



Neutral Citation Number: [2007] EWHC 1683 (QB)

Case No: IHJ/07/0551

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/07/2007

Before :

THE HONOURABLE MR JUSTICE EADY

Between :

T
(by her litigation friend the Official Solicitor)

Claimant

- and -

The British Broadcasting Corporation

Defendant

Gavin Millar QC and Fenella Morris (instructed by **Pearson Hinchcliffe**) for the **Claimant**
Mark Warby QC and Adam Wolanski (instructed by the **BBC litigation department**) for
the **Defendant**

Hearing date: 9 July 2007

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE EADY

The Hon. Mr Justice Eady:

1. Mr Millar QC, instructed by the Official Solicitor, applies for an injunction to prevent the identification in a television programme, due to be broadcast next week, of a young woman who has been referred to throughout as T. There is plainly a degree of urgency about the matter. The programme is planned as part of a series of five on the subject of adoption. The half-hour devoted to T is intended to inform the public about the relatively little known concept of “concurrent planning”. The idea is to minimise the disruption to a child’s life. If it proves necessary to remove a child from parental care for a time, but it has not necessarily yet been determined that he or she will have to be adopted, the child can be placed with foster parents on a temporary basis, but they are also being prepared with a view to adoption if it becomes unrealistic to return to the natural parent. That is what happened in this case.
2. T’s two year old daughter D was placed with foster/adoptive parents while the relationship between the daughter and her mother could be assessed with a view, possibly, to going back to live with her. When it was finally decided that this was not going to work, they adopted her. The programme portrays this process and includes footage of a number of intimate matters, including the last contact session between mother and daughter, which was tearful and distressing for T. It also includes a scene when the impression is given to viewers that T is sometimes rough with her daughter and has problems with anger management.
3. There is no dispute that T is a vulnerable adult (having passed her eighteenth birthday on 13 April of this year). Indeed, the programme makers originally met her at a centre for young vulnerable adults. She does not have, and did not have, capacity to give informed consent either to her participation in the programme or to the broadcast itself. She apparently has an IQ of 63, and it has been confirmed by Dr McGrath that she suffers from a mental disorder within the meaning of the Mental Health Act 1983 (and also a “mental impairment” within the meaning of the Mental Capacity Act 2005, which is not yet in force).
4. T is thus represented by the Official Solicitor, who seeks to protect her interest by preventing the intrusion upon her privacy which would be inherent in the broadcast.
5. The test to be applied in these circumstances is to be found in s. 12 of the Human Rights Act 1998 and, to a large extent, in the decisions of the House of Lords in *Campbell v MGN Ltd* [2004] 2 AC 457 and *Re S (A Minor)* [2005] 1 AC 593. It is also now necessary to take into account the decisions of the European Court of Human Rights, including *Z v Finland* (1997) 25 EHRR 371 and *Von Hannover v Germany* (2006) 43 EHRR 7.
6. The first question to ask is whether T’s Article 8 rights under the European Convention are engaged and as to that there is not, and could not be, any dispute. It then becomes a question of carrying out a parallel analysis, which involves applying an “intense focus” to the particular facts of the case. The court has to perform what has been described as the “ultimate balancing exercise” as to whether in these circumstances her Article 8 rights, should, or should not, take priority over the Article 10 rights of the BBC and other persons involved in the making and broadcast of the programme.

7. It is submitted by Mr Warby QC, on behalf of the BBC, that there is a preliminary stage to go through; that is to say, that I should first decide whether it is in the best interests of T for the programme to be broadcast or not. Only if I decide that it is not, should I then go on to perform the balancing exercise described above. I accept, of course, that T's best interests will fall to be considered in the carrying out of the parallel analysis, but I reject the need to go through a first stage devoted to determining that question in isolation. My attention was drawn to a particular passage in the judgment of Dame Elizabeth Butler-Sloss P (as she then was) in *Re A Local Authority Inquiry: Restraint on Publication* [2004] Fam 96 at [97], which would appear to bear out that approach. It was also recognised by Lord Steyn in *Re S* at [23] that the older authorities explaining the inherent jurisdiction of the court or *parens patriae* jurisdiction (normally, of course, exercised in the Family Division) will not normally nowadays need to be consulted, since the correct approach in the light of the Human Rights Act 1998 is to address the particular problem by balancing competing Convention rights in the way that their Lordships described.
8. I also reject the idea that I must try and predict outcomes in order to quantify the risks to T's welfare. There is expert evidence before me in the form of two reports from Dr McGrath, who attended the hearing and was cross-examined by Mr Warby for the BBC. The following extracts under "psychological impact" are important:

"... I believe that it is inevitable that both involvement in the filming process and showing the documentary will cause [T] considerable distress.

What I meant to suggest by my comment was that [T] is an extremely vulnerable woman with very poor coping strategies who is often overwhelmed by problems and difficulties in her life and who may well respond to such problems with extreme distress and self-harming behaviour.

To this extent her involvement in the documentary should be considered as simply one more such problem and would not in itself be a major cause of long-term psychological damage or mental distress over and above that which she has already experienced and continues to experience. I think that it is important to emphasise, however, that in my opinion [T] is less able than the large majority of people to cope with the consequences of traumatic events, of whatever sort, and that exposure to any form of trauma, including that of the documentary being shown, is likely to provoke emotional distress and self-harming behaviours similar to those she typically exhibits at such times.

...

The point I would wish to make is that [T], as a consequence of a combination of [her] innate intellectual limitations, her previous experiences and her personality and general functioning, is highly vulnerable to involving herself willingly in situations which she initially views as positive, but within

which she has no way of reflecting on the potential consequences of her actions.

Her opinions and feelings about situations are likely to change unpredictably and in my opinion she has very little innate ability to reflect on, manage or contain her emotional responses. She has very little ability to understand complex situations, or to weigh in the balance the potentially positive or negative outcomes of situations [in] which she finds herself. As a consequence it is likely that there would be times when she presents as happy and positive, and other times when she feels overwhelmed by negative feelings, both relating to the same situation.

As her initial decisions are often ill judged, the eventual outcome is commonly more negative than positive for [T], thus resulting in the strong probability that she would experience many situations, including her involvement in the documentary, as abusive, even when from an objective viewpoint this was not necessarily the case.

In my opinion this means that any benefit she may gain, whether transient such as her pleasure in her engagement with the production crew or longer term such as having a lasting record of her daughter, will be inevitably outweighed by the distress, including potentially long term distress, she will inevitably experience for reasons outlined above.

...

I also believe, having had extensive experience in working in the Family Court, that it is inevitable that, once the documentary is shown, [T] will be recognised in her own neighbourhood and will be exposed to criticism, hostility and abuse”.

Naturally, Dr McGrath accepted in cross-examination that making an assessment of a social situation, and in particular the reaction of potential viewers of the programme, falls outside his medical expertise. I naturally take that into account.

9. Nonetheless, it is powerful evidence which I must weigh in the balance. Mr Millar’s submission is that this is properly to be regarded as an “additional” factor; that actual harm to T, whether physical or psychological, is not a matter which it is necessary to attempt to predict. The whole exercise is speculative. The first step is to assess the infringement of T’s Article 8 rights, which has already taken place according to the evidence, and which does not require any prediction or speculation in order to evaluate.
10. Without the capacity to consent, and without the capacity to understand what the programme is about, let alone its potential consequences, T has apparently permitted herself to be portrayed in the most intimate circumstances and, in one instance, in

circumstances which can only be described as harrowing (primarily for her but also for ordinary viewers). There are few things more intimate, or engaging of Article 8 rights, than portraying a mother's last meeting with a much loved daughter, whom she will not be permitted ever to see again – at least until she grows up.

11. Some of the witnesses have said that the film puts T in a positive light. I do not agree. One can hardly fail to sympathise with her distressing plight. But I cannot accept that it gives a favourable impression. There is a scene in which T is admonished for being “rough” with the child (which she denies), and she is then told that because she cannot control her feelings she will not be allowed out with her daughter on that occasion.
12. Immediately after this, the opinion is expressed that T cannot be trusted to control her temper and, therefore, to have the child living with her again. Since the message is that the child may be physically harmed, I do not see that this can in any sense be seen as “positive”, or to T's or the child's advantage. No one suggests that she has been in any way deliberately abusive or unloving towards her daughter, but because of her mental disorder, and lack of insight, she is perceived to have difficulty in controlling her feelings and especially her frustration and anger.
13. Some witnesses have also suggested that it will be beneficial if the programme is seen in the locality, by those who know that she has had her child taken away, since they will have a more positive impression and not form the view that she has been abusive. Again, I do not agree.
14. When T was herself asked by her solicitor to list the advantages and disadvantages of the programme to be shown, T was only able to think of one advantage; namely, that she would be given a DVD of the programme for her to keep and to remind her of her daughter. She said that she would prefer to have the DVD without the programme being broadcast. Of course, she changes her mind from time to time, largely according to the person she is talking to, and no great weight should be attached to her assessment.
15. I must come to my own conclusion, having seen the programme and having heard the submissions of counsel. Yet I too can see no advantage for T which would outweigh the violation of her privacy which the making of the programme and its broadcast would clearly represent. It is not a matter of her, or the Official Solicitor, having to prove that she would be greeted with a hostile and abusive reaction by viewers who recognise her (as Dr McGrath suggests). That is, however, in my judgment a real possibility. It is clear from *Campbell v MGN Ltd* at [152], [154]-[155] and [169] that a “risk” or “potential harm” is for these purposes sufficient.
16. What is of more immediate concern is that the broadcast itself would constitute quite simply a massive invasion of T's privacy and autonomy, and would undermine her dignity as a human being. I would add, since the matter has also been addressed in submissions, that no rational person could possibly think that it was in her best interests to be portrayed to the general public in this light.
17. These are powerful factors for the court to weigh against such restrictions as the injunction would represent for the BBC's freedom of expression. It is necessary to evaluate the exercise of that right, not as a matter of generality, but in the particular circumstances of the case. No one doubts that there is a genuine public interest in the

subject of adoption and child care; nor that this series of programmes is intended to present a serious and informative coverage of that subject. Whether responsible treatment of the topic, however, requires such a fundamental invasion of this young woman's Article 8 rights (and especially given that she is incapable of giving meaningful or informed consent) is quite another matter. I bear in mind the observations of Lord Hoffmann in *Campbell v MGN Ltd* at [56].

18. It is for the court to carry out "the ultimate balancing exercise". The value of the broadcaster's expression in terms of Article 10 simply cannot be proportionate to the exposure of T's raw feelings and of her treatment of, or relationship with, her small daughter. As Neill LJ said a long time ago in *Re W (A Minor)* [1992] 1 WLR 100,103, in almost every case the public interest in favour of publication can be satisfied without any need to identify the child in question. There is no such need here, either in relation to the child herself or to the vulnerable young adult who is her mother.
19. The BBC is by no means insensitive to these matters and would not wish in any way to harm or to be unfair to T in the making of the programme or in its broadcast. The relevant personnel do not believe that there is any infringement of the relevant guidelines (to which I need to have regard in the light of s. 12(4)(b) of the 1998 Act). The following provisions of the BBC's editorial guidelines are material:

"Young people and vulnerable adults may not always be in a position to give informed consent. For example, people with learning difficulties or forms of dementia, the bereaved and people who are sick or terminally ill. In such cases, someone over eighteen with primary responsibility for their care should normally give consent on their behalf, unless it is editorially justified to proceed without it. However, we should normally avoid asking someone who is unable to give their own consent for views on matters likely to be beyond their capacity to answer properly."

Here it is true that it is too late to undo such infringements as took place in the making of the programme. Their consequences would, however, be amplified and perpetuated by broadcasting the programme in its present form.

20. The obligation imposed by the wording of the injunction placed before me on behalf of the Official Solicitor is to ensure that T is not identified in the course of the programme. It is for the BBC to decide whether, and in what form, the programme should be broadcast. It is not for the court to direct that any particular technique should be used, such as pixilation of features, the use of an actor's voice, or the deleting of names. The court's sole interest is to prevent the further infringement of T's Article 8 rights by her being identified in the context of this programme.