

IN THE HIGH COURT OF JUSTICE

CLAIM NO: CO/8624/2005

QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

B E T W E E N:

THE QUEEN

On the application of

ANDREW WOOD

Claimant

And

THE COMMISSIONER OF POLICE FOR THE METROPOLIS

Defendant

NOTE

- 1) This note deals with the decision of the Court of Appeal in *Murray v Big Pictures (UK) Limited* [2008] EWCA Civ 446. The appeal was allowed and the whole claim was permitted to proceed to trial. This, as recorded in the decision of Patten J at para 5, was for an injunction "to restrain further publication of the photograph or any other or similar photograph of him taken without his consent and for damages or an account of profits for breach of confidence, the infringement of his right to privacy and the misuse of private information resulting from the taking, recording, holding and publication of the photograph".

- 2) The main elements in the decision were:

As to whether or not there was an interference for the purposes of Article 8(1)

- a) The relevant question is [para 35] whether there is a reasonable expectation of privacy. This is an objective question answered by asking "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."

- b) The assessment takes account of all the circumstances of the case including: 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. [para 37].
- c) The position of a child may be different from that of an adult and Patten J erred in not giving sufficient emphasis to that feature in this case [37-8 and 45-7 and 56].
- d) The Court did not share Patten J's pre-disposition 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". [para 56].
- e) "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". [para 57]

As to whether the interference was justified

- 3) The Court was careful to note that the factors above went only to Art 8(1) and so there was no guarantee of privacy as Patten J feared. On the facts it was arguable that the balance should be struck in the Claimant's favour.

Application to the present case

- 4) The decision is supportive of the Claimant's case in the following ways:
- a) It recognises that the question whether photography in a public place involves an interference for the purposes of Article 8(1) requires consideration of a range of factors. In particular it is not a requirement that the activity in question be inherently private. Although the judgment (particularly paragraph 17 and 54) stresses publication¹ as a critical feature, that was inevitable in the context of the claim, which was directed at preventing publicity of that kind. The same reasoning can be applied where, as in this case, the use that is objected to is something other than media publication. Other relevant aspects included (this list is mainly taken from para 17):
 - i) The clandestine nature of the photography.
 - ii) The deliberate targeting of David with a view to taking a series of photographs of him [50]. This was different from "a single photograph taken of David which was for some reason subsequently photographed" [para 56]
 - iii) The photographs were taken with a view to their subsequent sale for publication.
 - iv) No consent was given or sought and the Defendant must have known it would have been refused [see also para 57].
 - v) This formed a part of a pattern of similar photography of the Claimants by other media agencies [para 18] giving rise to an understandable perception that others will take and publish photographs.

¹ "it seems to us the judges approach depends too much upon a consideration of the taking of the photograph and not enough on its publication".

5) The same passages make clear that it is unrealistic to separate the taking of a photograph from types of retention and use, which alone may involve an interference for the purposes of Article 8(1). They describe a process of clandestine photography without consent and with a view to publication. Depending on the circumstances the whole of that process engages Article 8. No part of the Claimant's claim was struck out and it included a claim about the taking of the photographs.

6) At paragraph 54 the Court did deal with taking as a separate point:

"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".

7) This does not mean that the mere taking of a photograph in a street will necessarily be unobjectionable. The context may make the course of conduct, including the taking of a photograph, a breach of Article 8. The reference to distress in this paragraph also supports the Claimant's case here. It suggests that it is not necessary to show a high level of invasion of a person's physical or psychological integrity in order to establish an interference under Article 8(1). This is consistent with the reasonable expectation test described above (para 2(a) and (b)).

8) The Court did not address the decision in *Von Hannover* in any detail, being satisfied that the ECtHR would reach the same decision that it had on the facts of *Murray*. Although it agreed with the judge's analysis of that case it also accepted that the "campaign of harassment" was part of the context in which the decision was made. It is consistent with the overall approach adopted by the Court for this to be a relevant factor.

Conclusion

- 9) The Court of Appeal decision in *Murray* supports the Claimant's contention that it is not necessary, in order for Article 8(1) to be engaged in a case like the present, for the activity in question to be inherently private. That is one factor but is not decisive. The key question in any case is what was the Claimant reasonably entitled to expect in relation to the type of interference/intrusion that he in fact suffered. For reasons already given in his skeleton argument the Claimant was subjected to action extending beyond what he could ordinarily expect.

MARTIN WESTGATE
May 14, 2008