

**ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY
PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS
MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE
DATABASE UNTIL FINAL DISPOSITION OF TRIAL.**

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

**CRI-2016-070-001260
[2017] NZHC 337**

BETWEEN DAMIEN OLLIVER, MARGARET
OLLIVER, DANNY TE URA AND
NARII TE URA
Applicants

AND DISTRICT COURT AT TAURANGA
Respondent

Hearing: 3 March 2017

Appearances: R E Harrison QC for Applicants
A J Pollett assisting the Court

Judgment: 3 March 2017

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 3 March 2017 at 4.45 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar

Date.....

[1] The applicants are facing charges alleging violence towards children in their care, including breaches of a protection order and assault. The children are aged 10, 11 and 12 years. The case is set down for a Judge alone trial commencing 6 March 2017. In minute dated 1 March 2017 Judge T R Ingram made a direction requiring that “all defence counsel file written cross-examination questions by 5pm on 3 March 2017”. The defendants say that the Judge lacked the jurisdiction to make the direction. This afternoon they made an oral application for interim relief staying that direction pending determination of intended judicial review proceedings in respect of it.

[2] Ms Pollett, who is acting for the Police in the criminal matter, appeared today by AVL to assist the Court. She does not have instructions from Crown Law in relation to the present application. She advised that the Police had not sought the direction and expressed doubt as to whether jurisdiction existed for the making of such a direction (though cautioning that she did not have instructions from Crown Law regarding a formal position on that issue).

[3] In making his direction the Judge identified the power under s 85 to control cross-examination and focused on the need for defence counsel to be careful and considerate, given the complainants’ ages and language abilities. However, having identified s 85 of the Evidence Act as providing a level of protection in this regard and the Court of Appeal’s recognition in *R v Hetherington* that a fair trial requires the complainant to be able to communicate in a way which best presents his or her evidence to the jury¹, the Judge turned his focus to the current practice in the courts in England and Wales and in particular the (apparently growing) practice of requiring full written questions for cross-examination to be provided in advance of a trial. Referring to the decision in *Lubemba v R*, the Judge said:²

The provision of full written questions for cross-examination to the Court and the Crown at a Ground Rules hearing is now completely uncontroversial in England. Given an undertaking from Crown counsel not to discuss the questions with the witnesses, the English courts have been unable to discern any potential injustice or derogation from fair trial rights in following that course. It is difficult to see how there could be any material difference in fair trial considerations between New Zealand and England.

¹ *R v Hetherington* [2015] NZCA 248.

² *R v Lubemba* [2014] EWCA 2064.

[4] The kinds of directions now being used in England and Wales have not yet been the subject of judicial consideration in New Zealand. They were drawn to the attention of the Court of Appeal in *Metu v R*, which dealt with a protocol regarding questioning of child or other vulnerable witnesses. The Court noted the practice direction issued in England and Wales in relation to questioning of young or other vulnerable witnesses and referred to *Lubemba v R* but did not find it necessary to consider it or similar cases. The factors identified by the Court of Appeal suggest, however, that careful consideration would be needed before it could be said confidently that the jurisdiction existed to make directions of the kind that the Judge has made in this case. The Court said:

The undoubted power to control the manner of questioning of a witness must be balanced against the right of a defendant in a criminal case to a fair trial. That right includes the right to challenge the prosecution witnesses and to put the defendant's version of events to them as the defendant or his or her counsel sees fit, subject as we have said to the judge's power, or duty in some instances, to exercise control if it be necessary [a reference to s 85 of the Evidence Act].

[5] Mr Harrison QC, submitted that (1) there was uncertainty as to whether a right of appeal lay under either ss 215 or 296 of the Criminal Procedure Act 2011. It is therefore anticipated that judicial review will be the appropriate mechanism for challenge (2) there is jurisdiction for this Court to grant interim relief in the context of judicial review proceedings³ (3) if the direction is not stayed and defence counsel are required to disclose their proposed cross-examination to both the Court and (probably inevitably) the Crown prior to trial the defendants will be seriously prejudiced (4) if the direction is stayed the complainants will still have the protection of s 85 of the Evidence Act 2006, under which the Judge may intervene to control unfair or needlessly repetitive cross-examination (5) an adjournment of the trial is not being sought; that is a matter for the trial judge and given the age of the complainants the Judge may prefer to proceed without the benefit counsels' cross-examination in advance.

[6] Given the imminent trial, the existing provisions for protection of young witnesses under the Evidence Act, the doubt over jurisdiction to make the direction and the potential for prejudice to the defendants I am satisfied that this is a matter in

³ Judicial Review Procedure Act 2016, s 15

which the defendants ought to be permitted the opportunity to advance their application for judicial review and that interim relief is required to allow that.

[7] I make the following orders:

- (a) Pending further order of this Court, the effect and execution of the direction made by Judge T R Ingram at [31] of his minute delivered on 1 March 2017 that all defence counsel file written cross-examination questions by 5 pm on 3 March 2017 is stayed;
- (b) Costs of and incidental to this application are reserved;
- (c) The matter is to be listed in the judicial review list in the week beginning 12 March 2017 for directions regarding the filing of a formal application for judicial review.

P Courtney J