ORDER PROHIBITING PUBLICATION OF LAWYER A AND LAWYER B'S NAMES, ADDRESSES OR IDENTIFYING PARTICULARS UNDER S 202 OF THE CRIMINAL PROCEDURE ACT 2011. PUBLICATION OF THEIR OCCUPATION IS PERMITTED.

ORDER PROHIBITING PUBLICATION OF ALL AFFIDAVIT EVIDENCE RECEIVED IN CONNECTION TO THIS APPLICATION, THAT IS NOT CONTAINED WITHIN THE PUBLIC VERSION OF THIS JUDGMENT, UNDER S 205 OF THE CRIMINAL PROCEDURE ACT 2011.

ORDER PROHIBITING PUBLICATION OF THE MEDIA RELEASE, THIS JUDGMENT OR ANY INFORMATION THERIN UNTIL THE JUDGMENT IS DELIVERED AT 2.00 PM ON 15 NOVEMBER 2024.

ORDER REDACTING PARTS OF THE JUDGMENT THAT IS MADE PUBLICLY AVAILABLE.

NOTE: ORDER PROHIBITING SEARCH OF THE FILES FOR THIS APPEAL WITHOUT LEAVE OF A JUDGE OF THIS COURT REMAINS IN PLACE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA598/2022
[2024] NZCA 579

BETWEEN	BRENTON HARRISON TARRANT Appellant
AND	THE KING Respondent

Court: Cooper P, French and Collins JJ

Counsel: Lawyer A and Lawyer B for Appellant
M F Laracy, A J Ewing and N J Wynne for Respondent
R K P Stewart KC and C M C Browne for Media Entities

Judgment: (On the papers) 13 November 2024 at 10 am

JUDGMENT OF THE COURT

A The application for name suppression of Mr Tarrant's counsel is granted and an order made permanently prohibiting publication of Lawyer A and Lawyer B's names, addresses, and identifying particulars under s 202 of the Criminal Procedure Act 2011. Publication of their occupation is permitted.

B Order prohibiting publication of all affidavit evidence received in connection to this application, that is not contained within the public version of this judgment, under s 205 of the Criminal Procedure Act 2011.

C Order prohibiting publication of the media release, this judgment or any information therein until the judgment is delivered at 2:00 pm on 15 November 2024.

D Order redacting parts of the judgment that is made publicly available.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] After pleading guilty to 51 charges of murder, 40 charges of attempted murder and one charge of engaging in a terrorist act, Mr Tarrant was convicted and sentenced to life imprisonment without parole.[1]

[2] Mr Tarrant filed a notice of appeal against conviction and sentence on 3 November 2022.

[3] Mr Tarrant's current counsel, Lawyer A and Lawyer B, were assigned to act for him in August 2023.[2] They have applied for an order permanently suppressing

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1 *R v Tarrant* [2020] NZHC 2192, [2020] 3 NZLR 15. For completeness, Mr Tarrant was sentenced to life imprisonment without parole on each murder charge and the engaging in a terrorist act charge, and a concurrent term of 12 years' imprisonment on each charge of attempted murder: at [187]–[189].

2 To comply with the suppression we have ordered, we have anonymised the names of Mr Tarrant's counsel.

publication of their names on the grounds set out in s 202(2)(a) and (c) of the Criminal Procedure Act 2011, which provide:[3]

> **202 Court may suppress identity of witnesses, victims, and connected persons**
>
> (1) A court that is hearing a proceeding in respect of an offence may make an order forbidding publication of the name, address, or occupation of any person who—
>
> …
>
> (c) is connected with the proceedings, or is connected with the person who is accused of, or convicted of, or acquitted of the offence.
>
> (2) The court may make an order under subsection (1) only if the court is satisfied that publication would be likely to—
>
> (a) cause undue hardship to the witness, victim, or connected person; or
>
> …
>
> (c) endanger the safety of any person; or
>
> …

[4] The application is opposed by the Crown and by four media organisations (the media entities).[4]

[5] The questions we are required to answer are as follows:[5]

(a) Are counsel for Mr Tarrant "connected with the proceedings" or otherwise "connected with" Mr Tarrant? If so;

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3 See *Dallison v R* [2023] NZCA 282 at [79]–[81] concerning the jurisdiction of this Court to make first instance decisions under s 202 of the Criminal Procedure Act 2011.

4 The media entities are NZME Publishing Ltd, Radio New Zealand Ltd, Stuff Ltd and Television New Zealand Ltd. Section 210 of the Criminal Procedure Act gives members of the media standing to be heard in relation to any application for a suppression order.

5 Once it is determined that a person is "connected" with the proceedings or offender, or otherwise falls within s 202(1), it is well established that the approach to name suppression involves a two stage inquiry: whether a threshold requirement in s 202(2) has been meet and if so whether the court is satisfied it should exercise its discretion and order suppression. See *Robertson v New Zealand Police* [2015] NZCA 7; *Beacon Media Group Ltd v Waititi* [2014] NZHC 281; and *Dallison v R*, above n 3.

(b) Have counsel established that publishing their names would be likely to cause them undue hardship or endanger the safety of any person? If so;

(c) Should we exercise our discretion to make the order sought?

Evidence

[6] The evidence before us comprises affidavits from both applicants and from two senior criminal defence lawyers, who we refer to as Lawyer C and Lawyer D. We do not name Lawyers C and D in order to protect them from conduct likely to endanger their safety as a consequence of their affidavit evidence. The essence of the evidence is that they, as senior criminal defence lawyers, have been subjected to extensive abuse and threats of harm because of acting for defendants in other cases who have attracted significant public opprobrium.

Lawyer A

[7] Lawyer A has appeared in many high-profile cases and in that capacity they have received "a limited amount of abusive emails" which they have ignored. Lawyer A is concerned, however, that Mr Tarrant's case is both "different" and "unique" because of the nature of the crimes that he has been convicted of. Lawyer A says Mr Tarrant's case "engenders and attracts extreme opinions".

[8] Lawyer A, who **[REDACTED]**, has had experience of extremists in **[REDACTED]** who are motivated by ideology and religion. They say such persons believe "they are entitled to behave in any extreme way to further their cause".

[9] Lawyer A is concerned not only for their own safety, but that of their children.

Lawyer B

[10] Lawyer B is also an experienced criminal defence lawyer who is concerned about the hardship they will suffer if their name is associated with Mr Tarrant. They are also concerned about their safety, and the safety of their spouse and children. Lawyer B explains:

7. I have received threatening and cruel communication from members of the public in the past. This has been a direct result of mainstream and social media publications about my cases. This has included threats to rape or murder myself or my family. They have been sent by text message and direct email. They have also been posted on social media such as Reddit. These people did not appear to have any connection to the cases specifically. The content revealed that they had read about my cases in the media.

…

11. I fear threats or negative comments will be made to myself or to my [spouse] or children if my name is published. Even if these threats are not carried out, I am concerned about the impact of the threats themselves mentally. My children … have limited capacity to respond to issues around Mr Tarrant[']s case, nor should they have to.

…

13. Comments online can be cruel and shocking. This is something that counsel should not have to deal with undertaking our jobs. My family are innocent bystanders and ought not be exposed to any threats or cruel comments.

Lawyer C

[11] Lawyer C has appeared as defence counsel in many high-profile cases. They say:

7. It is fair to say that I have received both kind and abusive contact from members of the public. It has surprised me how proactively (and confidently) members of the public will contact me to tell me their views on the cases I am or have worked on, and what they think of me as a result of my involvement. It is not unusual for members of the public to critique my work. The public routinely align me with my client. That is something I expect and have come to tolerate given the way in which the media has at times depicted lawyers who represent those charged with sexual offences …

…

10. ... One of the individuals I routinely receive abusive emails from as a result of my involvement with **[REDACTED]**'s appeal (because she thinks I am not working hard enough on his case) sent me several emails setting out her fervent desire that my children be raped. I have received hundreds of emails from this individual. I am not suggesting that she is in a position to personally harm me, but she includes others in her email trains that share her delusional impressions of the criminal justice system and those who work within it. I feel vulnerable as a consequence.

Lawyer D

[12] Lawyer D recently appeared as counsel for **[REDACTED]** in a high-profile murder trial that attracted considerable attention in the mainstream media and on social media. They explain:

> 7. During my time acting for **[REDACTED]**, I received email threats – ranging from straight out abuse to threats to harm my children (though they were not named). My [spouse], **[REDACTED]** also directly received threats via [their] email. I also received a small number of phone calls/messages to my office which were abusive.
>
> 8. I regarded the threats to my [spouse] and to my children's safety to be most serious and distressing and I referred these to the [p]olice. **[REDACTED].**

Connected persons

[13] Lawyers A and B submit that the meaning of "connected with the proceedings" or "connected with" an offender must encompass an offender's lawyer.

[14] On the other hand, the Crown submits it is "doubtful" that counsel for Mr Tarrant are persons "connected with the proceedings" or otherwise "connected" to him.

[15] This submission is advanced on the basis that persons who have been found to be connected to a proceeding or defendant "generally do not have a choice about becoming involved in the criminal justice system".[6] Examples of such persons cited by the Crown include a defendant's school,[7] employer,[8] or family member.

[16] The Crown submits that as trial lawyers have elected to undertake their professional duties in a public forum, they are in a different category to the examples of persons who have received name suppression because of their unintended involvement in a criminal prosecution.

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6 Citing Ministry of Justice *Departmental Report for the Justice and Electoral Committee: Criminal Procedure (Reform and Modernisation) Bill* (16 May 2011) at [982].

7 *R v Burrett* [2016] NZHC 636 at [5].

8 *Sansom v R* [2018] NZCA 49 at [13].

Analysis

[17] Section 140(1) of the Criminal Justice Act 1985 provided the court with jurisdiction to order name suppression prior to the enactment of the Criminal Procedure Act. This earlier provision stated:

> Except as otherwise expressly provided in any enactment, a court may make an order prohibiting the publication, in any report or account relating to any proceedings in respect of an offence, of the name, address, or occupation of the person accused or convicted of the offence, or of any other person connected with the proceedings, or any particulars likely to lead to such person's identification.

[18] In *R v Shapiro*, this Court explained that the jurisdiction under s 140(1) of the Criminal Justice Act did not extend to suppressing publication of the name of a person connected to the defendant who had no connection with the proceeding.[9] Thus, post-*Shapiro*, family members of a defendant who had no connection with the proceeding appeared unable to obtain name suppression under the previous legislation.[10]

[19] This lacuna appears to have been the impetus for expanding the meaning of connected persons under s 202 of the Criminal Procedure Act. In its report, which preceded the Criminal Procedure Bill 2010,[11] the New Zealand Law Commission recommended:[12]

> The court should have the power to make an order preventing publication of the identity of persons connected with the accused or the proceedings where publication would otherwise result in undue hardship to that person, whether or not the name of the accused is suppressed.

[20] While s 202 has extended the meaning of persons connected with an offender, the broadening of the scope of that concept is of peripheral importance. This is because if a lawyer engaged by an offender is connected to the proceeding, they are a connected person and it is unnecessary to consider whether or not the same lawyer is also a connected person because they are connected with the offender. We accept

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9 *R v Shapiro* [2008] NZCA 151 at [19].

10 Te Aka Matua o te Ture | Law Commission *Suppressing Names and Evidence* (NZLC IP13, 2008) at [4.27]–[4.28].

11 Criminal Procedure Bill 2010 (243–3A).

12 Te Aka Matua o te Ture | Law Commission *Suppressing Names and Evidence* (NZLC R109, 2009) at 4 and 41.

however that if an offender's lawyer is connected to the proceeding, then in all likelihood they would also be connected to the offender.

[21] We approach our task of ascertaining the meaning of "connected" to a proceeding by considering the text of the legislation.

[22] The ordinary and natural meaning of the adjective "connected" equates to a person being "related or associated" with another person or event.[13] A lawyer who appears in court on instructions from an offender performs a vital element in the court proceedings and as such they are intrinsically connected, related or associated with the proceeding.

[23] Unfortunately, we cannot find any information relating to purpose or context that might assist in ascertaining the meaning of "connected with the proceedings". The absence of any such guidance leads us to the view that the ordinary and natural meaning of "connected with" must be determinative unless that outcome produces a totally untenable result.[14]

[24] In our assessment, while Parliament may not have turned its mind to the possibility that s 202(1)(c) could apply to lawyers acting for an offender, holding that a lawyer is a connected person for the purposes of s 202 of the Criminal Procedure Act is a tenable outcome. Thus, absent information that contradicts the natural and ordinary meaning of "connected with the proceedings" we answer the first question, posed at [5(a)], in the affirmative.

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13 Tony Deverson and Graeme Kennedy (eds) *The New Zealand Oxford Dictionary* (Oxford University Press, Melbourne, 2005) at 230.

14 Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 418–419, citing *Jones v Wrotham Park Settled Estates Ltd* [1980] AC 74 (HL) at 105 per Lord Diplock. See also Lord Wensleydale's "Golden Rule" as articulated in *Grey v Pearson* (1857) 6 HL Cas 61, 10 ER 1216 at 106, where his Lordship commented that in interpreting written instruments, "the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to absurdity, repugnance or inconsistency with the rest of the instrument".

The jurisdictional threshold: undue hardship and endangerment of safety

[25] It is well established that undue hardship under s 202(2)(a) of the Criminal Procedure Act is a lower threshold than extreme hardship under s 200(2)(a), which a defendant must satisfy. As this Court explained in *Sansom v R*:[15]

> [15] There is a tension between ss 200 and 202 … s 200 applies the higher threshold of extreme hardship in relation to suppression of a defendant's name, while s 202 applies the lower threshold of undue hardship when the connected person is seeking suppression in their own right.

[26] In *Robertson v New Zealand Police*, this Court confirmed that:[16]

> [48] … "hardship" on its own means "severe suffering or privation". The addition of the qualifier "undue" in s 200(2)(c) indicates that something more than hardship simple is required, while the word "extreme" in s 200(2)(d) indicates something more again.

[27] Lawyer A and Lawyer B submit that they are likely to become the victims of "vigilante justice" or "retaliation" if they are publicly identified as the lawyers representing Mr Tarrant. They also point out that Mr Tait and Mr Hudson, who were Mr Tarrant's trial counsel,[17] required police security when going to and from court because of threats they received. This, they say, underscores the likelihood that Mr Tarrant's appellate counsel will also receive threats.

[28] The Crown however submits that the evidence before us does not meet the threshold of undue hardship or endangerment to the safety of any person. The Crown submits:[18]

> … For individuals swept up in the criminal justice system – including victims and witnesses – the law accepts there is a level of suffering and distress which is an inherent part of that process and which will fall short of triggering the jurisdiction to suppress. The evidence in this case does not suggest the applicants will suffer hardship of this kind, much less hardship that could be termed "undue".
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> …
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> The Crown doubts that the endangerment threshold can be satisfied here. There is nothing to suggest that vigilantism or retaliatory action is likely to be

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15 *Sansom v R*, above n 8.
16 *Robertson v New Zealand Police*, above n 5 (footnotes omitted).
17 For the period prior to him becoming self-represented.
18 Footnote omitted.

> directed to the applicants or their children. There is an absence of evidence from Mr Tarrant's previous counsel on this point. Nor is there anything to suggest that counsel representing unpopular defendants (even in Mr Tarrant's case) is a matter of active public concern or discourse.

Analysis

[29] The evidence before us does not identify specific risks of abuse or threats to Lawyer A and Lawyer B. The evidence does however illustrate in general terms, the types of harm that are often suffered by lawyers who represent high-profile clients who are despised by many in the community.

[30] Regrettably lawyers, like others who occupy significant positions in society, have become the targets of extreme abuse and threats from people who use social media as a weapon to vent their anger and hatred of others; especially lawyers who represent controversial clients.

[31] We are satisfied Lawyer A and Lawyer B will likely be the recipients of abuse and threats from people hiding behind the relative anonymity that social media platforms provide. It is impossible to predict the exact sources of this abuse and we consider it possible that the abuse would come from both those who abhor and those who support Mr Tarrant. As Lawyer C explains in their affidavit, they received extreme abuse from an unexpected source, namely a person who believed in the innocence of the client Lawyer C was acting for.

[32] The experiences suffered by Lawyer C and Lawyer D, illustrate that Lawyer A and Lawyer B are likely to receive abuse and threats from people expressing their anger and disdain at counsel for representing Mr Tarrant, a unique offender in the annals of Aotearoa New Zealand's criminal history. The crimes he has been convicted of not only rank him as the worst mass murderer in New Zealand, he is also a convicted terrorist.[19] The nature and seriousness of the abuse received by Lawyers C and D, in combination with the unprecedented and highly publicised nature of Mr Tarrant's offending, satisfies us that Lawyer A and Lawyer B are likely to receive abuse and threats that are extreme, thereby causing them undue hardship.

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[19] Although, as aforementioned, we acknowledge that Mr Tarrant has applied to appeal his conviction.

[33] While we agree — and Lawyer A and Lawyer B accept — that defence counsel can be expected to bear some level of adverse response from the public for the work they do, the circumstances of this case and the evidence before us satisfies us that the level and character of the abuse and threats Lawyers A and B would likely face are beyond the hardship which counsel should be expected to weather and would constitute undue hardship.

[34] Because we consider Lawyer A and Lawyer B would face undue hardship were their names not suppressed the jurisdictional threshold is satisfied and it is not strictly necessary for us to consider whether publication of their names would also "endanger the safety of any person". Despite this, we do consider there is a genuine risk that their safety and the safety of members of their family would be compromised if they were publicly identified as the lawyers representing Mr Tarrant.

[35] We therefore also answer in the affirmative the question posed in [5(b)].

The discretion

[36] Deciding whether or not to order name suppression involves the exercise of judicial discretion.[20] We have decided to exercise our discretion in favour of granting the application. The factors that have influenced the way we have exercised our discretion are set out below.

The principle of open justice

[37] In opposing the application, Mr Stewart, on behalf of the media entities, cited the following passage from the Supreme Court in *Erceg v Erceg* concerning the importance of open justice:[21]

> [2] … The principle's underlying rationale is that transparency of court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality, and suspicion of arbitrariness or partiality, on the part of courts. Open justice "imposes a certain self-discipline

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[20] *Robertson v New Zealand Police*, above n 5, at [39]; and *Beacon Media Group Ltd v Waititi*, above n 5.

[21] *Erceg v Erceg [Publication restrictions]* [2016] NZSC 135, [2017] 1 NZLR 310.

> on all who are engaged in the adjudicatory process – parties, witnesses, counsel, Court officers and Judges".[22]

[38] Mr Stewart submitted there is a real public interest in full transparency in court proceedings, including the public knowing the identity of counsel in high-profile cases.

[39] We fully endorse the principle of open justice and the importance of the media being able to report on court proceedings so as to ensure the public are informed about those proceedings. It is, however, questionable whether the role of the media is compromised through not being able to report the names of counsel representing Mr Tarrant, and if so, to what extent. What is undoubtedly important is that the media is able to report what counsel says in Mr Tarrant's appeal. The identity of the persons speaking on behalf of Mr Tarrant is not nearly as important as the submissions made on his behalf. Therefore, while the narrative of the reporting on Mr Tarrant's appeal may be slightly impinged upon by his counsel not being named, in the circumstances of this case — an appeal where Mr Tarrant is represented by senior members of the Bar — we do not consider that any reporting will be materially affected. Thus, concerns about open justice do not, in our opinion, justify declining the application.

[40] However, we do note the presumption of open justice, in the vast majority of cases, will of course require counsel to be named.

Risk of danger to the rest of the criminal bar

[41] Mr Stewart also submitted that if the application is granted:

> … a determined person looking to make the lawyer(s) representing [Mr Tarrant] a scapegoat could easily identify leading criminal barristers they suspect are representing [Mr Tarrant]. Such a person could then target all barristers they suspect.

[42] We do not place weight on this concern, and note it rather undermines the argument from the Crown that it doubts there is a genuine risk to the safety of the applicants or their families.

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[22] *Broadcasting Corporation of New Zealand v Attorney-General* [1982] 1 NZLR 120 (CA) at 132 per Richardson J.

[43] The reason we do not place weight on this submission is because, while a misguided person may seek to attack the applicants and/or their families, it is another matter entirely for some ill motivated individual to attack a random lawyer, or many random lawyers, on the off chance they are acting for Mr Tarrant. We do not consider this likely.

The cab-rank rule

[44] The cab-rank rule requires lawyers to accept instructions, within their area of practice, from any prospective client unless they have good cause not to.[23] Good cause does not include any grounds of discrimination prohibited by law, any personal attributes of the prospective client, or the merits of the case.[24] The cab-rank rule expresses one of the most fundamental duties of a lawyer, and is a recognition of the fundamental role lawyers play in the administration of justice. As Lord Pearce in *Rondel v Worsley* wrote:[25]

> It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter. And that would be the inevitable result of allowing barristers to pick and choose their clients.

[45] Mr Stewart submitted that granting suppression to counsel, in circumstances where under the cab-rank rule counsel are professionally obliged to act for clients who instruct them, "may result in undermining the underlying reasons for, and the public's understanding of, the rule itself".

[46] We do not consider this to be a particularly persuasive argument. Lawyer A and Lawyer B are playing a critical role in the administration of justice in what is undoubtedly a very difficult case. They have been instructed to represent Mr Tarrant and intend to do so in accordance with the cab-rank rule. The application before us is designed to prevent undue harm to counsel and their families and does not impact upon or undermine the cab-rank rule. If anything, we tend to agree with the applicants when

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23 Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008, r 4.
24 Rule 4.1.1; and Human Rights Act 1993, s 21(1).
25 *Rondel v Worsley* [1969] 1 AC 191 (HL) at 275.

they submit that suppression in this case may be seen as strengthening the cab-rank rule by allowing counsel to represent Mr Tarrant without suffering harm.

Efficacy of any orders

[47] Lawyer A and Lawyer B accept that people who attend Mr Tarrant's appeal[26] will quickly learn the identity of his counsel. It would therefore be a comparatively easy task for a disaffected member of the public to publish the identities of Lawyer A and Lawyer B online, thereby negating the efficacy of any suppression order.

[48] We do not, however, accept that we should decline this application simply because a subversive individual may elect to breach our orders. The law must be administered dispassionately and not in a way that assuages those who would seek to break the law.

[49] The Crown also raises a number of practical concerns that it argues will result from the granting of the application, for example that photography and video footage will need to be edited to ensure Mr Tarrant's counsel are not identifiable. The Crown and media entities also argue that other protective measures can be taken to protect Lawyer A and Lawyer B from harm, such as providing security for counsel when they arrive at and leave the court. We do not think this is a satisfactory answer to the concerns about online threats of harm and abuse directed towards counsel.

[50] We also do not consider that the practicalities of implementing a suppression order in this case should influence whether the application is granted. It should be quite feasible for images of the applicants to be avoided or pixelated by media covering the case. We also do not think the fact there may be other ways to mitigate the harm counsel may face is a sufficient reason to decline the application. The purpose of the application is to prevent harm from occurring. The harm Lawyer A and Lawyer B are likely to face is significant and we consider, in all the circumstances, that suppression of their identities is necessary to protect their wellbeing and safety.[27]

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[26] We note that as Mr Tarrant filed his appeal out of time, his application for an extension of time must first be determined before any substantive appeal may or may not occur.

[27] See generally the United Nations *Basic Principles on the Role of Lawyers* UN Doc A/CONF.144/28/Rev.1 (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August–7 September 1990) 117.

Precedent

[51] We are cognisant of the potential precedential effect this decision may have. There are two aspects to our concerns about precedent. First, we are unaware of any case in any jurisdiction in which current counsel has been granted permanent name suppression out of concerns for their wellbeing and security.

[52] In *YSA (anonymity of barristers)*, two barristers sought an order preventing publication of their identities as the lawyers for their clients, YSA.[28] The application arose after media reported on the litigation and suggested that YSA's lawyers were making money out of unmeritorious challenges to proper governmental actions. The Tribunal determined that the balance "very clearly" weighed against the applicants, and that the proposed order would be a disproportionate response to the media's right to freedom of expression.[29]

[53] A similar result occurred in *"A" bht "S" v New South Wales*, a case which concerned a plaintiff who was described as having "psychological problems".[30] In past hearings, he had threatened and intimidated numerous professionals involved in his case, including a judge and Crown counsel. An interim non-publication order had been granted in favour of Crown counsel, among other persons. The issue before the Court was whether to make final non-publication orders. The Court found it lacked jurisdiction to make such orders in favour of counsel who were neither "parties" nor "witnesses".[31] That case was decided under a legislative provision quite different from s 202 of the Criminal Procedure Act.[32] The Court did however note that making a non-publication order concerning the identities of counsel "would be in conflict with the requirements of open justice".[33]

[54] We are also aware that counsel who represented Mr Breivik, a Norwegian "neo-Nazi terrorist" who was convicted of killing 77 people in a bombing and shooting, did not seek suppression of their names. We note that, according to media

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28 *YSA (anonymity of barristers)* [2023] UKUT 74 (IAC), [2023] All ER (D) 76 (Mar).
29 At [58].
30 *"A" bht "S" v New South Wales* [2011] NSWDC 54, (2011) 13 DCLR (NSW) 113 at [43].
31 At [24].
32 Civil Procedure Act 2005 (NSW), s 72 (now repealed).
33 *"A" bht "S" v New South Wales*, above n 30, at [30].

reporting, senior counsel for Mr Breivik faced death threats, had a swastika painted on the side of his house and feared for the safety of his wife and eight children. He at one time needed a bodyguard, and his junior counsel also received a number of death threats for representing Mr Breivik. The experiences of these lawyers add to, rather than detract from, the merits of the application before us.

[55] The second aspect to precedent that causes us concern is the importance of ensuring that granting the present application will not set a precedent for similar applications in future high-profile cases involving notorious offenders.

[56] The factor which weighs against our concerns about precedent is, as we have emphasised, the uniqueness of Mr Tarrant's case. He has not only been convicted of 51 charges of murder and 40 charges of attempted murder, but he also has a conviction for terrorism offending. The unique nature of his case is a factor that allays our concerns that granting the current application would be an invitation to open the floodgates to other applications of a similar character.

Conclusion

[57] We are satisfied that we should exercise our discretion in favour of the application. We give an affirmative answer to the question posed in para [5(c)].

[58] Given the nature of the application and case, and to effectively achieve the purpose of prohibiting publication of Lawyer A and Lawyer B's identities, we consider it appropriate to also make an order suppressing all affidavit evidence we have received in connection with this application, that is not contained within the public version of this judgment.

[59] We note that this Court previously made an order suppressing the fact of the application until further order of the Court. For the avoidance of doubt, we confirm that this order has now lapsed. We also note that there is a pre-existing order that the file for this appeal is not to be searched without the leave of a Judge of this Court. That order remains in place.

Result

[60] We make the following orders:

(a) The application for name suppression of Mr Tarrant's counsel is granted and an order made permanently prohibiting publication of Lawyer A and Lawyer B's names, addresses, and identifying particulars under s 202 of the Criminal Procedure Act 2011. Publication of their occupation is permitted.

(b) Order prohibiting publication of all affidavit evidence received in connection to this application, that is not contained within the public version of this judgment, under s 205 of the Criminal Procedure Act 2011.

(c) Order prohibiting publication of the media release, this judgment or any information therein until the judgment is delivered at 2:00 pm on 15 November 2024.

(d) Order redacting parts of the judgment that is made publicly available.

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent