ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF RETRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 51/2023
[2025] NZSC 40

BETWEEN	MAHIA TAMIEFUNA Appellant
AND	THE KING Respondent

Hearing:	6–7 March 2024
Court:	Winkelmann CJ, Glazebrook, Ellen France, Williams and Kós JJ
Counsel:	S J Gray, E P Priest and S C Shao for Appellant P D Marshall and A J Ewing for Respondent B J R Keith, and A de Joux for Privacy Commissioner | Te Mana Mātāpono Matatapu as Intervener
Judgment:	16 April 2025

JUDGMENT OF THE COURT

A **The appeal is allowed. The conviction is quashed.**

B **A retrial is ordered.**

C **We make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the Internet or other publicly available database until final disposition of retrial. Publication in law report or law digest is permitted.**

REASONS

WINKELMANN CJ, ELLEN FRANCE AND WILLIAMS JJ
(Given by Ellen France J)

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Introduction

[1] The appellant, Mahia Tamiefuna, was convicted of one charge of aggravated robbery after a judge-alone trial.[1] Photographs of Mr Tamiefuna were taken by Detective Sergeant (DS) Bunting in the early hours of the morning on 5 November 2019. At the time, Mr Tamiefuna was a passenger in a Ford Falcon car which was the subject of a routine traffic stop. DS Bunting made a noting — a

1 *R v Tamiefuna* [2021] NZHC 1969 (Davison J) [Reasons for verdict].

record — of his discussions with Mr Tamiefuna that night on the Police National Intelligence Application (NIA) and added a photograph of Mr Tamiefuna to the NIA to accompany the noting.

[2] The photographs were critical evidence at Mr Tamiefuna's trial. That was because the clothing worn by Mr Tamiefuna in DS Bunting's photographs was highly like that worn by a man in the closed-circuit television (CCTV) footage which formed part of the Crown case. In that CCTV footage, Mr Tamiefuna was not readily identifiable except by virtue of the clothing he was wearing. The noting on the NIA also linked Mr Tamiefuna to the Ford Falcon which police said was connected with the robbery.

[3] There is no statutory authority authorising the taking of these photographs, nor the retention of one of those photographs on the NIA. Mr Tamiefuna challenged the admissibility of the photographs prior to trial on the basis they were taken in the course of an unlawful and unreasonable search in breach of s 21 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights). His case was that the evidence was therefore improperly obtained and inadmissible under s 30 of the Evidence Act 2006. The challenge was rejected in the High Court.[2] The Court of Appeal declined leave to appeal that decision pre-trial.[3] The challenge to the evidence based on breach of the right in s 21, to be secure against unreasonable search and seizure, was renewed at trial but rejected.[4]

[4] On Mr Tamiefuna's subsequent appeal to the Court of Appeal challenging his conviction, the Court concluded that the taking of the photographs and the retention of one of the photographs in the NIA was an unreasonable search in breach of s 21 of the Bill of Rights.[5] In reaching this conclusion the Court found that, in the particular circumstances, the search was both unlawful and unreasonable where it was not

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2 *R v Tamiefuna* [2020] NZHC 163 (Moore J) [HC pre-trial decision].

3 *Te Pou v R* [2021] NZCA 263, (2021) 30 CRNZ 699 (Clifford, Simon France and Edwards JJ). The Court acknowledged the proposed appeal on this point raised a "novel", generally significant, and "arguable" point but there was insufficient time to address it properly prior to trial: at [76] and see at [82]–[84].

4 Reasons for verdict, above n 1.

5 *Tamiefuna v R* [2023] NZCA 163, [2023] 3 NZLR 108 (Cooper, Brown and Goddard JJ) [CA judgment].

authorised by statute and the police did not "have a general power to photograph persons in the public realm and retain the images".[6] However, the Court did not consider the evidence should have been excluded under s 30 of the Evidence Act so the appeal was dismissed.

[5] Mr Tamiefuna appeals from that decision to this Court.[7] In granting leave, the Court anticipated argument on the following:[8]

> (a) whether the Court of Appeal was correct to find that the photographic evidence was improperly obtained for the purpose of s 30 of the Evidence Act; and
>
> (b) whether the Court of Appeal was correct in admitting the evidence under s 30 of the Evidence Act.

[6] We consider that the Court of Appeal was correct to find that the photographic evidence was improperly obtained for the purpose of s 30 as it was obtained by means of an unlawful and unreasonable search contrary to s 21 of the Bill of Rights. Our reasoning differs in some respects. Departing from the Court of Appeal decision however, we would allow the appeal on the basis the photographic evidence, having been improperly obtained, should have been excluded under s 30(4) of the Evidence Act.

[7] Whether the evidence was improperly obtained requires consideration of the following issues, namely, whether the taking of the photographs and retention of one of these was a search, and, if so, whether it was unlawful and unreasonable. We first summarise the factual background, which is set out in more detail in the reasons of Glazebrook J, and then deal with each of these two issues in turn before addressing s 30.

Background — a random traffic stop

[8] DS Bunting and another police officer were patrolling in an unmarked car in West Auckland at 4.20 am on 5 November 2019. They saw a Ford Falcon car which, apart from being one of the few on the road, was not doing anything that would draw

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6 At [69].
7 *Tamiefuna v R* [2023] NZSC 93 (Glazebrook, O'Regan and Ellen France JJ).
8 At [2].

it to attention. They followed the car and stopped it. DS Bunting said that he did so under s 114 of the Land Transport Act 1998.[9] In his evidence he agreed it was a stop to check compliance with the Land Transport Act, obtain the details of the driver and registered owner of the vehicle, and conduct breath alcohol testing. There were three men in the car: the driver and two passengers, one of whom was Mr Tamiefuna.

[9] The driver's details were checked and when this revealed that the driver was unlicensed DS Bunting impounded the vehicle. He went to speak to the two passengers in the car. Mr Tamiefuna was in the front passenger seat. The officer asked the two passengers what they were doing and where they were going. The driver of the car said that Mr Tamiefuna had asked him to pick him up from a friend's address and take him to another place. They said that was where they were going when they were stopped. DS Bunting asked them for their names and other details. Mr Tamiefuna provided his name and date of birth as did the second passenger. That information was recorded by DS Bunting on his police issue smartphone. He went back to the police patrol car and ran an NIA check for information held by police about the three men. As Davison J said in his reasons for verdict:[10]

> From the NIA checks [DS Bunting] ascertained that all three men had recent convictions for criminal offending relating to property and other serious offences, and [Mr Tamiefuna] had been recently released from prison and was subject to release conditions.

[10] While the police officers were waiting for the tow truck to arrive, the driver and the two passengers got out of the vehicle. The driver and passengers removed some items of property from the vehicle which they put on the footpath beside it. They had made arrangements to be collected and were standing on the footpath waiting for someone to come and get them. DS Bunting went back and spoke to them further. On further examination he saw that there were four car batteries along with a quantity of other property in the vehicle. There were too many items of property in the vehicle for the men to take them all. The officer also saw a woman's handbag and jacket in the front passenger footwell. He asked Mr Tamiefuna about these items.

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9 Section 114 allows, broadly, a police officer to request a driver of a vehicle to stop and remain stopped for as long as is reasonably necessary for the officer to complete exercising powers or duties imposed under the Act.

10 Reasons for verdict, above n 1, at [20].

Mr Tamiefuna said they belonged to his sister with whom he had been drinking earlier that night.

[11] At this point DS Bunting took photographs of the men and of some of the items of property removed from the car with his police issue smartphone. He did not use any of the phone camera's close-up or image-enhancing functions. The photographs are described by the High Court in this way:[11]

> [23] The photographs taken of [Mr Tamiefuna] show him standing on the footpath beside the Ford Falcon. He is looking towards the camera and is clearly well aware that he was being photographed. In the photographs [Mr Tamiefuna] is wearing a dark coloured cap, short-sleeved shirt and sleeveless jacket, beige coloured trousers with cuffs drawn in at the ankles, and black Asics brand sports shoes with a white sole.

[12] The evidence from DS Bunting was that by the time he took the photographs he was suspicious some of the property in the car may have been stolen property. DS Bunting said that in light of that, and the fact that the three men had serious criminal histories, he had decided to prepare and submit an intelligence noting and take photographs to go with it.

[13] As we have said above, after taking the photographs, DS Bunting filed a noting on the NIA. That noting records the details of the vehicle, the names of the three men and, among other things, Mr Tamiefuna's date of birth and residential address. It refers to the fact that Mr Tamiefuna was a passenger in the vehicle, what the driver said about what they were doing, and Mr Tamiefuna's account of the contents of the boot and passenger footwell. The noting included a photograph of Mr Tamiefuna taken at 4.33 am on 5 November 2019. Two of the three photographs admitted in evidence at trial match the High Court's description above, that is, they show Mr Tamiefuna looking towards the camera standing beside the vehicle.[12] The third of the photographs is of property taken from the vehicle. The bottom half of a man standing by the vehicle is visible.

[14] In the discussion which follows, we address the reasoning in the Courts below and the submissions to this Court in considering the following critical issues:

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11 Reasons for verdict, above n 1.
12 At [23].

(a) Did the police actions amount to a search?

(b) Was any such search reasonable?

(c) Should the photographs have been admitted as evidence at trial?

Did the police actions amount to an unreasonable search?

[15] It is common ground that the exercise of police common law powers is subject to statutory requirements and restrictions. Particularly relevant here is s 21 of the Bill of Rights, which provides that every person has the right to be secure against unreasonable search and seizure. Accordingly, if what occurred is an unreasonable search inconsistent with s 21, then the evidence was improperly obtained and the issue will be whether the Court of Appeal was correct to decide the evidence was nonetheless admissible under s 30 of the Evidence Act.[13] Following the approach in *Hamed v R*, we break down whether the search was unreasonable into two questions, the first being whether this was a search, and the second whether it was unreasonable.[14] In a case such as this, there is inevitably some overlap because analysis of the facts casts light on both of these questions.

Was this a search — the principles

[16] The activities said to amount to a search here are the removal of Mr Tamiefuna from the vehicle, placing him on a public thoroughfare, taking photographs of him, and retaining one of these photographs on the NIA. It is not immediately obvious, as it will be in some cases, for example where the police are executing a search warrant, that what happened was a search. To determine that question requires consideration of whether on these facts Mr Tamiefuna had a reasonable expectation of privacy that was intruded upon.

[17] There is no real dispute about this framing of the issue as between the parties. Rather, they disagree on whether or not there was a reasonable expectation of privacy

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13 Evidence Act 2006, s 30(5)(a) and see s 30(2)(b) and (4).
14 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.

in the particular circumstances, and on the lawfulness of the police actions. We can accordingly describe the relevant principles about what constitutes a search briefly.

[18] In discussing the definition of a "search", Blanchard J in *Hamed v R* cited from the reasons of Richardson J in *R v Jefferies*.[15] In the passage from *Jefferies* cited by Blanchard J, Richardson J said that the s 21 right "reflects an amalgam of values: property, personal freedom, privacy and dignity".[16] Richardson J went on to note that a search "is an invasion of property rights, a restraint on individual liberty, an intrusion on privacy and an affront to dignity".[17] In summing up the correct approach for determining what constitutes a search, Blanchard J adopted the analysis of the Supreme Court of Canada in *R v Wise*, namely that, "[i]f the police activity invades a reasonable expectation of privacy, then the activity is a search."[18] Blanchard J explained that a reasonable expectation of privacy has two components. The first is that the individual subjectively had an expectation of privacy at the time of the police activity; and, second, the expectation was one that society is prepared to recognise as reasonable.[19]

[19] It is clear from subsequent cases that Blanchard J's approach has general support. In *R v Alsford*, the parties accepted the correct approach was that of Blanchard J, and the majority of this Court in that case proceeded on that basis.[20] The Court in *Alsford* said that the question whether the expectation of privacy was reasonable was "a contextual one, requiring a consideration of the particular

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15 *R v Jefferies* [1994] 1 NZLR 290 (CA).

16 At 302 as cited in *Hamed*, above n 14, at [161] per Blanchard J.

17 *Jefferies*, above n 15, at 302.

18 *Hamed*, above n 14, at [163] per Blanchard J citing *R v Wise* [1992] 1 SCR 527 at 533 per Lamer CJ, Gonthier, Cory and Stevenson JJ.

19 *Hamed,* above n 14, at [163] per Blanchard J.

20 *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 at [50] per William Young, Glazebrook, Arnold and O'Regan JJ. The majority also noted that their approach appeared to reflect that of the Law Commission | Te Aka Matua o te Ture in its 2007 report on search and surveillance powers: at [50] per William Young, Glazebrook, Arnold and O'Regan JJ, referring to Law Commission | Te Aka Matua o te Ture *Search and Surveillance Powers* (NZLC R97, 2007) at [2.32] and following. Elias CJ in her dissenting reasons expressed reservations about restricting "search" under s 21 to conduct invading a "reasonable expectation of privacy": at [123].

circumstances of the case".[21] The Court noted that on the Canadian jurisprudence, the circumstances could include:[22]

> (a) the nature of the information at issue;
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> (b) the nature of the relationship between the party releasing the information and the party claiming confidentiality in the information;
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> (c) the place where the information was obtained; and
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> (d) the manner in which the information was obtained.

[20] Citing from the decision of the Supreme Court of Canada in *R v Plant*, the Court in *Alsford* also said that the reasonable expectation of privacy is directed at protecting "a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination [to] the state" and includes information "which tends to reveal intimate details of the lifestyle and personal choices of the individual".[23] The Canadian approach set out above was seen as providing a suitable framework for analysis of that case.

[21] The factors discussed by the majority in *Alsford* were not intended to provide a rigid template applicable in all cases. The second of the factors identified in *Alsford*, namely, the nature of the relationship between the relevant parties, makes more sense in the context of a case like *Alsford* which involved the provision of information by a third party, the electricity retailers, to the police. The Canadian case of *R v Plant* from which the Court in *Alsford* drew these factors similarly involved power consumption data recorded by a third party in a commercial context. By contrast, here, where the interaction between the police and Mr Tamiefuna was direct, we do not see a focus on the nature of the relationships as helpful on the question of whether what occurred here was a search. We do not therefore address this factor in the discussion which follows.

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21 *Alsford*, above n 20, at [63] per William Young, Glazebrook, Arnold and O'Regan JJ.

22 At [63] per William Young, Glazebrook, Arnold and O'Regan JJ citing the factors identified in *R v Plant* [1993] 3 SCR 281 at 293 per Lamer CJ, La Forest, Sopinka, Gonthier, Cory and Iacobucci JJ.

23 *Alsford*, above n 20, at [63] per William Young, Glazebrook, Arnold and O'Regan JJ, and see at [56] citing *Plant*, above n 22, at 293 per Lamer CJ, La Forest, Sopinka, Gonthier, Cory and Iacobucci JJ.

[22] In this case, where the use that is made of the information is critical and bound up with the taking of the photographs, we see "use" as an additional factor which warrants attention. We develop the relevance of use below.[24]

[23] As will be apparent, while we canvass the factors in turn, there is considerable overlap between them. It is the particular combination of the matters we discuss and the resultant intrusion on Mr Tamiefuna that leads us to conclude the removal of Mr Tamiefuna from the vehicle; placing him on a public thoroughfare; taking his photograph; and retaining a photograph on the NIA, together, was a search. Reflecting these elements which, in combination, we say comprised a search, we begin with consideration of the nature of the place, then use, the manner in which the information was obtained, and finally, we address the nature of the information.

The nature of the place

[24] On this aspect, the respondent emphasises that the photographs were taken on a public footpath. The respondent submits that people expect to be observed whilst in public and must know that they may be captured either by video or photograph, particularly given the all-pervasive nature of CCTV and mobile phone photography. Hence, the respondent says that the following observation from *Hosking v Runting* is apt:[25]

> At least at first blush it would seem very strained to view photographs as a form of seizure, or indeed search; and, in any event, seizing the image of a person who is in a public place could hardly be regarded as unreasonable, unless there was some very unusual dimension in the case.

[25] Reliance is also placed on the conclusion in *Hamed* that there was no reasonable expectation of privacy in relation to the video surveillance in that case when it took place on a public road.[26] This finding was consistent with the observation

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24 See below at [34]–[40].

25 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [226] per Tipping J.

26 *Hamed*, above n 14, at [171]–[178] per Blanchard J, at [265] per McGrath J and at [281] per Gault J.

of Blanchard J in *Hamed* that, while video surveillance may constitute a search, surveillance of a public place:[27]

> … should generally not be regarded as a search (or a seizure, by capture of the image) because, objectively, it will not involve any state intrusion into privacy. People in the community do not expect to be free from the observation of others, including law enforcement officers, in open public spaces such as a roadway or other community-owned land like a park, nor would any such expectation be objectively reasonable.

[26] We consider what occurred here is different from this aspect of *Hamed* and from the position in issue in *Hosking v Runting*.

[27] We start our consideration of the nature of the place from the standpoint of Mr Tamiefuna as a passenger in a car travelling in the early hours of the morning. In assessing the reasonable expectation of privacy, it is not correct to focus only on the position once Mr Tamiefuna was already on the street. That ignores the particular context of the person affected by the interference by, in effect, working on the presumption that the scope of police powers in this situation is general knowledge. There is here, for example, no evidence that Mr Tamiefuna knew the driver was disqualified, the car liable to be impounded, nor that he was in jeopardy of being effectively ejected from the vehicle. And, while of course Mr Tamiefuna was not concealed in the car, neither was he readily at hand.

[28] For the same reasons, it is no answer to say, as the respondent does, that it was Mr Tamiefuna's choice to travel on a public highway. Mr Tamiefuna was not simply out for a walk by choice that night when he was photographed, but ended up on the roadway only after he was required to get out of the car following its impoundment. And at that point he, although acting lawfully, was not simply observed but rather his photograph was taken (at fairly close range) and retained on the NIA.

[29] As the Court of Appeal said, this was not a situation where Mr Tamiefuna might have expected to be photographed by the police. Rather — as Laws LJ said in *R (Wood) v Commissioner of Police of the Metropolis*, a case involving the taking of

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[27] At [167] (footnote omitted). In the pre-trial judgment, for example, the High Court did not consider it was possible to have a legitimate expectation of privacy whilst standing on a public road: HC pre-trial decision, above n 2, at [126]. That was particularly so when the photographs of Mr Tamiefuna were taken openly when he was in "plain sight" of the photographer.

photographs by the police for identification purposes in anticipation of the possibility of future offending — it was state action confronting Mr Tamiefuna, as it were, unexpectedly and preventing him from continuing on his way.[28]

[30] The forced nature of the Land Transport Act stop by the police prior to Mr Tamiefuna's exit from the car also differentiates the position, for example, from a stop following a mechanical defect. In addition, the photographs were taken in a situation where the best that can be said for the respondent is that DS Bunting took the photographs, and retained one on the NIA, because he thought that this information might be useful in the future.[29]

[31] Further, as the Court of Appeal in this case said:[30]

> [56] It may be readily accepted that persons in a public place can have a low expectation of privacy; they can expect to be observed. But we find it hard to accept that stepping into a public space means people are thereby submitting to the obtrusion on privacy necessarily involved in the taking of a photograph for identification purposes by police. It is both the use of the camera and the involvement of the police that makes the difference. It creates a record of the subject's appearance and, depending on the framing, their location. We consider that many would find that an unreasonable intrusion, and that distinguishes this case from the reasoning applied by the majority in *Hamed*.

[32] It is true that CCTV coverage and the use of mobile phone photography are ubiquitous.[31] But footage from either CCTV or a mobile phone is not generally targeted at a named individual as this photography was. The targeted nature of what

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28 *R (Wood) v Commissioner of Police of the Metropolis* [2009] EWCA Civ 414, [2010] 1 WLR 123 at [45].

29 See Reasons for verdict, above n 1, at [50].

30 CA judgment, above n 5. See also *R v Jarvis* 2019 SCC 10, [2019] 1 SCR 488 at [41] per Wagner CJ, Abella, Moldaver, Karakatsanis, Gascon and Martin JJ — merely being in a public location did not "automatically negate all expectations of privacy with respect to observation or recording"; and see *R v Kawall* 2022 ONCJ 475 at [36]. Jones J in the latter case saw a difference between a private citizen being seen in public by another citizen and being recorded in some way by an agent of the state.

31 The respondent refers, amongst other cases, to *Kinloch v HM Advocate* [2012] UKSC 62, [2013] 2 AC 93 at [19] and the observation that "[a] person who walks down a street has to expect that [they] will be visible to any member of the public who happens also to be present. … [They] can also expect to be the subject of monitoring on closed circuit television in public areas where [they] may go, as it is a familiar feature in places that the public frequent. The exposure of a person to measures of that kind will not amount to a breach of [their] rights under art 8 [of the European Convention on Human Rights]": Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953) [European Convention on Human Rights].

occurred here is apparent in the fact that DS Bunting put a name (and other details) to the photograph.[32] The photograph plainly would have had less value without the addition of the name.[33] All this took place in a context where, while the police were entitled to ask Mr Tamiefuna to provide his name and address, a police officer must not suggest that it is compulsory to provide that information.[34] Mr Tamiefuna was not obliged to answer, only the driver was.[35]

[33] In conclusion on this factor, there were features of the relevant events that mean the fact Mr Tamiefuna's photograph was taken whilst he was on a public road is not a conclusive factor against the asserted reasonableness of his expectations of privacy. It remains important to preserve a sufficient zone of privacy for individuals. That in turn is a part of preserving the fundamentals of a liberal democracy.

The use to which the information taken was put

[34] We focus on use primarily because of DS Bunting's description of his actions. He said in evidence that he decided to complete an intelligence noting, and he did that "via" his mobile phone. He was clear in his evidence that the photograph was taken to "go along with" the noting he had made on his phone for inclusion on the NIA.

[35] The respondent submits that the retention of the photograph on the NIA is not relevant because the time to consider expectations of privacy is at the time the information was gathered. The respondent states that DS Bunting made the noting and then took the photographs. But, as we have said, the evidence was that the two actions were linked. Accordingly, the taking of the photographs cannot be separated from the fact that contemporaneously one of the photographs was placed and retained on the

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32 The European Court of Human Rights recognises that it is relevant "whether the individual in question was targeted by the monitoring measure": *López Ribalda v Spain* (2020) 71 EHRR 7 (Grand Chamber, ECHR) at [90]; and "whether there has been a compilation of data on a particular individual": *Uzun v Germany* (2011) 53 EHRR 24 (ECHR) at [45]. See also *Perry v United Kingdom* (2004) 39 EHRR 3 (ECHR) at [40]; and *Vukota-Bojić v Switzerland* 61838/10 ECHR 18 October 2016 at [56].

33 The European Court of Human Rights in *PG v United Kingdom* noted a person walking down a street will be visible to other members of the public also present. The same applies to CCTV footage viewed by a security guard. But, the Court said, "[p]rivate-life considerations may arise … once any systematic or permanent record comes into existence of such material from the public domain.": *PG v United Kingdom* (2008) 46 EHRR 51 (ECHR) at [57].

34 *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297, cl 1.

35 Land Transport Act 1998, s 114(3)(b). See below at [321], n 402 per Kós J.

NIA for some unspecified future use, and that it was taken for that purpose. The retention immediately made it possible to use the photograph and the associated information.

[36] The retention of information on a database and the absence or otherwise of controls on matters such as use or the length of time information may remain on the database have been seen as important features in the jurisprudence. Lords Sumption and Neuberger in *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* noted that, given the test for private life is whether there is a reasonable expectation of privacy, the test:[36]

> … must extend to every occasion on which a person has a reasonable expectation that there will be no interference with the broader right of personal autonomy recognised in the case law of the Strasbourg court. This is consistent with the recognition that there may be some matters about which there is a reasonable expectation of privacy, notwithstanding that they occur in public and are patent to all the world. In this context mere observation cannot, save perhaps in extreme circumstances, engage article 8 [of the European Convention on Human Rights], but the systematic retention of information may do.[37]

[37] In the context of considering the systematic retention of material, the European Court of Human Rights in *S v United Kingdom* made this point:[38]

> [71] The Court maintains its view that an individual's concern about the possible future use of private information retained by the authorities is legitimate and relevant to a determination of the issue of whether there has been an interference [with art 8]. Indeed, bearing in mind the rapid pace of developments in the field of genetics and information technology, the Court cannot discount the possibility that in the future the private-life interests bound up with genetic information may be adversely affected in novel ways or in a manner which cannot be anticipated with precision today.

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36 *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* [2015] UKSC 9, [2015] AC 1065 at [4] per Lord Sumption SCJ and Lord Neuberger P. Similarly, in *Wood*, above n 28, retention of the information was important: see at [45] and [57]–[60] per Laws LJ and at [88]–[89] per Dyson LJ. See also Daragh Murray "Police Use of Retrospective Facial Recognition Technology: A Step Change in Surveillance Capability Necessitating an Evolution of the Human Rights Law Framework" (2024) 87 MLR 833 at 841–842.

37 The absence of rules setting a clear maximum time limit on the retention of the information in issue in *Catt v United Kingdom* (2019) 69 EHRR 7 (ECHR) at [119] led the European Court of Human Rights to conclude there was a breach of art 8 of the European Convention on Human Rights.

38 *S v United Kingdom* (2009) 48 EHRR 50 (Grand Chamber, ECHR). See also at [99].

[38] Once the information is retained on a database like the NIA, that opens up the potential for collation of that information with other information. The prospect for abuse of that ability to collate the information was discussed by Sotomayor J in a concurring set of reasons in *United States v Jones*.[39] That case dealt with whether, when police attached a GPS tracking device to a car belonging to Mr Jones' wife and tracked its movements over about a month, that action comprised a search. The United States Supreme Court found that it was, although for varying reasons. In her concurring reasons, Sotomayor J made the point that "the government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse".[40] Sotomayor J continued:[41]

> The net result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the government, in its unfettered discretion, chooses to track—may "alter the relationship between citizen and government in a way that is inimical to democratic society".

[39] Sotomayor J, relevantly, queried whether people had a reasonable expectation that their movements would be "recorded and aggregated" in a way that allowed the government to ascertain a wide range of personal information about them.[42]

[40] While the law has to be able to develop gradually because of the complexities in this area, in a case such as the present it is artificial to focus only on the collection of the information. The use to which the information was to be put here is relevant to the intrusiveness of the search given, along with, as we shall discuss, its sensitivity and its status as a repository of biometric information.

[41] It is also illuminating to analyse why DS Bunting said he decided to take the photographs and retain one of them on the NIA. It suffices to set out three passages from DS Bunting's evidence.

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39 *United States v Jones* 565 US 400 (2012).
40 At 956.
41 At 956 citing *United States v Cuevas-Perez* 640 F 3d 272 (7th Cir 2011) at 285.
42 *United States v Jones*, above n 39, at 956.

[42] In the first excerpt, DS Bunting was responding to a question in cross-examination that he took Mr Tamiefuna's photograph because of his criminal history. DS Bunting denied it was "solely" on that basis and continued:

> It was a combination of all of the circumstances being the people who he was with, the time of the morning, the explanations they gave around what they were doing, my suspicions around the property that was in the vehicle, as to where that had come from and so that's why I completed it.

[43] Next, when asked about his understanding of the purpose of entering information on the NIA, DS Bunting responded that it was "a record which is available to other officers in the future to assist with policing activities". Finally, DS Bunting said:

> In this case there was no particular offence that I was investigating and so it was intelligence in terms of that the three people were associates associated to each other, that they were linked to that vehicle in that area at that time, that they had this particular property with them at that time.

[44] The respondent says that there was a good basis for suspecting that there was some stolen property in the vehicle. However, in terms of the reasonableness of Mr Tamiefuna's expectation of privacy, it is relevant that the High Court found that at the time the photographs were taken DS Bunting was not gathering evidence in relation to Mr Tamiefuna.[43] In other words, as the appellant submits, he was treated at the time by police as a suspect when the findings are that he was not. There is rightly no challenge to those findings. The prospect of stolen property was a matter DS Bunting raised late in the piece but, in any event, DS Bunting made no further inquiries about the property he saw in the vehicle and was not aware any other officer had made inquiries either. It appears that the matter was simply not pursued.

[45] Once the prospect of stolen property is removed from the equation, it is apparent from what DS Bunting said that what remains as the basis for his actions is that Mr Tamiefuna and those with him, at that time of the morning, had criminal histories and did not give satisfactory explanations about what they were doing. It was in this context that the Court of Appeal rejected the notion of "a free-ranging right to

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[43] Reasons for verdict, above n 1, at [50].

take and retain close-up photographs of members of the public acting lawfully in public places, perhaps because they look suspicious or different".[44]

[46] One of the complexities in this area is the effect of increasingly sophisticated technology. There is a helpful discussion of the approach to be taken to developing technology in *Kyllo v United States*.[45] That case dealt with thermal imaging which detects heat radiating from the external surface of the house. The United States Supreme Court made the point that although the technology at issue in that case "was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development".[46] The Supreme Court of Canada in *R v Telus* also suggested that "[t]echnical differences inherent in new technology should not determine the scope of protection afforded to private communications".[47] This suggests that, to ensure that expectations of privacy are respected, what counsel for the Privacy Commissioner | Te Mana Mātāpono Matatapu (the Privacy Commissioner) in this case describes as a "broader and contextual view" of s 21 of the Bill of Rights may be necessary to avoid erosion of the right by technological advances.

[47] Against this background, we see the uncontrolled use of this information along with the other factors we discuss as supporting a reasonable expectation of privacy for the purposes of whether there has been a "search" under s 21 of the Bill of Rights.

The manner in which the information was obtained

[48] Turning then to the way the information was obtained, the intrusiveness of the taking of the photographs viewed in isolation was not at the highest end. As the High Court stated in determining there was no search, "no image enhancing features were used to record an image containing any more detail than could be seen by the naked eye".[48] However, when the use to which the information was put is added into the analysis the level of intrusiveness increases.

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44 CA judgment, above n 5, at [71].
45 *Kyllo v United States* 533 US 27 (2001).
46 At 2044 per Scalia, Souter, Thomas, Ginsburg and Breyer JJ (footnote omitted).
47 *R v Telus* 2013 SCC 16, [2013] 2 SCR 3 at [5] per LeBel, Fish and Abella JJ.
48 Reasons for verdict, above n 1, at [48].

[49] The respondent characterises this as a case where DS Bunting simply recorded what he saw and heard.[49] The respondent relies on the line of participant recording cases which proceed on the basis that an individual can have no reasonable expectation that another person with whom they are interacting will not later disclose that interaction.[50] However, those cases are distinguished from the present case by two factors. First, there is a difference between the powers of observation (or listening) and the more intrusive — in privacy terms — act of recording particularly where, as we have said, Mr Tamiefuna was required to exit the vehicle in circumstances where he was acting lawfully. Second, the taking of the photographs here was combined with retention of the photograph together with Mr Tamiefuna's name on the NIA. DS Bunting presumably collated the photograph together with Mr Tamiefuna's name and other details because that made it possible to extract more value from the photograph.

[50] For the same reasons, it is wrong to characterise the case for the appellant as one in which he essentially argues for a right to be protected from flaws in manual note-taking.[51]

[51] In summary then, the manner in which the information about Mr Tamiefuna was obtained is another factor which, in combination with the others we have discussed, supports the fact that he had a reasonable expectation of privacy. We add that, in agreement with Glazebrook J, we place no weight on the fact Mr Tamiefuna did not object to the taking of the photograph.[52] He was not told he had a right to object. Nor, as we come to later, did the police comply with principle 3 of the information privacy principles in the Privacy Act 1993. That principle requires the collecting agency to take reasonable steps to inform the person from whom the information is being collected of various matters including the purpose of collection

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49 Compare with the reasoning of Glazebrook J, below at [230]–[231] and [233].

50 The respondent refers to cases in this category involving audio recording: see *R v A* [1994] 1 NZLR 429 (CA) at 437 per Richardson J, at 440 per Casey J and at 449 per Robertson J; *R v Barlow* (1995) 14 CRNZ 9 (CA) at 22–23 per Cooke P, at 33 per Richardson J and at 40 per Hardie Boys J; and *Lopez v United States* 373 US 427 (1963). The respondent also refers to cases involving video recording: *R v Smith (Malcolm)* [2000] 3 NZLR 656 (CA) at [51]–[52]; and *Tararo v R* [2010] NZSC 157, [2012] 1 NZLR 145.

51 An argument accepted in *Lopez*, above n 50.

52 Below at [255] and see at [276] per Glazebrook J.

and its legal basis.[53] The circumstances were such that he may well have felt he could not object.

The nature of the information at issue

[52] Finally, when viewed in combination with the factors we have discussed it is also relevant that the information involved here was personal, namely, Mr Tamiefuna's image.[54] Two of the photographs, including the one on the NIA, show his face. The personal and sensitive nature of this information taken in the particular circumstances of this case supports the reasonableness of his expectations of privacy. There is support for that in the joint report of the Privacy Commissioner and the Independent Police Conduct Authority | Mana Whanonga Pirihimana Motuhake, issued following an inquiry into police conduct when photographing members of the public (the Joint Report).[55] The Joint Report highlights the sensitive nature of a photographic image, noting as follows:[56]

> 20. Photographs of individuals are not, and cannot be treated as, the same as "intel notings". A digital photograph is not a description of an individual, it is an exact biometric image of that individual and no other. As such, it is sensitive personal information and must be treated accordingly. It is also capable of being analysed using facial recognition technology and other digital techniques which makes it even more important that the information is being collected, used, retained and stored lawfully.

[53] The Joint Report makes the point that photographs are "sensitive *biometric* information".[57] We add that the sensitivity of biometric information is recognised in the fact that statutory regimes are seen to be necessary to govern the use and collection

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53 Privacy Act 1993, s 6 Principle 3, para (1).

54 For example, it comes within the definition of "personal information" in s 2(1) of the Privacy Act 1993, which was the Act in force when the photographs were taken. It also comes within the definition in the current Act: Privacy Act 2020, s 7(1) definition of "personal information".

55 Privacy Commissioner | Te Mana Mātāpono Matatapu and Independent Police Conduct Authority | Mana Whanonga Pirihimana Motuhake *Joint inquiry by the Independent Police Conduct Authority and the Privacy Commissioner into Police conduct when photographing members of the public* (September 2022) [Joint Report].

56 The same point was made by the Court of Appeal of England and Wales in *R (Bridges) v Chief Constable of South Wales Police* [2020] EWCA Civ 1058, [2020] 1 WLR 5037 at [22]–[23] in discussing the commonalities between facial biometrics and fingerprints. The Court noted that biometric data enables the unique identification of individuals with some accuracy, which distinguishes it from other forms of data.

57 Joint Report, above n 55, at [14] (emphasis added).

of this information.[58] Except where the subject of specific statutory provisions, such as those in the Customs and Excise Act 2018, at present the collection and use of biometric information is otherwise governed by the Privacy Act 2020. Under that Act, biometric information is recognised as a subclass of "identity information".[59] The Privacy Act 2020 makes provision for access to identity information, and for the manner and form of this access.[60] The information privacy principles apply to these actions.[61] The same approach applied under the Privacy Act 1993, which as noted, was the Act in force when the photographs were taken of Mr Tamiefuna.[62]

[54] We add that the sensitivity of the information in issue here is also apparent from the jurisprudence of the European Court of Human Rights on art 8 of the European Convention on Human Rights, albeit art 8 is broader than s 21 in that it provides a free-standing protection for the right to respect for private and family life.[63] The jurisprudence is of some relevance in relation to this factor given art 8 is similar to art 17(1) of the International Covenant on Civil and Political Rights (ICCPR), New Zealand's commitment to which is affirmed in the Bill of Rights.[64]

[55] In combination with the other factors we have discussed, the nature of the information, which is both personal and biometric, supports a reasonable expectation

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58 See, for example, the Mental Health (Compulsory Assessment and Treatment) Act 1992; Customs and Excise Act 1996; Customs and Excise Act 2018; Parole Act 2002; Sentencing Act 2002; Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003; Corrections Act 2004; Policing Act 2008; Immigration Act 2009; Privacy Act 2020; and Maritime Powers Act 2022.

59 Privacy Act 2020, s 164 definition of "identity information", para (b).

60 Sections 165 and 166.

61 The information privacy principles apply to actions relating to "personal information", which encompasses identity information as "information about an identifiable individual": s 7(1) definition of "personal information", para (a); and see s 22.

62 Above n 54; and see Privacy Act 1993, Part 10A. At the time of writing this judgment, the Privacy Commissioner | Te Mana Mātāpono Matatapu (Privacy Commissioner) has announced their intention to issue a Biometrics Code. The Code would modify some of the information privacy principles as they relate to biometric information and the activity of biometric processing: Privacy Commissioner | Te Mana Mātāpono Matatapu "Privacy Commissioner announces intent to issue Biometrics Code" (press release, 18 December 2024); and see Privacy Commissioner | Te Mana Mātāpono Matatapu *Biometrics Processing Privacy Code draft guide* (December 2024) at 5.

63 In terms of the jurisprudence, see, for example, *Sciacca v Italy* (2006) 43 EHRR 20 (ECHR) at [29] citing *Von Hannover v Germany* (2005) 40 EHRR 1 (ECHR) at [50]–[53]; *Von Hannover v Germany (No 2)* (2012) 55 EHRR 15 (Grand Chamber, ECHR) at [95]; *López Ribalda v Spain*, above n 32, at [87]–[89]; and *Margari v Greece* (2023) 77 EHRR 27 (ECHR) at [27]–[28].

64 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976); and New Zealand Bill of Rights Act 1990, long title, para (b).

of privacy for the purposes of whether there has been a "search" under s 21 of the Bill of Rights.

Conclusion on whether there was a search

[56] In conclusion, we attach significance to the fact that the photographs were taken following Mr Tamiefuna's ejection from the vehicle in which he was travelling and used in the context of the exercise of a police power which was both intrusive and for a purpose which was generalised at best. The, personal, information was taken and then retained with very little in the way of controls applicable to its retention and use.

[57] We consider that what occurred in all the circumstances of this case was a search for the purpose of s 21 of the Bill of Rights. In reaching that conclusion we have applied three of the four of the factors discussed in *Alsford* to determine whether the expectation of privacy relied on by the appellant was reasonable. We have also considered the use to which the information was put. That reflects the factual position, namely, the unreality of separating out the taking of the photographs from retention on the NIA. We also see this development as part of the response necessary to address the impact on s 21 interests of increasingly sophisticated technology.

An unreasonable search?

[58] The next issue is whether the taking of the photographs and retention on the NIA was unreasonable. As Glazebrook J notes, the position of this Court as set out in *Marwood v Commissioner of Police* is that an illegal search will almost always be unreasonable. The Court in *Marwood* for that proposition relied on the majority view in *Hamed.*[65] We accordingly begin by considering the lawfulness of the search.

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[65] See *Marwood v Commissioner of Police* [2016] NZSC 139, [2017] 1 NZLR 260 at [23] per William Young, Glazebrook, Arnold and O'Regan JJ citing *Hamed*, above n 14. See below at [244] per Glazebrook J.

Lawfulness of the search

Submissions

[59] The appellant supports the conclusion of the Court of Appeal that the taking of the photographs and their retention was not lawful.[66]

[60] The respondent accepts that, if the taking of the photographs and retention was a search, there is no statutory power authorising the search. However, the respondent argues that DS Bunting had the power at common law to undertake the search of Mr Tamiefuna. This power, the respondent says, is not affected by the statutory provisions relied on by the Court of Appeal to limit police powers.

[61] In developing these submissions, the respondent relies on the common law duties of a constable. The respondent refers to the description in *R v Ngan* of the constable's "'absolute and unconditional obligation' … 'to take all steps which appear to them to be necessary for keeping the peace, for preventing crime or for protecting property from criminal injury'".[67] The respondent says a necessary part of fulfilling those common law duties is intelligence gathering of the sort that DS Bunting undertook. In particular, the respondent argues that, as recognised in cases such as *R (Catt)*, intelligence gathering extends to the systematic collection and retention of information for future police purposes such as the prevention and detection of crime.[68] The respondent notes also that the decision of this Court in *Alsford* was that the police could retain and use information that had in fact been improperly obtained, observing that such intelligence "may prove to be vital in enabling the police to resolve subsequent serious offending".[69]

[62] The respondent further endorses the point made by Lords Sumption and Neuberger in *R (Catt)* that a great deal of intelligence "is necessarily acquired in the

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66 CA judgment, above n 5, at [97].

67 *R v Ngan* [2007] NZSC 105, [2008] 2 NZLR 48 at [12] per Elias CJ, Blanchard and Anderson JJ citing *Glasbrook Brothers Ltd v Glamorgan County Council* [1925] AC 270 (HL) at 277 per Viscount Cave LC. The respondent refers to s 9 of the Policing Act which lists "law enforcement" and "crime prevention" as amongst the functions of the police.

68 *R (Catt),* above n 36, at [7] per Lord Sumption SCJ and Lord Neuberger P.

69 *Alsford*, above n 20, at [88] per William Young, Glazebrook, Arnold and O'Regan JJ, noting also that the police have a "legitimate intelligence-gathering function": at [88]. See also at [95].

first instance indiscriminately. Its value can only be judged in hindsight, as subsequent analysis" for a particular purpose will disclose a relevant pattern.[70]

[63] The respondent submits that the police common law power to gather intelligence includes the taking of photographs. The respondent relies in this respect on jurisprudence in comparable jurisdictions.[71] The respondent also refers to New Zealand authorities such as *Lorigan v R* holding that it is lawful for the police to undertake video surveillance of a place visible to the public so long as they do not trespass.[72] Finally, the respondent submits that the police can then use the photographs that they lawfully hold.

Our assessment

[64] As we have found there was a search, in the absence of any statutory authorisation for the search, it is necessary to consider whether the search is authorised at common law. In our view, it is clear it has never been the case that the warrantless search power at common law extends to what would be, in essence, a free-standing right to search a person, without a warrant, for general intelligence gathering purposes. We can explain our reasons shortly.

[65] At common law, "[t]he paramount duty of … the Police is to prevent crime and to detect and bring offenders to justice".[73] The police must have correlative powers to undertake these duties and the common law will supplement existing statutory provisions to the extent necessary.[74]

[66] That common law powers remain is acknowledged in the definition of "policing" in s 4 of the Policing Act 2008 which provides that police powers may be

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70 *R (Catt)*, above n 36, at [31] per Lord Sumption SCJ and Lord Neuberger P. See also at [52] per Lady Hale DP.

71 *Wood*, above n 28; *R (Catt)*, above n 36; and *R (Bridges) v Chief Constable of South Wales Police* [2019] EWHC 2341 (Admin), [2020] 1 WLR 672. See also *R v Shortreed* (1990) 54 CCC (3d) 292 (ONCA); *R v Abbey* [2006] OJ 4689 (ONSC) at [49], [79], and [82]–[84]; *Slaveski v State of Victoria* [2010] VSC 441 at [1362]; and *Caripis v Victoria Police (Health and Privacy)* [2012] VCAT 1472 at [27] and [33].

72 See *Lorigan v R* [2012] NZCA 264, (2012) 25 CRNZ 729 [*Lorigan* (CA)] at [29] and [37] approving *R v Fraser* [1997] 2 NZLR 442 (CA); *Hamed*, above n 14; and *R v Gardiner* (1997) 15 CRNZ 131 (CA). Leave to appeal to this Court was declined in *Lorigan v R* [2012] NZSC 67.

73 Neville Trendle *The Laws of New Zealand: Police* (Butterworths, Wellington, 1998) at [44].

74 See *Burton v Power* [1940] NZLR 305 (SC) at 307.

statutory or given by the common law.[75] Section 9 of the Policing Act also relevantly provides that the functions of the police include the following: keeping the peace; maintaining public safety; law enforcement; crime prevention; community support and reassurance; national security; participation in policing activities outside New Zealand; and emergency management. Finally, s 23(1) recognises that common law duties exist subject only to express statutory modification.

[67] It is also the case, as this Court recognised in *Alsford*, that the common law functions of the police extend to legitimate intelligence gathering.[76] The issue is whether that common law power to gather intelligence confers a common law power to search for the purposes of intelligence gathering. As we go on to explain, we conclude that it does not.

[68] For a number of reasons, it is plain that the limited police power at common law to search a person without a warrant does not extend to authorise what occurred here. The two-stage test from *R v Waterfield*, relied on by the respondent for determining lawfulness where the police conduct is "prima facie an unlawful interference with a person's liberty or property" requires consideration of whether the "conduct falls within the general scope of any duty imposed by statute or recognised at common law", and even if it does, whether the conduct "involved an unjustifiable use of powers associated with the duty".[77]

[69] The Court in *Waterfield* also made it clear that while there was, generally speaking, a duty to prevent crime, it was apparent from the decided cases "that when the execution of these general duties involves interference with the person or property of a private person, the powers of constables are not unlimited".[78]

[70] This Court in *Ngan* discussed the *Waterfield* test. In that context, the Court made it plain there must be a link between the power and a law enforcement purpose

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75 Section 4 definition of "policing", para (b).
76 *Alsford,* above n 20, at [88] per William Young, Glazebrook, Arnold and O'Regan JJ.
77 *R v Waterfield* [1964] 1 QB 164 (Crim App) at 170–171.
78 At 171.

because the powers at common law which attach to the relevant duties are those "necessarily incident to their discharge".[79]

[71] Here, the critical factual finding was that the officer was not investigating a crime, but rather he was searching as a form of intelligence gathering for some, unspecified, future occasion. The conduct is outside the scope in terms of the *Waterfield* test because of its disconnection from a law enforcement purpose. DS Bunting said he was looking for something that might help in the future. In doing that, he was conscious that it could later be used for evidence even though, at the time he took the photographs and stored one of them, he was not actually investigating an offence, as the High Court found. In these circumstances, there was no law enforcement purpose but simply a generalised wish to secure personal information for a hypothetical (and unspecified) potential use.[80]

[72] As we have found, the circumstances in which the photographs of Mr Tamiefuna were taken, and one retained, made this a search. That there is no free-standing warrantless search power for intelligence gathering is apparent from the situations identified by the respondent where some form of warrantless, but necessarily incidental or ancillary power, has been specifically recognised.[81] In its written submissions, the respondent says that:[82]

> The common law has thus recognised, for example: in Canada, the power to search incidental to arrest, to enter a dwelling by force to protect life and safety, to detain a person for investigative purposes and to search such a person

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79 *Ngan,* above n 67, at [11] per Elias CJ, Blanchard and Anderson JJ (footnote omitted).

80 We agree with Kós J to the extent that Kós J does not consider the common law powers allowed the police to retain the nominated photograph for general intelligence purposes unrelated to the circumstances in which the photographs were taken: see below at [326].

81 Steve Coughlan and Glen Luther suggest that the "*Waterfield* test" in Canada has become known as the "ancillary powers doctrine", "precisely because *Waterfield* was never intended to set out a test playing the role it has taken on in Canada", that is, a means of creating new police powers at common law: Steve Coughlan and Glen Luther *Detention and Arrest* (3rd ed, Irwin Law Inc, Toronto, 2024) at 18. The authors suggest it is possible the Supreme Court of Canada has indicated an "intention to show more circumspection in the use of the ancillary powers doctrine": at 23.

82 The respondent cites, respectively: as to Canada, *R v Caslake* [1998] 1 SCR 51, *R v Godoy* [1999] 1 SCR 311, and *R v Mann* 2004 SCC 52, [2004] 3 SCR 59; as to the United States, *Terry v Ohio* 392 US 1 (1968), and *Adams v Williams* 407 US 143 (1972) at 145–146; as to the United Kingdom, *Chic Fashions (West Wales) Ltd v Jones* [1968] 2 QB 299 at 310 per Lord Denning MR, *Lodwick v Sanders* [1985] 1 WLR 382 (QB) at 390 per Watkins LJ, *R (Rottman) v Commissioner of Police of the Metropolis* [2002] UKHL 20, [2002] 2 AC 692, and *Lavin v Albert* [1982] AC 546 (HL); and as to New Zealand, *Minto v Police* [1987] 1 NZLR 374 (CA), *R v Noble* [2006] 3 NZLR 551 (HC), *Ngan*, above n 67, and *Smith v R* [2022] NZCA 660.

> for protective purposes; in the United Kingdom, the power to seize property not specified in a search warrant but reasonably believed to be stolen, to stop a vehicle and detain it to effect an arrest, to search a person and their home when executing an arrest warrant, and to detain a person to prevent a breach of the peace; and in New Zealand, the power to take and detain chattels temporarily to prevent a breach of the peace, to search a person incidental to arrest, to collect and inventory property at the scene of an accident, and to stop and search a vehicle in emergency circumstances.

[73] None of these situations equate to the circumstances of the present case but rather are directed to situations such as where there is an arrest, some emergency or urgency, or a risk that property will be lost or a breach of the peace will ensue. Further, taking the power to search on arrest as an example, even then, the powers are confined.[83]

[74] That a narrow approach is taken at common law to warrantless searches of the person is apparent from the discussion of the Law Commission | Te Aka Matua o te Ture (the Law Commission) in its report on the powers of search and surveillance. In discussing the different considerations applicable to searches of the person compared with searches of property, stemming from the principle of bodily autonomy, the Commission said this:[84]

> Common law and statute have typically allowed a search of the person only in narrowly prescribed circumstances and do not generally give the automatic right to such a search as a corollary of a right to search premises or vehicles.

[75] In our view, the purpose of the search in this case, and the absence of any link to any investigation of any offence at all, also distinguish the present case from the cases relied on by the respondent. Each of those cases has to be read closely for their own circumstances. In *Lorigan*, for example, the video surveillance operation and use of night cameras were undertaken against the background that the police believed a Mr Van de Ven was involved, along with others, in the manufacturing and distribution

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83 See, for example, *Everitt v Attorney General* [2002] 1 NZLR 82 (CA) at [70] per Thomas J.

84 Law Commission | Te Aka Matua o te Ture, above n 20, at [8.2] (footnote omitted). See also at [8.4]: "…the circumstances in which a person may be searched need to be carefully circumscribed to ensure that such searches only occur where legitimate law enforcement objectives outweigh the protections otherwise accorded to the sanctity of the person". Christopher Corns, in describing the situations in which warrantless searches will be permissible, does not acknowledge any common law right to conduct a warrantless search of a person not pursuant to arrest — the permissible examples given of such searches are only pursuant to statute: Christopher Corns *The Law of Criminal Investigation in New Zealand* (Thomson Reuters, Wellington, 2021) at 383–387.

of methamphetamine.[85] It was unclear the extent to which his associates were involved in his drug-related activities. The surveillance undertaken was for the purpose of identifying people who visited Mr Van de Ven's house to establish the extent of their involvement.

[76] Nor is it logical to expand the warrantless search power beyond its traditional boundaries where the legislature, in explicitly permitting a warrantless search in the Search and Surveillance Act 2012, has carefully prescribed the circumstances in which such a power may be exercised.[86] Further, in addressing specifically police powers to take photographs of persons whilst in lawful custody and the situations in which that material may be retained, again, there are carefully prescribed statutory requirements and conditions imposed under the Policing Act. The fact that the search undertaken in this case was in breach of the relevant information privacy principles also indicates this is not a situation where an expansion of powers is apt.

[77] The support we draw from the terms of the Search and Surveillance Act in particular is not dependent on a finding that the legislation provides a code.[87] This point was not a focus of argument and it is not necessary to decide it. It is sufficient to find, as we do, that the relevant statutes show an intention to regulate the sorts of situations in which the taking of photographs and their retention is authorised. This does not preclude the exercise of the common law powers as we have discussed. But interpreting the extent of the common law search powers is not quite as straightforward as it was when Lord Devlin, writing extrajudicially, made the observations relied on by the respondent as to the width of those powers.[88] At some point, it can be said that legislative purpose will have effectively been subverted in a

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85 *Lorigan* (CA), above n 72.

86 Nor, as we discuss below, would this be a situation where a consent search could be undertaken in reliance on ss 91–96 of the Search and Surveillance Act 2012: see below at [86]–[88].

87 Compare *Ashby v R* [2013] NZCA 631, [2014] 2 NZLR 453 at [47]–[48] and [51] with *Holdem v R* [2014] NZCA 546 at [25]–[26] and *Roberts v R* [2024] NZCA 550 at [18] and see at [17].

88 See Lord Devlin *The Criminal Prosecution in England* (London, Oxford University Press, 1960) at 14. Lord Devlin said there had "never been any wide departure from the principle that the [constable] is to be treated as if [they] were an ordinary citizen".

case such as the present where the legislation has created what Mr Keith aptly described as a somewhat "denser environment".[89]

[78] Obviously, the statutory framework is relevant to reasonableness but, it must follow, it also has at least some relevance to how we now construe the relevant powers. In *Fletcher Timber Ltd v Attorney-General*, for example, the Court of Appeal took into account what was described as a manifestation of the contemporary shift towards open government in New Zealand to adopt a more restrictive approach to claims for public interest immunity.[90]

[79] It is helpful then to say a little more about the detail of each of the three relevant statutes in turn.

The Policing Act 2008

[80] Section 32 of the Policing Act sets out when and how "identifying particulars" may be taken when a person is in the lawful custody of the police.[91] Identifying particulars are defined as meaning a person's biographical details (such as their name or address), their photograph or visual image, and impressions of their fingerprints, palm-prints or footprints.[92] Section 32 encompasses the situation when the person is detained for committing an offence.[93] Section 32(1) makes it clear that the section is intended to allow the police only "to obtain information that may be used now or in the future by the Police for any lawful purpose". The constable must take the identifying particulars in a reasonable manner and may only use reasonable force.[94] Section 33 allows police to obtain the same information for the same purposes when there is good cause to suspect the person of committing an offence and the officer intends to bring proceedings against that person by way of a summons.[95]

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89 See also CA judgment, above n 5, at [67] contrasting the "careful statutory scheme" in the Policing Act with what occurred here. See also Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 753–756; and, regarding the effect on a constable's common law powers of express statutory provision for the taking of photographs of suspects detained at a police station, A T H Smith and N A Moreham "Privacy – Police Photographs in Public Places" [2009] CLJ 20 at 21.

90 *Fletcher Timber Ltd v Attorney-General* [1984] 1 NZLR 290 (CA) at 296 per Woodhouse P.

91 Policing Act, s 32(2)–(3).

92 Section 32(5).

93 Section 32(2).

94 Section 32(3).

95 Section 33(2).

[81] Under s 34(1), photographs taken under the authority of either of ss 32 or 33 may be entered, recorded and stored on a police information recording system. But s 34(2) provides that these photographs must be destroyed as soon as practicable after the decision is made not to commence criminal prosecution proceedings or the proceedings are commenced but have been completed with an outcome, such as an acquittal, for which continued storage is not authorised.[96] These limitations on retention, while applying to the other forms of identifying particulars described above, do not apply to biographical details.[97]

[82] The following implications can be drawn from these provisions. First, the fact that there was seen to be a need to expressly authorise and provide controls on the taking and retention of this type of biometric information is relevant to an assessment of the scope of the powers applicable here. It is the case that Mr Tamiefuna was not detained in custody but he was subject to the control of the officers, at least to the extent of being required to get out of the car. He was not a criminal suspect but, on the respondent's approach, the taking and retention of exactly the same information is lawful, and reasonable, albeit it took place without Mr Tamiefuna having the benefit of similar controls or protections to those in the Policing Act.

[83] Second, while in fact the photograph was not retained for long on the NIA, there is currently very little in the way of limits or controls on retention of information obtained in these circumstances on the NIA. The photograph could presumably have been retained for a much lengthier period. There is a stark contrast between the absence of limits or controls directed to retention of this photograph and the requirements of the Policing Act in relation to the taking and retention of photographs when a person is detained.

The Search and Surveillance Act 2012

[84] We draw on the following features of the Search and Surveillance Act. First, under the Act, search powers specifically authorise the person exercising the

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96 The outcomes authorising continued storage include conviction of the offence for which the particulars were taken and where the person is discharged without conviction under s 106 of the Sentencing Act: see Policing Act, s 34A.

97 See Policing Act, s 34(2) and compare s 32(5)(a).

search power "to take photographs".[98] That makes it clear the taking of photographs can be a part of what constitutes a search. The powers in this respect are not unlimited but are confined by the requirement that there are "reasonable grounds to believe that the photographs … may be relevant to the purposes of the entry and search".[99]

[85] Second, the ability to search a person without a warrant in a public place is constrained. For example, s 16 of the Search and Surveillance Act enables a warrantless search of a person in a public place where there are reasonable grounds to believe the person possesses evidential material relating to an offence punishable by a term of imprisonment of 14 years or more, or an offence against s 6B(1) of the Terrorism Suppression Act 2002. The restrictive nature of the circumstances under which that power may be exercised tells us something about when such a search is lawful as it supports the view such powers are intended to be "closely confined".[100]

[86] Third, ss 91–96 provide for consent searches in specified circumstances. The Court in *Alsford* noted that these provisions were a response to problems "perceived to result from police having an unrestricted ability to conduct consent searches".[101] The provisions apply to all searches, warrantless or otherwise, for which a particular suspicion or belief is required.[102]

[87] Consent searches may only be undertaken for the specified purposes, that is, to prevent offences; protect life or property; prevent injury or harm; investigate whether an offence has been committed; or for any statutory purpose that relies on an enforcement officer holding a particular suspicion or belief.[103] The effect of this regime is that there is no general reasonable cause requirement for consent searches, that is, consent searches may in specified circumstances be undertaken without either of the kinds of belief referred to in s 91. But there is a statutory limit on the permissible purposes of a consent search. There are also procedural safeguards. For example, the person being searched must be advised of their right to refuse consent.[104]

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98 Section 110(j).
99 Section 110(j).
100 CA judgment, above n 5, at [68].
101 *Alsford*, above n 20, at [22] per William Young, Glazebrook, Arnold and O'Regan JJ.
102 Section 91.
103 Section 92.
104 Section 93(c).

[88] The point we draw from this part of the Act is that a search for the general purpose of intelligence gathering is not permitted even if consented to because it is not in the list in s 92 and does not otherwise have statutory support.

[89] Finally, in s 125 there are "special rules" relating to searching persons. Section 125 provides that photographs may be taken of "any thing carried or in the physical possession or immediate control of the person" being searched where the person exercising the search power "has reasonable grounds to believe that the photographs … may be relevant to the purposes of the search".[105]

[90] The approach taken in the Act is properly seen as part of the background to the assessment of the lawfulness of what occurred in this case. Viewed in this way, the Act supports the position that the taking and retention of photographs in circumstances as they were here can form a search and that restrictions or protections are seen to be necessary when undertaking a search, even in a public place. The absence of any similar authorisation or controls suggests the common law should not expand the officer's powers in the present case.

The information privacy principles

[91] The Court of Appeal also relied on the fact there were breaches of information privacy principles in the Privacy Act. In addressing that conclusion, we first need to respond to the argument for the respondent, based on this Court's judgment in *Alsford*, that the information privacy principles do not assist here.[106]

[92] The first point to make is that the respondent overstates the position when submitting that *Alsford* makes it clear the fact of a breach of the information privacy principles would not assist in applying s 21. As counsel for the Privacy Commissioner put it, the Court in *Alsford* did not go so far as to treat the information privacy principles as if they were in a separate silo. Rather, and in agreement with Glazebrook J on this point, the effect of *Alsford* is that the information privacy principles are relevant, although not decisive, in an analysis for the purposes of s 21

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105 Section 125(1)(n).
106 *Alsford,* above n 20.

of the Bill of Rights and s 30 of the Evidence Act.[107] However, there is nothing in *Alsford* that would prevent the information privacy principles being highly relevant in a particular case, albeit not determinative.[108] *Alsford* was not dealing with a finding of breach of s 21 by a police officer. Rather, as we have indicated the relevant actions were those of a power company in supplying a record of electricity consumption, on request, to the police. In any event, in a case such as the present, the principles are useful in stating the expectations of the reasonable person.[109]

[93] Second, we need to address the respondent's argument that the Court of Appeal was, in any event, wrong to find there had been a breach of the information privacy principles. The relevant principles are principles 1, 3 and 9.[110] We can deal briefly with each in turn.

[94] Under principle 1, an agency may only collect personal information as is necessary for a lawful purpose.[111] The appellant supports the Court of Appeal's finding that this principle was breached. The respondent argues by contrast that the collection of the information in this appeal was necessary for a lawful purpose. It follows from our analysis of the scope of the police powers that the Court of Appeal was correct to find a breach of principle 1.

[95] Under principle 3, the collecting agency must take reasonable steps to inform the person concerned, among other things, about the collection, the purpose of the collection and its legal basis.[112] There is no question that this was not done in this case.

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107 See below at [204]–[208], [246], [258], [271] and n 333 per Glazebrook J.

108 The Court relied on the fact s 11(2) of the Privacy Act 1993 provides that the information privacy principles do not in general confer rights enforceable in the courts. We note for completeness that the Privacy Commissioner can now issue compliance notices in response to breaches of, among other things, the Privacy Act 2020 by public or private sector agencies: Privacy Act 2020, s 123(1); and see Privacy Commissioner | Te Mana Mātāpono Matatapu *Office of the Privacy Commissioner Compliance Notice Guidelines: Privacy Act 2020* (23 November 2020) at [5].

109 Counsel for the Privacy Commissioner also suggested the principles were a means by which tikanga aspects relating to intrusions could be addressed. The Commissioner cited in this respect Khylee Quince and Jayden Houghton "Privacy and Māori Concepts" in Nikki Chamberlain and Stephen Penk (eds) *Privacy Law in New Zealand* (3rd ed, Thomson Reuters, Wellington, 2023) 43. We did not hear any detailed argument on this point and we say no more about it.

110 Privacy Act 1993, s 6.

111 Section 6 Principle 1, paras (a)–(b). The New Zealand Police | Ngā Pirihimana o Aotearoa fall within the definition of an "agency": see s 2(1) definition of "agency", para (a).

112 Section 6 Principle 3, subs (1)(a), (b) and (e).

[96] Finally, under principle 9, personal information once collected must not be held for longer than is required for the purposes for which the information may lawfully be used.[113] Here, as has already been established, because there was no lawful purpose, the retention of the information was in breach of this principle.

Conclusion on lawfulness

[97] Taken together, and given the resultant intrusion, it was not lawful to take the photographs of Mr Tamiefuna and retain one of these photographs on the NIA. That would be to extend the common law power to authorise a free-standing warrantless search for intelligence gathering in a way which is not appropriate, particularly where the relevant statutory framework imposes controls in relation to the very same activity, albeit in different situations.

Unreasonableness

[98] There is no basis in this case to decide that, although unlawful, the search was nonetheless reasonable. Indeed, the considerations set out by Blanchard J in *Hamed*, namely, the level of intrusiveness into privacy, the reason for the search, and the nature of what is being searched, for the reasons given above, all support the conclusion the search was unreasonable.[114] The intrusion was a mix of intrusion on the property of a third party, namely, the driver of the car; Mr Tamiefuna's person as he was removed from the vehicle to the street in the early hours of the morning; and the use of modern technology to capture, upload and store biometric information, namely, his image, for future use.

[99] Finally, on the best view of the facts from the police perspective, the purpose of the intrusion on Mr Tamiefuna was to seize his image because of suspicious articles in the car. In addition, there was some reliance on the fact the group was travelling in the early hours of the morning and the occupants of the car all had criminal convictions. But the initial purpose evaporated relatively quickly and the goal became

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113 See also Kós J's discussion on this point below at [325].

114 *Hamed*, above n 14, at [172] per Blanchard J. See also the discussion of Glazebrook J, below at [251] and compare with [252]–[256].

one of general intelligence gathering just in case something came up, a purpose which also meant the search here was an unlawful one.

[100] In combination, these factors meant the search was an unreasonable one.

[101] The collection and retention of Mr Tamiefuna's information in the circumstances in which it occurred was therefore an unlawful and unreasonable search in breach of s 21 of the Bill of Rights. On that basis, the photographs were improperly obtained under s 30(5)(a) of the Evidence Act. That leads us to consider whether the Court of Appeal was wrong to admit the evidence.

Was the Court of Appeal wrong to admit the evidence?

[102] The Court of Appeal concluded that, although improperly obtained, the evidence was nonetheless admissible. In reaching that conclusion the Court said, among other matters, that while the right breached was important, the intrusion on this right was not very serious and the evidence obtained was central to the Crown case. In these circumstances, the Court considered exclusion of the evidence would be disproportionate to the breach. Whether the Court was right requires us to address the approach adopted by the Court to the inquiry required under s 30(2)(b), that is, to determine:

> … whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety and takes proper account of the need for an effective and credible system of justice.

[103] Under s 30(4), any improperly obtained evidence must be excluded if it is determined that its exclusion is proportionate to the impropriety.

[104] For the purposes of determining proportionality in terms of s 30(2)(b), the Act sets out a non-exhaustive list of factors that may be relevant to that inquiry. The factors listed in s 30(3) are as follows:

> (a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it:
>
> (b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:

(c) the nature and quality of the improperly obtained evidence:

(d) the seriousness of the offence with which the defendant is charged:

(e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:

(f) whether there are alternative remedies to exclusion of the evidence that can adequately provide redress to the defendant:

(g) whether the impropriety was necessary to avoid apprehended physical danger to the Police or others:

(h) whether there was any urgency in obtaining the improperly obtained evidence.

Submissions

[105] The appellant says the Court of Appeal was wrong in its approach to the admissibility of the evidence. In particular, the argument is that in respect of the factors in s 30(3), the Court gave insufficient weight to the importance of the right breached and the nature of the intrusion, while too much weight was given to the seriousness of the offence and the nature and quality of the evidence. The appellant also submits that the Court did not take proper account of the need for an effective and credible system of justice. Finally, the appellant asks the Court to restate and recalibrate the s 30(2)(b) balancing test. The appellant submits that the analysis in *R v Williams* is of assistance in this regard.[115]

[106] On the need for recalibration, the appellant undertook research of Court of Appeal cases citing s 30 dealing with real evidence where that evidence was obtained from searches contrary to the Bill of Rights and involving either search and seizure or rights closely linked to that. This research was provided to this Court as part of the appeal. The appellant emphasises that this survey of the cases shows that improperly obtained evidence is admitted 80 per cent of the time. The research also showed that in more than 50 per cent of the cases analysed, there was no reference to what was necessary to maintain an effective and credible system of justice.

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115 *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207.

[107] The respondent's submission is that exclusion of this evidence would be manifestly disproportionate to the impropriety. The respondent says that the Court of Appeal's approach was an orthodox one and there is no need to revisit what is now a well-established test. The respondent submits that there are a number of reasons why the real influence of s 30 is not as apparent from the material provided by the appellant. The survey focuses on the results at appellate level but various factors mean that that does not give the full picture. For example, prosecutors may decide not to seek to lead improperly obtained evidence where exclusion is likely. Further, most s 30 decisions will be unpublished judgments made by trial courts, so appeal decisions are a small and not necessarily representative subset. The respondent also submits that the individual s 30(3) factors should not be considered in isolation, for example, by simply counting cases in which s 30(3)(d) was in play and reasoning backwards from a decision to conclude that this factor is being given undue weight. That approach assumes incorrectly that s 30(3) factors are binary in nature. In other words, it presumes that they are either present or not. Rather, the various factors exist along a spectrum.

[108] The Privacy Commissioner emphasises that, at least in the cases in which the evidence has been obtained in breach of s 21 of the Bill of Rights or another human rights obligation, s 30 should be interpreted so as to provide an effective remedy for that breach. The Commissioner says that, as is well-established, an effective remedy must both vindicate the right of the individual and avoid recurrence of the breach in other cases.

Our assessment

[109] We first address the submission of the appellant that a recalibration of the test is necessary. The application of s 30 was considered in some detail by this Court in *Hamed*.[116] We are not convinced there is a need to revisit that, particularly as the reasons in that case address the content and importance of the need for an effective and credible justice system as required by s 30(2)(b). We also agree with Glazebrook J

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116 *Hamed,* above n 14.

that there is nothing in *Hamed* that suggests judges are prevented from applying the analysis in *R v Williams*, as that remains appropriate.[117]

[110] It is also difficult to know quite how much reliance can be placed on the analysis of the Court of Appeal decisions helpfully provided by the appellant. In any event, the Law Commission in its final review of the Evidence Act has considered s 30 in some detail and made recommendations for change.[118] At this stage it is preferable to wait and see what emerges from that process.

[111] Turning then to the s 30 assessment in this case, we accept the submissions for the appellant. This was a breach of an important right involving a mix of forms of intrusion into the right. Retention of the photograph uploaded to the NIA meant that the breach was an ongoing one. The breach was therefore more serious than the Court of Appeal considered. As to the nature of the impropriety, we accept that DS Bunting acted in good faith. But there plainly was a lack of clarity as to the scope of his powers indicating the need for some caution particularly given the slim purpose of the exercise. Obviously, the evidence was real and important and was relevant to a serious offence.

[112] Against this background, we consider exclusion would not be disproportionate to the impropriety. It seems to us that given the nature of the impropriety, albeit evidence which was both real and important was obtained, an effective and credible system of justice in this case requires the exclusion of the evidence. Otherwise, on a longer-term basis, the justice system is brought into disrepute. The point was made by Blanchard J in *Hamed* as follows:[119]

> [187] An effective and credible system of justice requires not only that offenders be brought to justice but also that impropriety on the part of the police should not readily be condoned by allowing evidence thereby obtained to be admitted as proof of the offending. It is not just a matter of balancing the impropriety on one side against the need to bring offenders to justice on the other. Both our Court of Appeal … and the Supreme Court of Canada in *R v Grant*[120] with reference to s 24(2) of the Charter of Rights and Freedoms have emphasised that society's longer-term interests will be better served by

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117 See below at [311] per Glazebrook J; and see *Williams*, above n 115.

118 Law Commission | Te Aka Matua o te Ture *Te Arotake Tuatoru i te Evidence Act 2006* | *The Third Review of the Evidence Act 2006* (NZLC R148, 2024).

119 *Hamed,* above n 14 (some footnotes omitted).

120 *R v Grant* 2009 SCC 32, [2009] 2 SCR 353 at [68]–[69].

> ruling out evidence whose admission would bring the system of justice into disrepute.

[113] Tipping J in *Hamed* similarly observed that it would be "a mistake to take the view that the need for an effective and credible system of justice is solely a counterpoint to the impropriety involved in gaining the evidence".[121] As Tipping J said, that is because the requirement to consider an effective and credible system of justice necessitates "not only an immediate focus on the instant case but also a longer-term and wider focus on the administration of justice generally".[122] Tipping J continued:[123]

> As the Supreme Court of Canada recently put it in *R v Grant*, the short-term public clamour for a conviction in a particular case must not deafen the judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly when the penal stakes for the accused are high. The seriousness of the offence charged is apt to cut both ways.

[114] It is important also to remember that, as Elias CJ, Tipping and McGrath JJ said, the admission of improperly obtained evidence to a greater or lesser extent tends to undermine the rule of law.[124] Finally, Elias CJ made the point, which is echoed by the submission of the Privacy Commissioner in this case, that "[t]he principle of the rule of law that breach of rights must be remedied is also essential to any effective and credible system of justice."[125] As Elias CJ said, the remedy must be tailored to the particular breach in order to be effective.

Conclusion on admissibility

[115] When the relevant factors are taken into account, this is a case where exclusion of the evidence would not be disproportionate to the breach. In our view, the Court of Appeal was wrong to conclude otherwise.

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121 *Hamed,* above n 14, at [229].
122 At [229] referring to *R v Shaheed* [2002] 2 NZLR 377 (CA) at [148] per Richardson P, Blanchard and Tipping JJ as to the longer-term interests of society.
123 *Hamed,* above n 14, at [230] (footnotes omitted).
124 At [230] per Tipping J, at [258] per McGrath J and at [62] per Elias CJ.
125 At [63].

Result

[116] For these reasons, in accordance with the view of the majority, the appeal is allowed. Mr Tamiefuna's conviction is quashed.

[117] A retrial is ordered. It will be for the Crown to decide whether there is sufficient admissible evidence to proceed to trial.

[118] For fair trial reasons, we make an order prohibiting publication of this judgment and any part of the proceedings (including the result) in news media or on the Internet or other publicly available database until final disposition of retrial. Publication in law report or law digest is permitted.

GLAZEBROOK J

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Introduction

[119] On 30 July 2021, Mr Tamiefuna was convicted of one charge of aggravated robbery, after a judge alone trial before Paul Davison J in the Auckland High Court.[126] His appeal against conviction was dismissed by the Court of Appeal on 9 May 2023.[127] On 28 July 2023, this Court granted Mr Tamiefuna's application for leave to appeal against that decision.[128]

[120] The appeal relates to whether a photograph of Mr Tamiefuna was admissible at his trial for the aggravated robbery. The photograph had been taken by a police officer in the early hours of 5 November 2019 and uploaded to the Police National Intelligence Application (NIA). It was a vital link in Mr Tamiefuna's identification as one of those involved in the robbery which had taken place in the early morning on

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126 *R v Tamiefuna* [2021] NZHC 1969 (Paul Davison J) [HC conviction decision].
127 *Tamiefuna v R* [2023] NZCA 163, [2023] 3 NZLR 108 (Cooper, Brown and Goddard JJ) [CA judgment].
128 *Tamiefuna v R* [2023] NZSC 93 (Glazebrook, O'Regan and Ellen France JJ).

2 November 2019 at a residential property located in West Auckland and occupied by the victim, Mr Lim.

[121] There were three main strands of evidence linking Mr Tamiefuna to the robbery.[129] The first was the CCTV footage of the driveway at Mr Lim's property. The Crown's case was that Mr Te Pou, the alleged co-offender, was clearly identifiable in that footage. The face of the man alleged to have been Mr Tamiefuna was obscured by a black cap with a white marking. That man was wearing black and white Asics shoes, beige pants with cuffs and grey gloves.[130]

[122] The second strand was CCTV footage taken at a petrol station the same day. Mr Te Pou was captured on CCTV in a Honda Odyssey accompanied by a man wearing similar clothing to the alleged second robber. This second man could be seen associating with the occupants of a blue Ford Falcon with silver roof racks, alleged to be the car involved in the robbery.[131]

[123] The third strand was the photograph taken of Mr Tamiefuna on 5 November when he was a passenger in the same Ford Falcon and wearing similar clothing. Mr Tamiefuna was arrested on 25 November 2019. A photograph taken following his arrest shows him wearing a pair of beige trousers with cuffs. A pair of Asics trainers was subsequently seized in a search of a vehicle driven by Mr Tamiefuna on 28 December 2019 when he was once again arrested.[132]

[124] I note at this point that Moore J, in a pre-trial ruling on 15 February 2021, had held the photograph of Mr Tamiefuna to be admissible at his trial for the robbery of Mr Lim.[133] The Court of Appeal had refused leave to appeal against that decision on 21 June 2021.[134] The issue was revisited at trial by Paul Davison J and the photograph held to be admissible.[135]

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129 CA judgment, above n 127, at [12].
130 At [5].
131 At [6]–[7].
132 HC conviction decision, above n 126, at [62].
133 *R v Tamiefuna* [2020] NZHC 163 (Moore J) [HC admissibility decision].
134 *Te Pou v R* [2021] NZCA 263, (2021) 30 CRNZ 699. The Court considered the issues arguable but there was insufficient time to deal with any appeal before trial.
135 HC conviction decision, above n 126, at [13]–[56].

[125] The issues in this appeal are whether the taking of the photograph constituted an unreasonable search in terms of s 21 of the New Zealand Bill of Rights Act 1990 (Bill of Rights) and, if so, whether or not it should have been admitted under s 30 of the Evidence Act 2006. Section 21 of the Bill of Rights provides that everyone has the right to be secure against unreasonable search or seizure. Section 30 of the Evidence Act covers improperly obtained evidence. I return to these sections in detail below.

[126] Before turning to the above issues, I set out the factual background. I then summarise the decisions below and the submissions of the parties and the intervener on the first issue.

Background

[127] On 5 November 2019, Detective Sergeant (DS) Bunting and Detective Constable (DC) Harrison were on night shift, patrolling in West Auckland. At about 4.20 am, they stopped a blue Ford Falcon to conduct driver licensing and breath alcohol checks.

[128] DC Harrison dealt with the driver. DS Bunting spoke with Mr Tamiefuna and the other passenger. He asked for their names and dates of birth and made what he described in evidence before Paul Davison J as "general conversation".[136] The driver explained that Mr Tamiefuna had asked to be taken home to Avondale from a house near where the vehicle had been stopped. They refused to provide the address of that house.

[129] DS Bunting returned to his vehicle and verified the men's details on the NIA. Because the driver was forbidden from driving, a decision was made to impound the vehicle. A tow truck was called, and the occupants were asked to get out of the car. They did so and began removing some of the property inside.

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[136] In evidence before Paul Davison J, Detective Sergeant (DS) Bunting referred to asking "general questions" such as, "[h]ow are you guys going? What are you up to tonight? et cetera." In evidence before Moore J, DS Bunting again mentioned having "general conversation" with the occupants of the vehicle while they were waiting for the tow truck about "what they were up to and where they had come from and where they were going".

[130] DS Bunting noticed items in the vehicle that he suspected might have been stolen: a woman's handbag and jacket (despite there being no women in the car)[137] and four car batteries (items commonly stolen for use as scrap). The NIA showed that all three men in the car had recent convictions for property and other serious offending; and that Mr Tamiefuna had recently been released from prison and was subject to release conditions.

[131] DS Bunting decided to record the events in an "intelligence noting" on the NIA. To accompany the noting, while the occupants were in the process of removing the items and then waiting to be picked up, DS Bunting took photographs on his mobile phone, including one of Mr Tamiefuna standing on the footpath next to the vehicle, looking directly at the camera.[138]

[132] DS Bunting said before Moore J that his understanding was that he was in a public place. He took the photographs overtly and Mr Tamiefuna was not objecting as can be seen from the photograph.

[133] DS Bunting said in evidence before Paul Davison J that he did not ask Mr Tamiefuna for permission to take the photograph because he did not believe he was required to. He said that he relied on the fact that they were in a public place where members of the public will take photographs of people.

[134] DS Bunting explained the reason he made the intelligence noting and took the photograph of Mr Tamiefuna in his evidence before Paul Davison J in the following terms:

> Q: Whenever you stop a vehicle though, you wouldn't take photographs of everybody in the vehicle, would you?
>
> A: No, I wouldn't. And that's why I said in this decision, in this instance, I decided to submit a intelligence noting and that I took the photographs to go along with that.
>
> Q: And just to cut to the chase, the reason you took the photo of Mahia Tamiefuna was because of his criminal history, wasn't it?

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[137] In the NIA noting, it is recorded that Mr Tamiefuna said the woman's handbag and jacket belonged to his sister with whom he had been drinking earlier that night: see below at [137].

[138] My reasons focus on this photograph which was subsequently uploaded to the NIA, as the challenge to admissibility related to this photograph.

A: It wasn't solely on that basis. It was a combination of all of the circumstances being the people who he was with, the time of the morning, the explanations they gave around what they were doing, my suspicions around the property that was in the vehicle, as to where that had come from and so that's why I completed it.

…

… And I was aware of their criminal convictions that all three of them had some serious criminal convictions recently prior to that, that time that I dealt with them. So, in totality … that led to me making the decision to complete the intelligence noting.

…

Well, also the time of the morning, there was a woman's handbag for example in the front, but no woman in the car. The nature of the property, four car batteries, it's a commonly stolen item for use for scrap. And that, you know, four of them in a car. Usually a car, you know, it's not a usual item that people would carry around in the boot of a vehicle.

[135] DS Bunting said in evidence before Paul Davison J that the noting would then be "available to other officers in the future to assist with policing activities". As to the suspicious property in the car, DS Bunting said that DC Harrison would have been responsible for following up, but he did not know whether she had done so.

[136] In the evidence before Moore J, DS Bunting had described the purpose of completing the intelligence noting as "linking them together to that vehicle and to that place in time". He accepted in cross-examination in evidence before Paul Davison J that he did not specifically say that he suspected that some of the property in the vehicle may have been stolen in his evidence before Moore J.[139]

[137] The "intelligence noting" recorded:

Occurred Date/Time: 05/11/2019 04:19

Noting type: Car/Person Acting Suspiciously

Location: At LUANDA DRIVE, RANUI, AUCKLAND

…

Subject: ACL699

Description: 3 males in vehicle

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[139] The presence of the property is, however, clearly outlined in the NIA intelligence noting.

…

Narrative Text: Vehicle ACL 699 observed travelling from LUANDA DRIVE onto Glen Road with three male occupants. Stopped on Glen Road.

Driver was [name of driver]

Front passenger TAMIEFUNA, MAHIA

Rear passenger [name of rear passenger]

[name of driver] stated that TAMIEFUNA had called him and asked to be picked up from a friends house in Ranui. The address was not given. They stated that they were returning to FLAT [number], [number] RACECOURSE PARADE where TAMIEFUNA resides on release conditions.

Vehicle had 4 car batteries in the boot. In the front passenger footwell there was a woman's handbag and jacket which TAMIEFUNA stayed [sic] belonged to his sister who he had been drinking with earlier in the night.

[Name of driver] was found to be a forbidden driver. The vehicle was impounded and [name of driver] summonsed for DWF.OC LHAY27

…

Photo attached …, taken on 05/11/2019 04:33:41

Description: TAMIEFUNA, MAHIA

High Court decisions: unreasonable search

[138] Moore J held in his pre-trial ruling that Mr Tamiefuna did not have an objectively reasonable expectation of privacy while standing "in the open public space of a roadside footpath".[140] There was therefore no search and no breach of s 21 of the Bill of Rights.

[139] After the Court of Appeal had refused his application for leave to appeal against Moore J's decision, Mr Tamiefuna withdrew his jury trial election, obtained severance and went to a Judge-alone trial before Paul Davison J. At that trial, only DS Bunting gave evidence. All other material facts were agreed via a Statement of Agreed Facts under s 9(1)(b) of the Evidence Act.

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140 HC admissibility decision, above n 133, at [129].

[140] Paul Davison J ruled the photograph admissible and found Mr Tamiefuna guilty of the aggravated robbery. He held that the initial traffic stop was lawful and consistent with the functions of the police.[141] The Judge also noted that Mr Tamiefuna was on the footpath by a public road when photographed. The fact he was in a private vehicle beforehand did not provide a basis for a reasonable expectation of privacy once he had exited the vehicle: that he had to get out of the car was a consequence of him travelling in a vehicle being driven by someone who was prohibited from driving. The Judge held that the decision to make an intelligence noting and to take photographs was made after Mr Tamiefuna had exited the vehicle.[142]

[141] The Judge held that there was no element of "concealment or secrecy" in the way the photographs were taken and Mr Tamiefuna was well aware he was being photographed.[143] The images showed only what could be seen by the naked eye.[144] The Judge also held that, while DS Bunting held suspicions about some of the property in the car, his actions were for intelligence (rather than evidence gathering) purposes, namely, recording information "against the possibility that it might be relevant to and of assistance to future police enquiries regarding the defendant or his associates".[145]

[142] Taking all the above factors into account, the Judge held that the taking of the photographs was not a search.[146] Even had it been a search, it would not have been unreasonable. The open taking of a photograph of Mr Tamiefuna standing in a public place and not engaged in any private activity would only be "a minimal intrusion" into Mr Tamiefuna's privacy and he had cooperated by looking directly at the camera.[147]

Court of Appeal decision: appeal against conviction

[143] As noted above, Mr Tamiefuna appealed against his conviction. In its judgment on that conviction appeal, the Court of Appeal held that photographing Mr Tamiefuna constituted a search for the purposes of s 21 of the Bill of Rights.[148]

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141 HC conviction decision, above n 126, at [43]. This finding is not challenged.
142 At [45].
143 At [46].
144 At [48].
145 At [50].
146 At [51].
147 At [52].
148 CA judgment, above n 127, at [56]–[58].

The Court said that the question of "whether there was a search is to be addressed by asking whether Mr Tamiefuna had a reasonable expectation of privacy in the circumstances in which the photographs were taken".[149] In the Court's view, where a state agent photographs an individual for identification purposes, "there is a reasonable expectation that will not occur in a public place without a good law enforcement reason".[150]

[144] The Court then considered ss 32–34A of the Policing Act 2008.[151] It held that these sections constitute a "careful statutory scheme" which was "inconsistent with any suggestion that the police may photograph persons and retain their images without bringing any charge and without any obligation to destroy the images". As there is no evidence that any inquiry was taken in relation to the items which were suspected to be stolen, and Mr Tamiefuna was not detained by the police, the Court found the powers under the Policing Act could not have been exercised.[152]

[145] The Court held that the common law did not authorise the officer's conduct.[153] Although "the police have authority to investigate crime and carry out actions that are reasonably incidental to that purpose", the officer who photographed Mr Tamiefuna had not been gathering evidence of alleged offending by him,[154] and the suspicious circumstances had not resulted in any police investigation.[155]

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149 At [58] relying on the majority decision in *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305.
150 CA judgment, above n 127, at [57].
151 At [60]–[66].
152 At [67]. The Court also referred to the very restricted power in s 16 of the Search and Surveillance Act 2012 for warrantless searches as supporting its conclusion that police powers to photograph and retain such photographs are intended to be "closely confined": at [68].
153 At [72]–[75].
154 At [74] and see at [70].
155 At [70] and see at [74] and [91].

[146] The Court said that an unlawful search will generally amount to an unreasonable search.[156] In this case the Court said:[157]

> We cannot accept that the police have a free-ranging right to take and retain close-up photographs of members of the public acting lawfully in public places, perhaps because they look suspicious or different. We do not consider such a right would be accepted by society as reasonable.

[147] The Court also took support from the joint report (released after the appeal had been argued) of the Privacy Commissioner | Te Mana Mātāpono Matatapu (the Commissioner) and the Independent Police Conduct Authority | Mana Whanonga Pirihimana Motuhake (the Joint Report) about police practices when photographing members of the public.[158]

[148] The Court said that the conduct in this case appeared to breach three information privacy principles under s 6 of the Privacy Act 1993: principles 1, 3(1) and 9.[159] The Court recognised that s 11(2) of the Privacy Act 1993 provides that, generally, the privacy principles do not confer any legal right enforceable in a court of law. The Court of Appeal held, however, that the privacy principles are relevant when "considering what reasonable expectations of privacy ought to encompass in accordance with modern societal expectations".[160]

[149] In conclusion, the Court held that the taking and retention of Mr Tamiefuna's photograph "was not lawful because it was not authorised by statute".[161] It also

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156 At [59] and see at [44].

157 At [71]. The Court also discussed Australian legislation which it considered supported its position: at [76]–[77]. The Crown submits that it is by no means clear that the police conduct in this case would be unlawful in Australia. It points, for example, to the Surveillance Devices Act 2004 (Cth) which expressly permits the use of "an optical surveillance for any purpose" (provided no trespass is committed): s 37(1)(a) and (c)–(d). It also points to the use of body cameras by the police in Australia. But in any event it submits, and I accept, that "current legislative regimes in the various Australian states and territories provide little assistance in applying s 21" of the Bill of Rights.

158 Privacy Commissioner | Te Mana Mātāpono Matatapu and Independent Police Conduct Authority | Mana Whanonga Pirihimana Motuhake *Joint inquiry by the Independent Police Conduct Authority and the Privacy Commissioner into Police conduct when photographing members of the public* (September 2022) [Joint Report].

159 CA judgment, above n 127, at [80]–[83]. The Privacy Act 2020 was not yet in force at the time the photographs were taken.

160 At [83] (footnote omitted). At [84]–[95], the Court also relied on *R (Wood) v Commissioner of Police of the Metropolis* [2009] EWCA Civ 414, [2010] 1 WLR 123 and decisions of the European Court of Human Rights limiting the period for which electronic data about individuals can be retained: *Catt v United Kingdom* (2019) 69 EHRR 7 (ECHR) [*Catt* (ECHR)]; and *Gaughran v United Kingdom* [2020] ECHR 144.

161 CA judgment, above n 127, at [97].

breached Mr Tamiefuna's right to be secure against unreasonable search and seizure protected under s 21 of the Bill of Rights.[162]

The submissions: unreasonable search

Mr Tamiefuna

[150] In relation to the first issue on appeal, Mr Tamiefuna submits that the taking of the photograph amounted to a search because it invaded upon his reasonable expectation of privacy when he had not been suspected of any criminal offending.

[151] Mr Tamiefuna submits that the circumstances set out in ss 32 and 33 of the Policing Act are exhaustive. The preconditions in these provisions were not made out in Mr Tamiefuna's situation. Mr Tamiefuna also submits that the subsequent storage of the photo failed to comply with s 34(1) of the Policing Act. This meant that the taking of the photograph and its storage were unlawful and, as a consequence, unreasonable.

[152] Mr Tamiefuna also submits that the Court of Appeal was correct in finding that the taking and uploading of his photograph on the NIA constituted a breach of the three privacy principles it identified.

[153] It is submitted that all of the above factors mean that the evidence was obtained in breach of Mr Tamiefuna's right not to be subjected to unreasonable search and seizure under s 21 of the Bill of Rights, rendering it improperly obtained for the purposes of s 30 of the Evidence Act.

The intervener

[154] The Commissioner submits that the right against unreasonable search and seizure in s 21 of the Bill of Rights should be interpreted consistently with the right to privacy.[163] This right is implemented not only through s 21 of the Bill of Rights, but

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162 At [97].

163 The Privacy Commissioner | Te Mana Mātāpono Matatapu [the Commissioner] points out that the right to privacy is contained in art 17 of the International Covenant and Civil and Political Rights to which New Zealand is a party: International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1966, entered into force 23 March 1976) [ICCPR].

also, among other things, through the information privacy principles in s 6 of the Privacy Act 1993.[164]

[155] Further, it is submitted that state intrusions into privacy must be prescribed by law: that is, not only authorised by law but sufficiently prescriptive that the terms are known and effectively enforced. In the Commissioner's submission, this (for example under the Policing Act) applies both to statutory powers and any so-called third source of powers.

The Crown

[156] The Crown submits that the photograph of Mr Tamiefuna was taken to assist the police in performing their duty to detect crimes. At common law, the police are empowered to collect intelligence, including via photography, for that purpose. This basic power has not been excluded by statute, including ss 32–34 of the Policing Act. The officer's actions were accordingly lawful.

[157] In the Crown's submission, there was no breach of s 21 of the Bill of Rights. A photograph taken, overtly and without objection, of a person on a public footpath does not invade any reasonable expectation of privacy. It is submitted that the privacy principles are of no independent significance and, in any event, there was no breach of these principles.

[158] It is submitted that there was therefore no search and, even if there were, it was not an unreasonable search. The Crown submits that the fact that the photograph was retained does not change the s 21 analysis and, even if it did, the short period of retention (around three weeks) before Mr Tamiefuna was implicated in serious criminal offending was not unreasonable.

Unreasonable search: issues

[159] I start with a discussion of police powers, referring in large part only to decisions of this Court. I then examine the relevance of ss 32–34 of the Policing Act,

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[164] As in force at the time of the vehicle stop in November 2019, and since re-enacted as s 22 of the Privacy Act 2020.

the Search and Surveillance Act 2012 and the privacy principles. After this, I consider whether there was a search in this case and, if so, whether it was reasonable in terms of s 21 of the Bill of Rights. I then discuss whether the privacy principles were breached in this case and the consequences if they were. Finally, I consider whether the actions of the police with regard to the photograph, including its retention, were an exercise of the common law duties of the police and whether those actions were reasonable.

Police powers

Duties and corresponding powers in statute and at common law

[160] The police have duties and corresponding powers to perform those duties, both under statute (including the Policing Act, the Land Transport Act 1998 and the Search and Surveillance Act) and the common law. Unless modified by statute, "the common law duties of a constable and the powers necessarily incident to their discharge attach to members of the police in New Zealand".[165] These are "public law duties… directed to the protection and welfare of the public at large".[166]

[161] The common law duties of the police are extensive and, at their core, is the duty "to take all steps which appear to them to be necessary for keeping the peace, for preventing crime or for protecting property from criminal injury".[167] As well as this core duty, there are also a:[168]

> …range of things that the police customarily do for the benefit of the public in furtherance of their general responsibility to protect life and property, but which are not directly associated with the prevention or detection of crime.

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165 *R v Ngan* [2007] NZSC 105, [2008] 2 NZLR 48 at [11] per Elias CJ, Blanchard and Anderson JJ [the majority] referring to *Minto v Police* [1987] 1 NZLR 374 (CA) at 377–378 per Cooke P, and s 5(6) of the Police Act 1958. McGrath J also accepted that the Police Act acknowledges that members of the police in New Zealand have the powers of a constable under the common law: at [74].

166 At [11] per the majority referring to *Thomas v Sawkins* [1935] 2 KB 249 at 254 per Lord Hewart CJ.

167 *Ngan*, above n 165, at [12] per the majority citing *Glasbrook Brothers Ltd v Glamorgan County Council* [1925] AC 270 (HL) at 277 per Viscount Cave LC. The majority said that it is, however, for the police to exercise their judgement as to the manner in which adequate response is made to reasonably apprehended breaches of the peace.

168 *Ngan*, above n 165, at [13] per the majority (footnote omitted).

[162] The police have the powers and immunities necessary to perform these functions, "which are regarded as part of their public law responsibilities".[169]

[163] The continued existence of the common law powers of a constable is recognised in the Policing Act. Section 4 defines policing as meaning: [170]

> (a) … the performance by the police of any of its functions; and
>
> (b) includes the exercise by Police employees of powers that they have because they are constables or authorised officers (whether the powers are statutory or given by the common law) …

Constraints on exercise of powers at common law

[164] Any interference with private liberty or property by the police is, however, unlawful unless it can be justified by statute or the principles of common law. The issue of whether or not an exercise of powers is unlawful requires considering two questions (the *Waterfield* requirements): first, whether the conduct falls within the general scope of any duty imposed by statute or recognised at common law; and, second, whether the conduct involves an unjustifiable use of powers associated with that duty.[171] Where the exercise of powers is not in pursuance of the core duties and the apprehended danger is to property rather than persons, "there may be less justification for any use of such powers". Overall, any exercise of the powers must be reasonable.[172]

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169 At [13] per the majority.

170 Section 5(6) of the Police Act, referred to in *Ngan*, above n 165, at [74], provided that, except as expressly provided in the Act, nothing in the Act limited the powers and duties conferred or imposed on the office of constable by common law or any enactment.

171 *R v Waterfield* [1964] 1 QB 164 (Crim App) at 170–171. Referred to by the majority in *Ngan*, above n 165, at [14].

172 *Ngan*, above n 165, at [14] per the majority referring to Cooke P's comments in *Minto*, above n 165, at 378 for the reasonableness requirement. Apprehended danger to property, but not directly related to the detection and prevention of crime, was at issue in *Ngan*. It was held by the majority that the police had the power to clean up and store Mr Ngan's property (including large amounts of cash) which had been scattered in and around his car after an accident. Drugs had been found in a sunglass pouch in the course of making an inventory of the property. It was held that, because the police were making an inventory and were not acting for the purpose of gathering evidence of a crime (despite suspicions about the presence of large amounts of cash), opening the pouch was lawful as an exercise of common law police powers and it was also reasonable: at [28]. The majority rejected the submission that, because the search had been conducted for inventory purposes, evidence of the product of the search could not be used for the purpose of a prosecution: at [30]–[37].

[165] Meeting the *Waterfield* standard is a constraint on the police that does not apply to the general public.[173] The existence and exercise of common law police powers is also subject to any statutory requirements, including those contained in the Bill of Rights and in particular s 21.[174] Aside from these constraints, in performing their common law duties (and in particular the core duties), the police have all powers necessarily associated with their exercise as noted above.[175] This includes (at least) being able to do what the general public can do in the same situation.[176]

Power to do what the general public can do

[166] An example of police powers to do what the general public can do arose in *Tararo v R*.[177] In that case, an undercover police officer had gone to the front door of a "tinnie house" and knocked. A man came to the door and the officer purchased cannabis from him, without going inside the house. Relevantly for this appeal, the officer had covertly filmed the transaction with a video camera concealed on his

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173 *Ngan*, above n 165, at [20]–[21] per the majority. This differs from Tipping J who would have decided the case on the basis that, if a private citizen could have lawfully taken possession of the pouch, a police officer should not be in any different position, but recognised that the police may be subject to statutory constraints (including under the Bill of Rights) or other constraints not applicable to members of the public: at [45] and [52]–[53].

174 At [22] per the majority. The majority said that the *Waterfield* criteria "appear to be entirely consistent with" the position under the Bill of Rights for situations "where the police may have 'no positive duty' but would normally be expected to intervene" (as was the case in *Ngan*): at [22] (footnote omitted). That the exercise of police powers is subject to the Bill of Rights was also recognised by Tipping J (see n 173 above) and by McGrath J at [97]. McGrath J would, however, have decided the case on the basis of the concept of a "residual freedom as a 'third source of authority' … distinct from statutory and common law powers": at [96]. He did not consider that there was authority under statute or the common law to undertake the actions the police took in that case: at [74] and [92].

175 Because the common law duties of the police and therefore the powers to perform them are extensive and cover the situation in this appeal, I do not need to consider whether or not there is a third source of authority: see the outline of McGrath J's views at n 174 above.

176 Tipping J would have decided *Ngan* on this basis: see *Ngan,* above n 165, at [46]. I do not read the majority reasons as differing from this, except insofar as they imposed an additional constraint of the *Waterfield* criteria of justification: at [20]–[21]. The majority discussed the position of an ordinary citizen in the same circumstances: at [16]. Tipping J took a similar approach in *Hamed*, above n 149, at [217]. I accept the Crown submission that, while Blanchard, McGrath and Gault JJ did not expressly endorse this point, they, in contrast to the position taken by Elias CJ, did not consider the absence of statutory authority for the police surveillance actions as meaning the evidence was unlawfully obtained: at [38]–[45] per Elias CJ. The unlawfulness arose from the trespass on private property and the resulting breach of s 21 of the Bill of Rights: at [155], [159], [178]–[179] and [183] per Blanchard J, and [263] and [266] per McGrath J. Gault J agreed with Blanchard J's reasons with regard to s 21: at [281], discussing trespass at [283]–[284] in the context of his s 30 analysis. A similar analysis of the judgment is made by the Court of Appeal in *Lorigan v R* [2012] NZCA 264, (2012) 25 CRNZ 729 [*Lorigan* (CA)] at [30]–[33] as I discuss in more detail below.

177 *Tararo v R* [2010] NZSC 157, [2012] 1 NZLR 145 [*Tararo* (SC)].

person.[178] The Court held that there is an implied licence for members of the public, including police officers, to go to the front door of private premises to make inquiries of an occupier for any reasonable purpose.[179]

[167] It was held in *Tararo* that those availing themselves of this implied licence could take photographs if it was reasonable to do so in order to accomplish that purpose. It was held that police officers were allowed to avail themselves of the implied licence for law enforcement purposes but not for anything that by law requires a warrant. The Court went on to say that it would usually be reasonable to make a photographic record of what the police officer does or sees while exercising the licence. This will allow the police officer to support the evidence of what was done and seen while on the premises. The Court held that making "such a record does not turn the officer into a trespasser".[180]

[168] This Court was not required in *Tararo* to consider whether what occurred was a search within the meaning of s 21 of the Bill of Rights as that was not a ground of appeal. The Court did, however, comment that, if the officer had been conducting a search, it was a reasonable search. The Court said that the "same values as are inherent in s 21 are reflected the trespasser/implied licence jurisprudence" discussed in the judgment.[181]

[169] The Court of Appeal in *Tararo* had held that the conduct of the police officer did not constitute a search in terms of s 21. The appellant's expectations of privacy in that case were minimal.[182] He was prepared to engage in cannabis trading from his

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178 At [5]–[6] per Blanchard, Tipping, McGrath and William Young JJ.

179 At [14] per Blanchard, Tipping, McGrath and William Young JJ. The Court commented that "the rigidity of the law of trespass requires modification in order to accommodate the ordinary interaction of citizens": at [15]. In *Hamed*, the Court rejected the view that there was an implied licence for the police to enter the land in question for investigative purposes because part of the land was accessible and used by members of the public for recreational purposes: *Hamed*, above n 149. This was different from the implied licence at issue in *Tararo* (SC), above n 178: *Hamed*, above n 149, at [7] and [88] per Elias CJ, [158] per Blanchard J and [219] per Tipping J. The licence to enter the land for recreational purposes did not allow the use of the licence for law enforcement purposes. The point was not addressed specifically by the other two judges, although McGrath J did consider the police had trespassed and Gault J said that he agreed with the reasons of Blanchard J for determining that the appellants' rights under s 21 had been breached: at [266] per McGrath J and [281] per Gault J.

180 *Tararo* (SC), above n 178, at [14] and more fully discussed at [17]–[22].

181 At [7].

182 The Court applied the wider definition of "search" set out by McGrath J in *Ngan* to include official

front door with strangers. The Court said that the "recording of a transaction freely entered into is not properly characterised as a search in the circumstances of this case".[183] The position may have been different had the police officer entered the house.[184]

Intelligence-gathering function

[170] The Crown submits that one of the powers of the police at common law is to gather intelligence. I accept that submission. The police do undoubtedly have an intelligence-gathering function at common law, as confirmed by this Court in *R v Alsford*.

[171] One of the issues in *Alsford* was whether search warrants for properties associated with Mr Alsford were improperly obtained because the information provided to the issuing officer relied on the results from an earlier unlawful search. The majority in *Alsford* decided that there should not be a blanket rule excluding reliance on such evidence for a number of reasons.[185]

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examinations or investigations that were not linked to the gathering of evidence, but which nonetheless affected privacy rights: *Ngan*, above n 165, at [111].

183 *Tararo v R* [2010] NZCA 287, [2012] 1 NZLR 145 [*Tararo* (CA)] at [63].

184 At [63].

185 *R v Alsford* [2017] NZSC 42, [2017] 1 NZLR 710 at [86]–[90] per William Young, Glazebrook, Arnold and O'Regan JJ.

[172] One of the reasons given was that a blanket rule would effectively require the police officer either to destroy or to quarantine and ignore information that had been ruled inadmissible. The Court went on to recognise that the police have a legitimate intelligence-gathering function that allowed the retention of such material and reliance on it:[186]

> But the police have a legitimate intelligence-gathering function, and obtain information from a wide variety of sources of varying reliability and importance. In some situations, the intelligence derived wholly or partly from inadmissible information may prove to be vital in enabling the police to resolve subsequent serious offending. It is not at all clear from a policy perspective that the police should be required, as a matter of course, to avoid any reliance on information that has been ruled to be inadmissible no matter how reliable and important it may be.

Power to take photographs

[173] The Crown submits that the common law intelligence-gathering function includes the power to take photographs and that this power extends to the retention, storage and use of any information gathered, including photographs.[187]

[174] I accept that submission. That the submission is correct is clear from *Alsford* and the cases relied on by the Crown.

[175] It suffices for the purposes of this appeal to discuss two New Zealand cases: the decision of a full court of the Court of Appeal in *R v Smith (Malcolm)*[188] and the Court of Appeal decision in *R v Lorigan*.[189] Both decisions relate to covert video surveillance.[190] *Lorigan* was decided after this Court's decision in *Hamed* and relies on it, as well as reconciling the separate reasons in *Hamed.*

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186 At [88] (footnote omitted).

187 For this proposition, the Crown relies in particular on *Hamed*, above n 149; *Lorigan* (CA), above n 176, at [29] and [37]; and on the following United Kingdom decisions: *Wood*, above n 160; *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* [2015] UKSC 9, [2015] AC 1065 [*Catt* (SC)] at [7], [29] and [31] per Lord Sumption SCJ; and *R (Bridges) v Chief Constable of South Wales Police* [2019] EWHC 2341 (Admin), [2020] 1 WLR 672. The Crown also refers to a number of Australian and Canadian authorities to the same effect: *Slaveski v State of Victoria* [2010] VSC 441 at [1362]; *Caripis v Victoria Police (Health and Privacy)* [2012] VCAT 1472 at [27] and [33]; *R v Shortreed* (1990) 54 CCC (3d) 292 (ONCA); *Brown v Regional Municipality of Durham Police Service Board* (1998) 167 DLR (4th) 672 (ONCA) at [47]–[48]; *R v Abbey* [2006] OJ No 4689 (ONSC) at [49], [79] and [82]–[84].

188 *R v Smith (Malcolm)* [2000] 3 NZLR 656 (CA).

189 *Lorigan* (CA), above n 176.

190 The Crown submits (and I accept) that the audio recording cases are analogous: *R v A* [1994] 1 NZLR 429 (CA) at 437 per Richardson J, 440 per Casey J and 449 per Robertson J; and *R v Barlow*

[176] While *Smith*, *Hamed* and *Lorigan* were in the context of police investigating suspected criminal conduct, there is no reason to suppose that the considerations are any different in the context of intelligence gathering. Although, as discussed below, that the context is intelligence gathering as against investigation of a particular offence may have significance when assessing the reasonableness of police actions and whether they breached the Bill of Rights.

[177] In *Smith*, at the behest of the police, a trusted courier of the appellant (Mr Bright) covertly filmed a drug transaction that the appellant conducted through hand signals. The Court of Appeal in that case did not consider it useful to decide whether there was a search in cases where the police actions are reasonable. It was convenient just to go straight to the issue of whether the actions were in fact reasonable.[191]

[178] In terms of the test for reasonableness, the Court of Appeal said that "[a]s with other inquiries under s 21 it is a matter of assessing time, place and circumstance, not adopting absolutist stances or rigid hard-line tests."[192] Applying that approach, the Court held the search to have been reasonable:[193]

> [52] On the merits there can be only one answer. The appellant was a willing participant in the transactions with Mr Bright who lived on the premises, was his trusted courier, and must be regarded as having express licence to be there on all those occasions. In a setting where drug transactions were conducted only by hand signals because the supplier believed his actions were under state electronic surveillance and where those transactions were confined to addicts to avoid undercover police operations, it is in our view hopeless to argue that expectations of privacy override other public interest values. Further, the whole purpose of the video was to obtain a record of what actually took place as it occurred and so to reduce the risk of unfair undermining of the reliability of Mr Bright's testimony if it stood alone.

[179] In *Lorigan* the police had conducted covert video surveillance to identify persons who had visited the residence of a person suspected of being involved in the manufacture and distribution of methamphetamine. The filming had taken place from

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(1995) 14 CRNZ 9 (CA) at 22 per Cooke P, 33 per Richardson J and 40 per Hardie Boys J.

191 *Smith*, above n 188. The Court noted that this was the same approach as had been taken in *R v Fraser*: *Smith*, above n 188, at [44] citing *R v Fraser* [1997] 2 NZLR 442 (CA).

192 *Smith*, above n 188, at [51].

193 *Smith*, above n 188. A similar point was made in *Barlow*, namely, "[a]voidance of the need for reliance on fallible memory … is in the interests of justice for both Crown and defence": *Barlow*, above n 190, at 40 per Hardie Boys J with whom Cooke P agreed.

a neighbour's property with the permission of the neighbour. Filming took place both during the day and at night, in the latter case by a camera with night vision filming capabilities. The filming captured all vehicles and persons who passed across, and entered or left, the suspect's driveway.[194]

[180] Mr Lorigan and two other people were among the persons who visited the address while it was under surveillance. The Crown proposed to adduce evidence of their visits to the property in the form of photographs or film footage and to relate the timing of those visits to intercepted conversations and text messages suggesting that they were involved in drug-related activities.[195]

[181] The issue was whether the surveillance evidence obtained was an unreasonable search in terms of s 21 of the Bill of Rights. As I discuss in more detail in the discussion of the application of s 21 in this case, the Court of Appeal in *Lorigan* held that there had been a search where the camera with night vision capability had been used but not where the ordinary camera was used. The night vision search was, however, reasonable and if it had not been, the footage would have been admitted under s 30.

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194 *Lorigan* (CA), above n 176, at [9].
195 At [11].

[182] The Court did, however, also consider whether the night vision camera search was lawful and whether the filming by the ordinary camera would have been lawful had it constituted a search.[196] The Court said that, prior to *Hamed v R,* video surveillance was lawful because there was no statutory or common law prohibition against it.[197] The video surveillance in this case would have therefore been lawful in accordance with this view:[198]

> [29] Applying the analysis of *Fraser* and *Gardiner* to the present case, the covert video surveillance (whether with enhanced-vision equipment or not) was lawful, because there was no statutory or common law prohibition of such activity and it would not have been unlawful for a citizen to do the same thing. The matter would, of course, have been different if the surveillance had involved any element of trespass by the police, because the trespass would have made the police actions unlawful. There was no trespass in the present case because the police had obtained the permission of the owner of the property on which the surveillance cameras were placed.

[183] The issue was whether this position had changed after *Hamed.* The Court of Appeal in *Lorigan* commented that the issue of lawfulness had been addressed directly in *Hamed* only by Elias CJ and Tipping J. The Court considered, however, that the approach taken by Tipping J seemed to have the broad support of the other judges, apart from Elias CJ.[199]

[184] The Court of Appeal said that Tipping J confirmed the law as outlined in *R v Fraser* and *R v Gardiner* and reiterated the view he had expressed in *R v Ngan* that the police are entitled to do what any member of the public can lawfully do in the same circumstances and do not need any specific authority to do so.[200]

[185] While Blanchard J did not directly deal with this issue, the Court of Appeal considered it clear that the unlawfulness he found in *Hamed* was based on the fact that the actions of the police in setting out the surveillance cameras had involved trespass, rather than on any inherent unlawfulness of video surveillance of a public place.[201]

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196 At [26].
197 At [28]
198 Referring to *Fraser*, above n 191, and *R v Gardiner* (1997) 15 CRNZ 131 (CA).
199 *Lorigan* (CA), above n 176, at [30] referring to *Hamed*, above n 149.
200 *Lorigan* (CA), above n 176, at [31] referring to *Hamed*, above n 149, at [217], *Fraser*, above n 191, *Gardiner,* above n 198, and *Ngan,* above n 165, at [45]–[56].
201 *Lorigan* (CA), above n 176, at [32] referring to *Hamed*, above n 149, at [155].

[186] The Court of Appeal pointed out that McGrath and Gault JJ both agreed with the analysis of Blanchard J and can therefore be taken to have agreed with his views on the source of the unlawfulness. The Court noted that McGrath J referred back to the comments he had made on this issue in *Ngan*, where he had concurred with Tipping J that police officers are entitled to do anything which can lawfully be done by a citizen unless there is some common law or statutory prohibition against their doing so.[202]

[187] By contrast, as the Court of Appeal in *Lorigan* pointed out, Elias CJ took the view that the video surveillance in *Hamed* was unlawful, whether there was a trespass or not, and considered *Fraser* and *Gardiner* to have been wrongly decided.[203] The Court in *Lorigan* said that this was, however, a minority view. The Court said:[204]

> In the absence of a majority decision of the Supreme Court to overturn the decisions of this Court in *R v Fraser* and *R v Gardiner*, we proceed on the basis that the statement of the law in *R v Fraser* and *R v Gardiner* is still good law and apply it to the present case. On the facts of this case, where the surveillance involved only the filming of a public place and in a manner that did not involve any trespass by the police, we conclude that the actions of the police were lawful. That is so even if enhanced-vision equipment is used.

[188] Leave to appeal against the Court of Appeal decision was declined by this Court on the basis that there was nothing sufficiently special to meet the criteria for a pre-trial appeal. This Court in the leave judgment, however, approved the Court of Appeal's analysis of *Hamed,* saying:[205]

> The Court of Appeal analysed the approach of this Court in *Hamed v R* and held, in line with the preponderance of the views of the various members of the Court, that the disputed evidence was admissible. This was a straightforward and unsurprising application by the Court of Appeal of a decision of this Court to the circumstances of the present case.

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202 *Lorigan* (CA), above n 176, at [33] referring to McGrath J's comments in *Hamed*, above n 149, at [217], and *Ngan,* above n 165, at [45]–[46]. The Court also said that McGrath J had expressed a similar view in *Rogers v Television New Zealand Ltd*: *Lorigan* (CA), above n 176, at [34] citing *Rogers v Television New Zealand Ltd* [2007] NZSC 91, [2008] 2 NZLR 277 at [110].

203 *Lorigan* (CA), above n 176, at [35]–[36] referring to *Hamed*, above n 149, at [9] per Elias CJ (distinguishing her position from that of Blanchard J) and [24]. I also refer to *Hamed*, above n 149, at [23].

204 *Lorigan* (CA), above n 176, at [37].

205 *Lorigan v R* [2012] NZSC 67 at [2].

[189] I agree with the analysis of the Court of Appeal in *Lorigan* and its conclusions, as well as the comments in the leave judgment of this Court. I add one caveat. While it is important that there is no statutory or common law prohibition and that the actions would be lawful if done by an ordinary member of the public,[206] there is an additional requirement: that the actions must be undertaken in fulfilment of the duties (either statutory or at common law) of a police officer. In most cases this added requirement will not be an additional restraint: the common law duties are extensive and the police have all the powers necessary to fulfil those duties.[207]

[190] Finally on this topic, I note that it is implicit in this Court's decision in *R v Rowe* that the general public has a right to take photographs of people in public places, even from a distance via a telephoto lens and likely without the subjects (in that case teenage girls at the beach) being aware they are being photographed.[208] I refer also to *Hosking v Runting* where it was held that there is normally no tortious privacy cause of action with regard to photographs taken in public places.[209] On the principle set out above at [165], this would mean that the police have the power at common law to take photographs in a public place as long as this is in the exercise of their common law duties.

Reasonable exercise of powers

[191] The Crown submits that the taking of photographs in a public place does not (absent circumstances such as detention or trespass) interfere with a person's liberty or property (meaning that the *Waterfield* requirements discussed above do not apply).[210]

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206 See the passage quoted at [182] above.

207 See above at [160]–[165].

208 *R v Rowe* [2018] NZSC 55, [2018] 1 NZLR 875 at [40] per Elias CJ, Glazebrook, O'Regan and Ellen France JJ, where Mr Rowe's actions are compared to the actions of a parent or a news media representative.

209 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [164] per Gault and Blanchard JJ ("[t]he photographs … do not disclose anything more than could have been observed by any member of the public"), [226] per Tipping J ("it would seem very strained to view photographs as a form of seizure, or indeed search; and, in any event, seizing the image of a person who is in a public place could hardly be regarded as unreasonable, unless there was some very unusual dimension") and [271] per Anderson P.

210 See above at [164].

[192] I do not accept this submission. Whether or not the taking of photographs in a public place interferes with a person's liberty, they must nevertheless have been taken in exercise of the duties of the police, as noted above at [189]. I also reject the submission that the second *Waterfield* requirement does not apply. The requirement of reasonableness must apply to the exercise of all police functions, whether or not that exercise involves interference with property or liberty. I will consider below whether these requirements are met in this case.

Statutory constraints

[193] The exercise of any common law powers will be subject to any constraints contained in other statutes, including the Bill of Rights and in particular s 21. I discuss below whether s 21 applies in the circumstances of this case. At this point, I just comment that, to the extent the United Kingdom cases referred to by the Crown relate to the photographing of protest activities, in a New Zealand context, ss 13 (freedom of thought, conscience and religion); 14 (freedom of expression); 16 (freedom of peaceful assembly); 17 (freedom of association); and 18 (freedom of movement) of the Bill of Rights will be relevant as well as s 21.[211]

Policing Act

[194] As noted above, the Court of Appeal was of the view that ss 32–34 of the Policing Act were inconsistent with the taking and storage of the photograph in Mr Tamiefuna's case. I accept the Crown submission that this is not the case.

[195] Those sections apply where a person is in lawful custody having been detained for committing an offence (s 32) or where there is good cause to suspect a person has committed an offence and there is an intention to bring proceedings against the person in respect of that offence by way of summons (s 33). The purpose of both sections "is to enable the Police to obtain information that may be used now or in the future by the Police for any lawful purpose".[212]

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211 I note the recommendation of the Joint Report in this regard: Joint Report, above n 158, at [37].
212 Policing Act 2008, ss 32(1) and 33(1).

[196] In both cases, the sections empower the taking of identifying particulars, including fingerprints and photographs.[213] Reasonable force can be used.[214] Under s 33(2) there is a power to detain the person for the purpose of taking the identifying particulars. A failure to comply with a direction given by a constable exercising either power is a criminal offence.[215]

[197] Section 34(1) gives the power to enter, record and store the particulars but they must be destroyed if a decision is taken not to prosecute or a prosecution ends in an outcome (including an acquittal) that does not allow continued storage under s 34A.[216]

[198] I accept the Crown submission that ss 32 and 33 apply at a particular point during the criminal process, for the purpose of ensuring a defendant is reliably identified — both for use in the current investigation, but also for use in possible future investigations. The important point is the power to compel compliance. Against that background, the Crown submits (and I accept) that such a regime cannot have been intended to limit police officers' common law powers to take and retain identifying particulars, including photographs, of individuals for policing purposes (including intelligence gathering) where no coercion or compulsion is involved.

[199] I comment that the notion that the powers in ss 32–34 of the Policing Act are comprehensive fails to take account of the recognition in the Policing Act that the police continue to have common law powers.[217] If the Policing Act was intended to limit the common law power to take photographs, it would have done so in a much more explicit fashion. The Court of Appeal in fact recognised the existence of common law powers but took a far too narrow view of their extent.[218]

[200] The notion that ss 32–34 of the Policing Act are comprehensive is also impossible to reconcile with *Hamed*, *Lorigan* and *Tararo*. In all of these cases, at least

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213 Sections 32(2) and (5) and 33(2).
214 Sections 32(3)(b) and 33(3)(b).
215 Sections 32(4) and 33(4).
216 Section 34(2).
217 See above at [163].
218 See above at [145]. The Court of Appeal did not, as discussed further below at [245]–[248], recognise the existence of intelligence-gathering powers and associated powers to take photographs discussed at [170]–[190] above. See also [166]–[169] for discussion of the proposition that the police are able (at least) to do, in exercise of their duties, what the general public can do.

at the time of the surveillance, there was no one in lawful custody having been detained for the commission of any offence (s 32) and there was no intention to proceed by way of summons against any person for an offence (s 33). Rather, the surveillance was for the purpose of finding evidence of possible offending by persons, many of whom had not at the time been identified. In *Lorigan* at least, given the length of the surveillance operation (some five months), it is probable that there were many people caught on camera during the surveillance operation who were never charged and it is likely that at least some of these visitors had perfectly innocent reasons for visiting the property.[219]

[201] Despite my conclusions on ss 32–34 of the Policing Act I do not, as discussed below, rule out the possibility that the provisions may be relevant to decisions on whether the police acted reasonably.

Search and Surveillance Act

[202] I accept the Crown submission that the Court of Appeal also erred in holding that the warrantless search power in s 16 of the Search and Surveillance Act indicated that "police powers to photograph in a public place and retain the images are intended to be closely confined".[220] As the Crown points out, s 16 concerns physical searches of a person, to which high expectations of privacy attach.[221] It is therefore unsurprising that the exercise of such a power is restricted to cases involving serious offending. This says nothing about the power take photographs, overtly and without compulsion, in a public place.[222]

[203] I also accept the Crown submission that the Search and Surveillance Act is predicated on the continuing existence of the common law surveillance power. As the Court of Appeal recognised in *Lorigan,* the Search and Surveillance Act proceeds on an assumption that surveillance of a public place in a manner not involving trespass is

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219 I note that the recommendation at [30] of the Joint Report, above n 158, is inconsistent with *Lorigan* (CA), above n 176, although it was made in a different context.

220 CA judgment, above n 127, at [68]; and see above n 152.

221 *R v Williams* [2007] NZCA 52, [2007] 3 NZLR 207 at [113] per William Young P and Glazebrook J.

222 Indeed, the filming was covert in *Tararo* (SC), above n 178; *Hamed*, above n 149; and *Lorigan* (CA), above n 176.

lawful and does not require a surveillance device warrant.[223] The Court said that "Parliament appears to have legislated on the basis that no statutory authorisation for such activity is necessary", even if the surveillance is a search.[224]

Privacy principles

[204] One of the issues in *Alsford* concerned the use by the police of power consumption data provided voluntarily by electricity supply companies. This raised the question of the relationship between the information privacy principles in the Privacy Act and s 21 of the Bill of Rights.

[205] This Court in *Alsford* said that "the privacy principles do not, for the most part, create rights that are enforceable through the courts".[225] This did not, however, mean that breaches of those rights are irrelevant in a court setting, including to whether evidence has been obtained unfairly in terms of s 30(5)(c) of the Evidence Act or to the balancing process under s 30(2)(b).[226] The Court sounded a note of caution, however, because personal information covers a range of information from highly personal to insignificant and breaches can also range from minor to significant.[227]

[206] The Court considered that it is unlikely that any breaches would be of independent significance in many instances. This is because what is important under a s 30 analysis is "the nature of the conduct at issue rather than the fact that it constitutes a breach of the privacy principles".[228] The Court also identified the

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223 Sections 45–48. As the Crown points out, the report of Te Aka Matua o te Ture | Law Commission [Law Commission] that preceded the Search and Surveillance Act considered that photography by law enforcement officers in public places fell in the category of activities that did not need to be regulated by search and surveillance legislation: Te Aka Matua o te Ture | Law Commission *Search and Surveillance Powers* (NZLC R97, 2007) at [2.51], [11.70]–[11.74] and see generally ch 11. See also Search and Surveillance Bill 2009 (45-2) (select committee report) at 3.

224 *Lorigan* (CA), above n 176, at [38].

225 *Alsford*, above n 185, at [37] per William Young, Glazebrook, Arnold and O'Regan JJ referring to s 11 of the Privacy Act 1993. The Crown also points out that, even under Part 5 of the Act, the mere breach of a principle is not enough to amount to "an interference with the privacy of the individual" thereby warranting a remedy. The Act enables complaints about "interference[s] with privacy", a concept that demands not only breach of a principle but also, among other matters, consequent harm, interference with the complainant's rights, or significant loss of dignity: Privacy Act 2020, ss 31(1) and 69; and see Privacy Act 1993, ss 11(2) and 66.

226 At [38] per William Young, Glazebrook, Arnold and O'Regan JJ.

227 At [39] per William Young, Glazebrook, Arnold and O'Regan JJ.

228 At [40] per William Young, Glazebrook, Arnold and O'Regan JJ.

possibility that compliance with the privacy principles may not necessarily eliminate the possibility that the evidence may be found to have been improperly obtained.[229]

[207] In the circumstances of that case, the Court in *Alsford* held that the case should not be governed by the privacy principles as that would amount to saying that these effectively confer on the police the power to obtain information about an individual from third parties. They did not.[230] Whether there is a search depends on whether there is a reasonable expectation of privacy. If there is no such expectation, then the issue will be whether the requirements for the exceptions in principles 2(2)(d) and 11(e) are met. If they are not, then the issue will be whether there is any issue of unfairness under s 30 and, if so, a proportionality analysis will be required.[231]

[208] I see no reason to depart from such a relatively recent decision of this Court. In any event, I consider it correctly states the law: the privacy principles may be relevant to s 21 of the Bill of Rights and to s 30 of the Evidence Act but are not controlling or binding.

Section 21 of the Bill of Rights

[209] I will consider the applicability of s 21 of the Bill of Rights by first considering the test for a search under that section and whether it is met in this case. I will then, on the assumption there was a search, consider whether the search was lawful and reasonable, before considering the application of the privacy principles in this case.

Test for a search?

[210] I first set out the caselaw on this issue. I start with *Hamed* and then consider a number of other New Zealand cases before reaching a conclusion on the appropriate test.

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229 At [40] per William Young, Glazebrook, Arnold and O'Regan JJ.

230 The Court said that, "in combination, they allow the police to seek personal information other than directly from the person involved and allow (but do not compel) an agency to release information to police provided the statutory pre-conditions are met": at [64] per William Young, Glazebrook, Arnold and O'Regan JJ.

231 At [64] and see [73(b)] per William Young, Glazebrook, Arnold and O'Regan JJ.

Hamed

[211] Elias CJ in *Hamed* took the view that s 21 guarantees reasonable expectations of privacy from state intrusion.[232] This is based on a wider context than property ownership: "[s 21] provide[s] security against unreasonable intrusion by state agencies into the personal space within which freedom to be private is recognised as an aspect of human dignity". This includes the right of the individual to determine for themselves when, how and to what extent they will release personal information about themselves.[233]

[212] She did not consider there to be any reason why activity in a public space should, by virtue of that circumstance alone, be outside the protection of s 21: it is consistent with the values in the Bill of Rights that "people may have reasonable expectations that they will be let alone by state agencies even in public spaces in their private conversations and conduct". She went on to say:[234]

> There is public interest in maintaining as a human right space for privacy in such settings. And in an age when technology makes surveillance impossible to resist, anywhere, the human right described in s 21 would be substantially obliterated if its scope is limited to what cannot be seen or heard by State agencies from public space. It follows that I am also unable to agree with the suggestion made by Blanchard J at [167] that police surveillance in a public place which is not technologically enhanced does not generally amount to a search. If those observed or overheard reasonably consider themselves out of sight or earshot, secret observation of them or secret listening to their conversations may well intrude upon personal freedom.

[213] Blanchard J said in *Hamed* that a reasonable expectation of privacy is relevant both to what constitutes a search and whether a search is unreasonable. An expectation of privacy will not be reasonable unless the person complaining of a breach of s 21 of the Bill of Rights "did subjectively have such an expectation at the time of the police activity and, secondly, that expectation was one that society is prepared to recognise as reasonable".[235]

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232 *Hamed*, above n 149, at [10].

233 At [11] referring to *R v Duarte* [1990] 1 SCR 30 at 46 per La Forest J, and *R v Jefferies* [1994] 1 NZLR 290 (CA) at 319 per Thomas J.

234 *Hamed*, above n 149, at [12].

235 At [163]. Blanchard J said he would affirm the statement to that effect by the Supreme Court of Canada in *R v Wise* [1992] 1 SCR 527 at 533.

[214] Blanchard J saw the term "search" in s 21 as having a broad meaning.[236] He referred to the reasons of McGrath J in *Ngan* where he said that the term had the underlying idea of "an examination or investigation for the purpose of obtaining evidence".[237] McGrath J would also have included situations where the state undertakes activities of a kind that significantly intrude physically on private zones, even if not for the purpose of gathering evidence.[238] Blanchard J also referred to *Fraser* where the Court of Appeal had said that there was a general connotation of investigation or scrutiny in order to expose or uncover where there was some degree of concealment (not necessarily deliberate).[239] A search can be for something tangible or intangible and does not necessarily involve trespassory conduct.[240]

[215] Blanchard J said that any physical examination of a person, the taking of bodily samples or an internal examination of an item of property is a search wherever it takes place.[241] It can be conducted personally or by means of technology and sometimes both where, for example, a police officer enters a building and takes photographs or makes a video recording.[242]

[216] Blanchard J said that video surveillance may constitute a search, depending on the place which is the subject of the surveillance. Surveillance of a public place would not generally be regarded as a search (or a seizure, by capture of the image) because, objectively, it would not involve any state intrusion into privacy. He said:[243]

> People in the community do not expect to be free from the observation of others, including law enforcement officers, in open public spaces such as a roadway or other community-owned land like a park, nor would any such expectation be objectively reasonable. The position may not be the same, however, if the video surveillance of the public space involves the use of equipment which captures images not able to be seen by the naked eye, such as the use of infra-red imaging.

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236 *Hamed*, above n 149, at [164].
237 *Ngan*, above n 165, at [106].
238 At [110].
239 *Fraser*, above n 191, at 449.
240 *Hamed*, above n 149, at [164].
241 At [165].
242 At [166].
243 At [167].

[217] Blanchard J noted that concern with how a law enforcement agency may use images so captured in a public place, for example by a CCTV camera, can, if necessary, be controlled by privacy legislation or by the civil law.[244]

[218] Blanchard J also said that it should make no difference to whether surveillance is a search or seizure if the surveillance was done from private land or that filming of any kind is done covertly:[245]

> The important matter is whether the subject of the surveillance was a place within public view … includ[ing] areas … such as the front garden of a house, which are open to viewing from the street or another public place …

[219] He qualified this, however, by saying that it is possible that a prolonged video surveillance of even such an open private area might involve such an intrusion that it would amount to a search.[246] He also said that if, in order to see into or carry out surveillance of such a private space, it was necessary to climb up a fence or to put a camera up a power pole, this is likely to constitute a search. It is also more likely to constitute a search if a camera is taken on to a property and used to record things unable to be filmed from a public area unless there was an express or implicit invitation to enter and do so, or a right of entry as in *Tararo*.[247]

[220] Tipping J was of the view that, under s 21 of the Bill of Rights, the word "search" in its "ordinary sense of consciously looking for something or somebody, is wide enough to cover watching persons or places by means of technological devices". He said that it should make no difference if the surveillance involves the human eye or ear or "any form of modern surrogate".[248] He favoured a wide definition of "search" for the purposes of s 21 with more of the work being done under the unreasonableness criterion.[249]

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244 At [167], n 197.
245 At [168].
246 At [168], n 198.
247 At [168] referring to *Tararo* (SC), above n 178. But note the qualification at [168], n 199 where Blanchard J noted that covert participant video surveillance, such as was found to be lawful in *Smith*, above n 188, has to date been treated as an exceptional case.
248 *Hamed*, above n 149, at [220].
249 At [222].

Lorigan

[221] The Court of Appeal in *Lorigan* considered that there had been no clear majority as to what constitutes a search in *Hamed.*[250] However, the Court considered that the test (for assessing whether surveillance of a public place not involving any trespass by the police is a search) that has the support of a majority of the Supreme Court is that proposed by Blanchard J in *Hamed*:[251]

> The test is whether the surveillance by the police involves state intrusion into reasonable expectations of privacy. That is similar to the test applied (in a different context admittedly) by McGrath J to determine whether police action amounted to a search in *R v Ngan*. And it is also broadly consistent with the test applied by the Chief Justice in *Hamed v R*, which involved assessing whether the privacy rights of those in the area under surveillance were breached. Although Blanchard J and the Chief Justice reached different results, the tests they applied were broadly the same.

[222] Applying that test to the facts of the case, the Court in *Lorigan* held that what had occurred was not a search (with the exception of footage from the night-vision camera). The Court said:[252]

> We consider that surveillance of a public area not involving trespass and image-enhancing equipment involves no (or, at most, minimal) intrusion into the privacy rights of those in the area under surveillance. It does not come within the test outlined above for a search. Such activity therefore is lawful and does not require a warrant.

[223] By contrast, the Court held that the surveillance with the camera having night-filming capacity was a search. This is because the images it captured could not be seen by the naked eye.[253]

[224] The Court was supported in its views by the reasons of Blanchard J in *Hamed* which make "it clear that non-trespass surveillance of a public place is not generally a search".[254] The Court also derived support from Elias CJ's opinion in *Hamed* that those in public places have a very limited privacy right (albeit this was said in the

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250 *Lorigan* (CA), above n 176, at [17]–[22].
251 At [22].
252 At [23].
253 At [25].
254 At [24]. The Court had earlier referred to *Hamed* for this proposition: at [17] citing *Hamed*, above n 149, at [163] and [167].

context of the s 30 Evidence Act balancing exercise).[255] The Court noted that the reasons of Tipping J also make it clear that he considers that people in a public place have little expectation of privacy (albeit this was said in the context of his unreasonableness analysis).[256]

Alsford

[225] In *Alsford* this Court noted the difference in views between Blanchard and Tipping JJ in *Hamed*. The Court said that, although it is not entirely clear, there appeared to be majority support for Blanchard J's approach on this point.[257] This Court said, however, that ultimately the difference between Blanchard and Tipping JJ "does not relate to the relevance of reasonable expectations of privacy to a s 21 analysis but to the point at which they become relevant".[258] The Court said that, while there was some academic support for Tipping J's approach, it would proceed on the basis of Blanchard J's approach.[259]

[226] The Court considered the following framework appropriate for analysis in the New Zealand context in a case such as the one before it:[260]

> [63] To summarise, the question whether there is a reasonable expectation of privacy in personal information has both subjective and objective elements. The objective component asks whether the subjective expectation of privacy held by the person involved is an expectation that society is prepared to recognise as reasonable. The court's approach to the determination of that question is a contextual one, requiring a consideration of the particular circumstances of the case. On the Canadian authorities, these circumstances could include:
>
> (a) the nature of the information at issue;
>
> (b) the nature of the relationship between the party releasing the information and the party claiming confidentiality in the information;
>
> (c) the place where the information was obtained; and

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255 *Lorigan* (CA), above n 176, at [44(c)].
256 At [44(b)].
257 *Alsford*, above n 185, at [48] per William Young, Glazebrook, Arnold and O'Regan JJ referring to the discussion in *Lorigan* (CA), above n 176, at [15]–[22].
258 *Alsford*, above n 185, at [49] per William Young, Glazebrook, Arnold and O'Regan JJ.
259 At [50] per William Young, Glazebrook, Arnold and O'Regan JJ.
260 At [63]–[64] per William Young, Glazebrook, Arnold and O'Regan JJ (footnotes omitted). See also [73(c)–(d)].

(d) the manner in which the information was obtained.

> The reasonable expectation of privacy is directed at protecting "a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination by the state" and includes information "which tends to reveal intimate details of the lifestyle and personal choices of the individual".

Tararo

[227] In *Tararo* the Court of Appeal applied the wider definition of "search" set out by McGrath J in *Ngan* to include official examinations or investigations that were not linked to the gathering of evidence, but which nonetheless affected privacy rights.[261] This Court on appeal did not need to decide this question.[262]

My assessment

[228] I accept that the proper test is that of Blanchard J in *Hamed* and that the framework set out by this Court in *Alsford* will be appropriate in most, if not all, cases.[263] I do comment, however, that the differences between the approaches of Blanchard and Tipping JJ in *Hamed* may be even smaller than noted by this Court in *Alsford*.[264] While Blanchard J said that reasonable expectations of privacy are relevant to whether or not there is a search for the purposes of s 21 of the Bill of Rights (contrary to Tipping J's approach where they would only be relevant to the reasonableness inquiry), under Blanchard J's approach, there still first had to be a search in the wide sense he defined it.[265] Whether there was a search under Blanchard J's approach was not defined merely by reasonable expectations of privacy.[266]

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261 *Tararo* (CA), above n 183, at [63].

262 *Tararo* (SC), above n 178, at [8] per Blanchard, Tipping, McGrath and William Young JJ.

263 See above at [207] and [213]–[219].

264 See above at [225].

265 See above at [213]–[214] and [220].

266 If McGrath J's definition of search in *Ngan*, above n 165 (applied by the Court of Appeal in *Tararo* (CA), above n 183) only has regard to reasonable expectations of privacy and does not require there to be a search, it does not accord with Blanchard J's approach and would extend s 21 too far. I note that the majority in *Ngan* had no difficulty concluding there had been a search: see *Ngan*, above n 165, at [21]. This is unsurprising as it involved the police officer looking inside the sunglass pouch, clearly a search in any ordinary sense of the word. Tipping J also analysed the situation on the basis that it was a search: at [61]. My reading of McGrath J's reasons, however, is that his approach effectively mirrors that of the other judges in *Ngan* and of Blanchard J in *Hamed*, above n 149. See McGrath J's comment in *Ngan* referring to the two possible meanings of search: *Ngan*, above n 165, at [106].

[229] I also draw attention to the fact that Elias CJ in *Hamed* articulates s 21 as protecting reasonable expectations of privacy from state intrusion.[267] Blanchard J, in the test for whether or not there is a search, does not link it to intrusions by the state but just to whether or not there has been an intrusion into a reasonable expectation of privacy by any person (including the police).[268] It is a subtle point but one that could affect the analysis in some cases.

Was there a search in this case?

[230] DS Bunting was not "looking for something or somebody".[269] Nor was he exposing what was concealed and there was no physical examination of Mr Tamiefuna.[270] In this case, all that occurred was a recording (photograph) of what could be seen with the naked eye and with no physical contact.[271] I accept, however, that a photograph can nevertheless be regarded because of its biometric nature as sensitive personal information.[272]

[231] There may be more of an argument that the Detective Sergeant was examining or investigating for the purpose of getting evidence (in this case of Mr Tamiefuna's identity).[273] But, it is not really apt to apply this description to filming or photographing in circumstances such as this, nor those in *Tararo* and *Smith*, where there is merely a recording of what is seen and heard by the person making the recording, and where there is no element of searching in the ordinary sense of looking for something or somebody. To hold such activities to be searches would extend the concept too far. For example, interviews of suspects and witnesses are for the purpose

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267 *Hamed*, above n 149. See above at [211].

268 See above at [213]–[219].

269 This was part of Tipping J's definition of search in *Hamed*, above n 149, at [220]. See above at [220].

270 This refers to Blanchard J's definition of "search" in *Hamed*, above n 149, at [164]. See above at [214].

271 I do not rule out that a photograph may be seen as part of the "biographical core of personal information" that may need to be protected in certain circumstances: see *Alsford,* above n 185, at [63]–[64] per William Young, Glazebrook, Arnold and O'Regan JJ, citing *R v Plant* [1993] 3 SCR 281 at 293 per Lamer CJ, La Forest, Sopinka, Gonthier, Cory and Iacobucci JJ; and above at [226]. But photographs showing an individual alone and fully clothed in a public place would be very unlikely to reveal intimate details of the lifestyle and personal choices of the individual that they expect to keep private. After all, they are in public and must know that they will be observed.

272 See below at [252].

273 See Blanchard J's definition of "search" in *Hamed*, above n 149, at [164]. See above at [214].

of investigating to obtain evidence, as are any recordings of such interviews. In many cases they will encroach on privacy, but it would be odd to dub them searches.

[232] It does not, however, matter for the purposes of this appeal. This is because in the circumstances I accept the Crown submission that Mr Tamiefuna did not have a reasonable expectation of privacy. This means that what occurred was in any event not a search for the purposes of s 21 of the Bill of Rights.

[233] The photograph was taken when Mr Tamiefuna was on a public footpath. As Blanchard J explained in *Hamed*, even covert video surveillance of a public place will not generally be a search because objectively it will not involve any state intrusion into privacy.[274] The exception he postulated (cameras showing what cannot be seen by the naked eye) does not apply in Mr Tamiefuna's case.[275] The photograph recorded no more than what the Detective Sergeant could see.

[234] I accept the Crown submission that, not only do people expect to be observed while in public, but they must also know their image may be captured on photograph or video. CCTV cameras, in particular, are widespread. Cameras on mobile phones are similarly ubiquitous. The Crown points out that, even before the widespread use of such technology, the Court of Appeal in *Hosking v Runting* did not consider there was any reasonable expectation of privacy in relation to images taken of young children in a public street. I also refer to this Court's decision in *Rowe*.[276] The right of the public to take photographs without consent and the limited exceptions are set out on the New Zealand Police | Ngā Pirimahana o Aotearoa website.[277] This type of publicly available information about the right of the general public to take photographs without consent must shape public expectations of privacy. If a person, despite all of this, had a subjective expectation that their image would not be captured while in public (by the police, other law enforcement authorities or the public generally), this expectation would not be reasonable.[278]

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274 *Hamed*, above n 149, at [167]–[168].

275 At [167]. See above at [216].

276 *Hosking v Runting,* above n 209; and *Rowe*, above n 208. See the discussion of these two cases at [190] above.

277 New Zealand Police | Ngā Pirimahana o Aotearoa "What are the rules around taking photos or filming in a public place?" <https://www.police.govt.nz/>.

278 For cases relating to the police and the taking of videos and photographs, see above at [166]–[169]

[235] The fact that Mr Tamiefuna had been "compelled by circumstances" to get out of the car does not change the analysis.[279] The vehicle he was travelling in was legitimately stopped by the police. There is no suggestion that the vehicle was wrongly impounded: the driver had been prohibited from driving.[280] I accept the Crown submission that vehicles are routinely stopped by police to check compliance with transport laws. This means that anyone in a car on a public road (whether as a driver or a passenger) must expect that they may be stopped and, in some circumstances, required to get out of a vehicle because of the breach of traffic or other laws. I also accept the submission that what occurred in this case does not point to Mr Tamiefuna having any greater expectation of privacy than, for example, a person who has to get out of a car that has broken down.[281]

[236] In this regard, it is significant that Mr Tamiefuna had been a passenger in a car travelling along a public road before it was stopped by the police. Those travelling in cars along public roads have minimal expectations of privacy related to their presence in the car. They would know they can be seen by passersby and by those in other vehicles through the car windscreen and usually through the car windows. Now that cameras on mobile phones and CCTV are so common, they would also expect that they may have their image recorded.[282] Certainly, any subjective expectations of privacy in such circumstances would not be reasonable.

[237] In *Hamed* there had been surveillance of vehicles passing along a public road. The footage was held to be admissible by all five judges of this Court.[283] Elias CJ would have found it to have been an unreasonable search (given her view that surveillance needed positive statutory authority) but would have admitted this evidence in application of s 30 of the Evidence Act.[284] She did not consider that the expectation of privacy in respect of information about which cars pass along a public

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and [173]–[190].

279 CA judgment, above n 127, at [58].

280 See above at [129].

281 The Crown points out that, in *Ngan*, McGrath J considered that a car that had been involved in an accident on a public road was "not [a location] in which a motorist can reasonably expect official respect for a high degree of privacy": *Ngan*, above n 165, at [112].

282 Indeed, as the Crown points out, on the day of the aggravated robbery, Mr Tamiefuna was recorded at least twice by private cameras, once from a residential property (a property neighbouring Mr Lim's house) and once at commercial premises (the Z petrol station on Lincoln Road).

283 *Hamed*, above n 149, at [89(b)].

284 At [8].

road was high. She said that the position may have been otherwise if more intrusive information had been at issue.[285] Blanchard J held that, as the filming was restricted to things that happened (the passing of cars) on the road, it was not a search and s 21 did not apply to it.[286] Tipping J said that the public road surveillance was a search but not unreasonable because drivers on a public road have little expectation of privacy of the fact of their doing so.[287]

[238] The same reasoning must apply to any passenger in a car travelling on a public road. Even if a passenger in a car is enclosed in a relatively small space and less exposed to public scrutiny than standing on a footpath and may thus feel more private, it is significant that Blanchard J's analysis of whether there is a reasonable expectation of privacy would not have changed even if a person is in a private place but in public view.[288]

[239] Finally on this issue, I accept the Crown submission that the participant recording cases make it clear that a person can have no reasonable expectation that another person with whom they are interacting (including the police) will not make and store a full and accurate audio or video record of the interaction. Nor would the person have a reasonable expectation that this recording would not be later disclosed and used.[289]

Was any search unlawful and/or unreasonable?

[240] As I have concluded that there was no search in this case, it is not strictly necessary to consider whether any search was unreasonable in terms of s 21 of the Bill of Rights. However, as I take the view that the second *Waterfield* requirement must be met,[290] and the considerations will be similar, it is nevertheless worth setting

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285 At [79].
286 At [171].
287 At [224].
288 At [168]; and see above at [218].
289 *Smith*, above n 188, at [52]; *Tararo* (SC), above n 178, at [14] and [24] per Blanchard, Tipping, McGrath and William Young JJ; *R v A*, above n 190, at 437 per Richardson J, 440 per Casey J and 449 per Robertson J; and *Barlow*, above n 190, at 33 per Richardson J and 40 per Hardie Boys J. These cases are discussed above at [166]–[169] and [175]–[178].
290 See above at [192].

out my views on whether, if it had been a search, it would have been an unreasonable search.

[241] First, I will examine whether unlawfulness means that a search is necessarily unreasonable. I will then consider whether the actions of the police were lawful in this case. This also has relevance to the requirement that police actions must be in the exercise of their duties.[291] I will then examine whether the actions of the police were unreasonable in terms of s 21 of the Bill of Rights.

Is an unlawful search always unreasonable?

[242] Elias CJ in *Hamed* said that an unlawful search is necessarily an unreasonable one on the basis that it cannot be reasonable for law enforcement officers to act unlawfully. However, she considered that lawfulness was not exhaustive of unreasonable search and seizure.[292] The second point is undoubtedly correct. She was in the minority on the first point.

[243] Blanchard J was less prescriptive, saying that there would normally be a finding of a breach of s 21 once it is found that the police have acted unlawfully in relation to a search. He said, however, that an "exception can be made in cases where the breach is minor or technical or perhaps where the police had a reasonable (although erroneous) belief that they were acting lawfully".[293] Tipping J said that unlawful searches are not automatically unreasonable, although they are "likely to be well on the way towards being unreasonable".[294] McGrath J agreed with Blanchard and Tipping JJ that, while generally an unlawful search will be unreasonable, that will not invariably be the case.[295]

[244] This Court in *Marwood v Commissioner of Police* said that an illegal search will almost always be unreasonable, relying on the majority view in *Hamed*.[296]

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291 See above at [189].
292 *Hamed,* above n 149, at [48]–[51].
293 At [174].
294 At [226].
295 At [263], n 265.
296 *Marwood v Commissioner of Police* [2016] NZSC 139; [2017] 1 NZLR 260 at [23] per William Young, Glazebrook, Arnold and O'Regan JJ.

Were the police actions in this case lawful?

[245] As outlined above, the core duty of the police at common law is "to take all steps which appear to them to be necessary for keeping the peace, for preventing crime or for protecting property from criminal injury".[297] The words "which appear to them to be necessary" are important. The police play a vital part in protecting our safety and property and maintaining the general order of society. Given their expertise and experience, the police must be given the appropriate leeway to decide how to perform their duties, including prioritising their resources.[298]

[246] At common law the police have all the powers necessary to perform the core duties and other secondary duties unless modified by statute.[299] To recap, such powers include intelligence gathering and the retention and storage of the information gathered, which can come from a wide variety of sources of varying reliability and importance.[300] The intelligence-gathering power includes the power to take photographs, as long as this is done in furtherance of police duties.[301] The provisions of the Policing Act relied on by the Court of Appeal are in a different context and do not restrict the common law powers.[302] The privacy principles may be relevant but are not binding or decisive.[303]

[247] In this case, DS Bunting made the noting and took the photographs so that the information would be "available to other officers in the future to assist with policing

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297 *Ngan,* above n 165, at [12] per the majority citing *Glasbrook Brothers Ltd* , above n 167, at 277 per Viscount Cave LC. See above at [161].

298 A similar point was made in *Ngan*, above n 165, at [12] per Elias CJ, Blanchard and Anderson JJ.

299 See above at [160]. I note the Commissioner's submission that state intrusions into privacy must be prescribed by law and that this means not only authorised by law but sufficiently prescriptive that the terms are known and effectively enforced. It is true that, under s 5 of the Bill of Rights, justified limits must be "prescribed by law". Privacy is not, however, included in our Bill of Rights, although some of the rights included may partly rest on privacy values and a privacy right is included in the ICCPR to which New Zealand is a party: see above at n 163. This is not to say that intrusions into privacy cannot be illegal. They must be lawful in terms of statute law or the common law. As I say at n 175, I do not need, given the extensive nature of the common law powers of the police, to discuss any possible third source of power. I note that I do not accept that the Commissioner's suggested added requirements of "sufficiently prescriptive that the terms are known and effectively enforced" are necessary for something to be prescribed by law, although of course they are desirable and, where absent, the law may be interpreted in favour of rights or privacy values.

300 See above at [172].

301 See above at [189]. There is also a need to meet the requirements of s 21 of the Bill of Rights and the second *Waterfield* requirement: see above at [192].

302 See above at [194]–[200]. They may, however, be relevant to reasonableness: see above at [201].

303 See above at [208].

activities".[304] This is a classic description of intelligence gathering. He said he made the noting because of a combination of circumstances: the other people in the car; their serious criminal convictions; the time of the morning; the explanations they gave around what they were doing; and his suspicions around the property that was in the vehicle, including a woman's handbag when there was no woman in the car and the presence of four batteries in the boot when it would not be usual to carry around that number of batteries and when batteries are commonly stolen for use as scrap.[305]

[248] The Court of Appeal did not consider that the Detective Sergeant's actions in this case were within the common law powers of the police.[306] This was taking far too narrow a view of police duties and powers and in particular does not take account of the intelligence-gathering function. The Court of Appeal approach would limit police activities to specific investigations of particular offences. To require such a siloed approach would inhibit the crime prevention and investigation duties of the police and reduce the efficacy of the intelligence-gathering function.

[249] DS Bunting had suspicions about the nature of items in the car and considered they may have been the product of crime, particularly given the criminal convictions of the occupants. These suspicions were reasonable and, in combination with the other factors he identified, justified the intelligence noting and the taking of the photographs. Even if his suspicions did not lead to an immediate investigation or, given police priorities, were not investigated at all by the officers who stopped the car, the record of the suspicions and why the noting was made were there for later investigators.[307] The photograph was also there to record what had been seen and avoid disputes about that, should the intelligence information become relevant later.[308]

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304 See above at [135].
305 See above at [134].
306 CA judgment, above n 127, at [71]–[75]; and see above at [145].
307 I do not need for the purposes of this appeal to decide what the position would have been had these items not been in the car.
308 For example, if a complaint had been made about a stolen handbag or stolen batteries. Or, as happened here, where the Ford Falcon in which Mr Tamiefuna was travelling was identified as the vehicle involved in the robbery of Mr Lim.

Unreasonable search?

[250] The police actions in this case were lawful for the reasons outlined above. A lawful search may, however, in some circumstances nevertheless be unreasonable.[309] I do not consider that the search was unreasonable in this case.

[251] Blanchard J in *Hamed* said that whether a search is unreasonable requires looking:[310]

> … at the nature of the place or object which was being searched, the degree of intrusiveness into the privacy of the person or persons affected and the reason why the search was occurring.

[252] Taking these criteria in turn, the photograph was taken while Mr Tamiefuna was standing in a public place having been required, for legitimate law enforcement purposes, to exit the vehicle travelling along a public road in which he had been a passenger. The photograph required no physical contact between the officer and Mr Tamiefuna. I accept that a photograph is a permanent record of a person's appearance which obviously has a more personal quality than (for example) a photograph of a person's car travelling along a public road. There is force in the Joint Report's description of a photograph as sensitive personal information because it is an "exact biometric image" of the person.[311] I also accept that there is significance in the fact that the photograph in this case was taken at close range at an early hour of the morning.

[253] In terms of the level of intrusion into privacy, Moore J said that he could not accept:[312]

> … that any person … could have a legitimate expectation of privacy while standing on a public road, especially while in close proximity and plain sight of a police officer who he knows is photographing him.

[254] Paul Davison J said that, had he considered the taking of the photograph a search, it would only have been "a minimal intrusion" into Mr Tamiefuna's privacy.

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309 See the comments of Elias CJ in *Hamed,* above n 149, at [48]–[51] outlined above at [242]; and *Williams*, above n 221, at [24] per William Young P and Glazebrook J.

310 *Hamed*, above n 149, at [172]. A similar test was set out in *Smith*, above n 188: see above at [178].

311 Joint Report, above n 158, at [20].

312 HC admissibility decision, above n 133, at [126].

This was because the photograph had been taken openly. Mr Tamiefuna was standing in a public place and not engaged in any private activity, and he had cooperated by looking directly at the camera.[313] The Court of Appeal, despite holding that there had been an unreasonable search, said that "the facts that the photographs were taken in public and without objection moderate the intrusion on privacy interests".[314]

[255] I agree that, if it had been a search, the photograph would only have been a minimal intrusion into Mr Tamiefuna's privacy for essentially the same reasons as I outlined above when discussing whether there was a search. In assessing the reasonableness of the search I would not, however, put as much emphasis as the Courts below on Mr Tamiefuna having cooperated with the taking of the photograph. This is because he may have thought he had no choice, either because he thought he could be compelled to cooperate or because he did not want to antagonise the officer. He could not have been said to "consent" to the taking of the photograph because of these factors.[315] And in any event the Detective Sergeant did not ask his permission.[316]

[256] In terms of why the search was occurring, I have already outlined that the police actions were an exercise of the intelligence-gathering powers of the police. There was nothing in the manner of their exercise that would make the actions unreasonable in the circumstances of this case. The presence of suspected stolen property in the car, combined with the other circumstances, meant that the exercise of the powers was reasonable. I note too that the Detective Sergeant was only taking photographs of what he could see and for the purpose of supplementing what he had recorded or was going to record in the intelligence noting by providing a reliable photographic record. I accept the Crown submission that, compared to the covert and sustained surveillance in *Lorigan* for example, overt and limited photography, as occurred here, will generally be less intrusive since it captures less information (at issue here is a single image of Mr Tamiefuna).

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313 HC conviction decision, above n 126, at [52]. See discussion above at [142].

314 CA judgment, above n 127, at [100].

315 Moore J makes a similar point: HC admissibility decision, above n 133, at [122]; and see below at [295] in the summary of his decision on s 30. I also note the Joint Report says that "current Police practices are not sufficient to ensure that, where consent is sought, any consent obtained is truly voluntary and informed": Joint Report, above n 158, at [64].

316 See above at [133].

[257] I also accept the Crown submission that the fact that the police retained the intelligence noting and photograph does not change the s 21 analysis. When assessing the reasonableness of a search, the relevant time is when the information is gathered.[317] What police later do with that information cannot retrospectively change the legal character of what occurred earlier. I will discuss whether the retention of Mr Tamiefuna's photograph was reasonable when discussing the second *Waterfield* requirement.[318]

Privacy principles in this case

[258] As noted above, the privacy principles may be relevant to s 21 of the Bill of Rights but are not binding or decisive.[319] In this case, consideration of those principles does not affect the analysis of s 21 of the Bill of Rights.

[259] The Court of Appeal held that the police actions in this case breached three of the privacy principles: principle 1, principle 3(1) and principle 9.[320] I consider each in turn and then consider the relevance of the Joint Report referred to by the Court of Appeal.

Principle 1

[260] Principle 1 provides that an agency may only collect personal information as is necessary for a lawful purpose. The Court of Appeal considered that the collection of Mr Tamiefuna's photograph was not for a lawful purpose connected with policing because the police were not engaged in an investigation related to suspicions about the property observed at the time the photographs were taken.[321]

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317 *Hamed*, above n 149, at [163] per Blanchard J (the individual must "subjectively have such an expectation [of privacy] at the time of the police activity") and [167], n 197 per Blanchard J ("Concern with how a law enforcement agency may use images so captured in a public place, for example by a CCTV camera, can, if necessary, be controlled by privacy legislation or by the civil law.").

318 See my explanation of the *Waterfield* requirements above at [164]–[165], and see above at [192].

319 See above at [204]–[208].

320 CA judgment, above n 127, at [80]–[82]; and see Privacy Act 1993, s 6.

321 CA judgment, above n 127, at [80].

[261] As I have already discussed, the Court of Appeal took far too narrow a view of common law police duties and powers.[322] I accept the Crown submission that there was no breach of principle 1: the photograph was necessary — meaning reasonably required in the circumstances, rather than indispensable[323] — for the lawful policing purpose of intelligence gathering for the reasons I have explained above. I have also already explained that the Court of Appeal was wrong to hold that the Policing Act and the Search and Surveillance Act placed limits and restrictions on the common law powers of the police to take photographs in the circumstances of this case.[324]

Principle 3(1)

[262] Principle 3(1) requires that the collecting agency takes reasonable steps to inform the person concerned about the collection, the purpose of the collection and its legal basis. The Court of Appeal said that the Detective Sergeant did not do this and that therefore this principle was breached.[325]

[263] The Crown submits that the Court of Appeal was wrong to hold there was a breach of principle 3(1): the officer did not have to tell Mr Tamiefuna that he was collecting intelligence about a suspected offence. While not explored in evidence, the Crown says that it is not difficult to appreciate why telling a person that he is suspected of being connected to certain possibly stolen property would have prejudiced the ability of the police to detect or investigate offending.[326]

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322 See above at [248].

323 The Crown referred to *Lehmann v Canwest Radioworks Ltd* HRRT 35/06, 21 September 2006 at [47] (if "necessary" were read as meaning essential, it would impose "a very high standard indeed") and [50] ("… Principle 1 is intended to set a standard that is workable and achievable, having regard to the circumstances of each case … [It] should be approached as setting a standard of reasonable rather than absolute necessity"); *Tan v New Zealand Police* [2016] NZHRRT 32 at [74.3] ("necessity" sets a higher threshold than "reasonableness"), [75] (necessary means more than "expedient") and [76]–[78] applying *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2013] 2 NZLR 57 at [19] (necessary means "required by circumstances" — more than "expedient" but less than "indispensable"). The Crown noted that the Law Commission considered recommending a revised test of "reasonable necessity" under principle 1 but concluded "requiring collection to be 'reasonably' necessary would add nothing and might in fact lead to greater uncertainty": Law Commission *Review of the Privacy Act 1993: Review of the Law of Privacy Stage 4* (NZLC R123, 2011) at [3.15] and see at [3.14]. See also Paul Roth *Privacy Law and Practice* (online ed, LexisNexis) at PA22.7(b) (the test for necessity is "not particularly strict").

324 See above at [194]–[203].

325 CA judgment, above n 127, at [81].

326 Privacy Act 1993, s 6 Principle 3, para (4)(c)(i). The Crown points out that in *Alsford* the majority described the comparable exception under principle 11 para (e)(i) as "broadly stated" and noted "the test—belief on reasonable grounds that non-compliance is necessary—is a relatively low

[264] I do not fully accept the Crown submission on this point: it is difficult to see how a statement that a photograph will be taken and stored pursuant to the intelligence-gathering powers of the police could prejudice any possible investigation. But a failure in this regard cannot turn something that is not a search into a search. Nor can it, on its own, turn what is otherwise a lawful and reasonable search into an unreasonable one.

Principle 9

[265] Principle 9 provides that personal information, once collected, must not be held for longer than is required for the purposes for which the information may lawfully be used. The Court of Appeal found that, as the photographs were not taken for the purpose of an investigation, they should not have been retained.[327]

[266] To the extent that the Court of Appeal held there was a breach of principle 9 because the photograph was not taken and stored for the purpose of a particular and current investigation, it was wrong. As already discussed, the police are entitled at common law to take and store photographs for intelligence and investigation purposes, even where they have not been linked to a particular investigation. There is an issue about the length of retention of such information and in particular the retention of photographs, which I will discuss below.

The Joint Report

[267] The Court of Appeal took support for its views from the Joint Report.[328] It said that the report "emphasises that police need to comply with the information privacy principles" in the Privacy Act "in circumstances where photographs are taken outside the specific authority contained in other statutes".[329] The Court of Appeal noted that the Joint Report recognises that the Land Transport Act does not provide general authorisation for police to take photographs of members of the public while at a traffic stop. This means that the privacy principles must be applied, including the

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one": *Alsford*, above n 185, at [34].

327 CA judgment, above n 127, at [82].

328 At [78]–[79] referring to Joint Report, above n 158.

329 CA judgment, above n 127, at [78].

consideration of whether the photograph is necessary for the purpose of the stop.[330] The Court noted that the Joint Report also said that intelligence gathering is not a lawful purpose for photograph-taking under the Land Transport Act.[331]

[268] I accept that the Joint Report expressed major concerns about how the police were exercising their intelligence-gathering powers, and the lack of clear guidelines for their exercise and, in particular, for the collection and storage of photographs.[332] The report says that photographs of people are sensitive biometric information and must be treated accordingly; they cannot be treated in the same way as "intel notings".[333] The Joint Report points out that a digital photograph is also capable of being analysed using facial recognition technology and other digital techniques which makes it even more important that the information is being collected, used, retained and stored lawfully.[334]

[269] The Joint Report said that, unless photography for intelligence purposes is linked to a particular circumstance that might require investigation, it is likely to result in the systematic over-collection of personal information in breach of privacy principle 1:[335]

> Indiscriminate collection of the exact biometric image of a person because it "may prove useful" also means law-abiding members of the public may have their image stored on police systems without the ability to exercise their rights to challenge that collection.

[270] The Joint Report recommends that Police policy:[336]

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330 I note that this slightly misstates the recommendations in the Joint Report. The Report said that photographs should not be taken at traffic stops as a matter of routine and were justified only where a driver's identity is not able to be ascertained in another way: Joint Report, above n 158, at [31]. Also the Report was concerned that traffic stops not be employed for the collateral purpose of gathering intelligence, while recognising that "photographs for intelligence or investigative purposes may occasionally be lawful if the necessity for them arises after the stop, but a stop that is simply a pretext to follow up an unrelated and pre-determined line of inquiry by way of a photograph is unlawful": at [32].

331 CA judgment, above n 127, at [79]. The Court said that this issue is relevant under information privacy principle 1(1): at [80], n 74; and see Privacy Act 1993, s 6.

332 Joint Report, above n 158, at [6]–[14] and [18]–[22].

333 At [18] and [20]. I comment that this, as a stark statement, is inconsistent with much of the caselaw discussed above but, as also noted above, privacy principles are only relevant and not decisive.

334 At [20].

335 At [22].

336 At [23] (emphasis and footnote omitted).

> … should provide instruction to officers that when photographing or video-recording an individual for general intelligence purposes the officer must be able to articulate a reasonable possibility, based on more than mere conjecture, that collection of the image will be relevant to a particular or likely investigation.

[271] I do not want to comment in depth on the recommendations of the Joint Report but do make some brief comments. I stress first that any policies developed by the Police to comply with the privacy principles as interpreted in the Joint Report would, in accordance with *Alsford*, be relevant only and not decisive in any analysis for the purpose of s 21 of the Bill of Rights or s 30 of the Evidence Act.

[272] Second, I do agree that there should be a policy on the reasonable exercise of police intelligence-gathering powers. This policy should strike the appropriate balance between effective policing (and in particular protecting the safety of the public) and privacy values. Whether the suggested policy in the Joint Report is too narrow to achieve this balance is something best left to the police and the Commissioner to discuss, although I do note that in this case the suspicions about possible stolen property in the car would seem to fit the police actions within the proposed policy.[337] I also note that the Detective Sergeant accepted that he would not photograph everyone in a vehicle at routine traffic stops.[338]

[273] Third, I agree with the Joint Report that the indiscriminate taking and storing of photographs could breach privacy values and note that it could also breach other rights, such as freedom of movement under s 18 of the Bill of Rights and the right to be free from discrimination under s 19. Those concerns do not, however, arise in this case because, as I have already discussed, the taking of the photograph was a legitimate and reasonable exercise of the intelligence-gathering power.

[274] Finally on the Joint Report, I note the recommendation in relation to privacy principle 4 which the Report asserts:[339]

> … always requires officers to consider if obtaining the consent of the individual is necessary when taking photographs in a public setting to ensure fairness and to limit unreasonable intrusion on the individual's privacy rights.

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337 See the discussion above at [245]–[249].
338 See above at [134].
339 Joint Report, above n 158, at [61].

[275] The Report goes on to say that seeking consent is not necessary if the police have a specific statutory power to take photographs, and also that photographs may be taken without consent in situations of urgency or risk or "where it is otherwise impracticable to obtain consent without creating a disproportionate risk of prejudice to the particular policing purpose".[340]

[276] It would obviously be impracticable, without totally compromising the investigation, to seek consent for the type of covert surveillance operations at issue in *Hamed*, *Lorigan*, *Tararo* and *Smith.*[341] Nevertheless, such operations are much more intrusive than the overt taking of a photograph in a public place at issue here.[342] It is difficult therefore to justify not requiring consent in relation to covert operations but requiring it when taking a photograph for legitimate reasons overtly and in public. In any event, consent may not in fact be a true consent — as indicated, even if a person knows it is not mandatory, the "consent" could be given because a person does not wish to antagonise the officer involved.[343]

[277] The Joint Report says that, if consent is refused, the photograph should not be taken:[344]

> … unless proceeding without consent is proportionate to the importance of the photograph for an investigation, and outweighs the fairness to the individual, who should be informed that the photograph is mandatory.

[278] This last statement is incorrect. Policing powers include the power to take photographs but do not include the ability, absent explicit statutory authorisation, to force a person to have their photograph taken. Further, as explained above, the power to take photographs includes taking photographs for intelligence-gathering purposes and not just related to particular investigations.

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340 At [62].

341 If there were a need to consider whether it is impractical to ask for consent of the subject, this would add another (to my mind unnecessary) layer of considerations that were not mentioned in the relevant decisions: *Hamed,* above n 149; *Lorigan* (CA), above n 176; *Tararo* (SC), above n 178; and *Smith*, above n 188.

342 See above at [256].

343 See above at [255].

344 Joint Report, above n 158, at [63]. See also the recommendations set out at [65].

[279] I do not comment on whether or not it is desirable to have a policy requiring consent for the taking of photographs outside of where there is specific statutory authorisation. Again, that is a matter for discussion between the police and the Commissioner. However, I do not accept that there is a legal requirement to seek consent before taking a photograph in public where that photograph is properly taken in exercise of police powers and duties, including intelligence gathering. Not asking for consent (if any policy requires it) may be relevant to assessing whether an officer's actions were reasonable, but I reiterate that the privacy principles are relevant but not binding for the purposes of s 21 of the Bill of Rights and s 30 of the Evidence Act or, indeed, for assessing whether the *Waterfield* criteria are met.

Was the taking and retention of the photograph by the police in exercise of their common law duties, and was it reasonable?

[280] As I discuss at [192] above, as well as not breaching s 21 of the Bill of Rights, the photograph of Mr Tamiefuna must have been taken and retained in exercise of the duties of the police. The actions of the police must also have been reasonable. If these requirements are not met, then the evidence would be improperly obtained in terms of s 30(5)(a) and/or (c) of the Evidence Act.

[281] In this case, the discussion above on whether the taking of the photograph was lawful and reasonable has confirmed that the requirements set out at [192] have been met. This leaves the issue of the retention and later use of the photograph.

[282] The Court of Appeal relied on a number of United Kingdom and European decisions to support its view that Mr Tamiefuna's photograph should not have been taken and stored in the circumstances.[345] I first set out the submissions of the Crown on those cases before assessing whether the retention and later use of Mr Tamiefuna's photograph was unreasonable.[346]

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345 See above n 160.

346 Mr Tamiefuna and the Commissioner say that the Court of Appeal was correct to rely on those cases.

United Kingdom and European cases relied on by the Court of Appeal

[283] The Crown submits that the Court of Appeal's reliance on decisions applying art 8 of the European Convention on Human Rights was misplaced as we do not have a similar provision in the Bill of Rights.[347] It is submitted that this provision guarantees a broad right to private life.[348] This extends to elements of control over one's image.[349] The mere storing of an individual's personal data constitutes an interference with private life.[350] This means that recording somebody in public may engage art 8, even if simply observing them would not.[351] Article 8 also regulates the retention and use of such data, requiring that this be proportionate to a legitimate aim.[352]

[284] It is submitted that the decisions cited by the Court of Appeal do not suggest that the retention was unreasonable in this case. It is submitted first that *R (Wood) v Commissioner of Police of the Metropolis* concerned quite different (and unusual) circumstances in which after "a few days"[353] there was no realistic possibility

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347 Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953) [European Convention on Human Rights]. While it is true that New Zealand does not have a provision equivalent to art 8, privacy values are relevant to s 21 of the Bill of Rights, although the privacy principles are relevant but not binding. New Zealand is also a party to the ICCPR, which in art 17 includes a right to privacy. The United Kingdom and European cases will therefore still be of assistance.

348 See *In re JR38* [2015] UKSC 42, [2016] AC 1131 at [36] per Lord Kerr SCJ ("Article 8 of the [European Convention on Human Rights] is, arguably at least, the provision … with the broadest potential scope of application.") and [86] per Lord Toulson SCJ, quoting with approval Laws LJ in *Wood*, above n 160, at [22] ("At the same time it is important that this core right protected by article 8, however protean, should not be read so widely that its claims become unreal and unreasonable.").

349 *S v United Kingdom* (2008) 48 EHRR 50 (ECHR, Grand Chamber) at [66] citing *Sciacca v Italy* (2006) 43 EHRR 20 (ECHR) at [29].

350 *S v United Kingdom,* above n 349, at [67].

351 *Catt* (SC), above n 187, at [4] per Lord Sumption SCJ ("… there may be some matters about which there is a reasonable expectation of privacy, notwithstanding that they occur in public and are patent to all the world. In this context mere observation cannot, save perhaps in extreme circumstances, engage article 8, but the systematic retention of information may do."); *Peck v United Kingdom* (2003) 36 EHRR 719 (ECHR) at [59] and see [57]–[58] citing *PG v United Kingdom* (2008) 46 EHRR 51 (ECHR) at [56] ("There is, therefore, a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'") and [57] ("A person who walks down the street will, inevitably, be visible to any member of the public who is also present. Monitoring by technological means of the same public scene (e.g. a security guard viewing through close circuit television) is of a similar character. Private life considerations may arise however once any systematic or permanent record comes into existence of such material from the public domain.").

352 *S v United Kingdom,* above n 349, at [101]–[103].

353 *Wood*, above n 160, at [77] per Dyson LJ.

the photographs would be relevant to the sole reason for which they were taken ("in case an offence had been committed" at the annual general meeting). There was, moreover, "no more likelihood" that the person photographed would commit a future offence than "any other citizen of good character".[354]

[285] By contrast, the Crown submits that here there was a reasonable basis to suspect both the commission of an offence and Mr Tamiefuna's connection to such an offence.

[286] In *Gaughran v United Kingdom*, the European Court of Human Rights (disagreeing with the United Kingdom Supreme Court) found Northern Ireland's retention of fingerprints, DNA profiles and photographs taken compulsorily from offenders breached art 8. The focus of the judgment, however, was the indefinite retention of such information. This put the state "at the limit of the margin of appreciation" and meant that "the existence and functioning of certain safeguards becomes decisive".[355] The Court found those safeguards deficient.[356]

[287] The Crown submits that there is nothing in that conclusion that casts doubt on the retention of Mr Tamiefuna's photograph for a short period.

[288] In the Crown's submission, the United Kingdom Supreme Court's later decision in *R (Catt) v Association of Chief Police Officers of England, Wales and Northern Ireland* is more instructive. There, the Court found nothing disproportionate in the police retaining, among other information, a photograph of Mr Catt for three years.[357] The European Court later emphasised that retention of records relating to Mr Catt was justified "for a period of time",[358] and it did not criticise the requirement to retain such records for a minimum of six years.[359] The European Court's art 8 concerns were instead directed to the "absence of effective safeguards" to prevent the

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354 At [89] per Dyson LJ.

355 *Gaughran*, above n 160, at [88].

356 At [94]–[96].

357 *Catt* (SC), above n 187, at [44] per Lord Sumption SCJ and Lord Neuberger P, [52] per Lady Hale DP, [59] per Lord Mance SCJ and [76] per Lord Toulson SCJ. While the European Court of Human Rights disagreed on this point, its concern was the potential indefinite retention of the data, given it was not clear that six-yearly reviews "were conducted in any meaningful way": *Catt* (ECHR), above n 160, at [120].

358 *Catt* (ECHR), above n 160, at [119].

359 At [120].

disproportionate retention of data beyond that point — particularly given the "chilling effect" of retaining data revealing political opinion that attracts a "heightened level of protection".[360]

My assessment

[289] It is clear from the above discussion of the European and United Kingdom cases that there cannot be art 8-consistent indefinite storage of information gathered by the police. Nevertheless, the retention periods approved have not necessarily been short. It is, however, clear from those cases that the information should only be retained for as long as it is related to the purpose for which the information was collected, or any other legitimate police purpose. Section 34(1) of the Policing Act, while not directly applicable, reinforces this view.[361]

[290] The Joint Report says that indefinite storage of personal information is contrary to privacy principle 9.[362] The Report recommends that police:[363]

> … should ensure consistent storage of photographs, minimising the retention of images on individual devices and the duplication of images across multiple storage systems. The policy should also provide guidelines covering limits on the use and retention of images, routine review and deletion of images from mobile and desktop devices, and protocols for purging and replacing devices.

[291] I agree that there should be a policy on both retention and use of information gathered under the intelligence-gathering power. Given the disparate quality of information gathered by police and the fact that, by its nature, such information is designed to be, as the Detective Sergeant put it in this case, "available to other officers in the future to assist with policing activities",[364] it would be difficult (and in fact inconsistent with the intelligence-gathering purpose) to tie retention to the completion of a particular investigation. A time limit and a regular review requirement may be the best means of ensuring retention periods are reasonable. Different retention periods for more sensitive personal information such as photographs may be required.

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360 At [123].
361 See above at [197].
362 Joint Report, above n 158, at [76].
363 At [82] (footnote omitted).
364 See above at [135].

[292] I do not, for the purposes of this appeal, need to decide on the outer limits of any such retention policy. This is because I accept the Crown submission that there was nothing unreasonable about the police retaining the photograph of Mr Tamiefuna for the short period of (at most) three weeks before it implicated him in serious criminal offending. The retention period was reasonable in this case.

[293] The fact that Mr Tamiefuna's photograph was used as evidence in the aggravated robbery of Mr Lim, and not (as far as we know) for an investigation into the suspected stolen property in the car, is of no moment. There is no restriction on the use of material gathered for intelligence-gathering purposes, as long as it is used for legitimate police purposes and within a reasonable retention period.[365] Sections 32(1) and 33(1) of the Policing Act are consistent with this as they recognise that any biometric information gathered under those sections can be used "now or in the future by the Police for any lawful purpose".[366]

Second issue in the appeal: s 30

[294] It is not necessary to consider s 30 as I have held the photograph to have been obtained lawfully and reasonably. I do, however, make some brief comments on s 30, after summarising the decisions of the Courts below and the submissions.

Decisions of the courts below: s 30

[295] In the High Court, Moore J would have held that, even if the photograph had been improperly obtained, its exclusion would have been disproportionate to any impropriety.[367] He considered that any legitimate expectation of privacy was limited given the circumstances: the lawful stopping by the police of a vehicle.[368] If there had been a breach, "it was not prolonged, was not undertaken by stealth, subterfuge or the use of image enhancing equipment. Mr Tamiefuna plainly knew he had been photographed". The Judge said that, while Mr Tamiefuna may not have consented, he

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365 In *Ngan*, the majority rejected the proposition that the content of items searched for the purpose of making an inventory could not then be used as evidence for a criminal prosecution: *Ngan,* above n 165, at [30]–[31] and see at [38]. McGrath J agreed: at [121].

366 See above at [195].

367 HC admissibility decision, above n 133, at [130].

368 At [131].

was satisfied nothing rested on that.[369] The evidence was important to assist in the proof of serious offending.[370] The Judge said that:[371]

> [b]alancing these factors … strongly favours the admission of the evidence. Any breach, if there was one, was very much at the lower end of the scale and the officer, at all material times, believed that he was acting lawfully and in good faith.

[296] Similarly, Paul Davison J held that, even if the evidence had been improperly obtained, it would not have been excluded: any impropriety was minimal, the evidence was crucial and its accuracy could not be challenged.[372]

[297] The Court of Appeal held the photograph was properly admitted under s 30 of the Evidence Act: exclusion would be disproportionate given the intrusion was not very serious, the breach inadvertent, the evidence real and important, and the offending serious.[373] It therefore dismissed the conviction appeal.[374]

The submissions: s 30

Mr Tamiefuna

[298] Mr Tamiefuna submits that the Court of Appeal erred in its execution of the balancing exercise under s 30 of the Evidence Act, wrongly admitting the evidence. Insufficient weight was given to the importance of the right breached and the nature of the intrusion, while too much weight was placed on the seriousness of the offence and the nature and quality of the evidence. Further, the Court failed to take proper account of the need for an effective and credible system of justice in its balancing exercise. The criminal justice system should not be routinely admitting improperly obtained evidence as, it is asserted, currently occurs.

[299] Mr Tamiefuna submits that there should be a recalibration of the s 30 test more aligned with the approach in *R v Williams*. The Court of Appeal in *Williams* set out a structured approach to the balancing exercise now contained in s 30, which it said

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369 At [132].
370 At [134].
371 At [135].
372 HC conviction decision, above n 126, at [53]–[55].
373 CA judgment, above n 127, at [98]–[103].
374 At [104].

should lead to more consistent results.[375] This approach involves weighing the seriousness of the breach of the Bill of Rights (taking into account any aggravating and mitigating factors) against public interest factors favouring admission of the evidence.[376] The overall test is whether the remedy of exclusion is proportionate to the breach of the Bill of Rights.[377]

[300] Mr Tamiefuna submits that there should be a three-step evaluative test for applying s 30(2):

(a) Is the evidence "improperly obtained"?

(b) If so, is exclusion of the evidence proportionate to the impropriety, having regard to the factors relevant to the balancing process under s 30(3)? This is the fact-specific assessment.

(c) Is this outcome consistent with the need for an effective and credible system of justice? This involves broader public policy considerations.

The intervener

[301] The Commissioner made some general comments on s 30. In his submission, the corollary of the right to privacy is that a breach of that right by the state must have an effective remedy, such that s 30 of the Evidence Act must be read to permit admission of unlawfully obtained evidence only in exigent circumstances.[378] Sections 21 and 30 ought not be viewed as a conflict between the state or public

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375 *Williams*, above n 221, at [147] per William Young P and Glazebrook J.

376 At [134] per William Young P and Glazebrook J. Factors relevant to the seriousness of the breach include the nature of the right, the nature of the breach, the extent of the illegality and the nature of the privacy interest: at [106]–[115]. Aggravating factors include failure by the police to comply with statute, the search being conducted in an unreasonable manner and evidence of police misconduct: at [116]–[121]. Mitigating factors include where the breach had occurred in a situation of urgency and where there had been an attenuation of the link between the breach and the evidence: at [122]–[125]. The presence of good faith on the part of the police is regarded as a neutral factor: at [130]. Public interest factors favouring admitting the evidence include the seriousness of the offence, the nature and quality of the evidence and the importance of the evidence to the prosecution's case: at [134].

377 At [142] per William Young P and Glazebrook J.

378 This submission appears to be advocating a return to a prima facie exclusion rule. This rule was replaced with a balancing test in *R v Shaheed* [2002] 2 NZLR 377 (CA). As the *Shaheed* test was effectively codified in s 30 of the Evidence Act, to accept the Commissioner's submission would not accord with s 30. I therefore say no more about it.

interest in securing as much information as possible and the necessary protections for individual privacy, but rather as aligned with the fundamental interest in ensuring that rights are upheld under law.

The Crown

[302] The Crown submits that, even if the evidence were improperly obtained, its exclusion would have been disproportionate to any impropriety: there was, at most, a minimal intrusion on Mr Tamiefuna's privacy; the evidence obtained was real, reliable and central to the Crown case; and the offending was serious. Excluding the evidence in these circumstances would undermine the need for an effective and credible justice system.

[303] The Crown does not accept that any recalibration of the s 30 test is required. It also says that there is no proper evidence that the test is operating routinely to admit improperly obtained evidence. It is not right, for example, to judge this just based on appeal decisions as these are a small and non-representative subset of cases.

The proper approach to s 30

What was said on s 30 in Hamed*?*

[304] In terms of the s 30 balancing process, Elias CJ in *Hamed* said that the general rule for improperly obtained evidence is for it to be excluded if the court determines such exclusion is "proportionate to the impropriety".[379] It is a contextual assessment and the court's reasoning must be transparent.[380] The considerations outlined in s 30(3) are not mandatory considerations, and relevance and weight will be contextual.[381]

[305] Elias CJ said that the need for "an effective and credible system of justice" is not a consideration that points only to admissibility. An effective and credible system of justice is one that gives substantive effect to human rights and the rule of law, and

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379 *Hamed*, above n 149, at [57].
380 At [58]–[59].
381 At [64].

the principle that breaches of rights must be remedied is also essential.[382] The same applied to the "seriousness of the offence". This cannot always prompt admission of the evidence obtained in breach of the Bill of Rights. That would be to treat human rights as withdrawn from those charged with serous offending.[383]

[306] Blanchard J said that an effective and credible system of justice requires not only that offenders be brought to justice but also that impropriety on the part of the police should not readily be condoned by allowing evidence improperly obtained to be admitted:[384]

> … the fact of the breach means that damage has already been done to the administration of justice. The courts must ensure in the application of s 30 that evidence obtained through that breach does not do further damage to the repute of the justice system.

[307] Tipping J said that the need for an effective and credible system of justice is not solely a counterpoint to the impropriety involved in gaining the evidence. The concept "involves not only an immediate focus on the instant case but also a longer-term and wider focus on the administration of justice generally".[385] He said:

> [230] The admission of improperly obtained evidence must always, to a greater or lesser extent, tend to undermine the rule of law. By enacting s 30 Parliament has indicated that in appropriate cases improperly obtained evidence should be admitted, but the longer-term effect of doing so on an effective and credible system of justice must always be considered, as well as what may be seen as the desirability of having the immediate trial take place on the basis of all relevant and reliable evidence, despite its provenance. As the Supreme Court of Canada recently put it in *R v Grant*,[386] the short-term public clamour for a conviction in a particular case must not deafen the judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly when the penal stakes for the accused are high. The seriousness of the offence charged is apt to cut both ways.

[308] McGrath J said that the s 30 balancing exercise must take "as a starting point the importance of the rights breached by the impropriety and the seriousness of the

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382 At [63] and see [62].
383 At [65].
384 At [187].
385 At [229].
386 *R v Grant* 2009 SCC 32, [2009] 2 SCR 353 at [84].

intrusion".[387] He said that the need for an effective and credible system of justice is not simply a factor aimed at bringing offenders to justice. It cuts both ways: "an effective and credible system of justice must also maintain the rule of law by ensuring that police impropriety when gathering evidence is not readily condoned".[388]

[309] Gault J commented that s 30 requires a balancing process that gives appropriate weight to the impropriety but also takes proper account of the need for an effective and credible system of justice. He said that the factors specified in s 30(3) call for "value judgments that may well depend on inclinations of particular judges, as will the comparative weighting to be accorded those factors".[389]

[310] In the circumstances in *Hamed*, Gault J accepted that the fact that the expectations of privacy of the appellants were breached must be weighed. In particular, the importance of the rights to be free from police conduct in excess of authority is not to be diminished. He considered, however, that to be heavily outweighed by the significance of the situation that police were attempting to deal with. The threat of serious danger indicated that an effective and credible system of justice should admit the evidence so that it could be heard and assessed as part of a full determination of the charges.[390]

Should the s 30 test be recalibrated?

[311] There is nothing in *Hamed* that would suggest judges are prevented from applying the analysis in *Williams*, to the extent it remains appropriate.[391] All of the Judges in *Hamed* recognised that a credible and effective system of justice involves important and wider policy decisions, and that it "cuts both ways".[392] This means that there is no need for a recalibration of the test to require courts to consider this factor separately.

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387 *Hamed*, above n 149, at [263].
388 At [258].
389 At [282].
390 At [285].
391 For instance, Blanchard J said that the importance of the right breached and the seriousness of the intrusion upon it, as well as the nature of the impropriety, tend to weigh in favour of exclusion: at [190] and [193]. On the other hand, he said that the seriousness of the offence and the nature and quality of the evidence usually favour admission: at [197] and [201].
392 At [258] per McGrath J. This is with the possible exception of Gault J.

Section 30 and this case

[312] In this case, had I considered there to have been an unreasonable search or the evidence otherwise improperly obtained, I would have admitted the photograph under s 30, essentially for the same reasons as in the Courts below.[393]

Conclusion

[313] For all the reasons set out above, I would dismiss the appeal.

KÓS J

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[314] I would dismiss this appeal. As my reasons are distinctive, I write separately. As they accord in part with aspects of the other reasons delivered, I write briefly.

[315] First, and in common with Glazebrook J, I find there was no search of Mr Tamiefuna engaging s 21 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights). Given that finding, I express no view on the hypothetical reasonableness of a search. Secondly, in common with the majority, I find the subsequent entry of Mr Tamiefuna's photograph into the police national database unlawful, neither statute nor common law permitting that act. Thirdly, I would not exclude the photograph in evidence, under the s 30 balancing test in the Evidence Act 2006, essentially for the same reasons given by the Court of Appeal and by Glazebrook J.

There was no search

[316] The police were entitled to impound the vehicle Mr Tamiefuna had been travelling in. Mr Tamiefuna thus found himself on the pavement in a public street. His situation was not materially different to that of a passenger in a vehicle which had

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393 See above at [295]–[297].

broken down. He was in a public place, and susceptible to being photographed. Being photographed in a public place is a predictable risk of travelling in, and then exiting, a motor vehicle. They break down, and are towed away. They are stopped, and then impounded. You walk. People, and devices, may photograph you as you do. Cell phones and CCTV have made this a routine experience.

[317] People standing on a pavement in a public street essentially lack a reasonable expectation of privacy from being photographed.[394] The only potential question of legality arising is what is then done with the photographs.[395] Such a distinction is drawn also in tort-based privacy cases, which treat reasonable expectations of privacy regarding intrusions into the personal sphere differently from reasonable expectations regarding the way personal information (such as photographs) is dealt with. In *Andrews v Television New Zealand Ltd*, a couple involved in a motor accident were filmed by a reality television show about firefighters. Allan J found they could reasonably expect that footage of their intimate conversation would not be broadcast on national television, even if "there could be no real objection to filming, or the taking of still photographs, of an accident scene in general, if it occurs on a public road".[396]

[318] Taking Mr Tamiefuna's photograph did not amount to a search. Section 21 of the Bill of Rights is concerned with the protection of reasonable expectations of privacy in private spaces or affairs. It exists to protect these zones of privacy against state intrusion.[397] It is not a general right of privacy: it is engaged only where a search (or seizure) has occurred which offends such expectations.[398] Both aspects are essential to s 21. I am unable to conclude that taking a photograph of a person standing

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394 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [164] per Gault P and Blanchard J; *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [167] per Blanchard J; and *Lorigan v R* [2012] NZCA 264, (2012) 25 CRNZ 729 at [22]–[24].

395 Which I address in the next section of my reasons.

396 *Andrews v Television New Zealand Ltd* [2009] 1 NZLR 220 (HC) at [63]. Later, in *C v Holland*, Whata J held that an intrusion into the personal sphere—as opposed to dealing with personal information—would only be an actionable breach of privacy if it involved "intimate personal activity, space or affairs", ensuring the tort of intrusion into seclusion concerned only those "matters that most directly impinge on personal autonomy": *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672 at [94]–[95].

397 *Hamed*, above n 394, at [164] and [167] per Blanchard J; and see *R v Harris* 2007 ONCA 574, (2008) 87 OR (3d) 214 at [33].

398 Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (2nd ed, LexisNexis, 2015) at [18.6.1].

in a public street—whether by a tourist, journalist, police officer or an ordinary security surveillance camera—engages either element.

[319] The essential feature of a search, as Blanchard J suggested in *Hamed v R*, is an examination or investigation (which can include surveillance) for the purposes of obtaining evidence, which intrudes upon a right to privacy.[399] In *Hamed*, Blanchard J said:[400]

> If the surveillance is of a public place, it should generally not be regarded as a search (or a seizure, by capture of the image) because, objectively, it will not involve any state intrusion into privacy. People in the community do not expect to be free from the observation of others, including law enforcement officers, in open spaces such as a roadway or other community-owned land like a park, nor would any such expectation be objectively reasonable.

Blanchard J then qualified that by noting that use of unusual forms of remote surveillance technology in public places might constitute a search. I agree: a remote listening device capable of recording what otherwise appeared to be a private conversation (albeit taking place in a public space) may effect a search for s 21 purposes. But an ordinary photograph of a person present on the pavement of a public street should not engage s 21.

Retention of the nominated photograph in the police database was unlawful

[320] I noted earlier that people standing on a pavement in a public street lack a reasonable expectation of privacy from being photographed and that the real question of legality is what is then done with the photographs—as in the *Andrews* case involving the couple filmed at a motor accident.[401] Reasonable expectations of privacy may trench on use, if not on capture. Here those expectations are influenced by the fact that three official acts by Detective Sergeant Bunting are in issue: (1) taking the photograph; (2) asking the subject for his name and birthdate; and (3) combining those outputs in the form of a nominated photograph—by which I mean the

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399 As the Court of Appeal noted in *R v Fraser*, a search does not per se intrude on privacy: *R v Fraser* [1997] 2 NZLR 442 at 449. However, for s 21 purposes at least, it must do so.

400 *Hamed*, above n 394, at [167]. In *Lorigan*, the Court of Appeal said "the test (for assessing whether surveillance of a public place not involving any trespass by the police is a search) that has the support of a majority of the Supreme Court is that proposed by Blanchard J": *Lorigan*, above n 394, at [22].

401 See above at [317].

photograph now had Mr Tamiefuna's identification details attached to it—and retaining it on the national database.

[321] Here, the officer was entitled to ask Mr Tamiefuna his name, birthdate and address. He was not entitled to imply it was compulsory to answer, but he did not do that.[402] Mr Tamiefuna gave his details freely, neither under compulsion nor misdirection. The officer was also entitled to photograph him. He did so, at least in part, because he suspected some of the contents of the vehicle had been stolen. Taking photographs of the former occupants of the vehicle was within the scope of his ordinary police responsibilities relating to public protection and welfare, including the detection of crime.[403] Let us suppose the goods left in the impounded vehicle *had* proved to have been stolen, as the officer suspected. It would have been poor police work indeed not to have sought names and addresses (and taken photographs, lest the details supplied were false) from those who had been in the vehicle. There was a proper policing purpose, both in inquiry and photography.[404]

[322] In *R v Ngan*, a majority of this Court described the common law duties of police as comprising an "absolute" duty "to take all steps which appear to them to be necessary for keeping the peace, for preventing crime or for protecting property from criminal injury", along with a further, general duty to act "for the benefit of the public in furtherance of their general responsibility to protect life and property" even if such action is not associated directly with the prevention or detection of crime.[405] Police possess at common law the powers necessary to carry out those duties,[406] subject to statutory modification and to the obligation to ensure any resulting

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402 *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297, cl 1. Only the driver was bound to answer: Land Transport Act 1998, s 114(3)(b).

403 See below at [322]–[323].

404 That constitutes the "good law enforcement reason" the Court of Appeal was looking for: *Tamiefuna v R* [2023] NZCA 163, [2023] 3 NZLR 108 (Cooper, Brown and Goddard JJ) [CA judgment] at [57].

405 *R v Ngan* [2007] NZSC 105, [2008] 2 NZLR 48 at [12]–[13] per Elias CJ, Blanchard and Anderson JJ (footnotes omitted) citing *Glasbrook Brothers Ltd v Glamorgan County Council* [1925] AC 270 (HL) at 277 per Viscount Cave LC.

406 *Ngan*, above n 405, at [11] citing *Minto v Police* [1987] 1 NZLR 374 (CA) at 377–378 per Cooke P.

interference with private liberty or property can be legally justified.[407] Police powers, as public powers, must be exercised "in accordance with law, fairly and reasonably".[408]

[323] I accept these duty-based powers enable the police to retain and use nominated photographs taken in a public place in undertaking law enforcement and crime prevention duties relating to the circumstances in which the photographs were captured. Mr Tamiefuna gave his name freely in the context of the particular incident that resulted in the car being impounded; his reasonable expectations of privacy must allow the nominated photograph that resulted to be used in connection with matters arising from that incident. Specifically, Mr Tamiefuna's photograph could be retained and used for so long as necessary to investigate whether the items found in the vehicle were stolen, being the potentially unlawful action remaining for investigation. I do not agree with the suggestion by the Court of Appeal that the investigative purpose must *precede* the taking of the photographs, but I accept they must be reasonably connected in both circumstance and time.[409]

[324] That said, I do not consider these powers extend so far as to enable the inclusion of the nominated photograph of Mr Tamiefuna in a general intelligence database for use in investigations unconnected to the original taking of that photograph. That goes well beyond the scope of the implied power to deal with photographs lawfully taken by police officers described above, and beyond the reasonable expectations of the subjects of such photographs as to how the information (including their names) will be used. In particular, it is inconsistent with the very careful framework provided by ss 32–34A of the Policing Act 2008 relating to retention of nominated information (including nominated photographs) of persons detained by the police. Those provisions also require that where that person is *not* then found responsible for offending—generally by conviction—the information must

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407 *Ngan*, above n 405, at [14].

408 *New Zealand Fishing Industry Assoc Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA) at 552 per Cooke P as cited in Philip A Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at 742, n 247. See also the foundational principles expressed in s 8 of the Policing Act 2008, including that "principled, effective, and efficient policing services are a cornerstone of a free and democratic society under the rule of law": at s 8(a); and that "policing services are provided in a manner that respects human rights": at s 8(d).

409 CA judgment, above n 404, at [80].

be destroyed.[410] In short, I do not consider that legislation leaves room for an inconsistent common law power to retain, for general intelligence purposes, nominated photographs of persons neither detained nor found responsible for offending.

[325] That view is buttressed by the reality that retention of nominated information for general future use conflicts with information privacy principle (IPP) 9 of the Privacy Act 1993. IPP 9 provides: "An agency that holds personal information shall not keep that information for longer than is required for the purposes for which the information may lawfully be used."[411] As explained above at [323]–[324], there are limits at common law on the purposes for which such information may lawfully be used. It may also be observed that the 2022 joint report of the Privacy Commissioner and the Independent Police Conduct Authority (Joint Report) found that indefinite retention of photographs by police was "incompatible with IPP 9".[412] I agree with that assessment.

[326] Accordingly, I do not consider any common law police power enables retention of nominated photographs for general intelligence purposes unrelated to the circumstances in which the photographs were captured.[413] Any such system would require a clear framework for retention, use and destruction.[414] The establishment of such a framework is pre-eminently a matter for Parliament, as ss 32–34A of the Policing Act demonstrate. It is preferable that the limits and broad framework for any such database now be determined by Parliament, by amendment of that Act.

The photograph should still be admitted in evidence

[327] I would not however exclude the photograph as evidence under the s 30

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410 Policing Act, s 34(2).

411 Privacy Act 1993, s 6.

412 Privacy Commissioner | Te Mana Mātāpono Matatapu and Independent Police Conduct Authority | Mana Whanonga Pirihimana Motuhake *Joint inquiry by the Independent Police Conduct Authority and the Privacy Commissioner into Police conduct when photographing members of the public* (September 2022) [Joint Report] at [76].

413 Including any prerogative power; Joseph, above n 408, notes that police officers have an "uncertain status" and it is therefore unclear whether their powers can properly be classified as prerogative in nature: at 741–742.

414 The Joint Report, above n 412, concluded that a new, comprehensive policy was needed to ensure compliance with information privacy principle 9 in respect of personal information collected for "general intelligence gathering purposes": at 18.

balancing test, essentially for the same reasons given by the Court of Appeal and by Glazebrook J. First, and in common with the majority, I do not consider the expression of the s 30 test by this Court in *Hamed* requires reconsideration.[415] Secondly, I agree with the analysis of the Court of Appeal at [100]–[104] of its judgment. Thirdly, as regards s 30(3)(b)—whether the impropriety was deliberate, reckless or done in bad faith—I would add that the Joint Report, which cast doubt on the legality of indefinite retention of nominated information for general intelligence purposes, was issued almost three years after the nominated photograph was uploaded by DS Bunting. What might have been seen as a grey area in 2019 was no longer so grey after that report was published. A different balance might be struck thereafter, in another case.

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[415] *Hamed*, above n 394.