

**Tasco Luc De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)
and Others**

Case CCT 5/03

Media Summary

The following explanation is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

The applicant, Mr De Reuck, has been charged in the Randburg Regional Court with possessing and importing child pornography in contravention of section 27(1) of the Films and Publications Act 65 of 1996 (the Act). The charges were brought following a police search at the residence of Mr De Reuck in July 2000.

The trial in the Randburg Regional Court has been postponed, to allow Mr De Reuck to challenge the constitutionality of the offence under which he is charged. His challenge was heard by the Johannesburg High Court (High Court) last year. Mr De Reuck argued that the offence of possession of child pornography, as presently defined, infringed the rights of freedom of expression and privacy (section 16 and 14 of the Constitution respectively). He also argued that his right to equality (section 9 of the Constitution) was infringed by the fact that the offence of possession is defined in terms different from other offences relating to distribution and broadcasting under the Act.

The High Court dismissed the challenge. Mr De Reuck now seeks leave to appeal to the Constitutional Court against this decision. Central to this case is whether the definition of child pornography is overbroad in two respects, firstly as to the materials it proscribes and secondly as to the persons who may import or possess materials caught by the definition. There is also the question of whether such persons would include researchers, doctors, film producers or lawyers who may possess child pornography for professional purposes. Such persons, it is argued, should not have to apply for an exemption from the Film and Publication Board in order to possess the material they need. Mr De Reuck, a film producer, alleges that he needs to possess certain material in order to produce a documentary film.

Deputy Chief Justice Langa (writing for the Court) has found that the stimulation of erotic rather than aesthetic feeling is an essential element of the definition of child pornography. Any image that predominantly stimulates aesthetic feeling is not caught by the definition. To determine whether an image constitutes child pornography, the image viewed objectively and as a whole must have as its predominant purpose the stimulation of erotic feeling in its target audience. Moreover, the image will not be child pornography unless it explicitly depicts a child engaged in sexual conduct; a child engaged in a display of genitals; a child participating in sexual conduct; or a child assisting another person to engage in sexual conduct for the purposes of stimulating sexual arousal in the target audience.

The Court has found that the criminalisation, in terms of section 27(1), of the importation and possession of the material that falls within the definition of child pornography, limits the right to

freedom of expression and privacy.

The Court however, has found that section 27(1) constitutes a law of general application and its limitation of the rights claimed is reasonable and justifiable. Its purpose is to curb child pornography which is seen as an evil in all democratic societies. The Court has found that the degradation of children through child pornography is a serious harm which is likely to impair their dignity and contributes to a culture which devalues the person of the child. The harm of child abuse is real and ongoing and the state is under a constitutional obligation to combat it.

The Court has concluded that the state has established three legitimate objectives which the limitation aims to serve, namely, protecting the dignity of children, stamping out the market for photographs made by abusing children and preventing a reasonable risk that images will be used to harm children. The objective of stamping out the market remains valid to researchers or film-makers who import and possess child pornography. Moreover, section 22 of the Act makes provision for an exemption procedure which permits research into child pornography if good cause is shown.

The Court has found no merit to the equality challenge put forth by the applicant.

The Court has ordered that (a) the application for leave is granted; and (b) the appeal is dismissed.