



## Obligation on publisher of "The Daily Mirror" to pay "success fees" in a breach of privacy case found to be excessive

In today's Chamber judgment in the case **Mgn Limited v. the United Kingdom** (application no. 39401/04), which is not final<sup>1</sup>, the European Court of Human Rights held, unanimously, that there had been:

**No violation of Article 10 (freedom of expression and information)** of the European Convention on Human Rights, as regards *Mgn Limited's* complaint related to private life;

**A violation of Article 10** of the Convention as regards the "success fees" *Mgn Limited* had to pay.

The case concerned the complaints of the publishing company *Mgn Limited* that the United Kingdom breached its freedom of expression rights as a result of:

- the national courts' finding against it for breach of Ms Naomi Campbell's privacy by publishing articles and pictures in *The Daily Mirror* about her drug-addiction treatment; and
- it being ordered to pay "success fees" agreed between Ms Campbell and her lawyers in relation to the same privacy proceedings.

### Principal facts

The applicant, *Mgn Limited*, is the publisher of a British national daily newspaper *The Daily Mirror*.

On 1 February 2001 it published an article on its front page entitled "*Naomi: I am a drug addict*" and another longer article inside the newspaper elaborating on Ms Campbell's addiction treatment. The articles were accompanied by photos taken secretly near the Narcotics Anonymous centre she was attending at the time.

In reaction to the articles and photos, Ms Campbell's lawyer wrote to *Mgn Limited* complaining that those publications breached her privacy and asking the publisher to undertake that it would not publish further private information. *The Daily Mirror* responded by publishing another two articles about Ms Campbell: those articles contained further details of her attendance at Narcotics Anonymous meetings as well as new pictures of her going to one of those meetings; and the articles were also critical of her complaints that her privacy had been breached by the newspaper.

Ms Campbell successfully sued the newspaper for breach of confidence and compensation. The High Court found in her favour, the Court of Appeal found in favour

<sup>1</sup> Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution)

of the newspaper, and the House of Lords finally found in her favour. In particular, the House of Lords found that the publication of the articles could have been justified as a matter of public interest, given that Ms Campbell had previously publicly denied drug use and the articles disclosed that she was being treated for drug addiction. However, the House of Lord concluded that the publication of the pictures, in combination with the articles, had been offensive and distressing for her and had breached her right to respect for her private life. As well as Pounds Sterling (GBP) 3500, the courts also ordered *Mgn Limited* to pay Ms Campbell's legal costs. Those costs amounted to over GBP 1,000,000 in total and included "success fees" agreed between Ms Campbell and her lawyers as part of a conditional fee agreement.

*Mgn Limited* contested the "success fees" before the House of Lords, arguing that their payment would breach its right to freedom of expression, given that the fees were largely disproportionate to what was awarded to Ms Campbell in damages. The House of Lords dismissed the complaint of *Mgn Limited*, finding that the existing legal regime governing the conditional fee agreements was compatible with the Convention.

*Mgn Limited* then challenged before the Judicial Taxing Officers of the House of Lords the proportionality of the success fees claimed in respect of the appeals before the House of Lords. Before a decision had been taken, however, *Mgn Limited* agreed to a settlement of the costs payable for the first House of Lords appeal in order to avoid accruing daily interest of 8%, possible further litigation and new success fees.

The Judicial Taxing Officers approved the success fees which *Mgn Limited* was asked to pay in the second House of Lords appeal and diminished only slightly the hourly rate on which they were based. A subsequent appeal of *Mgn Limited* before the House of Lords was dismissed.

## Complaints, procedure and composition of the Court

Relying on Article 10, *Mgn Limited* complained about the finding that it had breached Ms Campbell's privacy and, further, about the requirement to pay disproportionately high success fees agreed between Ms Campbell and her lawyers.

The application was lodged with the European Court of Human Rights on 18 October 2004.

Judgment was given by a Chamber of seven, composed as follows:

Ljiljana **Mijović** (Bosnia and Herzegovina), *President*,  
 Nicolas **Bratza** (the United Kingdom),  
 David Thór **Björgvinsson** (Iceland),  
 Päivi **Hirvelä** (Finland),  
 Ledi **Bianku** (Albania),  
 Nebojša **Vučinić** (Montenegro),  
 Vincent A. **de Gaetano** (Malta), *Judges*,

and also Fatoş **Araci**, *Deputy Section Registrar*.

## Decision of the Court

### Breach of privacy

The Court recalled the pre-eminent role of the press in a State governed by the rule of law. It then observed that a balance had to be made between the public interest in the publication of the articles and photographs of Ms Campbell, and the need to protect her

private life. Given that the sole purpose of the publication of the photographs and articles had been to satisfy the curiosity of a particular readership about the details of a public figure's private life, those publications had not contributed to any debate of general interest to society. In such a context, there was a lower level of protection of freedom of expression. Three separate UK courts had given detailed judgments. The domestic courts had agreed on the precise aspects of the articles which were relevant to the privacy case and on the correct case law of the European Court of Human Rights; the courts had applied those principles in some detail and had disagreed. Moreover, the House of Lords had given convincing reasons for their decision. In particular, the identified published information had been private and harmful to Ms Campbell, and the photographs added to the content of the articles, had been taken covertly and had caused her distress. Finally, the impugned publication had not been necessary to ensure the credibility of the story (drug addiction) published about her: the public interest had been already satisfied by the publication in the articles of the core facts about her addiction and treatment and adding the photographs was therefore a disproportionate breach of Ms Campbell's right to respect for her private life.

There had, therefore, not been a violation of Article 10 in respect of *Mgn Limited*.

#### Success fees

The Court observed that *Mgn Limited* had been asked to pay the "success fees" which Ms Campbell had negotiated with her lawyers.

The requirement to pay those fees had been based on domestic legislation, in particular the 1990 and 1999 Acts, the Conditional Fees Arrangement Orders 1995 and 2000 as well as the Civil Procedure Rules and the relevant Cost Practice Directions. The Court also accepted that the "success fee" agreement had sought to ensure the widest possible public access to legal services for civil litigation, including to people who would not otherwise be able to afford a lawyer.

The Court then examined whether the recoverability of substantial "success fees" against unsuccessful defendants in civil actions was reasonable and proportionate.

The Court paid particular attention to the fact that the general "success fee" scheme had been the subject of detailed and lengthy domestic public consultations initiated by the British Ministry for Justice since 2003. While there had been no legislative follow-up to the consultations' conclusions, they had identified fundamental flaws in the "success fees" scheme, especially in cases such as the present one. Those consultations (and notably the Jackson report) criticised the lack of any qualifying requirements for claimants of "success fees"; the lack of incentive for claimants to control "success fees" given that those were only payable if they won the case and often by the other losing party; the fact that often the losing party was forced to settle early despite good prospects of a successful defence only to avoid ever-mounting "success fees"; and the opportunity for lawyers in the "success fee" scheme to "cherry-pick" cases likely to succeed and to avoid claims with smaller chances of success.

As to the pressure on defendants (including different media and publishers) to settle cases which could have been defended, that represented a risk to media reporting and thus – possibly – to freedom of expression. The Ministry of Justice had acknowledged following those consultations that recoverable "success fees" rendered the costs' burden in civil litigation excessive and that the balance had swung too far in favour of claimants and against the interests of defendants, particularly in defamation and privacy cases.

Ms Campbell had been wealthy and therefore not someone who risked not having access to court on financial grounds and for whom the "success fees" scheme had been initially set up. The case of *Mgn Limited* had not entirely lacked merit given that the Court of

Appeal and two out of the five judges of the House of Lords had decided in the applicant's favour in the domestic proceedings. In addition, while the proceedings had been lengthy and somewhat complex, the "success fees" claimed in respect of the two appeals before the House of Lords alone had amounted to more than GBP 365,000.

The Court concluded that the requirement on *Mgn Limited* to pay the "success fees", which had been agreed by Ms Campbell and her solicitors, was disproportionate to the aim sought to be achieved by the introduction of the "success fee" system.

Accordingly, there had been a violation of Article 10.

### Article 41

The Court adjourned its examination of Article 41 (just satisfaction) of the Convention.

### Separate opinion

Judge Björgvinsson expressed a separate partly dissenting opinion which is annexed to the judgment.

*The judgment is available only in English.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.