

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: 261/2018
SCA Case No: 871/2017
HC Case No: 23871/2015

In the matter between:

CENTRE FOR CHILD LAW	1 st Applicant
KL	2 nd Applicant
CHILDLINE SOUTH AFRICA	3 rd Applicant
NATIONAL INSTITUTE FOR CRIME PREVENTION AND THE REINTEGRATION OF OFFENDERS	4 th Applicant
MEDIA MONITORING AFRICA TRUST	5 th Applicant
and	
MEDIA 24 LIMITED	1 st Respondent
INDEPENDENT NEWSPAPERS (PTY) LTD	2 nd Respondent
TIMES MEDIA GROUP LIMITED	3 rd Respondent
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	4 th Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	5 th Respondent

**APPLICANTS' NOTE FOR ARGUMENT
REGARDING THE FOREIGN STATUTES**

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INTRODUCTION

1 The media respondents' heads of argument contain a number of inaccuracies in their treatment of the foreign statutes. Given the time limitations on oral argument, it may not be possible to correct these errors in the necessary detail at the hearing. We have therefore prepared this short note for the Court.¹

GENERAL INACCURACIES

2 The media respondents claim that anonymity protections for child victims in other countries are generally confined to the equivalent of our child justice courts, and do not apply in general courts.² That is mistaken. New Zealand, Scotland, and New South Wales each protect the anonymity of child victims in all courts.³

3 The media respondents claim that section 63(5) of our Child Justice Act "*provides more extensive protection*" than the protections available in other jurisdictions, as it requires proceedings in child justice courts to be held behind closed doors.⁴

3.1 This conflates *in camera* protections with anonymity protections. The fact that proceedings occur behind closed doors does not protect child victims from having their names and other identifying information published.

3.2 In any event, this claim is simply wrong. All five jurisdictions have *in camera* protections in addition to anonymity protections for child victims.

¹ We are again grateful to Oxford Pro Bono Publico for assistance with this comparative law research. Any errors or omissions are our own.

² Media respondents' heads of argument p 7 para 10.1.

³ See Appendix 1 to the applicants' heads of argument.

⁴ Media respondents' heads of argument p 7 para 10.2.

In England and Wales,⁵ Scotland,⁶ New Zealand⁷ and New South Wales,⁸ there is a default rule that proceedings in the equivalent of our child justice courts must take place behind closed doors. In Canada, the courts also have the power to order these proceedings to be held in camera.⁹

- 4 We now address specific errors in the media respondents' treatment of the foreign statutes.

NEW SOUTH WALES

- 5 At paragraph 82.4 of their heads of argument, the media respondents assert that *"s 15A of the New South Wales Children (Criminal Proceedings) Act 55 of 1987 prohibits the public disclosure of the identity of all children who participate or are in any way involved in criminal prosecutions in the children's criminal court".* They go on to contend that section 15A, *"does not provide any protection to the child victims of crime unrelated to children's court prosecutions"*.

- 6 These assertions are incorrect. Section 4 of the Children (Criminal Proceedings) Act 1987¹⁰ provides that the anonymity protections in section 15A of the Act apply to *"any court that exercises criminal jurisdiction"* and to *"any criminal proceedings before any such court notwithstanding any law or practice to the contrary"*.

⁵ Children and Young Persons Act, 1933, section 47(2).

⁶ Children's Hearing Act, 2011, section 78.

⁷ Children, Young Persons and Their Families Act, 1989, sections 329 and 166.

⁸ New South Wales Children (Criminal Proceeding) Act 1987, section 10.

⁹ Youth Criminal Justice Act 2002, section 132(1)(a).

¹⁰ Children (Criminal Proceedings Act) 1987 (NSW), s 4.

NEW ZEALAND

- 7 In para 82.3 of their heads of argument, the media respondents assert that “s 438 of the NZ Children, Young Persons and their Families Act 24 of 1989 merely prohibits reports of the proceedings of children’s criminal courts. The proceedings are open to the public and the media.”
- 8 This is incorrect. Section 438 must be read together with sections 329 and 166 of the 1989 Act. Under these provisions, only certain persons are allowed to be present during the hearing of proceedings involving a child or young person.¹¹ Both provisions also make it clear that they do not otherwise limit the powers of the court to hear proceedings in private.¹²
- 9 In para 82.3, the media respondents contend that under section 204(1) of the New Zealand Criminal Procedure Act 2011 (which confers automatic anonymity protections in the general courts) “[a] child victim does not enjoy any protection until he or she becomes a “complainant” for purposes of the act. It is not clear at what point a victim acquires that status.” But the New Zealand High Court interprets “complainant” to include even victims who did not lay complaints.¹³

CANADA

- 10 Section 111 of the Canadian Youth Criminal Justice Act 2002 confers automatic, indefinite anonymity protection for all child victims and witnesses where the offender is a youth offender. The media respondents gloss over this.

¹¹ Children, Young Persons and Their Families Act, 1989, sections 329(1) and 166(1).

¹² Children, Young Persons and Their Families Act, 1989, sections 329(3) and 166(4).

¹³ *R v McDonald* [2015] NZHC 51 at paras 39 and 47.

- 11 At paragraph 10.3 of their heads of argument, the media respondents suggest that anonymity protections for child victims in the general courts are only available on a “case-by-case” basis and that this is consistent with the position they advance in this case. At footnote 15, they reference section 486.4 of Canada’s Criminal Code, 1985.
- 12 This claim is at best incomplete. Under section 486.4(2.1) and 486.4(2.2) of Canada’s Criminal Code, a court must grant an application for a publication ban where this is made by a victim under the age of 18. Thus, while the publication ban is not automatic, it is mandatory, once an application is made.¹⁴

ENGLAND AND WALES

- 13 At paragraph 82.2, the media respondents suggest that the anonymity protections under section 49 of the Children and Young Persons Act, 1933 and section 45(3) of the Youth Justice and Criminal Evidence Act, 1999 are limited, as these provisions apply only to children “*concerned in*” the proceedings.
- 14 But the provisions provide that a person is “*concerned in*” the proceedings if they are a person “*against or in respect of whom the proceedings are taken*” or are a “*a person called, or proposed to be called, to give evidence in the proceedings*”.¹⁵

¹⁴ Canadian Criminal Code 1985, sections 486.4(2.1) and (2.2).

¹⁵ Children and Young Persons Act, 1933, section 49(4); Youth Justice and Criminal Evidence Act, 1999, section 45(7).

15 The Courts have repeatedly indicated that the phrase “*in respect of whom the proceedings are taken*” includes child victims.¹⁶

SCOTLAND

16 In footnote 12, the media respondents state that it is unclear whether Section 47 of the Criminal Procedure (Scotland) Act, 1995 provides anonymity protections to child victims as it only applies to children “*concerned in the proceedings*”. As in England and Wales, a child victim is a person “*in respect of whom the proceedings are taken*”.¹⁷

CONCLUSION

17 The applicants therefore persist in contending that, on a proper analysis of the foreign statutes in the five Commonwealth countries we have considered, the regimes concerned are considerably more protective of the anonymity of child victims than our own section 154(3) of the Criminal Procedure Act.

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6 May 2019

¹⁶ See *R (on the application of JC) v Central Criminal Court* [2014] EWCA Civ 1777 at para 41; *R (on the application of Trinity Mirror Plc) v Croydon Crown Court* [2008] EWCA Crim 50 at para 25.

¹⁷ Criminal Procedure (Scotland) Act, 1995, section 47(1)(a).