IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KOTI MATUA O AOTEAROA
TAMAKI MAKAURAU ROHE

CRI-2018-404-116
[2018] NZHC 942

BETWEEN	ALFRED HAROLD KEATING Appellant
AND	THE NEW ZEALAND POLICE Respondent

Hearing: 1 May 2018

Appearances: G J Newell for the Appellant
B D Tantrum and S T Teppett for the Respondent

Judgment: 4 May 2018

ORAL JUDGMENT OF POWELL J

Solicitors:
Kevin McDonald & Associates
Crown Solicitor, Auckland
Counsel:
G J Newell, Barrister, Auckland

[1] The appellant, Alfred Keating, has been charged with attempting to intentionally make an intimate visual recording.[1] He has sought name suppression pending trial on this charge. His application for continued name suppression was however declined by His Honour Judge KJ Glubb in the District Court at Auckland.[2]

[2] In the hearing in the District Court Mr Keating advanced a number of grounds in support of his application; that it would cause him extreme hardship through making it difficult to obtain future employment, and would cause extreme hardship to others including his partner, a close family friend, and his son and daughter. He also raised the possibility of reputational damage to the New Zealand Defence Force. Each of these arguments was rejected by Judge Glubb on the basis it did not meet the high threshold set out in s 200(2) of the Criminal Procedure Act 2011("CPA").

[3] On appeal to this Court the matters at issue have narrowed significantly. The sole issue identified in the notice of appeal is the effect on Mr Keating's daughter, although his counsel, Mr Newell, did in passing also raise the difficulty of Mr Keating obtaining future employment, and the possibility of health issues arising if name suppression was not continued.

Background

[4] Until early this year Mr Keating held the rank of Commodore in the Royal New Zealand Navy, and as such was one of its most senior officers.

[5] In July 2017, he was serving as the Senior New Zealand Defence Attaché in Washington D.C, based at the New Zealand Embassy. At the time Mr Keating held full diplomatic status as a New Zealand citizen, and held immunity from prosecution in the United States.

[6] On Thursday 27 July 2017, a visual recording device was located in a unisex bathroom on Level 3 of the New Zealand Embassy. The device was a small covert camera, set to capture and record movement. It had been purposely mounted inside a heating duct unit in the bathroom, at a height and direction that captured recordings

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1 Crimes Act 1961, ss 216H and 72. The maximum penalty is 18 months' imprisonment.
2 *Police v Keating* [2018] NZDC 6335.

from people who arrived and used the toilet. The facility was generally only available to those employed at the Embassy, approximately 60 persons at any given time.

[7] The device was discovered at about 1.30 pm that day when it fell onto the floor of the bathroom. It was subsequently reported to Embassy staff. New Zealand Police travelled to Washington to investigate the incident, and the device was returned to and forensically examined back in New Zealand.

[8] That analysis revealed someone activating the device at about 9.00 am on 27 July 2017. A total of 19 images were then captured of persons using the bathroom over a five hour period. The images were only of persons wearing clothing. A thick layer of dust on the homemade platform the camera was mounted on indicated the device had been in place for many months.

[9] A search warrant was executed while Mr Keating was back in New Zealand in November 2017. No indecent images were found but the prosecution alleges examination of Mr Keating's personal computer showed he had installed driver software for the camera device on 25 July 2017, as well as other inculpatory evidence. DNA analysis was also undertaken, and it is alleged Mr Keating's matched that found on the SD card that was in the camera.

[10] The current charge was laid in March 2017, and Mr Keating subsequently resigned his position.

The Case for Mr Keating

[11] As noted, the appeal against Judge Glubb's decision is primarily on the basis the Judge gave insufficient weight to the extreme hardship which would result for Mr Keating's daughter if his name is published.

[12] Mr Newell submits publication of Mr Keating's name would cause his daughter extreme hardship in terms of s 200(2)(a) and also endanger her safety in terms of s 200(2)(e). He notes that of 14,000 current New Zealand Defence Force personnel, only four share the surname "Keating". Mr Newell submits she is a very junior service member serving with her unit, and is often subject to long periods of

isolation from her family and support networks. He argues because Mr Keating worked at the Defence Force for 42 years, and his senior role, he is well known in the organisation and has an in depth understanding of the risk publication will have on his daughter, including "possible harassment, victimisation and punitive treatment".

Name Suppression - Legal Principles

[13] The principles underpinning the grant of name suppression, and the rules contained in the CPA reflect a careful balance between the primacy of facilitating a free flow of information in the public sphere, and various competing interests. Open justice lies at the heart of our legal system and is the cornerstone principle. As the Court of Appeal stated in *R v Liddell*:[3]

> ... 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.

[14] Section 200(4) provides that when a person who is charged with an offence first appears before a court, the court may make an interim name suppression order if that person advances an *arguable* case that one of the grounds in subsection (2) applies. Section 200(5) provides, however, that such an interim order will expire at the person's next court appearance and may only be renewed if the court is satisfied that one of the grounds in s 200(2) applies. Section 200(2) provides:

> (2) The court may make an order under subsection (1) only if the court is satisfied that publication would be likely to---
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> (a) cause extreme hardship to the person charged with, or convicted of, or acquitted of the offence, or any person connected with that person; or
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> (b) cast suspicion on another person that may cause undue hardship to that person; or
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> (c) cause undue hardship to any victim of the offence; or
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> (d) create a real risk of prejudice to a fair trial; or
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> (e) endanger the safety of any person; or
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> (f) lead to the identification of another person whose name is suppressed by order or by law; or

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

(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.

[15] There is no doubt that extreme hardship for the purposes of s 200(2)(a) is a high threshold, given the authorities are clear that "hardship" on its own means "severe suffering or privation".[4] As the Court in *Robertson v Police* went on to state:[5]

> The addition of the qualifier 'undue' in s 200(2)(c) indicates that something more than hardship simply is required, while the word 'extreme' in s 200(2)(a) indicates something more again.
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> …
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> An assessment of whether the contended hardship is 'extreme' cannot take place in a vacuum. It is self-evidently contextual and in our view must entail a relative comparison between the contended hardship and the consequences normally associated with a defendant's name being published. It must be something beyond the ordinary associated consequences.

[16] As Williams J found in *K v Inland Revenue Department*, the case law on extreme hardship demonstrates that "if a consequence is reasonably to be expected, then it is harder to argue extreme hardship since it involves a hardship that affects all or most people in such circumstances".[6]

[17] In relation to s 200(2)(e), there is no restriction on the ways in which the safety of individuals can be endangered – the question is whether open justice will put individuals in danger for any reason.[7]

[18] In determining whether a name suppression application should be granted a two-stage analysis is followed:[8]

(a) **The jurisdiction stage:** The first stage requires the judge to consider whether he or she is satisfied that one of the threshold grounds listed in s 200(2) has been established. That is to say, whether publication would

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4 *Robertson v Police*, [2015] NZCA 7 at [48].
5 At [48]-[49].
6 *K v Inland Revenue Department* [2013] NZHC 2426, (2013) 26 NZTC 21-034 at [25].
7 At [51].
8 As confirmed in *Fagan v Serious Fraud Office* [2013] NZCA 367 at [9] and *Robertson v Police* [2015] NZCA 7 at [40] to [42].

be likely to lead to one of the outcomes listed in subs (2). "Likely" requires showing the stated harm or risk is a real and appreciable possibility, that cannot be dismissed as remote or fanciful.[9] "Only if" one of these prerequisites in subs (2) is engaged does the court have jurisdiction to suppress the name of a defendant, and move to the second stage of the analysis.

(b) **The discretion stage**: At the second stage the court must weigh the competing interests of the applicant and the public, taking into account such matters as whether the applicant has been convicted, the seriousness of the offending, the views of the victim and the public interest in knowing the character of the offender.[10] The interests of open justice fall for consideration at this stage.

[19] The two-stage approach to determining name suppression applications necessarily has implications for how appeals from such decisions should be approached. In this case Judge Glubb concluded that none of the threshold grounds had been met, and only if I conclude His Honour was wrong on that issue is it necessary to consider that the discretion stage of the analysis. [11]

Discussion and Analysis

[20] In determining whether publication of Mr Keating's name will cause his daughter extreme hardship, the only evidence that has been put before the Court is an affidavit by Mr Keating, which in so far as his daughter is concerned states:

> The impact of publication on my daughter… would also be extreme. [Mr Keating's daughter] is currently serving in the NZDF [with her unit] and is subject to long periods of isolation from her family, first-hand information and support networks. Given that I am a senior member of the NZDF and well-known within the organisation, [Mr Keating's daughter] will be subjected to extensive questions, judgment and negative comments … . [Mr Keating's daughter] is a very junior service member and by military law she cannot always speak out nor act freely. I believe publication has the potential to see

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9 *Beacon Media Group Limited v Waititi* [2014] NZHC 281 at [21].

10 The Court in *Robertson v Police*, above n 4, based these factors on *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) and s 200(6) of the CPA.

11 *Beacon Media Group Limited v Waititi*, above n 5.

> [Mr Keating's daughter] being harassed, victimised and possibly a recipient of punitive treatment.
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> Additionally, [Mr Keating's daughter] is already under considerable emotional stress due to the terminal illness of her aunt… whom [Mr Keating's daughter] has lived with since the age of 16 and sees as a mother figure. I am particularly concerned that [Mr Keating's daughter] will be unable to deal with the effects of the allegation made against me due to the current emotional pressure she is under.

[21] In my view Mr Keating's assertions do not come close to meeting the high threshold for extreme hardship. As Judge Glubb found, questioning of family members is an ordinary consequence of someone being charged with a criminal offence. It is not clear the claimed hardship would be "undue", let alone "extreme", while his comment that publication "has the potential to see [his daughter] being harassed, victimised and possibly a recipient of punitive treatment" is not only speculative and lacking in detail as to why or how likely such treatment may be, but is clearly self-serving. It is equally apparent that there is absolutely no factual foundation for any submission on behalf of Mr Keating that his daughter's safety will be put at risk should his name be published.

[22] Mr Keating's stated concerns about his daughter are in fact fundamentally counterintuitive and not supported by the nature of the New Zealand Defence Force, with its clear chain of command and accountabilities at every level in the structures established by the Defence Act 1990 and Armed Forces Discipline Act 1971. In a situation where Mr Keating's daughter is entirely innocent it is to be expected that her superior officers, non-commissioned officers and comrades will support her as they are required to do, and as the traditions of the relevant service dictate.

[23] In addition, the basis for the assertions made as to the effect on Mr Keating's daughter, and indeed his stated concern for his daughter were further undermined to a significant degree when it became apparent at the hearing before me that he had not even told her about the charge he faced, and the possibility of the publication of his name.

[24] The other issues raised in passing by Mr Newell can be disposed of very briefly. First, there is no evidence before the Court that publication of his name would indeed have a significant impact on Mr Keating's employment prospects other than a bare assertion by him to that effect. Likewise, there is no medical evidence before the court of any significant effect on Mr Keating, and indeed Mr Newell confirmed that Mr Keating had not seen a doctor regarding any issues arising from the potential publication. Clearly neither of these matters can possibly constitute extreme hardship for the purposes of s 200(2)(a).

[25] I accordingly conclude that Judge Glubb was quite correct in declining to continue name suppression, and, in particular, on the matters still in issue in this appeal. Given the conclusion I have reached it is not necessary to turn to the second discretionary stage of the analysis under s 200(2). Had it been necessary to do so I am satisfied that the poorly particularised harm claimed by Mr Keating would not have been sufficient to displace the presumption of open justice, particularly given the public interest in this case where New Zealand's international reputation, the reputation of those at the New Zealand Embassy in Washington DC, and the reputation of the Royal New Zealand Navy and New Zealand Defence Force have been called into question.

Decision

[26] The appeal is dismissed. Publication of Mr Keating's name, occupation and identifying particulars are accordingly now permitted.

Powell J