IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2021-485-000372
[2022] NZHC 2412

UNDER	the Broadcasting Act 1989
BETWEEN	NH Appellant
AND	RADIO VIRSA Respondent

Hearing:	10 November 2021
Further Submissions:	11 and 12 November 2021 18 and 21 February 2022 and 11 April 2022
Appearances:	W Akel and E A Keall for Appellant S J Price for Respondent A E Scott-Howman for Broadcasting Standards Authority
Judgment:	20 September 2022

REDACTED JUDGMENT OF EATON J

This judgment was delivered by me on 20 September 2022 at pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:

Introduction

[1] On 21 September 2020, an item on "Asliyat", hosted by Mr Parambeer Singh, was broadcast by Radio Virsa (broadcast). The broadcast was in Punjabi. The host made a series of comments NH believed identified his son. NH made a complaint (complaint) to the Broadcasting Standards Authority (Authority) alleging the broadcast breached Standard 10 of the Radio Code (Code), which relates to privacy.

[2] On 29 June 2021, in a majority decision, the complaint was not upheld.[1] NH appeals against that decision.

Background facts

[3] Radio Virsa is a small community radio station broadcasting in the Punjabi language. It was established in April 2013 from community donations and is run by volunteers. The station was founded by Sikhs to explore the teachings and philosophy of the Sikh religion and the extent to which those teachings are being subverted by modern practices.

[4] Since inception, the station has attracted some devoted opposition, predominantly from those who disagree with its teachings. There have been 12 complaints to the Authority against Radio Virsa. One was upheld and one upheld in part. The only penalty imposed was an order that the station broadcast a statement summarising the decision. All other complaints were dismissed (some due to jurisdictional issues).

[5] On 21 September 2020, the day of the broadcast, Radio Virsa's audience was estimated to be 200 to 250 people, some of whom were based in the United States and India. The show engaged in a wide ranging discussion that included an edict against a Sikh leader in India; a criticism of the way some Sikh people are happy to benefit from modern technology but are still bound by outdated religious orthodoxy; a discussion of whether Sikhs should adhere to the Sikh Rehat Maryada (the Sikh code of conduct and conventions); the shamefulness of particular crimes committed by

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1 *NH v Radio Virsa* BSA 2020-164, 29 June 2021 [The Decision].

some Sikh people; and, most relevantly, a discussion of the issues from a recent court case and petitions against those involved with Radio Virsa.

[6] The relevant portion of the broadcast appears about 40 minutes into the programme and lasts a little over a minute. The host is responding to what he perceives to be personal attacks that he is not a proper Sikh and seeks to highlight the hypocrisy of that accusation. The relevant portion of the broadcast has been translated and, although some words might not have a precise translation, the translation used by the Authority is as follows:[2]

> I know everyone out there, like what their backgrounds are and what they do…many of them are very close to me. It's alright, I don't have long hair, and they say I am not a Sikh, but many of them are addicted to drugs, they take white powder, are they Sikhs? Do they think they are Sikhs?
>
> …
>
> Ok, we admit, they might have 2 inch beards, long hair, a 4 metre long turban. So, I mean by taking drugs and white powder?
>
> There are many families, like there were […], one of them started a business and he found out that the other […] doesn't […] …he […]. He did many bad things, like […] and much more. When you resort to such activities, you are very likely to get addicted to drugs. After […] the other got to know that their whole system is going down.
>
> …
>
> Then they started investigating […]…
>
> Now people like this who are signing the petitions and are saying that I am not a Sikh…many of them are such people…

The complaint

[7] By email dated 14 October 2020, NH made a complaint to the Authority and to Radio Virsa.[3] The complaint was very wide-ranging, but expressly complained of a breach of the standards of good taste and decency, fairness, accuracy and privacy.

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2 The complainant raised issues with the translation throughout the process, but none of these would have greatly altered the essence of the broadcast.

3 The complaint NH attempted to send to Radio Virsa was sent to the wrong email address, so Radio Virsa did not receive it at this point.

[8] NH confirmed he was a signatory to the petitions referenced in the broadcast. He explained the contents of the petitions. One petition opposed the sale of property, the second condemned the "insulting and abusive" language used by Radio Virsa hosts about Sikh religious and historical figures, scripture, and women and children. He described the host, Parambeer Singh, […]. He said the host, had "some very confidential and sensitive information about [his] family" which was in the broadcast. He said Parambeer Singh had acted […] dispute.

[9] Radio Virsa responded, denying the broadcast had identified the complainant's son.

[10] NH maintained that the broadcast "gave ample information to the New Zealand listeners to identify [his] family" and referred specifically to the disclosure about a conflict between his sons as being private information that no one outside of immediate family and friends knew about. NH further alleged the broadcast included deliberate lies he believed were intended to harm his family's reputation. The broadcast was said to have taken a mental and financial toll on the complainant and his family.

[11] Radio Virsa then engaged counsel, Mr Price, who provided a further response to the Authority. Mr Price described Parambeer Singh as responding to a petition against the station calling on the hosts to be denied any role in the management of any Gurdwara (a place of assembly and worship for Sikhs). Further, he described the person who launched the petition (not NH) as the unsuccessful plaintiff in High Court proceedings relating to the Gurdwara property. In that proceeding, the plaintiff had disputed Parambeer Singh was a practising Sikh, making reference to the fact he cuts his hair.

[12] Mr Price did not accept the broadcast had identified the complainant's son beyond his family and close friends, denied the broadcast was a highly offensive publication of a private fact, and disputed whether there was a reasonable expectation of privacy in allegedly criminal conduct.

Jurisdictional issue

[13] In making the original complaint, NH used an incorrect email address for Radio Virsa. The broadcaster was not made aware of the complaint within 20 working days of the date of the broadcast. Pursuant to s 6(2) of the Broadcasting Act 1989 (the Act) the broadcaster was then entitled to refuse to accept the complaint. It exercised that right. However, because NH had submitted the complaint (including the privacy standard complaint) directly to the Authority by email of 14 October 2020, the Authority had jurisdiction to consider the privacy standard complaint.[4] The Authority had no jurisdiction to consider the complaints insofar as they related to good taste and decency, fairness, and accuracy.

The decision

[14] The majority summarised the complaint and the response from Radio Virsa.

[15] It referred to the essential premise that broadcasters should maintain standards consistent with the privacy of the individual and to the guidelines promulgated to assist broadcasters to strike the balance between a reasonable person's wishes not to have themselves or their affairs broadcast to the public and allowing broadcasters to gather, record and broadcast material of public interest.

[16] The majority referred to the three general criteria to find a breach of privacy, as follows:[5]

(a) The individual whose privacy has allegedly been interfered with was identifiable.

(b) The broadcast disclosed private information or material about the individual, over which they had a reasonable expectation of privacy.

(c) The disclosure would be considered highly offensive to an objective reasonable person.

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4 Broadcasting Act 1989, s 8(1A).
5 The Decision, above n 1, at [10].

[17] The majority took, as a starting point, the right to freedom of expression, observing that the Authority may only intervene and uphold a complaint where the broadcast has caused actual or potential harm at a level that justifies placing a reasonable limit on the right to freedom of expression.[6]

[18] The majority summarised the matters within the broadcast relevant to the issue of identification and concluded the complainant's son was not identifiable beyond family and close friends who would reasonably be expected to know about the matters dealt with in the broadcast.

[19] The majority did not uphold the complaint. The second and third criteria were not considered.

[20] The majority did, however, suppress publication of particular factual matters within the broadcast including the family relationship, an allegation of […], the state of knowledge of the relative and a relevant time frame, as follows:[7]

> There are many families, like there were [*two relatives*], one of *[them]* started a business and he found out that the [*other*] doesn't…[*details withheld to prevent further identification*] and …[*he*] started taking money out of it. He did many bad things, like…[*details withheld*]…and much more. When you resort to such activities, you are very likely to get addicted to drugs. After [*specified period of time*] the other got to know that their whole system is going down.

[21] The Chair, Judge Hastings, dissented.

[22] Judge Hastings agreed with the general principles as expressed by the majority regarding identification, noting "it is in the application of those principles to the facts of this case that we diverge".[8] The Chair found the son's past drug addiction was known in the community and was a significant identifying feature. He found, in combination with other features—including a close relationship to the host, his family's involvement with the petition and his business arrangements—that at least some listeners from the Sikh community in Auckland would have been able to identify the complainant's son.

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6 The Decision, above n 1, at [13].
7 At [2] (emphasis added).
8 At [21].

[23] Two particular factors were found to be significant to the minority. Firstly, the complainant became aware of the broadcast because he was informed by others, including the sister, who expressed shock that they could immediately identify who the host was talking about. Secondly, the broadcaster had conceded that family and close friends of the complainant's son may have identified him from the broadcast but submitted that would have been limited to those persons familiar with his […] and drug use. The Chair found those who might have identified the complainant's son due to their familiarity with his "[…] and drug use" would not have known of the other matters disclosed. Therefore, at least some of those who could identify the complainant's son would have learnt additional detail not previously known.

[24] Having found that the identification criteria was satisfied, the Chair considered whether the broadcast disclosed information about which the complainant's son had a reasonable expectation of privacy. He found it was unlikely there was any reasonable expectation of privacy in relation to drug addiction, given community knowledge of that matter. However, he found the son had a reasonable expectation of privacy in relation to an allegation that he […] and did "many [other] bad things", one of which was specified. In the minority view, a person who has worked to overcome an addiction and to make a valuable contribution to society could reasonably expect not to have such matters disclosed on air.

[25] Judge Hastings found that a denial of allegations as untruthful did not prohibit a finding that the false information is private material.[9]

[26] In considering whether the disclosure of private facts would likely be highly offensive, Judge Hastings referred to the guidance in the Code and found that the disclosure of allegations of […], alleged involvement in a named "bad" activity, and the allegation about "many [other] bad things" attributed to the complainant's son, was highly sensitive and had significant potential to impact negatively on his reputation and that of his family. He noted the negative effect of the broadcast on the complainant's son's mental health and reputation and concluded the disclosure would

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9 With reference to *Hill v Radio One* BSA 2013-074, 4 March 2014 at [12]–[15]; and *Singh v Radio Virsa* BSA 2017-001, 27 October 2017 at [55].

be considered highly offensive to an objective reasonable person in the complainant's son's position.

[27] Judge Hastings concluded that upholding the complaint would have been a reasonable and justified limit on the right to freedom of expression. He said the potential harm to the privacy interests of the complainant's son and family outweighed the broadcaster's right to make apparently unfounded allegations and unnecessary disclosures. Judge Hastings considered the broadcaster's point could have been expressed without disclosing sensitive private information at the expense of the complainant's son and his family. The broadcast, therefore, breached the privacy standard.

The Broadcasting Act 1989 and the relevant Standards/Guidelines

[28] Section 4 of the Act addresses programme standards. Responsibility for the maintenance of programme standards rests with the broadcaster. Section 4(1) provides:

> **4 Responsibility of broadcasters for programme standards**
>
> (1) Every broadcaster is responsible for maintaining in its programmes and their presentation, standards that are consistent with—
>
> (a) the observance of good taste and decency; and
>
> (b) the maintenance of law and order; and
>
> (c) the privacy of the individual; and
>
> (d) the principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest; and
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> (e) any approved code of broadcasting practice applying to the programmes.

[29] Relevant to this appeal, the broadcaster must maintain standards consistent with the privacy of the individual and any applicable approved code of broadcasting practice.

[30] The Act establishes the Authority.[10] The board of the Authority consists of four members, one of whom must be appointed as Chairperson.[11] That person shall be a barrister or solicitor of not less than seven years' practice of the High Court, whether or not the person holds or has held judicial office.[12] One member of the Authority must be appointed following consultation with representatives of the broadcasting industry.[13] Another must be appointed after consultation with representatives of public interest groups in relation to broadcasting.[14] Decisions on complaints are made by majority and, in the event of a tie, the Chair has the casting vote.[15]

[31] It is a function of the Authority to develop and issue codes of broadcasting practice.[16]

[32] The Authority have produced the *Broadcasting Standards in New Zealand Codebook (the Codebook)* which includes the "Code".[17] The Code prescribes 11 standards that apply to all radio programmes broadcast in New Zealand.

[33] Standard 10 of the Code is titled "[p]rivacy". It repeats the words of s 4(1)(c) of the Act and prescribes guidelines relevant to the application of the standard. It relevantly provides:

> **Broadcasters should maintain standards consistent with the privacy of the individual.**
>
> **Guidelines**
>
> 10a The privacy standard applies only to identifiable individuals. In some cases an individual may be identifiable even if they are not named or shown.
>
> 10b Broadcasters should not disclose private information or material about an individual in a way that is highly offensive to an objective reasonable person in the position of the person affected.
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> 10c There must be a reasonable expectation of privacy in relation to the information or material disclosed. Factors to consider include, but are not

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10 Broadcasting Act, s 20(1).
11 Section 26(1).
12 Section 26(2).
13 Section 26(1A).
14 Section 26(1B).
15 Crown Entities Act 2004, sch 5 cl 12.
16 Broadcasting Act, s 21(1)(f).
17 Broadcasting Standards Authority *Broadcasting Standards in New Zealand Codebook* (April 2020). As applicable at the time of the broadcast.

> limited to, whether the information or material is not in the public domain; and/or it is intimate or sensitive in nature; and/or the individual could reasonably expect it would not be disclosed.
>
> 10d A person will not usually have a reasonable expectation of privacy in relation to matters in the public domain. In some circumstances, there may be a reasonable expectation of privacy in relation to such information or material even though it is in the public domain.
>
> 10e Broadcasters should not intentionally intrude upon a person's reasonable expectation of solitude or seclusion in a way that is highly offensive to an objective reasonable person in the position of the person affected.

[34] The *Codebook* contains a discrete section entitled: "Guidance: Privacy" (Guidance). This provides guidance in the application of the privacy standard, with the introduction stating:

> This guidance is intended to elaborate on the guidelines set out in the privacy standard. It is not exhaustive and may require elaboration or refinement when applied to a complaint. The specific facts of each complaint are especially important when considering whether an individual's privacy has been breached. The BSA will also have regard to developments relating to privacy law in New Zealand and in other jurisdictions.

[35] The purpose of the *Codebook* is to provide guidance to parties in the way that standards are applied, and individual circumstances assessed. It is developed in consultation with broadcasters and other interested entities and is the subject of regular review and amendment in order to take account of developments in relevant law.

[36] The Guidance relevantly provides:

> ***2. Identification required***
>
> 2.1 Privacy will only be breached where the individual whose privacy is at issue is identifiable in the broadcast. Individuals must be identifiable beyond family and close friends who would reasonably be expected to know about the matter dealt with in the broadcast (see BSA decision *Moore and TVWorks Ltd*, 2009-036).
>
> …
>
> 2.3 In some circumstances, a combination of information inside the broadcast and other readily available material or information from outside the broadcast may enable identification.
>
> …

> ***6. Highly offensive intrusions and disclosures***
>
> 6.1 The means by which private material is gathered affects the offensiveness of the intrusion or disclosure. For example, it may be highly offensive to broadcast private material gathered by a surreptitious, deceptive or dishonest means.
>
> 6.2 Disclosure of private facts is likely to be highly offensive where:
>
> - it is done for the purposes of encouraging harassment
> - the material is particularly embarrassing, sensitive or traumatic, or has the potential to impact negatively on reputation
> - the person is particularly vulnerable
> - the broadcast is exploitative or gratuitous
> - the person concerned has made efforts to protect his or her privacy or has not consented to the broadcast.

[37] Part 2 of the Act prescribes a complaints procedure. Section 6 requires a broadcaster to consider a complaint made within 20 working days of the broadcast. Section 8 permits a complainant to refer a formal complaint to the Authority and, of particular relevance to this case, s 8(1A) of the Act allows a complainant to refer a privacy standard complaint directly to the Authority.

[38] It is well established that a complaint about a breach of the privacy standard need not be made by the person whose privacy is allegedly breached.[18] This reflects the focus of the legislation on the maintenance of privacy standards.

[39] Section 12 of the Act provides that, in considering a complaint, the Authority has the powers set out in ss 4B, 4C, 5, 6, 7, 8 and 9 of the Commissions of Inquiry Act 1908. That includes the power to conduct investigations, receive evidence in any form, summons witnesses and take evidence on oath. The complainant and the broadcaster have a right to make written submissions.[19] Complaints are to be determined with as little formality and technicality as permitted by the Act, a proper consideration of the complaint, and natural justice.[20]

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18 *TV3 Network Services Ltd v ECPAT New Zealand Inc* [2003] NZAR 501 (HC) at [17].
19 Broadcasting Act, s 10(1).
20 Section 10(2).

[40] Pursuant to s 13(1)(d) of the Act, if a privacy complaint is found to be justified, the Authority may make an order directing the broadcaster to pay to the individual in respect of whom the broadcaster has failed to maintain standards consistent with the privacy of that individual, compensation in a sum not exceeding $5,000.

Right of appeal and approach

[41] The broadcaster or the complainant may appeal to this Court against the whole or any part of a decision made under ss 11, 13, or 13A of the Act.[21] The Court shall hear and determine the appeal as if the decision or order appealed against had been made in the exercise of a discretion.[22] The appeal can only succeed if the Authority made an error of law or principle, took into account irrelevant considerations, ignored relevant considerations or was plainly wrong.[23] In determining the appeal, the Court may confirm, modify or reverse the decision or order appealed against (or part of that decision or order), and otherwise exercise any of the powers that could have been exercised by the Authority in the proceedings to which the appeal relates.[24] The determination of this Court on appeal is final.[25]

[42] As observed by Asher J in *Television New Zealand Ltd v West*:[26]

> [10] It is clear from s 18(4) that the High Court's jurisdiction is not the same as in a general appeal. The decision in *Austin, Nichols & Co Inc v Stichting Lodestar* requiring the appellate Court in such general appeals to come to its own view on the merits does not apply.

[43] I agree with the observation of Williams J in *Attorney-General of Samoa v TVWorks Ltd* that the Court is required to adopt "a measure of deference to the expertise" of the Authority.[27] Mr Akel submits there is no obligation on this Court to defer to the views of the Authority as a specialist tribunal in this appeal because the Authority was divided in its views. I acknowledge there was division of views as

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21 Broadcasting Act, s 18(1).
22 Section 18(4).
23 *May v May* (1982) 1 NZFLR 165 (CA) at 170; *Television New Zealand Ltd v West* [2011] 3 NZLR 825 (HC) at [9] and [10]; and *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].
24 Broadcasting Act, s 18(5).
25 Section 19.
26 *Television New Zealand Ltd v West*, above n 23, at [10] (footnote omitted).
27 *Attorney-General of Samoa v TVWorks Ltd* [2012] NZHC 131 at [37].

regards the application of principles to the facts, but there was no division of views as to the established principles.

The grounds of appeal

[44] The notice of appeal raises four grounds of appeal:

(i) The Authority was wrong in principle to find a criterion for finding a breach of the privacy standard is that the broadcast identifies the person whose privacy has allegedly been interfered with.

(ii) The Authority (majority) was plainly wrong to find the complainant's son (and the complainant and his family) had not been identified in the broadcast.

(iii) The Authority (majority) failed to take into account relevant considerations including the factors referred to by the minority, the gratuitous nature of the broadcast, that the privacy breach extended to the complainants' family and a s 5 New Zealand Bill of Rights Act 1990 (NZBORA) analysis.

(iv) The Authority (majority) took into account irrelevant considerations including the claim the host knew many persons who would fall within the category of the person described in the broadcast, and a submission that drug addiction and associated […] within a family business was unlikely to be unique within the Sikh community.

Summary of submissions

Appellant

[45] On behalf of NH, Mr Akel submits the majority was plainly wrong to find the complainant's son was not identified in the broadcast. Alternatively, he submits the

Authority wrongly fettered its own discretion by applying the guidelines as essential criteria.

[46] Mr Akel submits the appropriate test in considering an alleged breach of the Privacy Standard is to enquire as to whether there is a reasonable expectation of privacy in the relevant matter. Mr Akel relies on the United Kingdom Supreme Court decision in *Lloyd v Google LLC* (a judgment issued following the hearing of this appeal) where the Court summarised the tort of misuse of private information (the equivalent to the New Zealand tort on invasion of privacy) and stated that to establish liability for that tort it was necessary to show there was a reasonable expectation of privacy in the relevant matter.[28] The Court referred, with approval, to the following passage from the English Court of Appeal's decision of *Murray v Express Newspapers plc*:[29]

> …the question whether there is a reasonable expectation of privacy is a broad one, which takes account of all the circumstances of the case. They include the attributes of the Claimant, the nature of the activity in which the Claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the Claimant and the circumstances in which and the purposes for which the publication came into the hands of the publisher.

[47] Mr Akel encourages this Court to follow in the footsteps of the UK authority. He submits there ought not be a rigid requirement that the person whose privacy has allegedly been interfered with be identified in the broadcast and neither should the Authority need to be satisfied the broadcast would be considered highly offensive to an objective reasonable person. Mr Akel submits the inquiry as to a breach of the privacy standard need only consider whether there is a reasonable expectation of privacy in the given context.

[48] Mr Akel contends the essential context in the present case is the public disclosure of family information to which the broadcasting host was privy. In that context, the proper focus is not necessarily on the specifics of the information, but on

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28 *Lloyd v Google LLC* [2021] UKSC 50, [2022] 2 All ER 209 at [99].

29 *Lloyd v Google LLC* , above n 28, at [99], citing *Murray v Express Newspapers plc* [2008] EWCA Civ 446, [2009] Ch 481 at [36].

the fact family matters that ought to be protected by privacy law generally were disclosed.

[49] Mr Akel submits the Authority erred in taking as a starting point the right to freedom of expression and contends that freedom of expression rights must give way to the privacy rights of the individual.

Respondent

[50] Mr Price, on behalf of Radio Virsa, submits there is no justification for the appellant's submission, which effectively asks this Court to remove the requirement that publication is highly offensive and to provide blanket protection to "family matters", regardless of the specific facts disclosed and regardless of whether the complainant is identifiable.

[51] Mr Price submits the Authority's approach to the privacy standard, including the requirement of and test for identification, is consistent with the shape of the tort in New Zealand, the United Kingdom and the United States. In his submission, those principles were applied in an orthodox fashion by the majority.

[52] It is submitted the Authority rightly concluded the broadcast in question did not identify NH's son. The host took steps to keep his identity hidden by not broadcasting typical descriptors such as name, age, place of residence, appearance or specific occupation.

[53] Mr Price submits that NH is asking this Court to transform the Authority's approach to the NZBORA so that privacy (and presumably other standards listed in s 4 of the Act) trump rights of freedom of expression. In his submission, this would be inconsistent with the approach mandated and approved.

[54] Finally, he submits that if the broadcast did breach the Code, those questions relate to the standards of fairness and accuracy. Those were not standards that could be considered by the Authority because NH's initial complaint was misaddressed and, as a consequence, was not made within the statutory timeframe.

The Authority

[55] Mr Scott-Howman appeared on behalf of the Authority to assist the Court in relation to the relevant legislation, processes within the Authority and the relevant factual background. He confirmed that the Authority abides the decision of this Court, however, highlights that the arguments advanced by NH were not advanced before the Authority.

Issues for determination

[56] The appellant invites this Court to find the Authority's approach to the Privacy Standard is no longer fit for purpose and requires reconsideration in light of the developments of the tort of misuse of private information in the United Kingdom and the United States. Mr Akel invites this Court to essentially reduce the test for breaching the privacy standard to one where the Authority need only consider whether there is a reasonable expectation of privacy in the given context.[30] The appellant further invites the Court to develop the Authorities' approach to the NZBORA, such that privacy trumps the right to freedom of expression.

[57] I have concluded this case is not an appropriate vehicle for the exercise encouraged by the appellant. The issues raised in this appeal were not ventilated before the Authority and there was no disagreement among the members as to the applicable principles.

[58] The members of the Authority are appointed for their "appropriate knowledge, skills, and experience to assist the statutory entity to achieve its objectives and perform its functions".[31] In *Hosking v Runting*, the Court of Appeal drew on the privacy jurisprudence of the Authority to formulate the new tort of invasion of privacy, commenting on the expertise of the Authority and stating that it "must be taken as giving useful guidance".[32]

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30 See *Peters v Attorney-General sued on behalf of Ministry of Social Development* [2021] NZCA 355 at [111]–[115] for a recent refusal to discuss whether the "offensiveness" limb of the test is needed, as the Court of Appeal considered this analysis was not appropriate to undertake in a factual vacuum.

31 Crown Entities Act, s 29.

32 *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [86].

[59] In my view, it is desirable this Court have the benefit of the opinion of the specialist body dealing with privacy standards in New Zealand before embarking on substantial development of the law of privacy proposed by the appellant.

[60] I am also mindful of the view expressed by the Court of Appeal in *Hyndman v Walker* in response to an argument for reform of the tort of invasion of privacy:[33]

> …courts must proceed with care, paying close attention to countervailing rights and interest when formulating the criteria that will be used to gauge reasonable expectations of privacy. They must also recognise their institutional limitations, which dictate that law should be developed incrementally and by reference to specific facts.

[61] Having regard to the view I have taken of the facts and applicable law, the interest of justice in this case are met without the need to determine the reforms proposed by the appellant.

[62] The issues I will address are:

(i) Did the Authority adopt an erroneous approach to the NZBORA?

(ii) Does the Privacy Standard apply only to identifiable individuals, and if so, was the majority plainly wrong to find the complainant's son was not identified?

(iii) Was there a reasonable expectation of privacy?

(iv) Does the Privacy Standard apply to the broadcast of false information?

(v) Was the broadcast of the information highly offensive to an objective reasonable person and if so, was that material disclosed in a way that is highly offensive to an objective reasonable person?

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[33] *Hyndman v Walker* [2021] NZCA 25, [2021] 2 NZLR 685 at [75].

[63] Given the nature of the submissions in this appeal, much of the reasoning is drawn from the authorities that considered the tort of invasion of privacy (or the equivalent of this in international jurisdiction). However, I am mindful that the Authority's decisions are made in the context of the Act, with a body of relevant law being developed in this realm related to that statutory regime.[34]

Erroneous Approach to New Zealand Bill of Rights Act 1990 (NZBORA)?

[64] The *Codebook*, in its introduction, describes freedom of expression as the starting point in a consideration of complaints. It provides that complaints can only be upheld where the limitation on the right to freedom of expression is reasonable, prescribed by law and demonstrably justified in a free and democratic society.

[65] In both the majority/minority decisions, the Authority founded the decision on the grounds the Authority may only intervene and uphold a complaint where the broadcaster has caused actual or potential harm at a level that justifies placing a reasonable limit on the right to freedom of expression.[35] This approach reflects s 5 of the NZBORA which provides:

> **5 Justified limitations**
>
> Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[66] Section 14 of the NZBORA provides:

> **14 Freedom of expression**
>
> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[67] Mr Akel submits the Authority's approach was flawed as it failed to recognise s 4(1)(c) of the Act, which relates to privacy, with the consequence that s 14 of the NZBORA held sway in the Authority's analysis. Mr Akel submits that as privacy is explicitly referred to in s 4 of the Act, it has "elevated" status and should either hold

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34 See *Hosking v Runting,* above n 32, at [197].
35 The Decision, above n 1, at [13].

sway over, or be balanced against, the right to freedom of expression in s 14 of the NZBORA, with neither having primacy.

[68] Mr Akel referred to *Moonen v Film & Literature Board of Review* as authority for what he described as the preferred interpretive approach, distinct from the proportionality approach in the application of s 5 of the NZBORA.[36] Mr Akel contrasts the statutory recognition of privacy in the Act with the common law tort of invasion of privacy, where any expansion of liability for public disclosure of private facts necessarily limits freedom of expression, so must be demonstrably justified in a free and democratic society.

[69] Mr Akel submits the Authority has adopted a template approach to the NZBORA, with the effect that the right to freedom of expression affirmed in s 14 trumps all. In his submission the right to privacy, whilst not enshrined in the NZBORA, should be afforded precedence over the right to freedom of expression or, at the very least, be considered on equal terms.

[70] Mr Price urges this Court to be cautious in considering the United Kingdom authorities, given the variance of constitutional framework. He referred particularly to art 8 of the European Convention on Human Rights which provides that "everyone has the right to respect for his private and family life, his home and his correspondence".[37] He also contends the tort of wrongful disclosure of private information in the United Kingdom is not on all fours with the tort of invasion of privacy in New Zealand.

[71] Mr Price observes the statutory recognition of privacy imposes an obligation of responsibility on a broadcaster, as opposed to the Authority. A broadcaster's responsibilities under s 4 of the Act extend to other standards, including the observance of good taste and decency and the maintenance of law and order. He submits the appellant's argument would require those standards to also assume primacy over freedom of expression.

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36 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).

37 European Convention on Human Rights (opened for signature 4 November 1950, entered into force 3 September 1953), art 8.

[72] In *Television New Zealand Ltd v West*, Asher J referred to s 14 of the NZBORA and said:[38]

> [90] There is no doubt that a finding of breach of the standards involves an imposition on the right to freedom of expression, even if no direct restraint is involved. The mere upholding of a complaint without penalty can dampen future expression. The question for the Authority in every case if it is considering upholding a complaint, is whether its decision is such a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s 5. …

[73] And further:[39]

> The Authority should, in its own reasoning, show transparently why it has reached the conclusion that the limitation is justified under s 5, and not by reference to generic statements in other earlier decisions.

[74] Section 14 of the NZBORA affirms the right to freedom of expression. The NZBORA does not refer to the right to privacy. Section 28 provides that other rights and freedoms are not affected, abrogated, or restricted merely because they are not included in the NZBORA and s 5 recognises the rights affirmed in that Act may be subject to reasonable limits prescribed by law that are demonstrably justified in a free and democratic society. As the Court of Appeal said in *Peters v Attorney-General*, the absence of any provision in the NZBORA expressly referring to privacy rights and the express protection of freedom of speech does not preclude the development of statutory regimes or common law rules designed to protect privacy that may have the effect of limiting freedom of speech.[40]

[75] In considering a complaint, the Authority must have regard to the provisions of the NZBORA[41] and the s 5 NZBORA analysis should be articulated in the Authority's decision. Relevant to the s 5 balancing exercise is the particular form of expression. Mr Akel distinguished forms of expression between what he described as "high level" expression and (inferentially) "low level" expression. Baroness Hale, in the House of Lords, recognised the relevant distinctions in *Campbell v MGN Ltd*:[42]

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38 *Television New Zealand Ltd v West*, above n 23.
39 At [104].
40 *Peters v Attorney-General sued on behalf of Ministry of Social Development,* above n 30, at [93].
41 *Television New Zealand Ltd v West*, above n 23, at [86].
42 *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 AC 457 at [148].

> There are undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others. Top of the list is political speech. … Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals' potential to play a full part in society and in our democratic life. Artistic speech and expression is important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value. No doubt there are other kinds of speech and expression for which similar claims can be made.

[76] Although Radio Virsa covered a range of topics, including religious debate, the relevant section of the broadcast itself was far from political speech. It was not intellectual or educational and did not engage artistic speech or expression. Rather, it was a broadcaster mounting a personal attack in retribution for a perceived wrong. To use the words of Asher J in *Television New Zealand Ltd v West*, "[t]he right of freedom of expression is important, but as observed, the type of expression here is far from being the most deserving of protection".[43]

[77] In my view, the Authority did not err in principle in recognising, as a starting point, the right to freedom of expression. I do not accept the Authority applied a "freedom of expression trumps all" principle. Rather, the Authority recognised the privacy value and engaged in an appropriate balancing exercise.

Does the Privacy Standard apply only to identifiable individuals, and if so, was the majority plainly wrong to find the complainant's son was not identified?

[78] The Privacy Standard is Standard 10 of the Code. The privacy principles adopted by the Authority were approved by Eichelbaum CJ in *TV3 Network Services Ltd v Broadcasting Standards Authority*[44] and cited by the Court of Appeal in *Hosking v Runting*.[45] The *Codebook* now expressly incorporates the latest iteration of the Authorities' privacy principles. These are guidelines. Mr Akel proposes the guidelines be rewritten so that privacy should extend to protect against disclosure of any "family matters", whether or not the complainant is identified, and whether or not the publication is highly offensive. Mr Akel submits that the principles relating to

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43 *Television New Zealand Ltd v West*, above n 23, at [107].

44 *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720 (HC) at 727 and 728.

45 *Hosking v Runting*, above n 32, at [105].

publication of private facts on the one hand and intrusion, on the other, be fused to the extent that the only question in considering a privacy complaint is whether there is a reasonable expectation of privacy.[46] This submission cannot succeed here. The Privacy Guidelines have been developed over the years and have been regularly endorsed by the Courts. They have evolved in light of experience with the input of broadcasters, experts, complainants and the public. As Mr Price submits, they also reflect the balance struck between rights of freedom of expression and privacy by providing boundaries for broadcasters to work within.

[79] This appeal raises the following two issues in relation to identification in a privacy standard complaint:

(a) Is the identification criterion applicable?

(b) Was the majority plainly wrong to find the complainant's son was not identified in the broadcast?

Is the identification criterion applicable?

[80] Guideline 10a states the Privacy Standard only applies to identifiable individuals. This is expanded on by the privacy guidance at 2.1, set out above at [36], which suggests individuals must be identifiable beyond family and close friends who would reasonably be expected to know about the matter dealt with in the broadcast. The majority dismissed the complaint on the basis of the broadcast not identifying the complainant.

[81] Mr Akel criticises the majority for treating the guidance at 2.1"as if a rule of law". He submits that identification is not necessarily a precondition to a breach of privacy. Mr Akel referred to the "personal shield" which privacy protects. He submits hurt or harm can be suffered when someone knows their personal shield has been breached by an unjustified disclosure, without there necessarily being disclosure to a third party. Mr Akel submits this was one of those cases and, as a consequence, the

[46] See *C v Holland* [2012] NZHC 2155, [2012] 3 NZLR 672 for an authority on the tort of intrusion.

majority erred in dismissing the complaint due to a finding that the complainant had not been identified by the broadcast.

[82] In *Television New Zealand Ltd v BA* the Authority had held a complainant had to show she was identified beyond immediate family and close acquaintances who may reasonably be expected to know of the activities for which she received publicity in order to establish a privacy breach.[47] Miller J recorded counsel's acceptance this was the appropriate test.

[83] On the matter of whether identification is a necessary criterion in relation to the privacy tort, the authors of *Todd on Torts* state:[48]

> The weight of authority is in favour of the view that the plaintiff must have been identified before he or she can say his or her privacy has been invaded by publication. The American authorities are unanimous that identification is required to ground an action.

[84] The authorities recognise a single case, *L v G*, where tortious privacy liability was founded notwithstanding the absence of identification.[49] In that case a naked photograph of the plaintiff had been sent for publication in a sex magazine without her consent. Her face was not depicted and the District Court Judge found there were no identifying features visible in the photograph, with the possible exception of a distinctive top. The Court of Appeal in *Hosking v Runting* subsequently expressed the view that *L v G* may have been "better dealt with as a breach of confidence claim".[50]

[85] *L v G* was decided prior to *Andrews v Television New Zealand Ltd,* a decision of this Court in which, while still making a finding that the plaintiffs were identifiable, it was noted that "*[a]t least in most circumstances*… a plaintiff will need to establish that he or she has been identified in the publication, either directly or by implication".[51] I share that view.

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47 *Television New Zealand Ltd v BA* HC Wellington CIV-2004-485-1299, 13 December 2004 at [42].
48 Stephen Todd (ed) *Todd on Torts* (8th ed, Thomson Reuters, Wellington, 2019) at [59.17.5.03].
49 *L v G* [2002] NZAR 495 (DC).
50 *Hosking v Runting*, above n 32, at [84].
51 *Andrews v Television New Zealand Ltd* [2009] 1 NZLR 220 (HC) at [52] (emphasis added).

[86] In the present case, all members of the Authority applied the orthodox test requiring identification. I consider there is no issue to the approach taken by the Authority in requiring there to be identification. However, having regard to my view of the majority's factual findings, I emphasise that this case is not the vehicle for any substantial shift in this area of law.

Was there a reasonable expectation of privacy?

[87] Mr Akel referred to the emphasis in a number of cases to individual dignity and autonomy. He made particular reference to the observations of the Court of Appeal in *Peters,* in response to a submission that the invasion of privacy tort should be confined to widespread publication of private information:[52]

> [117] … The dignity and autonomy of a person may be affronted by disclosure of private information (for example, intimate photos taken by a former partner) to a small group, or even to one person. That harm may be very substantial. The "reasonable expectation" test does not support restriction of the tort to widespread publication. A person may have a reasonable expectation that very sensitive information will not be disclosed to anyone at all.
>
> [118] In *Hyndman v Walker* this Court held that the tort of invasion of privacy may be committed where disclosure is made to a small class. We agree. Indeed for the reasons outlined above, it is strongly arguable that the tort could be committed by disclosure to one person, where there was a reasonable expectation that no disclosure of any kind would occur. That will especially be the case where the recipient of the disclosure is not subject to any obligation to refrain from disclosing the information more widely, and there is a real prospect that they may do so.

[88] The Radio Virsa broadcast alleged that the complainant's son had […], had been involved in […] and had done "many [other] bad things". I agree with Mr Akel that this disclosure was more insidious because of the source of the broadcaster's knowledge. That knowledge was acquired when Mr Singh […] in a family dispute. I agree that the complainant, the complaint's son, and his family had a reasonable expectation of privacy in relation to the information that was disclosed in that particular setting.

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52 *Peters v Attorney-General sued on behalf of Ministry of Social Development,* above n 30.

Was the majority plainly wrong to find the complainant's son was not identified?

[89] Mr Akel submits the majority was plainly wrong to find the broadcast did not identify the complainant's son. He contends the majority failed to consider the cumulative weight of the various details published and erred in taking into account irrelevant matters.

[90] Mr Price, on behalf of the respondent, reminds me of Wild J's observation in *Browne v Canwest TV Works Ltd,* as follows:[53]

> [23] The expression "plainly wrong" posits a higher threshold than simply "wrong". Applied here, it requires the [appellant] to persuade me that, although the Authority's discretion may permit of more than one tenable answer, the decision it made was not such an answer.

[91] Mr Akel refers to the judgment of Simon France J in *Television New Zealand Ltd v Freeman* as an example of this Court finding a majority decision of the Authority to be plainly wrong.[54] In *Freeman*, the Authority had held in a majority decision that Television New Zealand Ltd had breached two of the standards in the Code. Simon France J expressed the strong view that the dissenting Authority judgment was plainly right and the majority plainly wrong.[55] The appeal was allowed "[e]ssentially for the reasons given by the minority".[56] The Judge considered the majority had failed to consider the context of the relevant programme.

[92] I accept it is not appropriate for this Court to simply substitute its view for the view of the Authority. I must come to the view the majority was not wrong, but plainly wrong. That is the conclusion I have reached. That is essentially for the following reasons:

(a) failing to consider the relevance of false details; and

(b) failure to consider the cumulative consequence of the broadcast details.

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53 *Browne v Canwest TV Works Ltd* [2008] 1 NZLR 654 (HC).
54 *Television New Zealand Ltd v Freeman* HC Wellington CIV-2011-485-840, 26 October 2011.
55 At [30].
56 At [44].

Failing to consider the relevance of false details

[93] The Authority adopted the orthodox approach to identification and referred to *J N v MediaWorks Radio Ltd* and *B L v MediaWorks Radio Ltd* in support of the proposition that an individual may be identifiable even if only a small number of people could recognise them from the information provided, if not all of those people were aware of the full details disclosed in the broadcast.[57]

[94] The majority described those relevant details as follows:[58]

> He was a member of a family which signed one of the petitions discussed in the broadcast.
>
> His family was 'close' to the host.
>
> He was involved in a business activity with another family member [whose relationship to him was specified].
>
> He was the one who started the relevant business.
>
> He had a drug addiction.
>
> He allegedly […].
>
> He allegedly did 'many [other] bad things', one of which was specified.
>
> His (business partner) relative got to know about his activities after an identified period of time.

[95] Of those details only […] and doing '[other] bad things' were described as allegations. That is unexplained but is likely a consequence of the complainant acknowledging his son had previously struggled with drug addiction and that this was known to the Sikh community. The complainant had, however, said it was not true that his son had […] and referred to "blatantly false allegations".

[96] The majority found the complainant's son was not identifiable beyond family and close friends who would reasonably be expected to know "about the matters dealt with in the broadcast".[59] The majority therefore concluded the case was distinguishable from previous decisions where the Authority had determined that

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57 The Decision, above n 1, at [19], citing *J N v MediaWorks Radio Ltd* BSA 2017-053, 27 October 2017 and *B L v MediaWorks Radio Ltd* BSA 2017-025, 9 August 2017.

58 At [16].

59 At [18].

while only a small number of people may have been able to identify the complainant from the information provided, not all of those persons were aware of the "full details" disclosed in the broadcast.[60]

[97] Radio Virsa accepted that family and close friends of the complainant's son may have identified him from the details within the broadcast but submits the son would have only been identified by those "already familiar with his […] and drug use".[61]

[98] The majority did not address the obvious factual dispute as to whether the individual concerned had […] and "[other] bad things". In my view, the majority fell into error in failing to address this conflict. If the broadcast included false information, it would not reasonably follow that family or close friends have knowledge of such matters. It would be necessary to establish whether the false allegations had been ventilated within the family or whether they were otherwise in the public domain. If it was untrue that the complainant's son had […] and done "many [other] bad things", and those were false allegations levelled by the host, those could not be details that persons who had identified the complainant's son would reasonably be expected to have known.

[99] In light of the strong denial of those matters, and in the absence of any material suggesting otherwise, the privacy complaint should have been determined on the premise those details were false. Assuming falsity, the respondent's submission that the complainant's son would only have been identifiable to persons who knew about his […] and drug use falls away, absent evidence those persons had prior knowledge of the false allegations.

[100] This was a significant error by the majority and one which, in my view, has led to a plainly wrong decision regarding identification. In coming to that view, I am not merely preferring the views of the minority (which I nevertheless share).

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60 The Decision, above n 1, at [19], citing *J N v Mediaworks Radio Ltd*, above n 57; and *B L v MediaWorks Radio Ltd,* above n 57.

61 The Decision, above n 1, at [8].

The cumulative consequence of the broadcast details

[101] Relevant to the identification of the son is the cumulative consequence of the broadcast details. As submitted the question is whether the complainant's son was identifiable beyond family and close friends who would reasonably be expected to know about the matters that were dealt with in the broadcast. It is not contentious that an individual need not be named (or shown) to be identified.

[102] The majority accepted that the broadcast caused distress to the complainant's son and family, and that they had been acutely affected by the broadcast.[62] But, the majority concluded that none of the potentially identifying features could be considered so unique as to identify the complainant's son and that "while the facts disclosed may match the son's circumstances, they are broad enough to match the circumstances of others as well".[63]

[103] In making this decision, the majority relied, in particular, on three factors:

> - Listeners were not provided with the family name, nature of their business or location of residence.
>
> - While the host's name and status as 'very close' to the family were available to listeners, Radio Virsa has argued the host has 'dozens of family members, hundreds of friends and thousands of acquaintances', many of whom 'would fall into the category of someone who had a [relative of a particular description] and started a business'.
>
> - Issues of drug addiction, the associated 'bad' behaviour and […] within family businesses are not unique in New Zealand society. We consider they are also unlikely to be unique in the Sikh community at which this broadcast was targeted.

[104] I am not persuaded the reasoning of the majority withstands scrutiny and deal with each of the three factors

[105] Plainly the broadcast did not include a family name or the location or nature of the son's business. However, given the dispute, the subject of the broadcast was very

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62 The Decision, above n 1, at [18].
63 At [19].

much a local issue. I consider it inevitable listeners would have assumed the persons described were residents in Auckland, New Zealand.

[106] The starting point is the target audience. Radio Virsa is a Sikh radio station operating out of Auckland. Given the obvious familiarity the broadcaster had with the complainant's family, the targeted individual is undoubtedly a Sikh based in Auckland. The individual or his family was also a signatory to the petitions. The Authority was told the total signatories on the petitions was 213, thereby significantly reducing the pool.

[107] The host described the targeted person's family as being "very close" to him. It is a reasonable inference that the host […]. The argument advanced by Radio Virsa as to the number of persons who might fall into the category of those referred to within the broadcast was not convincing. It is not appropriate that a broadcaster merely make an assertion the potential pool of persons it might consider fell within the descriptions provided in a broadcast. The real question in this case required the majority to enquire as to the potential pool of persons who were petitioners (immediately limited to no more than 213 persons), a drug addict (involving a white powder or heroin, i.e. methamphetamine or cocaine) was resident in Auckland (inference) and had commenced and engaged […] in a business with […]. From that collation of facts, the reference by Radio Virsa to hundreds of friends and thousands of acquaintances who might fall into the category of someone with […] and who had started a business is unhelpful. In my view, the majority were wrong to rely on that argument.

[108] The majority concluded that the drug addiction (white powder), associated "bad" behaviour […] and […] was unlikely to be unique in the Sikh community. I have serious reservations as to whether that conclusion was appropriate and, in my view, it reached that view absent an evidential foundation. No material was offered to the Authority as regards the prevalence or otherwise of drug addiction in the Auckland Sikh community. In my view the drug addiction was a significant identifying detail.

[109] I take a contrary view to the majority. In my view there was no material before the Authority to permit a finding that drug addiction within the Sikh community is not uncommon. The broadcaster identified the targeted person was in business with […]

and inferred that it was a business with which […]. The time period in which he was in business with his brother was also specified.

[110] When the various identifying factors are viewed as a whole, I have no doubt that the complainant's son was identified all but in name by the broadcaster. I find it speculative to suggest there might be another family member who had signed the petition and who […] who has a serious "white powder" drug addiction. The complainant's son was identified in the broadcast and, in my view, the majority was plainly wrong to find otherwise.

[111] My conclusion is consistent with the material before the Authority that the complainant was made aware of the broadcast because he was told by others (including his sister), who were shocked that they were immediately able to identify the complainant's son as the individual described in the broadcast. It is also consistent with the concession made by Radio Virsa before the Authority that family and close friends of the complainant's son may have recognised him from the details published in the broadcast "[b]ut only those who were already familiar with his […] and drug use".[64]

[112] I agree that some persons who identified the complainant's son would have known of his drug use. I do not accept that those persons would have known of his […] or "many [other] bad things". The persons who did identify the complainant's son would not reasonably be expected to know about matters beyond the drug addiction. That must be the case when the allegations of […] and "many [other] bad things" are denied and said to be untruthful.

[113] Mr Akel submits it is inappropriate to assume that those close to a complainant (family or friends) will know of the private facts disclosed. I agree that the fact of serious drug addiction would likely be known within a family, but there are a multitude of other issues including medical conditions, legal problems, sexual orientation or allegations of criminal offending that may not be known to immediate family or close friends. In the context of a privacy complaint, it must be established that the matters the subject of the disclosure were not known to family or close friends. If so, that

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64 The Decision, above n 1, at [8].

evidential onus is discharged, a privacy complaint might well be upheld in the circumstances described by the Court of Appeal in *Peters* where disclosure was to a single person.[65]

[114] The final matter to address as to identification is the majority decision to suppress portions of the broadcast. The published version of this judgment will respect those suppression orders. The majority suppressed the allegation the individual was in business […]; that the […] doesn't know much about the business; that the individual […]; […]; and the time span before […] found out about this. The only possible rationale for such orders was to avoid identification of the complainant's son. That the majority felt compelled to suppress particular details to avoid identifying the individual only serves to support my view the majority was plainly wrong in finding the son was not identified.

[115] The majority was plainly wrong to find the broadcast did not identify the complaint's son beyond family and close friends who would reasonably be expected to know of the details broadcast. At least some persons would have identified the son and learnt of matters previously unknown. Having reached this conclusion, it is not necessary to consider the other grounds of appeal.

Does the Privacy Standard apply to the broadcast of false information?

[116] On appeal, Mr Price submits that if the disputed details were false, there remains a live issue as to whether the complainant's son had a reasonable expectation of privacy in the false information. Having found the complainant's son was not identified in the broadcast, the majority did not address that issue.

[117] Mr Price relied on the position taken in *Shandil v Apna Networks Ltd,* where a radio station aired a suggestion that the complainant had been fired and the Authority said:[66]

> The Authority has stated in two recent decisions that the broadcast of an untrue allegation cannot constitute a breach of privacy (See Decisions Nos. 2005-049 and 2006-078). Accordingly, accepting Mr Shandil's assertion that he

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65 *Peters v Attorney-General*, above n 30.

66 *Shandil v Apna Networks Ltd* BSA 2006-049, 27 November 2006 at [15].

> resigned, rather than having his employment terminated, the privacy standard does not apply.

[118] Mr Price submits the position is left unresolved in New Zealand and that it is preferable that privacy cases should be limited to offensive disclosures of true information, leaving alleged falsities to be considered under the accuracy and fairness standards.

[119] Mr Akel submits that at common law it is now accepted that a claimant's right to privacy may be infringed by the publication of false information which purports to be, or is presented as, true.[67] In the broadcasting context, Mr Akel submits this position is supported by Judge Hasting's dissent in the decision under appeal, in which he referred to *Hill v Radio One* and *Singh v Radio Virsa*, where the Authority determined that it is the quality of the information about a person, rather than its veracity, which determines whether or not it is private.[68] In the present case, Judge Hastings found the disclosed information had the requisite private quality, having regard to how the allegations might reflect upon the complainant's son.[69]

[120] In the UK this issue has been raised in cases considering the interface between defamation and privacy claims. The UK courts have raised concerns that plaintiffs might advance what might appropriately be defamation concerns as privacy claims in order to avoid the issue of truth.

[121] The English Court of Appeal in *McKennitt v Ash* rejected an argument that as a consequence of the Judge having found the allegations within a book about a property dispute to be false, the claimant could not advance a cause of action of breach of confidence. The United Kingdom Supreme Court, in *Bloomberg LP v ZXC* (a matter determined following the hearing of this appeal), considered whether a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of information relating to that investigation.[70] The appellant had referenced defamation authorities.[71] The Court observed the claimant had not brought

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67 *McKennitt v Ash* [2008] QB 73 at [86].

68 The Decision, above n 1, at [29], citing *Hill v Radio One,* above n 9, at [12]–[15]; and *Singh v Radio Virsa* BSA 2017-001, 27 October 2017 at [55].

69 The Decision, above n 1, at [29].

70 *Bloomberg LP v ZXC* [2022] UKSC 5, [2022] 2 WLR 424.

71 At [74].

a claim in defamation.[72] The sole claim was in the tort of misuse of private information. The Court expressly noted that in the tort of defamation, the falsity of the information at issue is of central importance. This was contrasted with the purpose of the tort of misuse of private information, which is not confined to protection of an individual from publication of false information. Rather, "its purpose is to protect an individual's private life in accordance with article 8 of the [European Convention on Human Rights], whether the information is true or false". [73]

[122] I agree that if a claimant was deliberately advancing a privacy case in order to avoid addressing the issue of truth, the Authority might be reluctant to consider an allegedly false allegation against the privacy standard. NH does not seek to avoid the issue of truth. NH made it very clear the allegations of […] conduct and engaging in other "bad" conduct was strongly denied as false. Radio Virsa has not sought to defend the broadcast of those allegations as being truthful.

[123] In my view the proper focus is on the quality of the information as opposed to veracity, to determine if there is a reasonable expectation of privacy. The false details broadcast by the respondent implying the individual engaged in […] has the necessary privacy qualities.

[124] In the context of a broadcast said to have referenced both truthful and untruthful private disclosures, I think it appropriate the false disclosures be considered alongside the others under the privacy standard.

Was the broadcast of the information highly offensive to an objective reasonable person and if so, was that material disclosed in a way that is highly offensive to an objective reasonable person?

[125] The guidelines provide examples of circumstances that might lead to a finding a disclosure was highly offensive. The facts I find apply in the present case include that the material broadcast was particularly embarrassing, sensitive or traumatic. In my view, statements (including false allegations) describing […], drug addiction and general wrongdoings fall within that description. The broadcast was targeting an

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72 At [111].
73 At [111], citing the European Convention on Human Rights, above n 37, art 8.

individual person who was in recovery from drug addiction and was therefore vulnerable. I find it was intended to cause harm to the complainant's family in the eyes of the Sikh community, and would have done so. The host was […] and had been privy to private information […]. To broadcast sensitive private information (including allegations of criminal offending) to extract revenge for a personal grievance was exploitative and gratuitous. I have little difficulty finding the broadcast would be considered highly offensive to an objective reasonable person.

Conclusion

[126] The majority was plainly wrong to find the broadcast did not identify the complainant's son.

[127] The son had a reasonable expectation of privacy in the details broadcast.

[128] In my view, the broadcast of false information is subject to the protection of the privacy standard.

[129] Finally, I find the broadcast to be highly offensive in the eyes of an objective reasonable person.

[130] I find the majority was plainly wrong not to uphold the privacy complaint.

[131] I therefore allow the appeal and find the privacy complaint to be justified.

Compensation

[132] The maximum level of compensation that might be awarded pursuant to s 13(1)(d) of the Act is $5,000. Mr Akel submits this privacy breach was gratuitous and serious such that a maximum award is appropriate.

[133] Parambeer Singh […]. He was privy to personal information about the complainant, having acted as […]. Mr Singh then found himself at odds with the complainant in relation to a broader dispute within the Auckland Sikh community.

[134] In my view, to broadcast deeply personal information, secured through a […] connection, to a wider audience in response to a personal grievance flies in the face of the responsibility of a broadcaster to maintain standards that are consistent with the privacy of the individuals.

[135] I agree with Mr Akel that the public interest in this appeal is in ensuring broadcasters act responsibly and do not use their power in a vindictive and personal manner.

[136] I fix the appropriate compensation at $4,000.

[137] I make a final order suppressing the name of the complainant.

Costs

[138] Costs are reserved. Any application for costs is to be made by memorandum filed and served within 10 working days of the date of this judgment, with any submission in response to be filed within five working days thereafter.

.....
Eaton J

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