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IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI

SC 31/2019
[2019] NZSC Trans 29

D (SC 31/2019)
Appellant

v

NEW ZEALAND POLICE
Respondent

Hearing:	30 October 2019
Coram:	Winkelmann CJ William Young J Glazebrook J O'Regan J Ellen France J
Appearances:	J D Munro and J N Olsen for the Appellant A M Powell and M R G van Alphen Fyfe for the Respondent

CRIMINAL APPEAL

MR MUNRO:
May it please the Court, tēnā koe, Munro together with Olsen for the appellant.

WINKELMANN CJ:
Tēnā kōrua, Mr Olsen.

MR POWELL:
E Te Kōti Mana Nui. Tēnā koutou. Ko Powell ahau. Kei kōnei māua, Ms van Alphen Fyfe, mō te kaiurupare.

WINKELMANN CJ:
Tēnā kōrua. Now, Mr Munro, you're going first, aren't you, I think?

MR MUNRO:
Yes, Ma'am, I am. I have a synopsis with the registrar, if that could be handed out?

This case is simple, it raises no novel issues of law, and we ask this Court to apply the *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 test to this judicial discretion. No branch of government can infringe our fundamental rights unless they can be demonstrably in a free and democratic society, and I have four main submissions to support this argument.

The first submission I can gloss over very quickly and it really is what is simply set out there at 2(a) of my synopsis, that the Act or the New Zealand Bill of Rights Act 1990 under s 3 applies to all branches of government.

Moving on to 2(b) and 2(c) is probably the more substantive arguments. The Courts have applied the *Hansen* test to other cases involving discretions

across the various branches of government, and most recently in the new health case in 2018 involving an administrative decision not to fluoridate local water. In that case both Justice Ellen France and Justice O'Regan applied the *Hansen* test. In *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456, an executive decision of a policy then applied *Hansen* to the discretion in that case. In an example of a judicial discretion where it was applied is the *Commissioner of Police v Burgess* [2012] 2 NZLR 703 (HC) case in the High Court, Justice Asher. Overall the various range of case show or demonstrate across the different branches of government that the *Hansen* test is being used and demonstrates that the *Hansen* application is the norm. But obviously why not in purely criminal jurisdiction cases? Well, primarily because most criminal legislation has built-in mechanisms to guard against infringements. If, for example, if we look at the Bail Act across section 7 and section 8, there are various concepts throughout those sections such as reasonable terms and conditions unless the Court is satisfied just cause for continued detention, bailable as of right and those sorts of comments, or section 8, referring to risk and reasons making it unjust to detain a person. If we take, for example, the *R v Janssen* [2007] NZCA 450 case referred to in the Crown bundle at tab 17, which relates to post-release conditions, if I just take the Court to tab 17 and specifically to paragraphs 16 and 17. Also in another case that's not before the Court but a case of Justice Simon France's, *Smith v Parole Board* [2018] NZHC 955, again a judicial review of a Parole Board decision. His Honour at paragraphs 36 and 37 of that decision discussed directly that the reformulation of Justice Tipping in the *Hansen* case.

WINKELMANN CJ:

Sorry, what case was it?

MR MUNRO:

This is a case that's not before the Court. It's set out in my, it's not in any of the bundles, but it is set out in my footnote in my synopsis.

WINKELMANN CJ:

Yes, but what is the case?

MR MUNRO:

It's called *Smith v Parole Board*.

WILLIAM YOUNG J:

What footnote?

GLAZEBROOK J:

Footnote 9 of his synopsis.

MR MUNRO:

Yes. The last case on footnote 9. Specifically those paragraphs 33, 39, Justice Simon France raises the Justice Tipping test out of, reformulation out of *Hansen*, discusses it as the correct test but then refers specifically to the Act itself and discusses the fact that proportionality type assessments are incorporated into the Parole Act 2002. It is perhaps good reason why there are not any examples, or this is perhaps a good reason why there are not any examples of the discretion or the *Hansen* test being applied to criminal discretions. It is because many of the, much of the legislation relating to criminal discretions has those inbuilt proportionality tests within it. But the Registration Act has no such built-in proportionality test.

WILLIAM YOUNG J:

What about the other sort of similar provision, statutes like those providing for extended supervision orders?

MR MUNRO:

Yes, I haven't addressed every single extended supervision orders. I'll have to take a moment with that.

WILLIAM YOUNG J:

I've got a feeling I've read somewhere in the material references to that legislation.

MR MUNRO:

Yes. Sir, it's not across all legislation, all criminal legislation, but just across a few of them. I don't think, off the top of my head, I can't say that the extended supervision orders has that inbuilt proportionality to it.

ELLEN FRANCE J:

Is that that judgment at tab 6, I think, of the respondent's bundle, I think that's the ESO again? And there's some discussion from paragraph 57.

MR MUNRO:

Yes.

WILLIAM YOUNG J:

And what about preventive detention cases?

MR MUNRO:

The same point, Sir. Well, taking first this decision of Justice Downs at tab 6, it doesn't appear the there's an inbuilt mechanism there, and I'm not also aware of that in preventive detention cases.

WILLIAM YOUNG J:

Would it be the case that the Judge can't impose a sentence of preventive detention unless satisfied that, and contrary I think to the views of the UN Human Rights Committee, or the broadly the views of the Human Rights Committee, that the imposition of an indeterminate sentence is likely to be a unjustifiable limit on the rights in that case provided by the ICCPR and our case by the New Zealand Bill of Rights Act?

MR MUNRO:

Yes.

WILLIAM YOUNG J:

On your argument, whenever a question of preventive detention arises the Judge should say, "I'm not prepared to impose a sentence of preventive detention because such a sentence is a unjustifiable limit on rights in the New Zealand Bill of Rights, for instance to be free of disproportionate punishment or treatment?

MR MUNRO:

Well, no, but it'd have to be considered.

WINKELMANN CJ:

Well, you'd say it's within the statutory framework already that the entire balance is actually caught up with very high thresholds, et cetera, and the test that the Judge has to go through, apply, to be satisfied that an order is necessary, that's a sentencing, if part of the whole proportionality approach in the Sentencing Act 2002?

MR MUNRO:

Yes.

WILLIAM YOUNG J:

There is a view that it would never be justified, it's a view that derives some support I think from the UN Human Rights Committee. So I'm wondering how that would be applied in the context of a sentencing exercise now?

MR MUNRO:

I can't answer that.

WILLIAM YOUNG J:

A difficult question, sorry, I don't know the answer myself.

WINKELMANN CJ:

Well, might I suggest an answer, which is that you have to take into account the statutory intent and the statutory intent is clearly that at a certain threshold

it's justified. So there is a balancing that's required, and I think Mr Powell suggests that the statutory intent is part of the process. So a Court couldn't say that it would never be justified when Parliament's clearly intended that in some circumstances it is justified.

MR MUNRO:
Yes.

WINKELMANN CJ:
Well, what do you say to that?

WILLIAM YOUNG J:
Perhaps the Chief Justice and I should resume our arguments later.

WINKELMANN CJ:
We're not arguing.

ELLEN FRANCE J:
Just following up on that, in the decision of the Supreme Court of Canada that is in the respondent's bundle at tab 7, at paragraph 4, page 168, the Court makes the point that…

MR MUNRO:
Was this tab 7?

ELLEN FRANCE J:
Yes. Down the bottom there, the Court makes the point that it's a bit awkward when you're looking at an administrative decision – and by that that equates to our discretionary decision here I think – it's a bit awkward to treat that like a law which can theoretically be objectively justified by the State, which I think is the sort of question you're being asked, how does that sort of *R v Oakes* [1986] 1 SCR 103/*Hansen* analysis fit in that context?

MR MUNRO:

Oh, I see. Well, can I first say the *Doré v Barreau du Quebec* [2012] 1 SCR 395 case has been criticised, at least by academics, since 2012, most recently in the case, which is at footnote 10 of my synopsis, *Law Society of British Columbia v Trinity Western University* 2018 SCC 32, [2018] 2 SCR 293, by two Judges dissenting in that case, who said that, "The *Doré/Loyola,* which in our view betrays the promise of our Constitution that right limitations must be demonstrably justified." I think there's some doubt, there seems to be some doubt that *Doré* is the correct approach. It's still good law, but there seems to be some doubt that's the correct approach, to do a sort of holistic view of it and to return, perhaps, to a more structured approach. It's the danger in this particular case, as we don't have those inbuilt incorporated mechanisms to proportionalise, and if we do for criminal discretion, like in this case, have some structured questions for Judges, they'll turn their mind directly to some of the issues. Now that's particular to my next point actually, about the various policy considerations that are present in this registration.

New Zealand hasn't adopted *Doré*. *New Health New Zealand Inc v South Taranaki District Court* [2018] NZSC 59, [2018] 1 NZLR 948 referred to the *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038 case, which was effectively –

ELLEN FRANCE J:

Well, *Slaight* is a similar, *Slaight* is a more open-ended approach, isn't it, I think?

MR MUNRO:

Yes, it's still, it confirmed, my reading of it confirmed the *Oakes* test and the structured way for administrative decisions. We must bear in mind also *Doré*, there was a build-up to the decision in *Doré*, so there was a range of cases that started moving away from the *Oakes* test to that test, the administrative test outlined in *Doré* of the more holistic approach. That would be a difficult situation to apply here. We can see, even in the decisions on this case that have come through the Courts, lip service to the proportionality assessment at

the last stage in the discretion. Well, we see in the District Court the words used were, “I’m just bound to do it.” So this is particularly important, in my submission, that we follow a more structured approach with the criminal discretion so that Judges can particularly turn their minds to it and ask the right questions, given the nature of the registration.

ELLEN FRANCE J:

How does that work in a practical sense where here we have a report from the Attorney saying there are inconsistencies with the Bill of Rights? I’m just not quite sure how, for example, you actually apply *Oakes/Hansen.* I mean, what would your question be in terms of –

WINKELMANN CJ:

In other words, does the fact it’s inconsistent with the Bill of Rights mean that every time you exercise the discretion you decide not to impose it?

MR MUNRO:

So, pass that by me again? Sorry, Ma'am.

WINKELMANN CJ:

So what Justice France is saying to you is that you’ve a report that the Act is inconsistent with the Bill of Rights.

MR MUNRO:

Yes.

WINKELMANN CJ:

Does that mean that when you come to exercise your discretion will the *Hansen/Oakes* analysis drive you to decide that you must not exercise the discretion to impose it?

MR MUNRO:

No, no, not at all.

WINKELMANN CJ:

But how not? How do you get to not, or to impose it?

MR MUNRO:

Well, if we apply the questions, Justice Tipping's questions, that will drive the mind to the right result.

GLAZEBROOK J:

What questions sorry?

MR MUNRO:

Justice Tipping's reformulation.

GLAZEBROOK J:

Okay.

MR MUNRO:

At paragraph 79 of my submissions. It might not be in every case that this is slavishly followed, but at least if there's a guide or a yardstick for Judge's to follow they can at least turn their minds to asking the right questions.

ELLEN FRANCE J:

If, given the context, what's the problem as you see it with simply asking whether imposing an order is in due proportion? So a sort of a proportionality test. What do you see is the gaps that that would leave?

MR MUNRO:

It doesn't take into account those very policy factors under the, of registration itself.

ELLEN FRANCE J:

So the inability to monitor and other sorts of things?

MR MUNRO:

Yes, yes.

ELLEN FRANCE J:
Right.

WINKELMANN CJ:
So your point is this isn't a proportionality assessment, but it is a structured one and therefore in a criminal context it is appropriate?

MR MUNRO:
Yes. I move on to my third main submission. That is the explicit nature of the requirements of *Hansen* are necessary to ensure that the purported objective justifies infringement of the rights. Now it's set out at paragraph 81 to 106 of my submissions, the various policy factors. I take first, turning to my submissions, paragraph 84, or the purpose of the Act, if I take that first to paragraph 81. Is to reduce re-offending and the risk posed by serious child sex offenders using the mechanism, using information needed to monitor child sex offenders. The first point I'd make at paragraph 84 is, "While the registration is aimed at 'monitoring' registerable offences. The sheer volume of registered persons means that ultimately it will not be possible for all persons to be monitored as the Act suggests."

A case from the Supreme Court of the United Kingdom dealt with the issue, the question the Court there was considering was whether lifetime notification requirements were disproportionate to the legitimate aims of the legislation.

Proportionally in New Zealand there is nearly double the number of registered offenders than in the UK and logic follows that –

WILLIAM YOUNG J:
Is that right, or isn't the figure given, won't that just be for England and Wales and not the United Kingdom? There are three criminal justice systems.

MR MUNRO:
Yes, yes. I read it as all of the United Kingdom but – look, I guess the point remains in any event Sir –

WILLIAM YOUNG J:

They're still rather more proportionately here than in either England or Wales or the United Kingdom, whatever the case may be.

MR MUNRO:

Yes. But the point remains, I suppose, and the logic would dictate. The police would inevitably focus on the high-risk offenders to monitor in the community rather than those of low risk.

The second point I've made there, paragraph 89, is the lack of actual monitoring or supervision. Unlike the extended supervision orders and other criminal orders, this legislation of the Register doesn't assist in rehabilitating, have any powers to get the registered offenders to go on any sort of treatment courses or the like, and simply stated the Act serves as an information gathering tool. And so it shouldn't be conflated with those other similar types of sentences such as parole or release conditions or extended supervision orders.

WINKELMANN CJ:

So I suppose this is going to be dealt with by Mr Olsen, but you'd say it's not responsive in this case to the risk, which is of re-offending, which would occur in his home? If there's no monitoring of what's going on in his home, on his computer, then the registration doesn't respond to that risk?

MR MUNRO:

Yes, it's specifically for this sort of case, yes, even more so.

GLAZEBROOK J:

But isn't that just a criticism of the legislation itself?

MR MUNRO:

Well, it is, it's a criticism of the legislation itself. But I suppose it goes to also what the Judge –

GLAZEBROOK J:

And wouldn't that apply to just about anybody registered?

MR MUNRO:

Well, there's still be – it would apply to all people that are registered but –

GLAZEBROOK J:

The criticism, I mean.

MR MUNRO:

Yes.

WINKELMANN CJ:

Well, no, it wouldn't, because different people have different risk profiles. So actually being able to ascertain where someone is might be relevant to managing their risk or detecting them if they've committed offences, you know, so if it's a sexual assault on a child then the location where they are may be relevant in detecting it, but not so with Internet offending.

MR MUNRO:

Yes, that was my next point. Particularly so if they're high risk, and there are specifics about the nature of that risk, as Your Honour's pointed out. Then it could be used across a number of different departments to monitor that person.

WINKELMANN CJ:

Well, I suppose – I don't know. Does knowing where his computer's located help in terms of if they were – I don't know, you'd have to know about ISP addresses and I don't know sufficient about that.

MR MUNRO:

Well, it might apply as a sort of an oversight that he knows that they've got his IPC address or his Internet service provider or email address. But they can't monitor it is the key point I suppose, they have no –

WINKELMANN CJ:
But they know whether it's active?

MR MUNRO:
Yes. But my general submission out of all of those points is that that severely limits the intended object, which is obviously to monitor child sex offenders.

I move to the point about registration and re-offending at paragraph 95. The empirical research at least shows that most sex offenders do not re-offend, if we take that as a starting point. The rates of overall sexual recidivism rates have consistently been reported as under 20% on large diverse samples of sex offenders.

WINKELMANN CJ:
So where is that in your submissions?

MR MUNRO:
Paragraph 95. So that's just for sex offenders. And then if we move on to paragraph 96 there also research to suggest that there are lower recidivism rates for Internet versus contact offenders, and the published data there is set out at paragraph 96 via Dr Rogers. So in my submission the research suggests a low rate of re-offending, particularly for non-contact offenders, and that significantly dilutes the suggested benefits of registration.

GLAZEBROOK J:
It's actually relatively difficult to detect, isn't it, Internet offending? So one does have to look at issues in relation to difficulties of detection.

MR MUNRO:
Yes.

GLAZEBROOK J:
So I'm not sure what those studies are looking at specifically and just in terms of actual convictions or whether they were looking at whether people continued to look at that material afterwards?

MR MUNRO:
I see, and I'm not sure how they collected the data, what sort of data they used and how –

GLAZEBROOK J:
Because they do say, even with the, it's certainly true with the sexual offenders but it's an issue of that over-reporting in any event.

MR MUNRO:
Mmm.

GLAZEBROOK J:
Although possibly once somebody has been convicted there are arguments that that actually does stop them, but whether you can know that with the under-reporting becomes more difficult.

MR MUNRO:
I acknowledge that. I suppose in a general sense we can acknowledge also though that there's a low recidivism rate across both.

GLAZEBROOK J:
Well certainly probably lower than some other offending.

MR MUNRO:
Yes.

GLAZEBROOK J:
But then the consequences are probably more serious in some ways than some of the other offending if you're looking at, say, theft for instance, which I

think have fairly high recidivism rates as against – and I'm using theft in a generic sense.

MR MUNRO:

Yes. In saying that, Ma'am, the methods of detection now for the police on Internet-based offending of this type is, certainly from experience, it's pretty methodical and detailed now, international in its flavour, so they do manage to detect quite widely now people engaged in this sort of offending. There's an interesting quote, also paragraph 98 of Professor Kris Gledhill in an article he published referring to the *Regulatory Impact Statement*. At least in that statement there was, in his view, very little confidence in the sort of figures of re-offending, of prevented re-offending. Interestingly, for low-risk offenders there is a suggestion by the police in the *Regulatory Impact Statement* that there is, the possible stigma of registration could lead to adverse effects. Paragraph 100 refers that some of the issues they identify early on there, you'll see its effectiveness, and moving over the page, the last bullet point there, "Stigmatise sex offenders, which may have the perverse effect of increasing their propensity to re-offend..."

WINKELMANN CJ:

Does it stigmatise as a group as opposed to individually because it's a private register, isn't it?

MR MUNRO:

Yes.

WINKELMANN CJ:

Do you think – as a group?

MR MUNRO:

Yes Your Honour, yes, but I suppose it can stigmatise them at least in, even though it's a closed group, that know of the Register. Obviously in this case you'll see that there's some slippage on occasions, which we dealt with my learned friend, in the anonymisation.

So set out there for the rest of the, page 21 is the types of details they must hand over. The Court can consider the arbitrary length of such an order, so the lowest mandatory term is eight years, which is what the appellant in this case would be on, and he had no ability to reduce your risk and then come off the Register, which you can in the United Kingdom. You are subject to a penalty if you don't comply with a register. These are all good policy reasons, in my submission, which necessitate the need for a clear test for Judges in the criminal jurisdiction.

GLAZEBROOK J:
What does the test do, though, if it's really just a criticism of the legislation like the eight year term?

MR MUNRO:
Well it could be factored into proportionality I suppose. The level of infringement.

WINKELMANN CJ:
I mean do you say that that test requires that there be a clear identification of what the nature of the risk is and whether the registration is responsive to it, for instance?

MR MUNRO:
Yes. Yes I'd say obviously the first test under section 9 would give you the risk and the nature of the risk. The test will then drive, Justice Tipping's test will then drive the mind toward whether it actually benefits or it has the effected the purpose that it's supposed to do.

O'REGAN J:
How do you relate that to the fact that if your client hadn't been given home detention. Let's say he just hadn't had an address that was suitable for home detention, the order would have been mandatory. So Parliament must

have decided that offending that justifies imprisonment automatically justifies the entry on the Register.

MR MUNRO:
In that particular scenario Sir you may be able to adjourn the case to find an address, but…

O'REGAN J:
Often with child sex offenders it's difficult because the addresses have children in them, so it's not that uncommon, is it, for someone who might otherwise have got home detention to not get it because they can't find an appropriate address to go to.

MR MUNRO:
Yes.

O'REGAN J:
There seems to be, I know we're dealing with legislation which the Attorney-General has said doesn't meet the requirements of the Bill of Rights, but the analysis you're proposing to us seems to be leaning towards a situation where in the absence of imprisonment you would almost never require someone to be entered on the Register, and that seems to jar with the fact that if you're imprisoned then you're automatically on the Register.

MR MUNRO:
Well not necessarily Sir. There will still be many cases, I suppose, which driven by the risk. So even if they're moderate or high risk, even with the questions posed and the test posed at the discretionary phase, it would still be necessary to – and the type of the offending obviously, there might be indecent assault type offending, but with a large history, for example, of more serious offences where the risk is higher and so it would still, there would still be many cases in that sort of scenario.

O'REGAN J:

Well the argument you've just put to us is that it's all pointless, so on that basis you'd never justify. I mean basically what you've said is it doesn't help, it might actually make it worse, make it more likely you'd re-offend, and if that's right why would you impose the order if you had a choice of not imposing it.

MR MUNRO:

Well, I suppose it's, the stigma is not necessarily going to apply in all cases. That's to be factored against, I suppose, the term of it, the long-term, or if you can't get off, so…

ELLEN FRANCE J:

If you look at the statute, so section 9(2) and (3), and you make the order only if satisfied that the person poses a risk et cetera, and then you have the factors set out in subsection (3) "For the purpose of assessing the risk," you have to look at things like the seriousness of the qualifying offence et cetera. What do those other Justice Tipping questions add to the analysis that you would have the Court make?

MR MUNRO:

Well, the rational connection obviously to its purpose, so whether –

ELLEN FRANCE J:

But you would then – I mean, I'm not sure, given the other things you've said, how you would ever get to a rational connection.

MR MUNRO:

In the sorts of cases where the person is a high risk or moderate risk, where they've got a history and they need to be monitored, at least in the sense, depending on the nature of the offending, then yes. Director contact child offending, for example, there would still be a rational connection to monitor them as close to schools and things like that.

WINKELMANN CJ:

But of course the difficulty with you just focusing on that aspect is if the legislation captures this kind of offending would suggest a parliamentary intent that it be captured by the regime.

MR MUNRO:

Yes.

WINKELMANN CJ:

Can I ask you, if you look at Justice Tipping's formulation, which doesn't seem to me to be particularly well suited to what you're saying, but I understand the point of what you're saying, if you took (a) and put, "Does the limiting measure 'in this case' serve a purpose sufficiently important to justify a curtailment of the right or freedom?" That's really it, isn't it? And then, (b)(i) and (iii) can be seen as assisting you in that analysis. (b)(ii) seems to be off point because it was really dealing with the legislation, you know, the justifiability of the legislation, I think.

MR MUNRO:

Yes, it might not be that every single question is particularly suited to this sort of discretion, but I don't also suggest that it should be followed prescriptively in every sense.

WINKELMANN CJ:

But, well, when I look at it it seems that (b), if you apply in this way, I'm not saying that this is a deficiency in Justice Tipping's formulation, I'm just saying if you apply it, there's other contexts that are not contemplated. (b)(i) and (iii) are really just further exemplificiations of (a). So, "Is the limiting measure rationally connected with it purpose?" would be relevant to whether it serves a purpose sufficiently important to justify curtailment, so would, "Is the limit in due proportion to the importance of the objective?" I mean, they're both just other ways of articulating aspects of that first test.

MR MUNRO:

Yes.

WINKELMANN CJ:

Have you pretty much finished there, Mr Munro?

MR MUNRO:

Yes, I have. The fourth submission there is as is read.

MR OLSEN:

Tēnā koutou, e ngā Kaiwhakawā, may it please the Court. All Courts must act consistently with the New Zealand Bill of Rights Act and that, in this case, the Court of Appeal didn't consider the Court of Appeal didn't consider the New Zealand Bill of Rights Act for the specific appellant and this is, in my submission, an error of law which allows the Court to consider the merits of this case and whether or not the regulation order should have been imposed.

The Court has before it – should I say, earlier this week counsel filed a letter from Dr Loshni Rogers in relation to the anonymisation of the judgments –

WINKELMANN CJ:

So are we going to deal with anonymisation first?

MR OLSEN:

I just specifically want to deal with that letter, if that's okay to the Court?

WINKELMANN CJ:

Yes.

MR OLSEN:

And in that letter Dr Rogers somewhat updates the position and whether or not the Court is willing to accept his evidence for the purpose of the substantive appeal is a matter for Your Honours. But I would submit that it

provides the Court with and up-to-date position on where the appellant himself sits as to his level of risk.

WINKELMANN CJ:
Well I don't think we can really do that. You didn't apply for that to be admitted as additional, as evidence.

O'REGAN J:
Well let's hear argument on it anyway.

WILLIAM YOUNG J:
Yes, let's hear…

WINKELMANN CJ:
Well we'll hear what Mr Powell says about it anyway, yes, so go ahead.

MR OLSEN:
In terms of. if it was to be on the question of fresh evidence, Ma'am, in my submission Dr Rogers' reports have been accepted by the lower Courts, and she did provide the comprehensive assessment that was before the sentencing Judge, and in particular this information is fresh in the sense that it updates the Court as to the position that wasn't available to the Court of Appeal or the Courts below. In particular at paragraph 4 of the letter she notes the background of what's happened in relation to the leave judgment and the Court of Appeal judgment becoming available on line and then says at paragraph 4, "While research suggests that disruption to protected factors may increase risk for re-offending, Mr [D]'s positive proactive coping and reported lack of urge to revert to pornography, withdrawal, or seek support from online chat groups, suggests that his risk of re-offending remains low."

ELLEN FRANCE J:
Can I just check, Mr Olsen, in your experience is it usual for someone who's providing ongoing treatment, in the way Dr Rogers is, to also do the risk assessment?

MR OLSEN:
That has been my experience Ma'am.

ELLEN FRANCE J:
In this area?

MR OLSEN:
In this area, yes. Normally what would happen at sentencing, like in this case, is Dr Rogers would advise the Court as to how treatment has progressed and overall her views about the progress through treatment.

ELLEN FRANCE J:
Yes, but that's a different thing from then making the assessment about risk.

MR OLSEN:
Yes, I guess the –

ELLEN FRANCE J:
I'm not necessarily suggesting there's any problem with that, it's just that in other areas you wouldn't normally have the treating professional necessarily providing that sort of…

MR OLSEN:
Yes. I think the benefit that comes from, in my submission, having the treating professional providing the risk assessment is that they've seen the person in whatever case it is for a significant period of time, and they can also test whether or not the responses are genuine or not so the suggestion that he, his report to Dr Rogers that he hasn't had the urge to view pornography she can, knowing how he is and having dealt with him for a number of sessions,

can actually test in her own mind as a professional whether or not that is a fair assessment from his own point, or whether or not he's trying to hide the truth from her to better his own position.

ELLEN FRANCE J:
That potentially, I mean it's a matter for her I suppose, but that potentially does put her in a position of conflict with her patient, doesn't it?

MR OLSEN:
Yes, and so he would have had to provide authority for her to release this information. In a sense though it goes to the heart of what the Court of Appeal saw as the reason why registration should be upheld in the present case, and that's at paragraph 41 of the Court of Appeal judgment, which is on page 22 of the Supreme Court bundle. There in the final sentence they said, "We are not persuaded by the updating addenda that it can now safely be concluded the Mr [D]'s commendable rehabilitative efforts have been so successful that he no longer poses a risk to the sexual safety of children."

In particular they were concerned about possible triggers that would remain for his regression into re-offending, or potential for re-offending, and in my submission the position that we have for this particular appellant is quite different to that position. Mr [D] has been tested time and time again throughout the time that he was arrested by the police, or the search warrant was executed until now with various different triggers in his life –

WILLIAM YOUNG J:
So it's about three and a half years ago?

MR OLSEN:
Yes. These are particularly set out in paragraph 2 of that letter of 24 October from Dr Rogers where she says, "He has experienced several challenges including his family learning of his sexuality and the loss of employees, a structural timber designer, and several friendships, and then most recently by

one of his employers becoming aware of the Court of Appeal judgment." Tellingly, from none of these has his risk increased or has he reverted to the need to view pornography, in particular child pornography, or engage in online social chat groups, which was part of the impetus for viewing the child pornography. So this provides the Court with clear evidence that despite continued pressures being put on him, he doesn't have the fragility that could be suggested otherwise, and that puts this Court in quite a different position.

In particular those various things have happened at different stages. For example, the loss of his employment didn't occur in terms of the structural timber designer position, until he started the sentence of home detention when he was bound to his house. So that was after he'd done substantial treatment with Dr Rogers but before he'd started the SAFE programme. The most recent setback, if I can put it that way, with his employer learning of the Court of Appeal judgment, is in the context of him having completed entirely his rehabilitative treatment and still Dr Rogers concluded that his risk remains low, notwithstanding that, and that's because he's adopted the positive support measures which were part of his treatment programme.

So in my submission the appellant has been rigorously tested through these various trials and tribulations and to such an extent that to suggest that any future trials or tribulations would be sufficient to cause him to relapse, it is looking more on the remote side of things, and is possibly fanciful in its suggestion.

WINKELMANN CJ:
Well it is still self-reporting though, as the Court of Appeal said.

MR OLSEN:
Yes Ma'am. But that can be taken in the context that it's self-reported and is cross-checked against a professional who knows, and having treated him for a number of sessions over three and a half years, so would be aware if he was somehow making his position seem better than it was.

WINKELMANN CJ:

So can I ask you about the specifics of the Court of Appeal judgment?

MR OLSEN:

Yes Ma'am.

WINKELMANN CJ:

So in the High Court the High Court Judge seems to have wrongly proceeded, and tell me if I'm wrong about this, seems to have wrongly proceeded on the assumption that the appellant was publishing the pornography.

MR OLSEN:

Yes.

WINKELMANN CJ:

Not the material he's generated himself in relation to himself, but he child pornography.

MR OLSEN:

Yes, that was the reason why leave was granted by the Court of Appeal in part, to hear that second appeal.

WINKELMANN CJ:

And the Court of Appeal doesn't seem to expressly address that factual error?

MR OLSEN:

No. I think what they've done is they've established that there was an error, without going into it specifically, and it's just moved straight on to considering the merits afresh. Which when leave was granted they –

WINKELMANN CJ:

It would be of assistance to the appellant if there was a correction of that error, though, wouldn't it?

MR OLSEN:

Yes it would.

WINKELMANN CJ:

And what do you say about the analysis that they undertook in relation to the nature of the risk that he posed. I mean how are we to view the nature of the risk that he poses in terms of that section? Because if we take Mr Munro's suggested approach where there is a close analysis of the risk and a consideration as to whether the regime responds to that, how would you say we should assess it?

MR OLSEN:

The risk, there's the risk of re-offending, which you've got from the report of Dr Rogers, but then that's manifested in what is the nature of the offence, and the risk therefore. Here is Internet offending, and it is specifically the viewing or possession of child pornography, and so as Mr Munro pointed out, there are limited mechanisms within the Act of registration, well in my submission really no mechanism –

WINKELMANN CJ:

Well just before we move to that. So the risk to children that is generated by that is the demand side of the equation in relation to child pornography. That is, supports a marketplace which has in one part of it children being victimised and harmed?

MR OLSEN:

Yes, and it would be more on the, rather than a specific child or particular group of children being at harm, there's more children generally from the accessing of this material.

WINKELMANN CJ:

So he's not a creator of it, he's not an organiser of it, but he's a consumer of it…

MR OLSEN:

Yes.

WINKELMANN CJ:

And therefore is implicated in the harm.

MR OLSEN:

Yes.

ELLEN FRANCE J:

Sorry, why is it not a specific harm?

MR OLSEN:

He doesn’t pose a harm to a specific child or group of children in the sense that…

GLAZEBROOK J:

An identified group, you mean?

MR OLSEN:

Yes, yes. If it was a contact offender it could be someone that offends against, in an interfamilial way, and therefore it would be people in an interfamilial relation that would be those at risk of the harm. But the Act specifically contemplates that it could be a specific child or just children generally, and it falls on the latter in this case, that it’s children generally through the consumption of that material. But that risk as well must be viewed in the light too of the specific offence which, if re-committed, wouldn't create a new child victim, it would essentially just re-perpetuate harm that's already been cause when the pornography was made in the first place.

ELLEN FRANCE J:

I’m not sure that that's right. Even if you're just looking at it on a sort of supply and demand basis, you are potentially creating new child victims, new subject.

WINKELMANN CJ:
Well, also each viewer is victimising a child who's viewed, isn't it?

MR OLSEN:
Yes, yes, and I accept that it perpetuates the harm. But it's not necessarily that he himself will cause this to any specific child, it's more that he perpetuates harm that has already been done or will be done through the creation of child pornography by others.

As to registration itself though, the problem is that the registration regime is specifically designed at contact offenders in terms of the information that it gathers is largely, well, for those that have access to children or to make sure that they aren't having access to children. For example, you must report who you live with, where you work, if you work with children, if you're involved with children's organisations, including information such as what car you drive, which is relevant if you were a contact offender, if you were sitting outside a school, for example. But all of that information for the appellant in this case doesn't go any way to his risk, and that is really the third step in the Justice –

GLAZEBROOK J:
But those offenders are included in the regime, so I'm not sure that you can say that. I mean, it might be under an assumption that it could slide into actual offending, and I think there is research that suggests that that can certainly happen and in fact I think now is thought to happen more than has been thought in the past. Because in the past I think the idea was these people don't go on actually to offend, I think now the latest research suggests that certainly a proportion of them do.

MR OLSEN:
And I can't take that much further, Your Honour, but all I would say in relation to that is specifically on the information we know about this particular appellant, and I can't speak for everyone else but for this particular appellant.

GLAZEBROOK J:

Oh, no, if they're talking in the specific sense I think, certainly.

MR OLSEN:

Yes. And the reason why he was viewing it as well was because of abuse he'd suffered himself. And I'm not trying to justify the conduct in any way, but that does provide the Court with some information as to whether or not it is –

GLAZEBROOK J:

Oh, no, if it was specific in relation to this offender…

MR OLSEN:

Yes.

GLAZEBROOK J:

I understand the submission. Sorry, I thought you were speaking more generally, because more generally –

MR OLSEN:

Yes, there is a risk.

GLAZEBROOK J:

– they've been included. The fact that the information is irrelevant can't be a justification for saying that you take out a whole group of people. But if you're speaking in this particular instance I understand the submission.

MR OLSEN:

Yes. And coupled with that is the nature of registration in that the Judge has no discretion of how long the person is placed on the Register, it is eight years or nothing.

ELLEN FRANCE J:

Just in relation to that though, the Act does require in 16(1)(m), (n), (o), (p), (q) information that relates to this type of offending, doesn't it?

MR OLSEN:

Yes. But again, in terms of –

ELLEN FRANCE J:

I'm not saying anything about the effectiveness or otherwise of that –

MR OLSEN:

Yes, it does…

ELLEN FRANCE J:

– I'm just saying it's not the case that all of the information that has to be provided is directed towards contact offending. That's not the case.

MR OLSEN:

Yes, and you're correct Your Honour. The particular importance of that may be that if you look at the rights that are infringed, for example, the freedom of movement issue in notifying 48 hours before any movement within New Zealand or overseas, the police of who you're travelling with, where you're travelling to, for someone in the appellant's position where it is just online offending, that information doesn't go to his specific risk, and so there you've got the infringement of the right to freedom of movement which isn't linked to his specific risk. So certainly for a contact offender, yes it's there and you can almost, there is a way that you could rationalise or justify it in those circumstances, but here you don't have that same rational justification.

The other point this case in particular raises is the potential that registration is a retrospective penalty in that the offending occurred in May 2016 but the Register didn't come into effect until October 2016.

WILLIAM YOUNG J:

Can we take that into account? I mean there are two reasons why the Attorney-General certified against the Bill. One was the lifelong registration for certain offenders and secondly, the retrospectivity, but don't we just have to accept retrospectivity as a given?

MR OLSEN:

In my submission no Sir, and the reason for it is this. If it's compared against a case like that of *R v Pora,* in *Pora* the legislation mandated that the Court must do something, that is retrospective, such as the case with a person who's sentenced to imprisonment under this legislation. They must make the order for registration, or it's not even the Court making the order, should I say, it's more the law imposes the order. But here the Court has the discretion so in my submission once the discretion has been engaged the Courts must act consistent with the New Zealand Bill of Rights Act, and in particular the right to be free from retrospective penalties.

WILLIAM YOUNG J:

So are you saying that where someone is not sentenced to imprisonment, and the offending was before September/October 2016, the Courts shouldn't impose a registration order?

MR OLSEN:

It should be taken into account in the proportionality assessment. So if the offender –

WILLIAM YOUNG J:

How? Isn't it a sort of a binary thing? You either do it or you don't, with retrospect?

MR OLSEN:

Yes, but the question is whether or not that could be a justified limit. So the Court cannot impose a retrospective penalty unless it would be justified and so if you have someone who was a serial offender and had offended in the 80s, the 90s and the 2000s, and then was caught by viewing child pornography but just before the Act and they weren't charged until today, for example, those are circumstances where the Court may say well your risk is so high but even though it would be a retrospective penalty, it can be demonstrably justified in the society, given the previous offending that you've got.

WILLIAM YOUNG J:

Except that the Attorney-General has certified that it can't be justified.

MR OLSEN:

Yes.

WINKELMANN CJ:

So section 26, how would you say section 26 would come into play?

MR OLSEN:

Of the Bill of Rights Act Ma'am?

WINKELMANN CJ:

Yes.

MR OLSEN:

In the sense that the Court, at the time the Court has come to sentence, they would have to impose something that wouldn't have been available at the time that he had committed the offence.

WINKELMANN CJ:

So while Parliament may have created the power, you're saying well Parliament may have created the power, the Court can take into account that it's entrenching upon that right.

MR OLSEN:

Yes.

WINKELMANN CJ:

On exercising discretion.

MR OLSEN:

Just as much as it's entrenching upon the right of freedom of movement or expression. It's an added right, I guess, that you put into the proportionality

assessment under *Hansen*. But that right, in particular, for the appellant in this case –

WILLIAM YOUNG J:
To give a, I suppose, honest effect to section 26 would practically mean that the statute wouldn't apply to anyone who wasn't in prison . Because I don't see how you would override section if you see it as a significant consideration.

MR OLSEN:
And that may be a case.

WINKELMANN CJ:
Well you'd say it was consistent with the type of process that was taken by the Court in *Pora*.

MR OLSEN:
Yes.

WINKELMANN CJ:
But if Parliament intends things to have a retrospective effect they must make it very clear, including when they're giving a discretion to impose it, that you do it notwithstanding the retrospectivity.

MR OLSEN:
Yes. And because there's a discretion on the Courts the – in *Pora*, for example, if I can use that, the Court was mandated in that case to impose the particular sentence in that case, the Court had no discretion. So even if it was the justified limit it would be saved by section 4 of the Bill of Rights. But here the section 4 doesn't save this because there's no inconsistency between legislations, the Court has the discretion, and if it were to exercise it then that would infringe that right, and therefore it could only do so under section 5 if it was a justified limit.

WILLIAM YOUNG J:

But not just a discretion, it's actually a hard-edged constraint.

MR OLSEN:

It would be, yes. But there'd be only a small number of cases now that would be affected by that.

WILLIAM YOUNG J:

But this one.

MR OLSEN:

This is one of them, yes.

ELLEN FRANCE J:

But the Act now specifically envisages that it applies retrospectively.

MR OLSEN:

Yes, and that was Parliament's intent. But because the discretion is being given now to the Courts the Courts cannot impose or exercise their discretion if to do so would infringe the rights.

O'REGAN J:

But isn't that defying the plain language of the legislation, if the Court uses that as effectively a veto, isn't that just defying Parliament?

MR OLSEN:

No, Your Honour, and the reason why I'd say that is because if Parliament had intended that people be registered once they pose the risks then the Court wouldn't have given, Parliament wouldn't have given the Courts the discretion to impose registration.

WILLIAM YOUNG J:

Well, where's the prospective – oh, it's transitional provisions retrospective.

ELLEN FRANCE J:

And then if you look at the schedule, Schedule 1.

MR OLSEN:

In my submission for the appellant in this case, if the Court works through a proportionality test of the kind submitted by the appellant, that in *Hansen*, or any other sort of proportionality assessment, under section 5 the Court cannot find that it is a demonstrably justified limit on the appellant's rights to register him in the present case, in particular because of the lack of the Register to specifically address its objectives, which are meant to be risk reduction, when the Court has evidence that the appellant's risk is reduced and that placing him on the Register would not assist in that but may, as is the case here, stigmatise him. And I'm not saying it would lead to his further re-offending but more it stigmatises him unnecessarily when the Court here has before it someone who has done everything they can, he's done three and a half years of rehabilitative work, before he was sentenced and continues to see Dr Rogers, even though his sentence is now concluded, and that is not someone that it can be said that it's demonstrably justified to register them. But in my submission the new evidence from Dr Rogers, if this Court was to receive it, means the Court does not actually have to get to that consideration for the appellant's case because, in my submission, the risk just isn't made out. So the Court shouldn't move beyond the first step but, if it did, the proportionality test still doesn't support registration and therefore the appeal should be allowed because it –

WINKELMANN CJ:

Can I ask another question about the judgment?

MR OLSEN:

Yes.

WINKELMANN CJ:

So the Court of Appeal makes that comment that basically home detention was ordered and therefore – I can't recall its exact words – it needs strong reasons why not to impose?

MR OLSEN:

Yes. The Court said at paragraph 22 of the judgment, page 16 of this Court's bundle, the Court there said that, "Parliament has determined that whenever an offender is convicted of a qualifying offence and sentenced to any period of imprisonment they are automatically placed on the Register. This indicates that in cases such as the present, where the qualifying offence was sufficiently serious to attract a starting point exceeding two years, the Court will need good reasons to justify not making a registration order if satisfied the offender continues to pose a real risk to the lives and sexual safety of children." In my submission, Your Honours, that in a sense betrays section 5 and what that secures. Parliament has made a clear decision for the policy reasons that it has that it's going to register those that are sentenced to imprisonment and the Courts have no control over that, and therefore section 4 of the Bill of Rights applies. But here the Court has the discretion in making the order. And so it's not right to compare an offender to one that has received imprisonment because there the Court has no power or control on registration at all. Here the Court does, and so the Court's mandated by section 5 to take into account proportionality and find out whether or not there is a demonstrably justified limit, and that's the difference in essence.

WINKELMANN CJ:

Well, it's gloss, isn't it, on the legislation, and in fact you might say inconsistent with the scheme, because the scheme contemplates a fresh look by the Court if a sentence of imprisonment is not imposed.

MR OLSEN:

Yes.

WINKELMANN CJ:

But this is the Court creating an overhang of the compulsory aspect of the scheme.

MR OLSEN:

Yes, and here as well the Parliament was clear at all stages of the Bill to ensure that there was that discretion, and it was mentioned at all stages, from introduction, second reading, third reading, that the Court has the discretion to make the registration order, which shows a clear intent on Parliament's part for the Court to turn its own mind to it. It's, in my submission, not like the three strikes regime where the Court is forced to make a strike order regardless of what they view of the risk posed by the offender.

Those are really my submissions on the merits, unless Your Honours have any other questions on that?

WINKELMANN CJ:

Well, you were going to address us about…

MR OLSEN:

I am going to address the anonymisation.

WINKELMANN CJ:

Right. Well, just before you do I'll just check if anyone has any further – no, thank you.

ELLEN FRANCE J:

Just before you start on the anonymisation can I – there are varying spellings of the appellant's second name. Can you just confirm the correct spelling? Not necessarily now but…

MR OLSEN:

Yes. I can do it now.

WINKELMANN CJ:

Well, you might just like to hand that up and…

ELLEN FRANCE J:

To the registry?

MR OLSEN:

It should be the…

WINKELMANN CJ:

You don't have to do it now.

MR OLSEN:

Yes.

ELLEN FRANCE J:

I'm not – it's just if you go through the documents there are differing spellings.

MR OLSEN:

Yes, Your Honour. I can file something with the Court if that assists?

ELLEN FRANCE J:

Thanks.

MR OLSEN:

In terms of anonymisation, the central theme here is that – well, what's happened, should I start with, is that the appellant was working, he'd finished his sentence, and he'd obtained another job, and that job was integrating him within the LGBTI community, which was something that Dr Rogers saw as a protective factor for him personally and, in doing so, when one of his co-workers was looking him up online on Google a simple Google search showed the Court of Appeal judgment as the top result and the Supreme Court leave judgment as the fourth result, and consequently his employer spoke to him and said that it was best that he not return to work indefinitely until the dust settled. In my submission the dust is unlikely to settle as those

judgments remain online. So it simply takes someone searching, a simple Google search, to find it. And the problem here, as opposed to other cases, is the uniqueness of the appellant's name. We're not talking about a John or a Jim or someone's name that might be quite indistinguishable, but it's so unique that I think everything on the Google image that's a screenshot that's attached to his affidavit relates specifically to that appellant, all his different accounts, which shows how unique the name is.

ELLEN FRANCE J:
Did he ever seek name suppression?

MR OLSEN:
He didn't, Your Honour. And this isn't a request –

ELLEN FRANCE J:
So wouldn't that, aren't you effectively trying to achieve that?

MR OLSEN:
I guess you could say yes and no. What I'm seeking here is not a name suppression but simply that the judgment that's placed online refers to the appellant either by an initial, D v Police, or an alternative name. And the difference between that and suppression is that suppression carries with it penalties. If I was to go out of the courtroom now and the appellant's name was suppressed and tell someone about it, I would be committing an offence and also potentially a contempt of Court in publishing his name in relation to the offence. But here all that's asked for is just that the judgment that's placed online is anonymised, and what that will do is prevent, when you search his name, it coming up with the judgment. The judgment will still be accessible to the public in the same sense of the content –

WILLIAM YOUNG J:
Well, so will the Court of Appeal judgment.

MR OLSEN:

Yes. If this Court was to grant anonymisation then the appellant will seek that the Court of Appeal also anonymise their judgment.

ELLEN FRANCE J:

And how would we be sure that that would result in some change when someone did a Google search?

MR OLSEN:

Because the old judgment would come down and be replaced with this new judgment, and so when you did –

GLAZEBROOK J:

I'm not sure the Internet quite works like that.

MR OLSEN:

It may be available in metadata, but it's unlikely to be the top hit once it is removed from the Internet, and even if you did click on it you wouldn't find any information because the file wouldn't be there.

ELLEN FRANCE J:

Well, I suppose I'm saying I don't know that that is so.

MR OLSEN:

Yes.

WINKELMANN CJ:

Is it not in substance granting name suppression? Could we give birth to an entire new method of obtaining around the houses name suppression by doing this?

MR OLSEN:

Not in the sense that if the media wanted to they could publish this case. Because anonymisation doesn't prevent the publication of this case.

ELLEN FRANCE J:

Well, then that, it sort of defeats the point of what's being done, doesn't it?

MR OLSEN:

Yes, but at the moment there is no media publicity around this case. And the other thing to bear in mind is that this is an unusual case in the sense that Parliament by its design has prevented the Register from being publicly available, and there were a number of submitters while it went through Parliament that wanted the Register to be publicly available, and this appeal is simply on the issue of registration and so was that in the High Court and the Court of Appeal. The appellant is not seeking to change the sentence that was imposed or overturn his conviction.

WINKELMANN CJ:

Well, that's another point you make in he wasn't, he's not seeking to prevent his sentence appeal, his name being connected to his sentence, it's just the registration.

MR OLSEN:

The registration issue, yes. And it's a particularly problematic issue, because if this Court does as the Court of Appeal did and visits the merits of the case, undoubtedly you'd turn to the evidence of Dr Rogers, which discusses extremely personal and sensitive information about the appellant, and that is actually currently in the Court of Appeal judgment. And it talks about what happened to him when he was younger and other things faced in his life which, while relevant if he was on the Register to those authorities is, in my submission, completely inappropriate for public consumption. I guess anonymisation tries to seek a balance between giving the public access to all of this information, because this will be a decision of some important and that's why leave has been granted, but it allows the appellant to reintegrate into society without further hiccups. In effect this would of never happened had the appellant not made these appeals, so they're appeals simply on the registration issue, they're not appeals on sentence or otherwise. So if the appellant hadn't pursued the registration appeal then the judgments wouldn't

be out there and he wouldn't find himself in the position that he does. It's not that he's been suspended because they found out about the sentence that was imposed or the – well, they have in a sense, but the way of finding out was through the registration decision which is online.

WINKELMANN CJ:
Is the sentence not online?

MR OLSEN:
The sentence isn't online, and neither is the – the High Court judgment is online on the Judicial Decisions Online website, but on a Google search it doesn't come up. So if you go searching for it you can find it, but it's not something that comes up automatically such as the case here, where if you type in the appellant's first and last name it automatically comes up with the Court of Appeal judgment and the Supreme Court leave judgment, and will be the same case when the Supreme Court, or this Court, issues its substantive decision.

In my submission the sort of justification for this can also be found in the sense that it could be argued that this would be a disproportionately severe punishment by allowing a judgment to be publicly released which has this information on it. Because the appellant has in a sense served his sentence and he has paid his debt to society through serving that sentence. It's not the case that the public need to know about him because he poses some great risk to society.

WINKELMANN CJ:
Well, your point is I think the open justice requirements have already been met by the publication, unsuppressed publication of his sentence.

MR OLSEN:
Yes. And what normally operates in suppression cases on the discretionary step of open justice is the fact that suppressing someone's name would infringe on section 14 of Bill of Rights, the right to freedom of expression,

because by law and subject to penalty you would not be able to publish that information. But that's simply not the case here in what's sought, it's simply an anonymisation of the headnote and, if the appellant's name was used in the judgment, that a letter be used instead to identify him or just simply as, "The appellant." That, in my respectful submission, would not take away from the principle of open justice, nor would it result in the District Court sentencing notes or the file being suppressed or in any way prevent it from public access.

In terms of the minute issued by this Court on 15 October I took, and I may be wrong, that the Court had some concern about the issue of recall of its judgment, and this Court in *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)* [2019] NZSC 122, [2010] 1 NZLR 76 dealt with the issue of re-call and said there were three types of circumstances where recall may be allowed, and the third circumstance is where for some very special reason justice requires that the judgment be re-called, and in my submission that would be the case here. If the Court was to find that it would be disproportionately severe for his name to be out there and constantly subjecting the appellant to setbacks then that would meet the requirements of justice, and the countervailing principle of open justice isn't affected, as I've said, and so when you look at it through the lens of what the interests of justice require in the appellant's particular circumstances, which are very unusual I must say, in terms of this Court having a case or the Court of Appeal having a case come up to it specifically on the registration issue, there's only a small number of people that could be subject to the discretionary issue of registration. And the appellant was the first case, the case only got to the Court of Appeal because leave was granted for a second appeal and here for a third appeal, but that won't be the case in every case. So in my submission these are unusual circumstances and it wouldn't open the floodgates on all other cases seeking a quasi-suppression.

The other point to note is that the leave judgment, in my submission, doesn't change or alter the law, it simply alerts everyone that this Court's granted leave for the appeal to be filed and notifies them of a pending appeal judgment at some time in the future.

WILLIAM YOUNG J:

It does normally refer to the name, the judgment in the Court of Appeal.

MR OLSEN:

Yes, and so there would have to be some, I guess, working in tandem. But the Court could also just refer to the citation reference in the Court of Appeal and not necessarily by name. But to re-call and re-issue that judgment in particular wouldn't have any major impact, given that it merely signifies that leave has been given and doesn't substantively alter the Court of Appeal position until this –

WILLIAM YOUNG J:

So just the order (a) in the order granting leave to appeal refers to *[D] v New Zealand Police* [2019] NZCA 30, so what would that read?

MR OLSEN:

The Court could either just –

WILLIAM YOUNG J:

[.D] v Police or [..D] or ABC v Police?

MR OLSEN:

Yes, or even just have no name of the judgment under appeal and just simply the judgment number, there's no error for confusion.

WILLIAM YOUNG J:

You mean [2019] NZCA 30?

MR OLSEN:

Yes. And that would be sufficiently, it would allow sufficiently for anyone looking to know that leave has been granted on that specific issue. The appellant hasn't applied yet, or the applicant hasn't applied yet for anonymisation in the Court of Appeal because it's, it would be putting the cart

before the horse to do so until this Court made a decision. Because ultimately the same issue will arise when this Court issues its substantive submission.

Those are my submissions on the anonymisation, unless Your Honour have any further questions.

WINKELMANN CJ:
Thank you, Mr Olsen. I think we'll take the morning adjournment to let you set up, Mr Powell.

COURT ADJOURNS: 11.26 AM

COURT RESUMES: 11.44 AM

WINKELMANN CJ:
Mr Powell.

MR POWELL:
May it please Your Honours. I don't have a road map but I don't propose travelling very far.

WINKELMANN CJ:
Did you say you don't propose travelling very far?

MR POWELL:
No. There is one point I wish to advance or emphasise in my oral submissions, but otherwise I will simply answer any questions that Your Honours have.

But I would begin with the observation that plainly there is an issue of public importance in this appeal, notwithstanding our opposition to the grant of leave. You'll see in my submissions at paragraph 27 and if you turn to tab 25 of the respondent's bundle that our District Court Judges took the unusual step of making a submission to the Social Services Committee that considered this

Bill because they were concerned as to whether they would have sufficient guidance as to how it was to be applied and, as you'll see, the response was section 9(3) of the Act. But in the short time that the Act has been in force we have seen a divergence in approach in the High Court, the principal appeal Court from the District Court and, in the case below, the Court of Appeal sought to resolve that difficulty.

There is of course no question that an order made under this Act must be made consistently with the New Zealand Bill of Rights Act, and the issue that seemed to emerge while my friends were on their feet was how this should be set out for the District Court in essence when it is considering making these orders. And the point I wish to emphasise is that the respondent still firmly submits that the *Oakes* analysis or the *Hansen* analysis, as it is called, is not well suited to the task. That doesn't amount to a submission that *Oakes* or *Hansen* are wrong and if it is ever necessary to analyse the notion of proportionality that is how it resolves: on the one hand, whether there is a pressing social objective to which the measure imposed is rationally connected, and whether the limit it imposes is greater than is necessary to achieve that. And in the context of statutory interpretation it is often necessary, as it was in *Hansen*, to go through those processes.

But there are two principal reasons why we should not rush to impose that on sentencing Courts. For a start, I would say that we do not need to have footnotes every time the New Zealand Bill of Rights Act as discussed. Sometimes the issue are complex but sometimes they are straightforward, and if the New Zealand Bill of Rights Act is a constitutional document, is to do what constitutional documents should do, that is enter the consciousness of the people who live under it, then it should have as little exegesis as is possible, otherwise it places the Bill of Rights Act beyond the understanding of ordinary people.

Having said that, it is obvious that sections 4, 5 and 6 of the New Zealand Bill of Rights Act create unavoidable difficulties, and that is because a late decision was made to abandon a supreme law Bill of Rights and instead have

a statutory Bill of Rights, and so Parliament had to devise a mechanism to explain how this Bill of Rights would provide the yardstick against which all other Acts were measured but then would yield to those that didn't measure up, and the Court in *Hansen* did its best to explain how these sections worked together. But after *Hansen* – and the example I've used is the decision of this Court in *Brooker v Police* [2007] NZSC 30, [2007] 3 NZLR 91 – the Court approached section 5 in a much less structured way, and I've given the examples in my submissions but perhaps I could refer Your Honours to the decision, which is under tab 5 of the respondent's bundle, and in particular I refer you to the judgment of His Honour Justice Tipping at paragraph 91. I won't read that paragraph out but what I suggest to you is that that is an appropriate examination of how section 5 can be applied without a full *Oakes* analysis.

WILLIAM YOUNG J:
Got a bit of a re-run in *Morse v Police* [2011] NZSC 45.

MR POWELL:
Yes.

WILLIAM YOUNG J:
The Chief Justice's view, from recollection, was that it wasn't appropriate for the protections in the Bill of Rights to be applied on a factual basis as a matter of fact by the trial Judge but rather the Bill of Rights should inform the construction of the statute to set up a test which itself if applied would not result in a breach of the Bill of Rights. I can't recall if the others with her or not on that.

MR POWELL:
Her Honour was routinely expressing a dissenting judgment on matters concerned with sections 4, 5 and 6, but I'm not sure and I don't think –

WILLIAM YOUNG J:
Well, she was in the majority –

MR POWELL:

As to the result.

WILLIAM YOUNG J:

I'll have to – I've got a note on this somewhere so I might be able to find it.

WINKELMANN CJ:

But that would be to limit it, because it would say it only serves one purpose. But surely it must serve both purposes, the provision.

MR POWELL:

Yes.

WINKELMANN CJ:

So both construing the statute and as it's required, affecting…

MR POWELL:

Yes, absolutely. It's a question – but the *Oakes* analysis is simply a mechanism, it's a way of framing thinking, to determine whether or not a limit is demonstrably justified, and for the reasons given in *Doré* by the Canadian Supreme Court it is not always useful when applied to a provision that confers a discretion. That's not to say that it gets any, has any less impact.

Now in the course of argument this morning my friend made a point that in some of the criminal justice discretions the Parliament has actually provided both parts of the proportionality analysis within the statute. In this case, this legislation it's only done half of it. It has prescribed in section 9 when such an order might be justified. In other words this is the pressing social objective, where an offender constitutes a risk to the safety of children.

ELLEN FRANCE J:

Subsection (3)(j) refers to any other matter that the Court considers relevant.

MR POWELL:

Yes it does.

ELLEN FRANCE J:

What do you say that might mean in terms of how the Bill of Rights impact?

MR POWELL:

Well first of all the Crown's position is that the Bill of Rights imposes substantive rather than procedural obligations. It is not relegated merely to a factor that may be taken into account. It constitutes the legal boundaries within which the power has to be exercised. So that any other matter would have to be, itself, interpreted consistently with the Bill of Rights Act. So that would include any other matter that went to risk that wasn't identified but which was of the same type, but also any other factor which went to the imposition on freedoms that might be caused. And it is that second part which my friend, at least this part of the argument is correct, Parliament hasn't provided the second part of the balance.

GLAZEBROOK J:

Sorry, I didn't quite catch that? Just repeat what you just said please?

MR POWELL:

Well, in the Act itself Parliament hasn't expressed what sits on the other side. Why you might not make an order. So it hasn't said shall make an order unless it would be disproportionately or unduly onerous. It hasn't said anything about that. It is just left at their discretion. If the offender is not sentenced to imprisonment, but nonetheless qualifies, the Court may make an order and so if it may make an order that means it may not. That's an open discretion which must be exercised consistently with the New Zealand Bill of Rights Act. But the imposition on the offender by making the order is not concealed. There is clearly, as I've said in my written submissions, not a direct interference with freedom of movement because it does not constrain the subject of the order from moving. But there is a chilling effect in that being

required to announce to the authorities where you are moving may restrict indirectly the exercise of the freedom.

The impact on section 14 is more measured. Certainly there is no first order infringement in the sense that the offender is not restricted from expressing any thought they wish. They are, it's only because section 14 also protects the right to withhold information that the right is infringed at all. But as I have said in the written argument nonetheless there is, in an overall sense, one can accept that it is an affront to the notions of autonomy and dignity that underlie the New Zealand Bill of Rights Act that one is required to submit to these measures when other people are not. So it does have an impact on those protected rights. But the most significant impact on the offender's rights is the impact on their right to privacy because the sole effect of this legislation is to coerce the supply of information that ordinarily one would be entitled to withhold as private. Of course the right to privacy is not itself guaranteed by the New Zealand Bill of Rights Act, but it is nonetheless important and certainly sufficient to influence the exercise of a discretion such as this.

So the equation, having reached the point that the offender poses the requisite risk to the safety of children, is whether the imposition on those rights, both the protected rights under the New Zealand Bill of Rights Act, and the right to privacy, is justified and proportionate.

WINKELMANN CJ:
So in terms of the right to privacy, how you weighed that was considered in *Brooker*, wasn't it, and the majority in the, the majority was at odds with Justice Thomas on that?

MR POWELL:
Yes.

WILLIAM YOUNG J:
He was in dissent.

MR POWELL:

Yes he was and also –

WINKELMANN CJ:

I know he was in dissent generally, but on the –

MR POWELL:

The right to privacy is multifaceted. What was at issue in *Brooker* was the right of solitude. The right to be left alone. Whereas this is more linked to the information privacy. The right to withhold that which is personal to you from disclosure to others. But, yes, the right to privacy is still important and it exercises a gravitational pull on interpretation, it's just that it doesn't engage sections 4, 5 and 6 because it isn't a guaranteed right.

So I've identified in the written submissions the particular, or the ground in which this discretion appears to be able to work arises because Parliament has not presented these to the Judges as a suite of measures they can impose, it is all or nothing. You either impose, in the appellant's case, the whole set of orders for eight years or you don't. Now in some situations, and depending on how the view that's taken of it the appellant's case could be one of them, where the risk that is posed is confined or is perceived as being confined to use of the Internet, then within that suite of measures that's imposed are three or four that would be extremely useful to the police, that is, having to supply user names, email addresses and any other ways in which that person connects to the Internet. But there is all of the other, the kit and caboodle that comes with it, is also imposed. Now in exercising the discretion the Court would have to take into account in effect, is this using a sledgehammer to crack a nut? Likewise, if a Court thinks, "Well, it would be useful over the next 12 months to see what you do. I cannot impose this order for 12 months. The minimum I can impose it for is eight years and it is not capable of review." So that might trouble a Court as to whether it's warranted.

Now the Court below, and Justice Simon France in the earlier decision of *Goose v New Zealand Police* [2017] NZHC 1718, made the observation that where you do pass the threshold and you've received a sentence of home detention you would need a good reason not to impose an order is perhaps taking the matter further than it needs to be taken, whether the – it is, I suggest, not prescriptive, the Court wasn't saying in essence it becomes mandatory to make on unless you have a reason not to, it could be described as merely being predictive that in the ordinary course one would expect that those persons who pose a risk to the safety of children and have only just missed out on a sentence of imprisonment would normally get an order –

WINKELMANN CJ:
Well, even in a predictive sense though it's over-weighting, one is giving great weight – I would say over-weighting – but it's giving great weight to one factor.

MR POWELL:
They're powerful words, and they are apart to be misunderstood if they're not thought about. So whether that is a factor that should be addressed in the judgment of this Court, I – it's not necessary to the reasoning or logic of the argument to have any particular view as to whether an order will or will not be appropriate.

Coming to the reasons, the second reason – I know it's some time since I mentioned the first one – apart from allowing the Bill of Rights Act to be comprehensible, the particular occasion on which this is happening is sentencing or it's around the time of sentencing. The most appropriate or the most important audience in the sentencing is the offender, the offender is told of the penalty and the other orders that are going to be imposed on him and the Court must explain why they are being imposed. If an order of this sort is being made, where there is a discretion, then the Court needs to inform the offender, "This is why I am making the order," and there needs to be some reassurance, "though I have taken into account the imposition that this will cause on you, but I find it to be justified." That occasion is not going to be assisted by a complex run through of the *Oakes* analysis. It is different where

this Court is considering the interpretation of a provision that has more than one interpretation available and I accept that when this Court dealt with the *New Health* case two of Your Honours found a more structured approach to section 5 helpful in the judgment, but I also note that Your Honour Justice Glazebrook did not find that necessary. So there must be cases where it is useful but it isn't a universal formula.

WINKELMANN CJ:

Well isn't structure in thinking pretty much always helpful. The question is how complex that structure needs to be?

MR POWELL:

Yes, I suppose so. I mean in a sense that the, what is fundamentally behind section 5 is the notion of proportionality. That in most cases, although not in all, the rights are not absolute. They are capable of limitation, but they will only be, it will only be appropriate where it is justified.

WINKELMANN CJ:

Mr Munro took us to, articulated the test in *Hansen* by Justice Tipping at 79 of his submissions, and I did a bit of on the spot DIY on it.

MR POWELL:

I'm sorry, Your Honour, could you give me…

WINKELMANN CJ:

Paragraph 79 of Mr Munro's submissions.

MR POWELL:

Yes.

WINKELMANN CJ:

And I suggested to him that really if you apply that analysis in this case, I'm not saying it's the correct analysis, but if you try and make it fit what you're trying to do in this case, that really the test is (a) and that (b)(i) and (iii) are

really just further explanations of how you might do (a). So the test is does it limit measure, so, which is not to say I'm saying it is the test but trying to fit Mr Munro's argument to this case, "Does the limiting measure case serve a purpose sufficiently important to justify curtailment of the right or freedom," and if you're undertaking that it's helpful to think, "Is the limiting measure rationally connected with its purpose," and, "Is the limit in due proportion of the importance of the objective?"

MR POWELL:

I'd have to say no because the first part of the formulation if you looked at it in this case, the purpose that this legislation serves is to provide the authorities who deal with child sex offenders with information that will enable them to more successfully monitor and detect child sex offending. You would say that in terms of the first part of the formulation that is a sufficiently important objective to justify some curtailment of rights. But, and this is the way it would be applied if the legislation was being vetted, that may be a sufficiently important objective, but the measure itself is not rationally connected with it. In other words just because keeping children safe from sexual offending is an important objective, it doesn't follow that everything you do in its name is necessarily justified if it's not –

WINKELMANN CJ:

Can I just ask you to clarify. When you answered "No" were you answering, "No, this isn't a helpful test?"

MR POWELL:

My friend's argument is probably, is correct. The, those, (b) does do something different to (a). (a) simply identifies that there is a pressing social objective and we find this all the time with the various measures that have been imposed by Parliament on curtailing offending, future offending.

WINKELMANN CJ:

Okay, so I was thinking that if you actually are just applying (a) to the facts of the case, so you're actually asking if in this case does a limiting measure in

this case serve a purpose sufficiently important to justify curtailment of the right or freedom. To answer that you'd actually have to ask yourself first, is it actually rationally connected to managing a risk.

MR POWELL:

Yes, you would if you were – and the reason you wouldn't do it in relation to the individual exercise of the application of the power is that Parliament has already done that. Parliament has legislated that the purpose of reducing child sex offending is rationally connected to the provision of information about the child sex offender.

GLAZEBROOK J:

But if so, the fact that we might think and there might be good evidence to show that it's not rationally connected is effectively irrelevant because Parliament's decided it is, is that the submission?

MR POWELL:

Yes, that's where we've got to.

WINKELMANN CJ:

So you're saying that considering whether or not the suite of orders is responsive to the risk is beyond something the Court can take into account?

MR POWELL:

Yes, until it…

WILLIAM YOUNG J:

It's difficult to put it in absolute terms because…

MR POWELL:

Yes, it is.

WILLIAM YOUNG J:

If you say it's for the Court to say yes, it's not responsive, then the Court is effectively sabotaging the whole statute – well, sorry, half the statute, the bit

that was in control. On the other hand, it's hard to say that some assessment of the effectiveness of the regime is irrelevant.

MR POWELL:

Well, if you had, if you start with a person who you accept poses an undue risk to the safety of children…

WILLIAM YOUNG J:

Where does the word "undue" come from?

MR POWELL:

Well, sorry, poses a risk to the sexual safety of a child or children.

WILLIAM YOUNG J:

Sorry, it's just it implies any…

MR POWELL:

I'm sorry.

WILLIAM YOUNG J:

I mean, it's a difficult word because it implies some level of risk isn't undue.

MR POWELL:

Yes, no. Let's say there is a risk, but the point to be made for the defendant is that registration in this case would not contribute in any way to the reduction of that risk. Now is it an impossible argument to make on the facts of the case? Perhaps not. But if it was attempted in this case then you'd say, well, how could requiring a person who has accessed child pornography to supply their online information to the police not be connected to the purpose of gathering relevant information for the purpose of keeping children safe? The rational connection test is not difficult. The most –

GLAZEBROOK J:

It's the added information that might be not logically connected.

MR POWELL:

Yes.

GLAZEBROOK J:

But it might be on the hand, because if you know their online address but don't know where they're living it might be difficult to –

MR POWELL:

To catch them.

GLAZEBROOK J:

– find them, yes.

WINKELMANN CJ:

For my part I also –

GLAZEBROOK J:

If something happens.

WINKELMANN CJ:

I find your starting proposition difficult to accept, where the Courts have already foreclosed from looking at whether or not the regime responds to the nature of the risk, because it's the Court's discretion, the Court hasn't said that, Parliament hasn't said if that risk is there then it has to be imposed, there must be some notion that you assess the nature of the risk and whether that regime responds to it.

MR POWELL:

In connection with the particular offender, yes.

WINKELMANN CJ:

Yes.

MR POWELL:

But a general observation that this Act doesn't work can't be made.

WINKELMANN CJ:

No, no. So that's why I'm saying, well, that's what I was saying, that if you added in "in this case" does the limiting measure, in this case, serve a purpose sufficiently important to justify curtailment of the right of freedom? But, okay, so you don't like that test. So what are you suggesting, Mr Powell, if anything, or nothing?

MR POWELL:

The way it was expressed by Justice Lang, I believe, in the High Court, simply that it was the imposition on this offender that was caused by the making of an order was proportionate to the risk that he posed. Now, as I've said, in marginal cases it is important that the reasoning of the Court expands so that it can be seen why the decision was made. Simply saying it's proportionate or it isn't in some cases may not be enough. Judges are required to give reasons for their decision and sufficient reasons to make them intelligible. Now if there was a case, as Your Honour the Chief Justice mentioned, where there was an issue about whether imposing an order in this case would be rationally connected to the purpose for which the Act serves, then there would be a reason for the Court to say this is why I accept or do not accept that proposition. But in most cases it won't and so simply the, to the extent that there's any sort of combining it occurs more between subparagraph (b)(ii) and (b)(iii) and that is whether the limiting measure impairs the right or freedom not more than is reasonably necessary. We talk about whether it constitutes, it's within the range of reasonable options open to the Court, but that part of the analysis is very difficult to apply because there is no alternative. You either apply, make an order or you don't. So you can't say that not making an order is going to serve the purpose of the Act. You're really talking about the, is the limit that is going to be imposed on this offender proportionate. So in most cases where you said, for example, this offender only qualified by the skin of his teeth. If the offending was more ancient, for example. If, since the offending, the offender had some kind of religious conversion, or some other significant experience in their life, whereby they are unlikely, or their risk might remain but making these orders would be futile.

WINKELMANN CJ:

So do you accept that whether or not it's, that part of the analysis, whether or not it's all set out, part of the analysis a Judge would do is identify what the nature of the risk is that the offender poses?

MR POWELL:

Yes, although the –

WINKELMANN CJ:

Magnitude and nature?

MR POWELL:

Section 9 more or less guides the Judge to a fairly granular examination of –

WINKELMANN CJ:

Although not particularly responds to the facts of this case?

MR POWELL:

No. That puts this case squarely in that category. That the order is monolithic, so if they impose it, it all gets imposed, but that is being done for the sake of achieving the particular monitoring about use of the Internet, where there is a clear rational connection, I would suggest, in almost every case where a person is using the Internet to offend.

WINKELMANN CJ:

When you see that list applied to the facts of this case it does lose any kind of link, it seemed to me, to what the Act is all about. It just seems to become a tick box because it's being applied in a way without any kind of sense to measuring the nature of the risk.

MR POWELL:

I wonder if I could just refer back to section 9 before I answer that.

WINKELMANN CJ:

Because it shouldn't be applied in a tick box way, you'd accept wouldn't you?

MR POWELL:

No, no…

WINKELMANN CJ:

So what is it aiming to do is my next question for you.

MR POWELL:

Well again I note my friend has said that in his written statement, and he wasn't challenged on it in his oral argument, but the purpose of this Act is not to monitor. The Act is express, it is to obtain information so that other agencies can monitor. Now the obvious, the beneficiaries of the order as far as detecting future offending are the police, who happen to administer the Register, but it may equally be the Department of Social Welfare or somebody else who is monitoring. This give them the information that enables them to monitor. So that's all it does, is coerce the supply of information that otherwise wouldn't be had.

WINKELMANN CJ:

So my question is, against the purpose of the Act, what are we doing when we do that section 9(3) analysis because it seems to me you might be doing several things.

MR POWELL:

Mhm.

WINKELMANN CJ:

Quite hard to work out from the criteria what you are doing. I mean are you actually working out how bad an offender this person is? Are you working out how useful the regime will be?

GLAZEBROOK J:

Subsection (3) seems a bit one-sided, doesn't it, because it's just looking at risk?

MR POWELL:

Yes.

GLAZEBROOK J:

Well subsections (2) and (3) are just looking at risk.

WINKELMANN CJ:

Or the nature of the risk but what is – I mean I found it hard when I looked at it, especially as it was applied in this case, to see what the Court is about when it's doing it.

MR POWELL:

Well, I mean, an awful lot would be packed into any written assessment of the risk posed, because that suggests that some sort of professional examination or analysis is put before the Court.

WINKELMANN CJ:

So it looks like it's how likely they are to re-offend and how serious their re-offending will be.

MR POWELL:

Yes.

WINKELMANN CJ:

And therefore it's not simply looking at whether or not there's a risk they're going to offend, it's how serious that offending would be.

MR POWELL:

It seems to be, well, to reflect a view that there is an inherent risk, which is not explained in the Act why that view was taken. But there is obviously an inherent risk with certain types of offending that are precipitated by any sort of psychological dysfunction that further offending will occur. I mean, whether the risk of recidivism is as low or as high as my friend suggested for sexual offending, there is clearly a risk of recidivism by people convicted of these

sorts of offences and Parliament has not sought to quantify that, it seems to be based, the underlying assumption on which the whole regime is based.

WINKELMANN CJ:
But do you agree or not that it looks to me to be – well, you don't know how it looks to me – but do you agree that it seems to be attempting to identify both the risk of re-offending and also the seriousness of that re-offending if it occurs?

MR POWELL:
But it does refer to, I mean, it talks about a written assessment of the risk posed by the person, "And any other submission or evidence relating to the risk posed by the person." It seems to be contemplating that information of that sort would be before the Court if it needed or sought it.

WINKELMANN CJ:
Why I'm asking that is it suggests that the seriousness of the offending is relevant to the decision whether or not to make the order.

MR POWELL:
Just to refer back to the – so the qualifying offence, the seriousness of the qualifying offence, I take it and I'd have to accept that that refers to the offence rather than the offending. So it suggests that there is some hierarchy within each of the categories. But the class 1 offences that are listed in schedule 2 – no, I mean, so to take one example, if we did have the unusual case of a person convicted of abducting a person for the purpose of marriage, if the victim is under 16, it may be that at the first part of the assessment, considering whether they pose a risk, a Court would consider, "Well, did this represent an infatuation with one person in particular or are you likely prone to do this again?" That goes to, I suppose, the first part, as to whether or not the person poses a risk, and if they don't then there's no question of an order.

So when you get to the second – what the Court of Appeal said was that a consideration of the section 9 questions is relevant to the second part of the

inquiry, that is, a risk is posed but should an order be made? Now perhaps that did need a little further explanation, they must be considered in a different way, at that point the Court must be saying, “Well, in your case is the risk particularly great?”

O’REGAN J:
But it’s still only one side of the equation, isn’t it?

MR POWELL:
Yes, but the Court would have to, when it’s approaching the exercise of a discretion that’s designed to tailor the application to a particular person, that person’s circumstances have to be fully considered. So the risk, or the imposition on the exercise of their rights will differ from one person to the next. So that when the Bill of Rights is considered, when the proportionality is considered, it has to be done on the basis of the person’s individual circumstances.

WINKELMANN CJ:
So you accept there’s a close analysis of the risk needed. I'm just trying to work through what a Judge’s reasoning process should be.

O’REGAN J:
I mean a risk of minor offending, a high risk of minor offending, which would not be markedly reduced by having one of these orders made, might lead you to say, well, yes, there’s a high risk but it’s very low level offending. The order doesn’t really respond to it so on a proportionality basis it’s not worth making it.

MR POWELL:
Yes or –

O’REGAN J:
On the other hand a relatively low risk of very serious offending might –

MR POWELL:

Mmm.

O'REGAN J:

Which offending of the kind where the order may genuinely help to reduce the risk, then the Court may be more minded to make it.

MR POWELL:

Yes.

WINKELMANN CJ:

So you accept the second part, was going to be my next question but Justice O'Regan has pre-empted me, is that you also look at how responsive the suite of effects of that regime is to the risk.

MR POWELL:

You would have to but whether or not it's actually expressed one would predict that in most instances where you were convicted of these offences sufficient to warrant a sentence of home detention that the risk will be of a certain magnitude but –

GLAZEBROOK J:

Well it may not have because it may just be that this is the last time you will offend, the risk isn't there anymore, and you're just being punished for what you have done. I don't know that you can assume because you've got home detention that there's a risk of recidivism, or even that it's high, or low or…

MR POWELL:

I think that's probably fair. If you take the example of even a predatory offender, low level predator offender who is inclined to, given the opportunity around young children, touch them, and no, maybe an elderly person who since the offending is now confined to a rest home so their ability to, they're not mobile, their ability to come into contact with children is limited.

They have, as far as the Court is aware, never misused the Internet, whether or not a person of that age and in that position wishes to use the Internet then you would say well there's no real advantage to any of these orders in this case, even though it cannot be denied that this person does pose a risk to the –

GLAZEBROOK J:
Well I think you'd say in that case they don't pose a risk, wouldn't you, because there's no, there's clearly no opportunity available in those circumstances, well very limited opportunity because presumably the rest home will…

MR POWELL:
Yes.

WINKELMANN CJ:
But the more marginal the case the more you'd have to start thinking about hospital responsive this kind of standard boilerplate suite of effects is, wouldn't you?

MR POWELL:
Yes, and the Court, and perhaps the District Court Judges were pressing it, that they anticipated that they would need guidance as to how to do this in those marginal cases. But attempting to populate any analysis of how this section is to operate with all of the examples that could arise is just –

WINKELMANN CJ:
Problematic.

GLAZEBROOK J:
Well you just say that there is a proportionality analysis at the time that you're – once you've decided there's a risk, and how serious that risk is, and how serious the offending related to that risk is, you then do a proportionality analysis, in terms of the particular case as to whether the order is justified.

MR POWELL:

Yes.

GLAZEBROOK J:

That's the submission.

WINKELMANN CJ:

Put the responsiveness on the same side of the equation.

GLAZEBROOK J:

Yes.

WINKELMANN CJ:

Say serious offence, serious risk of re-offending, responsiveness to the regime, and then that's one side, and then on the other is the proportionality.

MR POWELL:

Yes.

GLAZEBROOK J:

I would have thought the responsiveness of the regime comes into proportionality rather than the risk, but I don't think it matters what stage you do it at.

MR POWELL:

No. What matters is that –

WINKELMANN CJ:

Well, it might do.

MR POWELL:

– an order is not made where it shouldn't be made.

WINKELMANN CJ:

Yes.

MR POWELL:

But in doing this part of what is becoming a longer and longer process of sentencing an offender the Court isn't doing anything different to what it does under the Sentencing Act.

WINKELMANN CJ:

And I think you gave us an Australian authority where it's reason has got it very straight – does the proportionality assessment, it's very straightforward.

MR POWELL:

Yes.

WINKELMANN CJ:

And did you give us that as an example of how straightforward it can be?

MR POWELL:

I did it simply to explain that we had looked at comparative jurisdictions but didn't consider them at all useful, but I gave you that example because that's typical of the Australian models.

But in my submission a requirement that an order is not made unless it is proportionate is sufficient to enable Judges to exercise that discretion. Because Judges after all not only are they obliged to themselves comply with the Bill of Rights Act, they are entrusted essentially as kaitiaki of the rights themselves because it is the Courts which determine whether or not the other branches of government have infringed the Bill of Rights. So there is a high level of community trust in Judges to makes those sorts of decisions, they are all, and they do so in, you know, quite complex matters like sentencing.

O'REGAN J:

So would you say that when an order like this is in issue in the District Court the Crown should be required to say in what way the order would assist in the management of the risk to actually give the Judge some idea of the level of intrusion and also the level of effectiveness of it?

MR POWELL:

Again, there will be some cases in which it is self-evident. But if it is a marginal case, yes, the prosecutor should address issues that are relevant, and if one anticipates that the Judge is going to response with, “To what end?” what would that, what purpose would that serve here? You would have to say, “why?” But in other cases it will be readily apparent why. Now if that conversation is pre-empted by an appellate Court having said, “You’ll need a good reason not to impose an order then,” then that is perhaps a reason why such a phrase shouldn't enter the equation. But in some cases it will be obvious, in other cases it will need to be addressed, and likewise when the Judge decides to make an order or not make an order they’ll need to explain why they decided that it wasn’t necessary, that it would be disproportionate.

O’REGAN J:

But in a case, say, where the risk was offending of the kind that occurred here, so the only risk that was perceived was the potential child pornography on the Internet, she the prosecutor then say, well these elements of being on the Register will help manage that, that fact you have to notify your ISP and identifiers and so on?

MR POWELL:

Yes.

O’REGAN J:

But a lot of other aspects of it, like having to notify when you move and where you live and so on may or may not. But if they don’t respond to it then the Judge can say, well, there is a very large intrusion there and the only part of that intrusion which actually helps is this. So that may indicate that it isn’t a proportional response.

MR POWELL:

But on the other hand if – you see, well, the rest of the orders, apart from those related to the Internet, are just noise and they’re an unwarranted imposition. But the risk of this person accessing the Internet, continuing to

access the Internet to access child pornography, is such that it warrants that imposition because the alternative is not to impose an order at all, and that would leave a clear risk to the safety of children in place.

WINKELMANN CJ:
So it's relevant to the proportionality exercise, the extent of redundant intrusion is relevant to the proportionality exercise, but in some cases you might say, well, look, notwithstanding the level of redundancy it still remains proportionate.

MR POWELL:
Yes, because detecting your offending is a priority.

GLAZEBROOK J:
But that will depend on the level of risk of re-offending then, won't it?

MR POWELL:
Yes.

GLAZEBROOK J:
Because if in fact the level is relatively low then the redundancy might actually overwhelm that.

WINKELMANN CJ:
It's an evaluative exercise.

MR POWELL:
Yes, inescapably so.

GLAZEBROOK J:
But I think you're accepting that?

MR POWELL:
Well, yes, it must be.

GLAZEBROOK J:

I mean, it may, it will depend of course on a low level of very serious offending as against a low level of less serious offending.

MR POWELL:

Yes.

GLAZEBROOK J:

Low risk of recidivism in terms of less serious offending.

MR POWELL:

Yes, well, it presupposes an inquiry as to when the offending happened, and if it was, particularly if it was a younger person and an isolated occasion, then that does raise the issue, even though the pornography you accessed is particularly bad, does it look like a moment of weakness or experimentation or something of that order? But, as here, what precipitated the appellant's offending were more deep-seated psychological issues.

ELLEN FRANCE J:

Just going back to what the Court of Appeal said, they're talking about the situation where the Court's satisfied the offender continues to pose a real risk to the lives or sexual safety of children. So are you saying that even when you get to that situation you might decide on the basis of this problems with scheme, for want of a better word, that you wouldn't impose an order, you wouldn't make the order?

MR POWELL:

Well, ultimately this is an exercise in statutory, the application of a statute in Parliament did not say, as it could have said, if satisfied that there is a risk to the safety of children –

ELLEN FRANCE J:

You always make one.

MR POWELL:

– the Court must. It's done that in relation to those offenders who are sentenced to imprisonment, so as Your Honour Justice O'Regan was saying in relation, when my friend was on his feet. The person who only just gets a sentence of imprisonment automatically gets this order, it's in effect presumed. The person who narrowly escapes imprisonment because a non-imprisonment sentence will meet the requirements of the Sentencing Act, that's when the discretion arises. But Parliament has contemplated that there will be cases where, notwithstanding that there is a risk, that an order is not warranted, and Parliament did not explain when those situations would arise, but plainly where it would be a disproportionate interference with rights must be on that side of the equation.

WINKELMANN CJ:

So does that take us on to section 26 in the retrospectivity?

MR POWELL:

I make no complaint about it, I would have appreciated the chance to think about this before I came to Court…

WINKELMANN CJ:

I mean, it is dealt with, but only briefly, in the appellant's submissions, but it is there I think.

MR POWELL:

Yes, yes, I think that's probable…

WINKELMANN CJ:

It is difficult, and it might be…

MR POWELL:

Well, if the Court is –

WINKELMANN CJ:

Do you need more time?

WILLIAM YOUNG J:

Can I just ask you to look at section 9(1)(a)?

MR POWELL:

Yes, the date on which the person was charged with the offence.

WILLIAM YOUNG J:

It's sort of slightly, it's rather awkwardly expressed. I would have thought it should say, "The date on which the offence was committed is irrelevant."

MR POWELL:

Yes, well –

WILLIAM YOUNG J:

Presumably that's what it means?

MR POWELL:

Well, I'm not going to get off base one with that, because of course this is a retrospective provision, so I would have to argue that it was –

WILLIAM YOUNG J:

But, sorry, why would the date on which a person is charged never be relevant?

WINKELMANN CJ:

That's a good question.

WILLIAM YOUNG J:

I mean, is that presumably – I see it's an amendment.

MR POWELL:

Yes, this –

WILLIAM YOUNG J:

I mean, in this case the defendant was charged in, what, April or, March or April 2016, which of necessity indicates that the offending was prior to the commencement of the Act…

MR POWELL:

Yes.

WILLIAM YOUNG J:

Presumably giving this section a fair, large, liberal interpretation. It means that that's irrelevant.

MR POWELL:

Yes, it does.

WILLIAM YOUNG J:

It's irrelevant that the offending occurred before the commencement of the Act.

MR POWELL:

Can I sit down now?

WINKELMANN CJ:

No. But we won't be giving it a fair, large and liberal interpretation, will we, because that's to give a retrospective effect.

WILLIAM YOUNG J:

Well, what else can it mean? Perhaps I should ask, we should ask Mr Munro if there's anything else it could mean.

MR POWELL:

It gets worse, unfortunately, because the Amendment Act, which introduced that provision, retrospectively amended the retrospectivity provision because Parliament had discovered that it hadn't captured all the offenders in the net

that it wanted to, so it changed the definition. Why they changed that section –

WILLIAM YOUNG J:
Why change the date of charge rather than the date of the –

MR POWELL:
Why that was – there is –

WILLIAM YOUNG J:
Is that explained in the legislative history?

MR POWELL:
The legislative history of the Amendment Act will probably be in there somewhere. It was done in a hurry.

WINKELMANN CJ:
Can I suggest that rather than dealing with this in reply, which is quite an important point, is that you have an opportunity to file some supplementary submissions and then Mr Munro to reply?

MR POWELL:
Yes.

WINKELMANN CJ:
Because I think it is an important point. We don't want to deal with it on the hoof.

MR POWELL:
If I could, it would be most useful if I could do that. I have nothing further to add on that part of the argument unless Your Honours have any more questions for me. I will very briefly address the question of whether an order was appropriate in this case and the only issue I thought I should address is my friend wished to put that information from the treating psychologist before the Court as updating evidence of risk. I have no objection to that, the Court

treating it as such. If Your Honour the Chief Justice is right, it should be put before the Court in the proper fashion, but I fear if the opportunity was given to do so it would simply result in that same information coming back. The Crown did not have any, file any information or any reports in response to what Dr Rogers had said in the Court of Appeal, so if that is her view that is her view. To take Your Honour Justice France's point, it does seem odd that a treating psychologist would make that sort of assessment because it seems to require the kind of disclosure of information which goes to the very heart of the therapist/patient relationship, but ultimately that is a decision for that expert to make if they feel they can and they have the necessary instructions, and, of course, whether the Court is prepared to accept it.

Again, if it's a marginal case the Court may want to have a specific third party assessment of risk but in this case the issue before the Court of Appeal was that the ongoing risk posed by this appellant was that if unfortunate life events happened, that he may revert to that kind of behaviour because that is what had been the pattern in the past. The evidence of Dr Rogers is that he has responded positively to the treatment that she's provided and that has addressed the risk. My friend reads into the fact that he hasn't done so since as supporting Dr Rogers' view well she is relying on information reported to her but of course as he's been on the Register, so the police have had access to that information since he has been on the Register, and there isn't any suggestion that he's offended again, so the question really is whether the position is advanced any further than the if it was before the Court of Appeal that there is, he is at a low risk of offending but if he does offend the offending is serious, or is likely to be serious.

But I accept, as indeed I think it was accepted in the Court below, to some extent those other parts of the order which enable him to be identified, such as not changing his name without notifying, not changing his residence, all of those sort of, that that information enables him and his computer to be located. They are all either directly or peripherally relevant. But the other aspects of the order that are essentially intended to track his movement to ensure he doesn't come into proximity with potential victims, that those are

not. They are part of the baggage that comes with the order. So the question, to put it in terms that we were discussing before, is the imposition of those other orders and their implicit interference with freedoms protected by the Bill of Rights Act and his right to privacy proportionate in order to achieve the continued access to information as to what he is looking at on the Internet.

And in keeping with the Crown's position that these are substantive matters, the Court on appeal can make the same assessment. It's not a question of whether the District Court was, it was open to the District Court to conclude otherwise. If this Court considered, or the Court of Appeal had considered, that in its assessment it was not a proportionate order then it would be inconsistent with the Bill of Rights Act and therefore the order couldn't stand. Whether the Court has sufficient information to make that determination in this case is a matter for the Court.

WINKELMANN CJ:
And anonymisation?

MR POWELL:
Anonymisation, yes. I had to disclose to my colleagues when I asked for some help with this part of the argument I grew up in Christchurch in the 1970s so I have not the same sort of understanding of how these things work. But from what I –

WINKELMANN CJ:
Do you mean these things as in the Internet?

MR POWELL:
The internet, well in particular how these search engines, how they deliver what they call the search engine results page, which is when you make a Google search it comes up with the 10 or 12 things that are most likely to satisfy your request. I understand first that the search engine not only looks at the information but looks at my pattern of searching and therefore, because I am using the Internet I am more likely to be looking for matters concerned

with courts and law, it will prioritise legal decisions in a way that another person wouldn't. But I suspect that the reason that the Court of Appeal judgment keeps coming up is that it mentions the appellant's name 61 times, and that is probably more than any of the other websites, and I understand that there is a service, there is always a service available where you can de-optimise, which essentially means you put in place a number of websites which have greater reference to your name than the one that you wish to supress, and so that the first 10 or 12 websites that you want to –

WILLIAM YOUNG J:
So you publish something about yourself with 64 mentions of your name.

MR POWELL:
Yes.

WINKELMANN CJ:
Well I don't know that that's so easy to do.

MR POWELL:
Not for the Court, no, and anything which requires the Court to manipulate what is expressed in the judgment obviously needs to be approached very carefully. I would say that there is a probably a broader issue to be addressed in another case as to whether the approach to name suppression needs to factor in that this is not, a disclosure is not simply going to have an effect over a shortened period of time, but the information remains accessible by this method. The principle of open justice certainly applies more at the sentencing phase because the public is entitled to know that the person has been convicted, and what they were convicted of and sentenced to. Appeals to the Court of Appeal may be for the purpose of correcting errors in the judgment. Likewise the principle of open justice still operates there, but to a lesser extent. When it comes to an appeal to this Court, which is done, is only where there is an issue of general or public importance. The principle of open justice doesn't have the same impact, I accept, but we are still talking about a specie of suppression order, that is information about the case which isn't made

available to the public. Now the difference between suppressing it and not providing it would involve just the kind of nice analysis of section 14 that the Crown usually gets criticised for. The fact is information that would otherwise be available is rendered more difficult to find. The question is in an appropriate case can the Court do that? I've no doubt that it can do it, but doing it in respect of this case wouldn't necessarily affect the decision in the Court of Appeal being the primary entry on the search engine's result page, and I'm also not sure, although –

WINKELMANN CJ:
Well, though it has to start somewhere.

MR POWELL:
Well, it has to start somewhere, but even if that Court of Appeal judgment is removed by the person who put it there, if it has been placed anywhere else as a pdf then it may still be accessible. I don't know. But that can perhaps be left for the Court of Appeal to determine. But ideally any issues of this sort should be dealt with before the appeal is heard. I accept that in my friend's case it did take him by surprise, but whether it's appropriate in this case would come to down to whether it would achieve a practical purpose. But, as I said in the memorandum I filed, the reality is that all appeals that come to this Court come for the purpose of either correcting a miscarriage of justice or clarifying the law, and the public benefits either way, and if appellants face the prospect of further vilification as a result of taking appeals then appeals are less likely to be brought. So there may well be a greater case for doing so in appeals to this Court than in Courts below, but…

GLAZEBROOK:
Especially in terms of – and I'm not sure whether you've mentioned this or I've missed it – because the register itself isn't public.

MR POWELL:

Yes, it isn't, it's no part of the – I suppose you could say that the fact that you have been put on a register is a public fact because that's declared by the Court in open Court. But the –

GLAZEBROOK J:

The details.

MR POWELL:

– information that you're required to provide isn't. And in the ordinary course of disposing of an appeal of this nature it is sometimes necessary, as the Court did, to deal with the issues as to why the order was made, and there is information in the Court of Appeal judgment that is certainly highly sensitive and personal to the appellant. But he'll have to address that with the Court of Appeal.

WINKELMANN CJ:

So your position is don't oppose?

MR POWELL:

I don't oppose it.

WILLIAM YOUNG J:

Up to us?

MR POWELL:

It's up to you. But I would concede that there is no question that the Court can anonymise a judgment without making a suppression order, but the question of whether it should, I don't believe a Court has actually looked at that, as to what would be irrelevant considerations before that happens.

WINKELMANN CJ:

Yes.

O'REGAN J:

I think it did happen in the guideline judgment *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750*,* there was a guideline judgment for rape and other sexual offences. I'm pretty sure there wasn't name suppression there but the Court didn't publish the name, given that the case was going to be cited in every sentencing for that kind of offence from then onwards.

MR POWELL:

And I know in refugee cases the Immigration and Protection Tribunal always anonymises the name because of the risk of information going abroad and invites the High Court to adopt the same anonymisation so that that information doesn't leak out. But that's not a suppression order, it's just a practice.

ELLEN FRANCE J:

There's a statutory provision relating to that though, isn't there?

GLAZEBROOK J:

Refugees, I think, but not the immigration generally.

MR POWELL:

Ah, for refugees but – no.

GLAZEBROOK J:

If I'm not mistaken?

MR POWELL:

I think that's right.

WINKELMANN CJ:

Can you recall, Mr Powell, if the High Court judgment sets out all the personal detail regarding background to the appellant's offending, the content of the report?

MR POWELL:
I'm afraid I can't…

WINKELMANN CJ:
Mr Munro will probably remember.

MR POWELL:
He'll know, I'm sure.

WINKELMANN CJ:
Are those your submissions?

MR POWELL:
They are.

WINKELMANN CJ:
Thank you. Mr Munro, do you have anything by way of reply?

MR MUNRO:
Ma'am, there's a very short reply and Mr Olsen is going to deal with it, if the Court doesn't mind?

WINKELMANN CJ:
All right. Because we have to agree timing on this retrospectivity submission too.

MR OLSEN:
In relation to Your Honour's comment about the High Court decision, there were references to Dr Rogers' report but I am not sure if it was specifically to the same highly sensitive information that was in the Court of Appeal judgment. But certainly at pages 35 to 38 of the Supreme Court bundle it refers to different parts of Dr Rogers' report.

The other point to emphasise here is that in offending of this nature the registration or the relevant parts of the information obtained from registration

by the State is just the Internet service provider's name and the user names of accounts online. It's not the password, it's not an ability to actually monitor the traffic, what is viewed, or what they're looking at, it's simply that they know who the Internet service provider is. So, unlike a contact offender where the police could sit outside that person' house if they posed a high risk and watch whether they leave or see whether or not their car's outside a school or that sort of information, with Internet offenders those factors addressed in registration don't actually allow of themselves the police to monitor.

WINKELMANN CJ:
But they would assist with detection, wouldn't they?

MR OLSEN:
They would, but also detection is reasonably easy once you've got the IP address. So the police would have to have the IP address in the first place to track back.

WINKELMANN CJ:
No, but he would give the IP address…

MR OLSEN:
He would give his IP address. But to detect further offending they would need to find him on an online chat room or downloading material and so on and so forth.

ELLEN FRANCE J:
It's just a different form of detection though, isn't it, in that sense?

MR OLSEN:
Yes. But then that's based on the fact that he does offend, whereas with a contact offender for example you've got them, if you saw their car outside a school, the police officer driving by knew that a particular offender who was high risk drove a car and owned the number plate…

WINKELMANN CJ:

We understand.

MR OLSEN:

Yes. That's all, unless Your Honours have any questions?

WINKELMANN CJ:

So in terms of timing of submissions, say 10 days, is that…

MR OLSEN:

That's more than sufficient, yes.

WINKELMANN CJ:

Well, I think Mr Powell first. Would 10 days?

MR POWELL:

That should be ample, yes.

WINKELMANN CJ:

And then how much longer would you need, Mr Olsen?

MR OLSEN:

Five days or so.

WINKELMANN CJ:

Right, so 10 days for the Crown and a further five days thereafter for the appellant.

Well, thank you, counsel, for your submissions, we've been greatly assisted. We will take some time to consider our decision and we await with interest the additional submissions.

COURT ADJOURNS: 12.58 PM