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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 13/2023
SC 14/2023
[2023] NZSC Trans 17

M (SC 13/2023)

LF (SC 14/2023)

Appellants

v

THE KING

Respondent

NZME PUBLISHING LIMITED

Interested Party

Hearing:	19 October 2023
Court:	Winkelmann CJ Glazebrook J O'Regan J Ellen France J Kós J
Counsel:	E P Priest, S A Mandeno and P D Wilks for the Appellants Z R Johnston and H G Clark for the Respondent T C Goatley and K M Wilson for the Interested Party

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CRIMINAL APPEAL

MS PRIEST:

Tēnā koutou e ngā Kaiwhakawā. May it please the Court, counsel's name is Ms Priest. I appear with Ms Mandeno and Ms Wilks for the appellants.

WINKELMANN CJ:

Tēnā koutou.

MS JOHNSTON:

May it please the Court, tēnā koutou e ngā Kaiwhakawā. Ms Johnston appearing together with Ms Clark on behalf of the respondent.

WINKELMANN CJ:

Tēnā kōrua, Ms Johnston and Ms Clark.

MS GOATLEY:

May it please the Court, Ms Goatley, appearing with Ms Wilson for NZME Publishing Limited.

WINKELMANN CJ:

Tēnā kōrua, Ms Goatley and Ms Wilson.

Mōrena counsel and everybody here today.

I just wanted to make some few preliminary remarks about suppression before we commence because suppression issues are important in this case. I remind everybody present and viewing online that name suppression applies for the appellants. During the course of this hearing we suggest they simply be referred to as L and [M]. That name suppression extends to any identifying particulars. In this case we ask that counsel limit themselves to referring to a [REDACTED] relationship rather than a particular relationship. We know it's hard but that's the strong attempt we should all make, and, of course, it's possible that people will breach that and we ask the media be mindful of those suppressions.

Suppression orders were made in the High Court preventing reporting of [mental health issues] . Those orders continue until further order of the Court.

I note that three of the victims, as I understand it, have waived name suppression, but remind counsel, media and those viewing online that name suppression continues for the other.

I acknowledge the presence of the victims and their families present in the courtroom and watching online.

We have also received some fresh evidence in the form of the new media material. Subject to what counsel say, we suggest that it can be referred to and we will rule on its admissibility later which is our customary practice on issues of admissibility so as not to expend Court time on it.

There's also the affidavits filed by the Crown. We don't understand, from having read the submissions, that any issues need to be resolved now and suggest again that they be received provisionally and their admissibility ruled on later if necessary.

So counsel when you stand to address can raise any issues regarding those indications.

There is an important issue regarding timing in this case because some of the submissions are very lengthy. We have read them all. They are very extensive and when read as a whole the material is quite repetitive, not saying that as a criticism, just an observation.

So, Ms Priest, we expect you to be finished by morning tea.

We should indicate that our understanding of the authorities is that the relevant principles in the area are quite settled and that the Court of Appeal decision in *DP (CA418/2015) v R* [2015] NZCA 476 is the one that governs the area. We therefore can indicate that there's no need to take us extensively through other cases which simply apply those principles, or fail to apply those principles because they are before the case, if in search of other principles, because *DP* seems to be good authority. But if you want to submit otherwise to ask us to amend, et cetera, then you should make your submissions, but make them in a focused way.

Is there any other issue before I ask Ms Priest, preliminary issue, before I ask Ms Priest to address?

MS PRIEST:

The only other matter, Ma'am, that was raised in advance of the hearing was whether suppression orders would be sought pursuant to 205 beyond those which your Honour has indicated today. I simply reserve my position in terms of any additional topics depending on what arises in the oral submissions today and I will address the Court on any additional evidence that we seek to have suppressed before we conclude.

WINKELMANN CJ:

Thank you, Ms Priest. Yes, you can address now.

MS PRIEST:

May it please the Court, firstly, in terms of the order in which submissions will be presented, I will do an initial introduction and then Ms Mandeno will address all of the issues relating to international treaties as relevant to youth as an expert and Youth Court advocate in the area. That is really outside of my area of practice, so she will assist and then I will return to the primary application of sections 200 and 202 as they relate to both appellants.

WINKELMANN CJ:

And you don't anticipate difficulties in complying with the time indication?

MS PRIEST:

I do, but I will do my very best, Ma'am. I can indicate in the High Court I took the better part of half a day during the appeal and I was anticipating I would have until lunch, but I will do my very best and I may have to just return to matters perhaps in reply if particular issues arise.

I won't cover the procedural or factual background because the Court will be well familiar with that.

What I do wish to do at this point is to expand on the medical and expert evidence as it was presented in respect of L in the –

THE COURT ADDRESSES MS PRIEST – SUPPRESSION REMINDER (10:09:42)

MS PRIEST:

– for L in the District Court. So if I can firstly, and my learned junior is going to assist, of course, with navigating the materials, I take you firstly to the report of Dr Duff on the 23rd of June of 2021 which is in the additional materials, page 342, at paragraph 10. Now this report was a report on disposition prepared pre-sentence and it indicated that L showed a limited range of sexual violence risk factors and his offending was to be viewed in the context of his own immaturity and wasn't comparable to adult sexual predation. They noted a series of risk factors and at the end of that paragraph indicated that L showed inadequate awareness of his feelings –

THE COURT ADDRESSES MS PRIEST – SUPPRESSION REMINDER (10:10:39)

MS PRIEST:

It indicated that L showed inadequate awareness of the feelings, needs and expectations of the victims and repetitious and self focussed behaviours that were more likely related to his autistic traits than sexually predatory behaviours.

If I can take the Court now to paragraph 70 of the same report where Dr Duff opined that L did not have indications of grooming, stalking or predating. He now views his offending in a different social context and expresses shame and remorse but still struggles to understand the points at which he misguided, or misjudged the information being given to him by one of the victims.

WINKELMANN CJ:

So are you giving us this material to address the issue of risk of re-offending?

MS PRIEST:

Correct. Risk and also the causative link of his autistic diagnosis to the offending so far as his inability to recognise the lack of consent which in my submission is a key factor in addressing culpability.

KÓS J:

Isn't that an incredibly troubling passage, given the double rape incident, the fifth complainant. I mean to be unable to pick up non-consensual indications in that context is really troubling.

MS PRIEST:

Yes, I absolutely accept that submission, and you'll see that because of these identified difficulties in reading social cues there was identified and very specific treatment which he undertook prior to sentencing even beginning which –

WINKELMANN CJ:

Can I just stop you in any case because aren't we really – you pursued the line in the Court of Appeal that the District Court Judge had underestimated the extent of the causative connection, but the Court of Appeal was satisfied that she'd given considerable weight to that and had accepted a causative connection, and that's really not the focus of this appeal. The focus of this appeal is in relation to name suppression, in particular the Youth Justice principles.

MS PRIEST:

A key focus of the name suppression and a reason why it is opposed by both the respondent and the media is on the basis that there remains a risk.

WINKELMANN CJ:

Yes.

MS PRIEST:

It will – sorry, I'll rephrase that. At the time of this offending there remained a high risk of re-offending and so the reason that I'm taking the Court through

these reports is really to establish that there was a causative connection between his inability to read social cues because of his autism but that was very much linked to the fact that he did both sexually violate by unlawful sexual connection and rape these girls, they did not consent, but he didn't have a full appreciation of that lack of consent, and then from there the work of both a therapist, Mr Nagler, his work is indicated throughout the reports as something that is specifically targeted to L's autism and to teach him how to read social cues in a way that will mean that he will not effectively be in this way again and it does indicate, of course, his ability to rehabilitate in the true sense despite him having what would otherwise perhaps be considered a stagnant underlying condition.

1015

So the reason for taking the Court through this was that but I can, if the Court is not assisted by that, I can move on or alternative –

GLAZEBROOK J:

The issue of whether the treatment has actually been successful or is going to deal with the problem I think might be something you might want to take us to.

WINKELMANN CJ:

Yes, the extent of risk I think is the central focus on this. I'm simply saying that I think it's – unless I'm reading the Court of Appeal incorrectly, the Court of Appeal refused that aspect of the appeal on the basis that they accepted there was this causative connection and that the District Court Judge had adequately reflected it in her sentencing, and name suppression.

MS PRIEST:

Yes, and the issue is whether it's been properly reflected in name suppression, correct.

WINKELMANN CJ:

And name suppression.

MS PRIEST:

Perhaps if I can just touch on a few additional passages.

WINKELMANN CJ:

So in other words, yes, address us on a risk issue but we don't want to hear a re-run of that point because in some ways it's helpful to you what was said there, so…

MS PRIEST:

If I can take the Court to paragraph 70 of this – we have it here – report, it does indicate at paragraph 70 that L did not have these indications of grooming, stalking or predating, but further they indicated that he, at the time of the offending, had not had any specialised treatment to support him to understand and prevent unsafe sexual behaviours, and you'll see at this point he had only very recently been referred to the specialist, Stefan Nagler, who was the private psychotherapist who worked with L in advance of sentencing and as referred to in the lower Court sentencing decision.

Down to paragraph 71, it indicated that L had been currently managing his risks by focusing on studies, avoiding social interactions, but indicated in particular that his risk would be reduced not only by specialist sex offending treatment but also on focused skills around emotional recognition, a clear set of concrete rules to follow which included making explicit verbal checks for consent rather than missing cues and on social skills to train him to overcome social anxiety so that he could effectively socialise without the need to rely on substance abuse.
1018

WINKELMANN CJ:

Is there any other assessment of his risk of re-offending other than Dr Duff's?

MS PRIEST:

There is. Dr Duff did three reports in advance of the sentencing and if I could take the Court to the second of those, this is the report on interventions at the casebook, page 118, and at paragraph 4…

O'REGAN J:

This is not the same casebook.

MS PRIEST:

No.

WINKELMANN CJ:

This is the casebook on appeal as opposed to the additional material?

MS PRIEST:

This is casebook on appeal rather than the additional materials.

O'REGAN J:

The Court of Appeal casebook?

MS PRIEST:

Yes. So at paragraph 4, this is a specific report by Dr Duff reporting on interventions, indicated that –

GLAZEBROOK J:

Can you just give me the date of that report just so that I'm…

MS PRIEST:

It's the 12th of July 2021. So this is the second report written. The first report was the 23rd of June.

GLAZEBROOK J:

Yes, I saw that.

MS PRIEST:

So on the 12th of July this report indicated that L had commenced assessments and interventions with Stefan Nagler, a psychotherapist who had worked with SAFE, and at that point in time only eight or nine sessions had been undertaken. Further, at paragraph 5, there was a very specific approach to be taken by Mr Nagler that he would work with L and his family on the autistic

spectrum specific approaches to understand and address future relationships in order to effectively rehabilitative him and mitigate any future sexual offending. So in addition to the SAFE programme which was recommended and had also commenced prior to sentence, we have got this very autistic-specific rehabilitation which is being undertaken by this private psychotherapist.

1020

Turning then to the report of Dr Martyn Matthews, and this is in the casebook at 120 to 127, and this report is dated the 15th of December of 2021 but it was also prepared in advance of sentencing, Dr Matthews was an autism specialist and wrote the report through that perspective. His comments which I wish to highlight for the Court, particularly at paragraph 19, he notes part way through this paragraph near the end that the "theory of mind is the ability to infer another person's intentions, emotions and mental state from their behaviour", and then over the page: "For many autistic individuals, this ability is impaired meaning they may not recognise when someone has changed their mind about something, or that they are upset or frightened. An example of this is when an autistic person may not realise that consent has been withdrawn or that they are doing something another person does not want or like." Again, it is a link through to obviously autism and consent in this case, but the importance of that in terms of rehabilitation is that this combined with the work that L was undertaking with Mr Nagler means that these issues were being addressed directly in terms of his rehabilitative programme that was proposed, well, had started before the sentencing and continued post-sentencing.

1022

I think also at paragraph 20 to 21 of this report, I simply wish to highlight paragraph 21 which just recognises I think the quite late diagnosis of L in terms of his autism and this report writer noted that if the interventions had been available to L and his family at a younger age, he may not be in the position he is in today, intellectually capable young man, and if he had had the appropriate intervention and support he would have been able to learn behaviours and self-management strategies, which would have effectively prevented the sexual offending for which he has entered guilty pleas.

Further, if we go to the report, the section 38 report, from Dr Anne Huddleston, this was on the 12th of April 2022, in the casebook, pages 128 to 141, there are a series of comments again recognising the influences which had led to L's offending. If I just pick some to highlight…

In terms of the risk assessment at paragraph 48 at 137 of the casebook, this report noted that L at 19 years of age was a young adult whose offending took place as a youth, and they noted that by definition he was still within his development period, which, of course, is an important factor in terms of recognising the greater capacity of rehabilitation of young people.

At 49 this report goes on to comment on I think what is well accepted by the courts now that the brain undergoes extensive changes during adolescence, including areas that control the ability to self-regulate and exercise judgement and risk taking can be especially present when people are with peers.

We see from this report that it was in April of 2021 – this is at paragraph 52 of the same report – that this was when L had started working with Stefan Nagler. So that was obviously before his sentencing.

1025

WINKELMANN CJ:

We've read these reports. Can you just take us to where she reaches her conclusion about the risk of repeating, does she reach a conclusion?

MS PRIEST:

Yes, at paragraph 58, the conclusion reached is that L "would benefit from targeted interventions to address the deficits associated with his high functioning autism, including psych-education, emotional recognition and empathy training, management of autistic anxiety and continued interventions [REDACTED].

[REDACTED].

WINKELMANN CJ:

[REDACTED].

MS PRIEST:

Yes, that's correct.

KÓS J:

The passage you've just taken us to doesn't quite deal with risk of re-offending, does it? Is there any more specific report on that?

WINKELMANN CJ:

And does the Court ever address it too. I can't find whether it has been addressed.

ELLEN FRANCE J:

In relation to that I was going to ask you, Ms Priest, about 108 and 109 of the High Court judgment which does address risk of re-offending, and whether, on what basis, or are you saying we should take a different view in relation to that and, if so, on what basis?

MS PRIEST:

I'll just get that up. First at 108, obviously there's recognition of the pre-sentence report, which is somewhat arbitrary in terms of risk assessment of course, but they've identified L's risk of re-offending as low. The report –

WINKELMANN CJ:

Yes, but as the High Court Judge notes somewhere or other, simple basis that he hasn't previously offended, but this was a lengthy period of offending, so the critical paragraph there is 109.

MS PRIEST:

The reports are very clear that the risk of re-offending remains moderate until L has completed the appropriate rehabilitation. So as at the time that he was sentenced, he had only commenced SAFE, I think he was about three months

in, and was obviously yet to continue down that pathway, and also the work with Stefan Nagler, I think he'd done about nine months with Mr Nagler prior to sentencing, but of course that work was ongoing. So as to the risk as at the time that suppression was granted, which of course is the time when we need to assess the risk, it's accepted that his risk wasn't at its lowest, but the point I think that's more important is that there were very strong plans in place, which were recognised in the sentencing to ensure that he could complete them, and the report writers all seem to accept that once he had undertaken those programmes to completion, that his risk at that point would then be low.

GLAZEBROOK J:

I'm not sure they do say that, do they? Apart possibly from the staff? Because there's also the negative peer influences and alcohol.

MS PRIEST:

They certainly accepted that things like going to his education provider and building prosocial peer groups would be a protective factor, but in terms of the risk, I'll just see if I can find that in the report. My very learned junior has, of course, brought to my attention that none of them say that he will reach a low risk of re-offending but they all recognise that his risk will be lowered.

1030

GLAZEBROOK J:

Of course, of course, but –

MS PRIEST:

Of course, and so I think that that's as high as I can state it. I note in paragraph 108, in my submission, the Judge in that case has not – he simply said that the risk of re-offending is not so low as to support a grant of name suppression and again accepts at the end of paragraph 108 that if L were to re-offend in a similar manner the risk of harm would be high. Now both of those things – well, the second thing, of course, is true. The risk of harm were he to re-offend, of course, must be assessed as high but the issue is what is the risk of re-offending on the basis that he continued down the pathway that had been

set for him as part of his sentence of home detention, and I mean while I digress, a little bit like *DP* you do have quite a static underlying physical condition. So *DP* had brain trauma and *DP* had learning deficits. Now they are quite static conditions but the combination of there being treatment out there, being available rehabilitation to assist, and his youth which, of course, gives us that hope and that, well, scientific basis to assert that there is a greater capacity for rehabilitation of young people is the basis upon which the Court can say: "Look, we must work on the basis that these young people can rehabilitate."

KÓS J:

Yes, but that's mixing a whole lot of things up together. What we're really focusing on here is the risk of re-offending.

MS PRIEST:

Yes, for L.

KÓS J:

Yes, for L.

MS PRIEST:

Yes. So the point I think that I'm trying to make is that the risk as at the date when suppression is determined will always be higher so far as it pre-dates rehabilitation which is yet to come, provided that the circumstances are such that rehabilitation is going to happen, and that could be either through the prison setting or through a very strict sentence like what we have in this case which is 12 months' home detention, judicial monitoring throughout, and then 12 months' supervision with judicial monitoring throughout. What we have is effectively set up as a safety net to ensure that the rehabilitation that is needed will be undertaken. So that, combined with that greater capacity of youth to rehabilitate, in my submission, is what the Court needs to assess at the time of name suppression being considered, because the rehabilitation would very rarely be completed by that point.

WINKELMANN CJ:

Well, if we just zoom back out to put this in principle, is your submission then that we're in a situation here where youth justice principles apply? They recognise that the Courts have to give weight to the prospects of rehabilitation? So they're not asking in every case for a perfect offender. They're asking the Court to weigh how pressing is the risk of offending in the future as a reason not to give name suppression with the prospect of this particular person being rehabilitated as a young offender whose offending is connected in some way to something that suggests that rehabilitation is a realistic possibility?

MS PRIEST:

Yes, I think that's right. So by way of another example, if there'd been a young offender who'd perhaps undertaken the SAFE programme in the past, successfully completed it and then has gone on to re-offend, then the Court's perhaps in quite a different situation because they've perhaps had an opportunity to rehabilitate, all efforts have been provided to them to undertake that work, and then if it had failed the Court may assess the risk quite differently. But it's really I think with young people about giving them the benefit of the opportunity to prove themselves, given what we know about youth development and brain development in terms of that greater capacity for rehabilitation.

GLAZEBROOK J:

Are you slightly mixing up sentencing principles and name suppression principles here?

MS PRIEST:

Certainly, and it is my –

GLAZEBROOK J:

Well, and is that legitimate because there's no doubt that *Churchward v R* [2011] NZCA 531 relates to the sentencing principles and I'm not suggesting they're irrelevant but there are slightly – there are other considerations, are they? It's not a benefit of the doubt. It's actually an assessment as a relevant factor of the risk of re-offending, isn't it?

1035

MS PRIEST:

Yes. I mean –

GLAZEBROOK J:

But you say here the prospects were – I'm assuming you say the prospects were good because he hadn't had autism diagnosis and therefore no autism interventions beforehand?

MS PRIEST:

Correct. In terms of addressing more specifically that's quite right but to me there are two parts to that because if he was a much older person who had the recent diagnosis in my submission that wouldn't be as persuasive as the fact that he is a young person because of what I call the *Churchward* factors. But, of course, they are recognised in name suppression cases and particularly *DP* sets out quite a comprehensive list of those factors, but perhaps I'll come to that later.

GLAZEBROOK J:

It was really the "benefit of the doubt" comment that I was asking you about because yes, that might be right in sentencing.

MS PRIEST:

Yes.

WINKELMANN CJ:

I don't think you said "benefit of the doubt", did you?

MS PRIEST:

I think perhaps poorly worded.

WINKELMANN CJ:

We all just thought you were going to say it and then you didn't.

MS PRIEST:

What I'm trying to say, I think, is that perhaps more opportunity ought to be given to young people to prove themselves because, simply because they are young where they haven't yet had the opportunity to undertake substantive rehabilitation which can meet an identified risk.

WINKELMANN CJ:

It's not just because they're young, though, is it?

MS PRIEST:

No.

WINKELMANN CJ:

It's because of society's great interest in ensuring that a young person is rehabilitated --

MS PRIEST:

Yes.

WINKELMANN CJ:

– rather than continues for another 60 to 70 years to be a harmful presence in our society?

MS PRIEST:

Of course, and I mean rehabilitation of young people serves everybody, them, their families, their victims and, of course, in preventing any future offending as your Honour has indicated.

WINKELMANN CJ:

Society.

MS PRIEST:

So at this point, before I hand over to Ms Mandeno, I simply wish just to do a slight summary of the media interest that we've had in this case to date. It is very much a summary.

WINKELMANN CJ:

Now can you just be clear what you're moving onto because it helps us when we know what you're talking about?

MS PRIEST:

Just paragraph 11 of the written submissions.

WINKELMANN CJ:

But what's the topic that you're talking about now?

MS PRIEST:

Just media interest in this case to date.

WINKELMANN CJ:

Well, we're not talking about media interest just because of media interest. We want to know how is it relevant to name suppression?

MS PRIEST:

This was just in terms of background to the media that we've had to date so that the Court can see the context within which name suppression is sought. But if you're happy to have simply read that –

WINKELMANN CJ:

No, no, is –

O'REGAN J:

I think we know that. I mean we have read all this material, yes.

WINKELMANN CJ:

Okay, yes.

MS PRIEST:

All right, thank you.

ELLEN FRANCE J:

Sorry, could I, just going back, Ms Priest, to the previous topic, can I just check, I was just looking at L's mother's affidavit which is July 2022, so that talks about ongoing contact with a therapist. Has that now ceased? Is there evidence that that has now been completed or…

MS PRIEST:

With Mr Nagler?

ELLEN FRANCE J:

Yes.

MS PRIEST:

I don't know the answer to that.

ELLEN FRANCE J:

Okay, no, that's fine, thanks.

WINKELMANN CJ:

I didn't want to cut you off entirely. I'm just asking you to make your – what is your critical submission in relation to media interest? We know there has been high media interest but how is it relevant to name suppression?

MS PRIEST:

I'll come to that later in my substantive submissions. I was only going to address just a bit of background around that before I handed over to Ms Mandeno.

WINKELMANN CJ:

We've seen it all in any case.

MS PRIEST:

All right, thank you. Well, at this point I'll hand over to Ms Mandeno to address the international law.

MS MANDENO:

I appear to speak in support of the submissions filed by the appellants in respect of the observance of youth justice principles, reference international instruments, the purposes of rehabilitation and reintegration, and the relationship of these to the exercise of the Court's discretion.

The proposition is advanced in submissions filed that youth justice principles be extended beyond the age of 18, as has been noted in studies and by the Court in cases such as *Churchward* as was –

WINKELMANN CJ:

Well, do you need them to be extended beyond the age of 18 because he was younger than 18 when he offended.

1040

MS MANDENO:

Yes. He was 17 and I'm simply seeking that they be extended for the purposes of the consideration…

WINKELMANN CJ:

Of this aspect?

MS MANDENO:

Yes, and as referred to by Ms Priest there is the research in respect of brain development and the continuation of this into the mid-twenties.

Importantly for the purposes of this appeal and at paragraph 28 of the appellant's submissions, research demonstrates that young adulthood is "a stage of life where behaviour change is more readily possible" and where "reintegrative and rehabilitative programmes show better results when compared with fully functioning adults". The same neurological factors that contribute to risk-taking and sensation-seeking behaviour in adolescents also make adolescents and young adults "more amenable to rehabilitation".

The Court is also referred to the decision of her Honour, Justice Dunningham, in *R v W* [2022] NZHC 295, which is at page 215 of the appellant's bundle, in respect of the recognition of the vulnerability of young persons and their greater capacity for rehabilitation –

GLAZEBROOK J:

Can you perhaps just pull the microphone over a bit? I'm just worried it's not going to pick up.

MS MANDENO:

– for the greater capacity for rehabilitation, being important considerations, and it is accepted that that was in the context of an interim application for name suppression in respect of a charge of murder.

Dr Nessa Lynch said in her April 2002 research paper in respect of young adults in the criminal justice system, at paragraph 31 of submissions, at page 11 of the submissions at footnote 40, at page 386, at paragraph 27: "It may be said that there is a developing norm of international human rights … that young adults should have special consideration in the criminal justice system." New Zealand and other jurisdictions have moved to extending youth justice principles to adults in accordance with the research, and in respect of the Beijing Rules at page 387 of the appellant's bundle, at Rule 3 point – sorry, the reference was to Nessa Lynch's –

WINKELMANN CJ:

So, Ms Mandeno, isn't there established authority that it's the age of the offending that's relevant for the application of youth justice principles?

MS MANDENO:

Apologies. I missed the first part of the question.

WINKELMANN CJ:

Is there not established authority that it's a youth of – date of offending which is relevant to the application?

MS MANDENO:

Yes, there is.

WINKELMANN CJ:

So I'm just not sure why we're going through this because he was –

MS MANDENO:

Yes, I will move –

GLAZEBROOK J:

Well, I think *Churchward* recognises anyway that "youth" doesn't mean 16 and under, so I don't think there's a –

MS MANDENO:

Yes, yes, it's 18 in terms of –

WINKELMANN CJ:

Yes, so I think we can move quickly past this.

MS MANDENO:

Yes, thank you.

In terms of one of the important aspects to note that prior to the decision of, that *DP v K* was decided prior to 2019 which was when the general comment was made and that's found at page 485 of the appellant's bundle, at page 495. There was a strengthening in counsel's submission in respect of the comment made about right to privacy and this is at paragraphs 66 through to 69 of the general comment. "The right of a child to have his or her privacy fully respected during all stages of the proceedings, set out in article 40(2)(b)(vii)," should be read in conjunction with Articles 16 and 40, and in particular I draw the Court's attention to paragraph 69, that: "In the committee's view there should be lifelong protection from publication regarding crimes committed by children. The rationale for the non-publication rule, and for its continuation after the child reaches the age of 18, is that publication causes ongoing stigmatization, which

is likely to have a negative impact on access to education, work, housing or safety. This impedes the child's reintegration and assumption of a constructive role in society. States parties should thus ensure that the general rule is lifelong privacy protection pertaining to all types of media, including social media."

1045

KÓS J:

And what's the status of a general comment as opposed to the convention we are signatory to?

MS MANDENO:

It's informative in terms of the Court's interpretation which is why there is regular research and then updating in terms of the general comment, and –

WINKELMANN CJ:

Isn't intended to evidence emerging international custom which attaches to the international convention?

MS MANDENO:

Yes.

GLAZEBROOK J:

Although not here because they recommend that they introduce rules, which implies that it's not actually general.

MS MANDENO:

Yes.

GLAZEBROOK J:

I'm not suggesting…

WINKELMANN CJ:

So I asked in my opening remarks that counsel identify clearly whether they are content with the *DP* principles or whether they are asking the Court to change them. So can you just state that clearly because I understand you to be

suggesting that perhaps *DP* is something that should be developed in some way?

MS MANDENO:

Yes, that it should be –

WINKELMANN CJ:

Can you say what your position is?

MS MANDENO:

It should be developed in regard to, in reference to the general comment in that it indicates that the position be that there be non-publication and that there be lifelong protection, and so in terms of counsel's submission this indicates potentially a movement forward in terms of how the discretion is applied.

WINKELMANN CJ:

Well, even the general comment says the general rule should be non-publication and in *DP* the Court you could say articulated pretty much a similar proposition by saying that the primary or central consideration are the youth justice principles of privacy. So it's a general rule but there must be able to be exceptions.

MS MANDENO:

Yes. In terms of –

WINKELMANN CJ:

Well, can you take us to the bit of *DP* where you – how you would change the rule, I think, because it's – this is an important part of your submission.

GLAZEBROOK J:

And for me you'd need to deal with how that fits in with the legislative scheme.

MS MANDENO:

And I accept that section 200 has not been amended.

WINKELMANN CJ:

Although *DP* does deal with the issue, doesn't it?

MS MANDENO:

Yes.

WINKELMANN CJ:

At 9(d).

MS MANDENO:

Yes.

WINKELMANN CJ:

And 10.

GLAZEBROOK J:

And 10, yes.

ELLEN FRANCE J:

And 11 as well.

WINKELMANN CJ:

Yes.

MS MANDENO:

Yes. The proposition is that the starting point be name suppression for those under 18 unless it's displaced –

GLAZEBROOK J:

So you'd challenge therefore – sorry, it's 9(a), isn't it?

MS MANDENO:

Yes.

GLAZEBROOK J:

Now I've lost it…

ELLEN FRANCE J:

So you're saying there's no, in relation to youth, there would be no presumption in favour of open reporting?

MS MANDENO:

Correct.

GLAZEBROOK J:

In fact the opposite?

MS MANDENO:

Yes.

GLAZEBROOK J:

A presumption in favour of suppression?

MS MANDENO:

Which accords with the comment as made in 2019.

1050

ELLEN FRANCE J:

And how do you fit that in with what the statute provides?

MS MANDENO:

The statute's to be interpreted in a manner that is consistent with UNCROC and the general comment.

WINKELMANN CJ:

If that is possible, and you say it's possible because it hasn't been excluded.

MS MANDENO:

Yes. It hasn't been excluded.

KÓS J:

So if that's the – you call that the starting point. I suspect it's also your ending point. When would the veil of suppression ever lift for a person under 18?

MS MANDENO:

In terms of the reference already made by Ms Priest to a situation where there has been that opportunity for rehabilitation and then there has been further offending.

WINKELMANN CJ:

Would you not also accept that there's a very high risk of offending?

MS MANDENO:

Yes.

WINKELMANN CJ:

In this sort of circumstance perhaps where there's, as the Crown is going to say against you, the risk is young people doing what young people do, which is gathering together and consuming alcohol, maybe some drugs, and I'm not saying all young people do that, but that creates the circumstances for offending.

MS MANDENO:

In referring to the particular circumstances of L, we were talking about a situation which, where he was impacted by his disability which had not been subject to any treatment, so it is a different situation from –

GLAZEBROOK J:

But we're trying to get what you say are the exceptions, not whether L fits within them at the moment.

MS MANDENO:

Yes.

GLAZEBROOK J:

So you say you have a presumption in favour of suppression, and that's not your end-point because you accept there are, there might be exceptions, and we're trying to find out what those exceptions are. So are you saying – and you were asked about a high risk of re-offending, whether that would be – of serious offending in a serious manner, whether that would be an exception. But you would accept…

MS MANDENO:

It depends on the nature of what offending there.

WINKELMANN CJ:

Yes, so would – I suppose if name suppression would be relevant to managing the risk of the offending, so…

MS MANDENO:

Yes.

The other aspect which I referred to also in terms of the place of UNCROC and the way in which it has been referred to by the legislature is that amendment to the Oranga Tamariki Act 1989 in 2019 to amend section 5 and to insert section 5(1)(b)(i) in terms of that: "The well-being of a child or young person must be at the centre of decision making that affects that child or young person, and, in particular, the child's or young person's rights (including those set out in UNCROC and the United Nations Convention on the Rights of Persons with Disabilities) must be respected and upheld."

One of the aspects that I have referred to which doesn't appear to have been specifically considered is the fact that recognition must be given to, in counsel's submission, to the Convention on the Rights of Persons with Disabilities which was adopted by the General Assembly by resolution on the 13th of December 2006 and entered into force on the 3rd of May 2008. New Zealand ratified this on the 25th of September 2008 and New Zealand made no reservations on that ratification.

1055

In Article 1: “The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

WINKELMANN CJ:

So, Ms Mandeno, you know that most people in our criminal justice system would have this Convention apply to them was the sad tragedy of the situation?

MS MANDENO:

Yes, and it is the fact that in terms of Article 7, given that L is a child in terms of UNCROC and also a child in terms of the Convention on the Rights of Persons with Disabilities, what is stated at Article 7 is that: “In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration,” and what has been noted is that in *DP* and other authorities there has been no specific reference to this particular Convention and counsel invites the Court to give effect to the applicability of this Convention as it relates to L being a child with a disability, as being a, forming a primary consideration and being relevant to the Court’s determination in respect of these proceedings.

The other aspect which I refer to in respect of [M] is Article 16 which again does not appear to have been specifically considered –

GLAZEBROOK J:

Article 16 of what, of the…

MS MANDENO:

Sorry. In terms of the UNCROC, in terms of the United Nation Rights of the Child, in terms of the right to privacy, there has been no specific consideration

in terms of the manner in which that protection is to be recognised for [M] in terms of [M]'s connection to L, and simply that recognition is asked that that be a specific consideration entered into when considering [M]'s position in respect of these proceedings.

The other aspect that is referred to in terms of the General Comment, at page 496 of the appellant's bundle at paragraph 76, again this is discussing the reaction to be given to an offence. At paragraph 76: "The Committee emphasizes that the reaction to an offence should always be proportionate not only to the circumstances and the gravity of the offence, but also to the personal circumstances (age, lesser culpability, circumstances and needs, including, if appropriate, the mental health needs of the child), as well as to the various and particularly long-term needs of the society. A strictly punitive approach is not in accordance with the principles of child justice spelled out in article 40(1) of the Convention. Where serious offences are committed by children, measures proportionate to the circumstances of the offender and the gravity of the offence may be considered, including considerations of the need for public safety and sanctions. Weight should be given to the child's best interests as a primary consideration as well as … to promote the child's reintegration into society."

1100

WINKELMANN CJ:

So that's very consistent with *DP*, isn't it, the last sentence?

MS MANDENO:

The last sentence, although I would refer to paragraph 9 of *DP* which is referred to in the Crown's submissions, at paragraph 39.6 of the Crown's submissions at page 12, where the "publication of name is also an element of the penal process", and counsel notes that this decision was prior to the 2019 General Comment which warns against a strictly punitive approach.

WINKELMANN CJ:

Although when you read all the principles they don't articulate a strictly penal approach, do they?

MS MANDENO:

Sorry, punitive approach.

WINKELMANN CJ:

Punitive approach, yes.

MS MANDENO:

I note the intention that Ms Priest will address the Court further in respect of *DP* in relation to her submissions.

The other aspect that I seek to refer to is at paragraph 59 of the appellant's submissions at page 20, is to the case of *A v R* [2021] NZHC 3612 at page 185 where the Court considered in that case the comments of the former Children's Commissioner, now Justice Becroft, and his co-authors advocating for automatic suppression for offences committed while a person was under the age of 18, even for serious offences, and in that paper it was further noted by the authors that "notoriety has a particular impact on children and youth convicted of serious offending and impacts reintegration", and the Court further stated at paragraph 56 in reference to X at page 200 of the appellant's bundle: "In particular vulnerability and the effects on youth of social media as well as the lack of regulation of that media must be taken into account. This effect on youth as the Court of Appeal noted is not limited to the psychological dimension but has practical and temporal dimensions. The effects of internet shaming are indelible – they last longer and potentially for life. The only way a young person [is able] to defend themselves is to go offline which has significant economic and social costs in lost opportunities."

WINKELMANN CJ:

Is Ms Priest going to address us on the environment, the media environment for young people today which has been picked up by the Court of Appeal on another case?

MS MANDENO:

Yes.

WINKELMANN CJ:

She is? Right.

1105

MS MANDENO:

One of the other aspects which had been referred to which I do draw attention to briefly is that again the recognition of young people's capacity for rehabilitation and the importance of the avoidance of the stigmatisation of and labelling in that process of rehabilitation is that the Child Protocol (Child Sex Offender Government Agency Registration) Act 2016 only applies to people over the age of 18.

The only other aspect to comment upon is that counsel for the appellants L and [M] have considered appendix 2 as provided by the Crown and agrees with the summation of the positions in Australia, England and Canada.

Those are the specific aspects that I wished to draw your attention to in respect of those aspects and at this juncture I'd ask Ms Priest to continue addressing the Court.

WINKELMANN CJ:

Thank you, Ms Mandeno.

MS PRIEST:

At this point it's my intention to address the Court on the failure to have L meet the test of extreme hardship. It is a ground of appeal that this –

WINKELMANN CJ:

Perhaps what do you – we've heard about the youth justice principles.

MS PRIEST:

Yes.

WINKELMANN CJ:

Do you say that the Court of Appeal have engaged with them or not?

MS PRIEST:

In *DP*?

WINKELMANN CJ:

Because this is – no, in this case, because this is an appeal.

MS PRIEST:

It's my submission that the Court has given insufficient weight to youth principles in this case and perhaps if I do address our ultimate –

GLAZEBROOK J:

So is that on the basis that *DP* is right or wrong?

MS PRIEST:

DP is right but it is my submission that we ought to go further.

GLAZEBROOK J:

But that wasn't the submission that's just been made in respect of *DP*. The submission –

ELLEN FRANCE J:

I think Ms Priest said it ought to go further.

GLAZEBROOK J:

Okay, sorry.

MS PRIEST:

Yes, it ought to go further. So *DP* has provided a strong foundation and I'm happy to address directly on what we ultimately seek the Court to do.

WINKELMANN CJ:

Because in my reading of the Court of Appeal decision I should indicate I didn't see any significant engagement with youth justice principles.

MS PRIEST:

No, and that was one of the bases upon which, of course, the appeal to that Court was made, and they didn't.

WINKELMANN CJ:

No, no, the Court of Appeal didn't…

MS PRIEST:

Yes, the Court of Appeal did not. That's correct.

In considering the discretion, *DP*, of course, stated, and it's set out at paragraph 37, that the balancing exercise required DP's best interests should be a primary consideration. The Court then at the following paragraph 38 referred to the United Nations Convention on the Rights of the Child and again noted that the best interests of the child required priority. So there's a lot of focus on it being a primary or a prioritised consideration but not one that trumps other considerations. The ultimate submission made on the appellant's behalf is that to give real effect to the United Nations Convention on the Rights of the Child that for young people under the age of 18 at the time of the offending there must be a commitment to prioritising their best interests but what this means is that where the threshold test has been met, extreme hardship or endangering their safety, that the only logical conclusion is that a presumption ought to be in favour of suppression and that there would be an onus on displacing that. So this would displace what is currently in the case law in terms of open justice principles being the primary consideration to be displaced.

WINKELMANN CJ:

So you've not put it as high as Ms Mandeno who said basically there should be presumption – that youth makes the presumption – there's a presumption in favour of non-publication?

MS PRIEST:

No, I do – sorry, I apologise if I haven't stated it as highly. That is the submission.

KÓS J:

I think Ms Mandeno was really adopting Judge Becroft's report.

MS PRIEST:

Yes.

1110

KÓS J:

But you're only putting it as a presumption. It's displaceable.

MS PRIEST:

Yes, I think Ms Mandeno did cover some exceptions. There must always be room for exceptions, but the presumption would be in favour of suppression for anyone who meets, of course, those threshold tests.

WINKELMANN CJ:

No, but you're adding in the threshold test. Ms Mandeno doesn't add in the threshold test.

MS PRIEST:

I understand that she was talking within the framework of name suppression, which would require the threshold test.

WINKELMANN CJ:

Okay.

MS PRIEST:

The reason I say that is because in the Youth Court, of course, the suppression is automatic, so it's only a very small group of people who are caught by the District Court name suppression rules, who are still 18 years, or under 18 years, and or otherwise caught by the United Nations Convention. So for those

people, yes, I submit that there ought to be a presumption that they get name suppression.

GLAZEBROOK J:

Can I just, the best interests of the child is *a* primary consideration in the, certainly in the immigration cases it's made very clear that it's not *the* primary consideration.

MS PRIEST:

Yes.

GLAZEBROOK J:

So I'm not entirely sure that resting it on the best interests of the child is necessarily the right starting point given that, but I think it's being rested rather on the right to privacy and more generally rehabilitation.

MS PRIEST:

Yes. I mean when I use the phrase "the best interests of the child" I'm very much meaning it within the meaning which we have from the United Nations documents.

GLAZEBROOK J:

But the case law here would say it can be overridden by protecting State orders.

MS PRIEST:

Yes, no, look, I think in the criminal law context it is my submission that once those threshold tests are met for name suppression for those young people who end up in the adult courts, what we know is that the Court is satisfied that they are going to suffer in some way, either extreme hardship or endangering their safety.

WINKELMANN CJ:

As does the fact of youth come into the meeting of the thresholds? Is it double counted?

MS PRIEST:

Yes.

WINKELMANN CJ:

Because harm could be removing their rehabilitative prospects, so is that your submission?

MS PRIEST:

I think it, youth comes in in two places. We're talking about it, of course, at the discretionary phase which is where it's most acute in this appeal, and those are the submissions which are being made off the back of *DP* but I agree that youth is also a factor, particularly in addressing extreme hardship, and that's where I can, of course, talk about the social media climate within which young people operate. I think that's a particularly important matter in those factors which are set out in *DP* applying *Churchward* principles if you like to name suppression, I think really assists us because they talk about young people's lowered capacity to be able to deal with publication

KÓS J:

So your methodology would have a presumption at the first stage if the offender was under 18, and then would the dispensation, or the presumption, the departure from it, be dealt with at the second stage in the discretion, or would you deal with it all in the first stage?

MS PRIEST:

I think perhaps the converse of what your Honour said. So in my submission there would need to be an evidential foundation for extreme hardship.

KÓS J:

Yes.

MS PRIEST:

I think youth alone would be insufficient. It's a relevant factor but I think in this case, for example, we have disability as well. We have significant social media,

but I do think it will be easier for a young person to reach an extreme hardship threshold because they live particularly in a digital world.

KÓS J:

All right, so your one works on this basis. First of all we establish that the defendant has extreme hardship.

MS PRIEST:

Yes.

KÓS J:

And then you say, oh, and this defendant was under 18 at the time of the offending, so therefore presumption of name suppression?

MS PRIEST:

Yes, and the under 18 –

KÓS J:

So the dispensation then falls into the second discretion.

MS PRIEST:

I think predominantly, yes, that's the way that I've, that's the conclusion that I've reached in thinking through the way that the law works, because otherwise we just have a blanket provision of suppression for all until they're 18, regardless of their offending, and I think there always needs to be some sort of safety valve. I mean one example that I can think of is someone who's perhaps in their 60s, and they have committed sexual offending throughout their life, and some of it is when you're a young person. Now they'd be caught by some sort of blanket suppression rule for their offending when they're very young, but if –

1115

WINKELMANN CJ:

But say they were a young person when they offend and when they come to trial, and their offending is, say, I don't know, wouldn't aggravated robberies

with guns be, you'd end up in the High Court I think. Anyway, say it's something like that. Would they need to show extreme hardship or would it be, what's the other threshold, undue, what's the other one –

MS PRIEST:

Endangering safety is a common one.

WINKELMANN CJ:

Endangering safety.

MS PRIEST:

Yes, to any person, which can include the defendant. That's the criteria we have in this case.

WINKELMANN CJ:

So they'd have to show endangering their safety or extreme hardship. They couldn't just say, well look if I'm named it's going to destroy my life's prospects. I'm just wondering if accepting a narrow aperture, just talking about general principle, not in this case, a narrow aperture is appropriate in all youth circumstances. I'm not coming up with a very good fact situation but…

MS PRIEST:

Yes…

WINKELMANN CJ:

So for instance if it's a 13-year-old, or 14-year-old who's convicted of manslaughter. Do they have to show extreme hardship or would it be sufficient to say that, you know, the circumstances were such, et cetera, that – you've got some suggestions, answers there.

MS PRIEST:

I have. We're just being drawn back, of course, to the legislation itself which has set the test –

GLAZEBROOK J:

That's what I was going to ask you about.

MS PRIEST:

The test is extreme hardship, and I think what your Honour is suggesting, all youth arguably would be caught by undue hardship. I think that that would be a fair –

WINKELMANN CJ:

Undue hardship. That was the expression I was trying to get.

MS PRIEST:

Undue hardship, but of course that is only the test for suppression of another person under section 202. The test for a defendant's name suppression must meet that much higher test of extreme hardship under section 200. So in my submission youth alone, perhaps controversially, wouldn't meet that, but there would, they would meet it far more easily than an adult in the same situation, and that's because of the application of these *Churchward* type principles, and in particular the social media environment within which young people exist. So I think those factors will tend to suggest that they're going to meet that threshold test easier, but it is my submission that particularly given the legislation we have that they do need to meet the statutory test. Just while we're talking about the legislation and this presumption in favour of open justice I just wish to highlight, of course, that is not legislated. That is in the common law. That has been an interpretation which has come through actually from the previous, the predecessor to the Criminal Procedure Act 2011, the Criminal Justice Act 1985, and cases which were decided under that legislation, so this presumption in favour of open justice at the discretion stage is very much a matter of case law, and of course it all predated the explosion, shall I say, of social media, and it also didn't take into account any of the United Nations Conventions. The Law Commission reports themselves make no mention at all of international conventions, and of course largely predated the widespread use of social media, particularly by young people.

GLAZEBROOK J:

Do you say, are you suggesting that, because the presumption of open justice does seem to follow through into these provisions. In fact, the fact that you had to show extreme hardship would suggest that you have a – I'm not suggesting that means you can't take into account youth justice principles, but I don't – are you suggesting there's something different about this legislation where the presumption of open justice doesn't generally apply to other offenders who aren't youths and with no disability?

MS PRIEST:

No, I think that it's fair for adult offenders, I think that that it gets displaced with young people –

GLAZEBROOK J:

All right, so the submission is that youth aside, yes.

MS PRIEST:

Yes, so with young people, as we know, the Youth Court completely displaces it because the principles of open justice just don't exist in the Youth Court. If they were considered, they've been put to one side. So what we're left with is this, as I said, quite narrow group of 18 and under who are otherwise caught by the international conventions, but are currently being forced through the adult regime, which properly considers all sorts of different factors, and there must be different weight to be applied depending on the circumstances of every case, and what we see, in my submission, in the legislation as it's being drafted, off the back of those Law Commission reports is quite an intentional or deliberate decision to keep the wording broad and hence why we have some overlap which sort of allows for all sorts of different scenarios to be captured by the legislation, but what we are submitting for here is that youth are given special consideration and that where they are under 18 that that would effectively displace a presumption in favour of open justice with a presumption in favour of acting in the best interests of the child, regardless of the phrasing of that, but where a threshold test is met, as I've said, publication by default

must be in their best interests and so it would be for either the Crown or for the media to displace that.

1120

KÓS J:

And if the complainant was also a child how would that factor into that consideration?

MS PRIEST:

At the moment of –

KÓS J:

Because the best interests of both children surely would be in consideration.

MS PRIEST:

I mean certainly the connected people, witnesses or victims who are children, I mean they will have their own legislation so, of course, 204 of the CPA covers child witnesses and child victims and they have automatic suppression.

KÓS J:

Yes, well, we're not talking about suppression of the complainants or the victims but actually their interests as well and that's, I mean, significant in the evidence we have in this case.

MS PRIEST:

In terms of a desire for publication?

KÓS J:

And their own therapeutic response to what's happened to them.

MS PRIEST:

Yes, I mean, it's very difficult. The victims themselves, for example, in this case, have had automatic suppression, of course, which is designed to protect them in accordance with all of these international conventions and is legislated. They've chosen to waive that. To me that is just quite a –

WINKELMANN CJ:

Some have.

MS PRIEST:

Some have, yes, some have, not all, correct.

O'REGAN J:

I think the question is direct –

GLAZEBROOK J:

It's not whether they've waived it or not, so I think the question was what about their interest in terms of victims? How are they taken into account?

WINKELMANN CJ:

Child victims.

MS PRIEST:

Yes. Well, child victims… What would I say? In terms of the UNCROC they're designed to protect them from publication and so I – their views as to whether another child ought to, or another young person, ought not to have suppression, in my submission, of course, must be taken into account. That's required by the legislation. But I find it difficult to see –

WINKELMANN CJ:

You are saying the UNCROC doesn't really speak directly to that situation?

MS PRIEST:

No, I don't, not where they've chosen actively to waive their own rights.

GLAZEBROOK J:

No, no, no.

O'REGAN J:

No, it's –

ELLEN FRANCE J:

No, no.

WINKELMANN CJ:

No, no, no, it's to do with naming of L and their ability to move on because they were children when they were offended against. Their ability to move on has been impeded in part by the Court process and by L's fighting name suppression is what we understand. So that's what's being said against you.

KÓS J:

That's part of it and perhaps the most profound element is their inability to tell others in their social groups of, to avoid L, and that's obviously having a significant effect on their outlook.

MS PRIEST:

I mean obviously there the interests come up hard against each other because in order to give effect, if you like, to the victims' wishes, that requires that the best interests of both L and [M] would be lower in terms of the Court's assessment of them. They must, of course, be balanced. In this case we say that the rights of L and [M] in seeking suppression, which is protected, is, that must trump, if you like, the rights of the victims. They have been able to tell everything but the names of the two appellants. The story has been told through documentaries. There have been petitions to improve consent education in schools. They have the – articles have been written. So, everything but the name has been published. It's not uncommon for victims to oppose name suppression. In *DP* the victims in that case also opposed name suppression and the Court made the comment that the publication of the name would not prevent them grieving, and I think there does need to be some consideration of what would publication actually achieve for the victims.

KÓS J:

Part of the trouble with this is we're dealing with such a blunt instrument.

MS PRIEST:

Yes.

1125

KÓS J:

I mean there really should be little standing in the way of the victims being able to say to their friends: "Avoid L. He's a risk." What we do want to do perhaps is to prevent that being published on social media, which is obviously harder but it's an internet form, and certainly in the regular conventional use media.

WINKELMANN CJ:

But that's not in the real world. That's an impossible paradigm in these days.

KÓS J:

Well that's the problem we have with such a blunt order.

WINKELMANN CJ:

I think your response on the general question is, though, that UNCROC does apply to regulate – to promote both parties' interests.

MS PRIEST:

Of course.

WINKELMANN CJ:

But parts of UNCROC that are concerned with rehabilitation can only reasonably be read as dealing with child offenders.

MS PRIEST:

That's right, and ultimately that does benefit everyone in society and so that would ultimately benefit the victims, albeit through an indirect route, if the offender is rehabilitated, which they do seek.

GLAZEBROOK J:

It does rest on there being a good prospect of rehabilitation, though, doesn't it.

MS PRIEST:

Yes.

GLAZEBROOK J:

Because it doesn't protect society if somebody does go on and re-offend, and in particular doesn't protect the future victims.

MS PRIEST:

That's right, and that's where we go back to the sentence in all of the reports and the assessments made, and so it's not appropriate to go in behind the decision that was made that the best interests of everybody, of the community, of – sorry, of L in this case, were that he could undertake that substantive rehabilitation while remaining in the community. It wasn't available in any other form.

WINKELMANN CJ:

So you accept that risk of re-offending is relevant.

MS PRIEST:

Yes.

WINKELMANN CJ:

But you might have to combine that with risk of – with prospects of rehabilitation?

MS PRIEST:

Yes and long-term reintegration as well, which of course was also recognised in *DP*. *DP* had, as I understand it, not done any rehabilitative work, but at the age of 16 was just, was considered capable of it, albeit within the prison setting or the youth justice setting in his case, and that alone was considered a basis upon which the Court was prepared to grant him suppression.

One point I do wish to make, and to front foot, is that a theme coming through the victims' affidavits is a concern that they're unable to speak with the

education provider they commonly attend with L, and it is my view that there is, I'm not sure that that's correct. My reading of the *ASG v Hayne* [2017] NZSC 59 case of this Court would tend to suggest that there is a legal basis for the victims, perhaps through their legal representatives, to speak to the education provider to create a plan to avoid [L]. So I do think that that is probably a better solution to the problem which they face, or are concerned with, which is running into him. I do also note that as far as I'm aware in the last five to seven years since this offending none of the victims have run into L, and –

KÓS J:

Except at court.

MS PRIEST:

Of course, at court, they knew he would be at court, and if they choose to attend one of his hearings he would, of course, be there. But barring that it's my understanding that none of them have run into him. That's not to take away from a fear, but I do think this issue around the education provider, which seems to be a particular area of concern, is arguably able to be dealt with if he has name suppression, because of the legitimate and very specific purpose upon which the education provider would be told of his name, which would be purely to come up with a safety plan to protect the victims. So I did wish to offer that in response to some submissions read by others.

WINKELMANN CJ:

So, you want to take us to extreme hardship now then do you?

MS PRIEST:

Yes, many of these –

WINKELMANN CJ:

It's going to be a morning tea break, so I think – you've run out of time, but we're not going to, we're going to give you until no later than 12.15 to finish your submissions.

MS PRIEST:

Thank you. Will we take the break now?

WINKELMANN CJ:

Yes.

COURT ADJOURNS: 11.29 AM

COURT RESUMES: 11.49 AM

MS PRIEST:

Thank you. I'd like to turn now, with the Court's leave, to address the issues of extreme hardship and why that test ought to have been met for L, but with a particular focus on the hardship which arises from social media.

WINKELMANN CJ:

Well, what about the issues in relation to mental health?

MS PRIEST:

I'm happy to address, it's just with the time restraints I assume that the –

WINKELMANN CJ:

Well half an hour seems quite a lot, doesn't it, to…

MS PRIEST:

I've also got to deal with [M]'s application, of course, and the test –

WINKELMANN CJ:

All right, well just deal briefly with the mental health issue thanks.

MS PRIEST:

Thank you. In terms of extreme hardship this Court will be aware that the hardship needs to be assessed on a cumulative basis, so a number of different factors need to be taken into account.

WINKELMANN CJ:

It's not simply adding up, is it. I mean you have to look at them how they interplay I suppose.

MS PRIEST:

That's right, but obviously the presence of a single factor may in and of itself meet the test of extreme hardship but a number of perhaps lesser factors when addressed cumulatively may meet that threshold, and that's particularly important, in my submission, when we're dealing with young people and social media which in my submission may have a more significant impact in terms of meeting the threshold.

In terms of mental health in this case we have [REDACTED], but we also importantly have significant impact on his family who are expected to provide sufficient supervision for him [REDACTED]., and that's evident throughout the decisions which have declined suppression. They've recognised that effectively is a mitigating factor [REDACTED] I simply reiterate –

WINKELMANN CJ:

In *DP* the Court took into account the long-term path of that issue.

MS PRIEST:

Yes, that was one of, again, a cumulative number of factors which the Court took into account in finding extreme hardship was meant for DP, which of course included his brain injury, his disability as well as mental health issues.

WINKELMANN CJ:

No, what I'm asking you about is the family, reliance seems to be placed on the family being able to manage that risk, and what do you say about that?

MS PRIEST:

In *DP* or in this case?

WINKELMANN CJ:

In this case.

MS PRIEST:

In this case. One, it's reliant upon L of course living with his family. That won't continue forever. He's now 20 years of age. It also fails, in my submission, to take into account the [REDACTED] anguish that is forced on L to live with [REDACTED]. So the Court, in my submission, has placed insufficient weight on the mental suffering that follows from a person who [REDACTED].

WINKELMANN CJ:

What about the fact the Court also took into account that they said he had managing strategies?

MS PRIEST:

The managing strategies were always, given with the proviso that his autism meant that he would commonly ruminate and that he would become fixated on things like social media, so when he was placed under additional stress, such as were his name to be published, that his coping skills would go down and he would start to ruminate and become quite obsessive, which was part of his autistic spectrum presentation. So it's something of a difficult or circular argument in that if he isn't given suppression he's more likely to experience these very real difficulties, [REDACTED]. If he has publication then this is far more mitigated and his strategies, which he's learned, he's able to keep in place.

The report prepared by Dr Duff in terms of name suppression specifically for the High Court did note, of course, the permanency of the internet, and the point that I'm making around L ruminating on negatively toned media, which would impact his mental health going forward.

The endangering safety aspect of this, of course, was accepted by the Courts in terms of the threshold test being met, but it is my submission that it is an overlapping factor to be taken into account in terms of an assessment of

extreme hardship, and that's particularly given the clear nexus between mental health deterioration, [REDACTED] and publication of his name.

Linked into that, if I can turn to news and social media, of course the decisions of *X (CA266/2020) v R* [2020] NZCA 387 and also *DV and AB (CA451/2021) v R* [2021] NZCA 700 have both recently considered social media and have said that social media raises policy issues which the Courts have yet to work through, and we would invite the Court to work through those issues as part of this appeal.

1155

The principles are very well established in *X* but are commonly limited in the lower Courts because of the extreme nature of the media in that case and the politicisation on an unprecedented scale. It is my submission that *X* ought not be limited in that way and that the realities of social media and the fact that particularly children who are now under the age of 18, they just live in a digital world, and that's not just on social media platforms such as Facebook or Instagram, more importantly it's in the direct messaging, Snapchat, Facebook Messenger, Instagram Messenger, where they are unable to avoid cruel comments being made to them. They can be bullied in their own home. Provided their phone is with them people have direct access to them. The alternative, of course, is for them to simply remove themselves from social media but that is akin to ostracising them themselves from their peers entirely.

So the world which I grew up in is quite different to the world which my children now live in as teenagers and they do literally live online, and that is something that wasn't contemplated, of course, when the name suppression law was written under the Criminal Procedure Act and that's recognised. The Law Commission didn't consider it and the first case to consider it in the context of name suppression, of course, was *X* but more recently *DV* has talked about the impact, in particular, of direct messaging.

Direct messaging is particularly relevant to [M]. The concern on [M]'s behalf is not that there'll be mainstream publicity of [their] name because there is very

little public interest in an associated person being published. The concern is that [they are] a teenager and that [they] will have direct messaging, that [they] will be unable to escape the bullying and ostracism and that did lead to [them] leaving a school and moving to a different school which is evident in the materials.

So…

KÓS J:

May I ask you a question that's been occurring to me and it's this. If name suppression is not granted in this case, and given the scale of response that you're talking about, isn't the inevitable consequence for L at least to be this, that he would have to effectively change his name to avoid that, you know, perpetual media imprint?

MS PRIEST:

Yes, I think that's right. We see, of course, played out in the media the case of Jayden Meyer which has considerable parallels. There was some media filed in this Court which may assist but, of course, he received a similar sentence, a home detention outcome, but did not seek suppression. You will see footnoted in the submissions – and I can find that, my junior will find that.

He effectively had to move cities then once his name was revealed in a new city he was unable to attend school and was completely ostracised, would be bullied in the street and was subject to vigilante attack. So we know exactly what will happen to L in particular in the event that he maintained his name and that may be that he cannot, you know, may have to move away. He may have to change his name. Those are the only ways that it could potentially be managed. I think that's fair. I submit also that that's not a reasonable or appropriate outcome in this case to expect a young person to have to do that in order to live.

It's set out at footnote 164, just a summary on the screen, of *Solicitor-General v Meyer* [2022] NZHC 2692 which, of course, was the sentencing appeal but it did set out some of the factual issues that had arisen in the *Meyer* matter.

1200

Of course, the very recent decision of *DV v R* the Court of Appeal also deal with social media and suppression. Now these were adult offenders. There was a discharge without conviction and ultimately name suppression in the Court of Appeal and in particular in that case there was direct messaging. You'll see set out at paragraph 79 of the written submission a quote and a particular reference to messages being received directly via Messenger, and I do think that, of course, publication as we know from the decision of this Court in *ASG v Hayne* indicates that publication to one can be publication. So when we look at the fact that direct messaging is very live and also can disappear, like on Snapchat, people send me messages with impunity. It's not uncommon to be, to see in the media [REDACTED] that this happens, and it's, when you compound that with the restriction of, or the inability of young people to have the perspective that adults have in terms of interpreting those messages as just being mean-spirited and telling them more about the other person than themselves, they simply take it on board, and it is devastating particularly in those teenage years up to the age of 18.

So I do invite the Court to consider the very real realities of social media and that there is an inevitability, in my submission, in naming and shaming L, both to others and directly, and the same for [M], naming and shaming [M], both directly and to others. That can be either publicly or through direct messaging.

Perhaps if I turn now, given the time, to the substantive appeal for [M] in terms of the law. The reason that this appeal has been made is off the back of the Court of Appeal judgment. At paragraph 42 – sorry, paragraph 44, where the Court, if we scroll down to the next page. So I'm beginning at the middle of paragraph 44 where it begins: "We will assume, without deciding this point, that a court may suppress the name of a defendant," so that is under 200(2)(f),

"where publication will identify a connected person whose name is suppressed under s 202."

So of course [M]'s name is suppressed under section 202 on the basis of undue hardship. So the Court has said that they will assume, without deciding the point, that the Court may supress the name of a defendant whose name is suppressed under section 202 which is undue hardship, but who cannot point to extreme hardship for the purposes of section 200(2)(a) and of course section 200(2)(a) allows, or sets out the test of extreme hardship which can be applicable to either a defendant or a connected person. So there's that higher test of extreme hardship for a connected person if the defendant's name is to be suppressed as the primary avenue, or if that's the pathway, if you like, which is pursued, then the Court goes on to say: "But it is unlikely to exercise the discretion in favour of suppression in such a case. In this case the applicant cannot justify… in his own right, and the harm that publication will cause [M] does not reach the level of extreme hardship." Then it references the victims' views in opposing their name.

So the question for this Court is whether you are prepared to engage with this issue, which is around the different levels of hardship which are allowed for connected people, either through section 200(2)(a) or section 202(2)(a), which is the lower undue hardship. It is our submission that quite properly and in a number of cases which are filed in the submissions where a person, a connected person, a witness or a victim has obtained an order for suppression under section 202, and that that is a legitimate threshold test which has been met, then it is quite proper for the Court simply to consider suppression of the defendant's name under section 200(2)(f), which is that publication of the defendant's name would lead to identification of another person whose name is suppressed by order or by law.

1205

That is a plain reading of the section but there is always this conflict where we have section 200(2)(a) which allows for a connected person to also meet that

extreme hardship test where they simply want the defendant's name alone suppressed.

GLAZEBROOK J:

Isn't that comment just in respect of the discretion? It's not saying that – or do you say it's going further than that?

MS PRIEST:

You'll see there's two alternate interpretations which have been posited by the appellant. One is that the Court is effectively fettering the discretion or opposing this additional threshold of only saying that under 200(2)(f) they would suppress the name of the defendant where the connected person also meets the test of extreme hardship which can't be right, in my submission, or alternatively there are – they appear to say that in the absence of meeting that extreme hardship the discretion is going to be very rarely exercised in favour of suppression of the defendant, and in my submission that's overstating the test. The threshold test, once it's met, is simply met under 200(2)(f) and then as we know from the cases we then look at those three competing interests: the interests of the defendant, in this case a young person with a disability; the interests of the connected person, in this case again a young person who the Court is satisfied has met the threshold test of being identified; and then the third interest –

GLAZEBROOK J:

Why at that stage would you be looking at the young person themselves?

MS PRIEST:

Sorry, could you repeat…

GLAZEBROOK J:

Well, because if you're just doing it on the basis of identification, why does the young person come into the discretion?

WINKELMANN CJ:

Who is the young person?

O'REGAN J:

Do you mean L or [M]?

MS PRIEST:

Under the case of *A*.

WINKELMANN CJ:

Do you mean the defendant?

GLAZEBROOK J:

Under (f).

O'REGAN J:

L. L or [M]?

WINKELMANN CJ:

Do you mean the defendant or…

GLAZEBROOK J:

I thought you said you took into account the interests of the defendant at that last stage.

MS PRIEST:

You do. Yes.

GLAZEBROOK J:

Why would you if it's just under (f)?

WINKELMANN CJ:

You wouldn't, would you?

MS PRIEST:

That's under *A*, isn't it?

GLAZEBROOK J:

Oh, *A*, yes, of course.

MS PRIEST:

Yes, that's under the decision of *A*. I'm not sure if it's the *Solicitor-General v Antolik* [2016] NZHC 2643 or the *A (CA605/2016) v R* [2017] NZCA 49 case, the Court of Appeal case.

WINKELMANN CJ:

Well, I mean even if it's under the extreme hardship threshold, if it's advanced on the basis of [M], you still wouldn't look at L, would you? You'd still only be looking at [M], whichever provision you're looking under.

MS PRIEST:

Yes, if [M] had advanced the application –

WINKELMANN CJ:

On [M]'s own.

MS PRIEST:

– for suppression of L's name on the basis of extreme hardship then [they] can get there [themself] under section 200. But in this case [they have] advanced [their] application on the basis of undue hardship to themself.

GLAZEBROOK J:

Well, all I was putting to you was that wouldn't you, when looking at the discretion, look at [M's] interests and not [L's]?

MS PRIEST:

My understanding – I mean you could depart from the case of *A* but my understanding is that there's three sets of interests have to be considered because there will be obviously a benefit to a defendant because their name will be suppressed through 200(2)(f). But if the Courts, I mean, if the Court was prepared to consider simply –

WINKELMANN CJ:

Yes, that doesn't seem to be something that would weigh greatly anyway. I think we've got the point.

MS PRIEST:

Yes. So the issue really just arose in the contents of those Court of Appeal comments and you'll see that that has subsequently been cited in the High Court by Justice Palmer in the case of *N v R* [2022] NZHC 3585 where again that higher threshold test was stated, and this is set out at page 195 of the written submissions where the High Court said: "The Court is unlikely to exercise its discretion in favour of suppression of an offender's name where there is not extreme hardship to the connected person," and in my submission that is conflating the test. It's imposing too high a threshold and far more than what is contemplated by the legislation.

1210

The only other comment that I did wish to make in terms of section 200 is that there does appear to be a circumstance where a connected person may seek for only the suppression of the defendant's name and not themselves, and that may well sit in behind why a connected person is caught by the extreme hardship test in section 200(2)(a), and of course that would be where a person didn't need suppression of their own name, they just need suppression of the defendant's name, and the scenarios which we've thought of might be where there's a very high profile defendant who's perhaps linked to an organisation which is intrinsically linked. Something like, we thought about the Mad Butcher as one example, or the woman who fronts the Briscoes ads, had one of those individuals been charged –

WINKELMANN CJ:

I'm sure they don't really want to be involved in these hypotheticals.

MS PRIEST:

I doubt that, but those sort of scenarios where you have very high profile people. In the event that someone like that was charged with an offence, their

organisations that they're a part of may wish to have the individuals or the defendant's names suppressed, but may need nothing to do with their name being suppressed at all.

WINKELMANN CJ:

Even so, it's still a peculiarity.

MS PRIEST:

It is, it is a peculiarity, and that's been recognised in a number of cases and never resolved prior to today. So *Sansom v R* [2018] NZCA 49 again does recognise the ability to make the applications on both bases, but some guidance from the Court would certainly be appreciated in that regard.

Unless the Court had any specific areas that you wished me to cover, the remaining material, of course, is all in the written submissions. I am happy to address any difficult points but I'm mindful of the time.

ELLEN FRANCE J:

Could I just check one thing arising out of *DV*.

MS PRIEST:

Yes.

ELLEN FRANCE J:

The Court there said that the first step of the *Robertson v Police* [2015] NZCA 7 two-stage enquiry gives the presumption of open justice statutory form because it insists that the Court determine on what principled basis suppression might be granted, and I was just thinking about that in terms of how you then see the youth justice principles applying at that stage, because if that's correct it potentially has some implications for how the Convention principles are applied.

MS PRIEST:

That must be right in the sense that suppression is something which people don't have as a matter of right in the adult courts. So far as open justice is the

starting point, that's simply what the legislation tells us in the adult court, which of course is converse to the youth court. It's my submission that that wouldn't be considered so much a part of step 1, but perhaps just the starting point for any application for suppression at all, because we have to make the application and of course you must meet these very high and special criteria. So I don't see that there's any, we're not suggesting that the law be rewritten. It's my submission that the principles of open justice are a matter of common law. They are not codified in the Criminal Procedure Act other than in the way that I'm saying, that there's no default principle, no default to suppression. It's something that must be sought. So inherent in that, yes, there is an overriding or overarching commitment to open justice, which must be right, but the issue is whether within this framework of section 200 we can look at the principles of youth and rehabilitation and risk and, I guess, change that presumption, particularly at the discretionary stage. That's where I see the most value in this because as to whether people meet thresholds or not will be a matter for individual courts with individual circumstances, but it's where those thresholds are met, it's my submission that there ought to be a presumption in favour of suppression for young people, and that is to be displaced at that step.

ELLEN FRANCE J:

Thank you.

WINKELMANN CJ:

Thank you.

THE COURT ADDRESSES COUNSEL – COURTROOM LIGHTING (12:15:45)

MS JOHNSTON:

May it please the Court. I propose at the outset just to start with a brief outline of the topics I propose to cover, and of course I'll be taken to where I'm taken. I first propose –

GLAZEBROOK J:

You might need to pull the microphone back now.

MS JOHNSTON:

Sorry. I propose to first start simply addressing some factual matters primarily, briefly addressing what the Crown says about LF's culpability as it's relevant to this appeal, just so the Court is clear on the Crown's position as to the facts before we proceed with the substance of the appeal.

The second topic that I would propose to address is the threshold grounds, and I propose to be relatively brief on the threshold. The Courts below found the risk to LF's safety and didn't find it an extreme hardship there given the overlap, and I'll come to this, but in the Crown submission all the factors were taken into account to the extent there is an issue there that's an issue for the discretionary stage and the essence of the appellants' submission in the Crown's view is that it is an issue of the weight that has been placed on those factors, rather than an issue of the threshold, given one of the thresholds were crossed. So I foreshadow that. I propose to spend more time, obviously, on the discretionary stage.

My third topic, and this is where I propose to address the Court of course on the issue of principle, if it is said to arise in relation to youth justice and the relevance of international instruments, and also I propose to briefly touch on this question of whether the Courts erred by not assessing whether given the publicity to date there is a purpose in publishing LF's name. That's something my learned friends have commented on in written submissions, and we've responded to, and there hasn't been much discussion of that this morning, so maybe I can be relatively brief on that, but I would also propose to touch on other factors relevant to the discretion obviously the issue of rehabilitation and perhaps risk of re-offending and I'll touch on the views of the victims, but I acknowledge the Court will have read the material that's been placed before you in relation to that.

The fourth and final topic is [M's] appeal which I would characterise as having two components. One is a statutory interpretation question about how section 200(2)(f) can be used, and then second, how those issues then play out in the discretionary stage.

So moving then to the first topic, which is the factual matters, and as I foreshadowed the Crown simply wants to make it clear to the Court what the Crown's position is on LF's culpability insofar as is relevant to name suppression, and of course it is. The submission is made here that LF has an honest but unreasonable belief in consent. Now that wasn't a submission made in those terms at the time of sentencing, which in the Crown submission's the time it should have been made if it was to be pursued because obviously an honest but unreasonable belief in consent is not a denial of an element of the offence, but would be a mitigating factor if it was accepted, but it is a matter in the Crown submission that needs evidence. It is a matter here that there is no direct expert evidence on the Crown would say. There is no evidence from LF that he had an honest but unreasonable belief in consent, and it's also inconsistent with the agreed summary of facts, which is agreed for the purposes of sentencing, and I've addressed the Court in more detail on this point in written submissions, and I so I don't propose to go through it in a lot of detail given time constraints. But in terms of the expert evidence the Crown accepts LF's autism diagnosis, and accepts that someone with autism has poorer capacity than a neurotypical person to interpret social and emotional cues. Dr Duff referred to it as blindness to feelings of others, a lack of awareness of moral or legal wrongfulness. Dr Matthews referred to LF struggling to understand the nuances of teenage social behaviour, and that he may not recognise when someone has changed their mind. He may have difficulty understanding when consent has been withdrawn, and Dr Huddleston refers to difficulties with self-control and self-regulation. But that, in the Crown submission, is really as far as the expert evidence goes and doesn't tie into the facts of this case.

1220

This isn't a case where we have victims who were wincing, or dropping eye contact, or using body language to turn their bodies away to LF in order to communicate their lack of consent. This is a case where the victims were quite clearly saying no and the agreed summary of facts refers to one of the victims making continual pleas for him to stop, physically struggling, him ignoring her, and him becoming more forceful as she continued to tell him to stop. In those circumstances, all those circumstances simply do not gel with the submission that this is somebody who is misreading social cues.

WINKELMANN CJ:

So you say the sentencing court did not accept any causative connection?

MS JOHNSTON:

I don't think I put it so high as to say "no causative connection". I think the Court accepted that LF's autism was relevant and took it into account at sentencing. Primarily the Crown's characterisation would be that it was taken into account in the decision not to impose imprisonment, and I think the District Court judge referred to the lack of acceptance by some that he was remorseful, and took it into account as somebody who is autistic with a more flat effect, it's hard for people to see his remorse. So Judge Ryan nevertheless gave LF discount for remorse.

KÓS J:

You're just challenging the assertion of honesty.

MS JOHNSTON:

Yes.

KÓS J:

Yes.

MS JOHNSTON:

So I accept the difficulties reading social cues, but it doesn't go so far as to give an honest belief of consent in circumstances where, I mean, the crux of it, the

complainant, the victims were not using social cues to communicate their lack of consent, they were using words and physical resistance, and that's a little blunt, but that's sort of the crux of the Crown submissions there, and also I acknowledge some of the victims were so intoxicated that it would simply be unreasonable for – a court should not accept that there was any honest belief in consent in circumstances where victims were showing no signs of consent because they were effectively unconscious.

The Crown would also point to LF's actions after the incidents occurred, don't give support for the assertion that he mistakenly believed in consent.

WINKELMANN CJ:
I just note at paragraph 15 of the sentencing indication the Judge does take into account these factors in assessing culpability. She accepts they reduced culpability.

MS JOHNSTON:
In the sentence indication?

WINKELMANN CJ:
Yes.

MS JOHNSTON:
Yes.

WINKELMANN CJ:
Where is the sentence in the documentation?

KÓS J:
The sentence isn't –

GLAZEBROOK J:
You're really just – this is really in relation to having an honest but mistaken belief in consent.

MS JOHNSTON:

Yes.

GLAZEBROOK J:

You say it might well reduce culpability on the non-consent but not in respect of, not to the extent of it being an honest but reasonable belief, is that –

MS JOHNSTON:

Yes, a very limited impact on culpability and does not rise to that level.

WINKELMANN CJ:

Could you just give me the reference to the sentencing notes in the – the sentencing notes in the –

KÓS J:

Tab 15 of the Court of Appeal casebook.

MS JOHNSTON:

The sentencing notes or the sentence indication?

WINKELMANN CJ:

Sentencing notes.

KÓS J:

Page 142 of the Court of Appeal casebook.

WINKELMANN CJ:

142. So she carries that forward at three. Right, okay, thank you.

MS JOHNSTON:

It might also be worth going to paragraph 119 of the sentencing notes. That's where the Judge is recognising in the middle of that paragraph there that "LF, by his guilty pleas, knew it was wrong, and others were saying it was wrong", and then I think the time where, the point at which mental health was considered as a mitigating factor is at paragraph 123. The final sentence:

"I accept that LF has committed more offences but he also has long term mental disability and…" was committed when he was younger, and that is when the Court has then gone on to, in the next paragraph, to give a 40% discount for youth and mental health, and if it assists the reference to remorse and flat effect is at paragraph 125. That is where the remorse was considered.

I think where I was addressing LF's actions after the incidents, and whether that was consistent with this assertion of honest belief in consent. The summary of facts records that LF approached one of the victims on the street one day sometime after the offending, spat in the face and said something aggressive to her. There was a text message sent to one of the rape victims the next morning saying: "I'm sorry I put my dick in your ass last night. It slipped out and I accidentally put it in the wrong hole." The Crown submits that assertion is inconsistent with the assertions now made of an honest belief in consent.

The pre-sentence report, which is the Supreme Court case on appeal at 110, LF simply says he has "no recollection" of the offending, "he was heavily intoxicated and didn't hear her (victim) asking him to stop," and he was "mentally weak back then". Again that, while in some respects is, ties in a little, it just doesn't rise to the level of an honest belief in consent. So the evidence doesn't go anywhere near the standard required to establish an honest but unreasonable belief in consent to be relevant either at sentencing or to mitigate culpability in the suppression context.

In that sense the Crown would say [L] is in quite a different category from cases where the Court has found offenders culpability so low as to favour suppression, and that's *X* and *DV*.

WINKELMANN CJ:
We're calling him L.

MS JOHNSTON:
L. What did I say?

WINKELMANN CJ:

[REDACTED]

MS JOHNSTON:

I'll do my best. Both *X* and *DV* were cases where culpability was low enough that the Courts discharged without conviction, and obviously here the Crown would say that the culpability is at the other end of the spectrum and is far more relevant. That deals with the factual matter I wished to raise. Unless there's any questions on that topic I propose to move to the threshold stage.

1230

As I foreshadowed all of the Courts below found that one of those thresholds was crossed, that publication was likely, there was a real and appreciable risk that publication would endanger the appellants' safety, and the Crown hasn't challenged that outcome but does say that that threshold was not met by a great margin and was heavily influenced here properly by the appellant's youth and circumstances.

WINKELMANN CJ:

Sorry, you don't challenge it but you say it wasn't met by a great margin?

MS JOHNSTON:

Correct.

WINKELMANN CJ:

So you're challenging it?

MS JOHNSTON:

I'm accepting that the threshold was met but only just.

WINKELMANN CJ:

Only just, all right, you're saying. It was an ambiguous statement.

MS JOHNSTON:

Sorry, your Honour, and I'm saying that simply to recognise that the Crown's approach to this appeal shouldn't be seen as a signal or that likely mental anguish caused by publication of itself would usually be enough to warrant suppression.

WINKELMANN CJ:

Yes, but this is a fact I'm interested in because this young man is not simply just saying it's mental anguish. This young man has [REDACTED]. It's not something springing up in connection with this case.

MS JOHNSTON:

Absolutely. So it's that range of factors that was taken into account: his youth, [REDACTED], his autism diagnosis, the social media context, and I submit the Court took into account the risk of, or the, what's been described as vigilante attacks, those incidents that have occurred at the family home were added into the calculus as part of the risk to safety, and the appellant points to other factors that he says were discounted or not given enough weight and essentially is saying that more weight should have been given to all these factors and therefore extreme hardship thresholds should also have been met.

Now given the overlap between those two factors, the Crown says that's really an argument that belongs in the discretionary stage because all of those factors were taken into account by the Court and all of those factors got him over one of the thresholds and got him into a position where the Court can consider the exercise of the discretion.

WINKELMANN CJ:

So what you're saying there that they took into account all of those things as part of the context for publication placing him in danger?

MS JOHNSTON:

Yes.

WINKELMANN CJ:

And really it seems to be a mental health assessment as opposed to a danger that he's going to be harmed by a vigilante attack. It's that the vigilantism is going to be part of the context in which he has to try and, or the family has to try and keep him safe.

MS JOHNSTON:

Yes, and the Crown wouldn't say great weight should be placed on the vigilante issue. It would be speculative, the Crown says, just to – I'll just find my better words – but I think in the written submissions the appellant's taken the point that those events were not taken into account by the Courts below and it's very clear, in the Crown's submission, from paragraph 99 of the High Court decision that this was a factor that was added to the calculus and the appellants raised the fact that the Court said that it was unknown whether those incidents were related to the offending but noted no other plausible explanation was offered and that, in the Crown's submission, is really of no moment. The issue is whether publication is likely to endanger the safety. It's simply too much of a stretch to suggest based on what the Crown would characterise as largely childish incidents that publication of the appellant's name would result in general members of the public acting in this way. People, presumably known to the parties because they know about it, have undertaken these frightening acts at the family home but it's a stretch to say that if the community at large know about this that other random members of the community would have sufficient instance to actually look up the appellant, find out where he lives and act in this way.

WINKELMANN CJ:

Although the Crown – the appellant is not without evidential foundation that in that there is substantial social media material where people are suggesting once they find out who the appellant is they will take action.

MS JOHNSTON:

I accept that those comments have been made but it's a stretch to – those comments are frequently made and very rarely acted upon.

KÓS J:

I just don't understand why you think the risk only comes from insiders, those who only know his name.

MS JOHNSTON:

To date?

KÓS J:

To date.

MS JOHNSTON:

To date all that's happened must be people who already know his name.

KÓS J:

Correct. That's right.

WINKELMANN CJ:

But when others know his name?

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MS JOHNSTON:

Yes. My point is that it's speculative to suggest that others who don't have as much personal emotional involvement in matters would then act in this way.

WINKELMANN CJ:

Well, to some extent risk is necessarily speculative though, isn't it?

MS JOHNSTON:

Yes.

WINKELMANN CJ:

And what more evidence could you ever have? If you get a large volume of people, and there's a reasonable level of threats of violence when you look across the material, you only need one person to act on it.

It's always going to be speculative. It's the new environment that we operate within.

MS JOHNSTON:

Yes, and I think all I can do is focus the Court on it's the risk of publication. Comments, nasty comments, uninformed comments, comments expressing an intention to do things, have been made, presumably throughout time. Now we are able to look it up, find it on social media, and those words are recorded on the internet. It doesn't, in my submission, mean that necessarily it's more likely that somebody is going to go around to the house and throw something at the window or whatever it is that's suggested.

WINKELMANN CJ:

Although it does create a different dynamic, doesn't it, which is what the submission is made against you, the social media world is a different dynamic and perhaps creates communities which are larger, communities of anger.

MS JOHNSTON:

Yes.

GLAZEBROOK J:

Well, here we're talking about the physical aspect. But, of course, there's the mental aspect of social media which is also said against you in terms of the additional stress.

MS JOHNSTON:

Yes. I mean it's also…

GLAZEBROOK J:

Whether it's going to be acted on or not.

MS JOHNSTON:

In terms of the mental anguish –

GLAZEBROOK J:

Yes.

MS JOHNSTON:

– and the vulnerability of young people to – the impact of social media. I wouldn't say that that's a point against the Crown because that's a point that was recognised by the Courts below and taken into account.

GLAZEBROOK J:

So you say it's been sufficiently taken into account?

MS JOHNSTON:

Yes.

KÓS J:

And in terms of your earlier submission about the first stage in *Robertson*, you're not saying, are you, that we simply find one of the elements in section 200(2) and then you immediately move to the second stage? It must be the case that you have to look. I mean if someone had all three or four of the factors at the first stage that would be very material.

MS JOHNSTON:

Yes, it would be relevant to the exercise of the discretion, I think, but the point here is because of the overlap between risk to safety and extreme hardship. But the real issue is an issue of weight placed to those factors because most of the factors referred to here are actually relevant under both heads, but I accept if another factor was met that that would – the Court would be starting the discretion on a different footing.

WINKELMANN CJ:

Can I just take you back to the point you made before where you said that the Courts below took into account the risk to L from social media, risks to his mental health from social media. Did they take it into account in the context of consideration of youth justice principles? Do you say they did?

MS JOHNSTON:

I say it's very clear that L's youth was taken into account at the threshold stage.

WINKELMANN CJ:

Well, is there any reference? Do they refer themselves to – any reference to the principles they should take into account, apart from just his youth, because, of course, it's not just his youth. It's the obligations that come with that.

MS JOHNSTON:

I acknowledge that the Courts below haven't referred explicitly to the UN Convention on the Rights of the Child. In terms of youth justice principles, there's a definitional point that just for completeness I think I need to make. In terms of youth justice principles, there obviously are principles in the Oranga Tamariki Act and the Court will know that those principles apply to youth court proceedings and not once a matter becomes, comes, as it has in this case, to the District Court. So I just make that definitional point and it's been touched on a little here because my learned friends have referred to the 2019 amendment that gave statutory recognition to UNCROC and an amendment to section 5 of the OT Act. That is important for the Youth Court. But I simply make the point that that does not have direction application in the current environment, but, of course, the youth justice principles, as in sort of the *Churchward* factors, of course, the Crown has to accept that that translates and applies here, and it's, the Court may say that there's not a lot of direct reference to those principles in the decision, but given, particularly when one looks at Judge Ryan's decision, and Judge Ryan had just earlier that day given a very rehabilitative sentence, described as a lucky break, that was quite clearly a sentence that would not have been given to an older offender. It was quite clearly to recognise L's youth, rehabilitative prospects, autism, and it's unrealistic, in the Crown submission, to suggest that when Judge Ryan then came to considering name suppression later that day, that those principles weren't front of mind.

1240

WINKELMANN CJ:

Well but the name suppression principles are different to the sentencing principles, aren't they?

MS JOHNSTON:

Yes, and I have, I may struggle to find it, but there is a footnote in our submissions that refers to all the places where the Courts below have referred to youth.

WINKELMANN CJ:

Ms Clark can give you that footnote reference later.

MS JOHNSTON:

I think it's in my footnote 128. So that's where I've noted that: "While UNCROC itself is not directly referred to, LF's age and prospects of rehabilitation were to the fore in the decisions of the Courts below." And that's a, that's probably not the right words, but it's the general submission that the overall crux of the decisions of the Courts below quite clearly gave effect to youth. I know there was a question earlier about double counting and that's not the words I would use, but the Crown accepts that youth is relevant to both stages of the enquiry.

In terms of the Court's consideration of mental anguish [REDACTED], here both the District Court and High Court very clearly found a link between publication and likely mental health deterioration, [REDACTED] and to the extent that it's argued that this court should have also found that the extreme hardship threshold was likely, I'd simply take the Court to the last word on this, and obviously subsequent to the High Court decision there's more evidence and that's in the further evidence bundle, further evidence before the Court of Appeal bundle at the first page, [REDACTED].

We don't have an updated risk assessment from an expert, and what we have here is clinical notes where L refers to [REDACTED], now being regretful of the incident, wanting to move to Australia, this report records that he's not clinically depressed or anxious, highly functioning, and is [REDACTED] This is

effectively offered to the Court as fresh updating evidence. It was before the Court of Appeal. Given that last word essentially shows that the, in the Crown submission, that the Courts below, the High Court and the District Court were not wrong in their assessment [REDACTED], which was that there was a risk to his safety but not so as to reach extreme hardship.

WINKELMANN CJ:

I suppose what will be said against you, and what any [REDACTED] professional will say, is that [REDACTED]is not static [REDACTED].

MS JOHNSTON:

Yes. All I can do, I think, is focus the Court on what information it does have, and –

WINKELMANN CJ:

Thank you. I just wanted to – give you an opportunity to comment on that.

MS JOHNSTON:

And –

KÓS J:

So that's almost a year ago that information.

1245

MS JOHNSTON:

Yes.

KÓS J:

We don't have anything more recent in relation to either his pathology or his risk of re-offending.

MS JOHNSTON:

We don't.

KÓS J:

Should we?

MS JOHNSTON:

Well, applying usual appellate principles, of course, as an appeal the Court should be focusing on circumstances before the lower Courts and in terms of the risk of re-offending the Crown would invite the Court to focus on what was before the lower Courts.

GLAZEBROOK J:

Would that be right though? Say in another circumstance where the person's gone on to commit five other offences, would you say: "Oh, well, actually that wasn't predictable at the time of the original offending on the reports," or would you accept that it would have to be relevant?

MS JOHNSTON:

I think my answer to that would be it depends, and, of course, on usual appellate principles the Court is looking at what happened at the time and whether or not that was wrong and in cases – and this case is an example of – and this is the fourth time this argument has been brought before a court, so matters are complicated where continuous fresh evidence is adduced before appellate courts, and here the Crown is inviting the Court to focus on the time of the original suppression decision. The Court doesn't have updated information available as to what we've just been touching on [REDACTED] but it also doesn't have any updated information as to L's current risk of re-offending. No application has been made to adduce fresh evidence. We know that he completed a sentence of home detention. As part of that he completed the SAFE programme. But we don't know what has happened in the last 18 months.

If the Court is interested, and if this appeal would in any way turn on a current risk assessment, a current assessment of L's rehabilitation potential, then I submit that the Court needs evidence in order to reach that conclusion, and both parties are likely to have information that they would seek leave to adduce

if current risk assessment is considered relevant to the disposition of this appeal. Now the Crown's not inviting the Court to do that or to go down that path, but if the Court is minded to go down that path then the Crown does wish to be heard by way of evidence on that point.

So I think where I was – I think I've completed what I need to say in terms of the mental anguish [REDACTED]. We've touched on the vigilantism point which was the next point in my notes, and social media we've touched on a little and undoubtedly the landscape has changed for the Courts over the last few years. We can no longer say that yesterday's, today's news is tomorrow's fish and chip wrapper. Things do remain on the internet forever. That doesn't mean though that everything on the internet is immediately accessible to people. Social media does give a voice to more people that can be found on the internet but I think the Court will accept there's an awful lot of words on social media out there and the words that are said about L are in that very big, I don't know what the right word is, but morass of social media out there and should not – it doesn't follow that everybody hears every voice on social media. People may need to go out and look and search particularly for it in order to see it. It also doesn't follow that everybody in the community places a great deal of weight on those voices.

1250

WINKELMANN CJ:

But if we look at it from a youth justice point of view, just the fact of being able to search for it, so even if you assume that over time the deluge that there absolutely has been in this case eases it's inconsistent with his potential for rehabilitation if you can just put a search in and the deluge re-emerges. So what do you say about that? I suppose it takes us to the – if you accept we've got through the first hurdle, which I think you do, and we're at the threshold and we've got youth justice principles applying, what about that then?

MS JOHNSTON:

The Crown accepts that youth are more vulnerable to social media. Youth who, generally speaking, engage more with social media are obviously – it's

obviously a strong factor the Courts will need to consider and the Crown would say have considered here. In terms of the voices out there saying negative things, and perhaps I'm repeating what I've already said, but people have always said, in my submission, nasty things about people, uninformed things about people charged with and convicted of criminal offences. Simply because some of these words are recorded on the internet doesn't mean that everybody reads them, although they may, if they use the right search terms, and I don't have the technical knowledge to know really to what extent people can do that.

WINKELMANN CJ:

His name. Search term would be his name.

MS JOHNSTON:

Search his name. The extent to which if you search his name you would come up with anything beyond the mainstream media, the extent to which that's going to reflect every Facebook post or Twitter tweet, I don't know, but I accept it's out there. But I also don't accept that people put a great deal of weight on what Joe Bloggs124 has said on Twitter about someone. Back in the age before social media people I imagine put weight on what a reporter might say about somebody and conclusions that a reporter subject to their obligations and guidelines might say, the expression of opinions they might reach based on their research and journalism, but it's not right to say that a general member of the public would place the same weight on what, I don't know, Bob124 has said on Twitter or what some other person has said on Facebook about what they reckon should happen in this situation. It's –

KÓS J:

But we did have a basic re-assumption of privacy underlay the Criminal Records (Clean Slate) Act 2004, for instance, that essentially people could put their convictions behind them and move back into an ordered place in the world. It's so much harder now when this "dirty slate", dirty private slate, remains available.

MS JOHNSTON:

Yes. I guess part of the response to that would be that that engages differently for somebody committing a "clean slate" offence or for somebody committing an offence that results in a discharge without conviction like Mr X and the appellants in *DV*. It's quite different for somebody who has committed offending of this nature where there is a much stronger public interest in the public knowing, the public being able to say: "I'm going on a date with somebody and his name is such-and-such," and being able to Google that name, and there is a public interest I would say in people being able to do that and find out some information. It doesn't follow that then that person who Googles that name is then going to engage in all of the opinions from all of the commenters on social media about what they think about this offending.

KÓS J:

So then I put to you the question that I put to Ms Priest which is doesn't that then drive L here to having to change his name so he can resume a normal life?

MS JOHNSTON:

Well, that's an option available to him. I think some of the problem here is the function of the conviction and that's something that there's a public interest in knowing. Another option for him would be to simply hold tight for the difficult period where there is an intense period of social media commentary and hold tight, to stay off social media, to look after himself with his family for that period, wait until that interest dies down. He can go on social media and use a different name. He can change his name if that's what he elects to do, and then it's really for him to resume life with accountability and I think something that is perhaps lost in the analysis here thus far is that accountability for behaviour is a youth justice principle. It's one of the key factors in Oranga Tamariki Act that the Courts should take into account as promoting in young people a sense of accountability, and yes, going forward I acknowledge it would be difficult for L having people know about this and having people being able to find out online what others back in 2023 said about him, but that is also a function of public social accountability.

1255

WINKELMANN CJ:

Well, we're outside social media now. We're really just in general name suppression point, aren't we? I mean it's, he…

MS JOHNSTON:

I've lost my structure, yes.

WINKELMANN CJ:

Well, I'm not saying that you've lost your structure. I'm saying that social media is one thing but the fundamental issue in this case really is about him being able to move beyond this at some point in his life and whether it's social media or just the mainstream media, naming him will prevent him being able to move beyond that. So I think you're probably not losing your structure. You're coming to the point. You're saying that yes, he will carry it forward with him and that's appropriate accountability and it's also appropriate for public safety.

MS JOHNSTON:

Yes. And if I could just take issue with the word "prevent" there, I don't accept that publication would prevent L from leading a productive life, a life where he finds his place in society. Yes, it will make it more difficult but at some point in his life he will be able to say: "Yes, I did some terrible, terrible things when I was young. After that I got diagnosed with autism. I've done these courses. I have learnt this. I now demonstrate how much I have changed my life," and maybe I'll be accused of being naïve here but society may well accept that and should accept that and we shouldn't assume that all members of the public will not accept that and will not enable him to find his place in the community after X number of years, once he's done his courses and able to demonstrate, and that's where in some ways, where youth is relevant in a different way to name suppression because a young person has an opportunity to look forward and to say: "I have changed. This is about what happened when I was young and I have changed," that perhaps older people it's more difficult for them to demonstrate that to people in their future.

GLAZEBROOK J:

Before you've finished on that topic, can I just check you did touch on this I think because it's not just the effect in the future of what other people might think, it's actually the effect on the young person of that social media pressure and especially it's argued somebody like L because of his autism and the fact that he won't be able to stop himself looking at those comments, and then the alternative is staying off media altogether and then becoming more isolated and affecting his – that's as I understand the submission.

WINKELMANN CJ:

Akin to social ostracism I think was what was said.

GLAZEBROOK J:

Yes. I mean I think your answer was they can stay off for a time and let the real flurry go down and then come back. Is that the only answer to that?

MS JOHNSTON:

That is an answer. Another answer in terms of the relevance of the autism is that I think the expert evidence refers to L being more likely to ruminate. I don't understand the expert evidence to support the proposition that he's unable to stay off social media because of –

GLAZEBROOK J:

No, no, I wasn't suggesting that. It was just that – well, I mean the trouble is if you stay off social media then you become isolated. If you go on you see these comments and that will cause perhaps more stress to somebody like L than it would to an older person or even another youth.

MS JOHNSTON:

Certainly accept that both the autism and the youth are factors that will make social media commentary more difficult for L. Also there are steps he can take and I don't accept that he would need to completely ostracise himself from social media. There are steps he can take on social media, and I think counsel for NZME have touched on this in their submissions, steps he can take to avoid

seeing comments online. He can go on social media and use a pseudonym, as many people do, so he's not then tagged, and he can avoid reading those things. I mean it's not like opening a newspaper. You have to go look to a certain extent and it's within his power to not Google himself every day I guess is one way of putting it.

WINKELMANN CJ:

Right, well, we'll take the luncheon adjournment now, Ms Johnston. What do you think in terms of your timing?

MS JOHNSTON:

I think I'm probably half way through, possibly more.

WINKELMANN CJ:

Good. We'll take the adjournment.

COURT ADJOURNS: 1.00 PM

COURT RESUMES: 2.16 PM

WINKELMANN CJ:

Ms Johnston.

MS JOHNSTON:

In terms of the agenda that I started with, I think I've said what I wanted to in terms of the first two topics which was the factual matters and the threshold stage, and I now propose to address the discretionary stage of name suppression and, of course, the Court is well familiar with the principles applying to appellate reconsideration of a discretionary exercise and, of course, one of the things the Court is looking for here is whether there was an error of law or principle in the decisions of the Court below. One of the errors of principle that I apprehend is being argued by the appellant –

GLAZEBROOK J:

Just to note, I'm not entirely sure that this is a discretion rather than an evaluative decision and the principles on appeal might be different.

MS JOHNSTON:

At the second stage?

GLAZEBROOK J:

At the second stage.

WINKELMANN CJ:

Yes, I share that concern.

GLAZEBROOK J:

So if it's evaluative then effectively we would make the evaluation.

WINKELMANN CJ:

Having said all that, there is an issue in this case, isn't there, I think about – well, you want to address that. I'm sorry to interrupt. I'm adding a different thought. But there's also an issue about what the test is and you're going to come onto that at the discretionary stage?

MS JOHNSTON:

Yes, and I mean I think – I should note at this point that the Crown hasn't understood that to date that the discretionary nature of the second stage was challenged, so that may be a matter that the Crown would need to file supplementary submissions on. Certainly happy to do that, and I imagine that will be of more value to the Court than me giving thoughts now.

WINKELMANN CJ:

Yes, well, just as a general indication, what is said to be true discretion has been through a long series of cases reduced quite considerably and it's really quite a narrow zone in terms of the appellate threshold approach issue. But

you're not in a position to address on that today because it hasn't been notified to you and you want to file submissions, right?

MS JOHNSTON:

Yes, if the Court would be assisted by that which it sounds like you would be, so yes.

KÓS J:

I wonder if we should have a discussion about that perhaps call for them?

WINKELMANN CJ:

Yes, well…

O'REGAN J:

Yes, I think you should just address us on it on the basis it is a discretion and then we can ask you for more submissions if we decide that it's not.

WINKELMANN CJ:

Well, I mean it doesn't make any difference to the submissions you make anyway, does it? It's simply as to the standard appellate scrutiny.

MS JOHNSTON:

And I guess the point I was about to make was about an error of principle which will be relevant for the Court to consider whether it's discretionary or evaluative.

O'REGAN J:

Well, you're basically saying that the decision's right.

MS JOHNSTON:

Yes.

O'REGAN J:

So that's all you'd need to say on either basis, isn't it?

MS JOHNSTON:

Yes. It obviously affects the extent to which this Court can reach a different view.

WINKELMANN CJ:

Before you get to the application of the discretion you need to address how it's framed legally which is one of the things that's said against you in relation to how *DP* should be changed.

MS JOHNSTON:

Right. Whether there is a presumption.

WINKELMANN CJ:

Yes. I think, well, if we – yes.

MS JOHNSTON:

Whether there is a presumption in favour of publication for a young person is the issue there.

KÓS J:

That's right.

WINKELMANN CJ:

Once one of the threshold's grounds is met is there a presumption against publication for a young person, I think was how it was – it was put that there was once the threshold had been crossed.

MS JOHNSTON:

Yes, and in terms of that question the Crown's position is that a presumption is a matter for Parliament. It's very squarely a matter within Parliament's domain. Section 200 was enacted against a background of decades of common law recognising the presumption or the importance of open justice.

GLAZEBROOK J:

Certainly that's true, but what Parliament has said is there's actually already a high threshold in the considerations under subsection (2). Do you need any presumption on top of that or do you just weigh after that, because what you've got to get over – so in terms of extreme hardship you have to get over the threshold of extreme hardship. Do you say there's a presumption in the case of extreme hardship that you would always publish? Well, that doesn't make any sense because extreme hardship is already an exception, a possible exception to the principle of open justice.

MS JOHNSTON:

The extreme hardship demonstrates that the Court should then consider whether or not to exercise the discretion, reach a decision to grant name suppression, but it still must be relevant for the Court to take into account the principles of open justice in –

KÓS J:

Yes…

GLAZEBROOK J:

Of course, nobody is suggesting that's not the case, but do you have a presumption that despite extreme hardship you publish, that you have to displace? It seems to me that it's a double, because you have to get to the extreme hardship to even consider whether you would suppress.

MS JOHNSTON:

So the question being put is whether there still is a presumption once –

WINKELMANN CJ:

In favour of publication.

GLAZEBROOK J:

Yes, yes, once you've passed those thresholds.

MS JOHNSTON:

Yes.

GLAZEBROOK J:

I accept that some of the other thresholds might be lower than extreme hardship; that's why I've picked extreme hardship.

MS JOHNSTON:

Right.

WINKELMANN CJ:

Do you say there is a presumption in favour of publication even once the threshold's crossed because I assume you don't because you've just said that presumption is a matter for Parliament and that's not the statutory scheme. There's no statement of a presumption in favour of Parliament – of publication once you've got to the threshold. It's just the evaluative exercise.

1425

MS JOHNSTON:

Section 200 is enacted against a background of years of open justice and against –

WINKELMANN CJ:

Yes, so that's the starting point.

MS JOHNSTON:

Yes, yes, and once the Court is satisfied the publication would be likely to reach one of those thresholds, the Court then goes on to consider whether the crossing of that threshold is sufficient to displace presumption of open justice.

KÓS J:

"May" is doing a lot of work here. The single little word "may" is doing a lot of work.

MS JOHNSTON:

As it often does in a discretionary exercise, yes.

ELLEN FRANCE J:

In *Robertson* it simply says: "At the second stage, the judge weighs the competing interests of the applicant and the public, taking into account such matters as…" That seems to be a weighing exercise rather than a displacement of the presumption.

WINKELMANN CJ:

I don't think you're arguing that there's any kind of presumption. You're saying there's no presumption which is consistent with *Robertson*. It's a weighing.

MS JOHNSTON:

I understand the point, yes.

GLAZEBROOK J:

Well, the way you put it you did have a presumption because you say at the second stage you still work out whether you displace it.

MS JOHNSTON:

Yes.

GLAZEBROOK J:

And then the question is whether it's actually that or whether at the second stage you're just saying, well, having passed that threshold so you can consider it, you just take everything into account and decide.

MS JOHNSTON:

And so maybe it doesn't make a difference. It's simply a weighing at that point and so long as all factors are weighed in that's what's –

GLAZEBROOK J:

And with obviously accepting the importance of the principle of open justice but maybe also accepting the importance of youth principles?

MS JOHNSTON:

Yes.

WINKELMANN CJ:

I mean that's consistent with authority. You'd actually be asking us to raise the threshold if we were to start the new presumption at the discretion end. So I don't think you'd be conceding anything.

MS JOHNSTON:

Thank you. In terms of – yes, where we started here is whether – and I think I need to finish responding to the proposition that there is or should be or that this Court should read in a presumption of suppression for a young person and I clearly submit that that is a matter for Parliament. It's quite clear from the statutory scheme that once a young person who is in the Youth Court and has statutory suppression by virtue of the Oranga Tamariki Act leaves that Court, that Act no longer applies and L has left that Court for two different reasons, one by virtue of the seriousness of the offending, the 14 to 16-year-old Youth Court offending moved up, the 17-year-old offending is carved out as a District Court matter, so for those two reasons he ends up in the District Court where the normal CPA provisions apply and in that legislation there are a number of carefully thought out statutory exceptions and statutory presumptions, such as the presumption that victims of sexual violence have automatic name suppression, such as the presumption that witnesses under the age of 18 who are in court, give evidence, they get statutory suppression. As against that background, in the context of that legislation, it's not open, the Crown says, for this Court to read in a presumption wholesale of suppression for a young person who has ended up, for whatever reason, before the adult courts. In that, I'm essentially asking the Court to endorse the Court of Appeal's reasoning in *DP* there.

O'REGAN J:

But you are not contending for a presumption of publication?

MS JOHNSTON:

I'm not –

O'REGAN J:

I don't really think you can. I mean the default position obviously is publication. If an order under section 200 isn't made, it'll be published.

MS JOHNSTON:

Yes.

O'REGAN J:

Right. So that's all it is, and so once the threshold in section 200 is passed the Court is then considering whether publication should happen notwithstanding the fact that the test for exercising the section 200 power is met or not, and that's just as Justice France said, it's just a matter of weighing up the interests of the public and the interests of the person seeking suppression.

1430

MS JOHNSTON:

Which is *Robertson* I guess.

O'REGAN J:

Yes.

MS JOHNSTON:

Yes, and so that's then a case where there is a range of factors for the Court to consider and –

GLAZEBROOK J:

And do you accept that the use of the defendant in UNCROC type values would be in that mix?

MS JOHNSTON:

Yes, and that youth would be *a* primary consideration, not *the* primary consideration, not an overwhelming consideration but one matter that needs to

be weighed up by the Court in reaching that evaluation or exercising that discretion depending on where we get to on that, and again I'm effectively asking the Court to endorse what was said in *DP*, that the interests of the child is a primary consideration, and that reflects the immigration case law that I think both counsel have referred to briefly in footnotes.

ELLEN FRANCE J:

I can't remember whether under UNCROC there's the ongoing reporting requirements for the government to the relevant United Nations body in terms of compliance with the Convention. I was just wondering if the government in that context, assuming there is that reporting requirement, whether there's been any discussion about compliance in terms of our legislation on name suppression?

MS JOHNSTON:

We have looked at, the Crown has looked at that material and not been able to find anything on point. The focus is on other issues in terms of New Zealand's reporting in compliance with UNCROC.

ELLEN FRANCE J:

Right.

WINKELMANN CJ:

So we have got an offshore protocol require reporting but we haven't reported on this you think?

MS JOHNSTON:

There are reports, I might get the terminology wrong, but nothing on the name suppression issue and that maybe that New Zealand is not actually inconsistent with, New Zealand's legislation isn't actually consistent with UNCROC, given that the primary method by which young people are brought before the Courts is within the Youth Court where there is statutory name suppression there is a carveout in New Zealand legislation for some young people to end up in adult courts, and I don't know, there's certain policy material that says that's a bad

thing but nevertheless that is New Zealand's legislation, and Article 1 of UNCROC defines "a child" as a "human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."

So it may be that it is open to New Zealand, as a States Party, to have the primary youth justice regime give name suppression consistent with UNCROC, but also to have an exception, essentially, for serious offending when it ends up in the District Court, and that's not necessarily inconsistent with UNCROC.

WINKELMANN CJ:

Well it's also that this provision has sufficient scope to preserve youth principles anyway, would be the other point about it not being inconsistent.

MS JOHNSTON:

In terms of the general best interests of the child?

WINKELMANN CJ:

Because even the general, I can't remember what it's called, general comment –

GLAZEBROOK J:

General comment did say you could have –

WINKELMANN CJ:

Comment allows for exceptions so…

MS JOHNSTON:

And I –

GLAZEBROOK J:

And the general comment isn't…

MS JOHNSTON:

Binding.

GLAZEBROOK J:

Yes and may go further than, in fact, is required under the Convention.

MS JOHNSTON:

And there is a textual argument in terms of the interpretation of "Article 40" they think counsel for NZME has made, and I wouldn't propose to steal that point from them, but there is a question as to whether that guarantee to have privacy fully respected at all stages of the proceedings on the text of UNCROC actually applies to somebody like L who is, in fact, convicted. Within the text of that Article it's actually referring to those who are alleged or accused of having infringed the criminal law. So in terms of that narrow provision in Article 40, that doesn't necessarily apply to the circumstance, but the more important point perhaps is the more general right to privacy, the more general best interests of the child principle, which I accept must be taken into account and was taken into account.

WINKELMANN CJ:

And possibly reads against such a narrow reading as well.

MS JOHNSTON:

Yes. That's all I would propose to say about the youth justice UNCROC point, unless there's anything else I need to address. The other sort of point of principle that the Crown has responded to is this point that the Court, point made on behalf of the appellant that the Court should have looked at whether it is actually in the public interest to publish L's name, and the Crown rejects that submission. There is very limited scope for the Court to need to look for a particular purpose in publication. The general principle is that somebody who has been convicted of an offence, their name should be published, and –

WINKELMANN CJ:

Well, I mean that's not quite right because the Courts do look, they do tease out the various interests that are supported by the principle of open justice when evaluating these matters, and that's why they weigh things like public interest, but also they weigh the risk of re-offending, because open justice also, serves

many interests, all purposes, accountability, freedom of expression, public interest. It also serves a public safety feature, so you'd want the Courts to be able to look at those different aspects, wouldn't you?

MS JOHNSTON:

Yes, and the point I'm trying to make is that the Court shouldn't need to be looking for a particular purpose, and this is an issue here given that so much has been published, as my learned friend has said, about this case already, and the Crown would say the fact that there has been public comment about the sentence, there has been public comment about whether he should get name suppression and the victims assisted the community by addressing the need for consent education in schools, and all of that valid social commentary. The fact that that has all happened doesn't then mean that the Court needs to find another specific reason why L's name should be published, because those other core reasons behind open justice remain, that your Honour has just touched upon. Also of course the common issue that arises in name suppression cases, that publication of names does enable others to come forward, as the Court has seen happen before.

I think where that then takes me is to the rehabilitation point, and the Crown of course recognises that there is a greater potential for a young person to rehabilitate, and that's a relevant factor and the Crown in this case right from the District Court acknowledge that that was a relevant factor in terms of the name suppression decision here, and there was obviously a clear public interest in L's rehabilitation.

I do submit that the Court needs to think about what that means, what rehabilitation means, and there's more than one aspect to that, in my submission, there's – and the Crown says the primary focus here should really be on the prevention of re-offending, which is an important aspect of rehabilitation, and that point is not inconsistent with publication. So to the extent rehabilitation is about prevention of re-offending, there's no indication that the publication of L's name would interfere with that. There's no indication that

somehow by having his name published that would prompt him to re-offend in a way he otherwise wouldn't.

WINKELMANN CJ:
Well no one is suggesting that's right.

MS JOHNSTON:
Well it is being suggested that publishing his name would put his rehabilitation to waste, and it's that point I'm responding to, because to the extent the rehabilitation is about prevention of re-offending, publication is consistent with that. It assists members of the community.

WINKELMANN CJ:
No, the general submission is that publication of offending generally can prevent a person establishing a prosocial life, and that's the general underpinning of UNCROC on this issue.

MS JOHNSTON:
Yes, and to the extent that the rehabilitation aim is avoiding the ostracism and enabling L to find his place in society. I certainly accept that publication will make his life more difficult, but there are other hypothetical cases the Court could think about where publication of a name might directly drive offending, perhaps a hypothetical is someone whose offending was driven by economic deprivation, who then when their name is published it is more difficult for them to get a job, drives them back into economic deprivation and then drives the offending. That's not a dynamic that's present in this case.
1440

My learned friends talked about all the expert evidence that supports the argument that L's name should be suppressed but nowhere in there is there evidence from any of these experts saying that publication of his name would contribute to possible re-offending. I take the point in terms of finding his place in –

WINKELMANN CJ:

I just don't think that's a realistic expectation that you're going to get evidence to say publication will contribute to re-offending. It's the theoretical and evidential basis of UNCROC that enabling people to move on is supportive of the establishment of a prosocial life.

MS JOHNSTON:

And I accept that aspect of it. I'm also asking the Court to bear in mind the extent to which publication is consistent with avoiding re-offending.

GLAZEBROOK J:

Is that because – is the submission that then potential victims know of the risk? Is that the thinking?

MS JOHNSTON:

And they can make their own decisions.

GLAZEBROOK J:

Yes, I understand, yes.

MS JOHNSTON:

And that does tie in, I think, to the discussion we've been having about social media because the flip side of social media, or another aspect of social media, is that young people today are constantly in contact with one another via these vast platforms, so young people are able to be in contact with a far greater number of people than they were able to, you know, 10, 15 years ago, and so perhaps the flip side of that is that there is a greater need for the community to be protected and a greater need for this information to be available.

Once upon a time when someone's making a decision about whether to go on a date with somebody, they will have met them through some kind of immediate social contact and will have that social fabric around them to give them warnings where appropriate. Today young people can, through dating apps and social media, access a vast number of other people that they can be in contact with

that they have no information about, they have no existing social connection to, and the flip side is that they then have the ability to Google somebody before they decide to go on a date with them.

KÓS J:

Assuming they haven't used one of your pseudonyms.

GLAZEBROOK J:

Yes.

MS JOHNSTON:

Yes.

WINKELMANN CJ:

Exactly.

MS JOHNSTON:

Well, I don't think that takes away from the general principle. I take the point, but, I'm probably repeating myself, but it's…

WINKELMANN CJ:

You don't get to see the person in their social context and their social fabric and pick up all the indicators that you might otherwise.

MS JOHNSTON:

Yes, and people do meet each other online and as the Court will know there are cases where dating apps are used by offenders to find people that they then offend against, and so there is perhaps a greater social need for free information being available and whilst we've talked about some of the bad sides of social media and the fact that there will be the horrible things out there, it also can be a protective factor.

The next discretionary factor that I propose to touch on in relatively brief terms is the views of the victims. The Court has acknowledged the presence of some

of the victims in the back of the Court today who maintain an interest and some of whom who have put material before the Court that I know the Court has read and the Crown has identified key things from those affidavits, the very real practical impacts on these young women during the time that they have needed to comply with interim suppression, their desire for accountability, both in terms of a justice or penal accountability and also the social accountability in terms of L's interactions with others in the community and also their freedom of expression rights, and the Court asked earlier about the role of these young women as children at the time under UNCROC and freedom of expression, as the Crown has said in written submissions, is a relevant right that's engaged there.

1445

Undoubtedly, a decision whether or not to publish L's name doesn't undo the harm that has been done to these young women, but nevertheless the Court is statutorily mandated to take their views into account and it may that the Court, having had the opportunity to read that material, will have a better understanding of the background reasons why these young women and their families have such strong views, because it has affected their day-to-day lives, and part of the reason why we are here is to consider the relevance of youth to this exercise, and one of the stand-out features here, in the Crown's submission, is that by function of their age these young people are in the same social circles. Many of them are getting first jobs and interacting with one another in large parties and at tertiary institutions as many people of their age do. So by function of their youth those issues are acute here.

The appellant has characterised the victims here as wanting to shame him and to seek retribution, and that, with respect, is an unfair characterisation of their aims here. What these victims are asking for, to the extent they are able to ask this Court for anything, is, in the Crown's submission, no more than the usual consequences of criminal convictions should apply. They're not asking L to stand in a public square with a sign around his neck to be publicly shamed. They're asking that there be some difficult social situations in the future. They're asking to be able to tell their friend: "Maybe you don't want to go on a

date with that guy. Maybe you don't want to go to a party at that house." They're asking for him to have to have some difficult situations in his future where he has to explain to people: "Yes, that is me. This is what I've done since then. You can trust me now for these reasons," and that is part of the usual social accountability that should result from criminal offending in the usual course, and I think I've touched on this already, I don't want to belabour the point, but that ties in with the important aim of accountability and promoting in a young person a sense of accountability is a youth justice factor, so it's not inconsistent with youth justice principles to ask, or for the Court to require, L to publicly live with that consequence.

WINKELMANN CJ:

Although he has faced accountability, hasn't he, to date? He has faced accountability, just that accountability hasn't included the publication of his name.

MS JOHNSTON:

In terms of the sentence he has received, yes, but yes, it hasn't – he hasn't faced social accountability, if I can make that distinction.

I acknowledge that there is an argument that's made that one victim, who's the young woman who wanted to approach her tertiary institution so that she would not be in contact with L, and she backed out of that meeting because she was afraid of breaching name suppression, and my learned friend makes the point that in accordance with her reading of this Court's decision in *Hayne* the university had a genuine interest in knowing so she could have told them, and that may well be the correct legal outcome but that is an awful lot to put on the shoulders of a young person in the community and it may well be legally true but it's not an easy answer. It's not an easy law for any of us to apply, and whether or not that is the case doesn't matter, in my submission, to this Court's decision because what matters here is that these victims are hyper anxious. They are part of the – part of the impact of name suppression for them is that they are continually concerned they'll be accused of committing a criminal

offence, and that is something that this Court can bear in mind regardless of whether they are legally correct on that.

I think that then covers everything I was proposing to say about L's appeal and I'll move onto [M's] appeal unless there's anything else I need to cover.
1450

So there are really two questions in terms of [M's] appeal and one is the statutory interpretation question of whether section 200(2)(f), which I think we have on screen, can be used by a defendant to obtain suppression of his name on the basis of the hardship to a connected person that has led to suppression of their name under section 202, whether section 200(2)(f) can be used as a threshold ground in those circumstances where section 200(2)(a) on its face requires that where a connected person's hardship is a ground for suppression of the defendant's name, the threshold should be extreme hardship, and in terms of that statutory interpretation point the Crown refers to the need for section 200(2)(a) to be given effect to. The Crown refers, as we have in the written submissions, to the background material from the Law Commission that suggests that the legislative intent was for extreme hardship to be the threshold for a connected person. The Crown also refers to section 202(4), which perhaps if we move down to section 202 –

GLAZEBROOK J:
Can I just check, the Court of Appeal didn't say there wasn't an ability to give name suppression on the basis of (2)(f) where it was, so are you going further than the Court of Appeal? Because the Court of Appeal didn't say as a matter of statutory interpretation there has to be extreme hardship for (f) to lead to – do I mean (f), sorry.

O'REGAN J:
[M] and L.

GLAZEBROOK J:

No, I think it is (f), to lead to the suppression of the person's name. You seem to be saying that you can't suppress unless it's extreme. Even if it would lead to identification?

MS JOHNSTON:

Yes, that's the argument I'm putting forward, and –

GLAZEBROOK J:

So you're going further than the Court of Appeal did in this case?

MS JOHNSTON:

Well –

GLAZEBROOK J:

They just said it would be unlikely. They didn't say it would be impossible.

MS JOHNSTON:

No, they said it would be unlikely that suppression would be granted at the discretionary stage and so what I'm trying to address is the earlier point, which is whether 200(2)(f) can be used in this way, which the Court assumed it could, and given –

GLAZEBROOK J:

And you're saying they were wrong? That it has to be extreme before you even get to discretion?

MS JOHNSTON:

That's the argument I'm putting forward on the basis that this is one of the grounds upon which this Court granted leave, and maybe I am misunderstanding that grant of leave, but I mean my primary submission is that the discretion –

GLAZEBROOK J:

No, I'm just checking what the submission is. So the submission is you don't pass the threshold even if it might lead to identification of a suppressed person's name, unless it would cause extreme hardship to that.

MS JOHNSTON:

If that suppressed person is a connected person, that 200(2)(a) would apply to it, yes. That's the argument I'm putting forward.

GLAZEBROOK J:

Does that really apply if you, if the person might be a connected person but a young child?

MS JOHNSTON:

Does it apply if the connected person is a young child? I think –

GLAZEBROOK J:

It just seems to be a very – it is a separate ground, it doesn't say you have to have extreme hardship before any of those others apply, does it?

MS JOHNSTON:

No, but it does say that the threshold for a connected person is extreme hardship and if –

GLAZEBROOK J:

All right, so you say that that colours all of the other provisions?

MS JOHNSTON:

Yes. In terms of the question about a young child, I think that the way that concern would be taken account of is that it would be easier for a young child to reach the threshold of extreme hardship under section 200(2)(a) so they wouldn't need to have recourse to (f) and section 202.

GLAZEBROOK J:

All right, so the argument is you don't even get to the discretion stage if you can't show extreme hardship, even if you meet any of those other provisions? 1455

MS JOHNSTON:

Yes, and this is against a background of perhaps all defendants before the Court will have a connected person who will suffer some hardship from publication of name, and that's well recognised by the Courts in every case and of itself shouldn't be a factor that results in the suppression of the defendant's name. So in the way that it's argued that 200(2)(f) can be used for a connected person that undercuts.

GLAZEBROOK J:

Well, (2)(f) only happens if that person has suppression which at the least they would have to have, show undue hardship.

MS JOHNSTON:

For the publication of their own name, yes.

GLAZEBROOK J:

Yes.

MS JOHNSTON:

Yes, and that undue hardship is a lower threshold than extreme hardship.

WINKELMANN CJ:

But it's a higher threshold than the harm that is caused to every person who is connected to a defendant, isn't it, because that's what the cases say, I think?

MS JOHNSTON:

Yes. Undue hardship is more than hardship, yes, and on this point I have to acknowledge that *Sansom* and other cases my learned friend has put before the Court are against the position I have just put forward, so I acknowledge that,

but I nevertheless make the argument for this Court's consideration and perhaps the – well, the more important point is what then happens at what before today I was calling the discretionary phase, but at the second stage of name suppression what then happens, and this is where the Court of Appeal has suggested it would be unlikely in that circumstance that suppression would be granted, and so I understand that really to be an argument that this concern about 202 and undue hardship under 202 and 200(2)(f) being used to circumvent the extreme hardship, avoid the extreme hardship threshold under 200(2)(a), that all comes out the wash in the second stage because that's where the Court takes into account, well, is this right for us to weigh the interests of that connected person and hardship to them greater than all of the public interest open justice factors that we all know about?

WINKELMANN CJ:

It's a very blunt kind of a tool though. Just it's unlikely that discretion will be exercised in that case. Can you suggest any other more nuanced approach or do you think that's all you can have?

MS JOHNSTON:

I think that the more nuanced wording would be that that is a factor that can be taken into account at that stage, the fact that the extreme hardship threshold hasn't been met.

I think the submission the appellant makes here is that there is a – what the Court of Appeal's characterisation is imposing a new threshold and perhaps that's what your Honour's referring to when you talk about the likelihood, unlikely that that would happen, but the Crown says it's simply another factor that should be taken into account at that stage and it's long been a principle of New Zealand law that [REDACTED] shame and embarrassment to [REDACTED] is insufficient to displace that presumption and so it would be – I'm using the "presumption" word again – but to displace those other public interest factors. It's simply something that's going into the mix and a weighing factor there.

KÓS J:

I mean these two applications have got very tangled up, causing this jurisdictional issue, but the reality is you have to deal with the defendant's position first and assess whether they will get name suppression or not. If they do get name suppression then the connected person's position may not require an application.

MS JOHNSTON:

Yes.

KÓS J:

But clearly the defendant has to meet the requirement in section 200 first. Having looked at that person's status, you then look at connected persons. It should always go in that order.

MS JOHNSTON:

And there certainly has been some – I mean maybe "tangled" is the – we have had some procedure – the procedure hasn't been perfect in the way it's followed in the Courts below in terms of clarity of what's being argued and –

WINKELMANN CJ:

Isn't the better way of trying to introduce the extreme hardship threshold into the (2)(f) analysis, which is a threshold which is related to the offender, is to look at the matters that favour publication of the offender's name at this point, discretionary phase for the person who's made out the undue hardship threshold, so the evaluative exercise takes into account public safety, accountability for the offender, those matters.

1500

MS JOHNSTON:

As against both the risk to his safety and –

WINKELMANN CJ:

No, no, no, just dealing with, we're just dealing with [M's] application now. You've dealt with L's, and you've decided, you've not, say, ex hypothesis in this situation, if we've got the, say if the offender's applied, and you've dealt with the offenders, and you say no name suppression for the offender, you then move onto the person in [M's] circumstance, and you consider them, you've come to the point where you're satisfied that undue hardship has been made out, come to the discretion, and at that point you take into account the issues of accountability, public safety, et cetera, which one assumes will be waiting or not, but isn't that the appropriate way of dealing with it, so it allows you to be nuanced because different circumstances will apply in different, and different considerations will apply in different circumstances.

MS JOHNSTON:

Yes, this maybe the same point, I may be completely misunderstanding, but the important point to remember is that section 200 is focusing on the publication of the defendant's name, and so if a threshold is reached on the basis –

WINKELMANN CJ:

Yes, yes, so you're in a circumstance where in order to protect the name suppression of the person under, whose made out undue hardship, you're having to suppress the offender's name. So that's the situation.

MS JOHNSTON:

Yes.

WINKELMANN CJ:

In that circumstance then those other factors come into account.

MS JOHNSTON:

And those other factors are the other factors about the need for public protection and accountability for the offender.

WINKELMANN CJ:

Yes, yes.

MS JOHNSTON:

Yes, those factors, the Crown would say obviously need to be weighing into the balance.

WINKELMANN CJ:

But if the person, yes, right, so if it didn't require the suppression of the offender's name, then those factors would not be taken into account. If it just required – if the person in [M's] circumstance was simply seeking suppression of [M's] name, yes.

MS JOHNSTON:

Right, yes, and that would be under section 202.

WINKELMANN CJ:

Yes.

MS JOHNSTON:

Yes, the constellation of factors there are different, yes. So then hypothetically if the Court are – or maybe not hypothetically, then if the Court are considering the second stage, having found a threshold reached on the basis of undue hardship plus (f), on the basis of undue hardship to the connected person then calling into question whether under section 200 the appellant's name should be suppressed –

WINKELMANN CJ:

Whether the appellant's name should be suppressed to support the suppression of the –

MS JOHNSTON:

Yes.

WINKELMANN CJ:

– person's name.

MS JOHNSTON:

Then the Court will also need to consider…

WINKELMANN CJ:

All the factors that favour publication of the offender's name.

MS JOHNSTON:

Yes, yes, and I think where I was going, which was actually on principle going back a step, but the Court will also need to consider the likelihood that – can we just pull 200…

WINKELMANN CJ:

Because what it seems to me, that gives you a more nuanced approach as opposed to just saying, I can't remember what the Court of Appeal said, but unlikely I think, because it allows for different circumstances, for it to be weighed differently.

MS JOHNSTON:

Yes.

GLAZEBROOK J:

I suppose you say how undue and how close it might – so how serious those are and then perhaps on the other side if there's absolutely no reason to – you'd even consider suppressing the offender's name outside of (2)(f) then that might be an important counterbalance.

MS JOHNSTON:

Yes, and I think –

GLAZEBROOK J:

So it's a, you look at how important it is for the name to be out there and how, whether there are factors that might have given you some pause, as clearly

there are here, given youth and mental issues, and then how undue the hardship is on the other side, because some cases say undue isn't a very high threshold for connected persons but totally innocent connected persons. Some cases say that's not the case.

MS JOHNSTON:

Right, I think in *Robertson* it says that any kind of hardship is suffering and privation and then undue hardship is something more than that.

GLAZEBROOK J:

Well certainly have to be more than that but the question is how much more than that I suppose.

1505

MS JOHNSTON:

Yes, and then how that weighs against all the other public interest factors that I've already addressed, I think, and the last two pages of our submissions were really designed to make clear the Crown's submission on if the Court were to conclude that two thresholds are reached, here essentially, one, the risk to safety to L which isn't challenged, and then, second, whether if the Court then accept that 200(2)(f) is engaged on the basis of the undue hardship the Court of Appeal found to [M] then where do we get to in terms of the discretion or the evaluative exercise, and while the Crown acknowledges the factors that we've been talking about, the youth of the appellant, his autism, it should not be lost this was very serious offending and repeated offending over a period of time, that there is a public safety interest and it was open the Courts below to conclude at the time that his risk was not low, particularly given that scale of the offending and the likelihood that he will continue to socialise with people, the important views of the victims should weigh heavily, in the Crown's submission, in the Court's consideration of matters, and also the supports that both appellants have [REDACTED].

WINKELMANN CJ:

As to that, the appellants do raise the fact that if the point, and I think this resonates with me, [REDACTED].

MS JOHNSTON:

Well, I accept that's a burden on [L's] family. It also places [his] family in a different position to many others that the Court sees. In *DP* the Court of Appeal referred to the deprived upbringing of that young man and his lack of social supports, and that was one of the reasons the Court concluded that he should obtain name suppression, and L is in quite a different position. It's not an absolute point but it is a factor that I submit the Court can and should take into consideration.

WINKELMANN CJ:

Yes, but you're not responding to the point I asked you to respond to which is that this is a burden that the family is basically carrying and it has implications [REDACTED] that the [REDACTED] family as an organism is subject to a great deal of stress.

MS JOHNSTON:

And I accept that. All families are subjected to stress when a member of their family is before the Courts. I absolutely accept that there is more stress here than, I don't know, perhaps the average case, or than other cases is a better way of putting it, and the Court's also seen the stress that has been caused to the victims and their families.

WINKELMANN CJ:

It's not a sum though.

MS JOHNSTON:

No.

WINKELMANN CJ:

And what we have to weigh up is the risk to mental, to young people, one of whom has got a very serious mental health history.

MS JOHNSTON:

Yes.

Those are the matters I wish to address the Court on, unless there's anything further.

WINKELMANN CJ:

Thank you, Ms Johnston. Now, Ms Goatley. I think you will probably have appreciated that we're thinking you'll be no more than half an hour, but given the matters that have been traversed today I don't think you'll have any difficulty with that.

1510

MS GOATLEY:

Thank you, your Honours. I am mindful of trying not to repeat things and with that in mind perhaps you'll excuse me if I jump around a bit just to try and make sure I cover off things that I do think have perhaps not been entirely covered, so we won't have my structure necessarily outlined in advance.

If I could start, your Honours, just by picking up on the discussion regarding *Robertson* and the two-stage test and the concern I think that was raised in relation to the presumption of open justice and where that fits, given the enactment of section 200.

If I could perhaps take your Honours to paragraphs 41 through 47 of *Robertson* which is in our bundle of authorities. Your Honours, with respect, I think those passages make it quite clear that the statutory intent behind section 200 was for the criteria which we now find in section 200(2)(a) through (h) to be an attempt to clarify and narrow down the gateway topics that could be used by an accused to attempt to get suppression, but that wasn't to import into those

gateways the principle of open justice and the presumption, because it is referred consistently through the authorities which pre-date the Criminal Procedure Act and is repeated numerous times in *Robertson*.

So, for example, paragraph 43, your Honours, not seriously arguable that the wording or scheme of the CPA has displaced the presumption of open reporting, the explanatory note that accompanied the Bill unambiguously states that the starting point for consideration is a presumption of open justice.

At paragraph 45, the key change from the previous law is that the grounds on which suppression can be granted are now specified. So codified, and obviously the introduction of the word "only" makes it clear that that's to remove the inherent jurisdiction of the Court to do otherwise, and Your Honours will, of course, remember that the enactment of the CPA was widely discussed as *increasing* the threshold for name suppression as opposed to making it easier.

Then at paragraph 46: "We agree with Mr Lithgow that the presumption of open justice is not directly relevant to the first stage of the section 200 analysis. While the presumption," and I think this is the key probably that your Honours were trying to get at, while the presumption underlies the fact of the existence of the threshold requirements, which is that subsection (2)(a) through (h), it will only be pertinent for Judges to consider the presumption of open justice in the exercise of the second stage discretion. So in my submission, your Honours, there is a presumption of open justice and it does apply at the second stage of the weighing exercise and it is then –

WINKELMANN CJ:

Well, I mean, what paragraph is that? Can we just look at that?

O'REGAN J:

46.

MS GOATLEY:

46.

WINKELMANN CJ:

So you're saying that in contrast to what Ms Johnston's saying, you're saying we should import a presumption into the statutory language even though it's not there at the evaluative stage?

MS GOATLEY:

I'm saying that the submission, your Honour, is that there has always been a presumption of open justice and that the statutory regime was not intended to, did not intend to remove it and in fact did not remove it.

WINKELMANN CJ:

So it's one of the factors? You're not saying we start with a presumption at the discretionary stage though, are you?

MS GOATLEY:

That's exactly what I'm saying, your Honour, and in my submission that's exactly what *Robertson* says and I don't understand there to have been any doubt about that when the CPA was enacted that that was the purpose of it. It's also relevant, your Honour, in terms of –

WINKELMANN CJ:

Well, I can just indicate to you I doubt that there is a presumption at that stage.

MS GOATLEY:

Well, it's relevant, your Honour, in a practical –

GLAZEBROOK J:

Can you please go down to 47?

1515

MS GOATLEY:

Certainly. So then this is a, the question on appeal was whether there was a blurring of the first and second stages because, of course, in the lower Court it wasn't clear at what point open justice had been considered, whether it was

considered as part of the first stage or the second stage, so then the Court here has gone on to say it's sufficient to state that the resumption of open justice plainly applies to suppression applications under section 200.

WINKELMANN CJ:

Because it just seems to me they're doubly weighting the presumption because the grounds that one assumes are being made out to, as evidence that it should be displaced, so then to add it back in at the second stage might be to be distorting the statutory scheme, whereas if you just take into account it's the valuative consideration that allows it to be weighed up fairly against the others. It might be quite problematic to put it in as a presumption.

MS GOATLEY:

Well, your Honour, I think in my submission there would then be difficulties in a practical respect because the existence of the presumption in my submission puts the onus on the person seeking suppression to establish not only the threshold grounds, so evidentially, but also then to show why those grounds outweigh the public interest in open justice.

GLAZEBROOK J:

There's only an onus if you're talking about evidence, isn't there? I'm not quite sure what – so I mean what you're saying is they have to show something over and above extreme hardship to get name suppression?

MS GOATLEY:

No your Honour, I'm just talking about –

GLAZEBROOK J:

What do they have to show at the second stage, that the presumption is displaced by what?

MS GOATLEY:

If I can just take a step back, your Honour, and put the submission in a different way perhaps. In any case where an accused in particular, or a connected

person is seeking suppression, the evidentiary onus is on them to establish why name suppression should be granted, and that starts off at the first stage. But then also the evidentiary onus to show that – that the open justice principle at the second stage should be displaced similarly lies on the accused, and that's not to say there's two different tests, it's just to say that the evidence has to be presented by the people in this case who have the greatest access and the ability to provide that evidence. If, in my submission, if there were no, if there were a presumption in the opposite direction, which is what I understand my learned friends to be proposing, then it would be incumbent on the Crown or the media to somehow provide evidence to show why the presumption of non-publication should be displaced, and in my submission that would create a practical issue.

GLAZEBROOK J:

Well frankly I don't think there's a presumption at the second stage just, either way, but – because it doesn't make sense in the statutory scheme that – so the counter-argument is not that there is a presumption the other way, the counter is well it's, you look at everything in the round at that second stage, weighting open justice because it's an important principle.

MS GOATLEY:

As I understand it there are two propositions that your Honours are considering. One is that there's no presumption of open justice in a general sense –

WINKELMANN CJ:

Well we might be just going round and round in circles here. You argue there's a presumption at the second stage. We're telling you we see that to be difficult because what, the person's already had to meet the ground, what extra do they do apart from ask the Judge to weigh the ground they've made against the principles of open justice. So they can't do something fresh. But you say there is such a presumption, you rely on *Robertson*, and is there anything else to add to that?

MS GOATLEY:

It's not just *Robertson*. I think the statutory intent was clear.

KÓS J:

The explanatory note in footnote 18 is probably your best point. *Robertson* is only a leave decision at the end of the day.

MS GOATLEY:

That's right. It's just the most convenient and most recent sort of encapsulation of sort of –

WINKELMANN CJ:

Can we see, not the footnote, oh, okay, right.

KÓS J:

Can you show us footnote 18 please, I've got it up.

WINKELMANN CJ:

That simply says, which I think is common ground, the starting point for considering publication as the principle of open justice. I think that's common ground by everybody today?

MS GOATLEY:

And I think inherent in that, your Honour, is the fact that it's the starting point is that it is the presumption.

WINKELMANN CJ:

At the beginning…

O'REGAN J:

I think presumption is just the wrong word.

WINKELMANN CJ:

But that's at the beginning.

ELLEN FRANCE J:

Yes, yes.

O'REGAN J:

It's the default position. Unless you get an order under section 200.

WINKELMANN CJ:

Yes.

O'REGAN J:

It'll be published.

WINKELMANN CJ:

And that's where you start off.

O'REGAN J:

So you've got to show why it shouldn't be.

1520

WINKELMANN CJ:

So maybe just – I think we've got your submission. I just…

MS GOATLEY:

The next submission, your Honours, is probably one just in terms of one of the factors that has received a lot of attention today and that is the intertwined concepts of rehabilitation and the prospects of re-offending, and, your Honours, there is a concern that there is an ongoing risk to the public through a lack of any evidence that there is no ongoing risk and in respect of that, your Honours, I just draw your attention to the sort of timeline and a couple of instances of non-compliance by the accused with his sentencing conditions that haven't been complied with. So, for example, your Honours, we understand that the alcohol and drug programme was completed by the accused in…

WINKELMANN CJ:

Just for a moment – okay, carry on.

MS GOATLEY:

So the alcohol and drug programme, or CADS, was completed in 2020 and notwithstanding that that programme had been completed by that point the accused went on to drink in breach of his home detention conditions and also was caught smoking cannabis in breach of his conditions, and just more recently, your Honours, it has come to the media's attention and there's an article included in our bundle which refers to an additional condition imposed by the District Court –

WINKELMANN CJ:

Are you offering this as evidence, the media's article, or are we accepting it as evidence?

MS GOATLEY:

I think it's been included in the bundle on the same basis as the media articles included in my learned friends' bundles, your Honour.

WINKELMANN CJ:

Yes, but that doesn't – that proved the fact of publication but I don't know that it proves conduct by L.

KÓS J:

What is it? What is the behaviour? Are we…

ELLEN FRANCE J:

It refers to – there is material about that, isn't there?

WINKELMANN CJ:

Well, I just wonder if you can just mention it to your learned friend, so we'll just be clear that we're not having material produced in court as evidence which isn't accepted. Is it…

MS GOATLEY:

I don't think – is there any issue with the condition that he not drink in a public –

MS PRIEST:

There's an article which is the annex to the media submissions. I think that's as far as they wish to take it. I'm happy to respond.

WINKELMANN CJ:

Yes, but you understand, Ms Priest, do you, that it might be taken as that Ms Goatley is offering it as evidence of non-compliance with conditions, and do you accept it as evidence?

MS PRIEST:

No, I don't accept that.

MS GOATLEY:

No, sorry, that's not what I was saying about that article, your Honour. It just reports the outcome of the most recent application by Corrections to have an additional condition that the accused not drink in public attached for his post-sentence conditions. I don't understand there to be any dispute about that, and the relevance of that, of course, your Honours, is that the imposition of that, we would invite your Honours to draw on inference from the imposition of that additional condition that there is a concern about him becoming drunk in public.

KÓS J:

But you think (inaudible 15:23:34). Okay.

MS GOATLEY:

I'd just like to step back also, your Honours, and just sort of attempt to re-cast where we sit and our understanding of what we're talking about when we consider social media and how that impacts young people. So just by way of context, your Honours, Facebook was launched in 2004. It's nearly 20 years old. It's so old that it's basically the domain of old people, like me. Twitter has been around since 2006.

WINKELMANN CJ:

We don't need a lesson on social media. Can you…

MS GOATLEY:

Well, no, your Honours, but it is being talked about in a way that suggests that it's something new and that its advent is something that needs dealing with because Parliament hasn't adequately considered it and that the, in particular, the Criminal Procedure Act in 2011 and the changes to the [Oranga Tamariki] Act in 2019 somehow didn't grapple with the reality of social media, and so the purpose for giving your Honours these dates is because they do put in context how long chatter and shouting into the ether has been around, and whether that is, whether we are discussing something in a way that reflects the understanding of the young people that we are actually talking about, and when we talk about young people, your Honours, we do need to be cognisant of the fact that we're talking about young people in a statutory way, when in fact most people are sort of under 40 are very well versed in social media, and a lot better than myself. So just to encapsulate that WhatsApp, for example your Honours, is 2009, Snapchat is 2011, and TikTok 2016.

1525

WINKELMANN CJ:

We're familiar with the social media landscape but what is said against you is that for this young person the social media is harmful, and so – and there, and we have evidence to that effect, so, I mean, a general recount of the social media landscape doesn't really respond to that.

MS GOATLEY:

In my submission, your Honour, social media exists for all accused, and so the question then is whether social media for this accused amounts to something more because of his age.

WINKELMANN CJ:

And his mental health, and his autism.

MS GOATLEY:

Yes your Honour. So against the background where those platforms have been around for a considerable time, and must be, have been within Parliament's

knowledge at the time when the CPA and the [Oranga Tamariki] Acts, well the CPA was brought into force and the [Oranga Tamariki] Act was amended, the Oranga Tamariki Act was amended specifically to bring New Zealand into line with the UNCROC age, so it increased the age at which young offenders were dealt with in the Youth Court, but there was a deliberate discussion about how that would impact the more serious offenders and those offenders who are at the upper end of the scale, and those Hansard debates are in our submissions, your Honours.

WINKELMANN CJ:

So I mean we are interested to hear from you on the points the Court of Appeal made I think in the case of, was it *X*, I can't remember, it's alphabet soup, we are interested to hear from you on that, but just sort of not generalised stuff about young people and social media. We know it's a complex issue but what the Court of Appeal has engaged with in *X*, and I think it's a fair account that the Courts have not been asked by counsel on many occasions to engage with these issues in any depth, is the implications of social media in terms of a fair sense of accountability, in terms of rehabilitation, and so we would be interested to hear from you on that I think.

MS GOATLEY:

So in that respect, your Honours, if I can target that, it's important to consider what the harm is that we are saying arises from social media, and to take into account the technological position that this accused can adopt. In my submission it is wrong to suggest that putting his name into social media will create a social isolation issue for him. The social media platforms are like any other form of communication, able to be tailored to the individual's experience. You don't need to accept every friend invite on Facebook. You can block numbers on WhatsApp, the same way you can block them on any other telephone. The real harm to this particular individual is perhaps if I can break it down, so the mainstream media reporting won't tell him anything he doesn't already know. Comments can be turned off so that you don't actually see them. They also don't generally come up in a Google search years later, because they're not attached to the URL in the same way as the article itself. So,

for example, the concern about employers or other people Google searching his name in future, if his name were published in the mainstream media then those mainstream media articles will pop up in the Google search, but the vitriol that might have been attached underneath won't, and in my respectful submission, your Honours, at that point the people searching his name will have his certificate of conviction in any event. So those articles are not going to tell a prospective employer something they didn't already know, and the employer will either be concerned by the conviction, or won't, but in any event people shouting into the ether underneath the mainstream media article is not going to create harm, and certainly not a harm different for this offender than it is for any other.

1530

So then we come to social media, and there are two types of social media that I understand my learned friends to be concerned about. The first is a sort of a general, by way of example, Reddit thread kind of social media. So these are forum, or fora, where like-minded people tend to get together and shout at each other about principles, they're commonly referred to as echo chambers, because those people tend to feed off each other's similar viewpoints.

KÓS J:

I just want to say I've never looked at Reddit. Could I go onto that and see that?

MS GOATLEY:

You can create a Reddit account and you can go on and have a look at Reddit, but in order to find particular threads you would need to search for particular strings. One of the passages of social media content that's in the bundle is a printout of a Reddit thread, but for example if you were to just Google search Jayden Meyer, for example, at the moment, because he doesn't have name suppression, you won't get Reddit threads. You will get the mainstream media articles, but you won't get Reddit thread in these other forum. Think of them as more sort of a needle in a haystack type information. They exist if you know they're there.

KÓS J:

But it's also a subscriber thing?

MS GOATLEY:

Ah, yes.

O'REGAN J:

We seem to be getting quite a lot of expert evidence on the internet.

MS GOATLEY:

Well it's just –

O'REGAN J:

You're a lawyer not a tech-er.

MS GOATLEY:

I am, but I'm a media lawyer your Honour.

WINKELMANN CJ:

I was really asking, Ms Goatley, to engage with the issues of principle that were raised by the *X* case I think.

O'REGAN J:

Let's deal with the legal issues.

MS GOATLEY:

Yes.

ELLEN FRANCE J:

DV I think.

WINKELMANN CJ:

Is it *DV*? Thank you.

MS GOATLEY:

Sorry, I was talking about this because you'd said *X*, your Honour, and I thought that was the concern, and that case was –

WINKELMANN CJ:

I asked whether I was right about *X*, but no one corrected me, thank you Justice France for correcting me now. It's, you know, the issues of principle. How we conceptually think about this, and what the Court of Appeal was identifying in a different case was the unusual burden that social media can put upon people, and in this context, a very young person.

MS GOATLEY:

The burden, your Honour, has to be understood in the context of social media being something you have to go and look for, by and large. The only context in which social media comes to a person is in that direct messaging forum, and in that context, much like picking up your telephone, you have the ability to block that content. You don't have to accept a WhatsApp invitation. So I am engaging with the principles in *DV* because it's how that harm comes to a person, and we do have to operate the legal principles in the context of a reality in which this social media exists, but also with a conceptual understanding of what social media actually is, and the harm, and people do have the ability to, this accused has the ability to step out of the bits of the social media that require him to actually engage with it before he even becomes aware of it, and in my respectful submission that is –

GLAZEBROOK J:

But what's said against that is then that cuts the person off from contact.

MS GOATLEY:

Well it doesn't cut them off from – and that's the point I was about to move onto your Honour, thank you – is that it does not cut the person off from contact with their friends. You can be friends with people on Facebook who you know and who you accept friend requests from. You don't have to –

WINKELMANN CJ:

He's probably not on Facebook, as he, he's probably not on Facebook. As you say, that's for old people.

MS GOATLEY:

It is for old people but the principle applies, and I'm using Facebook because I'm old too and I know how it works, but the same principle applies for other social media fora. You either, you choose to put your own image up there. You choose which emoji you use as your face. You choose whether you go on there as your actual name –

WINKELMANN CJ:

Okay, so anyway, you're saying it's all optional and he can make sure that his tailored social media experience is fine for him.

MS GOATLEY:

And it doesn't cut him off from his friends importantly your Honour.

WINKELMANN CJ:

Yes. I understand your submission. Okay so what's your next point Ms Goatley, because I'm just looking at the time. You did want to make a point, I think, about UNCROC?

1535

MS GOATLEY:

I did your Honour. So in my submission, your Honour, there is nothing inconsistent between UNCROC and the principles as outlined in *DP*, and in fact the principles in *DP* really recognise and reflect the flexibility given to member states who have ratified UNCROC in terms of being able to reflect the youth of a young person and, in particular, your Honours, taking into account the nature of the youth of the person because in this case – this only becomes relevant where we have a young person who is either at the upper end of the age threshold or has committed the most serious offending, and so the way in which the principles are enunciated in *DP* really reflect the ability to take into account

the nature of the youth. So, for example, the younger the young person is the more weight that can be given versus those who are at the upper end of the threshold might be less.

WINKELMANN CJ:

Well, different principles apply, don't they, at different times? So if you happen to have offended when you were 15 but you're convicted of it when you're 60, well, then the huge weight and value that's attached to the ability to be rehabilitated will not be one of the youth considerations.

MS GOATLEY:

No, that's exactly right, your Honour, and so in my respectful submission following the change to the OT Act to increase the age so that they were consistent the principles in *DP* are entirely aligned with UNCROC. The guidance note is not binding, as your Honours have recognised, and in any event, your Honours, neither UNCROC nor the guidance note, well, the guidance note to a slightly different point, but UNCROC certainly does not equate privacy with anonymity. It requires respect for privacy, and in my submission the principle of open justice does respect privacy. The fact that we have a starting point of open justice isn't inconsistent with privacy. It recognises that there are, like every other right enshrined in the New Zealand Bill of Rights Act 1990, legitimate limits where those rights butt heads, and in my submission a change to the principles in *DP* along the lines of what my learned friend is submitting would actually cause us some issues under the Bill of Rights Act which requires us under section 6 to interpret the statutes and the obligations consistent with the rights in the Bill of Rights Act, and one of those, of course, is the freedom of expression and the other one is the right to a fair and public hearing. So we do have to be cognisant that we're not trampling unintentionally other rights.

O'REGAN J:

Why does suppression interfere with the right to have an open and public hearing?

MS GOATLEY:

Because the media are the eyes and the ears of the public, your Honour.

O'REGAN J:

Well, if there's an open hearing there's an open hearing. That's all you're entitled to.

MS GOATLEY:

Well, the open and public hearing –

O'REGAN J:

There's nothing that says an open hearing requires that the *New Zealand Herald* be there to report it. There's millions of court cases happen every year where there's no media there.

MS GOATLEY:

Well, there's a different provision in the statute, your Honour, which guarantees the right of the media to be present even when the rest of the Court is closed. So there is a statutory right recognised for the media to be present. But –

WINKELMANN CJ:

In the Criminal Procedure Act?

MS GOATLEY:

Correct. But –

O'REGAN J:

Yes.

MS GOATLEY:

But I think the answer to your Honour's question is it didn't – it has been recognised –

O'REGAN J:

The right to an open and public hearing is a right for the accused person. It's not a right for the *New Zealand Herald*.

MS GOATLEY:

I wasn't suggesting that it was, your Honour.

O'REGAN J:

Why is it relevant to this decision?

MS GOATLEY:

Because inherent in the right to a fair and open hearing, your Honour, is a recognition that that's an important part of justice being done in a way that gives everybody, including the accused, confidence that it is being done and holds everybody in the process accountable.

O'REGAN J:

So you're saying we should publish his name for his own good, is that what you're saying?

MS GOATLEY:

Well, your Honour, I probably wouldn't put it –

O'REGAN J:

That non-publication will infringe his rights?

WINKELMANN CJ:

Anyway, your point in relation to freedom of expression is better made, I think. So…

MS GOATLEY:

Yes, well, this is to show that the two things butt up.

WINKELMANN CJ:

I know, I'm not quite sure that – I think, yes, you might have some difficulty with the other part of it but your point about freedom of expression is a better point and so – yes.

MS GOATLEY:

Just in terms of picking up, just picking up actually whether publication is in his own good, I wouldn't have put it quite like that, but –

WINKELMANN CJ:

Of course, just about the Bill of Rights Act, the Bill of Rights Act does not enshrine a right to privacy but it has a provision, and I cannot remember its number, but I'm sure that Justice France will again know it, which says that it does not diminish other rights which are not preserved there.

1540

MS GOATLEY:

Like all rights, perhaps, with the possible exception of the right to torture, your Honour, they are all able to be eroded by other competing rights.

WINKELMANN CJ:

Not eroded.

ELLEN FRANCE J:

In terms of –

MS GOATLEY:

Limited.

ELLEN FRANCE J:

In terms of the Bill of Rights and your argument section 14 is the more relevant, isn't it?

MS GOATLEY:

Yes, correct your Honour. Just going back to the concept of publication and what it's actual impact on rehabilitation and – would be, there is, in my submission, part of rehabilitation is rehabilitating within a community. It doesn't – and whether you can properly rehabilitate to the point where you could say you were not at risk of re-offending, inherent in that is the question of whether you can do that in the absence of the support and knowledge of the community in which you live, and that's a principle which, I'm not an expert in this area, your Honours, but that is a principle recognised in the tikanga world view where you can't reach a state of ea unless you have done –

GLAZEBROOK J:

Ea.

MS JOHNSTON:

Ea, unless you have done so in the context of doing so with the community, and so as I say I'm not an expert in this area but –

GLAZEBROOK J:

I don't think he is. It's not an individual concept so I don't think you can really translate those concepts into an individual aspect of rehabilitation because it's much more a communal aspect. But anyway.

WINKELMANN CJ:

Right.

O'REGAN J:

But if that was right the Youth Court, there'd be publication of every case in the Youth Court, and there isn't.

WINKELMANN CJ:

Again it's not your best point Ms Goatley.

MS GOATLEY:

No well I'm not, as I say I'm not proposing to get into the Youth Court side.

WINKELMANN CJ:

I think I wouldn't waste, limited time, I wouldn't be wasting time on that one.

MS GOATLEY:

Then the other point that's made in our submissions in relation to privacy is particularly section, Article 40, which does differentiate between the protections for an accused, and if you do look at the remaining provisions of Article 40 they are quite specifically tailored to considerations which should take place during the Court process. So in my submission it isn't unreasonable to then interpret the wording of the statute as it is on its face as being applicable to those accused.

WINKELMANN CJ:

But you don't argue, do you, that youth justice principles are relevant at the – I mean you're happy with the *DP* approach? *DP* approach, yes.

MS GOATLEY:

DP, yes your Honour. It's just to try and counter the argument which I understood my learned friends to be making, that that particular Article imported something more or different to the youth principles that meant they should be, in their written submissions they've elevated the youth justice principles to being *the* main principle, or *the* preponderant principle, whereas UNCROC makes it clear that youth is *a* principle, and then that's reflected in the [Oranga Tamariki] Act, which I've already said, as your Honours know, was enacted to reflect our obligations under UNCROC, and that similarly includes the youth of the accused as *a* principle and in fact there's one of four key principles which includes the rights of the victims, the need for the accused to be, or at that stage the convicted person to be accountable, and to take account of the community. So the submission is that there is nothing inconsistent, again, with *DP*, it's simply Article 40 applies during the process and not once you've got a convicted

person, and in that respect it's very aligned with the way in which the courts use the presumption of innocence in particular.

GLAZEBROOK J:

I thought the point being made against you was that the, relating to the privacy right in the general comment, I didn't understand them to be relying on Article 40.

MS GOATLEY:

It's just the way it's written in the submissions, your Honour, it's constantly referred to as *the* principle in a way that is inconsistent with the way it's referred to throughout UNCROC, which is *a* principle, which recognises that it has other principles that apply along with it, which in my submission that makes it consistent with *DP*, whereas if you were to elevate it to *the* principle there might be a misconceived idea that makes it inconsistent with *DP*.

1545

WINKELMANN CJ:

So are there any other points you want to cover, Ms Goatley?

MS GOATLEY:

Apologies, I have notes all over the place.

WINKELMANN CJ:

I can understand that.

MS GOATLEY:

Actually your Honours in relation to [M's] appeal, which we haven't traversed, we take a slightly different approach to the Crown, but I think it's clear in our submissions that the statutory interpretation for the interplay between section 202 for a connected person who reaches undue threshold, we say that the Court of Appeal applied that entirely correctly by recognising that there was the potential for [M] to be identified, but then the threshold is where that

comes – where the analysis comes into play. When you then look at section 200(1)(f) you then apply the threshold, and that's why the –

GLAZEBROOK J:

What do you mean by "threshold" sorry?

MS GOATLEY:

Sorry, once you've met –

GLAZEBROOK J:

The discretion?

MS GOATLEY:

Once you've met the threshold you then go on with the weighing exercise.

GLAZEBROOK J:

All right, thank you.

MS GOATLEY:

And that's why it's important that the presumption of open justice is in the second stage of the test, because it needs to be weighed at that point to ensure that you don't get that coach-and-four driven through the intended extreme hardship threshold for the accused.

WINKELMANN CJ:

Would the more nuanced approach that I've discussed with Ms Johnston also prevent that, because it would mean that all the other considerations that are weighing in the particular case could be weighed also. You know, safety, accountability of the accused, defendant, offender I think in the ex hypothesis, yes, offender, so those things would weigh quite heavily. So if it's, the Court might say, well, this would be difficult for you, undue hardship is met but these are powerful reasons why we must have this offender's name published.

MS GOATLEY:

I think that's consistent with what I'm saying, your Honour.

WINKELMANN CJ:

Well it's not exactly the test that the Court of Appeal enunciated, but you could say the Court of Appeal had just reached the view that when you did that you wouldn't often do it, but they certainly did enunciate – but it's a different test.

MS GOATLEY:

As I understand what your Honour is saying, yes, that must be right, because I think what the Court of Appeal were trying to say, but perhaps didn't say as completely as might have been helpful, was that if you've got a connected person, because they're connected to the accused, not connected to the proceeding, they've, if you like, just scraped in and therefore if they're just scraped in, when you start with the presumption of open justice, that the weighing exercise under section 200(f) you're then looking at well you just scraped in, whereas on the other hand we have an offender who has, you know, a likelihood potential for re-offending, et cetera, et cetera, and of course then it would be very unlikely that an undue hardship connected person would ever outweigh open justice for the accused's name suppression, and in my submission the rationale behind that is that he majority of the protection for the connected person come from their name being suppressed, which is in my submission the case in this case because as long as social media cannot mention [M],it can't be as directed to [them]. It can't be found to be referring to [them]. The majority of the protection comes from – well the majority of the avoidance of undue harm comes from [their] name suppression being granted. So for that reason, in my submission, the Court of Appeal were correct at that point where they said well it must be unlikely, whereas you can compare that with cases where Parliament has said, statutorily victims of sex crimes and children have statutory suppression, and so then in the weighing exercise under section 200(1)(f) that must weigh higher because that's a statutory suppression that would be hard to derogate from.

1550

I feel like there are a number of things I'm missing but I'm conscious of time. Your Honours, I was concerned by the suggestion –

WINKELMANN CJ:

Your junior is about to pass you a note. She'll be mindful of what you've missed.

MS GOATLEY:

Yes. She's reminding me what I was just about to say which is fantastic; we're on the same page. There is a concern that your Honours were signalling perhaps that the test on appeal at the second stage might no longer be the test of a, dealt with on the basis that it's the exercise of a discretion. That was not something we had understood was challenged or to be dealt with today and accordingly our submissions do not contain any reference to that other than just the bare assertion that the test is as it has always been.

WINKELMANN CJ:

Well, if we want, if that is an issue we're going to look at, we will issue a minute telling counsel that we want submissions on it and give you a period of time.

MS GOATLEY:

Thank you, your Honours, because I do think it significantly impacts what we would say about various factors that have been balanced in the threshold where it was assumed that because they'd been balanced in the threshold there wasn't a need to revisit them in any significant detail.

WINKELMANN CJ:

I mean the reality is that if you look at the law there has been a steady march towards deeper review of however you characterise the thing unless it's the sort of thing where it's a Minister who has an absolute discretion. So…

MS GOATLEY:

That is the case but usually the rationale behind that, your Honour, and I'm thinking particularly of Justice Asher's decisions and the Bail Act 2000, they all hinge on a particular change in regime which has imported specific criteria.

WINKELMANN CJ:

Well, not so. I think Justice Kós and I were party to that decision as well and it's…

KÓS J:

Taipeti v R [2018] NZCA 56.

WINKELMANN CJ:

Yes, and it actually indicates the general factors that indicate whether or not it's a discretion or evaluative exercise.

KÓS J:

But there are some real questions about whether you want to make bail decisions evaluative all the way up – sorry, not bail decisions –

WINKELMANN CJ:

Name suppression.

KÓS J:

– name suppression decisions, otherwise we're going to be dealing with every bail, every name suppression.

MS GOATLEY:

That is certainly –

GLAZEBROOK J:

Well, not really because you still have to show the decision was wrong.

KÓS J:

Leave, yes, I know.

MS GOATLEY:

That would be a material concern for the media.

WINKELMANN CJ:

We're not hearing submissions on it now anyway, Ms Goatley, or else we'll be here all night.

MS GOATLEY:

Thank you, your Honours, unless you have any other questions.

WINKELMANN CJ:

Thank you, Ms Goatley. Ms Priest. How long do you think you'll be in reply?

MS PRIEST:

Fifteen minutes. I'll try and do it in 10, with your Honours' leave.

KÓS J:

No, 15 is fine.

MS PRIEST:

I'll respond point-by-point. In response to the Crown submissions regarding the assertion by the appellant L that he had an honest but unreasonable belief in consent, perhaps overstated but simply the point to be made was that as at the time of the offending when L was aged 14 to 17 he was not diagnosed with autism and there's an accepted link in the reports that his autism reflected in a lack of understanding of social cues, including the withdrawal of consent. The complexities of consent of course being withdrawn are also complicated by alcohol and drug consumption. So that was the basis for the submission made in respect of consent.

WINKELMANN CJ:

Was that argument made at sentencing?

MS PRIEST:

I think the argument wasn't explicitly made in the way that I am now but it was very much underpinning all of the reports. It underpins the decision by her Honour, Judge Ryan, to accept the lesser culpability. So in my submission

while it may not have been explicitly determined or stated by the lower Court, it plainly underpins the decision that was made and perhaps I've just simply stated that more directly on appeal.

O'REGAN J:

So you're not contending that there was in fact an honest belief?

MS PRIEST:

Well, I mean in my submission yes, that's –

O'REGAN J:

All you're saying is he was ill-equipped to make a decision about it?

MS PRIEST:

Yes, and perhaps a better way to frame it is he was unable to form a view as to lack of consent as a result of it.

O'REGAN J:

It seems pretty hard to believe given the facts, frankly.

WINKELMANN CJ:

Honest but unreasonable belief.

MS PRIEST:

Correct. I mean I think "honest but unreasonable" is very much where it's landed in terms of the most direct way to put it. He now of course has insight into that and recognises from what he's learned that it is plainly unreasonable and that's evident in the guilty pleas which were entered.

1555

In terms of the thresholds, just see if I can understand these notes. The thresholds. It is submitted that there are, the more thresholds that are met, the stronger the case for name suppression. In this case we have, of course, endangering safety, and we also have 200(2)(f), which has been accepted by

the Court in that the publication of L's name would lead to the identification of [M]. The key basis upon which we also seek for this Court to consider the threshold of extreme hardship to be met is, of course, on the basis of some of the factors which overlap, which include endangering safety, and vigilante justice so far as that may lead to direct physical attacks on L. What I do wish to say is that under the heading of extreme hardship there are additional factors, and they include with vigilante justice, that when one Googles the name [REDACTED] L, only one person comes up [REDACTED].

WINKELMANN CJ:

Well having said that, is that something we now need to suppress?

MS PRIEST:

Perhaps I'll come to the suppression at the end Ma'am, but certainly that is something that a plain Google search –

WINKELMANN CJ:

No, the point you've just made. Reporting of a point you've just made. Well. If that's reported however.

MS PRIEST:

There have, of course, in the vigilante materials which are in –

WINKELMANN CJ:

It's an identifying particular, I suppose.

MS PRIEST:

I think not with the letters L or [M], but perhaps beyond that, certainly.

There have, we see in social media of course been calls to action which would fall under both of the headings of "extreme hardship" and "endangering safety" and they include calls for castration and for L to be hunted. Relevant, of course, to this the endangering safety overlap, I think is very much the risk or the fear of ongoing vigilante justice, and you'll see from the materials that have been

filed that there were, in fact, five, incidents over a three-month period where the [REDACTED].

The other important factors relevant to this threshold test of extreme hardship of course are social media and the youth aspects which have been addressed. I just do draw to the Court's attention the quote in *DP* at paragraph 23 which states: "… that a young person is likely to suffer a greater degree of hardship than an adult because they lack the requisite maturity to deal with the attendant publicity." I think this is a critical intersection between youth and social media.

When that's coupled with the *Churchward* concepts, which are set out at paragraph 12 of the *DP* decision, which talks about the poor judgment of youth and the impulsivity of youth, this of course doesn't only apply to offenders who have this capacity for rehabilitation, but also to the young people who are going to be, know the identity of [M], and know the identity of L, and they are more likely to target them, and perhaps more likely to inflict vigilante action because they too are young people who lack the requisite brain development to deal with social – to deal with the publication of their names in a responsible way. So the fact that we have young people as the environment within which this matter is being dealt with does, I think, inform us, not only of the impact on the appellants, but also of the likely response of their peers.

1600

In response to the Crown submission that this publicity will be short-lived and then move on, the appellants will be able to move on, I make a series of points. The first is perhaps an obvious one, is whether the Court is satisfied that L in particular could, in fact, move on, or whether the publicity would be linked to [REDACTED], and that, of course, is linked into his autistic rumination. The second point about publicity and moving on is linked into employment and L's unfinished education. He doesn't have the foothold in a career that will allow him to hold a job. He'll be in the unfortunate position of being a first-time job seeker once his degree is finished. The third point is that the ostracism that we have seen played out in social media such as in the case of Jayden Meyer very

much does inform us of the real risk of what will happen and he was not able to move on with any speed at all.

When the mainstream media portray L as a calculating predator, in my submission this is unfair because the media minimises the links between the culpability, the lowered culpability of L as a result of his youth and as a result of his disability which has been accepted by experts and has been accepted by the Courts.

O'REGAN J:

We're not the media council. It's not up to the Court to tell the media how to do their job. Either the name's out there or it's not.

MS PRIEST:

I accept that but it's still important –

O'REGAN J:

I don't think you can say we'll put the name out on a case where we think the media will report it better than they're reporting it in this case.

MS PRIEST:

I take that point, Sir. The issue I make though is that this is the climate upon which the name will be released and so rather than just saying "serial teen rapist", "calculating predator", we're going to have L, his name out there, and then "calculating predator", and the reality is that this is the mainstream media and this is the climate in which he will be job seeking and he will be existing for the rest of his life.

In my submission, given all of the mitigating factors which have resulted in the sentence of home detention, this very much does leave the wrong impression in the public mind and it does turn the public against him. As the Court quite rightly says, we can't stop that, but it's important that we recognise that in considering publication.

Another point I think which does link into the media is that the victims quite properly have very – they've suffered extreme trauma from this and that's recognised. What is also fair though, or clear though, is that the victims through their affidavits do not accept a number of things which the Court has, such as L's autism diagnosis and its causation in terms of the offending. They see name suppression as somehow negating L taking responsibility for his actions. Some do not see or accept that [REDACTED].

WINKELMANN CJ:

Is this relevant though on reply? Have we heard anything about this in the submissions?

MS PRIEST:

We have, and this – the relevance of this is simply that the three victims who have waived their suppression have come out speaking quite openly about this, the point being that the media climate again within which L's name will be released is one which is very victim-centric and doesn't have that full – doesn't have the ability to appreciate nuances of the sentencing outcome nor the work that he's done in order to right the wrong.

Now in terms of the – this was the matter raised by both the media and the Crown about the presumption –

WINKELMANN CJ:

The media of course does have an obligation to report in a fair and balanced manner.

MS PRIEST:

Yes, and I know that the oft response to that is that we ought to go to the appropriate bodies in order to report things that are not fair, but I think it's just important to realise the climate within which the name will be released, rightly or wrongly.

1605

This is the point about whether there is a presumption in favour of open justice at the discretionary phase. I agree with the media that the way that the Courts deal with open justice is not simply as the fallback position before an application is made for suppression but that the presumption of open justice is commonly seen as something that needs to be displaced at the discretionary stage and that's what's set out in *Robertson*. We do invite the Court to depart from that, given the change in climate and particularly given the developments in social media. I do note that when this law was enacted there was no consideration of course of the United Nations instruments and social media development was at its infancy.

In *X* – I'll just have my learned junior help me – yes, just at para 51 of the decision of *X*. This is quite a good précis of where things were at the time when the name suppression laws were enacted, so I simply invite the Court to consider paragraph 51 of *X*, recognising the context within which the law was made at the time.

I also note that Judge Ryan at page 191 of the Court of Appeal casebook, paragraph 77, that final sentence: "I therefore consider the presumption in favour of publication has not been displaced and I decline the application for name suppression." It's plain that Judge Ryan was considering that in the context of the discretion and so what may be an unintended consequence of this concept of a presumption of open justice has plainly been imported into the discretionary phase, and this again is reflected in the decision of Justice Moore at pages 65 and 67 of the casebook, so it's at paragraph 104, again dealing with the discretion, and finally at 67 there's an endorsement of Judge Ryan which says: "It cannot be said the Judge was plainly wrong," referring to Judge Ryan, "to exercise her discretion to decline L's application for permanent name suppression." So the point is that that perhaps erroneous test has very much flowed through the law since *Robertson* and we see it being played out in this case.

Just in terms of some factual corrections finally in respect of the media matters. There was a reference to L's bail curfew being tightened when he was found at

a bar drinking. He was not drinking alcohol. It's important that's clarified. He was simply at a bar and that misunderstanding was clarified. There was no tightening of bail conditions.

The second point related to the application for a re-sentence. This was largely to seek clarification by the Court as to the ongoing conditions for L as part of the second, the back end, the second half of his sentence which is the 12 months' supervision now this continues through till April of next year, and the first matter was that there was no condition imposed to require L to continue to undertake programmes at the direction of Probation. That was clarified by the sentencing Judge who undertook the re-sentencing. The issue about alcohol, L had been able to drink alcohol freely for six months for the first half of that supervisory sentence. Again this was clarified and the decision was made that he could drink a beer at home, which you'll see referenced in the media article, but the middle ground if you like was that he was not to be found intoxicated in public. So there's no suggestion of a breach there. It was rather a clarification upon re-sentence.

1610

The final matter which wasn't addressed in oral submissions but was addressed in the written submissions from the media, just in support of their use of the words "calculating predator" I simply invite the Court to consider the word "predator" or "predatory" in the sentencing notes of Judge Ryan. The use of that word is only made in stating submissions of others. Her Honour Judge Ryan does not endorse the word "predatory" nor does she use it herself, and it's at paragraph 101, the casebook page 163 if the Court wishes to have a reference, and a similar point is made referring to the Crown submissions, paragraph 53, page 92, and that's in the transfer decision from the Youth Court to the District Court. So the point I make is that they're not the words of the Judge, but rather the Judge simply restating the submissions made to her.

Finally, in reference to the word "calculating". The only reference to that in her Honour Judge Ryan's sentencing notes, this is at the casebook page 158 and 77, is again a reciting of a comment made by Dr Matthews that said that L

may give the impression of being calculating, rather than that being a description given by the Court.

Those are matters in reply, unless the Court has any questions, those are submissions on behalf of the appellants.

WINKELMANN CJ:

So any issues of suppression that arise from the hearing?

MS PRIEST:

Oh yes. If I could just briefly confer. We would simply endorse – sorry, I'll start again. In the event that the appeals are successful, there would be no opposition to reference to [REDACTED] being in the public domain in order for the public to fully appreciate the entire reasoning behind the decision. In the event that suppression is not granted, we would seek under section 205 suppression of references to [REDACTED], and obviously anything that I've said today. There have been many times when I've inadvertently made comments which would, or could, lead to the identification to either L or [M]. I do apologise but obviously anything of that nature would need to be redacted.

WINKELMANN CJ:

Yes, so I think you said that if certain letters were entered in a computer, only one name comes up. That's what I noted. You said it –

MS PRIEST:

Not a letter. If you search for that person's name in its entirety, there is only one person.

WINKELMANN CJ:

Oh, okay, right.

MS PRIEST:

Sorry, I do apologise if I've misled you.

WINKELMANN CJ:

Okay, I misunderstood you.

MS PRIEST:

It's around unusualness of name. [REDACTED]. We've undertaken that search because the unusualness of name is something that's commonly referred to in suppression decisions such as in *X*.

WINKELMANN CJ:

Yes, got it.

MS PRIEST:

But beyond that we would simply seek an embargo in the event that the appeal is unsuccessful to allow [L's] family time [REDACTED].

KÓS J:

Which would need to be what sort of duration?

MS PRIEST:

I hadn't thought about that Sir. I thought ordinarily it was around 48 hours, but anything in excess of 48 hours would be appreciated.

WINKELMANN CJ:

Right, does the Crown have, I can see that Ms Johnston is…

MS JOHNSTON:

Just one matter I'd just like to quickly raise with my learned friend if I can. Just a brief point my learned friend and I, and it's really just a matter of completeness, I'm not sure it's directly relevant to matters before the Court, but just in terms of the submission that the breach of bail insofar as it matters involved L not drinking alcohol, the notes of the Judge dealing with the bail application record the breach had been committed when he'd been consuming alcohol early in the evening and was found at a bar drinking.

WINKELMANN CJ:

So not clear that he was drinking – drinking?

MS JOHNSTON:

He was drinking in town at a bar.

WINKELMANN CJ:

Yes.

MS JOHNSTON:

And had been consuming alcohol earlier in the evening.

WINKELMANN CJ:

So he's not drinking alcohol at the bar but had been consuming alcohol earlier, right.

MS JOHNSTON:

And in terms of suppression matters I don't think I need to be heard other than just to raise that Mr Robertson from the law reports would like a copy of the submissions. Normally he would obtain that via the website but we obviously have agreed not to under the practice note put that forward, so he's asked me to raise with the Court whether counsel can provide him a copy of the submissions subject, of course, to the suppression orders.

WINKELMANN CJ:

Yes, that's fine, subject to suppression, and I make clear that suppression, all suppressions in place continue until further order of the Court. Thank you counsel for your very helpful submissions. We will take time to consider them and attempt to deal with this matter promptly.

COURT ADJOURNS: 4.16 PM