

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2009-404-003728

UNDER the Broadcasting Act 1989

IN THE MATTER OF an appeal from a decision of the
Broadcasting Standards Authority dated 10
June 2009

BETWEEN NICHOLAS PAUL ALFRED REEKIE
Appellant

AND TELEVISION NEW ZEALAND
LIMITED
Respondent

Hearing: 21 October 2009

Appearances: N P A Reekie in person and Ms R Wood as a McKenzie friend
H Wild for the Respondent
C Sophocleous for the Broadcasting Standards Authority

Judgment: 8 February 2010

JUDGMENT OF WHITE J

*This judgment was delivered by me on 8 February 2010 at 4:00 pm
pursuant to Rule 11.5 of the High Court Rules.
Registrar/Deputy Registrar*

Date:

Solicitors:
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Copy to:
Mr N P A Reekie, Auckland Prison, Private Bag 50-124, Albany, North Shore 0752

[1] The appellant, Mr Reekie, claims that the broadcast of “Until Proven Innocent”, the David Dougherty story, by Television New Zealand Limited (“TVNZ”) breached provisions of the Free to Air Television Code of Broadcasting Practice in its portrayal of him in the film. Mr Reekie, who was convicted of the abduction and rape of a young girl after David Dougherty had previously been convicted and then retried and acquitted on the same charges in respect of the same young girl, complained to TVNZ and then the Broadcasting Standards Authority (“the Authority”) that his portrayal in three short episodes in the film were fictional, in breach of his right to privacy, unbalanced, inaccurate and unfair to him. Both TVNZ and the Authority rejected the complaints. Mr Reekie has appealed to this Court against the decision of the Authority.

[2] The issue on appeal is whether the Authority in reaching its decision made an error of sufficient gravity to justify overturning the decision. This Court may not simply substitute its judgment for that of the Authority. It must be satisfied that in reaching its decision the Authority exercised its discretion on a wrong basis.

Background

[3] “Until Proven Innocent” was a feature-length film for television based on the story of David Dougherty who was wrongly convicted of abducting and raping an 11 year old neighbour. The programme was about the campaign to overturn his conviction, led by his lawyer Murray Gibson, journalist Donna Chisholm and scientist Arie Geursen.

[4] The programme was independently produced by Lippy Pictures Limited and broadcast by TVNZ on the Sunday night Theatre slot on TV One on 8 February 2009 from 8:30 pm to 10:15 pm. It was re-broadcast by TVNZ on 9 August 2009.

[5] A caption at the very beginning of the programme, stated that it was “Based on the true story of David Dougherty”.

[6] I have viewed a DVD of the programme which included three brief fictional scenes with Mr Reekie and David Dougherty while they were both in prison.

- a) First scene (45 seconds): the appellant approaches Mr Dougherty while they were both working with other prisoners under supervision:

NR – I know how you feel man. Those guys just think it's a joke, but I know what it's like. I'm innocent too.

DD – Is this a wind up?

NR – No way man. I know how it gets. It's hard to trust anyone after you've been falsely convicted. It does your head in.

DD – Yeh, it does.

NR – I'm Nick Reekie.

DD – David Dougherty.

Other prisoners – How cute, the two kiddie rapists have made friends.

DD – Is that what you're in for?

NR – No way man, just abduction. It's a total misunderstanding. The kids backed me up.

- b) Second scene (1 min 16): both men are shown in the prison chapel singing a hymn (How Great Though Art). This follows the death of David Dougherty's father and the dismissal of his appeal.
- c) Third scene (23 seconds): After Mr Dougherty heard he was to be released from prison, he was shown lying on the ground in the rain. The appellant is shown holding out his hand and pulling him up, and said, "Hey that's good news. You're getting out aye?"

[7] At the end of the programme, the on-screen captions summarised the factual outcomes for the people involved in the story:

- On the 17 of April 1997 David Dougherty was found not guilty of the crime for which he had spent more than three years in prison.
- Murray Gibson, Donna Chisholm and Arie Geursen continued to support and fight for David.
- It took another four years before the government apologised and awarded him compensation.

- Dougherty holds no animosity towards the girl who claimed he had abducted and raped her.
- He says she told the truth as she saw it.
- She just had the wrong man.
- In 2003 Nicholas Reekie was convicted of the abduction and rape of “Kate”. His DNA positively matched the semen sample taken from her pyjamas in 1992.
- Between the time of David’s conviction and his own, Nicholas Reekie had abducted and raped two other women.
- He was caught while attempting to abduct a third.

[8] When the programme was re-broadcast on 9 August 2009, the word “while” was replaced by “after” in the final caption.

[9] The programme received widespread critical acclaim, and won the following general television awards at the Qantas Film and Television Awards in September 2009:

- a) Best drama programme;
- b) Best performance by an actor (Cohen Holloway, who played David Dougherty);
- c) Best performance by a supporting actor (Peter Elliot, who played Murray Gibson);
- d) Best camera work – drama/comedy programme; and
- e) Best editing – drama/comedy programme.

[10] Mr Reekie made a formal complaint to TVNZ alleging that the programme was unbalanced, inaccurate, unfair and breached his privacy and the programme information standard. The complaint is summarised in the following paragraphs of the Authority’s decision of 10 June 2009:

[5] Looking at privacy, the complainant noted that his name was mentioned in the programme at least twice, along with his convictions at least once, and that the programme featured an actor playing him. He maintained that it was highly offensive, first, that his name and convictions were used in “such an inaccurate programme”, and because of the effect it had on his mental health and general wellbeing. Mr Reekie considered that it was also highly offensive because he had been convicted of the offences mentioned in the caption six years earlier, and “they have since become private to me again”. He therefore was of the view that the programme had affected his chances of effective rehabilitation and of being accepted back into society.

[6] Further, Mr Reekie said, both TVNZ and the production company knew he was seeking to appeal the convictions, and “the inaccurate display of events/evidence and other facts could strongly affect any possible retrial and my human right to a fair retrial”. Mr Reekie considered his privacy had been breached because no effort was made to seek his consent or point of view, or to clarify matters concerning him. He also argued that the breach of his privacy was highly offensive because of the effect the programme had on his family and friends.

[7] The complainant argued that the programme lacked balance with regard to his convictions, the facts around the case and the trial, David Dougherty’s involvement, and the circumstances in which they met. He said that he was not asked for his side of events which could have provided balance.

[8] Mr Reekie noted that the programme showed him interacting with Mr Dougherty on three occasions. He listed 18 instances in the programme which he considered to be inaccurate, including the fact that he had not been arrested while abducting a third woman, as stated in the caption, but at a casino two days later.

[9] Mr Reekie argued that the portrayal of him in the programme was not fair or accurate. He said that “not one of the meetings between me and David depicted actually took place, in those settings ... This is clearly a distortion of the facts”. Mr Reekie maintained that he and David Dougherty “were only ever once in the same unit and that was for period of two weeks”, and they had never spoken or been introduced.

[10] Finally, the complainant maintained that *Until Proven Innocent* had breached the programme information standard, as it had:

... distorted not only the events and the facts, in some cases, to the point of not being accurate, but it has also deceived viewers as to what occurred, both in the crime and the trial, as well as about me and my involvement with David, and, of course, David himself.

[11] Mr Reekie concluded by saying, “How much harm will these false and distorted accounts and depictions do me and any possible retrial, in the public eye?” More effort should have been made, he said, to limit the possible harm to him and his legal chances or rights for a fair hearing or retrial, by leaving him out of the film or ensuring the programme was accurate.

[11] TVNZ rejected Mr Reekie's complaint. Its reasons for doing so are set out in the following paragraphs of the Authority's decision:

[13] With regard to privacy, TVNZ maintained that no private facts about Mr Reekie were disclosed in the programme. The only details revealed in the broadcast were the complainant's name and his convictions, it said, which were included in an on-screen graphic at the end of the programme. That information was a matter of public record and did not amount to a private fact, TVNZ argued. It said that consent was not required to broadcast information that was on public record.

[14] The broadcaster considered that, given the seriousness of the offending, the information was a matter of high public interest and therefore "incapable of being construed as private facts, regardless of the length of time between conviction and broadcast". TVNZ declined to uphold the privacy complaint.

[15] The broadcaster declined to determine the balance and accuracy complaints, noting that Standards 4 and 5 applied to "news, current affairs and factual programmes". *Until Proven Innocent* was a drama, it said, and therefore the standards did not apply.

[16] Turning to Standard 6 (fairness), the broadcaster stated that the focus of the programme was the story of David Dougherty's fight to prove his innocence. It considered that the brief portrayals of Mr Reekie amounted to:

... dramatic licence by the production company and [TVNZ] is confident viewers would understand and appreciate this in the context of a drama.

[17] TVNZ again noted that a graphic was shown at the end of the programme which informed viewers about what had happened to the various people involved in the story. It said it was satisfied that the information contained in the graphic was accurate, and concluded that the portrayals of Mr Reekie in the programme were not unfair. TVNZ declined to uphold the fairness complaint.

[18] With regard to Standard 8 (programme information), TVNZ emphasised that the programme was broadcast in TV One's Sunday Theatre timeslot, and that all pre-publicity identified the programme as a drama. It considered that viewers would have understood that *Until Proven Innocent* was a drama and would have viewed it as such. TVNZ concluded that the programme did not deceive or disadvantage viewers, and therefore it declined to uphold the Standard 8 complaint.

[12] Mr Reekie was dissatisfied with TVNZ's response to his complaint and therefore referred it to the Authority under s 8(1B)(b)(i) of the Broadcasting Act 1989 ("the Act").

[13] Mr Reekie's submission to the Authority in support of his complaint is summarised in the following paragraphs of the Authority's decision:

[20] With regard to Standard 3, Mr Reekie considered TVNZ had only summarised the issue he raised and glossed over or ignored others. The complainant argued that showing him in prison in 1993 was a breach of his privacy because he had long since served the full sentence for any crime he was convicted of at that time. Mr Reekie maintained that the events depicted were public facts which had become private again, and considered his family and he should be able to put that behind them and “not have my imprisonment then made public again, some sixteen years later”.

[21] Mr Reekie reiterated the view that the encounters with David Dougherty depicted in the programme had never occurred and did not add anything to the story, which was meant to be about the three people who worked to free Mr Dougherty. These scenes could have been left out, he said, without affecting the storyline.

[22] The complainant said the convictions he was currently in prison for, including the abduction and rape of ‘Kate’, were six to seven years old, and argued that passage of time had made those convictions private, such that the screening of the programme was a breach of his right to privacy. “I have been punished by the courts, and nothing can be gained by such portrayals or comments about me”, he said, and the programme affected his right to privacy as well as his chance of being rehabilitated and his transition back into the community.

[23] Looking at the balance, Mr Reekie noted that the *Sunday Star Times* referred to the programme as a doco/drama in a 2008 article, and “the film stated what was meant to be facts at the end of the film”. He said that in an interview on *Good Morning* both the interviewer and the actor interviewed talked about the programme “as if it was fact”. Feedback on the internet made it clear that viewers mistook the programme as depicting accurate and balanced facts, he said, and his family and friends also perceived the programme as being factual. Mr Reekie believed that TVNZ wanted to create this perception and it did not state that the programme was not factual, nor did the programme state that some facts were changed or omitted.

[24] The complainant contended that *Until Proven Innocent* was subject to Standard 4 as it called itself “the David Dougherty story”, based on “real life stories”, and dealt with facts, quoted facts, and depicted real people. Therefore, it should be considered a factual programme, Mr Reekie said. He maintained that “throwing the word ‘drama’ into the mix” was a rather thin disguise for what was the real intent of the programme.

[25] Turning to accuracy, Mr Reekie reiterated that the programme was more than a drama and so Standard 5 should apply. He maintained that the on-scene graphic at the end of the programme was not totally accurate, and considered that TVNZ had glossed over other aspects of his accuracy complaint.

[26] Mr Reekie considered that TVNZ’s response to his fairness complaint was a “cop-out”. The public’s perception was that the events in the programme took place, he said, and viewers did not know how to tell the difference between facts and the occasions when dramatic licence was being used. The complainant questioned how portraying him in three events that never occurred, or screening a graphic that was not accurate, could be considered fair. The programme also omitted important facts about Mr

Dougherty's trial that affected his own trial, Mr Reekie said, which "made the case against [him] look stronger than it is".

[27] Looking at Standard 8 (programme information), the complainant reiterated his belief that the programme was a doco/drama rather than a simple drama. TVNZ's dramatic licence was not limited to portrayals of him, he said, but changed or omitted facts and fabricated events, while claiming the programme was based on a true story. Mr Reekie considered this was deceitful. As stated under other standards, website feedback indicated that viewers were deceived by the programme, as the distinction was not made between fact and fiction.

[14] The Authority rejected Mr Reekie's complaint in its decision of 10 June 2009. The Authority's reasons for doing so are set out in the following paragraphs of the Authority's decision:

Standard 6 (fairness)

[29] Standard 6 requires broadcasters to deal fairly with any person or organisation taking part or referred to in a programme. Mr Reekie argued that the portrayal of him in the programme was not fair, particularly because the three situations in which he and David Dougherty were shown interacting had not actually taken place.

[30] The Authority notes that it was made clear in a caption at the beginning of the programme that *Until Proven Innocent* was "based on the true story of David Dougherty", and it was screened in the Sunday Theatre timeslot. The Authority agrees with TVNZ that it was reasonable and acceptable to employ dramatic licence to portray the story, and that viewer would have understood that the story had been dramatised for the purpose of entertainment. While they should be able to expect that the programme was broadly representative of what happened, and accurate on material points, viewers would not have expected that a 2-hour programme representing three to four years of events would have been exactly accurate on minor or inconsequential points or included every detail of Mr Dougherty's case. Nor would they have expected a programme which focused on Mr Dougherty's story to include information about Mr Reekie and his subsequent conviction.

[31] In those circumstances, the Authority is of the view that the depiction of Mr Reekie interacting with Mr Dougherty on three occasions during the programme was not unfair to the complainant. It considers that the introduction of Mr Reekie's character into the storyline was a dramatic technique to show viewers the person who would later be revealed as the perpetrator of the crime.

[32] The Authority acknowledges that it was unfortunate if there was a minor error in one caption at the end of the programme (stating that Mr Reekie was arrested "while" attempting to abduct a woman). However, it finds that in the context of a drama, which focused on Mr Dougherty's case, the error was insignificant and not unfair to Mr Reekie.

[33] Accordingly, the Authority declines to uphold the Standard 6 complaint.

Standard 3 (privacy)

[34] When the Authority deals with a complaint that an individual's privacy has been breached, it must first consider whether the individual was identifiable in the broadcast. As the complainant's full name was disclosed in the programme, the Authority concludes that he was identifiable.

[35] In his original complaint, Mr Reekie argued that his convictions in 2003, as outlined in the caption at the end of the programme, had become private facts. Privacy principle 2 of the Authority's Privacy Principles states:

It is inconsistent with an individual's privacy to allow the public disclosure of some kinds of public facts. The 'public' facts contemplated concern events (such as criminal behavior) which have, in effect, become private again, for example through the passage of time. Nevertheless, the public disclosure of public facts will have to be highly offensive to an objective reasonable person.

[36] In the Authority's view, insufficient time had passed to render the fact of Mr Reekie's convictions private again. The convictions were of an extremely serious nature, and Mr Reekie is still serving his prison sentence. Such facts could not have become private merely by the passage of six years.

[37] The Authority notes that, in his referral to the Authority, Mr Reekie complained that the programme had featured him as being incarcerated at the same time as David Dougherty – some sixteen years ago – and that the fact of that prison term had long since become private. Because Mr Reekie did not raise this issue in his formal complaint to the broadcaster, the Authority has no jurisdiction to consider it.

[38] Accordingly, the Authority does not uphold the complaint that the disclosure of his name and 2003 convictions breached Mr Reekie's privacy.

Standard 8 (programme information)

[39] Standard 8 requires broadcasters to ensure that programme information and structure do not deceive or disadvantage viewers. Mr Reekie argued that viewers would have perceived the programme as factual, even though it was advertised as a drama.

[40] In the Authority's view, *Until Proven Innocent* was a drama, pre-publicity for the programme clearly advertised it as such, and it was screened in TV One's Sunday Theatre timeslot, which is well-known for showcasing dramas. Further, as outlined above under Standard 6, reasonable viewers would have understood that the statement that the programme was "based on" a true story meant that it had been dramatised for the purposes of entertainment, and therefore may not be a faithful depiction of past events or accurate in every respect.

[41] In these circumstances, the Authority considers that viewers would not have been deceived or disadvantaged by the programme's information or structure, and it declines to uphold the Standard 8 complaint.

Standard 4 (balance) and Standard 5 (accuracy)

[42] Standards 4 and 5 relate to news, current affairs, and other factual programmes. As outlined above, the Authority is of the view that *Until Proven Innocent* was a drama. It could not be considered a “factual programme” as envisaged by Standards 4 and 5. Accordingly, the Authority finds that the balance and accuracy standards do not apply, and it declines to uphold these aspects of the complaint.

[15] Dissatisfied with the Authority’s decision, Mr Reekie has appealed to this Court under s 18 of the Act. In support of his appeal, Mr Reekie provided written submissions and further oral submissions which reiterated and expanded on his complaint and the submissions made to TVNZ and the Authority. Mr Reekie’s submissions are considered in detail later in this judgment.

The Authority

[16] The Authority is established under the Act: s 20. It comprises four members, including a lawyer as Chairperson: s 26. One member is appointed after consultation with broadcasters and another after consultation with relevant public interest groups: s 26(1A) and (1B). Its functions include determining complaints and issuing advisory opinions relating to broadcasting standards and ethical conduct in broadcasting and codes of broadcasting practice: s 21(1) (a), (d) and (f).

[17] In determining complaints the Authority is required to receive and consider submissions from the complainant and the broadcaster, but is not required to have a formal hearing: s 10(1). In considering complaints, the Authority must provide for as little formality and technicality as is permitted by the Act, a proper consideration of the complaint and the principles of natural justice: s 10(2). The Authority has a wide range of powers in respect of complaints: ss 11–13A and 16. The Authority also has certain of the powers of a Commission of Inquiry established under the Commissions of Inquiry Act 1908: s 12.

[18] The Authority is required to issue codes of broadcasting practice for the purpose of maintaining programme standards in broadcasting in New Zealand and to encourage fair and accurate programmes: ss 21(1)(e)(iii) and (f).

[19] The nature and scope of the functions and powers of the Authority have been considered in previous decisions of this Court on appeals from the Authority. The relevant aspects of these decisions may be summarised:

- a) The Authority is a specialist tribunal with its members chosen for their expertise in their field of broadcasting: *Jardine Insurance Brokers Ltd v Television New Zealand Ltd* HC AK 176/94 3 November 1995 at 10–11; *Moonen v Television New Zealand Ltd* HC WN AP35/95 14 August 1996 at 1; *TV3 Network Services Ltd v Prime Minister (Rt Hon Helen Clark)* HC WN CIV-2003-485-1816 10 February 2004 at [37]; *Radio New Zealand v Ellis* [2006] NZAR 1 at [42]; *Canwest TV Works Ltd v XY* [2008] NZAR 1 at [60]; *Television New Zealand Ltd v Green* [2009] NZAR 69 (HC) at [42];
- b) The Authority's role is inquisitorial rather than adversarial. It is not a tribunal settling private disputes between an injured party and a broadcaster. Its role is to ensure that broadcasting standards are established and observed. While its jurisdiction is invoked by a complaint under s 13, the complaint need not be made by a person injured, the Authority has powers of a Commission of Inquiry and is not confined to the sanctions sought by a complainant: *Radio New Zealand v Ellis* at [42] and *Television New Zealand Ltd v KW* HC AK CIV-2007-985-1609 7 May 2008 at [28]–[29]
- c) In exercising its powers, the Authority needs to recognise that the Act does not impose any onus of proof on either the complainant or the broadcaster: *Television New Zealand Ltd v KW* at [24]–[32].
- d) In reaching its decisions on complaints and in interpreting and applying the standards in its codes, the Authority should be influenced by and undertake an analysis of relevant provisions of the New Zealand Bill of Rights Act 1996: *Television NZ Ltd v Viewers for Television Excellence Inc* [2005] NZAR 1 at [52]–[56], *Browne v*

Canwest TV Works Ltd [2008] 1 NZLR 654 at [30]–[42], *Television NZ v Green* at [40]–[41] and *Television NZ Ltd v KW* at [11]–[12].

The role and powers of the Court

[20] The role and powers of the High Court in relation to appeals against decisions of the Authority under the Act are set out in s 18, the relevant parts of which provide:

- (4) The Court shall hear and determine the appeal as if the decision or order appealed against had been made in the exercise of discretion.
- (5) In its determination of any appeal, the Court may –
 - (a) Confirm, modify, or reverse the decision or order appealed against, or any part of that decision or order:
 - (b) Exercise any of the powers that could have been exercised by the Authority in the proceedings to which the appeal relates.
- (6) *Repealed.*
- (7) Subject to the provisions of this section, the procedure in respect of any appeal under this section shall be in accordance with rules of Court.

[21] The requirement for the Court to hear and determine an appeal as if the decision of the Authority had been made in the exercise of discretion means that the Court may not simply substitute its judgment on the issues for that of the Authority. The Court must be satisfied that the Authority acted on a wrong principle, or failed to take into account some relevant matter or took account of some irrelevant matter, or was plainly wrong: *May v May* [1982] 1 NZFLR 165 (CA) at [169]–[170]. This approach has been followed consistently in appeals under the Act: *Television New Zealand Ltd v Green* at [17] and *Television New Zealand Ltd v KW* at [3].

[22] An appeal under the Act is therefore not a general appeal to which the judgment of the Supreme Court in *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141 applies: cf *Blackstone v Blackstone* (2008) 19 PRNZ 90 at [8]. In the present context the High Court is entitled to give due deference to the decision of the Authority which is, as has already been noted, a specialist tribunal.

[23] It may also be noted that the determination of the High Court on any appeal under s 18 of the Act is final: s 19. Previous decisions of the High Court on appeals under the Act have recognised the responsibility that follows from this provision.

The Free to Air Television Code of Broadcasting Practice

[24] In this case, the relevant Code was issued by the Authority in August 2006. The preamble to the Code stated:

Under the Broadcasting Act 1989, every broadcaster is responsible for maintaining in its programmes and their presentation standards which are consistent with:

- a) The observance of good taste and decency
- b) The maintenance of law and order
- c) The privacy of the individual
- 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
- e) Any approved Code of Broadcasting Practice applied to programmes.

[25] The relevant Standards were Standards (Privacy), 4 (Balance), 5 (Accuracy), 6 (Fairness), 7 (Programme Classification) and 8 (Programme Information).

[26] Standard 3 (Privacy) provided as follows:

In the preparation and presentation of programmes, broadcasters are responsible for maintaining standards consistent with the privacy of the individual.

Guideline

- 3a** When considering an individual's privacy, broadcasters shall apply the privacy principles developed by the Broadcasting Standards Authority (see Appendix 2).

[27] The relevant privacy principles referred to in Guideline 3a to Standard 3 were set out in Appendix 2 to the Code as follows:

Advisory Opinion: Privacy Principles

1. It is inconsistent with an individual's privacy to allow the public disclosure of private facts, where the disclosure is highly offensive to an objective reasonable person.
2. It is inconsistent with an individual's privacy to allow the public disclosure of some kinds of public facts. The 'public' facts contemplated concern events [such as criminal behaviour] which have, in effect, become private again, for example through the passage of time. Nevertheless, the public disclosure of public facts will have to be highly offensive to an objective reasonable person.
- ...
8. Disclosing the matter in the 'public interest', defined as of legitimate concern or interest to the public, is a defence to a privacy complaint.

Updated 1 August 2006

Note:

- *These principles are not necessarily the only privacy principles that the Authority will apply*
- *The principles may well require elaboration and refinement when applied to a complaint*
- *The specific facts of each complaint are especially important when privacy is in issue*

[28] Standard 4 (Balance) provided as follows:

In the preparation and presentation of news, current affairs and factual programmes, broadcasters are responsible for maintaining standards consistent with 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.

Guidelines

- 4a** Programmes which deal with political matters, current affairs, and questions of a controversial nature, must show balance and impartiality.
- 4b** No set formula can be advanced for the allocation of time to interested parties on controversial public issues. Broadcasters should aim to present all significant sides in as fair a way as possible, it being acknowledged that this can be done only by judging each case on its merits.
- 4c** Factual programmes, and programmes shown which approach a topic from a particular or personal perspective (for example,

authorial documentaries and those shown on access television), may not be required to observe to the letter the requirements of standard 4.

[29] The relevant parts of Standard 5 (Accuracy) provided as follows:

News, current affairs and other factual programmes must be truthful and accurate on points of fact, and be impartial and objective at all times.

Guidelines

5a Significant errors of fact should be corrected at the earliest opportunity.

5b Broadcasters should refrain from broadcasting material which is misleading or unnecessarily alarms viewers.

...

5d Factual reports on the one hand, and opinion, analysis and comment on the other, should be clearly distinguishable.

5e Broadcasters must take all reasonable steps to ensure at all times that the information sources for news, current affairs and documentaries are reliable.

[30] The relevant part of Standard 6 (Fairness) provided as follows:

In the preparation and presentation of programmes, broadcasters are required to deal justly and fairly with any person or organisation taking part or referred to.

Guidelines

6a Care should be taken in the editing of programme material to ensure that the extracts used are a true reflection, and not a distortion, of the original event or the overall views expressed.

6b Contributors and participants in any programme should be dealt with fairly and should, except as required in the public interest, be informed of the reason for their proposed contribution and participation and the role that is expected of them.

...

6d Broadcasters should acknowledge the right of individuals to express their own opinions.

...

6f Broadcasters should recognise the rights of individuals, and particularly children and young people, not to be exploited, humiliated or unnecessarily identified.

[31] Standard 7 (Programme Classification) provided as follows:

Broadcasters are responsible for ensuring that programmes are appropriately classified; adequately display programme classification information; and adhere to time-bands in accordance with Appendix 1.

Guidelines

- 7a** Broadcasters should ensure that appropriate classification codes are established and observed (Appendix 1). Classification symbols should be displayed at the beginning of each programme and after each advertising break.
- 7b** Broadcasters should ensure that all promos (including promos for news and current affair) are classified to comply with the programme in which they screen (“host programme”). For example:
- (i) promos for AO programmes shown outside AO time must comply with the classification of their host programme
 - (ii) promos show in G or PGR programmes screening in AO time must comply with the G or PGR classification of their host programme
- 7c** Where a promo screens in an unclassified host programme outside AO time (including news and current affairs), the promo must be classified G or PGR and broadcasters must pay particular regard to Standard 9 (Children’s Interests).
- 7d** Where a promo screens adjacent to an unclassified host programme outside AO time (including news and current affairs), the promo must comply with the underlying timeband.
- 7e** Broadcasters should consider the use of warnings where content is likely to offend or disturb a significant proportion of the audience.
- 7f** News flashes prepared for screening outside regular news bulletins, particularly during children’s viewing hours, should avoid unnecessary distress or alarm. If news flashes contain distressing footage, prior warning should be given. This guideline is not intended to prevent the broadcast of material which is of overriding public interest.

[32] Appendix 1 provided:

Free-to-air Television Programme Classifications

Definition

A child means a boy or girl under the age of 14 years (Children, Young Persons, and Their Families Act 1989).

G – General

Programmes which exclude material likely to be unsuitable for children. Programmes may not necessarily be designed for child viewers but must not contain material likely to alarm or distress them.

G programmes may be screened at any time.

PGR – Parental Guidance Recommended

Programmes containing material more suited for mature audiences but not necessarily unsuitable for child viewers when subject to the guidance of a parent or an adult.

PGR programmes may be screened between 9am and 4pm, and after 7pm until 6am.

AO – Adults only

Programmes containing adult themes and directed primarily at mature audiences.

AO programmes may be screened between midday and 3 pm on weekdays [except during school and public holidays and designated by the Ministry of Education] and after 8.30pm until 5am.

AO9.30pm – Adults Only 9.30pm – 5 am

Programmes containing stronger material or special elements which fall outside the AO classification. These programmes may contain a greater degree of sexual activity, potentially offensive language, realistic violence, sexual violence, or horrific encounters.

Unclassified Programming

- [i]** News and Current Affairs programmes, which may be scheduled at any time and may, on occasion, pre-empt other scheduled broadcasts, are not, because of their distinct nature, subject to censorship or to the strictures of the classification system.
- [ii]** However, producers are required to be mindful that young people may be among viewers of news and current affairs programmes during morning, daytime and early evening hours and should give consideration to including warnings where appropriate.
- [iii]** Sports and Live Programming cannot be classified due to the 'live' nature of the broadcast. The broadcaster must take all reasonable steps to ensure that the content of the programme conforms with the underlying timeband in which the programme is broadcast.

[33] Standard 8 (Programme Information) provided as follows:

Broadcasters are responsible for ensuring that programme information and structure does not deceive or disadvantage the viewer.

Guidelines

- 8a** Broadcasters should ensure that programme material and advertising material are clearly distinguishable.
- 8b** Broadcasters should not use the process known as “subliminal perception” or any other technique which attempts to convey information to the viewer by transmitting messages below or near the threshold of normal awareness.
- 8c** Broadcasters should not depict the process of putting a subject under hypnosis in sufficient detail to allow imitation, nor should they broadcast any programme designed to induce a hypnotic state in viewers.
- 8d** Broadcasters should ensure that there is no collusion between broadcasters and contestants which results in the favouring of any contestant or contestants.
- 8e** Programmes dealing with products or services shall not by implication, omission, ambiguity, or exaggerated claim, mislead or deceive viewers.

The appellant

[34] As is apparent from Mr Reekie’s complaint and the decisions of both TVNZ and the Authority, he has been convicted of a number of serious criminal offences. Details of the offences are contained in two judgments of the Court of Appeal: *R v Reekie* CA 283/93 15 November 1993 and *R v Reekie* CA 339/03 3 August 2004. For present purposes it is sufficient to set out the following paragraphs from the two judgments:

1993 judgment

The appellant, who is only 22 years of age, was sentenced to ten years imprisonment following his plea of guilty to one charge of burglary, one of aggravated burglary, and two charges of abducting young girls, aged 6 and 8 years.

...

We allow the appeal and substitute a term of five years on the charge of abduction and two years on the aggravated burglary charge, to be served cumulatively; with a further sentence of two years imprisonment on the charge of burglary to be served concurrently.

2004 judgment

[4] The appellant, who was born on 16 December 1970, was sentenced on 31 offences. He was found guilty of burglary, unlawfully entering premises, assault, indecent assault, abduction, sexual violation by unlawful sexual connection, and sexual violation by rape. His crimes were committed against four female complainants ranging in age from 11 to 69 years. They spanned a ten year period.

...

[38] The appeal is allowed and the minimum term of imprisonment imposed on the appellant is reduced to 20 years in respect of each sentence of preventive detention imposed upon him.

[35] In the course of the 2004 judgment the Court of Appeal set out the substance of the sentencing Judge's remarks which included the following statements in relation to Complainant "A":

[10] The Crown charged Mr Dougherty with your crimes. He was tried twice and convicted twice. He served over three years imprisonment. By 2002 advances in DNA profiling identified you to a standard close to mathematical certainty as Complainant A's attacker. Those same advances positively excluded Mr Dougherty.

[11] At trial, Mr Reekie, you denied these offences. At one stage you told Mr Perkins [the Crown prosecutor] you may have been in Christchurch. At another you said that you could not remember doing those things. The jury's verdict, Mr Reekie, shows that you have a poor memory. I need only add to what must be obvious to anybody. You could hardly forget events of such sustained brutality.

...

[14] ... Mr Reekie, I cannot envisage a case which presents more aggravating factors. The facts largely speak for themselves. My words could never do justice to Complainant A's suffering. When she went to bed that night in October 1992 she was, in her own words, communicated through her victim impact report, "a normal happy 11 year old who was attending school and competing regularly at gymnastics". Again in her own words "this October I will be 22 years old and half of my life has been taken up with what happened to me when I was 11".

[15] Complainant A's victim impact report confirms what I observed of her demeanour at trial. She remains haunted by the five hours of your terror and the pain to which you subjected her. Her suffering has been compounded by the ordeals of having to give evidence at Mr Dougherty's two trials, and the guilt associated with his convictions. While, of course, you are not

directly responsible for those miscarriages of justice, you must have known that your silence was condemning your victim to constantly reliving the horror of your crimes and an innocent man to at least three years imprisonment. It is consistent with my assessment of your character, confirmed from what I heard of you today, that you would stand by and let others suffer rather than accept responsibility for your conduct.

[36] The fact that Mr Reekie has been convicted of these offences and is currently still serving his term of imprisonment does not mean that he is prevented from lodging a complaint under the Act and pursuing an appeal to this Court against the Authority's decision in his case. Imprisonment does not automatically extinguish an inmate's legal rights of this nature: *Laws of New Zealand, Prisons and Enforcement of Sentences* (Reissue 1, LexisNexis, Wellington, 2003) at [87]. Mr Reekie is entitled to take steps to protect his rights by ensuring that TVNZ has complied with its obligations under the Authority's Code.

The appellant's submissions on appeal

[37] In relation to the Authority's decision relating to Standards 4 and 5, Mr Reekie submitted that the Authority was wrong to decide that, on the basis that the programme was a drama, it was not "a factual programme". Relying on the decision of the Authority in *Banks v Television New Zealand Ltd* Decision No 2003-141 15 December 2003, Mr Reekie submitted that if one looked at the context of the programme, it would be seen that it was a "factual programme" and not a drama. Mr Reekie drew distinctions between fictional dramas, documentaries and "docu-dramas". He noted examples of other cases where television dramas and documentaries were preceded by a disclaimer to the effect that they were dramatisations of true stories. In this case, there was no disclaimer. Mr Reekie considered the absence of a disclaimer to be particularly significant. Indeed he went so far as to indicate that if there had been a disclaimer, there may not have been any breach of Standards 4 and 5. In his submission, 90% of the programme was factually accurate, but 10% was fictional, namely the three episodes relating to him, and the captions at the end. It was dramatic licence. In his submissions in reply, Mr Reekie acknowledged that the factual and fictional proportions of the programme may have been closer to 50/50, but the factual proportion still exceeded the fictional proportion in his view.

[38] As far as the Authority's decision in relation to Standard 6 (Fairness) was concerned, Mr Reekie submitted that the Authority had erred at para [30] of its decision because it had concluded that the fictional part of the programme was the exercise of dramatic licence. In Mr Reekie's submission, that would have been acceptable if it were a drama, but not if it were a "docu-drama" as here. Mr Reekie accepted that he was "the villain in the movie", but claimed that he had been portrayed unfairly. In his submission, the three fictional episodes portrayed him unfairly. In terms of Standard 6, "fictional" was equivalent to "unfair". Mr Reekie conceded that in the context of the programme, 90% was factual and acceptable, only the three fictional scenes were unfair. Mr Reekie claimed that they constituted "character assassination" of himself and could have been left out of the film entirely. The change to the concluding caption to the movie involving the replacement of the word "while" with the word "after" for the second broadcast on 9 August 2009 did not overcome the unfairness. The replacement caption should have indicated that he was arrested in the Sky City Casino. Mr Reekie did accept, however, that the first sentence in the caption was accurate.

[39] As far as the Authority's decision relating to Standard 3 (Privacy) was concerned, Mr Reekie submitted that by the time of the broadcast of the film, his 1993 conviction had become a private fact and therefore ought not to have been broadcast. Mr Reekie admitted that he had been convicted in 1993 on two charges of abduction and sentenced to ten years imprisonment which had subsequently been reduced to seven years. He also admitted his subsequent convictions in 2000 and 2003. He referred to the Criminal Records (Clean Slate) Act 2004 and submitted that after seven years the public fact of his conviction in 1993 had become private again. The elapse of time meant that the public fact became a private fact and therefore Standard 3 was applicable, and the Authority was wrong. He noted that the conviction in 1993 was not for sexual offending and that the publicity surrounding his conviction in the programme had had an adverse effect on others.

[40] In relation to the Authority's decision on Standard 8 (Programme Information), Mr Reekie submitted that the guidelines were just guidelines, and that viewers were "deceived" by the three fictional episodes because they were fictional. He claimed that viewers had been disadvantaged by the absence of a disclaimer

about what the film was to be. He said that TVNZ had taken advantage of vulnerable members of society in broadcasting the film.

[41] In respect of the Authority's decision on Standard 7 (Programme Classification), Mr Reekie submitted that TVNZ had incorrectly classified the programme as a drama when it was a "docu-drama".

TVNZ's Submissions

[42] Counsel for TVNZ submitted that the Authority's conclusion that "Until Proven Innocent" was a drama and not a factual programme so that Standards 4 (balance) and 5 (accuracy) were inapplicable could not be criticised. There was no arguable basis for suggesting that the Authority acted on a wrong principle, failed to take into account some relevant matter or took into account some irrelevant matter, or was plainly wrong. Counsel submitted that no reasonable viewer would have expected the scripted dramatisation to be "truthful and authoritative". The fact that the programme was presented as a feature length film and broadcast in the Sunday night theatre slot reinforced the view that it was not a "factual programme". No reasonable viewer would have concluded from the brief encounters with Mr Reekie in the programme that they actually took place. The evidence relied on by Mr Reekie was irrelevant. Broadcasting standards were to be determined on an objective assessment, not on the interpretation of friends or associates of Mr Reekie.

[43] Counsel for TVNZ submitted that there was no basis for interfering with the Authority's decision in relation to Standard 3 (privacy) because the extremely serious nature of Mr Reekie's convictions for sexual offending and the fact that he was still serving his preventive detention sentence, which carried with it a minimum non-parole period of 20 years, meant that the public facts in his case had not become private six years after his conviction. Counsel submitted that neither the Criminal Records (Clean Slate) Act 2004 nor the law of privacy applied to or protected Mr Reekie. In the absence of public disclosure of private facts there was no breach of privacy.

[44] Counsel for TVNZ submitted that it could not be shown that the Authority erred in deciding that Standard 6 (Fairness) had not been breached because fairness needed to be assessed in the context of the nature of the programme and the manner in which the person took part or was referred to and here the scenes depicting Mr Reekie were presented as drama not as reality. The captions describing the consequences were in all material respects accurate and a matter of public record. Fairness did not require Mr Reekie's comment on them. In a film about David Dougherty, Mr Reekie's views on events were irrelevant.

[45] Counsel for TVNZ submitted that Mr Reekie's appeal under Standard 7 (programme classification) should be struck out as he had made no complaint under this Standard and the Authority had made no determination. Furthermore, programme classification does not distinguish "drama" from "docu-drama" and this programme was correctly classified AO 8:30.

[46] Counsel for TVNZ submitted that the Authority's decision in relation to Standard 8 (programme information) could not be criticised. There was no basis for Mr Reekie's new allegation of deception through wrong classification and disadvantage through misinformation.

The Authority's position

[47] As required by a minute of Venning J dated 14 October 2009, the Authority filed a report with the Court in accordance with rule 20.15 of the High Court Rules which addressed the process by which Mr Reekie's privacy complaint was redirected to TVNZ and the treatment by the Authority of further information received from Mr Reekie. The Report, which was signed by the Chair of the Authority, confirmed that Mr Reekie's additional comments, although not referred to, were taken into account by the Authority in reaching its decision.

[48] The Authority abided the decision of the Court. Counsel appeared to provide any assistance required by the Court.

Discussion

[49] In this case no questions have been raised by the parties as to the validity or adequacy of any of the relevant Standards, Guidelines or Advisory Options or as to the application of the New Zealand Bill of Rights Act 1990 to the Standards, Guidelines or Advisory Opinions or the Authority's decision in this case: cf Claudia Geiringer and Steven Price, "Moving from Self-Justification to Demonstrable Justification – the Bill of Rights and the Broadcasting Standards Authority" in Jeremy Finn and Stephen Todd (eds) *Law, Liberty, Legislation* (LexisNexis, Wellington, 2008) at 295. Nor was it argued that the Authority should have a standard which addresses the issue of the use of disclaimers which may raise other questions referred to in decisions of the Authority which were not addressed in argument before me: *Spectrum v Bays Television Ltd* Decision No 132 16 November 1995, *Cole v TVNZ* Decision No 8–10 8 February 1996 and *Ellis v Uma Broadcasting Ltd* Decision No 32 15 April 2003. I therefore propose to consider the issues raised in the context of each of the relevant standards which was the approach adopted by the parties to the appeal.

Standard 3 (Privacy)

[50] Standard 3 (Privacy), which requires broadcasters, in the preparation and presentation of programmes, to maintain standards that are consistent with "the privacy of the individual" reflects the express requirements of s 4(1)(c) of the Broadcasting Act 1989 as well as the general requirements of the law relating to the protection of privacy contained in legislation such as the Privacy Act 1993 and referred to in cases such as *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [77]–[135] *Brooker v Police* [2007] 2 NZLR 91 (SC) at [37] and [122]–[129], and *Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277 (SC): see also Geiringer and Price at 332-334. As recognised in *Hosking v Runting* at [85] and [101]–[104], the Authority's privacy principles have also influenced the general law relating to the protection of privacy.

[51] As the Guideline to Standard 3 stipulates, broadcasters, when considering an individual's privacy, must apply the privacy principles developed by the Authority.

For present purposes, the relevant privacy principles make it clear that it is inconsistent with an individual's privacy to allow the public disclosure of public facts relating to criminal behavior which have in effect become private again, for example through the passage of time. The first question in the present case is whether the Authority was right to consider that the information about Mr Reekie's 2003 convictions, as outlined in the caption at the end of the programme, had not become private facts again.

[52] In my view the Authority was right. Mr Reekie has failed to raise any grounds to support my exercising this Court's discretion to overturn the Authority's decision on this point.

[53] Mr Reekie's 2003 convictions were for extremely serious charges. The extracts from the judgments of the High Court in 2003 and the Court of Appeal in 2004 set out earlier in this judgment indicate the serious nature of his convictions. The facts of his 31 offences, his convictions, his sentences and the judgments of the courts were matters of public record. They were public facts in the public arena: cf *Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277 (SC) per McGrath J at [100]. There was no basis on which such public facts would have become private facts within only five or six years. Indeed it is unlikely that the public facts relating to Mr Reekie's convictions will in the foreseeable future become private facts protected from disclosure under any current law of privacy. The provisions of the Criminal Records (Clean Slate) Act 2004 are unlikely to have any application to Mr Reekie's criminal record: ss 7(1)(b) and (d) and 10(4) and (5). Mr Reekie's actions which, as the sentencing Judge noted, condemned his victim to constantly reliving the horror of his crimes and an innocent man to at least three years imprisonment, are likely to ensure that the public facts in his case remain public for a considerable period of time. They were certainly still public facts when the programme was broadcast by TVNZ in 2009. Mr Reekie will be in prison serving his sentences until at least 2023. His case is also likely to be back in the public arena when the question of his release on parole arises.

[54] Mr Reekie's submission in this Court that his 1993 convictions, which had provided the basis for the suggestion in the programme that he had been in prison at

the same time as David Dougherty, had become private facts again was not raised in his complaint with TVNZ. The Authority decided that it had no jurisdiction to consider it.

[55] In my view the Authority was right not to consider this submission: Broadcasting Act 1989, s 8(1B) But even if the Authority had been wrong to decline jurisdiction, the same decision would have been reached in respect of the public nature of Mr Reekie's 1993 convictions. Those convictions also related to serious offences and were not protected by the Criminal Records (Clean Slate) Act 2004, especially in the absence of a District Court order under s 10(4) requiring them to be disregarded. Furthermore, the 1993 convictions were back in the public arena as a direct result of Mr Reekie's 2003 convictions.

[56] To succeed on this part of his appeal, Mr Reekie would also have needed to have established that the disclosure of the information relating to his criminal convictions was "highly offensive to an objective reasonable person": Advisory Opinion: Privacy Principles, paras 1 and 2. The test is set at a high level and is plainly objective. Mr Reekie's submission that the test was met because of the effect the programme had on his own "mental health and general wellbeing" and on his "family and friends" was therefore misconceived because it focussed on the subjective views of his family and friends and himself. Viewed objectively, the disclosure of his criminal convictions in the programme would not be described as "highly offensive".

Standards 4 (Balance) and 5 (Accuracy)

[57] These two standards apply to "news, current affairs and factual programmes". Such programmes must show "balance and impartiality" and be "truthful and accurate on points of fact". As there was no dispute that "Until Proven Innocent" did not meet the Standards because it contained fictional scenes, the question is whether the Authority was right to decide that the programme was a drama and not a "factual programme" so that those Standards did not apply.

[58] The meaning of the expression “factual programme” has been considered by the Authority in two previous decisions. In *Banks v TVNZ* Decision No 2003–141 15 December 2003 the Authority said:

[46] The Code does not define a “factual programme” and the Authority has not previously articulated its position on the meaning of this phrase. However, it makes three points. First, that it is the content of a particular programme which determines whether it is “factual” and not any classification suggested by, for example, the programme title or prior expectation about a particular series. Secondly, the Authority has stated clearly that standards relating to balance and accuracy do not apply to fictional programmes. Thirdly, the Authority does not consider the phrase “factual programmes” covers all those programmes which are neither “news and current affairs” programmes nor fictional programmes.

[47] The Authority considers that the phrase “factual programmes” refers to a narrower class of programmes and excludes what may be called “opinion programmes”. Opinion programmes include programmes that promote the expression of an ideology based on religious, cultural or political beliefs. The Authority’s reasoning is as follows.

[48] Factual programmes are similar to news and current affairs programmes in that they are based on or concerned with facts. That much is apparent from Standard 5 of the Television Code which, by referring to “news, current affairs and other factual programmes”, reveals that news and current affairs are a sub-set of the broader class of “factual programmes”. Standard 5 also provides that news, current affairs and other factual programmes must be “impartial and objective at all times”. Those words reveal that such programmes cannot be of a kind that is designed to be partial or subjective. Rather, programmes of that kind are within the category that the Authority describes as “opinion programmes”. Any opinion expressed in such a programme is not, therefore, expressed in a “factual programme”.

[59] In *Accident Compensation Corporation v TVNZ* Decision No 2006–126 22 February 2007 the Authority said:

[14] The Authority considers that factual programmes are those which present themselves, and are reasonably understood by the audience, to be authoritative sources of information. This may include, for example, a section of a radio talkback programme in which a host asserts a statement or series of statements as the truth. The important criterion is whether a reasonable viewer or listener is entitled to expect that the information given in the programme will be truthful and authoritative and not just opinion or hyperbole.

[60] I agree with the approach of the Authority that whether a programme is a “factual programme” will depend principally on an objective examination of the content of the programme itself and not necessarily on its classification or

description. If, on an objective examination, the programme in question is concerned with the presentation of facts, ie something able to be shown to be true, to exist or to have happened, as opposed to the supposition of something or a belief about something, then the programme will be a “factual programme” and Standards 4 and 5 will apply. As the Standards indicate, “news” and “current affairs” programmes will be within the scope of “factual programmes”, as will be documentaries and other programmes presenting matters as the truth or existing or as having happened in fact. Programmes involving the presentation of opinions, fiction or drama will not be within the scope of the Standards as they will not be “factual programmes”. A drama may be based on a true story, but it will still be a drama and not a “factual programme” which a reasonable viewer or listener would necessarily expect to be balanced or accurate. A drama may present a story from a particular perspective. To decide on which side of the line a particular programme falls, it will therefore be necessary to examine the programme from the perspective of a reasonable viewer or listener.

[61] In this case an examination of “Until Proven Innocent” shows that it was a drama, albeit based on a true story. The programme was, as counsel for TVNZ submitted, a “scripted dramatisation” presented as a “feature length film” with actors playing the roles of the various people involved and sets used for the various scenes. A reasonable viewer would have expected the basic story line to be reasonably accurate, but would not have expected the script, the acting or the dialogue or the scenes to be totally “truthful and authoritative”. As the Authority pointed out in para [30] of its decision, a reasonable viewer would have understood that dramatic licence would have been necessary to compress the events of three or four years into a two hour programme. With actors playing all the roles, the programme was clearly presented as a dramatised version of the story about the wrongful conviction and subsequent acquittal of David Dougherty. It was not presented as a “factual programme” to which Standards 4 and 5 applied. A reasonable viewer would not have thought otherwise.

[62] The Authority’s decision that Standards 4 and 5 did not apply to the programme in this case was therefore right. Mr Reekie failed to raise any ground to

support my exercise of this Court's discretion to overturn the Authority's decision on this point.

[63] The fact that a proportion of the programme was based on the factual background relating to David Dougherty's conviction and acquittal did not make the programme a "factual programme" when, as Mr Reekie acknowledged in his submissions, it also contained a substantial proportion of fiction, including the three episodes relating to him which he described as "dramatic licence". As a reasonable viewer would have understood, the fictional aspects of the programme served to confirm that it was presented as a dramatised version of the David Dougherty story and not as a "factual programme".

[64] Mr Reekie's description of the programme as a "docu-drama" recognised that the programme was indeed a drama, albeit based on a true story. I agree with Mr Reekie that in this case the inclusion of a disclaimer which explicitly stated that the programme was not in all respects factually accurate would also have made it clear that Standards 4 and 5 were inapplicable, but at the same time the absence of a disclaimer to the effect that the programme was a dramatisation of a true story did not alter the conclusion that a reasonable viewer would have reached, namely that the programme, which was stated to be "based" on the true story of David Dougherty, was a drama and not a "factual programme".

Standard 6 (Fairness)

[65] Standard 6 requires broadcasters, in the presentation of programmes, to deal justly and fairly with any person or organisation taking part or referred to. As the Guidelines to Standard 6 indicate, the requirements of fairness relate principally to programmes in which persons actually participate in events or express views. The Standard is not really applicable to fictional programmes or dramatic works as Guideline 6 g (iii) recognises.

[66] The obligation on broadcasters to deal "justly and fairly" with persons referred to in programmes dealing with actual events is particularly important in the context of Court proceedings which are open to the public and the media. In the

context of criminal proceedings the obligation is consistent with an accused person's right to a fair trial under s 25 of the New Zealand Bill of Rights Act 1990. In Mr Reekie's case, however, there can be no suggestion that the 2009 broadcast of "Until Proven Innocent" could have had any effect on his 2003 trial. Mr Reekie's original complaint that his "rights for a fair hearing or retrial" were affected by the programme was far-fetched. Similarly, Mr Reekie's claim that the programme affected his chances of effective rehabilitation and of being accepted back into society does not withstand scrutiny. While there may be a public and private interest in the reintegration of Mr Reekie into society after he has completed his sentence (*Television New Zealand Ltd v Rogers* [2008] 2 NZLR 277 (SC) per Elias CJ at [403]), not only has that stage not been reached yet but also the content of the programme broadcast in 2009 is unlikely to have an adverse effect on that reintegration process when it does occur.

[67] Mr Reekie also faced the further difficulty that the three brief fictional scenes in the programme did not contain any material that was in fact "unfair" to him. The three scenes amounted to less than two and half minutes of the two hour programme. The first scene depicted a conversation between Mr Reekie and Mr Dougherty in which the actor playing Mr Reekie claimed to have been falsely convicted. In the second scene the two actors were shown singing a hymn together in the prison chapel and in the third scene Mr Reekie was shown pulling Mr Dougherty up from the ground in the rain after he had heard he was to be released from prison. In none of these fictional scenes could the portrayal of Mr Reekie be described as "unfair" to him. Indeed it might be considered that the latter two scenes portrayed Mr Reekie in a rather favourable light.

[68] This is not a case where fictional scenes have been included in a drama programme "based on a true story" where a person has been unfairly portrayed. Different considerations might arise in the event that a broadcaster produced a programme of that nature which did in fact treat unfairly a person portrayed in it.

[69] Here, once it is accepted that "Until Proven Innocent" was a dramatised version of the David Dougherty story, there is no basis for overturning the Authority's decision that the inclusion in the drama of the fictional episodes relating

to Mr Reekie was not unfair to him. Contrary to Mr Reekie's submission, in the context of a drama, "fictional" is not equivalent to "unfair". The portrayal of Mr Reekie in "Until Proven Innocent" was fairly based on the fact that he was subsequently convicted of the crime to which David Dougherty had originally been wrongfully convicted. The fictional episodes were, as the Authority decided, dramatic licence and not unfair. This was not a programme in respect of which the views of Mr Reekie needed to be sought.

[70] With one exception, the on-screen captions at the end of the programme, including those relating to Mr Reekie, were factually correct. The exception was that statement in the last caption that Mr Reekie had been "caught while attempting to abduct a third [woman]". As the Authority said, this minor error was "unfortunate", but in the context of the drama, which focussed on Mr Dougherty's case, it was insignificant and not unfair to Mr Reekie. The error was also corrected for the re-broadcast on 9 August 2009.

[71] The Authority's reasons for rejecting Mr Reekie's complaint in relation to Standard 6, which appear in paragraphs [30]–[32] of its decision, were therefore justified.

Standard 7 (Programme Classification)

[72] In terms of Standard 7 "Until Proven Innocent" was classified AO 8:30, i.e. Adults only after 8.30 pm. This was the correct classification for the programme.

[73] Mr Reekie's complaint about the classification of the programme, which had not previously been raised or addressed by the Authority in its decision, was misconceived. As counsel for TVNZ pointed out, programme classification is not directed at distinguishing between "drama" and "docu-drama".

Standard 8 (Programme Information)

[74] Under Standard 8 broadcasters are responsible for ensuring that programme information and structure does not deceive or disadvantage the viewer. As the

Guidelines to Standard 8 indicate, the requirements relating to programme information are directed at ensuring that viewers are not misled: programme material and advertising material is to be clearly distinguishable, the process known as “subliminal perception” is to be avoided as is hypnotism and collusion between broadcasters and contestants, and programmes dealing with products or services must not mislead or deceive. Apart from the requirement to distinguish programme and advertising material, Standard 8 is not really applicable to fictional programmes or dramatic works.

[75] Here, as the Authority pointed out in paragraph [40] of its decision, “Until Proven Innocent” made it clear that it was a drama. It was screened in TV One’s Sunday Theatre timeslot which is well-known for showcasing dramas. The statement that the programme was “based on” a true story also made it clear that it had been dramatised for the purposes of entertainment and that it would not necessarily be a faithful depiction of past events or accurate in every respect.

[76] The Authority’s decision that there was no breach of Standard 8 was therefore right. Mr Reekie failed to raise any ground to support my exercise of the Court’s discretion to overturn the Authority’s decision on this point.

[77] In the context of a programme which was clearly a “scripted dramatisation” of a true story presented as a drama, a reasonable viewer would not have been “deceived” or “disadvantaged” by the fictional episodes or the absence of a disclaimer. A reasonable viewer would have recognised that “dramatic licence” was involved in the full-length feature film. Nor would “vulnerable members of society” have been disadvantaged as claimed by Mr Reekie.

Result

[78] None of Mr Reekie’s grounds of appeal has been substantiated. The decision of the Authority rejecting Mr Reekie’s complain is accordingly upheld and his appeal to this Court is dismissed.

Costs

[79] TVNZ is entitled to an order for costs on the appeal if it considers that there is any point in pursuing the issue bearing in mind that, as French J pointed out in her minute of 15 July 2009 when rejecting an application for security for costs, Mr Reekie is a prison inmate. French J in her minute at [6] categorised the proceeding as 2B.

[80] If TVNZ does decide to pursue the issue of costs, it should file and serve a memorandum within 14 days of the date of this judgment and Mr Reekie should respond within a further 14 days.

D J White J