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Judgment: approved by the Court for handing down | *Delivered:* **07/01/09**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

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BETWEEN:

KENNETH CALLAGHAN

First Plaintiff;

and

INDEPENDENT NEWS AND MEDIA LIMITED

Defendant.

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BETWEEN:

NORTHERN IRELAND OFFICE

Second Plaintiff;

and

INDEPENDENT NEWS AND MEDIA LIMITED

Defendant.

STEPHENS J

Introduction

[1] This judgment is in respect of two actions which were tried before me at the same time. The parties agreed that all the evidence whether oral, documentary or by affidavit, would be admissible in both actions irrespective as to the action in which the evidence was given.

[2] In the first action, Kenneth Henry Callaghan, 39 (date of birth 8 April 1969) ("the first plaintiff") seeks an injunction to restrain Independent News

and Media Limited, ("the defendant"), whether by itself, its servants or agents or otherwise from:-

(a) publishing any unpixelated photographic images of the first plaintiff from which he could be identified ("an unpixelated photograph"); and

(b) publishing any information

(i) identifying the first plaintiff's address or the village, town, townland or city in which he lives,

(ii) identifying the addresses of his parents or siblings or the village, town, townland or city in which they live,

(iii) identifying any location at which he stays or which he frequents,

(iv) identifying his place of work, specifying his travel arrangements or specifying any other details that would enable members of the public to ascertain or anticipate his presence at a particular location at a particular time.

[3] The defendant acknowledged that it would be irresponsible to "reveal the detailed location of the whereabouts" of the first plaintiff and therefore there was no substantial issue as to the first plaintiff's entitlement to an order in respect of (b); however there was an issue as to the extent of the relief. During the trial greater precision was brought, not only to the order which the plaintiff sought to obtain ((b) above being the result of amendments), but also to the information which the defendant accepted that it would not publish. In essence the trial of the first plaintiff's action revolved around the single issue as to whether the defendant could or could not publish an unpixelated photograph.

[4] In the second action the Northern Ireland Office ("the second plaintiff") as the body responsible for operating the prisons in Northern Ireland, seeks a declaration that the defendant may not lawfully publish photographs of the first plaintiff without obscuring all of his distinguishing features ("an unpixelated photograph"). The second plaintiff further seeks a declaration that the defendant may not lawfully publish a photograph of any serving prisoner who is or who has been assessed at the plaintiff's Prisoner Assessment Unit, Crumlin Road, Belfast, unless all distinguishing features of that person are obscured, without giving the second plaintiff 48 hours notice of the intention to publish the same.

[5] Mr McDonald QC and Ms Askin appeared on behalf of the first plaintiff. Mr Shaw QC and Mr McMillen appeared on behalf of the second plaintiff. Mr Gerald Simpson QC and Mr MacMahon appeared on behalf of the defendant. I am indebted to all sets of counsel for the preparation of their skeleton arguments and the clear and concise manner in which they presented their submissions.

The offence committed by the first plaintiff, his conviction and the sentence imposed

[6] On 2 October 1987 the first plaintiff committed a brutal and callous sexual murder. His victim was Carol Jane Gouldie then aged 21. She had been employed as a secretary and she worked in the Priory Inn in Holywood in the evenings. The first plaintiff lived some doors away from her home and he was vaguely acquainted with her from that connection and also from the Priory Inn. The first plaintiff had enjoyed a lengthy relationship with another woman but she had finished it as she did not see a future there. When considering the present risks posed by the first plaintiff it is important to bear in mind the fact that the lethal attack that he perpetrated in 1987 was not on the woman with whom he had a relationship but rather the attack was transferred to and perpetrated upon a woman with whom he had only a vague acquaintance. To return to the sequence the first plaintiff broke into Carol Gouldie's otherwise empty house and hid having armed himself with in effect a hammer and when Carol Gouldie returned he inflicted numerous blows to her head with that weapon. He then tied her hands behind her back and placed a cushion cover as a hood over her head. He then raped her either as she was dying or when she was dead. The purpose of the cushion cover was to hide her identity so that he did not know that it was another girl rather than his ex-girlfriend upon whom he was carrying out these atrocities. The plaintiff then left her house and went out that evening to the pictures with a girlfriend. Later that same night he drove around Holywood with a friend and gave two female friends lifts to their houses, arranging a date with one of them for the next Tuesday evening. In the course of the police investigation the first plaintiff gave a totally dishonest account of his movements and what he had seen. He only made admissions when confronted with the fact that blood had been found on his shoes. His actions in the aftermath of the killing suggest that he felt no regret at the terrible deed that he had committed. The effect on Carol Gouldie's family is illustrated by the deceased's mother's statement that her life has been so brutalised that it can never be the same again. That she finds it impossible to come to terms with the loss of her daughter. She described her daughter as gentle, caring and gifted – a person who loved life and was loved by all who knew her. Mrs Gouldie fears for the welfare of her other children and feels locked in the past. The impact of this heinous crime has been more than she could ever express in words. This

court and the public are acutely conscious of the intense suffering of the family of Carol Jane Gouldie.

[7] The first plaintiff was arrested on 4 October 1987. On 23 June 1988, McCollum J sentenced the first plaintiff to life imprisonment. The tariff or the period representing the elements of retribution and deterrence was set by Kerr LCJ on 31 January 2005 at 21 years. The tariff period expired on 9 October 2008. Thereafter whether the plaintiff remains in custody or is released on licence is the responsibility of the Parole Commissioners under the Life Sentences (Northern Ireland) Order 2001. Under Article 6(4)(b) of that Order the first plaintiff cannot be released on licence unless the Parole Commissioners are satisfied that it is no longer necessary for the protection of the public from serious harm that he should be confined. Accordingly at present it is possible that the first-named plaintiff will be released on licence by the Parole Commissioners. The question as to whether the first plaintiff is actually released on licence is undertaken by the Parole Commissioners after a rigorous examination of the evidence such as to satisfy them that the risk that the first plaintiff will pose to the public can be managed and that it is no longer necessary for the protection of the public from serious harm that he should be confined. No prisoner is released on a whim or on the basis of a hunch that he or she will not re offend. The Parole Commissioners are not influenced by the length of time that a prisoner has served after the expiration of the tariff imposed by way of retribution and deterrence, or by pressure on prison accommodation. The Parole Commissioners are independent of government. It was not suggested by the defendant that the imperative on the Parole Commissioners was anything other than public safety.

The essential basis of the first plaintiff's action and the defendant's acceptance of a general risk of harm to sex offenders

[8] The first plaintiff brings this action on the basis that as a sex offender who has committed a most heinous crime there is, inter alia, a risk to his life if unpixelated photographs of him were published by the defendant. The defendant wishes to publish those photographs so that members of the public can identify the first plaintiff and are therefore enabled to take precautions in respect of the risk that he poses.

[9] The first plaintiff is not a person deserving of sympathy when it comes to the question of obscuring photographs of him so as to prevent his recognition by that means by members of the public. However the existence of a general risk of harm to sex offenders was expressly accepted by the defendant at the trial of these actions and indeed it was accepted implicitly by it prior to the trial. The extent of that risk remained to be decided and particularly as to whether it included an increased risk to the life of the first plaintiff by reason of the publication of unpixelated photographs of him

when taken in conjunction with the tone and content of the articles that have been published by the defendant.

An illustration of the extent of the risk of harm to those perceived to be sex offenders

[10] The fate that can befall even those who are incorrectly perceived to be sex offenders is illustrated by the case of *R v Stephen Lee Wright and others* [2007] NICC 33. On 26 December 2004 Stephen Lee Wright murdered Noel McComb at 20 Ireton Street, Belfast. Noel McComb was a street alcoholic and Stephen Lee Wright believed, entirely incorrectly, that his victim was a paedophile. He inflicted a vicious and sustained attack on his victim. I set out parts of Stephen Lee Wright's statement to the police as follows:-

> "We were sitting drinking vodka. There was a comment made that Noel McComb was a paedophile. I turned and I asked Noel 'was he in jail for being a paedophile?'. … He never responded to the question. I punched him twice. His injury was a busted nose and busted lip. And then I kicked his head off the wall. I kicked his head a few times. … I started to kick him more on the head when he was on the ground. I can't recall how many times. It was a lot of times. I jumped over his head. He tried to leave the house. I pulled him back and told him he wasn't going anywhere and then I had a vodka bottle and beat him over the head a number of times. When he was unconscious on the ground I kicked him some more. …. I turned to Elaine 'Have you any handcuffs'. She produced a set of handcuffs. Elaine and I tried to put the handcuffs behind his back. We got one on one wrist but couldn't get the other one on. … I then urinated on him and then I said I was going to burn the flat down."

[11] The effect of this murder on the victim's sister was devastating. The news of her brother's death and the sheer act of violence in the way he died was paralysing. All the more so in that her father had died in 1965, when she was 4 years old and then 7 years later in 1973 her mother was shot and brutally killed by masked gunmen. Her brother's death has added to her and her family's tragic history. She cannot get the image of his badly damaged face out of her mind. She has continuing nightmares and flashbacks. In a statement she concluded that:-

> "This event took place over two years ago but to me it feels like yesterday. All life should be honoured. No one has the right to take a life. The emotional damage does not end with the victim. It permeates and suffering can be felt for generations. Noel McComb was my brother and I loved him. His life had value and he was important to me."

This court and the public are acutely conscious of the intense suffering of the family of Noel McComb an entirely innocent individual who was incorrectly perceived to be a sex offender and who paid with his life.

[12] The specific facts in the case of *R v Stephen Lee Wright and others*, involving a number of alcoholics in a long drinking session, are different from any situation in which the first plaintiff could become involved. In deciding these actions I refer to that case merely as an illustration of a risk to life of a person *in a certain situation* who was perceived to be a sex offender even though he was not. It also illustrates *in that situation* that the risk is present without any articles or photographs having been published.

The newspaper articles published by the defendant

[13] The defendant has published a number of articles, not only in relation to the first plaintiff, but also in relation to (a) a number of other life sentence prisoners who could be released back into the community and (b) the general policy question as to whether there should be publication of all details in relation to sex offenders upon their release into the community so that members of the public can identify the offenders and take precautions in relation to the risks that they pose.

[14] The articles featuring the first plaintiff commenced on 12 February 2006. On that date the defendant published an article under the titles "Jailed sicko who abused dying woman to compete in run" and "Sex killer let out to train for marathon". This article was prompted by information that the first plaintiff was to avail of day release to compete in the Belfast marathon. The overwhelming burden of this article and all the articles published by the defendant was that the first plaintiff presently poses a significant risk to the public. That he is *and remains* a very sick individual, a psycho, a sex beast and evil. Indeed the purpose of the defendant in seeking to publish photographs of the first plaintiff is to enable the public to guard against the risks that he *presently* poses to their safety. Apart from one short acknowledgement published on 10 February 2008 that the first plaintiff had been assessed by professionals within the criminal justice system as suitable for inclusion in day release, the articles lack any balance in relation to the detailed assessments that had been carried out in respect of the first plaintiff. Apart

from that short acknowledgement the language employed by the defendant in its articles is replete with references to "killers on the loose", "back on the streets", "evil Callaghan", "sex beast", "notorious sex killer", and "sex beast killer".

[15] That this is all a description of the present risks that he poses is illustrated by an article on 7 May 2006 published under the heading "Killer on the run …" The word "run" being a play on words referring to the Belfast Marathon. In that article a prison source is quoted as describing:-

> "… the pervert is one of the least trusted inmates at Maghaberry and women officers are advised not to be alone with him."

In short the defendants were publishing that the prison authorities, who knew about the first plaintiff's present condition, considered him to present such a high risk, even to trained female prison officers that they should not be alone with him even in a prison where help was close at hand. On 12 February 2006 the defendant quoting on this occasion "a senior jail source" published that they had been informed that:-

> "There are many inmates who are afraid of him because they think he's a psycho".

This was a reference to those people who were in daily contact with the first plaintiff, namely fellow inmates, forming the view that he is presently a person to be feared by virtue of the risks that he currently poses. That a senior jail source considered those views to be of sufficient value to be repeated to the press.

[16] On 16 April 2006 the defendant published an article entitled "Attracta murderer held in the same unit as prison's most dangerous inmate". The article identifies the first plaintiff as the prison's most dangerous inmate. Jail sources are reported as saying that the first plaintiff:-

> "Is not to be trusted to be alone with a female member of staff".

That:-

> "Women prison officers aren't allowed to deal with him individually because of the dangers he is still thought to pose to females".

The defendants go on to quote a senior officer at the prison as saying:-

> "Despite being nearly 20 years in this place you couldn't take the risk of allowing Callaghan within 20ft of a lone female. He is a very calculating creepy offender."

The first plaintiff's application for an interlocutory injunction and further newspaper articles published by the defendant

[17] The first plaintiff's move from prison to the Prisoner Assessment Unit on 29 October 2007 prompted further interest on behalf of the defendant. On 2 February 2008 the defendant arranged for a photographer to take photographs of the first plaintiff in a public place outside the Prisoner Assessment Unit. On 1 February 2008 one of the defendant's photographers took photographs of the first plaintiff in a café and also took photographs of him in a shopping centre. One of the defendant's journalists approached the first plaintiff in the café and in the shopping centre.

[18] On 7 February 2008 the first plaintiff learnt that the defendant intended to publish an article about him together with the photographs which they had taken of him. He applied for an interlocutory injunction on Friday 8 February 2008 to prevent, inter alia, the publication of an unpixelated photograph. The defendant gave a number of undertakings to the court including one that it would not publish some details as to the plaintiff's address. In essence the interlocutory application came down to the question as to whether the defendant should be restrained until the trial of the action from publishing any unpixelated photograph of the first plaintiff. I granted the interlocutory injunction in those terms until the trial of the action. The defendant remained at liberty to publish many other details in relation to the first plaintiff including, for instance, his name, date of birth and the details of the crime which he had committed.

[19] On 10 February 2008 the front page headline in the Sunday Life was "Life ordered not to publish pictures of killers and rapists". "Banned". The various articles in that edition of the paper continued to describe the first plaintiff as posing a significant ongoing risk to the public. It was in this edition of the paper that there was the short acknowledgement that the first plaintiff had been assessed by professionals within the criminal justice system as being suitable for inclusion in the day release programme. However again the overwhelming sense was that publication of an unpixelated photograph of the plaintiff was vital information to guard against the present and substantial risk posed by the first plaintiff to the public.

Finding in relation to the tone and content of the newspaper articles published by the defendant

[20] I hold that the tone and content of these articles were calculated to and did engender considerable public hostility and animosity towards the first plaintiff. That there will be elements of the public informed by these articles who will perceive the first plaintiff as posing a present and substantial risk to the safety of any woman who is in contact with him. That the articles did not provide any balance by explaining for instance the supervision by the authorities of the first plaintiff in the community and the detailed steps taken to assess and address the risks that he poses to the public before there is any question of release on strict licence conditions. I also find that the articles failed to contain any information as to the risks that can be created to the public by the identification of the precise whereabouts of sex offenders at a stage when they are being rehabilitated back into the community. Not only was no such information provided to the public but the defendant's lack of response to the second defendant's invitation to explain the system evidenced an unwillingness on their behalf to consider such information. I hold that the articles are calculated to and do incite hatred and for reasons which I will set out, hatred in the context of the risks that the first plaintiff *presently* poses is counter productive if the first plaintiff's precise whereabouts are made generally known through the publication of unpixelated photographs. Counter productive because hatred combined with precise whereabouts actually increases the risks of re offending and therefore increases the risks to the public. I say generally known in contrast to careful and selected disclosure to a limited number of individuals which disclosure is presently undertaken by the prison or probation authorities.

The issue as to publication of the precise whereabouts of the first plaintiff and an inherent contradiction in the defendant's case

[21] After the interlocutory injunction was granted on 8 February 2008 and in its comment column on 10 February 2008 the defendant stated it was determined to continue to press for the right to publish unaltered images of the first plaintiff at a full hearing. This was to be on the basis of the media's freedom of expression and the public's right to be able to identify such criminals. However the defendant stated that:-

> "As a responsible newspaper we have no intention of revealing the detailed locations of the whereabouts of any of the prisoners".

Accordingly the defendant implicitly recognised that there would be an unacceptable risk of harm to the first plaintiff if the detailed locations of his whereabouts were known. Despite this the defendant wishes to publish unpixelated photographs of the first plaintiff. The defendant's motive in

wishing to do so is to enable members of the public in the same accommodation as the first plaintiff, the same general area, the same workplace, the same shops, pubs and other detailed locations to know that he is there so that they can take appropriate precautions. In short if the defendant is successful then members of the public in the first plaintiff's immediate communities would be able identify him and thereby know his "detailed locations". The first plaintiff contends, and I hold on the facts of this particular case, that this is an inherent contradiction in the defendant's case. On the one hand there is an acceptance that it would be irresponsible to give his detailed locations. On the other hand by publishing unpixelated photographs the defendant would in effect be achieving and would be desirous of achieving the very thing that it considers to be irresponsible, that is revealing the detailed locations and whereabouts of the first plaintiff. The only substantive difference between publishing his detailed location by giving for instance his home address on the one hand and publishing an image of him on the other, would be that readers of the newspaper outside the area in which he lives would not know his detailed locations. However the first plaintiff asserts, and I find, that the people from whom he would be most at risk would be a limited number of people but those limited number of people would overwhelming be in his immediate community.

Legal principles

[22] The first plaintiff's action is founded on two causes of action. The first is misuse of private information formerly known as breach of confidence and the second is harassment. The second plaintiff's action is grounded on the proposition that the proposed actions of the defendant are capable of being restrained as an interference with its statutory responsibility. The legal principles were essentially agreed between the parties. I will deal with each in turn.

Misuse of private information

[23] In respect of misuse of private information Mr Simpson, on behalf of the defendant, agreed with the propositions of law set out in the first plaintiff's skeleton argument dated 6 September 2008 and for instance the exposition of law given by Mr Justice Eady in *Mosley v Newsgroup Newspapers Ltd* [2008] EWHC 1777. Mr Simpson however emphasised the quality of evidence that would be required to be given in for instance determining factually that there was an increased risk to the life of the first plaintiff.

[24] The propositions of law can be summarised as follows:-

> (a) **The Human Rights Act**. The Human Rights Act 1998 requires the values enshrined in the European Convention on Human Rights be taken into

account. The foundation of the jurisdiction to restrain publicity is now derived from Convention rights under the European Convention on Human Rights see *In Re S (A Child)* [2005] 1 AC 593 at paragraph [23]. The relevant values in the actions before me are expressed in Article 2, 3, 8 and 10 of the Convention. The Convention "values are as much applicable in disputes between individuals or between an individual and a non Government body such as a newspaper, as they are in disputes between individuals and a public authority," see paragraph [9] of *Mosley v Newsgroup Newspapers Ltd*.

(b) **Expectation of privacy**. "The law now affords protection to information in respect of which there is a reasonable expectation of privacy, even in circumstances where there is no pre-existing relationship giving rise of itself to an enforceable duty of confidence," see paragraph [7] of *Mosley v Newsgroup Newspapers Ltd*. The question as to whether there is a reasonable expectation of privacy is an objective question and a question of fact. The reasonable expectation is that of the person who is affected by the publicity. The question was defined by Lord Hope in *Campbell v MGN* [2004] UKHL at paragraph [99] as follows:-

> "The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the claimant and faced with the same publicity".

The question whether there is a reasonable expectation of privacy "is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, 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 *Murray v Express Newspapers* [2008] EWCA Civ 446 at paragraph [36].

(c) **Balancing exercise**. "If the first hurdle can be overcome, by demonstrating a reasonable expectation of privacy, it is now clear that the court is required to carry out the next step of weighing the competing Convention rights in the light of an "intense focus upon the individual facts of each case"" see paragraph [10] of *Mosley v Newsgroup Newspapers Ltd* and see also *Murray v Big Pictures (UK) Ltd* [2008] EWCA 446 at paragraphs [35]-[40]. The balancing exercise is essentially a question of fact with the weight to be attached to the various considerations being of degree and essentially a matter for the trial judge. In carrying out the balancing exercise of weighing the competing Convention rights no one Convention right takes automatic precedence over another. "In order to determine which should take precedence, *in the particular circumstances*, it is necessary to examine the facts closely as revealed in the evidence at the trial and to decide whether (assuming a reasonable expectation of privacy to have been established) some countervailing consideration of public interest may be said to justify any intrusion which has taken place," see paragraphs [10] and [11] of *Mosley v Newsgroup Newspapers Ltd*. In carrying out the balancing exercise the justifications for interfering or restricting rights under Articles 8 and 10 must be taken into account. Finally proportionality must be applied to each which is called the ultimate balancing test. The judge will have to ask whether the intrusion, or perhaps the degree of intrusion, into the plaintiff's privacy was proportionate to the public interest supposedly being served by it , see paragraph [14] of *Mosley v Newsgroup Newspapers Ltd* and paragraph [17] of *Re S* [2005] 1 AC at 595. In weighing up the relative worth of one person's rights against those of another the use to which a person has put or intends to put his or her rights is to be taken into account, see paragraph [15] of *Mosley v Newsgroup Newspapers Ltd*.

(d) **Section 12 (4) of the Human Rights Act 1998 and the balancing exercise**. The requirement in Section 12(4) of the Human Rights Act 1998 to pay particular regard to Article 10 of the European Convention on Human Rights requires the court to pay particular regard to the rights of others in accordance with

Article 10(2) including the rights under Articles 2 and 3 as well as Article 17 which prohibits the abuse of rights, see Sedley LJ in *Douglas v Hello!* [2001] IPT 391 at paragraphs [133]-[134] and see also paragraph [50] of *Venebles & Thompson v Newsgroup Newspapers Ltd* [2001] 1 All ER 908. One does not start with the balance tilted in favour of Article 10, see paragraph [82] of *Douglas & Ors v Hello! Ltd & Ors* (No 3) [2005] EWCA Civ 595.

(e) **Photographs**. In carrying out the balancing exercise intensely focussing on the facts in the individual case then if that case involves competing rights under Article 10 to publish a photograph and Article 8 to restrain publication a court should be alive to the potential, depending on the particular facts of each individual case, that "as a means of invading privacy a photograph is particularly intrusive", see *Douglas & Ors v Hello! Ltd & Ors* (No 3) [2006] QB 125 at paragraph [84]. In *Von Hannover v Germany* 40 EHRR 1 at paragraph [59] the European Court of Human Rights remarked:-

> "Although freedom of expression also extends to the publication of photos, this is an area in which the protection of the rights and reputation of others takes on particular importance. The present case does not concern the dissemination of "ideas", but of images containing very personal or even intimate "information" about an individual. Furthermore, photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution."

(f) **Article 8 of the Convention**. The terms of Article 8 are

> "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."

"The guarantee afforded by Article 8 is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of `private life'" see *Von Hannover v Germany* [2004] ECHR 294 at paragraph [50].

(g) **Article 2 of the Convention**. "The right to life in Article 2 of the European Convention on Human Rights covers not only the negative obligation not to take the life of another person but imposes on contracting states a positive obligation to take certain steps towards the prevention of loss of life at the hands of others than the State. The positive obligation only arises when the risk is "real and immediate". A real risk is one that is objectively verified and an immediate risk is one that is present and continuing. The criterion of a real and immediate risk is one that is not easily satisfied: in other words the threshold is high," see paragraphs 19-20 of *Re Officer L* [2007] UKHL 36. "Furthermore there is a reflection of the principle of proportionality in the level of precautions which the State authorities have to take to avoid being in breach of the positive obligation under Article 2. There has to be a demonstration that the authorities have failed to do all that was reasonably to be expected of them to

> avoid the risk of life. This brings in the ease or difficulty of taking precautions and the resources available. It has not been definitely settled in the Strasbourg jurisprudence whether countervailing factors relating to the public interest as distinct from the practical difficulty of taking elaborate and far reaching precautions, maybe taken into account in deciding if there has been a breach of the positive obligation under Article 2." Lord Carswell continued in *Re L (An Officer)* at paragraph [21] by stating that - it may be correct in principle to take such factors into account but that he would prefer to reserve his opinion on the point. In this case the first plaintiff contends that there is a real and immediate risk to his life if those in his local community know his "whereabouts" by the publication of an unpixelated photograph. However such knowledge may also come through publication of his name to which the first plaintiff does not object. I consider that in so far as the first plaintiff's case is based on the suggestion that there is a risk to his life then it is necessary for him to establish whether there is an increased risk to his life by virtue of the publication of an unpixelated photograph of him.
>
> (h) **Freedom of expression**. The importance that the Strasbourg Court attaches to freedom of expression is illustrated by passages from the judgment of the court in *Nilsen & Johnsen v Norman* [1999] 30 EHRR 878 at paragraph [43] and *Observer and Guardian v UK* [1999] 14 EHRR 152 at paragraph [59]. In domestic law that importance was also emphasised, see the summary of the relevant authorities at paragraph [23] of *Thomas v Newsgroup Newspapers Ltd & Anor* [2001] EWCA Civ 1233.

[25] As I have indicated these propositions of law were not challenged by the defendant. In addition I consider that when carrying out any balancing exercise it is important not to conflate two aspects of public interest. There is on the one hand a recognised legitimate public interest in relation to the debate as to whether it is right to publish detailed information about sex offenders when they are to be released into the community and if so the extent of that information. I will term that "the wider debate". On the other hand there is a narrower and particular debate in this case as to whether it is in the public interest to publish unpixelated photographs of a particular individual that is the first plaintiff. I will term that "the narrower debate".

There are various observations that can be made about the public interest in the wider and narrower debates. It is not necessary to publish photographs of the first plaintiff to participate in the wider debate. A public interest in the wider debate does not establish a public interest in the publication of unpixelated photographs of the first plaintiff. The outcome of the wider debate will impact on the narrower debate. For instance if it was established by the defendant that the wider debate should be resolved as a general rule in favour of the publication of details in relation to sex offenders then that would have a significant impact on the outcome of the narrower debate as to whether there is a public interest in the publication of unpixelated photographs of the first plaintiff. I may say that the defendant did not seek to establish in evidence, by calling any witnesses or through any publications that the outcome of the wider debate should be determined in favour of publication. All the research articles introduced in evidence were to the effect that the wider debate should be resolved in favour of limited information being made available to the wider public because the type of laws in existence in the USA increase the risks to the public by undermining the home, employment and support networks of offenders who are being rehabilitated. The major aim is to decrease risk to the public. If public humiliation and identification of his precise whereabouts increases risks to the public then that is a course which is counter productive irrespective of the fact that the first plaintiff does not deserve any sympathy.

[26] In addition to the general legal principles that should be applied I was referred by counsel on behalf of the first plaintiff to a number of decisions relating to the approach taken in previous cases to the dissemination of photographs of criminals. In *Hellewell v Chief Constable of Derbyshire* [1995] 4 All ER 473 the distribution by police of photographs of the plaintiff, who had 32 previous convictions, was limited to distribution to shopkeepers in a local shop watch scheme in circumstances where there was a concern about the level of shoplifting. Accordingly the distribution was limited to those who had a particular and limited need to make use of it. In *R (On the application of Ellis) v Chief Constable of the Essex Police* [2003] EWHC 1321 concerned an attempt by Essex Police to introduce an offender naming scheme involving displaying posters containing a photograph of the face of a selected offender, his name, the nature of the offence he had committed and the sentence he was serving. The court ruled that the scheme was a genuine initiative to reduce crime and to increase the confidence of the public in the effectiveness of the police and the criminal justice system generally. However whether it was or was not lawful would depend on the structured assessment of the risks involved backed by more information and appropriate professional advice. That information was necessary before it could be assessed whether the possible benefits of the scheme are proportionate to the intrusion into an offender's Article 8 rights. If one contrasts that case with this case it is apparent that there has been no assessment in this case by the defendant of

the risks involved and there was no evidence that they have taken any professional advice or sought any information.

Harassment

[27] Article 1 of the Protection from Harassment (Northern Ireland) Order 1997 prohibits harassment. Thus:-

> "A person must not pursue a course of conduct:-
>
> (a) which amounts to harassment of another, and
>
> (b) which he knows or ought to know amounts to harassment of the other".

Article 3 provides a civil remedy. Article 7 which applies, inter alia, to the interpretation of Article 1, provides that:-

> "…
>
> (2) References to harassing a person include alarming the person or causing the person distress.
>
> (3) A `course of conduct' must involve conduct on at least two occasions.
>
> (4) `Conduct' includes speech."

[28] A series of publications in a newspaper can amount to harassment see paragraph [15] of *Thomas v Newsgroup Newspapers Ltd & Anor* [2001] EWCA Civ 1233.

[29] The nature of harassment and the nature of reasonable conduct were considered by Lord Phillips MR in *Thomas v Newsgroup Newspapers Ltd & Anor* [2001] EWCA Civ in the following terms:-

> "**[29]** Section 7 of the 1997 Act does not purport to provide a comprehensive definition of harassment. There are many actions that foreseeably alarm or cause a person distress that could not possibly be described as harassment. It seems to me that s.7 is dealing with that element of the offence which is constituted by the effect of the conduct rather than with the types of conduct that produce that effect.

[30] The Act does not attempt to define the type of conduct that is capable of constituting harassment. "Harassment" is, however, a word which has a meaning which is generally understood. It describes conduct targeted at an individual which is calculated to produce the consequences described in s.7 and which is oppressive and unreasonable. The practice of stalking is a prime example of such conduct.

[31] The fact that conduct that is reasonable will not constitute harassment is clear from s.1(3)(c) of the Act. While that subsection places the burden of proof on the defendant, that does not absolve the claimant from pleading facts which are capable of amounting to harassment. Unless the claimant's pleading alleges conduct by the defendant which is, at least, arguably unreasonable, it is unlikely to set out a viable plea of harassment.

The nature of reasonable conduct

[32] Whether conduct is reasonable will depend upon the circumstances of the particular case. When considering whether the conduct of the press in publishing articles is reasonable for the purposes of 1997 Act, the answer does not turn upon whether opinions expressed in the article are reasonably held. The question must be answered by reference to the right of the press to freedom of expression which has been so emphatically recognised by the jurisprudence both of Strasbourg and this country.

[33] Prior to the 1997 Act, the freedom with which the press could publish facts or opinions about individuals was circumscribed by the law of defamation. Protection of reputation is a legitimate reason to restrict freedom of expression. Subject to the law of defamation, the press was entitled to publish an article, or series of articles, about an individual, notwithstanding that it could be foreseen that such conduct was likely to cause distress to the subject of the article.

[34] The 1997 Act has not rendered such conduct unlawful. In general, press criticism, even if robust,

does not constitute unreasonable conduct and does not fall within the natural meaning of harassment. A pleading, which does no more than allege that the defendant newspaper has published a series of articles that have foreseeably caused distress to an individual, will be susceptible to a strike-out on the ground that it discloses no arguable case of harassment.

[35] It is common ground between the parties to this appeal, and properly so, that before 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.

[36] Mr Pannick QC, for the respondent, offered the example of the editor who uses his newspaper to conduct a campaign of vilification against a lover with whom he has broken off a relationship. Mr Browne rightly submitted that this unlikely scenario was miles away from the facts of this case. He submitted that editorial comment would only amount to harassment if it incited, provoked or encouraged harassment of an individual.

[37] It is not necessary for this court to rule on Mr Pannick's example, nor to attempt any categorisation of the types of abuse of freedom of the press which may amount to harassment. That is because the parties are agreed that the publication of press articles calculated to incite racial hatred of an individual provides an example of conduct which is capable of amounting to harassment under the 1997 Act. In so agreeing, Mr Browne recognises that the Convention right of freedom of expression does not extend to protect remarks directly against the Convention's underlying values (see *Jersild v Denmark* (1994) 19 EHRR 1, [1994] ECHR 15890/89, at para 35 of the former report, and *Lehideux and Isorni v France* (1998) 30 EHRR para 53)."

[30] A course of conduct which involves having a person watched is capable of amounting to harassment. Eady J stated at paragraph 23 in *Howlett v Holding* [2006] EWHC 41 at paragraph [23]:-

> "To keep someone on tenterhooks, knowing that she is likely to be watched as she goes about her daily life, seems to me remarkably cruel. Just because she does not know, in any given instance, that surveillance is taking place, it does not make it any the less distressing for her. What causes the distress is the awareness that secret surveillance is taking place, or is likely to take place at any moment. I see no reason why that form of besetting should fall outside either the spirit or the letter of the Act."

In the sphere of surveillance by the State there are strict controls provided by the provisions of the Regulation of Investigatory Powers Act 2000. This is an area worthy of substantial safeguards. However I also bear in mind that when considering the question of harassment through surveillance one has to take into account that in any event the first plaintiff is going to be supervised directly and indirectly by the prison authorities and is therefore being watched by them. It is the additional surveillance by the defendant which is in issue.

[31] In relation to this case the plaintiff seeks to establish that the taking of photographs, the surveillance and the threatened publication of unpixelated photographs of him when combined with the content of the articles which have been published and which he anticipates will be published amounts to harassment. I consider that the taking of photographs and the threatened publication by the defendants of unpixelated photographs in connection with press articles calculated to incite hatred of and animosity and hostility towards him is capable of amounting to harassment under the 1997 Order. In so far as the first plaintiff's statement of claim seeks an injunction restraining the defendant from pursuing any conduct which amounts to harassment I consider that the relief sought is too imprecise. Accordingly in relation to harassment the only issue which I will address relates to the question of taking and threatening to publish unpixelated photographs against the background of the articles which the defendant has published.

[32] The defendants rely on a defence under Article 1(3) of the Protection from Harassment (NI) Order 1997 that the publication of an unpixelated photograph of the first plaintiff is pursued for the purpose of preventing crime and/or that it is reasonable so that members of the public are aware of the risks posed by the plaintiff and can accordingly take precautions. The defence of preventing crime is not designed "to enable any Tom, Dick or Harry to set himself up as a vigilante and harass his neighbours under the

guise of preventing or detecting crime", see Eady J paragraph [31] *Howlett v Holding* [2006] EWHC 41. Accordingly what has to be addressed is not the prevention of crime by informing vigilante groups but the prevention of crime by enabling individuals for instance to avoid contact with the first plaintiff. If there is a low risk of re offending or if the risks are properly and effectively supervised and monitored in the community by the authorities then those are factors to be taken into account in considering the defence of reasonableness. Similarly if the risks posed by the first plaintiff have been overstated by the defendant then that also is a factor to be taken into account in respect of the defence of reasonableness together with other factors such as whether publication of unpixelated photographs actually increases the risks to the general public in the circumstances of this case.

Interference with statutory responsibility

[33] The second plaintiff recognises that in respect of the photographs which have been taken by the defendant of the first plaintiff it does not have sufficient standing to pursue an action for breach of confidence, see the judgment of Lord Woolf MR in *Broadmoor Hospital Authority & Anor v R* [2000] 2 All ER 727 at page 735C. The second plaintiff based its claim on the proposition that the actions of the defendant were interfering with the second plaintiff's statutory responsibility under Sections 2(1) and Section 41(1) of the Prison Act 1953 which it was required to perform in the public interest. That an injunction should be issued to prevent the defendant from acting in that way. The second plaintiff is responsible for the Northern Ireland Prison Service. By Section 2(1) of the Prison Act 1953 the Northern Ireland Prison Service is enjoined to make and give effect to arrangements for the welfare employment and training of prisoners. Under Section 41(1) of the Prison Act 1953 prison authorities may make and effect schemes for the supervision and assistance of prisoners with a view to their resettlement and rehabilitation. In *Broadmoor Hospital Authority & Anor v R* [2000] 2 All ER 727 at 734 paragraph [25] Lord Woolf stated:

> "I would therefore summarise the position by stating that if a public body is given a statutory responsibility which it is required to perform in the public interest, then, in the absence of an implication to the contrary in the statute, it has standing to apply to the court for an injunction to prevent interference with its performance of its public responsibilities and the courts should grant such an application when it appears to the court to be just and convenient to do so."

[34] Mr Simpson on behalf of the defendant did not dispute that there was a statutory obligation on the second plaintiff to make and give effect to

arrangements for the welfare of prisoners and to make and affect schemes for the supervision and assistance of prisoners with a view to their resettlement and rehabilitation. He also did not dispute that an injunction could issue though the injunction is designed to operate outside the confines of any prison or building owned or operated by the second plaintiff. He did not seek to take the point that if the first plaintiff was released on licence the statutory obligations were those of the Probation Service rather than those of the Prison Service.

Context of the statutory scheme

[35] Parliament has decided that life sentence prisoners may be released after their tariff has expired if their continued confinement is no longer necessary for the protection of the public from serious harm, see Articles 5 and 6 of the Life Sentences (Northern Ireland) Order 2001. The decision whether a life sentence prisoner should be released after the expiry of the tariff period is now taken by the Parole Commissioners. They are enjoined in discharging that function to consider inter alia, the desirability of securing the rehabilitation of life prisoners, see Article 3(4) of the Life Sentences (Northern Ireland) Order 2001. There is a public interest in the successful operation of the statutory scheme. To achieve that end the Prison Service operates a pre-release scheme which is designed to ensure the release of life sentence prisoners into the community. A major component of the pre release scheme is the Prisoner Assessment Unit. The purpose of this unit is so that prison staff can test and assess prisoners in conditions which are as close as possible to those on the outside world. Any assessment that takes place in a prison will be limited by the very fact that it is conducted in a prison. Prisoners may undergo successful counselling as to offending behaviour, they may undertake alcohol counselling and they may honestly profess that they will not abuse alcohol, however, when a prisoner is released into the temptations of the outside world the reality of the prisoner's behaviour may be entirely different. Whilst in the Prisoner Assessment Unit prisoners are carefully monitored to ensure that they follow the release plan prepared for them. This plan will be directed at reintegrating the prisoners into society and to provide support for them. In order to move from prison to the Prisoner Assessment Unit a prisoner has to be assessed by the prison authorities as suitable. At the Prisoner Assessment Unit he continues to be carefully monitored. There is equally a public interest in the successful operation of the pre-release scheme including the Prisoner Assessment Unit. There are publications in the public domain which set out the scheme in detail including the Northern Ireland Prison Service Information Booklet for Life Sentence Prisoners, the Prisoner Assessment Unit (Belfast) Information Booklet and the Multi Agency Sex Offender Risk Assessment and Risk Management Manual and Practice Guidelines.

The sequence of events in relation to rehabilitation of the first plaintiff

[36] Attempts to rehabilitate the first plaintiff commenced at the start of his sentence. However I will commence this sequence with the most recent events. On 29 November 2005 P A Quinn, B.Sc, M.Sc, C.Psychol, AFBPsS, Consultant Clinical Psychologist, provided a written report to the Life Management Unit at Maghaberry Prison in respect of the first plaintiff. This was a lengthy and detailed report extending to some 21 pages. It found that there was no evidence of the first plaintiff exhibiting major mental health difficulties and that he would be classified as being non psychopathic or exhibiting low evidence of this trait. Mr Quinn believed that the first plaintiff exhibited notable insight into his past behaviour. He displayed empathy and remorse. He had participated in a wide range of therapeutic and other relevant work during his time in prison from which he had derived significant benefits. Mr Quinn's reservation was in respect of the first plaintiff's ability to deal with romantic or intimate relationships with partners but that therapeutic monitoring and support in the community may be the best way of dealing with the situation. Mr Quinn concluded that "the overall results of … (a risk assessment tool) in Mr Callaghan's case suggest that he is of *low risk* of exhibiting violent behaviour". He also performed an assessment risk of sexual violence using the Structured Risk Assessment 2000. He concluded that the first plaintiff was of *low risk* of exhibiting sexual violent behaviour in the future. The final risk category with respect to future offending was *low risk*. Mr Quinn recommended his release from prison with appropriate supervision and support.

[37] However a different view in relation to the risks posed by the first plaintiff was taken by Mark Nicholson, Probation Officer, on 14 December 2005. On that date he reported to the Life Sentence Commissioners. His risk assessment was as follows:-

> "My assessment is that at this juncture Mr Callaghan has made significant progress in complying with work identified as necessary to reduce his level of risk. Risk of re-offending has been assessed as *high* using ACE (Assessment Case Management Evaluation) and the risk of harm should an offence occur is also considered *high* (using Risk Assessment Evaluation System). The risk is linked to unresolved issues concerning sexual relationships, fantasy and intimate personal relationships and recourse to violence, to assuage associated deviant thoughts."

However Mr Nicholson went on to state that the management of this risk and its reduction could be affected through further work which he identified.

[38] On 24 February 2006 a panel of three Life Sentence Review Commissioners met to consider the first plaintiff's case for review prior to the tariff expiry pursuant to Article 3(3)(a) of the Life Sentences (Northern Ireland) Order 2001. They noted the conflicting reports of Mr Quinn and Mr Nicholson and concluded that whilst the risk assessments presented to the panel were not consistent the experts were agreed that Mr Callaghan would benefit from further work on intimate relationships. That subject to satisfactory progress he should at an appropriate time be considered for progression to the pre-release scheme.

[39] Further work was undertaken and in September 2007 the first plaintiff was assessed in accordance with the ACE assessment tool as being of medium risk of re-offending. His score was 21. A medium risk of re-offending is in the bracket of 21-28. He was considered suitable for inclusion in a pre-release programme at the Prisoner Assessment Unit.

[40] On 29 October 2007 the first plaintiff was transferred from Maghaberry Prison to the Prisoner Assessment Unit. On arrival at that unit he had his terms and conditions explained to him and was asked to read and agree a contract which set out the behaviours expected of him whilst participating in the pre-release scheme.

[41] On 5 November 2007 the first plaintiff commenced a work placement.

[42] In October 2007 after the first plaintiff had been transferred to the Prisoner Assessment Unit he met a young woman who I will refer to as Ms A. He was required to record any such meeting in his diary and to report it to the prison authorities. He failed to do so. He was familiar enough with Ms A so as to on one occasion meet her for coffee in a city centre café. When this contact with Ms A was discovered by the prison authorities he was confined to the Prisoner Assessment Unit at the weekends as opposed to returning home. There was a multi-disciplinary team meeting. The first plaintiff accepted "his lack of clarity and transparency". That is his deceit. It was agreed to further monitor his behaviour and he was allowed to revert to normal pre-release conditions including weekend leave.

[43] The first plaintiff was granted home leave at Christmas 2007 from 21 to 27 December and then again from 28 December to 2 January 2008. During this period of temporary release and on a shopping trip he met a woman who I will refer to as Ms B. The friendship developed. The first plaintiff's father who was in poor health was admitted to hospital. On 12 February 2008 at a meeting in the Prisoner Assessment Unit the first plaintiff was advised by Governor Allenby and Mark Nicholson, Probation Officer, that they were

going to meet Ms B to ascertain her awareness of the offence which the first plaintiff had committed. That prior to that disclosure meeting he should not himself meet Ms B. However in March 2008 it was discovered that that instruction had been ignored by the first plaintiff in that Ms B had met the first plaintiff whilst she visited his father in hospital and on two occasions when she visited his parents' home. It subsequently also transpired that the disclosure that the first plaintiff had made to Ms B in relation to the offence he had committed had been inadequate. The first plaintiff was recalled from the Prisoner Assessment Unit to Maghaberry Prison in March 2008 as a consequence of this incident. Different views were taken of this incident. Mark Nicholson, Probation Officer, considered that the first plaintiff had made calculated efforts to hide the level and nature of the contact with Ms B and showed a lack of self-awareness. That accordingly the risk of re-offending had increased but that it was still a *medium risk* of re-offending. Governor Allenby concluded that in spite of the problems which had developed since the beginning of the year that these did not affect the first plaintiff's risk levels and she would regard him as not being a risk of serious harm to the public therefore suitable for release. She concluded that the risk is now sufficiently low for him to be released on licence.

[44] On 29 April 2008 Mark Nicholson, Probation Officer, reported to the Life Sentence Commissioners, now the Parole Commissioners. This report was prepared after the first plaintiff had been recalled to Maghaberry as a result of his contact with Ms B which had proceeded despite an instruction to the contrary. Mr Nicholson anticipated that Dr Phillip Pollock, Forensic Psychologist, would prepare an up-to-date risk assessment. He advised that there should be no return to the Prisoner Assessment Unit until a new risk assessment. Mr Nicholson concluded that in the light of the first plaintiff's lack of transparency in regard to contacts with females there was a heightened risk but that the risk had not increased to such an extent that he would be seen as someone imposing a high level risk of harm. The ACE score was now 28 which put the first plaintiff in the category of *medium risk* of re-offending. The medium category is a score of 21-28. This was an increase in score from 21 in September 2007. In view of the need for further assessment Mr Nicholson was not in a position to make a positive recommendation for release.

[45] On 29 May 2008 Mr P A Quinn reported to the Life Management Unit supporting the return of the first plaintiff to the Prisoner Assessment Unit and progression of his rehabilitation plan. He also drew attention to the major strain placed on the first plaintiff by the very negative and intrusive press reaction to the first plaintiff's release from prison.

[46] In view of the earlier differences of opinion as to the extent of the risk posed by the first plaintiff and in view of his failure to be comply with the conditions imposed on him it was decided to obtain a further risk assessment

from Dr Phillip Pollock, BSc(Hons), MSc, CPsychol, CSci.PhD, AFBPsS Consultant Forensic Clinical Psychologist. He met the first plaintiff on four occasions during May 2008 to undertake clinical assessment. He reported to the Life Management Unit on 31 May 2008. In that report Dr Pollock extensively reviewed the events surrounding Ms B which involved deception and lack of transparency on the part of the first plaintiff. He noted the impact of media attention which he considered to be a destabilising influence on the first plaintiff. It was apparent to Dr Pollock that the first plaintiff's psychological difficulties are manifest within the context of intimate relationships with a risk of sexual violence but he concluded that the first plaintiff was at relatively *low risk* of exhibiting violent behaviour.

[47] On 13 June 2008 a case conference was undertaken in the light of the report from Dr Pollock. It was agreed that the first plaintiff would return to the Prisoner Assessment Unit on 23 June 2008 with a number of conditions. The first plaintiff returned on that date and a further case conference was held on 1 August 2008 at which the first plaintiff's case was considered by Governor Cromie, Dr Pollock, Mr Nicholson, Probation Officer, and Mr Blackburn, a member of the Prisoner Assessment Unit staff. At that conference Mr Nicholson, Probation Officer, stated that the first plaintiff had been referred to a hostel and his case would be considered by a panel in due course. Hostel accommodation is a further step from prison to return to the community. Governor Cromie felt that a move towards hostel accommodation would have to wait.

[48] The preponderance of the evidence is that the first plaintiff is at *low risk* of exhibiting violent behaviour. Mr Nicholson, Probation Officer, has in the past assessed the first plaintiff as at high and then medium risk but it is significant that on 1 August 2008 he was raising the question of a move by the first plaintiff from the Prisoner Assessment Unit to a hostel and such a move would only be consistent with assessment of a low risk of re-offending. None of the professionals presently consider that the first plaintiff should not be in the Prisoner Assessment Unit. It is a matter for the Parole Commissioners as to whether they are satisfied that it is no longer necessary for the protection of the public from serious harm that the first plaintiff should be confined. For the purposes of this action the defendant did not call any evidence to the effect that the first plaintiff was a "psycho" or "shouldn't be within 20 feet of a woman". On the evidence before me the risk posed by the first plaintiff has been misrepresented by the defendant to the public. For the purposes of this action I find that there is a *low to medium risk* of re-offending. I emphasise that this is an assessment for the purposes of this action only and not otherwise. My finding is relevant to issues before me such as proportionality when considering competing claims under Articles 8 and 10 of the Convention. I do not decide the issue as to whether the first plaintiff should be released on licence. The decision to release on licence is for the Parole Commissioners. Their investigatory procedures with access to

all relevant witnesses and documents are best suited to this assessment. I again emphasise that the defendant to this action did not call any witnesses to justify its published claims. Those claims will no doubt be investigated by the Parole Commissioners who have an investigatory role as opposed to the adversarial system in these proceedings.

Research documentation in relation to the wider debate as to whether it is right to publish detailed information about sex offenders when they are to be released into the community.

[49] Most states in the USA require public disclosure of details as to where sex offenders reside and work. For instance in California any vehicle owned or driven by a convicted child sex offender is required to have pink registration plates. The law varies from state to state but the common element is physical identification to the community at large as to the precise whereabouts of sex offenders. The thesis behind these laws is that the public should know the identity of the offenders and are therefore then able to protect themselves. Furthermore community surveillance of sex offenders augments police surveillance. It is argued that under hundreds of watchful eyes, it is more difficult for a sex offender to escape into anonymity. Moreover, this increased surveillance may have a deterrent effect; registered offenders are less likely to commit sex crimes in the future if they believe their chances of detection are greater. Also, community knowledge of sex offenders' identities may help to prevent sex offences, rather than simply help to apprehend sex offenders after an offence has been committed. Individuals can tailor their behaviour to reduce the risk of victimisation by identified sex offenders. Finally, the community may feel empowered by this information rather than feeling helpless in the face of unknown criminals. For these reasons, community notification has gained tremendous public support in the United States in recent years.

[50] The system operated in the United Kingdom is to monitor and supervise the offenders. To increase their chances of securing employment and maintaining themselves in accommodation together with the maintenance of their circle of friends and family. That the authorities provide disclosure to limited and selected individuals to whom disclosure should be made. That the key ingredients to stability for an offender, who is being rehabilitated into the community, are a home, employment and a circle of family and friends. If these ingredients are maintained then the risks of re-offending are substantially reduced. That adverse publicity combined with precise identification of the offenders whereabouts substantially disrupts these key ingredients and thereby increases the risk of re-offending. The smoother the process of rehabilitation is then the less likely the offender will be to re-offend and therefore the greater the safety of the public.

[51] A considerable volume of research literature was introduced in evidence by the second plaintiff addressing the question in essence as to which approach is the most successful. There were some 17 articles and the second plaintiff also called Professor Bates Gaston an expert in this area to give oral evidence. A number of conclusions can be taken from that literature and her evidence.

[52] The first conclusion is that politics drove the passage of many of the sex offender laws in the USA. See Harvard Law Review Volume 119: 939 at 942

> "The Alabama Legislatures 'get tough on sex offenders' posturing led it to write a draconian law to calm public fear. This law is an example of a distorted policy outcome generated by the public's irrational evaluation of risk. Most of the laws components target notorious but rare crimes, and similar approaches have not proven effective in decreasing even these crimes in other states. By taking the easy and popular route, the Alabama Legislature wasted an opportunity to implement effective prevention and education programs that could help address the real dangers of child sexual abuse."

The same article concludes that these laws represent reflexive legislative reactions to public hysteria, not rational policy decisions. They waste not only public resources, but also an opportunity to actually protect the safety and well-being of potential victims of child sexual abuse.

[53] The second conclusion is that strict registry requirements and restrictions on where sex offenders may live and work further stigmatise them and present more barriers to their assimilation into their communities. This isolation can interfere with the offenders' treatment by making it difficult for them to adjust to society and build the kind of stable lives that minimize the likelihood of their re-offending, Harvard Law Review Volume 119: 939 at page 945. Thus that the laws in the USA increase the risks of re offending and therefore the risks to the public rather than decreasing those risks. This point was also made in an article by Bedarf entitled "Examining Sex Offender Community Notification Laws". One of the conclusions was that community notification programmes incite panic and violence within the community, and thereby prevent reformed sex offenders from reintegrating into the community. The literature also supports the proposition that public announcement of a sex offender's identity does more than simply warn people. It places a label on sex offenders which inhibits their inter-action in society and that by informing the public of a sex offender's presence,

notification law jeopardises an offender's chances of reintegrating into society and leading a productive life. Community notification laws destroy the anonymity that is crucial to reintegration.

[54] The third conclusion is that those seeking vigilante justice have used registries to locate sex offenders and commit violent crimes against them or against innocents living at their reported addresses, Harvard Law Review Volume 119: 939 at page 946. Washington State provides several examples of community notification generating a panic which transformed into vengeance. Washington State shows that 26% of sex offenders identified under the community notification law had been subjected to some form of harassment. The potential for harm to the offender exists, and the potential benefits to the community are negligible. Moreover, harassment is likely to drive a sex offender to move, assume an alias or otherwise fail to comply with the notification duties. In such cases, the benefits of community notification are lost altogether.

[55] The fourth conclusion is that in reality informed communities can do little more to protect themselves than uninformed communities.

[56] The fifth conclusion is that a re-integrative approach on the basis of stable housing and employment are more advantageous than the disruptive and anti-therapeutic effects of community notification. The findings indicate that community notification can have a critical impact on the minimum essentials needed for reintegration of offenders within the community. Those critical essentials are housing and employment.

[57] The abstract to an article by Wakefield entitled "Do Laws Targeting Sex Offenders Increase Recidivism and Sexual Violence?" states:

> "Sex offenders are universally hated and despised and seen as dangerous sexual predators unless locked up and kept under surveillance. Following a number of highly publicised violent crimes, all states (in the USA) passed registration and notification laws …. Although these laws were passed as a means to decrease recidivism and promote public safety, the resulting stigmatisation of sex offenders is likely to result in disruption of their relationships, loss of or difficulties finding jobs, difficulties finding housing, and decreased psychological well-being, all factors that could increase their risk of recidivism."

Similarly a meta analysis carried out by Gendreau and others in June 2000 further emphasised the need to maintain stable employment.

[58] The fifth conclusion is also supported in an article "Managing the Challenges of Sex Offender Re-Entry" published in February 2002 under the auspices of a project of the US Department of Justice, Office of Justice Programmes. That article stated:

> "… Prison administrators and staff must … recognise the critical ways in which they can support the successful transition and re-integration of sex offenders from within the prison. This can be realised in part through the use of specialised assessments and to guide case management plans beginning at the point of entry into the correctional setting, providing prison based programmes and services that 'work' to reduce recidivism with sex offenders, creating a prison environment that supports a rehabilitative philosophy and that establishes parallel expectations for sex offenders in the community and engaging in release planning with offenders to assure individuals are released with the structures and tools to support a crime free life, *such as appropriate housing, employment and community resources and supports."*(emphasis added)

[59] In respect of housing and employment the article continues:-

> "The inability of offenders to secure affordable and adequate housing and employment is among the most significant barriers to effective re-entry and this challenge becomes even more pronounced when sex offenders are involved.
>
> ….
>
> Housing. A significant factor that influences housing challenges for re-entering sex offenders is negative public sentiment. In some instances, neighbourhood groups – fuelled in part by certain community notification practices – have mobilised to both block sex offenders from moving into particular neighbourhoods or to drive them from existing residences. … Although the fears and concerns of local citizens are often understandable, and the enactment of these types of restrictions is well intended, some of the effects can actually compromise public safety – rather than increase it – by exacerbating known risk factors for sex offenders

(e.g. housing and employment instability, loss of community supports, and increased hostility and resentment)."

[60] In case it is thought that the research literature is applicable only to the USA the NSPCC's publication "Megan's Law: Does it protect children?" came to similar conclusions.

[61] All these conclusions were supported by the oral evidence of Professor Bates Gaston, Chief Psychologist of the Northern Ireland Prison Service. She described the internationally and nationally researched procedures used to identify risk of re offending together with the various agencies that supervised and monitored the arrangement for the reintegration of life sentence prisoners and sex offenders into the community. She placed emphasis on two very important factors leading to successful integration into the community and therefore in the reduction of risk of harm to the public. Those factors were:-

(a) Accommodation.
(b) Employment.

She stated that public disclosure was very often likely to increase the offender's level of anxiety. That it could destabilise his thinking and decision making process escalating the potential for re offending or to move to a different location which would not be known to the authorities. That the research indicated that public information such as contained in Megan's law does not reduce the risk of harm to the public but rather increases the risk of re offending and therefore of harm to the public. In particular identification to a local community disrupts the two key elements of accommodation and employment. I accept her evidence.

[62] The defendant did not call any expert evidence to challenge the evidence of Professor Bates Gaston. Furthermore it did not introduce in evidence any research or literature to support the proposition that community notification schemes were effective in reducing the risk of serious harm to the public. A universal theme throughout the research literature is that there is the ability to reduce the risk of re-offending with stable housing, employment and support and with careful monitoring of the offender. This should be allied to selective and controlled disclosure to a limited number of persons who are in contact with the offender. That increased stress is a precursor to re-offending. An offender does not generate sympathy but the essential objective is to reduce the risk to the public and accordingly the reduction of stress will reduce risk. In any event an offender faced with photographic identification can change his appearance and such publicity would lead to isolation and the potential for association with other sex offenders. Both these matters increase the risk of re-offending. I conclude on

the evidence in this case that the type of community notification scheme envisaged by the defendant, that is the ability to publish an unpixelated photograph of the first named plaintiff thereby enabling all those in his local community to immediately recognise him, combined with the articles that the defendant has published, would increase the risk of serious harm to the public by increasing the risk of the first plaintiff re-offending.

Risks to the first plaintiff

[63] In these actions there was no evidence of any specific threat having been made to the first plaintiff nor of any specific factor relating to where he proposes to live or work or socialise upon which he relies to support the proposition that there is a particular risk to him. The evidence of risks to the first plaintiff, including risk to his life, risk of degrading treatment, risk to his private and family life and his home, was based on the evidence of Acting Superintendent Wallace, the expert evidence of Professor Bates Gaston, the evidence of Governor Cromie, documentary evidence provided by the police and the research documentation. The defendant did not call any evidence in relation to this (or any other) aspect of the case.

[64] Acting Superintendent Wallace had 20 years experience as a police officer with particular experience in relation to sex offences. From July 2005 to October 2007 he was the policy lead officer for sex offences. He was involved in developing policies for sex offenders and represented the Chief Constable on the Northern Ireland Sex Offenders Strategic Management Committee. He served on a sub committee of that committee which oversaw high risk offenders.

[65] Acting Superintendent Wallace has authorised publication of unpixelated photographs of sex offenders in the past in circumstances where offenders have absconded but his view is that ordinarily such photographs should not be published. The reasons that he gave included:-

(a) The police and enforcement agencies use the possibility of exposure as a threat. It is his experience that the threat makes offenders compliant.

(b) That there have been a number of attacks on sex offenders in the community and such publication increases the risks of attack.

[66] In relation to attacks on sex offenders acting Superintendent Wallace referred to a document entitled "The following figures represent known main incidents towards individuals suspected or convicted of sexual offences". The document purported to provide statistics for the period 2006-2008 of murders, attempted murders, assaults, criminal damage or threats and abuse which

were "related to the fact that the victims are convicted of sexual offences". Acting Superintendent Wallace did not prepare that document but rather it was prepared by Detective Inspector Geddes who did not give evidence. Acting Superintendent Wallace was not himself involved in any of the investigations into any of the incidents. He accepted that when for instance a person is assaulted one could not definitely say what was the motive but rather this was a professional view formed by the police. Specifically in relation to the three murders and the two attempted murders counsel on behalf of the second plaintiff accepted that "the height of the evidence was that it was the current belief and suspicion of the Police Service of Northern Ireland that the murders are related to the perceived criminal background of the victims".

[67] Acting Superintendent Wallace's evidence to support the statistics contained in the document was based upon a limited number of police records which had been heavily redacted to maintain confidentiality. The documents were the reports that are made by the police as the incidents happened. They formed part of the police computerised criminal intelligence system. I will set out examples of a number of the incidents.

[68] The first example was a complaint by an individual who was known to the police who stated that he had been assaulted by members of his own family. That they were accusing him of being a paedophile. He was assaulted in his bed and then dragged out of his house and continually kicked. On arrival at the scene the police found blood on the bedroom walls and also drops of blood on the halls and carpets. The victim was taken to hospital by ambulance. He had severe bruising to his hands, arms and legs together with a fracture of his cheekbone. The police discussed with the victim moving address. They informed him that, "He couldn't live this way just waiting for something like this to happen again". The victim repeatedly stated that he did not wish to press any charges. There was no specific record one way or the other as to whether the victim was actually a sex offender but on balance I consider that he was. He was known to the police. He was advised to move house. The incident type was recorded as "sexual offence".

[69] The second example was a report to the police that an individual had just been verbally abused and had tins of beer thrown at him striking him on the shoulder by neighbours. The neighbours were still standing outside calling him a paedophile. The neighbour dispute had resolved prior to the police arrival.

[70] The third example was a report to the police that persons were wrecking his house. The house was that of an individual whose name was redacted. It was reported that there may be some connection with paedophile allegations. The individual was presently with a local priest. Acting Superintendent Wallace had no other documents in relation to this incident and was therefore unable to say whether the house was attacked or wrecked.

[71] The fourth example was a report of an incident in which the windows of a jeep had been smashed and paedophile written on the jeep at the front of the house. The subjects of this attack were not sex offenders but it transpired that a previous occupant of the house was a registered sex offender.

[72] A fifth example was an incident in which a report was made to the police that a crowd had gathered outside a woman's house and that she feared an attack on her house. Her son was on the sex offenders register though he no longer lived at that address. On arrival at 10.26 pm the police were told by the woman that she had heard that there was going to be a protest at her house. She informed the messenger that her son was not living there and the persons have now gone. The police were themselves then attacked with stones and withdrew from the area. Approximately one hour later they contacted the caller and she stated that the persons had called and advised her to move out. This was not threatening but was "friendly advice". The Housing Executive immediately arranged for the family to be rehoused that night. The house was boarded up. The Housing Executive provided security during the night for the house. The police passed again at approximately 1.00 am and by that time the woman had moved out and her house was boarded up.

[73] A sixth example was an incident in which a woman reported a call from a member of the UFF stating that an individual had 72 hours to leave. They stated that this because he was a paedophile. This pressure to move house and to disrupt family life is replicated by another incident of reported intimidation in which a convicted sex offender left his home address following a visit by "community restorative justice" who stated that local residents were aware of him and his conviction and that feelings were running high.

[74] A seventh example was a report by an individual at a police station who provided a handwritten note distributed to all residents warning them that a sex offender was visiting a family in the estate. It identified the registration number of his motor vehicle and gave the number of the house that he was visiting. The sex offender's daughter lived in that house. Neighbours were concerned for the safety of houses in the estate and for "the safety of the offender" if he returned to the estate. The handwritten note was accompanied by a photocopied newspaper cutting naming the sex offender. It was asserted that "this is the proof you have a pervert coming in your street".

[75] Governor Cromie who is in charge of the management of life sentence prisoners gave evidence as to the process over a period of three years prior to expiry of the tariff of assessment of a life sentence prisoner in relation to potential release on licence. This process involves multi-disciplinary teams including as co-members prison staff, psychologists and probation staff and others as appropriate to each individual case. In his experience there were three key elements to safe reintegration of life sentence prisoners into the

community. All those elements reduce risk and considerable effort should be taken to maintain them. The key elements were:

(a) Employment.
(b) A circle of support from family and friends.
(c) Accommodation.

Governor Cromie considered that an unpixelated photograph published by the defendant would lead some members of the community to do harm to the first plaintiff. That such clear recognition through a photograph would erode people's confidence to employ the first plaintiff. That it would have the effect of disrupting his circle of friends and could lead in general to life sentence prisoners "going underground". All this would lead to an increased risk of re-offending as it would disrupt all three of the key factors. Governor Cromie also stated that the publication of unpixelated photographs would for the same reasons effect the efficiency of the Prisoner Assessment Unit. The existing difficulties in obtaining employment for life sentence prisoners would increase. Prisoners would loss confidence in their ability to resettle. It would interfere with resettlement into society. Governor Cromie accepted that the first named plaintiff still presents a residual risk of serious harm to the public. That risk could be managed but it could not be eliminated. I accept the evidence of Governor Cromie and in particular his evidence as to the adverse effects of unpixelated photographs on the three key elements and accordingly the serious adverse consequences for the public by virtue of increased risk of re-offending following upon the substantial disruption of those key ingredients.

[76] The first plaintiff does not object to the publication of his name. The real and immediate risk to life that has to be established is by the additional component of publication of an unpixelated photograph of the first plaintiff. I am not prepared to hold on the state of the present evidence that there would be such a risk. There was insufficient evidence given in respect of the murders and attempted murders referred to in the police statistics and as to the beliefs and suspicions of the police in relation to those murders. Close analysis may have revealed that the circumstances of those offences were far removed from the circumstances of the first plaintiff. There has been no particular threat to the first plaintiff.

[77] I hold however that the first plaintiff has established that there would be disruption to his home, his private life and his family connections through acts of violence if his precise whereabouts was made known through publication of unpixelated photographs and given the background of the articles that have been published by the defendant.

Conclusions

[78] The first plaintiff has to establish an expectation of privacy. The defendant asserted that the first plaintiff had no reasonable expectation of privacy but was unable to articulate any basis upon which he would not have such an expectation. I consider that in all the circumstances of this case there was such an expectation. The attributes of the first plaintiff certainly remove all expectation of privacy as far as the police, the Prison Service and the Probation Service are concerned but there is a residuum of privacy afforded to convicted criminals. At the subsequent stage of undertaking the balancing exercise a criminal background and the risks that the criminal poses are highly relevant factors. However at this stage the first plaintiff did not consent to the intrusion into his privacy and knowledge of that lack of consent on the part of the defendant can be inferred. The intrusion occurred when he was in a café and in a shopping centre.

[79] The defendant's Article 10 Convention right to freedom of expression is clearly engaged. I am required to balance the competing rights of the first plaintiff under Article 8 of the Convention and the defendant under Article 10 of the Convention. There is a clear public interest in identifying criminals in the press and this is an important factor when carrying out the balancing exercise and the proportionality of any restriction on freedom of expression. I have set out my conclusions in relation to the evidence all of which are relevant to this balancing exercise. I do not propose to repeat all those conclusions at this stage but rather I summarise some of the points. The defendant is to be commended in relation to its stance against criminals and its desire to protect the public. However that the defendant intends to use any unpixelated photographs in conjunction with articles which lack balance and are aimed at creating hostility is out of proportion to the risks presently posed by the first plaintiff. The unpixelated photographs will identify the precise whereabouts of the first plaintiff which is something that the defendant accepts that as a responsible newspaper it should not do. The publication will increase the risk to the public by disrupting the first plaintiff's home employment and support networks. Such disruption is recognised as factors increasing the risk of reoffending and therefore the risk of harm to the public. There is in place monitoring and supervision by the Prison Service, the police and the Probation Service of the first plaintiff. The statutory scheme is for rehabilitation. In effect the defendant is seeking to introduce its own Megan's law irrespective of whether it is in the public interest and without proper regard for the accuracy of what they have published. The first plaintiff does not seek total anonymity. His name will continue to be published together with his age and details of the heinous crime that he committed. I consider that a restriction on publication of unpixelated photographs is a proportionate response and necessary in a democratic society. I find in favour of the first plaintiff on the basis of misuse of private information. I make an order in the terms set out in paragraph [2](a) of this judgment. There was no substantial dispute in relation to the

relief sought at paragraph [2](b) and I also make an order in those terms. It was accepted by the defendant that if the first plaintiff was entitled to an order on the basis of misuse of private information that he would also be entitled to the same order under the protection from Harassment (Northern Ireland) Order 1997. The application of the principles set out at paragraphs [27]-[32] producing in effect the same result. I so find.

[80] There was a similar acceptance by the defendant that the action brought by the first plaintiff would be determinative of the issues in respect of the action brought by the second plaintiff. I come to the conclusion in relation to the second defendant's action that there has been and is likely to be interference with its statutory responsibility. I make orders in the terms set out at paragraph [4] of this judgment.