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Judgment: approved by the Court for handing down | *Delivered:* **26/08/2015**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between

ROBERT McAULEY

Plaintiff:

and

SUNDAY NEWSPAPERS LIMITED and

INDEPENDENT NEWS AND MEDIA LIMITED

Defendants:

_____

STEPHENS J

Introduction

[1a] This is an unanonymised version of the judgment which I delivered on 21 July 2015 in an anonymised form and with a reporting restriction. I adopted that course to enable the plaintiff to consider whether he wished to appeal. If he had indicated that he did wish to appeal I would have maintained the anonymity order and the reporting restriction order for a limited period of time to enable the plaintiff to make an application to the court of appeal to maintain both orders until the outcome of the appeal. In the event the plaintiff has indicated today, 26 August 2015, that he has decided not to appeal. Accordingly I remove the reporting restrictions which I imposed at an earlier stage and now deliver this judgment in an unanonymised form.

[1] By this application the plaintiff, Robert McAuley, seeks an interlocutory injunction against both Sunday Newspapers Ltd ("the First Defendant") and Independent News and Media Ltd ("the Second Defendant") preventing them, until the trial of the action or further order, from "harassing, pestering, annoying or molesting the plaintiff whether by publishing, distributing, broadcasting or transmitting any information relating to the plaintiff in the newspapers Sunday World, Sunday Life or otherwise". The plaintiff contends that he is entitled to this

relief on the basis of articles 2, 3 and 8 ECHR and under the Protection from Harassment (Northern Ireland) Order 1997. However at the end of the hearing it was stated on behalf of the plaintiff that the grounds for the interlocutory application would be restricted to articles 2 and 3 ECHR. In view of the fact that the other grounds were argued and in view of the impact that they might have on anonymity and a reporting restriction I have set out my conclusions in relation to them.

[2] At an earlier stage I granted an interim anonymity order until judgment was given in relation to the plaintiff's application for an interlocutory injunction. By virtue of that order the plaintiff would be referred to by the letters 'SN' rather than by his name. For the same period I also granted an interim order restricting reporting of these proceedings which provided that there should be:

a) no report of the hearing before this court which would reveal that the plaintiff in these proceedings was the applicant in a judicial review application which was heard and determined by the Divisional Court

b) no report of this hearing which involved any reference to any article published in the Sunday World or the Sunday Life that refers to or identifies or purports to refer to or to identify the plaintiff.

The plaintiff seeks to maintain both of those orders until the trial of the action or until further order.

[3] Upon the application coming on for hearing the plaintiff and the second defendant entered into terms disposing of the entire proceedings between them. The court was requested to stay those proceedings on terms endorsed with liberty to apply. However, whether there should be a reporting restriction and whether the identity of a litigant should be anonymised, is for the court, not for the parties to decide. Given that the court had not ruled on those issues it was agreed between the plaintiff and the second defendant that the interlocutory application as between them should be adjourned to await the outcome of the application as between the plaintiff and the first defendant. At that stage it would become apparent as to whether anonymity was to be maintained and whether the reporting restriction would remain in place.

[4] When delivering the judgment on 21 July 2015 I stated that regardless of the outcome of the plaintiff's application and in the judgment as then delivered I anonymised the name of the plaintiff and maintained a reporting restriction to afford the plaintiff an opportunity to appeal to the Court of Appeal in relation to the orders which I proposed to make. As indicated in paragraph [1a] the plaintiff has stated that he does not intend to appeal and accordingly I have removed anonymity and discharged the reporting restriction order.

[5] Mr O'Donoghue QC and Ms Rooney appeared on behalf of the plaintiff. Mr Lockhart QC appeared on behalf of the first defendant. Mr Simpson QC appeared

on behalf of the second defendant. I am grateful to all counsel for the assistance that I derived from their carefully prepared and well-reasoned written submissions. By virtue of the agreement between the plaintiff and the second defendant Mr Simpson made no oral submissions and withdrew from the hearing. I am grateful to Mr O'Donoghue and Mr Lockhart for the clear and concise manner in which they presented their oral submissions.

Factual Background

[6] On 25 October 2012 Daniel McKay was murdered in his living room at Longlands Road, Newtownabbey. On 26 October 2012 DI McGuinness was made aware of intelligence reports relating to the murder which suggested that the plaintiff was involved. Background checks were then conducted which revealed that the plaintiff may have had connections with dissident republican groupings. On 27 October the plaintiff was arrested on suspicion of being involved in the murder and he was taken to Antrim Serious Crime Custody Suite. At the time of his arrest he had a clear criminal record. Mr Harry McMahon was also arrested, at or about the same time, also on suspicion of involvement in the murder. An application was made by the police to extend the detention period pursuant to paragraph 32 of Schedule 8 of the Terrorism Act 2000 ("the 2000 Act") in relation to the plaintiff and another suspect. His Honour Judge Sherrard decided to exclude the plaintiff and his representatives from the hearing so that he could receive evidence from a police officer dealing with intelligence information and certain forensic tests the results of which were anticipated, in exercise of the power contained in paragraph 33 of Schedule 8 of the 2000 Act. After receiving such evidence His Honour Judge Sherrard decided to grant the extension application authorising the continued detention of the plaintiff until 12 noon 1 November 2012.

[7] On 29 October 2012 the plaintiff challenged that decision by bringing judicial review proceedings. On 30 October 2012 the plaintiff was unconditionally released without charge. At the time of his arrest he was suspected by the PSNI of involvement in the murder but as far as the plaintiff is concerned he has not had any further police interviews and he is unaware as to whether the police consider that he still remains a suspect.

[8] The judicial review application was heard by the Divisional Court in early 2014 in open court and without any reporting restriction. Judgment was given in open court on 13 March 2014 under citation [2014] NIQB 31. That judgment was published by Northern Ireland Courts and Tribunals Service on the internet and it is still publicly accessible. In the judgment the plaintiff is named. Anyone who wishes to find out who was suspected of involvement in the murder of Daniel McKay can conduct an internet search for the judgment which contains in paragraph [2] a description of the murder including a claim that those involved in hijacking a car used in the murder were members of the IRA, in paragraph [3] reference to intelligence reports in relation to the plaintiff to the effect that he may have had connections with dissident republican group and in paragraphs [8]-[22] the

procedure followed by His Honour Judge Sherrard to hear further unspecified evidence in the absence of the plaintiff and his representatives on the intelligence which had been relied upon in determining whether to arrest the plaintiff after which further evidence the judge made an order extending detention.

[9] The judgment records that as two armed and hooded men left the scene one shouted "that will put an end to drugs in Longlands". Reading the judgment it can be discerned that it was suspected that the victim of the murder was a drug dealer, that it was suspected that the murder was perpetrated by members of the dissident IRA taking lethal action against drug dealers, that the plaintiff was suspected of involvement in the murder and that he may have had connections with dissident republican groupings.

[10] The Divisional Court judgment was delivered on 13 March 2014 and on the same day the Office of the Lord Chief Justice published a summary of the judgment on the internet. That summary also named the plaintiff stating that he had been arrested as a suspect in connection with the murder of Daniel McKay. It also referred to intelligence. That summary is also still available on the internet.

[11] No application was made to the Divisional Court to anonymise the judgment nor has the plaintiff returned to the Divisional Court seeking an order that the judgment should be anonymised on the basis that the Divisional Court still retains jurisdiction to deal with article 2 ECHR risk to life issues. There is no evidence of any approach having been made by the plaintiff to Northern Ireland Courts and Tribunals Service to request that organisation to remove the judgment from the internet. The judgment has also been published on Bailli and there is no evidence of any approach having been made by the plaintiff to Bailli to request that the judgment is removed from its internet site. In addition there is no evidence of any approach having been made by the plaintiff to the Council of Law Reporting for Northern Ireland that the judgment should not appear in the Northern Ireland Law Reports or in the Northern Ireland Judgment Bulletins.

[12] On 6 April 2014 the second defendant published an article on page 29 of the Sunday Life under the heading "Suspect in drug dealer's murder has been named." The article stated that:

> "A suspect in the dissident republican murder of small time drug dealer Danny McKay has been named in public after he lost a legal fight.
>
> Robert McAuley was identified in court papers published online detailing how he failed in an attempt to win a judicial review.
>
> … this is the first time that any of the suspects for the brutal McKay murder – claimed by the shadowy

> republican group Correct Action Against Drugs – has been named."

The meanings taken from that part of the article were that the plaintiff was a suspect in the murder and as the murder was claimed by a shadowy republican group that he was also a suspected member of that group.

[13] On 28 May 2014 and over 7 weeks after the publication in the Sunday Life the PSNI having received information informed the plaintiff that:

> "Criminal elements plan to carry out an attack on Robert McAuley of … in the near future. Police believe this refers to you and would recommend you review your personal security."

The threat message from the PSNI does not a) identify the type of attack or action, b) state whether it involved a threat to the life of the plaintiff or c) specify the reason for the threat. Accordingly it is not apparent from the threat message as to whether the threat was caused or materially (that is greater than marginally) contributed to by the publication of the Divisional Court judgment or by the publication in the Sunday Life or whether there was some other cause revealed by further intelligence or further background checks since the earlier intelligence reports which had suggested that the plaintiff was involved in the murder of Daniel McKay and the earlier background checks which had revealed that the plaintiff may have had connections with dissident republican groupings.

[14] There can be many reasons for attacks on individuals. The plaintiff asserts that he is not involved in any way with any criminal activity and that it should be inferred that the reason for the threat is an unjustified belief generated by the publication of the Divisional Court judgment and by the subsequent article in Sunday Life that he was suspected of involvement in the murder of Daniel McKay and a suspected member of a shadowy republican group. On the other hand it is asserted that the plaintiff is the leader of a criminal gang and that this exposes him to considerable risks which risks have nothing to do with any publication whether in the Sunday Life or in the Sunday World.

[15] In relation to the *Sunday Life* I consider that the gap between the date of the publication on 6 April 2014 and the date of this threat message to the plaintiff from the police is a strong indicator against the threat being caused or materially contributed to by that publication. In relation to the *Sunday World* the threat which gave rise to this message and to the subsequent message on 4 June 2014 was not caused or contributed by anything published in the Sunday World as nothing was published in the Sunday World until 6 July 2014. In short the plaintiff was receiving threats in May and June 2014 which had nothing to do with any publication in the Sunday Life or in the Sunday World. The question that remains is as to whether the subsequent publications in the Sunday World materially (that is more than

marginally) contributed to the renewal or the continued existence of the threats or whether the later threats emanated from exactly the same or similar people for the same or similar reasons.

[16] On 4 June 2014 a "threat message" on Form TM1 was served on the plaintiff by Sergeant McCarron of the PSNI. The message passed was:

> "Criminal elements in the … area intend to carry out a serious assault on a male called Robert McAuley. It is assessed that this refers to you."

This threat message was delivered some 8 weeks after the publication in the Sunday Life and again that lack of association in time is a strong indicator against the threat being caused or contributed to by the publication in the Sunday Life. Again, the police did not provide any information as to why it was believed that there was a threat to the plaintiff.

[17] On 6 July 2014 the first defendant published an article on pages 8 and 9 of the Sunday World under the heading: "Robbing Hood: Anti-drugs gang boss raking in a fortune from dope peddlers." This article was accompanied by a photograph of an individual wearing a balaclava and a forensic type boiler suit brandishing a handgun beside action against drugs graffiti daubed on a wall. Beside that photograph is another showing the plaintiff's face with a caption "Masked: Robert McAuley posing with a gun in front of AAD graffiti warning". The article stated that the plaintiff is a suspect in relation to the murder of Daniel McKay. The main thrust of the article was that he was also head of Action Against Drugs and that this organisation was a criminal gang which does not prevent the drug trade but rather "rakes in a small fortune 'taxing known dealers'". The article also states that the plaintiff had successfully recruited disgruntled members of Oglaigh na hEireann including Tony Rooney and Carl Reilly.

[18] On 27 July 2014 the first defendant published a further article on page 26 of the Sunday World under the heading "Vigilante has price on his head". The article states that "Bogus anti-drug vigilante Robert McAuley is on a dissident republican death list". The article recounts how in the previous Sunday World article the plaintiff had been unmasked as a leader of a criminal gang stalking the streets of North Belfast. It goes on to assert that the gang is believed to be made up of disgruntled dissident republicans and that the plaintiff is now spreading his operation to West Belfast and that he is specifically targeting members of the terror group Oglaigh na hEireann which group has responded by issuing a death threat. It recounts how the plaintiff's activities have brought him into conflict with the INLA who retaliated to a pipe bomb attack on one of their members by abducting a senior action against drugs figure and holding him for a number of days. It also quotes from a source that the plaintiff is "a dead man walking." "He has gone out of his way to target Oglaigh na hEireann members and he has ruffled feathers."

[19] On 28 July 2014 a further threat message on Form TM1 was served on the plaintiff by the PSNI. There is a clear association in time between the publication on 27 July 2014 and the threat message on 28 July 2014. However there is no police evidence as to the cause of the threat. The plaintiff asserts that the appropriate inference is that it was caused by or materially contributed to by the publication. The first defendant states that it has nothing to do with the publication but rather that the threat was generated by the plaintiff's activities as described in the article.

[20] On 8 July 2014 the plaintiff's solicitors wrote to the PSNI referring to the existence of two death threats "which apparently emanate from criminal elements, one of which refers to a firearm being used and the other referring to physical harm". The letter states that in the best interests of the plaintiff's personal security he could not be seen to be entering or leaving a police station and requested further information from the police as to the threats. At this stage, despite the contents of the article dated 6 July 2014 no letter of claim was sent to the first defendant.

[21] On 1 August 2014 the plaintiff's solicitors wrote to both the first and second defendants intimating claims and seeking an undertaking that no further articles would appear in the respective newspapers identifying the plaintiff by name or photograph in connection with any serious criminal activity. In the event proceedings were not issued until 27 February 2015.

[22] Between July and December 2014 no further articles were published. On 7 December 2014 the first defendant published an article on pages 10 and 11 of the Sunday World under the banner "Exclusive Bombs and Threats as Rivals Fight for Deadly Business" and under the heading "Brothers in Harm". The main theme of the article is that a band of INLA brothers are at the centre of a power struggle with cash hungry Action Against Drugs. That a drug driven feud has been simmering for months as the two criminal gangs vie for control of the narcotics trade in north Belfast. The article also refers to the plaintiff and his arrest in connection with the murder of low level drug dealer Danny McKay.

[23] On 4 December 2014 a further article was published in the Sunday World under the heading "AK47 for Hire". The article states that "Action Against Drugs rents out deadly weapon … for more cash they'll claim responsibility for any 'client' shootings". This was followed by a further article published in the Sunday World on 25 January 2015.

[24] On 30 January 2015 Harry McMahon, who had also been arrested in October 2012 on suspicion of involvement in the murder of Daniel McKay, was the victim of a shooting incident in north Belfast in which he was shot in the head.

[25] On 1 February 2015 a further article was published in the Sunday World which stated that the INLA had been fingered as the chief suspect in the attempted murder of Harry McMahon who was stated to be a close associate of Action Against Drugs boss Robert McAuley.

[26] The plaintiff states that on 3 February 2015 "a fourth threat to life was communicated to me by the PSNI regarding a death threat from Dissident Republicans". He does not state that a Form TM1 was issued. No details are given as to who communicated this to the plaintiff or the circumstances in which it was communicated. There is no correspondence from the PSNI which confirms this threat message or whether it was assessed by a duty inspector or was deemed to be high or credible. Again there is no independent information as to why it was believed that there was a threat to the plaintiff. There is an association in time between this threat message and the shooting of Harry McMahon on 30 January 2015 as well as an association in time with the further article published in the Sunday World on 1 February 2015.

[27] On Monday 9 February 2015 on the internet on a "Dissident Republicans" blog http://dissidentrepublicans.blogspot.co.uk which aims to keep the public updated on the activity and membership of the various dissident republican groups and under the heading "Belfast Shooting, Dissident Republicans, Harry McMahon" the following was published namely "Dissident hit target Harry "O" McMahon remains in a coma in hospital after being shot through the eye socket, in Belfast. A man with two young kids watched as the hit man calmly and callously shot the close associate of Action Against Drug chief Robert McAuley."

Articles 2 and 3 ECHR

[28] The Court of Appeal *In the Matter of an Application by Officers C, D, H and R* [2012] NICA 47 set out the circumstances in which prospectively the positive operational duty to protect life under article 2 arises. If that duty does arise then appropriate steps are required to be taken to safeguard the individual's life and there is an obligation to take preventative operational measures to protect an individual against risks of criminal acts from others. If the need for operational action and article 2 is in play then this court, as a public authority, is required to address the issue of what proportionate response is required in the circumstances. The standard "is based on reasonableness, which brings into consideration the circumstances of the case or difficulty of taking precautions and the resources available. In this way the State is not expected to undertake an unduly burdensome obligation: it is not obliged to satisfy an absolute standard requiring the risk to be averted regardless of all other considerations" see *Re Officer L* [2007] 1 WLR 2135 at paragraph 21. The potential steps for the court in this case are to anonymise the proceedings, to impose a reporting restriction and to grant an interlocutory injunction.

[29] The positive operational duty arises where there is a real and immediate risk to the life of an identified individual or individuals. A real risk is a risk which is neither fanciful nor trivial and which would be present if a particular course of action is or is not taken. An immediate risk is one which is present and continuing.

[30] As I have indicated if the positive operational duty arises then that does not necessarily mean that action or any particular action needs to be taken. Rather the nature of the action depends on the nature and degree of the risk and what, in the light of the many relevant considerations, the relevant public authority might reasonably be expected to do to prevent it. So the response is to be proportionate taking into account the many relevant considerations. Even if the plaintiff establishes *some* additional risk to his life by virtue of the publications then the response of the court has to be proportionate to that increased risk. In such circumstances if additional risk represented no more than a small addendum to an existing state of affairs a proportionate response could be that there should be no interlocutory injunction given the extent of the remaining significant and material risk.

[31] On the facts of this case if there is a real and immediate risk to the life of the plaintiff which was caused by or materially (that is greater than marginally) contributed to by the publications then I consider that the proportionate response is relatively straightforward in that there should be no further publications, the identity of the plaintiff should be anonymised and a reporting restriction should be imposed.

[32] In relation to the question as to whether there is a real and immediate risk to the life of the plaintiff it is submitted on his behalf that this has been established by the police threat messages and by the fact that Harry McMahon was shot in the head. In effect the first defendant agrees that there is a real and immediate risk to the life of the plaintiff as it alleges that there is a dangerous and lethal gang war taking place in which the plaintiff is participating. In one article the first defendant quotes a source, which it considers to be reliable, that the plaintiff is "a dead man walking." This may have a degree of hyperbole attached to it but in effect it is common case between the parties that there is a real and immediate risk to the life of the plaintiff. I agree that there is such a risk and I also consider that there is a real and immediate risk that he would be subjected to torture and inhuman or degrading treatment contrary to article 3 ECHR.

[33] The remaining issue between the parties is as to whether these risks were caused by or materially (that is greater than marginally) contributed to by the publications. At this interlocutory stage the plaintiff has to establish that at trial it is likely that that issue will be decided in his favour.

[34] Section 12 of the Human Rights Act 1998 provides that if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression that no such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is *likely to establish* that publication should not be allowed (emphasis added).

[35] The correct meaning of "likely" in section 12(3) was considered in *Cream Holdings Limited and others v. Banerjee and others* [2004] UKHL 44. The standard is

flexible. "…'likely' in section 12(3) cannot have been intended to mean 'more likely than not' in all situations." The passage from the speech of Lord Nicholls continues:

> "That, as a test of universal application, would set the degree of likelihood too high. In some cases application of that test would achieve the antithesis of a fair trial. Some flexibility is essential. The intention of Parliament must be taken to be that 'likely' should have an extended meaning which sets as a normal prerequisite to the grant of an injunction before trial a likelihood of success at the trial higher than the commonplace American Cyanamid standard of 'real prospect' but permits the court to dispense with this higher standard where particular circumstances make this necessary."

In order to achieve the necessary flexibility the degree of likelihood of success at trial needed to satisfy section 12 (3) must depend on the circumstances. There can be no single, rigid standard governing all applications for interim restraint orders. The court should not make an interim restraint order unless satisfied that the applicant's prospects of success at trial were sufficiently favourable to justify such an order being made in the particular circumstances of the case, see *AB v Sunday Newspapers* [2014] NICA 58 at paragraph [7]. I consider that the more serious the consequences the less cogent the evidence needed to satisfy the standard, see *Callaghan v Independent News & Media Limited* [2008] NIQB 15 at paragraph [17] which in my view is an aspect of the precautionary principle see *Jordan's Applications (13/002996/1), (13/002223/1) (13/037869/1)* [2014] NIQB 11 at paragraph [118].

[36] Applying that flexible standard and on the evidence before me I hold on an interlocutory basis that the plaintiff is not likely to establish that the publication of the articles in the Sunday World or the publication of further articles have caused or will cause any or any material (that is greater than marginal) contribution to the risk to his life or to the risk of torture and inhuman or degrading treatment. I do so for a number of reasons some of which individually would not be sufficient to arrive at that conclusion but where the individual reasons on their own are insufficient they add to the cumulative impact. The reasons are:

a) There is no direct evidence from the police or from the plaintiff that the risk was caused by or materially contributed to by the publications. The police have not informed the first defendant or any of its journalists that they are causing or materially contributing to a risk to the life of the plaintiff.

b) There were two threat messages to the plaintiff from the police before any of the articles were published in the Sunday World. This establishes that the risk was not caused by those publications but existed prior to the publications for some other reason.

c) There was no association in time between the first and second threat messages from the police and the publication in the Sunday Life on 6 April

2014. On the basis of that lack of an association in time I consider it appropriate to draw the inference that the risk was not caused by the publication in the Sunday Life but existed independently of that publication and for some other reason.

d) The third threat message from the police on 28 July 2014 is associated in time with the article published in the Sunday World on 27 July 2014 but the evidential strength of that association in time between the publication and the threat message has to be seen in the context of two previous threat messages unrelated to any publication. Also if the allegations in the article are correct then the association in time is with the activities of the plaintiff rather than with the publication and accordingly in assessing the association in time consideration should be given to the matters referred to at g) and h).

e) There was no threat message from the police in the hours or days after the publications in the Sunday World in December 2014. The next threat message was on 3 February 2015. If there was an association between the publications and the risk then it would be expected that there would be a renewed threat message as a response at an earlier stage.

f) The fourth threat message from the police on 3 February 2015 occurred days after a potentially lethal attack on Harry McMahon who was linked to the plaintiff in that both had been arrested on suspicion of involvement in the murder of Danny McKay. The reason for the fourth threat message could be associated with the threat that actually materialised in relation to Harry McMahon. Furthermore the threat to Harry McMahon was not related to anything published in the Sunday World as there was no mention of him in any of the articles published prior to 30 January 2015.

g) There is evidence that the plaintiff was involved in criminal activity which would amply explain the risk to his life. The evidence supporting his involvement is contained in the affidavit of Paula Mackin the journalist who wrote the articles. She states that the plaintiff is a well-known criminal in the North Belfast criminal community and that her information comes from her credible and long standing sources though she does not identify those sources. The fact that the sources are not identified considerably weakens the evidence and in some cases would be fatal however in this case her evidence gains support from a reasonable suspicion on behalf of the PSNI of the plaintiff's involvement in the murder of Daniel McKay which suspicion led to his arrest. His Honour Judge Sherrard presented with the evidence in relation to that reasonable suspicion decided to grant an extension application authorising the continued detention of the plaintiff following his arrest. The Divisional Court in its judgment stated that the plaintiff "was arrested on the basis of a reasonable suspicion of involvement in a murder." In addition the evidence of Paula Mackin gains support from the police intelligence reports relating to the murder of Daniel McKay which suggested that the plaintiff

was involved together with the police background checks which revealed that the plaintiff may have had connections with dissident republican groupings.

h) Against that evidence is the evidence of the plaintiff who denies that he is involved in any criminal activity. In considering those denials I take into account that he was convicted on 28 August 2014 of two offences of dishonesty on 13 April 2014 of making a false declaration to obtain a certificate of insurance and making or possessing a false driving document though the punishment imposed was modest being a fine of £100 in relation to each offence. I also take into account aspects of his evidence which I did not consider to be reliable. The articles published by the first defendant allege that the reason why Harry McMahon was shot was because of his links to the criminal organisation led by the plaintiff and the conflict between that organisation and the INLA. In his affidavit the plaintiff states that he understands that Mr McMahon received a threat to life TM1 form some time ago, in or around the summer time and he had to move house. However the plaintiff does not state how he knew that Mr McMahon had received a TM1 and does not set out the exact nature of his relationship with Mr McMahon. I infer that there is a reason for this lack of detail in that the plaintiff is not being honest or open about the relationship between himself and Mr McMahon who was also reasonably suspected of involvement with the plaintiff in the murder of Daniel McKay. In paragraph 4 of his affidavit the plaintiff states that the first defendant is trying to link him "with these notorious criminals" but does not identify any notorious criminal and by his counsel informed the court that he is unaware of the identity of any notorious criminal. That in effect the word "notorious" was inappropriate. This is to be contrasted with paragraph 31 of his affidavit in which he denies knowing a number of individuals whom he names but does not deny knowing "Tony Rooney" who was stated in the article published on 6 July 2014 to be a disgruntled member of Oglaigh na Eireann who was arrested in west Belfast after PSNI foiled a punishment attack by ONH for which he spent three years in Maghaberry. I also take into account that the plaintiff has chosen not to provide any background information to the court as to, for instance, how he earns a living, what his explanation was to the police in relation to the suspicion of his involvement in the murder of Daniel McKay, what he was doing on the day that Daniel McKay was murdered and the attempts by him to distance himself from the allegations about his involvement in extorting money from drug dealers.

For all those reasons I consider that it is not likely that the plaintiff will be able to establish at trial that the publication of the articles in the Sunday World or the publication of further articles have caused or will cause any or any material contribution to the risk to his life or to the risk that he would be subjected to torture and inhuman or degrading treatment.

[37] If I am wrong in the conclusion that the plaintiff is unlikely at trial to establish *any* contribution between the articles and those risks then I consider that the additional risk is not sufficiently significant to lead to a different outcome to this application it being no more than a small addendum to an existing and continuing state of affairs.

Article 8

[38] The question arises as to whether the first defendant has published or intends to publish information in relation to which the plaintiff has an expectation of privacy**.** The Data Protection Act 1998 provides that "sensitive personal data" consists of information relating to amongst other matters the commission or alleged commission by him of any offence, any proceedings for any offence committed or alleged to have been committed by him and the disposal of such proceedings or the sentence of any court in such proceedings. In *Green Corns Ltd v Claverley Group Limited* [2005] EWHC 958 at paragraph [62] Tugendhat J stated that:

> "The information about individuals relevant to this case is not confined to the addresses where they live. There is other information the disclosure and use of which individuals have a right to control in accordance with Art 8. A useful indication of the sort of personal information that is regarded as sensitive can be found, in addition to the statutes referred to above, in the Data Protection Act 1998 s.6 (although no reliance is placed upon that statute by the applicant in this case). "Sensitive information" as defined in that section includes information as to a person's physical or mental health or condition, sexual life, and the commission or alleged commission by him of any offence."

Since the first defendant has published allegations that the plaintiff has committed and intends to commit criminal offences which is information in relation to which the plaintiff has an expectation of privacy article 8 is engaged. The article 8 right is a qualified right, see article 8(2). The interference with the right to respect for private and family life has to be (a) in accordance with law, (b) it has to pursue a legitimate aim, and (c) it has to be necessary in a democratic society. This last question of being necessary in a democratic society requires consideration as to whether the decision is proportionate and strikes a fair balance between the competing public and private interests. The competing interests in this case include the article 10 rights of the first defendant. Before interfering with those rights and under section 12(3) the plaintiff has to establish that if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression that no such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the plaintiff is *likely to establish* that publication should not be

allowed. I consider that there is a public interest in the publication of the material (section 12(4) HRA 1998) and that the balance comes down firmly in favour of the article 10 rights of the first defendant. In short that there is a sufficient public interest in the publications to justify the curtailment of any article 8 right.

Harassment

[40] In respect of the claim for harassment there are six matters which Simon J considered in *Dowson v Chief Constable of Northumbria Police* [2010] EWHC 2621 had to be established in order to found a claim in harassment:

(i) There must be conduct which occurs on at least two occasions.
(ii) The conduct is targeted at the claimant.
(iii) The conduct is calculated in an objective sense to cause alarm or distress.
(iv) The conduct is objectively judged to be oppressive and unacceptable.
(v) What is oppressive and unacceptable may depend on the social or working context in which the conduct occurs.
(vi) A line is to be drawn between conduct which is unattractive and unreasonable, and conduct which has been described in various ways e.g. "torment" of the victim, or "of an order which would sustain criminal liability". Article 10 of the Convention is clearly a live issue in such matters.

[41] In considering the claim for harassment I also seek to apply what Lord Phillips stated in *Thomas v News Group Newspapers Ltd* [2001] EWCA Civ 1233 that press criticism, even if robust, did not constitute unreasonable conduct and did not fall within the natural meaning of harassment. Before press publications are capable of constituting harassment they must be attended by some exceptional circumstances which justify sanctions and the restriction on the freedom of expression that those sanctions involve. Such circumstances will be rare. Mr O'Donoghue accepted that there were no exceptional circumstances in this case and accordingly he accepted that interlocutory relief on this ground was not appropriate. I agree.

Conclusion

[42] I dismiss the plaintiff's application for an interlocutory injunction.

[43] I do not consider it likely that at trial the plaintiff will be able to establish a material connection between the publication of the articles or the publication of this judgment and the risk to his life. I have come to the conclusion that there is a public interest in publication when balancing the plaintiff's article 8 rights against the first defendant's article 10 rights. Accordingly both the reporting restriction and the anonymity order should be lifted.

[44] I also release the first defendant from its written undertaking dated 6 March 2015 though I will hear counsel in relation to the issue as to whether the undertaking should be maintained for a short period together with an anonymity order and a reporting restriction to allow the plaintiff time to consider an appeal to the court of appeal. If there is no appeal within a short and specified period of time or if this court and the court of appeal decline to keep the anonymity and reporting restriction orders in place pending the outcome of the appeal I will then make an unanonymised copy of this judgment available for publication on the court service website.

[45] I will also hear counsel in relation to the costs of the application.