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-2020-404-573
[2020] NZHC 814

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

Hearing: 17 April 2020

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

Judgment: 24 April 2020

JUDGMENT OF PETERS J

This judgment was delivered by Justice Peters on 24 April 2020 at 4.30 pm
pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date: .....

Solicitors: Crown Law Office, Wellington

Copy for: B

Preliminary comments

[1] Yesterday I issued a judgment dismissing an application by A, of 14 April 2020, to issue a writ of habeas corpus.[1]

[2] At the time I heard A's application I also heard an application, in virtually identical terms, by B, filed on 16 April 2020. B is an associate of A's. He endorsed A's submissions, and made brief submissions of his own before Crown counsel, Mr Powell, responded.

[3] Much of this judgment is in the same terms as that in respect of A's application. Any differences are to distinguish B's position where necessary or appropriate.

Introduction

[4] 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").[2] The order also required people to observe what was referred to as physical distancing.

[5] B, the applicant, submits the terms of order subject him to "detention" within the meaning of the Habeas Corpus Act 2001 ("Act").[3] By application of 16 April 2020, B challenges the legality of the detention he alleges and seeks a writ of habeas corpus for himself and those he describes as his "fellow bubble members" which I take to mean those with whom B lives. Quite who those people are does not matter particularly, because the effect of the issue of the writ would be to release B and those for whom he applies and, by extension, the entire population, from the restrictions imposed by the order.[4]

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1 *A v Ardern* [2020] NZHC 796.

2 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.

3 Habeas Corpus Act 2001, s 3.

4 Section 14(1).

[6] I heard B's application as Duty Judge on 17 April 2020, with B appearing by telephone and Crown counsel, Mr Powell and Ms McCall, present through virtual meeting facilities.

[7] The respondents opposed the application. Mr Powell submitted that B is not detained by the order within the meaning of the Act. Alternatively, if he is, such detention is lawful and the Court must decline B's application.

[8] Mr Powell also submitted that, in reality, B 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 B wishes to pursue them, he will need to make an application for judicial review under the Judicial Review Procedure Act 2016.

Name suppression

[9] B seeks an order for permanent suppression of the publication of his name and other identifying details. The gist of B's submissions (oral and written) were that, although he brings this application for himself, the implications for the wider community mean it will attract publicity and attention. Some people in the community will favour the application and underlying thrust of the argument, being that the order was unlawful because it was unnecessary, and some will not. In all of this, B's identity does not much matter, and he prefers not to be named.

[10] B also advised me that he has been the subject of death and other threats since becoming associated with A and, although he has advised the police of these, he is concerned there may be a repeat.

[11] Mr Powell advised the respondents will abide the decision of the Court. However, Mr Powell said that B'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.

[12] I may make an order prohibiting publication of B'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.

[13] I decline to grant B name suppression on the basis of the death threats of which he informed me. B was not on oath when he told me of these matters and nor is there 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 B, rather than for the Court to prohibit disclosure.

[14] B's other submissions, which were consistent with Mr Powell's point that B's application might be considered "public interest" litigation, are more persuasive. I accept B's identity does not particularly matter to any media report of his application. What is important is that an application for habeas corpus has been made in respect of an order affecting the entire population, and the grounds on which the application has been made. However, neither Mr Powell nor B referred me to any authority or made any submissions addressing how suppression for these reasons could be reconciled with the authorities cited in [12] above. I may have been able to take this point further had they done so. Absent that, however, I decline to make the order for permanent name suppression sought.

[15] B 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 B to pursue an appeal if he wishes.

Order

[16] The relevant part of the order is as follows:[6]

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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.

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

Isolation or quarantine requirements

I [the Director-General] require all persons within all districts of New Zealand to be isolated or quarantined as follows:

a. to remain at their current place of residence (**residence**), except as permitted for essential personal movement; and

b. to maintain physical distancing, except –

i from fellow residents; or

ii to the extent necessary to access or provide an essential business; and

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.

[17] "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.[7]

[18] "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".[8]

Issues

[19] B'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 B's release.[9]

Detention

[20] The Act defines "detention" as:[10]

detention includes every form of restraint of liberty of the person

[21] 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*

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7 At 1-3.
8 At 3.
9 Habeas Corpus Act, s 14(1).
10 Section 3.

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".[11] 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.

[22] 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.[12] Collins J was satisfied the effect of these conditions meant Mr Wilson was detained for the purposes of the Act.[13] It is fair to say, however, the point does not appear to have been argued before the Judge.

[23] 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.[14] 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".[15] 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.[16]

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11 *Schuchardt v Commissioner of Police* [2017] NZAR 1689 at [10].
12 *Wilson v Chief Executive of the Department of Corrections* [2018] NZHC 2322, [2018] NZAR 1357.
13 At [10].
14 *Drever v Auckland South Corrections Facility* [2019] NZCA 346, [2019] NZAR 1519.
15 At [27].
16 At [30].

Submissions

[24] B submitted the terms of the order subject him to detention. This is because he may not leave his house for whatever purpose he wishes, such as to swim, hunt or tramp, or to travel as he sees fit etc, but only for essential personal movement.

[25] Turning to the order, Mr Powell acknowledged it imposes significant restrictions on B but submitted these fall short of detention. B may leave his home for essential personal movement, he is not required to seek permission to do so or inform anyone in advance, and he may do so whenever he wishes and for as long as he wishes. He may also use the telephone or internet, and communicate with others as he sees fit. His 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

[26] In this case, the effect of the order is to limit the purposes for which B may leave his home, and it also limits some forms of interaction beyond others with whom he lives. But, as the respondents submit, B remains free to engage in many of his usual activities. In my view, the freedom to exercise whenever he wishes, to go to the supermarket whenever he wishes, to talk to whomever he wishes, and to access the internet whenever he wishes 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.

[27] 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.

[28] For these reasons, I do not consider B is detained within the meaning of the Act by the terms of the order.

Lawfulness

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

[30] 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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> …
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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:
>
> …

[31] 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.

[32] 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;[17]

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[17] 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.[18] 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…";[19] 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).[20] In addition, an epidemic notice, being a notice issued under s 5(1) Epidemic Preparedness Act 2006, was in force.[21]

[33] 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. As appears from my judgment on A's application, A raised a particular point regarding whether the reference to "persons" in s 70(1)(f) is sufficient to encompass the entire population. I considered it was, for the reasons I gave.

[34] B acknowledged his application was not about whether "the legal framework is in place to order the lockdown" that is, to make the order. B accepted the respondents could establish that it was.

[35] Rather, B said his application was directed to "the legality of the actions of the Prime Minister and the Director-General of Health together to abrogate the rights of all New Zealanders" by ordering the lockdown. B submitted the Prime Minister had sufficient powers at her disposal to respond to the COVID-19 pandemic without resorting to the making of the order. He submitted the respondents were unable to discharge the burden of establishing lawfulness simply by proving the criteria in

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

s 70(1)(f) were satisfied at the time the order was made, but were required to present evidence establishing the lawfulness of the actual decision to make the order.

[36] Mr Powell rejected B's submission as to what was required for the respondents to establish the lawfulness of any detention effected by the order. He submitted the respondents were not required to do more than produce the order to the Court and demonstrate compliance with the requirements of s 70(1) Health Act, as they had done.

[37] Mr Powell also submitted the grounds on which B 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 B seeks to put in issue on this application.[22]

[38] 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.[23]

Conclusion on lawfulness

[39] I accept the respondents have established any detention effected by the order is lawful, for the reasons in [32] and [33] above, and are not required to address the lawfulness of any decision to make the order. I am also satisfied the arguments B 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 for B to follow is an application for judicial review.

[40] 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.[24]

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22 *Manuel v Superintendent of Hawkes Bay Regional Prison* [2005] 1 NZLR 161.
23 At [30(3)] and [49].
24 Habeas Corpus Act, s 9(3).

The application must be given precedence over all other Court business and must be determined as a matter of "priority and urgency".[25] The matters raised by an applicant must be capable of a response "effectively on demand" by the respondent.[26] The matters B 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 B 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 B's arguments, all heard within three days of the application being filed.

[41] Given these matters, the habeas corpus procedure is not suitable for the arguments B wishes to pursue. As B himself acknowledged, his arguments do not go to the lawfulness of any detention but the underlying decision to make the order, which is a different issue.[27]

[42] The respondents have established that any detention to which B is subject to under the order is lawful.

Summary

[43] B is not subject to detention within the meaning of the Habeas Corpus Act 2001. If I am wrong, and B is detained, the detention is lawful.

Result

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

Peters J

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25 Section 9(2).
26 *Manuel v Superintendent of Hawkes Bay Regional Prison*, above n 22, at [46]-[51].
27 At [49].