NOTE: ORDER PROHIBITING PUBLICATION OF LAWYER A AND LAWYER B'S NAMES, ADDRESSES OR IDENTIFYING PARTICULARS UNDER S 202 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. PUBLICATION OF THEIR OCCUPATION IS PERMITTED. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

ORDER PROHIBITING SEARCH OF THE FILES FOR THIS APPLICATION WITHOUT LEAVE OF A JUDGE OF THIS COURT.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 128/2024
[2025] NZSC 36

BETWEEN	NZME PUBLISHING LIMITED Applicant
AND	BRENTON HARRISON TARRANT First Respondent
	THE KING Second Respondent
	LAWYERS A AND B Third Respondent

Court: Glazebrook, Ellen France and Kós JJ

Counsel: E D Nilsson and S C Brougham for Applicant
Lawyers A and B for First and Third Respondents
M F Laracy and A J Ewing for Second Respondent

Judgment: 11 April 2025

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B Order prohibiting search of the files for this application without leave of a Judge of this Court.

REASONS

[1] NZME Publishing Ltd (NZME) seeks leave to appeal the Court of Appeal's first instance grant of permanent name suppression to the third respondents, Lawyers A and B, appellate counsel for the first respondent.[1] NZME submits that the appeal discloses a matter of general and public importance. The Crown supports the application for leave to appeal in one respect only. The first respondent and Lawyers A and B support the Court of Appeal judgment.

[2] The first respondent pleaded guilty to 51 murder charges, 40 of attempted murder and one of engaging in a terrorist act following his commission of the 2019 Christchurch Mosque shootings.[2] He now appeals his convictions therefor to the Court of Appeal on the basis that he pleaded under duress.

Legal framework

[3] The application concerns the suppression of the details of persons connected to proceedings pursuant to s 202 of the Criminal Procedure Act 2011. Three issues are involved in applications for an order made under that section: (a) whether the person is connected with the proceedings; (b) relevantly, whether publication would be likely to cause undue hardship or endanger the safety of any person; and (c) whether the court should then grant the order.

The Court of Appeal's judgment

[4] The Court of Appeal answered each issue in the affirmative. It considered Lawyers A and B to be persons connected with the proceeding, rejecting the Crown's argument that they were not because they chose to become involved in the criminal justice system.[3]

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1 *Tarrant v R* [2024] NZCA 579 (Cooper P, French and Collins JJ) [CA judgment]. "Media entities" were represented at the Court of Appeal, but they were not listed as a party to the proceeding.

2 *R v Tarrant* [2020] NZHC 2192, [2020] 3 NZLR 15.

3 CA judgment, above n 1, at [15] and [21]–[24].

[5] It found Lawyers A and B would face undue hardship, even though the evidence did not identify any specific risks of abuse or threats towards them. It found they would likely be abused and threatened by social media users, having regard to evidence as to what had happened to two other lawyers in other, serious cases and the peculiarly grave and public nature of the first respondent's offending and character. It would also have found endangerment of their own and their families' safety if that were necessary.[4]

[6] It described the last issue as involving an exercise of "judicial discretion". While endorsing the importance of open justice, it questioned the related importance of reporting the names of counsel. It dismissed as contradictory and unlikely the Crown's argument that the whole criminal bar was at risk of being attacked if counsel were not named. It considered that the cab-rank rule may be strengthened, and certainly not harmed, by making the order. It noted the ease with which someone attending the hearing might then breach the orders, but neither that prospect, nor the existence of mitigation measures (for example, security), were reasons to not make orders which aim to prevent harm.[5]

Submissions

[7] NZME advances three grounds of appeal, all based on the general and public importance ground.[6] First, that the Court of Appeal improperly applied the "undue hardship" test; it failed to articulate the counterfactual to which the hardship is compared, the reasons for barrister's public role and the efficacy of mitigation options. Second, that evidence of specific, as opposed to general, evidence of hardship is required to meet the jurisdictional threshold. Third, that the Court of Appeal misapprehended the last step of the analysis which is an evaluative, not a discretionary, exercise. NZME submits that the appeal is of general and public importance, that this case is an appropriate vehicle to consider these issues, that the proposed appeal has merit and that the public interest is enhanced given this is the only forum in which an oral hearing can occur.

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4 At [32]–[34].
5 At [36] and [39]–[50].
6 Senior Courts Act 2016, s 74(2)(a).

[8] The Crown supports leave being granted only in relation to the first ground, particularly as to how the test for undue hardship is construed in relation to criminal lawyers.

[9] The first and third respondents oppose leave. They emphasise the importance of suppression to the first respondent's fundamental rights, the unimportance of the lawyers' names to reporting and confidence in the justice system and the unlikelihood of the decision setting an adverse precedent.

Our assessment

[10] As noted above, the sole leave criterion said to be engaged is that the proposed appeal discloses a matter of general or public importance. Further, as this would be an appeal from an interlocutory application, leave must not be granted unless the Court is satisfied it is necessary in the interests of justice to hear and determine the appeal before the proceeding's conclusion.[7] In our view, none of these requirements are met in this application.

[11] Although this Court has suggested previously that the approach to undue hardship may be a point of importance worthy of its consideration, we do not consider this an appropriate case in which to undertake that exercise.[8] The unusual circumstances of the underlying appeal disclose no balanced question of general or public importance. NZME's second ground is highly fact-specific and we do not consider it discloses a question of general or public importance. As to its third ground, this Court recently left the basis for appellate review for name suppression decisions open in *M (SC 13/2023) v R*, it making no practical difference in that case.[9] The same is likely true here, as the circumstances of this case suggest the precise test for appellate review is unlikely to be a material issue on appeal. In any event, we see no appearance of error in the evaluation undertaken by the Court of Appeal.

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7 Senior Courts Act, s 74(4).
8 *Parker v R* [2021] NZSC 20 at [10].
9 *M (SC 13/2023) v R* [2024] NZSC 29, [2024] 1 NZLR 83 at [46]–[47].

[12] For these reasons, no issue of general or public importance arises, and it is not necessary in the interests of justice to hear and determine the proposed appeal before the proceeding's conclusion.[10]

Result

[13] The application for leave to appeal is dismissed. Accordingly, the Court of Appeal's order permanently prohibiting publication of Lawyer A and Lawyer B's names, addresses or identifying particulars remains in force.

[14] We also make an order prohibiting search of the files for this application without leave of a Judge of this Court.

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

[10] Senior Courts Act, s 74(2)(a) and (4).