**IN THE HIGH COURT OF NEW ZEALAND**
**CHRISTCHURCH REGISTRY**

**I TE KŌTI MATUA O AOTEAROA**
**ŌTAUTAHI ROHE**

**CIV-2020-409-000240**
**[2021] NZHC 446**

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| BETWEEN | CRAIG LEE MCDONALD<br>Applicant |
| AND | THE DISTRICT COURT AT CHRISTCHURCH<br>Respondent |

Hearing: 23 February 2021

Appearances: A J Bailey and R J T George for Applicant
D L Harris for Respondent

Judgment: 9 March 2021

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**JUDGMENT OF DUNNINGHAM J**

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*This judgment was delivered by me on 9 March 2021 at 4.00 pm, pursuant to r 11.5 of the High Court Rules*

*Registrar/Deputy Registrar*
*Date:*

## The application

[1] The applicant, Mr McDonald, seeks a declaration that two directives of the District Court, prohibiting Registrars from determining applications for bail or variation of bail in family violence cases, are invalid. He seeks orders declaring the District Court acted illegally in issuing the directives, quashing the directives, and ordering costs on his application.

[2] The two directives he claims were made are:

(a) a directive preventing Registrars of the District Court from granting bail to any defendant if charged with a family violence offence;

(b) a directive prohibiting Registrars of the District Court from considering bail variation applications for any defendant charged with a family violence offence.

[3] Mr McDonald says these directives contravene s 20 of the District Court Act 2016 which provides:

> The jurisdiction of the Court may be exercised by –
>
> (a) a Judge; or
>
> (b) if authorised by this Act or any Act or by the rules, a Registrar or any person authorised to carry out the functions of a Registrar.

Section 20(b) is engaged because s 27(2) of the Bail Act 2000 expressly authorises Registrars to grant bail on criminal charges if the prosecutor agrees, as does s 168(1) Criminal Procedure Act 2011.

[4] Furthermore, if the charge is a family violence charge, s 30AAA of the Bail Act, gives Registrars and judicial officers powers to impose conditions for the protection of the victim or a related person.[1] It provides:

> A judicial officer or Registrar who grants bail to a defendant charged with a family violence offence may impose as a condition of the bail (in addition to the condition or conditions imposed under section 30) any condition that the judicial officer or Registrar considers reasonably necessary to protect—
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> (a) the victim of the alleged offence; and
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> (b) any particular person residing, or in a family relationship, with the victim.

[5] Similarly, s 168A Criminal Procedure Act makes specific provision for Registrars to grant bail on family violence charges with the agreement of the

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1 Inserted on 3 December 2018 by s 11 of the Family Violence (Amendments) Act 2018.

prosecution.[2] While these provisions are relatively recent amendments, they merely expand on the existing powers a Registrar has to grant bail where there are family violence charges.

[6] In Mr McDonald's submission, the Bail Act authorises Registrars to deal with bail on family violence charges, the decision by the District Court to restrict the statutory powers of Registrars is therefore unlawful, and the proper response for this Court is to issue a declaration to that effect and quash both directives.

**The response to the application**

[7] While the convention is usually for the District Court to abide the decision of this Court, in the present case the District Court was directed to file a statement of defence and affidavit evidence to address the following questions:

(a) Does the respondent accept the first and second directives (as defined in the statement of claim) were issued?

(b) If so, does the respondent accept that it issued these directives?

(c) Was there jurisdiction for the first and second directives to have been made?

[8] The District Court's position, as set out in its statement of defence, is to deny that "directives" were made. Instead the actions are described as part of the Family Violence Bail Report pilot which was "an initiative authorised by the Chief District Court Judge to strengthen the Court's ability to respond effectively when dealing with family violence charges".

[9] In submissions, counsel for the District Court, Ms Harris, expands on this pleading. He does not accept the alleged "directives" have limited, taken away or prohibited the statutory powers of Registrars under the Bail Act. Rather, they should be seen as the promulgation of administrative arrangements for the exercise of the

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2 Inserted on 1 July 2019 by s 44 Family Violence (Amendments) Act 2018.

District Court's jurisdiction, in particular, the District Court's ability to ensure the "orderly and efficient conduct of the Court's business". Specifically, s 24(3)(i) provides that the Chief District Court Judge may "make directions and set standards for best practice and procedure in the Court".[3] Ms Harris submits the decisions made in relation to processing bail applications for family violence charges are authorised by this section.

**Mr McDonald's circumstances**

[10] Mr McDonald's circumstances need not be traversed in detail. It is sufficient to say that they alerted him to the situation now raised in these proceedings, as to whether Registrars can deal with family violence bail applications.

[11] Mr McDonald was charged on 4 February 2019 with various historic offences which were categorised as family violence offences. Pursuant to s 21 of the Bail Act, the police granted Mr McDonald police bail.

[12] On 11 February 2019, Mr McDonald attended the Christchurch District Court for his first appearance. The police were seeking that he be granted Court bail on the same conditions he had been subject to pursuant to police bail. Mr McDonald, through his lawyer, consented to the imposition of those conditions and the request for bail with the proposed bail conditions noted on it was given to the Registrar. Mr McDonald waited in the District Court for his request to be processed and his lawyer left the Court. Approximately 30 minutes later, the Registrar advised that because the charges were family violence related, bail could only be granted by a Judge and the charges would be called in Court for bail to be determined. As Mr McDonald's lawyer could not return in time, a duty lawyer appeared before a District Court Judge on Mr McDonald's behalf and bail was, in due course, granted. Mr McDonald says that having to wait for the matter to be called before a Judge "significantly added" to the time he was required to be at Court.

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3 District Court Act, s 24(3)(i).

**Were the directives issued?**

[13] The first issue to resolve is whether such directives or (as I shall now refer to them), directions were made and if so, in what circumstances. Mr McDonald, understandably, adduces no evidence on the making of the directions. He simply recounts his own experience where he says he "learnt that Christchurch Registrars have been directed not to grant bail to any defendant charged with a 'family violence offence'". Similarly, he "learnt that Registrars have been directed not to consider bail variation applications for defendants facing 'family violence charges'".

[14] The District Court filed two affidavits. One is from Judge John Walker, a very experienced District Court Judge and the Principal Youth Court Judge, outlining how the District Court developed specific processes for dealing with bail applications on family violence charges. The other was from Mr Philip Miles, a longstanding service manager and Deputy Registrar in the Christchurch District Court, who gives evidence on the implementation of the Family Violence Bail Report pilot at the Christchurch Registry.

[15] Judge Walker explains that in 2014, at the request of the Chief District Court Judge, he was given responsibility for leading the District Court response to family violence. This work involved oversight of the family violence courts, serving as a judicial representative on Ministry of Justice working groups, leading the District Court implementation of statutory changes affecting family violence, providing external input into the police change programme in relation to family violence, and providing judicial education on family violence through the Institute of Judicial Studies.

[16] In 2014, in the context of this work, Judge Walker became aware that a person convicted of the murder of his wife, was, at the time of the offence, on bail in relation to a family violence charge, where his wife was the alleged victim. The offender had been granted bail by a Justice of the Peace and then bail was renewed by a Judge when he appeared on a breach of that bail, and on each appearance, bail had not been opposed by the police.

[17] On reviewing that case, Judge Walker learnt that because bail had not been opposed, no information about the alleged facts, the defendant's history, or the victim's circumstances, were placed before the Court. He also became aware that Registrars in many Courts were routinely granting bail in family violence cases when bail was unopposed, with little or any information other than the charging document. From his investigation of that case, he developed a list of what he considered should be the minimum set of information available to a Judge when bail on family violence charges was being considered. The list included the following:

(a) the charging document(s);

(b) the summary of alleged facts;

(c) any previous criminal history of the defendant;

(d) any previous bail history of the defendant;

(e) any protection orders which were in place;

(f) any breaches of protection orders;

(g) details of any police safety orders which had issued and any breaches; and

(h) details of any current Family Court applications affecting the care of children (which can indicate heightened tension and risk).

[18] Steps were then taken to develop a computer programme for police use which would enable this information to be collated in one single document and this became known as the Family Violence Summary Report. This report would then be made available to Judges prior to dealing with applications for bail on family violence charges. The report is now known as the Family Violence Bail Report (FVBR).

[19] In 2015, it was agreed that the use of the FVBR would be trialled in the Porirua District Court and in the Christchurch District Court. This began on

1 September 2015. It has subsequently been rolled out to other Courts and, in August 2020, a decision was made for a national rollout to all Courts.

[20] Judge Walker emphasises that victims' safety has been the driver for the FVBR. He says that experience has shown that the greatest level of unidentified risk lies in the unopposed bail applications when information is lacking, as was found in the original case which prompted this review.

[21] He then explains that, as "part of FVBR, in the Courts where the process is in place, the responsibility for dealing with family violence bail has been placed on Judges and community magistrates and where neither are available, Justices of the Peace". He goes on to set out the reasons for this decision, saying:

> Registrars have not had the education in family violence bail risk assessment, and it has always been the position of the Chief District Court Judge and myself, when the process was developed, that while Registrars have the statutory power to grant unopposed bail in family violence cases, the safety of complainants and victims dictated that they ought not to do that work. This has been communicated to all participants in the Courts where the process has been established as a key part. Our concern was to ensure that the power could be safely exercised.

[22] Mr Miles' evidence provides information about the implementation of the FVBR pilot in the Christchurch Registry. He explains it commenced in Christchurch on 1 September 2015, and in his email to the District Court Judges on that date, he records "it has been agreed that with effect from 1 September 2015 all FV first appearance cases regardless of whether bail is opposed or unopposed will be called before a DCJ in DC1 i.e. The Registrar will not deal with any first appearance FV charges".

[23] Mr Miles' evidence attaches various iterations of guidance material prepared by the Ministry of Justice to assist Registry staff with implementing this new process. Although one of the earlier iterations attaches a flowchart which suggests that Registrars can still deal with unopposed applications, he says his understanding of the operations of the FVBR pilot was that there was "an expectation that all [family violence] bail applications (whether opposed or unopposed) be put before a Judge". Similarly, Judge Walker says "the reference to Registrars dealing with unopposed

family violence bail applications in an early version of one guidance document appears to me to have been an error and does not reflect the process that was agreed".

[24] Finally, Mr Miles gives evidence regarding the instruction to the Christchurch Registry regarding applications to vary bail in family violence cases. Mr Miles notes that, while bail applications involving family violence charges were to be determined by a Judge, Registrars would sometimes deal with applications to vary bail if they were unopposed by police. However, he said there was a query as to whether this was consistent with the purposes and processes of the FVBR pilot, and so he raised it with the Executive Judge at Christchurch.

[25] On 12 March 2018, the Executive Judge, Judge O'Driscoll, responded to that query saying:

> I have discussed this issue with the Christchurch District Court Judges. The Judges' clear view is that a Judge has the responsibility of considering bail in Christchurch in all cases involving domestic violence allegations. Bail is either refused or granted by the Judge with any appropriate conditions. The Judges' view is that all applications for variation of those conditions must go to a Judge and no variation should take place by Registry staff. Those variations could take place either in chambers or if necessary, in Court. I hope this is clear.

[26] Mr Miles advised Registry staff of this direction and also forwarded it on to the President of the local branch of the New Zealand Law Society, who in turn advised criminal practitioners of the decision.

[27] Having considered this evidence, it is still somewhat unclear exactly how the decision that Registrars should not deal with bail applications in any of the FVBR Pilot Courts was made or how it was promulgated to Registry. There is no evidence of a formal Practice Note to this effect but, in due course, the Ministry of Justice guidance pack makes it clear that such applications are to be heard by a judicial officer. For example, in the pack dated April 2016, it says:

> **Judicial Officer**
>
> The Judge will hear the family violence bail matter wherever possible.

> When no Judge or Community Magistrate (CM) is available at smaller Courts (e.g. when there is no Judge on site, or when the only Judge on site is sitting in the Family Court), the JP will hear the family violence bail matter. In the absence of the Judge or CM, the JP's should be provided with the same family violence information.

[28] The same paragraph was included in the September 2017 and August 2018 iteration of this document. I infer, therefore, that all Registries where the FVBR pilot was operating complied with this requirement and Registrars forwarded all bail applications on family violence charges to a Judge or other judicial officer rather than dealing with them themselves.

**Submissions**

*Mr McDonald's submissions*

[29] Counsel for Mr McDonald, Mr Bailey, submits that the effect of the directions is to intentionally strip Registrars of legislative powers contained in the District Court Act and the Bail Act which have been vested in Registrars in relation to defendants charged with family violence offences. These are powers which they were previously entitled to exercise, and frequently did exercise. In his submission, such directions are unlawful as they prevent Registrars from exercising statutory powers which Parliament has seen fit to give them.

[30] While the affidavit evidence sets out why the system was implemented, Mr Bailey says the bona fides of the FVBR pilot is not the subject of this application for review, it is the legality of the directions. If there are good reasons for stripping this power from Registrars, that needs to be done through legislative amendment. In Mr Bailey's submission, the directions effectively rewrite the Bail Act, providing that no defendant may be granted bail, or allowed to go at large, or have his or her bail conditions varied, on a family violence charge except by a Judge or other judicial officer. In his submission, no Judge has the power to do that.

[31] Mr Bailey points to the following statement in *Greer v Smith* regarding the relationship between Registrar and Judges as supporting his submissions:[4]

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4 *Greer v Smith* [2015] NZSC 196 at [6].

> The Act and rules are not exhaustive of the relationship between the Judges and the Registrar. The Court consists of the Judges and the Registrar is an officer of the Court. It is implicit in this, and consistent with the inherent powers of the Judges of any Court, that the Judges have the general right to direct and supervise the Registrar in relation to the business of the Court *providing such direction and supervision is not inconsistent with the scheme of the Act and rules.* [Counsel's emphasis].

[32] Mr Bailey submits that whether the District Court is exercising inherent powers or, as the respondent suggests, the powers available to the Chief District Court Judge under s 24 of the District Court Act, then it was required to do so in a manner consistent with the provisions of the Bail Act. The pilot could have been implemented with Registrars retaining their existing powers. If this necessitated Registrars being given additional training, then this should have been facilitated. However, the District Court did not have power to override the statutory powers of Registrars prescribed by the Bail Act.

*The District Court's submissions*

[33] Counsel for the respondent, Ms Harris, does not accept that the directions have limited, taken away or prohibited the statutory powers of Registrars under the Bail Act. Rather, she says the directions should be seen as the promulgation of administrative arrangements for the exercise of the District Court's jurisdiction, in particular, the District Court's ability to ensure the orderly and efficient conduct of the Court's business pursuant to the Chief District Court Judge's functions under s 24 of the District Court Act 2016.

[34] Ms Harris refers to the evidence, and says the FVBR pilot is an example of the Chief District Court Judge setting standards for best practice and procedure in the Court, with the purpose of enhancing victim safety, using the statutory power available to the Chief District Court Judge under s 24(3)(i) of the Act.

[35] Ms Harris submits that while the Bail Act confers jurisdiction on a judicial officer or Registrar to grant bail or vary bail conditions in specified cases, it does not dictate that a Registrar must exercise this jurisdiction. The Registrar, when faced with an unopposed bail application is free to elevate it or reassign it to a judicial officer. To do so would be to read the permissive language of the statute as mandatory, contrary

to the statutory scheme, noting that the word "may" is usually permissive or empowering.[5]

[36] Ms Harris then goes on to explain why the FVBR pilot, and the associated decisions as to who should deal with bail applications in family violence matters is permitted under s 24(3)(i) of the District Courts Act. Ms Harris argues that the evidence shows Judge Walker was delegated responsibility by the Chief District Court Judge for developing the administrative arrangements in cases of family violence and Judge Walker has explained why the task should be placed on judicial officers rather than Registrars, as it is judicial officers who have received education in respect of family violence bail risk assessments and can ensure those powers are safely exercised.

[37] In Ms Harris's submission, this is akin to other administrative arrangements made by the Chief District Court Judge, for example, the use of arrest lists at various Registries throughout the country which are presided over by judicial officers or Registrars on different days during the week. The fact that a list is presided over by a Judge does not mean that a Justice of the Peace or Community Magistrate has been deprived of their jurisdiction or vice versa. Here, she says the legislation provides for a range of possible decision-makers and the Court has managed its business so that unopposed bail applications or variation applications are heard by some of those decisionmakers in accordance with s 24(3)(i) of the District Court Act.

**Were the directions issued pursuant to s 24(3)(i)?**

[38] Despite Ms Harris's submissions, the evidence as to who exactly made the initial decision to prevent Registrars from dealing with bail applications on family violence charges, and whether it was authorised or otherwise endorsed by the Chief District Court Judge, was lacking. While Judge Walker says he embarked on the process of looking at how the District Court could better deal with family violence, and this was done at the request of the Chief District Court Judge, the evidence does not go so far as to say he was delegated with the power to make decisions under s 24,

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5 Citing the Supreme Court in *B v Waitemata District Health Board* [2017] NZSC 88, [2017] 1 NZLR 823.

nor does it say exactly how the decision was made to remove the responsibility for making bail decisions on family violence charges from Registrars.

[39] The link to s 24 is even more tenuous in relation to the direction on who should deal with applications to vary bail on family violence charges. The only evidence before me was that a decision on this was made at a local level to apply in the Christchurch District Court. It may be that this was always intended to be the effect of the original directions made as part of the FVBR pilot, or it may simply be that the Christchurch District Court Judges considered, at a local level, that this was an appropriate direction to make and was consistent with the earlier direction. For these reasons, I simply do not have sufficient evidence to confirm that these were decisions made pursuant to s 24(3)(i) District Court Act.

[40] If, in fact, the directions were a purported exercise of the power under s 24(3)(1) I go on to consider whether there was scope to make such a decision under that section.

[41] The Chief District Court Judge's responsibilities are set out in s 24(3) of the District Court Act as follows:

> (3) The Chief District Court Judge must ensure the orderly and efficient conduct of the court's business and, for that purpose, may, among other things,—
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> (a) determine the sessions of the court; and
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> (b) assign Judges to those sessions; and
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> (c) assign Judges to particular divisions or jurisdictions; and
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> (d) assign Judges to the hearing of cases and other duties; and
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> (e) determine the places and schedules of sessions for individual Judges (including varying the places and schedules of sessions for Judges from time to time); and
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> (f) manage the workload of individual Judges; and
>
> (g) delegate administrative duties to individual Judges; and
>
> (h) oversee and promote the professional development, continuing education, and training of Judges; and

(i) make directions and set standards for best practice and procedure in the court.

[42] There can be no doubt that the Chief District Court Judge is able, pursuant to s 24(3)(g), to delegate the task of developing better procedures for the processing and hearing of family violence charges to Judge Walker and to ensure, under s 24(3)(h), that Judges get appropriate training in dealing with family violence and learning how to make better risk assessments based on the more detailed information which would now be provided under the FVBR.

[43] What is at issue is whether there was scope within s 24(3)(i) to direct that only judicial officers should hear bail applications involving family violence charges, notwithstanding that Registrars had statutory power to determine those applications. I do not consider it does extend that far.

[44] The power to make directions and set standards for best practice and procedure in the District Court must be exercised consistently with the relevant statutes which govern the practice and procedure of that Court. Through the provisions of the District Court Act, the Bail Act and the Criminal Procedure Act, Registrars have authority to make decisions on family violence bail applications where the prosecution does not oppose. That authority cannot be removed by a direction or decision made under s 24(3)(i).

[45] I do not consider the directions in this case are analogous to the allocation of work to either judicial officers or Registrars on different days during the week. That sort of decision is clearly for administrative convenience. It is a scheduling decision to ensure that someone with jurisdiction to make the relevant decisions is available to do so at any given place or time. Here, the decision has the practical effect of determining that Registrars must not grant bail applications on family violence charges. The purpose of such a direction is not an administrative decision, but is a substantive decision on whether Registrars are an appropriate category of persons to undertake this sort of decision-making. As Judge Walker says, the decision was made because the District Court Judge and he considered that Registrars "ought not to do that work". That decision was contrary to the intention of Parliament which gave Registrars that power.

[46] That is not to ignore the concerns of the District Court judiciary. Clearly there were good reasons for requiring bail applications to be based on full information, which the FVBR now provides to the decision-maker. There was also a need to provide education to those making decisions on such matters so they were alert to relevant risk factors identified in the FVBR. That said, I consider the District Court had other options to address the concerns they had. For example:

(a) Registrars could be encouraged, if they had any concerns about the application before them, to refer it to a Judge;

(b) appropriate training could be given to Registrars, just as has been given to Judges;

(c) as part of the legislative amendments which were introduced through the Family Violence (Amendments) Act in 2018 to enhance victims' safety, amendments could have been sought to the provisions which set out who has jurisdiction to deal with family violence bail applications.

[47] However, for the reasons given in [44]-[45] above, I am satisfied that the District Court acted unlawfully in directing that Registrars could not determine bail on unopposed family violence charges.

**Were the directions unreasonable?**

[48] Mr McDonald's pleadings claim, as an alternate ground of review, that the respondent acted unreasonably when it issued the directives. Given my findings on the legality of the directions, I address this claim briefly. In my view, the directions do not meet the threshold for being struck down as unreasonable. Indeed, but for the illegality I have identified above, they are manifestly reasonable for the reasons set out in Judge Walker's affidavit.

**Outcome**

[49] Given my conclusion that the District Court (whether through the Chief District Court Judge exercising powers under s 24, or otherwise), did not have the

power to prohibit Registrars from dealing with applications on family violence charges, I must turn to what orders should be made as a consequence.

[50] Given my finding in [47] above, I make the following declaration:

(a) The directions made by the District Court requiring any decision on bail applications on family violence charges to be made by judicial officers only, are unlawful.

As a consequence, the directions are quashed.

**Costs**

[51] Mr McDonald sought costs on the application. If the parties cannot agree on costs, then:

(a) any memorandum seeking costs should be filed no later than 20 working days after the date of this decision;

(b) any memorandum in response to be filed within a further 10 working days; and

(c) any memorandum in reply within a further five working days.

[52] The issue of costs will be determined on the papers unless I need to hear from counsel.

Solicitors:
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Crown Law, Wellington