

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

This Transcript is Crown Copyright. It may not be reproduced in whole or in part other than in accordance with relevant licence or with the express consent of the Authority. All rights are reserved.

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
[2019] EWHC 2675 (Admin)



CO/2288/2018

Royal Courts of Justice

Wednesday, 24 July 2019

Before:

MRS JUSTICE CUTTS DBE

B E T W E E N :

THE QUEEN
ON THE APPLICATION OF
LEO ADAMSON

Applicant

- and -

THAMES MAGISTRATES' COURT

Respondent

- and -

THE COMMISSIONER OF POLICE
FOR THE METROPOLIS

Interested Party

THE APPLICANT appeared as a Litigant-in-Person.

THE RESPONDENT was not present and was unrepresented.

MR G. LADENBURG appeared on behalf of the Interested Party.

J U D G M E N T

MRS JUSTICE CUTTS:

- 1 The applicant in this case seeks permission for judicial review of a decision on 27 March 2018 by a district judge of Thames Magistrates' Court to order forfeiture of a number of indecent images pursuant to s.5 of the Protection of Children Act 1978 (as amended) and prohibited images pursuant to s.67 of the Coroners and Justice Act 2009.
- 2 The matter was referred by Sir Wyn Williams, who considered the paper application for oral argument.
- 3 Section 67 of the Coroners and Justice Act 2009 provides for the civil forfeiture of prohibited images of children. These are specifically not photographs of actual children, but include pornographic drawings of children. By s.62 of the Coroners and Justice Act 2009, a prohibited image is an image which is pornographic, is either an image which focuses solely or principally on a child's genital or anal region or portrays one of a number of sexual acts set out in subsection 7 and is grossly offensive, disgusting or otherwise of an obscene character.
- 4 By Schedule 11 of the Police and Justice Act 2006, a constable may apply to the court for forfeiture of such items. By para.10(4) of the Schedule, the court must condemn the items if it is satisfied that they are forfeitable property and no-one who has given a notice of claim has a legitimate reason for possessing it. By para.1(2) of the Schedule, any indecent photograph or pseudo-photograph of a child is forfeitable property. By para.13, either party may appeal against a decision of the Magistrates' Court to the Crown Court.
- 5 The applicant seeks to challenge the forfeiture orders. Essentially, Mr Adamson submits that any forfeiture order made under s.67 of the Coroners and Justice Act 2009 in respect of obscene drawings is in breach of Articles 8 and 10 of the European Convention on Human Rights. This is because, he argues, such forfeiture is not a proportionate restriction of the rights guaranteed by those articles in that it has no rational connection with any legitimate aim.
- 6 The applicant has restricted his arguments to the drawings that were forfeited at the Magistrates' Court as opposed to any other type of image. He concedes that the Court of Appeal in *Smethurst, R (on the application of)* [2001] EWCA Crim 772 held that s.1 of the Protection of Children Act, making or distributing an indecent photograph, was a proportionate interference with Articles 8 and 10 for the legitimate aims of the prevention of crime, protection of morals and to prevent the exploitation of children. But he submits that this does not apply to drawings, which he submits are works of imagination rather than directly captured images of real individuals. To that extent, it cannot be argued, he submits, that children are being exploited. In any event, in his written submissions, although not developed in oral argument before me today, he submits that the ruling in *Smethurst* was 18 years ago and needs to be revisited and submits that the rationale of the decision no longer applies in that there is evidence that he has put before this court, as he attempted to do at the Magistrates' Court, in the form of a report from Dr Thomson commissioned by the applicant in this case which now shows that those who are in possession of indecent images are less rather than more likely to commit contact offences. He seeks to rely, in support of his assertion, that the forfeiture of such images is a disproportionate interference with his Article 8 and 10 rights, on a report from the Joint Human Rights Committee when a proposal to ban possession of drawings was before Parliament. This report concluded that no sufficiently weighty reasons had been provided for the interference in those rights.

- 7 He has argued in his written submissions, but again not developed in oral argument before me today, that the interference in these rights engages Article 14, as it is a measure which is aimed at a minority based on a personal characteristic, namely paedophiles. He argues that in making the orders the district judge was therefore in breach of the duty of public authorities to apply and interpret the law in accordance with the European Convention on Human Rights as required by s.3 and s.6 of the Human Rights Act 1998. The applicant seeks to invite the court to consider making a declaration of incompatibility under s.4 of the Human Rights Act.
- 8 The Commissioner of Police for the Metropolis is named as an interested party in the case. That is because it was on the application of the Commissioner that the items were forfeited at the Magistrates' Court. Although not submitting any acknowledgment of service on the understandable basis that the claim arises in respect of the proportionality and legality of the relevant provisions rather than in her application of them, the Commissioner has submitted a skeleton argument in compliance with the order of Sir Wyn Williams that the interested party should do so not less than two days before the permission hearing. In that argument and in oral submissions made to me on behalf of the Commissioner by Mr Ladenburg today, the Commissioner resists the application for permission for judicial review. I have granted permission for the interested party to take part in this hearing pursuant to CPR 54.9A.
- 9 Mr Ladenburg submits that I should refuse permission for judicial review for the following reasons. Firstly, the forfeiture orders were lawful, reasonable and proportionate and that the applicant's grounds are not properly arguable. Secondly, that the possession of prohibited images constitutes a criminal offence. The civil forfeiture of such images absent a criminal prosecution cannot be said to be unlawful and amounted to a necessary and proportionate restriction of the applicant's Article 8 and 10 rights. Thirdly, that although the applicant's Article 8 and 10 rights are engaged by the present proceedings, the regime under s.62 of the Coroners and Justice Act 2009 is compatible with the European Convention on Human Rights. He relies upon the decision in *Smethurst* that the forfeiture and destruction of indecent images of children is necessary in a democratic society for the prevention of crime, for the protection of morals and the protection of rights and freedoms of children. He submits that the regime is sufficiently certain, as well as proportionate and necessary to a legitimate aim for the purpose of criminal punishment. It is therefore inevitable that that is so for the purposes of civil forfeiture. Article 14, he submits, is not engaged in these proceedings; there has been no evidence that the applicant has been discriminated against.
- 10 I am grateful for the submissions that I have heard today. In essence, the applicant submits to me that whilst there may be a justification for the prohibition on indecent photographs because actual children are involved in those photographs and therefore it can be argued that they are being exploited, the same cannot apply to drawings and that the decision in the case of *Smethurst* cannot apply. He submits that the protection of morals is, in fact, a subsidiary reason, that the substantial reasons that can be put forward to justify an infringement of rights are the prevention of the exploitation of children and for the prevention of crime. He submits that no children have been exploited in the production of these images and raises the question as to which crime is sought to be prevented. He submits that the only possible crime would be contact offending. He submits that if there is going to be an infringement of rights it should be on the basis of evidence. There is no evidence to support that the possession of such images can lead to contact offending and he relies on the evidence in the expert report of Dr Thomson that he has produced, which is evidence going, in fact, to support the opposite proposition.
- 11 I have come to the conclusion, having considered these arguments carefully, that there are no arguable grounds for judicial review in this case. I accept that both Articles 8 and 10 are

engaged. These are qualified rights. The question here is one of the proportionality of any interference with those rights. In *Smethurst*, the Court of Appeal held that s.1 of the Protection of Children Act 1978 prohibited the making of indecent photographs or pseudo-photographs was proportionate for the reasons that it is necessary in a democratic society for the prevention of crime, the protection of morals and to prevent the exploitation of children. I have considered the submission which was made in writing that *Smethurst* should be reconsidered on the basis of this one article by Dr Thomson commissioned by the applicant and consider it unarguable that it should.

- 12 I accept that in drawings no actual child has been exploited. However, by s.62(2), possession of such an image is only unlawful if it is pornographic, that is if it is of such a nature that it must reasonably be assumed to have been produced solely or principally for the purpose of sexual arousal, if it falls within subsection 6 and if it is grossly offensive, disgusting or otherwise of an obscene character. That is very specifically defined. It is a higher test than that which has to be met for “indecent” as required for actual photographs. The rationale behind the prohibition is set out in the Legislative Scrutiny: Coroners and Justice Bill, a report of the Joint Committee on Human Rights, at para.1.175. The Government’s view was that such material was being currently exploited as a form of permissible child pornography, that there was a need to protect children from abuse and to protect children and vulnerable adults from coming into contact with the material, that such material could desensitise people to child abuse and reinforce people’s inappropriate and potentially dangerous feelings towards children and that the impact of the internet and existing laws did not cater for the potentially wide sphere of circulation for this material.
- 13 I consider it unarguable that prohibiting the possession of images falling into this well-defined category is a disproportionate interference with the applicant’s Article 8 and Article 10 rights. I find no basis for the argument that the applicant has been discriminated against.
- 14 As I consider it unarguable that the prohibition on possession of these items is a disproportionate interference with the applicant’s Article 8 and 10 rights, it follows that I consider it unarguable that forfeiture of the items is such. It is plain that the district judge in this case carefully went through each image and carefully applied the criteria within s.62 when determining whether or not there should be forfeiture of such. I therefore refuse permission to judicially review the order of the district judge for forfeiture.

CERTIFICATE

Opus 2 International Ltd. Hereby certifies that the above is an accurate and complete record of the judgment or part thereof.

*Transcribed by Opus 2 International Ltd.
(Incorporating Beverley F. Nunnery & Co.)
Official Court Reporters and Audio Transcribers
5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
admin@opus2.digital*

This transcript has been approved by the Judge.