Neutral Citation Number: [2010] IEHC 248

THE HIGH COURT

2010 4661 P

BETWEEN

MICHAEL MURRAY

PLAINTIFF

AND

NEWSGROUP NEWSPAPERS LIMITED, INDEPENDENT NEWSPAPERS (IRELAND) LIMITED, INDEPENDENT STAR LIMITED, COMMISSIONER OF AN GARDA SÍOCHÁNA, MINISTER FOR JUSTICE AND LAW REFORM, IRELAND, AND ATTORNEY GENERAL

DEFENDANTS

JUDGMENT of Ms. Justice Irvine delivered on the 18th day of June, 2010

1. In this application, the plaintiff seeks an interlocutory injunction against the first, second and third named defendants. The plaintiff in these proceedings is Mr. Michael Murray who has a number of convictions for serious sexual offences in this jurisdiction and in England.

2. The first three defendants are the publishers of the Irish Daily Star, the Star Sunday, the Irish Sun, the Irish News of the World and the Evening Herald newspapers.

3. The plaintiff has instituted these proceedings by way of plenary summons dated the 14th May 2010, wherein he seeks, *inter alia*, damages for mental pain, distress and anguish caused by an alleged interference with his right to privacy, as well as his other rights such as his right to earn a living, his right to life and to have and maintain a permanent dwelling, as protected by the Constitution and the European Convention on Human Rights. He also seeks injunctive relief, including interlocutory relief, restraining the further publication of photographs of him and details of his whereabouts.

4. By notice of motion dated 14th May, 2010, the plaintiff seeks a number of wide-ranging interlocutory reliefs against the defendant newspapers as a result of the publication by them of a significant number of articles and accompanying photographs relating to him. He seeks orders prohibiting the defendant newspapers from further publishing any of the following:-

- Any photographic image of him from which he might be identified.
- Information identifying his address or the village, town, town land or city in which he lives.
- Information identifying any location at which he stays or which he frequents.
- Information identifying his place of work, specifying his travel arrangements or specifying other details that would enable members of public to ascertain his presence at a particular location at a particular time.
- Information supplied by the plaintiff to An Garda Síochána in confidence pursuant to the Sex Offenders Act 2001.

5. The aforementioned reliefs are sought by way of permanent injunction in his substantive proceedings.

6. The plaintiff also seeks orders against the fourth named defendant in the main proceedings in circumstances where he maintains that the information he is required to supply to An Garda Síochána pursuant to the Sex Offenders Act 2001, has been unlawfully disclosed by its members to the newspapers. However, the plaintiff seeks no interlocutory relief against the Commissioner of An Garda Síochána apparently on the basis that it has been acknowledged on the present application that any such actions as those complained of by the plaintiff against the Gardaí, if true, and which are denied, would offend the provisions of s. 62 of the Garda Síochána Act 2005.

7. The plaintiff has sworn a lengthy affidavit grounding his application for the interlocutory relief sought. His application is also supported by a number of affidavits sworn by his solicitor Mr. Robert Eager. These affidavits exhibit the newspaper articles relied upon by the plaintiff in support of the relief sought.

The plaintiff's background

8. On 17th October, 1996, the plaintiff pleaded guilty in the Central Criminal Court to charges of aggravated sexual assault, false imprisonment and four counts of rape in relation to offences committed in September 1995. He was sentenced to eighteen years imprisonment with the final year suspended. He served his sentence at Mountjoy Prison, Arbour Hill Prison, Wheatfield Prison and Castlerea Prison. The plaintiff was released from Castlerea Prison on 16th July, 2009, having been afforded the usual statutory period of remission for good behaviour. Prior to the commission of the offences in September 1995, the plaintiff had in 1989 previously been convicted of rape in the United Kingdom, an offence in respect of which he received a lengthy sentence. In addition, it appears from the Voluntary Supervision Contract entered into by the plaintiff with the Probation Service following his release from prison that he has also been convicted of other offences not mentioned in his grounding affidavit including offences in respect of causing actual bodily harm and indecent exposure to children. The plaintiff is subject to the notification requirements of the Sex Offenders Act 2001 and he maintains that he has at all times complied with those requirements since his release from prison although no supporting documentary evidence of this fact has been produced.

The plaintiff's accommodation since release from prison

9. With the aid of the Probation Service and a project within that service known as New Directions, the plaintiff was initially able to secure accommodation in Dublin. The plaintiff deposes to the fact that following his release from prison on 16th July, 2009, he travelled to Dublin by train to meet his probation officer. On arrival at Heuston Station, he states that he was met by a reporter and a photographer who photographed him along with his probation officer. These photographs were subsequently published in articles in

the Star and Evening Herald newspapers and are exhibited in the affidavit of Mr. Eager.

10. The plaintiff maintains that he lived at an address in Blackhall Square North between 16th July and 30th November, 2009. However, as a result of certain publications in the newspapers on 18th July, 2009, he maintains that he was advised by his key worker in the Probation Service to stay indoors and keep a low profile. The accommodation in Blackhall Square appears to have been a temporary arrangement and in November 2009, unrelated to any acts of the defendant newspapers, he moved to an address in Findlater Street with the assistance of the Probation Service and New Directions. On 10th January, 2010, photographs of the plaintiff were published in the Star Sunday, under the headline "Beast in the snow". This article is exhibited in Mr. Eager's affidavit. Thereafter, the plaintiff maintains that his landlady served a notice to quit giving him one month's notice to leave. He maintains that he was later informed by the gardaí that his landlady had come under pressure from the local residents committee to get him out of his accommodation and that he accordingly left that accommodation on 19th January, 2010.

11. Between 19th January, 2010, and 5th February, 2010, the plaintiff lived at an address in the Metropolitan Apartments in Kilmainham, Dublin. Again, this accommodation was obtained with the assistance of his key worker in the Probation Service and the New Direction Project. The plaintiff claims that the gardaí called to this address numerous times everyday in stark contrast to the once daily visits which he received when living at Findlater Street.

12. On 3rd February, 2010, the plaintiff states that a reporter called to his front door as a result of which he contacted his key worker and the gardaí. The gardaí arrived and ordered the reporter to leave. However, later that day the plaintiff maintains that two gardaí called to his home and banged on the door loudly. When he opened the door, someone photographed him in his apartment and this photograph together with accompanying articles subsequently appeared in the Star and Evening Herald newspapers on 4th February, 2010. These articles are also exhibited in Mr. Eager's affidavit. The plaintiff states that shortly after the publication of this photograph he was contacted by a member of Sherry Fitzgerald, Estate Agents, who advised him that he was "all over the paper" and that his landlord wanted the apartment back. The plaintiff believes that the Estate Agent was referring to the photographs of him published in the newspaper on 4th February, 2010. The plaintiff states that accordingly he left that address on 5th February, 2010, as he no longer felt safe there.

13. As he had nowhere else to go, the plaintiff maintains that he moved back to his previous address at Blackhall Square where he stayed for a number of days. He states that a photographer again took his photograph in that locality and that this photograph and an accompanying article appeared in the Sun newspaper on 12th February, 2010. As a result of this publication, the plaintiff maintains that he felt compelled to leave the area and thereafter stayed for a while at hotels in Castleknock, City West and Portlaoise.

14. For the month of March 2010, the plaintiff lived at an address in Thurles. However, on 3rd April, 2010, he was once again photographed and this photograph appeared the following day in the News of the World which published yet another article about him. Shortly thereafter the plaintiff's landlord allegedly phoned him and told him he wanted him out of his apartment "because of what was in the paper". Accordingly, the plaintiff left Thurles on 4th April, 2010, following which he booked into the Tara Towers Hotel in Ballsbridge, Dublin for one week. Since that time he has stayed in a number of hotels and bed and breakfast accommodation in Dublin, Laois and Kildare.

The plaintiff's efforts at rehabilitation and his relationship with the Probation Service

15. The plaintiff refers to a number of matters in his affidavit concerning his efforts at rehabilitation in prison and his relationship with the Probation Service since his release. The plaintiff has deposed to the fact that whilst he was in Wheatfield Prison, he attended a psychologist for between eighteen months and two years on a weekly basis for therapy surrounding his offending behaviour and his addiction to drugs and alcohol. He deposes to the fact that during his incarceration he stopped using drugs and alcohol and that he remained "clean" since his release from prison. The plaintiff states that he asked to be moved from Wheatfield Prison to Castlerea Prison because of the prevalence of drugs in Wheatfield Prison and his desire to be in a drug free environment.

16. The plaintiff maintains that he worked in the kitchens in Castlerea Prison for nine and a half years and that this was a position of trust. He says he also completed a business studies course over sixteen weeks and was awarded a diploma. He states that he met with another prison psychologist in Castlerea Prison and met with him for counselling once a week during the two years prior to his release. He also deposes to the fact that he met a prison psychiatrist as part of his pre-release case conference. Towards the end of his imprisonment, the plaintiff deposes to the fact that he contacted the Probation Service with a view to obtaining their assistance to find accommodation following his release. He states that he visited with a probation officer who carried out a risk assessment, that he co-operated fully with the Probation Service and that he received assistance from the New Directions Project which is funded by the Department of Justice through the Probation Service for the provision of accommodation and support to sex offenders.

17. The plaintiff states that on 16th July, 2009, he entered into a voluntary supervision contract with the Probation Service and a copy of the contract is exhibited in his affidavit. The contract is signed and dated 3rd July, 2009. A probation officer was nominated as a contact and counsellor. The plaintiff states that he visited this person twice a week following his release from prison and that he provided swabs for urine and drug analysis. The plaintiff deposes to the fact that his contract with the Probation Service required him to remain at a permanent address but that due to his inability to keep a permanent address, he felt compelled to end his voluntary supervision contract. That contract provided that the plaintiff would reside each night at the agreed accommodation for the duration of the contract and abide by a 10 *p.m*. curfew and also attend and co-operate with twice weekly appointments with the Probation Service.

18. The plaintiff maintains that as a result of the efforts on the part of the Probation Service, he applied for and obtained voluntary employment at St. Mary's Hospital in Dublin. The management of the hospital were made aware of his previous convictions and he started working there in October, 2009. He maintains that as result of media publicity regarding his position at the hospital he was forced to resign from his job there, which he did in February 2010.

19. The plaintiff states that he has no family or friends for support and is entirely dependent upon the Probation Service.

The media publicity surrounding the plaintiff following his release from prison

20. Mr. Robert Eager exhibits in his various affidavits the articles complained of by the plaintiff. All of them refer to the plaintiff by name, discuss his previous convictions and state that the gardaí believe that he is at risk of re-offending. The articles refer to the numerous addresses where he has lived since his release from prison including those at Blackhall Square, the Metropolitan Apartments in Kilmainham and his address in Thurles. The tone of the articles is illustrated by the headlines in which the plaintiff is referred to as a "beast" and a "monster". In one article he is referred to as "Ireland's most dangerous serial rapist". The articles are relied upon by the plaintiff in support of his assertions that he was hounded out of the areas where he resided due to pressure from local residents when his identity and the fact that he was living in these areas were disclosed and his further claim that he was forced to quit his job at St. Mary's Hospital. The following is a list of the articles exhibited in the affidavits of Mr. Eager:- .

(i) The Star, 18th July, 2010

(ii) The Star Sunday, 10th January, 2010

(iii) The Star, 4th February, 2010

(iv) The Star, 5th February, 2010

(v) The Star, 6th February, 2010

(vi) The Evening Herald, 4th February, 2010

(vii) The Evening Herald, 5th February, 2010

(viii) The Evening Herald, 6th February, 2010

(ix) The Evening Herald, undisclosed date

(x) The Evening Herald, 12th February, 2010

(xi) The Sun, 12th February, 2010

(xii) The News of the World, 4th April, 2010

(xiii) The Irish News of the World, 9th May, 2010

(xiv) The Evening Herald, 7th May, 2010

(xv) The Star, undisclosed date

21. By letter dated 5th May, 2010, Mr. Eager wrote to the editors of the Irish Star, the Evening Herald, the News of the World and the Sun, requesting each of them to furnish an undertaking by Friday, 7th May, 2010, that they would desist from further publishing information identifying the plaintiff and his whereabouts. No response was received to these letters.

22. In a supplemental affidavit dated 17th May, 2010, Mr. Eager deposes to the fact that as a result of the defendant newspapers ongoing conduct that the plaintiff has had to attend a doctor for medical treatment. A medical report dated 13th May, 2010 exhibited in that affidavit states that the plaintiff has been suffering from panic attacks, has been diagnosed with depression and anxiety and has been prescribed anti-depressants.

The defendant's response.
23. The editors of the relevant newspapers have sworn replying affidavits which, in terms of their content, are similar to each other. A number of points are made in these affidavits. The defendant newspapers claim they have reason to believe that the plaintiff presently constitutes a danger to members of the public who may come into contact with him and they are not persuaded that the plaintiff will not re-offend. They state that the plaintiff re-offended in the past and that the evidence at the time of his sentencing was that there was no way of insuring that he would not re-offend in the future. They also rely upon a review carried out by the Department of Psychology at Broadmoor Hospital of literature on sex offender treatments which reports on the risk of those convicted of sexual crimes re-offending. Finally, they refer to a number of statements attributed to a former Assistant Garda Commissioner whom it is alleged has described the plaintiff as a significantly dangerous criminal.

24. Relying, *inter alia*, on the aforementioned matters and the plaintiff's history of convictions, the defendant newspapers maintain that they are *bona fide* of the view that the public interest is best served by information regarding the plaintiff being brought into the public domain and that their right to freedom of expression outweighs any rights that the plaintiff asserts are being breached. They maintain that the case raises fundamental issues as regards freedom of the press and the right of the public to be protected from a serious sex offender including the rights of citizens to their right to life and bodily integrity and that in this regard they have a full defence.

25. The defendant newspapers also make a number of subsidiary points including an assertion that the balance of convenience is not in favour of the relief sought being granted, that the delay of the plaintiff pursuing his claim for interlocutory relief should precludes the success of that application, that the relief sought is unique in terms of the scope of order demanded and that an early trial would meet the best interests of both parties. Finally, the defendant newspapers maintain that any interference with their rights to freedom of expression, if upheld at the trial of the action, are not such as can be compensated for in damages.

The legal basis for the plaintiff's claim for damages and injunctive relief
26. The plaintiff's claim is for damages for mental pain, distress and anguish caused by interference with his rights to privacy, to have and maintain a permanent dwelling, to the inviolability of that dwelling, to continue his rehabilitation, to seek and maintain the means of earning of living, to life, and to bodily integrity. The plaintiff claims these rights are protected by the Constitution and the European Convention on Human Rights. He also submits that the conduct of the defendant newspapers amounts to incitement to hatred contrary to s. 2 of the Prevention of Incitement to Hatred Act 1989, and harassment contrary to s. 10 of the Non Fatal Offences Against the Person Act 1997. The plaintiff further claims injunctive relief, both on a permanent and interlocutory basis.

27. Counsel for both parties delivered helpful written legal submissions and these have been of significant assistance to the Court. From those submissions and from the arguments made by counsel on his behalf, the plaintiffs claim at this interlocutory stage is one principally based upon his alleged continued right to privacy, albeit that Mr O'Higgins S.C. accepts that the plaintiff's right in this regard must be somewhat attenuated by reason of his previous criminal record. He also bases the plaintiff's right to interlocutory relief on his rights to life, bodily integrity and to the inviolability of his dwelling.

The constitutional right to privacy
28. The right to privacy is an unenumerated constitutional right. This was recognised in the well known case of *Kennedy v. Ireland* [1987] I.R. 587, as well as in cases such as *McGee v. Attorney General* [1974] I.R. 284 and *Norris v. Attorney General* [1984] I.R. 36. Hamilton P. (as he then was) in his judgment in *Kennedy v. Ireland* at p. 592 said the right to privacy is not an unqualified right and that its exercise may be restricted "by the constitutional rights of others, by the requirements of the common good and is subject to

the requirements of public order and morality".

29. In the recent case of *Herrity v. Associated Newspapers (Ireland) Ltd*. [2009] 1 I.R. 316 Dunne J. expressly held that actions for damages for breach of the constitutional right to privacy were not confined to actions against the State or state bodies but could also be maintained against a private person or entity. She reviewed the relevant authorities on the right to privacy and at p. 337 of her judgment summarised the relevant principles as follows:-

> "(1) there is a constitutional right to privacy;
>
> (2) the right to privacy is not an unqualified right;
>
> (3) the right to privacy may have to be balanced against other competing rights or interests;
>
> (4) the right to privacy may be derived from the nature of the information at issue - that is, matters which are entirely private to an individual and which it may be validly contended that there is no proper basis for the disclosure either to third parties or to the public generally;
>
> (5) there may be circumstances in which an individual may not be able to maintain that the information concerned must always be kept private, having regard to the competing interests which may be involved but may make complaint in relation to the manner in which the information was obtained;
>
> (6) the right to sue for damages for breach of the constitutional right to privacy is not confined to actions against the State or State bodies or institutions."

The European Convention on Human Rights and the right to privacy

30. The right to privacy is also protected by Article 8 of the European Convention on Human Rights. This right is not unqualified and Article 8(2) provides that the right to private and family life may be interfered with by a public authority "in accordance with law", in a manner which is "necessary in a democratic society" and in the "interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".

31. The plaintiff relied on a number of decisions of the European Court of Human Rights including *Von Hannover v. Germany* (2005) 40 E.H.R.R. 1 and *Sciacca v. Italy* (2006) 43 E.H.R.R. 20. In *Sciacca* the applicant was under investigation by the Revenue authorities in Italy and her photograph was published in newspapers on four occasions. The photograph published was an identity photograph that had been taken by the Revenue Police at the time of the applicant's arrest, and subsequently released by them to the press. The applicant complained that the release of her photograph at the press conference organised by the public prosecutor's office and the Revenue Police had infringed her right to respect for her private life. The court held there had been a violation of Article 8. At para. 29 of its judgment the court said:-

> "29. Regarding whether there has been an interference, the Court reiterates that the concept of private life includes elements relating to a person's right to their picture and that the publication of a photograph falls within the scope of private life. It has also given guidelines regarding the scope of private life and found that there is:
>
> > 'a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life".'
>
> In the instant case the applicant's status as an 'ordinary person' enlarges the zone of interaction which may fall within the scope of private life, and the fact that the applicant was the subject of criminal proceedings cannot curtail the scope of such protection.
>
> Accordingly, the Court concludes that there has been interference."

The Court held the release of the applicant's photograph by the state authorities was not "in accordance with law" and therefore there was a breach of Article 8. The Court did not find it necessary "to determine whether the interference in question pursued a 'legitimate aim' or was 'necessary in a democratic society' to achieve that aim."

32. In *Von Hannover v Germany* (2005) 40 E.H.R.R. 1 Princess Caroline of Monaco and Hanover had made a number of applications for injunctions restraining the further publication of photographs of her which had appeared in German magazines. These applications were refused by the German courts on the grounds that she was a public figure. The Princess complained to the European Court of Human Rights which held that Germany was in violation of her rights under Article 8. At paras. 57 ff. of its judgment the Court explained the reasons for its decisions:-

> "57. The Court reiterates that although the object of Art. 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. That also applies to the protection of a person's picture against abuse by others. The boundary between the State's positive and negative obligations under this provision does not lend itself to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation.
>
> 58. That protection of private life has to be balanced against the freedom of expression guaranteed by Art. 10 of the Convention. In that context the Court reiterates that the freedom of expression constitutes one of the essential foundations of a democratic society. Subject to para. 2 of Art. 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broad-mindedness without which there is no 'democratic society'. In that connection the press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart—in a

manner consistent with its obligations and responsibilities—information and ideas on all matters of public interest. Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.

59. Although freedom of expression also extends to the publication of photos, this is an area in which the protection of the rights and reputation of others takes on particular importance. The present case does not concern the dissemination of 'ideas', but of images containing very personal or even intimate 'information' about an individual. Furthermore, photos appearing in the tabloid press are often taken in a climate of continual harassment that induces in the persons concerned a very strong sense of intrusion into their private life or even of persecution.

60. In the cases in which the Court has had to balance the protection of private life against the freedom of expression it has always stressed the contribution made by photos or articles in the press to a debate of general interest. The Court thus found, in one case, that the use of certain terms in relation to an individual's private life was not 'justified by considerations of public concern' and that those terms did not '[bear] on a matter of general importance' and went on to hold that there had not been a violation of Art. 10. In another case, however, the Court attached particular importance to the fact that the subject in question was a news item of 'major public concern' and that the published photographs 'did not disclose any details of [the] private life' of the person in question and held that there had been a violation of Art. 10. …."[emphasis added].

33. The Court went on to hold that whilst the Princess was a public figure she performed no official public role and this case did not "come within the sphere of any political or public debate because the published photos and accompanying commentaries relate exclusively to details of the applicant's private life."

34. At paras. 76 ff. of its judgment the Court explained the complex balancing exercise that a court must perform where a person's right to privacy is at stake, on the one hand, and the media's freedom of expression is sought to be restricted, on the other hand. The balance in that case favoured the applicant's right to privacy as the court explained:-

> "76. As the Court has stated above, it considers that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution since the applicant exercises no official function and the photos and articles related exclusively to details of her private life."

35. It is clear from these decisions that, *prima facie*, a member of the public customarily enjoys a right to have their private life protected and that this right may afford protection to one's photograph and /or address. The extent of that right and the zone of privacy to be afforded to an individual's own actions and/or their interactions with others will depend on the prevailing circumstances. At times the right to privacy contended for may be in conflict the competing interests of those who seek to exercise their right to freedom of expression. In such circumstances, whether protection for private life can be sustained will be resolved by the court carrying out an assessment of the competing interests and rights of the respective protagonists bearing in mind the public interest. At times an individual's right to privacy as provided for in Article 8 may have to give way to the competing rights of others to exercise their right of freedom of expression under Article 10

Decisions of the High Court of Northern Ireland

36. The applicant relied heavily on the decision of the High Court of Northern Ireland in *Callaghan v. Independent News and Media Ltd* [2008] N.I.Q.B. 15. In that case the plaintiff was convicted of a brutal sexual murder in 1987. He sought an injunction restraining the defendant from publishing photographs from which he could be identified as well as orders restraining the publishing of any information identifying his address, his place of work or his whereabouts. The defendant had published a number of articles, not only in relation to the plaintiff, but also in relation to a number of other life sentence prisoners due for release back into the community. The articles also concerned "the general policy question as to whether there should be publication of all details in relation to sex offenders upon their release into the community so that members of the public can identify the offenders and take precautions in relation to the risks that they pose."

37. The plaintiff's application was supported by the Northern Ireland Office which also sought a declaration that the defendant could not lawfully publish photographs of the plaintiff without obscuring his identity nor any photograph of any serving prisoner who was being assessed at the Prisoner Assessment Unit unless all identifying features were obscured.

38. The plaintiff in that case had been sentenced to life imprisonment for a brutal sexual murder. The tariff in respect of the retribution and deterrence element of his sentence was set by the Lord Chief Justice at 21 years.

39. The plaintiff was due to become eligible for release on licence in October 2008. In advance of that date, namely in October 2007, when he was serving the last year of the tariff element of his sentence, the plaintiff was moved to what is described as the Prisoner Assessment Unit. That transfer occurred following extensive assessments carried out by a multidisciplinary team at the prison and also by the Life Sentence Review Commissioners who are the independent government body responsible for deciding when, if at all, and subject to what conditions a life sentence prisoner will be released into the community. In the Prisoner Assessment Unit, the plaintiff remained under the supervision of the Prison Service whilst being supported and evaluated in accordance with a plan for his potential phased reintegration into the community. As part of that plan he had been approved for occasional day release from the unit.

40. The articles published by the defendant had referred to the plaintiff by name, detailed the offence for which he had been convicted and reported that he had been moved to the Prisoner Assessment Unit. A photograph had been published of the plaintiff in a public place but his face was obscured by the hat he was wearing. In these articles the plaintiff had been depicted as someone that other prisoners and prison staff were afraid of. He was portrayed at that time as a sick individual who was a psychopath, a killer and an evil sex beast and as someone who, in the opinion of those in charge of his care, constituted a substantial risk to public safety. The articles had made no mention of the rehabilitation that the plaintiff had undertaken in prison nor of the fact that following continuous assessment by multi disciplinary teams that he had been deemed to have been rehabilitated to the point that he was no longer considered to constitute a risk to the public. Neither was there any mention of the fact that his release, if ultimately sanctioned, would be on the basis of a very limited license or subject to other precautions that would be implemented to ensure compliance with the terms of that licence. The defendant proposed to publish another photograph of the plaintiff in a Sunday newspaper with an accompanying article entitled "Killers on the Loose" and the plaintiff brought the interlocutory application to restrain that publication.

41. At the interlocutory application the defendant gave an undertaking not to publish the address of the Prisoner Assessment Unit at which the plaintiff resided or the address of the plaintiff's parents at which he might reside in the future. No undertaking was given, however, not to publish photographs identifying the plaintiff.

42. The Prison Service , whilst not a party to the proceedings, was permitted to make submissions at the interlocutory hearing and did so in support of the plaintiffs application. In its affidavit the Prison Service set out in detail how life prisoners, in the final year of the tariff period of their sentence are assessed on an ongoing basis by a multi disciplinary team which includes prison officers known to the prisoner, psychologists, medical staff, probation workers, police and welfare officers. It is only when this team and also the Life Sentence Review Commissioners conclude that a prisoner is ready that they are transferred to the Prisoner Assessment Unit where their preparation for release on license is monitored and progressed. The role of the Prisoner Assessment Unit was explained and it was stated that research "has demonstrated that phased release and home leave contributes to an increased chance that prisoners are safely re-integrated into society". A detailed explanation was given as to the ongoing assessments carried out within the Prisoner Assessment Unit before a prisoner might ultimately be deemed ready for release on licence. The affidavit stated that the Prison Service "is of the firm view that the Prisoner Assessment Unit system is very valuable not simply to prisoners, but also to the public in allowing the safe re-integration of prisoners".

43. The plaintiff in *Callaghan* contended there was a risk to his life in having his photograph published in the newspaper identifying him as a sex offender. At para. 9 of his judgment at the full hearing ([2009] N.I.Q.B. 1) Stephens J. said:-

> "[9] The first plaintiff is not a person deserving of sympathy when it comes to the question of obscuring photographs of him so as to prevent his recognition by that means by members of the public. However the existence of a general risk of harm to sex offenders was expressly accepted by the defendant at the trial of these actions and indeed it was accepted implicitly by it prior to the trial. The extent of that risk remained to be decided and particularly as to whether it included an increased risk to the life of the first plaintiff by reason of the publication of unpixelated photographs of him when taken in conjunction with the tone and content of the articles that have been published by the defendant."

44. In relation to the alleged threat to his life, the plaintiff adduced, at the interlocutory application, statistical evidence of the rate of attacks on convicted sex offenders in Northern Ireland. Stephens J. at para. 11 of his judgment noted it was "significant" there had been three murders of persons suspected of being convicted of sexual offences and two attempted murders, although there was no evidence as to the motivation for the attacks or whether there had been publicity attached to the individuals concerned. The plaintiff's assertion there was a risk to his life was also supported by the Prison Service in the affidavit filed on its behalf which noted that there had been cases of serious assaults and murder in respect of convicted sex offenders and that "the risk of attack also will apply to those with whom the prisoner is residing, flatmates, other hostel residents, members of his family etc." There was no evidence that threats had actually been made to the plaintiff. On the evidence before him, Stephens J., at the interlocutory application, expressed himself satisfied that "there is a risk of a real and immediate threat to the life of the plaintiff and also a risk of a real and immediate threat of inhuman and degrading treatment in relation to him". Stephens J. noted the test was whether there was evidence of a real risk, "there does not have to be evidence that the risk will actually materialise".

45. In deciding whether to grant the interlocutory injunction, Stephens J. considered the defendant's right to freedom of expression. At para. 19 of his judgment he noted that there was no evidence that a photograph capable of identifying the plaintiff had already become available to the public. In the only published photograph produced to the Court the plaintiff's face was obscured by the hat he was wearing. The Court noted there was a public interest "in the press debate about the release of life prisoners". However, the plaintiff and the Prison Service questioned the public interest in publishing a photograph of the plaintiff from which he could be identified and the publication of details of the exact location of the Prisoner Assessment Unit. The Prison Service in its affidavit stated that publishing the location of the Unit could put the personal safety of other prisoners at risk and there was evidence of previous attacks at a hostel in Belfast. The Prison Service stated that "we are further of the firm view that such attention will only harm the prospects of a safe and adequate re-integration of such prisoners into society".

46. At para. 21 of his judgment Stephens J. concluded there was a public interest in members of the public being able to identify the plaintiff so as to protect themselves against him and that there was a public interest "that the identity of those convicted and sentenced for criminal offences should not be concealed from the public". However, there was also a "clear public interest in ensuring that prisoners are re-integrated into society if they are deemed not to be at risk". Stephens J. held that there was a conflict between the plaintiff's rights to life, freedom from inhuman and degrading treatment and privacy and the defendant's right to freedom of expression and that the Court should attempt to strike an appropriate and proportionate balance between those competing rights. Stephens J. concluded that, having regard to the significant body of evidence that the plaintiff was considered to be unlikely to re-offend, the balance was in favour of the plaintiff being granted the interlocutory injunction preventing photographs being published of him until the trial of the action.

The test to be applied for the granting of an interlocutory injunction

47. The test for the granting of an interlocutory injunction is that set out in the judgment of Keane J. (as he then was) in *Campus Oil Ltd. v. Minister for Industry and Commerce (No. 2)* [1983] I.R. 88.

48. In his judgment in that case Keane J. referred to the following passage from page 2 of *Kerr on Injunctions* (6th ed. 1927) which was cited with approval by Lavery J. in *Educational Company of Ireland Ltd. v. Fitzpatrick*, [1961] I.R. 323 at p. 336, and outlines the purpose of an interlocutory injunction.

> "The interlocutory injunction is merely provisional in its nature, and does not conclude a right. The effect and object of the interlocutory injunction is merely to keep matters *in statu quo* until the hearing or further order."

49. The test adopted by Keane J. in the High Court, and approved on appeal by the Supreme Court, is a three-stage test:-

> First, whether the plaintiff has raised "a fair question" to be decided at the trial.
>
> Second, whether the balance of convenience requires the granting or refusing of the injunction sought by the plaintiff.
>
> Third, the effect on the *status quo* of any order made by the court on the application.

50. Although no mention was made of it in *Campus Oil* it is generally accepted that the court must consider whether damages are an adequate remedy for the plaintiff if he succeeds at trial. The court also must also consider the adequacy of the undertaking as to damages which the plaintiff is required to give when seeking to obtain equitable relief. (See the judgment of the Supreme Court in *Dunne v. Dun Laoghaire-Rathdown County Council* [2008] 1 I.R. 568, 580-581).

51. In *Callaghan v. Independent News and Media Ltd* Stephens J. considered the test that should apply in an application for an

interlocutory injunction which has the effect of restraining freedom of expression. In particular, Stephens J. referred to s. 12 of the Human Rights Act 1998 (UK) which provides:-

> "12(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> (2) ….
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to –
>
> (a) the extent to which—
> (i) the material has, or is about to, become available to the public; or
>
> (ii) it is, or would be, in the public interest for the material to be published;
>
> (b) any relevant privacy code."

52. Stephens J. referred to the decision of the House of Lords in *Cream Holdings Ltd. v. Banerjee* [2005] 1 A.C. 253 where Lord Nicholls suggested that when deciding whether to grant an interlocutory injunction restraining freedom of expression the threshold for success should customarily be higher than the common place requirement that the plaintiff establish simply that there is a fair question to be tried. In particular he referred to the effect of the provisions of section 12 on that test. In *Cream Holdings Ltd*. at pp. 259-262 of his speech Lord Nicholls said:

> "13. The legal background against which this statutory provision has to be interpreted is familiar. In the 1960s the approach adopted by the courts to the grant of interlocutory injunctions was that the applicant had to establish a *prima facie* case. He had to establish this before questions of the so-called 'balance of convenience' fell to be considered. A *prima facie* case was understood, at least in the Chancery Division, as meaning the applicant must establish that as the evidence currently stood on the balance of probability he would succeed at the trial.
>
> 14. The courts were freed from this fetter by the decision of your Lordships' House in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396. Lord Diplock said, at pp 407-408, that the court must be satisfied the claim 'is not frivolous or vexatious; in other words, that there is a serious question to be tried'. But it is no part of the court's function at this stage of litigation to try to resolve conflicts of evidence on affidavit nor to decide difficult questions of law calling for detailed argument and mature consideration. Unless the applicant fails to show he has 'any real prospect of succeeding in his claim for a permanent injunction at the trial', the court should proceed to consider where the balance of convenience lies. As to that, where other factors appear to be evenly balanced 'it is a counsel of prudence' for the court to take 'such measures as are calculated to preserve the *status quo*'.
>
> 15 . When the Human Rights Bill was under consideration by Parliament concern was expressed at the adverse impact the Bill might have on the freedom of the press. Article 8 of the European Convention, guaranteeing the right to respect for private life, was among the Convention rights to which the legislation would give effect. The concern was that, applying the conventional *American Cyanamid* approach, orders imposing prior restraint on newspapers might readily be granted by the courts to preserve the *status quo* until trial whenever applicants claimed that a threatened publication would infringe their rights under article 8. Section 12(3) was enacted to allay these fears. Its principal purpose was to buttress the protection afforded to freedom of speech at the interlocutory stage. It sought to do so by setting a higher threshold for the grant of interlocutory injunctions against the media than the *American Cyanamid* guideline of a 'serious question to be tried' or a 'real prospect' of success at the trial.
>
> 16. Against this background I turn to consider whether, as the 'Echo' submits, 'likely' in section 12(3) bears the meaning of 'more likely than not' or 'probably'. This would be a higher threshold than that prescribed by the *American Cyanamid* case. That would be consistent with the underlying parliamentary intention of emphasising the importance of freedom of expression. But in common with the views expressed in the Court of Appeal in the present case, I do not think 'likely' can bear this meaning in section 12(3). Section 12(3) applies the 'likely' criterion to all cases of interim prior restraint. It is of general application. So Parliament was painting with a broad brush and setting a general standard. A threshold of 'more likely than not' in every case would not be workable in practice. It would not be workable in practice because in certain common form situations it would produce results Parliament cannot have intended. It would preclude the court from granting an interim injunction in some circumstances where it is plain injunctive relief should be granted as a temporary measure.
>
> 17. Take a case such as the present: an application is made to the court for an interlocutory injunction to restrain publication of allegedly confidential or private information until trial. The judge needs an opportunity to read and consider the evidence and submissions of both parties. Until then the judge will often not be in a position to decide whether on balance of probability the applicant will succeed in obtaining a permanent injunction at the trial. In the nature of things this will take time, however speedily the proceedings are arranged and conducted. The courts are remarkably adept at hearing urgent applications very speedily, but inevitably there will often be a lapse of some time in resolving such an application, whether measured in hours or longer in a complex case.
>
> 18. What is to happen meanwhile? Confidentiality, once breached, is lost for ever. Parliament cannot have intended that, whatever the circumstances, section 12(3) would preclude a judge from making a restraining order for the period needed for him to form a view on whether on balance of probability the claim would succeed at trial. That would be absurd. In the present case the 'Echo' agreed not to publish any further article pending the hearing of Cream's application for interim relief. But it would be absurd if, had the 'Echo' not done so, the court would have been powerless to preserve the confidentiality of the information until Cream's application had been heard. Similarly, if a judge refuses to grant an interlocutory injunction preserving confidentiality until trial the court ought not to be powerless to grant interim relief pending the hearing of an interlocutory appeal against the judge's order.

19. The matter goes further than these procedural difficulties. Cases may arise where the adverse consequences of disclosure of information would be extremely serious, such as a grave risk of personal injury to a particular person. Threats may have been made against a person accused or convicted of a crime or a person who gave evidence at a trial. Disclosure of his current whereabouts might have extremely serious consequences. Despite the potential seriousness of the adverse consequences of disclosure, the applicant's claim to confidentiality may be weak. The applicant's case may depend, for instance, on a disputed question of fact on which the applicant has an arguable but distinctly poor case. It would be extraordinary if in such a case the court were compelled to apply a 'probability of success' test and therefore, regardless of the seriousness of the possible adverse consequences, refuse to restrain publication until the disputed issue of fact can be resolved at the trial.

20. These considerations indicate that 'likely' in section 12(3) cannot have been intended to mean 'more likely than not' in all situations. That, as a test of universal application, would set the degree of likelihood too high. In some cases application of that test would achieve the antithesis of a fair trial. *Some flexibility is essential*. The intention of Parliament must be taken to be that 'likely' should have an extended meaning which sets as a normal prerequisite to the grant of an injunction before trial a likelihood of success at the trial higher than the commonplace *American Cyanamid* standard of 'real prospect' but permits the court to dispense with this higher standard where particular circumstances make this necessary.

21. ….

22. …. Section 12(3) makes the likelihood of success at the trial an essential element in the court's consideration of whether to make an interim order. But in order to achieve the necessary flexibility the degree of likelihood of success at the trial needed to satisfy section 12(3) must depend on the circumstances. There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success 'sufficiently favourable', the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal.

23. This interpretation achieves the purpose underlying section 12(3). Despite its apparent circularity, this interpretation emphasises the importance of the applicant's prospects of success as a factor to be taken into account when the court is deciding whether to make an interim restraint order. It provides, as is only sensible, that the weight to be given to this factor will depend on the circumstances. By this means the general approach outlined above does not accord inappropriate weight to the Convention right of freedom of expression as compared with the right to respect for private life or other Convention rights. This approach gives effect to the parliamentary intention that courts should have particular regard to the importance of the right to freedom of expression and at the same time it is sufficiently flexible in its application to give effect to countervailing Convention rights. In other words, this interpretation of section 12(3) is Convention-compliant." [Emphasis added].

53. In *Callaghan*, Stephens J., having considered the extensive evidence made available to him in support of the plaintiff's application, concluded that he had established that it was likely that the publication of photographs which would identify him were likely to be prohibited at the hearing of the action.

54. There is no equivalent to the provisions of s. 12 of the Human Rights Act 1998 in the European Convention on Human Rights Act 2003 in this jurisdiction. However, counsel for the defendant newspapers in his written legal submissions has suggested that where freedom of expression is sought to be restrained the court should apply an attenuated version of the *Campus Oil* test when deciding whether or not to grant an interlocutory injunction. He relied on the decision of Kelly J. in *Foley v. Sunday Newspapers Ltd*. [2005] 1 I.R. 88. In that case the plaintiff was described by the defendant as "a notorious and self-professed crime lord and major drug dealer known as 'the Viper'". The plaintiff claimed his life was in danger and sought injunctions restraining the publication, *inter alia*, of information which suggested he was a Garda informer. Kelly J. said material previously published by the defendant if untrue would be defamatory of the plaintiff but the plaintiff had not sued in defamation. He referred to the well known principle that a party seeking to restrain the prior publication of allegedly defamatory material must establish that it is clear that he will succeed in his claim at the full trial (*Bonnard v. Perryman* [1891] 2 Ch. 269, *Reynolds v. Malocco* [1999] 2 I.R. 203). At p. 101 of his judgment Kelly J. said:-

"42. In this country we have a free press. The right to freedom of expression is provided for in Article 40 of the Constitution and article 10 of the European Convention on Human Rights. It is an important right and one which the courts must be extremely circumspect about curtailing particularly at the interlocutory stage of a proceeding. Important as it is, however, it cannot equal or be more important than the right to life. If, therefore, the evidence established a real likelihood that repetition of the material in question would infringe the plaintiff's right to life, the court would have to give effect to such a right."

55. Kelly J. accepted the plaintiff had raised a fair question to be tried and that if his life was in danger damages would, obviously, not be an adequate remedy. On the issue of the balance of convenience, Kelly J. considered a number of matters at p. 102 of his judgment:-

"46. There are a number of matters which appear to me appropriate to take into account on this question of the balance of convenience.

Firstly, all of the material which has been complained of is already in the public domain. Much of it has been in the public domain for a very long time. ….

49. I have already mentioned the argument made by the defendant to the effect that, as the plaintiff would not be granted an injunction of this type in a defamation action, so he should not be granted such in the present case. I do not think that that necessarily follows, but I am quite satisfied that, before an injunction of this type should be granted, the

plaintiff would have to demonstrate, by proper evidence, a convincing case to bring about a curtailment of the freedom of expression of the press.

50. This is particularly so having regard to the strongly expressed guarantees in the Constitution in favour of freedom of expression. The Irish (and indeed the English courts in the absence of a written constitution) have always shown a marked reluctance to exercise their injunction jurisdiction in a manner which would entrench on the freedom of expression enjoyed by the press and the media generally. A good example of this is to be found in the judgment of O'Hanlon J. in *M. v. Drury* [1994] 2 I.R. 8.

51. This approach is also justified having regard to the provisions of article 10 of the European Convention on Human Rights and the jurisprudence which has built up on foot of it.

52. Article 10 of the European Convention on Human Rights is entitled 'Freedom of Expression' and reads as follows:-

> '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

53. In the case of *Venables v. News Group Newspapers Ltd*. [2001] Fam. 430, Butler-Sloss P. held (admittedly on a trial) that, by virtue of article 10 of the Convention, the freedom of the media to publish could not be restricted unless the need for such restriction fell within the exceptions in article 10(2) which were to be construed narrowly. She also held that the onus lay on those seeking such restrictions to show that they were, in accordance with the law, necessary in a democratic society to satisfy one of the strong and pressing social needs identified in article 10(2) and proportionate to the legitimate aim pursued.

54. In the course of her judgment, she cited with approval at p. 450, the observations of Munby J. in *Kelly v. B.B.C*. [2001] Fam. 59, where he said, at p. 70 of his judgment:-

> 'If those who seek to bring themselves within paragraph 2 of article 10 are to establish "convincingly" that they are - and that is what they have to establish - they cannot do so by mere assertion, however eminent the person making the assertion, nor by simply inviting the court to make assumptions; what is required … is proper *evidence*.'

55. In the present case, it appears to me that the evidence falls short of what would justify me in curtailing the freedom of the defendant to state facts and express opinions upon the plaintiff and his activities.

56. As I have already pointed out, I can find no evidence of any express exhortation or positive encouragement to persons to do violence to the plaintiff.

57. The three previous attempts on his life long antedate the publication of any material by the defendant which the plaintiff has identified as offensive. That fact is supportive of the view that any risk to the plaintiff's life or well-being comes not from any publication by the defendant but rather from his own involvement in criminal activities and the criminal underworld.

58. As the evidence stands, I am satisfied that I would not be justified in restricting the defendant's right, between now and the trial of this action, to write of or concerning the plaintiff provided, of course, that it does not exhort anybody to do violence towards him. It has not done so in the past and there is no evidence that it intends to do so in future.

59. Whatever about the issues that fall to be determined at trial, the evidence before the court does not justify the curtailment of the defendant's rights which the plaintiff seeks.

60. Furthermore, the information in question is in the public domain and the bringing of this action with its attendant publicity has given it a much wider circulation. An injunction restraining this defendant from repeating it would have little value. The plaintiff has, of course, by bringing this action obtained prominence for his denials of the allegations with which he takes issue.

61. I am also satisfied that the order which is sought is altogether too wide. If it were to be granted in the terms sought, the task of the defendant in attempting to ascertain what would be permissible material to publish and what not would be very difficult indeed. Even if I were minded to grant an injunction, I would not do so in those terms.

62. Accordingly, the application for injunctive relief is refused. I will, however, direct an early trial of this action and will hear counsel on the question of the delivery of accelerated pleadings and the fixing of a trial date." [Emphasis added].

56. Counsel for the defendant newspapers also relied on the decision of the Supreme Court in *Mahon v. Post Publications Ltd*. [2007] 3 I.R. 338. In that case the Mahon Tribunal sought an injunction restraining the defendant from publishing or using information which the tribunal had circulated on a confidential basis. Kelly J. in the High Court and a majority of the Supreme Court on appeal refused the injunction sought. Fennelly J., delivering the majority judgment of the Supreme Court said at p. 377 of his judgment:-

> "97. Our courts, therefore, recognise that the right of freedom of expression is not absolute. It may be necessary to reconcile it, in the event of conflict, with other constitutional rights. It may even, as in the case of *Murphy v. I.R.T.C*. [1999] 1 I.R. 12, be restricted or controlled by laws passed for the advancement of other legitimate social purposes. In such cases, the courts have found it useful to have resort to the principle of proportionality. The judgment of Barrington

J. identified the issue at p. 26 as follows:-

> "The real question is whether the limitation imposed upon the various constitutional rights is proportionate to the purpose which the Oireachtas wished to achieve.
>
> 98. As I hope to explain, this approach is, and has been recognised by this court to be, closely comparable to that adopted by the European Court of Human Rights when interpreting the Convention."

57. Fennelly J. continued at pp. 379 – 382 as follows:-

> "103. Section 2 of the European Convention on Human Rights Act 2003 now requires the court in interpreting 'any statutory provision or rule of law, … in so far as is possible, subject to the rules of law relating to such interpretation and application, [to] do so in a manner compatible with the State's obligations under the Convention provisions'. That provision applies to the provisions of the Tribunals of Inquiry Acts and to the general or common law regarding the protection of confidential information.
>
> 104. A restriction on freedom of expression, if it is to be permitted pursuant to article 10(2) of the Convention, must, as that provision requires, firstly, be 'prescribed by law' and, secondly, be 'necessary in a democratic society'. It must, as the European Court of Human Rights has said serve 'a pressing social need'. It must also, of course, serve one of the listed interests. One of these is: 'preventing the disclosure of information received in confidence'. ….
>
> 105. It is important to note the first of these requirements, that of legality. The restriction proposed must be based on a provision of the law of the state. Hoffmann L.J. said as much in the passage already cited. It is not necessary that the exception invoked be prescribed by statute. The law of defamation indubitably restricts freedom of expression, but is almost entirely a creature of the common law. But it must be based on known and accessible legal provisions. It must, as Lord Hope says, be 'sufficiently precise to enable [an affected individual] to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law'.
>
> 106. The principle of proportionality is not expressly mentioned in the article, but has been developed in the case law of the European Court of Human Rights. It derives from the requirement that the restriction be 'necessary in a democratic society'. The European Court of Human Rights has consistently held that to satisfy this requirement the restriction sought must serve 'a pressing social need' (see *Observer and Guardian v. United Kingdom* (1992) 14 E.H.R.R. 153). A further crucially important aspect of that requirement is that the restriction should not be any broader than strictly necessary to serve the interest invoked to justify it. ….
>
> 109. Finally, under this heading, it is important to reiterate that what is sought by the plaintiff's amounts to a form of prior restraint. The defendant, in reliance on the jurisprudence of the European Court of Human Rights, submits that any such restriction calls for the most careful scrutiny. In *The Observer and the Guardian v. United Kingdom* (1992) 14 E.H.R.R. 153 the court held:-
>
> > 'Article 10 of the Convention does not in terms prohibit the imposition of prior restraints on publication, as such. … On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny by the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.'
>
> 110. That passage referred, of course, to the obligation of the European Court itself. However, it is equally plain, for reasons I have given above, that this court is under a corresponding obligation. Lord Hope of Craighead in *R. v. Shayler* [2002] UKHL 11, [2003] 1 A.C. 247 at p. 280 spoke of a 'close and penetrating examination of the factual justification for the restriction'. The court must scrutinise the present application for an injunction seeking prior restraint on publication with particular care."

58. In my view this Court should pay particular regard to the aforementioned guidance given by Fennelly J. in *Mahon .v. Post Publications Ltd* in circumstances where the relief sought on this interlocutory application is a prior restraint order directed to curtail in a significant manner the defendant's rights to freedom of expression pending the hearing of the action.

59. Counsel for the defendant newspapers also relied on the decision of Clarke J. in *Cogley v. R.T.E. and Aherne v. R.T.E.* [2005] 4 I.R. 79. In that case R.T.E. had investigated and produced a documentary into the standard of nursing home care provided at a nursing home managed by the plaintiff in the first action and owned by the plaintiff in the second action. The documentary included footage which had been secretly filmed at the nursing home. It was alleged the programme was defamatory of the plaintiff in the first set of proceedings and in breach of the rights to privacy of the plaintiffs in the second set of proceedings and also in breach of the privacy rights of the patients of the nursing home filmed in the course of the documentary. In the first set of proceedings Clarke J. applied the well established principle that in order to restrain the prior publication of allegedly defamatory material the plaintiff was obliged to establish clearly that she would succeed in her claim at the full trial (*Reynolds v. Malocco* [1999] 2 I.R. 203).

60. In the second set of proceedings Clarke J. also considered the implications of restraining debate on matters of public importance. He considered the right to privacy and noted that it was not an unqualified right. At p. 90 of his judgment, he made an important distinction between, what he described as, a right of privacy in "underlying information" disclosure of which may be sought to be prevented, on the one hand, and, on the other hand, a right to privacy, which does not extend to "underlying information", but where it is claimed that the method adopted to obtain the information sought to be published amounted to a breach of that right. Clarke J. continued:-

> "There are certain matters which are entirely private to an individual and where it may validly be contended that no proper basis for their disclosure either to third parties or to the public generally exists. There may be other circumstances where the individual concerned might not, having regard to competing factors which may be involved, such as the public interest, be able to maintain that the information concerned must always be kept private, but may make a complaint in relation to the manner in which the information was obtained. It seems to me that different considerations apply most particularly at an interlocutory stage, dependent on which of the above elements of the right to privacy is involved."

In this case, Clarke J. said that the right to privacy contended for by the plaintiff fell into the second category as they could not

contend they had a right to privacy which "would preclude information about the conduct of [their] business which tends to suggest that there were serious irregularities in the manner in which it was being conducted, from being broadcast".

61. Clarke J. then considered the public interest in being informed about the conditions in the nursing home and said the issues raised in the programme to be broadcast were of the "highest public interest" to which "very significant weight" must be attached. He then went on to consider, in the light of those findings, the test to be applied to the court on an interlocutory application when an order by way of prior restraint was sought. At pp. 94 – 95 of his judgment he said:-

> "43. It should be noted that one of the underlying reasons for the reluctance of the courts in this jurisdiction to grant injunctions at an interlocutory stage in relation to defamation stems from the fact that if the traditional basis for the grant of an interlocutory injunction (*i.e.* that the plaintiff had established a fair issue to be tried) was sufficient for the grant of an injunction in defamation proceedings, public debate on very many issues would be largely stifled. In a great number of publications or broadcasts which deal with important public issues, persons or bodies will necessarily be criticised. There will frequently be some basis for some such persons or bodies to at least suggest that what is said of them is unfair to the point of being defamatory. If it were necessary only to establish the possibility of such an outcome in order that the publication or broadcast would be restrained, then a disproportionate effect on the conduct of public debate on issues of importance would occur. In that regard it is important to note that both the Constitution itself and the law generally recognises the need for a vigorous and informed public debate on issues of importance. Thus the Constitution confers absolute privilege on the debates of Dáil and Seanad Éireann. The form of parliamentary democracy enshrined in the Constitution requires that there be a vigorous and informed public debate on issues of importance. Any measures which would impose an excessive or unreasonable interference with the conditions necessary for such debate would require very substantial justification. Thus the reluctance of the courts in this jurisdiction (and also the European Court of Human Rights) to justify prior restraint save in unusual circumstances and after careful scrutiny. Similar considerations also apply to a situation where a party may contend that there has been a breach of his right to privacy but where there are competing and significant public interest values at stake. It is for that reason that I have distinguished between a right to privacy which subsists in the underlying information which it is sought to disclose on the one hand and information which might legitimately be the subject of public debate on an issue of public importance (albeit private to some extent) but where there may be a question as to the methods used to obtain that information on the other hand.
>
> 44. I would wish to emphasise that the balancing exercise which I have found that the court must engage in is not one which would arise at all in circumstances where the underlying information sought to be disclosed was of a significantly private nature and where there was no, or no significant, legitimate public interest in its disclosure. In such a case (for example where the information intended to be disclosed concerned the private life of a public individual in circumstances where there was no significant public interest of a legitimate variety in the material involved), it would seem to me that the normal criteria for the grant of an interlocutory injunction should be applied. In such cases it is likely that the balance of convenience would favour the grant of an interlocutory injunction on the basis that the information, once published, cannot be unpublished. It is also likely, in such cases, that damages would not be an adequate means of vindicating the right to privacy of the individual.
>
> 45. However, as I have indicated, where, as here, the information concerned is one which, on its face, appears important to an informed public debate on an issue of significant public importance different criteria, it seems to me, apply." [Emphasis added].

62. At pp. 95- 96 Clarke J. referred to the decision of the Court of Appeal of New Zealand in the case of *TV3 Network Services Ltd v. Fahey* [1999] 2 N.Z.L.R. 129 which he found "persuasive" and he adopted the following test "as being the appropriate criteria to be applied for the grant of interlocutory relief in this jurisdiction in circumstances such as this". The test to be applied was:-

> "1. a consideration of the context and circumstances in which the impugned methods were employed;
>
> 2. any special public interest considerations in favour of broadcasting the programme; and
>
> 3. the adequacy of damages as an available remedy for any wrong proved at trial."

63. Applying that test to the facts of the case before him Clarke J. found that while the secret filming in the nursing home may not have been justified, the legitimate public interest in the programme being broadcast carried "very heavy weight". On the issue of the adequacy of damages Clarke J. found that if the accusations in the report were found to be true any breach of privacy would be adequately compensated by an award of damages, while if the accusations were not true the plaintiffs could take proceedings for defamation.

64. Clarke J. concluded by quoting with "complete approval" a passage from the judgment in *TV3 Network Services Ltd v. Fahey* [1999] 2 N.Z.L.R. 129 and he added at p. 98 that:-

> "any claim to an entitlement to broadcast or publish material which has, arguably, been unlawfully obtained, on the basis of a legitimate public interest will necessarily result in the court exercising significant scrutiny over the public interest asserted. I am mindful of the fact that it is all too easy to dress up very many issues with an exaggerated or unreal public dimension. However on the facts of this case and for the reasons which I have set out earlier, I am more than satisfied that the defendant has shown that there are very real, significant and weighty public interest issues involved. For those reasons I refused to grant an interlocutory injunction which would have the effect of restraining the broadcast."

Application of the law to the facts of this case

65. As noted by Fennelly J. in his judgment in *Mahon v. Post Publications Ltd*. s. 2(1) of the European Convention on Human Rights Act provides:-

> "2(1) In interpreting and applying any statutory provision or rule of law, a court shall, in so far as is possible, subject to the rules of law relating to such interpretation and application, do so in a manner compatible with the State's obligations under the Convention provisions."

66. Although the courts are not required by the provisions of s. 3 of the Act as an "organ of the State", as defined in s. 1, to perform their functions in a manner compatible with the State's obligations under the Convention, s. 2(1) imposes a mandatory obligation on

the court, in so far as possible in accordance with the terms of that subsection, to interpret and apply statutory provisions and rules of law in a manner compatible with the State's obligations under the Convention. Section 1 of the Act defines "rule of law" to include the common law. The test for the granting of an interlocutory injunction is a rule of law developed by the courts in this jurisdiction in the exercise of their inherent jurisdiction to grant equitable relief. The test itself is a flexible one to be adapted to the circumstances of the particular case. In this case, the test must be interpreted and applied in a manner compatible with Article 8 and Article 10 of the European Convention on Human Rights.

67. I am satisfied that the plaintiff has established a fair question to be tried and that his claim is not frivolous or vexatious. The rights he asserts, in particular the right to life and the right to privacy, are constitutional rights and are also protected by the European Convention on Human Rights. The decision of the High Court in Northern Ireland in *Callaghan .v. Independent News and Media Limited* supports the possibility of a court in appropriate circumstances interfering with the right to freedom of expression enjoyed by the press in favour of a potential infringement of the right to life or privacy enjoyed by a particular plaintiff.

68. In cases where freedom of expression is sought to be restricted by an interlocutory order I am satisfied that the plaintiff is required, as Kelly J. said in *Foley v. Sunday Newspapers Ltd.* [2005] 1 I.R. 88, "to demonstrate, by proper evidence, a convincing case to bring about a curtailment of the freedom of expression of the press". In my view this is the same as saying that the plaintiff must demonstrate at an interlocutory application that he is likely to establish at the trial of the action that the publication complained of should not be allowed. I agree with what Lord Nicholls said in *Cream Holdings Ltd. v. Banerjee* [2005] 1 A.C. 253 that this requirement should operate in a flexible manner. However, in most cases, at a minimum the plaintiff should be required to adduce "proper evidence" to support his claim that the publication complained of should be prohibited at the trial of the action. In order to demonstrate a "convincing case", or that such prohibition is "likely" to be ordered, the applicant must show that the interference with freedom of expression sought is justified by one of the recognised exceptions to that right and that the proposed restriction will be proportionate to the aim to be achieved. Furthermore, as Fennelly J. said in *Mahon v. Post Publications Ltd*. [2007] 3 I.R. 338 the court must scrutinise an application for an injunction seeking prior restraint of a publication "with particular care".

69. Whilst I accept that the plaintiff has demonstrated a *prima facie* case that his right to life and his right privacy are engaged, and the protection of "the rights of others" is one of the exceptions to freedom of expression, I am not satisfied that the plaintiff has adduced sufficient evidence at the interlocutory application to demonstrate that he is likely to succeed at the trial of the action in restricting the further publication of photographs identifying him and/or the publication of details of his address. Of course it is not for me to prejudge what evidence may be available and advanced by the plaintiff at the trial of the substantive proceedings and the court at that time will be in a position to consider with much greater precision the entirety of the evidence made available prior to finally resolving the conflicting interests of the parties. The plaintiff may well be able to procure the type of evidence that will convince the court that he should succeed in his action as happened in *Callaghan v. Independent News and Media Limited*. However, at this time I have not been furnished with what can be described as proper or cogent evidence to demonstrate he is likely to prove that any potential infringement of his right to life or that any interference with his rights to privacy cannot be justified in the public interest.

70. Looking first at the plaintiff's right to life and a possible infringement of that right, the plaintiff in his affidavit does not suggest that to date any actual threat has been made to his life. He states that he did not feel safe living at a number of the addresses where he has resided over the past nine months because details of these were published in the defendant's newspapers. However, he fails to explain why this was so. What is clear from his evidence is that for substantial periods of time since his release his whereabouts and his physical appearance have been known to significant numbers of people including various landlords, members of one residents' association, his former employers and various members of the public and the media. No evidence has been produced which protests that he has been assaulted or subjected to any type of verbal or physical abuse or that he has been threatened in any way. Insofar as he has changed address he does not appear to have done so in response to any warnings or threats visited upon him, but rather has moved on at the request of various landlords and estate agents or alternatively of his own volition in the hope of avoiding further identification.

71. Secondly, unlike in the case of *Callaghan v. Independent News and Media*, the plaintiff has not sought to adduce any statistical evidence of the rate of attacks on convicted sex offenders in Ireland or the effect that media publicity may have on increasing the risk of such an attack being perpetrated upon him as a convicted sex offender. In my view this is a significant omission. Although the Court could take notice of such a potential risk to the plaintiff on the basis of the evidence set out in the judgment of Stephens J. in *Callaghan*, that evidence is hearsay and, more importantly, the evidence may be particular to Northern Ireland. In any event, the burden of proof is on the plaintiff to demonstrate a real risk to his life in order for the Court to grant the interlocutory injunction he seeks pending the trial of the action. Accordingly, I am not satisfied that the plaintiff has demonstrated by "proper" evidence on this interlocutory application a "convincing case" that should the defendant newspapers be permitted to publish photographs from which he can be identified or permitted to publish the location at which he resides pending the hearing of the action that he faces a real risk to his life such as would require the Court to stand down the defendant newspapers' rights to freedom of expression in favour of his right to life. This being so the plaintiff's claim for interlocutory relief on this ground fails.

72. In relation to the plaintiff's right to privacy, while I accept the plaintiff enjoys a constitutional right to privacy, a right which is also protected by the European Convention on Human Rights, and that he may succeed in proving there has been an interference with that right at the hearing of the action, I am not satisfied that the plaintiff has demonstrated on this application "by proper evidence" a "convincing case" that his privacy has unjustifiably been intruded upon by the defendant newspapers such as would justify the Court curtailing the defendant's freedom of the expression pending the trial of the action. Time and time again the courts have referred to the dangers inherent in granting what are described as prior restraint orders and have determined that such orders should only be made following a close and penetrating examination of the factual justification for the restraint sought.

73. A person does have a right to privacy in respect of his or her identity as contained in a photograph and also has the right to control the disclosure of and use of their home address. The European Court of Human Rights has recognised both of these rights. However, it is also clear from the judgments of the Irish courts and the European Court of Human Rights that the right to privacy is not unqualified. The judgment of the European Court of Human Rights in *Von Hannover* states that "the protection of private life has to be balanced against the freedom of expression guaranteed by Art. 10 of the Convention". In considering the appropriate balance to be struck between the two competing rights, "the decisive factor" lies "in the contribution that the published photos and articles make to a debate of general interest". In *Von Hannover*, the court was satisfied that the public had no legitimate interest in the private life of the Princess. In my view the same cannot be said in this case.

74. In the present case the information sought to be disclosed by the defendant's cannot be described as being of a significantly private nature such that it can reasonably be contended that there is no, or no significant, legitimate interest in its disclosure. It must be accepted that there is public interest in a debate which contends that there should be publication of information in relation to sex offenders released from prison. There is also a public interest in members of the public being able to identify persons convicted

of violent offences and in their being informed as to the location in which they may be residing. In this regard the pictures published by the defendant's and the articles containing details of his known whereabouts contribute significantly to the debate and the public interest. Such knowledge may allow members of the public to adjust their behaviour in whatever manner they feel might best protect them from any risk to which they may legitimately feel exposed.

75. The public interest in members of the public being able to identify persons previously convicted of serious crimes was clearly and explicitly acknowledged by Stephens J. in his judgment in *Callaghan*. The level of public interest, and the weight to be attached to it, in my view, depends on the risk that a person convicted of a violent offence actually poses to the community, if that risk can be ascertained. Accordingly, in seeking to determine whether the restraint sought by the plaintiff can be justified, I must subject the evidence adduced by the parties which is material to that risk to a "penetrating examination". Unfortunately, the evidence is that the plaintiff, having served a lengthy prison sentence in the United Kingdom in respect of a rape committed in 1989, re-offended in respect of the same violent offence in this jurisdiction on a number of occasions. The defendant newspapers have also exhibited uncontested statistical evidence regarding the risk of sex offenders re-offending which certainly supports their case that the plaintiff should be viewed as somebody who may re-offend. Further, I believe the Court can take judicial notice of the fact that convicted sex offenders may continue to pose a risk to the community after their release from prison by reason of the notification requirements introduced into this jurisdiction by the Sex Offenders Act 2001. I also believe I should have regard to the seriousness of the crimes which the Plaintiff has perpetrated as a re-offender since his first conviction in 1989.

76. In stark contrast to the aforementioned evidence I have little from the plaintiff in terms of cogent or proper evidence to suggest that he is unlikely to offend again and this fact is one which must weigh heavily upon the Court when deciding upon the level of the public interest in information concerning his identity and his whereabouts. As the burden is on the plaintiff to establish by evidence at least a *prima facie* case of an unjustified intrusion with his right to privacy in order to obtain an interlocutory injunction it is a serious omission, in my view, for the plaintiff not to have adduced any documentary evidence from the prison authorities as to his efforts at rehabilitation whilst in prison. The plaintiff has provided no evidence to validate his asserted participation in the counselling to which he has referred nor, even more importantly, as to the likely effect if any, of that counselling on his risk of re-offending. In relation to his relationship with the Probation Service, the plaintiff's assertions are not supported by any documentary evidence from those with whom he maintains he has engaged since his release. Neither has the Court been furnished with any medical, psychological or psychiatric evidence or evidence from any person with expertise to suggest that he is unlikely to be a risk to members of the community into which he has been released. The results of the risk assessment allegedly carried out in advance of his release has not been made available. Regarding his abstinence from drugs and alcohol, a matter which he maintains is relevant to his risk of re-offending, the results of any such testing to which he may have submitted whilst in custody or subsequent to his release have not been exhibited. The absence of this type of evidence is, in my view, of particular significance having regard to the fact that this application has not been made as a matter of great urgency and there seems to be no reason why evidence of the type just mentioned, assuming what the plaintiff has deposed to is true, has not been made available. Indeed the defendant newspapers maintain that the delay on the part of the plaintiff in seeking interlocutory relief, something they say could have been sought as early as July 2009, is a ground which should influence the Court in its decision to refuse the relief sought.

77. The evidence advanced by the plaintiff on the present application is to my mind totally insufficient to justify the wide ranging interlocutory relief that he seeks given that the extent of the public interest in his identity and whereabouts is greatly dependant upon the risk he may currently pose to the community. I believe that my conclusion in this regard can be borne out by contrasting the facts and the evidence available on this application relevant to the risk which the plaintiff may pose to the public with the vastly more reassuring evidence available to Stephens J. in respect of the same risk when he was asked to grant the significantly more modest relief sought in *Callaghan* at the interlocutory stage. The major differences are as follows:-

> i. The plaintiff in this case has a significant history of repeated crimes of sexual violence. In *Callaghan*, whilst the murder for which the plaintiff was serving a life sentence was a brutal one, he had no prior history of violent crime, a fact material to assessing his potential risk to the public.
>
> ii. In the present case the plaintiff is free having completed his sentence and is only supervised to the extent that he has obligations to provide certain information to the Gardaí under the Sex Offenders Act 2001. By way of contrast, the plaintiff in *Callaghan*, at the time of his application for interlocutory relief, was actually serving the final year of the tariff element of his sentence. He was not, like the plaintiff in these proceedings, "free". He remained under the control and supervision of the Northern Ireland Prison Service and had been approved for release to what the Court referred to in its judgment as the Prisoner Assessment Unit. He was likely at some future date, subject to the approval of the relevant authorities, to be released back into the community on licence, but this had not occurred at the time of his application. The evidence was that during periods of release to the Prisoner Assessment Unit "the prisoner is carefully monitored to ensure that he follows the release plan prepared for him". It is likely that the existence of this type of monitoring would have been a factor the Court would have taken into account in assessing the extent to which *Callaghan* then posed a risk to the public.
>
> iii. The fact that *Callaghan* was residing in the Prisoner Assessment Unit, albeit subject to some permitted day release, at the time of his application for interlocutory relief is relevant in a number of respects:
>
> > (a) the evidence was that a prisoner could not be admitted to that unit until such time as a multidisciplinary team had concluded he was ready for such a move. The Court was told that such a decision was made following a process of continuous assessment. The multidisciplinary team would bring together persons from various backgrounds such as prisoner officers who knew the prisoner, psychologists, medical staff if appropriate, police, probation and welfare officers etc. The idea was that these professionals could pool their knowledge and expertise to assess whether a prisoner who was reaching the end of the tariff element of his sentence, could, having regard to the issue of public safety, safely be moved to the Prisoner Assessment Unit hopefully with a view to further rehabilitating him to the point where he might ultimately be released on licence. The Court had evidence that *Callaghan* had been favourably assessed by the relevant multidisciplinary team.
> >
> > (b) The Court was also told that a prisoner could not be moved to the Prisoner Assessment Unit without the agreement of the Life Sentence Review Commissioner ("the Commissioners"). The Commissioners are a statutory body responsible for certain decisions that must be taken in respect of life sentence prisoners. Most importantly they decide whether a life sentence prisoner may be released back into the community or should remain confined because of the risk they pose to the community. The Commissioners, when making their decision as to whether a prisoner is fit to be transferred to the Prisoner Assessment Unit in any case obtain the benefit of numerous reports from prison psychologists. In exercising this function the Commissioners are required to have regard to the

desirability of preventing the commission by life prisoners of further offences. They are also required to carry out a detailed analysis in relation to the prisoner and must resolve any doubt as to risk the prisoner poses in favour of the public. The Commissioners approved the plaintiff's transfer to the Prisoner Assessment Unit on this basis.

(c) It was stated on affidavit that the Northern Ireland Prison Service had "no hesitation in returning prisoners to prison" if they were in breach of the conditions applying to their stay at the Prisoner Assessment Unit. Thus prisoners at the Unit were incentivised to be of good behaviour. Further, in the absence of the successful compliance by the prisoner with the programme prepared for them in the Prisoner Assessment Unit they were likely to have no prospect of ultimately being approved by the Commissioners for release back into the community on licence. Thus, prisoners in that Unit were liable to experience significant sanctions if in breach of their obligations and likewise were given an incentive to be compliant with the management plan prepared for them.

iv. In *Callaghan* the plaintiff's application was supported by The Northern Ireland Office and also by the Prison Service on the basis that they were satisfied that he did not constitute a significant risk to the public and the defendants did not adduce evidence to the contrary. By way of contrast, the defendant newspapers in these proceedings positively maintain that the plaintiff currently constitutes a significant risk to the public and have put forward some *prima facie* evidence in support of their stated belief that he is at risk of re-offending.

v. The relief sought in *Callaghan* was limited to restricting the publication of an unpixelated photograph on the interlocutory application. (An undertaking not to publish the address of the Prisoner Assessment Unit had been given).

vi. The application was formally supported by the Parole Commissioners who were granted a right of audience for such purpose at the hearing.

78. From the aforementioned summary I believe that it is clear that the type of comfort that was available to the court in *Callaghan* as to the very limited risk the plaintiff in that case posed to the community at the time he brought his application for interlocutory relief is not replicated in these proceedings. By reason of the absence of evidence of that nature on this application and having regard to the evidence adduced by the defendant newspapers I can only conclude that the degree of public interest in the plaintiff's identity and his whereabouts being disclosed must be deemed to be very considerable indeed.

79. The public interest in being able to identify the plaintiff and his whereabouts could however be outweighed by other factors and by evidence of a type which has not been produced by the plaintiff on this application. In *Callaghan* the Court not only had evidence of the "rigorous examination" of the risk that the plaintiff posed to the community but it also had evidence as to immensely valuable role played by the Prisoner Assessment Unit in the integration of life sentence prisoners back into the community. The evidence on the interlocutory application included an affidavit filed on behalf of the Prison Service which stated that there was research which "demonstrated that phased release and home leave contributes to an increased chance that prisoners are safely re-integrated into society" and that such an approach could reduce their chances of re-offending, both being matters of significant public interest which inure to the benefit of the public. However, the plaintiff in the present case has produced no evidence on this application that the anonymity he seeks will facilitate his re-integration into the community such that his chances of re-offending will be reduced to the benefit of the community at large. He seeks to have the Court conclude by reference to the evidence in *Callaghan* that it is in the public interest to grant him the protection he seeks. However, he is not residing in the type of facility which was established in *Callaghan* to have been successful in reintegrating prisoners back into the community on a controlled and phased basis such that it was in the public interest to afford privacy to those attending the unit. As I have already stated, the two cases on their facts are very different with the independent evidence in *Callaghan* permitting Stevens J. to conclude that there was a public interest in affording anonymity to <u>former prisoners who no longer constituted a risk to the public.</u> He then granted to the plaintiff the limited relief sought having expressed himself satisfied, from the detailed evidence adduced, that the plaintiff fell into the category of prisoner who did not constitute a substantial risk to the public.

80. The lack of supportive independent evidence in relation to the plaintiff's rehabilitation and relationship with the Prison authorities and the Probation Service, when allied to the lack of any independent evidence regarding his risk of re-offending, are factors which have lead me to conclude that the public interest in the plaintiff being allowed to live without publicity at a stable address so as to continue his rehabilitation would not outweigh the public interest in being informed of the identity and whereabouts of a convicted criminal who may pose a risk to the community. The plaintiff may well be in a position to adduce this type of evidence at the trial of the action, but in the absence of any cogent or convincing evidence on these matters at the interlocutory application, the Court cannot accede to his request for interlocutory relief.

81. Since the plaintiff has not established by evidence that he is likely to succeed in prohibiting further publication at the trial of the action, it is not necessary for the Court to consider the balance of convenience in this case. However, if the Court were to consider the balance of convenience, in my view, there are a number of factors which would indicate the balance of convenience is not in favour of granting the interlocutory injunction.

82. First, as Kelly J. noted in *Foley*, much of the information which the applicant wishes to prohibit being further published is already in the public domain. His identity has been made known to the public and several photographs clearly identifying him have already been published. It was a significant factor in *Callaghan* that only one photograph of the plaintiff had been published prior to the interlocutory application and in that photograph the plaintiff's face was obscured by his hat. The application for the injunction in *Callaghan* was brought to prohibit another photograph of the plaintiff being published which probably would have clearly identified him. There was accordingly an obvious benefit in granting the injunction in the circumstances of that case. The same consideration does not arise in this case where many photographs have already been published over the last number of months clearly identifying the plaintiff. Accordingly, the benefit in prohibiting further publication of photographs identifying the plaintiff must be significantly reduced.

83. Secondly, while the plaintiff's current whereabouts has not been revealed in the press, he has chosen, bizarrely, to disclose his address in his affidavit in the course of these proceedings. In any event, the plaintiff is currently living a peripatetic life with no fixed address. If the plaintiff had been in a position to adduce evidence from the Probation Service that suitable and stable accommodation could now be found for him where he could continue to be supervised by the Probation Service and that this was something they thought would favour and which was likely to benefit the community, then that would be something the Court could take into account. However, the plaintiff has adduced no such evidence.

84. I accept that the plaintiff has suffered considerable inconvenience in having to move address several times and that this has probably had the consequence of interrupting his supervision by the Probation Service. However, the plaintiff has not adduced sufficient evidence to demonstrate that the balance of convenience is in his favour and outweighs the defendant newspapers'

freedom of expression at this stage of the litigation process.

85. The onus is on the plaintiff to demonstrate the balance of convenience favours the granting of the interlocutory injunction he seeks. The plaintiff has failed to demonstrate sufficient significant inconvenience such as would justify a curtailment on the freedom of expression of the defendant newspapers.

86. The plaintiff's case raises complex issues which require the Court to reconcile, in a proportionate manner, the plaintiff's right to privacy, on the one hand, and the defendant newspapers' right to freedom of expression, on the other. This exercise will involve a consideration of both the public interest in members of the public being able to identify and know the whereabouts of convicted sex offenders and the public interest in sex offenders who are released from custody having served their sentence living at a stable address where they can be monitored and supervised by the gardaí and the Probation Service. It is more appropriate for these complex issues to be considered at the full hearing of the action in light of all the relevant evidence that may by then be available to the parties and to the Court. The plaintiff's right to privacy is not unqualified and this Court cannot, at the interlocutory stage, attempt to reconcile his right to privacy with the newspaper's freedom of expression without a much better evidential basis than that produced on this application for the plaintiff's assertions that his privacy has been unjustifiably been interfered with in this case.

87. Finally, in relation to the adequacy of damages, I consider that any intrusions the plaintiff has already suffered to his privacy are capable of being compensated by an award of damages if the plaintiff succeeds at the trial of the action. The plaintiff is a person of limited means; therefore, his undertaking as to damages if he fails at the hearing of the action can carry little weight.

Conclusion

88. The plaintiff has not demonstrated by the necessary evidence that there is a real risk to his life or that he is likely to succeed at the trial of the action in further prohibiting the publication of information concerning him by the defendant newspapers. The plaintiff has not demonstrated that he is entitled to the reliefs sought.

89. I understand from the Chief Registrar of the High Court that an early hearing date for the trial of the action is possible in October. Accordingly, I will hear the parties as to the listing of this case for trial at the earliest opportunity.