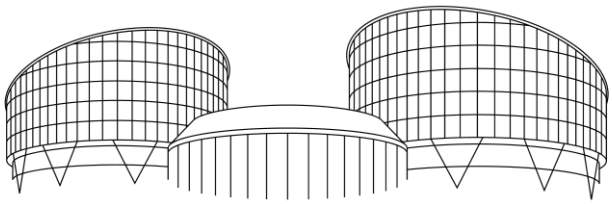

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF MOSLEY v. THE UNITED KINGDOM

(Application no. 48009/08)

JUDGMENT

STRASBOURG

10 May 2011

FINAL

15/09/2011

This judgment has become final under Article 44 § 2 (c) of the Convention. It may be subject to editorial revision.

In the case of Mosley v. the United Kingdom**,**

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Lech Garlicki, *President,*
Nicolas Bratza,
Ljiljana Mijović,
David Thór Björgvinsson,
Päivi Hirvelä,
Ledi Bianku,
Nebojša Vučinić, *judges,*
and Lawrence Early, *Section Registrar,*

Having deliberated in private on 11 January 2011 and 12 April 2011,

Delivers the following judgment, which was adopted on the latter date:

PROCEDURE

1. The case originated in an application (no. 48009/08) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a British national, Mr Max Rufus Mosley ("the applicant"), on 29 September 2008.

2. The applicant was represented by Collyer Bristow LLP, a firm of solicitors based in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr D. Walton, Foreign and Commonwealth Office.

3. The applicant alleged that the United Kingdom had violated its positive obligations under Article 8 of the Convention, taken alone and taken together with Article 13, to ensure his right to respect for his private life.

4. On 20 October 2009 the Court decided to give notice of the application to the Government. It also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. The applicant and the Government each filed written observations (Rule 54 § 2 (b)). Third-party comments were also received from Guardian News & Media Ltd, The Media Lawyers' Association and Finers Stephens Innocent on behalf of 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, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 (a)).

6. A hearing in the case took place in public in the Human Rights Building, Strasbourg, on 11 January 2011 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr	D. WALTON,	*Agent*,
Mr	J. EADIE QC,	*Counsel*,
Mr	A. JEEVES,	*Adviser*;

(b) *for the applicant*

Lord	PANNICK QC,	
Mr	D. SHERBORNE,	*Counsel*,
Mr	M. MOSLEY,	*Applicant*,
Mr	D. CROSSLEY,	
Mr	T. LOWLES,	*Solicitors*.

The Court heard addresses by Mr Eadie and Lord Pannick and their answers in reply to questions put by the Court.

7. On 1 February 2011 the Court changed the composition of its Sections (Rule 25 § 1) but the present case remained with the Chamber constituted within the former Fourth Section.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1940 and lives in Monaco.

9. On 30 March 2008, the *News of the World*, a Sunday newspaper owned by News Group Newspapers Limited, published on its front page an article headed "F1 boss has sick Nazi orgy with 5 hookers". The article opened with the sentence, "Formula 1 motor racing chief Max Mosley is today exposed as a secret sadomasochistic sex pervert". Several pages inside the newspaper were also devoted to the story, which included still photographs taken from video footage secretly recorded by one of the participants in the sexual activities, who was paid in advance to do so. An edited extract of the video as well as still images were also published on the newspaper's website and reproduced elsewhere on the internet. The print version of the newspaper invited readers to view the video, providing the website address of the newspaper.

10. Later that same day, the applicant's solicitors made a complaint to the *News of the World* regarding the video footage available on the website. The next day, 31 March 2008, the edited footage was voluntarily removed from the website and an undertaking was given that it would not be shown again without 24 hours' notice. Such notice was given by letter dated 3 April 2008 and faxed at 1.19 p.m. that day.

11. The edited video footage was viewed over 1.4 million times over 30 and 31 March 2008. The online version of the article was visited over 400,000 times during the same period. The print version of the *News of the World* has an average circulation of over three million copies.

12. On 4 April 2008 the applicant commenced legal proceedings against News Group Newspapers Limited claiming damages for breach of confidence and invasion of privacy. Although he did not dispute that the sexual activities had taken place, he contested the characterisation of his activities as being Nazi role-play. He also sought an injunction to restrain the *News of the World* from making available on its website the edited video footage.

13. On 6 April 2008 a second series of articles on the applicant's sexual activities was published in the *News of the World*.

14. On 9 April 2008 Mr Justice Eady, in the High Court, refused to grant an injunction because the material was no longer private by reason of its extensive publication in print and on the internet.

15. In assessing the approach to be taken by the court to the granting of an interim injunction, he noted that the following principles should be borne in mind in any case where it was sought to restrain publication on the basis of an alleged infringement of rights guaranteed by Article 8, and where those rights came into conflict with the rights of other persons, and in particular the rights of the media to freedom of expression:

> "28... i) No Convention right has, as such, precedence over another;
>
> ii) Where conflict arises between the values safeguarded under Articles 8 and 10, an 'intense focus' is necessary upon the comparative importance of the specific rights being claimed in the individual case;
>
> iii) The Court must take into account the justification for interfering with or restricting each right;
>
> iv) So too, the proportionality test must be applied to each."

16. He continued:

> "29. Here there is no doubt that the rights of Mr Mosley under Article 8 come into conflict with those of the Respondent company under Article 10. One question which has to be answered is whether, in respect of the information contained in the edited footage, Mr Mosley any longer has a reasonable expectation of privacy, having regard to everything which has happened since the original publication."

17. Eady J considered that there was no public interest in publication of the images powerful enough to override the applicant's *prima facie* right to be protected in respect of the intrusive and demeaning nature of the photographs, observing:

> " 30. ... The only reason why these pictures are of interest is because they are mildly salacious and provide an opportunity to have a snigger at the expense of the participants. Insofar as the public was ever entitled to know about Mr Mosley's sexual tastes at all, the matter has already been done to death since the original coverage in the *News of the World*. There is no legitimate element of public interest which would be served by the additional disclosure of the edited footage, at this stage, on the Respondent's website."

18. However, as to the extent of the applicant's reasonable expectation of privacy, Eady J noted that the material had been seen by thousands of people around the world and that it continued to be available. He went on:

> "33. ... The Court must always be conscious of the practical realities and limitations as to what can be achieved ... Nevertheless, a point *may* be reached where the information sought to be restricted, by an order of the Court, is so widely and generally accessible 'in the public domain' that such an injunction would make no practical difference.
>
> 34. As Mr Millar [for News Group Newspapers Limited] has pointed out, if someone wishes to search on the Internet for the content of the edited footage, there are various ways to access it notwithstanding any order the Court may choose to make imposing limits on the content of the *News of the World* website. 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, in the traditional terminology, as a *brutum fulmen*. It is inappropriate for the Court to make vain gestures."

19. He concluded that the material was so widely accessible that an order in the terms sought would make very little practical difference, noting:

> "36. ... The dam has effectively burst. I have, with some reluctance, come to the conclusion that although this material is intrusive and demeaning, and despite the fact that there is no legitimate public interest in its further publication, the granting of an order against this Respondent at the present juncture would merely be a futile gesture. Anyone who wishes to access the footage can easily do so, and there is no point in barring the *News of the World* from showing what is already available."

20. The edited video footage was restored to the *News of the World* website shortly afterwards.

21. In the course of the subsequent privacy proceedings before the High Court, the court heard evidence from the editor of the *News of the World*. As to the reasons for providing no advance warning to the applicant of the imminent publication of the story, the following exchange took place:

> "Q: Your third reason was the risk of an interim injunction, and that was the real reason, was it not?

A: That was a major concern, yes.

Q: You were worried that the court might grant an injunction.

A: It was a consideration, yes.

...

Q: So you did recognise that there was a real risk that a court would take the view, on an interim basis, that this intrusion on privacy was not justified?

A: It is a risk all newspapers are faced with these days.

Q: What is the matter with letting the court make the decision? Is that not the way democratic societies work; that one person says it is not an intrusion of privacy and the other says it is? ... There is nothing wrong with an impartial judge looking at it is there?

A: No. It happens a lot.

Q: But you were not prepared to risk that on this occasion?

A: On this occasion."

22. On 24 July 2008 judgment was handed down in the privacy proceedings.

23. Regarding the allegations in the articles that there was a Nazi theme, Eady J noted that once the material had been obtained, it was not properly checked for Nazi content and that the German was not even translated. Instead, those concerned were simply content to rely on general impressions, which Eady J considered to be "hardly satisfactory" having regard to the devastating impact the publication would have on all those involved and to the gravity of the allegations, especially that of mocking the treatment given to concentration camp inmates. He was prepared to accept that the journalist responsible for the story and the editor thought there was a Nazi element, not least because that was what they wanted to believe. He concluded:

"170. The belief was not arrived at, however, by rational analysis of the material before them. Rather, it was a precipitate conclusion that was reached 'in the round', as Mr Thurlbeck [the journalist] put it. The countervailing factors, in particular the absence of any specifically Nazi indicia, were not considered. When Mr Myler [the editor] was taken at length through dozens of photographs, some of which he had seen prior to publication, he had to admit in the witness box that there were no Nazi indicia and he could, of course, point to nothing which would justify the suggestion of 'mocking' concentration camp victims. That conclusion could, and should, have been reached before publication. I consider that this willingness to believe in the Nazi element and the mocking of Holocaust victims was not based on enquiries or analysis consistent with 'responsible journalism' ... [T]he judgment was made in a manner that could be characterised, at least, as 'casual' and 'cavalier'."

24. Eady J went on to consider the newspaper's assessment, prior to publication, of the lawfulness of publishing the articles. He observed that, in the context of privacy, there was a good deal of scope for differing assessments to be made on issues such as whether there was a reasonable expectation of privacy or a genuine public interest to justify intrusion. He considered that he was not in a position to accept the applicant's submission that any of the relevant individuals must have known at the time that the publication would be unlawful in the sense that no public interest defence could succeed, nor could he conclude that they were genuinely indifferent to whether there was a public interest defence. While, he said, they may not have given it close analysis and one could no doubt criticise the quality of the journalism which led to the coverage actually given, that was not the same as genuine indifference to the lawfulness of this conduct. He noted:

> "209. It is also clear that one of the main reasons for keeping the story 'under wraps' until the last possible moment was to avoid the possibility of an interlocutory injunction. That would avoid delaying publication and, in a privacy context, would generally mean that a potential claimant would not trouble to institute any legal proceedings at all. Once the cat is out of the bag, and the intrusive publication has occurred, most people would think there was little to gain. Even so, it would not be right to equate such tactics with deliberately or recklessly committing a wrong."

25. Eady J concluded that the newspaper articles and images constituted a breach of the applicant's right to privacy. He found that there were no Nazi connotations in the applicant's sexual activities and that there was therefore no public interest or justification in the publication of the article about his personal life and the accompanying images.

26. On the question of damages, Eady J declined to award exemplary damages and limited the damages available to a compensatory award. He considered it questionable whether deterrence should have a distinct, as opposed to a merely incidental, role to play in the award of compensatory damages, noting that it was a notion more naturally associated with punishment. He further observed that if damages were paid to an individual for the purpose of deterring the defendant it would naturally be seen as an undeserved windfall. He added that if damages for deterrence were to have any prospect of success it would be necessary to take into account the means of the relevant defendant. Any award against the *News of the World* would have to be so large that it would fail the test of proportionality when seen as fulfilling a compensatory function and would risk having a "chilling effect" on freedom of expression.

27. Eady J recognised that the sum awarded would not constitute adequate redress, noting:

> "230. ... I have already emphasised that injury to reputation is not a directly relevant factor, but it is also to be remembered that libel damages can achieve one objective that is impossible in privacy cases. Whereas reputation can be vindicated by an award of damages, in the sense that the claimant can be restored to the esteem in which he

was previously held, that is not possible where embarrassing personal information has been released for general publication. As the media are well aware, once privacy has been infringed, the damage is done and the embarrassment is only augmented by pursuing a court action. Claimants with the degree of resolve (and financial resources) of Mr Max Mosley are likely to be few and far between. Thus, if journalists successfully avoid the grant of an interlocutory injunction, they can usually relax in the knowledge that intrusive coverage of someone's sex life will carry no adverse consequences for them and (as Mr Thurlbeck put it in his 2 April email) that the news agenda will move on.

231. Notwithstanding all this, 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. That unpalatable fact cannot be mitigated by simply adding a few noughts to the number first thought of. Accordingly, it seems to me that the only realistic course is to select a figure which marks the fact that an unlawful intrusion has taken place while affording some degree of *solatium* to the injured party. That is all that can be done in circumstances where the traditional object of *restitutio* is not available. At the same time, the figure selected should not be such that it could be interpreted as minimising the scale of the wrong done or the damage it has caused."

28. The applicant was awarded GBP 60,000 in damages and recovered approximately GBP 420,000 in costs. The judge noted that the applicant was hardly exaggerating when he said that his life was ruined. A final injunction was granted against the newspaper.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Press Complaints Commission

29. The Press Complaints Commission ("PCC") is an independent body set up to examine complaints about the editorial content of newspapers and magazines, and their websites, in the United Kingdom. If a complaint is upheld, a public ruling will be issued by the PCC and the newspaper or magazine concerned is obliged to publish the critical ruling in full and with due prominence.

30. On 18 November 2008 the PCC upheld a complaint by Mr P. Burrell that the *News of the World* had published an article about him which was inaccurate, in breach of clause 1 of the Editors' Code of Practice (see further paragraph 31 below). The newspaper had failed to approach him for comments prior to publication. In its adjudication, the PCC noted:

"The [PCC] has previously said that failure to contact the subjects of articles before publication – while not obligatory – may constitute a lack of care under Clause 1 in some circumstances. It has never said that people have no right ever to comment on a story, or to be offered a right of reply, if they have misled people in another context.

> The [PCC] was also aware of the newspaper's concerns about an undeserved injunction being granted. However, it did not consider that this meant that the requirements of the Code did not apply. Given the nature of the story, and how the newspaper wished to present it, the inclusion of the complainant's comments was necessary to avoid breaching the Code.
>
> ...
>
> It has never been an absolute requirement for newspapers to contact those who are about to feature in articles. This would be impractical for a number of reasons: often there will be no dispute about the facts, or the information will be innocuous; the volume of people mentioned in straightforward stories would make it impossible; and legitimate investigations might on some occasions be compromised by such a rule. However, in this case the newspaper made the wrong decision and the complaint was upheld."

B. Codes of Practice

1. The Editors' Code of Practice

31. The PCC is responsible for ratifying and enforcing the Editors' Code of Practice ("the Editors' Code"). The Editors' Code is regularly reviewed and amended as required. Clause 1 of the Editors' Code provides, *inter alia*, that the press must take care not to publish inaccurate, misleading or distorted information, including pictures.

32. Clause 3 of the Editors' Code deals with privacy. At the relevant time, it provided as follows:

> "3. *Privacy
>
> i) Everyone is entitled to respect for his or her private and family life, home, health and correspondence, including digital communications. Editors will be expected to justify intrusions into any individual's private life without consent.
>
> ii) It is unacceptable to photograph individuals in a private place without their consent.
>
> Note - Private places are public or private property where there is a reasonable expectation of privacy."

33. Clause 10 of the Editors' Code sets out provisions on clandestine recordings:

> "10 *Clandestine devices and subterfuge
>
> i) The press must not seek to obtain or publish material acquired by using hidden cameras or clandestine listening devices; or by intercepting private or mobile telephone calls, messages or emails; or by the unauthorised removal of documents or photographs; or by accessing digitally-held private information without consent.

ii) Engaging in misrepresentation or subterfuge, including by agents or intermediaries, can generally be justified only in the public interest and then only when the material cannot be obtained by other means."

34. At the relevant time, the "public interest" was explained in the Editors' Code as follows:

"There may be exceptions to the clauses marked * where they can be demonstrated to be in the public interest.

1. The public interest includes, but is not confined to:

i) Detecting or exposing crime or serious impropriety.

ii) Protecting public health and safety.

iii) Preventing the public from being misled by an action or statement of an individual or organisation.

2. There is a public interest in freedom of expression itself.

3. Whenever the public interest is invoked, the PCC will require editors to demonstrate fully how the public interest was served.

4. The PCC will consider the extent to which material is already in the public domain, or will become so.

..."

35. Paragraph 3 was amended in October 2009 to provide:

"Whenever the public interest is invoked, the PCC will require editors to demonstrate fully that they reasonably believed that publication, or journalistic activity undertaken with a view to publication, would be in the public interest."

36. The Editors' Codebook accompanies the Editors' Code and is intended to provide guidance as to compliance with the Code's provisions. It underwent major revision in January 2011, providing updates on prior notification and "public interest". As regards prior notification, it now explains:

"There is wide agreement that prior notification of the subjects of stories ahead of publication, while often desirable, could not – and should not – be obligatory. It would be impractical, often unnecessary, impossible to achieve, and could jeopardise legitimate investigations. Yet, at the same time, a failure to include relevant sides of the story can lead to inaccuracy and breach the Code. The PCC has set out guidance on how to square this circle:

1. If there is no doubt about the story's truth, it is unlikely that a failure to approach those involved for comment prior to publication will lead to a breach of Clause 1 of the Code [on accuracy];

2. Where information has come from a source (especially an anonymous one), it may be prudent to seek the 'other side of the story' before the article appears;

...”

37. As to the “public interest” test, the Codebook notes:

> “In judging publications’ claims that otherwise prohibited information or methods were justifiable in the public interest, both the Code and the PCC set high thresholds. The burden is on the editor to *demonstrate fully* how the public interest was served.”

38. It provides details of previous rulings of the PCC on the question of the “public interest” and identifies key questions as:

> “Was it reasonable to believe that publication or journalistic activity would have served the public interest? The PCC would require a full explanation showing that the grounds were genuine and sound in the circumstances.
>
> If clandestine methods, subterfuge, harassment or payments to criminals or witnesses are involved, could the information have been obtained by other means?
>
> Is the information in the public domain, or likely to become so?
>
> If children are involved, is the public interest in publication exceptional?”

2. The Ofcom Broadcasting Code

39. Broadcasters are subject to the Ofcom Broadcasting Code (“the Ofcom Code”). Section 7 of the Ofcom Code deals with fairness and provides, *inter alia*:

> “7.9 Before broadcasting a factual programme, including programmes examining past events, broadcasters should take reasonable care to satisfy themselves that:
>
> ...
>
> - anyone whose omission could be unfair to an individual or organisation has been offered an opportunity to contribute.”

40. Principle 8 of the Ofcom Code addresses the need to avoid any unwarranted infringement of privacy in programmes and in connection with obtaining material included in programmes.

C. Remedies for publication of private information

41. Under English law, a number of remedies are available in cases of misuse of private information. An injunction can be sought to restrain publication of the private material. Damages are also available to compensate for the injury caused by any intrusive publication, including aggravated damages where additional features of the intrusion or the defendant’s post-publication conduct makes the original injury worse. An alternative to damages is an account of the profits made by the defendant. The court can also order delivery-up of the offending material.

42. Further protection is offered by the Data Protection Act 1998, which makes provision for the regulation of the processing of information relating to individuals, including the obtaining, holding, use or disclosure of such information. It sets out in a schedule eight data protection principles which must be observed by data controllers in the United Kingdom. These principles include the principles that personal data shall be processed fairly and lawfully; that personal data shall be obtained only for one or more specified and lawful purposes; that personal data shall be adequate, relevant and not excessive in relation to the purpose for which they are processed; that personal data shall be accurate and up to date; and that personal data shall be processed in accordance with the rights of data subjects under the Act. Further requirements are stipulated in respect of "sensitive personal data", which includes information as to a person's sexual life.

43. However, section 32(1) of the Act provides a "public interest" exemption from the data protection principles where information is processed for journalism purposes:

> "Personal data which are processed only for the special purposes are exempt from any provision to which this subsection relates if—
>
> (a) the processing is undertaken with a view to the publication by any person of any journalistic, literary or artistic material,
>
> (b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and
>
> (c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes."

44. Section 3 defines "the special purposes" as including the "purposes of journalism". Section 32(2) provides that the exemption relates to the data protection principles, except the seventh data protection principle which sets out the need for appropriate technical and organisational measures to be taken against unauthorised or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data. Section 32(3) provides that compliance with any code of practice is relevant to the assessment of whether there was a reasonable belief that publication would be in the public interest.

45. Section 13 of the Act entitles a data subject to apply for compensation where there has been a contravention of the requirements of the Act and section 14 allows him to apply for rectification, erasure or destruction of personal data.

D. Interim injunctions

46. The position as regards interim injunctions under English law was set out in the case of *American Cyanamid Co. v. Ethicon Ltd* ([1975] Appeal Cases 396). In particular, a claimant seeking an interim injunction was required to show that he had a "seriously arguable case" to be tried. Once this had been shown, it was for the courts to decide where the balance of convenience lay between the case for granting the injunction and that of leaving the applicant to his remedy of damages. If there were doubts as to the adequacy of a remedy in damages, the preservation of the *status quo* often prevailed, with the result that an interim injunction would be granted.

47. The position in cases engaging the right to freedom of expression was subsequently amended with the entry into force of the Human Rights Act 1998. Section 12 of the Act provides:

> "(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> (2) If the person against whom the application for relief is made ('the respondent') is neither present nor represented, no such relief is to be granted unless the court is satisfied—
>
> (a) that the applicant has taken all practicable steps to notify the respondent; or
>
> (b) that there are compelling reasons why the respondent should not be notified.
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
>
> (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—
>
> (a) the extent to which—
>
> (i) the material has, or is about to, become available to the public; or
>
> (ii) it is, or would be, in the public interest for the material to be published;
>
> (b) any relevant privacy code."

48. The effect of the Human Rights Act, in particular section 12(3), was considered by the House of Lords in *Cream Holdings Limited and others v. Banerjee and others* [2004] UKHL 44. Lord Nicholls of Birkenhead observed that:

> "15. When the Human Rights Bill was under consideration by Parliament concern was expressed at the adverse impact the Bill might have on the freedom of the press. Article 8 of the European Convention, guaranteeing the right to respect for private

life, was among the Convention rights to which the legislation would give effect. The concern was that, applying the conventional *American Cyanamid* approach, orders imposing prior restraint on newspapers might readily be granted by the courts to preserve the status quo until trial whenever applicants claimed that a threatened publication would infringe their rights under article 8. Section 12(3) was enacted to allay these fears. Its principal purpose was to buttress the protection afforded to freedom of speech at the interlocutory stage. It sought to do so by setting a higher threshold for the grant of interlocutory injunctions against the media than the *American Cyanamid* guideline of a 'serious question to be tried' or a 'real prospect' of success at the trial."

49. He concluded that:

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

50. Subsequently, in *Douglas & Ors v Hello! Ltd & Ors* ([2005] EWCA Civ 595), the Court of Appeal noted:

"258. Of course, as recently emphasised by the House of Lords in *Cream Holdings Limited v Banerjee* [2004] 3 WLR 918, a claimant seeking an interlocutory injunction restraining publication has to satisfy a particularly high threshold test, in light of section 12(3) of the Human Rights Act 1998."

E. The House of Commons Culture, Media and Sport Committee

51. On 9 February 2010 the House of Commons Culture, Media and Sport Committee ("the Select Committee") published a report on *Press standards, privacy and libel* (2nd Report of Session 2009-10, HC 362-I). The report was prepared following receipt of written submissions and the hearing of oral evidence from a number of stakeholders, including the applicant and the editor of the *News of the World*. A chapter of the report was dedicated to examining privacy and breach of confidence. As regards

the evidence received on the need for a rule of pre-notification, the report noted:

> "82. In his own case, Mr Mosley stated that he would certainly have sought an injunction if he had had advance notification of the *News of the World*'s intention to publish. Mr Myler [the editor of the *News of the World*] told us that he and his colleagues at the newspaper were conscious of this: 'we knew that probably Mr Mosley would get an injunction, and I felt very strongly that this was a story that actually should not be stopped because of an injunction'."

52. According to the evidence received by the Select Committee, journalists contacted the subjects of their articles prior to publication in the great majority of cases. However, there was some evidence before the Select Committee that editors sometimes took a calculated risk not to contact a subject because they knew or suspected that an injunction would be imposed in respect of an intended publication.The report noted:

> "91. Clearly pre-notification, in the form of giving opportunity to comment, is the norm across the industry. Nevertheless we were surprised to learn that the PCC does not provide any guidance on pre-notification. Giving subjects of articles the opportunity to comment is often crucial to fair and balanced reporting, and there needs to be explicit provision in the PCC Code itself."

53. The Select Committee recommended 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, and that guidance for journalists and editors on pre-notifying should be included in the Editors' Codebook.

54. As to the need for a legally binding pre-notification requirement, the Select Committee concluded that:

> "93. ... a legal or unconditional requirement to pre-notify would be ineffective, due to what we accept is the need for a 'public interest' exception. Instead we believe that it would be appropriate to encourage editors and journalists to notify in advance the subject of a critical story or report by permitting courts to take account of any failure to notify when assessing damages in any subsequent proceedings for breach of Article 8. We therefore recommend that the Ministry of Justice should amend the Civil Procedure Rules to make failure to pre-notify an aggravating factor in assessing damages in a breach of Article 8. We further suggest that amendment to the Rules should stipulate that no entitlement to aggravated damages arises in cases where there is a public interest in the release of that private information."

III. RELEVANT INTERNATIONAL MATERIALS

A. Relevant Council of Europe texts

1. The Parliamentary Assembly of the Council of Europe

55. On 23 January 1970, the Parliamentary Assembly of the Council of Europe adopted Resolution 428, containing a declaration on mass communication media and human rights. As regards the duty of the press to act responsibly, the declaration indicated that it would be desirable to put in place:

> "(a) professional training for journalists under the responsibility of editors and journalists;
>
> (b) a professional code of ethics for journalists ; this should cover inter alia such matters as accurate and well balanced reporting, rectification of inaccurate information, clear distinction between reported information and comments, avoidance of calumny, respect for privacy, respect for the right to a fair trial as guaranteed by Article 6 of the European Convention on Human Rights;
>
> (c) press councils empowered to investigate and even to censure instances of unprofessional conduct with a view to the exercising of self-control by the press itself."

56. The declaration also noted that there was an area in which the exercise of the right of freedom of expression might conflict with the right to privacy protected by Article 8, and that the exercise of the former right should not be allowed to destroy the existence of the latter. It observed that the right to privacy consisted essentially in the right to live one's own life with a minimum of interference and concerned private, family and home life, physical and moral integrity, honour and reputation, avoidance of being placed in a false light, non-revelation of irrelevant and embarrassing facts, unauthorised publication of private photographs, protection against misuse of private communications and protection from disclosure of information given or received by the individual confidentially. The declaration also stated that the right to privacy afforded by Article 8 should not only protect an individual against interference by public authorities, but also against interference by private persons or institutions, including the mass media, and that national legislation should guarantee this protection

57. On 26 June 1998 the Parliamentary Assembly adopted a further resolution, Resolution 1165, on the right to privacy, focusing on public figures. The Resolution noted that personal privacy was often invaded, even in countries with specific legislation to protect it, as people's private lives had become a highly lucrative commodity for certain sectors of the media. It continued:

"8. It is often in the name of a one-sided interpretation of the right to freedom of expression, which is guaranteed in Article 10 of the European Convention on Human Rights, that the media invade people's privacy, claiming that their readers are entitled to know everything about public figures.

9. Certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens, and it may therefore be legitimate for readers, who are also voters, to be informed of those facts.

10. It is therefore necessary to find a way of balancing the exercise of two fundamental rights, both of which are guaranteed in the European Convention on Human Rights: the right to respect for one's private life and the right to freedom of expression.

58. The resolution reaffirmed the importance of every person's right to privacy and of the right to freedom of expression as fundamental to a democratic society. It noted that these rights were neither absolute nor in any hierarchical order, since they were of equal value. Further, the right to privacy afforded by Article 8 required protection against interference by private persons or institutions, including the mass media. The resolution also set out specific guidelines on the necessary content of national legislation:

"i. the possibility of taking an action under civil law should be guaranteed, to enable a victim to claim possible damages for invasion of privacy;

ii. editors and journalists should be rendered liable for invasions of privacy by their publications, as they are for libel;

...

iv. economic penalties should be envisaged for publishing groups which systematically invade people's privacy;

...

vii. provision should be made for anyone who knows that information or images relating to his or her private life are about to be disseminated to initiate emergency judicial proceedings, such as summary applications for an interim order or an injunction postponing the dissemination of the information, subject to an assessment by the court as to the merits of the claim of an invasion of privacy;

viii. the media should be encouraged to create their own guidelines for publication and to set up an institute with which an individual can lodge complaints of invasion of privacy and demand that a rectification be published."

59. On 3 October 2008 Resolution 1636 (2008) on indicators for media in a democracy was adopted by the Parliamentary Assembly. It recalled the importance of freedom of expression of the press in a democracy and called on member States to assess their national media legislation bearing in mind the basic principle that there should be a system of media self-regulation

including a right of reply and correction or voluntary apologies by journalists and that journalists should set up their own professional codes of conduct and that they should be applied.

2. The Committee of Ministers

60. At the Sixth European Ministerial Conference on Mass Media Policy in Cracow, 15-16 June 2000, the participating Ministers adopted a declaration on "A media policy for tomorrow". In the declaration, the representatives of the Contracting States agreed on a programme of action at pan-European level, to be implemented by the Steering Committee on Mass Media ("CDMM"). The programme of action included the following provisions:

> "**I. Activities relating to the balance between freedom of expression and information and other rights and legitimate interests**
>
> The CDMM should:
>
> - step up its work on the balance between freedom of expression and information and the right to privacy;
>
> - complete the work on the disclosure of information and the expression of opinions about political figures and public officials, the disclosure of information in the public interest, as well as media reporting on legal proceedings, so as to define common orientations for the whole of Europe as speedily as possible;
>
> - examine the problems caused by the dissemination of material casting doubt on individuals' dignity and integrity, even in the traditional media;
>
> - examine the implications of the on-line dissemination of information by individuals or other sources which may not be bound by professional journalistic ethics or codes of conduct."

61. Following the adoption of the programme of action, the CDMM established a Group of Specialists on freedom of expression and other fundamental rights ("MM-S-FR"). The MM-S-FR prepared a draft declaration of the Committee of Ministers on freedom of expression and the right to respect for private life which was reviewed by the CDMM at its meetings of 10 July 2003 and 21 January 2004. However, the CCDM did not invite the Committee of Ministers to adopt the declaration.

B. Law and practice in Council of Europe member States

62. According to the information provided by the parties or otherwise available to the Court, there is no pre-notification requirement as such in any of the legal systems of the Contracting Parties. However, some member States require the subject's consent to publication of material relating to private life, in many cases subject to some form of "public interest"

exception. Thus the failure to obtain consent may have legal consequences in any subsequent civil proceedings commenced by the subject of the publication.

63. A number of member States have adopted codes of practice, generally not binding, which also contain some form of consent requirement.

C. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("the EC Directive")

64. The EC Directive was adopted in order to ensure adequate protection for personal data. It applies to the 27 Member States of the European Union. It was transposed in the United Kingdom through the Data Protection Act 1998 (see paragraphs 42-45 above). There is no reference in the EC Directive to the need to provide for a pre-notification requirement in privacy cases.

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.

Done in English, and notified in writing on 10 May 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early Registrar	Lech Garlicki President