Neutral Citation No: [2017] NICA 70 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **DEE10461** *Delivered: 22/11/2017*

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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2017 No. 11928

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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BETWEEN:

DECLAN ARTHURS

Plaintiff/Appellant;

-and-

NEWS GROUP NEWSPAPERS LIMITED

Defendant/Respondent.

_____

Before: Morgan LCJ, Deeny LJ and Sir Richard McLaughlin

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DEENY LJ (delivering the judgment of the court)

[1] This is an appeal by Declan Arthurs an intended plaintiff who has been granted a reporting restriction order to remain in place until the determination of the appeal. [This order was vacated by the court on 24 November 2017, there being no application for leave to appeal to the Supreme Court.]

[2] The appeal is against the dismissal by Burgess J of applications by Mr Arthurs for an interim injunction against the defendant for "the common law tort of misuse of private information" and for an interim order pursuant to "section 10 of the Data Protection Act" in relation to the plaintiff's sensitive personal data as defined by

section 2(f), (g) and (h) of the Data Protection Act 1998. The judge heard the matter on 27 April 2017 pursuant to a summons dated 3 February 2017. However, his written judgment and his Order were made on 22 September 2017.

[3] Mr Arthurs is complaining under the two causes of action outlined above of an article published by the defendants in The Sun newspaper linking him to his father who has convictions for terrorist offences and for fraud. He complains that this is an invasion of his right to privacy and a breach of the Data Protection Act. The factual basis of his case is set out by the learned judge at paragraph [4] of his judgment and for convenience we now set that out.

> "The Summons was grounded on an affidavit by the Plaintiff dated 3 February 2017, the salient paragraphs of which for the purpose of this judgment at this stage, are as follows:
>
> > '4. I applied for the BBC1 musical talent television show entitled 'Let it Shine' by an online application in or around September 2016. …
> >
> > 5. There was nothing in the form asking contestants about their family background. As a result of my application I had to attend an audition at the Europa Hotel in Belfast. At the Europa Hotel there was a vocal coach employed by "Let it Shine" and I auditioned before him.
> >
> > 6. After the September 2016 audition, I was notified by email that I had been selected to attend the next stage to sing in front of the producers of the show at Media City London. I auditioned three songs there before a panel. I was asked by one of the producers was there anything in relation to my family that would result in publicity. I told the show that my Uncle Declan had been murdered in Loughgall. She said that this was very sad and that was the end of the matter. However, she did take a note of this. I did not see how any previous criminal convictions my father had were in any

way relevant to my participation in the show and it had not occurred to me to refer to them in response to this informal query raised by the show's producers. I also view the fact that my father has criminal convictions is a private and confidential matter as it relates to me personally.

7. It was shortly after this audition I received a call from the producer, Claire, who informed me that I had been picked to attend the television audition due to take place in Manchester in October 2016 before a studio audience and the celebrity judges' panel …

8. Getting through to the televised audition was the highlight of my amateur singing career. I have invested a huge amount of time and effort and I was extremely proud that I had made it through to this stage. I had hoped the televised audition would help me grow my musical career whether or not I made it through the next round of the competition.

9. The show was pre-recorded and was first broadcast on BBC1 on Saturday 7 January 2017. My audition was a success and I beg leave to refer to a recording of the same when available. I believe that I presented as a likeable contestant. In the pre-audition discourse with the judges' panel, when asked what I wanted to achieve honestly answered that "I wanted to be known for my singing". My mother was pictured in the audience but not my father. Unlike some other contestants, no pre-audition VT was shown relating to my family life or background. I performed the well-known Sinatra song "New York, New York" and received an excellent reaction from the crowd and

the judges' panel. I received enough marks or "stars" from the judges' collective vote to proceed to the next round of the competition.

…

12. A week after the broadcast of my televised audition, the Sun Newspaper in its online editions carried articles which I believe breach my privacy and data protection rights. … The online article remains published at the date of the issuance of these proceedings.

13. On 14 January 2017, the Sun Newspapers and the online edition (at 10:41 pm) published a story, displayed in its original/existing format below under the following Banner:

"EXCLUSIVE" headline

> *"BAD DAD of a wannabe star on Gary Barlow's new talent show 'Let it Shine' was an IRA terrorist who was jailed for 25 years: Deaghlan Arthurs, 18, is the son of ex-IRA Bridgade Commander, Brian, who was jailed for 25 years."*

14. The story that the Article is seeking to "exclusively" tell the reader is the fact that my father was an IRA terrorist. I was born after the ceasefire and had no involvement or knowledge of events in respect of my father. I believe that the fact that my father's conviction is a matter in respect of which I have a reasonable expectation of privacy and that the publication of the same amounts to processing of my personal and sensitive personal data by the defendant.

> 15. Implicit within the title is that there is some relevance of my father's criminal convictions to my worth or ability as a contestant in a singing talent show. I dispute this – his convictions have nothing to do with assessing my worth or ability as a contestant on the talent show.
>
> 16. The article continues:
>
> 'Let it Shine hopeful Deaghlan Arthurs is the son of a convicted IRA terrorist who was jailed for 25 years. Deaghlan, 18, of County Tyrone, Northern Ireland, was seen last week reaching the next stages of the BBC contest singing New York, New York. The fresh-faced hopeful impressed the Let it Shine judging panel last week with his charismatic rendition of Frank Sinatra's New York New York. The performance saw him win a standing ovation from all four judges while Gary Barlow gushed he was "amazing, absolutely amazing". But his dad Brian, 51, is an ex-IRA Brigade Commander jailed for possessing explosives. He was released in 2000 after 5 years under the terms of the Good Friday Agreement. In 2012 he was convicted of a £250,000 mortgage fraud and given a suspended jail term. In 2014 he was named as the chief perpetrator of a gang funding letter bombs by selling counterfeit fags. He was then said to have "strong" links to the New IRA. Deaghlan's family were not featured in any video clips on the show'."

[4] The judge went on to make certain findings of fact. The plaintiff was born on 14 October 1997 and was therefore 18 and in law no longer a child at the time he applied to take part in the talent show on television.

[5] The judge noted at paragraph [9] that by his own admission Declan Arthurs chose to tell the show's producer when asked about anything in relation to his

family that would result in publicity, that "my Uncle Declan had been murdered in Loughgall".

[6] The judge noted that he did not choose to disclose his father's background.

[7] It was accepted at the hearing before us that his uncle was Declan Arthurs (Senior) who was part of an IRA attack on Loughgall Police Station which was met with overwhelming force by the SAS and that Declan Arthurs was one of those shot dead.

[8] The judge noted that the talent contest involved not only assessment of singing but involved references to collective appeal, compatibility and cohesion in the literature provided.

[9] He had already noted the express enquiry from the show's producer about the family of the intended plaintiff. Short video pieces about the background and family of some of those being auditioned were shown by the producers of the programme. The judge noted that Mr Arthurs had already sung professionally in Ireland on a number of occasions. He rejected the contention that the plaintiff was entitled to a heightened or greater weight to be placed on his rights by reason of his age.

[10] He recorded at [19]:

> "There is no dispute about the accuracy of [the father's] convictions or about the criminal background of his father. His reason for not saying anything [to the BBC] is that it was "a private and confidential matter" as it related to him personally."

[11] The judge found that five days prior to the publications by the defendant in their newspaper and on their website the Irish News newspaper published a piece about Arthur's appearance on the talent show and referred to him being the son of a "prominent County Tyrone Republican Brian Arthurs". No steps were taken by Mr Arthurs with respect to that publication either at the time or since. The judge found that the background of the plaintiff's father was public knowledge in Northern Ireland.

[12] He found that the plaintiff had no legitimate expectation of privacy in regard to being linked to his father and his criminal record.

[13] He went on to carry out a balancing exercise and to consider some aspects of the Data Protection Act but for reasons which will now be set out it is not necessary to address those in more detail.

[14] The matter came on for hearing before the Court of Appeal on 8 November 2017. Mr Peter Girvan appeared for the plaintiff/appellant and Mr Gerald Simpson QC led Mr Jonathan Scherbel-Ball for the defendant/respondent. The court had the assistance of very comprehensive skeleton arguments from counsel.

[15] Mr Simpson's able skeleton argument had pointed out that Mr Girvan was now attempting to make an argument with regard to the Data Protection Act 1998 which had not been before the judge. He complained that counsel for Mr Arthurs was now seeking to argue that the material published about him and his father constituted "sensitive personal data" within the meaning of section 2(a) of the 1998 Act because it consisted of information as to "the racial or ethnic origin" of APD. This was outwith his summons of 3 February 2017 and had not been argued before Burgess J.

[16] The court indicated its unwillingness to go outside what had been put before the lower court. Mr Girvan accepted that and, further, expressly conceded that he was no longer relying on section 2(g) and (h) as headings for his proposition that what had been said about his client constituted "sensitive personal data".

[17] Counsel was then also asked by the Lord Chief Justice where the requisite notice under section 10 of the Data Protection Act, relied on by APD, was to be found in the papers. Mr Girvan referred to a letter from his solicitors sent to the defendant and to a solicitor who was not in fact acting for the defendant on 19 January 2017. It was pointed out to him that there was absolutely no reference to the Data Protection Act in that letter (to be found at page 109 of the papers). The only cause of action relied on was "the common law tout (sic) of misuse of private information". Mr Girvan then elected not to pursue his appeal with regard to the Data Protection Act any further but to leave that issue to any trial of the matter when further factual evidence might be given with regard to these issues.

[18] The case therefore proceeded only with regard to the application for an interim injunction grounded on the tort of misuse of private information.

[19] On that basis Mr Girvan submitted that the learned judge was wrong in addressing the two stages of the test to be applied. He accepted that there was an onus on the plaintiff pursuant to section 12 of the Human Rights Act. That onus required the intended plaintiff, firstly, to show that he had a reasonable expectation of privacy which had been breached. The second stage of the test was whether the rights of the appellant pursuant to Article 8 of the European Convention were likely to prevail over the rights of the newspaper to freedom of expression pursuant to Article 10 of the Convention. I set those articles out.

> "Article 8
>
> **Right to respect for private and family life**

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.

Article 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

[20] The court has taken into account the written and oral submissions of Mr Girvan and those of Mr Simpson in reply relating to the relevant statutes, case law, the convention and guidelines. It is not necessary to set them out seriatim.

The law

[21] The role of an appellate court in dealing with appeals from the court at first instance has been the subject of consideration in the Supreme Court in several recent cases. We note the judgment of Lord Reed delivering the judgment of the court in *Henderson v Foxworth Investments Limited and Another* [2014] 1 WLR 2600; [2014] UKSC 41; at paras [66] and [67]:

> "66. These dicta are couched in different language, but they are to the same general effect, and assist in understanding what Lord Macmillan is likely to have intended when he said that the trial judge might be shown "otherwise to have gone plainly wrong". Consistently with the approach adopted by Lord Thankerton in particular, the phrase can be understood as signifying that the decision of the trial judge cannot reasonably be explained or justified.
>
> 67. It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

[22] This dictum was cited with approval in *Carlisle v Royal Bank of Scotland* [2015] UKSC 13 at paras [21] and [22] and by Gillen LJ in this court in *H v H* [2015] NICA 77. See also *DB v Chief Constable of PSNI* [2017] UKSC 7 at paras [78] to [80].

[23] The need for appellate restraint is, of course, particularly manifest in a case, such as this where the judge is exercising a discretion, as here, dealing with the alleged tortious breach. "The grant of an interlocutory injunction is a remedy that is both temporary and discretionary": Lord Diplock in *American Cyanamid v Ethicon Limited* [1975] AC 396 at page 405.

[24] In *Lord Browne of Madingley v Associated Newspapers Limited* [2008] QB 103 the Court of Appeal in England was dealing with the particular situation we face here, namely an appeal from a judge's order with regard to restricting the publication of information for alleged misuse of private information. The Master of the Rolls, Sir Anthony Clarke, as he then was, said the following at paragraph 45:

> "The approach which should be adopted on an appeal of this kind is not, we think, in dispute. Although the exercise upon which the judge was engaged was not the exercise of a discretion it was similar in that it involved carrying out a balancing exercise upon which different judges could properly reach different conclusions. In these circumstances it is now well settled that an appellate court should not interfere unless the judge has erred in principle or reached a conclusion which was plainly wrong or, put another way, was outside the ambit of conclusions which a judge could reasonably reach."

[25] *Browne* is also a helpful authority on the approach to be taken by the court in privacy cases. The Master of the Rolls cited the judgment of Lord Nicholls in *Campbell v MGN Limited* [2004] 2 AC 457 at paragraphs [13], [14] and in particular [21]:

> "Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy."

At paragraph 23 of the judgment in *Browne* the Master of the Rolls said this:

> "As we see it, the approach required by Section 12 arises in this way. The court should first consider whether this is a case in which Article 8 is engaged. It should then consider whether Article 10 is engaged and, critically, whether the applicant for relief has shown that he is likely to establish at a trial that publication should not be allowed within the meaning of Section 12(3) of the HRA."

At paragraph 24:

> "The first question under Article 8 is whether in respect of the disclosed facts the claimant has a reasonable expectation of privacy in the particular circumstances of the case."

[26] We pause to observe that his use of the word 'engaged' at paragraph 23 would appear, in the light of the other dicta at 24 and 37, to mean "have a reasonable expectation of privacy". He continued at paragraph [26]:

> "The cases make it clear that, in answering the question whether in respect of the disclosed facts the claimant has a reasonable expectation of privacy in the particular circumstances of the case the nature of any relationship between the relevant persons or parties is of considerable potential importance."

Here we are not concerned with that relationship, but we are concerned with "the disclosed facts". Clearly there is no relationship of confidence between APD and the defendant.

[27] This point is reiterated by the Master of the Rolls at paragraphs 32 and 37.

> "32. That is clear, for example from Lord Nicholls' formulation of the test, namely whether *in respect of the disclosed facts* the claimant has a reasonable expectation of privacy – our emphasis. As we see it the test must be applied to each item of information communicated to or learned by the person concerned in the course of the relationship.
>
> 37. If, in respect of particular information, there is a reasonable expectation of privacy, Article 8 is engaged. The question is then whether interference with those rights should be permitted under Article 8(2)."

[28] Short reference was made to *In Re JR38* [2016] AC 174. The applicant there, when aged 14, was involved with other young persons in serious rioting causing danger and fear to local residents. At the request of the police two local newspapers published images of him and others while rioting to assist the police in identifying the participants and as part of a campaign to deter further acts of public disorder. On the applicant's application for judicial review the Divisional Court of the Queen's Bench Division in Northern Ireland refused his application, holding, by majority, that Article 8 was engaged but that the interference with his Article 8 rights was justified in the circumstances as being necessary and proportionate.

[29] On appeal to the Supreme Court the full court agreed with the Divisional Court that if there was interference it was justified. However, the majority considered that the applicant's Article 8 rights were not engaged i.e. that he had no reasonable expectation of privacy in relation to the subject matter of his complaint. The majority held that the test, which was the same whether one described it as reasonable expectation or legitimate expectation of privacy, was an objective one which had to be applied broadly, so that the court would, in taking account of all the circumstances, consider the applicant's attributes, the nature of the activity in which

he had been involved, the place where it had happened and the nature and purpose of the intrusion. The fact that the applicant was a child was a factor to be taken into consideration. As Lord Clarke of Stone-cum-Ebony JSC said at paragraph 114:

> "The law is to be applied broadly, taking account of all the circumstances of the case. In Lord Steyn's famous phrase, in law context is everything. "

Consideration of first stage expectation

[30] In *Axel Springer AG v Germany* [2012] ECtHR 493 the Grand Chamber of the European Court of Human Rights considered whether a daily newspaper in Germany was entitled to publish the fact that an actor had been arrested in possession of cocaine at the Munich Beer Festival, contrary to the findings of the German courts.

[31] One finds in the judgment at paragraphs 88 and following matters that relate more to the issue of the balancing exercise between Articles 8 and 10. The court here held that there was a breach of Article 10. The rights of the press were not confined to reporting political issues or crimes but could extend to sporting issues or the activities of performing artists.

[32] As this case was before the court on foot of an acknowledged interference with the newspapers Article 10 rights under the Convention attention was paid to the balance between Articles 8 and 10 rather than to the first stage issue. Nevertheless paragraph [91] is relevant to our consideration:

> "91. The role or function of the person concerned and the nature of the activities that are the subject of the report and/or photo constitute another important criterion, related to the preceding one. In that connection a distinction has to be made between private individuals and persons acting in a public context, as political figures or public figures. Accordingly while a private individual unknown to the public may claim particular protection of his or her right to private life the same is not true of public figures (see *Minelli v Switzerland* (App. No. 14991/02) (Admissibility Decision, 14 June 2005) and *Petrencov Moldova* [2011] EMLR 77 at paragraph [55])."

[33] Bearing that in mind in this context one notes that this young man was somebody who had already performed in public in his own county. More importantly, he had entered this competition expressly in the hope of appearing on national television and he did so. An interesting question might arise if he had not

been chosen to appear on television but that is not the case. He had put himself in the public eye and, indeed, if he had got through at that stage would have sought and obtained further mass coverage throughout these islands.

[34] While clearly not therefore a household name in the entertainment or political fields he had, of his own volition, sought and obtained publicity.

[35] Mr Girvan sought to rely on the decision of the House of Lords in *In Re S (A Child)* [2004] UKHL 47; [2005] 1 AC 593. *S* was a child aged 5. His parents separated and he went to live with his father. His brother died of what was found to have been salt poisoning and the mother was indicted for murder. It was common case that the order of the judge in the care proceedings prohibiting any identification of S's name or school was lawful but his subsequent order permitting the name and photographs of the mother and the deceased child to be published was at issue. Ultimately the House held that that interference with the child's Article 8 rights, albeit distressing, was lawful.

[36] Lord Steyn, delivering the judgment of the House, said the following at paragraph 18:

> "In oral argument it was accepted by both sides that the ordinary rule is that the press, as the watchdog of the public, may report everything that takes place in a criminal court. I would add that in European jurisprudence and in domestic practice this is a strong rule. It can only be displaced by unusual or exceptional circumstances. It is, however, not a mechanical rule. The duty of the court is to examine with care each application for a departure from the rule by reason of rights under Article 8. In that case it was accepted that Article 8 was engaged."

[37] Mr Girvan relied on *Regina (L) v Metropolitan Commissioner of Police* [2010] 1 AC 410; [2009] UKSC 3. The claimant there applied for a job supervising children. The Metropolitan Commissioner of Police disclosed on foot of statutory provisions not only that her son had been convicted of robbery but that the social workers concerned with the family prior to that believed that she had very little control over his behaviour at the age of 13 or knowledge of his whereabouts. The court held that her Article 8 rights were engaged but the disclosure had been reasonable. We do not see how those very different facts or the conclusions of the court assist APD. The court proceeded to consider that the Article 8 rights were in that case not such as to prevail over the duty of disclosure.

[38] Mr Girvan sought to rely on *PJS v News Group Newspapers Limited* [2016] AC 1081; [2016] UKSC 26. But the facts there are so radically different that we do not see

that it assists the applicant in the case before us either. The information which the claimants there were seeking to restrain related not to the criminal convictions of one of the parties to the marriage but to the private sexual activities of that person. As stated above by Lord Steyn there is an important principle that the press are at liberty to report what happens in a court sitting in public. That is completely different from private sexual practices which will normally be confidential, although sometimes one of the parties to them may subsequently wish to disclose or publicise them.

[39] Secondly, that case related to protecting the young children of the marriage from the disclosure of these matters. The matters had become known on the internet and in some jurisdictions in print but the court still considered it worth protecting the children from newspapers plastered with the details of their parent's conduct. That is radically different from the position here of a young man seeking to make a career in the public eye.

[40] We note that it is not in dispute that the judge was entitled to find that APD's personality and circumstances and compatibility were relevant to his selection for the show. This was reinforced by the BBC producer's express question to APD about his family quoted above. He chose to give an answer that elicited her sympathy – "that was very sad". He chose not to disclose either that his uncle had been an active member of the IRA or that his father had been as well, leading to a lengthy sentence of some 25 years for the offences which he had committed. The father had been convicted of further offences since his release from prison under the Good Friday Agreement.

[41] This Court is obliged to apply the express provisions of section 12 of the Human Rights Act 1998:

> "**Freedom of expression**
>
> (1) This section applies 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.
>
> (2) If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied—
>
> (a) that the applicant has taken all practicable steps to notify the respondent; or

(b) that there are compelling reasons why the respondent should not be notified.

(3) 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.

(4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—

(a) the extent to which—

(i) the material has, or is about to, become available to the public; or

(ii) it is, or would be, in the public interest for the material to be published;

(b) any relevant privacy code.

(5) In this section—

'court' includes a tribunal; and

'relief' includes any remedy or order (other than in criminal proceedings)."

[42] It can be seen that no injunctive relief "is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish the publication should not be allowed." 'Likely' in this section has been held to be more than an arguable case although not quite a probability.

[43] The applicant could not be "likely to establish the publication should not be allowed" unless he can establish that he had a reasonable expectation of privacy regarding the association of his father's convictions with himself as his son.

[44] Although it has been held that there is no precedence between the rights under Article 8 and those under Article 10 both the judge and this court must bear in

mind the injunction at section 12(4) to "have particular regard to the importance of the Convention right to freedom of expression …".

Conclusion

[45] On foot of the dicta above we must identify the facts which make up the context of the judge's decision. These may be summarised as follows.

(i) Declan Arthurs was and is of full age and not in law a child.

(ii) He was not some young person upon whom public attention had fallen through no choice of his own e.g. by some spontaneous act of bravery or excellence. He wished to be a performer. He entered the competition to seek to perform on television. He obtained that ambition and performed very creditably. He therefore put himself in the public eye.

(iii) He was expressly asked about "anything in relation to my family that would result in publicity" according to his own affidavit of 3 February 2017. He did not say that he wished to have no enquiry about his family but keep that entirely private. That might have had an adverse effect on his chances of being selected for the next broadcast stage of the competition. Rather he chose to refer to his uncle's death without disclosing his father's convictions which were at least as relevant.

(iv) His relationship to his father would have been well-known in the neighbourhood in which he lived.

(v) The link to the father was disclosed in the Irish News newspaper circulating in Northern Ireland prior to publication by The Sun, albeit without setting out his convictions.

[46] It appears to us that in the light of the disclosed facts the learned judge at first instance was fully entitled to conclude that the appellant had no legitimate or reasonable expectation of privacy restraining a newspaper from linking him, after he appeared on television in a creditable way, with his father's discreditable personal history. The father's convictions were in the public domain as was his relationship to the applicant, who voluntarily entered the public domain. We find that the appellant therefore was correctly found to have failed at the first hurdle he faced.

[47] In those circumstances it is neither necessary nor appropriate for this court to consider further the judge's findings under the second stage i.e. the balancing exercise between Articles 8 and 10. The appellant faced a formidable obstacle there in attacking what was clearly an exercise of discretion by the judge set out in a careful and measured way by him.

[48] Given the withdrawal of the appeal under section 10 of the Data Protection Act we do not need to consider Mr Girvan's novel and belated submission that this information was "sensitive personal data" because it identified the "racial or ethnic origins" of the applicant. That would be another considerable hurdle for this applicant to surmount, even before consideration of section 12 of the Act and its protection for journalistic publication.

[49] This appeal is therefore dismissed.