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

IN THE DISTRICT COURT

I TE KŌTI-Ā-ROHE

CIV-2024-092-003333
[2024] NZDC 29896

BETWEEN	CHIEF EXECUTIVE OF THE DEPARTMENT OF CORRECTIONS Applicant
AND	[TOM FINLEY] Respondent

Hearing:	27 September 2024
Appearances:	C Flatley for the Applicant No appearance by or on behalf of the Respondent
Submissions:	29 October 2024
Judgment:	12 December 2024

RESERVED JUDGMENT OF JUDGE D P ROBINSON

Application

[1] The Chief Executive of the Department of Corrections seeks a final order imposing special conditions on the respondent under the Returning Offenders (Management and Information) Act 2015 ("ROMI Act").

Procedural background

[2] [Tom Finley] is a New Zealand citizen who had lived in Australia since 1999. He was deported to New Zealand under s 501 of the Migration Act 1958 (Cth), having been convicted and imprisoned in Queensland on a number of charges of sexual offending against a child.

[3] In anticipation of the respondent's arrival in New Zealand, the applicant applied to the Manukau District Court for an order that the respondent be made subject to interim special conditions.

[4] An interim order was made on 9 July 2024 and was served on the respondent on his arrival in Auckland.

[5] The interim order was subsequently extended to 27 September 2024.

[6] The special conditions imposed (and extended to 27 September) were in the following terms:

> (a) You must report to a probation officer as and when required to do so by a probation officer and must notify a probation officer of your residential address and the nature and place of your employment when asked to do so.
>
> (b) You must not leave or attempt to leave New Zealand without the prior written consent of a probation officer.
>
> (c) You must, if a probation officer directs, allow the collection of biometric information.
>
> (d) To reside at an address as directed by a probation officer, and not to move from that address without the prior written approval of a probation officer.
>
> (e) To attend and engage in a rehabilitative assessment, and any subsequent recommended treatment or program, as directed by the probation officer and/or assessor/treatment provider.
>
> (f) Not to possess, use or consume alcohol or drugs and/or psychoactive substances except controlled drugs prescribed for you by a health professional.
>
> (g) Not to have contact or otherwise associate with any victim of your offending [including previous offending], directly or indirectly, unless you have the prior written approval of a probation officer.
>
> (h) Not to have contact or otherwise associate with a person under the age of 16 years, directly or indirectly, unless you have the prior written approval of a probation officer, or unless you are under the supervision and in the presence of an adult approved in writing by a probation officer.

[7] The proceeding was called before me on 27 September 2024. While there was no appearance by or on behalf of the respondent, he had given his probation officer a letter advising that he:

(a) had the opportunity to seek legal advice in respect of the application for final orders;

(b) did not wish to appear in court in relation to that application; and

(c) did not oppose the imposition of the final conditions sought, comprising conditions (a)–(f) and (h) above.

[8] I extended the current interim orders pending receipt of written submissions from counsel for the applicant, which are now to hand.

Issue

[9] The issue is whether there is jurisdiction to make orders in respect of the respondent, given that he was subject to a suspended term of imprisonment at the time he was deported to New Zealand.

[10] Determination of the application requires consideration of the chronology and the applicable provisions of the ROMI Act and the Penalties and Sentences Act 1992 (Qld) ("PS Act").

Chronology

[11] Below is a table providing a timeline of the relevant events:

Date	Event
31/12/2019 – 5/4/2020	The respondent offends.
17/7/2021	The respondent's sentence commences (that is, the respondent was on remand).

15/9/2021	The respondent is sentenced by Judge Clare SC to four years' imprisonment, with the sentence to be suspended for a period of four years after the respondent had served 15 months in custody.
6/10/2021	The respondent's visa is cancelled under s 501(3A) of the Migration Act 1958 (Cth).
16/10/2022	The respondent is released from custody, but subject to a suspended sentence.
18/1/2023–6/4/2023	The respondent is detained in immigration custody. He is released after his visa cancellation is revoked under Ministerial Direction 99.[1]
19/6/2024	The respondent's visa is again cancelled under s 501(3A) of the Migration Act 1958 (Cth) and he is detained in immigration custody.
10/7/2024	The respondent arrives in New Zealand and is served with the interim order imposing interim special conditions.

Law

[12] Subpart 3 of part 2 of the ROMI Act governs whether there is jurisdiction to impose special conditions on a respondent because he was returned to New Zealand more than six months after his or her release from custody on that sentence. The Act relevantly provides:

> **32 Who subpart applies to**
>
> (1) This subpart applies to a returning offender who—
>
> (a) meets the criteria set out in section 17(1) for a returning prisoner, except that he or she is returning or has returned to New Zealand more than 6 months after his or her release from custody in prison; and
>
> (b) was, immediately before his or her return to New Zealand from the relevant overseas jurisdiction, subject to—

[1] Memorandum of applicant dated 8 July 2024 at [1.7].

(i) monitoring, supervision, or other conditions for the relevant sentence; or

(ii) conditions imposed under an order in the nature of an extended supervision order or public protection order.

(2) In subsection (1)(b), **immediately before his or her return to New Zealand** includes, if the offender was in detention immediately before his or her return to New Zealand, immediately before the offender was first so detained.

33 Court may impose conditions on returning offender

(1) On the application of the chief executive, a court may impose any conditions on a returning offender to whom this subpart applies and must, if it does so, specify when the conditions end.

(2) The court may impose conditions if it is satisfied that the conditions are—

(a) necessary to facilitate the rehabilitation and reintegration of the returning offender; or

(b) necessary to reduce the risk of reoffending by the returning offender; or

(c) necessary for both purposes in paragraphs (a) and (b).

(3) The conditions must not be imposed more than 6 months after the returning offender's return to New Zealand.

[13] Section 17 of the Act provides:

17 Criteria for determination that person is returning prisoner

(1) The Commissioner must determine that a person is a returning prisoner if the Commissioner is satisfied that the person—

(a) has been convicted in an overseas jurisdiction of an offence for conduct that constitutes an imprisonable offence in New Zealand; and

(b) has, in respect of that conviction, been sentenced to—

(i) a term of imprisonment of more than 1 year; or

(ii) 2 or more terms of imprisonment that are cumulative, the total term of which is more than 1 year; and

(c) is returning or has returned to New Zealand within 6 months after his or her release from custody during or at the end of the sentence.

(2) In subsection (1), **release from custody** means release from custody in a prison or, if a person is detained in an immigration or other facility following release from prison, release from that facility.

(3) To avoid doubt, a person who is released at the end of a prison sentence and has been in the community for more than 6 months is not a returning prisoner, even though he or she is later detained in an immigration or other facility.

[14] It follows that, as the respondent was returned to New Zealand more than six months after his release (after serving 15 months in prison),[2] and having been in the community for more than six months after his release from custody,[3] for the ROMI Act to apply, the respondent must have been:

(a) convicted in an overseas jurisdiction of an offence for conduct that constitutes an imprisonable offence in New Zealand[4] (the equivalent New Zealand offence being "sexual conduct with young person under 16");[5]

(b) sentenced to a term of more than one year[6] (the respondent having been sentenced to four years' imprisonment, suspended for four years after 15 months had been served in prison); and

(c) immediately before his return to New Zealand, subject to monitoring, supervision or other conditions for the relevant sentence.[7]

[15] The first two criteria are met. Accordingly, the issue of jurisdiction comes down to whether a suspended sentence under the PS Act amounts to "monitoring, supervision, or other conditions for the relevant sentence" for the purposes of the ROMI Act.

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2 Returning Offenders (Management and Information) Act 2015, ss 17(1)(c) and 32(1)(a).
3 Section 17(3).
4 Sections 32(1)(a) and 17(1)(a).
5 Crimes Act 1961, s 134.
6 Returning Offenders (Management and Information) Act 2015, ss 32(1)(a) and 17(1)(b)(i).
7 Section 32(1)(b)(i).

Submissions

[16] Ms Flatley takes the position that the fact the respondent was made subject to the Queensland child sex offender reporting regime did not make him subject to "monitoring, supervision, or other conditions for the relevant sentence".[8] That is because the conditions apply automatically on sentence and are not conditions related specifically to the "relevant sentence"[9] Those obligations arise under the Child Protection (Offender Reporting And Offender Prohibition Order) Act 2004 (QLD) for which the sentencing process is the trigger.[10]

[17] The applicant's argument is, effectively, that the suspended sentence imposes a condition that the respondent commit no further offence within the operational period, which is sufficient to fulfil the criterion of "other conditions for the relevant sentence".

[18] Ms Flatley accepts that such a condition does not amount to "monitoring or supervision". She submits, however, that a suspended sentence, which applies following the respondent's release from custody, can be considered similar to the standard release conditions that apply after short sentences of imprisonment in New Zealand.

[19] Counsel submits that the words "or other conditions for the relevant sentence" provide a wide ambit for various conditions, provided they are imposed *for* the relevant sentence (counsel's emphasis). Ms Flatley submits that the condition cannot be attributed to any other offending or sentence.

[20] While not expressly imposed to manage the respondent's risk after his release from custody, counsel submits that a suspended sentence has that effect; therefore, it fulfils the criteria under s 32 of the ROMI Act.

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8 Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004 (Qld).
9 Returning Offenders (Management and Information) Act 2015, s 32(1)(b)(i).
10 Counsel's submissions at [17].

[21] Given that the respondent now faces no prospect of the suspended sentence being activated in the event of further offending, counsel submits that imposition of special conditions is necessary to manage the risk that he poses to the community.

Consideration

Case law

[22] There are limited authorities on the ROMI Act. In *Chief Executive, New Zealand Department of Corrections v Amohanga*, Edwards J stated:[11]

> Subpart 3 applies to returning offenders who meet the criteria of a "returning prisoner"; who have returned to New Zealand more than six months after release from custody; and have been subject to monitoring, supervision or ESO-like conditions immediately prior to their return.

[23] That suggests "monitoring, supervision, or other conditions for the relevant sentence" will involve some level of oversight or control over the individual.

Legislative history

[24] The observation cited from *Amohanga* is consistent with the terms of the explanatory note to the Returning Offenders (Management and Information) Bill:[12]

> Some returning offenders will not automatically qualify for management as a returning prisoner because they were released from an overseas prison into the supervision of a correctional agency more than 6 months before their return to New Zealand. Where these offenders were subject to *monitoring or supervision* immediately prior to their return, the Bill empowers a court, on application by Corrections, to impose conditions on these returning offenders to *continue their management* in the New Zealand community.

[25] The "clause by clause analysis" records:[13]

> Subpart 3 applies to a returning offender who would qualify as a returning prisoner but for the fact that he or she is returning or has returned to New Zealand more than 6 months after his or her release from custody. *A court may impose release conditions, that is, both standard release conditions and special conditions, on the returning offender if he or she was subject to*

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11 *Chief Executive, New Zealand Department of Corrections v Amohanga* [2017] NZHC 1406 at [48].

12 Returning Offenders (Management and Information) Bill 98—1, explanatory note at 2 (emphasis added).

13 At 3 (emphasis added).

> *corresponding release conditions* immediately before his or her return to New Zealand.

[26] Those passages suggest that there is intended to be some connection or consistency between the conditions applying to the sentence imposed in the overseas jurisdiction and those to be imposed under the ROMI Act.

[27] That "other conditions" are intended to relate to monitoring is apparent from the observations of the Minister of Justice, Hon Amy Adams, during the first reading of the Bill:[14]

> **Hon AMY ADAMS (Minister of Justice):** … The aim of this bill is to better protect the law-abiding public by ensuring that a *similar regime of supervision* applies to convicted offenders *who served their sentences in prisons overseas as applies to those convicted and imprisoned in New Zealand*.
>
> …
>
> The proposed supervision regime as set out in this bill will mean that offenders who arrive in New Zealand shortly after being released from prison will be subject to the *same sort of oversight as offenders who have served a similar sentence here*.
>
> …
>
> Finally, the bill gives new powers to the District Court to impose special conditions on eligible offenders, on either an interim or an ongoing basis. This allows the court to impose conditions on any offender who is subject to some form of monitoring or supervision at the time that they return to New Zealand, regardless of how long it has been since their release.

[28] During the second reading of the Bill, the Minister noted:[15]

> So if we start with the operation of the bill, I said in my first reading contribution that the bill is about trying to replicate as closely as possible—and I do not pretend that it is an exact replication—*the sort of supervision and management of offenders that they would likely have been subject to if they had served the same sentence in New Zealand*.
>
> …
>
> [T]he bill, effectively, replicates a parole framework.
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> …
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> The reason for that is that what these conditions are about, whether they are applied in New Zealand or under this bill, is helping to oversee the highest-

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14 (17 November 2015) 710 NZPD 8032 (emphasis added).
15 (17 November 2015) 710 NZPD 8052 (emphasis added).

> risk period for an offender, which is the time when they are first released from prison. The longer they have been in prison, the harder that reintegration is, and therefore the longer the monitoring tends to occur. It is not a punitive attack on the offender; it is about making sure that someone who has been in an institution and under very strict rules for a long period of time is carefully monitored and watched for offending behaviours and for the assistance they will require as they reintegrate. If someone has served an offence in Australia, for instance, and has been living and working and going about their business in Australia for some time, it would not be appropriate to then turn round and impose those sorts of *oversight conditions*. If, however, they have only recently been released, then we absolutely need to be tracking that sort of behaviour.
>
> …if they have been out in the Australian community for more than 6 months, then that case cannot be made in the same way that we need to help them with that reintegration. Within 6 months, we think the case can be made. However, the question was asked about what happens if they have been out for 7 months and they still need monitoring. The *bill provides that if they come back to New Zealand and are subject to an ongoing monitoring regime*—let us say they have got lifetime monitoring because there was serious concern in Australia that they needed to be watched—then it enables the New Zealand authorities to go to the courts here and say "Well, actually, in this case, we think it is made out", and would they look at it. It does not apply automatically, but there is that provision if they were subject to an ongoing monitoring regime.

[29] Hon Alfred Ngaro said:[16]

> So my brief comments on the second reading of the bill are particularly in relation to Subparts 2 and 3 of Part 2. These define the returning prisoners and establish a supervision regime for them to be administered by the Department of Corrections on a basis comparable with its supervision of prisoners released on conditions as well, whether or not they be non-custodial. Some of those conditions are that the Department of Corrections will be able to apply to a court for a period of *supervision for offenders who have been in the community for more than 6 months where they were subject to supervision or monitoring at the time of their leaving the other jurisdiction as well*.

[30] Those passages suggest that a measure or oversight or control is required for overseas conditions to found jurisdiction under the ROMI Act.[17]

Penalties and Sentences Act 1992 (Qld)

[31] It is then necessary to consider the scheme of the PS Act:

> **Part 8 Orders of suspended imprisonment**
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> **143 Court not to act without recording a conviction**

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16 At 8063.
17 At 8032.

A court may make an order under section 144(1) only if it records a conviction.

144 Sentence of imprisonment may be suspended

(1) If a court sentences an offender to imprisonment for 5 years or less, it may order that the term of imprisonment be suspended.

(2) An order under subsection (1) may be made only if the court is satisfied that it is appropriate to do so in the circumstances.

(3) An order under subsection (1) may suspend the whole or a part of the term of imprisonment.

(4) A court must not suspend a term of imprisonment if it is satisfied, having regard to the provisions of this Act, that it would be appropriate in the circumstances that the offender be imprisoned for the term of imprisonment imposed.

(5) The court must state an operational period during which the offender must not commit another offence punishable by imprisonment if the offender is to avoid being dealt with under section 146 for the suspended sentence.

(6) The operational period starts on the day the order is made and must be—

(a) not less than the term of imprisonment imposed; and

(b) not more than 5 years.

145 Effect of suspended imprisonment

An offender for whom an order under section 144 is made has to serve the suspended imprisonment only if the offender is ordered to do so under section 147.

[32] The learned author of *Queensland Sentencing Manual* observes:[18]

Part 8 of the Penalties and Sentences Act 1992 does not give the court power to impose conditions such as those that can be attached to a probation order (s 93) or an intensive correction order (s 114), or a parole order made subsequently by a Community Corrections Board: Corrective Services Act 1988, s 175.

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[18] M Jackson *Queensland Sentencing Manual* (online ed, Thomson Reuters) at [15.17]. I note for completeness that the Corrective Services Act 1998 has been repealed and replaced by the Corrective Services Act 2006. Section 200 of the latter Act appears to be the operative provision. The author's observation remains valid despite the new legislation.

[33] The commentary in *Indictable Offences Queensland* is to similar effect:[19]

> The problem with a suspended sentence as it presently stands, is if it is not combined with another order, the offender does not have the benefit of supervision during the term of the suspended imprisonment, in contrast for example with an order for probation, or community service. The other disadvantage of orders for suspended imprisonment is that no conditions can be attached to the order, in contrast to a probation, community service or intensive correction order. Pure suspended sentence orders rely on their efficacy for the threat of the suspended imprisonment having to be served if the offender commits another offence punishable by imprisonment during the operational period of the suspended sentence.

[34] Those passages confirm that the suspended sentence does not involve any form of monitoring, control or directed rehabilitation.

[35] I do not consider that the suspended sentence under the PS Act can be construed as including a condition not to offend. Enforcement of the sentence is a consequence of further offending (under s 146 of the PS Act, where a determination is made to enforce the sentence under s 147), rather than a breach of a condition. That is apparent from s 144(5) of the PS Act, which requires the sentencing Court to:

> …state an operational period during which the offender must not commit another offence punishable by imprisonment if the offender is to avoid being dealt with under section 146 …

[36] The terms of that provision, and the scheme of pt 8 of the PS Act, can be contrasted with other available sentences under that legislation, which expressly make it a condition of sentence not to offend.

[37] A probation order can be imposed either as a stand-alone community-based sentence[20] or effectively as release conditions when the offender is sentenced to no longer than one year's imprisonment.[21] The probation order must contain "requirements" that the offender not commit another offence during the period of the order,[22] as well as standard conditions,[23] and may contain additional conditions akin to a sentence of supervision, or release conditions in New Zealand.[24]

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19 G Lynham (ed) *Indictable Offences Queensland* (online ed, Thomson Reuters) at [PSA.144.20].
20 Penalties And Sentences Act 1992 (Qld), s 92(1)(a) and (2)(a).
21 Section 92(1)(b) and (2)(b).
22 Section 93(1)(a).
23 Section 93(1)(b)–(g).
24 Section 94.

[38] An intensive correction order is available where a court sentences an offender to a term of imprisonment of one year or less.[25] The effect of the order is that the offender is to serve the sentence of imprisonment by way of intensive correction in the community and not in a prison.[26] The intensive correction order must contain "requirements" that the offender must not commit another offence during the period of the order,[27] as well as standard conditions.[28] The Court may also impose additional conditions.[29] The sentence is akin to intensive supervision.

[39] The terms of ss 93(1)(a) and 114(1)(a) requiring that probation orders and intensive correction orders (respectively) contain conditions that an offender "must not commit another offence during the period of the order", are quite different to the structure of pt 8 of the Act.[30] I therefore cannot conclude it is a condition of a suspended sentence that an offender not offend.

Interpretation

[40] The meaning of "other condition" is, in my judgment, to be interpreted by reference to "monitoring [and] supervision…" in s 32(1)(b) of the ROMI Act. Consistent with the legislative intent apparent from the commentary to the Bill, and the cited passages from Hansard, "conditions" will relate to oversight, control or rehabilitation of the returning offender. That is absent from the suspended sentence scheme.

[41] The suspended sentence scheme under the PS Act has no features similar to standard or special release conditions applicable to short terms of imprisonment,[31] or

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25 Section 112.
26 Section 113(1).
27 Section 114(1)(a).
28 Section 114(1)(b)–(i).
29 Section 115.
30 I note that the condition that the offender "must not commit another offence during the period of the order" is also a feature of community service orders (Penalties and Sentences Act 1992 (Qld), s 103(1)(a)), graffiti removal orders (s 110C(1)(a)), and treatment orders (s 151R(2)(a)). It is also a condition of parole that a prisoner not commit an offence: Corrective Services Act 2006 (Qld), s 200(1)(f).
31 Sentencing Act 2002, s 93.

parole conditions that could be applied in New Zealand.[32] Those are, of course, the conditions that can be applied under the ROMI Act.[33]

[42] Special release or parole conditions, and special conditions on a returning offender, can only be imposed to:[34]

(a) reduce the risk of re-offending by the offender;

(b) facilitate or promote the rehabilitation and reintegration of the offender; or

(c) provide for the reasonable concerns of victims of the offender.

[43] Those are not features of the suspended sentence.

[44] It is evident from the commentary to the Bill that the conditions to be imposed under the ROMI Act are intended to reflect the conditions the offender was subject to in the overseas jurisdiction. The proposed conditions here bear no relation to the suspended sentence.

[45] The kinds of special conditions that might be imposed under the ROMI Act (which must be necessary to facilitate the rehabilitation and reintegration of, and reduce the risk of re-offending by, the returning offender) do not reflect the terms and effect of a suspended sentence under the PS Act.[35]

New Zealand Bill of Rights Act 1990

[46] Finally, one must also consider the respondent's rights to freedom of association, movement and to not be subject to double punishment under the New

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32 Parole Act 2002, ss 14 (standard release conditions) and 15 (special conditions).

33 Returning Offenders (Management and Information) Act 2015, ss 25 (standard conditions) and 26 (special conditions), as applied by s 34.

34 Sentencing Act 2002, s 93(3); Parole Act 2002, s 15(2); and Returning Offenders (Management and Information) Act 2015, s 26(3).

35 Returning Offenders (Management and Information) Act 2015, s 33(2)(a) and (b).

Zealand Bill of Rights Act 1990 ("NZBORA").[36] A "rights-consistent" interpretation is to be preferred.[37]

[47] The Court of Appeal has recognised that conditions authorised by the ROMI Act are in the nature of penalties, which can result in significant restrictions on rights affirmed by NZBORA.[38] The Court also held that application of the ROMI Act regime means there has been a breach of s 26(2) of NZBORA.[39] It was of moment in that case that the penalty consisted of substituting release conditions imposed by the ROMI Act in place of what would have applied had the offender remained in Australia.

[48] That is not the case here, where the conditions sought go substantially beyond those the respondent was subject to in Australia. I do not consider that the ROMI Act could be interpreted in a way that would permit a returning offender to be made subject to a more onerous regime in New Zealand than he was subject to in Australia before his deportation.

Conclusion

[49] I therefore hold that a suspended sentence under the PS Act is not an "other condition" sufficient to give the Court jurisdiction to make orders in respect of Mr [Finley] under the ROMI Act.

Result

[50] Mr [Finley] does not satisfy the cumulative requirements of s 32 of the ROMI Act, as he was not subject to "monitoring, supervision, or other conditions" of his sentence immediately before his return to New Zealand.

[51] The application for final orders is refused and the current interim orders are discharged.

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36 New Zealand Bill of Rights Act 1990, ss 17, 18 and 26.
37 Section 6.
38 *Commissioner of Police v G* [2023] NZCA 93, [2024] 3 NZLR 116 at [81] and [84].
39 At [110].

Comment

[52] This is a matter which, in my view, requires legislative attention. The offending for which Mr [Finley] was convicted was serious, and his risk profile is such that ongoing oversight and engagement with a probation officer is appropriate. The ROMI Act should be explicit if it is intended to apply to those who were subject to suspended terms of imprisonment at the time of their removal to New Zealand, or to allow imposition of more onerous conditions that an offender was subject to prior to their return.

[53] Had I found there was jurisdiction to make the final orders sought, I would have found the conditions necessary to facilitate Mr [Finley]'s rehabilitation and reintegration, and to reduce the risk of re-offending. The proposed conditions were entirely appropriate for the management of a convicted sex offender.

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Judge DP Robinson
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 12/12/2024