

Neutral Citation No. [2011] NICA 8

Ref: **GIR8129**

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **31/3/11**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN
IRELAND**

QUEEN'S BENCH DIVISION

BETWEEN:

DREW ROBERT KING

Appellant;

-and-

SUNDAY NEWSPAPERS LIMITED

Respondent.

Before: Higgins LJ, Girvan LJ and Coghlin LJ

GIRVAN LJ (delivering the judgment of the court)

Introduction

[1] The plaintiff in the action who is the appellant in this appeal claimed damages and an injunction against the defendant, the respondent and cross-appellant in the appeal, in respect of the contents of a number of articles published in the "Sunday World" newspaper by the respondent from 2002 onwards. These articles made a number of allegations against the appellant accusing him of involvement in serious criminal activity, murder and drug dealing and of following a lifestyle funded by criminal activities. His claim relates not to those allegations as such but rather to the content and form of the articles which he alleged created a real and immediate risk to his life and security, infringed his right to privacy and damaged his family life and relations. Ms Quinlivan appeared with Mr Moriarty on behalf of the appellant Mr Hanna QC appeared with Mr Dunlop on behalf of the respondent.

The articles

[2] The "Sunday World" has published over the years numerous articles relating to paramilitary crimes carried out in Northern Ireland. These articles have included reports relating to the activities of the LVF, a so-called Loyalist paramilitary organisation of which Billy Wright was reputedly the leader. The newspaper has also published a number of articles relating to the activities and lifestyle of the appellant whose alleged crimes, according to the newspaper, included the murder of Martin O'Hagan, a journalist employed by the newspaper who was murdered in 2001. The editor of the newspaper, Jim McDowell, considers that the appellant and his brother were involved in that murder. The newspaper alleged that the appellant's brother Billy King shot Mr O'Hagan and that the appellant drove his brother to and from the murder scene. The appellant was described in the articles as an LVF godfather and drug dealer. Notwithstanding the gravity of the allegations and imputations in respect of the appellant's character he has not instituted defamation proceedings.

[3] In the present proceedings the appellant referred to a number of articles, 29 in total, published since 2002. The articles commenced on 29 September 2002 when the respondent published an article under the title "Police Seek Marty Suspect". The article began "This is the missing suspect police want to question about our reporter Martin O'Hagan. He is Lurgan LVF man Drew King who was the piper at LVF godfather Billy Wright's funeral". The article was accompanied by a photograph of the appellant in piping regalia which showed the appellant leading the procession at the funeral of Billy Wright. A further article of 6 October 2002 under the title "Cops Trace Marty Suspect to Scotland" contained a photograph of the appellant again in his piping regalia and repeated the allegation against him. In 2003 it was reported that the appellant gave himself up for questioning by the police in respect of the murder. The newspaper alleged that LVF ordered him to stay in Scotland but he had slipped back and was living in Belfast. In 2004 the Sunday World was reporting an LVF/UVF feud and that the appellant was being targeted at that time. In 2005 it was reported that the appellant was being questioned by police and that his then girlfriend, who had been a prison officer, was the subject of searches in her house. In 2006 it was stated that the Assets Recovery Agency was interested in the appellant's assets from crime, that the Police Ombudsman was being urged to consider the character of the police investigation into the murder of Martin O'Hagan; that the police were questioning the appellant but he had absconded to Spain and that there was an LVF split because of the appellant's involvement in drug dealing. In 2007 it was reported that the appellant was holidaying in the Canary Islands and that he might be called upon to give evidence to the Billy Wright Inquiry. In 2008 it was reported that the appellant had escaped arrest and that his partner had had a child and a twin had been lost. Reference was

also made to his previous girlfriend, the former prison officer. The appellant was charged with murder and detained in custody on remand. In 2009 he appeared in court and the Sunday World reported an attack on their reporter's motor vehicle which had been parked at the court. There were also reports about the appellant's applications for bail.

[4] In the proceedings there was particular focus on two articles published in November 2009. One was published on 22 November 2009 under the title "King Size Loophole lets Piper Roam Free". The other was published on 29 November 2009 containing the heading "LVF's King Christen's New Child a Catholic" and "Protestant Terror Pals in Shock as their Chief lets his Baby become an RC Member" and there was another sub-heading "Loyalist Thug Boss in Catholic Church to Baptise Wee Girl". The article referred to the partner and the child, to the christening of the child in a Catholic Church, to information about the partner, namely where she was living, where she was working giving details about her family and her grandmother and about the proposed wedding of the couple at Ashford Castle, County Mayo the following summer. Further information about Catholic associations of the appellant and his family were reported. The article was accompanied by a photograph of the appellant and his partner a photograph of Ashford Castle and a photograph of the church where the christening was reported to have occurred though the church in fact had been wrongly identified.

[5] In the article of 22 November beneath the photograph which was published of the appellant and his partner. Her first name was referred to. The photograph purported to show them "all dickied up at a wedding". The article stated that he was subject to a death threat, the newspaper sources stating that it might be emanating from a former LVF man once based in East Belfast who was worried about King and the rest of those charged in connection with Mr O'Hagan's murder who, it was feared, might open their mouths and incriminate him.

[6] In the article published on 29 November 2009 the partner was identified by a full name. The article referred to the fact that the baby daughter was christened in a Catholic Church in a County Down village identifying the parish of the church. It referred to the fact that the appellant and the partner had moved into an address identified in the article. It gave details of her father's job, stated that her mother was in a relationship and stated where the mother's partner worked. It referred to the wedding plans of the appellant and the photograph accompanying the article showed the appellant and his partner, a photograph of the hotel where the wedding was due to take place and the church where the christening had allegedly occurred.

The proceedings

[7] The appellant issued a writ on 11 December 2009 wherein he claimed damages for personal injuries loss and damage sustained by reason of harassment, breach of statutory duty, misuse of private information and breach of the appellant's rights under Articles 2, 3 and 8 of the Convention in respect of the publication of the address where the appellant was believed to be living, of the appellant's picture along with his girlfriend, of the wedding plans, of family details and of the religion of the appellant's child together with christening details. On 11 December 2009 Hart J granted an interim injunction by which he restrained the respondent from publishing information identifying the location at which the appellant resided or making any reference to the existence of the child and in particular its religious denomination.

The judgment below

[8] Weatherup J dealt firstly with the appellant's claim that his life was endangered by the publication of this information about the appellant which exposed him to a real and immediate threat to his life and a risk that he would be subjected to torture and inhuman or degrading treatment. The appellant claimed an injunction to prevent publication of his address. The judge was satisfied that there had been threats against the appellant for a number of years from Loyalist paramilitaries and dissident republicans. He was satisfied that there was a real and immediate risk to the appellant, that the risk was objectively verified and that it was present and continuing. He was not satisfied that in fact, his current address had been published but he was satisfied that in considering the appellant's right to life and the real and immediate risk to his life his current address or any future address should not be published. Accordingly he granted an injunction restraining, until further order, the respondent from publishing the present and future addresses of the appellant.

[9] The judge then dealt with the appellant's claim for misuse of the allegedly private information to which the appellant objected on the grounds that it involved a lack of respect for his private and family life. At paragraph [25] of his judgment he identified the particulars of private information to publication of which the appellant objected. These were:-

- (a) the address of the appellant;
- (b) the wedding plans of the appellant and his partner;
- (c) the details of the partner (including her identification, details relating to her workplace, details relating to her family members and her religion); and

(d) the photograph of the appellant and his partner.

[10] Having already imposed a restriction on publication of the appellant's address the judge concluded that it was unnecessary to say anything further about that. He dealt with the other matters thus:-

(a) In relation to details of the wedding plans, while a reasonable expectation of privacy could be assumed in relation to them the balance of interests under Articles 8 and 10 came down in favour of publication. The justification for the publication of the wedding particulars related to the appellant's income from drug dealing and to his criminal lifestyle which were subject matters of the articles.

(b) In relation to the identity of the partner and the other personal details referred to there was undoubtedly an expectation of privacy. It was asserted that the appellant was a womaniser and it was said that the appellant's association with a Catholic woman was an instance of hypocrisy which the respondent should be permitted to disclose as part of its story and its portrayal of the appellant. The judge concluded that it was almost inevitable that a spouse or partner would be drawn into reporting of his lifestyle. There was a legitimate public interest in the identity of such a partner.

(c) In relation to the proportionality in respect of the details published about the partner's workplace the members of her family and her religion, the judge considered that the publication of those details was unwarranted, intrusive and unnecessary.

(d) In the context of the partner's religious background the judge put the position thus in paragraph [36] of his judgment:

"The defendant justifies this as being an indication of the plaintiff's hypocrisy. This approach by the defendant is to imply that the loyalist targeting of Catholics has some basis in religious belief, either of the loyalists who undertake the targeting or the victims who are targeted, or both. I am not satisfied that the conduct of Loyalist paramilitaries or the LVF in particular could be said to be motivated by any religious belief or that the disclosure of the religious persuasion of the plaintiff's partner is irrelevant to the articles or to the conduct of the plaintiff as described in the articles."

The judge thus granted an injunction to restrain further publication of the details of the partner's workplace, family members and religion.

- (e) The judge concluded that in relation to the child, being a member of the appellant's family the appellant's Article 8 rights were engaged. There was a reasonable expectation of privacy for the child's details including its identification, its religion and details of the christening. The judge held that there was no justification for publishing the information about the child's identity, its religion or details about the christening and he granted an injunction accordingly.
- (f) In relation to the photograph of the appellant with his partner the judge concluded that there was a reasonable expectation of privacy. The justification for publication is that the photograph accompanied the articles and shared their justification. Since the identification of the appellant and his partner was justified he was satisfied that their identification by photograph was equally justified and in the circumstances was proportionate. Accordingly, the judge did not propose to restrict publication of the photograph.

[11] In relation to the appellant's claim for harassment under Article 3 of the Protection from Harassment (Northern Ireland) Order 1997 the judge was satisfied of the bona fides of the respondent in advancing the central theme of the articles. While there were aspects of the articles which were unwarranted and there were some inaccuracies in the articles the series of articles did not constitute an abuse of the freedom of the press such that the pressing social needs of a democratic society required them to be restricted. On the overall question as to whether or not the publication of the series of articles constituted unreasonable conduct the judge was satisfied they did not amount to harassment of the plaintiff. Accordingly, he dismissed the claim of harassment.

[12] It was agreed that the trial before the judge should be conducted as a split hearing with the issue of liability and injunctive relief being determined in advance of a hearing relating to the assessment of damages, if any, arising out of any established claim for harassment or breach of privacy.

The parties' submissions

[13] Although in their skeleton argument counsel for the appellant sought to extend the Article 2 argument originally raised before the judge by arguing that publication of private information about the appellant which included photographs of the appellant, would create a real and immediate risk to his life and personal security, this argument was not pursued in oral submission. No such issue was raised in the notice of appeal and it had not been the subject of any argument before the judge. Ms Quinlivan ultimately focused

her argument on a challenge to the judge's decision not to restrain publication of the name of the appellant's partner and of any photographs of the appellant and the partner together. Relying on Paton v UK 3 EHRR 408 and Y F v Turkey [2004] 39 EHRR 34 counsel argued that contrary to the respondent's argument, the appellant was entitled to protection against the publication of details of his partner and child as an aspect of his own Article 8 right to respect for his family and private life. The photograph which had been published had been taken on a private occasion of a wedding and gave rise to an expectation of privacy in the information which the photograph imparted. As a means of invading privacy a photograph is particularly intrusive and it is no answer to a claim to restrain the publication of an improperly obtained photograph that the information portrayed in the photograph is already available in the public domain. The judge failed to evaluate the nature and importance of the private information at issue or the extent to which the proposed disclosure contributed to public debate.

[14] Counsel contended that the judge was wrong to dismiss the appellant's harassment claim because the respondent's campaign against the appellant over a lengthy period of time amounted to harassment. Counsel submitted that in determining whether the respondent's conduct amounted to harassment within the meaning of Article 5 of the 1997 Order, it was necessary to take account of the way in which the respondent decided to publish what it thought was the appellant's home address within a week of the paper referring to the fact that the appellant had been subject to death threats, something which, as the judge ruled, exposed him to a real and immediate risk to his life. The respondent also identified details of his car by reference to colour, make, series and county registration and circumstances where it believed that the appellant was under a death threat. The respondent had misused private information in breach of the appellant's Article 8 rights. The judge had noted that the respondent considered that the appellant by his alleged criminal conduct had forfeited any expectation of privacy and that those who voluntarily associated with him had no reasonable expectation of privacy. Furthermore the respondent had repeatedly published factually inaccurate information as the judge accepted at paragraph [44] of his judgment. Counsel also raised an argument not made to the judge, namely that the articles were designed to and did expose the family unit to hostility from different sections of the community. The Press Complaints Commission Editors' Code of Conduct provides that details of an individual's religion must be avoided unless genuinely relevant to the story. The judge concluded that it was not relevant to the story. All these matters, counsel argued, negated the proposition that the course of conduct followed by the respondent was reasonable. In the circumstances the respondent's conduct amounted to harassment.

[15] Mr Hanna on behalf of the respondent argued that the judge was wrong to hold that the protection of the Article 8 rights of the appellant extended to include any details of the partner or child of the appellant and of members of the partner's family or others associated with her, none of whom were plaintiffs in the proceedings. When the proceedings were heard the partner had not instituted proceedings although she has done so since then. Where or if the partner had no complaint then the appellant could not assert what in effect was a privacy claim on her behalf. The appellant could have no expectation of reasonable privacy in respect of the photograph of him with the partner. The judge should have adopted an appellant-centric approach rather than a partner-centric approach. Mr Hanna contended that the religion of the appellant's partner was part of the story. It related to the issue of the hypocrisy or double standards of the appellant who, on the one hand, portrayed himself as an LVF Loyalist protestant, a member of an organisation with an image and character of sectarian paramilitarism which targeted Catholics as such. At the same time he was living with a Catholic, bringing up a child as a Catholic and attending Catholic ceremonies. Counsel contended that what the judge said at paragraph [36] of the judgment missed the point. The fact that the LVF could not be said to be motivated by any "religious belief" was irrelevant. Its supporters were motivated by anti-Catholic sectarian views which the appellant claimed to share. Such a plaintiff's partner would be drawn into any reporting of his lifestyle. There was a legitimate public interest in the identity of such a partner. Mr Hanna maintained the correctness of the judge's conclusion that publication of the identity of the appellant's partner and photographs showing them together did not wrongfully infringe the appellant's Article 8 rights.

[16] Finally Mr Hanna submitted that the judge was correct to dismiss the appellant's harassment claim. A finding of misuse of private information is not the same as a finding of harassment. The context of the present case supported the view that the respondent was publishing legitimate information concerning serious criminal activity. The respondent knew of only one death threat and was not deliberately exposing the appellant to the risk of death. In the context of the publication of press articles such justification would rarely amount to harassment (per Lord Phillips in Thomas v News Group Newspapers Limited [2001] EWCA Civ. 1233). The judge was entitled to reach the conclusion that the harassment claim had not been made out.

The issues for determination on the appeal

[17] Counsel's arguments identified the following key questions:-

- (a) Was the judge wrong to hold that the protection of the Article 8 rights of the appellant extended to include any details of the partner and/or

child and/or members of his partner's family and others associated with her, none of whom were plaintiffs ("the proper claimant issue").

- (b) Was the judge wrong to hold that the publication of the name of the partner was justified.
- (c) Was he wrong to hold that the publication of the partner's religion was unjustified.
- (d) Was he wrong to hold that publication of the photograph of the appellant and the partner together at a wedding was justified?
- (e) Was the judge correct in holding that the claim for harassment had not been made out.

The proper claimant issue

[18] Article 8 of the Convention provides:-

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

In the context of a dispute between individuals as opposed to a dispute between an individual and a public authority, a plaintiff's claim is not per se a claim for breach of a Convention right. It is tortious claim, that tort claim being sometimes called an action for breach of personal confidence, an action for breach of privacy or, in the nomenclature adopted by Sir Anthony Clarke MR in Murray v Big Pictures UK Limited [2008] EWCA 446, an action for misuse of private information. As the Master of the Rolls also pointed out in Murray the values enshrined in Articles 8 and 10 of the Convention are now part of the action and should be treated as of general application and as being as much applicable to disputes between individuals as to disputes between individuals and public authorities.

[19] An individual normally has a reasonable expectation of privacy in respect of information relating to his private, intimate and family

relationships. The private and family life of an individual is multifaceted. It is of the nature of any relationship between two or more persons that the relationship has effects on each of the parties to the relationship. The rights arising under Article 8 include the right to establish and develop relationships with others. Where that relationship is that of an intimate partnership or is a parent/child relationship the impact of what happens in respect of one of the parties has clear repercussions and consequences in respect of the relationship generally. In Paton v UK [1981] 3 EHRR 408 the Commission accepted that the applicant as a potential father was so closely affected by the termination of his wife's pregnancy that he might claim to be a victim (within the meaning of Article 25 of the Convention) of the legislation he sought to impugn. In earlier Commission decisions in X v Belgium in [1970] and Mekrane v UK [1973] it concluded that the widow and children of persons against whom allegedly impermissible actions had been taken fell to be considered victims themselves. In the case of Y F's Application [2004]]39 EHRR 34 the European Court of Human Rights in an admissibility decision considered that it was open to a husband to raise a complaint concerning allegations by his wife of violations of the Convention in that case an enforced gynaecological examination.

[20] Accordingly, the fact that divulging of private information and material in relation to the partner and the child of the appellant may have entitled them to pursue their own claim for a remedy does not mean that the appellant himself does not have a claim. The fact that the impact of a breach of privacy may be greater in respect of the other parties in the relationship would be reflected in the assessment of any compensatory damages but that does not mean that in the present proceedings the appellant has no cause of action arising out of unjustifiable publication of private information in respect of his private relationships. Furthermore the fact that the appellant has been accused of criminal actions or a crime does not curtail the scope of the protection available under Article 8 (see Sciacca v Italy [2005] Application No. 50774-99). We conclude that the judge was correct in concluding in paragraph [30] of his judgment that the publication of details of family members of a particular person may engage the Article 8 rights of that person.

The identification of the partner and her religion

[21] The evolution of the tort of misuse of private information represented a domestic law response to the need to develop civil law remedies to protect the Convention rights conferred on individuals by the Human Rights Act 1998. In Campbell v MGN Limited [2004] 2 AC 457 the House of Lords acknowledged that Article 8 has re-shaped the action of breach of confidence so that it now protects against abuse of private information. In HRH Prince of Wales v Associated Newspapers Limited [2008] 57 Lord Phillips concluded that:

“The courts have extended the law of confidentiality so as to protect Article 8 rights in circumstances which do not involve a breach of a confidential relationship.”

In Mosley v News Group Newspaper Limited [2008] EWHC 1777 Eady J stated that:

“The law is concerned to prevent the violation of a citizen’s autonomy, dignity and self-esteem.”

[22] When a plaintiff alleges a wrongful publication of private information the court has to decide two separate questions namely:

- (a) was the information private in the sense that it is protected by Article 8?
- (b) If so, has there been an infringement of Article 8?

[23] As to the first question the court must apply a reasonable expectation of privacy test. The question whether there is a reasonable expectation of privacy is a question of fact. It is a broad one which takes account of all the circumstances of the case. These include the attributes of the claimant, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher (see Sir Anthony Clarke in Murray v BIG Pictures Limited [2009] 481 at [36] and [41].)

[24] As to the second question, this involves the application of Article 8(2) and when freedom of expression is involved under Article 10 (as it will be in cases such as the present) the court must undertake a balancing exercise to decide whether in the circumstances the interests of the party affected by the publication of the private information must yield to the publisher’s right to freedom of expression under Article 10. Under the law before the 1998 Act the circumstances in which the public interest overrode the duty of confidence were limited and exceptional. Under the current law the test is a test of proportionality, the question being whether, on the particular facts, a fetter on the right of freedom of expression is necessary in a democratic society. A significant element to be weighed in the balance is the importance in a democratic society of upholding duties of confidence created between individuals. (McKennett v Ash [2008] QB 73 at 11 and HRH Prince of Wales v Associated Newspapers Limited [2008] 57 at 67.

[25] The question whether there is a reasonable expectation of privacy is a question of fact. If the question of justification of the publication of the private information arises that involves a determination of relevant factors and a balancing of them. The weight to be attached to the various considerations is a matter of fact and degree. As Sir Anthony Clarke MR pointed out in Murray at [41] this is essentially a matter for the trial judge. It is for the appellant to demonstrate that the judge took account of or omitted to take account of relevant factors in reaching his determination in that balancing exercise or that, in balancing the relevant factors, he reached a conclusion that no reasonable tribunal could have reached in the circumstances.

[26] The judge concluded, justifiably in the circumstances, that the appellant had a reasonable expectation of privacy in respect of the identity of his partner, details of her workplace and particulars about her family members and details of her religion. He thus decided the first question in the appellant's favour.

[27] He then proceeded to the second question and concluded that the balance came down in favour of publication of details of the partner's identification but against the publication of other details including details of her religion. The factors which he concluded weighed in the scales in favour of publication of her identity were the nature of the appellant's lifestyle, funded as it was by criminal conduct and the fact that he was a womaniser together with the fact that the partner willingly shared the appellant's lifestyle. He concluded that there were no circumstances in the present case that would lead to the non-disclosure of the partner.

[28] It is, however, necessary to bear in mind that the relevant intimate relationships in this case are triangulated. They involve the appellant as partner and father, the partner as partner and mother and the appellant and the partner as parents of the child. Furthermore in considering the issue of the justification for the publication of the partner's identification it must be borne in mind that the relevant articles cannot be read in isolation one from the other. The journalistic story was an evolving and developing one with the divulging of details and particulars in instalments. The permissibility of identifying the partner's name and her religion cannot be considered in isolation from the impact of such publication on relationships involving the child.

[29] It is clear that the respondent chose to reveal details about the partner, her name, her religion and family in such a way that the child who featured in the articles of 22 and 29 November 2009 became identifiable by the very fact that it was the child of the appellant and the identified named partner. As the judge pointed out, paragraph 6(v) of the Press Code states that the editors must not use the fame, notoriety or position of a parent or guardian as

the sole justification for publishing details of a child's private life. The Code requires that in cases involving children under 16 editors must demonstrate an exceptional public interest to override the normally paramount interest of the child. The judge properly concluded that the respondent had failed to justify the publication of information about the child's identity, its religion and the christening details. That correct conclusion (which has not been challenged in the appeal or cross-appeal) had however implications in relation to the question of the identification of the child's mother. The respondent's identification of the mother further identified the child whom she was bringing up. The paramount interest of protecting the child's identity leads to the conclusion that the identification of the mother was inappropriate unless there was some exceptional public interest justifying her identification which would outweigh the paramount interests of protecting the child. Where the interests of protecting a child's identity are paramount, the price to be paid for this paramountcy will normally be that the parent, or indeed in the criminal context an abuser parent, cannot be identified or named. The parent's anonymisation is a necessary concomitant of the need to safeguard the child's identity.

[30] In the context of the present case there were no factors justifying the naming of the child's mother when her identification contributed to the identification of the child. In the absence of the complicating feature arising from the decision by the respondent to incorporate into the story details relating to the child, the naming of the partner would have been justifiable for the reasons adumbrated by the judge. A partner who chooses to share the criminal lifestyle of another person inevitably is drawn into reporting of that lifestyle, the reporting of which is clearly a proper matter for journalistic investigation and comment.

[31] In relation to the identification of the partner's religion the tenor of the respondent's case was that the fact that the appellant chose to have a Catholic partner, allowed his child to be brought up a Catholic and participated in Catholic ceremonies demonstrated hypocrisy or double standards on his part. There is force in Mr Hanna's criticism of the judge's reasoning on that issue as set out in paragraph [36] of the judgment. "*Hypocrisy*" is defined by the Oxford English Dictionary as "*the practice of falsely presenting a belief to which one's own character or conduct does not conform.*" A person purporting to support a sectarian organisation whose adherents on occasions target individual Catholics as such while at the same time living with a Catholic, bringing up a child as a Catholic and participating in Catholic ceremonies could fairly be considered by many to be hypocritical. Thus, if the partner's identity had not been revealed (thereby inappropriately contributing to the identification of the child) a reference to the fact that the appellant had chosen a Catholic partner and had decided to bring up a child a Catholic could have been justified for the purposes of Article 8 read with Article 10.

Publication of the photographs

[32] The publication of the photographs of the appellant with his partner in the context of the articles which gave details in respect of the child and identified the child's mother and father by name, gave further emphasis to the identification of the child by reference to its mother. For this reason the publication was a further facet of the unjustifiable invasion of the child's privacy in respect of which the appellant is for the reasons given entitled to sue.

[33] In addition to that reason for concluding that the publication of the photograph was unjustified, we conclude that there is another reason why its publication was inappropriate. A number of authorities including Campbell v MGN [2004] AC 457, Douglas v Hello [2005] QB 125, Von Hannover v Germany [2004] ECHR 294 and Theakston v MGN [2002] EWHC 137 have emphasised the potential of photographs creating a substantial intrusion into a person's privacy to which special considerations apply. In this case there is no evidence that the relevant photograph was taken surreptitiously by the respondent. Nor does the photograph demonstrate any embarrassing or inappropriate conduct on the part of the appellant or his partner. The photograph seems to have been taken in private at the partner's home when she and the appellant were going to a wedding. The respondent has not volunteered any information as to the circumstances in which it came into the possession of the newspaper. The appellant has asserted that the photograph was improperly obtained and used for publication without their consent. The judge considered that the balance of interest fell in favour of publication because it was taken upon an occasion when the appellant and his partner intended to be photographed, although not for viewing by the general public and although no discreditable conduct was depicted therein. This approach to the balancing exercise leaves out of account the extent to which an obligation may be imposed upon a recipient of material as a consequence of his or her perception, or knowledge of its private nature. In HRH The Prince of Wales v Associated Newspapers Limited [2006] EWCA Civ. 1776 Lord Phillips stated at paragraph [36]:

"It is not easy in this case, as in many others, when considering that information as private to identify the extent to which this is because of the nature of the information, the form in which it is conveyed and the fact that the person disclosing it was in a confidential relationship with the person to whom it relates. Usually as here those factors form an inter-dependent amalgam of circumstances. If, however, one strips out the fact of breach of a confidential relationship and assumes that a copy of the journal had been brought to the newspaper by someone who had

found it dropped in the street, we consider that its form and content will clearly have constituted private information entitled to protection of Article 8(1) as qualified by Article 8.2.”

The material concerned in that case was obviously a private journal. It is a question of fact depending on the nature of the material and reasonable perception of the person or body who wishes to publish. In the present circumstances it must have been obvious to the respondent that the photograph had been taken on a private occasion and represented private information.

Harassment

[34] In Dowson and Others v Chief Constable of Northumbria Police [2010] EWHC 2612 Simon J at 142 usefully summarised what must be proved as a matter of law in order for a claim of harassment to succeed:

- “(1) There must be conduct which occurs on at least two occasions
- (2) which is targeted at the claimant,
- (3) which is calculated in an objective sense to cause alarm or distress, and
- (4) which is objectively judged to be oppressive and unacceptable,
- (5) what is oppressive and unacceptable may depend on the social or working context in which the conduct occurs.
- (6) A line is to be drawn between conduct which is unattractive and unreasonable and conduct which has been described in various ways: “torment” of the victim of an order which would sustain criminal liability’.”

[35] The appellant has not sought to challenge the central truth of the allegations against him. The fact that the articles have caused him distress does not of itself establish harassment. It would have to be shown that the respondent knew or ought to have known that it was harassing the appellant. While the articles contain some factual errors and misuses some private information that does not of itself show the respondents set out to harass the appellant as opposed to printing a story in which it was intended to expose

those aspects of the appellant's life which the respondent regarded as justifying exposure in the public interest in the exercise of its right of free expression.

[36] Article 3(3) of the 1997 Order provides that the concept of harassment does not apply to a course of conduct if the person who pursued it shows:

- “(a) that it was pursued for the purposes of preventing or detecting crime;
- (b)
- (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.”

While the provisions of the Order are capable of applying to this series of newspaper articles and while the judge justifiably concluded that the articles would have caused alarm and distress to the appellant (and must have been intended to do so), in a case of harassment a plaintiff must show that the conduct was oppressive and unreasonable. In approaching the question whether the respondent's conduct was unreasonable and oppressive the court must take into account the right of the press to freedom of expression. In Thomas v News Group Newspapers Limited [2001] EWCA Civ. 1237 Lord Phillips at paragraphs [34], [35] and [50] set the position out thus:

“[34] In general press criticism even if robust does not constitute unreasonable conduct and does not fall within the natural meaning of harassment. A pleading that does no more than allege that the defendant newspaper has published a number of articles which have foreseeably caused distress to an individual will be susceptible to a strike out on the grounds that it is not disclosed an arguable case of harassment.

[35] It is common ground between the parties to this appeal and properly so that before the press publications are capable of constituting harassment they must be attended by some exceptional circumstance which justifies sanctions and the restriction on the freedom of expression that they involve. It is also common ground that such circumstances will be rare.

[50] On my analysis the test of reasonableness requires the publisher to consider whether a proposed series of articles which is likely to cause

distress to an individual will constitute an abuse of the freedom of press which the pressing social needs of democratic society require should be curbed. This is a familiar test and not one which offends against Strasbourg's requirement of certainty."

[37] The judge concluded that the present case was not attended by exceptional circumstances justifying sanctions and restrictions on the freedom of expression. The articles did not constitute an abuse of freedom of the press which the pressing social needs of a democratic society required should be curbed.

[38] Particularly in light of the fact that the appellant declined to institute defamation proceedings to challenge the correctness of the thrust of the robust allegations of serious criminality made in the articles we conclude that the judge was correct to conclude that the appellant had not made out a case of harassment.

Disposal of the appeal

[39] We have differed from the judge on the question whether the respondent was wrong to have published details of the identity of the partner and the photograph of the partner. To that limited extent we allow the appeal. While we have differed from the judge's reasoning in deciding to prohibit a publication of the religion of the partner we do not differ from him in the result. We conclude that the judge was correct in deciding that the appellant had not made out a case of harassment. We will hear counsel on the appropriate form of the order to be made and on the question of costs.