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Case No: A3/2007/2236

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
THE HON. MR JUSTICE PATTEN
[2007] EWHC 1908 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/05/2008

Before :

SIR ANTHONY CLARKE MR
LORD JUSTICE LAWS
and
LORD JUSTICE THOMAS

- -

Between :

DAVID MURRAY (by his litigation friends NEIL MURRAY and JOANNE MURRAY)	**Appellant/ Claimant**
- and -	
BIG PICTURES (UK) LIMITED	**Respondent /Defendant**

- -
- -

Mr Richard Spearman QC and Mr Godwin Busuttil (instructed by Messrs Schillings) for the Appellant
Mr Mark Warby QC and Mr Jonathan Barnes (instructed by **Messrs Solomon Taylor & Shaw**) for the Respondent

Hearing dates: 10 and 11 March 2008

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Approved Judgment

Sir Anthony Clarke MR :

This is the judgment of the court.

Introduction

1. Dr Neil Murray and Mrs Joanne Murray are the parents of David Murray. Mrs Murray is the author of the Harry Potter books which, as everyone knows, she wrote under the name JK Rowling. David was born on 23 March 2003. On Monday 8 November 2004 Dr and Mrs Murray were out walking in an Edinburgh street some time after 9 o'clock in the morning. Dr Murray was pushing a buggy with David in it. The respondent ('BPL') took a colour photograph of the family group which was subsequently published in the Sunday Express magazine on 3 April 2005 ('the Photograph').

2. On 24 June 2005 proceedings were issued in David's name through his parents as his litigation friends against the publishers of the Photograph, Express Newspapers Plc as first defendant and against BPL as second defendant. The action against the first defendant was settled leaving BPL as the sole defendant. In the action David asserts an infringement of his right to respect for his privacy contrary to article 8 of the European Convention on Human Rights ('the Convention'). He also puts his claim under the Data Protection Act 1998 ('the DPA').

3. BPL applied for an order striking out the claim under CPR 3.4 or for summary judgment under CPR 24. The application was heard by Patten J ('the judge') on 20, 21 and 22 June 2007. By an order dated 7 August 2007 the judge struck out the claim and gave judgment for BPL. In reaching his conclusion he assumed that the facts alleged in the particulars of claim were true. This appeal is brought with the permission of the judge, who gave permission on the ground that the case raises an important point about the relationship between the decision of the House of Lords in *Campbell v MGN* [2004] UKHL 22, [2004] 2 AC 457 and that of the ECtHR in *Von Hannover v Germany* (2005) 40 EHRR 1.

The facts

4. We can for the most part take the facts from the judgment. However, on 4 December 2007, which was of course after the order of the judge but before the hearing of the appeal, BPL disclosed a CD ROM on which were stored copies of digital versions of the Photograph and five further photographs of David and his parents taken on the same day. As a result of that disclosure the appellant has produced draft amended particulars of claim and it has been agreed that we should consider the appeal on the footing that the facts alleged in that draft are true. It was also agreed that the court could take account of the contents of a witness statement by Dr Murray in which he described the events of the morning of 8 November.

5. David's parents have a daughter, Mackenzie, who was born on 23 January 2005 and with whom Mrs Murray was pregnant at the time the photographs, including the Photograph, were taken. Mrs Murray also has another daughter, Jessica, by a previous marriage, who was born on 27 July 1993. When the Photograph was taken the Murrays were walking from their flat to a local café. They were accompanied by a security officer, Ms de Kock. Shortly after they arrived at the café Ms de Kock

noticed that they were being observed by a man in a car parked opposite. As they left the café some time later, Ms de Kock saw the man take a long lens camera from the boot of the car and apparently take some photographs. It is inferred on behalf of the appellant that the camera was used to take photographs of the family. Of the six photographs, the first two, which include the Photograph, were taken while they were on their way to the café, whereas the remaining four show them crossing the road and returning to the flat.

6. The Photograph shows Mrs Murray walking alongside the buggy and shows David's face in profile, the clothes he was wearing, his size, the style and colour of his hair and the colour of his skin. It was taken covertly by a photographer using a long range lens. Neither David, who was about 19 months old, nor his parents were aware that the photograph was being taken. His parents were not asked for their consent to any of the photographs being taken.

7. On 12 January 2005 the Daily Record and the Western Daily Press published copies of photographs which formed part of a series taken by BPL on 8 November 2004. As we understand it, the Western Daily Press published a copy of the Photograph. In any event the family's solicitors ('Schillings') wrote to BPL on 17 January complaining about the photographs, which they understood to be the property of BPL, in so far as they depicted David and asked for an undertaking not to publish or permit the publication of such photographs in the future. On 21 and 25 January BPL wrote offering certain undertakings. On 26 January Schillings wrote complaining that one of the photographers "camped outside our client's home" was from BPL. On the same day BPL replied denying the allegation but asserting that a named news agency, a named freelance photographer and two named newspapers did have photographers outside the house. On 27 January Schillings wrote with regard to the undertakings referred to in the communication of 21 January. They in effect accepted the undertakings but sought an undertaking from BPL to write a letter to certain newspapers and magazine companies. They also sought costs. On 1 March Schillings wrote again asking to see copies of the letter and asking for a response on costs. On 4 March BPL wrote saying that they were willing to write the letter but that they were not willing to pay costs.

8. That was how matters were left when, on 3 April, the Photograph appeared in the Sunday Express accompanied by the headline "My Secret" and the text of a quotation attributed to Mrs Murray in which she set out some thoughts on her approach to motherhood and family life. As the judge put it, the accuracy of the quotation was not disputed but the pleaded case was that it related to Jessica, was made several years earlier and was not provided for publication in that edition of the Sunday Express or in conjunction with the Photograph. It is plain that, as at the date of the publication, BPL was aware that the Murrays had not given consent to the publication of the Photograph. Moreover, although the judge does not expressly so conclude, it is at least arguable (and we would have thought plain) that it was made clear in the correspondence, in so far as the letters were written on behalf of David, that the Murrays positively objected to the publication of any photographs of David.

9. On 11 April Schillings wrote to BPL on behalf of the Murrays, including David, referring to the earlier correspondence and setting out what they said were the undertakings given by BPL as follows:

> 1. "We undertake not to further publish, license or sell the images in question"; (letter dated 21 January 2005).
>
> 2. "We cannot undertake to return the images to you. We can however undertake to delete the images from our database and our website;" (letter dated 25 January 2005).
>
> 3. "We are willing to contact all publishing companies to inform them that the pictures in question are no longer available for publication"; "(21 January 2005)"; and then "We are more than happy to carry out our undertakings with regards to informing our clients that those pictures are no longer available for publication; (letter 4 March 2005)."

Schillings added that BPL was in breach of some at least of the undertakings and sought further performance of them, an apology and costs.

10. BPL replied on 13 April saying that it had no intention of further publishing, licensing or selling "the images of JK Rowling in question". It added that it had contacted its clients who might have the pictures in their own library and instructed them not to publish them and that the pictures remained unavailable on their website. It further said that it was unfortunate that pictures of JK Rowling were published in the Sunday Express magazine on 3 April but BPL was doing what it could to see that that did not re-occur. Finally it offered an apology and a contribution of £400 towards costs, given its understanding that payments had been received from the publications that ran the pictures.

11. On 23 June Schillings sent a letter before action on behalf of David's parents as his litigation friends, saying among other things that they would be seeking delivery up of all the offending photographs and not merely those published and that the action would be brought in the interests of preventing future taking and publication of photographs "of our client". In our view that letter made it clear that the action was to be brought solely by David. So it was that this action was commenced on 24 June on David's behalf.

The action

12. It is in our opinion of some importance that the action was brought by David's parents only on behalf of David and not on their own behalf. Mr Spearman submits that that fact was not sufficiently recognised by the judge, whom he submits treated the action as if it was brought for the benefit of both the parents and the child. We accept that submission. It does seem to us that there are parts of the judge's judgment in which he treated the action as if it were brought at least in part to protect Mrs Murray because of her fame as JK Rowling.

13. For example at [6] he said:

> "… I think it is fair to say that the action is seen by the Claimant's parents as something of a test case designed to establish the right of persons in the public eye (such as the Claimant's mother) to protection from intrusion into parts of

> their private or family life even when they consist of activities conducted in a public place."

We do not think that that is correct. The evidence supports the conclusion that David's mother has not sought to protect herself from the press, no doubt on the basis that she recognises that because of her fame the media are likely to be interested in her. It is also of note that the claim is brought on the ground that David is entitled to respect for his private life under article 8 of the Convention, not on the basis that all the members of the family including the parents are entitled to respect for their family life.

14. At [7] the judge described the issue in this way:

> "The issue for the Court in these proceedings and most of the argument on this application is centred on the degree of protection which someone who is well known or of public interest is entitled to in respect of their private family life. The reality of the case is that the Claimant's parents seek through their son to establish a right to personal privacy for themselves and their children when engaged in ordinary family activities wherever conducted."

Again we do not think that that is quite correct. We do not think that the reality is that the parents seek through their son to establish a right to personal privacy for themselves and their children when engaged in ordinary family activities. The positions of parents on the one hand and children on the other hand are distinct. We will return to the relevant test in a moment but it seems to us that David may have a reasonable expectation of privacy in circumstances in which his famous mother might not. In our judgment the question in the action is whether there was an infringement of David's rights under article 8, not whether there was an infringement of the parents' rights under it.

15. We stress that we are not suggesting that the judge disregarded the fact that it was David who was the claimant or that he treated the claim as that of the parents. He was for example, correct to say at the end of [16] that the purpose of the claim is to carve out for the child some private space in relation to his public appearances. On the other hand, he said that in the context of his description at [13-17 and 23]:

> "13. I have already set out the basic facts as pleaded, but there are a number of additional matters set out in the Particulars of Claim which have to be brought into account as part of the assumed basis for the claim. They can be summarised as follows:
>
> i) The Claimant's mother has achieved enormous success and wealth from the hugely popular series of Harry Potter books together with the films of those novels and associated merchandising;
>
> ii) The Claimant's mother accepts that as a result of this there will be curiosity and even a measure of

legitimate interest on the part of the media and the general public in her activities and her appearance;

iii) In contrast to (ii) above the Claimant's parents since his birth have never sought to place the Claimant's family as a unit or his siblings as individuals in the public eye but have repeatedly and consistently taken steps to secure and maintain the privacy of the Claimant and their other children in which they have been substantially successful. In particular, the children have never been taken to events such as a book launch at which they would have been exposed to public view and to media and other publicity;

iv) The Claimant's mother has not placed any photograph of any of her children on her website or provided any such photograph for publication;

v) The Claimant's mother has never discussed details of her private life or those of her family in any interview;

vi) Only three photographs of Jessica have appeared in the media and none of these was authorised by the Claimant's parents. In the case of one of the photographs (taken on a beach in Mauritius) the Claimant's mother made a complaint to the Press Complaints Commission (PCC) which was upheld by a decision of the PCC as a breach of Cl.3 of the Code; and

vii) Notwithstanding this, not only the Claimant's mother but also the rest of the family have been subjected to continual and repeated attention by the media and members of the public. This is unwelcome and threatens in future to involve either a direct or indirect interference with the Claimant's private life in particular because his mother becomes upset while she is out on the street and is photographed with her children and her children also become upset either on their own account or because she has become upset.

14. Mr Warby emphasises as part of his application a number of what he says are significant omissions from the Particulars of Claim; (1) no particular act of an intimate or private nature is said to have been depicted; (2) the photograph is not said to have portrayed any particular physical feature of the Claimant; (3) no reliance is placed on the fact that the Claimant is or was a child, nor is his infancy said to give rise to any particular sensitivities or

vulnerabilities relevant to the claim; and (4) no allegation is made of any actual upset caused at the time of the photograph to the Claimant or either of his parents and no claim is made by the Claimant in respect of upset caused to himself or to his parents.

15. So far as this last point is concerned, it is accepted by the Claimant that he was not himself upset by the taking of the photograph or by its subsequent publication and cannot in any event claim for any upset caused to others. But this, I think, highlights the somewhat artificial nature of a claim by a child in relation to the issues of breach of confidence and privacy. Very young children are likely to be oblivious to the taking of photographs unless they are taken at very close range and in a way which causes the child actual fear and distress. This is not what this case is about. It is not based on distress or harassment caused to the Claimant. The issue of principle is whether the Claimant who is not a public figure in his own right but is the child of one, is entitled to protection from being photographed in a public place even where a photograph shows nothing embarrassing or untoward but in which he is shown depicted with his parents. Looked at from the perspective of his parents and in particular his mother the question is, as I stated earlier, whether someone who is well known or a public figure, is entitled to a measure of protection in respect of their ordinary family life even when conducted in a public place. If such a right is established, then it must in my opinion extend not only to the adult individual but also to the infant and dependant members of his or her family and be enforceable equally by each of them. This approach is, I believe, consistent with the Court's duties towards the Claimant as a child. In relation to under age children the Court has to make assumptions and a judgment as to what measure of protection they are entitled to having regard to the way in which they have been brought up; the way they have led their lives under the control of their parents and any other relevant circumstances. The fact that they are children is obviously important in itself and Mr Spearman has rightly stressed the Claimant's status as a child and its recognition (eg) in the Press Complaints Commission Code and in the 1990 United Nation's Convention on the Rights of the Child with its emphasis on the need for the state and its institutions to protect the child from unlawful interference with his or her privacy, family and home: see UNCRC Art.16.

16. But one needs, I think, to differentiate between the case where the child has for medical or some other personal

> reasons come to the knowledge of the general public and for those very reasons may be particularly vulnerable to harm from intrusive press exposure and the much more ordinary case (such as the present one) in which the child comes into focus largely if not exclusively by being in the company of his or her much more famous parents. Even in cases of this kind the Court is bound to have regard to any particular harm (actual or prospective) which the child may suffer from having his image publicly displayed. But in most such cases (and on the pleadings this is no exception) the child will have suffered no upset or harm. The purpose of the claim will be to carve out for the child some private space in relation to his public appearances.
>
> 17. For this reason it is difficult to see how in the converse case a famous parent who chooses to exploit his children to gain personal publicity could avoid publication of photographs taken of his children in a public place simply by resorting to the device of making that child the Claimant. There is an obvious argument that the reasonable expectations of a child in respect of his or her privacy cannot be wholly divorced from the wishes and actions of its parents and the Court has to look at all the relevant circumstances in the round when deciding what degree of protection to enforce. This is, I think, recognised in this case from the express reference in the Particulars of Claim to the degree to which the Claimant's mother has taken steps to keep her children out of the limelight."

A little later, at [23], the judge repeated his view that it was artificial for the parents to bring the action in the name of the child.

16. In our opinion in those paragraphs the judge focuses too much upon the parents and not enough upon the child. The child has his own right to respect for his privacy distinct from that of his parents. While it is true that a small child of as little as 19 months is likely to be oblivious of the taking of a photograph of him (or her), at any rate if taken at long range, and there is no suggestion that David suffered distress or harassment as a result of the taking (or indeed publication) of the Photograph, we do not think that it is quite right to describe the issue of principle as being

> "whether the Claimant who is not a public figure in his own right but is the child of one, is entitled to protection from being photographed in a public place even where a photograph shows nothing embarrassing or untoward but in which he is shown depicted with his parents."

Moreover, we do not agree that it is artificial for the parents to bring the action in the name of the child.

17. It may well be that the mere taking of a photograph of a child in a public place when out with his or her parents, whether they are famous or not, would not engage article 8 of the Convention. However, as we see it, it all depends upon the circumstances. We will return to the context below but it seems to us that the judge's approach depends too much upon a consideration of the taking of the Photograph and not enough upon its publication. This was not the taking of a single photograph of David in the street. On the claimant's case, which must be taken as true for present purposes, it was the clandestine taking and subsequent publication of the Photograph in the context of a series of photographs which were taken for the purpose of their sale for publication, in circumstances in which BPL did not ask David's parents for their consent to the taking and publication of his photograph. It is a reasonable inference on the alleged facts that BPL knew that, if they had asked Dr and Mrs Murray for their consent to the taking and publication of such a photograph of their child, that consent would have been refused.

18. Moreover, on the assumed facts, this was not an isolated case of a newspaper taking one photograph out of the blue and its subsequent publication. This was at least arguably a very different case from that to which Baroness Hale referred in her now well-known example (at [154] of *Campbell*) of Ms Campbell being photographed while popping out to buy the milk. The correspondence to which we have referred shows that a news agency, a freelance photographer and two newspapers had photographers outside the Murrays' house in the period before publication of the Photograph and a schedule exhibited to the particulars of claim shows that this was not an isolated event. It is not clear how much BPL was aware of the interest taken by the media in JK Rowling, her husband and children but it seems to us to be at least arguable that it was aware of that interest. These are matters for trial but, in its skeleton argument before the judge, BPL was described as a commercial picture agency that obtains, holds and licenses photographs for use in the media and runs a website which, subject to certain terms, permits photographs to be downloaded by publishers in return for fees. The claimant further relies upon the fact that BPL describes itself as "The World's Biggest and Best Celebrity Picture Agency" and as being allied to another business concerned with encouraging members of the public to sell it "celebrity, photos videos and stories, namely www.mrpaparazzi.com". Since the whole point of putting the Photograph on the website in order to sell the right to publish it was because of the media interest (including interest in David as JK Rowling's child), on the material available it seems to us to be likely that BPL was fully aware of the potential value of taking and publishing such photographs. The Photograph could, after all, have been published with David's features pixelated out if BPL had wished. In these circumstances the parents' perception that, unless this action succeeds, there is a real risk that others will take and publish photographs of David is entirely understandable.

The correct approach

19. As already indicated, the judge struck the action out under CPR 3.4 on the assumption that the facts alleged are true. The facts now alleged are somewhat more extensive than they were before the judge. This was not the trial of a preliminary issue but an application to strike the action out without a trial. The claimants are entitled to have the action tried unless the defendant's case is plainly correct on the assumed facts. We do not think that this principle is in dispute.

Privacy – the principles

20. The two most important recent cases that have considered the relevant principles are of course the decision of the House of Lords in *Campbell v MGN* and the decision of the ECtHR in *Von Hannover v Germany*, which were concerned with well-known celebrities, namely Naomi Campbell and Princess Caroline respectively. In this court we are bound by the former and not the latter and we fully recognise that the House of Lords made it clear in *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 AC 465, that, in the event of a conflict between a decision of the House and a later decision of the ECtHR, lower courts, including this court, must follow the former: see per Lord Bingham at [43-44] in a passage quoted by the judge at [61]. We will therefore focus in particular upon the decision in *Campbell*.

Campbell v MGN

21. The facts are well-known but were shortly these. Naomi Campbell is an internationally famous fashion model. On 1 February 2001 the *Daily Mirror* published articles and photographs which Ms Campbell said infringed her right to respect for her private life contrary to article 8 of the Convention. The photographs included a photograph of her in the street leaving Narcotics Anonymous ('NA'), which had been taken by a freelance photographer specially employed for the purpose. The source of the information that Ms Campbell went to NA was either an associate of hers or a fellow addict. Ms Campbell admitted that she was a drug addict and that she had lied about it publicly. It was accepted on her behalf that, as Lord Hoffmann put it at [36], it was those falsehoods that entitled the newspaper to publish the fact that she was addicted to drugs. This left three matters which were said to infringe her rights under article 8: first, the fact that she attended meetings of NA; secondly, the published details of her attendance and what happened at the meetings; and thirdly, the photographs taken in the street without her knowledge or consent: see eg per Lord Hoffmann at [42].

22. Ms Campbell succeeded before Morland J and, although she failed in this court, she succeeded by a majority in the House of Lords. Lord Hope, Baroness Hale and Lord Carswell were in the majority, with Lord Nicholls and Lord Hoffmann dissenting. However, the difference of opinion was a difference on the facts. So, for example, Lord Hoffmann said at [31] that, although the principles were stated in varying language, he could discern no significant differences between the views of the members of the appellate committee. In these circumstances, we naturally accept that their reasoning does not significantly differ, although there is we think scope for argument that it is not quite the same in every case.

23. Articles 8 and 10 of the Convention provide so far as relevant:

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

1. Everyone has the right to respect for his family and private life …

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 … for the protection of the rights and freedoms of others.
>
> *Article 10 – Freedom of expression*
>
> 1. Everyone has the right of freedom of expression. …
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, … for the protection of the reputation or rights of others …"

24. The principles stated by Lord Nicholls can we think be summarised in this way:

    i) The right to freedom of expression enshrined in article 10 of the Convention and the right to respect for a person's privacy enshrined in article 8 are vitally important rights. Both lie at the heart of liberty in a modern state and neither has precedence over the other: see [12].

    ii) Although the origin of the cause of action relied upon is breach of confidence, since information about an individual's private life would not, in ordinary usage, be called 'confidential', the more natural description of the position today is that such information is private and the essence of the tort is better encapsulated now as misuse of private information: see [14].

    iii) The values enshrined in articles 8 and 10 are now part of the cause of action and should be treated as of general application and as being as much applicable to disputes between individuals as to disputes between individuals and a public authority: see [17].

    iv) Essentially the touchstone of private life is whether in respect of the disclosed facts the person in question had a reasonable expectation of privacy: see [21].

    v) In deciding whether there is in principle an invasion of privacy, it is important to distinguish between that question, which seems to us to be the question which is often described as whether article 8 is engaged, and the subsequent question whether, if it is, the individual's rights are nevertheless not infringed because of the combined effect of article 8(2) and article 10: see [22].

25. This last point seems to us to be of potential significance because of the view that Lord Nicholls took of the suggestion that one of the requirements which a claimant must satisfy is that publication of matter must be 'highly offensive in order to be actionable'. He said this at [22]:

> "Different forms of words, usually to much the same effect, have been suggested from time to time. The second Restatement of Torts in the United States (1977), article 652D, p 394, uses the formulation of disclosure of matter which 'would be highly offensive to a reasonable person'. In *Australian Broadcasting Corporation v Lenah Game Meats Pty*

> *Ltd* (2001) 185 ALR 1, 13, para 42, Gleeson CJ used words, widely quoted, having a similar meaning. This particular formulation should be used with care, for two reasons. First, the 'highly offensive' phrase is suggestive of a stricter test of private information than a reasonable expectation of privacy. Second, the 'highly offensive' formulation can all too easily bring into account, when deciding whether the disclosed information was private, considerations which go more properly to issues of proportionality; for instance, the degree of intrusion into private life, and the extent to which publication was a matter of proper public concern. This could be a recipe for confusion."

26. It is clear from that paragraph that Lord Nicholls regarded the 'highly offensive test' as a stricter test than his own formulation of 'reasonable expectation of privacy'. It seems to us therefore that, in so far as it is or may be relevant to consider whether publication of information or matter was 'highly offensive', it is relevant to consider it in the context, not of whether article 8 is engaged, but of the issues relevant to proportionality, that is to the balance to be struck between article 8 and article 10.

27. In the subsequent decision of this court in *McKennitt v Ash* [2006] EWCA Civ 1714, [2008] QB 73, Buxton LJ, with whom Latham and Longmore LJJ agreed, underlined at [11] the point that articles 8 and 10 of the Convention are now the very content of the domestic tort that the English court must enforce, and identified two key questions which must be answered in a case where the complaint is of the wrongful publication of private information. They are first, whether the information is private in the sense that it is in principle protected by article 8 (ie such that article 8 is in principle engaged) and, secondly, if so, whether in all the circumstances the interest of the owner of the information must yield to the right to freedom of expression conferred on the publisher by article 10. In expressing that conclusion Buxton LJ quoted the last part of the extract from [22] of Lord Nicholls' speech which we have set out above.

28. Baroness Hale's approach was the same as that of Lord Nicholls. She said at [134] that the balancing exercise may begin when the person publishing the information knows or ought to know that that there is a reasonable expectation that the information in question will be kept confidential. At [135] she added that that test is much simpler than the test in the *Australian Broadcasting Corporation* case that publication would be highly offensive to a reasonable person. Then, importantly, she again stressed (at [137]) that the 'reasonable expectation of privacy' is the threshold test which brings the balancing exercise into play. In the latter part of her speech, she considered how the balance should be struck.

29. It is perhaps arguable that Lord Hope took a somewhat different view on the relevance or potential relevance of the 'highly offensive' test: see eg [100]. However, he said at [92] that in some cases the question whether the information is public or private will be obvious and added:

> "Where it is not, the broad test is whether disclosure of the information about the individual ("A") would give substantial

> offence to A, assuming that A was placed in similar circumstances and was a person of ordinary sensibilities."

At [93], after referring to the judgment of Gleeson CJ in the *Australian Broadcasting Corporation* case, Lord Hope said that that test was useful in cases where there was room for doubt but that there was no room for doubt on the facts of the *Campbell* case.

30. Thus, Lord Hope's view was that the first question is whether the information is obviously private. He explained what he meant by 'obviously private' in the first sentence of his [96]:

> "If the information is obviously private, the situation will be one where the person to whom it relates can reasonably expect his privacy to be respected. So there is normally no need to go on and ask whether it would be highly offensive for it to be published."

On that approach, there is no difference between Lord Nicholls, Baroness Hale and Lord Hope, namely that the first question is whether there is a reasonable expectation of privacy and, if there is, that article 8 is in principle engaged. Nor is there any difference between their opinions and that of Lord Carswell, who expressly agreed with Lord Hope and Baroness Hale.

31. As we said earlier, Lord Hoffmann took the view that he too was applying the same principles. At [51] he emphasised that the law now focuses upon the protection of human autonomy and dignity –

> "the right to control the dissemination of information about one's private life and the right to the esteem and respect of other people."

At [72] Lord Hoffmann said that the same principles applied to photographs but added at [73] that the famous and the not so famous who go out in public must accept that they may be photographed without their consent, just as they may be observed without their consent. He concluded:

> "As Gleeson CJ said in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1, 13, para 41:
>
> > "Part of the price we pay for living in an organised society is that we are exposed to observation in a variety of ways by other people."

32. Lord Hoffmann then drew an important distinction between the mere taking of a photograph and its publication:

> "74. But the fact that we cannot avoid being photographed does not mean that anyone who takes or obtains such photographs can publish them to the world at large. In the recent case of *Peck v United Kingdom* (2003) 36 EHRR 41 Mr Peck was filmed on a public street in an

> embarrassing moment by a CCTV camera. Subsequently, the film was broadcast several times on the television. The Strasbourg court said (at p 739) that this was an invasion of his privacy contrary to article 8:
>
> > "the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by or to security observation and to a degree surpassing that which the applicant could possibly have foreseen when he walked in Brentwood on August 20, 1995.""

33. Lord Hoffmann then distinguished in [75 and 76] between the widespread publication of a photograph of someone in a situation of humiliation or severe embarrassment and the photograph taken of Ms Campbell. He concluded, in disagreement with the majority, that there was no invasion of Ms Campbell's privacy. He did not analyse the facts by specific reference to the two stages identified above. Lord Nicholls doubted whether the disputed photographs were taken in circumstances in which there was a reasonable expectation of privacy at [25-27] but concluded at [28-35] that the balance between article 8 and article 10 came down in favour of permitting publication.

34. The members of the majority concluded that the photographs were taken in circumstances in which there was a reasonable expectation of privacy and held that the balance between Ms Campbell's rights under article 8 and the newspaper's rights of freedom of expression under article 10 came down in favour of the conclusion that the publication of the disputed photographs involved a breach of Ms Campbell's rights under article 8. The balance was considered in considerable detail: see per Lord Hope at [112-125], especially at [122-124], Baroness Hale at [142-158] and Lord Carswell at [169-170].

35. In these circumstances, so far as the relevant principles to be derived from *Campbell* are concerned, they can we think be summarised in this way. The first question is whether there is a reasonable expectation of privacy. This is of course an objective question. The nature of the question was discussed in *Campbell*. Lord Hope emphasised that the reasonable expectation was that of the person who is affected by the publicity. He said at [99]:

> "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."

We do not detect any difference between Lord Hope's opinion in this regard and the opinions expressed by the other members of the appellate committee.

36. As we see it, 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.

37. In the case of a child the position is somewhat different from that of an adult. The judge recognised this in [23] of his judgment, where he said this, albeit in the context of a somewhat differently formulated test discussed by Lord Hope at [100] in *Campbell*:

> "This test cannot, of course, be applied to a child of the Claimant's age who has no obvious sensitivity to any invasion of his privacy which does not involve some direct physical intrusion into his personal space. A literal application of Lord Hope's words would lead to a rejection of any claim by an infant unless it related to harassment of an extreme kind. A proper consideration of the degree of protection to which a child is entitled under Art. 8 has, I think, for the reasons which I gave earlier to be considered in a wider context by taking into account not only the circumstances in which the photograph was taken and its actual impact on the child, but also the position of the child's parents and the way in which the child's life as part of that family has been conducted. This merely reinforces my view about the artificiality of bringing the claim in the name of the child. The question whether a child in any particular circumstances has a reasonable expectation for privacy must be determined by the Court taking an objective view of the matter including the reasonable expectations of his parents in those same circumstances as to whether their children's lives in a public place should remain private. Ultimately it will be a matter of judgment for the Court with every case depending upon its own facts. The point that needs to be emphasized is that the assessment of the impact of the taking and the subsequent publication of the photograph on the child cannot be limited by whether the child was physically aware of the photograph being taken or published or personally affected by it. The Court can attribute to the child reasonable expectations about his private life based on matters such as how it has in fact been conducted by those responsible for his welfare and upbringing."

38. Subject to the point we made earlier that we do not share the judge's view that the proceedings are artificial, we agree with the approach suggested by the judge in that paragraph. Thus, for example, if the parents of a child courted publicity by procuring the publication of photographs of the child in order to promote their own interests, the position would or might be quite different from a case like this, where the parents have taken care to keep their children out of the public gaze.

39. As applied in this case, which, unlike *McKennitt v Ash*, is not a case in which there was a pre-existing relationship between the parties, the first question at any trial of the action would be whether article 8 was in principle engaged; that is whether David had a reasonable expectation of privacy in the sense that a reasonable person in his position would feel that the Photograph should not be published. On Lord Nicholls'

analysis, that is a lower test than would be involved if the question were whether a reasonable person in his position would regard publication as either offensive or highly offensive. That question would or might be relevant at the second, balancing stage, assuming article 8 to be engaged on the footing that David had a reasonable expectation that commercial picture agencies like BPL would not set out to photograph him with a view to selling those photographs for money without his consent, which would of course have to be given through his parents.

40. At a trial, if the answer to the first question were yes, the next question would be how the balance should be struck as between the individual's right to privacy on the one hand and the publisher's right to publish on the other. If the balance were struck in favour of the individual, publication would be an infringement of his or her article 8 rights, whereas if the balance were struck in favour of the publisher, there would be no such infringement by reason of a combination of articles 8(2) and 10 of the Convention.

41. At each stage, the questions to be determined are essentially questions of fact. The question whether there was a reasonable expectation privacy is a question of fact. If there was, the next question involves determining the relevant factors and balancing them. As Baroness Hale put it at [157], the weight to be attached to the various considerations is a matter of fact and degree. That is essentially a matter for the trial judge.

The decision of the judge

42. Since the issue before the judge did not arise at a trial but under CPR 3.4 or CPR 24, the first question for his consideration was whether David had an arguable case that there was an infringement of his rights under article 8. The judge held that he did not.

43. His reasoning can be summarised in this way:

i) The test is one of reasonable expectation of privacy: see [24].

ii) There is no simple rule that the information contained in a photograph is private if taken in a private place but not if taken in a public place: see *Campbell*: see [26].

iii) The majority in *Campbell* reached their conclusion by taking into account the additional information contained in some of the photographs and the accompanying text, namely that she was undergoing treatment for drug addiction, which distinguished the case from what might have been the case if the photographs had simply depicted Ms Campbell on a more banal errand such as a shopping expedition: see [26].

iv) The facts of this case are different from those in *Campbell* because here David was being pushed along by his parents on the most ordinary of occasions: see [27].

v) The facts of this case are very different from those, for example, in *Peck v United Kingdom* (2003) 36 EHRR 719, where it was held that the release and publication of CCTV footage showing the applicant attempting to commit

suicide resulted in the moment being viewed to a far greater extent than he could have foreseen, and this was not publication of a photograph of someone which revealed him in a situation of humiliation or severe embarrassment: see [27], quoting from Lord Hoffmann in *Campbell* at [74-75]. See also per Lord Hope at [123] quoted by the judge at [28]. See also [64].

vi) The English courts do not recognise a right to a person's own image; so that we have not so far held that the mere fact of covert photography is sufficient to make the information in the photograph confidential; the activity photographed must be private. If Ms Campbell had simply been going about her business in a public street there could have been no complaint. See [28] quoting Baroness Hale at [154].

vii) The facts here are indistinguishable from those in *Hosking v Runting* [2005] 1 NZLR 1, where a photographer was commissioned to take photographs of the eighteen month old twins of a well-known television personality being pushed down the street by their mother. The action for breach of confidence failed. See [33-35].

viii) An analysis of *Von Hannover* showed that the ECtHR took a much wider view of what falls within the scope of an individual's private life than *Campbell*: see [36-49], especially at [45-49]. We take three examples:

a) it was inherent in the court's analysis that article 8 was engaged by the publication of the whole range of photographs involved in the complaint including apparently innocuous images of the Princess shopping, riding and playing tennis: see [43];

b) the important and perhaps novel aspect of the decision is the court's acceptance that the relevant criteria were satisfied in relation to many of the images under consideration, including photographs which (as Lord Nicholls put it) showed nothing untoward or undignified: see [44]; and

c) an individual's private life can include ordinary activities such as family holidays or expeditions which are not public in any sense beyond the fact that they are conducted in a street or some other public place: see [45].

ix) In particular, the decision in Princess Caroline's favour did not depend upon harassment or significant press intrusion: see [48-49] and the decision of the ECtHR in *Sciacca v Italy* (2006) 43 EHRR 20. The judge's own views are summarised at [47]:

> "My own reading therefore of *Von Hannover* is that it recognises that an individual whose life and activities are of public interest may have a legitimate expectation of privacy in relation to private family and personal activities which are not in themselves either embarrassing or intimate in a sexual or medical sense. It also establishes that in the case of someone like the

> Princess who is well known but not a public figure in the sense of being a politician or the like, the publication of the photographs and the information they contain cannot be justified as a legitimate exercise of the right to freedom of expression where the sole purpose of publication is to satisfy readers' curiosity rather than to contribute to a debate on or the raising of an issue of general public interest or importance."

x) Those views are consistent with those of Buxton LJ in *McKennitt v Ash*: see [50-57], especially at [57], where the judge referred to [37] and quoted [39-42] of *McKennitt v Ash*, in which Buxton LJ held that the English courts should pay respectful attention to *Von Hannover*. It was certainly open to Eady J, he said, to have regard to *Von Hannover* in relation to the very different facts of *McKennitt v Ash*.

xi) Although Buxton LJ accepted the wider interpretation of *Von Hannover*, he also accepted Eady J's conclusion at first instance that the more trivial information in the book (eg a shopping trip to Italy) did not qualify for protection under article 8. As the judge put it at [59], Buxton LJ clearly considered that there must remain a category of cases involving innocuous, unimportant and unremarkable events, which, although private in one sense, do not necessarily qualify for protection under article 8. The judge added that there is, however, no specific guidance (and probably cannot be) as to where precisely the line should be drawn.

xii) This case is an attempt to apply *Von Hannover* in its most absolutist form: see [64].

xiii) The critical conclusions reached by the judge are at [65-68].

44. Because [65-68] contain the judge's critical conclusions we should set them out in full:

> "65. It seems to me that a distinction can be drawn between a child (or an adult) engaged in family and sporting activities and something as simple as a walk down a street or a visit to the grocers to buy the milk. The first type of activity is clearly part of a person's private recreation time intended to be enjoyed in the company of family and friends. Publicity on the test deployed in *Von-Hannover* is intrusive and can adversely affect the exercise of such social activities. But if the law is such as to give every adult or child a legitimate expectation of not being photographed without consent on any occasion on which they are not, so to speak, on public business then it will have created a right for most people to the protection of their image. If a simple walk down the street qualifies for protection then it is difficult to see what would not. For most people who are not public figures in the sense of being politicians

or the like, there will be virtually no aspect of their life which cannot be characterized as private. Similarly, even celebrities would be able to confine unauthorized photography to the occasions on which they were at a concert, film premiere or some similar occasion.

66. I start with a strong predisposition to the view that routine acts such as the visit to the shop or the ride on the bus should not attract any reasonable expectation of privacy. Although the arguments in favour of freedom of expression have specifically to be considered once a Claimant's Art. 8 rights are engaged, it seems to me inevitable that the boundaries of what any individual can reasonably expect to remain confidential or private are necessarily influenced by the fact that we live in an open society with a free press. If harassment becomes an issue then it can and should be dealt with specifically as it is by the 1997 Act. I have considerable sympathy for the Claimant's parents and anyone else who wishes to shield their children from intrusive media attention. But the law does not in my judgment (as it stands) allow them to carve out a press-free zone for their children in respect of absolutely everything they choose to do. Even after *Von-Hannover* there remains, I believe, an area of routine activity which when conducted in a public place carries no guarantee of privacy. In my view this is just such a case. As mentioned earlier, there is no allegation of any direct harm or distress being caused to the Claimant or to his parents at the time and I am not persuaded that his mother's understandable sensitivity to and upset caused by her children being photographed on any occasion can of itself be allowed to dictate what the legal boundaries of protection should be.

67. It is though important to stress the dangers of categorizing various types of information for purposes of defining what is the scope of an individual's private life for the purposes of Art. 8 and I have taken this into account in making my own assessment in this case. Information or events which can in one sense be described as anodyne or trivial may be of considerable importance and sensitivity to a particular person in certain circumstances. Eady J recognized this in *McKennitt v Ash* and I endorse that approach. It is a matter of fact and degree in every case. But I am not satisfied that the facts pleaded either individually or collectively are sufficient in this case to engage the Claimant's Art. 8 rights.

> 68. In summary, therefore, I propose to strike out or dismiss the claim based on breach of confidence or invasion of privacy for two reasons: firstly, that on my understanding of the law including *Von Hannover* there remains an area of innocuous conduct in a public place which does not raise a reasonable expectation of privacy; and secondly, that even if the ECtHR in *Von Hannover* has extended the scope of protection into areas which conflict with the principles and the decision in *Campbell,* I am bound to follow *Campbell* in preference. Because I regard this case as materially indistinguishable from the facts in *Hosking v Runting* I am satisfied that on that test it has no realistic prospects of success. In these circumstances it is not necessary for me to consider the wider issues of freedom of expression or to perform the balancing exercise required by reason of Art. 10."

Discussion

45. We have reached a different conclusion from that of the judge. In our opinion it is at least arguable that David had a reasonable expectation of privacy. The fact that he is a child is in our view of greater significance than the judge thought. The courts have recognised the importance of the rights of children in many different contexts and so too has the international community: see eg *R v Central Independent Television Plc* [1994] Fam 194 per Hoffmann LJ at 204-5 and the United Nations Convention on the Rights of the Child, to which the United Kingdom is a party. More specifically, clause 6 of the Press Complaints Commission Editors' Code of Practice contains this sentence under the heading Children:

> "v) Editors must not use the fame, notoriety or position of the parent or guardian as sole justification for publishing details of a child's private life."

There is also a publication called The Editors' Codebook, which refers to the Code and to the above statement. Although it is true that the Codebook states (at page 51) in a section headed 'Intrusion' that the Press Complaints Commission has ruled that the mere publication of a child's image cannot breach the Code when it is taken in a public place and is unaccompanied by any private details or materials which might embarrass or inconvenience the child, which is particularly unlikely in the case of babies or very young children, it seems to us that everything must depend on the circumstances.

46. So, for example, in *Tugendhat and Christie* on *The Law of Privacy and the Media* the authors note at paragraph 13.128 (in connection with a complaint made by Mr and Mrs Blair) that the PCC has stated that:

> "the acid test to be applied by newspapers in writing about the children of public figures who are not famous in their own right (unlike the Royal Princes) is whether a newspaper would write such a story if it was about an ordinary person."

It seems to us to be at least arguable that a similar approach should be adopted to photographs. If a child of parents who are not in the public eye could reasonably expect not to have photographs of him published in the media, so too should the child of a famous parent. In our opinion it is at least arguable that a child of 'ordinary' parents could reasonably expect that the press would not target him and publish photographs of him. The same is true of David, especially since on the alleged facts here the Photograph would not have been taken or published if he had not been the son of JK Rowling.

47. Neither *Campbell* nor *Von Hannover* is a case about a child. There is no authoritative case in England of a child being targeted as David was here. There is an unreported decision of Connell J in *MGN Ltd v Attard*, 9 October 2001, in which he expressed doubts as to whether article 8 was engaged in respect of the publication of a photograph taken in a Malta street of the survivor of the conjoined twins. However, the facts were very different from this case because the parents would have permitted publication if they could have agreed a price with the newspaper.

48. The case that particularly struck the judge was, however, *Hosking v Runting*, which he regarded as on all fours with this. The facts are indeed similar to those here. However, for the reasons we gave earlier, we are of the opinion that the test applied in that case is not the same as the test of reasonable expectation of privacy, which falls to be applied at the first stage of the analysis. In giving the leading judgment of the New Zealand Court of Appeal, Gault P and Blanchard J (with whom Tipping J substantially agreed) described at [117] the two fundamental requirements for a successful claim for interference with privacy:

> "1. The existence of facts in respect of which there is a reasonable expectation of privacy; and
>
> 2. publicity given to those private facts that would be considered highly offensive to an objective reasonable person."

49. As can be seen, those are separate considerations. For the reasons given earlier, as explained by Lord Nicholls in *Campbell*, it is only the first question that has to be asked in order to decide whether article 8 is in principle engaged. If it is, the second question may be relevant in carrying out the balancing exercise as between the rights under article 8 and the rights under article 10. It is true that the court decided both questions in favour of the defendants but the underlying basis for the conclusions of Gault and Blanchard JJ can be seen from [161-165] quoted by the judge at [34]:

> "161. The real concern of the appellants as parents relates not to the publication of photographs of their two children in the street, but to publication of the photographs along with identification and the association of them with a "celebrity" parent. We accept the sincerity of their anxiety for the wellbeing of the children and their concern at the prospect of recurring unwanted media attention. They wish to protect the freedom of the children to live normal lives without constant fear of media intrusion. They feel that

if publication of the present photographs is prevented there will be no incentive for those who, in the future, might pursue the children in order to capture marketable images.

162. We must focus on the issues now presented. If there is no case for relief now, we cannot address the future. We are inclined to the view, however, that the concerns are overstated.

163. We are not persuaded that a case is made out for an injunction to protect the children from a real risk of physical harm. We do not see any substantial likelihood of anyone with ill intent seeking to identify the children from magazine photographs. We cannot see the intended publication increasing any risk that might exist because of the public prominence of their father.

164. The inclusion of the photographs of Ruby and Bella in an article in New Idea would not publicise any fact in respect of which there could be a reasonable expectation of privacy. The photographs taken by the first respondent do not disclose anything more than could have been observed by any member of the public in Newmarket on that particular day. They do not show where the children live, or disclose any information that might be useful to someone with ill intent. The existence of the twins, their age and the fact that their parents are separated are already matters of public record. There is a considerable line of cases in the United States establishing that generally there is no right to privacy when a person is photographed on a public street. Cases such as *Peck* and perhaps *Campbell* qualify this to some extent, so that in exceptional cases a person might be entitled to restrain additional publicity being given to the fact that they were present on the street in particular circumstances. That is not, however, this case.

165. We are not convinced a person of ordinary sensibilities would find the publication of these photographs highly offensive or objectionable even bearing in mind that young children are involved. One of the photographs depicts a relatively detailed image of the twins' faces. However, it is not sufficient that the circumstances of the photography were considered intrusive by the subject (even if that were the case, which it is not here because Mrs Hosking was not even aware the photographs had been taken). The real issue is whether publicising the content of the photographs (or the

> "fact" that is being given publicity) would be offensive to the ordinary person. We cannot see any real harm in it."

50. It seems to us that, although the judges regarded the parents' concerns as overstated, the parents' wish, on behalf of their children, to protect the freedom of the children to live normal lives without the constant fear of media intrusion is (at least arguably) entirely reasonable and, other things being equal, should be protected by the law. It is true, as the judges say at [164], that the photographs showed no more than could be seen by anyone in the street but, once published, they would be disseminated to a potentially large number of people on the basis that they were children of well-known parents, leading to the possibility of further intrusion in the future. If the photographs had been taken, as Lord Hope put it at [123] of *Campbell*, to show the scene in a street by a passer-by and later published as street scenes, that would be one thing, but they were not taken as street scenes but were taken deliberately, in secret and with a view to their subsequent publication. They were taken for the purpose of publication for profit, no doubt in the knowledge that the parents would have objected to them.

51. We recognise that the facts of *Hosking v Runting*, as in this case, are not the same as in *Campbell*, but in our opinion the judges' view of whether the children would have a reasonable expectation of privacy, in the sense that they could reasonably expect to be left alone without photographs of them being published in the media without their consent, is at least arguably a view which should not be adopted here. It does not seem to us to follow from the reasoning of the House of Lords in *Campbell* that the judges were correct (let alone plainly correct) on the reasonable expectation of privacy point.

52. As to [165], as the judge observed at [35], the approach is different from that approved in *Campbell*. The approved test is not whether a person of ordinary sensibilities would find the publication highly offensive or objectionable, even bearing in mind that young children are involved, but (as Lord Hope put it in the passage quoted at [35] above) what a reasonable person of ordinary sensibilities would feel if he or she was placed in the same position as the claimant and faced with the same publicity. The judges did not consider either of the two questions posed through the eyes of the reasonable child, or (more realistically) through the eyes of the reasonable parent on behalf of the child. Although the judge recognised the error, he said that neither Lord Hope nor Baroness Hale expressed any doubts about the decision in *Hosking v Runting*. That is true but the question whether *Hosking v Runting* would be followed here was not the question which the House of Lords had to decide. In these circumstances, the decision in *Hosking v Runting* was in our opinion not a sufficient reason to hold that the claimant cannot show a reasonable expectation of privacy at a trial. Yet, as we read [68], the judge's reliance on *Hosking v Runting* was a significant part of his reasoning.

53. We note in passing that in *Rogers v Television New Zealand Limited* [2007] NZSC 91, although four of the five judges in the Supreme Court said that they were willing to proceed on the footing that *Hosking v Runting* represented the law, Elias CJ and Anderson J (who were admittedly dissenting) expressed doubts: see [23, 25, 26 and 144].

54. As to the judge's [65] and [66], as we read his reasoning he focuses on the taking of the Photograph. As we indicated earlier, it is our opinion that the focus should not be on the taking of a photograph in the street, but on its publication. In the absence of distress or the like caused when the photograph is taken, the mere taking of a photograph in the street may well be entirely unobjectionable. We do not therefore accept, as the judge appears to suggest in [65], that, if the claimant succeeds in this action, the courts will have created an image right.

55. We recognise that there may well be circumstances in which there will be no reasonable expectation of privacy, even after *Von Hannover*. However, as we see it all will (as ever) depend upon the facts of the particular case. The judge suggests that a distinction can be drawn between a child (or an adult) engaged in family and sporting activities and something as simple as a walk down a street or a visit to the grocers to buy the milk. This is on the basis that the first type of activity is clearly part of a person's private recreation time intended to be enjoyed in the company of family and friends and that, on the test deployed in *Von Hannover*, publicity of such activities is intrusive and can adversely affect the exercise of such social activities. We agree with the judge that that is indeed the basis of the ECtHR's approach but we do not agree that it is possible to draw a clear distinction in principle between the two kinds of activity. Thus, an expedition to a café of the kind which occurred here seems to us to be at least arguably part of each member of the family's recreation time intended to be enjoyed by them and such that publicity of it is intrusive and such as adversely to affect such activities in the future.

56. We do not share the predisposition identified by the judge in [66] that routine acts such as a visit to a shop or a ride on a bus should not attract any reasonable expectation of privacy. All depends upon the circumstances. The position of an adult may be very different from that of a child. In this appeal we are concerned only with the question whether David, as a small child, had a reasonable expectation of privacy, not with the question whether his parents would have had such an expectation. Moreover, we are concerned with the context of this case, which was not for example a single photograph taken of David which was for some reason subsequently published.

57. It seems to us that, subject to the facts of the particular case, the law should indeed protect children from intrusive media attention, at any rate to the extent of holding that a child has a reasonable expectation that he or she will not be targeted in order to obtain photographs in a public place for publication which the person who took or procured the taking of the photographs knew would be objected to on behalf of the child. That is the context in which the photographs of David were taken.

58. It is important to note that so to hold does not mean that the child will have, as the judge puts it in [66], a guarantee of privacy. To hold that the child has a reasonable expectation of privacy is only the first step. Then comes the balance which must be struck between the child's rights to respect for his or her private life under article 8 and the publisher's rights to freedom of expression under article 10. This approach does not seem to us to be inconsistent with that in *Campbell*, which was not considering the case of a child.

59. In these circumstances we do not think that it is necessary for us to analyse the decision in *Von Hannover* in any detail, especially since this is not an appeal brought

after the trial of the action but an appeal against an order striking the action out. Suffice it to say that, in our opinion, the view we have expressed is consistent with that in *Von Hannover*, to which, as *McKennitt v Ash* makes clear, it is permissible to have regard. We do not disagree with the judge's summary of the decision in *Von Hannover* which we have quoted at [43 ix)] above. Mr Warby drew our attention to the oral submissions made to the ECtHR by Mr Prinz on behalf Princess Caroline, where he emphasised the campaign of harassment conducted against her by the German media. That was indeed part of the context in which the decision was made. For his part Mr Spearman stressed the fact that some of the photographs, the publication of which was held to infringe Princess Caroline's rights under article 8, showed her doing no more than walking in public.

60. The context of *Von Hannover* was therefore different from this but we have little doubt that, if the assumed facts of this case were to be considered by the ECtHR, the court would hold that David had a reasonable expectation of privacy and it seems to us to be more likely than not that, on the assumed facts, it would hold that the article 8/10 balance would come down in favour of David. We would add that there is nothing in the Strasbourg cases since *Von Hannover* which in our opinion leads to any other conclusion: see eg *Reklos and Davourlis v Greece*, petition no 1234/05, 6 September 2007.

61. In these circumstances, the judge was in our judgment wrong to strike out David's claim on the ground that he had no arguable case that he had a reasonable expectation of privacy. Understandably, the judge did not consider whether, if article 8 was engaged, David had an arguable case that the balance should be struck in his favour. In our opinion David has an arguable case on both points and his parents should be permitted to take his claim to trial on his behalf.

The DPA

62. Part of the judge's reasoning which led to his striking out David's claim under the DPA was his conclusion that article 8 was not engaged and that BPL was entitled to publish or procure the publication of the Photograph in the exercise of its right to freedom of expression contained in article 10. If the trial judge were to hold that article 8 is engaged and that the article 8/10 balance should be struck in David's favour, it would follow that BPL's admitted processing of David's personal data was unlawful. The judge expressly recognised the position in [72]. It would also follow that the processing was unfair and that none of the conditions of schedule 2 to the DPA (including the only condition relied upon, namely that in paragraph 6(1)) was met: see [76].

63. In these circumstances, the issues under the DPA should be revisited by the trial judge in the light of his or her conclusions of fact. Those issues include the other issues considered by Patten J under this head, notably (but not restricted to) those relating to causation and damage. Given that there is now to be a trial, we do not think that the claims under the DPA should be struck out, whatever the conclusions of fact may be. They seem to us to raise a number of issues of some importance, including the meaning of 'damage' in section 13(1) of the DPA. It seems to us to be at least arguable that the judge has construed 'damage' too narrowly, having regard to the fact that the purpose of the Act was to enact the provisions of the relevant Directive. All these issues should be authoritatively determined at a trial.

CONCLUSION

64. For the reasons we have given, we allow the appeal and direct that there be a trial of all the issues between the parties, unless of course they can be settled.