NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY PERSONS UNDER THE AGE OF 18 YEARS WHO IS A COMPLAINANT IS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360352.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 17/2025
[2025] NZSC 46

BETWEEN	W (SC 17/2025) Applicant
AND	NEW ZEALAND POLICE Respondent

Court: Ellen France, Kós and Miller JJ

Counsel: N P Bourke for Applicant
P D Marshall and T Zhang for Respondent

Judgment: 1 May 2025

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant, whom we shall call W, was sentenced to eight months' imprisonment[1] after pleading guilty to a charge of exposing a young person to indecent material under s 124A of the Crimes Act 1961.[2] Given his sentence, he was automatically placed on the Child Sex Offender Register (the Register).

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1 *New Zealand Police v [W]* [2023] NZDC 9051 (Judge Greig) [Sentencing remarks].
2 The maximum penalty is three years' imprisonment.

[2] The applicant appealed unsuccessfully against sentence to the High Court.[3] He was given leave for a second appeal to the Court of Appeal on the question of the impact on sentencing decisions of registration on the Register.[4] The Court of Appeal dismissed the appeal concluding that, generally, registration should only result in reduced sentences for child sex offenders in exceptional cases and that there was nothing exceptional about the circumstances of this case.[5] He now seeks leave to appeal to this Court from the decision of the Court of Appeal.

Background

[3] The applicant and the victim worked at the same place. At the relevant time of the offending, the applicant was aged 40 years and the victim was 14 years old. The applicant connected with the victim on social media and then began to send her inappropriate messages. Subsequently, after making an inappropriate comment to the victim at work on an occasion in late 2022, he sent her several messages that evening including photographs showing him partially naked and exposing the outline of his genitalia and of him naked showing his buttocks. He accepted he knew the victim's age and that the communications were indecent.

[4] The sentencing Judge considered the current offending was "demonstrative of ongoing participation in sexual offending against children in that it involved his grooming of a child".[6] The Judge noted that the applicant has a previous conviction following sexual connection with a girl under the age of 16. After his release from prison on that charge, he was convicted of breaching his release conditions by approaching the victim of that offending. The Judge took the view that it was not appropriate to commute the end sentence of eight months' imprisonment to home detention because imprisonment was the only effective deterrent.[7]

[5] In dismissing the appeal against sentence, the Court of Appeal discussed the legislative framework and authorities including those from relevant Australian

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3 *[W] v New Zealand Police* [2023] NZHC 1935 (Palmer J).
4 *[W] v New Zealand Police* [2023] NZCA 475.
5 *[W] v New Zealand Police* [2025] NZCA 15 (Cooper P, French and Ellis JJ) [CA judgment].
6 Sentencing remarks, above n 1, at [19].
7 The applicant had engaged in counselling and psychological treatment whilst in prison for the earlier offending.

decisions before reaching its considered viewpoint. The Court's conclusions were as follows:[8]

> (a) Sentencing is quintessentially a discretionary exercise and clearer words would be required in either the [Child Protection (Child Sex Offender Government Agency Registration) Act 2016 (the Act)] or the Sentencing Act before Parliament can be assumed to have intended to remove completely any discretion to take the impact of registration into account at sentencing.
>
> (b) However, having regard to the important purpose of the Act to reduce sexual reoffending against children, any judicial discretion to take registration into account must be considered a limited one.
>
> (c) Generally speaking, it would be contrary to Parliament's clear intention were registration to result in reduced sentences for child sex offenders in anything other than exceptional cases. That approach applies to both the issue of length of sentence where registration should not generally be regarded as warranting a discrete discount and also to the type of sentence.
>
> (d) Exceptional circumstances justifying an allowance for the effects of registration will exist if registration is exceptional in its effects on the particular offender and will render an otherwise appropriate sentence unusually or disproportionately severe.
>
> (e) It follows that the operation of the Act will seldom result in a sentence otherwise within range being manifestly excessive.
>
> (f) It also follows that it would be inconsistent with the legislative purpose and hence wrong for a sentencing court to reduce a prison sentence on account of registration so as to bring it within the range of home detention. That would be to subvert the distinction drawn in the Act for a prison sentence and offending that does not.
>
> (g) For the avoidance of doubt, we confirm that where the length of a prison sentence arrived at without regard to the impact of registration is under the home detention threshold, then in deciding between prison and home detention, the availability of a s 9 registration order may be taken into account in determining whether home detention will sufficiently meet the need for community protection. Home detention should not however be imposed for the purpose of avoiding registration.

The proposed appeal

[6] The applicant seeks leave to appeal to this Court on the question of the proper approach to the effect of registration on the Register on sentencing. He submits that, as the Court of Appeal recognised in granting leave to appeal for a second appeal, the

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8 CA judgment, above n 5, at [98] (footnotes omitted).

proposed appeal raises a question of general or public importance and is a suitable vehicle for considering that issue.[9] He notes that registration has been treated as a penal sanction for sentencing purposes[10] and says that it follows that the need for proportionality in sentencing is directly engaged. In this case, he argues, the effect of remaining on the Register for eight years is disproportionate to what he submits has been treated as offending at the lowest end of the spectrum. There will accordingly be, in his submission, a miscarriage of justice if the proposed appeal is not heard.[11]

[7] The respondent in opposing leave says there is no error apparent in the reasoning of the Court of Appeal. The respondent also submits that what may constitute exceptional circumstances is better suited to case-by-case development.

[8] As the respondent accepts, the question about the effect of registration on sentencing may involve a question of general or public importance.

[9] This Court in declining leave to appeal in *S (SC 75/2024) v R* on the same question similarly accepted that the arguments advanced "potentially" raised issues of general importance.[12] But the Court said that case was not one in which to consider the issue where the arguments had not been made in the Court of Appeal so the Court did not have the views of the Court of Appeal. In the present case, by contrast, the matter has been fully argued in the Court of Appeal.

[10] Whether the threshold for making some allowance for registration is properly characterised as "exceptional" is a question this Court may wish to consider at some point. That said, we consider it would be premature for the Court to address that question now. The Court of Appeal saw the threshold as one that applied "generally speaking" leaving open the possibility of further development. Further, the issue would be raised in something of a factual vacuum where the applicant has completed his term of imprisonment, his release conditions have expired, and he accepts he should be on the Register. Moreover, it is difficult to see that registration would have

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9 Senior Courts Act 2016, s 74(2)(a).

10 Citing *D (SC 31/2019) v New Zealand Police* [2021] NZSC 2, [2021] 1 NZLR 213 at [59] per Winkelmann CJ and O'Regan J, [159] per Ellen France J, [161] per Glazebrook J and [278] per William Young J.

11 Senior Courts Act, s 74(2)(b).

12 *S (SC 75/2024) v R* [2024] NZSC 140 at [6].

impacted on the sentence in this case. For the same reasons, we accept the submission for the respondent that there is no risk of a miscarriage of justice if the proposed appeal is not heard.

Anonymisation

[11] The applicant seeks anonymisation of his name in this judgment to avoid what he submits would be the "significant adverse impact" of further publicity. The respondent opposes anonymisation submitting that there is here no evidence of the impact of further publicity.

[12] The applicant points to the decision in *D (SC 31/2019) v New Zealand Police* where this Court decided to anonymise its judgment.[13] A majority of this Court in *D* attached significance to the fact that the Register is a confidential one and was concerned to avoid an approach which would discourage appeals. We see no basis for taking a different view in this case. We accordingly anonymise this judgment.

Result

[13] The application for leave to appeal is dismissed.

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent

[13] *D*, above n 10.