



**2011 EUROPEAN COURT OF HUMAN RIGHTS
MOOT COURT COMPETITION**

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STATEMENT OF FACTS

Preliminary Round I

09 September 2009
FOURTH SECTION

Application no. 00009/08
by Perry ERVERT
against the Unified Kingdom (UFK)
lodged on 08 October 2008

THE FACTS

The Applicant, Mr. Perry Ervert, is a national of the Unified Kingdom (hereinafter UFK), born in 1960. The facts of the case take place in the territory and within the jurisdiction of the UFK, which has acceded to the ECHR since the early 70's but only recently (2000) enacted legislation giving effect to the ECHR, by the Human Rights Act.¹

The Circumstances of the Case:

The facts of the case, as submitted by the applicant, may be summarised as follows: On 08 August 2008, “*Goodbye*”, a newspaper with an average daily circulation of 40,004 copies nationally, published on its cover page a photograph of a group of 3 people in intimate intercourse, amongst which also Mr. P.Ervert. The face of Mr. P.Ervert, who is a renowned author of children’s books, was clearly discernable right under the heading: “P.ERVERT indeed”. The inside story included still photographs taken from video footage secretly recorded by one of the participants in the sexual activities. An edited extract of the highly intrusive video as well as still images were also published on the newspaper’s *facenote* page and reproduced elsewhere on the internet. The edited video footage was viewed over 1.2 million times over 8 and 9 August 2008.

On 10 August 2008 Mr. P.Ervert brought legal proceedings against “*Goodbye*”, claiming damages for defamation for being characterized a “pervert”, as well as for invasion of privacy. He also sought an injunction before the UFK High Court to restrain “*Goodbye*” from further publishing the material. No notice was given to “*Goodbye*”.

On 14 August 2008, Mr. Justice Justicious, in the UFK High Court, refused to grant an injunction as i) a defence of justification could be established and ii) in any event the material was no longer private by reason of its extensive publication in print and on the internet.

Defamation:

In assessing the approach to be taken by the court to the granting of an interim injunction, Mr. Justice Justicious noted (at paragraph 22) that:

“[...] a judge at first instance is bound by existing authority. So I must apply the law of defamation as it is: The case at hand is one where the information relates to conduct which is voluntary, discreditable, and personal (eg sexual) but not unlawful. In defamation, if the defendant can prove one of the libel defences, he will not have to establish any public interest. According to *Reynolds v Times Newspapers Ltd*: “Truth, is a complete defence. If the defendant proves the substantial truth of the words complained of, he thereby establishes the defence of justification.” The point in relation to justification is that the defendant is free to say anything that is true, however harmful or distressing even if there is no public interest or public benefit. In the case at hand I stand convinced that while the other party is not present a defence could still be made that either Mr. P. Ervert was objectively and thus truly involved in pervert intercourse or at the very least that reference was made to his name and that alone, which as matter of truth is Perry Evert (“P.ERVERT”). So long that *Bonnard v Perryman* (as affirmed in *Greene*) stands

¹ It is nothing but a sheer coincidence that the 2000 HRA of the UFK is identical to the 1998 HRA of the U.K. and that UFK’s cited case-law overlaps completely with the respective cases in the UK, so that reference can be made both to the latter’s facts and dicta.

strong, no interim injunction can be granted, as “*Goodbye*” published this story in words for which there seems to be a defence in law, under one or other of the defences available in defamation.”

Privacy Proceedings:

Mr. Justice Justicious went further on to say at para. 32 with regard to the privacy proceedings: “Provided that the nub of Mr.P.Ervert complaint is not merely the protection of his reputation, but equally protection from a breach of privacy, the following observations are in place: As Lord Nicholls of Birkenhead observed in *Cream Holdings Limited and others v. Banerjee and others*: “Section 12(3) HRA” [which is applicable in privacy but not in defamation proceedings] “makes the likelihood of success at the trial an essential element in the court’s consideration of whether to make an interim order. [...] 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. [i.e.] the applicant [must] satisf[y] 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.” In the case at hand, there is no legitimate element of public interest which would be served by the additional publishing of the material. However it could hardly be argued that Mr. P.Ervert any longer has a reasonable expectation of privacy. The Court should guard against slipping into playing the role of King Canute. Even though an order may be desirable for the protection of privacy, and may be made in accordance with the principles currently being applied by the courts, there may come a point where it would simply serve no useful purpose and would merely be characterised as a *brutum fulmen*. It is inappropriate for the Court to make vain gestures and I stand convinced that the case at hand is one where there is no longer anything which the law can protect despite there being also no legitimate public interest in further publication.”

On 09 September 2008, the judgment on the merits was handed down awarding Mr. P.Ervert 30,000 € for misuse of private information.

COMPLAINTS

#1. a) Mr. P.Evert submits that UFK bears responsibility for not guaranteeing his rights under Art. 8, ECHR *vis-à-vis* his reputation. This is as the Court failed to examine whether the interference with the said right was in light of the facts of the case necessary under Art. 8 para. 2, ECHR. Insofar the Court considered itself bound by *Bonnard v Perryman* it refrained from performing the balancing test spelled out in Art. 8 para. 2 in breach of the ECHR. Quite contrary, once the *Bonnard v Perryman* defence of defamation was *arguendo* established, no regard was considered due to the impact of publication on Mr. P.Evert’s reputation. b) In any event Mr. P.Evert submits that the Court failed to strike the correct balance between Arts. 8 and 10, ECHR.

#2. a) Mr. P.Evert further argues that there was no effective domestic remedy open to him as required by Art. 13, ECHR. Although the Court found a serious breach of his right to respect for privacy and he was awarded damages, this award was not able to restore his privacy. He contends that only the possibility to seek an interim injunction could constitute an effective remedy in his case, while b) the fact that he had to satisfy such a high threshold (“likelihood of success”) before being granted interim injunctions prejudiced his right to have access to Court under Art.6, ECHR.