Neutral Citation Number: [2013] EWCA Civ 554

Case No: A2/2012/2391

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, QUEEN'S BENCH DIVISION
MRS JUSTICE NICOLA DAVIES DBE
HQ11X00412

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/05/2013

Before:

MASTER OF THE ROLLS
LORD JUSTICE TOMLINSON
and
LORD JUSTICE RYDER

- -

Between:

AAA (BY HER LITIGATION FRIEND BBB)	**Appellant**
- and -	
ASSOCIATED NEWSPAPERS LIMITED	**Respondent**

- -
- -

Mr James Price QC and Mr William Bennett (instructed by **Collyer Bristow LLP**) for the **Appellant**
Mr Desmond Browne QC and Ms Alexandra Marzec (instructed by **Reynolds Porter Chamberlain LLP**) for the **Respondent**

Hearing dates: 29 & 30 April 2013

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Judgment

The Master of the Rolls:

Introduction

1. The claimant was born on 14 November 2009. She is the daughter of an unmarried professional art consultant ("the mother"). The information whose disclosure by the Daily Mail is the subject of these proceedings relates to the claimant's paternity. I shall refer to this as "the private information". Her alleged father ("the father") is a prominent elected politician. The claimant and the mother first came under the spotlight of media attention a few days before 16 July 2010. On that date, the first Daily Mail article about the claimant and her paternity was published by the defendant. In the preceding week, she had been photographed by London Media, a press agency which sold a photograph of the claimant being pushed by the mother in her buggy ("the photograph") as well as details of the private information to the Daily Mail for publication. Prior to 16 July 2010, the private information had not been in the public domain. The defendant then published a further eight articles, three of which included the photograph and all of which further published the private information. All of the articles and the accompanying photographs were also published on the defendant's website, Mail Online. These proceedings are brought by the claimant's maternal stepgrandfather.

2. Nicola Davies J awarded £15,000 damages for breach of the claimant's right of privacy by the repeated publication of the photograph. She did not award damages for the publication of the private information. She also refused to grant any injunctive relief to the claimant. She did, however, accept an undertaking from the defendant concerning future publication of photographs of the claimant.

3. She dismissed the claim in respect of publication of the private information in the first article. She held that, while the claimant had a reasonable expectation of privacy in respect of it, (i) it was a reduced expectation by reason of what the mother had said about the claimant's paternity at a country house weekend in June 2010 and when later interviewed for an article that was published in a magazine (which I shall refer to as "the T magazine") and (ii) the public interest in the information outweighed the claimant's reduced expectation of privacy and justified the publication.

4. She refused to grant an injunction restraining further publication of the non-photographic information on the ground that so much information was now in the public domain that an injunction to prevent further publication would serve no real purpose.

5. The claimant appeals against the dismissal of her claim for damages in respect of the private information and the refusal to grant an injunction. The defendant does not appeal against the award of damages in respect of the publication of the photographs.

The article published on 16 July 2010

6. For the purposes of resolving the issues that arise on this appeal, it is sufficient to refer to the first article that was published by the defendant. The article included the following: "… when the girl was born her appearance shocked him [the mother's partner] and led to jokes that she looked a lot more like [the father]… He [the mother's partner] took a paternity test and discovered that he was not the father,

prompting the couple to split." The article referred to a friend of the mother's partner having said: "the gossip among [the mother's partner's] friends was that this child when newborn had shocking wild red hair and bright blue eyes, and we were all saying she looked a lot more like [the father] than [the mother's partner]." The article continued by giving further information about the alleged cause of the split between [the mother] and [the mother's partner] (in particular, the child's appearance), and more about [the mother's partner's] paternity test as well as a quotation from a friend of [the mother] about the [the mother's] initial belief that the father of the unborn child was [her partner]. The article continued: "Only when the child was born did [the mother] join everyone in surprise at the little girl's appearance, saying: 'There is no red hair in my family or [my partner's]'". A little later, the article said: "a friend of [the mother] said 'early last year [the mother] was talking about her relationship with [the father] when she suddenly said 'I slept with him' in a 'God, what have I done?' sort of way. The article said that the friend added: "It came as a shock when [the mother] discovered the father of her daughter wasn't [the mother's partner]. By then she didn't want him having anything to do with the baby …".

The grounds of appeal

7. There are four grounds of appeal. First, the judge failed to make any or any proper assessment of the claimant's best interests as regards media attention and media publication of information or speculation concerning her paternity and related private information. Secondly the judge was wrong to hold that two factors weakened the claimant's expectation of privacy in this case. These factors were (i) the events at a house party attended by the mother during the weekend of 26 June 2010; and (ii) the interview by the T magazine of the mother in September 2010 which was published in November 2010. Thirdly the judge wrongly held that the claimant's expectation of privacy (weakened as she held it to be) was outweighed by the public interest in the recklessness of the father. Fourthly the judge was wrong to hold that there was a public domain defence for publication of the defendant's subsequent articles and that an injunction to prevent any further publication of information about the claimant's paternity would serve no real purpose.

The role of the Court of Appeal

8. It is now clearly established that a balancing exercise between articles 8 and 10 of the European Convention on Human Rights ("the ECHR") conducted by a first instance judge is treated as analogous to the exercise of a discretion. Accordingly, an appellate court should not intervene unless the judge has erred in principle or reached a conclusion which was plainly wrong or outside the ambit of conclusions that a judge could reasonably reach: see, for example, *Lord Browne of Madingly v Associated Newspapers Limited* [2007] EWCA Civ 295, [2008] QB 103 at para 45. In *JIH v News Group Newspapers Ltd* [2011] EMLR 15 at para 26, Lord Neuberger MR said: "While [the decision of the lower court] did not involve the exercise of a discretion, it involved a balancing exercise, with which, at least as a matter of general principle, an appellate court should be slow to interfere".

9. In sensitive privacy cases such as the present, but particularly where there are cogent public interest arguments in play, there is a difficult judgement to be made by the court in balancing the competing rights. The balancing exercise requires a detailed appreciation of the evidence that was before the trial judge. She was in the best

position to undertake the balancing exercise and had the advantage denied to this court of seeing and hearing the witnesses and making an assessment of them.

The first ground of appeal: failure to consider the claimant's best interests

10. The general approach of the law to a child's best interests was summarised by Lord Kerr in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166 at para 46:

> "46. It is a universal theme of the various international and domestic instruments to which Lady Hale has referred that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result."

11. In *K v News Group Newspapers* [2011] EWCA Civ 439, [2011] 1 WLR 1827, Ward LJ cited this passage at para. 19 describing it as the proper approach in the context of an application for a privacy injunction. Nicola Davies J cited both passages at paras. 60 and 61 of her judgment. She also referred to section 12(4)(b) of the Human Rights Act 1998 which required her to have particular regard to the importance of ECHR rights to freedom of expression and, where the proceedings relate to material which appears to the court to be journalistic material, to have regard to "any relevant privacy code". She cited clause 6 para (vi) of the Press Complaints Commission (PCC) Editors' Code of Practice which provides:

> "In cases involving children under 16, editors must demonstrate an exceptional public interest to override the normally paramount interests of the child."

12. At para 56, the judge also referred to the Guidelines to the 2009 version of the Code which states:

> "The Code goes to exceptional lengths to safeguard children by raising the thresholds on disclosure and defining tightly the circumstances in which press coverage would be legitimate.
>
> For the most part, this applies up to the age of 16 …

> **Children of the famous:** the rules apply equally to children of parents from all walks of life."

13. The judge summarised the claimant's case on reasonable expectation of privacy at paras 64 to 68 of her judgment. It was the discussion of the claimant's looks, the supposed circumstances of her conception, the alleged reaction of her mother's then partner to the claimant's looks at birth and other information regarding her character, interests and activities that was information that the reasonable parent would consider to be private. It was also her case that where, as here, the child's paternity was being kept private by the mother and her family, it was within the realm of private and family life for which article 8 of the ECHR required respect. It was summarised by the judge as "a classic example of information as regards which the individual must be allowed to exercise personal autonomy, and in the case of a small child, in which autonomy is exercised on its behalf by its responsible parent".

14. The judge expressed her conclusions on the weight to be attached to the claimant's expectation of privacy in the following passage:

> "113. I have little difficulty accepting the claimant's submission that the paternity of this young child is a matter which engages her rights pursuant to Article 8. The provisions of a statute, yet to be enforced, provide little by way of counter argument.
>
> 114. As to the paramount nature of a child's interests in any subsequent balancing exercise, the defence rightly stated that this case was not conducted as a "best interests of the child" hearing. Had that course been taken I would have expected other evidence to be called, including expert evidence. I note that in the written submissions received following the hearing it was stated on behalf of the claimant that the "child's best interests are not paramount in a sense that they must always prevail over all other concerns however powerful." I attach considerable weight to the claimant's interests but I do not regard them as being so powerful as to override, without more, the competing interests involved in any balancing exercise.
>
> 115. The approach which I have adopted is that having identified that the claimant's Article 8 rights are engaged, to then ask whether she has a reasonable expectation of privacy in respect of the matter of her paternity. Of itself, I accept that this issue is one in respect of which this young claimant would have a reasonable expectation of privacy such as would allow her mother the time to decide when it would be appropriate to tell her who her father is. However, a real difficulty in this case has been the manner in which the claimant's mother has, on identified occasions, chosen to deal with the question. I refer to her conversations with friends, but in particular the events of the country weekend (Private Appendix 5), the process leading up to and the publication of the interview in the magazine (Private Appendix 6) and to my findings."

15. Mr Price QC submits that the judge failed to make any or any proper assessment of the claimant's best interests and that this failure vitiates the exercise that she conducted in balancing the claimant's article 8 rights against the defendant's rights under article 10 of the ECHR. The strength of the claimant's expectation of privacy and whether it should prevail over any competing public interest in publication could not be properly evaluated without considering where the claimant's best interests lie in regard to any future publication of information of this nature concerning her.

16. But the first sentence of para 114 of the judgment accurately reflected the way the case had been conducted on behalf of the claimant. The focus of that case was that the mother wanted to protect the claimant from media intrusion and that she alone had the right to decide when the time was right to tell the claimant about her paternity. The judge was right to say that there was little evidence on the question of whether it was in the best interests of the claimant that her reasonable expectation of privacy should be respected in this case. It is, however, right to say that the mother did give evidence that she thought that the publication of the private information was not in her daughter's best interests. In her witness statement, she said that, if the article remained on line, the claimant or her school companions might read it "and what an absolutely devastating allegation to read about the circumstances of your conception" (para 79); the identity of her father is "exceptionally sensitive and delicate" and the claimant's "wellbeing may be damaged if she is told the identity of her father in the wrong way" (para 121); one of her greatest fears is that the child "will be teased/bullied or questioned at school if the material complained of remains on the internet or if she is subjected to more speculation in the media about her paternity" (para 131). Similar expressions of opinion were made in the witness statements of the litigation friend and the claimant's grandmother.

17. But these expressions of opinion need to be viewed in the context of what the mother said in her oral evidence. When she was asked why she thought that it was in the claimant's best interests to keep the identity of the father secret, she replied (Day 3 p 140 lines 1 to 11):

> "A. I don't
>
> Q. You don't?
>
> A. I don't necessarily think it is in her best interests, I just think it is in the best—I don't want it discussed in the newspapers. I do not think that is right. It is up to me as a parent and it is up to her other parent to decide when and how we tell her about her paternity."

18. The judge was right to say that the real thrust of the claimant's case was as she summarised it in the first sentence of para 114. Nevertheless, the judge was mindful of the need to have particular regard to the best interests of the claimant. She said in terms in the last sentence of para 114 that she attached "considerable weight" to the claimant's interests. It is common ground that she was right to do so. In my view, having regard to the way that the case was conducted on behalf of the claimant, it is not open to Mr Price to criticise the judge for failing to make a detailed assessment of the child's best interests. It was sufficient that she recognised that (i) the claimant had a reasonable expectation of privacy in relation to her paternity, (ii) respect for this

expectation was in her best interests and (iii) considerable weight was to be attached to her best interests. On the material that was before her, she could not be expected to have done more.

19. It would have been indeed surprising if the judge had overlooked the need to assess the claimant's best interests when she had taken the trouble to refer to the PCC Editors' Code of Practice, the authorities to which I have referred above as well as international instruments relating to children and jurisprudence of the ECtHR. But it is clear from the last sentence of paragraph 114 that she did not do so. There is no reason to doubt that she did attach considerable weight to the claimant's best interests. But having done so, she went on at para. 115 to explain why, by reason of the two events to which I am about to refer, the weight to be attached to the claimant's expectation of privacy (and therefore best interests) was reduced.

20. For these reasons, I reject the first ground of appeal.

The second ground of appeal: the judge was wrong to hold that the reasonable expectation of privacy was weakened by the two events.

General

21. It is common ground that, in evaluating the strength of the claimant's reasonable expectation of privacy, the judge was entitled to take into account any relevant conduct of the mother. In *Murray v Express Newspapers plc* [2008] EWCA Civ 440, [2009] Ch 481 at para 37, the Court of Appeal approved the following statement:

> "The question whether a child in any particular circumstances has a reasonable expectation of 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 should remain private … The court can attribute to the Appellant 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."

22. Having made her findings in relation to the two events (which I describe below), the judge concluded at para 116:

> "The claimant's mother is an intelligent professional woman. She chose to speak and act as she did. In my view, the result has been to compromise the claimant's reasonable expectation of privacy upon the issue of her paternity. I do not find that the claimant has no reasonable expectation, rather the weight to be attached is of a lesser degree than would have been the case had nothing been said or permitted to be said upon this matter."

The country house weekend

23. The mother was invited to a house party on the weekend of 26 June 2010 by her partner. The details of what happened are described in detail by the judge in her Private Appendix 5. In short, she had a conversation about her child with Nicholas Coleridge, the managing director of a major magazine group. She told him that the child's father was not her partner and she identified the real father. At paragraph 10 of the Appendix, the judge said:

> "In his closing submissions, Mr Price QC made the point, which I accept, that this was a private house party. However, [the mother] was not talking to an old or close friend. She had never met Nicholas Coleridge prior to that evening. Her evidence, that she did not know he was President of Condé Nast was surprising, given the circles in which [the mother] moved. The question asked by Nicholas Coleridge, namely was [the mother's partner] the father of the claimant, could have been shortly answered in the negative by [the mother]. If it was the wish of the claimant's mother to stop gossip or speculation, no more was required to be said. It raises the question of why it was [the mother] chose to volunteer the information in the manner in which she did. In my view it points to an inconsistency or ambivalence in her approach to the issue of speculation concerning the paternity of her daughter."

24. Mr Price submits that the judge should not have taken any of this into account in assessing the strength of the claimant's expectation of privacy in the private information. He submits that the conversation between the mother and Mr Coleridge was entirely private and confidential. It is clear law that disclosure in a private circle of matters which it is known should not be passed on to the press should not be treated as affecting a person's expectation of privacy with respect to media publication: see, *Lord Browne of Madingly v Associated Newspapers Ltd* [2008] QB 103, para 61:

> "It appears to us that there is potentially an important distinction between information which is made available to a person's circle of friends or work colleagues and information which is widely published in a newspaper."

See also *K v News Group Newspapers Ltd* at paras 10(3) and 11 of the judgment of Ward LJ.

25. In my view, the judge was right to regard the mother's behaviour at the weekend party as indicative of an ambivalent approach to the confidentiality of the claimant's paternity. She had never met Mr Coleridge before. The facts of the case were not analogous to sharing confidential information with a close friend. The judge's assessment of the situation at para 10 of the Appendix is beyond challenge. I should add (although it is not material) that Mr Coleridge did not make any public disclosure of what the mother had told him.

The article in the T magazine

26. In October 2010, the T magazine published an article about the mother which contained references to her relationship with the father and to the fact that he was alleged to be the father of the claimant. The article was based on an interview with one of the magazine's journalists and had been approved by the mother. It contained references to the claimant's looks and her similarities with the father, although it stated that the mother would not "be drawn on the subject of the child's paternity". A passage that was inserted in the article on the advice of her lawyers stated:

> "[the mother] has not confirmed, and will not confirm, at this stage, that [the father] is the baby's father. 'Because it's private' she says. 'It's private for all sorts of reasons. And it is very important to me to protect my child's privacy and to ensure that she is allowed to grow up without intrusion. Neither her father nor I will speak publicly about her. She can't speak for herself.'"

27. In Private Appendix 6 of her judgment, the judge set out in considerable detail the facts which led up to the publication of this article. What follows is a summary. In May/June 2009, the then editor of the magazine approached the mother saying that he wanted to do a profile of her business for the magazine. She considered that such an article would be helpful for her business. The final draft of the proposed article was sent to her on 30 July 2009. For reasons which are not material, the article was not published.

28. The first Daily Mail article which is the subject of the current proceedings was published on 16 July 2010. Three days later the new editor of the magazine emailed the mother saying that the "furore" caused by the article must be extremely stressful and that she would like to discuss updating the interview that the mother had given the previous year.

29. On 9 September 2010, the mother met the editor of the magazine for lunch. The editor made it clear that it was plain that the magazine could not run an article without mentioning the name of the father: she said that she did not want to look "actively stupid" by running a piece about somebody who had been referred to as the mother of someone's child without referring to the huge news story. The editor said that she did not intend to publish the first interview (which was out of date) and that she had formed the impression over lunch that the mother was "ambivalent" about identifying the father of the claimant. The mother did not want to be seen to talk about her affair with the father and the paternity question, but she did not seem to mind it being mentioned (para 10). At the lunch, the mother agreed to a further interview provided that she liked the journalist. The judge said that, according to the editor, the mother seemed quite keen "which surprised her" (para. 13).

30. There followed a series of emails including an email of 15 September 2010 at 15.22 from the mother to the journalist in which the mother said that she had been advised by her lawyers against agreeing to the publication of photographs of the claimant. She said that this was "quite disappointing as she is very photogenic and at her most cute". In fact during the period 13 – 16 September, the mother did not consult her solicitors about the inclusion of the claimant in the photo shoot. In her oral evidence, the mother said that she was not telling the truth about consulting her lawyers, since she was hiding behind them and "stringing" the magazine along. As the judge said, it was

difficult to understand the mother's conduct as she described it, since she had given full approval for the photo shoot, the interview was going ahead and there did not appear to be a need to "string" the magazine along (para 15).

31. On 21 September 2010, the interview and photo shoot took place. By 28 September, the journalist had prepared a draft article. The mother said that she wished to change paragraphs relating to her sisters because of concern for her mother as well as paragraphs relating to her partner. There were further email exchanges between the mother and the journalist regarding proposed changes in relation to her partner and her sisters. There was no mention of the claimant or the father in these emails.

32. The judge's conclusions on all this material are set out at paras. 25 – 29 of Private Appendix 6 in these terms:

> "25. I am satisfied that at the lunch on 9 September 2010 [the mother] had the choice of proceeding with the [magazine] article or stopping the process. The mother chose to go ahead with an article that she must have been aware would include reference to her daughter and inevitably speculation as to her daughter's paternity. I accept the evidence of [the mother] that in proposing amendments to draft, she would direct her attention to matters of particular concern. Given her stated aim in these proceedings, it is surprising that the focus of efforts was directed to possible concerns of her mother, information relating to her sisters and to [her partner] and his activities.
>
> 26. On behalf of the claimant, it is said that by this time information relating to the claimant and allegations as to paternity were already in the public domain. I accept the point. However, in agreeing to an interview with [the magazine], which inevitably was going to contain information upon these matters, [the mother] was playing a part in the perpetuation of facts and the speculation which is at the core of these proceedings. No doubt that is why [the mother's] solicitors advised her not to do the interview, advice which she chose not to follow. [The mother] is an intelligent, professional woman, she knew what she was doing. It is not enough to say that this claim is brought on behalf of the claimant and not her mother. Given her young age, the claimant's reasonable expectation of privacy is affected by her mother's conduct of what is her private life. The fact that her mother contrary to advice from solicitors acting on behalf of her daughter chose to go ahead with an article which she knew would contain information about her daughter and speculation as to her daughter's paternity demonstrates an ambivalence on her part, to the matters which are at the core of this application.

> 27. The inconsistency in the approach of [the mother] to disclosure of facts relating to the paternity of her daughter has been an issue in these proceedings. I have reached a view as to its core. [The mother] loves and is rightly proud of her daughter. She feels strongly that her daughter's conception was not and should not be perceived as the "drunken mistake" so described by a "friend" in first article. [The mother] is understandably concerned that such a perception is not one of which her daughter should learn.
>
> 28. The identity of the father of her daughter is a matter upon which [the mother] is not without some pride. I believe [the mother] is torn between two competing factors:
>
> (a) A wish to inform certain individuals, if not of the father's identity, then at least to point them in a certain direction in order to "set the record straight; and
> (b) The stated aim in these proceedings which is, for the present, to keep the matter a secret save for family and close friends.
>
> 29. It is the wish identified in 28 (a) which, I believe, prompted [the mother] to volunteer the unnecessary information to Nicholas Coleridge, is the explanation for her behaviour as described by [the editor] of the magazine [at their lunch on 9 September] and was a factor in her cooperation with the [magazine] interview. Having seen and listened to the evidence of [the mother], I am not confident that she has resolved this particular conflict."

33. Mr Price challenges the judge's assessment of the mother's attitude as evinced by the magazine article and the events relating to it. He says that the judge failed to take into account that her attitude was affected by the fact that the issue of the claimant's paternity had already been put into the public domain by the first Daily Mail article on 16 October 2010. He submits that no interview with the magazine could ignore the paternity question as the editor had made clear at the lunch on 9 September. The magazine article contained nothing that was not already in the public domain. It follows that the fact that the mother was content to be interviewed and approved the article does not indicate that she did not believe that it was important to protect the claimant's privacy in relation to her paternity.

34. In my view, the judge's assessment is unassailable. She had the benefit of seeing the mother (as well as the editor and the journalist) give evidence. She rejected the suggestion made by the mother that she had been coerced into agreeing to the interview. As the editor stated in her evidence (which the judge clearly accepted), the mother was not subjected to any coercion. This is clear from the many friendly emails between the mother and the magazine that we were shown. The mother went ahead with the interview despite the fact that she had received legal advice from her solicitor on 1 October that it would be preferable for the magazine not to run an article about her until the privacy claims were concluded. The judge was right to find that the mother could have refused to be interviewed. She knew that the magazine did not

intend to publish a story based on the 2009 interview and that, unless she agreed to be interviewed again, the story would not be published. But she was keen to participate and even seems to have been keen on the idea of photographs: see, for example, the email of 13 September 2010 at 13.46 to the journalist: "I'm fine about including [the claimant] in the shoot, but can see my lawyers advising me against". I have already referred to the email sent on 15 September at 15.22 (para 28 above).

35. As Mr Browne QC points out, the mother seems to have had little concern as to the effect of the magazine article on the claimant. Such concerns as were expressed appear to have been expressed by the mother's lawyers who were worried that the article would "affect our privacy case and my claim for insurance to cover it": see email of 15 October at 11.34 from the mother to the journalist.

36. There is no evidence that the mother was only willing to be interviewed by the magazine because the issue of the claimant's paternity had already been put into the public domain by the Daily Mail. If the mother had said that she would not have agreed to the interview but for the previous publicity and that, for example, she wanted to be interviewed in order to put the issue in a different light, then there might have been force in the submission that her willingness to be interviewed did not cast doubt on her concern to protect the claimant's privacy. But that was not the case here.

37. The judge made a careful and nuanced assessment of the mother's attitude at paras 25 to 29 of Private Appendix 6 to her judgment. The evidence amply justified her conclusion that the mother's conduct demonstrated "at the least, an ambivalence towards and an inconsistent approach with her stated aim in these proceedings" (para 101 of the main judgment). I would reject the second ground of appeal.

The third ground of appeal: challenge to the judge's balancing of the rights under article 8 and 10 of the ECHR.

38. At para 117 of her judgment, the judge recorded (i) the wish of the mother and the litigation friend to be allowed to find the right time to tell the claimant who her father is and (ii) the fact that it had never been the claimant's case that her paternity would remain a secret from her. The identity of the father was already known or speculated upon beyond the group of friends in whom the mother had confided and she was aware of that. This would have played a part in hastening the decision of the mother to tell her daughter of the identity of her father.

39. So far as the balancing exercise was concerned, the judge stated her conclusion as follows:

> "118. The Article 10 rights of the defendant must be recognised by the court in carrying out the balancing exercise as between the claimant's Article 8 rights and the defendant's Article 10 rights. The test required to justify publication is a high one, "exceptional public interest". It is undisputed that there is a public interest in the professional and private life of the claimant's supposed father. His professional position speaks for itself. As to his private life, he is man who has achieved a level of notoriety as

> result of extramarital adulterous liaisons. Of itself, the fact of an extramarital affair does not render inevitable the publishing of information that, as a result, a child was conceived. However, the claimant is alleged to be the second such child conceived as a result of an extramarital affair of the supposed father. It is said that such information goes to the issue of recklessness on the part of the supposed father, relevant both to his private and professional character, in particular his fitness for public office. I find that the identified issue of recklessness is one which is relevant to the professional and personal character of the supposed father. Specifically, I find that it goes beyond fame and notoriety.
>
> 119. For the reasons identified I find that the claimant's reasonable expectation of privacy is to be accorded less weight than would have been the position had the claimant's mother said or done nothing. In balancing the claimant's expectation of privacy against the public interest in the supposed father and in particular the recklessness, relevant to his character and fitness for public office, I find that the publication of the fact of the claimant's birth in the circumstances alleged was justified. As to the claimant's mother's appointment by the claimant's supposed father at a time when she was pregnant, of itself that would not have been of sufficient weight to justify publication, it was a matter of which account could be taken in making a decision to publish."

40. Mr Price criticises this part of the judgment. He submits that any public interest in the father's infidelities and philandering could be fully served by discussion and criticism of the alleged affair with the mother and his other affairs, without any need to identify the claimant. Mr Steafel, the deputy editor of the Daily Mail was cross-examined by Mr Price on the issue of public interest: see day 5 p 45. He agreed that the public interest related to the father's philandering adultery and his personal character as it affects his public duties. When asked whether this could be discussed without reference to the claimant, he said:

> "It could be, but there is an additional element to this, which is the charge against [the father] which has been levelled in relation to this case and previously, which is of recklessness. Self-evidently it is possible to have an extra marital affair and ensure that there is not a child. Extreme recklessness of this type was already on [the father's] record, as we all know. There was a previous affair which resulted in the lady concerned having an abortion. That caused him great personal and professional discomfort, and this story appeared to suggest that history in his case was repeating itself, which made explaining the child's part in the story and indeed

> demonstrating that the child looked an awful lot like [the father] very important."

41. The judge recognised that the mere fact that the father had been involved in extramarital affairs did not of itself mean that it was in the public interest to publish information about a child whose conception resulted from such an affair (para 118). But she accepted the evidence of the deputy editor and the submission of Mr Browne that it was in the public interest to publish information about the claimant because the information went to the issue of recklessness and whether on that account he was fit for public office.

42. Mr Price says that no evidential basis was laid for this suggested public interest justification. The mother was not asked whether the conception of the child resulted from recklessness with respect to taking contraceptive precautions. The circumstances relating to the conception were not explored in the evidence. The mother may indeed have wanted a child, although that is not what she told the T magazine journalist. Mr Price submits that it was not open to the judge to decide the critical question of whether the defendant's article 10 right of freedom of expression outweighed the claimant's privacy rights under article 8 on the basis of the father's alleged recklessness.

43. In my view, this is to take too narrow a view of what the judge meant by "recklessness" in this context. She was right to say that the mere fact of an extramarital affair does not necessarily justify publishing in the public interest the fact that a child was conceived where the parent is a well known politician or other public figure. It must depend on the circumstances. The judge did not spell out what she meant by "recklessness" as fully as she might have done. But it is clear that she had in mind that the claimant was alleged to have been the second child conceived as a result of the father's extramarital affairs. She may well also have accepted the defendant's case that in his sexual activities the father was reckless about the feelings of others, particularly his wife and family. It was not material to the judge's conclusion whether contraceptive precautions were taken. What was material was that the father's infidelities resulted in the conception of children on two occasions. The judge was entitled to hold that this was of itself reckless behaviour, regardless of whether any contraceptive precautions were taken. The recklessness issue was put clearly by the defendant's solicitors in their letter to the claimant's solicitors dated 29 May 2012:

> "You suggest that the information that [the father] may have fathered a child as a result of the affair adds nothing to the pubic interest story of the affair. We do not agree. It is a telling fact about the character of [the father] that he may have fathered a child outside his own marriage, in the course of what appears to have been a casual affair with a woman who was, at that time, living with another man and that he has neither confirmed nor denied paternity of the child. It is also relevant to an assessment of his character that this is the second time that he has (or may have) caused a woman who was not his wife to become pregnant, with potentially serious consequences both for the woman concerned and his own wife and family. One may reasonably judge a man differently on these facts than one

> would if the story were simply one of a discrete, isolated affair which had not consequences for either party."

44. I have not so far mentioned that the Daily Mail article of 16 July 2010 referred to the fact that, when the mother was in the early stages of her pregnancy, the father appointed her to a public position as a fundraiser. This is touched on in the final sentence of para 119 of the judgment (para 39 above). Mr Steafel gave somewhat conflicting evidence as to whether this appointment was relevant to his decision to mention the child in the article. At day 5 p 43, he said that, without this additional factor, it would have been a "closer call" whether to publish the private information and the photograph. At day 5 p 48, he said that the appointment of the mother as a fundraiser did not play any significant part in his decision to include references to the claimant in the story. In view of the modest (if any) part that the mother's appointment played in Mr Steafel's decision, I do not consider that the judge's equally modest treatment of the issue can be criticised.

45. The judge had to perform a difficult and sensitive balancing exercise. She first assessed the strength of the claimant's article 8 rights taking account of the fact that she was a very young child, but also the attitude to her expectation of privacy displayed by the mother. Having concluded that the claimant's reasonable expectation of privacy had been compromised by the two events to which I have referred, she then had to weigh it against the Daily Mail's article 10 rights. I bear in mind the jurisprudence to which I have referred at paras 8 and 9 above. For the reasons that I have given, I would reject the criticism that Mr Price makes of the way that the judge conducted the exercise.

The fourth ground of appeal: the judge was wrong to hold that an injunction restraining publication of the private information would serve no useful purpose .

46. The judge refused to grant an injunction in relation to the publication of photographs of the claimant on the basis that an undertaking had been offered by the defendant, which she accepted, not to publish such photographs without parental consent. She also refused to grant an injunction restraining the publication of the private information as to the claimant's paternity. The form of injunction claimed in the Particulars of Claim was an injunction to restrain publication of "any particulars reasonably likely to lead to [the claimant's] identification in conjunction with information (including rumours and speculation) concerning the Claimant's paternity". In the Notice of Appeal to this court, the injunction sought is (with certain exceptions) to restrain the publication of "information or speculation about the Claimant's paternity, the supposed circumstances of her conception, her appearance or other private information in connection with her supposed paternity".

47. Mr Browne submits that this new claim gives rise to different legal issues from those dealt with by the judge, in particular whether the circumstances of an individual's conception is information in which that individual has a reasonable expectation of privacy and whether the appearance of a child, when described, is a private matter. He says that there are no good grounds for this court to open up issues on which the judge has not made findings.

48. Mr Price has shown us that these issues were in play before the judge. By their letter dated 5 April 2012, the claimant's solicitors made it clear to the defendant's solicitors

that the claimant's litigation friend and family should have protection from "future publication of information and speculation about her paternity and related information, about the supposed circumstances of her conception, her appearance etc". It is clear from the claimant's skeleton argument in the court below and the way that her case was put to the judge that the case was conducted on the basis that the injunction sought included the restraining of publication of information about the circumstances of the conception and the claimant's appearance.

49. It is true that no application was made for permission to amend the prayer to the Particulars of Claim to reflect the precise nature of the injunction that was being sought. But it has not been suggested that such an application would have been opposed or that there were any good grounds for opposing it. I would reject Mr Browne's complaint that we cannot consider the enlarged terms of the injunction sought.

50. I turn to the substance of the issue. I should say at once that, during the hearing of the appeal, Mr Browne told us that he had instructions to say that the defendant was willing to undertake not to repeat the reference to a small part of the story as to the circumstances of the claimant's conception.

51. The judge dealt with the question whether the fact that the information about the claimant's paternity was in the public domain was a sufficient reason for refusing to grant an injunction in these terms:

> "129. As at the date of trial, a considerable amount of information regarding the claimant's mother's affair with the supposed father, the claimant's birth and her supposed paternity was in the public domain. The claimant's case is that all the articles which followed the first article were triggered by it. I do not regard the position as being so straight forward for the following reasons:
>
> i) This was a story which was going to be published. If the defendant had not done it, another newspaper would;
>
> ii) No one can stop the claimant's mother's ex-boyfriend speaking to the press;
>
> iii) Following the first article, letters were written by solicitors on the claimant's behalf to media organisations including the defendant. No proceedings were issued until months later by which time numerous articles had been published upon the matter. No explanation has been given for the delay of nearly one year following the publication of the first article and service of proceedings upon the defendant. The trigger for the institution of proceedings appears to have been the republication of the photograph of the claimant

> accompanying the eighth article as this was perceived as a breach of the assurance/undertaking given by the defendant not to publish any photographs of the claimant. Of note is the fact that when the claimant's mother and litigation friend were asked about identified articles no issue was taken with the content of the articles. Significantly, the litigation friend used the word "permissible" to describe the content.
>
> iv) The troubling matter of the claimant's mother's interview with the magazine. The claimant's mother had input into the editing of the final article which contained information about the claimant and speculation as to her paternity.
>
> 130. For the reasons stated I do not accept that all subsequent publications of this story went ahead by reason of the publication of the first article. If there had been a wish on the part of those acting on behalf of the claimant to prevent publication of similar articles, action could and should have been taken much earlier.
>
> 131. So much information is now in the public domain that an injunction to prevent any further publication upon this topic would serve no real purpose. That said, the defendant's undertaking not to publish any further photographs of the claimant save in certain circumstances can be accepted by the court and included in an order."

52. Mr Price makes the point that, before the Daily Mail published its front page story about the "paternity riddle" on 16 July 2010, nothing had appeared in the media about the claimant. The Daily Mail publication opened the floodgates. He challenges the reasons given by the judge at para 129. As regards para 129(i), he submits that there was no evidential basis for her finding that the story was going to be published anyway. The common sense of the matter is that, before the Daily Mail decided to go public, the media deliberately did not mention the claimant, but as soon as the Daily Mail published the story, the restraint was abandoned. Many of the later publications referred explicitly back to the first Daily Mail article. Mr Price also submits that the fact that the information was in the public domain should not be accorded much if any weight because (i) it was the defendant who put the information in the public domain in the first place; and (ii) if the injunction were granted, the information would fade from the public mind, so that the injunction would serve a real purpose.

53. I cannot accept these submissions for the reasons given by Mr Browne. At para 130, the judge rejected the contention that all subsequent publications of the story went ahead by reason of the publication of the first article. That was a finding of fact that she was entitled to make. There was evidential support for it. The Daily Mail first got the story from a tip from the news agency London Media. The evidence of Mr Steafel was that it was "clear that other newspapers were working on similar information at the same time, not least the Mirror and the Telegraph": day 5 p 20.

Not only were the Telegraph working on the story, but they had photographed the claimant outside her home on 3 July 2010. They would not have done so if they had not intended to publish the story, as they did on 17 July. In any event, it would be most surprising if other media organisations published stories about the father without making their own assessments of what could lawfully be published. The judge was also entitled to take into account that nobody could stop the partner from speaking to the press.

54. The "fade factor" relied on by Mr Price carries little weight in this case. First, much that has been published by the media in relation to the claimant's paternity remains available online. It is also included in *Just Boris*, a book written by Sonia Purnell. Secondly, the permanent injunction sought by the claimant would only restrain the defendant from referring to the information, although many other media organisations have published the same thing. Thirdly, it is fanciful to expect the public to forget the fact that the man who is said to be the claimant's father, and who is a major public figure, has fathered a child after a brief adulterous affair (not for the first time). Nor are they likely to forget the outline facts of the story including the identity of the mother. The mother accepted in cross-examination that any woman who embarked on an affair with the father was "playing with fire" (day 3 p 90) and that such an affair was bound to attract "very considerable media attention in both the national media and the London press" (day 3 p 91). As Mr Browne puts it, once it was out, there could be no question of returning it to obscurity.

Conclusion

55. For all these reasons, and on the defendant giving the undertaking to which I have referred at para 50 above, I would dismiss this appeal. The judge carefully considered all the issues and reached a conclusion which is beyond challenge. It is not in dispute that the legitimate public interest in the father's character is an important factor to be weighed in the balance against the claimant's expectation of privacy. The core information in this story, namely that the father had an adulterous affair with the mother, deceiving both his wife and the mother's partner and that the claimant, born about 9 months later, was likely to be the father's child, was a public interest matter which the electorate was entitled to know when considering his fitness for high public office.

Lord Justice Tomlinson:

56. I agree.

Lord Justice Ryder:

57. I also agree.