ORDER CONTINUING INTERIM NAME SUPPRESSION OF APPELLANTS UNTIL 4.00 PM ON 8 MAY 2020 OR SUCH OTHER DATE AS MAY BE ORDERED BY THE SUPREME COURT.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA218/2020
[2020] NZCA 144

BETWEEN	DERMOT GREGORY NOTTINGHAM AND ROBERT EARLE MCKINNEY Appellants
AND	JACINDA ARDERN, ASHLEY BLOOMFIELD AND SARAH STUART-BLACK Respondents

Hearing:	1 May 2020
Court:	Kós P, French and Collins JJ
Counsel:	Appellants in person A M Powell and V McCall for Respondents
Judgment:	1 May 2020 at 4.00 pm
Reasons:	4 May 2020 at 4.00 pm

JUDGMENT OF THE COURT

A The appeals are dismissed.

B Order continuing interim name suppression until 4.00 pm on 8 May 2020 or such other date as may be ordered by the Supreme Court.

C There is no order for costs.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] Mr Nottingham and Mr McKinney allege that the New Zealand Government's response to COVID-19 has subjected them to unlawful detention. Two general questions are addressed in this judgment:

(a) Did the High Court err when it declined to issue writs of habeas corpus in favour of Mr Nottingham and Mr McKinney?[1]

(b) Did the High Court err when it declined applications for interim name suppression by Mr Nottingham and Mr McKinney in relation to their proceedings?

[2] Two sub-issues are raised under the question posed in [1(a)]:

(a) are Mr Nottingham and Mr McKinney detained within the meaning of that term in the Habeas Corpus Act 2001 (the Act); and, if so

(b) is habeas corpus the appropriate procedure for considering the allegations made by Mr Nottingham and Mr McKinney?

[3] On 1 May 2020 we heard and determined the appeal by answering in the negative the two questions posed in [1]. We now provide the reasons for our decision.

Key measures taken by the Government in response to COVID-19

[4] The following are the key measures taken by the Government in response to the threats posed by the COVID-19 pandemic that are relevant to the issues raised by the appeals.

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1 *A v Ardern* [2020] NZHC 796; and *B v Ardern* [2020] NZHC 814.

[5] On 11 March 2020, COVID-19 was added to the lists of notifiable infectious diseases and quarantinable infectious diseases in the Health Act 1956.[2]

[6] On 21 March 2020, the Prime Minister announced New Zealand's four-stage alert system for responding to the COVID-19 pandemic. Two days later, the Prime Minister explained New Zealand had moved to COVID-19 Alert Level 3 and that on 25 March 2020, the country would be placed into the most restrictive level, COVID-19 Alert Level 4.

[7] The Government took a number of measures to implement its response to the pandemic, including:

(a) On 25 March 2020, the Government issued an Epidemic Notice under s 5 of the Epidemic Preparedness Act 2006.[3]

(b) On 25 March 2020, the Government declared a state of national emergency under the Civil Defence Emergency Management Act 2002.[4] That notice has since been extended on five occasions and remains in force today.[5]

[8] Those measures laid the foundation for the Director-General of Health (the Director-General) to issue a series of orders under s 70(1) of the Health Act. For present purposes we need focus only upon three of those orders:

(a) An order issued under s 70(1)(m) of the Health Act on 25 March 2020, which required the closure of all premises in New Zealand, other than exempt premises. The list of exempt premises included private dwelling houses. Also exempt were the premises of defined "essential businesses". The order also banned people from congregating in

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2 Health Act 1956, sch 1, pt 1, s B; and sch 1, pt 3, inserted by cl 3 of the Infectious and Notifiable Diseases Order (No 2) 2020.

3 Epidemic Preparedness (COVID-19) Notice 2020.

4 "Declaration of State of National Emergency by Minister of Civil Defence" (25 March 2020) *New Zealand Gazette* No 2020-go1435.

5 The current notice expires on 6 May 2020 at 12.21 pm, see "Declaration by Minister Extending State of National Emergency" (28 April 2020) *New Zealand Gazette* No 2020-go1801.

certain outdoor places and required those who were permitted to leave their homes to maintain "physical distancing", meaning they were required to remain two metres away from other people. This order was revoked on 27 April 2020.[6]

(b) An order issued under s 70(1)(f) of the Health Act on 3 April 2020 requiring all people to remain in their current place of residence, which has come to be referred to as their "bubble", unless they were permitted to leave for defined "essential personal movement". This order also required people to maintain "physical distancing" except from fellow residents of their "bubble" or to access or provide an essential business or service. This order was also revoked on 27 April 2020.[7]

(c) The Health Act (COVID-19 Alert Level 3) order which came into force on 27 April 2020 in place of the above orders. This order was also issued under s 70(1)(f) and (m) of the Health Act, and relaxed some of the restrictions associated with COVID-19 Alert Level 4. For example, the COVID-19 Alert Level 3 order permits people to leave their places of residence to attend businesses and educational facilities that have put in place "relevant infection control measures".[8] This order also changed a number of restrictions relating to exercise and recreation that had been prohibited under COVID-19 Alert Level 4 and permits people to extend their "bubble" arrangements under certain circumstances.

Mr Nottingham and Mr McKinney

[9] Mr Nottingham and Mr McKinney argue that the effect of the measures we have summarised at [5]–[8] is to detain them unlawfully. They seek writs of habeas corpus under the Act.

[10] Mr Nottingham and Mr McKinney chose not to be represented by a lawyer. Mr Nottingham purported however, to represent himself and unnamed members of his

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6 Health Act (COVID-19 Alert Level 3) Order 2020, cl 13.
7 Clause 13.
8 Clause 7(a)–(c).

family. Mr McKinney purported to bring his application on behalf of his fellow "bubble" members. Mr Nottingham's family and Mr McKinney's "bubble" members are not parties to their respective proceedings and Mr Nottingham and Mr McKinney cannot represent them. We will therefore treat each appellant's proceeding as being limited to the appellant alone.

[11] At the time he commenced his proceeding in the High Court, Mr Nottingham was serving a sentence of home detention.[9] On 24 April 2020, the Supreme Court granted Mr Nottingham bail pending his appeal to that Court against his sentence.[10] The conditions of his bail require, among other things, Mr Nottingham to reside at all times at an address agreed to by the Crown and Mr Nottingham and not to communicate with certain named people.[11]

[12] The fact Mr Nottingham was serving a sentence of home detention when he commenced his proceeding in the High Court could have raised issues as to whether or not his application for habeas corpus was moot and an abuse of the Court's process. That option, however, is no longer appropriate in view of the fact Mr Nottingham has bail, albeit on restrictive terms.

[13] Mr Nottingham acknowledged to us that during both COVID-19 Alert Level 4 and COVID-19 Alert Level 3, he has left his home to go to a supermarket and that he undertakes exercise away from his home.

[14] Mr McKinney travelled to Mr Nottingham's home to conduct his appeal on the same telephone as Mr Nottingham. He has also left his home over the past four weeks to go shopping and to undertake exercise.

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9 *R v Nottingham* [2018] NZDC 15373; *Nottingham v R* [2019] NZCA 344; and leave to appeal against sentence granted in *Nottingham v R* [2020] NZSC 23.

10 *Nottingham v R* [2020] NZSC 39.

11 At [14].

Habeas Corpus Act 2001

[15] The Act superseded common law versions of the habeas corpus remedy, which can be traced to 1206.[12] The Act is able to be invoked to challenge the legality of a person's detention.[13] Its purposes include reaffirming "the historic and constitutional purpose of the writ of habeas corpus as a vital means of safeguarding individual liberty".[14]

[16] The Act defines detention in broad terms as including, "every form of restraint of liberty of the person".[15] Once it is established that an applicant is detained, the onus normally passes to the defendant to establish that the detention is lawful.[16] In 2013, Parliament modified this general requirement so now the High Court may refuse to issue a writ of habeas corpus, without requiring the defendant to establish that the detention is lawful, if the Court is satisfied that habeas corpus "is not the appropriate procedure for considering the allegations made by the applicant".[17]

Are Mr Nottingham and Mr McKinney detained for the purposes of the Act?

[17] In the High Court, Peters J concluded neither Mr Nottingham nor Mr McKinney were detained for the purposes of the Act.[18] She was satisfied Mr Nottingham and Mr McKinney were free to engage in many of their usual activities. For example, they were free to exercise, go to a supermarket, talk to anyone and access the internet.

[18] The approach taken by Peters J reflected this Court's judgment in *Drever v Auckland South Corrections Facility*, in which it was held that special conditions of parole imposed on Mr Drever did not constitute detention for the purposes of the Act.[19] After reviewing relevant authorities, this Court held that the

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12 David Clark and Gerard McCoy *Habeas Corpus: Australia, New Zealand and The South Pacific* (2nd ed, The Federation Press, Sydney, 2018) at 19. We record with great regret that Dr McCoy QC, one of the authors of this text, passed away in Hong Kong on 28 April 2020. Tribute was paid by the Court to Dr McCoy at the commencement of the hearing.

13 Habeas Corpus Act 2001, s 6.

14 Section 5(a).

15 Section 3.

16 Section 14(1).

17 Section 14(1A)(b).

18 *A v Ardern*, above n 1, at [25]–[27]; and *B v Ardern*, above n 1, at [26]–[28].

19 *Drever v Auckland South Corrections Facility* [2019] NZCA 346, [2019] NZAR 1519.

concept of detention under the Act refers to circumstances where a person is held in "close custody".[20] Examples referred to included where a person is detained in prison, or an immigration or deportation context.[21]

[19] We acknowledge the breadth of the definition of detention in the Act. The term "liberty" has a range of meanings. The primary meaning of liberty is to be "free from captivity, imprisonment, slavery, or despotic control".[22] It is this meaning that Parliament had in mind when it introduced liberty into the definition of detention.

[20] It is also important not to conflate restrictions on a person's movement with restrictions upon their liberty. The spectrum of restrictions on a person's movement may vary from imprisonment through to the comparatively mild restrictions imposed when a person is required, for example, to sit in an aeroplane during take-off or landing. Imprisonment entails obvious restrictions upon a person's movement and liberty. It cannot be seriously argued, however, that the requirement to sit in an aeroplane seat involves restrictions upon a person's liberty, even though it necessitates obvious restrictions upon their movement. In order to constitute detention under the Act, restraint of a person's liberty must entail more than intermittent or limited constraint upon his or her general right of movement. Not every curtailment of the right to movement affirmed by s 18 of the New Zealand Bill of Rights Act 1990 constitutes detention under the Act. Detention under the Act requires holding a person in close custody or in a similarly restrictive environment not shared by the public generally.[23]

[21] The assessment as to whether or not restrictions upon an individual's movement constitute a restriction of their liberty, and therefore detention for the purposes of the Act, requires an examination of all relevant facts and an evaluative judgement as to whether or not Parliament intended that the established circumstances satisfy the requirements of detention in the Act.

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20 At [25], citing Clark and McCoy, above n 12, at 66–67.

21 At [29], citing *Schuchardt v Commissioner of Police* [2017] NZAR 1689 (HC) at [10].

22 *The Concise Oxford Dictionary: The Classic First Edition* (Oxford University Press, Oxford, 2011) at 469.

23 *Drever v Auckland South Corrections Facility*, above n 19, at [25]—[30], citing Clark and McCoy, above n 12, at 68.

[22] In undertaking this exercise, we apply the circumstances as they exist at the time we heard the appeal.[24] To do otherwise, would risk the Court engaging in an exercise in futility. That is a consequence that should always be avoided, but particularly so in the context of habeas corpus applications. Thus, it is the restrictions imposed by the COVID-19 Alert Level 3 order that determine whether or not Mr Nottingham and Mr McKinney are detained under the Act.

[23] While the COVID-19 Alert Level 3 order imposes restrictions on a person's movements, it also permits a wide range of activity. Under the order Mr Nottingham and Mr McKinney may, for example:[25]

(a) access businesses and services that have the relevant infection control measures in place;

(b) attend work where the relevant infection control measures are in place;

(c) engage in appropriate outdoor exercise or recreation in their region that is consistent with physical distancing; and

(d) extend their bubble arrangements to include other people.[26]

[24] Subject to Mr Nottingham's bail conditions, he and Mr McKinney can continue to communicate with whomsoever they wish, and they may continue to have unrestricted access to the internet. They have taken advantage of many of these opportunities.

[25] The restrictions on movement imposed by the COVD-19 Alert Level 3 order do not involve restrictions upon the liberty of Mr Nottingham and Mr McKinney as Parliament intended liberty to be understood in the Act. Mr Nottingham and Mr McKinney have not therefore been detained for the purposes of the Act.

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24 *Misiuk v Chief Executive, Department of Corrections* [2010] NZCA 480, [2011] 2 NZLR 114 at [25].

25 Health Act (COVID-19 Alert Level 3) Order, cl 7.

26 Schedule 1 defines "extended bubble arrangements" as an agreement between all of the adult residents of two or more homes to isolate or quarantine in accordance with the order as if they were one residence. This is to be done for the purpose of keeping connections with family or whānau, enabling caregiving, or supporting persons living alone or otherwise isolated.

Is habeas corpus an appropriate procedure in this case?

[26] Peters J decided that if she were wrong in her assessment that Mr Nottingham and Mr McKinney were not detained, she was nevertheless satisfied that their detention was lawful.[27]

[27] If Mr Nottingham and Mr McKinney are detained, we do not think it is necessary to determine the lawfulness of their detention. This is because habeas corpus is not the appropriate procedure for considering their allegations.

[28] As has been noted by the Regulations Review Committee[28] and two of New Zealand's leading public law academics,[29] there are unresolved questions about the lawfulness of the notices issued under s 70 of the Health Act.

[29] Those questions, cannot, however, be appropriately addressed in the context of an application for habeas corpus. Our reasons for this conclusion are:

(a) The questions raise complex legal issues that are not amenable to the truncated procedures prescribed in the Act.

(b) If unsuccessful, the Crown has no right of appeal under the Act.[30] We do not accept that would be a reasonable consequence if questions concerning the lawfulness of the notices issued under s 70 of the Health Act were answered against the Crown.

(c) An expedited application for judicial review seeking declarations in the High Court is the only appropriate procedure in the circumstances of this case.

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27 *A v Ardern*, above n 1, at [40] and [43]; and *B v Ardern*, above n 1, at [39] and [42].

28 Letter from Alastair Scott MP (Chair of the Regulations Review Committee) to Dr Ashley Bloomfield (Director-General of Health) regarding notices issued under s 70 of the Health Act 1956 (20 April 2020), available from <www.parliament.nz>.

29 Andrew Geddis and Claudia Geiringer "Is New Zealand's COVID-19 lockdown lawful?" (27 April 2020) UK Constitutional Law Association <ukconstitutionallaw.org>.

30 Habeas Corpus Act, s 16(1)(b); and *Hunia v Parole Board* [2001] 3 NZLR 353 (CA) at [5].

(d) Applications for habeas corpus should not be entertained in circumstances where they are really being used as a substitute for judicial review.

[30] Even if Mr Nottingham and Mr McKinney are detained we would, if it were necessary to do so, decline to issue a writ of habeas corpus without requiring the Crown to justify the legality of their detention because habeas corpus is not the appropriate procedure for considering their allegations.

Name suppression

[31] Mr Nottingham and Mr McKinney have also appealed the decision of Peters J declining their applications for name suppression.[31] Orders were made in the High Court to continue interim name suppression for 20 working days following the High Court's judgment, subject to further order of the Court.[32] Before us, Mr Nottingham and Mr McKinney sought interim name suppression for six months. This is because they say they are concerned about their safety, and in the case of Mr Nottingham, the safety of his family. They claim they are likely to be subject to physical danger from other New Zealanders, who may take issue with their challenge to the lawfulness of the Government's measures to combat the risks of the COVID-19 virus.

[32] The starting point is the application of the principle of open justice, which normally requires parties in civil proceedings to be identified. The Supreme Court has explained:[33]

> The principle of open justice is fundamental to the common law system of civil and criminal justice. It is a principle of constitutional importance, and has been described as "an almost priceless inheritance". The principle's underlying rationale is that transparency of court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality…

[33] There are, however, circumstances in which the principle of open justice should yield to a party's concerns in order to ensure justice is achieved in individual

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31 *A v Ardern*, above n 1, at [9]; and *B v Ardern*, above n 1, at [13]–[14].
32 *A v Ardern*, above n 1, at [10]; and *B v Ardern*, above n 1, at [15].
33 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [2] (footnotes omitted).

cases.[34] The present case, is however, far removed from the types of circumstance which justify departure from the principle of open justice.

[34] There is no factual basis upon which we can conclude that Mr Nottingham, his family, or Mr McKinney will suffer physical harm if the public knows they are the individuals who have initiated these proceedings. It is possible they may receive some unwelcome comments and that they may be upset by what others have to say. Those are, however, not proper grounds for granting them name suppression, even on an interim basis.

Ancillary matters

[35] When we announced our decision on 1 May 2020, Mr Nottingham and Mr McKinney said that they would seek leave to appeal to the Supreme Court. They sought an extension of the interim name suppression orders until further order in the Supreme Court. We ordered that the existing interim name suppression orders could continue until 4.00 pm on 8 May 2020 or such other time as the Supreme Court may determine.

[36] Mr Nottingham and Mr McKinney have referred to the respondents in person. In doing so, Mr Nottingham has engaged in political comments of a personalised nature, particularly against the Prime Minister. Respondents in applications for habeas corpus should be referred to by the office they hold[35] or by naming the Attorney-General as the respondent.[36] If the matter proceeds further, that correction should be made by Mr Nottingham and Mr McKinney.

[37] Mr Nottingham and Mr McKinney wish to appeal a decision of Peters J declining their application to have their proceedings transferred directly to this Court. The fact their appeal has now been heard by this Court renders that aspect of their appeal nugatory.

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34 *Y v Attorney-General* [2016] NZCA 474, [2016] NZAR 1512 at [29]–[31].
35 Habeas Corpus Act, s 8; and Crown Proceedings Act 1950, s 14(2).
36 Crown Proceedings Act, s 14(2)(c).

Result

[38] The appeals are dismissed.

[39] Order continuing interim name suppression until 4.00 pm on 8 May 2020 or such other date as may be ordered by the Supreme Court.

[40] There is no order for costs.

Solicitors:
Crown Law Office, Wellington for Respondents