MAX RUFUS MOSLEY v UNITED KINGDOM (Application no. 48009/08)

## SUBMISSIONS ON BEHALF OF GUARDIAN NEWS AND MEDIA LIMITED ("GNM") AS A THIRD PARTY INTERVENER

*Introductory*

1. These submissions are made by permission granted by the President of the Chamber, under Rule 44 of the Rules of Court, to address the general principles involved in the solution of the case. GNM are grateful for this opportunity. GNM are also grateful to the independent legal experts who have advised on the position in their jurisdictions in the preparation of these submissions[1]. If the Court decides to convene a hearing, GNM would request the Court to give permission for them to be represented at the hearing.

2. The Editor of *The Guardian*, Alan Rusbridger, has publicly recognised the importance of maintaining a fair balance between the competing rights to free expression and respect for private life, as a matter of law and responsible journalism undertaken in accordance with the ethics of the profession[2]. He has emphasised, however, in recent evidence accepted by a Parliamentary Select Committee[3], his experience of the potentially draconian and costly effects of fighting legal battles arising from injunctions which prevented *The Guardian* from publishing information that it believed was important to make known to the public.

3. Much as one may have sympathy for the present Applicant, whose right to respect for his private life has already been held to have been violated, his case fails to recognise that a fair balance has to be struck, and has been struck in English law, between competing positive obligations imposed on Contracting States by both Articles 8 and 10. If his claim were to be accepted by the Court, what he seeks would give priority to Article 8 rights over those under Article 10, and thereby seriously and disproportionately fetter the right of the press to gather and publish, and of the public to receive, information and opinions in the public interest. The positive duty for which the Applicant contends would have a serious and unjustified chilling effect[4] upon the practical enjoyment of the right to free expression[5]. This is a classic example of

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[1] They are (omitting their titles): Darian Pavli (Albania), Dirk Voorhoof (Belgium), Roger Errera (France), Christian Tomuschat (Germany), Miklos Haraszti (Hungary), Francesca Fanucci (Italy), Willem Kortals Altes and Wooter Hins (Netherlands), Adam Bodner and Dominika Bychawska-Siniarska (Poland), Andrei Richter (Russia, Armenia, Azerbaijan, Georgia, Latvia, Lithuania, Moldova, Ukraine), Ulf burg (Sweden) and David A Schulz (USA). GNM are also grateful to Sandra Coliver, Senior Legal Officer for the Freedom of Information and Expression Programme of the Open Society Institute Justice Initiative, for her assistance.

[2] The Committee on the Law of Defamation, chaired by Lord Porter, noted in its report that invasions of personal privacy by the media should be dealt with as a "problem of internal discipline to be regulated by an understanding between the proprietorial and journalistic organisations", and that the offence "is primarily one against good taste": Report, Cmnd. 7536, 1948, §26. However, these days, the problem is tackled not only by self-regulation but also by domestic law.

[3] See House of Commons Culture Media & Sport Committee Report, "Press Standards, Privacy and Libel", Second Report of Session 2009-2010, Volume 1, published 24 February 2010, at §85. The Committee has also rejected the Applicant's claim for a legally binding pre-notification requirement.

[4] The Court has recognised the 'chilling effect' which unnecessary restrictions may have upon the exercise of freedom of expression: see eg., Application No. 33348/96, *Cump n and Maz re v Romania* (2005) 41 EHRR 14, §114; Application No. 14888/03, *Godlevskiy v Russia*, Judgment of 23 October 2008, §36; *Armoniene v Lithuania* (2009) 48 EHRR 53, §47. The 'chilling effect' concept was first recognised by Justice William Brennan Jr giving the Opinion of the United States

the need to heed the well-known judicial warning that hard cases, like great cases, make bad law "because of some accident of immediate and overwhelming interest which appeals to the feelings and distorts the judgment." [6]

*The nature and far-reaching implications of the Applicant's claim*

4. The Applicant contends[7] that:

> "The United Kingdom is in breach of the positive duty under Article 8, read on its own and together with Article 13, by failing to impose any duty on newspapers and other media, enforceable by criminal or regulatory sanctions, to give prior notification to a person of a publication which will infringe their Article 8 right to private life by publishing private information so that the person may seek an injunction from a court prior to publication."

5. The central issue therefore is not whether an interim injunction may be ordered to restrain the publication of private facts by the media; for privacy injunctions are in practice granted in the UK[8] and the other Contracting States, if not in the USA. The central issue raised by the Applicant is whether the Convention requires the UK and other States to introduce a legally enforceable duty of pre-publication notification.

6. The way in which the Applicant's claim is formulated is rooted in the facts of his case, which is why his claim is confined to a duty imposed only on the media and only in relation to a threatened breach of the right to respect for private life. However, as a matter of principle and practice, the duty for which the Applicant contends could not be confined in that way. The true nature of what is at stake in terms of the adverse impact upon the practical enjoyment of the right to free expression by the media and the public is much more extensive.

7. This is for two main reasons. *First*, such an alleged breach may involve not only the media but any public authority or non-governmental organisation, or private individual. *Secondly*, it is not only in cases involving a threatened breach of the right to respect for private life that an interim injunction may be sought to preserve the status quo and protect the claimant's interests. An interim injunction, like any other prior restraint, may seriously interfere with freedom of expression because it may be sought and ordered in pursuit of any of the legitimate aims prescribed by Article 10 (2)[9]. If the Applicant's contention were accepted, the

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Supreme Court in *New York Times Co. v Sullivan*, 376 U.S. 254, (1964), and was cited with approval by the House of Lords in *Derbyshire County Council v Times Newspapers Ltd.* [1993] AC 534, at 548, *per* Lord Keith of Kinkel.

[5] As Hoffmann LJ (as he then was) warned in *R v Central Independent Television Plc* [1994] Fam 192, 202-204:"Publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which "right-thinking people" regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute ... the principle that the press is free from both government and judicial control is more important than the particular case."

[6] *Northern Securities Co. v United States* 193 U.S. 197, 400-01 (1904), *per* Holmes J.

[7] Application, § 15(10).

[8] Indeed, it is the way in which the English courts have developed a cause of action to give effect to rights protected under Article 8 which has led to the attacks on the Human Rights Act 1998 and on the courts by some sections of the media, referred to in the Applicant's Supplemental Statement, at §§57-60. See also Lester, Pannick and Herberg, *Human Rights Law and Practice* (3rd. ed., 2009) §2.12, note 1.

[9] Eg., a restraint to protect the authority and independence of the judiciary by preventing a newspaper from publishing an article attributing negligence to the manufacturers and distributors of the drug 'Thalidomide', Application. No.6538/74, *Sunday Times v United Kingdom (No.1)* (1979) 2 EHRR 245; the confiscation of an applicant's cassettes, books,

UK would, as a matter of logic and principle, have to change the law so as to require prior notification before publication to protect *any* of these legitimate aims.

*The dangers inherent in prior restraints on publication*

8. The Applicant refers[10] to the full Court's judgment in *The Observer and the Guardian v United Kingdom*[11], which recognised that the reasons given for granting interim injunctions in that case to protect national security were relevant. However, the key passage in that judgment, for present purposes, is where the Court stated[12] as a matter of principle that

> "...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."[13]

9. The Court's statement of principle in the *Observer* and *Guardian* case related to an injunction to restrain a breach of confidence granted in the interests of national security - a particularly compelling public interest.

10. The House of Lords has recently reaffirmed the fact that prior restraints are "seriously inimical to freedom of political communication"[14] and that the central importance of Article 10 in the Convention regime means that a newspaper's "[f]reedom to publish free of unjustifiable restraint must indeed be recognised as a distinguishing feature of the sort of society which the Convention seeks to promote"[15]. It is significant that nowhere in the Applicant's submissions does he acknowledge the dangers to freedom of expression inherent in prior restraints, dangers well-recognised in the Court's constant jurisprudence. His approach would give absolute protection to the right to respect for personal privacy at the pre-publication stage by effectively ensuring that an application could always be made for an interim injunction to prevent publication, thus creating an imbalance between the competing rights and freedoms previously unknown in English law or in the laws of other modern democratic societies.

*Legal remedies in defamation and privacy cases*

11. The Applicant notes[16] that the Court has recognised that the right to reputation figures among the rights safeguarded by Article 8. It is unclear whether the Applicant would argue therefore

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diary and map alleged to promote racist and anti-Turkish propaganda, Application No. 28940/95, *Foka v Turkey*, Judgment of 24 June 2008, §102-§109); the seizure of pamphlets to protect reputation and prevent crime, Application No.36404/97, *Soini v Finland*, Judgment of 17 January 2006, §§52-58; and the refusal of a classification certificate for a video work so as to protect the rights of others (namely, the treatment of a religious subject in such a manner as to cause public outrage), Application No. 17419/90, *Wingrove v United Kingdom* (1997) 24 EHRR 1, §43-§53.

[10] Supplemental Statement, §30.

[11] (1992) 14 EHRR 153, at §62.

[12] §60. See also *Wingrove v United Kingdom* (1997) 24 EHRR 1, §58, and Application no.40287/98, *Alinak v Turkey*, Judgment of 29 March 2005, at §37

[13] In their partly dissenting Opinion, Judges de Meyer, Pettiti, Russo, Foighel and Bigi stated that: "Under no circumstances...can prior restraint, even in the form of judicial injunctions, either temporary or permanent, be accepted, except in what the Convention describes as a 'time of war or other public emergency threatening the life of the nation' and, even then, only 'to the extent strictly required by the exigencies of the situation.'" Judges Pettiti, Pinheiro Farinha,, Walsh, de Meyer, Martens, and Morenilla also gave Dissenting Opinions for finding a lack of necessity for the granting of interlocutory injunctions against the media in the circumstances of the case.

[14] *R (Pro Life) Alliance v BBC* [2004] 1 AC 185, §8, *per* Lord Nicholls of Birkenhead.

[15] *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359, *per* Lord Bingham at §18.

[16] Supplemental Statement, §75.

that the pre-publication rule for which he contends should also apply to defamation law as much as to wider torts concerning the unauthorised publication of private information. It was the risk of conflating the two which led the (Younger) Committee on Privacy to warn of the "real threat to freedom of speech if the safeguards for it that have been built into the law of defamation were to be put in jeopardy by the process of subsuming defamation into a wider tort..."[17]. Care is needed to avoid upsetting "the careful balance between private interests and freedom of speech which the law of defamation and associated torts have struck."[18]

12. In *defamation* cases, because of the importance attached by the common law to freedom of expression, English courts observe a general common law rule[19] that applications for interim injunctions should be refused where the defendant swears that he will seek to justify the defamatory imputation at trial, and the defence cannot be shown to be a sham or to have no chance of success. If the claimant succeeds at trial, the usual remedy will be for damages, but in some cases a permanent injunction may also be ordered to prevent further publication. As the authoritative work on defamation has explained[20],

> "The rule in *Bonnard v Perryman* is long established, straightforward to apply and in harmony with the importance attached by the Convention and the European Court of Human Rights to the right to freedom of expression. Moreover the rule releases the court from the usually impossible task of investigating summarily the merits of the defence of justification which is so often dependent on the credibility of witnesses and the detailed consideration of documents."

13. English law also now recognises, in accordance with Article 10, that where the media publish defamatory allegations whose truth cannot be proved, they have a public interest defence (as part of the defence known as "qualified privilege") if they can show that they have acted fairly and responsibly in accordance with relevant professional standards and that the information is of public interest[21]. One factor to be taken into account is whether the newspaper has notified the claimant so as to verify the accuracy of the proposed publication and to provide the chance to comment. However, although it is a strong incentive[22], pre-publication notification is not, as the Applicant appears to suggest[23], a necessary condition or requirement, still less a legal duty, for the operation of the public interest defence. Other factors are also to be taken into account, including the urgency of the matter, since news is a perishable commodity, the nature of the information, and the extent to which it is a matter of public concern[24]. It is submitted that this fully accords with the legal principles developed by the Court[25].

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[17] Report of the Committee on Privacy, Chairman, The Rt. Hon. Kenneth Younger, Cmnd. 5012, July 1972, §71, citing also the Report of the Porter Committee on the Law of Defamation, Cmnd. 7536, 1947, §§24-26, quoted at p.41 of the Younger Report.

[18] *Midland Metals Overseas Pte Ltd v The Christchurch Press Co Ltd* [2002] 2 NZLR 289, §65, *per* Tipping J.

[19] Known as the rule in *Bonnard v Perryman* [1891] 2 Ch 269, affirmed, in the context of the Human Rights Act 1998, in *Greene v Associated Newspapers* [2005] QB 972 (CA).

[20] Gatley on Libel and Slander, 11th ed 2008, §27.21, note 90, approved by Tugendhat J in *Coys Ltd v Autocherish Ltd* [2004] EMLR 25, §§56-7.

[21] *Reynolds v Times Newspapers* [2001] 2 AC 127 (HL), at 205, *per* Lord Nicholls of Birkenhead.

[22] As the Applicant notes in the Supplemental Statement, §70.

[23] Supplemental Statement §70.

[24] See *Reynolds v Times Newspapers* [2001] 2 AC 127, at 205.

[25] See *Galloway v Telegraph Newspapers* [2006] EMLR 11, at §80 confirming that this so. See further *Jameel v Wall Street Journal Europe SPRL* [2007] 1 AC 359 and Application No. 28577/05, *Wall Street Journal Europe SPRL v United Kingdom* (2009) 48 EHRR SE19.

14. This is also consistent with the approach which the English courts have adopted in developing the distinct tort of "misuse of private information" (within the law of confidence) to give effect to their positive obligations under Article 8 and 10[26]. Consistent with Strasbourg jurisprudence, the basic elements of the tort require the courts to ask (i) whether, in all the circumstances of the case, a claimant has a 'reasonable expectation of privacy' in respect of disclosed facts (or facts threatened to be disclosed) in order to engage Article 8[27]; and, if so, (ii) whether any countervailing public interest (under Article 8(2) or 10) justifies interference with the claimant's prima facie Art. 8 rights[28]. The House of Lords has called the second of these questions the "ultimate balancing exercise", requiring an "intense focus" on competing rights being claimed under the two Articles, and has developed important circumstance-specific principles as to how this exercise is to be carried out[29].

15. As far as injunctive relief is concerned, section 12(3) of the Human Rights Act 1998 requires that, in a freedom of speech case, no 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." There is no single, rigid standard governing all applications for interim restraining orders. The court must not make an interim restraint order unless the claimant shows that he is more likely than not to succeed at trial. But circumstances may arise "where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice...Circumstances where this may be so include...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..."[30]. This is therefore a flexible, circumstance-specific standard.

16. English law also provides further effective remedies for interference with privacy rights under the Data Protection Act 1998 ("DPA 1998")[31], which implements the requirements of the EC Data Protection Directive[32]. The scheme of the DPA 1998 (consistent with the Directive and the Convention) strikes a fair balance between personal data rights and freedom of expression, in particular by granting *specific exemption* in section 32 for the processing of personal data for the 'special purpose' of journalism[33] up to, including and after publication of news material[34].

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[26] See *Campbell v MGN Ltd.* [2004] 2 AC 457 (HL), *per* Lord Nicholls at §§11-22 where he explained that the law of confidence had shaken off the limiting constraint of a need for a pre-existing confidential relationship, and that the values enshrined in Articles 8 and 10 are now part of the cause of action for breach of confidence to protect individuals' rights to respect for their private life.

[27] This initial requirement is arguably less strict than the "highly offensive to a reasonable person" test developed in other common law jurisdictions, such as New Zealand and Australia, by reference to the United States' Restatement of Torts: see, eg., *Hosking & Hosking v Simon Runting and Anor* [2004] NZCA 34, §§66-68, 127, and 158, *per* Gault P. See further *Campbell v MGN Ltd.* [2004] 2 AC 457 (HL), per Lord Nicholls at §22. This less strict threshold is therefore designed to give more latitude to protecting Article 8 rights under the Convention.

[28] See, eg., *Campbell v MGN Ltd.* [2004] 2 AC 457 (HL), per Baroness Hale at §137; *Murray v Express Newspapers* [2009] Ch. 481, at §§35-36 & 40, *Browne v Associated Newspapers Ltd* [2008] QB 103 (CA), at §§37-38, *The Author of a Blog v Times Newspapers* [2009] EWHC 1358 (QB), per Eady J at §7, and *John Terry (LNS) v Persons Unknown* [2010] EWHC 119 (QB), §§55-56.

[29] See *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, per Lord Steyn at §17.

[30] *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253 (HL), §22, *per* Lord Nicholls of Birkenhead.

[31] Under the DPA 1998, a individual can request access to "personal data" (encompassing "sensitive personal data", per s.2) which are processed by "data controllers" (s.7), require such controllers to stop processing their data if it is likely to cause unwarranted damage or distress to that individual (s.10), ask a court to order rectification, blocking, erasure, or destruction of inaccurate personal data (s.14), or seek compensation for damage caused by reason of a breach of the requirements and data protection principles under the DPA 1998 (s.13).

[32] Directive 95/46/EC

[33] Section 3(a) DPA 1998. See also Article 9 of the Directive.

[34] See *Campbell v MGN* [2003] QB 633 (CA), §§107-130, where the Court of Appeal explained the "good reasons" for the section 32 exemption: "[The core provisions of the DPA] are not appropriate for the data processing which will normally

Section 32(4) and (5) impose a procedural stay on certain proceedings against journalist data controllers under the DPA 1998, which in effect prevents the merits of those proceedings being determined until *after* publication. The purpose of these provisions is "to prevent the restriction of freedom of expression that might otherwise result from gagging injunctions"[35]. This particular statutory safeguard for the press and its freedom of expression would be undermined by any generally applicable obligation to require the media to take the initiative of pre-notifying persons whose privacy interests might be infringed by a journalistic publication, so that they could seek injunctive relief and then (conceivably) initiate proceedings under the DPA 1998.

17. Professor Gavin Phillipson, whose argument closely matches that now presented to the Court on the Applicant's behalf, contends[36] that there is

> "more or less universal agreement that in most cases involving unauthorised disclosure of sensitive personal information, an injunction is the only effective remedy."

However, the Court's jurisprudence to which he refers[37] does not support his contention[38]; and, unlike the applicant, Professor Phillipson recognises the dangers of imposing a blanket pre-notification requirement, accepting that the issue is necessarily dependent on the circumstances[39]. In any event, the jurisprudence of New Zealand, for example, has recognised the primary remedy for invasion of privacy as being an award of damages, rather than an injunction[40].

18. English courts adopt a flexible approach to the remedies to be given, having regard to the particular context and the elements of the wrongdoing. For example, in the recent decision in the English High Court in the *John Terry* case[41], the captain of the English football team

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be an incident of journalism...The speed with which these [data processing] operations have to be carried out if a newspaper is to publish news renders it impractical to comply with many of the data processing principles and the conditions in Schedules 2 and 3, including the requirement that the data subject has given his consent to the processing... Furthermore, the requirements of the Act, in the absence of section 32, would impose restrictions on the media which would radically restrict the freedom of the press...": per Lord Phillips MR at §§121-123. (The Court of Appeal's decision was overturned by a majority of the House of Lords but not in relation to its consideration of the DPA 1998.)

[35] See again *Campbell v MGN* [2003] QB 633 (CA), per Lord Phillips MR at §116.

[36] "Max Mosley goes to Strasbourg: Article 8, Claimant Notification and Interim Injunctions", [2009] 1 Journal of Media Law 73, at 81.

[37] At 79-81.

[38] *Armoniene v Lithuania* (2009) 48 EHRR 53 concerned the maximum limit of financial compensation available in domestic law, but did not suggest that damages as such were a less effective type of remedy than the alternative of injunctive relief, let alone that injunctive relief could only be effective with prior notification. *I v Finland* (2009) 48 EHRR 31 concerned the adequacy of safeguards to secure against access to medical records: a very different context.

[39] Phillipson acknowledges (at 95) that if the English courts were to follow what he calls the 'absolutist' approach to infringements of privacy in *Von Hannover v Germany* (2005) 40 EHRR 1, then the notification requirement could become "onerous indeed [since] every time it was proposed to publish a photograph of an individual without [that person's] consent..., the person would have to be contacted in advance of publication" to give them the opportunity to apply for an injunction. For this reason, Phillipson goes on to accept, again unlike the Applicant, that any pre-notification requirement may have to be adapted so that "it did not apply in every case, but only where the material would be seriously invasive of privacy...". This necessarily recognises the need to leave the issue to the editorial discretion of the publisher in the first place, on a circumstance-specific basis.

[40] See, for example, the New Zealand Court of Appeal's decision in *Hosking & Hosking v Simon Runting and Anor* [2004] NZCA 34, per Keith J at §258 in his concurring judgment, with which Anderson J agreed: "I see the remedy for invasion of privacy as being primarily an award of damages. Prior restraint by injunction...will be possible but should, in my view, be confined to cases which are both severe in likely effect and clear in likely outcome..."

[41] *John Terry (LNS) v Persons Unknown* [2010] EWHC 119 *per* Tugendhat J.

(referred to anonymously in the judgment as "LNS") successfully applied for an interim injunction (without notice to the press) to restrain publication to the world of details of his relationship with the ex-partner of a fellow team mate. However, Tugendhat J later discharged the injunction, having concluded among other things that damages would be an adequate remedy in the circumstances of the case. He observed that[42]

> "This is not a case where, on the evidence before me, the potential adverse consequences are particularly grave. On the evidence, ... I do not think it likely that LNS regards as particularly sensitive information of the kind that is sought to be protected. As Eady J has observed in *Mosley* [26], different people have different views on matters of conduct. But since the attributes of the applicant are amongst the relevant circumstances, the less sensitive the information is considered by the applicant to be, and the more robust the personality of the applicant, and the wider the information has already spread in the world in which the applicant lives and works, the less the court may find a need to interfere with the freedom of expression of others by means of an injunction. The test includes proportionality. Damages may be an adequate remedy in some cases, if not in all." [Emphasis added]

19. This is a recent and important statement of principle from a judge experienced in privacy and defamation law. It undermines the Applicant's assertion[43], echoing Professor Phillipson, that there is "universal support" amongst the judiciary (as well as academics) that an injunction restraining the original publication of private or confidential information is the *only* effective remedy for a breach of Article 8 rights in all cases[44]. More importantly, however, the fact that John Terry was initially able to secure a wide ranging injunction purely on the basis of "rumours" circulating among the sporting community concerning his private life[45] contradicts the Applicant's further argument that injunctive relief can only be an effective remedy if combined with an obligation on the press to pre-notify. John Terry needed no advance warning to protect his Article 8 rights. Furthermore, the *John Terry* case also illustrates that an injunction can be an over-effective and disproportionate remedy as the interim order which he managed to persuade a court to grant (commonly referred to by newspapers as a 'super injunction') went so far as to seal the court file and prevent the press from even reporting the fact that an injunction had been made: see judgment at §16- §26.

*The unworkable nature of a pre-publication duty to notify*

20. The Applicant's claim refers to "prior notification to a person of a publication which *will* infringe their Article 8 right to private life by publishing private information" (emphasis added). This is question-begging, and does not recognise that, where the public interest is

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[42] Judgment §127.

[43] Supplemental Statement, §25.

[44] It should also be noted that in *Douglas v Hello! Ltd (No 3)* [2006] QB 125 (CA), on which the Applicant further relies at §28 of his Supplemental Statement, and which was reversed in part by the House of Lords on appeal (on other grounds), the Court of Appeal accepted at §254 that "Of course, even where a claimant has a very strong case indeed for contending that publication of information would infringe his privacy, there may be good reasons for refusing an interlocutory injunction", which would leave redress to an award of damages. It was simply that on the facts of that case, where Hello! magazine had published unauthorised photographs of a celebrity wedding in circumstances where the celebrities had already signed an agreement for the publication rights with a rival magazine, damages (particularly in the sum of £14,600) could not fairly be regarded as adequate, so the court considered that the earlier injunction which had originally been granted should not have been discharged on appeal. The court did not state (or imply) a judicial consensus that an injunction was always the only effective remedy for all cases of infringement of privacy, as the Applicant appears to contend.

[45] See judgment, §§28-29

asserted, the publisher may well have a justifiable public interest defence. While it may well be desirable that there should normally be consultation between a media organisation and someone in the Applicant's position before the organisation publishes information that might include matters capable of being protected under Article 8, it is not right to impose on such organisations a legal requirement that they should notify beforehand. That is a matter on which an editor should and would be in a position to form his or her own judgment[46]. It would be entirely unworkable (and so inconsistent with the values of practicality and effectiveness[47]) to expect a newspaper in effect to seek permission to publish from a duty judge as its deadlines approach. Furthermore, imposing a general obligation to pre-notify on the press is fundamentally inconsistent with the concept of recognising (and trusting) responsible journalistic freedom which the Court has consistently emphasised[48]. It cannot sensibly be argued (as the Applicant does[49]) that the concept of a 'proviso' that journalists should act in good faith in order to provide accurate and reliable information in accordance the ethics of journalism necessarily or inherently encompasses a blanket obligation to pre-notify.

21. The House of Commons Committee on Culture Media and Sport's Report on *Press Standards, Privacy and Libel* has also recently rejected[50] the Applicant's proposal for mandatory pre-notification, having carefully considered his specific case. The Committee noted[51] that, if compulsory pre-notification were introduced, others besides newspapers would be affected, and finally concluded that "a legal or unconditional requirement to pre-notify would be ineffective, due to what we accept is the need for a "public interest" exception...", which would operate on a circumstance specific basis[52]. The Committee accepted that "pre-notification, in the form of giving opportunity to comment, is the norm across the industry."[53]

*The absence of legal recognition of a pre-publication duty across most Contracting States*

22. Even though they all give legal protection to the right to respect for private life, no such duty has been recognised in the domestic legal order of most modern democratic societies,

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[46] Cf., Application No.5380/07, *Karsai v Hungary*, Judgment of 1 December 2009, §28. See also *Campbell v MGN* [2004] 2 AC 457, *per* Lord Hoffman (dissenting) at §59 & §62: "...judges are not newspaper editors.... it would be inconsistent with the approach which has been taken by the courts in a number of recent landmark cases for a newspaper to be held strictly liable for exceeding what a judge considers to have been necessary. The practical exigencies of journalism demand that some latitude must be given. Editorial decisions have to be made quickly and with less information than is available to a court which afterwards reviews the matter at leisure..."

[47] Recognised in such cases at *I v Finland* (2009) 48 EHRR 31, §47-§48.

[48] See, eg. Application No. 56767/00, *Selisto v Finland* (2006) 42 EHRR 8, §59

[49] Supplemental Statement, §74, relying on Application No. 21980/93 *Bladet Tromsø & Stensaas v Norway* (2000) 29 EHRR 125, §65

[50] Second Report of Session 2009-10, published on 24 February 2010, §§77-93.

[51] *Ibid.* §87, citing Global Witness, a non-govermental organisation investigating profiteering and human rights abuses resulting from exploitation of natural resources, as having said that such a duty could put their staff and sources in danger.

[52] Instead of a legal requirement, the Committee recommended that the self-regulatory body - the Press Complaints Commission - should amend its Code (set out in the Court's Statement of Facts, Part B) to include a qualified requirement that journalists should normally notify the subject of their articles prior to publication, subject to a 'public interest' test, and to provide guidance for journalists and editors on pre-notifying in the Editors' Codebook. The Committee also recommended that failure to pre-notify should be an aggravating factor in assessing damages where there is no public interest in publication. To balance this, the Committee further recommended the development of a fast track procedure for a final decision where an interim injunction banning publication of a story has been granted, or where a court refusal has been appealed.

[53] *Ibid*, §91

including most Contracting States, whether based on the common law[54] or on civil law systems[55], because of the importance they give to the protection of free expression and freedom of the press. Nor does the Court's jurisprudence support the imposition of such a duty[56]

*The margin of appreciation*

23. Article 8 imposes certain positive obligations on the State to adopt measures designed to secure Article 8 rights even in the sphere of relations between individuals. It does not simply require (by way of negative obligation) the State to abstain from arbitrarily interfering with the individual's right to respect for his or her private and family life under Article 8(1)[57]. Whether the case is examined in the context of the State's positive or negative obligations, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in both cases the State enjoys a margin of appreciation which varies in accordance with the nature of the issues and the importance of the interests at stake.[58] Here there is an international consensus among the great majority of Contracting States against the imposition of a duty such as is contended for by the Applicant, because of the importance of the right to freedom of expression. Accordingly, a wide margin of appreciation should be accorded to the UK as to whether and in what circumstances to permit the imposition of prior restraints on free expression. It is submitted that the English courts and the legislative and executive branches of government, have given proper effect to the positive obligations inherent in Articles 8 and 10[59] and have struck a fair balance between the competing Convention rights and freedoms.

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[54] Eg., in Australia, Canada, Ireland, New Zealand, South Africa, the UK, and the USA. The comparative common law position regarding the protection of personal privacy was usefully reviewed by the Court of Appeal of New Zealand in the leading judgment of Gault P. in *Hosking & Hosking v Simon Runting and Anor* [2004] NZCA 34. Among these common law jurisdictions, only in the United States is such primacy given to free expression and freedom of the press protected by the First Amendment to the U.S. Constitution that there is scant constitutional protection of the right to personal privacy in relations to the media: see *Time Inc. v Hill* 385 U.S. 374 (1967) and the critical analysis by the distinguished commentator, Anthony Lewis, in *Make No Law: The Sullivan Case and the First Amendment* (1991), Chapter 17. In the United States privacy is protected primarily as a matter of common law, because neither the U.S. Constitution nor the constitutions of most States contain any explicit recognition of a general right of privacy. *See* D. Schulz and A. Kissinger, "Policing Privacy: How U.S. Law Navigates the Boundary Between Free Speech and Private Facts," MEDIA LAW RESOURCE CENTER BULLETIN (September 2007) at 30-32.

[55] Eg., in Belgium, France, Georgia, Germany, Hungary, Italy, Sweden, and The Netherlands. However, Article 49 of the Russian Statute on the Mass Media provides, as regards the Duties of Journalists, that "The journalist shall be obliged to obtain the consent of a private citizen of his lawful representatives (except where it is necessary to protect public interests) to the spread in a mass medium of information about his private life." Similar provisions are to be found in Albania, Azerbaijan, Latvia, Lithuania, Moldova, Poland, and Ukraine, requiring prior notice, at least where the public interest is not implicated, without defining the meaning of 'public interest'.

[56] Even the two Resolutions of the Parliamentary Assembly of the Council of Europe, cited by the Court's Statement of Facts, Part C, do not suggest the imposition of a duty of prior notification.

[57] See eg., Application no.59320/00, *Von Hannover v Germany* (2005) 40 EHRR 1 at §57; *Armoniene v Lithuania* (2009) 48 EHRR 53 at §36.

[58] *Evans v United Kingdom* (2008) 46 EHRR 34, at §59 & §§75 & 77, where the Court said that "[t]here will also usually be a wide margin [of appreciation] if the State is required to strike a balance between competing private and public interests and Convention rights": §77.

[59] The English courts have recently been careful to strike a fair balance between positive obligations under Articles 8 and 10 in applying new rules enacted to permit access by the media to family proceedings (subject to safeguards) which used to be absolutely private: see *Re Child X (Resident & Contact – Rights of Media Attendance)* [2009] EMLR 26, per Sir Mark Potter P (President of the Family Division). In the case of children, Parliament has already made specific statutory provision preventing the press from identifying minors in family proceedings: see s.97 of the Children Act 1989 & s.12 of the Administration of Justice Act 1960. Family courts deal with very intimate, personal details in deeply emotional cases which is why the media are subject to specific restrictions on publishing information that could lead to a child being identified in relation to proceedings. Similar restrictions apply in rape cases and the youth courts.

*The draconian effects of a pre-publication duty*

24. The imposition of such a duty as a matter of Convention law would have a truly draconian effect on the media acting in the public interest as an independent public watchdog[60], and would distort the fair balances struck within the domestic legal order not only of the United Kingdom, but indirectly of each Contracting State by operation of the *erga omnes* principle.

25. The effect of the Applicant's contention would amount to giving the courts the power to prevent publication and to decide what is published: a form of judicial licensing and a wholly disproportionate, stringent restriction upon freedom of expression which would have a severe chilling effect.

26. This chilling effect would be particularly severe in the context of *political* speech and debate, which the Court has consistently emphasised deserves higher levels of protection[61]. The news media would be under a general obligation to contact a politician or government official whenever they sought to publish critical stories considered justifiably to be in the public interest, so as to gain permission to publish.

*Conclusion*

27. The legal duty for which the Applicant contends is not required by Article 8 and is inconsistent with the Convention right to freedom of expression. The availability in English domestic law of a combination of injunctive relief and the ability to sue for damages after the event is proportionate and offers the Applicant and others similarly situated an adequate and effective domestic remedy in terms of Article 13 of the Convention. In practice, injunctive relief is usually available and will in itself be an effective remedy.

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[60] See, eg., Application No.33348/96, *Cumpănă and Mazăre v Romania* (2005) 41 EHRR 14, §§113-14; Application No. 56767/00, *Selisto v Finland* (2006) 42 EHRR 8, §48; and Applications 3002/03 and 23676/03, *Times Newspapers Ltd (Nos. 1 & 2) v United Kingdom*, Judgment of 10 March 2009, §§40-41.

[61] See, eg., Application No. 9815/82, *Lingens v Austria* (1986) 8 EHRR 407, §§41-42, and Application No. 20834/92 *Oberschlick v Austria (No. 2)* (1998) 25 EHRR 357, §29, and Application No. 73219/01, *Filatenko v Russia* (2010) 50 EHRR 35, §40.