
ACTIVITY 47

Murray case (allow 1 hour 30 minutes)

Using the legal databases to which you have access, please find and read the judgment of Patten J in the following case: *Murray (by his Litigation Friends) v. Express Newspapers plc and Another* [2007] EWHC 1908 (Ch). You do not need to read the part of the judgment which deals with the Data Protection Act.



Make a note of your answers to the following questions:

- 1 Whose Article 8 rights were being defended in this case?
- 2 What did Patten J say was the issue of principle here?
- 3 Where did he say was the correct place to start when deciding a case like this?
- 4 Which precedent did he say he was bound to follow: domestic case law, or a decision of the ECtHR in Strasbourg?
- 5 What did he conclude with regard to whether the complainant's Article 8 rights were engaged? What was his reasoning?

COMMENT

- 1 This case concerned the Article 8 rights of the 18-month-old son of the author JK Rowling and her husband. A photograph had been taken of the boy, using a long-range lens, when he was in the street with his parents. The photograph was taken without the consent of the parents, and in 2005 it was used by Express Newspapers in its Sunday Express magazine alongside a quotation from JK Rowling about motherhood.
- 2 Patten J said that the issue of principle here was whether the 18-month-old, '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.'
- 3 The starting point had to be to identify the test for determining whether the conduct complained of had engaged Article 8 at all. Following *Campbell*, Patten J said that logically this question has to be answered first, before any balancing exercise between Articles 8 and 10 is carried out or issues of proportionality are discussed. The test for determining whether the conduct complained of has engaged Article 8 is that set down by the House of Lords in *Campbell*, ie whether the complainant has a reasonable expectation of privacy in respect of the disclosed facts, whether they are portrayed in words or pictures. This is an objective test and ultimately 'it will be a matter of judgment for the Court with every case depending upon its own facts' (paragraph 23).
- 4 Patten J said that as a matter of precedent, he was bound to follow the decision in *Campbell* to the extent that there appears to be a conflict between a ruling of the Court of Appeal or the House of Lords (now the Supreme Court) and a decision of the Strasbourg court (following *Kay v. Lambeth LBC* [2006] UKHL 10). However, he expressed some doubt as to whether the *Hannover* decision did conflict with the decision in *Campbell*.
- 5 Patten J said the decision of the House of Lords in *Campbell* had confirmed that the engagement of a claimant's Article 8 rights cannot be conclusively determined on the basis of whether or not the photograph was taken of the claimant in a public or private place. The fact that the photographs in *Campbell* were taken in a public place did not prevent the majority of the House from ruling that they constituted an invasion of the model's right to respect for her private life.

However, this case differed from *Campbell*, in that the claimant was being pushed along the street in a buggy by his parents on an innocent and ordinary occasion. In *Campbell*, Baroness Hale had stressed that if the photographs of the model had been similarly ordinary, for example photographs of her popping out to the shops for a bottle of milk, the House might well have reached a decision different from the one it did reach.

In considering the persuasive authority of *Hannover*, Patten J had difficulty in reconciling why the Princess's rights under Article 8 were engaged in relation to all the photographs, including the apparently innocuous ones.

Patten J then went on to consider the English case law since *Hannover*. He relied on the Court of Appeal decision in *McKennitt v. Ash* [2006] EWCA Civ 1714 at [8], that even since the *Hannover* case, there remain certain categories of innocent and ordinary personal information which carry with them no expectation of protection from disclosure under Article 8.

Applying this to the *Murray* case, he therefore concluded that these were innocent pictures of a child being pushed along a street and were not sufficient to engage the claimant's Article 8 rights.

The *Murray* case subsequently went to the Court of Appeal ([2008] EWCA Civ 446), which held as follows:

- (a) In deciding whether there had been an infringement of Article 8, the first question to be asked was whether there was a reasonable expectation of privacy. That was an objective question and took account of all the circumstances of the case, including the attributes of the claimant, the nature of the activity in which he was engaged, the place at which it happened, the nature and purpose of the intrusion, the absence of consent, the effect on the claimant and the circumstances in which, and the purposes for which, the information reached the hands of the publisher.

If there was a reasonable expectation of privacy then the second question was how the balance should be struck as between the claimant's right to respect for his private life and the publisher's right to publish. At that stage, the question of whether the publication of those private facts would be considered highly offensive to an objective, reasonable person might be relevant (*Campbell* followed and *Hannover* considered).

- (b) It was at least arguable that the appellant had a reasonable expectation of privacy. The fact that he was a child had greater significance than had been attributed to it by the judge at first instance. Although the Press Complaints Commission had ruled that the mere publication of a child's image could not breach its Editors' Code of Practice when the picture was taken in a public place and unaccompanied by private details that might embarrass the child, everything depended on the circumstances.
- (c) There might well be circumstances, even after *Hannover*, in which there would be no reasonable expectation of privacy. However, it all depended on the circumstances of the case. It was not possible to draw a distinction between activities that were part of a person's private recreation time and publication of which would be intrusive, and other activities such as a walk down the street or a trip to the grocer to buy milk. It was not necessarily the case that such routine activities should not attract any reasonable expectation of privacy; everything depended on the circumstances. Subject to the facts of the case, the law should protect children of parents who were in the public eye from intrusive media attention, at least to the extent of holding that the child had a reasonable expectation that he would not be targeted in order to obtain photographs in a public place for publication, where the taking of such photographs would be objected to on the child's behalf.