[GB] Supreme Court judgment on privacy injunctions

IRIS 2016-7:1/19

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The case of PJS v. News Group Newspapers Ltd concerns the attempts of a high profile couple to prevent the publication of a story relating to sexual encounters that one of the couple, identified only as “PJS”, had had some time ago. On 22 January 2016, the Court of Appeal, pending the main trial, granted an interim injunction; it was generally accepted that this was properly granted. The dispute concerned whether the injunction should be dismissed since details of the story had been published in the media outside England and Wales, and also on various websites and social media. The English press (News Group Newspapers - NGN) therefore argued that they were being subject to grave injustice in not being permitted to publish the story. On 18 April 2016, the Court of Appeal set aside the injunction on the basis that the protected information was now in the public domain; the injunction served no useful purpose and potentially constituted an unjustified interference with NGN’s right to freedom of expression, provided in Article 10 of the European Convention on Human Rights (ECHR). However, on 19 May 2016, the Supreme Court reversed the decision of the Court of Appeal, although not unanimously (Lord Toulson dissenting) and with Lord Mance, Lord Neuberger and Lady Hale all giving separate concurring judgments.

The Supreme Court reiterated that neither Article 10 nor Article 8 (the right to respect for private life) has automatic priority, but that this will be a fact-specific analysis taking into account the justifications for restricting the respective rights and the proportionality test. Even if the Court of Appeal had not, in suggesting that Article 10 should be more heavily weighted in the light of section 12 of the Human Rights Act, misdirected itself on this point, it had accorded too much weight to the public interest of publication in its balancing of the various interests. The Court of Appeal had accepted that there was a limited public interest in publication insofar asthe media are entitled to criticise the conduct of individuals even when there is nothing illegal about the conduct. According to Lord Mance, that justification “cannot be a pretext for invasion of privacy”. Referring to the European Court of Human Rights (ECtHR) judgments of Armoniene v. Lithuania (no. 36919/02, 25 November 2008), Mosley v. UK (see IRIS 2011-7/1) and Couderc and Hachette Filipacchi Associé v. France (see IRIS 2016-1/3), Lord Mance questioned whether “the mere reporting of sexual encounters of someone like the appellant, however well known to the public, with a view to criticising them does not even fall within the concept of freedom of expression under Article 10 at all”.

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Lord Mance's conclusion that the Article 8 interests outweighed the putative media interests was supported by Lord Neuberger, and by Lady Hale who elaborated on the impact on the children of PJS. Lady Hale stated that the IPSO Editor's Code, to which the Court must have regard, provides that there must be "an exceptional public interest to over-ride the normally paramount interests of [children under 16]".

In determining whether the fact that the identity of the couple was known at least somewhere in the world was fatal to a continuation of the injunction, the balance of secrecy and confidentiality on the one hand and invasion of privacy on the other was decisive to the question of whether the injunction should be maintained. It was in the assessment of this point that Lord Toulson differed from the four other judges. In Sunday Times v. UK (No. 2) (no. 13166/87, 26 November 1991), the publication of the restricted material outside the relevant jurisdiction, and consequent loss of confidentiality, meant that injunctions could no longer be justified. In the context of privacy, however, "the repetition of known facts about an individual may amount to unjustified interference with the private lives not only of that person but also of those who are involved with him". Nonetheless, the English courts have refused injunctions in relation to privacy applications on the basis that the facts were known, but in cases where there was very broad knowledge of the facts (for example, CTB v News Group Newspapers Ltd [2011] EWHC 1326 (QB)). Furthermore, the Supreme Court acknowledged that in terms of the degree of intrusion there is a difference between disclosure on the Internet and publication in the press. Lord Mance suggested that lifting the injunction would give rise to a "media storm" which would exacerbate the distress felt by PJS and his family. The Court recognised that privacy rights require an effective remedy; damages after the event are not always effective, and in this respect privacy differs from defamation.

PJS v. News Group Newspapers Ltd [2016] UKSC 26, 19 May 2016

http://www.bailii.org/uk/cases/UKSC/2016/26.html

PJS v. News Group Newspapers Ltd [2016] EWCA Civ 393, 18 April 2016

http://www.bailii.org/ew/cases/EWCA/Civ/2016/393.html

PJS v. News Group Newspapers Ltd [2016] EWCA Civ 100, 22 January 2016

http://www.bailii.org/ew/cases/EWCA/Civ/2016/100.html

CTB v News Group Newspapers Ltd [2011] EWHC 1326 (QB)

http://www.bailii.org/ew/cases/EWHC/QB/2011/1326.html

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Judgment by the European Court of Human Rights (Second Section), case of Armonienė v. Lithuania, Application no. 36919/02 of 4 November 2008

https://hudoc.echr.coe.int/eng?i=001-89823

Judgment by the European Court of Human Rights, case of The Sunday Times v. the United Kingdom (no. 2), Application no. 13166/87 of 26 November 1991

https://hudoc.echr.coe.int/eng?i=001-57708

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