

**IN THE HIGH COURT OF JUSTICE**

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

**QUEEN'S BENCH DIVISION**

**PLANNING COURT**

**BETWEEN**

**THE QUEEN (on the application of  
(1) LONDON BOROUGH OF HILLINGDON and six others  
(2) FRIENDS OF THE EARTH LIMITED  
(3) PLAN B EARTH  
(4) NEIL SPURRIER  
(5) HEATHROW HUB LIMITED and another)**

**Claimants**

**-and-**

**THE SECRETARY OF STATE FOR TRANSPORT**

**Defendant**

**-and-**

**(1) HEATHROW AIRPORT LIMITED  
(2) ARORA HOLDINGS LIMITED**

**Interested Parties**

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**PLAN B'S SKELETON ARGUMENT IN SUPPORT OF  
THE LIVE-STREAMING OF PROCEEDINGS**

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**INTRODUCTION**

1. In their position statements ahead of the pre-trial review of 15 January 2019, Plan B and Friends of the Earth made a joint application for the final hearing of these proceedings to be live-streamed on the internet. The Mayor of London, Greenpeace and the five boroughs have since expressed their support for the application to the Court, as has Mr Spurrier. No party opposes it. The Secretary of State is "neutral" on the issue, subject to the Court being satisfied it has jurisdiction to make the order, as is the First Interested

party. The Second Interested Party “does not object” to the application and considers there is “force in the arguments made in support”. It is understood that the technical facility to grant the order is in place.

2. In summary, there is opposition to this application neither on the grounds of principle nor practicality. The outstanding question, which this skeleton argument addresses, is whether the application may be granted as a matter of law. Specifically the issue arises as to whether such an order is prohibited by the Criminal Justice Act 1925, section 41 (“CJA s. 41”) relating to photography and sketches of persons in court.
3. In the course of the pre-trial review, Holgate J invited Plan B to make further submissions in support of its application, which Plan B did on 18 January. Plan B is grateful to the Court for the additional opportunity to file a skeleton argument in advance of the hearing on 5 February 2019. Further consideration of the relevant jurisprudence has prompted a more nuanced position than previously advanced.
4. In light of the Court of Appeal’s decision in *Loveridge*, Plan B’s submissions on CJA s. 41 may be summarised as follows:
  - (a) an expansive interpretation of CJA s. 41, to encompass the prohibition of live-streaming, is not appropriate to the circumstances of this case, which are not the “mischief” at which the provision takes aim;
  - (b) in any event the Court ought not to be regarded as “a person” for the purposes of CJA s. 41;
  - (c) if, contrary to (a) and (b) above, the Court considers that CJA s. 41 prohibits the live-streaming of images 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”, the pragmatic solution is to direct the camera in such a way that it does not capture such images, while still allowing the public to follow the proceedings.

#### **A. THE RATIONALE FOR THE APPLICATION**

5. Together with Friends of the Earth, Plan B applies for an order that the proceedings be live-streamed. It may assist, at the outset, to provide a brief explanation of streaming. The BBC explains the concept as follows<sup>1</sup>:

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<sup>1</sup> <http://www.bbc.co.uk/webwise/guides/about-streaming>

*“Streaming means listening to music or watching video in ‘real time’, instead of downloading a file to your computer and watching it later.*

*With internet videos and webcasts of live events, there is no file to download, just a continuous stream of data. Some broadcasters prefer streaming because it’s hard for most users to save the content and distribute it illegally.”*

6. The second part of that explanation, in particular, has relevance to the matters in issue. The application is made for the reasons set out below.
7. First, these proceedings relate to the control and accountability of public decision-makers who exercise public law powers, but who are ultimately under a duty to act in the public interest. Specifically, this case raises issues of exceptional concern to the population at large, relating to the long-term future of the country’s aviation and environmental strategies, and the compatibility of the former with the Paris Agreement on Climate Change, the successful implementation of which is, according to the best available science, critical to the prospects of current and future generations of UK citizens. There is therefore an inherent democratic value in facilitating, and indeed encouraging, public engagement with the grave matters in issue in these proceedings.
8. Second, these proceedings are relevant to people across the country. In accordance with the principles of equality and open justice, the public should be able to follow the proceedings as easily as technology will allow, recognising the difficulties that more vulnerable members of society may have in physically attending court and the fact that many people will be unable to attend court in person because the cost and inconvenience of travel to London is prohibitive. Whilst laudable efforts have been taken to make the courtrooms of the High Court of Justice accessible, they remain far from suitable for wheel-chair users (as has recently been experienced by Friends of the Earth staff themselves wishing to attend another trial). It is also of note that many of those who are most concerned by the issues raised in these proceedings, are also concerned to reduce carbon emissions by avoiding unnecessary travel. Opening up the courts through available technology, and making them accessible to a wider audience, will ensure all members of the public who wish to follow the proceedings can do so, regardless of their personal situation or principles. In the context of the difficulties experienced by wheel-chair users, the terms of the Equality Act, 2010, section 149 (“the public sector equality duty”) are relevant:

***“149 Public sector equality duty***

- (1) *A public authority must, in the exercise of its functions, have due regard to the need to –*
- (a) *eliminate discrimination ... that is prohibited by or under this Act;*
- (b) *advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it ...”*

9. Third, there is evidence that substantially more people wish to attend the proceedings than even two courtrooms would accommodate. For the Directions hearing on 4 October 2018, Court 76, the largest court in the building was full. On 8 January 2019, Plan B made an inquiry over social media to test public interest in following the proceedings. Over the course of just over a week (and in circumstances where Plan B’s social media reach is far from expansive), over 1,600 people expressed in writing a desire to follow the proceedings<sup>2</sup>. Friends of the Earth is currently enquiring within its local group network as to the level of interest for viewing the trial live-streamed, and expects there to be significant interest such that the current arrangements of an overspill courtroom would not be sufficient. By way of example, there are in the region of 157 Friends of the Earth local groups across the country (excluding other associated community groups that we work with), and the membership of the directly affected London-based local groups is currently at 130 individuals. In the absence of live-streaming, it may transpire that people travel long distances, at substantial expense, only to be turned away from the court because of lack of capacity. An overflowing courtroom would not be conducive to the efficient or practical administration of justice.
10. Fourth, the case does not raise issues of individual privacy that might argue against such an order. Consequently the balance of interest is firmly in favour of as open and accessible a process as possible.
11. Fifth, there is growing recognition that proceedings of a public nature, concerning matters of substantial public interest, should be live-streamed where possible. Proceedings in Parliament and the Supreme Court are live-streamed as a matter of course. In November 2018, Court of Appeal proceedings relating to West Ham United and the Olympic Stadium were live streamed. Sir Terence Etherton, the Master of the Rolls, noted<sup>3</sup>:

*“This is an exciting way of opening up our courts to help the public understand and see for themselves the way that courts work, and how appeals are heard.”*

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<sup>2</sup> Plan B has a spreadsheet of all names, with email addresses and time-stamps, which can be made available to the Court if appropriate.

<sup>3</sup> <https://www.judiciary.uk/announcements/launch-of-live-stream-of-civil-appeal-hearings/>

## **B. THE PRACTICALITY OF THE APPLICATION**

12. It is understood that the technical capacity to live-stream proceedings from Court 76 is already in place and it has not been suggested otherwise. If that is correct, it seems unlikely that utilising the facility would incur very substantial expense. Given the substantial public interest in the proceedings, such cost cannot and should not be a prohibitive issue.

## **C. THE COURT'S JURISDICTION TO GRANT THE ORDER**

13. In the absence of any contrary provision, the High Court has the inherent jurisdiction to regulate its own procedures.

14. So far as the Parties are aware, there is no legal or procedural provision specifically relating to the live-streaming of legal proceedings in the High Court.

15. *The Crime and Courts Act 2013, s. 32 (1)* provides that the Lord Chancellor may by order disapply *The Criminal Justice Act 1925, s. 41* and *The Contempt of Court Act 1981 s.9*, which relate to the permanent capture of images of persons involved in legal proceedings and to the recording of proceedings without permission. In the absence of such an order relating to High Court proceedings, the question arises whether either provision operates as a bar to the application sought.

### **C. 1 The Contempt of Court Act 1981, section 9**

16. *The Contempt of Court Act 1981 s.9* states as follows:

*“(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” (emphasis added).*

17. Since the provision only prohibits activity that takes place without leave of the court, it follows that it does not apply to any activity for which the court has given leave or which the court has expressly ordered.

### **C. 2 The Criminal Justice Act 1925, s. 41**

18. *The Criminal Justice Act 1925, s. 41* states 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”.*

19. The provision does not expressly prohibit the live-streaming of proceedings (a process which does not entail the creation of a permanent record).

### **C.2.1 The interpretation of “any photograph”**

20. It is accepted that CJA s. 41 should be interpreted flexibly and in accordance with its purpose to accommodate developments in technology. In *Loveridge, Lee and Loveridge*<sup>4</sup>, the Court of Appeal considered circumstances in which the police had covertly filmed defendants appearing in a magistrates’ court in order to facilitate an identification procedure. The question arose as to whether the filming was prohibited by CJA section 41. Lord Woolf ruled as follows<sup>5</sup>:

*“The language of section 41 is very wide. Mr Johnson, on behalf of the prosecution, like the judge, contended that the section was not intended to apply to what occurred in this case. He would like to have argued that the language of the section should not be applied to video recordings. However, he agreed that it would be strange if the section applied to a single photograph and not to filming which would have a more serious impact on the administration of Justice than the taking of a still photograph. Obviously when the Act was passed in 1925, video cameras were not in contemplation. However, we have no doubt that the section should be applied in a way, which takes into account the modern developments in photography. Accordingly we have come to the conclusion that a filming which took place at the court contravened section 41.”*

21. The Court also held that the recording constituted a breach of the defendants’ rights to privacy under European Convention on Human Rights, Article 8. Although the point was not taken in *Loveridge*, in such circumstances the Human Rights Act 1998 (“HRA”) s. 3(1) argued for an expansive interpretation of the provision:

*“So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”*

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<sup>4</sup> [2001] EWCA Crim. 973; [2001]2 Cr.App.R. 29

<sup>5</sup> §25

22. Live-streaming does not involve the creation of a permanent record and so may be distinguished from *Loveridge*. The difference is material, as emphasised in the BBC's explanation of streaming. Nevertheless, Plan B accepts there would be a compelling argument to apply CJA s. 41 to circumstances similar to those in *Loveridge*, which involved, for example, the police attempting to conduct an identification of a defendant via covert live-streaming in court. But that is not, in Plan B's submission, because the prohibition against taking "*any ... photograph*" should always be interpreted as if it included "*live streaming*". It is because an expansive definition of CJA s.41 is appropriate where:

(a) the conduct falls within the mischief at which the statutory provision takes aim; and where

(b) the Human Rights Act 1998 section 3 requires such an interpretation in order to safeguard privacy rights under ECHR Article 8.

23. It is apparent from the wording of CJA s. 41 that the provision is intended 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*". Since the circumstances in *Loveridge*, in which the police sought covertly to exploit the defendants' appearance in court to capture their images, illustrate the mischief that CJA s. 41 was designed to prevent, and since ECHR Article 8 and hence the HRA 1998, s. 3(1) were engaged, an expansive interpretation was appropriate.

24. It is trite law that statutes should be interpreted in accordance with their purpose. It does not follow that the same expansive interpretation should be applied to circumstances that:

(a) do not fall within the scope of the mischief at which CJA s. 41 takes aim;

(b) where no privacy issues arise and hence the HRA 1998 s. 3 is not engaged; and

(c) where the public sector equality duty argues for a more purposive interpretation.

### **C.2.2 The interpretation of "person"**

25. In the alternative, if the Court concludes that "*any photograph*" must be given a consistent interpretation, which includes live-streaming, it is Plan B's submission that the term "*person*" in CJA s. 41 should be interpreted as meaning only a natural person and not as referring to the court itself.

26. The Interpretation Act 1978, s. 5, states as follows:

*“In any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 to this Act are to be construed according to that Schedule.”*

27. Schedule 1 of the Act defines “person” as including “a body of persons corporate or unincorporate”.

28. In the conjoined cases of *Haringey London Borough Council v Marks & Spencer Plc* and *Liverpool City Council v Somerfield Stores Ltd*<sup>6</sup>, however, the Queen’s Bench Division of the High Court ruled that the term “person”, in the context of the Licensing Act 1964, s. 169A(1), should be interpreted in the context of the Act as a whole, and that in that context, it referred only to a natural person. A company, therefore, could not commit the offence of selling alcohol to an under-age purchaser.

29. In Plan B’s submission it is readily apparent that CJA s. 41 was not intended to make it an offence for a court to exercise its inherent jurisdiction to regulate its own procedures and, in particular, it was not intended to prevent a court giving effect to the principles of equality of opportunity and of open justice, in circumstances where a video-link to another courtroom or live-streaming to the internet is the most effective means of doing so.

30. Recognising that CJA s. 41 should be interpreted in light of the different circumstances that apply in 2019, balance may be achieved through an expansive definition of “any photograph” in conjunction with a narrow interpretation of “any person”, which excludes the court itself.

### **C.2.3 A pragmatic solution if the Court rules against the applicants on the interpretation of CJA s. 41**

31. If, contrary to the interpretation set out above, the Court interprets CJA s. 41 such that:

(a) “any photograph” includes a live projection or film, that does not create a permanent record; and such that

(b) “person” applies to the court itself

then it seems to follow that a live video-link to a second courtroom would also be prohibited.

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<sup>6</sup> [2004] EWHC 1141 (Admin)



32. In Plan B's submission, such a consequence is further argument against such an expansive interpretation of CJA s.41.
33. In any event, there is a substantial practical and logistical difficulty to be addressed. Given the level of public interest in this case and the number of parties involved, it cannot be right to restrict the opportunity to follow these proceedings to those who can fit within one or even two courts and a pragmatic solution is required.
34. CJA s. 41 relates only to the recording and publication of images of specific persons involved in court proceedings. It does not otherwise relate to the content of the proceedings. Specifically, where it applies, it prohibits only the taking and publication of photographs 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*". On the face of it, it does not protect the identity of Counsel or other legal representatives. For the purposes of these proceedings, even on the most expansive interpretation of CJA s. 41, it would still be possible to make the proceedings accessible to the public by one of the following practical measures:
- (a) Directing the camera in such a way that it does not capture the images of judges or parties (there being no jurors or live witnesses);
  - (b) Providing only a fixed visual image, while allowing for the proceedings to be heard over the live-stream; or
  - (c) Using technology to obscure the images of judges and parties.

## **D. OTHER MATTERS**

### **D. 1 The Court of Appeal (Recording and Broadcasting) Order 2013**

35. It is noted that an order has been made pursuant to the *Crime and Courts Act 2013*, s. 32 relating to Court of Appeal proceedings (*The Court of Appeal (Recording and Broadcasting) Order 2013*).
36. The order provides for the recording and subsequent broadcast of proceedings by a third party who obtains written permission from the Lord Chancellor to conduct the recording and who agrees to assign copyright in the recording to the Lord Chancellor on behalf of the Crown (section 7 of the Order). It does not relate to live-streaming or to a video link.
37. Consequently, it cannot be said that the absence of such an order in relation to High Court proceedings indicates an intention not to allow live-streaming of High Court proceedings.

## D.2 The Supreme Court's assertion of copyright over live-streamed proceedings

38. The "Supreme Court Live" webpage<sup>7</sup> includes the following note for users:

*"This footage is made available for the sole purpose of the fair and accurate reporting of judicial proceedings of the The UK Supreme Court. Although you are welcome to view these proceedings, the re-use, capture, re-editing or redistribution of this footage is not permitted. You should be aware that any such use could attract liability for breach of copyright or defamation and, in some circumstances, could constitute a contempt of court."*

39. An equivalent assertion could accompany any order for the live-streaming of these proceedings, to safeguard against any unauthorised recording.

## CONCLUSION

40. There are compelling public interest reasons in support of this application. No party is opposed to it, and no principled or practical objection to it has been raised. Large crowds of people attempting to fit within Court 76 would create difficulties for court staff; would not assist the parties to this case; and would risk impeding the efficient administration of justice.

41. It may be that for the future, guidance on the use of live-streaming in the High Court would be valuable. In the meantime, the absence of such guidance is not a reason to refuse the application. There is time to consider the practicalities in advance of the start of the final hearing, using experience from the Supreme Court and Court of Appeal as a guideline.

TIM CROSLAND  
DIRECTOR, PLAN B  
1 FEBRUARY 2019

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<sup>7</sup> <https://www.supremecourt.uk/live/court-01.html>