

## Children and the Right to Privacy

*Murray v Big Pictures (UK) Ltd* [2008] EWCA Civ 446 (07 May 2008)

The England and Wales Court of Appeal has considered that scope of a child's right to privacy in a case in which photographs of the child of a celebrity were taken and published without consent.

### Facts

Dr Neil and Mrs Joanne Murray were walking in Edinburgh with their 19-month-old son David when a photographer for Big Pictures (UK) Ltd (BPL) took a covert picture of the family. Mrs Murray is the author of the Harry Potter books and is known more commonly by her pen-name JK Rowling. The photograph was subsequently published in several newspapers and magazines.

Dr and Mrs Murray issued proceedings on David's behalf as his litigation friends. David asserted an infringement of his right to privacy for the taking and subsequent publication of the photograph contrary to art 8 of the Convention. Publishers of the photograph, Express Newspapers Plc were named as the first defendant. The photographer's employer, BPL, was named as the second defendant. The action against Express Newspapers Plc settled, leaving BPL as the sole defendant. BPL applied for an order striking out the claim or an order for summary judgment on the ground that David's claim was not arguable.

### Decision at First Instance

Justice Patten of the court of first instance decided in favour of BPL and struck out the claim. Relying on *Campbell v MGN* [2004] UKHL 22, he considered 'what a reasonable person of ordinary sensibilities would feel if placed in the same position as the claimant and faced with the same publicity.' In applying this test to David's case, Justice Patten concluded that David had no obvious sensitivity to an invasion of privacy because (1) the photograph was taken with a long-range lens from across the street and (2) there was no direct physical intrusion into David's personal space. Further, Patten J observed that the law does not allow celebrities to carve out a press-free zone for their children in respect of everything they choose to do. As an illustration of this point, he noted that 'if a simple walk down the street qualifies for protection, it is difficult to see what does not.' He concluded that there remains an area of routine activity which, when conducted in a public place, carries with it no guarantee of privacy.

Justice Patten also followed the *obiter* in *McKennitt v Ash* [2008] QB 73 that English courts 'pay respectful attention' to the decision of the European Court of Human Rights in *Von Hannover v Germany* (2005) 40 EHRR 1. In *Von Hannover*, Princess Caroline of Monaco made a successful claim for breach of privacy against the German press for a series of photographs taken without her consent. These photographs were of her regular day-to-day activities, including her picking her children up from school, playing sport and shopping at a market. They were, in this respect, similar to the photograph of David. Also significant was the fact that Princess Caroline's claim did not involve harassment or significant press intrusion. It is clear that *Von Hannover* interprets private life more broadly than *Campbell*, allowing for a legitimate expectation of privacy in relation to family and personal activities which are not, in themselves, embarrassing or intimate. However, the House of Lords made it clear in *Kay v Lambeth LBC* [2006] UKHL10 that in the event of a conflict between *Campbell* and *Von Hannover*, the decision of the House of Lords in *Campbell* should prevail.

### **Decision of the Court of Appeal**

The Court of Appeal decided that David's claim was arguable and reinstated the action. The Court considered that Dr and Mrs Murray's wish, on behalf of David, to protect their child's freedom to live a normal life without the constant fear of media intrusion was reasonable and should be protected by law. The court conceded that the photograph of David showed no more than could be seen by any passer-by on the street. However, once published, it would be disseminated to potentially a large number of people, leading to the possibility of further future intrusion into his private life. The court also noted that at the time the case was decided by Justice Patten, there was no authority on a child being targeted by the press in the way that David had been. It also considered the fact that the United Kingdom is a party to the *United Nations Convention on the Rights of the Child*. Finally, the Court of Appeal was influenced by the obligation of editors under the Press Complaints Commission Editors' Code of Practice to avoid using the fame or notoriety of a parent or guardian as the sole justification for publishing details of a child's private life: 'The test to be applied by newspapers in writing about the children of public figures who are not famous in their own right is whether a newspaper would write such a story if it was about an ordinary person.' The Court held that 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; on the alleged facts, the photograph would not have been taken or published if David had not been the son of JK Rowling. For these reasons, the Court of Appeal held that David did have an arguable claim for breach of his right to privacy under art 8.

### **Relevance for the Victorian Charter**

The most relevant *Charter* rights to *Murray* are ss 13 and 17. Section 13 protects a person's privacy, family and home from unlawful and arbitrarily interference. Section 17(1) provides that as families are the fundamental unit of society, they are entitled to protection by society and the State. Finally, section 17(2) provides that every child has the right, without discrimination, to such protection as is in his or her best interests. The decision in *Murray* confirms that any intrusions on the right to privacy must be demonstrably justifiable and that this threshold will be particularly stringent in the case of children.

The decision is available at <http://www.bailii.org/ew/cases/EWCA/Civ/2008/446.html>.

*Louise Fahey is a lawyer with DLA Phillips Fox*