INTERIM ORDER PROHIBITING PUBLICATION OF THE NAME, ADDRESS OR IDENTIFYING PARTICULARS OF THE APPLICANT.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2020-404-568
[2020] NZHC 796

BETWEEN	A Applicant
AND	JACINDA ARDERN, ASHLEY BLOOMFIELD AND SARAH STUART-BLACK Respondents

Hearing: 17 April 2020

Appearances: A in person
A M Powell and V McCall for Respondents

Judgment: 23 April 2020

JUDGMENT OF PETERS J

This judgment was delivered by Justice Peters on 23 April 2020 at 12.30 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: .....

Solicitors: Crown Law Office, Wellington

Copy for: A

Introduction

[1] In response to the COVID-19 pandemic, on 3 April 2020, the Director-General of Health, Dr Ashley Bloomfield, ("Director-General") made an order requiring everyone in New Zealand to remain at home except as permitted for "essential personal movement" ("order").[1] The order also required people to observe what was referred to as physical distancing.

[2] A, the applicant, submits the terms of order subject him and his family to "detention" within the meaning of the Habeas Corpus Act 2001 ("Act").[2] By application of 14 April 2020, A challenges the legality of the detention he alleges and seeks a writ of habeas corpus, for himself, his partner and two other members of his family.[3] The effect of the issue of the writ would be to release A and his family from the restrictions imposed by the order.[4] I heard the application as Duty Judge on 17 April 2020, with A appearing by telephone and Crown counsel, Mr Powell and Ms McCall, present through virtual meeting facilities.

[3] The respondents opposed the application. Mr Powell submitted that, to the extent A is detained at present, it is because he is serving a sentence of home detention, and not because of the order. Alternatively, if A and his family are detained by the order, such detention is lawful and, accordingly, the Court must decline A's application.

[4] Mr Powell also submitted that, in reality, A is seeking to litigate the merits or otherwise of the decision to make the order. Mr Powell submitted these issues are not capable of determination on an application for a writ of habeas corpus and, if A wishes to pursue them, he will need to make an application for judicial review under the Judicial Review Procedure Act 2016.

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1 Section 70(1)(f) Health Act 1956 Order by Director-General of Health (3 April 2020) [Section 70(1)(f) Health Act Order]. The order was originally to expire at 11.59 pm, 22 April 2020. On 21 April 2020, the Director-General extended the order to expire at 11.59 pm, 27 April 2020.

2 Habeas Corpus Act 2001, s 3.

3 Section 6.

4 Section 14(1).

Preliminary points

Name suppression

[5] A seeks an order for permanent suppression of the publication of his name and other identifying details. A perceives that, in the past, publication of his name in connection with other legal proceedings in which he has been involved has led to death threats against him, and threats to harm him and his family. These threats are distressing to A and his family, and exacerbate serious health conditions affecting all concerned. A advised me that he has informed the police of these threats.

[6] As to why publication of his name in connection with this proceeding would be likely to lead to further threats, A said this has been the general consequence of publication of his name in the past and there is no reason to believe the result will be different on this occasion.

[7] Mr Powell advised the respondents will abide the decision of the Court. However, Mr Powell said that A's application might be considered "public interest" litigation, which always requires one member of the public to bring the proceeding, and this might make it appropriate to grant suppression or to anonymise this judgment.

[8] I may make an order prohibiting publication of A's name and identifying details if necessary to serve the ends of justice.[5] However, the starting point is a presumption that all aspects of civil court proceedings are subject to disclosure and there must be sound reason to displace that presumption.

[9] I am not persuaded a sound reason exists in this instance. The advice from A, to which I have referred in [5] above, was not on oath. I have no other evidence of the threats to which A refers or any evidence of a link between the mere fact of publication of his name, in connection with any legal proceeding, and the making of any such threat. Even if such were established, it is for the police to investigate any threat to A and his family, rather than for the Court to prohibit disclosure. I therefore decline to make the order for permanent name suppression sought.

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5 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310; *Y v Attorney-General* [2016] NZCA 474, [2016] NZAR 1512; and *Peters v Bennett* [2019] NZHC 2980.

[10] A advised me he would wish to appeal any refusal of name suppression. At the end of the hearing, I made an order for interim suppression pending further order of the Court. I continue that order, again subject to further order of the Court, for 20 working days from the date of this judgment to enable A to pursue an appeal if he wishes.

Transfer to the Court of Appeal

[11] A also sought an order transferring his application to the Court of Appeal, ideally to be heard by a full Court of five Judges. A submitted the significance of his application made this an appropriate course.

[12] I declined A's application. Any decision to transfer a proceeding from the High Court to the Court of Appeal is one for the Court of Appeal, not the High Court.[6]

Order

[13] The relevant part of the order is as follows:[7]

> **Isolation or quarantine requirements**
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> I [the Director-General] require all persons within all districts of New Zealand to be isolated or quarantined as follows:
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> a. to remain at their current place of residence (**residence**), except as permitted for essential personal movement; and
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> b. to maintain physical distancing, except –
>
> i from fellow residents; or
>
> ii to the extent necessary to access or provide an essential business; and
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> c. if their residence is mobile, to keep that residence in the same general location, except to the extent they would be permitted (if it were not mobile) to leave the residence as essential personal movement.

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6 Senior Courts Act 2016, s 59(2).

7 Section 70(1)(f) Health Act Order at 1.

[14] "Essential personal movement" is defined in the order but in the main it comprises going to the supermarket, exercising in a manner permitted by the order, and seeking medical assistance if necessary.[8]

[15] "Physical distancing" means "... remaining 2 metres away from other people or, if you are closer than 2 metres, being there for less than 15 minutes".[9]

Issues

[16] A's application raises two issues. The first is whether the terms of the order effect a detention within the meaning of the Act. If so, the second issue is whether the respondents can establish the legality of the detention. If not, I must order A's and his family's release.[10]

Detention

[17] The Act defines "detention" as:[11]

> **detention** includes every form of restraint of liberty of the person

[18] The Court has previously considered this definition in the case of an applicant who is not imprisoned but contends he or she is detained in any event. In *Schuchardt v Commissioner of Police*, Keane J said that, although the definition appears wide, detention in the habeas corpus context is usually taken to connote "imprisonment or actual detention in some analogous form, say arising in an immigration or deportation context, or on account of a person's mental health".[12] In that case, Mr Schuchardt had been granted bail on condition he live at his home address, refrain from communicating with certain people, from driving, and from going within a particular distance of a service station. Keane J did not consider these conditions constituted detention.

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8 At 1-3.
9 At 3.
10 Habeas Corpus Act, s 14(1).
11 Section 3.
12 *Schuchardt v Commissioner of Police* [2017] NZAR 1689 at [10].

[19] In another case, *Wilson v Chief Executive, Department of Corrections*, Mr Wilson was subject to an extended supervision order, requiring him to reside at a property in Whanganui and prohibiting him from leaving the district without the prior approval of his probation officer.[13] Collins J was satisfied the effect of these conditions meant Mr Wilson was detained for the purposes of the Act.[14] It is fair to say, however, the point does not appear to have been argued before the Judge.

[20] Most recently, in *Drever v Auckland South Corrections Facility*, the Court of Appeal was required to consider whether special conditions of parole imposed on Mr Drever constituted detention.[15] The Court said relevant New Zealand authorities were to the effect that habeas corpus is not an appropriate remedy for a person not "held in close custody".[16] Although he had been released on parole, Mr Drever was required to be at home between 10 pm and 6 am, seven days a week, unless his probation officer agreed otherwise. The Court did not consider this curfew sufficient to constitute detention for the purposes of the Act, particularly as the probation officer might authorise an absence.[17]

Submissions

[21] A submitted the terms of the order subject him and his family to detention. This is because they may not leave their house for whatever purpose they wish, such as to swim, hunt or tramp, or to travel as they see fit etc, but only for essential personal movement.

[22] Mr Powell's first submission on this point was that, to the extent A is presently detained, it is because he is serving a sentence of home detention, and not because of the terms of the order. This sentence of home detention is to continue until 31 July 2020.

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13 *Wilson v Chief Executive of the Department of Corrections* [2018] NZHC 2322, [2018] NZAR 1357.
14 At [10].
15 *Drever v Auckland South Corrections Facility* [2019] NZCA 346, [2019] NZAR 1519.
16 At [27].
17 At [30].

[23] Even if A is presently detained pursuant to his sentence of home detention (and he contends he is not), it is still necessary to decide whether the effect of the order is to detain A's family. For that reason, I shall put the effect of A's existing sentence of home detention to one side.

[24] Turning to the order, Mr Powell acknowledged it imposes significant restrictions on A and his family but submitted these fall short of detention. A and his family may leave their home for essential personal movement, they are not required to seek permission to do so or inform anyone in advance, and they may do so whenever they wish and for as long as they wish. They may also use the telephone or internet, and communicate with others as they see fit. Their movements are not monitored in any way, as they might be on electronically-monitored bail or a sentence of home detention. These freedoms are inconsistent with the concept of detention.

Conclusion on detention

[25] In this case, the effect of the order is to limit the purposes for which A and his family may leave their home, and it also limits some forms of interaction with friends and other family. But, as the respondents submit, A and his family remain free to engage in many of their usual activities. In my view, the freedom to exercise whenever they wish, to go to the supermarket whenever they wish, to talk to whomever they wish, and to access the internet whenever they wish is quite different from being "held in close custody", which the Court of Appeal said in *Drever* is required for detention. A greater degree of control of the time and place of movement and/or association would be required.

[26] On a comparative basis, the extent of the restrictions imposed by the order is still some distance short of the effect on Mr Drever of his overnight curfew, day in, day out (subject to a probation officer's permission to leave), which the Court of Appeal held did not constitute detention.

[27] For these reasons, I do not consider A and his family are detained within the meaning of the Act by the terms of the order.

Lawfulness

[28] If I am wrong in this, it becomes necessary to consider the lawfulness of the detention.

[29] The order was made pursuant to s 70(1)(f) of the Health Act 1956 ("Health Act"), which provides:

> **70 Special powers of medical officer of health**
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> (1) For the purpose of preventing the outbreak or spread of any infectious disease, the medical officer of health may from time to time, if authorised to do so by the Minister or if a state of emergency has been declared under the Civil Defence Emergency Management Act 2002 or while an epidemic notice is in force,—
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> …
>
> (f) require persons, places, buildings, ships, vehicles, aircraft, animals, or things to be isolated, quarantined, or disinfected as he thinks fit:
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> …

[30] The medical officer of health may make an order under s 70:

(a) for the purpose of preventing the outbreak or spread of any infectious disease; and

(b) if, amongst other things, a state of emergency has been declared or an epidemic notice is in force.

[31] Mr Powell submits, and I accept, these requirements were met in the present case:

(a) the Director-General has all the functions of a medical officer of health and may exercise those functions in any part of New Zealand;[18]

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[18] Health Act 1956, s 22(1).

(b) an infectious disease is any disease for the time being specified in Parts 1 or 2 of Schedule 1 of the Health Act.[19] COVID-19 is specified in Section B of Part 1 of Schedule 1. Accordingly, COVID-19 is an infectious disease for the purposes of s 70(1);

(c) the Director-General made the order "[f]or the purpose of preventing the spread of COVID-19, an infectious disease…";[20] and

(d) as of 3 April 2020, a state of emergency under the Civil Defence Emergency Management Act 2002 had been declared (and has been renewed since).[21] In addition, an epidemic notice, being a notice issued under s 5(1) Epidemic Preparedness Act 2006, was in force.[22]

[32] Turning to s 70(1)(f) Health Act, the effect of the order is to "require persons … to be isolated" in their current place of residence.

[33] Although A did not dispute the pre-requisites in s 70(1) for the making of the order were met — his argument as to the lawfulness of the order being quite different — A did raise a point as to whether s 70(1)(f) permits the Director-General to require *everyone* in New Zealand to be isolated by staying at home. On this point, A's submission on the text of s 70(1)(f) was that "persons, places, buildings …" connotes smaller, confined groups of persons, not the entire population.

[34] In response, Mr Powell submitted the word "persons" in s 70(1)(f) is sufficiently broad to cover "all persons within all districts of New Zealand", being the ambit of the order.[23] Mr Powell submitted this must be so, given the express purpose of s 70(1) is to prevent the outbreak or spread of any infectious disease, and there would be no reason to confine s 70(1)(f) as A submitted.

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19 Section 2.
20 Section 70(1)(f) Health Act Order at 1.
21 "Declaration by Minister Extending State of National Emergency" (31 March 2020) *New Zealand Gazette* No 2020-go1506.
22 Epidemic Preparedness (COVID-19) Notice 2020.
23 Section 70(1)(f) Health Act Order at 1.

[35] I accept the orders that may be made under s 70(1) are very broad. For instance, the Director-General may require any insanitary building to be "pulled down";[24] require persons to submit themselves for medical examination;[25] forbid the removal of ships, vehicles and aircraft pending examination;[26] and require premises to be closed and forbid people to congregate.[27] The range of orders available indicates an intention the medical officer of health should have the broadest possible powers to respond to the outbreak or spread of an infectious disease. Plainly, it may be impossible to confine an outbreak to a particular geographical area or sector of the community and s 70(1) expressly contemplates the spread of an infectious disease might constitute "a significant risk to the public".[28] Accordingly, having regard to all of s 70(1), I am satisfied the reference to "persons" in s 70(1)(f) should not be read down as A submitted, and that "persons" is capable of encompassing the entire population.

[36] As I have said, however, A's argument as to the proper construction of s 70(1)(f) was not his main submission on the issue of legality. Rather, A submitted the order was unlawful on numerous, quite different grounds. A submitted the order constituted a gross breach of all New Zealanders' human rights and "fundamental inalienable freedoms", such as those conferred by the New Zealand Bill of Rights Act 1990 and the Act, that, as a matter of principle, it could never be lawful. A also submitted the order was unlawful because it was "unreasonable", in the sense there was insufficient evidence to warrant its making in the first instance. He also submitted the evidence that now exists — and which he believes was or might have been foretold — as to hospitalisation and death rates, the sector of the population most likely to be adversely affected (the elderly), and the effects of the "lockdown" on the New Zealand economy render the continuation of the order unlawful, even if its making was lawful, which he refutes. A also submitted the order was not made for a proper purpose, namely to control the spread of the disease, but for many other extraneous reasons, including to enhance Ms Ardern's prospects of re-election.

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24 Health Act, s 70(1)(b).
25 Section 70(1)(e).
26 Section 70(1)(i).
27 Sections 70(1)(m)(ii) and 70(m)(1)(iii).
28 Sections 70(1)(e)(a) and 70(1)(f)(a).

[37] Mr Powell submitted I need not determine A's allegations, because the respondents have established any detention is lawful. They have produced the order to the Court, they have demonstrated compliance with the requirements of s 70(1) Health Act, and they are not required to do more to rebut A's application for a writ of habeas corpus.

[38] Mr Powell also submitted the grounds on which A relies are incapable of determination on an application for a writ of habeas corpus. This is because the Act is concerned with the lawfulness of any detention and not the making of the "upstream" decisions leading to detention which Mr Powell submitted is what A seeks to put in issue on this application.

[39] Mr Powell referred me to the Court of Appeal's decision in *Manuel v Superintendent of Hawkes Bay Regional Prison* in support of these submissions.[29]

Conclusion on lawfulness

[40] I accept the respondents have established any detention effected by the order is lawful, for the reasons in [31] and [35] above. I am also satisfied the arguments A relies on are not suitable for determination on an application for a writ of habeas corpus. In fact, s 14(1A) of the Act permits the Court to refuse an application for the issue of the writ if satisfied the application is not the appropriate procedure for considering an applicant's allegations. This is such a case. The appropriate procedure is an application for judicial review.

[41] The Act envisages consideration of underlying questions of fact and law relevant to an applicant's detention only to the extent such is possible within the timeframes and procedures provided for in the Act. These require the Court to hear an application for a writ of habeas corpus within three working days of it being filed.[30] The application must be given precedence over all other Court business and must be determined as a matter of "priority and urgency".[31] The matters raised by an applicant

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29 *Manuel v Superintendent of Hawkes Bay Regional Prison* [2005] 1 NZLR 161 at [30(3)] and [49].
30 Habeas Corpus Act, s 9(3).
31 Section 9(2).

must be capable of a response "effectively on demand" by the respondent.[32] The matters A raises are not capable of such a response. That an unsuccessful respondent does not have a right of appeal against a finding of unlawfulness also counts against the matters A seeks to litigate being determined under the Act. This would mean the respondents would not have any right to appeal if I were to accept A's arguments as to the matters referred to in [36] above, all heard within three days of the application being filed.

[42] Given these matters, the habeas corpus procedure is not suitable for the arguments A wishes to pursue. His arguments do not go to the lawfulness of any detention but the underlying decision to make the order, which is a different issue.[33]

[43] The respondents have established that any detention to which A and his family are subject to under the order is lawful.

Summary

[44] A and his family are not subject to detention within the meaning of the Habeas Corpus Act 2001. If I am wrong, and A and his family are detained, the detention is lawful.

Result

[45] I dismiss this application for a writ of habeas corpus.

Peters J

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32 *Manuel v Superintendent of Hawkes Bay Regional Prison*, above n 29, at [46]-[51].
33 At [49].