Annotation: EHRM 2011-05-10

Hins, A.W.

Europees Hof voor de Rechten van de Mens 10 mei 2011, nr. 48009/08
(Garlicki (President), Bratza, Mijović, Björgvinsson, Hirvelä, Bianku, Vučinić)
Noot Hins

Vrijheid van meningsuiting. Recht op privacy. Fatsoensnorm voor de media om publicaties vooraf te laten zien aan slachtoffers. Chilling effect van een algemene verplichting.

[EVRM art. 8, 10, 13]

Max Mosley, de klager in deze procedure, was voorzitter van de Fédération Internationale de l'Automobile (FIA), een internationale organisatie op het terrein van de auto- en motorsport. Hij is in 1940 geboren als zoon van Oswald Mosley, in de jaren dertig oprichter en leider van de British Union of Fascists. Op 30 maart 2008 komt klager ernstig in opspraak door een publicatie in het zondagblad News of the World. Onthuld wordt dat Max Mosley zich heeft overgegeven aan een sadomasochistisch spelletje met vijf prostituees, waarbij Mosley de rol speelde van een gevangene in een concentratiekamp en de prostituees Duitse uniformen droegen. De krant had de informatie verkregen van één van de meisjes, die met een verborgen camera filmopnamen had gemaakt. De film was geplaatst op de website van News of the World. In de krant werden de lezers uitgenodigd deze website te bezoeken. De uitnodiging was niet aan dovemansoren gericht, want de eerste twee dagen werd het filmpje 1,4 miljoen keer bekeken. Zoals gebruikelijk op het internet waren er al snel tientallen andere sites die de beelden hadden gekopieerd.

De procedure binnen het Verenigd Koninkrijk bestond uit twee stappen. Eerst vorderde Mosley in kort geding dat News of the World de beelden van de website moest verwijderen. Die vordering werd afgewezen, omdat de rechter oordeelde dat een bevel zinloos zou zijn. Het filmpje was al door duizenden mensen bekeken, zodat geen sprake was van een geheim. Bovendien zou iedereen die het nog niet gezien had, dat alsnog kunnen doen op één van de buitenlandse websites. Een rechterlijk bevel aan News of the World zou neerkomen op een ‘brutum fulmen’ oftewel dom machtsvertoon. De tweede stap was een bodemprocedure, waarin Mosley onder meer schadevergoeding vorderde. Hier had de klager succes. De rechter stelde vast dat zowel het krantenartikel als het filmpje inbreuk maakten op het recht op privacy. Hij verwierp het verweer van de krant dat het gedrag van Mosley blijk gaf van nazistische sympathieën en dat hij spot had gedreven met de slachtoffers van de Holocaust, waardoor de publicatie een zaak van algemeen belang zou zijn. News of the World werd veroordeeld tot het betalen van een schadevergoeding van 60.000 pond en een vergoeding voor zijn juridische kosten van 420.000 pond. Tenslotte werd, anders dan in het kort geding, een verbod tot verdere publicatie opgelegd. Geen van de partijen stelde hoger beroep in.

Hoewel Mosley de bodemprocedure won, meende hij dat het Britse recht tekort was geschoten. Het ging hem niet om schadevergoeding. Als multimiljonair heeft hij geld genoeg. De enige effectieve bescherming van zijn privacy zou zijn geweest een rechterlijk verbod vooraf. Die mogelijkheid is hem echter ontnomen doordat News of

the World heeft nagelaten hem te waarschuwen. Integendeel, de krant heeft moeite gedaan te voorkomen dat Mosley preventief juridische stappen zou kunnen zetten. Het Verenigd Koninkrijk heeft volgens de klager een positieve verplichting bij artikel 8 EVRM geschonden doordat er geen enkele wettelijke verplichting voor journalisten bestaat om potentiële slachtoffers op de hoogte te stellen (een 'pre-notification requirement').

De Britse regering verweert zich in Straatsburg met de stelling dat de meeste lidstaten van de Raad van Europa geen wettelijke verplichting met die strekking kennen. Binnen het Verenigd Koninkrijk is sprake van een fatsoensnorm die in concrete gevallen uitgelegd wordt door de Press Complaints Commission. Dit is een vorm van zelfregulering. Omzetting in een bindende regeling zal leiden tot grote moeilijkheden. Het is uitermate lastig de reikwijdte van de verplichting te definiëren, waarbij te denken valt aan het begrip 'media', de situaties waarin een waarschuwing moet plaats vinden en de uitzonderingen die nodig zijn in het algemeen belang. Ook het formuleren van sancties is problematisch, gezien artikel 10 EVRM.

Het Hof stelt voorop dat in het Verenigd Koninkrijk wel degelijk maatregelen zijn getroffen om het recht op privacy te beschermen tegen de media. De rechter kan een medium veroordelen tot het betalen van schadevergoeding aan het slachtoffer. In het onderhavige geval is dat ook gebeurd. Aan te nemen valt dat de mogelijkheid van een veroordeling achteraf een heilzaam effect zal hebben op het gedrag van journalisten. Verder wijst het Hof erop dat een preventieve maatregel in de vorm van een waarschuwingsplicht noodzakelijkerwijs een algemene strekking zal hebben. De door de klager gewenste wettelijke regeling zou niet alleen betrekking hebben op deze ene casus, maar op allerlei perspublicaties die schade kunnen toebrengen aan de privacy. Volgens het Hof is sprake van een grote margin of appreciation voor de lidstaten. Relevant acht het Hof onder meer dat voor zover sprake is van een consensus binnen de Raad van Europa, deze gaat in de richting van een afwijzing van de waarschuwingsplicht. Om effectief te zijn zou de regeling tenslotte zware strafsancties moeten bevatten. Dit kan leiden tot een chilling effect bij politieke verslaggeving en onderzoeksjournalistiek, die een hoge mate van bescherming genieten krachtens artikel 10 EVRM.

Geconcludeerd wordt dat het gedrag van News of the World ernstige afkeuring verdient. Het Verenigd Koninkrijk heeft echter geen positieve verplichting bij artikel 8 EVRM geschonden. De Lidstaten zijn niet verplicht een juridisch bindende regeling in te voeren die journalisten verplicht de slachtoffers van een voorgenomen publicatie vooraf te waarschuwen. De klacht is dus ongegrond.

Mosley
tegen
Verenigd Koninkrijk

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 8 AND 13 OF THE CONVENTION

65. The applicant complained that the United Kingdom had violated its positive obligations under Article 8 of the Convention, taken alone and taken together with Article 13, by failing to impose a legal duty on the *News of the World* to notify him in advance in order to allow him the opportunity to seek an interim injunction and thus prevent publication of material which violated his right to respect for his private life. The Government contested that argument

66. In the Court's view, the complaint under Article 13 as to the absence of an effective domestic remedy is a reformulation of the applicant's complaint under Article 8 of the Convention that the respondent State did not ensure respect for the applicant's private life, and is subsidiary to it (see *Armonienė v. Lithuania*, no. 36919/02, § 23, 25 November 2008; and *Biriuk v. Lithuania*, no. 23373/03, § 23, 25 November 2008). The Court accordingly considers it appropriate to analyse the applicant's complaints solely under Article 8 of the Convention, which reads in so far as relevant as follows:

> "1. Everyone has the right to respect for his private and family life ...
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of 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."

A. Admissibility

1. Victim status

a. The parties' submissions

67. The Government considered that the applicant was no longer a victim of any violation of the Convention. They noted that he had successfully pursued domestic proceedings and was awarded the sum of GBP 60,000 in damages and recovered GBP 420,000 in costs (see paragraph 28 above). They concluded that he had obtained a remedy before the domestic courts and considered that remedy to constitute adequate and proportionate reparation for the harm he had suffered. They emphasised that the damages awarded in his case were the highest to date in the United Kingdom for an invasion of privacy. The Government further noted that the applicant had recovered damages in other jurisdictions and that it seemed that he had outstanding proceedings

in the United Kingdom and elsewhere in respect of the same or similar publications. These included proceedings in Germany, which settled for EUR 250,000, and civil and criminal proceedings in France and Italy regarding the publication which was the subject of the English proceedings.

68. The Government also emphasised that since commencing his legal action against the News of the World, the applicant had sought and obtained a high profile in the United Kingdom as a champion of privacy rights and, in that context, had submitted evidence to Parliament and had participated in a number of press and media interviews. They questioned whether the effect of the publication was as detrimental to the applicant as he claimed.

69. The applicant insisted that he remained a victim of a violation of the Convention notwithstanding the damages award in the domestic proceedings. He argued that damages were not an adequate remedy where private and embarrassing personal facts and intimate photographs were deliberately exposed to the public in print and on the internet. This information could never be expunged from the minds of the millions of people who had read or seen the material and privacy could not be restored to him by an award of damages. The only effective remedy in his case would have been an injunction, a remedy which he was denied by the failure of the newspaper to notify him in advance. Similarly, actions taken in other jurisdictions did not remove his victim status. Such actions were aimed at requiring media and internet websites to remove explicit or highly personal information repeated or taken from the original publication by the *News of the World*. Indeed, his efforts in this regard were evidence of how persistent and damaging the breach of his privacy had been.

70. Finally, the applicant argued that any implication that he had not suffered from the breach of his privacy was both absurd and offensive. He pointed to the intimate nature of the material disclosed and the humiliation occasioned by its public disclosure, as well as to the impact of the publication on his family.

b. The Court's assessment

71. The Court accepts that the publication of the articles, photographs and video images of the applicant participating in sexual acts had a significant impact on the applicant's right to respect for his private life. The fact that, following the widespread dissemination of the material (see paragraph 11 above), the applicant has chosen to pursue what he perceives to be a necessary change in the law does not lessen the extent of any humiliation or injury suffered by him as a result of the original exposure of the material.

72. The Court notes the unusual nature of the applicant's complaint. Having won his case at domestic level and obtained damages, his argument before this Court is directed at the prevailing situation in the United Kingdom in which there is no legal requirement to pre-notify the subject of an article which discloses material related to his private life. Whether or not Article 8 requires, as the applicant has contended, the United Kingdom to put in place a legally binding pre-notification requirement is a matter to be considered in the context of the merits of the case. However, it is clear that no sum of money awarded after disclosure of the impugned material could afford a remedy in respect of the specific complaint advanced by the applicant.

73. In light of the above, the Court finds that the applicant can claim to be a victim in light of the specific nature of his complaint under Article 8 of the Convention.

2. Exhaustion of domestic remedies

a. The parties' submissions

74. The Government argued that in so far as the applicant sought to claim that the damages awarded in the domestic proceedings were not adequate, he had failed to exhaust domestic remedies as he did not appeal the judge's ruling on exemplary damages. They further relied on the fact that the applicant had elected to pursue a remedy in damages, rather than an account of profits. Finally, they noted that the applicant had failed to bring any proceedings under the Data Protection Act 1998 (see paragraphs 42-45 above), which would have allowed him to complain about the unauthorised processing of his personal information and to seek rectification or destruction of his personal data.

75. The applicant reiterated that he was not seeking further damages from the newspaper but was making a complaint about the absence of a law which would have prevented publication of the article which violated his right to respect for private life. Accordingly, the additional remedies proposed by the Government were, in his submission, irrelevant to his complaint.

b. The Court's assessment

76. The Court reiterates the unusual nature of the applicant's complaint in the present case (see paragraph 72 above). None of the remedies on which the Government rely could address his specific complaint regarding the absence of a law requiring pre-notification. They are therefore not to be considered remedies which the applicant was required to exhaust before lodging his complaint with this Court.

77. The Government's objection is accordingly dismissed.

3. Conclusion

78. The Court has dismissed the Government's objections as to the applicant's victim status and exhaustion of domestic remedies. It notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

a. The applicant

79. The applicant argued that a positive obligation could arise under Article 8 of the Convention even in the sphere of the relations of individuals between themselves. In the present case, he contended, the respondent State had an obligation to enable him to apply for an injunction by requiring that he be notified prior to publication of an article which interfered with his private life. The applicant emphasised that in his case details of the most intimate parts of his private life were published on the front page, and in several inside pages, of a newspaper with an estimated readership of approximately ten million people in the United Kingdom. Highly intrusive images made by means of secret recordings were also posted on the newspaper's website and inevitably reproduced elsewhere on the internet. The applicant considered that the

judgment of Eady J made it clear that had he had an opportunity to apply for an injunction, an injunction would have been granted (see paragraphs 17-18 above).

80. In support of his argument that the law should provide for an opportunity to seek an injunction, the applicant emphasised, first, that where a conflict arose between competing interests under Article 8 and Article 10, it was for the courts and not the newspapers to resolve it. He highlighted the dangers of allowing journalists to be the sole judges as to where the balance between the right to freedom of expression and the right to respect for private life lay, as, he claimed, the British press were largely hostile both to the need to protect private life and to the interpretation of that right by the judiciary. Further, he considered that as the law currently stood, editors were encouraged not to notify subjects as, once an article had been published, subjects often decided not to bring legal proceedings for fear of attracting further publicity in respect of the invariably embarrassing or damaging details about their private lives. Second, the applicant argued that where the resolution of the conflict between Articles 8 and 10 occurred only after publication, there was insufficient protection for private life because, once lost, privacy could not be regained. Referring to the judgment of Eady J (see paragraph 27 above), the applicant noted that in defamation cases, it was a complete defence to prove the truth of the published material and that, as a result, damage done to reputation could be removed by proving that the allegations were false. However, the same could not be said in relation to privacy, which was inherently perishable and therefore could not be restored to the victim of the interference. Further, he was of the view that section 12 of the Human Rights Act 1998 provided significant protection for newspapers' right to freedom of expression by setting a high threshold before an interim injunction would be granted (see paragraphs 47-50 above). He emphasised that pursuant to the Court's jurisprudence on Article 10, there was a need for newspapers claiming protection to comply with the requirements of responsible journalism. In his view, these requirements included a pre-notification requirement.

81. The applicant accepted that the respondent State had a margin of appreciation but contended that it related solely to the scope or efficacy of any pre-notification requirement. His complaint was not that he had received some warning but not enough; rather, he had received no warning at all. He considered that the absence of a uniform approach in other Contracting Parties requiring pre-notification was not decisive. He pointed to the fact that in a number of States, consent played an important role in the context of privacy law and contended that where consent was either required for disclosure or relevant to an assessment of whether the disclosure was lawful, there was no need for a separate pre-notification requirement. He further relied on what he called the "unique nature of the tabloid press" in the United Kingdom, highlighting the unlawful actions of some tabloid reporters and the criticisms made by the tabloid press of developing laws on privacy.

82. While the applicant agreed that the precise mechanics and scope of any system of pre-notification was a matter for the discretion of the respondent State, he considered the difficulties which the Government claimed would arise, for example, in formulating a pre-notification obligation, to be illusory or at the very least exaggerated, given in particular that prior notification already occurred in the vast majority of cases (see paragraph 52 above). In his view, a pre-notification obligation in respect of an intended publication would arise, at the very least, where there were reasonable grounds to believe that the publication would infringe the right to respect

for private life, having regard to all the circumstances of the case including any public interest defence. There was nothing unfamiliar about the legal concept of "reasonable belief". He further pointed out that a form of pre-notification was already envisaged in the Ofcom Code, which imposed an obligation on broadcasters before broadcasting a factual programme to seek comments from anyone it would be unfair to exclude (see paragraph 39 above).

83. The applicant accepted that any system would require exceptions in certain circumstances to allow for legitimate situations where it would be either impractical or contrary to the public interest for the media to notify an individual in advance. Thus where all practicable steps had been taken to notify or where there were compelling reasons not to notify, no sanction for a failure to notify would arise. He disputed that conceptual difficulties would arise in devising any public interest exception to the general requirement, pointing to the provision in the Human Rights Act 1998 that a party seeking an injunction should notify the media in advance of the application and to the exception for "compelling reasons" to that general rule set out in the same Act (see paragraph 47 above).

84. As to sanctions, the applicant considered that criminal or regulatory sanctions were required to enforce the pre-notification requirement (citing *K.U. v. Finland*, no. 2872/02, 2 December 2008). He pointed out that criminal proceedings against newspapers and editors for alleged contempt of court, obscenity or breaches of the Official Secrets Acts were possible.

b. The Government

85. While the Government accepted that Article 8 could give rise to positive obligations, they contended that a high threshold had to be crossed before Article 8 would be engaged in this way. They distinguished between three types of cases. First, where an applicant had suffered directly from State inaction, such as non-recognition of transsexuals, the case for a positive obligation was strong. Second, where positive action by the State was called for by an applicant to prevent interference by non-State bodies, such as in environmental and media cases, positive obligations were less readily invoked. Third, where an applicant alleged that positive action by individuals was called for, the extent of any positive obligation under Article 8 was at its weakest. The Government argued that relevant factors in determining the extent of the positive duty were the extent to which fundamental and essential aspects of private life were in issue; the prejudice suffered by the applicant; the breadth and clarity of the positive obligation sought to be imposed; and the extent of consensus among Council of Europe member States or internationally. With reference to these factors, they argued that they had no positive obligation to protect the applicant's privacy by providing for a legally binding pre-notification requirement.

86. If there was a positive obligation in the circumstances of the case, the Government contended that there was a significant margin of appreciation available to them in deciding where in domestic law to strike the balance between the requirements of Article 8 and Article 10 and that the current position fell within that range. They argued that an inevitable consequence of a pre-notification requirement was that there would be an increase in the number of interim injunctions granted, which in themselves were a restriction on freedom of expression and for that reason should be approached with caution.

87. The Government pointed out that there was a consistent pattern among Council of Europe member States against a system of pre-notification and disputed in this regard that the tabloid press in the United Kingdom was unique in Europe. As to the role of consent in certain other States, the Government noted that it was not clear whether consent was a strict requirement in the cases mentioned by the applicant, nor was it clear whether there were exceptions. In any case, they considered it questionable whether this approach differed from the approach in the United Kingdom, where consent would be a complete defence to any action for invasion of privacy and failure to pre-notify would be taken into consideration in fixing any damages award. Further, the Government emphasised that an insistence on compulsory pre-notification would be to depart from internationally accepted standards as established by the Council of Europe (see paragraphs 55-59 above). In this regard, they noted in particular that the legal position in the United Kingdom complied with the guidelines set out in Resolution 1165 (see paragraph 58 above).

88. The Government also referred to the important role of the PCC and the Editors' Code in the system for protection of privacy rights in the United Kingdom. In particular, they highlighted that the PCC had recently upheld a complaint where a newspaper had failed to seek the subject's comments prior to publication (see paragraph 30 above). They also emphasised that the matter had recently been examined in the context of an inquiry by the House of Commons Culture, Media and Sport Committee (see paragraphs 51-54 above). After hearing evidence, the Select Committee had decided against recommending a legal requirement of pre-notification (see paragraph 54 above).

89. Finally, the Government considered that the fact that pre-notification was carried out as a matter of good practice in most cases did not mean that there were no insuperable difficulties in imposing a legal requirement to do so. In their view, the introduction of a pre-notification requirement would give rise to a number of practical and principled objections. Difficulties arose regarding the formulation of the scope of any obligation, including the identification of the categories of press and media to which the obligation would apply and the extent of the notification requirement and the circumstances in which it would be engaged, as well as the operation of any "public interest" exception. In this regard, they disputed the applicant's claim that the Ofcom Code provided an example of the kind of pre-notification duty called for, considering the obligation set out in Rule 7.9 of that code to be significantly different. The question of sanctions for a failure to comply with a pre-notification requirement was also problematic. The Government considered it clear that the applicant contemplated criminal sanctions and expressed concern about how to define and enforce any criminal offence. They also warned that an inadequately framed law could give rise to breaches of Article 10.

90. In conclusion, the Government invited the Court to find that the framework of legal regulation in place in the United Kingdom concerning publications which might contravene the right to respect for private life was sufficient to comply with any positive obligations which arose.

c. Third party submissions

i. Guardian News & Media Ltd

91. The Guardian News & Media Ltd ("the Guardian") argued that if the applicant's complaint were to be upheld by the Court, it would seriously and disproportionately fetter the right of the press to publish, and the public to receive, information and opinions in the public interest. A pre-notification requirement would thus have a serious and unjustified chilling effect upon the practical enjoyment of the right to freedom of expression. It would, in their view, also be inconsistent with the concept of responsible journalistic freedom which the Court had consistently emphasised.

92. The Guardian stressed that while the applicant had formulated the pre-notification duty by reference to the facts of his case, its repercussions would be felt far more widely. First, they argued, an alleged breach could involve not only the media but also public authorities, non-governmental organisations or even private individuals. Second, logic dictated that pre-notification would be required not only in privacy cases but in all cases requiring a balancing exercise pursuant to Article 10 § 2.

93. Referring to the wide margin of appreciation in this area, the Guardian considered that the appropriate balance had been struck in the United Kingdom. They highlighted the absence of any European consensus that a pre-notification duty was required. Further, although some countries required that consent be obtained before information regarding private life was disseminated, at least where the public interest was not implicated, a similar number of countries had no such provision. The Guardian also referred to the Data Protection Act 1998 and its parent EC Directive, which did not provide for any pre-notification requirement (see paragraphs 42-45 and 64 above). They further referred to the recent inquiry by a House of Commons Select Committee, which in its subsequent report rejected the argument that there was a need for a pre-notification requirement in the United Kingdom (see paragraphs 51-54 above).

94. Finally, the Guardian contended that any pre-notification requirement would be unworkable in practice. They considered that it would not always be obvious when the pre-notification rule would be triggered, nor was it clear how the need for a "public interest" exception could be catered for.

ii. The Media Lawyers' Association

95. The Media Lawyers' Association ("the MLA") contended that a pre-notification requirement was wrong in principle, would be unworkable in practice and would constitute a breach of Article 10 of the Convention.

96. The MLA emphasised the wide margin of appreciation in deciding what measures were required to satisfy any positive obligation in this field. They referred to the lack of any European consensus on the need for a pre-notification duty. They also pointed to the fact that a House of Commons Select Committee had recently rejected the suggestion that there should be a legal pre-notification requirement (see paragraph 54 above). The question whether there was a need to contact a subject prior to publication was, in their view, a matter to be addressed in the context of the ethics of journalism and the codes of practice governing the media. These codes had evolved over time and demonstrated that the media were well aware of the duty to respect each individual's right to privacy. In particular, the MLA noted that the Editors' Code gave guidance as to what might be covered by "public interest" (see paragraphs 34-35 above).

97. The MLA contended that the duty for which the applicant argued was vague and uncertain in scope. They pointed out that a pre-publication duty would have wide ramifications, potentially applying not just to the media and journalists but to a far broader group. A number of practical questions arose, for example, as to who would have to be contacted by the media in respect of any intended publication, whether the duty would arise in respect of photographs taken in the street of unknown persons, whether it would apply to images or text previously published and whether it would extend to notification of close family members of the subject, who might also be affected by the publication of the material. The MLA further referred to the need for exceptions to any general duty, for example, where there was a good reason not to contact the subject or where there was a public interest in publication.

98. The MLA emphasised the importance of Article 10 and in particular the role of the press as "public watchdog". They considered that the availability and operation of interim injunctions continued to be a matter of concern in this area and contended that prior restraints on publication constituted a serious interference with the right to freedom of expression. Accordingly, such restraints should only be granted where strictly necessary, and any order granted should be no wider than necessary. They emphasised that injunction proceedings in themselves inevitably led to delay and costs, even if no injunction was eventually granted, and any changes which would encourage the seeking of injunctions would therefore not be desirable. They argued that domestic law struck an appropriate balance between competing rights and interests.

iii. The Media Legal Defence Initiative, Index on Censorship, The Media International Lawyers' Association, European Publishers' Council, The Mass Media Defence Centre, Romanian Helsinki Committee, The Bulgarian Access to Information Programme (AIP) Foundation, Global Witness and Media Law Resource Centre

99. In their joint written submissions, the interveners referred to the importance of the right to freedom of expression. There would, in their view, be significant consequences were a pre-notification requirement to be introduced. It would delay publication of important news, which was itself a perishable commodity, in a wide range of public interest situations wherever the public figure could claim that his psychological integrity was at stake from publication of the truth. The interveners disputed that any balance was required between rights arising under Articles 8 and 10, arguing that there was a presumption in favour of Article 10 and that reputation was a subsidiary right which had to be narrowly interpreted.

100. The interveners further argued that there was a wide margin of appreciation in this area. They emphasised the tradition in common law countries against prior restraints on publication, arguing that a pre-notification requirement would go against the long-standing approach in this area. Further, they pointed out, there was no Europe-wide consensus as to a need for a pre-notification rule. It was also noteworthy that questions of privacy protection had been regularly debated in the United Kingdom in recent years and had been the subject of various reports, including the recent Select Committee report (see paragraph 51-54 above). In that report, the applicant's case for a pre-notification requirement had been rejected.

101. The interveners also contended that privacy was inadequately defined to support a pre-notification requirement. However, they accepted that there might be an argument for a notice requirement relating to medical records and photographs taken without consent in private places, for example, but only if reputation were no part of

Article 8 and private information were properly defined. In their view, as currently formulated, the requirement called for was so vague as to be unworkable.

102. The interveners considered that any general duty would have to be subject to exceptions, notably to an exception where there was a "public interest" in publication. This being the case, it was relevant that in the applicant's case, the editor of the *News of the World* would have published the story without notification even if there had been a legally binding pre-notification requirement because he genuinely believed that there was a Nazi element to the activities which would have justified publication in the public interest (see paragraph 24 above).

103. The interveners emphasised that even successfully defended injunction proceedings could cost a newspaper GBP 10,000; an unsuccessful newspaper could pay GBP 60,000. It was simply not viable for the media to contest every case where compulsory notification would be followed by a request for an injunction. This was the chilling effect of a pre-notification requirement.

2. The Court's assessment

104. The Court recalls that Eady J in the High Court upheld the applicant's complaint against the *News of the World* (see paragraph 25 above). He found that there was no Nazi element to the applicant's sexual activities. He further criticised the journalist and the editor for the casual and cavalier manner in which they had arrived at the conclusion that there was a Nazi theme. In the absence of any Nazi connotations, there was no public interest or justification in the publication of the articles or the images. Reflecting the grave nature of the violation of the applicant's privacy in this case, Eady J awarded GBP 60,000 in damages. The newspaper did not appeal the judgment. In light of these facts the Court observes that the present case resulted in a flagrant and unjustified invasion of the applicant's private life.

105. The Court further notes that as far as the balancing act in the circumstances of the applicant's particular case was concerned, the domestic court firmly found in favour of his right to respect for private life and ordered the payment to the applicant of substantial monetary compensation. The assessment which the Court must undertake in the present proceedings relates not to the specific facts of the applicant's case but to the general framework for balancing rights of privacy and freedom of expression in the domestic legal order. The Court must therefore have regard to the general principles governing the application of Article 8 and Article 10, before examining whether there has been a violation of Article 8 as a result of the absence of a legally binding pre-notification requirement in the United Kingdom.

a. General principles

i Article 8

106. It is clear that the words "the right to respect for ... private ... life" which appear in Article 8 require not only that the State refrain from interfering with private life but also entail certain positive obligations on the State to ensure effective enjoyment of this right by those within its jurisdiction (see *Marckx v. Belgium*, 13 June 1979, § 31, Series A no. 31). Such an obligation may require the adoption of positive measures designed to secure effective respect for private life even in the sphere of the relations of individuals between themselves (see *Von Hannover v. Germany*, no. 59320/00, § 57, ECHR 2004-VI; and *Stubbings and Others v. the*

United Kingdom, 22 October 1996, § 61-62, *Reports of Judgments and Decisions* 1996-IV).

107. The Court emphasises the importance of a prudent approach to the State's positive obligations to protect private life in general and of the need to recognise the diversity of possible methods to secure its respect (*Karakó v. Hungary*, no. 39311/05, § 19, 28 April 2009). The choice of measures designed to secure compliance with that obligation in the sphere of the relations of individuals between themselves in principle falls within the Contracting States' margin of appreciation (see, *inter alia*, *X and Y v. the Netherlands*, 26 March 1985, § 24, Series A no. 91; and *Odièvre v. France* [GC], no. 42326/98, § 46, ECHR 2003-III). However, this discretion goes hand in hand with European supervision (see, *mutatis mutandis*, Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 59(c), Series A no. 216; and *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-XI).

108. The Court recalls that a number of factors must be taken into account when determining the breadth of the margin of appreciation to be accorded to the State in a case in which Article 8 of the Convention is engaged. First, the Court reiterates that the notion of "respect" in Article 8 is not clear-cut, especially as far as the positive obligations inherent in that concept are concerned: bearing in mind the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case (see *Sheffield and Horsham v. the United Kingdom*, 30 July 1998, § 52, *Reports* 1998-V). Thus Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention (see *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A no. 24, p. 22, § 48; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 67, Series A no. 94; *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 97, ECHR 2003-VIII; and *Armonienė*, cited above, § 38). In this regard, the Court recalls that by reason of their direct and continuous contact with the vital forces of their countries, the State authorities are, in principle, in a better position than the international judge to give an opinion on how best to secure the right to respect for private life within the domestic legal order (see, *mutatis mutandis*, *Handyside*, cited above, § 48; *A, B and C v. Ireland* [GC], no. 25579/05, § 232, 16 December 2010; and *MGN Limited v. the United Kingdom*, no. 39401/04, § 142, 18 January 2011).

109. Second, the nature of the activities involved affects the scope of the margin of appreciation. The Court has previously noted that a serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 77, ECHR 2002-VI). Thus, in cases concerning Article 8, where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State is correspondingly narrowed (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-IV; and *A, B and C v. Ireland* [GC], cited above, § 232). The same is true where the activities at stake involve a most intimate aspect of private life (see, *mutatis mutandis*, *Dudgeon v. the United Kingdom*, 22 October 1981, § 52, Series A no. 45; and *A.D.T. v. the United Kingdom*, no. 35765/97, § 37, ECHR 2000-IX).

110. Third, the existence or absence of a consensus across the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to

the best means of protecting it, is also relevant to the extent of the margin of appreciation: where no consensus exists, the margin of appreciation afforded to States is generally a wide one (see *Evans*, cited above, § 77; *X, Y and Z v. the United Kingdom*, 22 April 1997, § 44, *Reports* 1997-II; and *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78, ECHR 2007-XIII). Similarly, any standards set out in applicable international instruments and reports are relevant to the interpretation of the guarantees of the Convention and in particular to the identification of any common European standard in the field (see *Tănase v. Moldova* [GC], no. 7/08, § 176, ECHR 2010-...).

111. Finally, in cases where measures which an applicant claims are required pursuant to positive obligations under Article 8 would have an impact on freedom of expression, regard must be had to the fair balance that has to be struck between the competing rights and interests arising under Article 8 and Article 10 (see *MGN Limited*, cited above, § 142), rights which merit, in principle, equal respect (*Hachette Filipacchi Associés* (*ICI PARIS*) *v. France*, no. 12268/03, § 41, 23 July 2009; compare and contrast Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 65, Series A no. 30).

ii. Article 10

112. The Court emphasises the pre-eminent role of the press in informing the public and imparting information and ideas on matters of public interest in a State governed by the rule of law (see *Financial Times Ltd and Others v. the United Kingdom*, no. 821/03, § 59, 15 December 2009; *MGN Limited*, cited above, § 141; and *De Haes and Gijsels v. Belgium*, 24 February 1997, § 37, *Reports* 1997-I). Not only does the press have the task of imparting such information and ideas but the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (Observer *and* Guardian, cited above, § 59; Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III; *Gutiérrez Suárez v. Spain*, no. 16023/07, § 25, 1 June 2010; and *MGN Limited*, cited above, § 141).

113. It is to be recalled that methods of objective and balanced reporting may vary considerably and that it is therefore not for this Court to substitute its own views for those of the press as to what technique of reporting should be adopted (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298). However, editorial discretion is not unbounded. The press must not overstep the bounds set for, among other things, "the protection of ... the rights of others", including the requirements of acting in good faith and on an accurate factual basis and of providing "reliable and precise" information in accordance with the ethics of journalism (see *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 78, ECHR 2004-X; *Times Newspapers Ltd v. United Kingdom (nos. 1 and 2)*, no. 3002/03 and 23676/03, § 42, ECHR 2009-...; and *MGN Limited*, cited above, § 141).

114. The Court also reiterates that there is a distinction to be drawn between reporting facts – even if controversial – capable of contributing to a debate of general public interest in a democratic society, and making tawdry allegations about an individual's private life (see *Armonienė*, cited above, § 39). In respect of the former, the pre-eminent role of the press in a democracy and its duty to act as a "public watchdog" are important considerations in favour of a narrow construction of any limitations on freedom of expression. However, different considerations apply to press

reports concentrating on sensational and, at times, lurid news, intended to titillate and entertain, which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life (*Von Hannover*, cited above, § 65; *Hachette Filipacchi Associés* (*ICI PARIS)*, cited above, § 40; and *MGN Limited*, cited above, § 143). Such reporting does not attract the robust protection of Article 10 afforded to the press. As a consequence, in such cases, freedom of expression requires a more narrow interpretation (see *Société Prisma Presse v. France* (dec.), nos. 66910/01 and 71612/01, 1 July 2003; *Von Hannover*, cited above, § 66; Leempoel *& S.A. ED. Ciné Revue v. Belgium*, no. 64772/01, § 77, 9 November 2006; *Hachette Filipacchi Associés* (*ICI PARIS)*, cited above, 40; and *MGN Limited*, cited above, § 143). While confirming the Article 10 right of members of the public to have access to a wide range of publications covering a variety of fields, the Court stresses that in assessing in the context of a particular publication whether there is a public interest which justifies an interference with the right to respect for private life, the focus must be on whether the publication is in the interest of the public and not whether the public might be interested in reading it.

115. It is commonly acknowledged that the audiovisual media have often a much more immediate and powerful effect than the print media (see *Jersild*, cited above, § 31; and *Peck v. the United Kingdom*, no. 44647/98, § 62, ECHR 2003-I). Accordingly, although freedom of expression also extends to the publication of photographs, the Court recalls that this is an area in which the protection of the rights of others takes on particular importance, especially where the images contain very personal and intimate "information" about an individual or where they are taken on private premises and clandestinely through the use of secret recording devices (see *Von Hannove*r, cited above, § 59; *Hachette Filipacchi Associés* (*ICI PARIS)*, cited above, § 47; and *MGN Limited*, cited above, § 143). Factors relevant to the assessment of where the balance between the competing interests lies include the additional contribution made by the publication of the photos to a debate of general interest as well as the content of the photographs (see *Krone Verlag GmbH & Co. KG v. Austria*, no. 34315/96, § 37, 26 February 2002).

116. The Court recalls that the nature and severity of any sanction imposed on the press in respect of a publication are relevant to any assessment of the proportionality of an interference with the right to freedom of expression (see, for example, *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV; *Lešník v. Slovakia*, no. 35640/97, § 63, ECHR 2003-IVl and *Karsai v. Hungary*, no. 5380/07, § 36, 1 December 2009). Thus the Court must exercise the utmost caution where measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern (see *Jersild*, cited above, § 35; and *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 111, ECHR 2004-XI).

117. Finally, the Court has emphasised that while Article 10 does not prohibit the imposition of prior restraints on publication, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of 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 (see Observer *and* Guardian, cited above, § 60). The Court would, however, observe that prior restraints may be more readily justified in cases which demonstrate

no pressing need for immediate publication and in which there is no obvious contribution to a debate of general public interest.

b. Application of the general principles to the facts of the case

118. As noted above (see paragraph 106), it is clear that a positive obligation arises under Article 8 in order to ensure the effective protection of the right to respect for private life. The question for consideration in the present case is whether the specific measure called for by the applicant, namely a legally binding pre-notification rule, is required in order to discharge that obligation.

119. The Court observes at the outset that this is not a case where there are no measures in place to ensure protection of Article 8 rights. A system of self-regulation of the press has been established in the United Kingdom, with guidance provided in the Editors' Code and Codebook and oversight of journalists' and editors' conduct by the PCC (see paragraphs 29-38 above). This system reflects the 1970 declaration, the 1998 resolution and the 2008 resolution of the Parliamentary Assembly of the Council of Europe (see paragraphs 55 and 58-59 above). While the PCC itself has no power to award damages, an individual may commence civil proceedings in respect of any alleged violation of the right to respect for private life which, if successful, can lead to a damages award in his favour. In the applicant's case, for example, the newspaper was required to pay GBP 60,000 damages, approximately GBP 420,000 in respect of the applicant's costs and an unspecified sum in respect of its own legal costs in defending the claim. The Court is of the view that such awards can reasonably be expected to have a salutary effect on journalistic practices. Further, if an individual is aware of a pending publication relating to his private life, he is entitled to seek an interim injunction preventing publication of the material. Again, the Court notes that the availability of civil proceedings and interim injunctions is fully in line with the provisions of the Parliamentary Assembly's 1998 resolution (see paragraph 58 above). Further protection for individuals is provided by the Data Protection Act 1998, which sets out the right to have unlawfully collected or inaccurate data destroyed or rectified (see paragraphs 42-45 above).

120. The Court further observes that, in its examination to date of the measures in place at domestic level to protect Article 8 rights in the context of freedom of expression, it has implicitly accepted that *ex post facto* damages provide an adequate remedy for violations of Article 8 rights arising from the publication by a newspaper of private information. Thus in *Von Hannover*, cited above, the Court's analysis focused on whether the judgment of the domestic courts in civil proceedings brought following publication of private material struck a fair balance between the competing interests. In *Armonienė*, cited above, a complaint about the disclosure of the applicant's husband's HIV-positive status focused on the "derisory sum" of damages available in the subsequent civil proceedings for the serious violation of privacy. While the Court has on occasion required more than civil law damages in order to satisfy the positive obligation arising under Article 8, the nature of the Article 8 violation in the case was of particular importance. Thus in *X and Y v. the Netherlands*, 26 March 1985, § 27, Series A no. 91, the Court insisted on the need for criminal law provisions to achieve deterrence in a case which involved forced sexual intercourse with a sixteen year old mentally handicapped girl. In *K.U. v. Finland*, no. 2872/02, §§ 46-47, 2 December 2008, the availability of civil law damages from an Internet service provider was inadequate where there was no possibility of identifying the

person who had posted an advert in the name of the applicant, at the time only twelve years old, on a dating website, thus putting him at risk of sexual abuse.

121. In the present case the Court must consider whether, notwithstanding its past approach in cases concerning violations of the right to respect for private life by the press, Article 8 requires a pre-notification rule in order to ensure effective protection of the right to respect for private life. In doing so, the Court will have regard, first, to the margin of appreciation available to the respondent State in this field (see paragraphs 108-110 above) and, second, to the clarity and potential effectiveness of the rule called for by the applicant. While the specific facts of the applicant's case provide a backdrop to the Court's consideration of this question, the implications of any pre-notification requirement are necessarily far wider. However meritorious the applicant's own case may be, the Court must bear in mind the general nature of the duty called for. In particular, its implications for freedom of expression are not limited to the sensationalist reporting at issue in this case but extend to political reporting and serious investigative journalism. The Court recalls that the introduction of restrictions on the latter type of journalism requires careful scrutiny.

i. The margin of appreciation

122. The Court recalls, first, that the applicant's claim relates to the positive obligation under Article 8 and that the State in principle enjoys a wide margin of appreciation (see paragraph 108 above). It is therefore relevant that the respondent State has chosen to put in place a system for balancing the competing rights and interests which excludes a pre-notification requirement. It is also relevant that a parliamentary committee recently held an inquiry on privacy issues during which written and oral evidence was taken from a number of stakeholders, including the applicant and newspaper editors. In its subsequent report, the Select Committee rejected the argument that a pre-notification requirement was necessary in order to ensure effective protection of respect for private life (see paragraph 54 above).

123. Second, the Court notes that the applicant's case concerned the publication of intimate details of his sexual activities, which would normally result in a narrowing of the margin of appreciation (see paragraph 109 above). However, the highly personal nature of the information disclosed in the applicant's case can have no significant bearing on the margin of appreciation afforded to the State in this area given that, as noted above (see paragraph 121 above), any pre-notification requirement would have an impact beyond the circumstances of the applicant's own case.

124. Third, the Court highlights the diversity of practice among member States as to how to balance the competing interests of respect for private life and freedom of expression (see paragraphs 62-63 above). Indeed the applicant has not cited a single jurisdiction in which a pre-notification requirement as such is imposed. In so far as any common consensus can be identified, it therefore appears that such consensus is against a pre-notification requirement rather than in favour of it. The Court recognises that a number of member States require the consent of the subject before private material is disclosed. However, it is not persuaded that the need for consent in some States can be taken to constitute evidence of a European consensus as far as a pre-notification requirement is concerned. Nor has the applicant pointed to any international instruments which require States to put in place a pre-notification requirement. Indeed, as the Court has noted above (see paragraph 119), the current system in the United Kingdom fully reflects the resolutions of the Parliamentary

Assembly of the Council of Europe (see paragraphs 56-59 above). The Court therefore concludes that the respondent State's margin of appreciation in the present case is a wide one.

ii. The clarity and effectiveness of a pre-notification requirement

125. The applicant considered that the duty should be triggered where any aspect of private life was engaged. It would therefore not be limited to the intended disclosure of intimate or sexual details of private life. As such, the duty would be a relatively broad one. Notwithstanding the concerns expressed by the Government and the interveners (see paragraphs 89, 94, 97 and 101 above) the Court considers that the concept of "private life" is sufficiently well understood for newspapers and reporters to be able to identify when a publication could infringe the right to respect for private life. Specific considerations would arise, for example in the context of photographs of crowds, but suitable provisions could be included in any law. The Court is further of the view that a satisfactory definition of those who would be subject to the requirement could be found. It would appear possible, for example, to provide for a duty which would apply to those within the purview of the Editors' Code.

126. However, the Court is persuaded that concerns regarding the effectiveness of a pre-notification duty in practice are not unjustified. Two considerations arise. First, it is generally accepted that any pre-notification obligation would require some form of "public interest" exception (see paragraphs 83, 89, 94, 97 and 102 above). Thus a newspaper could opt not to notify a subject if it believed that it could subsequently defend its decision on the basis of the public interest. The Court considers that in order to prevent a serious chilling effect on freedom of expression, a reasonable belief that there was a "public interest" at stake would have to be sufficient to justify non-notification, even if it were subsequently held that no such "public interest" arose. The parties' submissions appeared to differ on whether "public interest" should be limited to a specific public interest in not notifying (for example, where there was a risk of destruction of evidence) or extend to a more general public interest in publication of the material. The Court would observe that a narrowly defined public interest exception would increase the chilling effect of any pre-notification duty.

127. In the present case, the defendant newspaper relied on the belief of the reporter and the editor that the sexual activities in which the applicant participated had Nazi overtones. They accordingly argued that publication was justified in the public interest. Although Eady J criticised the casual and cavalier manner in which the *News of the World* had arrived at the conclusion that there was a Nazi element, he noted that there was significant scope for differing views on the assessment of the "public interest" and concluded that he was not in a position to accept that the journalist and editor concerned must have known at the time that no public interest defence could succeed (see paragraphs 23-24 above). Thus, in the applicant's own case, it is not unlikely that even had a legally binding pre-notification requirement been in place at the relevant time, the *News of the World* would have chosen not to notify in any event, relying at that time on a public interest exception to justify publication.

128. Second, and more importantly, any pre-notification requirement would only be as strong as the sanctions imposed for failing to observe it. A regulatory or civil fine, unless set at a punitively high level, would be unlikely to deter newspapers from publishing private material without pre-notification. In the applicant's case, there is no doubt that one of the main reasons, if not the only reason, for failing to seek his

comments was to avoid the possibility of an injunction being sought and granted (see paragraphs 21 and 52 above). Thus the *News of the World* chose to run the risk that the applicant would commence civil proceedings after publication and that it might, as a result of those proceedings, be required to pay damages. In any future case to which a pre-notification requirement applied, the newspaper in question could choose to run the same risk and decline to notify, preferring instead to incur an *ex post facto* fine.

129. Although punitive fines or criminal sanctions could be effective in encouraging compliance with any pre-notification requirement, the Court considers that these would run the risk of being incompatible with the requirements of Article 10 of the Convention. It reiterates in this regard the need to take particular care when examining restraints which might operate as a form of censorship prior to publication. It is satisfied that the threat of criminal sanctions or punitive fines would create a chilling effect which would be felt in the spheres of political reporting and investigative journalism, both of which attract a high level of protection under the Convention.

iii. Conclusion

130. As noted above, the conduct of the newspaper in the applicant's case is open to severe criticism. Aside from publication of the articles detailing the applicant's sexual activities, the *News of the World* published photographs and video footage, obtained through clandestine recording, which undoubtedly had a far greater impact than the articles themselves. Despite the applicant's efforts in a number of jurisdictions, these images are still available on the Internet. The Court can see no possible additional contribution made by the audiovisual material (see paragraph 115 above), which appears to have been included in the *News of the World*'s coverage merely to titillate the public and increase the embarrassment of the applicant.

131. The Court, like the Parliamentary Assembly, recognises that the private lives of those in the public eye have become a highly lucrative commodity for certain sectors of the media (see paragraph 57 above). The publication of news about such persons contributes to the variety of information available to the public and, although generally for the purposes of entertainment rather than education, undoubtedly benefits from the protection of Article 10. However, as noted above, such protection may cede to the requirements of Article 8 where the information at stake is of a private and intimate nature and there is no public interest in its dissemination. In this regard the Court takes note of the recommendation of the Select Committee that the Editors' Code be amended to include a requirement that journalists should normally notify the subject of their articles prior to publication, subject to a "public interest" exception (see paragraph 53 above).

132. However, the Court has consistently emphasised the need to look beyond the facts of the present case and to consider the broader impact of a pre-notification requirement. The limited scope under Article 10 for restrictions on the freedom of the press to publish material which contributes to debate on matters of general public interest must be borne in mind. Thus, having regard to the chilling effect to which a pre-notification requirement risks giving rise, to the significant doubts as to the effectiveness of any pre-notification requirement and to the wide margin of appreciation in this area, the Court is of the view that Article 8 does not require a legally binding pre-notification requirement. Accordingly, the Court concludes that

there has been no violation of Article 8 of the Convention by the absence of such a requirement in domestic law.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 8 of the Convention.

NOOT

1. Persorganen hebben volgens het EHRM de rol van ‘public watchdog’ in een democratische samenleving, maar sommige waakhonden zijn vals. Berucht zijn de Britse tabloids die reputaties kunnen maken en breken. Het zondagblad ‘News of the World’ is in bovenstaand arrest de grote boosdoener. Het lijdt geen twijfel dat het met een verborgen camera filmen van een particuliere burger die meedoet aan een SM spel, een ernstige inbreuk maakt op diens privacy als bedoeld in artikel 8 EVRM. De onrechtmatigheid wordt in deze zaak door drie factoren versterkt. In de eerste plaats heeft News of the World één van de vijf prostituees die aan het spel deelnamen voor haar verraad betaald. In de tweede plaats heeft de krant het filmpje op internet geplaatst, waarvan het nauwelijks meer te verwijderen is en tenslotte heeft de krant veel moeite gedaan om te voorkomen dat het slachtoffer, Max Mosley, lucht zou krijgen van de voorgenomen publicatie. Hij zou wel eens naar de rechter kunnen stappen om een publicatieverbod te krijgen en dan dreigde het blad extra omzet mis te lopen. De stelling van News of the World dat de publicatie een maatschappelijk belang diende omdat de nazistische denkbeelden van Mosley aan de kaak werden gesteld, is er met de haren bijgesleept. Daarover zijn de Britse rechter en het Hof in Straatsburg het eens.

2. Opmerkelijk is dat ‘News of the World’ twee maanden na het arrest zozeer een symbool werd voor riooljournalistiek, dat eigenaar Rupert Murdoch zich gedwongen zag het weekblad op te heffen. Op zondag 10 juli 2011 verscheen de laatste aflevering. De reden voor sluiting was niet dat het blad geen winst maakte. Integendeel, in het voorjaar van 2011 had News of the World iedere week gemiddeld 2,66 miljoen lezers. Er was echter een golf van verontwaardiging door het Verenigd Koninkrijk getrokken toen aan het licht kwam dat de krant illegaal de voice mail van een verdwenen meisje van 13 jaar had laten afluisteren. Het meisje was vermoord, maar haar ouders hadden een tijdlang valse hoop gekoesterd omdat zij veronderstelden dat het hun dochter was die de voice mail raadpleegde. Dat in het verleden veel meer mensen waren afgeluisterd − politici, filmsterren en leden van het Koninklijk Huis – had het publiek voor kennisgeving aangenomen, maar dit verhaal deed de stoppen doorslaan. Het Lagerhuis besloot tot een spoeddebat en Rupert Murdoch zag zijn geplande overname van de satellietzender BSkyB in gevaar komen. Als concessie trok hij de stekker uit het zondagblad. Het offer bleek overigens tevergeefs, toen bekend werd dat politiefunctionarissen waren omgekocht om geen prioriteit te geven aan het onderzoeknaar de afluisteraffaires. De overname van BSkyB lijkt daardoor definitief van de baan.

3. De klacht die Mosley in Straatsburg indiende hield in dat het Verenigd Koninkrijk een positieve verplichting had geschonden bij artikel 8 EVRM. Weliswaar had Mosley een bedrag van 60.000 pond gekregen wegens emotionele schade, maar wat heb je aan zo’n bedrag als je multimiljonair bent? Voor een vermogend bedrijf als News of the World is het al helemaal een peulenschil. Dat had de nationale rechter ook onder ogen gezien. Rechter Eady van het High Court overwoog dat ‘(..) it has to be accepted that an infringement of privacy cannot ever be effectively compensated by a monetary

award. Judges cannot achieve what is, in the nature of things, impossible'. De gedachte om het bedrag van de schadevergoeding zo hoog vast te stellen dat media effectief worden afgeschrikt wees hij af. Het toekennen van zulke bedragen zou geen proportionele beperking van de persvrijheid zijn en een 'chilling effect' hebben. Bovendien zou sprake kunnen zijn van een ongerechtvaardigde verrijking voor bepaalde slachtoffers.

4. In Straatsburg richtte Mosley zijn pijlers niet op de beslissing van het High Court. Hij was tegen deze uitspraak ook niet in beroep gegaan bij een hogere rechter. Zijn bezwaren richtten zich op het Engelse recht als geheel. Naar zijn mening had het Verenigd Koninkrijk 'an obligation to enable him to apply for an injunction by requiring that he be notified prior to publication of an article which interfered with his private life' (r.o. 79). Er zou een wettelijke plicht voor de media moeten bestaan om personen wier privacy geschonden dreigt te worden door een voorgenomen publicatie, tijdig te waarschuwen. Op die manier zou het slachtoffer een onafhankelijke rechter kunnen vragen een afweging te maken tussen het recht op privacy en het recht op vrijheid van meningsuiting (r.o. 80). Volgens het Hof levert het ontbreken van een dergelijke regeling echter geen schending op van artikel 8 EVRM. Een belangrijke overweging is dat op dit punt geen consensus bestaat binnen de Raad van Europa. Weliswaar kennen sommige lidstaten het uitgangspunt dat privégegevens alleen mogen worden gepubliceerd met toestemming van de betrokkene, maar daaruit vloeit niet voort dat men het eens is over de noodzaak van een recht op voorinzage (r.o. 124). Het Hof wijst bovendien op het risico dat een dergelijke regeling kan ontaarden in een vorm van censuur (r.o. 129).

5. Hoe zit dat nu in Nederland? De Stichting Raad voor de Journalistiek kent een Leidraad waarin gedragsregels voor journalisten zijn opgenomen. De tekst is te raadplegen op *www.rvdj.nl*. De Leidraad is op zichzelf geen recht, maar geeft aan wat de beroepsgroep als fatsoenlijke journalistiek beschouwt. Als orgaan voor zelfregulering is de Raad voor de Journalistiek vergelijkbaar met de Britse Press Complaints Council (PCC), die het Hof hierboven in r.o. 119 noemt. Artikel 1.3 van de Leidraad geeft het uitgangspunt:
1.3. De journalist behoeft geen toestemming voor of instemming met een publicatie te hebben van degene over wie hij publiceert. Wel dient hij het belang dat met de publicatie is gediend, af te wegen tegen de belangen die eventueel door de publicatie worden geschaad.
In de paragraaf over privacy treffen we de volgende regels aan:
2.4.3. De journalist publiceert geen foto's en zendt geen beelden uit die zijn gemaakt van personen in niet-algemeen toegankelijke ruimten zonder hun toestemming, en gebruikt evenmin brieven en persoonlijke aantekeningen zonder toestemming van betrokkenen.
2.4.4 (..)
2.4.5. De journalist kan afwijken van hetgeen onder de punten 2.4.3. en 2.4.4. is bepaald, indien een gewichtig maatschappelijk belang dit rechtvaardigt en hetzelfde doel op geen andere manier kan worden bereikt.

6. De hamvraag is wanneer sprake zal zijn van een gewichtig maatschappelijk belang. In een voetnoot bij artikel 2.4.5 van de Leidraad staat dat dit belang onder meer wordt gediend door 'het aan het licht brengen van ernstige misdrijven en misdragingen, het beschermen van de openbare veiligheid en gezondheid en het voorkomen van misleiding van het publiek door handelingen en uitspraken van personen of organisaties.' Naar aanleiding van een klacht kan de Raad voor de Journalistiek een oordeel geven over de vraag of een bepaalde publicatie van foto's of filmbeelden uit de privésfeer zonder toestemming al dan niet gerechtvaardigd was. Dat oordeel is niet meer dan een opinie, want de Raad heeft geen bevoegdheid sancties op te leggen. Als iemand een bindend rechtsoordeel wenst, dient hij zich te wenden tot de burgerlijke rechter. Die kan zich wel weer laten inspireren door de 'jurisprudentie' van de Raad voor de Journalistiek.

7. Artikel 7 van de Grondwet bepaalt in het eerste en derde lid dat niemand voorafgaand verlof nodig heeft om gedachten en gevoelens te openbaren, behoudens ieders verantwoordelijkheid volgens de wet. Voor radio en televisie geldt een vergelijkbare regeling, nu het tweede lid zich verzet tegen voorafgaand toezicht op de inhoud van een radio- of televisieuitzending. Over de betekenis van deze grondwettelijke normen is onlangs geschreven door A.J. Nieuwenhuis, 'De vrijheid van meningsuiting en het grondwettelijk verbod van voorafgaand verlof', *NTM/NJCM-Bull.* 2011, afl. 1, p. 24-43. Uit de jurisprudentie blijkt dat een rechterlijk publicatieverbod onder omstandigheden toelaatbaar is, indien ten minste de inhoud van de voorgenomen publicatie vaststaat. Een bekend voorbeeld is HR 2 mei 2003, Storms vs Niessen, *NJ* 2004, 80. De Hoge Raad overwoog in r.o. 4.3.2: *'Er bestaat mede in het licht van artikel 3:296 BW (..) geen grond aan te nemen dat het in art. 7 Gr.w. neergelegde verbod van censuur – het voorafgaand overheidstoezicht op een voorgenomen uiting – in de weg zou staan aan de bevoegdheid van de rechter met het oog op een effectieve rechtsbescherming een uiting die jegens een ander onrechtmatig is, te verbieden'*.

8. De burger die een schadelijke publicatie vreest, zal echter lang niet altijd de precieze inhoud kennen. Kan hij bij de rechter vorderen dat het medium hem van tevoren inzage geeft? De kwestie speelde onder meer in Hof 's-Hertogenbosch 18 februari 1999, De Limburger vs Van Goethem, *NJ* 2000, 369. In kort geding had Van Goethem geëist dat hij inzage zou krijgen in het concept van een te verwachten krantenartikel over zijn declaratiegedrag als burgemeester. De president van de rechtbank Maastricht had de vordering toegewezen. Hij had De Limburger verboden over te gaan tot de publicatie van een artikel over de declaratieperikelen in de gemeente Beek, als niet eerst het concept voor commentaar aan Van Goethem was aangeboden (Pres. Rb. Maastricht 27 januari 1998, *Mediaforum* 1998-3, nr. 17 m.nt. G.A.I. Schuijt). Het gerechtshof vernietigde deze uitspraak wegens strijd met artikel 10 EVRM. Het voorwaardelijke verbod was niet noodzakelijk in een democratische samenleving. Het hof wijst erop dat het onrechtmatige karakter van een publicatie mede wordt gevormd door de toonzetting, de opmaak en de plaats die het artikel in de krant inneemt. Die factoren zijn van tevoren niet bekend. Nu het gerechtshof de vordering alleen toetste aan artikel 10 EVRM – en artikel 7 Grondwet buiten

beschouwing liet− blijft het denkbaar dat het hof onder andere omstandigheden een voorwaardelijk verbod wel zou hebben goedgekeurd.

9. Een principiële afwijzing is te vinden in twee eerdere uitspraken (Pres. Rb. 's-Gravenhage 17 december 1993, Van den B. vs BZZTôH, *Mediaforum* 1994-2, p. B23 en Pres. Rb. Amsterdam 1 mei 1997, Ten Kortenaar c.s. vs Gooi- en Eemlander, *Mediaforum* 1997-6, p. B94). De uitspraak van de Haagse president is het meest uitvoerig. Over artikel 7van de Grondwet overwoog deze:
Inzage vooraf zoals door eisers is gevorderd is niet verenigbaar met de in art. 7 van de Grondwet gewaarborgde en nader in de jurisprudentie uitgewerkte vrijheid van drukpers.
Slechts na publicatie kan, onder omstandigheden, sprake blijken te zijn van onrechtmatig handelen dat noopt tot rectificatie, schadevergoeding of, in het meest verstrekkende geval, een verbod tot verdere publicatie. Zo ver is het thans nog niet. Eisers betogen nu wel dat er geen sprake is van censuur, aangezien slechts inzage wordt gevraagd om te kunnen vaststellen of er al dan niet kan worden gesproken van een dreigende onrechtmatigheid en dat een verbod nu nog niet aan de orde is. Dit betoog snijdt geen hout omdat de gevorderde inzage juist ten doel heeft eisers in de gelegenheid te stellen als zij daar aanleiding toe zien een publicatieverbod uit te lokken. De strekking van de vordering is dan ook geen andere dan om gedaagden in de situatie te brengen dat zij voorafgaand verlof nodig hebben en is daarmee in strijd met het uitgangspunt van de Grondwetgever.

10. De zaak Mosley verschilt in een belangrijk opzicht van de Nederlandse zaken. Mosley wist niet dat een publicatie op komst was en kon dus niet van tevoren naar de rechter stappen om een recht op inzage te eisen. Vandaar zijn stelling dat de media moeten worden onderworpen aan een algemene waarschuwingsplicht. In Nederland zou de invoering van een dergelijke plicht (onder het motto 'de goeden moeten onder de kwaden lijden') in strijd zijn met artikel 7 van de Grondwet. Ook al was de handelwijze van News of the World schandalig, het is goed dat de klacht van Mosley door het EHRM is afgewezen. Van den Brink heeft terecht opgemerkt dat een verplichte waarschuwing zal leiden tot meer rechtszaken, wat media huiverig kan maken te schrijven over misstanden. Bovendien leidt inzage tot uitstel, terwijl nieuws bederfelijke waar is (J. van den Brink, 'Publish and be damned', *Mediaforum* 2011-3, p. 65). De mate van zorgvuldigheid die een medium in acht heeft genomen bij de voorbereiding van een publicatie, met name bij het toepassen van hoor en wederhoor, moet de rechter achteraf beoordelen.

A.W. Hins
hoogleraar mediarecht, Universiteit Leiden
docent staats- en bestuursrecht, Universiteit van Amsterdam