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IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

AP46/02

UNDER s 18 Broadcasting Act 1989

BETWEEN TV3 NETWORK SERVICES LTD  
Appellant

AND ECPAT NEW ZEALAND INCORPORATED  
Respondent

Dates of hearing: 22 and 23 August 2002

Counsel: Tim Allan and Clare Bradley  
for the Appellant  
Christopher Toogood QC and Denise Ritchie  
for the Respondent  
Andrew Scott-Howman  
for the Broadcasting Standards Authority

Date of judgment: 20 December 2002

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**JUDGMENT OF CHAMBERS J**

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Lawyers:  
Grove Darlow & Partners, PO Box 2882, Auckland, for the Appellant  
Buddle Findlay, PO Box 1433, Auckland, for the Respondent  
Bell Gully, PO Box 1291, Wellington, for the Broadcasting Standards Authority

## **'Paradise Lost'**

[1] On 15 July last year, TV3, one of the free-to-air television companies in New Zealand, broadcast on its '20/20' programme a documentary entitled 'Paradise Lost'. The programme dealt with poverty and child prostitution in Fiji and was prompted by allegations which had arisen following the murder in Fiji of Red Cross director, John Scott, and his partner. In one part of the programme, there was footage taken outside a court in Nadi of a Fijian child who had allegedly been sexually abused. The face of that child was clearly visible. In another part of the programme there was an interview with two young shoeshine boys. In that interview, the two boys were asked whether they had sex with foreigners. Both denied it. The programme then switched to an interview with a social worker who told a different story. The social worker said that the boys were in fact prostitutes.

[2] Some members of an organisation called ECPAT New Zealand Incorporated saw the programme. Ecpat New Zealand is part of a world-wide network of organisations which campaign to eliminate child prostitution, child pornography, and the trafficking of children for sexual purposes. The Ecpat members who saw 'Paradise Lost' were generally supportive of the programme, as the society supports exposure of the kinds of exploitation dealt with in the programme. They did not argue with the broad objectives of the programme. But what they disapproved of was the fact that TV3 showed the faces of the child sex abuse victim and of the two young shoeshine boys. In their view, showing the children's faces re-victimised and exploited them.

[3] The Broadcasting Act 1989 provides a mechanism whereby viewers can complain about programmes broadcast on television. Ecpat lodged a complaint with TV3. They said that TV3 had breached privacy standards and standards G4 and G13 of the Free-to-Air Television Programme Code: see Broadcasting Act 1989, s 4(1)(c) and (e). The privacy complaint was referred direct to the Broadcasting Standards Authority under s 8(1)(c) of the Act. The standards complaints were referred to the authority under s 8(1)(a) after TV3 had rejected them. The authority is conferred with jurisdiction under the Act to determine complaints referred to it under s 8: see s 10.

[4] The authority delivered its decision on 14 March this year. It upheld Ecpat's privacy complaint with respect to the child sex abuse victim and the shoeshine boys. It also upheld Ecpat's complaint that standard G4 had been breached so far as the

child sex abuse victim was concerned. It rejected Ecpat's assertion that standard G13 had also been breached. The authority, under s 13(1)(a), ordered TV3 to broadcast a statement explaining why the complaint had been upheld. It also ordered TV3 to pay costs in the sum of \$463.50 to Ecpat.

[5] From that decision, TV3 has appealed. This judgment is concerned with matters raised on that appeal.

### **Issues on this appeal**

[6] With respect to the 'privacy' part of the decision, the following issues arise on this appeal:

[a] Did the authority assume that the Act had extraterritorial effect and, if so, was that an error of law?

[b] Did Ecpat have standing to bring the complaint?

[c] For the purposes of privacy principle (i), is it open to TV3 to challenge the authority's finding that the facts revealed were 'private facts [the public disclosure of which would be] highly offensive and objectionable to a reasonable person of ordinary sensibilities'.

[d] If these facts were 'private facts', was there a 'public disclosure' of them?

[e] Was public interest available as a defence?

[f] Did the authority deal improperly with the impact of the New Zealand Bill of Rights Act 1990?

[7] With respect to the authority's 'standards' decision, only one issue arises:

[g] Was the authority wrong in holding TV3 breached standard G4?

[8] One other issue arose during the hearing. Mr Allan, for TV3, asked me to view a 23 minute videotape which contained, he said, examples of other documentaries. This was not material which had been before the authority. Mr

Toogood QC, for Ecpat, and Mr Scott-Harman, for the Broadcasting Standards Authority, objected to my viewing this videotape. In light of the opposition, I declined to view it. I said I would give my reasons in the main judgment.

[9] I shall deal with these issues in turn.

### **Extraterritorial effect**

[10] Mr Allan submitted that the authority, with respect to the privacy complaint, had acted on a wrong principle or misdirected itself in 'assuming the Act has extraterritorial effect'. He submitted that the Act protected the privacy only of those who live in New Zealand or who are shown to be known in New Zealand by at least one person. He said it was common ground that the children depicted in the documentary did not live in New Zealand. There was no evidence, Mr Allan submitted, that they were known by anyone here. The onus was on the complainant to establish that they were known here. Ecpat had not done that. The privacy complaint therefore had to fail. The authority, in finding that the children's privacy had been breached, was according to the Act an extraterritorial effect.

[11] I reject that submission. The purpose of the Act is not to protect the privacy of particular individuals, at least directly. The primary purpose of the Act, at least so far as the present case is concerned, is 'to provide for the maintenance of programme standards in broadcasting in New Zealand': see Long Title, para (a). Part I of the Act is concerned with those standards. Section 4(1), the first section in Part I, imposes on every broadcaster a responsibility for maintaining in its programmes and their presentation certain standards, including standards consistent with the privacy of *the individual*. It is the *concept* of privacy which is important and which must be honoured.

[12] Mr Scott-Howman advanced the argument in this way. He said that Mr Allan's argument involved a misunderstanding of the fundamental tenet of the Broadcasting Act. The object of the Act was not, Mr Scott-Howman said, to 'protect individuals concerned' in a broadcast or to allow individuals to 'avoid embarrassment and humiliation', as Mr Allan had submitted. Rather, the object of the Act was to maintain programme standards in broadcasts in New Zealand. The focus was on broadcasts in New Zealand and the standards expected of those broadcasts. That object was not fulfilled, and indeed would be defeated, if the Act applied only to certain parts of broadcasts in New Zealand; that is, those parts which

did not involve foreign nationals. There was, Mr Scott-Harman submitted, no question of extraterritorial jurisdiction being exercised by the authority when it considered complaints about New Zealand broadcasts which contained footage of foreign nationals.

[13] I agree with those submissions. The Act draws no distinction between New Zealanders and non-New Zealanders. The privacy principles established under the Act are standards which must be adhered to by those who broadcast in New Zealand, regardless of whether the individuals portrayed in the broadcast live here or are known here. The authority did not purport to exercise extraterritorial powers. It dealt with a complaint concerning a New Zealand broadcast which, it was said, breached privacy principles developed under the Act. Those principles do not differentiate between nationals and non-nationals.

[14] In any event, Mr Allan's test would be extremely difficult for any broadcaster to apply. How would the broadcaster find out in advance whether anyone in New Zealand knew the person whose privacy they intended to breach? How would TV3 have worked that out in this case? Given Fiji's proximity to New Zealand, almost certainly someone here did know one or more of the children depicted. Would the broadcaster have to err on the side of caution or would it run the risk? Mr Allan's test for privacy would be impractical.

[15] There was no error on the authority's part in this respect.

### **Ecpat's standing**

[16] Mr Allan submitted that the authority had acted on a wrong principle or misdirected itself in 'giving Ecpat standing'. He said that Ecpat was a person or entity 'whose privacy interests are not affected by the publication and therefore has no or should have no standing to complain that another's privacy is breached under s 4(1)(c) of the Act.'

[17] That submission is based on the same error as the submission considered in the previous section of this judgment. The Act does not limit who may complain. Anyone who considers broadcasting standards are not being complied with can complain. Where the complaint alleges breach of standards relating to 'the privacy of the individual', the same rule applies: the complaint may be made by anyone concerned about the failure to meet the required broadcasting standard, regardless of

whether the person whose privacy is immediately affected is concerned. For example, a person may complain about another's privacy being improperly interfered with because he or she is concerned that next time it might be his or her own privacy that is interfered with. (A person's motive for complaining, however, is not relevant to the question of whether or not standards have been maintained.) A person may complain because he or she is concerned to protect the interests of a group, e.g. children. The Commissioner for Children, for instance, has previously complained about breach of a privacy principle in respect of information disclosed about a child in a broadcast: see *Commissioner for Children v Television New Zealand Ltd* BSA 1999/93 15 July 1999. Establishing a principle may assist others in the group.

[18] There was no error on the authority's part when they dealt with a complaint from Ecpat.

#### **The 'private facts' challenge**

[19] One of the functions of the authority is to issue to broadcasters advisory opinions relating to broadcasting standards and ethical conduct in broadcasting: see s 21(1)(d). Pursuant to that power, the authority issued Privacy Principles in September 1999. The authority, in issuing the principles, entered certain caveats. The principles were not necessarily the only privacy principles that the authority would apply. The authority acknowledged that the principles might well require elaboration and refinement when applied to a complaint. The authority also acknowledged that the specific facts of each complaint are especially important when privacy was an issue.

[20] In this case, TV3, in its submission to the authority, did not attempt to go outside the principles laid down. TV3 contended that, on a proper application of the principles, no breach of privacy was established. On appeal, Mr Allan took a similar line. He submitted that the authority had misapplied the privacy principles. He did not assert that the principles were inapplicable or deficient in any way, although he did submit that they had to be interpreted in accordance with the Bill of Rights. That particular aspect I deal with below.

[21] The authority concluded that the 3 children's privacy had been breached in terms of the first privacy principle. Principle (i) reads as follows:

The protection of privacy includes protection against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities.

[22] Mr Allan, on the appeal, sought to argue that TV3 had not breached principle (i) because there was no proof that any 'private facts' had been disclosed. He argued that the authority was not entitled to 'assume' that the facts were 'private facts'. If Ecpat wished to assert that these were 'private facts', then Ecpat should have proved that. There should have been a hearing at which evidence was called.

[23] There was, in the authority's decision, very little discussion on this 'private facts' issue. That there was little discussion, however, was perfectly understandable in light of TV3's concession before the authority. After the authority had received Ecpat's privacy complaint, it referred the complaint to TV3 for comment. TV3's Standards Committee considered the matter and issued a 'decision' on 14 September last year. TV3 forwarded that decision to the authority as its response. TV3, in its 'decision', accepted that, in terms of principle (i), 'the broadcast did touch on private facts that could be deemed to be "highly offensive and objectionable"'. TV3's Standards Committee considered, however, that there was no breach of principle (i) because there was not 'public disclosure', the people concerned not being in New Zealand.

[24] The authority, in para 27 of its decision, recorded the concession made by TV3 'that, in terms of privacy principle (i), the broadcast ... did touch on private facts that could be deemed to be "highly offensive and objectionable"'.

[25] Mr Allan, on this appeal, cannot reopen something which was conceded before the authority. It does not make sense for TV3 now to assert that the authority should have held a hearing on an aspect which was not in dispute before it. It is not open on this appeal for TV3 now to contend that these were not 'private facts' within the meaning of privacy principle (i).

[26] In any event, I should add that I think TV3's concession both proper and inevitable. Obviously, to show the face of a child sex abuse victim in the context of a story concerning the sexual abuse perpetrated on that child is to disclose private facts about her which any reasonable person would regard as objectionable. Similarly, to show the faces of the shoeshine boys in the context of a story which accused them of being child prostitutes – a charge they denied – was to breach their privacy. For a start, they denied the allegation, but even if it is true, they were

clearly victims requiring protection. Reasonable people would object to these children's identity being revealed as it would make it more likely that they would be abused in future. Any man intent on sex with under-age boys learnt from this programme the first names and identities of these shoeshine boys and of their potential availability for sex if he travelled to Fiji.

[27] I hold that it is not open on this appeal for TV3 now to contend that these were not 'private facts' within the meaning of privacy principle (i).

### **Public disclosure**

[28] Mr Allan submitted that there was no 'public disclosure'. The authority found that there was. Mr Allan's submission that there was no 'public disclosure' was in part premised on his assertion that there was no proof that these facts were 'private facts' in Fiji. His point was that you cannot have public *disclosure* of facts that are already public. This argument cannot, of course, succeed because of my finding in the previous section of this judgment. TV3 conceded before the authority that these were 'private facts'. That in itself disposes of this thread of Mr Allan's 'public disclosure' argument.

[29] Mr Allan's other line of attack was to assert that there is no 'public disclosure' if the individuals concerned do not live here or are not known here. This is in essence the 'extraterritorial' argument in another guise. TV3 chose to show the faces of the sex abuse victim and of the two shoeshine boys. They were thereby recognisable. It is irrelevant whether anyone in fact recognised them.

[30] In my view, the authority was correct in finding that there had been 'public disclosure' and that there was a prima facie breach of privacy principle (i).

### **Public interest**

[31] Privacy principle (vi) reads as follows:

Discussing the matter in the 'public interest', defined as of legitimate concern or interest to the public, is a defence to an individual's claim for privacy.

[32] The authority held with respect to this matter as follows (para 31):



The Authority's remaining task is to consider whether there is any justification for the breach. It has considered TV3's submission that privacy principle (vi) provides a defence to any breach, as the matter was in the public interest. The Authority considers that there is a public interest in the subject matter of the item (the development of a child sex trade in a neighbouring Pacific country which many New Zealanders visit). However, it considers that the public interest does not apply to excuse the broadcast of private facts about identifiable individuals.

[33] In other words, the authority held that the public interest defence was not applicable to a breach of privacy principle (i). It could be available as an answer to breaches of other privacy principles. For example, privacy principle (v) expressly makes that principle 'subject to the "public interest" defence in principle (vi).'

[34] Mr Allan submitted that the public interest defence should have succeeded. He submitted that it was available as a defence to a *prima facie* breach of principle (i).

[35] The privacy principles cannot be construed as if they were an Act of Parliament. They are merely guidelines intended to assist broadcasters in maintaining standards consistent with the privacy of the individual. The principles must also be considered as a whole. Principle (vii) is relevant:

An individual who consents to the invasion of his or her privacy, cannot later succeed in a claim for a breach of privacy. Children's vulnerability must be a prime concern to broadcasters. When consent is given by the child, or by a parent or someone in loco parentis, broadcasters shall satisfy themselves that the broadcast is in the best interests of the child.

[36] TV3 did not assert before the authority that this invasion of privacy was protected by consent. TV3, in its submission to the authority, noted that no evidence had been given by Ecpat 'to support the contention that the young people involved, or their families, feel their privacy has been breached'. But that was not put forward as an assertion of 'consent' for the purposes of principle (vii). Rather, that point was made in the context of TV3's assertion that privacy complaints could be made only by the person identified in the broadcast. I have already dealt above with that point.

[37] Because consent had not been raised before the authority, it clearly could not be raised on this appeal. Nor did Mr Allan try to raise it. What we are left with, therefore, is this. There was public disclosure of private facts which, TV3 had conceded, were highly offensive and objectionable to a reasonable person of ordinary sensibilities. We also had a situation where the broadcaster did not assert by

way of defence that the children had consented. No doubt that reflected, at least in part, a difficulty in the broadcaster's showing how the identification of these children could conceivably have been in the best interest of those particular children. Given that overall background, the authority's decision that public interest was not available as a defence was perfectly understandable.

[38] No one is denying TV3's right to broadcast a documentary on the topic of poverty and child prostitution in Fiji. No one is denying that the topic was one of public interest. All that is being complained about is TV3's decision to show the faces of the child sex abuse victim and the shoeshine boys. The sex abuse victim, if she had to be shown at all, could have been filmed from behind or her face could have been pixillated. The shoeshine boys could have been interviewed off camera or their faces blacked out or pixillated. What they had to say could have been reported by the television reporter. Exactly the same information could have been conveyed by a variety of other means which would not have violated the children's privacy.

[39] TV3 has not demonstrated that the authority's rejection of the public interest defence was wrong.

### **Bill of Rights**

[40] The authority did consider the Bill of Rights when coming to its decision: see para 37 of its decision. The authority concluded that this exercise of its power under the Broadcasting Act did not unduly restrict TV3's right to express itself freely. The restriction imposed by its decision was 'reasonable and demonstrably justified': see s 5 of the Bill of Rights.

[41] Mr Allan submitted that, if this broadcast was in breach of principle (i), then principle (i) was unreasonable or should be read down so that it did not protect 'foreign nationals in another country where they are unlikely to have any idea that anything is published about them in this country'. If the principle were read down in that way, then, Mr Allan submitted, there would be no breach of principle (i) here because the children concerned 'do not live here' and 'there is no prospect of them being embarrassed by this publication'. No argument to this effect was addressed to the authority, although the argument is largely 'extraterritoriality' in another guise.

[42] Regardless of whether this matter can be raised on appeal, I nonetheless address it. The decision does not infringe the Bill of Rights and in particular TV3's

right under s 14 to freedom of expression. The restriction placed on TV3 by the decision is minor and clearly proportionate. The authority did not ban the documentary. The authority did not prohibit discussion about child sexual abuse or child prostitution. All the authority declared wrongful was the identification of the child victims. What they had to say and what others said about them could still have been conveyed in any number of ways. The only breach of standards was TV3's act of revealing their faces and thereby identifying them.

[43] The restriction placed on TV3 is entirely consistent with obligations which New Zealand has assumed under the United Nations Convention on the Rights of the Child, dated 20 November 1989. New Zealand ratified that convention on 6 April 1993. On 7 September 2000 New Zealand became a signatory to the Optional Protocol to the Convention dealing with the sale of children, child prostitution, and child pornography. The importance of protecting children is also expressly referred to in s 21(1)(e)(i) of the Broadcasting Act and in numerous other statutes. The need to protect children from sexual abuse and prostitution is an important countervailing consideration to be balanced against the need to protect freedom of speech. TV3's absolutist stance – that freedom of speech trumps all – is simply not right. A balancing of interests is required. The restriction on freedom of speech effected by the authority's decision is minor when compared with the competing need for protection of children.

[44] The suggested restriction of privacy protection for New Zealanders alone misses the point. The purpose of Part I of the Broadcasting Act is to maintain standards of broadcasting in New Zealand. Good broadcasting requires appropriate recognition of the privacy of the individual, wherever in the world the individual resides. Private facts the disclosure of which any reasonable person would regard as highly offensive or objectionable should as a matter of principle remain private.

[45] This challenge to the authority's decision must fail.

#### **Standard G4**

[46] One of the functions of the authority is to encourage the development and observance by broadcasters of codes of broadcasting practice: see s 21(1)(e). These codes are required, among other things, to ensure that programmes protect children and are 'fair and accurate' and that procedures are in place 'for correcting factual errors and redressing unfairness'. The authority has so encouraged and the

broadcasters have responded. They prepared the Free-to-Air Television Programme Code dated May 1996 and the authority approved it under s 21(1)(g). Standard G4 in that code requires broadcasters in the preparation and presentation of programmes 'to deal justly and fairly with any person taking part or referred to in any programme'.

[47] In this case, the authority held that the breach of the child sex abuse victim's privacy was 'inherently unfair' to her. It upheld that aspect of the standards complaint.

[48] Mr Allan made no separate submission concerning this finding of the authority. His essential argument was that there had not been any breach of the child sex abuse victim's privacy. I have upheld the authority's decision on that aspect. Mr Allan did not attempt to argue that, if TV3 failed on privacy, it should nonetheless succeed on standard G4.

[49] In the circumstances, the appeal against the 'standards' decision must fail.

#### **Reception of other videotape**

[50] I have already indicated that Mr Allan applied to have me look at another videotape which apparently contained some other documentaries. He accepted it was not evidence. He accepted that it had not been before the authority.

[51] Mr Scott-Howman objected to my looking at the videotape. He acknowledged that I would have jurisdiction to consider further evidence but, he said, TV3 accepted this was not evidence. Mr Scott-Howman said he was not sure exactly what it was, but it was clearly intended that this 'material' should influence the court. There was no basis for its admission.

[52] Mr Toogood advanced a similar argument. He said it was acknowledged that this was not evidence, yet nor was it counsel's submission. It was extrinsic material. If it was relevant in some way, it should have been put before the authority.

[53] I declined to view the videotape. It was clear that it could not come in as evidence. The fact that television was – to use Mr Allan's terminology – a 'visual medium' did not support looking at something simply because it was itself 'visual'. The videotape apparently contained excerpts from other documentaries which, so Mr

Allan contended, would have fallen foul of broadcasting standards were the authority's decision in this case correct. Even if that is so, where does it get us? It is no defence to a speeding ticket to show that others have sped but not been ticketed.

[54] I was also aware of the narrow nature of any appeal to the High Court: see s 18(4). The material was not before the authority. It could not be relevant on an appeal against discretion. I am not determining this matter on a first instance basis. My task is simply to determine whether the authority erred in law or misdirected itself.

### **Result**

[55] Under s 18(5)(a), I confirm the authority's decision. I dismiss the appeal.

### **Costs**

[56] I hope the parties will be able to resolve costs themselves. If they cannot, then I shall receive memorandums. TV3 must respond to any costs claim within 10 working days of receipt of the costs-claiming party's memorandum. The costs claiming party must file and serve any response to TV3's memorandum within 5 working days of receiving it. 'Working days' has the meaning ascribed in r 3 of the High Court Rules. I shall decide costs on the papers unless any party seeks an oral hearing.

Signed at 12.30 p. on 20 December 2002

A handwritten signature in black ink, appearing to read "Robert Chambers". The signature is written in a cursive, slightly slanted style.