CITATION:	*EE v Attorney-General (NT)* [2017] NTCA 2
PARTIES:	EE v ATTORNEY-GENERAL OF THE NORTHERN TERRITORY
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL from SUPREME COURT exercising Northern Territory jurisdiction
FILE NO:	No. AP 11 of 2016 (21328402)
DELIVERED:	23 June 2017
HEARING DATES:	6 February 2017
JUDGMENT OF:	Grant CJ, Southwood and Riley JJ
APPEALED FROM:	Blokland J

CATCHWORDS:

ADMINISTRATIVE LAW – STATUTES – OPERATION AND EFFECT OF STATUTES – PREVENTATIVE DETENTION LEGISLATION

Contravention proceedings pursuant to the *Serious Sex Offenders Act* (NT) – – continuing supervision order previously made on basis appellant a "serious danger to the community" – appellant contravened supervision order by consuming alcohol and cannabis, and by using a mobile phone to access pornographic material – Court required to revoke supervision order and make a final continuing detention order unless "satisfied it would not be

appropriate to do so" – onus of satisfying the Court rested upon the appellant – paramount consideration was the need to protect victims or potential victims, their families and members of the community generally – secondary consideration was the desirability of providing rehabilitation, care and treatment for the person subject to the order – appellant remained a serious danger to the community – conditions of supervision designed to manage the risk had not been successful because of the appellant's deliberate conduct in undermining those measures – protection of the community could no longer be met by the supervision order – no error disclosed – appeal dismissed.

Serious Sex Offenders Act (NT) s 6, s 9, s 14, s 17, s 22, s 23, s 24, s 25, s 27, s 30, s 31, s 36, s 38, s 58, s 65, s 88, s 90, s 92

Attorney-General (NT) v EE (2013) 33 NTLR 102, *Attorney-General of the Northern Territory v EE (No 2)* (2013) 280 FLR 35, *Attorney-General (NT) v JD* [2015] NTSC 28, *Attorney-General (Qld) v Francis* [2006] QCA 324, *Politis v Federal Commissioner of Taxation* (1988) 16 ALD 707, considered.

REPRESENTATION:

Counsel:

Appellant:	M Thomas
Respondent	T Anderson

Solicitors:

Appellant:	Northern Territory Legal Aid Commission
Respondent	Solicitor for the Northern Territory

Judgment category classification: B
Number of pages: 27

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

EE v Attorney-General (NT) [2017] NTCA 2
No. AP 11 of 2016 (21328402)

BETWEEN:

EE
Appellant

AND:

ATTORNEY-GENERAL OF THE NORTHERN TERRITORY
Respondent

CORAM: GRANT CJ, SOUTHWOOD and RILEY JJ

REASONS FOR JUDGMENT

(Delivered 23 June 2017)

THE COURT:

[1] The *Serious Sex Offenders Act* (NT) ("the SSO Act") commenced operation on 1 July 2013. The appellant was the first person dealt with under the terms of that legislation. On 16 July 2013 the appellant was made the subject of an interim supervision order pursuant to the terms of the SSO Act. The presiding judge rejected an application to make an interim continuing detention order against the appellant and determined that the interim supervision order was appropriate in all the circumstances.[1]

1 *Attorney-General of the Northern Territory v EE* [2013] NTSC 35; 33 NTLR 102.

[2] The matter came before the same judge for the substantive hearing and, on 21 October 2013, her Honour made a final continuing supervision order having determined that the proposed intensive supervision regime would provide the necessary protection of the community as required under the SSO Act.[2] In so doing her Honour found that the appellant was a "serious danger to the community" within the meaning of the SSO Act, and would pose an unacceptable risk that he would commit a serious sex offence unless he was in custody or subject to a supervision order.[3] Her Honour ultimately concluded that while the risk of reoffending remained high, it would be significantly minimised and appropriately managed with the intensive form of supervision contemplated under the terms of the order. The regime of supervision met "the risk of reoffending, the primary object of the protection of the community and the secondary object of rehabilitation".

[3] The Attorney-General lodged an appeal against that decision pursuant to s 102 of the SSO Act. An application by the Attorney-General pursuant to s 105 of the SSO Act for an interim continuing detention order pending determination of the appeal was dismissed.[4] The appeal was subsequently withdrawn.

[4] On 17 December 2015 the appellant was dealt with in the Supreme Court for an alleged contravention of the order by returning a positive test to

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2 *Attorney-General of the Northern Territory v EE (No 2)* [2013] NTSC 68; 280 FLR 35.

3 *Serious Sex Offenders Act*, s6.

4 *Attorney-General of the Northern Territory v EE* [2014] NTCA 1.

cannabis. He admitted the contravention. The Court determined that, in all the circumstances, it would not be appropriate to revoke the final supervision order.

[5] Regrettably, the appellant further contravened the order by consuming alcohol and cannabis on 26 January 2016, and by using a mobile phone to access internet sites for the purposes of social networking and, importantly, obtaining access to pornography. The contraventions came before the same judge and, on 30 June 2016, her Honour revoked the final supervision order that had been made on 21 October 2013 and made the appellant the subject of a final continuing detention order. As part of that disposition her Honour fixed the matter for review in June 2017 pursuant to s 65 of the SSO Act.

[6] The appellant appeals against the revocation of the final supervision order and the making of the final continuing detention order. The appeal asserts that the judge failed to apply the correct test under the legislation in various ways, and erred in concluding that adequate protection of the community could only reasonably be provided through the imposition of a final continuing detention order.

The scheme of the legislation

[7] The essential purpose, objects and operation of the SSO Act were described by Mildren AJ in *Attorney-General (NT) v JD* in the following terms:[5]

5 *Attorney-General (NT) v JD* [2015] NTSC 28 at [3]-[6].

[3] The Act seeks to remedy a concern that those prisoners who have committed very serious sexual offences are released back into the community in circumstances where there is an unacceptable risk that, upon their release, they will commit another serious sex offence. The Act represents a very important shift in the administration of justice because it impacts upon the fundamental principle that a person's liberty is not to be affected except upon proof of a criminal offence, and then only for so long as the sentence of the court in respect of that offence allows, and no longer. The scheme of the Act permits this Court in the exercise of its civil jurisdiction to make an order for continued detention or supervision beyond expiration of the Court's sentence imposed in relation to a criminal sentence even though no further offence has been committed, albeit only in very limited circumstances.

[4] The objects of the Act are expressed in s 3:

> **3 Objects of Act**
>
> (1) The primary object of this Act is to enhance the protection and safety of victims of serious sex offences and the community generally by allowing for the control, by continued detention or supervised release, of offenders who have committed serious sex offences and pose a serious danger to the community.
>
> (2) The secondary object of this Act is to provide for the continuing rehabilitation, care and treatment of those offenders.

[5] The words "serious sex offence" are defined by s 4 of the Act to mean any of the offences listed in Schedule 1 of the Act (including an offence that was in Schedule 1 at the time it was committed), an offence which substantially corresponds to such an offence which has since been repealed or is a law from another jurisdiction, or an attempt, a conspiracy or incitement to commit such an offence. The offences listed in Schedule 1 include sexual intercourse and gross indecency without consent including a range of other sexual offences where the maximum penalty is seven years or longer.

[6] The expression "serious danger to the community" is defined by s 6(1) of the Act if there is an "unacceptable risk" that the person "will commit a serious sex offence unless he or she is in custody or subject to a supervision order".

[8] In summary form, and so far as is relevant for present purposes, the SSO Act empowers the Attorney-General to apply to the Supreme Court for a final

continuing detention order or a final supervision order in relation to a qualifying offender.[6] A qualifying offender is a person who has been convicted of a "serious sex offence" as defined.[7] Upon application the matter is set for a preliminary hearing to determine whether the matters alleged, if proved, would satisfy the court that the qualifying offender is a serious danger to the community.[8] In the event of a finding that the court would be so satisfied the matter is set for hearing, and medical assessments of the offender ordered from two medical experts.[9]

[9] Once a date has been set for the hearing of the application, the Commissioner of Correctional Services is required to prepare a supervision report in relation to the offender.[10] The supervision report must set out the Commissioner's opinion as to whether, if a supervision order were made, it would be reasonably practicable for the Commissioner to ensure that the person is appropriately managed and supervised having regard to the considerations of protection and rehabilitation.[11] In the meantime, the Court may make an interim continuing detention order or an interim supervision order pending determination of the application.[12]

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6 *Serious Sex Offenders Act,* s 23.

7 *Serious Sex Offenders Act,* s 22.

8 *Serious Sex Offenders Act,* s 24.

9 *Serious Sex Offenders Act,* s 25.

10 *Serious Sex Offenders Act,* s 27.

11 *Serious Sex Offenders Act,* s 88.

12 *Serious Sex Offenders Act,* s 30.

[10] On the hearing of the application the court may make a final continuing detention order or a final supervision order.[13] As the name suggests, a continuing detention order requires the offender to be detained in custody. A final continuing detention order remains in force until it is revoked. Provision is made for the periodic review of final continuing detention orders no less frequently than every two years.[14] A final supervision order, again as the name suggests, requires that the offender be supervised under the terms of the order for a specified period of at least five years,[15] which may be extended upon application to the Court.[16] Either type of order may be revoked by the court on application by the Attorney-General or the detainee/supervisee.[17]

[11] In determining whether to make, amend or revoke a continuing detention order or a supervision order the court must regard as the paramount consideration the need to protect victims of serious sex offences that have been committed or are likely to be committed by the offender, the victims' families, and members of the community generally.[18] A secondary

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13 *Serious Sex Offenders Act,* s 31.

14 *Serious Sex Offenders Act,* s 65.

15 *Serious Sex Offenders Act,* s 17.

16 *Serious Sex Offenders Act,* s 38.

17 *Serious Sex Offenders Act,* Part 7.

18 *Serious Sex Offenders Act,* ss 9, 14.

consideration is the desirability of providing rehabilitation, care and treatment for the offender.[19]

[12] When determining whether to make, amend or revoke a supervision order, the court, in considering the need for protection, must also have regard to the likelihood of the offender committing another serious sex offence; whether it will be reasonably practicable for the Commissioner of Correctional Services to ensure that the offender is appropriately managed; and whether adequate protection could only reasonably be provided by making a continuing detention order in relation to the person.[20]

[13] It is an offence for a supervised person to engage in conduct that results in a contravention of the terms of the order.[21] In addition, any contravention may come before the Supreme Court for civil purposes and if the Court is satisfied the contravention occurred, it must revoke the supervision order and impose a final continuing detention order.[22] The Court also has the power to make no order in appropriate circumstances. Section 58 of the SSO Act provides that the Court is "not required to make the orders … if satisfied it would not be appropriate to do so". The onus in this regard rests upon the so-called "supervisee". Further, the Court has the power to amend

19 *Serious Sex Offenders Act*, ss 9, 14.

20 *Serious Sex Offenders Act*, s 14.

21 *Serious Sex Offenders Act*, s 36.

22 *Serious Sex Offenders Act*, s 58.

the supervision order in response to a contravention as it considers appropriate.[23]

The present case

[14] It was not in dispute that the appellant is a "serious danger to the community" for the purposes of the SSO Act or that he had breached the terms of the supervision order in the manner alleged.

[15] The offending that led to the conclusion that the appellant was a serious danger to the community for the purposes of the SSO Act included sexual offences that had been committed when he was heavily intoxicated with alcohol and cannabis. His most recent offending took place in July 2012. Whilst not associated with the abuse of alcohol or cannabis, that offending was associated with pornographic material accessed through a mobile phone. Specifically, the appellant exposed two young girls to a pornographic video on his mobile phone and then attempted to remove the pants of one of the girls. The prohibition upon him obtaining access to pornography was intended to minimise the risk of offending of that kind being repeated.

[16] Against that background of offending, the appellant's conduct in accessing pornographic material was the most serious of the contraventions he committed. So much is apparent from the fact that the Court had previously determined in relation to the first contravention constituted by the return of the positive test result for cannabis that it would not be appropriate to

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23 *Serious Sex Offenders Act*, s 58.

revoke the final supervision order; and from the fact that there would have been no revocation of the final supervision order in the course of the second contravention proceedings (which also involved the consumption of alcohol and cannabis) but for the breach involving the phone and pornographic material.

[17] That contravention only came to light when the appellant's partner admitted to buying him a mobile phone with internet capabilities using his Basic Card. This purchase took place without the knowledge of the appellant's supervisors. The partner also confirmed that the appellant was aware that his possession of a mobile phone with internet capabilities was in breach of the conditions of his supervision order. It was with that awareness that the appellant told his partner to keep the phone a secret. Once he had taken possession of the phone, the appellant created a Facebook account under a false name. He also used the phone to view pornographic material. Subsequent investigations by correctional services staff revealed he had used the phone to access 122 adult pornography websites.

[18] The importance of the prohibition was affirmed by further medical assessments which were conducted after the contravention had been detected and which were received into evidence for the purpose of the contravention proceedings. Those assessments confirmed that the appellant lacked awareness or insight in respect of the impact of his behaviour on others.

[19] By report dated 29 April 2016, Dr Mark Hall, a consultant forensic psychiatrist, concluded that the appellant was a high risk of committing a further serious sexual offence if not subject to a continuing detention or supervision order.[24] The essence of the risk was identified as the appellant's motivation to offend stemming from hypersexuality and sexual preoccupation; poor emotional awareness; vulnerability to impulsive acting out; use of sex as an emotional coping mechanism; and vulnerability to substance abuse and dependence with associated escalation in anger and/or disinhibitory effects.[25] Dr Hall expressed the view that:[26]

> … it is not possible to reliably quantify any reduction in risk that might be achieved with tailored interventions. It is also important to note that (the appellant's) sustained co-operation into the future is essential for the success of a management plan. It is impossible to guarantee on his behalf regardless of how strenuously he declares his commitment to it in the present.

[20] Dr Hall was emphatically of the view that the appellant "should be prohibited from accessing pornographic material" and "should also be prohibited from accessing the Internet at a private residence or on any mobile device".[27]

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24 Report of Dr Mark Hall, Consultant Forensic Psychiatrist, dated 29 April 2016 at para 93.

25 Report of Dr Mark Hall, Consultant Forensic Psychiatrist, dated 29 April 2016 at para 94.

26 Report of Dr Mark Hall, Consultant Forensic Psychiatrist, dated 29 April 2016 at para 95.

27 Report of Dr Mark Hall, Consultant Forensic Psychiatrist, dated 29 April 2016 at para 96.

[21] By report dated 19 April 2016, a second consultant psychiatrist, Dr Lester Walton, made the following observations:[28]

> It beggars belief that a person such as [the appellant] would place his freedom at risk by indulging in alcohol and drug abuse and accessing pornography on the internet, especially as he was well aware, in line with the concerns expressed by [the Commissioner of Correctional Services] recently, that others regarded his substance abuse and his use of pornography as relevant to the previous offending. While I do not regard [the appellant] as mentally ill, I would describe him as strikingly psychologically immature.

[22] Dr Walton had previously examined the appellant in 2013 for the purposes of the initial proceedings. He then reassessed the appellant in 2016 for the purposes of the contravention proceedings. During the course of that assessment the appellant acknowledged that he had requested his partner to acquire the phone for him for the specific purpose of accessing the internet, and that he deliberately sought out pornographic material once the phone was in his possession. Dr Walton observed that the appellant's misconduct in this respect was "entirely in line with the rather adverse predictions of his risk of reoffending which were made previously".

[23] Dr Walton concluded that he saw no reason to change his previous prognostication that the appellant presented "an appreciable continuing risk of … reoffending sexually". That was a reference to the opinion expressed in Dr Walton's previous report dated 11 September 2013 to the effect that it

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28 Report of Dr Lester Walton, Consultant Psychiatrist, dated 19 April 2016 at p 5.

was probable, and perhaps "highly probable", that the appellant might engage in a further incident of serious sexual offending.[29]

[24] In addition to the medical evidence led by the Attorney-General, two persons who were acting in the position of Commissioner of Correctional Services at various times during the course of the contravention proceedings provided reports to the Court advising that, in their opinion, it was no longer reasonably practicable to continue to provide the level of direct supervision necessary to ensure compliance with the conditions of supervision.

[25] The appellant did not lead any evidence or point to any regime that could be put in place to deal with the identified concerns. Counsel for the appellant sought only to cross-examine the acting Commissioner of Correctional Services briefly, and put the appellant's case on the basis that he posed no greater risk to the community than when the supervision order was made in 2013, and that it would therefore be inappropriate to revoke the supervision order and impose a detention order. In making that contention, counsel for the appellant did not put forward any factual material on which to assert positively that it would be inappropriate to revoke the supervision order and make a final continuing detention order.

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29 See generally *Attorney-General of the Northern Territory v EE (No 2)* [2013] NTSC 68; 280 FLR 35 at [26]-[28].

The reasons for decision

[26] In her reasons for decision the judge at first instance noted that s 58 of the SSO Act required her to revoke the final supervision order and make a final continuing detention order unless "satisfied it would not be appropriate to do so".[30] In this regard her Honour correctly observed that the onus of satisfying the Court rested upon the appellant.[31] It was noted that the paramount consideration for the Court was the need to protect victims or potential victims, their families and members of the community generally; and that a secondary consideration under the legislation was the desirability of providing rehabilitation, care and treatment for the person subject to the order.[32]

[27] Her Honour noted that the appellant had been found to be an unacceptable risk of committing a serious sex offence at the time the final supervision order was made. A detention order was not made at that time because it was then thought that the risk could be appropriately managed by direct and intensive supervision. The evidence before her Honour made it plain that the supervision had not been successful in addressing the identified risks.[33] The appellant had deliberately contravened the terms of the order, and

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30 *Attorney-General of the Northern Territory v EE (No 3)* [2016] NTSC 35 at [15].

31 *Attorney-General of the Northern Territory v EE (No 3)* [2016] NTSC 35 at [16].

32 *Attorney-General of the Northern Territory v EE (No 3)* [2016] NTSC 35 at [18]-[19].

33 *Attorney-General of the Northern Territory v EE (No 3)* [2016] NTSC 35 at [22].

consciously and deliberately concealed both his possession of the mobile phone and his access to pornographic sites.

[28] The cumulative effect of these contraventions led the Court at first instance to conclude that the unacceptable risk posed by the appellant could not be reasonably managed under an order for supervision in the community.[34] His limited insight raised the very real concern that he might conduct himself in such a way as to compromise the "very protections that are in place to minimise the risk of any further serious sexual offending".[35] That supervisory regime notwithstanding, the appellant was prepared to engage in conduct that "undermines the protective regime designed to manage the already existing high risk of him committing another sex offence".[36]

Ground 1: failure to apply the proper test under s 14(3)

[29] The first ground of appeal is that the judge at first instance erred in failing to apply the correct test in relation to s 14(3)(b) of the SSO Act. That error is said to lie in the fact that her Honour failed to address the question whether, if the appellant's final supervision order continued, the management and supervision of him by probation and parole officers would be reasonably practicable and appropriate. This contention is without foundation.

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34 *Attorney-General of the Northern Territory v EE (No 3)* [2016] NTSC 35 at [21].

35 *Attorney-General of the Northern Territory v EE (No 3)* [2016] NTSC 35 at [25].

36 *Attorney-General of the Northern Territory v EE (No 3)* [2016] NTSC 35 at [21].

[30] A proper reading of the reasons for decision makes it plain that her Honour considered in some detail the management and supervision of the appellant in all the circumstances.[37] As described above, her Honour concluded that the appellant remained a serious danger to the community and that the conditions of supervision designed to manage the risk had not been successful because of the appellant's deliberate conduct in undermining those measures. It was held that in those circumstances the consideration of protection of the community could no longer be said to be "genuinely met by the supervision order".[38]

[31] A number of specific observations may be made in relation to this ground of appeal, and in relation to the appellant's circumstances generally.

[32] First, it may be accepted that in determining whether it would be appropriate to revoke the supervision order under s 58 of the SSO Act it was necessary for the Court to have regard to the considerations specified in s 14(3) of the SSO Act. Those considerations included whether it would be reasonably practicable for the Commissioner of Correctional Services to continue to supervise the appellant (through the agency of probation and parole officers) in a manner that would adequately protect victims, their families and the

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37 The appeal court should approach the task of reading reasons at first instance "sensibly and in a balanced way, not reading passages from the reasons for decision in isolation from others to which they may be related or taking particular passages out of context of the reasons as a whole": *Politis v Federal Commissioner of Taxation* [1988] FCA 446; 16 ALD 707 (said in relation to appeals from the decision of the Administrative Appeals Tribunal, and which has equal application to the reading of the reasons of the court at first instance in this matter).

38 See generally, *Attorney General of the Northern Territory v EE (No 3)* [2016] NTSC 35 at [15]-[43].

broader community; and whether that protection could only reasonably be provided by making a continuing detention order.

[33] Counsel for the appellant contended that, having regard to those matters, it was incumbent on the judge at first instance to be satisfied that it would not be reasonably practicable for the appellant to be managed and supervised (through the agency of probation and parole officers) in a manner that would keep the relevant risk at acceptable levels. This is to invert the onus. For the reasons already given, it was incumbent on the appellant to satisfy the Court that it would not be appropriate to revoke the supervision order and make a final continuing detention order. In practical terms, that required the appellant to satisfy the Court that it would be practicable to manage and supervise him in a manner that would keep the relevant risk at acceptable levels. That is something the appellant manifestly failed to do at first instance, and did not attempt to do.

[34] Even if it be accepted that as a precondition to revocation the Court had an overarching obligation to satisfy itself that it would not be reasonably practicable for the Commissioner of Correctional Services to continue to supervise the appellant (through the agency of probation and parole officers) in a manner that would meet the statutory purposes, that precondition was satisfied. In making that assessment, it must be borne in mind that the final supervision order to which the appellant was subject was as onerous as could be made, short of continuing detention. As counsel for the respondent submitted, it was akin to an order for home detention. That reflected the

fact that when the final supervision order was made in 2013 the psychiatric evidence was to the effect that the appellant would require 24-hour supervision "similar to being incarcerated".[39] It followed that actual detention was the only available option if something more onerous was required in order to meet the statutory purposes.

[35] It was with those matters in mind that the judge at first instance approached the task. The Court concluded that the management and supervision that could be provided under a supervision order was no longer sufficient to protect the community because of the elevated risk of offending demonstrated by the nature of the appellant's contraventions and the consequent practical inability to enforce essential terms of the supervision order.[40] That finding was entirely consistent with the psychiatric evidence[41] and the evidence from correctional services officers. It was unnecessary in the reasons for decision to descend into any minute analysis of the technical and procedural reasons why it would not be reasonably practicable for probation and parole officers to obviate that elevated risk;[42] the obvious

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39 *Attorney-General of the Northern Territory v EE (No 2)* [2013] NTSC 68; 280 FLR 35 at [45]-[49].

40 See generally, *Attorney General of the Northern Territory v EE (No 3)* [2016] NTSC 35 at [18]-[39].

41 To the extent it might be said that Dr Hall's report (at [96]) suggested the appellant's propensities might be moderated by anti-libidinal treatment with a selective serotonin reuptake inhibitor (SSRI) antidepressant, counsel for the appellant at first instance indicated during the course of submissions that the appellant had commenced on SSRI medication.

42 Although it was unnecessary for the reasons for decision to descend into that level of detail, and accepting that the relevant onus at first instance was on the appellant, the Court will ordinarily find it both helpful and appropriate for the Attorney-General to adduce evidence from correctional services officers which contains some exploration of those issues beyond a recitation of the factual history and a conclusory statement that it is no longer reasonably

nexus between access to pornographic material and the risk of reoffending; or the nexus between the elevated risk and the appellant's clearly demonstrated propensities and limited insight.

[36] The second specific observation to be made is that the judge at first instance did not approach the matter on the basis that the supervision order had to be revoked unless the risk of either reoffending or further contravention could be excluded. Counsel for the appellant drew attention in this respect to the decision of the Queensland Court of Appeal in *Attorney-General v Francis*,[43] and to the following passage in particular:[44]

> Insofar as his Honour was concerned that, if the appellant began to use alcohol or drugs, he might abscond, the risk of a prisoner absconding is involved in every order under s 13(5)(b). The Act does not contemplate that arrangements to prevent such a risk must be "watertight"; otherwise orders under s 13(5)(b) would never be made. The question is whether the protection of the community is adequately ensured. If supervision of the prisoner is apt to ensure adequate protection, having regard to the risk to the community posed by the prisoner, then an order for supervised release should, in principle, be preferred to a continuing detention order on the basis that the intrusions of the Act upon the liberty of the subject are exceptional, and the liberty of the subject should be constrained to no greater extent than is warranted by the statute which authorised such constraint.

[37] The same observations may be made in relation to the relevant operation of the SSO Act. While the principles may be the same, they fall to be applied having regard to the risk profile of the particular offender under

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practicable to manage and supervise the supervisory in a manner which achieves the statutory purposes.

43 [2006] QCA 324.

44 At [39].

consideration. The question for determination in *Francis* was whether upon the expiry of his term of imprisonment the offender should be subjected to a detention order or a supervision order. The court at first instance in that case made a detention order on the extrapolation that *if* a supervision order was made, and *if* the offender were to abscond and remain at large for a period long enough to form another relationship, the risk that he would commit violence on the person with whom he entered into that relationship could not be excluded.[45]

[38] Unlike the present case, there had been no contravention of a previously imposed supervision order. In the present case monitoring by correctional services officers had already proved unsuccessful "to prevent the concatenation of circumstances which makes the appellant dangerous"[46] and, unlike the situation which presented for consideration in *Francis*, it could not be said that monitoring was likely to prevent those circumstances arising in the future.

[39] Against that background, and contrary to the submission made on behalf of the appellant, the judge at first instance did not approach the matter on the basis that "the prospect of a contravention ought to be ruled out". Rather, her Honour correctly addressed the issue in terms of the relevant statutory provisions.[47] The gravamen of her Honour's finding was not that the risk

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45 *Attorney-General v Francis* [2006] QCA 324 at [35].

46 As the relevant risk was described in *Attorney-General v Francis* [2006] QCA 324 at [38].

47 And in particular, *Serious Sex Offenders Act*, s 58.

could not be excluded, but that the risk could no longer be reasonably and appropriately managed in the community by direct and intensive supervision.[48] The appellant's contention in this respect again fails to appreciate that he bore the onus of satisfying the Court that it would not be appropriate to revoke the supervision order and make a final continuing detention order. As already described, no effort was made by the appellant to discharge this onus at first instance.

Ground 2: no evidence that it was not reasonably practicable to continue management and supervision in the community

[40] The second ground of appeal was that the judge at first instance erred in accepting the conclusion of the acting Commissioners of Correctional Services that it was not reasonably practicable to continue to provide the level of supervision required to meet the preventative and protective objects of the SSO Act. It was submitted that there was "no evidence" to support that conclusion. Again, this submission is without foundation and reflects a misreading of the evidence and of the reasons for decision. It also ignores the history of the matter and the evidence that had been led in the three sets of proceedings leading to the ultimate determination to revoke the supervision order and make a final detention order.

[41] It was common ground that any contraventions involving alcohol or illicit drugs could be appropriately managed. The relevant concern was that the appellant could not effectively be prevented from gaining access to

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48 *Attorney General of the Northern Territory v EE (No 3)* [2016] NTSC 35 at [22]-[23], [32].

pornographic material, particularly in light of his determined efforts to do so and to subvert the conditions of his supervision. Counsel for the appellant submitted that it would be reasonably practicable for correctional services officers to conduct regular searches on the mobile phone provided to the appellant by the agency. That is not to the point.

[42] The operative question was whether it was reasonably practicable for correctional services officers to prevent the appellant from coming into possession of a contraband phone with internet capacity. This was the import of Acting Commissioner Steer's evidence that while collateral checks could continue in respect of the appellant's possession of any unauthorised phone, given the size of the premises on which the appellant was residing under the terms of the supervision order it was practically impossible to search that area in order to identify all locations in which an unauthorised phone might be secreted.[49] It is implicit in the reasons for decision that the judge at first instance accepted that evidence.

[43] The appellant had already taken active steps to procure a phone of that type with the admitted intention of using it to access pornographic material and in a full awareness that to do so was in breach of the conditions of the supervision order. Not only was he successful in doing so, but he managed to keep the phone hidden from correctional services officers for a significant period. His possession of the phone would have remained undiscovered but

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49 *Attorney General of the Northern Territory v EE (No 3)* [2016] NTSC 35 at [38].

for his partner's spontaneous confession. This demonstrated propensity on the part of the appellant and elevated the risk that he would reoffend.

[44] In addition, and contrary to the submission made on behalf of the appellant, the conclusions posited by the acting Commissioners in relation to the practicability of managing the appellant in the community was not inconsistent with the psychiatric evidence placed before the Court.

[45] After concluding that the appellant was "at high risk of committing a further serious sexual offence",[50] Dr Hall went on to observe that the appellant's sustained co-operation into the future was essential for the success of a management plan yet impossible to guarantee, regardless of how strenuously he declared his commitment to it.[51] That observation is a clear reference to the appellant's demonstrated propensities and the threat they presented to the success of any plan for management in the community.

[46] In the passage already extracted above, Dr Walton endorsed Commissioner Payne's concern that the appellant's use of pornography was relevant to his previous offending, and concluded that the appellant's contravention in this respect was "entirely in line with the rather adverse predictions of his risk of reoffending".[52] Dr Walton did not presume to express any opinion as to whether a detention order should be made and, if so, the duration of any

50 Report of Dr Mark Hall, Consultant Forensic Psychiatrist, dated 29 April 2016 at para 93.

51 Report of Dr Mark Hall, Consultant Forensic Psychiatrist, dated 29 April 2016 at para 95.

52 Report of Dr Lester Walton, Consultant Psychiatrist, dated 19 April 2016 at p 4.

further period of incarceration. He observed only that further incarceration would not enhance the appellant's prospects of successful assimilation back into the community; and that, leaving aside the option of indefinite imprisonment, the same challenges would arise regardless of the point at which the appellant was released into the community.[53]

[47] The conclusions drawn by the correctional services witnesses fell comfortably within the matrix of that psychiatric opinion.

Ground 3: no evidence that a continuing detention order was necessary

[48] The third ground of appeal was to similar effect, suggesting that the necessity for the imposition of a continuing detention order was not supported by the psychiatric evidence. It must fail for similar reasons. The submissions in support of this ground reflect a misunderstanding of the evidence of both psychiatrists. Read as a whole, and in context, the psychiatrists raised real concerns regarding the danger posed by the appellant if not detained. For example, and as already canvassed, Dr Hall expressed the opinion that the appellant was at high risk of committing a further serious sexual offence if not subject to a continuing detention or supervision order. He went on to observe, in effect, that the efficacy of a supervision order was compromised by the appellant's demonstrated non-compliance.

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53 Report of Dr Lester Walton, Consultant Psychiatrist, dated 19 April 2016 at p 5.

[49] It was with express and specific reference to the psychiatric evidence that the judge at first instance made the following findings:[54]

> In my opinion the combination of past problems with substance abuse that was connected with his offending, the continued hypersexuality coupled with his recent lack of compliance in respect of the orders made to assist in managing those issues and the inherent risks are all relevant factors that make a compelling case in favour of revoking the supervision order. The paramount consideration of protection of the community can no longer be said to be genuinely met by the supervision order.
>
> …
>
> My interpretation of Dr Hall's report is that he acknowledges the final decision lies with the Court and therefore gives an alternative should the Court decide to release the respondent on a supervision order. It is the case that neither Dr Walton nor Dr Hall asserts any significant change in the risk posed by the respondent. The supervision order was for some time effective in regulating the respondent's conduct, but to ensure the protection required by the Act requires the respondent's cooperation and compliance. This last point was stressed in Dr Hall's report. Unfortunately the respondent engaged in an activity that had the effect of sabotaging an important part of the Order designed to protect the community.

[50] Those findings do not disclose or demonstrate any relevant error.

Ground 4: no evidence that the appellant's compliance with the supervision order was insufficient to maintain community protection

[51] The fourth ground of appeal was that error occurred in finding that the appellant's compliance with his supervision regime could no longer be considered sufficient to maintain the level of protection of the community that was required. It was asserted there was "no evidence" to support this finding. Again, this ignores the history of the matter and all of the evidence

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54 *Attorney General of the Northern Territory v EE (No 3)* [2016] NTSC 35 at [28], [33].

placed before the Court. It also fails to recognise the evidential and persuasive onus placed upon the appellant by the legislative regime.

[52] In particular, there is an air of unreality about the premise of this ground in circumstances where the contravention proceedings at first instance involved an admitted breach of a fundamental condition of the supervision order concerning access to pornographic material; and in which the Court received a substantial body of evidence demonstrating a psychological profile and pattern of offending characterised by "appetitive motivation to offend stemming from hypersexuality and sexual preoccupation".[55]

Ground 5: failure to take into account the secondary consideration of rehabilitation

[53] The fifth ground of appeal was that her Honour failed properly to take into account the significance of the secondary considerations relating to rehabilitation, care and treatment of the appellant. The judge at first instance did address those matters but, correctly and as required by the statutory scheme, gave paramountcy to the need to protect potential victims and members of the community.

[54] In pressing this ground of appeal the appellant could not escape the fact that the judge at first instance gave quite extensive treatment to the secondary consideration of rehabilitation and matters going to the appellant's credit in

55 See, for example, report of Dr Mark Hall, Consultant Forensic Psychiatrist, dated 29 April 2016 at para 94.

that respect.[56] For that reason, counsel for the appellant framed the complaint on the basis that the reasons for decision "did not specify whether these matters … would militate in favour of a supervision order continuing due to the desirability of providing rehabilitation, care and treatment of the Appellant".[57] That complaint cannot be sustained, and indeed should not have been pressed, in light of her Honour's express reference to the desirability of providing rehabilitation, care and treatment for a person subject to an application or order under the SSO Act, her Honour's extensive consideration of the appellant's progress under the supervision order; and the ultimate finding that a final continuing detention order should be made notwithstanding the very significant impact it would have on the appellant.

Ground 6: error in finding that the appellant's risk was elevated

[55] The final ground of appeal was that her Honour erred in finding that the risk posed by the appellant was elevated. Counsel for the appellant asserted that there was a lack of analysis of the connection between the contraventions and the relevant risk. This submission is essentially a compendium of parts of the earlier grounds of appeal, and must fail for the reasons already given. It also reflects a misreading of the reasons for decision.

[56] The appellant was acknowledged to be a serious danger to the community throughout the proceedings and it was not contended otherwise at any time,

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56 *Attorney General of the Northern Territory v EE (No 3)* [2016] NTSC 35 at [18], [21], [23]-[25], [37]-[41].

57 Appellant's Outline of Written Submissions dated 18 January 2017 at [32].

including on this appeal. The reasons for decision given by the judge at first instance make it plain that although the appellant's psychological presentation and profile had remained the same since the order for supervision was first made, the conditions of supervision which had been put in place to manage the risk had been demonstrably unsuccessful in achieving the statutory purposes. In the absence of effective management and supervision, the appellant presented a serious danger to the community and posed an unacceptable risk of a further serious sex offence being committed. The appellant led no evidence and did not otherwise identify any supervisory regime which could be implemented in order to ameliorate the otherwise unacceptable risk. The reasons fell to be read in that context.

Disposition

[57] The appeal is dismissed.
