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*Judgment: approved by the Court for handing (subject to editorial corrections)** | *Delivered:* **08/02/08**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

KENNETH CALLAGHAN

Plaintiff;

and

INDEPENDENT NEWS & MEDIA LIMITED

Defendant.

STEPHENS J

[1] The plaintiff, Kenneth Callaghan, brings this application for an interlocutory injunction to restrain Independent News & Media Limited, the defendant, until the trial of this action or until further order from publishing a photograph of him in the Sunday Life which has not been pixelated or obscured in such a way as to conceal his identity. The application was brought on an urgent ex parte basis. I have heard submissions from Ms Askin, on behalf of the plaintiff, and from Mr Gerry Simpson QC, on behalf of the defendant. I also heard submissions from Mr McMillan, on behalf of the Prison Service of Northern Ireland. I now give this ex tempore judgment which I direct should be transcribed.

[2] In view of the fact that if successful this application will affect the defendants Convention right to freedom of expression it is, in the ordinary course of events, required under Section 12(2) of the Human Rights Act 1998 to be on notice to the person against whom the application for relief is to be made. The application proceeded before me as if it had been on notice. No objection was raised to the Prison Service making submissions and I permitted those to be made even though they are not a party to the action. Mr Simpson, for the defendant, was content that the Prison Service had leave to make submissions provided that if the plaintiff's

application failed then they would not themselves immediately start their own application for an interlocutory injunction against the defendant. On that agreed basis I heard submissions from Mr McMillan on behalf of the Prison Service. It was also agreed that an affidavit would be sworn and filed in these proceedings by the Prison Service. An undertaking was given by the Prison Service that the draft affidavit would be sworn and filed.

[3] I am indebted to all counsel in the case for the concise and succinct manner in which they dealt with this interlocutory application. The defendant proposes to publish the photograph of the plaintiff on Sunday and accordingly the issues had to be identified and addressed at short notice.

[4] I should say something at the outset about the way in which these proceedings developed. The threatened publication was in the Sunday Life. Initially the plaintiff claimed an injunction to restrain the defendant in broad terms. The interlocutory injunction sought was to restrain the defendant from publishing or causing to be published any information identifying the plaintiff or from which he could be identified, publishing or causing to be published any photographs of the plaintiff which could identify the plaintiff or which could identify where the plaintiff currently resides or which could identify where any members of the plaintiff's family or friends currently reside or which could identify where the plaintiff currently works.

[5] The plaintiff then conceded that there was no objection to publication of his name or of the details of the crime that he had committed, but there was an objection to the publication of the exact address of the Prisoner Assessment Unit at which he resides and also an objection to the publication of his parents' address at which he may reside in the future together with the objection to the publication of his unpixelated photograph. Mr Simpson QC indicated to the court that his clients were prepared to give an undertaking that they would not publish the address of the Prisoner Assessment Unit or the address of the plaintiff's parents. The exact form of that undertaking was as follows:-

> "The Defendant (Sunday Life) hereby undertakes not to do the following, until further order:-
>
> 1. The Defendant will not identify where the Prison Assessment Unit is located and will ensure that no photographs of identifiable prisoners actually identify physical locations, including the Prison Assessment Unit, where they are being held.
> 2. The Defendant will omit any reference to the Prison Assessment Unit.
> 3. The Defendant will not publish photographs of any staff employed by the Prison Service.

4. The Defendant will not publish the address of the parents of the Plaintiff or the village in which they live."

[6] The application has, therefore, come down to the question as to whether I should or should not grant an interlocutory injunction restraining the defendant from publishing any photograph of the plaintiff which has not been pixelated.

[7] The plaintiff was convicted and sentenced in 1988 for a murder that he committed on 2 October 1987. He has been in custody since 9 October 1987. He was sentenced to life imprisonment. The tariff or the period representing the elements of retribution and deterrence were set by the Lord Chief Justice at 21 years. All questions of risk are then the responsibility of the Life Sentence Review Commissioners. In discharging any functions under the Life Sentences (Northern Ireland) Order 2001 the Commissioners shall have due regard to the need to protect the public from serious harm from life prisoners and have regard to the desirability of preventing the commission by life prisoners of further offences and securing the rehabilitation of life prisoners. Under Article 6(4)(b) of the same Order the plaintiff cannot be released on licence unless the Life Sentence Review Commissioners are satisfied that it is no longer necessary for the protection of the public from serious harm that he should be confined. They are required to and do carry out detailed risk assessments and analysis in relation to the prisoner. Any doubt as to risk is to be resolved in favour of the public. That is the scheme which has been set by Parliament and that is the context in which I am required to and do approach this case. The Life Sentence Review Commissioners have formed the view that there is no substantial risk to the public for the plaintiff to go to the Prisoner Assessment Unit.

[8] I shall say something more now about the crime the plaintiff committed in 1987 and the press coverage that has taken place in relation to the release of the plaintiff on licence.

[9] The crime that the plaintiff committed in 1987 was a brutal sexual murder which has had devastating effects on the family of his victim. The defendant has published articles in relation to the release of the plaintiff on licence. The plaintiff took part in the Belfast Marathon in May 2006. On 12 February 2006, in anticipation of the plaintiff participating in that Marathon, the defendant published an article in the Sunday Life under the following heading "Jailed Sicko Who Abused Dying Woman to Compete in Run. Sex Killer Let Out to Train for Marathon". Various extracts from the article are as follows:

> "A notorious sex killer who abused a woman as she lay dying is back pounding Ulster's streets during excursions from prison."

The plaintiff is referred to as "Evil Callaghan" and as the "Sex Beast and Pervert". Another paragraph says:

> "A lot of the prison staff have read his file and he really is one sick individual. He has never shown any remorse for what he did and some staff think he is still a risk because he is still relatively young."

The article continues:

> "He still gets some stick from the other prisoners for what he did, but there are many inmates who are afraid of him because they think he is a psycho."

That article was followed up on 19 February 2006 with another article and this was under the heading "Second Jailed Beast Lines Up for Top Race". Again, it referred to the plaintiff as a notorious killer who sexually assaulted a County Down woman after bludgeoning her to death in 1987.

[10] The defendant proposes to publish an article in the Sunday Life under the headline "Killers on the Loose". I draw the inference that the article will be published using language similar to the previous articles. That the present risk to the public posed by the plaintiff will be portrayed by the defendant in terms that the public may take it that he is presently a very substantial risk to public safety. That he is presently a killer on the loose and that he is and remains one very sick individual who is a psycho and a sex beast and evil. Previous articles contained no suggestion of any review and consideration of the plaintiff's risk by the Life Sentence Review Commissioners. There was no mention of the precautions that are put in place to ensure compliance with the terms of the then very limited release on licence. I may illustrate that lack of balance by setting out some of the matters contained in the affidavit which is to be sworn on behalf of the Prison Service. Paragraph 4 of that affidavit states that:

> "The Prisoner Assessment Unit is intended to manage the re-integration of Life Sentence Prisoners into society once they are in the final year of completing their tariff periods and are assessed as being ready for such a process. Research carried out by Dr Ian O'Donnell of Trinity College Dublin and others has demonstrated that phased release and home leave contributes to an increased chance that prisoners are safely re-integrated into society."

The affidavit continues by addressing the assessments that are carried out before a prisoner is released on licence:

> "… prisoners may be sent to the Prisoner Assessment Unit only if the Multi-Disciplinary Team and the Life Sentence Review Commissioners agree they are ready. The Multi-Disciplinary Team, as the name suggests, brings together persons from various backgrounds, prison officers who know the prisoner, psychologists, medical staff, if appropriate, police, probation, welfare, etc. The idea is that they can pool their knowledge and expertise to assess whether the prisoner may be ready for release and fundamentally whether the prisoners will pose a risk to the public if moved to the Prisoner Assessment Unit. The prisoner will also be assessed by the Life Sentence Review Commissioners which will have the benefit of numerous reports from the prison psychologists, etc."

The affidavit then addresses the public interest in the re-integration of prisoners into the community. It continues:

> "The purpose of the Prisoner Assessment Unit is so that staff can test and assess the prisoner in conditions which are as close as possible to those in the outside world. The court will appreciate that any assessment that takes place in prison will be limited by the very fact that it is conducted in a prison, for example a prisoner may successfully undergo counselling as to their offending behaviour, they may undertake alcohol counselling and they may honestly profess that they will not abuse alcohol, however, when a person is released into the temptations of the outside world the reality of the prisoner's behaviour may be entirely different."

The affidavit returns to the precautions taken in respect of risks to the public and to the sanction to be applied to prisoners if they do not comply with the terms of their licence. It continues:

> "During all these periods, ie the periods of release to the Prisoner Assessment Unit, the prisoner is carefully monitored to ensure that he follows the release plan prepared for him. This plan will be directed at re-integrating the prisoner into society and to provide support for that person. For example the plan may require that he works in a particular place, that he does not associate with certain persons, that he resides at specific accommodation, that he may be subject to a curfew and he does not consume alcohol. Even when on

> periods of release he will still be subject to spot checks. It should be stated that the Northern Ireland Prison Service has no hesitation in returning prisoners to prison, in Maghaberry in the case of lifers, if they breach the conditions of release. The primary concern is the safety of the public."

Then finally the affidavit returns to the public interest and states:

> "The Northern Ireland Prison Service is of the firm view that the Prisoner Assessment Unit system is very valuable not simply to prisoners, but also to the public in allowing the safe re-integration of prisoners. The Northern Ireland Prison Service has to operate within the legal framework set by Parliament. The central fact is that Parliament has decided that even life sentence prisoners should, in the normal course of events, be released (or at least conscientiously considered for release) in due course. As part of that the Northern Ireland Prison Service has a duty to ensure that prisoners have the opportunity to prove that they are fit for release."

[11] The plaintiff contends that the proposed article under the headline "Killers on the Loose" combined with a photograph of him will result in a threat to his life. That in the event of publication there would be a real and immediate risk to his life. In support of that contention the plaintiff relies on a number of factors including a police risk assessment. That risk assessment was made available to the court. It is headed "The following figures represent known main instances towards individuals suspected or convicted of sexual offences". It covers the years 2006, 2007 and 2008. It relates to Northern Ireland. I was informed that these are offences that took place in a public environment rather than in a prison environment. The risk assessment reveals that there had been approximately ten instances of threats, verbal abuse towards these individuals. This incorporates "phone calls, message, letters and concern within local communities." There have been approximately ten instances of criminal damage to property/vehicles of individuals. Significantly there had been three murders of persons who were suspected of or convicted of sexual offences over the years 2006, 2007 and 2008. In addition there were two attempted murders. Approximately five individuals had been assaulted and that involved assault occasioning actual bodily harm, grievous bodily harm and paramilitary type assaults.

[12] It was correctly pointed out by Mr Simpson that we do not have the exact details in relation to those offences and in exactly what circumstances they occurred. There are no details substantiating the inference that the motivation related to the offences which the victims either had or were suspected of having committed. We

also do not know whether before those offences were committed, publicity had been attached to a particular individual and that individual had been identified to members of the public by means of a photograph in a paper with major circulation in the area of his home within the meaning of Article 8. Those are matters which can be eventually resolved at a trial of this action.

[13] The plaintiff also relies on the likely tone and nature of the article and a lack of any balance in the previous articles. Further, the plaintiff states that there is a particularly known risk to sex offenders. This has also been referred to in the affidavit to be sworn on behalf of the Prison Service. Paragraphs 15 and 16 of that affidavit are in the following terms:-

> "15. Unfortunately in Northern Ireland, and in Great Britain, offenders and alleged offenders have been seriously assaulted and indeed murdered. The risk of attack also will apply to those with whom the prisoner is residing, flatmates, other hostel residents, members of his family etc. Further prisoners are regularly visited by members of the Northern Ireland Prison Service and probation staff. If such persons happen to be in the wrong place at the wrong time or if they are identified as assisting the prisoner their safety may be in jeopardy.
>
> 16. I do not believe that the concerns are idle or hypothetical. Indeed over the past few years there has been considerable public concern as to the presence of sex offenders in society at the end of their sentences. The Ventry Lane Hostel in Belfast has been the target of protests over the past two years forcing ex-offenders to relocate. This was largely a result of adverse press coverage which caused concern to members of the local community. This has led to wider issues for the Probation Board NI and others responsible for the provision of accommodation for released offenders. This has lead to such schemes being relocated. This, in itself, has caused additional cost to the public purse which, to the best of my knowledge at present has run into hundreds of thousands of pounds in Northern Ireland alone."

I make it absolutely clear that it was never suggested nor could it conceivably be suggested that there is any risk to the plaintiff from the family of the plaintiff's victim. They have conducted themselves with the utmost propriety in what is a most appalling and dreadful situation.

[14] The defendant states that I cannot be satisfied that there is a likelihood of a real and immediate risk to the life of the plaintiff. It is submitted that there is no direct evidence of this. There is no evidence of any threat to the plaintiff. There is no evidence of anything unusual or untoward occurring during the Marathon despite the advanced publicity in relation to it and the risk to the life of the plaintiff is pure speculation. I do not accept that proposition. I consider on the evidence before me that there is a risk of a real and immediate threat to the life of the plaintiff and also a risk of a real and immediate threat of inhuman and degrading treatment in relation to him. Those risks give rise to Article 2 and Article 3 rights of the plaintiff under the European Convention and they also affect his rights under Article 8. As Ms Askin submitted the test is evidence of real and immediate risk. There does not have to be evidence that the risk will actually materialise.

[15] The defendant's Article 10 rights under the Convention are engaged. If an order was made granting an interlocutory injunction that would limit the defendant's freedom of expression. Freedom of expression includes freedom to publish photographs and in that respect I was referred by Mr Simpson to the case of *Verlagsgruppe News GmbH v. Austria (no. 2)* where at paragraph 29 of the judgment of European Court of Human Rights it was stated:

> "The present case is not concerned with a restriction on the contents of reporting but with the prohibition to accompany a report with a picture of the person concerned. The Court recalls that Article 10 protects not only the substance of ideas and information but also the form in which they are conveyed (see, among other authorities, *News Verlags GmbH & Co. KG*, cited above, § 39 with a reference to *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, pp. 23-24, § 31). Furthermore, the Court has explicitly recognised that freedom of expression extends to the publication of photos (*Von Hannover v. Germany*, no. 59320/00, § 59, ECHR 2004-VI). Consequently, the preliminary injunction at issue constituted an interference with the applicant company's right to freedom of expression. This is not disputed by the parties. "

It is clear that a prohibition on the right to publish a photograph would be an interference with the defendant's Article 10 rights.

[16] I turn then to consider Section 12(1) of the Human Rights Act 1998 which deals with freedom of expression:

> "This section applies if a court is considering whether to grant any relief which, if granted, might affect the

exercise of the Convention right to freedom of expression."

Section 12(3) is in the following terms:

> "No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish the publication should not be allowed."

Section 12(4) provides:

> "The court must have particular regard to the importance of the Convention right to freedom of expression, and where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material …, to –
>
> (a) the extent to which –
>
> (i) the material has, or is about to, become available to the public; or
>
> (ii) it is, or would be, in the public interest for the material to be published."

[17] I turn, therefore, to consider the test under Section 12(3). The court has to be satisfied that the applicant is likely to establish that the publication should not be allowed. I was referred to the case of *Cream Holdings Limited and others v. Banerjee and others* [2004] UKHL 44. At paragraph [12] of his speech Lord Nicholls stated:

> "12. As with most ordinary English words 'likely' has several different shades of meaning. Its meaning depends upon the context in which it is being used. Even when read in context its meaning is not always precise. It is capable of encompassing different degrees of likelihood, varying from 'more likely than not' to 'may well'. In ordinary usage its meaning is often sought to be clarified by the addition of qualifying epithets as in phrases such as 'very likely' or 'quite likely'. In section 12(3) the context is that of a statutory threshold for the grant of interim relief by a court. "

Then at paragraph [14] consideration was given to the *American Cyanamid* test. I make it expressly clear that I do not apply that test in these proceedings. At paragraph [16] Lord Nicholls continued:

> "16. Against this background I turn to consider whether, as the Echo submits, 'likely' in section 12(3) bears the meaning of 'more likely than not' or 'probably'. This would be a higher threshold than that prescribed by the *American Cyanamid* case. That would be consistent with the underlying parliamentary intention of emphasising the importance of freedom of expression. But in common with the views expressed in the Court of Appeal in the present case, I do not think 'likely' can bear this meaning in section 12(3). Section 12(3) applies the 'likely' criterion to all cases of interim prior restraint. It is of general application. So Parliament was painting with a broad brush and setting a general standard. A threshold of 'more likely than not' in every case would not be workable in practice. It would not be workable in practice because in certain common form situations it would produce results Parliament cannot have intended. It would preclude the court from granting an interim injunction in some circumstances where it is plain injunctive relief should be granted as a temporary measure."

I also refer to paragraph [20]:

> "20. These considerations indicate that 'likely' in section 12(3) cannot have been intended to mean 'more likely than not' in all situations. That, as a test of universal application, would set the degree of likelihood too high. In some cases application of that test would achieve the antithesis of a fair trial. Some flexibility is essential. The intention of Parliament must be taken to be that 'likely' should have an extended meaning which sets as a normal prerequisite to the grant of an injunction before trial a likelihood of success at the trial higher than the commonplace *American Cyanamid* standard of 'real prospect' but permits the court to dispense with this higher standard where particular circumstances make this necessary."

I consider that the more serious the consequences the less cogent the evidence needs to be to satisfy that test. In that sense and on the evidence before me I hold that the plaintiff is likely to establish that the publication of photographs which have not been pixelated would not be allowed at trial.

[18] I turn now to consider Section 12(4) of the Human Rights Act 1998. I am enjoined by Section 12(4) to have particular regard to the importance of the Convention right to freedom of expression and I readily do so. In *Reynolds v Times Newspaper Ltd* [2001] 2 AC 127 Lord Nicholls at page 200, letters G-H, stated:

> "It is through the mass media that most people today obtain their information on political matters. Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment."

[19] I am also enjoined under section 12(4) of the Human Rights Act 1998 to, and do, consider whether the material has or is about to become available to the public. I have had no evidence that a photograph which is capable of identifying the plaintiff has become available to the public. The only published photograph which has been produced to me is a photograph of the plaintiff participating in the Marathon where his face is obscured by the hat that he was wearing.

[20] I am also enjoined to consider the public interest for the material to be published. The public interest in the press debate about the release of life prisoners is not in question. That is expressly acknowledged and there is no attempt to seek to limit that debate. The importance of that debate in any article which the defendant proposes to publish has not been called into question. That was summarised by the Prison Service in a letter of 7 February 2008. In that letter it was stated:

> "We do not dispute that it may be legitimate to publish an article which brings such a system to the knowledge of the public and which may be the subject of debate."

The plaintiff has not sought in anyway to challenge the important public interest in that debate. However the plaintiff and the prison service called into question the public interest in the publication of a photograph of the plaintiff which had not been pixelated. The Prison Service letter addressed the question of the public interest in that aspect of the case in the following way:-

> "We do, however, question whether anything which identifies the location of the Prisoner Assessment Unit can add anything to the debate. Further and in particular, we have very grave concerns as to how the publication of photographs of persons who are being assessed in this facility at present could add anything of value to the piece.

> While it may be quite legitimate to identify the categories of prisoners who use the facility or, in some cases, the names of persons who use the facility we do not understand what pictures of those persons add to this. Indeed, we are of the firm view that this may put their personal safety at risk. We would suggest that the fact that these prisoners can be recognised will bring them to the attention of persons who may wish to target these persons for unwelcome attention or physical attack as has recently happened to some Belfast hostels that accommodate offenders.
>
> We are further of the firm view that such attention will only harm the prospects of a safe and adequate re-integration of such prisoners into society."

[21] In this case when considering the public interest under section 12(4) of the Human Rights Act 1998 that interest has to be in the publication of the unpixelated photograph of the plaintiff. Mr Simpson QC brought definition to that public interest by stating that it would enable the public at large to recognise the plaintiff and, therefore, to protect themselves against him. The defendants have not disputed the assessments carried out by the Life Sentence Review Commissioners and the Prison Service as to the risk posed by the plaintiff in 2008 as opposed to the risk that he posed in 1987. Mr Simpson refers to the potential for mistakes being made by the Life Sentence Review Commissioners and by the Prison Service and that the public should be in a position to guard against that risk. I consider that there is a public interest in identifying the plaintiff for that purpose. I also consider that there is public interest that the identity of those convicted and sentenced for criminal offences should not be concealed from the public, see *R v Croydon Crown Court ex parte Trinity Mirror plc and others* [2008] EWCA Crim 50. In respect of the second public interest it is to be seen in the context that there was no challenge to the defendants naming the defendant and identifying him as the perpetrator of, and giving the details of, a horrendous sexual murder. The first public interest is to be seen in the context of the degree of risk posed by the plaintiff and of the assessments carried out by the Prison Service and the Life Sentence Review Commissioners. It also has to be seen in the context of the Parliamentary scheme for the release of prisoners and also in the context of public interest that such releases are conducted appropriately. I consider that there is a clear public interest in ensuring that prisoners are re-integrated into society if they are deemed not to be a risk by the Life Sentence Review Commissioners.

[22] Accordingly where, as here, the Article 2, 3 and 8 convention rights of the plaintiff are in conflict with the Article 10 rights of the defendant, a question of proportionality arises and an appropriate balance has to be struck between the competing rights. I consider that the appropriate balance comes down in favour of

the plaintiff and, accordingly, I am prepared to and do grant an interlocutory injunction to prevent any unpixelated photographs of the plaintiff being published until the trial of this action or until further order.