

- 1 ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION AND OTHER IDENTIFYING DETAILS OF THE PLAINTIFF
- 2 ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON

IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2023] NZHRRT 8

I TE TARAIPUNARA MANA TANGATA

Reference No. HRRT 036/2021

UNDER

THE PRIVACY ACT 2020

BETWEEN

JM

PLAINTIFF

AND

THE MINISTER RESPONSIBLE FOR THE
NEW ZEALAND SECURITY
INTELLIGENCE SERVICE

DEFENDANT

AT WELLINGTON

BEFORE:

Ms GJ Goodwin, Deputy Chairperson

Dr SJ Hickey MNZM, Member

Ms SB Isaacs, Member

REPRESENTATION:

Mr PJ Dale KC for plaintiff

Ms K Laurenson and Ms CN Tocher for defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 12 April 2023

DECISION OF TRIBUNAL GRANTING PLAINTIFF INTERIM NAME SUPPRESSION¹

¹ [This decision is to be cited as *JM v Minister for NZSIS (Interim Name Suppression)* [2023] NZHRRT 8. Note – non-publication restrictions]

INTRODUCTION

[1] JM alleges that the Minister responsible for the New Zealand Security Intelligence Service (Minister) has interfered with his privacy in breach of the Privacy Act 1993 (PA) as a result of the lack of timeliness in, and the nature of, the Minister's responses to JM's request for his personal information under Information Privacy Principle 6. The Minister generally denies any interference with JM's privacy.

[2] Prior to the substantive case progressing, JM sought permanent non-publication orders. Specifically, he sought permanent suppression of his name, the names of his, yet unspecified, witnesses and any details identifying them.

[3] On 25 August 2022, in *[JM] v Minister for NZSIS [Redacted] (JM HRRT)*, the Tribunal declined permanent name suppression, prior to the filing of any evidence and prior to the hearing of the case. Nevertheless, as JM had indicated that he might seek to appeal *JM HRRT* or seek judicial review, in order that such options were not rendered nugatory JM was granted interim non-publication orders, to enable him to consider the options available to him.

[4] JM then made application for judicial review of the decision of the Tribunal in *JM HRRT*. On 17 February 2023, in *JM v Human Rights Review Tribunal & Anor [2023] NZHC 228 (JM HC)* JM's application for judicial review of the decision in *JM HRRT* was dismissed. Publication of the judgment in *JM HC* which identified JM was, however, prohibited "pending further order of the Court".

[5] On 8 March 2023 JM lodged a notice of appeal to the Court of Appeal against the decision in *JM HC* declining his application for judicial review of the decision in *JM HRRT*. JM's appeal to the Court of Appeal, seeks:

[5.1] An order granting his application for judicial review of *JM HRRT*; and

[5.2] An order directing the Tribunal reconsider its decision in *JM HRRT* in light of the findings of the High Court in *JM HC*.

[6] By memorandum, also dated 8 March 2023, JM applied to this Tribunal seeking interim name suppression in his proceeding before the Tribunal, pending disposal of the appeal to the Court of Appeal against the High Court's refusal to grant judicial review.

[7] By memorandum dated 5 April 2023 the Minister indicated to the Tribunal that it was accepted that JM's appeal would be rendered nugatory if the Tribunal published JM's name and that it would be proper for the Tribunal to grant interim non-publication orders until such time as JM's appeal to the Court of Appeal is disposed of.

THE RELEVANT LAW

[8] By virtue of s 95 of the Human Rights Act 1993 (HRA) the Chairperson or Deputy Chairperson has jurisdiction to make an interim order if satisfied the order is necessary in the interests of justice to preserve the position of a party pending a final determination of the proceedings. Section 95(1) provides:

95 Power to make interim order

- (1) In respect of any matter in which the Tribunal has jurisdiction under this Act to make any final determination, the Chairperson or a Deputy Chairperson of the Tribunal shall have

power to make an interim order if he or she is satisfied that it is necessary in the interests of justice to make the order to preserve the position of the parties pending a final determination of the proceedings.

[9] Where interim name suppression orders are sought exercise of the discretion in HRA, s 95 must take into account that:

[9.1] HRA, s 107 explicitly provides every hearing of the Tribunal must be held in public unless it is desirable for the hearing to be closed or for a non-publication order to be made.

[9.2] Because the Tribunal is bound by the New Zealand Bill of Rights Act 1990 (NZBORA) any non-publication order made by the Tribunal is a limit on the right to freedom of expression guaranteed by NZBORA, s 14 and so it must be a reasonable limit under s 5 of that Act.

[9.3] In *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 (*Erceg*) the Supreme Court determined that there should be an inquiry into what will serve the ends of justice. A non-publication order is only valid if it is really necessary to secure the proper administration of justice in the particular proceedings. The party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule of open justice. The standard is a high one; see *Erceg* at [2], [3], [13] and [18].

[10] The Tribunal's approach to non-publication orders following *Erceg* and the "desirable" threshold in HRA s 107 is set out in *Waxman v Pal (Application for Non-Publication Orders)* [2017] NZHRRT 4 (*Waxman*) at [66] and in *Director of Proceedings v Brooks (Application for Final Non-Publication Orders)* [2019] NZHRRT 33.

[11] In addition, the High Court in *JM HC* held that there is a two-step approach in making a non-publication order. The first step is the evaluative exercise of whether the Tribunal is satisfied that a non-publication order is desirable and, if so, the second step is whether the Tribunal should exercise its discretion to make a non-publication order; see *JM HC* at [84] and [85].

APPLICATION FOR INTERIM NAME SUPPRESSION - ANALYSIS

[12] Applying the principles set out in *Waxman*, JM must satisfy the Tribunal that interim non-publication orders are necessary in the interests of justice to preserve his position, pending a final determination of the proceedings. He must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule of open justice.

[13] JM's position has always been, in summary, that non-publication orders are necessary because of the following specific adverse consequences:

[13.1] There would be great public interest in any case where the Minister's response to requests for personal information was being challenged. Consequently, JM says he would fall under the suspicion of being a terrorist.

[13.2] JM and his potential witnesses could be regarded by others with suspicion and shunned in society. JM would be unable to secure employment in his specialist field, if at all

[14] The position sought to be preserved by JM in this case is that there has been no publication, to date, of the fact that he is bringing his claim before the Tribunal and, accordingly, the specific adverse consequences he says will arise have been avoided.

[15] In these circumstances the Tribunal is satisfied that the making of interim non-publication orders are necessary in the interests of justice, to preserve JM's position, pending a final determination (or withdrawal) of the proceedings. We are also satisfied that it is desirable to make such orders. Finally, we are likewise satisfied that an interim order is a reasonable limit of the NZBORA freedoms, pursuant to s 5 of that Act

[16] Accordingly, we exercise our discretion to make interim non-publication orders sought by JM.

INTERIM ORDERS

[17] The following orders are made pursuant to ss 95 and 107 of the Human Rights Act 1993:

[17.1] Publication of the name and other identifying particulars which could lead to the identification of JM in this proceeding is prohibited until such time as JM's appeal to the Court of Appeal against the High Court's refusal to grant judicial review is disposed of.

[17.2] There is to be no search of the Tribunal file without leave of the Chairperson or of the Tribunal. The parties are to be notified of any request to search the file and be given an opportunity to be heard on that application.

[17.3] Leave is reserved to all parties to make further application should the need arise.

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Ms GJ Goodwin
Deputy Chairperson

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Dr SJ Hickey
Member

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Ms SB Isaacs
Member