IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA654/2024
[2024] NZCA 647

BETWEEN	CERI LEE EVANS Appellant
AND	THE KING Respondent

Hearing: 12 November 2024

Court: Collins, Dunningham and Powell JJ

Counsel: I G Hunt for Appellant
T R Simpson for Respondent

Judgment: 10 December 2024 at 11 am

JUDGMENT OF THE COURT

A The application for an extension of time is granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] In 1984, Dr Ceri Evans was convicted in the Ashburton District Court on a charge of careless driving.[1] He was fined and ordered to attend a defensive driving course which he completed in Dunedin where he was, at the time, studying medicine.

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[1] Transport Act 1962, s 60.

[2] In 2023, Dr Evans sought leave to appeal his conviction out of time. His objective was to be discharged without conviction because of the embarrassment and inconvenience caused to him by the conviction when he travels overseas for his work commitments. He also applied to have his name and identifying details suppressed under s 200 of the Criminal Procedure Act 2011 (CPA), and the evidence and submissions related to the appeal suppressed under s 205 of that Act.

[3] The applications for leave to appeal out of time and for name suppression were declined by Harland J on 12 August 2024.[2] Dr Evans now appeals the refusal to grant him name suppression.

Extension of time

[4] Counsel for Dr Evans attempted to file a notice of appeal against both decisions of Harland J on 9 September 2024. The conviction appeal was rejected for filing by the Registry for want of jurisdiction. The Registrar indicated however that Dr Evans had a right of appeal against the suppression decision contained in s 284 of the CPA. The Registrar asked counsel to complete the suppression appeal form if Dr Evans wished to proceed with that appeal, and the notice of appeal against the suppression decision was accepted for filing on 3 October 2024.

[5] The fresh notice of appeal was out of time pursuant to s 285(2) of the CPA. We treat the notice as if it contains an application for an extension of time per r 8.5 of the Criminal Procedure Rules 2012 and, given the delay is short, there is no opposition from nor prejudice to the respondent, and the applicant attempted to file within time, we grant an extension accordingly.

Background

[6] With the passage of time, it is difficult to completely reconstruct what was in issue and how the careless driving charge was resolved. The court records that have been located show that after Dr Evans was charged, he appeared in the Ashburton District Court on 16 July 1984. The proceeding was adjourned to

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2 *Evans v Police* [2024] NZHC 2249 [High Court judgment].

30 July when a not guilty plea was entered, and a hearing allocated for 10 September. On the day of the hearing, Dr Evans was convicted, fined $75, ordered to pay court costs of $20 and a witness fee of $13. He was, as we have noted, also ordered to complete a defensive driving course.

[7] Dr Evans deposed that he worked with a duty solicitor but that he could not recall being advised of the option of applying for a discharge without conviction.

[8] Since his conviction, Dr Evans has led an impeccable and very successful life. He has not incurred any other convictions. His professional career was described by Harland J in the following way:

> [6] The applicant is an exceptionally talented and successful consultant psychiatrist. His curriculum vitae is impressive. It reveals not only excellent academic qualifications but considerable experience providing forensic psychiatry services that have no doubt benefited not only those he has treated, assessed or taught but also the community.
>
> [7] In addition to his clinical work, the applicant has worked extensively as a high-performance consultant in New Zealand and internationally. His consultancy services have been provided to many different sectors and have included providing assistance to government, military, police, corporate, industrial, sporting, educational, medical and legal entities.
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> [8] The applicant's clients have included:
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> (a) in New Zealand, national sports teams, including the All Blacks since 2010 and Olympic athletes;
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> (b) in the United States, a team in the National Basketball Association (NBA) Basketball competition;
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> (c) in the United Kingdom, Formula One racing and an English Premiere League Football team; and
>
> (d) in Australia, National Rugby League (NRL) and Australian Football League (AFL) teams.
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> [9] The applicant also regularly delivers keynote addresses and provides workshops focusing on high performance. He frequently travels overseas to do this.
>
> [l0] The applicant's work with sports teams is due to increase significantly in 2024 and will require him to travel overseas. This requirement is particularly relevant and part of the contractual obligations he owes to his clients.

[9] The extensive travel Dr Evans undertakes requires him to declare his conviction as a prerequisite to entering Australia and the United States. This is because the Criminal Records (Clean State) Act 2004 (the Clean Slate Act), which applies to Dr Evans' conviction[3] does not apply when a person with a conviction in New Zealand seeks to enter another country and is required to disclose their convictions. We will examine aspects of the Clean Slate Act at [53]–[60].

[10] Dr Evans estimates he has declared his conviction approximately 100 times when entering Australia. This causes him embarrassment and inconvenience. In June 2023 when Dr Evans was entering Australia, a border control officer told Dr Evans to "address" his historic conviction, because the Australian Border Force was "wasting time" on a matter that had been reviewed multiple times.[4] When he travelled to the United States for work, Dr Evans was required to attend an interview at the United States Consulate in Auckland prior to obtaining a visa. He was asked about his historic conviction. Although the evidence is not clear, Dr Evans' understanding is that he may have to explain his conviction in any subsequent application for a visa to work in the United States.

High Court judgment

[11] The application for leave to appeal out of time was based upon s 115(2) of the Summary Proceedings Act 1957.[5] It was argued that Dr Evans' conviction, and the continuing implications of that conviction, constituted a miscarriage of justice.[6]

[12] After reviewing the authorities relevant to applications to appeal out of time under the Summary Proceedings Act, Harland J concluded that Dr Evans had not satisfied the relevant criteria. In particular, she concluded:

(a) the merits of the proposed appeal were not strong;[7] and

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3 Criminal Records (Clean Slate) Act 2004 [Clean Slate Act], s 6.
4 High Court judgment, above n 2, at [12]–[13].
5 See Criminal Procedure Act 2011, s 397.
6 Summary Proceedings Act 1957, s 115(2). While the phrase "miscarriage of justice" was not defined in that Act, cases have applied the definition contained in s 232(4) of the CPA to appeals under that Act: see for example *Thomas v Police* [2022] NZHC 3622 at [35].
7 High Court judgment, above n 2, at [69].

(b) the length of the delay in making the application weighed against granting the application.[8]

[13] The Judge also explained that even if leave to appeal out of time was granted, she would have declined the application for a discharge without conviction because the direct and indirect consequences of the conviction were not out of all proportion to the gravity of the offending.[9] On the contrary, Dr Evans' conviction has had no genuine impact on his abilities to travel. The conviction has meant Dr Evans has suffered embarrassment and inconvenience when having to explain his conviction to border control officials, but this has had no impact on his ability to fulfil his travel commitments.[10] The Judge also commented that she did not consider that a miscarriage of justice had occurred.[11]

[14] Harland J dealt with Dr Evans' application for name suppression under s 200(2)(a), (g) and (f) of the CPA. There was also an application under s 205(2)(e) of the CPA to suppress submissions and evidence relating to the proposed appeal.[12]

[15] For present purposes, it is sufficient to record that under s 200(2)(a), (f) and (g) of the CPA, a court may make an order forbidding publication of the name, address or occupation of a person who is convicted of an offence, only if the court is satisfied that publication would be likely to:

(a) cause extreme hardship to the person … convicted of … the offence, or any person connected with that person; or

…

(f) lead to the identification of another person whose name is suppressed by order or by law; or

(g) prejudice the maintenance of the law, including the prevention, investigation, and detection of offences; …

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8 At [76].
9 At [76].
10 At [69].
11 At [77].
12 We will at [67]–[70] address the Crown's argument that the application should have been considered under s 46 of the Criminal Justice Act 1954.

[16] Section 205(2)(e), which concerns applications to suppress evidence and submissions, is identical to s 200(2)(g) of the CPA.

[17] Name suppression applications under the CPA involve a two-stage analysis. The first requires the court to be satisfied that one of the threshold grounds listed in s 200(2) of the CPA has been established. If so, the second stage requires the court to determine whether, in the exercise of its discretion, it should prohibit publication of the applicant's name.[13]

[18] Harland J correctly explained that the risk of reputational damage to Dr Evans and organisations with which he is associated failed to satisfy the high "extreme hardship" threshold set by s 200(2)(a) of the CPA.[14]

[19] The Judge also correctly noted that s 200(2)(f) of the CPA was not engaged because declining Dr Evans' application would not "lead to the identification of another person whose name is suppressed by order or by law".[15] Rather, the suppression would be for the benefit of Dr Evans himself and not another person.[16]

[20] The submission based upon s 200(2)(g) was that dismissing Dr Evans' application for name suppression would have the effect of subverting the consequences of the Clean Slate Act, thereby causing "prejudice to the maintenance of the law".[17] The Judge described this submission as "novel".[18]

[21] The Judge noted that the scheme of the Clean Slate Act is directed toward eligible individuals being permitted to avoid disclosure when asked about previous convictions.[19] She concluded that "the Clean Slate Act does not confer suppression, rather it provides a scheme to limit the effect of an individual's convictions if the individual satisfies relevant eligibility criteria".[20] The Judge considered that the effect

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13 *Fagan v Serious Fraud Office* [2013] NZCA 367 at [9]; and *Robertson v Police* [2015] NZCA 7 at [39]–[41].
14 High Court judgment, above n 2, at [62], [64] and [90]–[91].
15 Criminal Procedure Act, s 200(2)(f).
16 High Court judgment, above n 2, at [93].
17 Criminal Procedure Act, s 200(2)(g).
18 High Court judgment, above n 2, at [95].
19 At [97], citing *Kerr v Dominion Post* HC Wellington CIV-2007-485-2243, 12 February 2008 at [4].
20 High Court judgment, above n 2, at [102].

of s 19 of the Clean Slate Act puts an individual on notice that their criminal history can be discussed in civil and criminal proceedings where relevant.[21] If the individual considers that hardship will result and that their name should be suppressed, they will still need to seek suppression under the relevant provisions in the CPA.[22] And further, s 21 of the Clean Slate Act does not alter the need for the statutory test in the CPA to be met before an application for suppression can be granted.[23] Accordingly, s 200(2)(g) of the CPA was not engaged and there was no need to consider the second, discretionary stage that courts must evaluate before granting applications for name suppression under the CPA.

[22] In light of this conclusion, Harland J also did not need to consider the application under s 205(2)(e) of the CPA.[24]

[23] On 15 August, three days after having issued her substantive judgment, Harland J issued a minute granting Dr Evans interim name suppression pending determination of this appeal.

Grounds of appeal

[24] As we have noted [3], Dr Evans appeals only the decision declining his application for name suppression. He does so on the basis that the Judge erred in her analysis and application of s 200(2)(g) of the CPA.

[25] Mr Hunt, who appeared for Dr Evans in this Court, accepted that if s 200(2)(g) of the CPA was not engaged then the appeal would have to be dismissed. If it was engaged however, then Mr Hunt submitted we should exercise our discretion under s 200 of the CPA to suppress Dr Evans' name and identifying particulars.

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21 At [103]. The Judge commented that s 19 of the Clean Slate Act requires an individual to state their criminal record if it, or information about it, is relevant to any criminal or civil proceedings and that publication is assumed to follow disclosure in open court.

22 At [107].

23 At [108]. Section 21 of the Clean Slate Act governs the relationship of the Act to other provisions. Its effect is that any reference in legislation, rule of law, or documents referring to an individual's criminal record must be interpreted in a way that is consistent with the clean slate scheme: see High Court judgment, above n 2, at [101]; and Mathew Downs (ed) *Adams on Criminal Law — Criminal Records (Clean Slate)* (online ed, Thomson Reuters, updated to 23 October 2024) at [CSIntro.08].

24 High Court judgment, above n 2, at [110].

Crown's position

[26] As we have foreshadowed, the Crown submits:

(a) there was no jurisdiction to determine Dr Evans' name suppression application under the CPA;

(b) in any event, s 200(2)(g) was not engaged, and even if it was, there is no basis for this Court to exercise its discretion in favour of Dr Evans; and

(c) even if the application was considered under s 46 of the Criminal Justice Act 1954, it would still fail to satisfy the criteria for name suppression.

[27] With regard to jurisdiction, Ms Simpson for the Crown submitted that s 397 of the CPA applies to this case and that any jurisdiction to appeal the name suppression judgment must reside in the law that applied in 1984.

[28] The relevant portions of s 397 of the CPA provide:

> **397 Proceedings commenced before commencement date**
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> (1) This section applies to proceedings—
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> (a) commenced before the commencement date; and
>
> (b) not finally determined (including any rehearing, retrial, or appeal) before the commencement date.
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> …
>
> (3) For the purposes of subsection (1), a proceeding has commenced if—
>
> (a) an information has been laid in accordance with the Summary Proceedings Act 1957 in respect of an offence:
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> …

[29] It was contended by the Crown that as the charge was commenced in 1984 under the Summary Proceedings Act, and as the application for leave to appeal out of time was lodged in 2023, the effect of s 397(1)(b) is that the charge had not been finally

determined before the relevant provisions of the CPA came into force on 1 July 2013. Accordingly, the application for name suppression could only be determined in accordance with the law that applied prior to the CPA coming into force. Ms Simpson submitted that meant s 46 of the Criminal Justice Act applied. That section provided:

> (1) Except as otherwise expressly provided in any enactment, the Court may in its discretion prohibit the publication, in any report relating to any proceedings in respect of any offence, of the name of the person … convicted of the offence …
>
> (2) Where the publication of any person's name is prohibited under this section it shall not be lawful to publish that person's name, or any name or particulars likely to lead to the identification of that person.
>
> …

[30] Ms Simpson also submitted that there was a further obstacle to Dr Evans' appeal posed by s 115 of the Summary Proceedings Act:

> (1) Except as expressly provided by this Act or by any other enactment, where on the determination by a [District] Court of any information … any defendant is convicted … , the person convicted … may appeal to the [High] Court.

[31] Ms Simpson contended that the effect of s 115 of the Summary Proceedings Act was that:

> [W]hile the High Court would have had jurisdiction to grant an order for name suppression under s 46 of the [Criminal Justice Act] and suppression of submissions under s 375 of the Crimes Act 1961, there appears to be no route available to [Dr] Evans to appeal the refusal of such orders to this Court.

Analysis

[32] We will deal with the following four questions:

(a) Is there jurisdiction for us to hear the appeal under the CPA from the decision declining Dr Evans' application for name suppression?

(b) If so, is the threshold ground in s 200(2)(g) of the CPA engaged?

(c) If it is, should the discretion to grant name suppression be exercised?

(d) If not, should we nevertheless grant name suppression under s 46 of the Criminal Justice Act?

Is there jurisdiction under the CPA?

[33] We accept that the application for leave to appeal the conviction out of time was properly considered under the Summary Proceedings Act. Because there has been no appeal from the dismissal of the conviction appeal, we need not consider the effect of s 115 of the Summary Proceedings Act on that decision.

[34] The name suppression application however is more vexed.

[35] The CPA commenced in two stages. Stage 1 came into effect on 5 March 2012 and included a small number of reforms, including of the law relating to the suppression of names and evidence.[25] Stage 2 came into effect on 1 July 2013 and comprised the remainder of the reforms.[26]

[36] As noted, s 397(2) of the CPA states that where a proceeding has commenced prior to the CPA's commencement, the proceeding must continue in accordance with the law at the time. The question becomes whether an application for name suppression, made after the CPA commenced in relation to a charge to which s 397 applies, is governed by the law at the time the proceeding commenced, or when the application was made.

[37] This Court's decision in *Fawcett v R* suggests the crucial moment is when the proceeding commenced.[27] In that case, the proceeding against Mr Fawcett commenced on 12 November 2012. During the course of the trial in 2014, the Judge made an interim suppression order of the identities of two police officers, which became permanent on 3 March 2014. Thus, at the date the proceeding commenced, the CPA suppression provisions were in force, yet other procedural provisions, such as appeal pathways, were not.

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25 Criminal Procedure Act Commencement Order 2011 (SR 2011/43). It introduced sub-pt 3 of pt 5 regarding reporting (ss 194–211) and transitional provisions directed to the same subject (ss 390–393).

26 Criminal Procedure Act Commencement Order 2013 (SR 2013/162).

27 *Fawcett v R* [2023] NZCA 183.

[38] In respect of the suppression order made by the Judge in March 2014, this Court said as follows:[28]

> [22] The fact that the suppression order itself was made under the [CPA] makes no difference to this analysis. That is because different parts of the [CPA] came into force at different times. The provision under which Gendall J made the order — s 202 of the [CPA] — came into force on 5 March 2012. Unlike s 283, it was thus already in force when the proceeding against Mr Fawcett commenced in November 2012 and so outside the scope of the transitional provisions.

Fawcett could be said to support the notion that it is the time the proceeding commences which determines what provisions will apply.

[39] In *Ellis v R*, the Supreme Court was required to consider whether and what suppression orders should continue in respect of proposed additional evidence which the Crown sought to admit on appeal.[29] The appellant had been convicted in 1993 for sexual offending against children at the crèche where he worked. He was sentenced to 10 years' imprisonment[30] and in 2000, this Court dismissed his appeal.[31] In 2019, Mr Ellis was granted leave to appeal to the Supreme Court.[32] In addition to applying to admit the additional evidence, the Crown sought to lift the suppression orders associated with the evidence.

[40] Relevantly, the Court stated that the proceeding was "subject to the law as set out in the Criminal Justice Act 1985 (now repealed), rather than the Criminal Procedure Act".[33] In a footnote, the Court stated:[34]

> Counsel made submissions at the hearing on the suppression provisions of the [CPA]. However, s 397 of the [CPA] provides that proceedings commenced before the commencement date and not finally determined before that date must continue in accordance with the law as it was before the commencement date. The commencement date is 1 July 2013. The present case is an appeal

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28 Footnote omitted.
29 *Ellis v R* [2020] NZSC 137 [*Ellis* (SC)].
30 *R v Ellis* HC Christchurch T9/93 (22 June 1993).
31 *R v Ellis* [2000] 1 NZLR 513 (CA). Mr Ellis had also appealed previously and in a judgment released on 8 September 1994, three of the counts against one complainant were quashed and verdicts of acquittal entered: see *R v Ellis* (1994) 12 CRNZ 172 (CA).
32 *Ellis v R* [2019] NZSC 83.
33 *Ellis* (SC), above n 29, at [11].
34 At [11], n 8.

> from a 1999 Court of Appeal decision, so these proceedings were clearly commenced before the commencement date.

[41] The proceeding against Mr Ellis commenced some time prior to 26 April 1993. The application regarding suppression was made in 2019, after the commencement of the CPA. *Ellis* suggests that where a person is *charged* prior to the commencement of the CPA, the pre-CPA law will apply to adjacent applications. However, as we discuss below, we do not consider this is a blanket rule.

[42] In cases concerning historical offending where the offender has been charged *after* the commencement of the CPA, the CPA provisions apply to procedural matters, while the law as it was at the time applies to the offending. In *W (CA674/2020) v R*, the appellant was charged on 14 September 2020 with indecently assaulting three young students at Dilworth School between 1977 and 1983.[35] Matters regarding suppression were governed by the CPA.[36]

[43] A distinction can be seen in this Court's decision in *Taylor v C*.[37] Mr Taylor had commenced a private prosecution against C, charging him with one count of attempting to pervert the course of justice and eight counts of perjury. The charges related to evidence given by C at the 1990 trial of David Tamihere for the murder of two Swedish tourists. Mr Taylor also applied to revoke or vary an order for name suppression of C made by Tompkins J during Mr Tamihere's trial, which was made to protect C, a serving prisoner, from retribution in the prison community for giving evidence for the Crown.

[44] In the High Court, Fogarty J declined that application.[38] There was a preliminary jurisdictional question: whether the CPA or the Criminal Justice Act governed the Court's jurisdiction to set aside suppression orders.[39] The parties agreed the Court did have jurisdiction:[40]

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35 *W (CA674/2020) v R* [2020] NZCA 677.
36 See [8], [10]–[11] and [16].
37 *Taylor v C* [2017] NZCA 372 at [13] [*Taylor v C* (CA)].
38 *Taylor v "C"* [2016] NZHC 2355 at [43].
39 At [19(a)].
40 *Taylor v C* (CA), above n 37, at [13]. Fogarty J recorded the agreement of parties that the Court had jurisdiction to set aside the order: *Taylor v "C"*, above n 38, at [21].

> While the original order was made under the [Criminal Justice Act], ss 18 and 21 of the Interpretation Act 1999 provided for the continued effect of that order. Fogarty J proceeded on the basis the CJA applied.

[45] On appeal, this Court noted that the immediate question for it was whether it had jurisdiction to consider an appeal against the High Court's determination. It said as follows:[41]

> [21] Does the [Criminal Justice Act] or CPA apply? Sections 138 and 140 of the [Criminal Justice Act] were repealed by the CPA. Section 397 of the CPA provides that where proceedings have been commenced prior to the commencement date of the Act, but not concluded, they must proceed in accordance with the law as it was prior to the commencement date. Section 397 applies to "proceedings". The relevant proceeding in which the 1990 order was made was the prosecution of Mr Tamihere. That proceeding has concluded. Mr Tamihere was convicted and sentenced, and has exhausted his rights of appeal. Section 397 does not extend the life of the [Criminal Justice Act] in relation to the 1990 order.

[46] In this case, Dr Evans' appeal rights are exhausted (and in any event, he does not seek to appeal his conviction any further). The proceeding has therefore concluded. Similarly to this Court's comment in *Taylor v C* that s 397 of the CPA cannot extend the life of the Criminal Justice Act in respect of a suppression order made in 1990, s 397 cannot be said to extend the life of the Criminal Justice Act in respect of a fresh application for suppression.

[47] We do not consider this is altered by *Ellis*.[42]

[48] First, the Supreme Court's comment that the Criminal Justice Act applied was primarily explained in a footnote and did not, in our view, receive the benefit of full exploration. We do not interpret the Court as making an authoritative statement that in all cases where a person is charged prior to the CPA's commencement, every subsequent application in that case must be governed by the pre-CPA provisions.

[49] Secondly, that case concerned an application to adduce fresh evidence, the question being whether existing suppression orders should continue in respect of that evidence. Applications to adduce evidence may go to the core of an appeal, because the outcome of an application to adduce fresh evidence can affect the outcome of any

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41 *Taylor v C* (CA), above n 37.
42 *Ellis* (SC), above n 29.

appeal. In contrast, name suppression proceedings can be said to run parallel to any appeal.

[50] In this case, the charge can no longer be said to exist, for the proceeding has ended. Further, the name suppression application was first made last year, after the commencement of the CPA. In circumstances where the proceeding has ended, and the name suppression application has arisen for the first time, we can see no reason why the Criminal Justice Act would prevail over the CPA.

[51] Unlike the attempt to appeal the conviction, the name suppression application was not a proceeding that was extant, or capable of being revived when the CPA came into force on 1 July 2013, as that application only came into existence last year. In this respect, the application for name suppression was quite distinct from the application for leave to appeal out of time which concerned a proceeding that was commenced before the CPA came into force and was effectively revived through the application to appeal out of time.

[52] Accordingly, s 397(1)(b) of the CPA does not apply to the appeal from the decision declining Dr Evans' application for name suppression, and the application for name suppression and the appeal from that decision are governed by the CPA.

Is s 200(2)(g) of the CPA engaged?

[53] This question hinges on two sub-questions:

(a) does the Clean Slate Act effectively confer suppression upon Dr Evans in respect of his conviction; and

(b) if so, would declining his application be likely to prejudice the maintenance of the law?

[54] The Clean Slate Act establishes a scheme under which an eligible person is deemed to have no criminal record for the purposes of any question asked of him or

her about their criminal record.[43] Such persons are also entitled to have their criminal record concealed by government departments and law enforcement agencies that hold or have access to the person's criminal record.[44]

[55] Because he did not receive a custodial sentence and fulfilled the terms of his sentence, Dr Evans was eligible to receive the benefit the clean slate regime when it came into force in 2004.[45]

[56] Section 14 of the Clean Slate Act states:

> **14 Effect of clean slate scheme on eligible individual**
>
> (1) If an individual is an eligible individual, he or she is deemed to have no criminal record for the purposes of any question asked of him or her about his or her criminal record.
>
> (2) An eligible individual may answer a question asked of him or her about his or her criminal record by stating that he or she has no criminal record.
>
> (3) Nothing in subsection (1) or subsection (2)—
>
> (a) prevents an eligible individual stating that he or she has a criminal record, disclosing his or her criminal record, or consenting to the disclosure of his or her criminal record; or
>
> (b) authorises an individual to answer a question asked of him or her about his or her criminal record by stating that he or she has no criminal record if the question is asked—
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> (i) under the jurisdiction of the law of a foreign country while an eligible individual is outside New Zealand; or
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> (ii) while he or she is in New Zealand but relates to a matter dealt with by the law of a foreign country (for example, a question asked on an application form by the immigration or customs agency of a foreign country).
>
> (4) Subsections (1) and (2) are subject to the exceptions in section 19.

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43 Clean Slate Act, s 4(a), definition of "clean slate scheme" and s 14. Section 7(1) lists the criteria for eligibility. An individual is eligible if they have completed a rehabilitation period; no custodial sentence has ever been imposed; no order has ever been made in relation to them under s 34(1)(b) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 or its previous provisions; they have not been convicted of a specified offence; if they were ordered to pay costs or compensation, the amount is paid in full or deemed remitted; and no order has been made about them under s 65 of the Land Transport Act 1998 or under s 30A of the Transport Act 1962.

44 Section 4(b), definition of "clean slate scheme".

45 Section 7(1)(b). For completeness, we note that Dr Evans met the other criteria contained in s 7(1).

[57] As noted in s 14(4), the Clean Slate Act contains exceptions to the general effect of the clean slate regime. Those exceptions include where the individual's "criminal record or information about the … individual's criminal record is relevant to any criminal or civil proceedings before a court".[46] Thus, the clean slate regime does not apply where a person's conviction that is otherwise subject to the protections of the regime is relevant to any criminal or civil proceeding.

[58] We agree with Harland J's analysis that s 19(3) of the Clean Slate Act means that the regime created by that Act does not also create a suppression regime.[47] Rather, the clean slate regime means that an eligible individual is deemed to not have a criminal record when asked about his or her criminal past. If asked about their criminal record, they can say they do not have one. The effect of the regime is therefore much narrower than a suppression order.

[59] Dr Evans' criminal record was relevant to his name suppression proceeding. Section 19(3)(b) therefore applied, and Dr Evans was required to disclose his criminal record.[48] In other words, the clean slate regime (to the effect that an eligible individual is deemed not to have a criminal record) was displaced in respect of his application to suppress his name in relation with his conviction.

[60] Mr Hunt submitted however that while Dr Evans' criminal record was relevant to the application for leave to appeal out of time, it did not follow that s 19 requires publication or public disclosure of his conviction. We agree, but before there could be an order suppressing publication of Dr Evans' name, he first needed to establish that granting his application was necessary under s 200(2)(g), that is to say he had to satisfy the Court that publication of his name would be likely to prejudice the maintenance of the law.

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46 Section 19(3)(b).

47 High Court judgment, above n 2, at [99]–[102]. The Judge also commented on s 21 on the Clean Slate Act, as we have noted at [21] of this judgment.

48 Clean Slate Act, s 19(1).

Prejudice to the maintenance of the law

[61] Section 200(2)(g) would normally be engaged where it was necessary to suppress publication of the defendant's identity so as not to prejudice police investigations.[49] We accept however that the text of s 200(2)(g) is broader than preserving the efficacy and integrity of criminal investigations.

[62] Risking prejudice to the maintenance of the law could encompass situations where suppression was necessary to preserve the integrity of orders made by a court of competent jurisdiction or to give effect to other legislative provisions.

[63] Dr Evans' application however falls considerably short of establishing likely prejudice to the maintenance of the law if his name is allowed to be published in association with these proceedings. On the contrary, maintenance of the law would be undermined when a person convicted of a criminal offence waits for 40 years before trying to overturn their conviction and, at that person's request, the court hears and considers the application under a cone of silence; at least in so far as the identity of the applicant is concerned. Such an approach is the antithesis of open justice, which the Supreme Court has described as being of constitutional importance and as "fundamental to the common law system of civil and criminal justice".[50]

Second limb — discretion

[64] Our conclusion that Dr Evans' case does not engage the threshold criteria in s 200(2)(g) of the CPA means that it is unnecessary for us to consider in any depth whether the Court should exercise its discretion to grant name suppression.

[65] Suffice to record that even if s 200(2)(g) of the CPA were engaged, we would not have exercised our discretion to order name suppression. The reason for this is that although Dr Evans may suffer some temporary stress and embarrassment if his name is published in relation to these proceedings, that stress and embarrassment falls significantly short of the levels of consequences and outcomes that are normally

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49 Downs, above n 23, at [CPA200.02A(g)].
50 *Erceg v Erceg [Publication restrictions]* [2016] NZSC 135, [2017] 1 NZLR 310 at [2].

required before a court will displace the presumption in favour of an open criminal justice system.

[66] For the same reasons, the application in so far as it relates to the suppression of evidence and submissions related to the appeal under s 205 of the Criminal Procedure Act must also fail.

Criminal Justice Act

[67] While we have established that the CPA applies to the application for name suppression, we briefly traverse the provisions in the Criminal Justice Act. Both counsel agree that s 46 of the Criminal Justice Act afforded the court wider discretion in determining whether to grant a suppression order, as compared to that set out in s 200 of the CPA.

[68] In *R v Liddell*, this Court considered the principles that applied to applications for name suppression under s 140 of the Criminal Justice Act 1985,[51] which replaced s 46 of the 1954 Act. There was little change between ss 46 and 140. The Court in *Liddell* recognised the starting point in deciding whether to grant suppression was:[52]

> … the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as "surrogates of the public". …

[69] The Court also said that what needs to be born upper most in mind is "the prima facie presumption as to reporting is always in favour of openness".[53]

[70] As we have noted, Dr Evans may suffer temporary stress and embarrassment if publicity is given to his failed applications. Those consequences however fall considerably short of the standards required to displace the principles of open justice articulated in *Liddell*.

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51 *R v Liddell* [1995] 1 NZLR 538 (CA).
52 At 546.
53 At 547.

Result

[71] The application for an extension of time is granted.

[72] The appeal is dismissed.

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