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in the matter of An Application by JR38 for Judicial Review  
(Northern Ireland) [2015] UKSC 42**

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## Case notes

# Publication of children’s images, privacy and Article 8: judgment in the matter of *An Application by JR38 for Judicial Review (Northern Ireland)* [2015] UKSC 42

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Identified as contemporary ‘folk devils’,<sup>1</sup> children who are allegedly involved in rioting and disorder at interface areas in Northern Ireland have become the targets of stereotypical media portrayals.<sup>2</sup> Ongoing issues relating to the legacy of over 30 years of conflict in Northern Ireland include contestation of space, the formal and informal policing of children and young people, and the persistence of paramilitary punishment attacks.<sup>3</sup> This context raises significant issues in relation to children’s rights. One contentious formal policing response to disorder, described as ‘the worst rioting in years’,<sup>4</sup> was publication by the the Police Service of Northern Ireland (PSNI) of the images of children and young people whom they wanted to question, under the code name Operation Exposure.<sup>5</sup> The images had been captured on closed-circuit television (CCTV) during incidents of interface violence in the summer of 2010. This policing tactic became the subject of protracted legal proceedings.

As a result of the internal circulation of CCTV within the PSNI, a 14-year-old boy referred to as JR38, who had a previous caution for riotous behaviour, was arrested on 1 July 2010. Following arrest, JR38 did accept that the CCTV placed him at the interface, but it did not show him engaging in criminal activity. The applicant submitted an application for judicial review in relation to the PSNI’s decision to release the images to the local media and their publication in a leaflet, on the single ground that ‘the use of . . . Operation Exposure to identify and highlight children and young persons involved in criminal activity as part of a name and shame policy without due process is in breach of the applicant’s rights pursuant to Article 8 of the European Convention on Human

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1 Stan Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (Martin Robertson 1972).

2 Faith Gordon, *A Critical Analysis of the Print Media’s Representation of Children and Young People during Transition from Conflict in Northern Ireland* (Queen’s University Belfast 2012).

3 *Northern Ireland NGO Alternative Report, Submission to the United Nations Committee on the Rights of the Child for Consideration during the Committee’s Examination of the United Kingdom of Great Britain and Northern Ireland Government Report* (Children’s Law Centre and Save the Children NI 2015).

4 *New York Times* (13 July 2010). In April 2010, the devolution of policing and justice powers saw decision-making on criminal justice policies and practices return to the Northern Ireland Assembly, following a period of 38 years of direct rule on these matters by the UK government. During the riots in the summer of 2010, pressure was placed on the PSNI and the new Justice Minister to respond to the escalating disorder.

5 PSNI, *Operation Exposure Leaflet* (PSNI 2010). The PSNI in Derry/Londonderry printed and distributed 35,000 leaflets in August 2010. The leaflets contained 21 numbered images of 23 children and young people to whom the PSNI wanted to speak regarding sectarian disorder.

Rights' (ECHR).<sup>6</sup> In September 2010, Treacy J in the High Court granted leave for a judicial review application. In March 2013, the Divisional Court (Morgan LCJ, Higgins and Coghlin LLJ) dismissed the application and concluded that any interference with the applicant's rights was necessary for the administration of justice, the prevention of disorder and crime and to protect society, within the meaning of Article 8(2) of the ECHR.<sup>7</sup> Following an appeal, on 1 July 2015, the Supreme Court gave its judgment in the matter of *JR38*.<sup>8</sup>

The appeal to the Supreme Court considered two core legal issues. Firstly, did the publication of the image amount to an interference with the appellant's right to respect for a private life under Article 8 of the ECHR and, secondly, if there was an interference, was it justified? The respondent argued that the appellant could not be said to have any reasonable expectation of privacy where he had willingly engaged in acts of disorder in public.<sup>9</sup> Counsel for the appellant submitted that reasonable expectation of privacy was not in general a prerequisite for engagement of Article 8 and particularly not in the case of a child or young person. Counsel for the appellant suggested that, while reasonable expectation was a factor that could be taken into account, it should not be treated as determinative of the issue of whether Article 8 was engaged.<sup>10</sup>

There was disagreement between the justices on the first issue of whether the appellant's Article 8 rights were engaged. The question which divided the justices was whether Article 8 is only engaged where the alleged victim has a legitimate expectation of privacy or a reasonable expectation of protection and respect for his private life.<sup>11</sup> Three justices (Lord Toulson, Lord Clarke and Lord Hodge) felt that, because the appellant was engaged in criminal activity in a public place when his image was captured, he could not have a reasonable expectation of privacy and that this was 'the touchstone' of whether Article 8 was engaged.

Lord Toulson, with whom Lord Clarke and Lord Hodge were in agreement, referred to several matters outlined by the Strasbourg Court in *Von Hannover v Germany*,<sup>12</sup> including the purpose of Article 8, what it seeks to protect, and the need to examine the particular circumstances of the case in order to decide whether the applicant had a legitimate expectation of protection.<sup>13</sup> In particular, Lord Toulson was concerned with one of the qualifications set out by Laws LJ in *R (Wood) v Commissioner of Police of the Metropolis*,<sup>14</sup> namely the touchstone of whether the claimant enjoyed on the facts a 'reasonable expectation of privacy' or 'legitimate expectation of protection'.<sup>15</sup> Lord Toulson also referred to Sir Anthony Clarke MR in *Murray v Express Newspapers plc*<sup>16</sup> and his application

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6 Case *Re JR38 Application* [2013] NIQB 44, paras 1, 16–21. Article 8 of the ECHR states: '(1) Everyone has the right to respect for his private and family life, his home and his correspondence; (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 in the interests of . . . public safety . . . for the prevention of disorder or crime.'

7 *Re JR38* (n 6) para 38.

8 [2015] UKSC 42.

9 *Ibid* judgment para 33.

10 *Ibid*.

11 *Ibid* para 105. Lord Toulson took the expressions to be synonymous.

12 (2004) 16 BHRC 545.

13 Supreme Court judgment (n 8) para 85.

14 [2009] EWCA Civ 414, [2010] 1 WLR 12.

15 Supreme Court judgment (n 8) para 87.

16 [2008] EWCA Civ 446, [2009] Ch 481, para 35.

of *Campbell v MGN Ltd*,<sup>17</sup> which indicated that the question of whether there is a reasonable expectation of privacy is a broad one and must take into account all of the circumstances of the case.<sup>18</sup> Lord Toulson was of the opinion that the fact that the applicant was a child at the time was not a reason for departing from the test of whether there was a reasonable or legitimate expectation of privacy, though he conceded that it was a potentially relevant factor.<sup>19</sup> In his opinion, the present case was on all fours with *Kinloch v HM Advocate*,<sup>20</sup> in which Lord Hope argued that '[t]he criminal nature of what he was doing . . . was not an aspect of his private life that he was entitled to keep private'.<sup>21</sup> Lord Toulson concluded that the protected zone of interaction between a person and others was not interaction in the form of a riot and that the 'reasonable' or 'legitimate expectation' test was an objective test, to be applied broadly, taking into account all of the circumstances of the case<sup>22</sup> and having regard to the underlying value or values to be protected.

In contrast, two of the justices, Lord Kerr with whom Lord Wilson was in agreement, considered that other factors such as criminalisation of the appellant, the risk of stigmatisation, the lack of consent and how widely his image had been circulated in local newspapers were relevant.<sup>23</sup> In their view, Article 8 was engaged. In examining the Strasbourg jurisprudence on engagement of Article 8, Lord Kerr concluded that a nuanced approach was needed to reach a conclusion on this issue.<sup>24</sup> He stated that engagement of the right must cover a wide field of an individual's activity and that the scope of application must vary according to the conditions in which it is invoked and the circumstances of the individual.<sup>25</sup> In particular, the judgment in *PG and JH v UK*<sup>26</sup> illustrated that an unduly rigorous use of the reasonable expectation test is impossible to reconcile with the breadth of possible application of Article 8 and that the reasonable expectation of privacy was not the sole test of whether Article 8 is engaged.<sup>27</sup> In the situation where someone was engaged in activities such as public disorder, which were liable to be reported or recorded, what is reasonable to expect as to protection of her/his privacy is a factor to be taken into account in deciding whether Article 8 is engaged, but it will not automatically determine the issue.<sup>28</sup> Lord Kerr concluded that to make the 'reasonable expectation of privacy' an inflexible and wholly determinative test would be to fundamentally misunderstand the proper approach to the application of Article 8 and would unjustifiably limit its possible scope.<sup>29</sup>

On the second of the core issues, the appellant took no issue with the respondent's assertion that the interference with his Article 8 right pursued a legitimate aim. However, counsel for the appellant claimed that it was not in accordance with law and was not

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17 [2004] UKHL 22, [2004] 2 AC 457.

18 Supreme Court judgment (n 8) para 88; circumstances included the attributes of the claimant, the nature of the activity in which the claimant has been involved, the place where it has happened and the nature and purpose of the intrusion.

19 Ibid para 95.

20 [2012] UKSC62, [2013] 2 AC93.

21 With which the other members of the court agreed.

22 Reaffirming Sir Anthony Clarke's opinion in *Murray* (n 16).

23 As affirmed in *Rekelos v Greece* (2009) 27 BHRC 420.

24 Ibid para 55.

25 Ibid para 36.

26 (2001) 46 EHRR 1272

27 Supreme Court judgment (n 8) para 38.

28 Ibid para 39.

29 Ibid para 56.

necessary in a democratic society.<sup>30</sup> All of the justices were agreed that the interface rioting, which was dangerous and unpleasant for residents living in the areas, had to be brought to an end and that it was important that the young people were discouraged from being involved.<sup>31</sup> The justices noted that the police had made extensive efforts to identify the individuals before deciding that the images should be published and, therefore, the interference was justified.<sup>32</sup> The Supreme Court therefore unanimously dismissed the appeal.<sup>33</sup> The Lords agreed that, if there had been an interference with the appellant's Article 8 right, it was necessary for the administration of justice.

The Supreme Court's judgment is illuminating in further demonstrating the limits of privacy, particularly in the exercise of balancing the right to a private life and other specific societal values. Lord Clarke made reference to Lord Steyn's famous phrase, 'in law, context is everything',<sup>34</sup> and in this case it appears that context was relevant not only in the court's consideration of whether an interference was justified, but also in their determination of the first question relating to engagement.<sup>35</sup> The decision is based on a very one-dimensional view of Article 8, in the sense of it being a privacy right only.<sup>36</sup> This is evident in the assertion that the touchstone for the engagement of Article 8 is whether the claimant enjoys on the facts a 'reasonable expectation of privacy'.<sup>37</sup> It is likely, however, that this case will become a leading authority on the context where Article 8 can be engaged by the publication of photographs. In this connection, it is interesting that none of the justices refer to *Weller and Others v Associated Newspapers Ltd*,<sup>38</sup> which also involved the publication of photographs of children taken in a public place. The Court of Appeal's decision in *Weller*<sup>39</sup> was in line with the focus on children's rights as set out in *Murray v Express Newspapers*,<sup>40</sup> which confirmed that intrusions on the right to privacy must be demonstrably justifiable and that the threshold would be particularly stringent in the case of children. Similarly, the rights of children have been of paramount importance and have been protected by the courts in recent cases, such as in the Supreme Court's decision in *PJS v News Group Newspapers Ltd*.<sup>41</sup>

Responses from the children's rights sector in Northern Ireland have criticised the judgment for not being consistent with the UN Convention on the Rights of the Child (UNCRC)<sup>42</sup> and it is somewhat surprising that Lord Kerr is the only justice to engage with international instruments such as the UNCRC and the Beijing Rules.<sup>43</sup> At the 72nd session of the Committee on the Rights of the Child on 23 May 2016, the UN Committee made direct reference to the PSNI's Operation Exposure and asked for commitments that police policy in the future would not 'name and shame' children. This is particularly

30 Ibid para 68.

31 Ibid para 77.

32 Ibid paras 76–77.

33 Released on 1 July 2015.

34 *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, para 28.

35 Supreme Court judgment (n 8) para 114.

36 Article 8 of the ECHR is a broad-ranging right and also includes the right to respect for her/his family life, home and correspondence.

37 Supreme Court judgment (n 8) para 105.

38 [2014] EWHC 1163 (QB).

39 [2015] EWCA Civ 1176.

40 [2008] EWCA Civ 446.

41 [2016] UKSC 26.

42 See, for example, <[www.niccy.org/media/1653/niccy-ezine-operation-exposure-jr38-2015-uksc-42-oct-15.pdf](http://www.niccy.org/media/1653/niccy-ezine-operation-exposure-jr38-2015-uksc-42-oct-15.pdf)>.

43 Supreme Court judgment (n 8) 49–52.

significant in instances of mistaken identity and subsequent labelling and stigmatisation, such as in a recent example of an error made by East Cambridgeshire police in England, which saw the distribution of CCTV images of two children, wrongly accusing them of theft from a local store.<sup>44</sup> This demonstrated the far-reaching consequences of police tactics breaching children's rights. This issue remains live and it is concerning that this judgment may be raised in future cases as a demonstration of a new threshold.

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44 See 'Police Apologise for Picturing the Wrong Girls in Theft CCTV Footage' *Daily Express* (London, 23 May 2016).

