

20/10; [2010] VSC 164

SUPREME COURT OF VICTORIA

CHIEF COMMISSIONER of POLICE & ANOR v HERALD & WEEKLY TIMES LTD & ORS

Beach J

27, 28 April 2010

PRACTICE AND PROCEDURE – APPLICATION FOR A DECLARATION REGARDING THE WITNESS PROTECTION ACT 1991 – MEANING OF “PERSON” – MEANING OF “PERSON WHO HAS BEEN A PARTICIPANT” – WHETHER “PERSON” INCLUDES A DECEASED PERSON WHO WAS A PARTICIPANT IN THE VICTORIAN WITNESS PROTECTION PROGRAM: WITNESS PROTECTION ACT 1991, S10(5).

Section 10(5) of the *Witness Protection Act 1991* ('Act') provides:

A person must not, without lawful authority, disclose information in Victoria or elsewhere—

(a) about the identity or location of a person who is or has been a participant; or

(b) that compromises the security of such a person.

Penalty: Level 5 Imprisonment (Maximum 10 years).

1. **Construing s10(5)(a) of the Act narrowly so as not to apply in respect of a deceased former participant would not promote the underlying purposes and objectives of the Act. It follows that s10(5)(a) of the Act applies not only to a living person who is or has been a participant, but also to a deceased person who was a participant. Such a construction serves the purpose of encouraging witnesses to come forward, safe in the knowledge that their families will remain protected, even after their death (that is, the death of the participant), by the prohibition upon disclosure of the identity of the deceased former participant.**

***R v JP* [2008] VSC 86; and**

***DPP & Anor v Dale & Ors*, MC11/2010; [2010] VSC 88, considered.**

2. **Accordingly, it was appropriate to make a declaration that the reference to "a person ... who has been a participant" in s10(5)(a) of the Act includes a person who was a participant but is now dead.**

BEACH J:

Introduction

1. This proceeding concerns the operation of s10(5) of the *Witness Protection Act 1991*. Section 10(5) provides:

“A person must not, without lawful authority, disclose information in Victoria or elsewhere—

(a) about the identity or location of a person who is or has been a participant; or

(b) that compromises the security of such a person.

Penalty: Level 5 Imprisonment (Maximum 10 years).”

2. “Participant” is defined in s3 of the Act to mean “a person who is included in the Victorian Witness Protection Programme”. “Victorian witness protection program” is defined to mean “the program established and maintained by the Chief Commissioner of Police under s3A”.^[1]

3. In this proceeding, the plaintiffs seek declarations in the following terms:

(a) “A declaration that publication by the defendants, or any of them, of information that identifies the person named in paragraph 3 of the affidavit of David Anthony Ryan sworn 23 April 2010 as having been a participant in, or otherwise associated with, the Victorian witness protection program, is prohibited by section 10(5) of the *Witness Protection Act 1991* (Vic)”.

(b) “A declaration that publication by the defendants, or any of them, of information that the person named in paragraph 3 of the affidavit of David Anthony Ryan sworn 23 April 2010 was going to give evidence in [an identified prosecution]^[2] is prohibited by s10(5) of the *Witness Protection Act 1991* (Vic)”.

4. Z is the person named in paragraph 3 of the affidavit of David Anthony Ryan sworn 23 April 2010. Z was a participant. Z is dead. The time, cause and circumstances of Z's death are not relevant in this proceeding.

5. The defendants to this proceeding are the media organisations Herald & Weekly Times Limited, Nine (Network) Australia Pty Ltd, Ten Network Holdings Limited, the Australian Broadcasting Corporation and The Age Company Limited. The material and submissions placed before the Court disclose that the parties are in dispute concerning the proper construction and operation of s10(5) of the *Witness Protection Act*. On the defendants' construction, the defendants contend that they can publish information to the effect that Z was a participant and that Z was going to give evidence in a prosecution (identifying the prosecution). The plaintiffs contend that any such publication would be in breach of s10(5) of the Act. The plaintiffs have taken the course of seeking the declarations sought in this proceeding in an attempt to resolve the dispute between them. The defendants accept that this proceeding is one in which it is appropriate that there be declaratory relief.^[3]

6. The central issue in this case is whether the reference to "a person who ... has been a participant" in s10(5)(a) includes a person who was a participant but is now dead. For the reasons given below, I am of the view that s10(5)(a) has application in the case of a person who was a participant and is now dead. Accordingly, there will be a declaration in those terms.

Section 10(5) of the *Witness Protection Act*

7. Section 10(5) of the *Witness Protection Act* has been considered by this Court in *R v JP*^[4] and *DPP & Anor v Dale & Ors.*^[5] In *R v JP*, Whelan J determined that it was not necessary for him to attempt a comprehensive analysis of the width of s10(5).^[6] However, in analysing s10(5), his Honour said:^[7]

"The noteworthy feature of s10(5) is its apparent width. It seems to me that the concept of an identity is a very broad one. A person's identity is not just their name, it also includes the features of that person which enable that person to be differentiated from others. Thus, information about a person's character, physical features, activities, and a myriad of other matters that relate to them, could, in a given context, be information about the person's identity.

Information which s10(5) says cannot be published is information about the identity of a person who is, or has been, a participant. It seems to me that there must be some connection between the information in question and the person's status as a participant before s10(5) applies.

Whilst each individual case would need to be assessed by reference to the particular circumstances of that case, in addition to the obvious prohibition upon naming a person as being a witness in the witness protection program, it seems to me that s10(5) also prohibits disclosing information which would enable others to recognise a person as being a witness in a criminal proceeding where that person is a participant in the program. It may also be significant in particular cases that the information which cannot be disclosed is information 'about' the identity of a participant."

8. In *DPP & Anor v Dale & Ors.*,^[8] the conclusions in respect of the construction of s10(5)(a) were summarised as follows:^[9]

"(a) The offence created by s10(5)(a) has a mental element, being knowledge or recklessness as to a person's status as a participant.

(b) Section 10(5)(a) prohibits publication (disclosure) of the identity or location of a person who is or was in the witness protection program where publication (disclosure) has some connection with that participation – such connection including the fact that the person is giving evidence in criminal proceedings. Further, it is not necessary for there to be an express reference to the person's participation in the witness protection program in such a publication (or disclosure) in order to contravene s10(5)(a).

(c) It is not necessary for the purposes of this proceeding to further define the connection referred to in sub-paragraph (b) above or the limits of that connection.^[10]"

9. As is clear from *R v JP*,^[11] and *DPP & Anor v Dale & Ors.*,^[12] the construction of s10(5) is not free from difficulty. In support of their submissions that the *Witness Protection Act* is only concerned with the security of living individuals who are or have been participants, the defendants

rely upon s1 of the Act. Section 1 provides:

“The purpose of this Act is to facilitate the security of persons who are, or have been, witnesses in criminal proceedings in Victoria or elsewhere in Australia.”

It was said this involved a specific overlooking by the Parliament of any purpose to facilitate the security of family members.

10. Further, the defendants referred to dictionary definitions^[13] which they submitted disclosed meanings conveying the sense of a living person. However, the question of whether the word “person”, when used in a statute, includes a person who has died depends, of course, on the proper construction of the statute in which the word is used.^[14] Indeed, one can find examples in the statute books where the Parliament has used the word “person” in a context which discloses that the Parliament could only have been referring to a deceased person.^[15] There is nothing in the dictionary definitions which assists in the proper construction and interpretation of s10(5) (a).

11. Additionally, the defendants submitted that, if one examines the text of s10(5), one sees that the language used is more apposite to describe prohibitions on the disclosure of the identity of location of living persons – rather than a person who is deceased: first, the section refers to “a person who is or has been a participant”; and secondly, the section refers to the compromising of the security of such a person. Obviously enough, the security of a deceased person cannot be compromised.

12. Against the defendants’ submissions, the Minister for Police and Emergency Services’ Second Reading Speech said of the *Witness Protection Bill*.^[16]

“The Bill is designed to help the police to combat organised crime and to solve major crimes of violence. In these areas, the police rely heavily on inside information – the evidence of persons closely connected to the perpetrators of the crimes. By agreeing to give evidence, many of these people place themselves and their families at risk from the threat of death or injury designed to prevent them testifying at criminal trials. ...

The Bill will provide a major weapon in the armoury of the Victoria Police available to combat serious crime. It will encourage witnesses to come forward, safe in the knowledge that they will be fully protected at all times against retribution from the criminals they have helped to convict.”^[17]

13. The purposes of the *Witness Protection Act* include the protection not only of participants, but also of their families. Further, the *Witness Protection Act* is designed to encourage witnesses to come forward, safe in the knowledge that they and their families will be protected at all times against retribution that might be taken by others upon learning of their participation in the programme. It is trite that a construction that promotes these purposes is to be preferred over one that does not achieve this object.^[18]

14. Whilst the defendants relied upon the more limited statement of purpose in s1 of the Act, the fact that the Act has as one of its purposes the protection of family members is borne out by a number of provisions of the Act.^[19] For example, s3A(1) empowers the Chief Commissioner of Police to take such action as he or she thinks necessary and reasonable “to protect the safety and welfare of ... a member of the family of a witness”. Similarly, s3A(2) provides that such action may include applying for a document necessary to allow a family member to establish a new identity, applying for a document necessary to protect a family member, relocating a family member, providing accommodation for a family member and “doing any other things that the Chief Commissioner of Police considers necessary to ensure the safety of ... [a] family member”.^[20] Further, it is to be remembered that s35(a) of the *Interpretation of Legislation Act* 1984 contemplates that some purposes or objects underlying an Act may not be expressly stated.^[21]

15. The defendants attempted to accommodate one of the purposes of the Act, being the protection of family members, by submitting that if a relevant family member was in need of protection, he or she could be admitted to the programme. The submission relied upon paragraph (d) of the definition of “witness”, being “a person who, for any other reason, may require protection or other assistance under this Act”. It can be accepted for present purposes that, by the operation of that paragraph and s 3A, a person who did not witness any event, but who is a family member

of a person who did witness an event, may, in appropriate circumstances, be admitted to the programme. However, this possibility does not detract from the direct and specific language in the Act concerning the protection of family members as distinct from witnesses. Further, it is to be noted that accepting such a submission would (at least after the death of the real witness) mean that in order to provide the protection provided by s10(5)(a) in respect of family members, the relevant family members would have to be made participants. This would require each of them to enter into a memorandum of understanding as required by ss3B and 5 of the Act. It is unlikely that the Parliament intended to make such a procedure necessary in all cases in the event of the death of a witness. Additionally, on the defendants' construction, there would be a period during which a disclosure might be made which might imperil the safety of a family member (that is, between the death of the participant and the entry into of a memorandum of understanding). For these reasons, I reject this submission of the defendants.

16. Construing s10(5)(a) narrowly so as not to apply in respect of a deceased former participant would not promote the underlying purposes and objectives of the *Witness Protection Act*. It follows that in my view, s10(5)(a) applies not only to a living person who is or has been a participant, but also to a deceased person who was a participant. Such a construction serves the purpose of encouraging witnesses to come forward, safe in the knowledge that their families will remain protected, even after their death (that is, the death of the participant), by the prohibition upon disclosure of the identity of the deceased former participant.

17. In reaching the conclusions I have reached, I have not overlooked the defendants' submissions that s10(5) should be "read down so as not to prohibit the disclosure of information about the identity of a person who is no longer a participant by reason of their death".^[22] It was submitted that this reading down should occur "consistently with the principle that statutory provisions which derogate from the open administration of justice or which impose criminal penalties ought to be narrowly construed".^[23] Similar submissions were made in *DPP & Anor v Dale & Ors*.^[24] There is no doubt that there are competing principles in play in the interpretation of s10(5)(a). However, as has been said in previous cases, "The protection of the identity of persons to whom the *Witness Protection Act* applies is a matter of great significance. It may, in some cases, truly be a matter of life and death".^[25] In my view, these considerations lead to the conclusion that the construction I have favoured does not give an operation of s10(5)(a) which is too wide.

18. In any event, this submission of the defendants loses much of its force (at least in relation to the issue of any derogation from the open administration of justice) when considered in conjunction with the defendants' submission that the terms of the Act permit family members to be made participants. If the Act prohibits disclosure of the identity of a family member who is made a participant under the Act, then, so far as the open administration of justice is concerned, whether that person's identity cannot be disclosed because he or she is a participant or because of an application of s10(5)(a) in relation to a deceased former participant is of no moment.

19. For these reasons, I have determined that s10(5)(a) applies not only to a person who is no longer a participant by reason of s16 of the Act (or some other circumstance occurring during the life of the participant), but it also applies in respect of a deceased person who was a participant.

The terms of a declaration

20. In argument, I raised with counsel some of the difficulties associated with the terms of the declarations sought in the originating motion. Specifically, the first declaration sought did not encompass the possibility that one or some of the defendants might have "lawful authority" to make a particular disclosure. Further, there is obvious difficulty with the words "or otherwise associated with" in the first of the two declarations sought by the plaintiffs.

21. Ultimately, the parties were content for a declaration to be made as to whether the reference to "a person who ... has been a participant" in s10(5)(a) includes a person who was a participant but is now dead. The parties agreed that if I was to come to the view I have now come to, then the second declaration would become unnecessary, that matter being governed by *R v JP*^[26] and *DPP & Anor v Dale & Ors*.^[27] That is, because s10(5)(a) applies in respect of a deceased former participant, s10(5)(a) prohibits disclosure of the identity of such a deceased where disclosure has some connection with participation in the programme – such connection including the fact that the deceased has given (or was to give) evidence in criminal proceedings.

Conclusion

22. For the reasons given above, there will be a declaration that the reference to “a person who ... has been a participant” in s10(5)(a) of the *Witness Protection Act* 1991 includes a person who was a participant but is now dead.

23. I will hear the parties on the precise form of order and on the issue of costs.

[1] See s3.

[2] The order sought identifies the prosecution, but in the light of the conclusions I have come to and in order to permit publication of the judgment, I do not propose to reveal in this judgment the identity of the accused.

[3] Cf *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1, per Gibbs ACJ at p25; 21 ALR 505; 53 ALJR 11; 37 ALT 122.

[4] [2008] VSC 86.

[5] [2010] VSC 88.

[6] [2008] VSC 86, [20].

[7] At paragraphs [17]-[19].

[8] *Supra*.

[9] *Ibid* at [45].

[10] Cf *R v JP* [2008] VSC 86 at paragraph [20].

[11] [2008] VSC 86.

[12] [2010] VSC 88.

[13] Specifically, the *Macquarie Dictionary* (Fourth Edition).

[14] Cf *R v Jefferies* [1969] 1 QB 120; [1968] 3 All ER 238; (1968) 52 Cr App R 654; *R v Maguire* [1992] QB 936; [1992] 2 All ER 433; (1992) 94 Cr App R 133; [1992] 2 WLR 767; *R v Keiley (No. 2)* [1994] 3 All ER 246; *Stephenson v Human Rights and Equal Opportunity Commissioner* (1996) 68 FCR 290; (1996) 139 ALR 678; [1996] EOC 92-833 and *Commonwealth v Wood* (2006) 27 ALR 631; 41 FLR 109.

[15] See for example s29(2A)(b) of the *Administration and Probate Act* 1958.

[16] Victoria, Parliamentary Debates, Legislative Assembly, 15 November 1990, 2060 (Mr Sandon (Minister for Police and Emergency Services)).

[17] In argument, the defendants sought to submit that the first paragraph of the Second Reading Speech extracted above suggests that the Parliament was only concerned with risks to families designed to prevent witnesses from testifying and that once a witness had testified, there was no risk to a family member within the scope and operation of the *Witness Protection Act*. In my view, such a distinction is artificial. In any event, it does not accord with what was said in the second paragraph of the Second Reading Speech extracted above. The debates and the language of the Act show that the Parliament was concerned with the safety of witnesses and family members both in relation to threats designed to prevent the giving of evidence and retribution for having given evidence.

[18] Cf s35(a) of the *Interpretation of Legislation Act* 1984.

[19] Further, it may be that in referring only to the security of persons who are, or who have been, witnesses, the word “witnesses” in s1 may have been used in the wider meaning given it in s3. Section 3 defines “witness” to mean, amongst other things, “a person who, for any other reason, may require protection or other assistance under this Act”. This part of the definition of “witness” is clearly wide enough to encompass family members.

[20] See also ss5(2)(i), 6(1) and 7(b) of the Act.

[21] See the words in parenthesis in s35(a), viz “whether or not that purpose or object is expressly stated in the Act or subordinate instrument”.

[22] See paragraph 22 of the outline of submissions on behalf of the defendants dated 27 April 2010.

[23] *Ibid*.

[24] [2010] VSC 88, [39].

[25] *R v JP* [2008] VSC 86, [26] and *DPP & Anor v Dale & Ors* [2010] VSC 88, [40].

[26] [2008] VSC 86, [19].

[27] [2010] VSC 88, [45(b)].

APPEARANCES: For the first plaintiff Chief Commissioner of Police: Dr SP Donaghue with Mr EM Nekvapil, counsel. Victorian Government Solicitor's Office. For the second plaintiff DPP: Mr DA Trapnell SC with Ms D Piekusis, counsel. Solicitor for Public Prosecutions. For the first-fifth defendants Herald & Weekly Times *et al*: Ms GL Schoff, counsel. Kelly Hazell Quill, solicitors.
