arm.

[78] [Assessor 1] concluded that Mr Mosen routinely reacts in an abusive and at times threatening manner towards staff. [Assessor 1] concluded that Mr Mosen's abusive and threatening behaviour towards individuals is a persistent way in which he behaves when he perceives his needs are not being met. Mr Mosen appears to lack the nuanced skills to tolerate frustration and problem solve effectively. He has demonstrated a persistent behavioural pattern of being reactive and impulsive to perceived situational threats.

[79] The repeated nature of this behaviour is a typical way in which Mr Mosen deals with the situational problems rather than assisting desire to cause harm. An examination of behavioural problems in the custodial environment failed, in [assessor

1]'s view, to find evidence that Mr Mosen has a pattern ruminating on perceived injuries and harbouring intentions to harm others seen by him as responsible.

[80] At times Mr Mosen displays threatening, aggressive, abusive and violent behaviour towards one or more persons, and this has been a persistent way of behaving. This behaviour was not a vengeful desire to cause harm but rather because of poor self-regulation and decision making. At times, this has escalated to physical harm being inflicted on others. These behaviours were reactive and, in the moment, when Mr Mosen expressed harmful intentions. Therefore, [assessor 1] remained of the opinion Mr Mosen does not display persistent harbouring vengeful intentions towards one or more persons.

[81] [Assessor 2] (2019) did not elicit any indication of persistent vengeful intentions towards any specific people or class of people. While Mr Mosen openly discussed ideas relating to white supremacy, he denied and did not display any intention to perpetrate violence towards other races or ethnicities.

[82] [Assessor 2] (2020) reviewed his opinion on each of the s 107IAA factors set out in his original report and did not identify a need to alter or add to his opinion at all. This was at the request of the Court.

[83] Specifically, he reviewed his opinion on whether Mr Mosen demonstrates a persistent harbouring of vengeful intentions towards one or more persons.

[84] [Assessor 2] looked at the meaning of the word "vengeful" as in the online Cambridge Dictionary:

> Expressing a strong wish to punish someone who has harmed you or your family or friends.

[85] He noted that the word "persistent" as defined in the Cambridge Dictionary online as being lasting for a long time or difficult to get rid of.

[86] [Assessor 2] pointed out that Mr Mosen has a long-term pattern of threatening behaviour in the context of feeling wronged by others and experienced brief but intense anger. He noted that this is being directed at people such as custodial staff,

probation officers, other prisoners and peers in the community, and it included himself. In elaboration, Mr Mosen disclosed thoughts of strangling [assessor 2] during the interview while experiencing anger about questions put to him. [Assessor 2] concluded:

> However, these episodes seem to be typically brief and I am not aware of Mr Mosen evidencing long-term stable intentions of harming specific persons.

[87] [Assessor 2] concluded that-

> 9. It is for the Court to decide the intention and meaning of the criteria of "persistent harbouring of vengeful intentions". It requires demonstrating that the person is held the desire to harm or punish one or more specified persons over an extended period of time, Mr Mosen did not seem to reach that threshold.
>
> 10. Mr Mosen does demonstrate a persistent pattern of briefly harbouring vengeful intentions towards a range of other people. In terms of situational factors, he is prone to perceiving threat of harm from others, which is not limited to expecting to be physically attacked. Mr Mosen also can respond with intense anger when he perceives that he is being slighted, disrespected, or thwarted in some way.

[88] [Assessor 1] and [assessor 2] gave evidence in Court before me. The evidence focussed entirely on the "vengeful harbouring" limb of the s 107IAA test.

[89] [Assessor 1] said, in evidence that Mr Mosen has antisocial values and beliefs, and that Mr Mosen has pro-offending, pro-criminal values, resorting to violence when his needs are not met. He concluded that Mr Mosen's behaviours in response to these situations were reactive in nature, likening them to "here and now survival". When Mr Mosen acts in the ways he does, it is not to punish or harm someone but is his, it is typically his way that he problem solves".

[90] [Assessor 2] did not find any evidence of holding vengeful intentions over a long time for one or more persons. He said that there is a "repetitive harbouring very briefly over a long period of time."

> So we have these incidents over and over where he feels threatened and it can be in a variety of ways and he reacts with a well learned strategy of some form of aggressive behaviour which is typically verbal and occasionally property damage things like that there is an attack back
>
> ….

> he's prone to seeing people slighting him or there to harm him in some ways so he's very fragile and that's why he reacts so quickly and out of proportion typically.

[91] [Assessor 2] commented that there is a pattern of exaggerated responses to the perception of threat. He pointed out that even at the interview, he saw [assessor 2] questions as threatening and the tension rose. He began to see [assessor 2] as "the enemy and even to have those thoughts of wanting to harm me".

[92] [Assessor 2] approached his assessment on the premise that it was necessary to demonstrate that Mr Mosen held intentions for a long period of time. [Assessor 2] said that in his first report that was how he understood it. On this aspect, [assessor 2] said that the Mr Mosen was "harbouring it for seconds or minutes and then it dissipates as quickly as it arises".

> Q. You've obviously, you've considered that this behaviour is persistent and that it happens repetitively? If that was how you have approached the word persistent.
>
> A. Yes, and I think that is what I have tried to set out and there is persistence in a pattern continuing over time but not the persistent harbouring towards one or more persons.

Authority

[93] I turn to consider authority on this point.

[94] In *Chief Executive of the Department of Corrections v C J W*, Venning J, after considering all the evidence, concluded:[14]

> On the basis of the evidence taken as a whole… and Mr W's history, I am satisfied Mr W has persistent vengeful intentions, not necessarily towards one particular person but directed at whomever he considers may have slighted him at the time.[15]

[95] In 1997, the respondent had been ruminating about his girlfriend going out with his sister and had feelings of jealousy and anger, leading to his violent attacks on several people.

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[14] *Chief Executive of the Department of Corrections v C J W* [2016] NZHC 1082.
[15] Ibid, at [41].

[96] In 2001, CJW raped and indecently assaulted a young girl. He admitted that this was the result of hostile rumination towards the victim's family. In an interview in 2012, he acknowledged fantasies of burning down the family's home upon release and wanting to ruin their lives. It is not indicated in the judgment whether these fantasies persisted constantly over the 11 years, or whether they came and went.

[97] In 2011, he acknowledged that he struggled to contain thoughts and feelings and was concerned that he might act violently or explode based on negative ruminations of others.

[98] [The report writer] accepted that once the respondent perceived he had been wronged, he acted out vengeful intentions.

[99] In *Department of Corrections v McCord*:[16]

> … there was limited overt evidence on file to suggest Mr McCord's violent behaviour was the result of vengeful intentions, or that he was prone to themes of retribution and grievance.[17]

[100] There was one example of an attack on his then partner's father, who he believed was instrumental in keeping him and his partner apart. It was observed that the violent behaviour tended to follow after he had become enraged due to conflicts arising within intimate or domestic relationships whereby he had resorted to acts of violence to gain control of his partner.

[101] Having referred to the judgment of Venning J in *C J W*, Davison J concluded:[18]

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

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[16] *Department of Corrections v McCord* [2017] NZHC 744.
[17] Ibid, at [56].
[18] At fn 14 above.

[102] In *Chief Executive of Department of Corrections v Paul*[19], Mander J observed that the respondent's violence was precipitated by his perception of having been provoked or challenged, feeling intense anger, engaging in ruminative thinking, and being under the influence of substances.[20]

[103] In considering the extent of persistent harbouring of vengeful intentions, Mander J observed the respondent had reported intermittent periods of engaging in violent ruminative ideation, which appeared to have been in response to perceptions that he was at risk of harm from others.

[104] The report writer, Ms Walker, opined that such thinking appeared to occur in the context of transient stress related episodes and paranoid thinking, rather than representing the presence of specific, persistent, vengeful thoughts.

[105] Mander J concluded that on all the information provided, all criteria for an ESO were met.

[106] In *Chief Executive, Department of Corrections v Amohanga*, Edwards J observed that the respondent's offending did not demonstrate the targeting of any specific people or groups.[21] In that sense, there was no evidence of a persistent harbouring of vengeful intentions to one or more persons. However, some of the offending was characterised by reacting in a violent and aggressive manner to those who imposed restrictions on Mr Amohanga or curtailed his freedoms.[22] This suggested that those tasked with overseeing his supervision might be at risk.

[107] Of the other s 107IAA(2) matters, Edwards J concluded that all of them were made out. However, the evidence concerning the absence of understanding for all concern about the impact on victims, was conflicting.

[108] Edwards J nevertheless concluded:[23]

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[19] *Chief Executive of Department of Corrections v Paul* [2017] NZHC 1294.
[20] Ibid, at [17].
[21] *Chief Executive, Department of Corrections v Amohanga* [2017] NZHC 1406.
[22] Ibid, at [35].
[23] Ibid, at [38].

> [38] Considering all of these factors in the round, I am satisfied that Mr Amohanga poses a very high risk of committing a relevant violent offence in the future. Mr Amohanga therefore reaches the threshold necessary to impose an ESO.

[109] In *Chief Executive, Department of Corrections v Paniora*,[24] one psychologist could not discount the respondent's potential to seek revenge through violence and identified such conduct in his past offending.[25] A second psychologist was of the view that the respondent was intensely motivated to be violent, including for revenge.[26]

[110] Jagose J observed that the respondent's offending was characterised by reversion to violence to gain redress for perceived slights, or to obtain desired reward, and his depiction of himself as the "victim" for which revenge is sought or taken. His bullying and resistance to authority, had vengeful motivation.[27]

[111] There is no express indication in the judgment that the vengeful intentions were persistent in the sense that they were long lasting, but the respondent's past offending, continue when personal characteristics in rating the "far horizon of actuarial tools" also satisfied His Honour that there was a very high risk that the respondent would commit a relevant offence. An ESO was therefore made.

Submissions

[112] For Corrections, Mr Carter summarised the positions of the psychologists, as being based around the definition of the phrase "persistent harbouring of vengeful intentions". If, as [assessor 2] said (2020), it is required that the person holds the desire to harm or punish one or more persons over an extended period of time, then the threshold has not been met.

[113] On the other hand, Mr Carter submits that a persistent pattern of briefly harbouring vengeful intentions towards other people, meets the statutory test. Mr Carter submits that [assessor 2] conclusion is in these terms, when he reported (2020):

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[24] *Chief Executive, Department of Corrections v Paniora* [2018] NZHC 1505.
[25] Ibid, at [14].
[26] Ibid, at [19].
[27] Ibid, at [28].

> 10. Mr Mosen does demonstrate a persistent pattern of briefly harbouring vengeful intentions towards a range of other people. In terms of situational factors, he is prone to perceiving threat of harm from others, which is not limited to expecting to be physically attacked. Mr Mosen also can respond with intense anger when he perceives that he is being slighted, disrespected, or thwarted in some way.

[114] Mr Carter argues therefore that a more expansive interpretation of the "harbouring vengeful intentions" test is required. He cites the authorities of *C J W*,[28] *Paul,*[29] and *Amohanga.*[30]

[115] Mr Carter submits that Corrections is not required to establish that the respondents had harboured harmful intentions for an extended period before the violence occurred. Mr Carter submits that this interpretation makes logical sense, as there would be somewhat of a lacuna in the law, if an ESO could not apply to someone who was consistently and generally violent purely because they did not have a regular victim or class of victims because they did not demonstrate planning and forethought prior to the violence occurring.

[116] Mr Carter points to several passages in the reports which, in his submission, are examples of Mr Mosen behaving in a manner which shows vengeful intentions as applied in the authorities.

[117] For Mr Mosen, Mr Parsons argues that the evidence of the psychologists, does not display a persistent harbouring of vengeful intentions towards one or more persons. Mr Parsons draws on the literal wording of their conclusions in their reports, and in their evidence given in Court.

[118] For example, Mr Parsons relies on [assessor 2]'s 2019 report, in which the psychologist said that he did not elicit any indication of persistent vengeful intentions towards any specific people or class of people. This comment was made in the context of Mr Mosen openly discussing ideas relating to white supremacy while denying and not displaying any intention to perpetrate violence towards other races or ethnicities.

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[28] At fn 14 above.
[29] At fn 19 above.
[30] At fn 21 above.

[119] Mr Parsons submits that given these conclusions, the mandatory "harbouring of vengeful intentions" limb is not made out, and the Corrections application must therefore be declined.

Discussion

[120] A review of the authorities arrives at the conclusion that the harbouring of vengeful intentions need not be persistent in the sense of being longstanding. Rather, it is enough that the vengeful intentions have been persistent in the sense that they occurred on more than one occasion. That is, they persist in the sense that they are not one-off occurrences. Based on *C J W*, *McCord* and *Paul*,[31] it may be concluded that the requirements of s 107IAA(2)(a)(iii) may be met, if the respondent has previously offended, on at least two occasions, because of harbouring vengeful intentions against somebody, whether of short duration or lasting some time.

[121] In *Amohanga*, Edwards J did not find evidence of persistent harbouring of vengeful intentions against one or more persons specifically but did recognise that the respondent's offending was characterised by reacting in a violent and aggressive manner to those who imposed restrictions on him or curtailed his freedom.[32]

[122] This approach to interpretation of the words "persistent harbouring" makes sense when considered against the purpose of an ESO, which is to protect the community from those who pose a real and ongoing risk of committing serious violent offences.[33] A tendency to harbour vengeful intentions against persons is particularly dangerous, because of what can occur when in combination with the other subs (2)(a) characteristics. This, in turn, is what justifies the making of an ESO.

[123] Ajose J, in *Chief Executive of the Department of Corrections v Waiti*, commented on this aspect:[34]

> [36] Looking at ESO-qualifying "severe disturbance" alone, such is required to be established from the combination of the required characteristics. While the complete statutory wording is important, to summarise, it is a severe

[31] At fn 14, 16 and 19 above.
[32] At fn 21 above.
[33] Section 107I(1).
[34] *Chief Executive of the Department of Corrections v Waiti* [2019] NZHC 3256.

> disturbance characterised by violence, volatility, and vengeance. But the disturbance's materiality is in the offender's either planned resort to violence to achieve a specific end, or disinhibition. The point is, either by design or inadvertence, the offender's disturbed behaviour may be realised. And the offender lacks comprehension of the impact of the violence on victims, meaning there is no claim on self-control. In that context, "persistent harbouring of vengeful intentions" is required to provide motivation for unpredictable resort to violence. But why only that particular combination qualifies as the necessary "severe disturbance" is unexplained.

[124] I conclude that a proper assessment of the authorities supports the contention argued for by Corrections. I am entitled to consider all the evidence, in the round, rather than taking a narrow view of it when considering the application of the "persistent harbouring of vengeful intentions" criteria.

[125] To take the view contended for by Mr Parsons, is not, in my judgment, consistent with the wording of the statute, and is supported by consideration of the purpose for the making of an ESO, and authority.

[126] Both psychologists say that Mr Mosen responds to given situations in a reactive way, and that he harbours vengeful intentions for short periods of time. The evidence supports the conclusion that this behaviour happens repetitively. Mr Carter is correct when he submits that there must be a lacuna in the law, if I were to conclude that this scenario does not amount to a persistent harbouring of vengeful intentions.

[127] I conclude that the reverse must apply, and that the evidence allows the conclusion to be drawn that Mr Mosen does in fact persistently harbour vengeful intentions. That conclusion is consistent with the evidence (and available inferences from it), authority and (importantly) is consistent with the purposes of an ESO. To conclude otherwise would contradict that purpose.

[128] I am therefore satisfied that there is enough evidence of Mr Mosen harbouring vengeful intentions towards 1 or more persons.

Conclusion

[129] It follows that I am satisfied that-

(a) Mr Mosen has, or has had, a pervasive patter of serious violent offending and

(b) There is a very high risk that he will in future commit a relevant violent offence.

[130] The application is therefore granted.

Term

[131] An ESO may not exceed ten years. The term of the order must be the minimum period required for the safety of the community considering:

(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. [35]

[132] Ten-year terms are not routinely imposed, particularly in cases involving violence. For example, in *C J W*, Corrections applied for a ten-year term.[36] The respondent submitted that a two-year term was sufficient. Venning J imposed a seven-year term.

[133] In imposing a 10-year term, in *Paul*, Mander J concluded:[37]

> [37] I have concluded that Mr Paul has a pervasive pattern of serious violent offending and remains at a very high risk of committing a relevant violent offence in the future. Mr Paul is not engaged in any reintegrative activities during his current sentence and is likely to be poorly equipped to manage activities of daily living. It having been some 10 years since he has lived independently, Mr Paul does not have a well-developed personal support network. He presents of a number of complex integration needs and is yet to develop the type of comprehensive risk management plan that would enable him to independently manage his very high risk of reoffending over the longer term.

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[35] Section 107I(4) and (5).
[36] At fn 14 above.
[37] At fn 19 above.

[134] On the face of it, this comment might be apposite when considering Mr Mosen's case. However, I have not had the benefit of commentary from the psychologists as to their views on the term of an ESO.

[135] I heard evidence on the prospects of Mr Mosen successfully completing a programme of treatment for violence. The conclusion I reach was that the prospects of successful treatment were extremely remote in the short to medium term. However, that conclusion does not assist in deciding the term of an ESO that is consistent with s 107I(5).

[136] The reports and evidence made it clear that Mr Mosen would need to successfully complete a preparatory programme of therapy before commencing treatment for violence proper. The preparatory programme would be required to address issues such as childhood trauma, that currently act as blocks to Mr Mosen taking part in therapy for violence.

[137] In prison programmes for violence can take around nine months, and I was told that there are no similar programmes in the community. A major impediment to any engagement by Mr Mosen is his deep distrust of anyone connected to Corrections, and anyone he perceives to be in authority. A clear example is his termination of the interview with [assessor 2], who was not engaged by Corrections.

[138] In *Moeke v Chief Executive of the Department of Corrections* the Court of Appeal, in upholding the 10-year period of an ESO, invited the Department to ensure that the material before the Courts in future cases includes;[38]

(a) A section in the psychological report that addresses the fully the minimum terms sought for the particular offender against the s 107I(5) criteria;

(b) A thorough assessment of the efficacy and suitability of post release plans including their nature and duration;

[38] *Moeke v Chief Executive of the Department of Corrections* [2010] NZCA 60.

(c) Relevant updating information at the date of the extended supervision order hearing; and

(d) Steps which the offender has taken to address perceived risks.

[139] While the evidence I heard relating to the prospects of success of treatment for Mr Mosen was valuable, I would have been more assisted by updated reports addressing the *Moeke* criteria.[39]

[140] Section 107I(4) provides that every extended supervision order must state the term of the order which may not exceed ten years. I therefore am unable to split the making of the order, from the term.

[141] I conclude that based on the reports and evidence I heard the minimum period required to address the risks in s 107I(5) is five years. I would have been open to imposing a higher term, given the pessimistic outlook for Mr Mosen's ability to address issues of violence. Given the absence of evidence addressing the minimum term required, I have concluded that I am not able to impose a longer term.

Order

[142] I make an extended supervision order for a term of five years.

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Judge BR Northwood
District Court Judge

Date of authentication: 03/07/2020
In an electronic form, authenticated pursuant to Rule 2.2(2)(b) Criminal Procedure Rules 2012.

[39] Ibid.