THE HIGH COURT OF NEW ZEALAND CIV 2014-485-11344

WELLINGTON REGISTRY

Under	The Judicature Amendment Act 1972, Part 30 of the High Court Rules, the Bill of Rights Act 1990, and the Search and Surveillance Act 2012
In the matter of	An application for judicial review
And in the matter of	A search warrant issued by Judge IM Malosi of the Manukau District Court on 30 September 2014
Between	**N A HAGER** *Applicant*
And	**HER MAJESTY'S ATTORNEY-GENERAL** *First Respondent*
And	**THE NEW ZEALAND POLICE** *Second Respondent*
And	**THE MANUKAU DISTRICT COURT** *Third Respondent*

Media summary

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May it please the Court:

I. INTRODUCTORY SECTION

Introduction

1.1. New Zealand's preeminent investigative journalist, Nicky Hager, was given emails taken from the computer of an attack blogger, Cameron Slater. The emails disclosed the immoral (and arguably criminal) acts of Mr Slater, public relations agents, and members of the governing National Party. Mr Hager wrote a book about them.

1.2. The Police then conducted an unprecedented search of Mr Hager's home. They gave no consideration to whether Mr Hager's rights, and those of his many confidential informants, meant the search should not have been made; they say that they did not have to. Nor did they have any regard for the requirements the Court of Appeal laid down in *TVNZ v Attorney-General*. They seized Mr Hager's computers and many of his documents.

1.3. This search has grave implications for democracy in New Zealand. It damages the public's ability to receive vital information, through journalists, from people who are prepared to take great personal risks to expose wrongdoing and abuses of power. Once the Police arrived at his home and the story got in the news, much of the damage was done. The best hope to reduce this damage is an equally high profile decision that says that this raid on a journalist was wrong.

Summary of submissions

1.4. This is an application for judicial review and a claim for compensation for breaches of the New Zealand Bill of Rights Act 1990 (the "**Bill of Rights**"). By agreement, issues of quantum have been deferred. The purposes of these submissions are to show that the respondents acted unlawfully in:

1.4.1. deciding to seek a warrant,

1.4.2. conducting warrantless searches of his private information,

1.4.3. applying for a warrant,

1.4.4. issuing a warrant,

1.4.5. executing that warrant, and

1.4.6. retaining his seized property.

These unlawful acts include breaches of the applicant's rights under the Bill of Rights.

1.5. The need for journalists to protect the identity of their confidential informants has been recognised by New Zealand statute and common law. It has been recognised by every comparable jurisdiction internationally. The source protection privilege has been seen as a vital component of the right of free expression, protected in New Zealand under s 14 of the Bill of Rights. It is not absolute, but can only be interfered with when it is necessary for an overriding public interest.

1.6. The object of the search in this case was to discover the identity of a confidential informant of Mr Hager's. In order to attempt to find the identity of that informant, the Police intended conducting a general search of all of Mr Hager's documents (physical and digital), inevitably violating the privilege attaching not only to the informant they were looking for but to many of Mr Hager's other confidential informants.

1.7. Mr Hager had not committed any offence. The Police say they were treating him as a witness. The nature of the search was such that it was inevitably going to cause a significant disruption to Mr Hager's work.

1.8. In every phase, the respondents had obligations to respect Mr Hager's rights under ss 14 and 21 of the Bill of Rights. This included, but was not limited to, considering s 68 of the Evidence Act 2006 and complying with the common law including *TVNZ v Attorney-General*. While the Police recognised that s 68 was an issue, they decided that these issues did not

have to be dealt with until after the search had been executed. They do not appear to have taken any account of *TVNZ v Attorney-General* at any stage.

1.9. Had the respondents properly considered Mr Hager's interests, and those of his informants and the public at large, they would not have conducted the search. Mr Hager's case is a canonical example of one where the privilege applies. The interests at stake in permitting Mr Hager to protect the identity of his confidential informant are high. The fact that the search would violate the privilege of other confidential informants makes these interests even higher. So too did the inevitable harm that the search would do to interests of Mr Hager and the public. The countervailing interest, while not insignificant, did not come close to overriding the public's interests in maintaining the privilege.

1.10. The Police breached the law in several respects when applying for the warrant:

1.10.1. the fact of the privilege was of central importance to whether or not the warrant should have been granted, yet the Police failed to bring it to the attention of the Judge;

1.10.2. the Police also failed to be candid with the Judge about the details of the investigations that had taken place so far, the fact that those investigations had been fruitless for reasons that meant that the search was also likely to be fruitless, and that they still had many alternative avenues of investigation open to them, some of which they were midway through pursuing;

1.10.3. the Police lacked reasonable grounds to believe that relevant evidence would be found at Mr Hager's property - they knew that the confidential informant had been taking steps to prevent leaving any forensic trace of his identity and the search was based on no more than the tenuous hope that he might not have been as careful in his dealings with Mr Hager;

1.10.4. the warrant that was sought was overly broad and essentially permitted the Police to seize and search through all of Mr Hager's correspondence; and

1.10.5. the warrant sought the right to search unspecified email accounts and cloud storage facilities in breach of s 103 of the Search and Surveillance Act 2012 (the "**SSA**").

1.11. The errors of law described above meant that the issuing of the warrant was also unlawful.

1.12. In executing the warrant the Police compounded their previous errors by:

1.12.1. commencing the search without giving the applicant a chance to claim privilege in violation of s 145(2) of the SSA; and

1.12.2. breaching their undertakings to Mr Hager, violating their own policies, and acting in bad faith, by breaching the applicant's claims of privilege over several documents.

1.13. Before applying for a warrant, the Police sought, and obtained, Mr Hager's private information from third parties without obtaining a production order. In doing so they made unsupported allegations of fraud against Mr Hager and asserted exceptions to the Privacy Act 1993 that did not apply.

VI. OVERALL CONCLUSION

6.1. The error by the Police and the judge at the heart of this case was to treat this search the way they would any other. They thought it was the sort of "obvious and logical step" they would usually take in an investigation. But the circumstances of this search were not standard, in particular in the following five significant ways:

6.1.1. It was conducted in the home of a witness not a suspect. This is very rare, and requires careful justification.

6.1.2. More significantly, it was conducted in the premises of a working journalist. The Court of Appeal has held "where media freedom is seen to be involved, there is a further reason for restraint and careful scrutiny" in relation to the grant of a search warrant.

6.1.3. More significantly still, it must have been obvious to the Police that this particular search would inevitably destroy the journalist's privilege in any material that was examined. Even the act of assessing a scrap of paper with a name on it for its evidential value would inevitably pierce the veil of confidentiality. Once seen, it could not be unseen. The act of examining was always going to breach privilege, whether or not privilege had been invoked. Sealing it up afterwards does not undo the harm.

6.1.4. Compounding the damage, the confidentiality, and privilege, would be vitiated for all the journalist's sources named or identified in material examined, not just the source Police were looking for. Creating certain jeopardy to the legal interests of third parties is not part of a standard search.

6.1.5. As Police in fact anticipated, this search was always likely to receive extensive media coverage, which also makes it different to most other searches. They must have known that this was likely to provide a powerful signal to any of Mr Hager's sources, present or future, that entrusting him with their secrets was dangerous. It

would also send a powerful signal to the present and potential future sources of other journalists that Police might raid their working spaces and undermine promises of confidentiality. The Court of Appeal has held that "only in exceptional circumstances where it is truly essential in the interests of justice should a warrant be granted or executed if there is a substantial risk that it will result in the "drying up" of confidential sources of information for the media."

6.2. The Police did consider the statutory protection for journalists' confidential sources contained in s 68 of the Evidence Act. But they viewed it narrowly. They saw it merely as a potential impediment to the search. They were advised that if privilege was claimed, they should secure the material for later resolution of the privilege claim. And so they believed they didn't have to think any more about it.

6.3. That was to overlook the serious consequences of the exercise they were embarking on. It was to forget the great harm that the mere fact of the search was likely to do to Mr Hager, his family, his large number of confidential sources, and his ability to continue to effectively pursue his journalism. It also disregarded the harm to other journalists relying on confidential sources, to the wider public, who have a vital interest in the sort of probing, responsible journalism Mr Hager produces, and ultimately to the working of democracy which needs constant scrutiny against corruption, ineptitude and abuse of power.

6.4. This was to fail to grapple with the fundamental principle, deeply embedded in international law and the laws of New Zealand and other comparable countries, and located at the core of the right to free speech, that when journalists promise confidentiality to a source in exchange for information of public importance, they should not be compelled to disclose the source's identity unless there is an overriding public interest.

6.5. These factual oversights caused legal errors. Those errors can be cast in different ways. The Police breached the common law by conducting a

search that was likely to cause confidential sources to dry up. They breached the Bill of Rights by damaging Mr Hager's rights to freedom of expression and to be free from unreasonable search without demonstrable justification. They breached their obligations to the Court by not providing all the information necessary for the judge to make a proper decision. They breached their administrative law obligations by failing to take into account mandatory relevant considerations, including the likely chill effect of their actions.

6.6. In turn, the Court by granting the warrant, made many of the same errors.

6.7. In executing the warrant, the Police then provided a vivid illustration of the reasons the law seeks to protect journalists against compelled disclosure in the first place. They commenced their search without asking Mr Hager if he wished to claim privilege. They examined and seized material containing any confidential sources, because they couldn't tell which might be the one they were looking for. Even after Mr Hager claimed privilege, they continued writing notes and taking photos of privileged material, and failed to seal those notes and photographs. They could not resist taking further investigatory steps on the basis of the leads they thought they uncovered, even though these plainly violated Mr Hager's privilege.

6.8. This is as clear and unambiguous a case of an illegal search as is ever likely to come before the courts. It is respectfully submitted that this Court should answer it with an equally clear and unambiguous condemnation.

Date: 1 July 2015