

**INTERIM ORDER PROHIBITING PUBLICATION OF NAME(S),  
ADDRESS(ES), OCCUPATION(S) OR IDENTIFYING PARTICULARS OF  
APPELLANT AND APPELLANT IN [2025] NZHC 33 IN TERMS OF  
PARAGRAPH [60].**

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

**I TE KŌTI MATUA O AOTEAROA  
TĀMAKI MAKĀURAU ROHE**

**CRI-2024-404-000648  
[2025] NZHC 32**

BETWEEN                      DOWAN KIM  
   Appellant

AND                              THE KING  
   Respondent

Hearing:                      9 December 2024

Appearances:                N F Flanagan for Crown  
   S J M Mount KC for Defendant

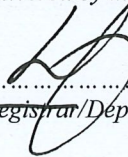
Judgment:                    30 January 2025

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**JUDGMENT OF ANDERSON J**

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*This judgment was delivered by me on 30 January 2025 at 3.00 pm*

*LF*   
.....  
Registrar/Deputy Registrar

**L.I Fidow  
Deputy Registrar  
High Court**

Solicitors:  
Meredith Connell, Auckland, Crown Solicitors  
Croftfield Law, Auckland

[1] In 2020, the Commerce Commission investigated potential anti-competitive conduct in the supply of consumer televisions. Arising from that investigation, the facts of which I outline below, Mr Dowan Kim was charged with, and pleaded guilty to, one charge of attempting to obstruct the course of justice.<sup>1</sup> He sought a discharge without a conviction under s 106 of the Sentencing Act 2002 and permanent name suppression under s 200 of the Criminal Procedure Act 2011.

[2] By oral decision on 15 October 2024, Judge B A Gibson granted the application for discharge without conviction but declined the application for suppression.<sup>2</sup> Mr Kim appeals.

### **Legal principles — name suppression**

[3] Applications under s 200 involve a two-step process.<sup>3</sup> The Court first considers whether it is satisfied that the claimed threshold grounds for name suppression have been established. If a threshold ground is established, the Court moves to the second stage. At this point, it undertakes a discretionary exercise and considers whether name suppression should be granted.

[4] At the threshold stage, the Court must be satisfied that “publication would be likely” to result in one of the listed consequences.<sup>4</sup> The word “likely” in this context means “a real and appreciable risk”<sup>5</sup> or a “real risk that cannot be readily discounted”.<sup>6</sup>

[5] The statutory thresholds differ according to the status of the person affected. A defendant who seeks name suppression under section 200(2)(a) must satisfy the Court that they would be likely to suffer “extreme hardship.”

[6] This level of hardship connotes a very high level of hardship:<sup>7</sup>

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<sup>1</sup> Crimes Act 1961, s 117(e). Maximum penalty: seven years’ imprisonment.

<sup>2</sup> *R v Kim* [2024] NZDC 25233 [Kim suppression decision].

<sup>3</sup> *Robertson v Police* [2015] NZCA 7 at [39], citing *Fagan v Serious Fraud Office* [2013] NZCA 367 at [9]; and *Beacon Media Group Ltd v Waititi* [2014] NZHC 281.

<sup>4</sup> Criminal Procedure Act 2011, s 200(2).

<sup>5</sup> *Wallis v Police* [2015] NZHC 2904 at [22].

<sup>6</sup> *Beacon Media Group Ltd v Waititi*, above n 3, at [17]. See also *Huang v Serious Fraud Office* [2017] NZCA 187 at [9]–[10]; and *F v R* [2022] NZHC 2547 at [44]–[46].

<sup>7</sup> *Robertson v Police*, above n 3, at [48] (footnotes omitted), endorsed by the Supreme Court in *M (SC 13/2023) v R* [2024] NZSC 29, [2024] 1 NZLR 83.

The word “hardship” on its own means “severe suffering or privation”. The addition of the qualifier “undue” in s 200(2)(c) indicates that something more than hardship simple is required, while the word “extreme” in [s 200(2)(a)] indicates something more again.

[7] The assessment of whether the threshold has been met is contextual. It entails a relative comparison between the contended hardship and the consequences normally associated with the publication of a name. The consequences must be something beyond the ordinary associated consequences.<sup>8</sup>

[8] Open justice is the starting point in decisions about name suppression.<sup>9</sup> In undertaking the second stage balancing exercise, counter-balancing factors must be weighed on a case-by-case basis against that principle and the underlying interests it serves.<sup>10</sup>

### **Approach on appeal**

[9] The appeal is brought under s 283 of the Criminal Procedure Act. The first-stage “threshold test” involves the application of general appeal principles.<sup>11</sup> Accordingly, the principles in *Austin, Nichols & Co Inc v Stichting Lodestar* apply.<sup>12</sup> If my view on the s 200 threshold differs from the Judge, I must go on to make my own determination about whether suppression should be granted.<sup>13</sup>

[10] An appeal on the second stage “discretionary assessment” involves the application of the principles for appeals against the exercise of a discretion.<sup>14</sup> Here, the Judge decided that the application failed at the jurisdictional, threshold stage. His comments on what he would have done had he accepted the threshold test was met are obiter. Counsel agreed that, in these circumstances, if I allow the appeal from the

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<sup>8</sup> At [49].

<sup>9</sup> *Beacon Media Group Ltd v Waititi*, above n 3, at [27], citing *R v Liddell* [1995] 1 NZLR 538 (CA) at 546; and *M (SC 13/2023) v R*, above n 7, at [44].

<sup>10</sup> *M (SC 13/2023) v R*, above n 7, at [44].

<sup>11</sup> *Parker v R* [2020] NZCA 502 at [29]; and *C (CA123/2022) v R* [2022] NZCA 566 at [17].

<sup>12</sup> *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16].

<sup>13</sup> *S v R* [2020] NZHC 2279 at [29].

<sup>14</sup> The test is that the appeal must be allowed if the Judge: (a) made an error of law or principle; (b) failed to take into account a relevant consideration; (c) took into account an irrelevant matter; or (d) was plainly wrong; *Parker v R*, above n 11, at [29]–[30]. However, also see *M (SC 13/2023) v R*, above n 7, at [47] where the Supreme Court queried whether the second stage is truly a discretionary exercise, rather than evaluative.

Judge's decision on the threshold evaluation, I should go on to exercise afresh the discretion at the second stage.

### **Background to the appeal**

[11] LG Electronics Inc is a global electronics company. Its presence in the Pacific is managed by LG, an Australian company, which has a sales and marketing branch in New Zealand. At the relevant times, Mr Kim was the Country Manager of the New Zealand branch.

[12] In 2020, the Commerce Commission was investigating potential anti-competitive conduct in the supply of consumer televisions. A key focus of the investigation was communications between manufacturers, such as LG, with retailers. As part of the investigation, the Commission issued a notice under s 98 of the Commerce Act 1986 requiring LG to provide it with certain communications. LG's response omitted instant messages such as those sent via Facebook and WhatsApp chats. The Commission queried that omission and required LG to provide these messages.

[13] Mr Kim told certain employees that before handing over their phones to the Commission they should delete any messages that might be an "issue". Two employees did so.

[14] In January 2021, the Commission received an anonymous tip that Mr Kim had instructed the deletion of material. Mr Kim and the two employees who deleted material were charged. Some, but not all, deleted messages were recovered. Those recovered did not disclose incriminating material. The Commission does not allege that the unrecoverable messages would have disclosed Commerce Act breaches.<sup>15</sup>

[15] The Commission's investigation into anti-competitive conduct concluded in or about June 2022 with no charges being laid.

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<sup>15</sup> This was one of the agreed facts for Mr Kim's sentencing. The Crown rejects that this goes so far as the Commission accepting there was no incriminating material as opposed to not being in a position to allege this in the absence of recovering it.

[16] The two other employees who deleted the messages were discharged without conviction on charges of failing to comply with a notice under s 98 of the Commerce Act.<sup>16</sup> One of the employees was granted permanent name suppression to protect his health and the health of his vulnerable daughter. Whata J declined name suppression for the other, Mr Clarke, whose application was advanced on the basis that publication of his name would identify those involved who continued to have name suppression.<sup>17</sup>

[17] Mr Kim subsequently sought a discharge without conviction on the more serious charge he faced for attempting to obstruct the course of justice.<sup>18</sup> One of the facts accepted for the purposes of sentencing was that, in instructing employees to delete material, Mr Kim was following the direction of a more senior LG executive. That was a fact not negated by the Crown beyond reasonable doubt in a disputed facts hearing prior to sentencing. It is appropriate to emphasise that LG strongly disputes that Mr Kim was acting on the instruction of another executive.

[18] Following charges being laid, Mr Kim was required to remain in New Zealand and was suspended from his LG employment on a base remuneration. His wife and two children moved to Canada. The Judge accepted that if he was convicted Mr Kim would not be admitted to Canada and the family's permanent residence application would likely be declined.<sup>19</sup> Mr Kim would have to return to South Korea with serious downstream consequences for the whole family, including the impact on his wife who had been diagnosed with depression arising from the stresses of the prior years. Mr Kim was discharged without conviction because these consequences were disproportionate to Mr Kim's offending.<sup>20</sup>

## **The appeal**

### *District Court decision*

[19] As noted earlier, Mr Kim sought name suppression in the District Court on the basis that publication of his name would cause him extreme hardship.<sup>21</sup>

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<sup>16</sup> An offence under Commerce Act 1986, s 103(1)(a)

<sup>17</sup> *Clarke v R* [2023] NZHC 3175.

<sup>18</sup> Kim suppression decision, above n 2, at [22].

<sup>19</sup> At [20]–[22].

<sup>20</sup> At [22].

<sup>21</sup> At [26].

[20] The Judge accepted that in South Korean culture there is a “widespread feeling of shame if anyone is convicted of a criminal offence” and that publication would cause significant shame.<sup>22</sup> He accepted that publication of Mr Kim’s name in association with the offence, even though a discharge deems him acquitted, would cause him and his family some difficulty among Korean communities wherever he settles.<sup>23</sup>

[21] Mr Kim and his wife deposed that a prospective employer in Canada would undertake background checks from which they would learn of Mr Kim’s connection to the offence of attempting to obstruct the course of justice, and that an employer in the suitable employment fields of accounting or financial analysis would not employ a person with such a connection. Mr and Mrs Kim said that, as a consequence, they would be unable to afford their children’s tertiary education, which would be “devastating”.

[22] The Judge regarded the asserted employment consequences as speculative. He emphasised that there was nothing in the way of evidence from “anyone who specialises in the placement of persons of the defendant’s seniority in companies” to support it.<sup>24</sup>

[23] Mr Kim referred to the effect on his wife of the consequences of publication, given her recent depression and corresponding vulnerability. The Judge accepted that Mr Kim’s wife “will have suffered a considerable amount of stress as a result of the family being split and the defendant being detained in New Zealand, effectively by these proceedings”.<sup>25</sup> However, he noted that this would shortly come to an end and the family will be reunited.<sup>26</sup>

[24] Overall, the Judge was not satisfied that the consequences of publication would be any more than would be suffered by anyone else who appeared in court for a criminal charge. Accordingly, the extreme hardship threshold was not met. The Judge

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<sup>22</sup> At [30].

<sup>23</sup> At [30].

<sup>24</sup> At [29].

<sup>25</sup> At [33].

<sup>26</sup> At [33].

noted that there are many cases that hold that employment consequences are not to be elevated to the point of extreme hardship.<sup>27</sup>

[25] The Judge went on to say that if he was wrong on the threshold, he would not have granted name suppression in his discretion because of the significant public interest in a case of this nature.<sup>28</sup>

*Application to adduce further evidence on appeal*

[26] Mr Kim applies for leave to adduce further evidence on appeal. He seeks to rely on an affidavit of Sarah Byron-Wood, a New Zealand recruitment consultant. Ms Byron-Wood provides expert evidence on the effect of publication on Mr Kim's prospects of securing employment in the financial or accounting fields.

[27] The approach to the admission of evidence on appeal is well settled.<sup>29</sup> The evidence must be fresh, in the sense that it could not, with reasonable diligence, have been obtained at the original hearing. However, despite this requirement, the overarching consideration will remain the interests of justice. The evidence must be sufficiently credible, and cogent in that, had it been available, it may potentially have reasonably led to a different finding by the Court from which the appeal lies.<sup>30</sup>

[28] The Crown submits the evidence is not fresh as it could have been obtained or produced earlier. Mr Mount KC for Mr Kim accepts the evidence could have been obtained at the time of the District Court hearing when the discharge and name suppression applications were addressed together. But he submits such a course would have been unrealistic. He says that it was only once Mr Kim knew the outcome of the discharge without conviction application that the need for any evidence as to employment consequences arose.

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<sup>27</sup> At [34].

<sup>28</sup> At [35].

<sup>29</sup> See the statements of principle in *Grace v R* [2024] NZCA 571 at [22], citing *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273.

<sup>30</sup> *Lundy v R*, above n 29, at [120], cited with approval in *Ellis v R* [2021] NZSC 77 at [29].

[29] This stretches the concept of what is “fresh” evidence. However, Mr Mount’s submission has substantive merit in the sense that the appropriate scope and focus of the expert evidence was impacted by the outcome of the discharge application.

[30] The Crown submits that, in any event, the further evidence is not credible, “at least in the sense of being sufficiently probative.” The Crown emphasises that the evidence does not address some important aspects. Such criticisms have justification, as I will come to. However, I find the evidence credible (in the sense that the opinions are genuine) and the aspects on which the expert does comment are substantially helpful to me.<sup>31</sup> Ms Byron-Wood has experience with recruitment processes in New Zealand, but not in Canada. While that tends to undermine her qualification as an expert in the Canadian market, she says, and I accept, that there is no reason why the position would be different there on the matters she comments on.

[31] In his decision, the Judge emphasised the lack of expert evidence to support Mr Kim’s key contention as to the employment consequences of publication and linked this to its speculative nature.<sup>32</sup> Absence of expert evidence may have had a material impact on the Court’s ability to assess the employment consequences.<sup>33</sup> In my view, its admission may avoid the risk of a miscarriage of justice. I grant leave for the evidence to be adduced.

### *Grounds of appeal*

[32] Mr Kim appeals on the basis that:

- (a) the Judge applied the wrong threshold test under s 200(2)(a) of the Criminal Procedure Act;
- (b) the Judge erred in concluding that employment consequences per se could not meet the threshold of extreme hardship; and

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<sup>31</sup> Compare *Bader v Housing NZ Corporation* [2016] NZHC 974 at [19]–[20].

<sup>32</sup> Kim suppression decision, above n 2, at [29]–[30].

<sup>33</sup> Compare *Grace v R*, above n 29, at [24].

- (c) the Judge was wrong to determine the s 200(2) threshold test was not met.

*Discussion of Grounds One and Two: Wrong threshold test/effect of employment consequences*

[33] Mr Mount submits the Judge applied the wrong test under s 200(2)(a). He relies on the way the Judge articulated the threshold in terms that the defendant must show that “it *would cause* extreme hardship to him if his name was published”, whereas the wording of the section requires that publication “*would be likely to cause*” extreme hardship. Mr Mount notes that the Judge did not correct this error in his later reasoning. Mr Mount therefore submits the inference is that the Court asked itself the wrong question, and that this error alone is sufficient to require the Court to reassess the application afresh.

[34] The Crown says that the omission of this word from the oral judgment of an experienced District Court Judge does not indicate the Court was unaware of, or did not apply, the correct legal test. Of course, as Mr Mount says, words do matter. However, I apprehend that the experienced District Court Judge will have been well aware of the statutory wording he was referring to and the associated test, with the lacuna in expression arising from the giving of an oral judgment.

[35] On the second ground of appeal, Mr Mount submits the Judge’s comment that there are “many cases which note that employment consequences are not to be elevated to the point of extreme hardship” is contrary to the decision of the Court of Appeal in *H (CA134/2022) v R*.<sup>34</sup> He refers to *X (CA588) v R*, where the Court of Appeal made an order for permanent name suppression on the basis that publication of the applicant’s name would cause him to lose his job and suffer serious financial hardship.<sup>35</sup> To the extent that the Judge was suggesting that, as a matter of law, employment consequences cannot constitute or found a finding of extreme hardship, that is in error.

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<sup>34</sup> *H (CA134/2022) v R* [2022] NZCA 220 at [30], cited in *Strange v R* [2024] NZCA 200 at [19].

<sup>35</sup> *X (CA588/2020) v R* [2021] NZCA 331 at [27].

[36] However, the above two grounds of appeal are really a side-show. The Judge's conclusion was that the asserted consequences for Mr Kim's employment were speculative (and hence so too were the indirect consequences to him in terms of impact on his family). The Judge was not satisfied that the consequences of publication were more than would be suffered from anyone else who appeared in court on a criminal charge. On appeal, I am invited to find he was wrong in his conclusion on whether the threshold of extreme hardship is met, including with the benefit of the further evidence. I turn to that principal issue.

*Submissions on Ground Three: Whether extreme hardship test is met*

[37] Mr Mount submits that the cumulative employment, financial, education, health and cultural consequences for Mr Kim and his family meet the threshold of extreme hardship.<sup>36</sup> Section 200 requires an assessment of the effects of publication on the defendant. Negative impacts on close family members also impact on the defendant. Therefore, hardship suffered by those closely connected to a defendant is relevant to the s 200 threshold assessment.<sup>37</sup>

[38] It is common ground that the Commission will issue a media release about the prosecution of Mr Kim for the conduct leading to the discharge. Mr Mount submits that were Mr Kim to be named, this would significantly impact his employment prospects, even if the media release detailed that he was discharged without conviction.

[39] Mr Kim is the primary income earner in his family. Without suitable employment, he says he will be unable to pay the university tuition fees for his son, or his daughter who is in her last year of school and intends to study at university. Mr Kim says that it is deeply important to him and his wife that his children attend university. He says that in South Korean culture tertiary education is particularly important, as is a parent's role in providing the means for this. This is supported by expert evidence.

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<sup>36</sup> *X (CA226/2020) v R* [2020] NZCA 387 at [40].

<sup>37</sup> *C (CA436/2022) v R* [2022] NZCA 460 at [17]–[18].

[40] Mr Mount submits Mr Kim's culpability is very low on the spectrum of offending for the charge of attempting to obstruct the course of justice. His offending was not premeditated but a momentary lapse of judgement. He says he was following orders from above and took no steps further than instructed. He did not act for personal gain. In addition, Mr Mount submits Mr Kim has strong personal mitigating factors, including his guilty plea, character, remorse, low risk of reoffending and full compliance with the Commission's investigation into LG. Mr Mount says publication would convey greater seriousness than is justified.

[41] This context relates to a further cultural dimension that in South Korea it is not customary to have details of offences, other than very serious offences, published. Mr Kim says that being seen as a criminal is deeply shameful in the Korean community. Despite his conduct being of, in his view, relatively low seriousness, he will be viewed as a serious criminal. Mr Kim says that this cultural aspect will make the shame and embarrassment flowing from publication greater in the Korean community.

[42] Mr Kim's affidavit also highlights the hardship on his wife since she moved to Canada on her own in 2022. Mr Mount submits that if the family suffered the shame of publication and Mr Kim were also unable to pay for his children's university, this would "further imperil Mrs Kim's mental health" in light of her diagnosis with depression. There is an affidavit from Mrs Kim and a report from a medical professional she has been seeing that support that she has been diagnosed with depression and is vulnerable to stress.

*Discussion of Ground Three: Whether extreme hardship threshold is met*

[43] The Judge was correct that the evidence advanced by Mr Kim at the hearing as to the employment consequences for him of publication was not sufficiently supported and was speculative. However, I now have the expert evidence of Ms Byron-Wood. Her evidence is as follows:

- (a) In New Zealand, in professional services areas, including finance and accounting roles, a conviction for obstructing, or attempting to obstruct, the course of justice would be viewed as a serious matter and would

likely mean that a candidate would not proceed past an initial screening phase.

- (b) Although Mr Kim was not convicted, if potential employers/recruiters knew of Mr Kim's guilty plea, it is unlikely he would secure a senior role, despite his discharge without conviction.
- (c) Background checks, including internet searches, are commonly used in recruitment processes, particularly in the finance and accounting sector.
- (d) Such a check would likely find a media release by the Commission on Mr Kim's guilty plea or other media, and the impact of this on his employment prospects would not be lessened significantly by the fact that there was a discharge, due to the nature of the offence, which would be viewed as serious and potentially harmful to the business of an employer, should clients find out.
- (e) Mr Kim's age (46 years old) and English being his second language places him at a comparative disadvantage. Publication would mean it is very unlikely that he would be able to find suitable employment in the field of accounting or finance.

[44] With the benefit of this expert evidence, I accept there is a real and appreciable risk that in the absence of name suppression, Mr Kim would not get through initial background check screening for what he describes as a suitable finance and accounting role in Canada. I accept that there is a real risk that cannot readily be discounted that background checks would pick up a media release by the Commission and any associated media reporting.<sup>38</sup> I have considered the Crown's objection that the expert does not have experience in the Canadian recruitment market. As I commented earlier, Ms Byron-Wood fairly says that there is no reason to believe that the Canadian market is different.

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<sup>38</sup> The expert does not address this, but it is implicit in her evidence.

[45] While accepting the expert evidence, I have concluded that the consequences set out by Ms Byron-Wood, together with the other consequences relied upon, do not meet the threshold test of extreme hardship in s 200.

[46] First, on the key consequence of claimed inability to obtain suitable work in the finance and accounting fields, I am not satisfied that the ultimate outcome of Mr Kim's applications would be any different in the counterfactual of "no publication." In stressing the importance of reputation and the effect of a guilty plea for dishonesty offending in these fields, Ms Byron-Wood does not touch on the obvious corollary of whether, if such an applicant were to get past a background check, they would nonetheless be likely to be asked or obliged to disclose this information in the application or interview process.

[47] Mr Mount submits that it was for the Crown to put up evidence to that effect. I do not accept this, at least in the context of the present case. There is no "onus" on the applicant under s 200. However, the defendant has an evidential burden and I need to be satisfied the section's threshold is met.<sup>39</sup> The question of whether Mr Kim's guilty plea would likely emerge in any event through the usual questioning in the recruitment process is somewhat conspicuous by its absence in expert evidence directed at assisting the Court on the s 200 enquiry.<sup>40</sup>

[48] Ms Byron-Wood stresses the significance to recruitment in the professional services area of an applicant having admitted conduct of the present nature. For Mr Kim, who would be applying in the context of having been suspended from his most recent employment for several years while his charge was dealt with, common sense suggests that Mr Kim would not get through the process without the details of the charge and plea emerging, accepting that Mr Kim would be honest in his answers.<sup>41</sup>

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<sup>39</sup> *Farish v R* [2024] NZSC 65, [2024] 1 NZLR 223 at [27], citing *Robertson v Police*, above n 3, at [44].

<sup>40</sup> Ms Byron-Wood's brief is limited to giving her opinion on "the employment consequences if Mr Kim's name were published online in connection with a guilty plea to the offence of attempting to obstruct the course of justice".

<sup>41</sup> I note that, in *ASG v Hayne* [2016] NZCA 203 at [30]–[32], the Court of Appeal considered that a security guard who had received a discharge without conviction and name suppression owed a duty to disclose his offending for indecent assault to his employer under the Employment Relations Act 2000. On appeal, the Supreme Court declined to address this aspect: *ASG v Hayne* [2017] NZSC 59, [2017] 1 NZLR 777. I do not know what the position is in Canada of duties of disclosure of prospective employees.

It is true that in the context of such an interview, Mr Kim would be in a position to explain the specific nature of the conduct. However, Ms Byron-Wood's evidence is to the effect that it is the nature of the offence itself that would be viewed as too serious by an employer for Mr Kim to be employed.

[49] Accordingly, I am not satisfied that the outcome for Mr Kim's employment would be any different in the counterfactual of "no publication." I did not understand Mr Kim to suggest that, if I put employment and downstream consequences to one side, there was sufficient to meet the threshold of extreme hardship.

[50] Second, even if the above conclusion is not correct, I am not satisfied that the claimed cumulative circumstances summarised above reach the high threshold of extreme hardship. If an explanation by Mr Kim of the nature and circumstances of his conduct would indeed overcome the fact of the guilty plea for such an offence, it is open to Mr Kim to front foot this in his initial applications. Moreover, it is not suggested that Mr Kim will be unable to obtain employment in Canada. The focus is on the difficulty he may face in obtaining suitable employment at a sufficiently senior level in the accounting and finance fields. This consequence, and the potential downstream effects on the family's lifestyle, are usual consequences of publication.

[51] Mr Kim's evidence outlines the present costs of university fees and accommodation for Mr Kim's son, with over half of the cost relating to accommodation in Toronto. His daughter intends to start tertiary education after her present final year of school. Even if the employment consequences for Mr Kim are as suggested, the evidence does not enable me to be satisfied that there is a real and appreciable risk that the children will be unable to complete tertiary education at all. For example, the cost of such education can be minimised by studying close to home and part of the cost could be met by the children. Both parents are able to work.

[52] The high points for the contention that the cumulative circumstances meet the extreme hardship threshold are the added cultural dimensions Mr Kim relies upon and the effect on Mrs Kim. It is said that Mrs Kim's depression will make her particularly vulnerable to the cultural impacts of the reporting of the prosecution and of being unable to fund the children's education. It is said her depression will exacerbate for

her the effects flowing from Mr Kim's prospective inability to obtain suitable employment.

[53] In my view, the affidavit evidence overstates the prospect of the New Zealand news release and associated news media becoming widely known in the Kims' community in Canada and having an impact there. I observe that the primary emphasis in the evidence was on the effect of such reporting if Mr Kim returned to South Korea. Regardless of whether reports of Mr Kim's conduct are accessed outside New Zealand, fair reporting will include that Mr Kim has been discharged without conviction.

[54] The circumstances for Mrs Kim have been that she has had to cope alone in Canada with the particular uncertainties over what would be the outcome of the charges and whether Mr Kim would be required to return to South Korea. She will now have his support in Canada, the family will be reunited, and there will be an ability to move on. She is having treatment and is on medication. If it transpires that the Kims cannot meet the costs presently estimated for tertiary education in Toronto, I accept that will be a stressor, particularly in light of the cultural dimension that parents are expected to pay. The importance of the children's education is presented as Mrs Kim's key concern, but I am not satisfied that the employment consequences will likely result in the children being unable to undertake tertiary education at all.

[55] Ultimately, I do not consider that all the consequences identified in combination with Mrs Kim's fragility are so different in degree to the usual consequences of publication to constitute extreme hardship, given the high threshold.

[56] For completeness, and in contrast to some cases,<sup>42</sup> publication will not undercut the benefit of Mr Kim's discharge without conviction because of the degree to which that turned on the immigration consequences of conviction.

[57] Because I have concluded the threshold test is not met, it is unnecessary for me to exercise my discretion at the second stage of the test.

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<sup>42</sup> For example: *R v S* [2022] NZHC 2944 at [42]–[45].

## **Result**

[58] The appeal is dismissed.

## **Interim suppression**

[59] Mr Mount advised that if the appeal was unsuccessful, he was likely to have instructions to seek leave to appeal to the Court of Appeal. There is a similar position concerning an appeal by LG in a judgment issued in parallel with this.

[60] In the circumstances, I make interim orders continuing the interim suppression respectively of Mr Kim's name and identifying particulars and that of LG:

- (a) for 20 working days (to enable an application for leave to be filed either by Mr Kim or by LG in respect of its related judgment); or
- (b) the relevant appeal in respect to the relevant appellant is finally determined if notice is filed by that date and leave is given.

[61] The appeal is dismissed.

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Anderson J