IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2024-485-765
[2025] NZHC 1985

BETWEEN	GRANT WILLIAM SMITH Plaintiff
AND	TELEVISION NEW ZEALAND LIMITED Respondent

Hearing: 25 June 2025

Appearances: Plaintiff in Person and S Austin
J Edwards and J Renner for Respondent

Judgment: 17 July 2025

JUDGMENT OF MANDER J

This judgment was delivered by me on 17 July 2025 at 4.15 pm
pursuant to Rule 11.5 of the High Court Rules 2016

Registrar/Deputy Registrar

Date: .

[1] On 1 May 2024, Television New Zealand Ltd (TVNZ) broadcast a news item on 1News about protests being conducted in relation to the Israel-Hamas conflict in the Gaza Strip. The broadcast commenced with coverage of pro-Palestinian protests at Colombia University presented by a New Zealand reporter based in the United States. It then switched to coverage by a local reporter of a protest at the University of Auckland about the conflict in Gaza. Shortly before the end of the item, the reporter referenced a ruling by the International Court of Justice (ICJ).[1] She stated:

> Look, we did reach out to the New Zealand government today. A spokesman from Winston Peters' office, the Foreign Minister, said New Zealand has repeatedly backed those calls for a ceasefire, and they're expressing serious concerns about what they see happening in Gaza and would like to see a more permanent, long-term solution for peace. But in terms of the word 'genocide' they've said they are being guided by the United Nations, by the International Criminal Court of Justice. *It so far has said it's plausible that genocide is happening on the ground in Gaza, has urged Israel to do more to improve the humanitarian situation.* But, for those gathered here tonight, that's simply not good enough. They say that every minute those politicians spend debating terminology, that's more lives that are being lost.
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> (emphasis added)

[2] The appellant, Grant Smith, complained to TVNZ that the broadcast breached the accuracy standard of the Code of Broadcasting Standards in New Zealand (broadcasting code of standards).[2] Mr Smith's complaint was that the reporter had incorrectly stated the ICJ had said it is plausible that genocide is happening in Gaza (the contested statement). TVNZ rejected that complaint, and Mr Smith referred the matter to the Broadcasting Standards Authority (the BSA).[3] The complaint was not upheld.[4] Mr Smith has now appealed that decision.

Background

[3] The decision referred to by the reporter is an ICJ ruling of 26 January 2024 that addresses an application made by South Africa for provisional measures pending determination of alleged violations by Israel of the Convention on the Prevention and

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1 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel) (Request for the indication of Provisional Measures)* [2024] ICJ Rep 3.

2 Broadcasting Standards Authority Broadcasting Standards and New Zealand Code Book (July 2022).

3 Broadcasting Act 1989, s 8(1B).

4 *Vincent and Smith v Television New Zealand Ltd* BSA 2024/043, 14 October 2024.

Punishment of the Crime of Genocide (the Genocide Convention).[5] The ICJ concluded that, prima facie, it had jurisdiction pursuant to the Genocide Convention to entertain the case.[6] It further held:[7]

> In the Court's view, the facts and circumstances mentioned above are sufficient to conclude that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible. This is the case with respect to the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts identified in Article III, and the right of South Africa to seek Israel's compliance with the latter's obligations under the Convention.

[4] The Court then turned to whether there was a link between the plausible rights claimed by South Africa and the provisional measures requested. After making a finding that "the catastrophic humanitarian situation in the Gaza Strip is at serious risk of deteriorating further before the Court renders its final judgment", the Court concluded there was sufficient urgency to require it "to indicate provisional measures", which were set out in the judgment.[8]

Ex curia comment

[5] Both Mr Smith and TVNZ relied on the ICJ decision in support of their respective cases regarding the accuracy of the broadcast's reference to that decision. However, Mr Smith also placed considerable reliance on the content of an interview conducted by the BBC on 25 April 2024 with Judge Joan Donoghue, the recently retired President of the ICJ who was one of 17 Judges who sat on the ICJ bench that heard South Africa's claim. In response to an observation by the interviewer that the ICJ had found there was a plausible case for genocide, Judge Donoghue responded:[9]

> You know, I'm glad I have a chance to address that because the court's test for deciding whether to impose measures uses the idea of plausibility. But the test is the plausibility of the rights that are asserted by the applicant, in this case, South Africa. So the court decided that the Palestinians had a plausible right to be protected from genocide and that South Africa had the right to present that claim in the court. It then looked at the facts as well. But it did not decide, and this is something where I'm correcting what's often said in the media, it

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5 Convention on the Prevention and Punishment of the Crime of Genocide 78 UNTS 277 (signed 9 December 1948, entered into force 12 January 1951).

6 At 16.

7 At 23.

8 At 28–30.

9 Interview with Joan Donoghue, former president of the International Court of Justice (Stephen Sackur, HARDtalk, BBC, 27 April 2024).

> didn't decide that the claim of genocide was plausible. It did emphasise in the order that there was a risk of irreparable harm to the Palestinian right to be protected from genocide. But the shorthand that often appears which is that "there's a plausible case of genocide" isn't what the court decided.
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> … the purpose of the ruling was to declare that South Africa had a right to bring its case against Israel and that Palestinians had "plausible rights to protection from genocide"—rights which were at a real risk of irreparable damage. The judges had stressed they did not need to say for now whether a genocide had occurred but concluded that some of the acts South Africa complained about, if they were proven, could fall under the United Nations' Convention on Genocide.

The UN press release

[6] The TVNZ reporter sourced her information about the ICJ's decision from a press release issued by the Office of the United Nations (UN) High Commissioner for Human Rights on 31 January 2024 (the UN press release). In a lengthy statement, it commented:[10]

> The ICJ found it plausible that Israel's acts could amount to genocide and issued six provisional measures, ordering Israel to take all measures within its power to prevent genocidal acts, including preventing and punishing incitement to genocide, ensuring aid and services reach Palestinians under siege in Gaza, and preserving evidence of crimes committed in Gaza.
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> …
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> The Court found that Israel cannot continue to bombard, displace, and starve the population of Gaza, while allowing its officials to dehumanise Palestinians through statements that may amount to genocidal incitement.

The original complaint

[7] Mr Smith's complaint to TVNZ was lodged on 2 May 2024. It pleaded a breach of the accuracy standard (standard 6) contained in the broadcasting code of standards. Mr Smith articulated his complaint in the following way:

> The reporter stated that the International Court of Justice had said that it is plausible that genocide is happening in Gaza. That is not true. Attached is a link to a part of a BBC interview with the ICJ former president who delivered the actual ruling who confirms that is not what it said. Given the wave of anti-semitism sweeping the world at the moment, fueled by misinformation, a correction and apology should be broadcast immediately.

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[10] United Nations "Gaza: ICJ ruling offers hope for protection of civilians enduring apocalyptic conditions, say UN experts" (press release, 31 January 2024).

The BSA decision

[8] As a "starting point" for its assessment, the BSA identified its role as being "to weigh up the right to freedom of expression and the value and public interest in the broadcast against any harm potentially caused by the broadcast". It noted it may only intervene and uphold a complaint when the resulting limit on the right to freedom of expression is demonstrably reasonable and justified.[11]

[9] The BSA found the contested statement was likely to be received by viewers as a statement of fact by the reporter and proceeded to deal with the complaint on that basis. As a result, the "accuracy standard" applied. Having made that determination, the BSA identified the next question for it to address was whether it was materially misleading for the reporter to state the ICJ has "said its plausible that genocide is happening on the ground in Gaza". The BSA held that to "mislead" in the context of the accuracy standard is "to give another a wrong idea or impression of the facts".[12]

[10] The BSA noted the ICJ ruling had been widely reported as determining there had been "plausible genocide" in Gaza, and that despite the former ICJ President's clarification, some discussion and debate regarding the meaning of the ICJ's plausibility test and ruling continues. By reference to various sources, the BSA commented that it appears a degree of uncertainty generally has attached to what the "plausibility" test entails, even within the ICJ itself. The BSA noted the ICJ had undertaken some factual analysis in its decision which it opined appeared to go beyond mere assessment of whether the allegations fell within its "subject-matter jurisdiction", and that the test could sensibly include "some notion of a plausibility of claim/prospect of success approach".[13]

[11] The BSA concluded:

> [20] In the circumstances, we are not satisfied it is materially inaccurate to describe the ICJ as saying it was 'plausible that genocide is happening' in Gaza. It is not a definitive statement. On either interpretation, the ICJ's finding and consequent decision to 'indicate provisional measures' was a significant ruling against Israel. Any subtle legal nuance between the two interpretations

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11 At [9], citing Code of Broadcasting Standards in New Zealand, above n 2, introduction.
12 At [13], citing *Attorney-General of Samoa v TVWorks Ltd* [2012] NZHC 131, [2012] NZAR 407 at [98].
13 At [18].

> of the ruling is unlikely to register with the audience. In our view, most audience members would interpret the statement as an indication there was some basis for the genocide claim while being aware it was still to be determined.
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> [21] The materiality of any inaccuracy also needs to be considered in the context of the specific broadcast. The broadcast in this case was just over six minutes long. It focused primarily on growing protests in the United States and in New Zealand seeking peace in Gaza. The relevant statement was contained in a brief comment at the end addressing the position of the New Zealand government, the ICJ ruling and some protestors' perspectives on that.
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> [22] In this context, the statement would not have significantly affected viewers' understanding of the programme. For these reasons, we find the broadcast was not materially misleading.
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> (footnotes omitted)

Relevant principles and guidance

Approach to appeal

[12] A party may appeal to this Court against the whole or any part of a decision made by the BSA.[14] However, the appeal does not proceed by way of rehearing, and it is not this Court's role to identify error and substitute its own view simply because it would have come to a different decision. On an appeal from a BSA decision, the appellate court is required to hear and determine the appeal as if the decision or order appealed against had been made in the exercise of a discretion.[15] In *Television New Zealand Ltd v West*, Asher J articulated the correct approach to such appeals in the following way:[16]

> [10] It is clear from s 18(4) that the High Court's jurisdiction is not the same as in a general appeal. The decision in *Austin Nichols & Co Inc v Stichting Lodestar* requiring the appellate Court in such general appeals to come to its own view on the merits does not apply. A now considerable line of cases has followed the approach in relation to an appeal against the exercise of a discretion set out in *May v May*:
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> > "[A]n appellant must show that the Judge acted on a wrong principle; or that he failed to take into account some relevant matter or that he took account of some irrelevant matter or that he was plainly wrong."
> >
> > (footnotes omitted)

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14 Broadcasting Act, s 18(1).
15 Broadcasting Act, s 18(4).
16 *Television New Zealand Ltd v West* [2011] 3 NZLR 825 (HC) at [10].

[13] It follows that this appeal can only succeed if Mr Smith is able to show the BSA acted on a wrong principle, failed to take into account some relevant matter, took account of some irrelevant matter, or that the decision was plainly wrong.[17]

[14] It was submitted on behalf of TVNZ that, because the BSA could be categorised as an expert decisionmaker best placed to assess complaints of this type, a measure of deference was required to be extended to the BSA.[18] Mr Smith did not accept that proposition. Insofar as that aspect of the approach to the appeal may be considered relevant, it is an issue to which I return later in this judgment.

Broadcasting Code of Standards

[15] Section 4 of the Broadcasting Act 1989 (the Act) places a responsibility on every broadcaster to maintain in its programming and their presentation, standards that are consistent with any approved code or broadcasting practice applying to those programmes.[19] The applicable standards are those set out in the broadcasting code of standards, which prescribes eight standards that apply to television and radio broadcasts in this country. The Code also sets out guidelines and commentary that "are not firm rules and do not carry the same weight as the standards".[20] Standard 6 provides:

> Broadcasters should make reasonable efforts to ensure news, current affairs and factual content:
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> - is accurate in relation to all material points of fact
> - does not materially mislead the audience (give a wrong idea or impression of the facts).
>
> In the event a material error of fact has occurred broadcasters should correct it within a reasonable period after they have been put on notice.

[16] In the commentary to the standard, it is stated that its purpose is to protect the public from being significantly misinformed, and that the standard recognises the

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17 *Lowry v Television New Zealand Limited* [2019] NZHC 351 at [19]; and *NH v Radio Virsa* [2022] NZHC 2412 at [41].

18 *Attorney-General of Samoa v TVWorks Ltd*, above n 12, at [37]; and *NH v Radio Versa*, above n 17, at [43].

19 Broadcasting Act, s 4(1)(e).

20 Code of Broadcasting Standards in New Zealand, above n 2, at 4.

important role broadcasters play in protecting New Zealanders from misinformation and disinformation.[21]

The appeal

[17] Mr Smith raised four broad grounds in support of his appeal. He alleged the BSA decision was plainly wrong to have found the contested statement was not materially inaccurate and the broadcast not materially misleading and that, in arriving at its decision, it had taken into account irrelevant considerations and failed to take into account relevant factors. By reference to various features of the BSA's decision, Mr Smith also argued the decision was flawed as a result of apparent or possible bias on the part of the BSA.

[18] In defence of the BSA's decision, TVNZ submitted there was no material error of fact in the broadcast and that the contested statement did not mislead the audience. It was argued the high threshold for an appeal, of demonstrating the decision was plainly wrong, had not been met and that the BSA had acted in accordance with its powers by taking into account various relevant considerations. Further, it was submitted that there was no basis for an allegation of bias or that TVNZ had demonstrated an appearance of bias. In the alternative, should the contested statement be found to be inaccurate or misleading, it was argued TVNZ had made reasonable efforts in the circumstances to avoid such an outcome.

Was the BSA's decision plainly wrong?

The competing positions

[19] The central submission advanced by Mr Smith was that the contested statement constituted an inaccurate and misleading statement of fact, and that the BSA's decision to the contrary was plainly wrong. He argued the ICJ decision contained no statement that could "logically and readily" be summarised or paraphrased in a way that could be equated to the contested statement. Mr Smith submitted the BSA's finding that it was not satisfied it was materially inaccurate to describe the ICJ as saying it was

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[21] At 16.

"plausible that genocide is happening" in Gaza, and its conclusion that this was not a definitive statement, were both wrong.

[20] Mr Smith argued the contested statement does not admit of any "subtle legal nuance", nor had the statement been qualified in a way that may otherwise have been acceptable by stating "the issue [of genocide] is arguable", or that the ICJ decision had been interpreted by some in a certain way. To the extent there was disagreement as to the ICJ's findings, Mr Smith submitted the contested statement should have been qualified by at least expressly referencing that controversy.

[21] Insofar as the materiality of the contested statement was concerned, Mr Smith was critical of the BSA's view that the statement was only a "brief comment" at the end of an item, which he submitted enhanced, rather than diminished, its significance to the viewer. He argued the ICJ's ruling concerning South Africa's allegations of genocide against Israel provided important context to the coverage of the protest, where reference had been made by some of the local protestors to genocide. Mr Smith submitted the suggestion in the contested statement that the ICJ had considered the genocide allegations "credible" was not a peripheral point, but one likely to influence viewers' perspectives regarding the merits of the protest that was the subject of the coverage, and their perceptions of the findings of the ICJ and the actions of the New Zealand Government in relation to the Gaza conflict.

[22] Mr Smith further argued the reference to the plausibility of genocide happening on the ground in Gaza in the contested statement had the effect of suggesting that South Africa's genocide allegation appeared reasonable or credible to the ICJ. He submitted the reasonable viewer would consider the meaning of plausible as "carrying some suggestion of reasonableness, believability, truthfulness or probability" which, when regard is had to the statement of the ex-President of the Court, was submitted not to be correct.[22]

[23] On behalf of TVNZ, Mr Edwards submitted the BSA's view that audiences would interpret the contested statement as meaning "there was some basis for the genocide claim while being aware it was still to be determined" was a fair and reasoned

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22 Interview with Joan Donoghue, above n 9.

finding by the BSA that fell well short of meeting the threshold of "plainly wrong". Mr Edwards referred to various parts of the ICJ's decision that stated that Israel's actions were capable of falling within the provisions of the Genocide Convention; that Palestinians had plausible rights to protection against these acts; and that these rights were at imminent risk of prejudice. He submitted that when taken together these statements could be accurately reported as the Court having acknowledged it was plausible that genocide was happening in Gaza.

[24] Mr Edwards argued the reference to "plausible" in the contested statement was not intended as a reference to a complex legal test or determination, but was meant to convey a possibility, and that the reasonable viewer would not have taken anything more from the statement.

[25] Mr Edwards noted the considerable debate in academic and legal circles regarding the interpretation of what is a highly contentious decision that the reporter was attempting to summarise in terms that could be understood by the general audience. He submitted the various views expressed by commentators only demonstrated how the ICJ's decision was open to a range of interpretations, and that the BSA's analysis of the contested statement was reasonable. Mr Edwards argued the BSA's conclusion that the viewing audience would be unlikely to differentiate "[a]ny subtle legal nuance between the two interpretations of the ruling" was one fairly available to it. Its assessment was not clearly contradicted on the available evidence which, it was argued, would be necessary to allow this Court to conclude the BSA's decisions was "plainly wrong".

Discussion

[26] A central premise of Mr Smith's argument was that the ICJ's decision itself was devoid of any statement that "it's plausible that genocide is happening on the ground in Gaza", and that the reported representation of what the Court had said was materially inaccurate and misleading. I accept this was of concern to the ex-President of the ICJ. She took the opportunity during the BBC interview to emphasise that the Court's test for deciding whether to impose measures uses the idea of plausibility, but that such a test is the plausibility of the rights asserted by the applicant (South Africa).

It was emphasised that the Court had decided the Palestinians had a plausible right to be protected from genocide, and that South Africa had the right to present that claim in the Court.

[27] It is apparent from the ex-President's comments that she was concerned with the conflation or employment of language used in the test for the "plausibility of the rights" with what she described was the "shorthand" appearing in media reports of the Court having purportedly decided that "there is a plausible case of genocide". However, while the ex-President was concerned to draw that distinction, the BSA's task was to assess whether the standard for accuracy in relation to the factual content of the broadcast had been breached in the way the ICJ's decision had been referenced, and whether what had been conveyed about the ICJ's decision in necessarily broad terms—indeed, in no more than a single sentence—was materially misleading and gave a wrong impression.

[28] TVNZ's source for the contested statement it included in its broadcast was the UN press release. It stated:[23] "[t]he ICJ found it plausible that Israel's acts would amount to genocide…". That extract appears to be an example of the type of "shorthand" about which the ex-President expressed concern. However, the question remains whether that "shorthand" was substantially inaccurate when measured against the broadcasting standard and whether or not it materially misled the audience by giving a wrong idea or impression of the ICJ's decision.

[29] In considering that question, Mr Smith accepted it was necessary to examine the decision itself. Indeed, it was his submission that this was the essential exercise when assessing whether the accuracy standard had been breached. That task, which the BSA also undertook, is unavoidable in the circumstances and Mr Edwards did not demur from such an approach.

The ICJ's decision

[30] I have endeavoured to set out the essential parts of the ICJ decision that have informed my understanding and assessment of its effect. In doing so, the Court leaves

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23 United Nations, above n 10, at 0360.

itself open to the allegation of selectivity. However, having read the judgment as a whole, I consider the following extracts are salient to the assessment of whether the contested statement was, in the circumstances, materially inaccurate.

[31] Under the heading "PRIMA FACIE JURISDICTION", the ICJ notes that South Africa and Israel are parties to the Genocide Convention. The Court observes:

> 20. Since South Africa has invoked as the basis of the Court's jurisdiction the compromissory clause of the Genocide Convention, the Court must also ascertain, at the present stage of the proceedings, *whether it appears that the acts and omissions complained of by the Applicant are capable of falling within the scope of that convention* ...
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> (emphasis added)

[32] The Court records that:

> 23. Israel contends that South Africa has failed to demonstrate the prima facie jurisdiction of the Court under Article IX of the Genocide Convention. …
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> 24. Israel further argues that the acts complained of by South Africa are not capable of falling within the provisions of the Genocide Convention because the necessary specific intent to destroy, in whole or in part, the Palestinian people as such has not been proved, even on a prima facie basis. …
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> 28. In light of the above, the Court considers that the Parties appear to hold clearly opposite views as to *whether certain acts or omissions allegedly committed by Israel in Gaza amount to violations by the latter of its obligations under the Genocide Convention*. The Court finds that the above-mentioned elements are sufficient at this stage to establish prima facie the existence of a dispute between the Parties relating to the interpretation, application or fulfilment of the Genocide Convention.
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> …
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> 30. At the present stage of the proceedings, the Court is not required to ascertain whether any violations of Israel's obligations under the Genocide Convention have occurred. Such a finding could be made by the Court only at the stage of the examination of the merits of the present case. As already noted (see paragraph 20 above), at the stage of making an order on a request for the indication of provisional measures, *the Court's task is to establish whether the acts and omissions complained of by the applicant appear to be capable of falling within the provisions of the Genocide Convention … In the Court's view, at least some of the acts and omissions alleged by South Africa to have been committed by Israel in Gaza appear to be capable of falling within the provisions of the Convention.*

3. Conclusion as to Prima Facie Jurisdiction

> 31. In light of the foregoing, the Court concludes that, prima facie, it has jurisdiction pursuant to Article IX of the Genocide Convention to entertain the case.
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> 32. Given the above conclusion, the Court considers that it cannot accede to Israel's request that the case be removed from the General List.
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> (emphasis added)

[33] I interpose here to observe that the ICJ at this stage of its decision had decided that some of the allegations made by South Africa, on their face, are capable of constituting breaches of the Genocide Convention and therefore prima facie provide the Court with jurisdiction.

[34] Under the heading "THE RIGHTS WHOSE PROTECTION IS SOUGHT AND THE LINK BETWEEN SUCH RIGHTS AND THE MEASURES REQUESTED", the Court stated:

> 35. The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible …
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> 36. At this stage of the proceedings, however, the Court is not called upon to determine definitively whether the rights which South Africa wishes to see protected exist. It need only decide whether the rights claimed by South Africa, and for which it is seeking protection, are plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested …
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> …
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> 38. *South Africa submits that the evidence before the Court "shows incontrovertibly a pattern of conduct and related intention that justifies a plausible claim of genocidal acts*". It alleges, in particular, the commission of the following acts with genocidal intent: killing, causing serious bodily and mental harm, inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, and imposing measures intended to prevent births within the group. According to South Africa, genocidal intent is evident from the way in which Israel's military attack is being conducted, from the clear pattern of conduct of Israel in Gaza and from the statements made by Israeli officials in relation to the military operation in the Gaza Strip. The Applicant also contends that "[t]he intentional failure of the Government of Israel to condemn, prevent and punish such genocidal incitement constitutes in itself a grave violation of the Genocide Convention". South Africa stresses that any stated intention by the Respondent to destroy

> Hamas does not preclude genocidal intent by Israel towards the whole or part of the Palestinian people in Gaza.
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> *
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> 39. Israel states that, at the provisional measures stage, the Court must establish that the rights claimed by the parties in a case are plausible, but "[s]imply declaring that claimed rights are plausible is insufficient." *According to the Respondent, the Court has also to consider the claims of fact in the relevant context, including the question of the possible breach of the rights claimed*.
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> (emphasis added, footnotes omitted)

[35] After setting out art II of the Genocide Convention, the meaning of genocide and the acts prohibited by the Convention, the Court reviewed a body of information from various sources which, in general terms, describes the state of living conditions in Gaza and the nature of military operations carried out in that region before concluding:

> 54. *In the Court's view, the facts and circumstances mentioned above are sufficient to conclude that at least some of the rights claimed by South Africa and for which it is seeking protection are plausible*. This is the case with respect to the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts identified in Article III, and the right of South Africa to seek Israel's compliance with the latter's obligations under the Convention.
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> (emphasis added)

[36] The Court then turned to "the condition of the link between the plausible rights claimed by South Africa and the provisional measures requested", and noted it had already found that at least some of the rights asserted by South Africa under the Genocide Convention are plausible.[24] The Court concluded a link exists between those rights and "at least some of the plausible measures requested".[25]

[37] Under the heading "RISK OF IRREPARABLE PREJUDICE AND URGENCY", the Court then addressed itself to the risk of irreparable prejudice being caused to rights, or the alleged disregard of such rights entailing irreparable consequences as preconditions to the exercise of its power to indicate provisional measures:[26]

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[24] At 23 and 24.
[25] At 24.
[26] At 24.

> 62. The Court is not called upon, for the purposes of its decision on the request for the indication of provisional measures, to establish the existence of breaches of obligations under the Genocide Convention, *but to determine whether the circumstances require the indication of provisional measures for the protection of rights under that instrument*. As already noted, the Court cannot at this stage make definitive findings of fact (see paragraph 30 above), and the right of each Party to submit arguments in respect of the merits remains unaffected by the Court's decision on the request for the indication of provisional measures.
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> (emphasis added)

[38] After recording that Israel denies there exists a real and imminent risk of irreparable prejudice in the present case,[27] the ICJ concluded:

> 66. In view of the fundamental values sought to be protected by the Genocide Convention, the Court considers that the plausible rights in question in these proceedings, namely the right of Palestinians in the Gaza Strip to be protected from acts of genocide and related prohibited acts identified in Article III of the Genocide Convention and the right of South Africa to seek Israel's compliance with the latter's obligations under the Convention, are of such a nature that prejudice to them is capable of causing irreparable harm …

[39] After reviewing the content of several sources of information regarding the situation in Gaza and the state of its civilian population, the Court stated:

> 72. In these circumstances, the Court considers that the catastrophic humanitarian situation in the Gaza Strip is at serious risk of deteriorating further before the Court renders its final judgment.
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> …
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> 74. In light of the considerations set out above, *the Court considers that there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights found by the Court to be plausible,* before it gives its final decision.
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> VI. CONCLUSION AND MEASURES TO BE ADOPTED
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> 75. *The Court concludes on the basis of the above considerations that the conditions required by its Statute for it to indicate provisional measures are met*. It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the rights claimed by South Africa that the Court has found to be plausible (see paragraph 54 above).
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> …
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> 78. The Court considers that, with regard to the situation described above, Israel must, in accordance with its obligations under the Genocide Convention, in relation to Palestinians in Gaza, take all measures within its

[27] At 25.

> power to prevent the commission of all acts within the scope of Article II of this Convention, in particular: *(a)* killing members of the group; *(b)* causing serious bodily or mental harm to members of the group; *(c)* deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and *(d)* imposing measures intended to prevent births within the group. The Court recalls that these acts fall within the scope of Article II of the Convention when they are committed with the intent to destroy in whole or in part a group as such (see paragraph 44 above). The Court further considers that Israel must ensure with immediate effect that its military forces do not commit any of the above-described acts.
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> (emphasis added)

[40] Israel defended South Africa's claim on the basis the acts complained of occurring in Gaza were not capable of falling within the provisions of the Genocide Convention. Those allegations are yet to be proved, but the ICJ held that those alleged acts and omissions appear capable of falling within the provisions of the Genocide Convention, being acts and omissions which the Genocide Convention prohibits. Having regard to the analysis carried out by the ICJ, which included a review of information or evidence placed before it by the parties, the Court found that Palestinians' rights to protection from genocide were at real risk of irreparable damage, and refused Israel's request that the case not be allowed to proceed. As noted earlier, the ICJ referred to it having been established on a prima facie basis that its jurisdiction under the Genocide Convention had been triggered.

[41] The Court then examined whether it was necessary to "indicate" provisional measures. It may only do so if it is satisfied the asserted rights (to be free from the alleged acts prohibited by the Genocide Convention) are at least plausible. On "the facts and circumstances" claimed, which Israel itself accepted the Court was required to consider "in the relevant context, including the question of the possible breach of the claimed rights", the Court assessed whether, on the basis of that material, it was open to conclude that at least some of those claimed rights were plausible. Moreover, that irreparable prejudice could be caused to those rights without "indicating" provisional measures.

[42] While the ICJ was not being called upon to establish breaches of obligations under the Genocide Convention, it was required "to determine whether the circumstances require the indication of provisional measures" for the protection of

those rights.[28] The Court concluded, on the basis of the information before it, that the rights to be protected from genocidal acts under the Genocide Convention were at real and imminent risk of irreparable prejudice.[29]

[43] As the former President of the ICJ stated in the BBC's interview, it was not necessary for the Court to say "for now whether a genocide had occurred", only that some of the acts complained of by South Africa that were happening in Gaza, if proven, could fall under the Genocide Convention. For the ICJ to move forward and assert jurisdiction to hear and determine that issue, it appears some threshold or prima facie case that the asserted rights were in jeopardy was required to be satisfied. The language used by the ICJ was that the rights claimed under the Genocide Convention for which protection was being sought were plausible. Neither that finding, nor the decision to "indicate" provisional measures, was taken in a factual vacuum, nor without opposition from Israel as to the factual basis for the asserted breaches of the Genocide Convention.

[44] I consider the ICJ's decision could accurately be described as a finding by that Court that South Africa's claim of breaches of the Genocide Convention is tenably arguable. It is against that analysis that I assess whether the contested statement that the ICJ "so far has said it's plausible that genocide is happening on the ground in Gaza" breached the broadcasting accuracy standard.

Analysis

[45] In support of his appeal, Mr Smith emphasised that the reporting of matters involving Israel and Palestine are of such sensitivity that precision and accuracy is vital. In making that submission, he referred to earlier decisions of the BSA that had stressed this very point in the context of broadcasts concerning the conflict in Gaza.[30] Mr Smith argued that required approach underlined the importance of accuracy in this instance, and should have led the BSA to conclude the audience had been materially misled. Its decision to the contrary, Mr Smith argued, was therefore plainly wrong.

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28 At 25.
29 At 28.
30 *Wellington Palestine Group v Radio New Zealand Ltd* BSA 1996-186, 17 December 1996; and *Wellington Palestine Group v Television New Zealand Ltd* BSA 2015-101, 12 May 2016 at [10] and [15].

Mr Smith submitted further that the BSA's decision was at odds with *Wellington Palestine Group v Television New Zealand Ltd* and the case of *Muir & Knight v Radio New Zealand Ltd*.[31]

[46] This aspect of Mr Smith's argument may have relevance to his allegations of bias, which I will address later in this judgment, but, insofar as reliance was placed on some inconsistency in approach taken by the BSA in its present decision with the two cases mentioned at [45], I do not discern error. Both of those cases are distinguishable on the basis of key factual differences, with their only commonality being that they involved broadcasts that concerned Israel-Palestine relations.

[47] In *Wellington Palestine Group v Television New Zealand Ltd*, the broadcast included a statement that "[r]oad blocks are in place and thousands of police and soldiers are patrolling across Israel as it tries to stop a wave of violence". It then crossed to a correspondent in east Jerusalem and displayed footage labelled as Jerusalem. The BSA found a breach of the accuracy standard, as viewers would have been misled into thinking East Jerusalem was in Israel when it is in Palestine, and that the violence was taking place there. This case largely concerned geographical confusion and the accurate identification of where an event was taking place. The contested statement in the present case is quite different.

[48] In *Muir & Knight v Radio New Zealand Ltd*, the BSA accepted that the standard had been breached by a statement in a news bulletin that said the ICJ decision had found Israel "not guilty of genocide". This was accepted as an interpretive error. The statement should have read the ICJ "… had not found Israel guilty of genocide". Corrections were broadcast which stated that the ICJ did not make a specific ruling on whether genocide had occurred, but stated there was a plausible case under the Genocide Convention. The case concerned a definitive statement which materially misrepresented the purpose and outcome of the ICJ decision in an obvious way.

[49] Mr Smith maintained it was necessary to be able to point to a statement in the ICJ decision that essentially said the same thing or used the same words as the contested statement, and that the hypothetical "reasonable viewer" should be able to

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31 *Muir and Knight v Radio New Zealand Ltd* BSA 2024-008 (22 April 2024).

expect to be referred to the same statement that was made in the broadcast in the body of the ICJ decision. I do not accept that is reasonable or a realistic expectation of broadcasters, nor is it a requirement of the accuracy standard.

[50] Mr Smith was also critical of the suggestion that the contested statement represents a summary of the ICJ decision, and argued the decision could equally be summarised in different terms and TVNZ had chosen to present only one of a number of possible assertions which was not required to make the broadcast coherent. Mr Smith referred to views expressed by some commentators, including one who had described the ICJ decision as a "victory" for Israel,[32] and that for the BSA to refer to the ICJ's finding and consequent decision to "indicate provisional measures" as a significant ruling against Israel was incorrect.[33] Again, I do not consider that critique can be sustained when measured against the broadcasting standard.

[51] For the complaint to be upheld, the BSA had to be satisfied that describing the ICJ as having "so far" said it was "plausible that genocide is happening" in Gaza was materially inaccurate. That is required to be assessed through the lens of the "reasonable viewer", and the question to be asked is whether the contested statement gave a wrong idea or impression of the effect of the ICJ's decision to such a person. In assessing that issue, regard is to be had to the materiality of the statement and the context in which it was made as part of the broadcast as a whole. Competing submissions were made in this regard.

[52] The broadcast, which extended just over six minutes in length, fused two distinct items. The first concerned continuing protests in the United States, in respect of which accusations of police brutality against pro-Palestinian protestors were made, and was presented by a correspondent in situ at Columbia University, where police had taken steps to bring the protest to an end after students had occupied university premises. A segue which referenced that protests were growing around the world preceded a further item from a New Zealand-based reporter regarding a pro-Palestinian protest at Auckland University expressing concern about the loss of life in

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32 Mr Smith was referring to comments of Professor Al Gillespie, quoted by the BSA in *Muir and Knight v Radio New Zealand Ltd*, above n 31, at [4].

33 *Vincent and Smith v Television New Zealand Ltd*, above n 4, at [20].

Gaza. It included short statements from those involved in the protest, which was summarised as the protestors wanting more urgent action in order to save lives. The contested statement was made in the course of a relatively short passage "delivered to camera" by the reporter towards the end of the item.

[53] Mr Edwards submitted that, when the broadcast is viewed as a whole, the contested statement was incidental to the overall broadcast and that the BSA was correct to conclude the statement would not have significantly affected viewers' understanding of the programme. It followed therefore, in his submission, that the statement could not be described as materially misleading having regard to the overall subject matter of the broadcast. Mr Smith, on the other hand, maintained the placement of the statement towards the end of the broadcast tended to highlight what had been said about the ICJ ruling and would have left a lasting impression on the viewer.

[54] I consider it is of some significance that the broadcast was not about the ICJ decision or the proceedings brought by South Africa against Israel in that forum. As a result, the contested statement was tangential to the subject matter of the broadcast which was focused on the occurrence of protests taking place in New York and Auckland. That said, it was evident from the broadcast that the objective of the New Zealand protest was to draw attention to the loss of life in Gaza, and reference was made in a very short statement or "sound bite" from a person taking part to the spectre of genocide. The word was also discernible on one of the protest signs.

Decision

[55] The focus must be on whether the introduction of the contested statement attributed to the ICJ's decision would have caused the reasonable audience member to have been materially misled having regard to the overall effect of the broadcast. Having assessed the materiality of the contested statement to the six minute broadcast and the concerns raised by Mr Smith, I am not satisfied the attempted paraphrasing or summarisation of the ICJ's decision would have materially misled the reasonable viewer.

[56] There is clearly much controversy as to what the ICJ's judgment means, but it is necessary for Mr Smith to demonstrate, on the limited scope of review available on an appeal from a decision of the BSA, that its conclusion that the contested statement was not materially inaccurate was plainly wrong. I reject the submission that, in order not to be inaccurate, the contested statement needed to be expressly qualified by it being an "interpretation" of the ICJ decision. I have already rejected the submission that the reasonable viewer would understand the statement to be a direct quote from the ICJ. The reasonable viewer would have recognised it as a high level description of the ICJ's decision.

[57] The BSA determined that an audience would interpret the contested statement as meaning "there was some basis for the genocide claim while being aware it was still to be determined".[34] I consider that was a finding available to the BSA, which falls short of meeting the threshold of "plainly wrong". In reaching that conclusion, the BSA did not consider the contested statement was of significant materiality to the broadcast having regard to the balance of the programme and its content. Assessing the context of a programme is something that has been acknowledged by this Court as being very much within the specialised skills of the BSA, and that it would be a formidable task to try and establish the BSA in making such an assessment had fallen into error.[35]

[58] It is notable that the contested statement is prefaced with the words that the ICJ "so far have said …". I accept Mr Edwards' submission this conveys that the Court's position is not definitive and that the issue remains to be determined. Given the focus of the broadcast, which was on the protests, it was not incumbent on the broadcaster to provide any further detail, explanation or analysis of the ICJ's ruling. I do not consider a reasonable viewer would have been misled into believing the reference was anything other than, as would be apparent on its face, a broad indication of the nature of the ICJ's decision.

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34 At [20].

35 *McDonald v Television New Zealand Ltd* HC Wellington CIV-2011-485-1836, 30 April 2012 at [28].

[59] Mr Edward submitted that the term "plausible" could be equated with the "possibility" that some form of genocide could be taking place in Gaza. He argued the two terms were interchangeable. Examined forensically, that may not be strictly so. Plausibility usually denotes something more than mere possibility, but I do not consider a layperson viewing the broadcast would have discerned much, if any, difference or, moreover, read more into the reference to the ICJ. Overall, I consider, in the context in which the contested statement was made, during a broadcast that was focused on the protests themselves and on the need for action to save lives in Gaza, that the contested statement would have been interpreted by the reasonable viewer as the ICJ having acknowledged only that genocide could be occurring in that location.

[60] As I have concluded, a more correct prēcis of the ICJ proceeding may have been that claimed breaches of the Genocide Convention had been found to be tenably arguable. In language closer to that used by the reporter that employed the problematic term "plausible", I accept it may have been preferable for a more qualified statement to have been used that referenced "allegations of genocide" being plausible. However, I consider this distinction would likely have been lost on the reasonable viewer. I do not consider another description of the ICJ's "for now", or provisional ruling that it is plausible genocide is happening in Gaza resulted in a breach of the accuracy standard.

[61] Views may differ, but I consider it would be reasonable to conclude from the ICJ's decision that a necessary precondition to South Africa's claim being tenably arguable was a finding of the plausibility of the claimant's allegations of breaches of the Genocide Convention. This is capable of being correlated with a provisional acknowledgement of the plausibility of genocide happening in Gaza that appears inherent to the ICJ's acceptance of the need to indicate provisional measures. Having examined the Court's ruling for myself, I am satisfied that, while the contested statement was a broad, unrefined and unsophisticated description of the ICJ's decision, set within the context of the broadcast as a whole, it was not materially inaccurate, or likely to materially mislead the programme's audience.

Taking into account irrelevant considerations and failing to have regard to relevant considerations

[62] It is convenient to deal with both of these other grounds of the appeal together. Mr Smith argued the BSA took into account irrelevant considerations in reaching its decision by erroneously having regard to extraneous material that expressed "interpretation or arguments" advanced by others as to what the ICJ decision meant, or must be taken to have meant, or to have been implicitly accepted. Mr Smith argued the BSA's role was to read the ICJ decision for itself and compare it with the accuracy of the contested statement. In that regard, he submitted the BSA's approach was flawed because the contested statement had not been made or prefaced by the reporter referencing how the ICJ's decision had been interpreted by others.

[63] I do not consider this ground of the appeal advances Mr Smith's appeal. The BSA is an inquisitorial body that has powers to seek out and receive material of its own volition.[36] It is apparent the BSA familiarised itself with various articles and publications that evidence the controversy and debate as to what can be drawn from or concluded about the ICJ's decision. Notably, the BSA drew upon this material to find the ruling dealt with complex legal procedural issues and that the ICJ's plausibility test and ruling had been the subject of considerable discussion which, notwithstanding the former President's BBC interview, had continued unabated.

[64] Two points need to be made in respect of the BSA's use of this material. First, in large measure, it was drawn upon in response to the reliance Mr Smith placed on the former President's comments about the Court's decision, which was presented as being a definitive statement of the outcome of the ICJ's decision that directly contradicted the contested statement. The contested statement, it was submitted, was therefore inaccurate and materially misleading.

[65] Second and relatedly, the sourced material was used to illustrate that the BSA was having to assess the material accuracy of the contested statement against the backdrop of an ongoing controversy, but that, whatever interpretation was to be given to the ICJ's decision, it was satisfied most audience members would interpret the

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[36] Broadcasting Act, s 12; and Commissions of Inquiry Act 1908, ss 4B and 4C.

statement as an indication there was some basis for the genocide claim, albeit this was still to be determined. In other words, notwithstanding the difficult interpretive issues to which the ICJ's decision gave rise, the understanding conveyed by the contested statement was discernible from the decision. I do not consider this material was irrelevant to the BSA's task, or that it was used or deployed illegitimately in reaching its decision.

[66] Mr Smith was also critical of the BSA's reference to the ICJ's decision to "indicate provisional measures" as being a significant ruling against Israel. He argued this was an irrelevant consideration when assessing the accuracy of the contested statement. However, there is a danger of taking the BSA's statement out of context. I do not interpret the BSA's observation as some type of "makeweight" remark, as was suggested by Mr Smith to justify what was otherwise an inaccurate and/or misleading statement contained in the broadcast. The BSA's reasoning was relatively brief, but I interpret its comment as a reference to whatever competing arguments or interpretations that can be made regarding the ICJ's findings, it is apparent a sufficient case was established to justify provisional measures despite Israel's opposition. As should be apparent from my review of what I considered to be the salient parts of the ICJ's judgment, when read as a whole there is a reasonable basis upon which to conclude it constitutes a finding there is some case to answer in respect of South Africa's claimed breaches of the convention which warranted the provisional measures. That reasoning contributed to the BSA's analysis of whether, in the circumstances, the contested statement was likely to materially mislead audiences.

[67] As an alternative argument, Mr Smith submitted that should the Court consider the BSA was entitled to consider extraneous evidential material, then it was obliged to consider certain publications that advanced arguments in favour of his complaint. These included statements made by UK Lawyers for Israel and comments made by an academic already mentioned, that the ICJ decision was a "victory for Israel". For the reasons already articulated, the BSA did not rely upon extraneous material that supported a particular view of the ICJ's decision, but drew upon that material to illustrate the different ways the ICJ's decision had been interpreted and the complex legal issues to which it gives rise.

[68] In the event, the BSA did have regard to one of the sources Mr Smith identified that it should have sourced. He points out himself that the BSA referenced the UK Lawyers for Israel critique in a footnote to its decision.[37] However, the short point is that, apart from recognising the different interpretations and controversy regarding the ICJ's decision, the myriad of views and interpretations proffered by various persons and organisations did not materially bear on the BSA's decision, at least not beyond its recognition of the existence of the controversy. It follows that Mr Smith's complaint of the BSA not taking into account other statements and comments by commentators and interested groups has not given rise to error.

[69] Mr Smith further submitted under this heading that the BSA was obliged to provide the material it had located from its own research to the parties and furnish it with an opportunity to comment and potentially respond. While not articulated as such, this effectively was a submission there had been some breach of natural justice. I do not consider that submission is sustainable. The BSA is provided with powers akin to those of a commission of inquiry.[38] When dealing with complaints, it has broad powers that permit it to "receive any evidence in any form, conduct investigations and require production of documents and other things, and summons witnesses".[39]

[70] Section 4A(2) of the Commissions of Inquiry Act 1908 expressly requires Commissions of Inquiry to give persons adversely affected by evidence the right to be heard. Notwithstanding various provisions of that statute having application to the BSA's decision-making process, no similar obligation is imposed, at least not by the statute, on the BSA to s 4A. It is notable that the BSA is empowered to consider and determine any complaint referred to it without a formal hearing, and that, other than giving a complainant and the broadcaster a reasonable opportunity to make submissions in writing in relation to the complaint, the BSA "shall provide for as little formality and technicality" as is permitted by the requirements of the Act, a proper consideration of the complaint, and the principles of natural justice.[40]

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37 At [16], n 10.
38 Broadcasting Act, s 12.
39 *Television New Zealand Ltd v Wicks* [2022] NZHC 597 at [14]; and Commissions of Inquiry Act, ss 4B, 4C, 5, 6, 7, 8 and 9.
40 Broadcasting Act, s 10.

[71] The only rationale put forward by Mr Smith for providing him with the opportunity to respond to the material independently sourced by the BSA was to provide him with the opportunity to comment and potentially respond with material of his own in support of his complaint. However, as I have already observed, the material that is the subject of complaint was used only to illustrate the competing views regarding whether the ruling had determined whether genocide was plausible in Gaza, and the existence of further discussion and debate, notwithstanding the retired President's comments to the BBC.

[72] As Mr Smith, himself, acknowledged, the accuracy of the contested statement and whether there had been a breach of the applicable broadcasting standard was required to be assessed against the content of the ICJ's ruling, not the weight of commentary in respect of that judgment. That is the approach I have taken on the appeal, and I do not consider the BSA approached its task any differently. I therefore reject Mr Smith's submission the BSA was under an obligation to provide him with the material which it independently sourced.

Bias

[73] Mr Smith argued the BSA's approach to his complaint exhibited "possible bias" in favour of the Palestinian cause and/or against Israeli actions, such that "it had an unacceptable degree of predisposition or predetermination" in respect to the issue, and that the BSA's decision, as a consequence, was irretrievably tainted.

[74] Mr Smith submitted it was not necessary to establish actual bias on the part of the BSA, only that there was "the real danger or possibility of bias from the manner in which the decision was reached".[41] Mr Smith submitted, in the absence of being able to exclude actual bias, the danger or possibility of bias can still be held to arise from appearances.[42] He relied on the following statement from *Muir v Commissioner of Inland Revenue*, which he claimed had been breached by the BSA:[43]

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41 Citing *Riverside Casino Ltd v Moxon* [2001] 2 NZLR 78; *Bates v Valuers Registration Board* [2015] NZHC 1312; and *Muir v Commissioner of Inland Revenue* [2007] NZCA 334.

42 *Riverside Casino Ltd v Moxon*, above n 41, at [31].

43 *Muir v Commissioner of Inland Revenue*, above n 41, at [64].

> … Secondly, there should not reasonably be room for a perception that the judge will decide the case on anything but the evidence in front of him or her. Thirdly, a judge must be in a position to consider all potentially relevant arguments. Fourthly, there may conceivably be a series of events or rulings which reasonably warrant an inference that the challenged judge's perception is warped in some way.

[75] Mr Smith's allegation of bias rested on what he submitted was the cumulative effect of a number of factors which he put forward in an endeavour to substantiate his claim, each of which I address in turn.

[76] First, reference was made to a report commissioned by the BSA titled *Research: Freedom of Expression and Harms Impacting Diverse Communities*.[44] Mr Smith submitted this report had been prepared without participation from the New Zealand Jewish community and that no explanation had been provided for that omission. He referenced the war in Gaza and the media discourse, both traditional and online, that included criticisms of Israel and its response, and worldwide protests in April and May 2024, at the time the report was being prepared. He commented that, while there was specific reference to the Palestine/Israel conflict from respondents who had been identified as either Asian or Muslim, no Jewish voices had been heard despite, in his submission, it being difficult "to think of people who might be more affected in their perception of free speech and its limits" than Jewish people.

[77] This criticism of the research undertaken for the report falls well short of contributing to a finding of bias. Participants' comments in the report on the Israel/Palestine conflict were made in the context of a much wider discussion regarding the harm of hate speech, than the situation in Gaza. That conflict was not a focus of the report. It is a highly speculative jump from the absence of an interviewee from the Jewish community to a claim of institutional bias on the part of the BSA. Given the limited parameters of the appeal and the paltry evidential basis upon which the allegation is made, which rests entirely on the tendering of a copy of the report, it is not necessary, nor appropriate, for the Court to venture any further comment.

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[44] Broadcasting Standards Authority *Research: Freedom of Expression and Harms Impacting Diverse Communities* (May 2024).

[78] The second factor upon which Mr Smith relies is the BSA's statement that ICJ's finding was "a significant ruling against Israel".[45] It was submitted, whether or not that statement was true, it was irrelevant to the BSA's decision. Mr Smith submitted that essentially four of the nine provisional measures sought by South Africa were granted by the ICJ and that it did not order a suspension of military operations as sought by South Africa. Mr Smith made submissions as to how the ICJ's provisional measures should be interpreted as little more than a requirement to comply with its existing obligations under the Genocide Convention.

[79] For the reasons I have earlier canvassed in identifying what I consider to be the relevance of the BSA's statement regarding the significance of the ruling "against Israel", I consider its observation was a legitimate part of its reasoning. Insofar as it is put forward as an indicator of bias, I do not consider it is capable of reflecting a personally held view by the BSA, and, as submitted by Mr Edwards, largely represents a mainstream understanding of the ICJ decision notwithstanding whatever commentary Mr Smith would prefer. It is not capable of being an indicator of bias.

[80] Thirdly, Mr Smith referred to the BSA's reliance on material it had sourced itself and not supplied to either party, nor referred to them for comment. That submission which alleges both parties having been prejudiced seems counter to any contention of bias. Mr Smith argued the BSA, by adopting this course, effectively acted as a party or advocate, rather than an impartial decisionmaker. For the reasons I have already reviewed, I do not consider the process adopted by the BSA went beyond the exercise of the orthodox powers of an inquisitorial body exercising its legitimate powers in discharging its statutory function.

[81] Fourthly, Mr Smith again referenced prior decisions of the BSA, namely *Muir & Knight v Radio New Zealand Ltd* and *Wellington Palestine Group v Television New Zealand Ltd*. He sought to draw an adverse inference from the outcome of those complaints, which he categorised as "pro-Israel" errors where breaches of the Code were sustained, and compared those outcomes with the fate of his complaint. The rationale for those decisions are plain from the reasoning that accompanies the BSA's

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[45] At [20].

decisions and are readily explicable. A simple comparison between the results of three separate complaints is not capable of supporting an allegation of bias.

[82] Mr Smith also placed reliance on how the BSA had, in *Muir & Knight v Radio New Zealand Ltd*, summarised the outcome of the ICJ decision in what he described was an accurate and unobjectionable way. In its decision, the BSA had stated that "the ICJ found that at least some of the rights claimed by South Africa for which it was seeking protection were plausible".[46] Mr Smith argued the BSA was now ignoring its own description of the ICJ case in its earlier decision in the way it chose to analyse his complaint.

[83] Again, I do not consider the comparison Mr Smith wishes to draw is supportive of his allegation of bias. The way the BSA chose to articulate the ICJ's decision in its earlier ruling by adhering closely to the wording used by the Court in that decision does not confine its analysis or assessment of how a broadcaster has chosen to describe the outcome of the same case in determining whether there had been a breach of the broadcasting standards. The way the BSA summarised or described the ICJ's decision in an earlier decision and the reasoning of its determination of whether TVNZ breached the Code of Broadcasting Standards in another are not mutually exclusive. Mr Smith falls well short of demonstrating the approaches taken by the BSA in previous decisions are capable of demonstrating or supporting an allegation of bias.

[84] Finally, Mr Smith sought to argue that because an earlier draft of the BSA's ruling had dismissed his complaint, but on different grounds, its actual decision which adopted different reasoning indicated bias. For reasons not entirely explained, Mr Smith was provided by the BSA with an earlier draft of its decision. This was not a draft formally circulated to the parties for their comment, but material Mr Smith obtained from the BSA after it had issued its decision the subject of this appeal. The draft had approached the issue on the basis that TVNZ had made reasonable efforts to ensure the statement's accuracy, but the BSA's reasoning for that conclusion had been based on the false premise the broadcaster was reporting a statement of the Foreign Minister's office. TVNZ subsequently clarified that was not the case. Mr Smith

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[46] At [19].

submitted the final decision, which did not reference the "reasonable efforts" reasoning, reflected how the BSA had adopted a different way to deny his complaint.

[85] The BSA's draft judgment has no standing but, to the extent reliance is placed upon it for the purpose of pursuing the allegation of bias, the bare fact the BSA reached the same outcome on different grounds is not capable of suggesting bias or predetermination. It does not follow from the BSA having proceeded on a misapprehended understanding of the facts that its fresh appraisal, which also resulted in Mr Smith's complaint being declined, is an indicator of bias. In the event, it was not necessary for the BSA to consider the issue of whether the broadcaster had made "reasonable efforts" to ensure the accuracy of the factual content of its broadcast because it found the contested statement was not materially inaccurate.

[86] This Court has held that a finding of inaccuracy is a prerequisite to assessing the question of "reasonable efforts" and that if a broadcast is not found to be inaccurate or misleading that issue does not need to be examined.[47] It follows that the absence of any analysis of the "reasonable efforts" argument, that apparently found favour in the BSA's earlier draft decision, cannot be considered an indicator of bias or improper reasoning. It was the result of its determination that the contested statement was neither inaccurate nor misleading. Any contrary contended inference would be unreasonable and speculative.

[87] As will be apparent from my foregoing review of the matters upon which Mr Smith relied to sustain his allegation of bias, even when taken in combination they are not capable of sustaining such a claim.

Reasonableness of the reporting

Procedural issue

[88] As an alternative argument, Mr Edwards submitted that should the contested statement be considered inaccurate or misleading, TVNZ had taken reasonable efforts to ensure the accuracy of the factual content of the report. Mr Smith raised a

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[47] *Radio New Zealand Ltd v Bolton* HC Wellington CIV-2010-485-225, 19 July 2010 at [41] and [45].

jurisdictional objection to that submission on the grounds the BSA had not addressed in its decision whether TVNZ made reasonable efforts to ensure the contested statement was accurate, and the respondent was therefore not entitled on the appeal to raise that issue.

[89] In support of his argument, Mr Smith relied upon two decisions of this Court which discussed the procedure to be followed where reliance is sought to be placed by a respondent on an aspect of the matter that did not form part of the decision the subject of appeal. Part 20 of the High Court Rules 2016, that deals with appeals to this Court, contains no equivalent provision to r 33 of the Court of Appeal (Civil) Rules 2005, which requires a respondent to file and serve a memorandum 10 working days after the appellant's notice of appeal if it wishes to support a judgment on grounds other than those relied upon by the Court below. Ronald Young J, in *Re Bay of Plenty Energy Ltd*, after noting this anomaly, considered that parties should have the same rights of appeal in this Court as in the Court of Appeal and considered the objective of the High Court Rules would best be promoted by reading into them a provision analogous to r 33 of the Court of Appeal Rules.[48]

[90] In *van der Eik v Accident Compensation Corporation*, Cooke J considered that "when a party wants to say that the ultimate decision was right, but for different reasons", a respondent should be expected to advise of such an intention, potentially during the case management of the appeal, and that such notice would give fair warning to the appellant of matters to be argued in the appeal to ensure no procedural unfairness.[49] Cooke J considered filing and serving a cross-appeal would fairly bring the appellant's attention to the respondent's desire to contest the lower Tribunal's reasoning on a different point. In that case, the appellant had chosen not to engage with those issues in his written submissions, but it was considered he had been adequately able to do so in oral submissions.[50]

[91] Mr Smith argued that until he received TVNZ's written submissions, he had not been provided with prior notice of its intention to advance an argument that did

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48 *Re Bay of Plenty Energy Ltd* HC Wellington CIV-2011-485-1371, 22 August 2011, at [40]–[41].
49 *van der Eik v Accident Compensation Corporation* [2020] NZHC 2523 at [11].
50 At [12].

not form part of the BSA's decision, and that, in the absence of filing formal notice or a cross-appeal, TVNZ should not be permitted to raise the matter on the appeal. Because of the conclusion I have already reached regarding the substantive issue on Mr Smith's appeal, it is not strictly necessary for me to consider either this procedural issue, nor TVNZ's alternative argument, and I do not intent to do so in any detail. However, I make the following observations.

[92] Insofar as the procedural argument is concerned, it needs to be recognised that Mr Smith's appeal was against a finding of the BSA that the accuracy standard of the broadcasting code of standards had not been breached. Had I found the BSA had been wrong to find the contested statement had not breached the standard, it would have been necessary for me to have assessed whether TVNZ had made reasonable efforts to ensure the accuracy of the contested statement, notwithstanding its error, in order to find the standard breached.

[93] It is an ingredient of any breach of the accuracy standard that the broadcaster be found not to have taken reasonable efforts to ensure the accuracy of its broadcast. As previously noted, it was not necessary for the BSA to consider whether TVNZ had made reasonable efforts to ensure the accuracy of the factual content of its broadcast because it found the contested statement was not materially inaccurate. Having reached that conclusion, it was not necessary for it to assess the question of "reasonable efforts".[51]

[94] However, in order for Mr Smith to have succeeded on his appeal and for this Court, contrary to the BSA, to have found a breach of the standard it would have needed to examine this element of the standard. I do not consider, therefore, this Court could have been procedurally precluded from examining that issue should that have proved necessary, more so given the determination of the appeal by this Court will be final.[52]

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51 *Radio New Zealand Ltd v Bolton*, above n 47, at [41].

52 Broadcasting Act, s 19; and *Reekie v Television New Zealand Limited* HC Auckland CIV-2009-404-6074, 29 July 2011 at [29].

[95] In any event, it is not apparent that Mr Smith was prejudiced. TVNZ's argument regarding the reasonableness of its reporting was set out in its written submissions, to which Mr Smith replied in his written submissions in rebuttal and addressed in oral argument. It is discernible from Cook J's approach in *van der Eik* that the key consideration is the question of procedural fairness, rather than adherence to any applicable procedural rule. In Mr Edwards's written submissions, filed some two weeks prior to the hearing, he noted that, contrary to Mr Smith's submission, TVNZ had at no point conceded that it did not make reasonable efforts to ensure the "accuracy of the broadcast" and, as noted, Mr Smith then took the opportunity to address that aspect of the appeal in his reply submissions.

Reasonable efforts to ensure accuracy

[96] The commentary to the accuracy standard observes that "[a] programme may be inaccurate or misleading, but nevertheless may not breach the standard, if the broadcaster took reasonable steps, for example, by relying on a reputable source". Guideline 6.3 provides:

> 6.3 The assessment of whether the broadcaster has made reasonable efforts to ensure accuracy includes consideration of the following, where relevant:
>
> - the source of material broadcast (eg a reputable organisation or an authoritative expert; or social media or third-party content from a non-reputable or non-authoritative organisation or person which may require additional care or steps to be taken by the broadcaster)
> - whether the broadcast was live or pre-recorded
> - whether there was some obvious reason to question the accuracy of the programme content before it was broadcast
> - whether the broadcaster sought and/or presented comment, clarification or input from any relevant person or organisation
> - the extent to which the issue of accuracy was reasonably capable of being determined by the broadcaster
> - the effect of any subsequent or follow-up coverage (eg where information has been updated or corrected as part of a developing story; or there is a delay between the time of broadcast and when the content has been accessed)

- the level of the broadcaster's editorial control over the content.

[97] Mr Edwards submitted the broadcast was required to be understood in light of its context and its focus, which he described as a "human interest piece" about pro-Palestine protests at universities and not the ICJ decision or the contested statement. He argued it was also relevant that the story was occurring in real time, rapidly developing, and that TVNZ was subject to significant pressure which curtailed the time that could be dedicated to investigating the contested statement. Having regard to those constraints, Mr Edwards submitted that TVNZ could reasonably and responsibly rely for accuracy on a reputable source such as a UN press release in preparing the broadcast.

[98] It was further submitted, on behalf of TVNZ, that the reasonableness of TVNZ's reliance on the UN press release was reinforced by publication of a number of similar statements by other reliable sources, albeit not relied upon for the purposes of compiling the programme. He gave by way of example an article by the *New Yorker*, "The importance of the I.C.J Ruling on Israel", published on 27 January 2024, in which a Yale law professor was quoted as stating:[53]

> I think what this decision is saying is that Israel has engaged in acts that could plausibly constitute violations of the Genocide Convention—both genocidal acts and perhaps incitement to genocide—and that there's enough here that's been alleged, that those allegations are plausible.

[99] Mr Smith, in response, emphasised the only evidence of any actual source relied upon by TVNZ was the UN press release. He accepted that, had the broadcaster placed reliance on a media release from the ICJ itself, it could not be criticised, and noted such a statement had been issued by that Court in late January 2024, which, he submitted, said nothing to support the contested statement. Mr Smith argued TVNZ had chosen to base its report upon a secondary source which he disputed as being "widely accepted" as a detached and independent source of information.

[100] The reliance TVNZ places on the urgency of its broadcast and the time pressure it was under to undertake further investigation of the accuracy of the contested

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[53] Isaac Chotiner "The importance of the ICJ ruling on Israel" Q&A, *The New Yorker* (online ed, New York, 27 January 2024).

statement is not compelling. I accept the pressures of the news cycle and the preparation of an item for broadcast about a current event that has recently taken place, or was continuing at the time the programme was prepared, places obvious limitations on the extent of the research or checking that can be undertaken. However, as TVNZ itself emphasised, the news item was not about the ICJ decision, and the contested statement constituted a peripheral comment made towards the conclusion of the item. It did not logically need to be a part of the broadcast in order for it to maintain its coherence. Because the statement was not required to be included, mitigation of the adequacy of those efforts to ensure its accuracy based on urgency or time must carry lesser weight.

[101] I accept the UN could constitute a reputable organisation for the purposes of guideline 6.3, which ordinarily it would be reasonable for TVNZ to rely upon as a reliable source of information. Further, I do not consider it would have been reasonable in the circumstances to have expected the broadcaster to analyse the ICJ's judgment and decide for itself what it meant. The journalist who was reporting from the scene of the Auckland protest was not in a position to undertake such a task, and I doubt whether it would have been reasonable to have expected such analysis for the purposes of the news report given the contested statement's peripherality to the subject of the broadcast. The contested statement, as I have said, was a short comment made in the context of the news report which was not focused on the ICJ's ruling. That observation, however, tends to take one back to whether, given those difficulties and the practicalities of undertaking further checks, the statement should have been included at all.

[102] A question raised in respect of the "reasonable efforts" issue is whether those efforts should have been sufficiently extensive to reveal the controversy attaching to the ICJ's decision and the associated debate. However, for the purposes for which the brief statement was deployed as it was, as part of a news item reporting upon a protest event, it would appear to be placing an onerous requirement on a broadcaster to have to go beyond a "reputable source" that ought to be able to be relied upon to provide accurate information such as the UN. As already noted, it is not necessary for me to come to any concluded view regarding this issue.

Conclusion

[103] Having rejected the four grounds advanced by Mr Smith in support of his challenge to the BSA's decision, his appeal must be dismissed.

Result

[104] The appeal is dismissed.

Costs

[105] Costs should follow the event and are payable by the unsuccessful appellant in the ordinary way. It is anticipated the parties will be able to agree costs, but leave is granted to exchange and file memoranda (no more than three pages) if necessary.

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