

HIGH COURT OF JUSTICIARY

HCJDV 10

OPINION OF LORD WOOLMAN

IN77/11

In the Petition by

THE BRITISH BROADCASTING
CORPORATION FOR ACCESS TO
CROWN PRODUCTIONS

In the case of

HER MAJESTY'S ADVOCATE

Against

KIMBERLEY MARY HAINEY

BBC: Clancy QC, D. Hamilton

Crown: Andrew Stewart QC AD

Defence: Targowski QC *et* L. Reilly

12 January 2012

[1] On 15 December 2011, Kimberley Hainey was convicted of murdering her infant son, Declan Hainey. His mummified body was found on 30 March 2010 in the flat at 45 Bruce Road, Paisley, that he shared with his mother. It had lain there for several months. Careful and thorough work was undertaken by various experts, including pathologists, paediatricians, toxicologists and entomologists. However, it proved impossible to determine the precise date and cause of death.

[2] Because of these unusual features, the trial commanded wide public interest. It has been the subject of extensive reporting in the media.

[3] I sentenced Kimberley Hainey today at Glasgow High Court. I imposed a life sentence with a punishment part of 15 years on the murder charge. On the charge of attempting to defeat the ends of justice, I imposed a concurrent sentence of 7 years. I admonished her on the charge of breach of a bail condition.

[4] The BBC seeks access to various photographs which were lodged as Crown productions at the trial. They wish to use them in broadcast reports of the sentencing diet. If access is granted, the BBC does not seek the exclusive right to publish the photographs - they will be made available to all sections of the media.

[5] In England, there is a protocol between the Association of Chief Police Officers, the Crown Prosecution Service and the media about the release of such materials: *Publicity and the Criminal Justice System*. It states that "Our overriding objective is to provide an open an

accountable prosecution process, by ensuring the media have access to all relevant material wherever possible, and at the earliest appropriate opportunity."

[6] In terms of the protocol, photographs of the victim alone "may be released after consideration by the Crown Prosecution Service in consultation with the police and relevant victims, witnesses and family members." An appeal against any decision made under the Protocol may be taken to the CPS Head of Strategic Communications.

[7] Despite discussions having been initiated in 2005, no such protocol is yet in place in Scotland. Mr Clancy, who appeared on behalf of the BBC, explained that requests for access to productions are dealt with on an individual basis by the Crown Office. From the BBC's perspective, no clear policy has emerged.

[8] On 29 November and again on 15 December 2011, the BBC requested the release of various photographs which had been used in the Hainey trial. Both requests were refused by the Crown Office. The BBC then petitioned the *nobile officium* for their release. Lord Carloway held that the application was incompetent on the basis that two other remedies were open to the BBC.

[9] First, the BBC could apply direct to me as the trial judge as the person: "... who is best placed to assess the request and, where necessary, to take into account the human rights of others, including the convicted or accused person or the victim and any close relatives." (2012 HCJ 2 at paragraph 7). Secondly, the BBC could seek judicial review of the decision to refuse access to the photographs.

[10] The BBC lodged a revised version of the petition late on 6 January 2012. The application came before me on the afternoon of Monday 9 January 2012, when I heard submissions from the BBC and the Crown. After the hearing, I appointed the BBC to intimate

the petition to Kimberley Hainey and her legal advisors. I also fixed a further hearing immediately before today's sentencing diet, in order that she was given the opportunity to make submissions on the petition, if she so chose.

[11] Immediately prior to the hearing on 9 January, agreement was reached between the BBC and the Crown regarding the photographs of the interior of the flat at 45 Bruce Road. The Crown agreed to disclose those photographs, subject to the important qualification that Declan's body is not shown in any of the images that are reproduced. Yesterday, those photographs were placed in the public domain by the Crown Office. They were shown in news footage on television last evening and are widely published in newspapers this morning.

[12] At the hearing at 9.30am this morning, Mr Targowski moved for the hearing to be continued for 13 days. He asked that the BBC be ordered to prepare and intimate a written argument within 7 days to that period. Mr Targowski stated that his provisional view is that copyright in the photographs lies with Miss Hainey and any reproduction would be an infringement.

[13] Mr Targowski sought the adjournment as intimation of the application had only been received by email at 4.55pm on Tuesday. The hard copy of the petition was served yesterday. He mentioned that the Scottish Legal Aid Board had indicated yesterday that today's hearing would be covered under Miss Hainey's existing criminal legal aid certificate, but any further proceedings would require a civil certificate.

[14] Mr Targowski said that he had only had the briefest opportunity to consult with Miss Hainey this morning and his instructions are to oppose the petition. He said that it was a complex matter of law of some public importance and that he sought time to prepare a written argument.

[15] In opposing that motion, Mr Clancy on behalf of the BBC stated that there was no good reason why it should not be dealt with today. He stated that news is a perishable commodity, that the sentencing diet will be widely publicised; and that if the photographs are not available today, their impact will be significantly diminished. He said that if I granted the adjournment, it would be destructive of the whole application.

[16] The Advocate Depute indicated that the Crown did not oppose the motion to adjourn.

[17] I decided to adjourn the hearing until 12 noon after the sentencing diet. At that stage Mr Targowski renewed his motion, but I indicated that I wished to be addressed on the merits at 2pm. When the court reconvened, Mr Targowski said that he now only sought an adjournment until tomorrow. However, I took the view that I should reach a decision today for the following reasons:

- a. I had heard detailed submissions on the matter.
- b. All parties were present and an adjournment would cause substantial extra expense.
- c. I am due to commence a new trial tomorrow and might not be able to hear further submissions in this case.
- d. It was important that a decision be reached today if possible, for the reasons advanced by the BBC.
- e. Both the BBC and the Crown indicated that they would appeal an adverse decision.
- f. Miss Hainey would have an opportunity to represent her position at the appeal.

g. Mr Targowski accepted that her position might be closely aligned with that of the Crown.

The Photographs

[18] There are seven photographs in dispute. All of them feature Declan as a healthy and apparently happy infant. They were taken in the period from when he was a few months old, to when he was about 12 months old, or perhaps a bit older. Using the court production numbers, they are as follows:

53 (a) Declan sleeping

(b) & (c) Declan holding his bottle and feeding himself

54 (a) & (b) Declan dressed in a 'little devil' outfit at Halloween 2008

55 (a) Declan at his first birthday party with his grandmother, Mrs Elizabeth Rodden, and his great aunt, Mrs Anne McNeilage.

(b) Declan in a 'babygro' smiling at the camera

[19] Although the BBC seeks access to photograph 55(a), it undertakes to crop the image so that it only shows Declan and Mrs Rodden.

[20] The photographs were supplied to the police by Mrs Rodden for use at the trial. Copies were provided to the jury and each of the photographs was referred to a number of times by

different witnesses. However, they were not placed on the document imager and shown on the public screens in court.

The Copyright Issue

[21] All seven photographs were taken by Kimberley Hainey. She therefore owns the copyright in them. However, section.45 of the Copyright, Designs and Patents Act 1988 provides as follows:

"(1) Copyright is not infringed by anything done for the purposes of parliamentary or judicial proceedings.

(2) Copyright is not infringed by anything done for the purposes of reporting such proceedings; but this shall not be construed as authorising the copying of a work which is itself a published report of the proceedings."

[22] In my view, that provides an answer to any claim of copyright infringement by Miss Hainey. The BBC only intends to use the photographs for the purpose of reporting the trial.

[23] The BBC also founds another provision of the 1988 Act. Section 171(3) states:

"Nothing in this Part affects any rule of law preventing or restricting the enforcement of copyright on grounds of public interest or otherwise."

[24] The ambit of this provision is explained in *Copinger and Skone James on Copyright* at paragraph 3-308 as follows:

"Where the right to freedom of expression under art.10 of the European Convention on Human Rights comes into potential conflict with the rights of the copyright owner, the permitted act provisions of the 1988 Act, in particular the fair dealing provisions, will usually provide a defence. There may, however, be exceptional and rare cases where this is not the case, even construing the 1988 Act as generously as possible to accommodate the right. In such circumstances, and where the art.10 right is paramount in the public interest, a court would be bound to deny the copyright owner any relief of which would be to prevent freedom of expression. Usually, this will involve the denial of an injunction ..."

[25] That passage cites *Ashdown v Telegraph Group Ltd* [2002] Ch. 149. In that case, the Court of Appeal adopted a flexible approach: "the circumstances in which public interest may override copyright are not capable of precise categorisation or definition" (at paragraph 58 approving a statement made by Mance LJ).

[26] In my view, were it necessary to do so, the public interest in the proper and full reporting of this case is sufficient to "trump" any right of the copyright owner.

art. 8 Right to Respect for Private and Family life

[27] The Crown oppose access to the photographs on the ground that it would infringe Mrs Rodden's right to privacy. She has been asked on a number of occasions in the last few months if she would permit the release of the photographs, but has declined. She has indicated that it would cause her distress for the photographs to be widely circulated. Mr Targowski indicated that Miss Hainey would be likely to oppose the petition on the same ground.

[28] Article 8 of the European Convention on Human Rights provides as follows:

- "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

art. 10 Freedom of Expression

[29] By contrast, the BBC found on Article 10, which states:

- "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the

protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[30] I stress that freedom of expression includes "the right to receive and impart information". I also have regard to the fact that "the court must have particular regard to the importance of the Convention right to freedom of expression": Section 12 of the Human Rights Act 1998.

The General Rule

[31] In the context of the reporting of criminal trials, and in particular the grant of anonymity orders, Lord Steyn stated the general rule as follows:

"... the ordinary rule is that the press, as the watchdog of the public, may report everything that takes place in a criminal court. I would add that in European jurisprudence and in domestic practice this is a strong rule. It can only be displaced by unusual or exceptional circumstances. It is, however, not a mechanical rule. The duty of the court is to examine with care each application for a departure from the rule by reason of rights under article 8."

In Re S (A Child) [2005] AC per Lord Steyn

[32] In the same case, Lord Steyn also observed (at page 608, para 34) that

"from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial.

If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer."

[33] A similar point was made by Lord Rodger when deciding whether or not an Anonymity Order should be granted:

"... editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive." *In re Guardian News and Media Ltd* [2010] 2AC 697, at para 63.

[34] In my view, the correct approach is to consider articles 8 and 10 and undertake a balancing exercise, using the propositions set out by Lord Steyn (*In Re S* para.17).

- a. neither article has *as such* precedence over the other.
- b. where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary.
- c. the justifications for interfering with or restricting each right must be taken into account.

d. the proportionality test must be applied to each.

[35] In my view, the BBC should not be granted access to photograph 55(a), which is the one of Declan with Mrs Rodden. No good justification for publishing that photograph was provided. The BBC argue that publication of a photograph of the child with his grandmother would heighten legitimate public interest in case. In my opinion, however, that is a weak justification. Applying the proportionality test, the art. 10 right does not override Mrs Rodden's art. 8 right.

[36] The other photographs of Declan alone are in my opinion in a different category. No questions of indecency or of shock to members of the public arise. They show a normal infant. I see no reason why they cannot be broadcast or published to illustrate the tragedy associated with his death. In my view, the right to freedom of expression or more particularly the principle of open justice indicates that the BBC is entitled to access to these photographs.

[37] I am fortified in my view by having regard to recent statements made by the European Court of Human Rights: *Tarsasag A Szabadsagjogokert v Hungary* (2011) 53 EHRR 130:

"26. The Court has consistently recognised that the public has a right to receive information of general interest. Its case-law in this field has been developed in relation to press freedom which serves to impart information and ideas on such matters ... In this connection, the most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society's 'watchdogs', in the public debate on matters of legitimate public concern ... even measures which merely make access to information more cumbersome.

27. In view of the interest protected by Article 10, the law cannot allow arbitrary restrictions which may become a form of indirect censorship should the authorities create obstacles to the gathering of information. For example, the latter activity is an essential preparatory step in journalism and is an inherent, protected part of press freedom ... The function of the press includes the creation of forums for public debate."

The Right of Access to Court Documents

[38] The Crown also founded upon *R (Guardian News & Media Ltd) v Westminster Magistrates Court* [2011] 1 WLR 1173. That was an extradition case brought by the Government of the United States of America. It involved allegations of high profile corruption. The media sought disclosure of certain documents, including affidavits, witness statements submitted by the US Department of Justice and correspondence between the US Department of Justice and the Serious Fraud Office. The documents had been referred to and relied upon during the course of the court proceedings and there had been no reporting restrictions.

[39] The Court of Appeal upheld the decision at first instance that the media did not have a right to view court documents. It gave six reasons for doing so: paras. 55 to 61. Leave to appeal against that decision has been granted: [2011] WLR 3253. While accepting that the point was of some importance, Lord Neuberger stated that "there are strong and principled arguments as to why the projected appeal should fail."

[40] In my view, while that case is of high persuasive authority, it can be distinguished from the present case, having regard to the sensitive nature of the documents and the fact that

certain of the documents had been referred to, but not read out, in court. In this case, the photographs were significant adminicles of evidence at the trial and were effectively published in open court.

[41] For the reasons I have endeavoured to set out above, in my opinion the photographs should be disclosed in this case.