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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT
DIVISIONAL COURT
[2019] EWHC 528 (Admin)

CO/3089/2018
CO/2760/2018
CO/3149/2018
CO/3071/2018
CO/3147/2018

Royal Courts of Justice

Tuesday, 5 February 2019

Before:

LORD JUSTICE HICKINBOTTOM

and

MR JUSTICE HOLGATE

Before:

- -

THE QUEEN ON THE APPLICATION OF

(1) NEIL SPURRIER
(2) LONDON BOROUGH OF HILLINGDON
(3) FRIENDS OF EARTH LIMITED
(4) PLAN B EARTH
(5) HEATHROW HUB LIMITED AND ANOTHER — Claimants

- and -

SECRETARY OF STATE FOR TRANSPORT — Defendant

- and -

(1) HEATHROW AIRPORT LIMITED
(2) ARORA HOLDING LIMITED — Interested Parties

- -
- -

A P P E A R A N C E S

MR T CROSSLAND (Director, Plan B Earth) appeared in person on behalf of the Claimant Plan B Earth.

MR D WOLFE QC (instructed by Leigh Day) appeared on behalf of the Claimant Friends of the Earth.

MISS S RING - Solicitor Advocate - (instructed by Harrison Grant) appeared on behalf of the claimants London Borough of Hillingdon and other boroughs.

THE DEFENDANT did not attend and was not represented.

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JUDGMENT

Lord Justice Hickinbottom:

Introduction

1. The Claimants seek to challenge the Airports National Policy Statement: New Runway Capacity and Infrastructure at Airports in the South East of England, which the Defendant Secretary of State designated as a National Policy Statement under section 5 of the Planning Act 2008 on 26 June 2018. They do so in five linked claims for judicial review which are due to be heard on a rolled-up basis by this constitution of the court in March 2019.

2. The claims give rise to several issues of considerable public interest and importance, including the legal compatibility of the UK Government's aviation strategy with its obligation to implement the Paris Agreement on Climate Change. That issue lies at the heart of the claims brought by Plan B Earth and Friends of the Earth Limited.

3. There is before the Court an application by those two Claimants that the March hearing be live-streamed on the internet. Those Claimants are represented by Tim Crosland and David Wolfe QC respectively. A number of the other Claimants have expressed support for the application. Susan Ring appears on behalf of the London Borough of Hillingdon and other local authority Claimants in support of it. The Secretary of State has indicated he is neutral on the issue. No party opposes it.

4. Mr Crosland, who has led on the issue, submits that the factors in favour of live-streaming the hearing are overwhelming. There is, he submits, a growing recognition that judicial proceedings of a public nature should be made available by live-streaming. It is an important element of the principle of access to justice. These proceedings concern matters which are of particular public interest and, Mr Crosland submits, are matters in respect of which public engagement should be facilitated if not positively encouraged. Many people who have an interest in the issues raised will be unable to attend the hearing because of the costs and difficulties in travelling to London. Some, including wheelchair users, may have difficulties of access to the courts in this building. In any event, Mr Crosland submits that there are likely to be more people wishing to attend the proceedings than a court - or even two courts - could accommodate. This court - Court 76 - is the largest court in the Royal Courts of Justice, and it was full for the October 2018 hearing for directions. There are therefore several positive reasons for an order allowing live-streaming whilst, he submits, there is no downside: for example, the case does not raise issues of individual privacy which might argue against such an order. Live-streaming facilities are available in several of the courts, as they are in regular use in the Court of Appeal. The cost of providing the facility is not an issue, especially when balanced against the public interest in allowing live-streaming.

5. If the court had a discretion to allow the broadcasting of its proceedings in the form of live-streaming, I see the very considerable force in these submissions on the merits of the application.

6. However, Parliament has imposed restrictions on the publication of court proceedings. Insofar as such restrictions are made by Parliament, they constrain the inherent jurisdiction of the High Court to regulate its own procedure.

7. Section 41 of the Criminal Justice Act 1925, as amended by section 47 of the Constitutional Reform Act 2005 (which excluded the Supreme Court from the restrictions) and section 32(7) of the Crime and Courts Act 2013, under the heading "Prohibition on taking photographs, &c., in court", provides as follows:

> "(1) No person shall—

(a) take or attempt to take in any court any photograph, or with a view to publication make or attempt to make in any court any portrait or sketch, of any person, being a judge of the court or a juror or a witness in or a party to any proceedings before the court, whether civil or criminal; or

(b) publish any photograph, portrait or sketch taken or made in contravention of the foregoing provisions of this section or any reproduction thereof;

and if any person acts in contravention of this section be shall, on summary conviction, be liable in respect of each offence to a fine....

(1A) See section 32 of the Crime and Courts Act 2013 for power to provide for exceptions.

(2) For the purposes of this section—

(a) the expression "court" means any court of justice (including the court of a coroner), apart from the Supreme Court;

(b) ..

(c) a photograph, portrait or sketch shall be deemed to be a photograph, portrait or sketch taken or made in court if it is taken or made in the court-room or in the building or in the precincts of the building in which the court is held, or if it is a photograph, portrait or sketch taken or made of the person while he is entering or leaving the court-room or any such building or precincts as aforesaid."

For these purposes, "photograph" includes moving film (R v Loveridge, Lee and Loveridge [2001] EWCA Crim 973; [2001] 2 Cr App R 29).

8. Thus, section 41 prohibits not only the taking or making of a photograph or moving film of court proceedings but also the publication of such material. The prohibition is absolute, in the sense that the court has no power to override it by granting permission for recording or publication of images. Parliament has made no provision for such authorisation which, absent statutory intervention, would fall within the inherent powers of the High Court to govern its own procedure.

9. Section 9 of the Contempt of Court Act 1981 deals with sound recording and publication:

"(1) Subject to subsection (4) below, it is a contempt of court—

(a) to use in court, or bring into court for use, any tape recorder or other instrument for recording sound, except with the leave of the court;

(b) to publish a recording of legal proceedings made by means of any such instrument, or any recording derived directly or indirectly from it, by playing it in the hearing of the public or

any section of the public, or to dispose of it or any recording so derived, with a view to such publication.

(1A) In the case of a recording of Supreme Court proceedings, subsection (1)(b) does not apply to its publication or disposal with the leave of the Court.

(2) Leave under paragraph (a) of subsection (1), or under subsection (1A), may be granted or refused at the discretion of the court, and if granted—

(a) may, in the case of leave under subsection (1)(a), be granted subject to such conditions as the court thinks proper with respect to the use of any recording made pursuant to the leave; and

(b) may, in the case of leave under subsection (1A), be granted subject to such conditions as the Supreme Court thinks proper with respect to publication or disposal of any recording to which the leave relates; and where leave has been granted the court may at the like discretion withdraw or amend it either generally or in relation to any particular part of the proceedings.

(4) This section does not apply to the making or use of sound recordings for purposes of official transcripts of proceedings.

(5) See section 32 of the Crime and Courts Act 2013 for power to provide for further exceptions."

Therefore, the court is given power to authorise the recording of sound in court - but not for its publication, which Parliament strictly forbids. Mr Crosland's submission that section 9(2) properly construed enables a court to impose conditions on the use of tape recording in court to the extend to its publication inevitably fails because it is in direct conflict with section 9(1)(b).

10. Exceptions to these provisions have been provided by statute. Section 47 of the Constitutional Reform Act 2005 amended section 41 of the 1925 Act and section 29 of the 1981 Act to exclude the Supreme Court from the relevant provisions. Consequently, the Supreme Court may authorise the recording and publication and broadcast of its proceedings; and, in practice, it regularly authorises the live-streaming of its proceedings.

11. Furthermore, the two statutes each expressly refer to exceptions provided for by the Crime and Courts Act 2013 ("the 2013 Act"). Following the White Paper, "Proposals to allow broadcasting, filming, and recording of selected court proceedings" (May 2012), under the heading "Enabling the making, and use, of films and other recordings", section 32 of the 2013 Act was enacted to provide (so far as relevant to this application):

"(1) The Lord Chancellor may, by order made with the concurrence of the Lord Chief Justice, provide that a section mentioned in subsection (2) or any provision of either of those sections—

(a) does not apply in relation to the making of a recording or the making of a prescribed recording;

(b) does not apply in relation to the making of a recording, or the making of a prescribed recording, if prescribed conditions are met, including conditions as to a court or tribunal or any other person being satisfied as to anything or agreeing;

(c) does not apply in relation to prescribed use of a prescribed recording.

(2) Those sections are—

(a) section 41 of the Criminal Justice Act 1925 (no photography or drawing in court of persons involved in proceedings, and no publication of contravening

images);

(b) section 9 of the Crime and Courts Act 2013 (no sound recording in court without permission, and no public playing of recordings).

(5) In this section—

'recording' means a visual or sound recording on any medium, including (in particular)—

(a) films and other video-recordings, with or without sound,

(b) other photographs, and

(c) sketches and portraits;..

(6) The preceding provisions of this section do not apply in relation to Supreme Court proceedings".

12. The Lord Chancellor has made two Orders under that section. In accordance with section 58(4) of the 2013 Act, a draft of each Order was laid before and approved by a resolution of each House of Parliament.

13. The first, the Court of Appeal (Recording and Broadcasting) Order 2013 (SI 2013 No 2786), applies to the Court of Appeal when sitting as a full court in public (article 3). The Order provides that section 41 of the 1925 Act and section 9 of the 1981 do not apply where a hearing is recorded or broadcast in accordance with the conditions in the Order (article 4). Broadcasts are restricted to the broadcast of "recordings" (article 8). Unlike the primary statutes, the Order provides definitions of "broadcast" and "recording", article 2 stating:

"'broadcast' means the transmission to members of the public of a recording of a hearing of the court;

'recording' means a visual or sound recording on any medium from which a single image, a moving image or any sound may be produced or reproduced, or the making of any such recording, and 'record' and' 'recorded' shall be construed accordingly...".

Proceedings of the Court of Appeal are regularly broadcast by live-streaming under that provision.

14. The second Order made by the Lord Chancellor is the Crown Court (Recording) Order 2016 (SI 2016 No 612) allows the recording of sentencing remarks in the Crown Court on a pilot, not-for-broadcast basis (articles 4 and 5).

15. Mr Crosland, supported by Mr Wolfe QC, submits that live-streaming authorised by the court is not covered by the restrictions in section 41 of the 1925 Act and section 9 of the 1981, for essentially two reasons.

16. First, he submits that the provisions only relate to "recordings". His primary submission, as I initially understood it, was that they consequently relate to only permanent or semipermanent recordings of sound or image. Therefore, they do not prohibit live-streaming which involves no such recording. Mr Wolfe picked up that submission in his oral submissions today.

17. However, Mr Crosland developed a more nuanced argument that the interpretation of "any

photograph" should be given a wide, flexible and purposive interpretation. He submitted that the circumstances of this case (i) do not fall within the scope of the mischief at which section 41 is aimed, i.e. to protect the privacy and identity of "any person, being a judge of the court or a juror or a witness in or a party to any proceedings before the court"; and (ii) no privacy issues are engaged. Further, he submitted that section 41 only relates to the recording and publication of the images of specific persons involved in court proceedings, excluding (e.g.) Counsel; and, even if the court were against him on other grounds, it would be possible to live-stream images of proceedings which were restricted in scope to avoid contravention of section 41, e.g. by having a fixed camera on Counsel as they were addressing the court.

18. Second, even if live-streaming in this case is covered by section 41, Mr Crosland and Mr Wolfe submitted that that provision only prohibits the recording and publication of images by a "person", which should be construed as meaning only a natural person and not a nonnatural person including the court itself.

19. As I have made clear, I have sympathy for the application on its merits; but section 41 of the 1925 Act and section 9 of the 1981 are legislative restrictions on the recording and broadcasting of proceedings. They affect the jurisdiction (i.e. the power) of this court to direct or allow broadcast of proceedings by way of live-streaming.

20. Mr Crosland and Mr Wolfe submitted that live-streaming did not result in a "recording", for the purposes of both statutory provisions, because it merely involved a stream of data rather than a file which could be downloaded. Consequently, it is more difficult for a recipient to save its content. We have, perhaps unfortunately, not been provided with any evidence as to the mechanics by which it is envisaged live-streaming might be made; and, in the absence of such evidence, I am unconvinced that a record is not made even if it is not transmitted in file form. Live-streaming is not of course literally in "real time", because there is an in-built delay in broadcasting of three minutes. But, no matter what the delay in transmission, some delay at least there must be as a result of transmission; and the images and sounds must be in some form as they are being transmitted.

21. However, in any event, I cannot accept the submission that the statutory provisions apply only to permanent or semi-permanent recordings. Section 41(1)(b) prohibits the publication of "any photograph" which, in my view, clearly includes the transmission or broadcasting of any photograph via the internet, no matter how transient that might be.

22. Mr Wolfe emphasised that the 1925 Act had, in effect, been outstripped by technology - but both amendments to that Act, and Orders such as the 2013 Order made, under that Act recently - well into the internet age - and they maintain the terminology used in the Act. In particular, it seems to me that the 2013 Order lends some support to the interpretation that I prefer. "Recording" helpfully appears to be defined in terms of "a visual or sound recording in any medium"; but the definition goes on to say "from which a single image, a moving image or any sound may be produced or reproduced". If "recording" were limited as Mr Crossland and Mr Wolfe submit, then the reference to "produced", as opposed to "reproduced", would be otiose. Furthermore, article 4 makes it clear that section 41 of the 1925 Act and section 9 of the 1981 Act do not apply where a hearing is recorded *or* broadcast. That suggests that the terms are used, at least in the Order, consistently with the construction that I have adopted.

23. Nor do I consider it is arguable that the interpretation of "any photograph" may vary with the context in which the issue is raised: it must have a consistent meaning that cannot be dependent upon (e.g.) whether its subject wishes to maintain his or her privacy. The actual or perceived purpose of a statutory provision cannot be used to distort the wording of a statute that is unambiguously clear.

24. Similarly, although section 9(1)(b) of the 1981 Act expressly prohibits the publication of any

"recording" of court proceedings, that is clearly not restricted to circumstances in which a permanent recording is made and then broadcast. It is used to mean, and mean no more than, that which may be broadcast. In my view, it cannot sensibly be construed to prohibit only the publication of the permanent or semi-permanent sound recording of proceedings.

25. Whilst I consider the words of the statutory provisions to be clearly to that effect, it comes as some comfort that they have been construed in that way by the Government in its 2012 White Paper to which I have referred; and by the courts themselves, which have not allowed any broadcasting by way of live-streaming unless an express exception applies.

26. In my view, the statutory provisions express the will of Parliament that, generally, court proceedings should not be broadcast, save for the exceptions made either by statute (in the case of the Supreme Court) or Order under section 31 which have been approved by Parliament (in the case of the Court of Appeal). It includes both recording and broadcasting of proceedings. The Crown Court (Recording) Order 2016 underscores the distinct prohibitions, by allowing recording of certain Crown Court proceedings but not any broadcast.

27. Second, Mr Crosland submits that "person" in section 41 of the 1925 Act means only a natural person, and not any corporation or the court itself. In support of that proposition he relies on Haringey London Borough Council v Marks & Spencer plc [2004] EWHC 1141 (Admin); [2005] 1 WLR 1742, in which this court (Maurice Kay LJ and Rafferty J as she then was) held that, for the purposes of section 169A(1) of the Licensing Act 1964 (which provided that a person should be guilty of an offence if, in licensed premises, he sold intoxicating liquor to a person under 18), "person" was restricted to a natural person and the defendant company did not fall within its scope. However, that case very much turned on the specific statutory provisions involved: non-natural persons were excluded from the scope of "persons" in section 169A(1) because (it was held) two other related provisions in the statute had that effect (see page 1751E-G). The consequence of the construction put forward by Mr Crosland would be that companies would not be included in the prohibition here, which would have no rational basis and cannot be the intention. In any event, Mr Crosland's submission based on that authority is, at best, double-edged; because it was common ground that, in that context, "person" included an employee of a company outwith the provision. On that basis, even if "the court" could not be liable under section 41 of the 1925 Act and section 9 of the 1981 Act, any natural person acting as its agent would be liable.

28. But, in my view, there is a more fundamental difficulty for the submission: it would mean that a court could effectively give leave for any form of recording or broadcasting of legal proceedings, which is clearly contrary to the intention of the statutory provisions to impose restrictions upon such broadcasting.

29. As I have indicated, I consider the wording of the statutory provisions firmly and unambiguously points against this court having the power to direct or permit live-streaming of the March 2019 hearing. It is in any event, as I have described, the interpretation of the provisions which has been maintained since the 1925 Act came into force - none of the many parties to the litigation has been able to point to a single occasion on which any form of broadcasting of court proceedings has been permitted without falling into one of the exceptions to which I have referred - and, in those circumstances, even if my view of the construction of the provisions had been less clear and less firm, I would be reluctant now to depart from the well-established interpretation.

30. That deals with live-streaming: unless it comes within one of the exceptions to which I have referred, it is prohibited by statute. However, I do not accept that the statutory provisions restrict the transmission of pictures and sounds from one court to another court: in those circumstances, the second court is simply an extension to, and thus part of, the court, subject to the usual rules and restrictions that a court can and does impose. There have been examples

of where such arrangements have been put in place.

31. Without straying into areas which Parliament has prohibited, I am anxious to ensure that those with an interest in the proceedings have a reasonable opportunity to follow them. At the directions hearings, my Lord Holgate J has already indicated that the hearing will be held in this court (Court 76), the largest modern court at the Royal Courts of Justice; and the hearing will be transmitted to another large court here. An application to live tweet can be made; and there does not seem any reason why such an application would not be successful. A daily transcript of the proceedings has already been ordered, and the parties are agreed as to how that should be funded. The possibility can be investigated of that transcript being made accessible on the web as soon as it is available on the day. Arrangements will be made, in the usual way, to accommodate those with disabilities. It would of course assist if the court has prior notice of any particular needs, but the courts are used to ensuring that those with such needs can be and are accommodated. Therefore, there is in my view much that can be done to ensure that those who are interested in the issues raised by these claims are engaged with the process.

32. However, for the reasons I have given, live-streaming is prohibited by statute; and this application must be refused.

Mr Justice Holgate :

33. I agree.

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This transcript has been approved by the Judge.