

European Court of Human Rights judgments on the right to freedom of expression

Bulletin III: FREEDOM OF EXPRESSION AND THE RIGHT TO PRIVACY

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Focus on ECHR case law and related standards on freedom of expression and the right to privacy

The European Court of Human Rights has stated that “even the publication of items which are true and describe real events may under certain circumstances be prohibited [for example] the obligation to respect the privacy” (*Markt intern Verlag GmbH and Klaus Beermann v. Germany*, 1989). In recent times this has been in issue in particular with regard to the publication of photographs and videos, including on the internet.

The leading European Court of Human Rights decisions on the publication by journalists of private materials are the Grand Chamber judgments in the cases of *Von Hannover v. Germany (1)* and *(2)*, *Axel Springer v Germany*, *MGN Ltd v United Kingdom*, and *Mosley v United Kingdom*.

The basic principles established by the Court are as follows:

() Contribution to a debate of general interest

An initial essential criterion is the contribution made by photos or articles in the press to a debate of general interest. The definition of what constitutes a subject of general interest will depend on the circumstances of the case. The Court has recognised the existence of such an interest not only where the publication concerned political issues or crimes, but also where it concerned sporting issues such as doping practices or performing artists.

() How well known is the person concerned and what is the subject of the report?

The role or function of the person concerned and the nature of the activities that are the subject of the report and/or photo constitute another important criterion. A distinction has to be made between private individuals and persons acting in a public context, as political figures or public figures. Whilst a private individual unknown to the public may claim particular protection of his or her right to private life, the same is not true of public figures. A fundamental distinction needs to be made between reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official

functions for example, and reporting details of the private life of an individual who does not exercise such functions. Although in certain special circumstances the public's right to be informed can even extend to aspects of the private life of public figures, particularly where politicians are concerned, this will not be the case – despite the person concerned being well known to the public – where the published photos and accompanying commentaries relate *exclusively* to details of the person's private life and have the *sole aim* of satisfying public curiosity in that respect.

() Prior conduct of the person concerned

The conduct of the person concerned prior to publication of the report or the fact that the photo and the related information have already appeared in an earlier publication are also factors to be taken into consideration. However, the mere fact of having cooperated with the press on previous occasions cannot serve as an argument for depriving the party concerned of all protection against publication of the photo at issue.

() Content, form and consequences of the publication

The way in which the photo or report are published and the manner in which the person concerned is represented in the photo or report may also be factors to be taken into consideration. The extent to which the report and photo have been disseminated may also be an important factor, depending on whether the newspaper is a national or local one, and has a large or a limited circulation.

() Circumstances in which the photos were taken

The context and circumstances in which the published photos were taken cannot be disregarded. Regard must be had to whether the person photographed gave their consent to the taking of the photos and their publication or whether this was done without their knowledge or by subterfuge or other illicit means. Regard must also be had to the nature or seriousness of the intrusion and the consequences of publication of the photo for the person concerned. For a private individual, unknown to the public, the publication of a photo may amount to a more substantial interference than a written article.

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Recent cases illustrating how the Court applies these principles include *Alkaya v. Turkey* (application no. 42811/06, judgment of 9 October 2012) in which the Court held the media should not disclose the private address of an actress who had been burgled; *Avram and other v Moldova*, (application no. 41588/05, judgment of 5 July 2011) in which the Court held that the publication of a video showing a romp between naked women and police officers in a sauna breached the women's right to respect for private life; and the twin cases of *Kurierzeitungsverlag (no. 2) v. Austria* (application no. 1593/06, judgment of 19 June 2012) and *Krone Verlag GmbH v. Austria* (application no. 27306/07, judgment of 19 June), in which the Court held that detailed reports on a custody dispute involving a child and which identified and showed photographs of that child violated the right to respect for private life.

The following paragraphs highlight the five leading cases.

1. European Court of Human Rights decisions

- *Von Hannover v. Germany*, application no. 59320/00, Judgment 24 June 2004

This concerned an application by Princess Caroline of Monaco in 2000, on which the Court gave judgment in 2004. The issue was whether the publication in several German magazines of photographs taken of her in a restaurant infringed her right to respect for private life. The German courts had decided that just because Princess Caroline was a figure of contemporary society “par excellence”, she had to tolerate a degree of intrusion into her private life and even photographs taken of her in a restaurant could be published.

The European Court, in a judgment handed down just after the death of Princess Diana in a car accident while pursued by press photographers (‘paperazzi’), ruled that the reasoning of the German courts had been inadequate. The European Court noted that while the right to respect for privacy needs to be balanced against the right to freedom of expression, the present case concerned “the dissemination 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 which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution”. The Court noted furthermore that “a fundamental distinction needs to be made between reporting facts - even controversial ones - capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of ‘watchdog’ in a democracy by contributing to ‘imparting information and ideas on matters of public interest’, it does not do so in the latter case”. The Court noted furthermore that “increased vigilance in protecting private life is necessary to contend with new communication technologies which make it possible to store and reproduce personal data. This also applies to the systematic taking of specific photos and their dissemination to a broad section of the public”.

Given these factors, the German courts had been wrong to rule that just because Princess Caroline is a figure of contemporary society “par excellence”, she had to tolerate intrusion into her private life. It therefore found a violation of the right to respect for private life.

- *Von Hannover v. Germany (no. 2)*, application nos. 40660/08 and 60614/08, judgment of 7 February 2012 (Grand Chamber) and *Axel Springer AG v. Germany*, application no. 39954/08, judgment of 7 February 2012 (Grand Chamber)

This concerned two cases at the European Court of Human Rights that were jointly heard by the Grand Chamber. The first again concerned Princess Caroline of Monaco; the second was brought in relation to photographs that had been published of a German actor.

The European Court held that media coverage and the publication of photographs of celebrities is acceptable when the publication concerns matters of public interest or contributes to a debate of general interest. In *Von Hannover v. Germany (no. 2)*, the Court held unanimously that the publication of a picture of Princess Caroline of Monaco that was used to illustrate an article about the Principality of Monaco did not violate the right to respect for private life. The European Court emphasised that the Princess is a public person, the photograph was used to take illustrate a story

on an issue of public interest, and that it had not been taken surreptitiously or by other secret means.

The case of *Axel Springer AG v. Germany* concerned press coverage of the arrest and conviction of a TV actor for possession of drugs. The actor was known as a policeman in a popular TV series and so his arrest for drugs possession was thought to be newsworthy. The actor obtained an injunction stopping publication of the story, and a German magazine appealed to the European Court complaining that this violated their right to freedom of expression. The European Court found that it had: there was a genuine public interest in the arrest and conviction of the actor. The actor was closely identified with his role as a policeman whose mission was law enforcement and crime prevention. Furthermore, the arrest had taken place in public, in a tent at the beer festival in Munich. The Court also noted that the magazine had not published any further details of the actor's private life, and the article was very factual. The Court also noted that information had been obtained legally, and referred to the chilling effect of the injunction on the right to freedom of expression. The Court therefore held that the injunction had violated the right to freedom of expression.

- *MGN Limited v. United Kingdom*, application no. 39401/04, Judgment of 18 January 2011

This case concerned the publication of a newspaper report on the supermodel, Naomi Campbell, and her treatment for drug addiction. The report was accompanied with photographs that had been taken secretly. Ms Campbell sued the newspaper concerned for breach of privacy, and won damages of a relatively modest £3,500. The newspaper was also ordered to pay Ms Campbell's legal costs, which were more than £1,000,000 and which included a "success fee" that her lawyers had charged. The newspaper appealed to the European Court.

The European Court held that the ruling by the English courts that the newspaper had violated Ms. Campbell's right to respect for private life did not violate the newspaper's right to freedom of expression. It considered that a balance had to be struck between the public interest in the publication of the articles and the photographs of Ms. Campbell and the need to protect her private life. The Court agreed with the reasoning of the English courts that while there was a public interest in the publication of the articles, because Ms. Campbell had herself spoken out against the use of drugs, there was no public interest in the publication of the photographs, which had been taken surreptitiously.

However, the Court held that the order to pay Ms Campbell's legal fees did violate the newspaper's right to freedom of expression: the amount was vastly disproportionate to the damages that had eventually been awarded, and had a strong chilling effect on other publications who would be reluctant to publish anything they might have to defend in court.

- *Mosley v. the United Kingdom*, application no. 48009/08, judgment of 10 May 2011

This case concerned the publication, on a newspaper website, of a video showing the president of the International Automobile Federation, Max Mosley, engaged in an orgy with prostitutes wearing what looked like prison uniforms and speaking in German accents. The newspaper website said that the orgy had a "nazi" theme. Mr Mosley sued for violation of his right to respect for private life and was awarded damages. Mr Mosley subsequently complained to the European Court of Human

Rights, arguing that the newspaper should have warned him that it was going to publish the story and arguing that its failure to do so violated his right to respect for private life. He asked the European Court to rule that whenever the media publish stories that potentially intrude on someone's privacy, they should be required to notify that person.

The European Court ruled that the publications in question had resulted in a flagrant and unjustified invasion of Mr. Mosley's private life. However, the Court did not agree that a legally binding pre-notification rule was required. The Court noted that a pre-notification requirement would impact on political reporting and serious journalism as well as "celebrity" journalism, and would therefore have a serious chilling effect on freedom of expression. It might even be seen as a form of censorship, particularly if there were fines or other serious sanctions for failing to notify people. The Court also noted that any pre-notification obligation would have to allow for an exception if the public interest were at stake, and that this was likely to be unworkable in practice. Therefore the Court concluded that a legally binding pre-notification requirement could not be justified under the European Convention on Human Rights.

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