

## Strasbourg Privacy Revolution

### Bad news for paparazzi - Strasbourg has spoken

Media intrusion on the private lives of individuals has been an important theme in recent English cases. The courts have tried to strike a careful balance between the Article 8 right to private life and the Article 10 right to freedom of expression. The boundaries of the claim in breach of confidence have been modestly extended, with a view to protecting private information. All this may be the subject of radical revision as a result of the decision of the European Court of Human Rights in *von Hannover v Germany* (judgment, 24 June 2004), the most important Strasbourg media case of recent times.

### Princess Caroline

The applicant was Princess Caroline of Monaco. She has long been an "international celebrity" whose every move has been of great interest to the tabloid press. She has brought legal actions in a number of countries to try to prevent the publication of photographs of her private life. These photographs typically showed her engaging in ordinary activities in a variety of public places. She complained that she was hounded by paparazzi who followed her every daily movement. The press was not, she argued, performing its essential role in a democratic society but was an "entertainment press", seeking to satisfy its readers' voyeuristic tendencies and make huge profits.

In a series of important privacy cases in the German courts she had been successful in restraining the publication of photographs taken of her children and photographs taken in "secluded places", but there was no remedy in respect of photographs taken in public places. Princess Caroline was what German law calls a "figure of contemporary society par excellence" and, as a result, was not entitled to privacy when she was in public places. The public had a legitimate interest in knowing how such a person behaved in public.

The German government defended its national law, and the Association of German Magazine Editors intervened in support. They (correctly) submitted that German law was half way between the powerful protections of French privacy law and the weak privacy protection in England. They went on to argue that the role of the press as watchdog could not be narrowly interpreted, and that German law struck a fair balance between privacy and freedom of expression.

### Violation of Article 8

A unanimous Court of Human Rights rejected these submissions. Their decision rested on three crucial points.

#### *'Zone of interaction'*

First, the court said that the "zone of interaction of a person with others, even in a public context" fell within the sphere of private life (para 50). As a result, there was no doubt that the publication of photographs of the applicant in her daily life fell within the scope Article 8 (para 53).

#### *Positive obligations*

Second, although the interferences were not by the State but by private bodies, Article 8 was relevant because the State owed positive obligations that "may involve the adoption of measures designed to secure respect for private life, even in the sphere of the relations of individuals between themselves" (para 57). This also applied to the protection of a person's picture against abuse.

#### *Striking a balance*

Third, although a balance had to be struck between privacy and freedom of expression when considering these positive obligations, the publication of the photographs did not contribute to public debate. The Court stressed the essential role of the press in imparting information and ideas on matters of public interest - which extended to the publication of ideas that "offend, shock or disturb" (para 58). There was, however, "a fundamental distinction ... to be made between reporting facts ... capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who ... does not exercise official functions" (para 63).

The publication of the photographs did not contribute to any debate of general interest and freedom of expression had to be given a "narrower interpretation" (paras 65-66).

#### *A "fetish of freedom of the press"*

In his concurring judgment, Judge Zupancic complained that the Court of Human Rights, under American influence, had to some extent "made a fetish of freedom of the press". He expressed the view that it was time that the pendulum swung back to a different kind of balance between what is private and what is public.

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### *Court's conclusion*

The Court unanimously found a violation of Article 8. Five of the judges gave a joint judgment. In concurring, Judges Cabral Barreto and Zupancic took a more restrictive view of the rights of celebrities to be left alone in public places - relying on the familiar concept of "reasonable expectation of privacy". They nevertheless agreed that German law did not provide sufficient Article 8 protection. The judgment will become final after three months, unless the German government makes a request for the case to be reheard by a grand chamber of 17 judges.

### **The impact on English law**

The Princess Caroline case has potentially wide-ranging consequences for English media law. Although it is not binding on the English courts, the decision must be "taken into account" under section 2 of the Human Rights Act 1998 (HRA 1998). The Court of Human Rights did not defer to the decisions of the German court, despite the fact that they had carefully considered the "balancing" issues and developed a sophisticated privacy law, stronger than the protection provided in the UK. In contrast to the cases in which privacy laws have been held to be consistent with Article 10 (eg *Société Prisma v France* judgment, 1 July 2003), the state was not afforded a "margin of appreciation". A number of important points arise.

### *Positive obligations*

The Court used the concept of "positive obligations" to extend Article 8 privacy rights into the private sphere. Such obligations mean that the state must protect private individuals against interferences in private life by other private individuals. In other words, the Convention has "horizontal effect" in this area.

The positive obligations to protect privacy fall on the court as much as on the government. As a result, the courts must protect the privacy rights of private individuals against media intrusion. HRA 1998 means that the courts must act to protect privacy in the sense in which it is understood in Princess Caroline's case. It is difficult to see how the UK could argue that the margin of appreciation would allow it to say it is providing sufficient protection for invasion of privacy to the extent required. Private life in public places

A second important point is the extension of the domain of private life into "public" but "non-official" activity. Shopping is as much part of "private life" as sitting at home watching television. This approach can be contrasted with that taken in *Campbell v MGN* ([2004]

2 WLR 1232) in which the House of Lords made it clear that publication of photographs taken in public places is actionable only in exceptional circumstances (see also *Hosking v Runting* [2004] NZCA 34). The approach of the Court of Human Rights is much closer to the strict protections of privacy available in French law.

### *Value of expression*

Third, the Court was strongly influenced by the "value" of the form of expression involved. The fact that the publications were aimed at entertainment, rather than the dissemination of information and ideas on matters of public interest, meant that Article 10 protection was considerably weakened. As was said in *Société Prisma*, an article "having the sole objective of satisfying the curiosity of a section of the public about the intimacy of the private life [of the applicants] cannot claim to contribute to any debate of general interest for society, despite the fact that they are very well known".

This point echoes the reasoning of Lady Hale in the *Campbell* case. The courts must now proceed on the basis that different Article 10 considerations apply to different types of journalism.

### *Bad news for the paparazzi*

Finally, the most obvious impact of the decision is on press photography. A clear "public interest" appears to be required to justify the publication of a photograph of a person who does not hold public office and who is not participating in an "official" event. Everyday shots of celebrities going about their daily business cannot be justified. Famous people have the right to be left alone, even when they are in public places. It is difficult to imagine a case where such pictures could be said to contribute to a debate of matters of public concern. The impact on the profession of paparazzo is likely to be substantial.

The decision also appears to require the protection of "image rights". Even if the taking of a particular photograph is not a wrongful interference with private life, Article 8 requires the state (and its courts) to protect that photograph against "abuse". It seems that the courts must now develop protection equivalent to the second limb of the US privacy tort: the appropriation of a person's name or likeness.

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### Future rights of privacy

Although the case deals only with photography, there is a strong argument that the same approach must also be applied to stories about a person's private life. This seems to follow from earlier cases such as *Société Prisma*. It means that a failure by the courts to protect individuals against the publication of such stories for "entertainment purposes" with no public interest would also breach Article 8. It is difficult to see how this can be reconciled with recent English cases such as *A v B plc* ([2003] QB 195), where the Court of Appeal discharged an injunction against the publication of information about the extra-marital relationships of footballer Gary Flitcroft, or the decision in relation to Lord Coe, who failed in May to obtain an injunction stopping Sunday newspapers publishing details of a secret affair.

Princess Caroline's case is a strong and clear warning from Strasbourg to the English courts that they have a positive obligation to protect the privacy rights of individuals. The Convention on Human Rights requires the development of a domestic law that protects not only "private life" but also the "right to control the use of one's image". Strasbourg has spoken, and it now remains to be seen how the English courts will react. Media law is heading for a serious shake up.

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