IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2003 485 2658

BETWEEN	TELEVISION NEW ZEALAND LIMITED Appellant
AND	VIEWERS FOR TELEVISION EXCELLENCE INC. Respondent

Hearing: 31 May 2004

Appearances: W Akel for the appellant
P McKenzie QC for the respondent
A E Scott-Howman for the Broadcasting Standards Authority

Judgment: 23 July 2004

JUDGMENT OF WILD J

Solicitors:
Simpson Grierson, Private Bag 92518, Auckland for appellant
Keesing McLeod, PO Box 30342, Lower Hutt for respondent
Bell Gully, PO Box 1291, Wellington for Broadcasting Standards Authority

Introduction

[1] The appellant ("TVNZ") appeals against a decision (No. 2003-124) of the Broadcasting Standards Authority ("the Authority") given on 20 November 2003. The Authority had upheld a complaint by the respondent ("VOTE") that a news broadcast by TVNZ had breached Standards and Guidelines in the Code of Broadcasting Practice for Free-to-Air Television ("The Code"). The Code was promulgated under s21(f) of the Broadcasting Act 1989.

[2] The primary ground of appeal is that the Authority's decision breaches the New Zealand Bill of Rights Act 1990, ("the BORA"), in particular s14. It is submitted that the decision is defective because it did not represent a balancing of the restrictions in s4 of the Broadcasting Act against the right to freedom of expression in s14 of the BORA, as is required by ss5 and 6 of the BORA. The relevant part of s4 of the Broadcasting Act provides:

> **4 Responsibility of broadcasters for programme standards**
>
> (1) 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; and
>
> (b) The maintenance of law and order; and
>
> (c) The privacy of the individual; and
>
> (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; and
>
> (e) Any approved code of broadcasting practice applying to the programmes.

[3] Section 14 of the BORA provides:

> **14 Freedom of expression**
>
> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[4] A further ground of appeal, raised by TVNZ in its submissions but not in its notice of appeal, gained significance in the course of argument. This was a submission that the Chairperson of the Authority ought to have exercised her casting vote to maintain the status quo, which TVNZ submitted was the decision of its own Complaints Committee not to accept VOTE's complaint.

Background

[5] The item complained of (I will refer to it as "the news item"), was telecast on *One News* at 6 pm on Saturday 5 July 2003. The introduction to the item gives its flavour:

> Thousands of children in the African nation of Uganda are being kidnapped and forced to kill by a brutal rebel group. The government has been powerless to stop the so-called 'Lord's Resistance Army'. Over the past 17 years, 20,000 Ugandan children have been kidnapped. Many others have fled to the northern city of Gulu in search of safety. From there, the BBC's Hilary Anderson reports....

[6] Most of the item was based in the town of Gulu to which, as the introduction explains, children had fled in large numbers to escape from, or avoid being captured by, the Lord's Resistance Army.

[7] The programme had footage of these children filmed in Gulu, including children in the hospital there. There was also footage of children still "serving" in the Lord's Resistance Army. The item ended with a child being reunited with his mother in Gulu. There was a picture of a young woman who had allegedly been raped and whose face had been mutilated.

The Code

[8] After a preamble, and a section setting out the grounds for a formal complaint, the Code comprises ten standards, each followed by guidelines aimed at assisting broadcasters in meeting those standards. The preamble includes the following:

> Fundamental to broadcasters, and to the Authority's activities, is the statutory right to freedom of expression which is provided for in section 14

of the New Zealand Bill of Rights Act 1990. Broadcasters and the Authority also acknowledge that New Zealand is a party to the United Nations Convention on the Rights of the Child (*see Appendix 3*).

[9] The standards and guidelines referred to in the Authority's decision, and thus in argument before me, are:

> Standard 9 Children's Interests
>
> During children's normally accepted viewing times (*see Appendix 1*) broadcasters are required, in the preparation and presentation of programmes, to consider the interests of child viewers.
>
> *Guidelines*
>
> ...
>
> 9e Scenes and themes dealing with disturbing social and domestic friction or sequences in which people – especially children – or animals may be humiliated or badly treated, should be handled with care and sensitivity. All gratuitous material of this nature must be avoided and any scenes which are shown must pass the test of relevancy within the context of the programme. If thought likely to disturb children, the programme should be scheduled later in the evening.
>
> ...
>
> Standard 10 Violence
>
> In the preparation and presentation of programmes, broadcasters are required to exercise care and discretion when dealing with the issue of violence.
>
> *Guidelines*
>
> ...
>
> 10g News, current affairs and factual programmes will, by their nature, often contain violent, disturbing or alarming material. Broadcasters should not falsify, by omission, a world in which much violence and brutality occurs. When such scenes are necessarily included to serve the public interest, the fact that violence has painful and bloody consequences should be made clear. However, editors and producers must use judgement and discretion in deciding the degree of graphic detail to be included in news programmes when children are likely to be watching. Warnings within news programmes must be used as appropriate.
>
> ...

[10] There are three appendices at the end of the code. Attached to appendix 1, dealing with free-to-air television programme classifications, is the following note:

NOTE

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. 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.

The Authority's decision

[11] I intend no criticism in saying that the Authority's decision is a fairly brief one. The broadcasting complaints regime in Part II of the Broadcasting Act is deliberately intended to be accessible, affordable, informal and prompt. Most of the Authority's hearings are on the papers, which essentially comprise the complaint and the broadcaster's decision on it. Lawyers for the parties are seldom involved in the complaints procedure, at least not visibly so.

[12] The Authority determined VOTE's complaint without a formal hearing. Its decision summarises the news item, and VOTE's complaint. It then sets out the relevant Standards and Guidelines. Then follow summaries of TVNZ's response and the points made by VOTE and TVNZ in referring the complaint to the Authority, and responding to that referral, respectively.

[13] In the operative part of its decision the Authority identifies the central issue raised by the complainant as whether or not the item should have been preceded by a warning. It stated that it was divided in its decision. The majority, comprising Joanne Morris and Tapu Misa, concluded that the item should have been preceded by a warning. The majority explained:

> [20] ... It (the majority) refers in particular to Guideline 10g of Standard 10 which points out that warnings should be used in news programmes which deal with violence. This item, it notes, talked about crippling injuries inflicted on the children, the rape of the girls captured by the rebels, showed a girl's mutilated face, and portrayed a boy giving a graphic account about how he had been required by the rebels to kill. The majority also acknowledges that the complaint related to a news item, and while news items cannot be subject to censorship as the Code accepts, it observes that the Code also refers to the use of a warning where appropriate. In the majority's view, the content of the item constituted 'violent, disturbing and

alarming material' as contemplated by the standard. Accordingly, the majority finds that Standard 10 was breached.

[21] The majority also took Guideline 9e of Standard 9 into account. It includes a reference to items where children are humiliated or badly treated and requires broadcasters to think carefully about the time at which such material is scheduled. The majority considers that children's viewing interests were not adequately considered by the broadcaster in view of its contents and, therefore, the majority concludes that Standard 9 was breached.

[14] The minority's view was this:

[22] A minority of the Authority (Rodney Bryant and Diane Musgrave) disagrees. It points out that the item, while including distressing comments, was visually restrained. It also notes the item's introduction which, while not including an explicit warning, would have informed parents and care-givers that the item could well include an account, and possibly visuals, of some very unpleasant and alarming events.

[23] In view of the intimation in the introduction and the discreet way in which the horrifying events were presented, the minority concludes that a warning was not necessary.

[15] There followed a paragraph referring to s5 of the BORA. The end point of the decision was this:

[24] ... **For the above reasons, the Authority upholds the complaint that the broadcast by Television New Zealand Ltd of an item on *One News* on 5 July 2003 breached Standards 9 and 10 of the Television Code of Broadcasting Practice.**

[16] In view of the division of opinion on the Authority as to whether the item breached the Standards, the Authority declined to impose any of the orders available to it under ss13 and 16 of the Broadcasting Act.

Appeal principles

[17] Section 18(4) of the Broadcasting Act provides:

The Court shall hear and determine the appeal as if the decision or order appealed against had been made in the exercise of a discretion.

[18] It is now firmly established, and all parties accept, that the correct approach on appeal from the exercise of a discretion is the formula outlined in *May v May* (1982) 1 NZFLR 165 (CA) at 169-170:

> ... an 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.

[19] Similarly, it was common ground that, on an appeal such as this, the grounds on which the appellate Court may interfere with a discretionary decision such as that of the Authority here, are wider than those available in judicial review (Mr Akel termed them judicial "control") proceedings: *Shotover Gorge Jet Boats v Jamieson* [1987] 1 NZLR 437 (CA) at 439.

[20] Mr Akel submitted that the law, at least in the United Kingdom, is moving towards a greater readiness to interfere in decisions involving the exercise of a discretion affecting human rights. He relied on *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, and *R (on the application of ProLife Alliance) v British Broadcasting Corp* [2003] 2 All ER 977 ("*ProLife*"), both decisions of the House of Lords. I have already expressed my general agreement with that submission, albeit in a judicial review context: *Wolf v Minister of Immigration* (High Court, Wellington, CIV 2002 485 106, 7 January 2004).

The BORA point

Argument

For TVNZ

[21] For TVNZ Mr Akel submitted that this appeal raised and turned on the relationship between s14, and ss5 and 6, of the BORA, and their effect on the decision at various stages as to whether a warning should have been given to viewers of the news item. His point was that those sections governed the interpretation of the

Standards and Guidelines in the Code which in turn governed the decision as to whether or not a warning was appropriate. That decision must:

a) Be as consistent as possible with the right to freedom of expression;

b) Have an end result which society can accept as a reasonable limitation - one which is demonstrably justified in a free and democratic society.

[22] TVNZ argued that the interpretation of the Guidelines which gave them a meaning more favourable to freedom of expression rights, must be preferred: s6 of the BORA. Likewise, if the limitation could not be demonstrably justified, and the decision imposing it encroached upon freedom of expression rights, it could not stand: s5. Mr Akel referred to the analysis of Tipping J in *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9 (CA) ("*Moonen 1*") paras [17]-[19] in respect of the interplay between ss4, 5 and 6 and the BORA. I will refer to this as the "*Moonen* balancing exercise".

[23] Next, Mr Akel identified the four successive decisions relating to the news item:

a) The decision of TVNZ's producer/editor as to whether a warning should be given;

b) The Authority's decision whether to uphold VOTE's complaint against TVNZ;

c) The decision of the Chair of the Authority on her casting vote;

d) This Court's decision on this appeal.

[24] Mr Akel stressed that TVNZ was not challenging the validity of the Standards and Guidelines in the Code, nor was he suggesting that the s14 BORA right was absolute. But he stressed that the s14 right did not distinguish between people of any age, and covered the right to receive, as well as impart, information and opinions of any kind, and in any form. In short, he stressed the breadth and

depth of the s14 right. This culminated in Mr Akel submitting that each of the four decision makers he had identified was required to balance the Standards and Guidelines against the s14 BORA right, as directed by ss5 and 6 of the BORA.

[25] Mr Akel then turned to consider each of the four decisions applying those principles of interpretation. He made the following points about the decision of TVNZ's editor/producer, and that of the Authority:

a) Guideline 10g requires the producer to use his judgment and discretion in deciding the degree of graphic detail to be included in news programmes when children are likely to be watching. Warnings are to be used only when considered appropriate.

b) Guideline 10g does not require that warnings must be given. It directs editors and producers to use judgment and discretion. It involves a subjective decision by the editor. Any review of that decision must be carried out in a manner consistent with s14. The Authority did not consider that point.

c) Guideline 10g acknowledges that news programmes will often, of their very nature, contain violent and disturbing material. It expressly states that broadcasters should not falsify a world in which such violence occurs. It acknowledges that editors have to decide the degree of graphic detail that is to be included in a news item. It is not the news item itself, but the amount of graphic detail contained in it (ie its content), that is subject to the editor's discretion. The majority of the Authority did not consider this point either.

d) The fact that young/vulnerable children are watching the news, does not mean that a warning must be given simply because violent and disturbing material is to be shown. The Authority has in past decisions pointed out that children are unlikely to be watching except in the presence of parents who can exercise some degree of control over what their children view: *Barker v TVNZ* (Decision No. 2000-

033, 2 March 2000); *Del La Varis v TV3 Network Services Limited* (Decision No.2002-206, 17 December 2002). In *Barker* the Authority said:

> The Authority ... believes that children of a vulnerable age are unlikely to watch the news unattended ...

Again, the majority of the Authority does not refer to these issues.

e) TVNZ's editor acknowledged the United Nations Convention on the Rights of the Child. Article 13 of that Convention which sets out a child's right to freedom of expression, is broadly similar to s14 of the BORA. The majority of the Authority did not refer to the Convention.

f) The guide Note to Appendix 1 to the Code provides that editors are only required to be mindful that young people may be among viewers of news programmes, including during the early evening hours and "should give consideration to including warnings where appropriate". The requirement is for consideration to be given to including a warning; there is no requirement that warnings be given. The majority of the Authority overlooked this important distinction. Mr Akel placed particular reliance on two passages in the judgment of Lord Walker in *ProLife* where His Lordship said:

> [124] ...The broadcasters also had to take into account the special power and intrusiveness of television. They are, by their training and experience, well qualified (so far as anybody, elected or unelected, could claim to be well qualified) to assess the Alliance's PEB as against other more or less shocking material which might have been included in news or current affairs programmes, and to form a view about its likely impact on viewers...
>
> [139] ... That requirement (for exclusion of offensive material) is expressed in imprecise terms which call for a value judgment to be made. The challenge is to the value judgment made by the broadcasters.

[26] Mr Akel said that the thrust of this appeal is that the Authority simply failed to consider all these issues in respect of the decision of TVNZ's news editor, as to whether a warning should be given.

For VOTE and the Authority

[27] Mr McKenzie made thorough and measured submissions for VOTE. Having given the required notice, the Authority appeared through its counsel, Mr Scott-Howman. He explained that the Authority considered this case may have significance for it beyond its particular facts. It may significantly affect the way in which the Authority conducted itself in determining future complaints, and for that reason it wished to be heard on two aspects:

a) The application of the principles of the BORA; and

b) the United Nations Convention on the Rights of the Child.

[28] I see no need to summarise these two sets of helpful submissions, since they are reflected in my decision, to which I now move.

Decision

[29] Although developed with more complexity, the nub of TVNZ's argument on this appeal is this:

a) The Code is an enactment to which ss5 and 6 of the BORA apply.

b) Accordingly, the Authority was required to carry out the *Moonen* balancing exercise.

c) In stating that "warnings should be used in news programmes which deal with violence", the Authority failed to interpret Guideline 10g in a manner consistent with the least infringement of the right to freedom of expression, as s6 of the BORA required.

d) The Authority's decision itself is contrary to ss5, 6 and 14 of the BORA because the requirement for a warning for the news item was not a reasonable limit on the right to freedom of expression. Consequently, the Authority's decision was plainly wrong, failed to take into account relevant matters, and/or proceeded upon wrong principles.

[30] The first of these propositions hinges on the application of s6 of the BORA, which provides:

> **6 Interpretation consistent with Bill of Rights to be preferred**
>
> Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

[31] Section 6 obliges everyone who interprets enactments, to prefer BORA consistent over inconsistent meanings. Is the Code an enactment, as Mr Akel submits?

[32] Under s29 of the Acts Interpretation Act 1999, "enactment" is defined as "the whole or a portion of an Act or regulation". "Act", in turn, means an Act of the Parliament of New Zealand or of the General Assembly; and includes an Imperial Act that is part of the law of New Zealand. "Regulation" is defined as:

> (a) Regulations, rules, or bylaws made under an Act by the Governor-General in Council or by a Minister of the Crown:
>
> (b) An Order in Council, Proclamation, notice, Warrant, or instrument, made under an enactment that varies or extends the scope or provisions of an enactment:
>
> (c) An Order in Council that brings into force, repeals, or suspends an enactment:
>
> (d) Regulations, rules, or an instrument made under an Imperial Act or the Royal prerogative and having the force of law in New Zealand:
>
> (e) An instrument that is a regulation or that is required to be treated as a regulation for the purposes of the Regulations Act 1936 or the Acts and Regulations Publication Act 1989 or the Regulations (Disallowance) Act 1989:

> (f) An instrument that revokes regulations, rules, bylaws, an Order in Council, a Proclamation, a notice, a Warrant, or an instrument, referred to in paragraphs (a) to (e):

[33] Given a wide interpretation, s29(b) might possibly be read as encompassing the Code, as being a 'notice' or 'instrument' made under an enactment that varies or extends the scope or provisions of an enactment. But, applying the interpretative maxim noscitur a sociis, the tenor of the s29 definition read as a whole seems to me to require something more authoritative (for want of a more precise term) than the Code. After all, the Code is no more than a set of industry standards developed by broadcasters for broadcasters, albeit under the Act, with the assistance and ultimate approval of the Authority, and published in the *Gazette*.

[34] My view is that the Code is not an "enactment" and is thus not caught by s6 of the BORA. It follows that the *Moonen* balancing exercise was not required of the Authority.

[35] The relevant enactment for BORA purposes is the Broadcasting Act pursuant to which the Code was promulgated. Section 6 of the BORA requires that all empowering provisions be read as authorising only such delegated legislation as is consistent with the BORA: *Drew v Attorney-General* [2002] 1 NZLR 58 (CA). As is stated by Rishworth, Huscroft, Optican & Mahoney in *Bill of Rights in New Zealand* (Oxford University Press, 2003) at p 160:

> Whether the delegated legislation breaches the Bill of Rights is a question for consideration under s5. If, on inquiry, it is decided that the delegated legislation does perpetrate or authorise a breach of the Bill of Rights, then the legislation (or the decision thereunder) is ultra vires.

[36] That argument best fits a challenge to the reasonableness of the standards themselves. There is no such challenge here (one would be unlikely, given TVNZ's participation in promulgating the Code). However, as is clear from that quote from *Bill of Rights in New Zealand*, the authors contemplate the possibility that a decision made under the Code which constitutes an unreasonable limit on the right to free speech would be ultra vires the Broadcasting Act. That would provide an alternative basis to challenge the Authority's decision. I do not consider that further, both because this is not a vires challenge, and because, even if that were an available

avenue, I consider the Authority's decision passes the s5 test. I develop the latter point.

[37] In case I am wrong and the Code is an enactment for BORA purposes, I consider now the *Moonen* balancing exercise. As will become apparent, I do not think that exercise works here, but I undertake it because Mr Akel submitted that the Authority had failed to do so. I do not overlook that Tipping J suggested rather than prescribed the approach, and the Court of Appeal reiterated that point in *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754 (*"Moonen 2"*) at paras [14]-[15]:

> Clearly, it was not intended to be prescriptive. "May" means may. The five-step approach may be helpful. Other approaches are open.

[38] As mentioned in paragraph [22] above, Tipping J's five step approach is to be found in paragraphs [17]-[19] of *Moonen 1* , and I will not set it out here. The relevant right is that contained in s14 of the BORA: freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form. The Court of Appeal at paragraph [15] in *Moonen 1* described that right as being "as wide as human thought and imagination". As mentioned in paragraph [24] above, Mr Akel fastened upon that.

[39] The first *Moonen* step is to identify the different interpretations of the words of the Broadcasting Act which are properly open. Here, the relevant provision is standard 10, and in particular guideline 10g, both of which I have set out in paragraph [9] above.

[40] The Authority interpreted 10g as stating that "warnings should be used in news programmes which deal with violence", albeit the Authority a little later recognised the qualifying words "where appropriate". The Authority considered that the content of the news item was 'violent, disturbing and alarming' (the words used in 10g), and that this triggered the requirement for a warning. In taking that approach, it is arguable that the Authority failed to identify other interpretations of 10g, for example that it necessitated a warning only when an item contained

exceptionally or particularly violent, disturbing or alarming material and/or was particularly graphic in its detail.

[41] The relevance of this depends on whether the requirement to give a warning is correctly viewed as a limit on the right to free expression. As the authors of *Bill of Rights in New Zealand* point out, and avoid in their suggested four stage alternative, this is one of the problems with the *Moonen* approach: consideration of whether the warning requirement does limit freedom of expression arises at an unnecessarily late stage.

[42] Opposing arguments can obviously be mounted as to this point. On the one hand, it can be said that the statutory obligation on broadcasters to meet the standards set out in s4 of the Broadcasting Act (including the Code) necessarily derogates from the right to freedom of expression, or in the words of *Moonen 1*, is a *pro tanto* abrogation of the right to freedom of expression (see *TV3 Network Services Ltd v Holt* [2002] NZAR 1013, paragraph [36] at 1022). Also, it can be argued, as indeed it was in *RJR-MacDonald Inc. v Canada (Attorney-General)* [1995] 3 SCR 199, that the freedom of expression includes the right not to say certain things. For that reason the majority of the Supreme Court of Canada held, inter alia, that a statutory provision requiring cigarette manufacturers to place health warnings on tobacco packages, infringed the right of free expression. On the other hand, it can be contended that it is hard to see how a requirement to give a warning that scenes may disturb is in any real sense a limit on the right to free expression, especially when the point arises after the news item has been telecast, and no orders were made by the Authority consequential on the breach.

[43] Assuming, however, that the obligation to give a warning does represent a limitation on free expression, it can be argued that the Authority, in taking the broad brush approach it did as to when warnings should be given, failed to adopt a meaning which constitutes the least possible limitation on the right. This case is similar to *Moonen 1* in this respect: the Film and Literature Review Board in *Moonen 1* was held by the Court of Appeal not to have considered the different meanings of "promotes or supports" for the purposes of s3 of the Films Videos & Publications Classification Act 1993. The Court of Appeal set aside the decision,

directing the Board to reconsider its decision in the light of the law as explained in the judgment.

[44] Again, I note that the authors of the *New Zealand Bill of Rights* criticise *Moonen 1* on this point, stating at pp135-136:

> The second difficulty with the *Moonen* approach is that ... it assumes that the aim of interpretation is to adopt a meaning that is the least possible limitation on a right or freedom. That cannot be right. If the Bill of Rights is conceived as a benchmark against which legislation is to be measured for consistency, there is no basis for invoking it to attribute a meaning solely because it produces the least possible impact on a right.
>
> (pp135-136)

[45] Thus, if the Code is an enactment, I consider the Authority faltered also at step 2 of the *Moonen* balancing exercise. A similar remedy to that granted in *Moonen 1* may be appropriate.

[46] If, on the other hand, the Authority's decision survives step 2, in my view even on the wider meaning given to 10g by the Authority, it clears the justified limitations threshold imposed by s5. That is my view both in terms of the interpretation of the standard/guideline adopted by the Authority and its application to the news item. As to the latter point, a statute cannot be interpreted to permit unreasonable applications.

[47] Even if the requirement to warn viewers of a violent news item is perceived to be an infringement of the right to free expression, it is, in this instance, a justified infringement. The objective of the warning, namely, to protect young viewers from unduly distressing images, is sufficiently important to warrant such a measure. The Authority's finding that TVNZ ought to have forewarned viewers of the "violent, disturbing, or alarming" material that was to ensue, constituted in my opinion a reasonable limitation on the s14 right to freedom of expression. In short, the Authority's decision meets steps 3, 4 and 5 of the *Moonen* balancing exercise, and I find that the requirement for a warning is a justifiable limitation in terms of s5. In *TV3 Network Services Ltd v Holt*, Rodney Hansen J at paragraphs [38] to [39], held that, having applied the relevant standard(s) and guidelines to the facts, it was

unnecessary for the Authority to test the decision it had reached against s5. He said at paragraph [39]:

> In my view, this goes a step too far. The impact of the Bill of Rights should be considered, if it is necessary to consider it at all, on the standard or standards which are being applied in the particular case.

[48] With respect, I do not agree with that. Even if the standards themselves are unassailable, surely they can be misconstrued so as to produce a non BORA compliant result. That may be unlikely where the complaint is about violence. But the Code has standards (e.g. standard 3 and its associated Appendix 2) dealing with protection against the public disclosure of private facts which are highly offensive and objectionable to a reasonable person of ordinary sensibilities. It is not hard to contemplate a decision which takes too broad an approach to the privacy principles at the expense of free expression. The meaning of the standard adopted i.e. the particular interpretation or application, ought to be justifiable in terms of s5. I believe my view accords with the approach Goddard J took in *Society for the Promotion of Community Standards Inc. – Visitor Q* HC Wellington CIV 2002 485 238 16 January 2004, and earlier in *Society for the Promotion of Community Standards Inc.' – Baise Moi* HC Wellington CIV 2002 485 235, 11 November 2003 Goddard J.

[49] There is a further point here. Mr Akel contended that the Authority failed to favour free expression over prefacing the news item with a warning in what was a marginal case, as is evidenced by the Authority's split decision. This point draws some support from *Moonen 1* where the Court of Appeal held (at paragraph [28]) that "in applying the concepts of promotion and support to the publications in question, s5 requires that such application favours freedom of expression over objectionability if the case is marginal". I am unable to extrapolate that to a requirement, where opinions differ, to give ascendancy to the least rights-inhibitive view or, in this case, to a requirement upon the chairperson to exercise her casting vote in a particular way.

[50] If the BORA is to apply, I consider it must be by virtue of s3 which provides:

3 Application

This Bill of Rights applies only to acts done –

(a) By the legislative, executive, or judicial branches of the government of New Zealand; or

(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

[51] The Authority must surely be viewed as a body performing a public function, power or duty conferred by or pursuant to law. That was the view Rodney Hansen J took in *TV3 Network Services Ltd v Holt* (at paragraph [35]). The relevant function or power for present purposes is the capacity to determine complaints, conferred by s21 of the Broadcasting Act.

[52] I consider that application of the BORA meant that the Authority was required to take into account the right in question (here, s14 of the BORA) as a mandatory relevant consideration. It had to balance the limit on that right, which was inherent in its decision, against the objective sought to be achieved in the particular case, and it had to be satisfied as to the reasonableness of that intrusion. In short, a s5 type analysis.

[53] Subjecting its decision to the reasonableness requirement in that way seems to be the approach the Authority has taken, for example in *Clark v TV3* (2003/055-61) where the Authority stated:

> [258] ... the Authority considers that the combined effect of s5 and s6 of the New Zealand Bill of Rights Act requires the Authority to ensure that there is proportionality and a rational connection between the social objective of the Broadcasting Act and any limit imposed on the right to freedom of expression in each individual case.

[54] That approach received at least implicit approval from Chambers J in *TV3 Network Services Ltd v ECPAT New Zealand Inc.* [2003] NZAR 501. His Honour concluded that the Authority had considered the BORA in coming to its decision:

> [40] ... The Authority concluded that this exercise of its power under the Broadcasting Act did not unduly restrict TV3's right to express itself freely. The restriction imposed by its decision was 'reasonable and demonstrably justified': see s5 of the Bill of Rights.
>
> ...

> [42] ... The decision does not infringe the Bill of Rights and in particular TV3's right under s14 to freedom of expression. The restriction placed on TV3 by the decision is minor and clearly proportionate. The Authority did not ban the documentary. The Authority did not prohibit discussion about child sexual abuse or child prostitution. All the Authority declared wrongful was the identification of the child victims.

[55] That approach necessarily differs from that advocated by Rodney Hansen J in *TV3 Network Services Ltd v Holt*, to which I have already referred. His Honour there held that the BORA does not require the Authority to consider, as a matter of course, whether an unjustifiable limitation is raised by the complaint. In paragraph [38] Rodney Hansen J said:

> [38] ... What has been prescribed by law, for the purpose of complaints to the Authority, are the standards referred to in s4 of the Act. ... The standards in the Code are the relevant limits prescribed by law. It is these standards which must be the focus of any inquiry under s5.

[56] In my view, the act which attracts the BORA obligation is the determination by the Authority of complaints pursuant to the Broadcasting Act. It is that act of decision making which is implicitly qualified by the requirement not to perpetrate unreasonable limits on rights. I accept that most of the Authority's decisions under the Code will pass the justifiable limitations threshold, given the content of the Code and the relatively "tame" sanctions available to the Authority to remedy any breach. But that in my view does not eliminate the need for the Authority to consider the impact of its decision on freedom of expression in respect of each specific complaint, by subjecting it to a s5 reasonableness assessment.

[57] I am satisfied that the Authority did undertake such a s5 proportionality assessment, although I accept that it was not expressed as such. In paragraph [20] of its decision the Authority first refers to the graphic and disturbing content of the news item. Next it acknowledges that news items cannot be subject to censorship, but notes that warnings should be used where appropriate. It then expresses its view that, given the graphic and disturbing violence depicted, a warning was required. That implicitly involves the Authority striking what it considered was the appropriate balance between freedom of information on the one hand, and not unduly distressing children on the other. Further, in not making any order consequent on its decision, the Authority could be seen to be making the least

possible interference with the free expression right in recognition of the fairly minor nature of the breach.

[58] To summarise, in my view the Authority was constrained by the BORA because it was a body performing a public function or power under s3(b), rather than because of the interpretative obligation under s6. As such, it was bound to consider the s14 right in its decision making, and in particular, it needed to satisfy itself that its determination of the complaint constituted a justifiable limitation on the s14 right. I consider that the Authority did that, though implicitly rather than explicitly.

The casting vote point

[59] Mr Akel suggested that there existed a convention that the chairperson of the Authority, faced with a 2:2 split, should have exercised her casting vote to uphold the status quo. He conceded immediately that what authority he had been able to find did not support his suggestion. The first authority he referred to was Pitchforth's *Meetings Practice and Procedure in New Zealand* (3rd ed, 1999) at para 3-191, Casting Vote. The author simply sets out two opposing views about how a casting vote should be exercised. The first view is that the chairperson has the right to take advantage of her casting vote to achieve the outcome she considers correct (or wants). The other is that the chairperson should exercise the vote in favour of the status quo, so that there is no material change.

[60] The second authority is an article by Matthew Ockleston "The Chairman's casting vote" in *Public Law Review* Vol 11, September 2000 at p228. The abstract to that article reads:

> The casting vote, which allows the chairperson of a meeting to determine the outcome of a vote on a tied vote, dates from the 17th century. Despite its age, there is very little law on how it ought to be exercised. This inevitably leads to dissatisfaction because there is no universally accepted practice, and different people have different expectations. This article discusses some of these expectations and the different types of bodies for which they may be appropriate. It concludes that dissatisfaction would be minimised if individual bodies could determine how their chairperson should exercise a casting vote, based on the characteristics of that body and its chairperson. This determination should be given legal force to ensure compliance.

[61] In that article, under the heading "*Elected for skills and abilities*", Mr Ockleston suggests that the Chair of a statutory authority appointed by a Cabinet Minister, or by the Governor-General in ministerial advice (the latter is the position here: s26(1) of the Broadcasting Act) might perhaps tend to exercise her casting vote in a "neutral" manner. The author then continues:

> In the case of a quasi-judicial body, such as a disciplinary or appeals board, the chairperson may wish to follow judicial principles in the event of an equality of votes. This would cause the chairperson to dismiss a disciplinary charge or uphold a decision which is the subject of an appeal. This is effectively the same as preserving the status quo.
>
> (Footnote) *Judicature Act* 1908 (NZ), s59(2) provides, in respect of the Court of Appeal, that "(i)f the Judges present are equally divided in opinion, the judgment or order appealed from or under review is taken to be affirmed."

[62] Mr Akel did not press this point, and I therefore will not dwell on it, but make two comments. The first is that the Authority was not dealing with an appeal. As TVNZ's complaints committee had declined VOTE's complaint, VOTE was entitled to, and did refer its complaint to the Authority. There was thus no question of the chairperson preserving the status quo by upholding a decision appealed from. Secondly, Mr McKenzie suggested that the Code itself could be viewed as the status quo here. I share Mr Akel's difficulties in accepting that. In the context of judicial or quasi-judicial proceedings, I have never before heard it suggested that relevant legislation can itself be regarded as the status quo. I have difficulty in detecting any status quo which the chairperson could, through the exercise of her casting vote, uphold, even if she was in some way obliged to do so.

[63] Mr Akel's primary submission was that the Chair ought to have exercised her casting vote with the minority, since their view was most consistent with ss5 and 6 of the BORA. That submission largely reiterates TVNZ's principal contention, namely that the Authority erred in not carrying out a *Moonen* balancing exercise. I need not repeat my reasons for not accepting that argument.

[64] In my view, the chairperson was free to exercise her casting, as well as her deliberative, vote in the way in which she, bringing to bear her experience and skills in the broadcasting standards area, considered best applied the Standards and

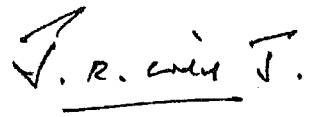
Guidelines to the news item. In fact, there is a powerful argument that her statutory responsibility required her to do no less.

Result

[65] I have not upheld any of TVNZ's grounds of appeal. The appeal is accordingly dismissed. The decision of the Authority stands.

Costs

[66] The parties made no submission as to costs. I see that, in their consent memorandum of 5 February, they reserved the right to make submissions on costs. My tentative view is that the respondent is entitled to its costs against the appellant on the agreed 2B basis. I am unsure whether the Authority, having sought leave to be heard in the proceeding, seeks costs. Tentatively, I do not think an order in its favour would be appropriate. I reserve to all parties leave to file memoranda about costs in the event that they cannot be agreed.



Judgment signed at 2.15 on 23 July 2004