

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

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

**CRI-2014-485-000056
[2014] NZHC 1525**

UNDER	Subpart 7 or Part 6 of the Criminal Procedure Act 2011
IN THE MATTER	of an appeal against an order suppressing the name of the Respondent made by the District Court at Wellington in CRI-2014-085-005323 on or about 30 May 2014
BETWEEN	FAIRFAX NEW ZEALAND LIMITED Appellant
AND	MUHAMMED RIZALMAN BIN ISMAIL Respondent

Hearing: 1 July 2014

Counsel: R K P Stewart for Appellant
G J Burston and B J Dawson for New Zealand Police
B J Hunt as Amicus Curiae

Judgment: 1 July 2014

Reasons: 2 July 2014

REASONS FOR JUDGMENT OF COLLINS J

Introduction

[1] This judgment explains why on 1 July 2014 I granted an appeal by Fairfax New Zealand Ltd (Fairfax) from a decision of Judge Davidson made in the Wellington District Court on 30 May 2014. Fairfax appealed Judge Davidson's decision to extend an interim name suppression order in relation to Mr Ismail.

Context

[2] On Saturday 10 May 2014 Mr Ismail appeared in the Wellington District Court in relation to two charges:

- (1) assault with intent to commit sexual violation;¹ and
- (2) entering a building with intent to commit an imprisonable offence.²

[3] Mr Ismail was seen by Ms Hunt, the duty solicitor that day, and his case was dealt with by a Justice of the Peace, who remanded Mr Ismail to 30 May 2014. The Justice of the Peace granted Mr Ismail bail and interim name suppression until his next court appearance.

[4] Ms Hunt, who accepted appointment as amicus in the High Court on 1 July 2014, advised me that Mr Ismail's application for interim name suppression was based on:

- (1) the need for Mr Ismail to notify his family of the charges; and
- (2) the seriousness of the charges which warranted interim name suppression while further inquiries were made.

[5] Mr Ismail and his family are from Malaysia. He was living in New Zealand and was a member of the staff of the Malaysian High Commission. He enjoyed the privileges and immunities granted by arts 1, 22-24 and 27-40 of the Vienna Convention on Diplomatic Relations 1961 (the Convention).³ Because Mr Ismail was a diplomatic agent as defined in the Convention he enjoyed "immunity from the criminal jurisdiction" of New Zealand unless his immunity was waived by Malaysia.⁴

¹ Crimes Act 1961, s 129(2).

² Crimes Act 1961, s 231(1)(b).

³ Diplomatic Privileges and Immunities Act 1968, s 5.

⁴ Vienna Convention on Diplomatic Relations 1961, arts 29 and 31.

[6] On 15 May 2014 Mr Ismail's bail conditions were revoked by a District Court Registrar at the request of the police. He was remanded at large.

[7] In an email sent to the District Court on 29 May 2014 the police advised:

- (1) Mr Ismail had diplomatic immunity and that Malaysia had declined to waive that immunity;
- (2) Mr Ismail had left New Zealand;
- (3) Mr Ismail's immunity from this country's jurisdiction lapsed when he departed New Zealand;
- (4) the police would apply for an arrest warrant on 30 May 2014; and
- (5) the police did not oppose continuation of the interim name suppression order.

[8] The file was placed before Judge Davidson in chambers on 30 May 2014. Judge Davidson obtained confirmation from the attending police officer that the contents of the email of 29 May 2014 were correct. Thereafter, Judge Davidson:

- (1) issued a warrant for Mr Ismail's arrest; and
- (2) continued the interim name suppression order until further order of the Court.

[9] The issue of the arrest warrant raises a number of questions which are outside the scope of this appeal. They will need to be addressed in due course. This decision is confined to the continuation of the interim name suppression order.

Appeal

[10] By 30 June 2014 considerable political and media attention had built up over the circumstances surrounding Mr Ismail's departure from New Zealand. At that stage neither Mr Ismail's name nor his country of origin were known to the public.

[11] On 30 June 2014 Fairfax lodged an appeal from Judge Davidson's decision on the grounds that the statutory criteria for suppressing publication of Mr Ismail's name had not been established.⁵ I explain the statutory grounds for name suppression in paragraph [15] of this judgment.

[12] Fairfax's appeal was originally scheduled to be heard on 4 July 2014. However, on 1 July 2014 I agreed to hear the appeal as a matter of urgency when it became apparent that Malaysia's Foreign Minister was proposing to hold a press conference in Kuala Lumpur at about 4.00 pm New Zealand time on 1 July 2014. It was apparent the purpose of the press conference was to address Mr Ismail's case. Fairfax was concerned that it and other New Zealand media would not be able to publish any comments by Malaysian authorities which identified Mr Ismail or his country of origin. In addition, Mr Ismail's name had reportedly already been published in at least one online media service based in Malaysia.

[13] Mr Burston appeared on instructions from the New Zealand Police and did not oppose the appeal.

[14] Ms Hunt expressed concern as amicus that the appeal was being dealt with in the absence of any representation for Mr Ismail or the Malaysian High Commission.

Key legislation and governing principles

[15] Section 200(1) and (2) of the Criminal Procedure Act 2011 (the Act) gives a court authority to prohibit the publication of the name, address or occupation of a defendant. However, such an order can only be made if the court is satisfied that publication of the defendant's identifying details would be likely to:

⁵ Fairfax's standing to commence the appeal is found in s 210 of the Criminal Procedure Act 2011.

- (a) cause extreme hardship to the [defendant] ... or any [other] person connected with [the defendant]; or
- (b) cast suspicion on another person that may cause undue hardship to that person; or
- (c) cause undue hardship to any victim of the offence; or
- (d) create a real risk of prejudice to a fair trial; or
- (e) endanger the safety of any person; or
- (f) lead to the identification of another person whose name is suppressed by order or by law; or
- (g) prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; or
- (h) prejudice the security or defence of New Zealand.

[16] When a defendant first appears in court an interim name suppression order may be made if the court is satisfied there is an arguable case that one of the grounds for interim name suppression applies.⁶ The initial name suppression order expires upon the defendant's next appearance in court, and may only be renewed if the court is satisfied that at least one of the grounds I have set out in paragraph [15] applies.⁷

[17] The name suppression provisions of the Act were adopted by Parliament against the background of the Court of Appeal having emphasised that there needed to be very good reasons not to publish the names of those charged with criminal offences. This principle was emphasised in *R v Liddell* when the Court of Appeal said:⁸

... the starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as "surrogates of the public".

[18] It was against that background that Parliament enacted a high threshold for suppressing publication of a defendant's name when it passed the Act. As a consequence, there were significant obstacles that needed to be overcome when Mr Ismail was granted name suppression on 10 May 2014, and an even higher threshold when his case was dealt with on 30 May 2014.

⁶ Criminal Procedure Act 2011, s 200(4).

⁷ Section 200(5).

⁸ *R v Liddell* [1995] 1 NZLR 538 (CA) at 546.

Analysis

[19] Judge Davidson was placed in an unenviable position when the police advised him that they did not oppose continuation of the interim name suppression orders. With the benefit of hindsight it would have been wiser for the police to have focused on whether or not the statutory criteria for interim name suppression applied.

[20] Mr Burston, who did not appear for the police in the District Court, has now properly focused on the statutory criteria for name suppression and agrees with Fairfax that none of the criteria for name suppression applies in this case.

[21] I agree with the stance now taken by Fairfax and the police. In particular:

- (1) there was no suggestion Mr Ismail would suffer extreme hardship if his name was published in connection with the charges;
- (2) there was no suggestion that it was necessary to suppress publication of Mr Ismail's name in order to avoid casting undue suspicion on another person. On the contrary, continuing to suppress publication of Mr Ismail's name is likely to unfairly cast suspicion on other members of the Malaysian High Commission in New Zealand;
- (3) there is no suggestion that publishing Mr Ismail's name will cause undue hardship to the victim. The victim of this case enjoys automatic name suppression and nothing may be published which could identify her;⁹
- (4) there is no suggestion that publication of Mr Ismail's name would pose a real risk of prejudice to any trial. Mr Ismail has now left New Zealand's jurisdiction and, as at 1 July 2014, there was no certainty he would ever face trial in New Zealand; and
- (5) there is no suggestion that any of the other criteria in s 200(2) of the Act applied in this case.

⁹ Criminal Procedure Act 2011, s 203.

[22] Thus, absent any statutory basis to continue the interim suppression orders made in favour of Mr Ismail, I allowed Fairfax's appeal. When reaching this conclusion I was satisfied that while the Convention required Mr Ismail be treated with due diplomatic respect, his status did not alter the statutory criteria that governed the decision that was made on 30 May 2014.

[23] I carefully considered whether or not it was appropriate to hear the appeal in the absence of any representation for Mr Ismail. As Mr Ismail chose to exercise his right to leave New Zealand and place himself beyond the immediate jurisdiction of New Zealand's courts I believed he had effectively waived any right he would otherwise have had to be heard in relation to the appeal.

Conclusion

[24] The order made on 30 May 2014 continuing the interim name suppression of Mr Ismail was quashed by me on 1 July 2014.

[25] Nothing may be published which names or otherwise identifies the victim.

D B Collins J

Solicitors:
Izard Weston, Wellington for Appellant
Crown Solicitor, Wellington