



The European Convention on Human Rights does not require media to give prior notice of intended publications to those who feature in them

In today's Chamber judgment in the case **Mosley v. the United Kingdom** (application no. 48009/08), which is not final¹, the European Court of Human Rights held, unanimously, that there had been:

No violation of Article 8 (right to protection of private and family life) of the European Convention on Human Rights.

The case concerned a complaint that the United Kingdom failed to impose a legal duty on newspapers to notify the subjects of intended publications in advance to give them an opportunity to prevent such publications by seeking an interim court injunction.

Principal facts

The applicant, Max Rufus Mosley, is a British national who was born in 1940 and lives in Monaco. He is the former president of the International Automobile Federation, a non-profit association that represents the interests of motoring organisations and car users worldwide and is also the governing body for Formula One.

In March 2008, the Sunday newspaper *News of the World* published on its front page an article entitled "F1 boss has sick Nazi orgy with 5 hookers". 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.

An edited extract of the video, in addition to still images, were also published on the newspaper's website and reproduced elsewhere on the internet.

On 4 April 2008, Mr Mosley brought legal proceedings against the newspaper claiming damages for breach of confidence and invasion of privacy. In addition, he sought an injunction to restrain the *News of the World* from making available on its website the edited video footage.

On 9 April 2008, the High Court refused to grant the injunction because the material was no longer private as it had been published extensively in print and on the Internet. In subsequent privacy proceedings before the High Court, the court found that the images did not carry any Nazi connotations. Consequently there was no public interest and thus no justification for publishing that article and accompanying images, which had breached Mr Mosley's right to privacy. The court ruled that *News of the World* had to pay to Mr Mosley 60,000 GBP in damages.

¹ 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

Complaints, procedure and composition of the Court

Relying on 8 (right to private life) and Article 13 (right to an effective remedy), Mr Mosley complained that, despite the monetary compensation awarded to him by the courts, he remained a victim of Article 8 of the Convention as a result of the absence of a legal duty on the *News of the World* to notify him in advance of their intention to publish material concerning him thus giving him the opportunity to ask a court for an interim injunction and prevent the material's publication.

The application was lodged with the European Court of Human Rights on 29 September 2008.

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

Lech **Garlicki** (Poland), *President*,
 Nicolas **Bratza** (the United Kingdom),
 Ljiljana **Mijović** (Bosnia and Herzegovina),
 David Thór **Björgvinsson** (Iceland),
 Päivi **Hirvelä** (Finland),
 Ledi **Bianku** (Albania),
 Nebojša **Vučinić** (Montenegro), *Judges*,

and also Lawrence **Early**, *Section Registrar*.

Decision of the Court

Admissibility

Victim status

The British Government considered that Mr Mosley was no longer a victim of a Convention violation given, in particular, that he had been compensated by the newspaper as ordered by the UK courts: 60,000 British pounds (GBP) in damages and GBP 420,000 for legal costs.

Mr Mosley insisted that he had remained a victim of a violation by the UK of his right to privacy, as the damages awarded were unable to restore his privacy to him after millions of people in the world had seen the embarrassing material in which he featured.

The Court found that no sum of money awarded after disclosure of the material which had caused Mr Mosley humiliation could be a remedy for his specific complaint that no legal requirement existed in the UK obliging the media to give advance warning to a person of a publication related to their private life.

Consequently, Mr Mosley could claim to still be a victim of a Convention violation.

Exhaustion of domestic remedies

The Government claimed that Mr Mosley had not exhausted a number of domestic remedies before taking his complaint before the Court. In particular, they argued that he had not appealed against the UK judge's ruling on exemplary damages, that he could have pursued an account of profits claim as opposed to a claim for damages as he had done, and that he had failed to complain under the Data Protection Act about the unauthorised processing of his personal information and to seek rectification or destruction of his personal data.

Mr Mosley considered the proposed remedies irrelevant to his complaint.

The Court found that none of the remedies relied upon by the Government could have addressed Mr Mosley's specific complaint about the absence of a UK law requiring pre-notification of the publication of the article which had interfered with his right to respect for his private life.

Private life

The Court noted that the UK courts had found no Nazi element in Mr Mosley's sexual activities and had therefore concluded that there had been no public interest in, and therefore justification for, the publication of the articles and images. In addition, the newspaper had not appealed against the judgment. The Court therefore considered that the publications in question had resulted in a flagrant and unjustified invasion of Mr Mosley's private life. Given that Mr Mosley had achieved a finding in his favour before the domestic court, the Court's own assessment concerned the balancing act to be conducted between the right to privacy and the right to freedom of expression not in the circumstances of the applicant's particular case but in relation to the UK legal system.

It was clear that the UK authorities had been obliged under the Convention not only to refrain from interfering with Mr Mosley's private life, but also to take measures to ensure his effective enjoyment of that right. The question which remained to be answered was whether a legally binding pre-notification rule was required.

The Court observed that it had implicitly accepted in its earlier case law that damages obtained following a defamatory publication provided an adequate remedy for right-to-private-life breaches arising out of newspaper publications of private information.

It then recalled that States enjoyed a certain margin of appreciation in respect of the measures they put in place to protect people's right to private life. Notwithstanding the potential merits of Mr Mosley's individual case, given that a pre-notification requirement would inevitably affect political reporting and serious journalism, in addition to the sensationalist reporting at issue in Mr Mosley's case, the Court stressed that any restriction on journalism required careful scrutiny.

In the United Kingdom, the right to private life had been protected with a number of measures: there was a system of self-regulation of the press; people could claim damages in civil court proceedings; and, if individuals were aware of an intended publication touching upon their private life, they could seek an interim injunction preventing publication of the material. In addition, in the context of private life and freedom of expression, a parliamentary inquiry on privacy issues had been recently held in the UK with the participation of various interested parties, including Mr Mosley himself, and the ensuing report had rejected the need for a pre-notification requirement.

The Court further noted that Mr Mosley had not referred to a single jurisdiction in which a pre-notification requirement as such existed, nor had he indicated any international legal texts requiring States to adopt such a requirement. Last and not least, the current UK system fully corresponded to the resolutions of the Parliamentary Assembly of the Council of Europe on media and privacy.

As to the clarity of any pre-notification requirement, the Court was of the view that the concept of "private life" was sufficiently well understood for newspapers and reporters to be able to identify when a publication could infringe the right to respect for private life. It further considered that a satisfactory definition of those subject to the obligation could be found. However, any pre-notification obligation would have to allow for an exception if public interest was at stake. Thus, a newspaper could opt not to notify an individual if it believed that it could subsequently defend its decision on the basis of the public interest in the information published. The Court observed in that regard that a narrowly defined public interest exception would increase the chilling effect of any pre-notification

duty. In Mr Mosley's case, given that the *News of the World* had believed that the sexual activities they were disclosing had had Nazi overtones, hence were of public interest, they could have chosen not to notify Mr Mosley, even if a legal pre-notification requirement had been in place. Alternatively, a newspaper could choose, in any future case to which a pre-notification requirement was applied, to run the same risk and decline to notify, preferring instead to pay a subsequent fine. The Court emphasised that any pre-notification requirement would only be as strong as the sanctions imposed for failing to observe it; however, particular care had to be taken when examining constraints which might operate as a form of censorship prior to publication. Although punitive fines and criminal sanctions could be effective in encouraging pre-notification, that would have a chilling effect on journalism, even political and investigative reporting, both of which attracted a high level of protection under the Convention. That ran the risk of being incompatible with the Convention requirements of freedom of expression.

The Court concluded by recognising that the private lives of those in the public eye had become a highly lucrative commodity for certain sectors of the media. The publication of news about such people contributed to the range of information available to the public. Although the dissemination of that information was generally for the purposes of entertainment rather than education, it undoubtedly benefitted from the protection of Article 10. The Article 10 protection afforded to publications might cede to the requirements of Article 8 where the information was of a private and intimate nature and there was no public interest in its dissemination.

However, looking beyond the facts of Mr Mosley's case, and having regard to the chilling effect to which a pre-notification requirement risked giving rise, to the doubts about its effectiveness and to the wide margin of appreciation afforded to the UK in that area, the Court concluded that Article 8 did not require a legally binding pre-notification requirement. Therefore, its absence in UK law had not breached Article 8.

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.