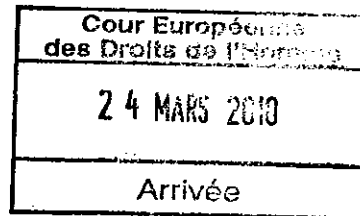


In the Case of

**Mosley v United Kingdom**  
**Application No. 48009/08**



*A Submission to the European Court of Human Rights 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, Media Law Resource Centre and Global Witness.*

**23 March 2010**

**For the Interveners:**

Mark Stephens  
Finers Stephens  
Innocent LLP  
179 Great Portland  
Street  
London W1W 5LS  
+44 (0)20 7323 4000

Geoffrey Robertson  
QC  
Doughty Street  
Chambers  
London

Counsel for Media  
Legal Defence  
Initiative  
Peter Noorlander

**IN THE EUROPEAN COURT OF HUMAN RIGHTS**

**Application No. 48009/08**

***Mosley v United Kingdom***

**WRITTEN COMMENTS OF**

---

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 (A.I.P.) Foundation

Global Witness

Media Law Resource Centre

---

Pursuant to leave granted on 1 February 2010 by the President of the Grand Chamber under Rule 44(2) of the Rules of the Court, the above named organisations hereby submit written comments on the principles involved in the solution to the case, as identified in the 'questions to the parties' on 22 October 2009.

**INTRODUCTION**

***I believe that newsworthiness is a firm realisation of the fact that there's nothing so much the average Englishman enjoys on a Sunday morning - particularly a Sunday morning - as to read a bit of dirt.***

Sir Melford Stevenson QC, High Court judge in *The Bounds of Freedom* (Constable, 1980), page 34.

1. The interveners represent a wide range of media organisations, operating in the UK and throughout Europe, and public interest organisations concerned that the legal system should not impede the publication of the truth in relation to any matter of public interest. The Claimant is a wealthy international public figure with a penchant for satisfying his sexual desires by beating women, and being beaten by them. He pays prostitutes to engage with him in mildly sado-masochistic orgies, and campaigns for a law that will enable the truth about such 'private' conduct to remain secret, namely a statutory requirement to give advance notice several days before anyone's privacy is (even arguably) infringed so that an injunction can be obtained banning publication.
  
2. Intervenors point out (as does a recent UK Parliamentary Committee) that any such advance notice requirement on the media would be a serious incursion on freedom of expression guaranteed by Article 10. In these proceedings, however, the Respondent called upon to defend free speech is, under the procedural rules, none other than the United Kingdom, which has been demonstrated to be amongst the worst violators of free speech in Europe. The cases in which the UK government has been found to have breached Article 10 are numerous, from *Golder v United Kingdom*<sup>1</sup> and *Sunday Times v United Kingdom*<sup>2</sup> through to *Observer and Guardian v United Kingdom*,<sup>3</sup> *Hashman and Harrap v United Kingdom*,<sup>4</sup> *Silver v United Kingdom*,<sup>5</sup> *Steel and Morris v United Kingdom*,<sup>6</sup> *Bowman v United Kingdom*,<sup>7</sup> *Financial Times v. United Kingdom*<sup>8</sup>, etc, etc. – a list of cases that extends throughout the years until the present day. In such cases, the Respondent government has been shown to have breached Article 10 principles, and indeed it is generally recognised by the media as an enemy of free speech. For example, the United Nations Human Rights

---

<sup>1</sup> *Golder v United Kingdom* (1975) 1 EHRR 524.

<sup>2</sup> *Sunday Times v United Kingdom* (1979) 2 EHRR 245.

<sup>3</sup> *Observer and Guardian v United Kingdom* (1992) 14 EHRR 153.

<sup>4</sup> *Hashman and Harrap v United Kingdom* (2000) 30 EHRR 241.

<sup>5</sup> *Silver v United Kingdom* (1983) 5 EHRR 347.

<sup>6</sup> *Steel and Morris v United Kingdom* (2005) 41 EHRR 22.

<sup>7</sup> *Bowman v United Kingdom* (1998) 26 EHRR 1.

<sup>8</sup> *Financial Times v. United Kingdom*, Application No. 821/03 of 15 December 2009.

Committee, in its most recent 'Concluding Observations' on UK compliance with the UN Covenant on Civil and Political Rights, singled out Britain's libel laws as having '*served to discourage critical media reporting on matters of serious public interest, adversely affecting the ability of scholars and journalists to publish their work*' and noted that with the advent of the internet the UK's '*unduly restrictive libel law will affect freedom of expression worldwide on matters of valid public interest.*'<sup>9</sup> So it is obviously unsatisfactory to have the main case against an important new and unique restriction on the media argued by a party in which the media and civil society itself has no confidence, in written submissions that have not been shown to the media for comment and in oral submissions to which the media cannot reply. Whilst this unsatisfactory and unfair position may be the result of the procedural rules, it can only be ameliorated by inviting the media and civil society:

- (a) to file comments on the final submissions of the UK government; and
- (b) to appear at any hearing and to make an oral submission.

3. These interveners respectfully request such an invitation from the Court.

### **The Root Problem: This Court's illegitimate importation of 'honour and reputation' into Article 8**

4. Article 10(1) guarantees free expression, including the right to impart information, subject to a number of Article 10(2) exceptions prescribed by law and necessary in a democratic society for (*inter alia*) 'the protection of the reputation and rights of others'. It was, until recently, settled law that Article 10(1) creates a presumption in favour of free speech, defeasible only in response to a pressing social need for the protection of reputation, an exception that must be 'strictly construed' and convincingly established. There is no 'balance' between Article 10(1) freedom and Article 10(2) reputation — the latter is amongst 'a number of exceptions which must be strictly interpreted'.<sup>10</sup> This is

<sup>9</sup> Human Rights Committee Concluding Observations, 30 July 2008, UN Doc. CCPR/C/GBR/CO/6.

<sup>10</sup> *Sunday Times v United Kingdom* (1979) 2 EHRR 245 at 271. See also *Observer and Guardian v United Kingdom* (1992) 14 EHRR 153 at para 55.

a clear approach to Article 10 interpretation, precise enough for the media, its readers and its potential complainants to understand. Free speech is guaranteed (yes, guaranteed) unless it is necessary to restrain or punish its exercise because it damages a reputation. Since the 'reputation' that overrides free speech must be a true reputation, it cannot be damaged by the publication of truthful information. The 'reputation' protected as a subsidiary right under Article 10(2) is the right to stop, or to receive compensation for the publication of, falsehoods.

5. Otherwise, outside the framework of Article 10, publication of truth can only be restrained as the result of a 'balance' with another primary guarantee e.g. fair trial (Article 6 — not relevant here) or Article 8, which calls for 'respect for his private and family life, his home and his correspondence'. Interestingly, Article 8 itself makes no exception for the right to freedom of expression — an indication that the framers did not intend it to be 'balanced' with Article 10, other than in respect of a class of publications that interfere disrespectfully with private, home and family life. It is only in this comparatively narrow area that a 'balance' is the appropriate legal mechanism: where the strength of the competing public interest are compared, there will be cases where one's home and family life must be respected and the press can be stopped, for example, from providing intimate personal details or disclosing personal matters concerning children. In relation to such publications which have no countervailing public interest, injunctions and compensatory damages are entirely in order, as would be a condign penalty, for example, indemnity costs or aggravated damages — where notice of a gross privacy invasion was not given.
6. This simple and straightforward position was thrown into turmoil in a series of decisions that imported 'honour and reputation' as protected rights under Article 8. This development is both astonishing and illegitimate, as it is well known that at the drafting meetings in 1950 an attempt was made to insert 'honour and reputation' into Article 8, but was resoundingly rejected by the high contracting parties.<sup>11</sup> As a result of the founding states' deliberate decision, 'reputation' is not protected as an Article 8 right to be advanced against the presumption in

---

<sup>11</sup> Professor Velu in Robertson, *Privacy and Human Rights* (1973), 15-18.

Article 10(1). However, quite incredibly, beginning with several cases from France (*Radio France*<sup>12</sup> and *Chauvy*<sup>13</sup>) the Court has simply stated that Article 8 protects 'reputation', without giving any reason for this departure from historical fact, and of course courts in the UK and elsewhere have followed, making the same assumption without investigating its validity. It is our respectful opinion that because 'reputation' was deliberately rejected as an Article 8 right in the *travaux préparatoires*, it was intellectually irresponsible for the Court to smuggle it back into Article 8, without explanation or reasoning. In *Radio France*, the Court said no more than it was 'an element of Article 8' and in *Chauvy* it said that reputation was 'part of the right to respect for family life' (which it plainly is not). These cases are juristically unacceptable: judges have no right to twist or distort the law that they apply, to protect rights that they know were specifically excluded from the law at the time it was framed and agreed. The discretion allowed to judges to 'develop' the law is not vouchsafed for them to develop it so as fundamentally to contradict the deliberate intention of the law-makers. 'Reputation' is protected under Article 10(2), under the mechanism as stated by that article, but has no place in Article 8.

7. There was some dawning recognition of this fact in *Karako v Hungary*,<sup>14</sup> where the correct suggestion is made that libel — an attack on character — should be dealt with entirely under Article 10, not Article 8. This was certainly the intention of the framers of the European Convention on Human Rights, and of the full European Court in the *Sunday Times* decision. It would leave a narrow list of matters to be subject to the 'notice requirement' sought by this application. However, the acceptance by this court (for example, in *Pfeifer v Austria*<sup>15</sup>) that 'a person's reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity' makes the notice requirement sought in this case quite unacceptably broad. It would mean that the media would be obliged to give several days' notice of any criticism of a public figure, however 'public' the context of the debate, which

---

<sup>12</sup> *Radio France and Others v France* (2004) 40 EHRR 29.

<sup>13</sup> *Chauvy v France* (2005) 41 EHRR 29.

<sup>14</sup> *Karako v Hungary* (Application No. 39311/05), unreported, 28 April 2009.

<sup>15</sup> *Pfeifer v Austria* (2007) 48 EHRR 175, 183, para 35.

could upset such nebulous but ego-centric concepts as 'personal identity' and 'psychological integrity', especially if such criticisms are true.

8. What the Claimant in this case wants is for Courts to shield by pre-publication injunction important people like himself from criticism based on facts that are true. This would be a massively disproportionate result in the UK because of the rule against prior restraint (see below), which prevents any injunctive restraint on the dissemination of information alleged to be untrue, where the publisher indicates an intention to defend.

### **Consequences of Prior Notification: Banning or Delaying Perishable News**

9. The fact that the notice requirement for the potential breach of Article 8 would apply wherever reputation is in issue, even in public debate involving public figures, would delay publication of important news — a very perishable commodity — in a wide range of public interest situations and wherever the public figure could claim his or her 'psychological integrity' was at stake from publication of the truth — for example, that he had sex with sheep, or did not pay his taxes, or practiced black magic, or beat up his girlfriend or sold arms in the breach of UN sanctions. This would be an absurd restriction, yet it is a consequence of the Complainant's case. Of course, having stalled publication for 48 hours, the public figure (which could be a multinational corporation claiming that its integrity was at stake<sup>16</sup>) would hire lawyers to apply to a judge to claim that the psychological impact of the Article 8 violation by themselves or on members of their family would outweigh the public interest inherent in learning of their exploits with sheep or tax avoidance or whatever.
10. The judge would probably continue the injunction for a week (this is the usual practice) until there was time for a full hearing — so that is another week in which the Article 10 right to publish is suspended. Then a day would be set aside for a hearing to see whether the Claimant has a case that might succeed at trial. It will not be a full hearing, but will be decided on affidavits by people who may later fear to turn up at trial or may later have to accept they are

---

<sup>16</sup> In the UK case law, companies have been held to have privacy rights, for example, to sue to protect confidentiality: see *X Ltd v Morgan Grampian (Publishers) Ltd* [1990] 2 W.L.R. 421 (CA) per Lord Donaldson.

mistaken. A full day hearing at the High Court will cost the media defendant up to £60,000 if it loses and about £10,000 if it wins. This, of course, is the 'chilling effect' of a notice requirement: newspapers will not bother to publish newsworthy stories of genuine public importance for which they must give notice because they know that giving notice will trigger expensive attempts to stop the story.

### Failure to define 'respect for privacy'

11. Further uncertainty - so much that the 'prescribed by law' requirement is breached — is provided by the failure of this Court and of UK judges to give any sensible or coherent definition to the concept of privacy and 'respect of privacy'. In *Pfeifer*, the Court says it includes 'psychological integrity'. But what does this mean? A capacity to suffer embarrassment because others know the truth? In *Von Hannover*<sup>17</sup> the Court talked of 'the development of the personality of each individual in his relations with other human beings'. What does this mean? If a public male figure consistently lies to the women he seduces, does this truth about his developing personality require covering up, even if the women seduced went to exercise their free speech rights? The Court goes on to locate 'a zone of interaction of a person with others, even in a public context, which may fall within the scope of private life'.<sup>18</sup> What on earth does this formulation mean? How is a court to locate 'this zone of interaction...in a public context', the truth of which may be withheld from the public? Definitions like this are so intolerably vague that a restriction based upon them cannot be said to be 'prescribed by law'.<sup>19</sup>
12. The UK judges have done no better in defining privacy — indeed, their efforts have been even vaguer. In *R v Broadcasting Standards Commission, Ex p BBC*<sup>20</sup> Lord Mustill said:

*To my mind the privacy of a human being denotes at the same time the personal 'space' in which the individual is free to be itself, and also the carapace or shell or umbrella or whatever other metaphor is preferred,*

<sup>17</sup> *Von Hannover v Germany* (2005) 40 EHRR 1

<sup>18</sup> *Von Hannover*, para 50.

<sup>19</sup> *Hashman and Harrup v United Kingdom* (2000) 30 EHRR 241, at paras 31-39.

<sup>20</sup> *R v Broadcasting Standards Commission, Ex p BBC* [2001] QB 885 ('*R v BSC*').



*which protects that space from intrusion. An infringement of privacy is an affront to the personality, which is damaged both by the violation and by the demonstration that the personal space is not inviolable.*<sup>21</sup>

13. This is entirely metaphysical: the media is to be punished for violating the 'carapace of a personal space' — a nonsense — and for 'affronting personality' which could include any critical comment, however true or any insult, however trivial or justified. Lord Hope has found that 'his reputation, his personality, the umbrella that protects his personal space from intrusion'<sup>22</sup> would mean that the appellant's privacy is invaded by a broadcaster pointing out the true fact that his DNA proved he was guilty of rape. It is extraordinary that the media had to go to the highest court to establish the simple fact that it was in the public interest to breach 'privacy' in order to publish evidence of a person's guilt of a serious crime. Although the Applicant's behaviour is not in this category and some would not even think it immoral, ironically, it could amount to a crime in English law of 'keeping a disorderly house', which is occasionally prosecuted and even punished by prison sentences: see *R v Cynthia Payne*.<sup>23</sup>
14. But the point is that cases like *Attorney-General's Reference (No. 3 of 1999)* may often be decided in favour of the media in the end, but the end is a Supreme Court where the costs orders, when they win, are only around 60% of the total they have paid and if they lose, they must pay the other side's costs, which usually total over £1 million.<sup>24</sup> So long as wealthy or 'conditionally fee'd' claimants can take the media to court (and because 'reputation' is an 'element' of an utterly vague concept of 'privacy', they can usually get in to court), the media faces heavy legal costs no matter how obviously incidental the story. The media simply cannot pay lawyers to contest every case where compulsory notification would inevitably be followed by an injunction.
15. Judges in the UK and in Europe are *insouciant* about legal costs: they think that the 'balancing act' between Article 8 and Article 10 is fine because public

<sup>21</sup> *R v BSC*, para 48 per Lord Mustill.

<sup>22</sup> *Attorney-General's Reference (No. 3 of 1999)* [2000] 3 WLR 1164, para 22.

<sup>23</sup> *R v Payne (Cynthia)* (1980) 2 Cr. App. R. (S.) 161.

<sup>24</sup> The costs of *Jameel v Wall Street Journal* [2007] AC 359 (HL) after a three week trial, three days in the Court of Appeal and two days in the House of Lords, amounted to £2.28 million of which only £1.346 million was recovered.

interest cases will usually win out at the end of the day. They do not comprehend the importance of being able to publish truthful information quickly and without legal inhibition, or the cost in editorial and journalistic time, quite apart from the cost of exorbitantly charging UK lawyers, in fighting for the right to publish.

16. If 'reputation' were no part of Article 8, and private information was properly defined, there might be an argument for a notice requirement, for example relating to medical records, sex with consenting partners who did not want to have the details published, photographs taken without consent in private places and so on. But the vast scope of the new law which is contended for — backed by a criminal sanction in the case of non-compliance — whenever the 'reputation' aspect of privacy or the 'carapace of psychological' well being is violated, is so vague as to be unworkable. Editors simply will not know whether to give notice or not, in relation to a vast range of newsworthy stories that will affect someone's reputation or someone's carapace of psychological wellbeing (which may depend on whether that someone has an 'eggshell' carapace, i.e. is likely to take offence easily).
17. The Applicant's case for compulsory pre-publication notification has been roundly rejected by the House of Commons *Press Standards, Privacy and Libel Report*.<sup>25</sup> It found the Applicant's suggestion to be unworkable and ineffective, because there would have to be a 'public interest' exception which would have permitted the editor in this case to avoid notice because he genuinely believed that there was a Nazi sex orgy (which would, apparently, have made the story of public interest<sup>26</sup>) and had a statement from one participant purporting to confirm it. Even had notice been given and a hearing convened, the evidence would have been on affidavit and since the editor had a witness statement from witness 'A', the woman who organised the party and who purported to confirm the 'Nazi theme', he would have satisfied the pre-trial hearing test, i.e. Mr

---

<sup>25</sup> House of Commons Culture Media and Sport Committee Report, 'Press Standards, Privacy and Libel', Second Report of Session 2009-2010, Volume 1, published 24 February 2010.

<sup>26</sup> But this is questionable. Eady J assumed that there would be public interest in the revelation if the Nazi fetish element were proved, but why should this be so? If there is a privacy right to keep one's sexual fetishes to oneself and to act them out with willing (even if paid) partners, why should it matter whether the fantasies involved schoolgirls or nurses or Nazis or women from Mars, so long as they are consenting adults?

Mosley could not have shown that he was likely to succeed at trial (succeed he did eventually, but only after the witness “went to water” and refused at the last minute to testify on behalf of the newspaper).

18. The UK Parliamentary Select Committee points out, at para 87, that NGOs would be seriously and adversely affected by a pre-notice requirement. Global Witness, one such NGO which is party to this submission — repeats the point it made convincingly to the Parliamentary Committee, that a compulsory pre-notice requirement would, in relation to some of their reports (e.g. on Blood Diamonds) put staff and sources in danger.<sup>27</sup>

### **The Rule Against Prior Restraint**

19. The UK government had a positive and powerful obligation not to provide the Claimant with the power to go to Court to stop the press. This derives from Anglo-American history and tradition which is very different and much sturdier and more principled than European traditions of *lettres de cachet* and the Napoleonic insult laws, and which is summed up in the Duke of Wellington’s reply to a journalist who gave notice, namely “Publish and be Damned!”. The UK/Commonwealth/US rule is called *The Rule Against Prior Restraint* and is a fundamental right to publish, with any damnation coming later. It is hallowed by the great jurist Blackstone, who expressed it as follows:

*The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints on publications, and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to law what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity.*<sup>28</sup>

---

<sup>27</sup> See Press Standards, Privacy and Libel Report, para 87 and Evidence, 241-2.

<sup>28</sup> William Blackstone, *Commentaries on the Laws of England* (1975), Book IV, 151-2.

20. Blackstone's words were the basis for both British and American common law and the rule against prior restraint was affirmed by the US Supreme Court in its historic *Pentagon Papers*<sup>29</sup> decision:

*Any system of prior restraint on expression comes to this court bearing a heavy presumption against its constitutional validity. The only effective restraint upon executive police and power in the areas of national defence and international affairs may be an enlightened citizenry - informed and critical public opinion which alone can here protect the values of democratic government. For without an informed and free press there cannot be an enlightened people.*<sup>30</sup>

21. The rule against prior restraint has operated in libel cases in Britain for centuries.<sup>31</sup> It is modern and well-understood by litigants and was recently endorsed by the Court of Appeal in *Greene v Associated Newspapers Ltd*.<sup>32</sup> It would be wrong in principle and contrary to the Anglo-American tradition of freedom of speech for a UK government to require newspapers to notify (and thus invite injunction) whenever they plan to publish newsworthy information that may damage a reputation or arguably disrespect privacy. A notification requirement would destroy the rule against prior restraint and reverse the long line of case law that prevents a pre-publication injunction being granted in a libel action where the newspaper is prepared to defend on public interest grounds.
22. Notwithstanding what is said above, we note that the Court, without hearing argument, is already infected with the Article 8 and Article 10 'balancing' approach, which we contend is fundamentally wrong and which repeals the approach under Article 10 laid down in *Handyside*<sup>33</sup> and *Sunday Times*. The manner in which the Court has framed question 2(b)) assumes that there is a 'balance' between 'the interests protected under Article 8' and the freedom guaranteed by Article 10. In the *Sunday Times* case, the Court stressed that there was no 'balance': there was a presumption in favour of Article 10 and

<sup>29</sup> *New York Times v. U.S.*, 403 U.S. 713 (1971).

<sup>30</sup> *New York Times v. U.S.*, 403 U.S. 713 (1971) at 729.

<sup>31</sup> *Bonnard v. Perryman* (1891) 2 Ch. 269 (justification); *Quartz Hill Consolidated Mining v. Beal* (1882) 20 Ch. D. 501 (privilege); *Fraser v Evans* (1969) 1 Q.B. 349 (fair comment).

<sup>32</sup> *Greene v Associated Newspapers Ltd* [2005] QB 972.

<sup>33</sup> *Handyside v United Kingdom* (1976) 1 EHRR 737.

'reputation' was a subsidiary right which had to be narrowly interpreted and firmly established. (The only occasion for 'balance' is where a genuine Article 8 right is involved, i.e. an intimate personal detail or confidential information about home and family life).

23. Question 3 assumes that Article 8 was legitimately engaged in this case. The only extent to which it was engaged was in the secret filming of a private party. The use of a surreptitious surveillance device may be deplorable and something for which the victim can be awarded damages, but it is not information that can be made subject to a notice requirement. That 'information' was simply that a wealthy public figure so enjoyed beating women, and being beaten by them, that he paid a large sum of money to savour this experience with five prostitutes. The judge found that this was 'private' information, although it had nothing to do with family and home life, and any personal details were hardly intimate since they were exhibited to five women.
24. It is almost always overlooked by complainants and by courts that Article 8 does not guarantee a right to privacy. It guarantees a right to respect for private and family life. What respect did Mr Mosley show for his own private and family life by disporting himself with five prostitutes, whom he paid to share his otherwise private sado-masochistic fantasies and to watch him ejaculate? He took the risk that any one of those five, who all knew who he was, might choose to talk or to publish an account of his gluttony for punishment. He complains that he was given no notice of publication, and of course it is accepted that the newspaper published a serious defamation of him: they said he had indulged in a Nazi sex orgy whereas he had only indulged in a British sex orgy. Had he sued in defamation, he would have been entitled to compensatory and aggravated damages (aggravated of course by the lack of notice) awarded by a jury. But he did not have to go before a jury — in the UK, the ultimate arbiter on questions of free speech - he sued in privacy which removes the right to trial by jury in favour of the newspaper. His receipt of £60,000 for damages from the judge has served to vindicate his position as a decent person without the slightest interest in Nazi themes; he has exposed the incompetence of the News of the World journalists; he now tours the country as a scourge of the tabloid press and

makes himself available for flattering profiles in other sections of the press. He has, of course, suffered embarrassment (although his attraction to *le vice anglais* is not unusual in English men) and mortification at the exposure of his private pleasure but, this did not unseat him from his pre-eminent position in the sport of motor racing. His damages and costs award was adequate compensation for the newspaper's disrespect for his private life.

25. It is Mr Mosley's fundamental contention that without a notice requirement to enable victims to put the genie back into the bottle, they have no effective remedy. This argument fails to take on board the fact that once information is 'out' — especially out in newspaper offices — it cannot effectively be bottled. It will spread as rumour, and it will go up on internet blog sites, social media such as twitter and the fact of the injunction may make people think that the information is 'worse' than it really is. Moreover he has the 'just satisfaction' of having been vindicated in court - with the consequent enhancement of his dignity and public standing, and the consequent contempt (from media groups in particular) towards *News of the World*, which did not even appeal the decision.
26. It is idle for the Complainant's lawyers to go on at length about the 'commercial incentives' of the press. 'Responsible journalism' is a defence in libel cases but not in privacy (another rank unfairness is protecting 'reputation' under Article 8) but as the leading case of *Jameel*<sup>34</sup> recognises, there is no absolute obligation to notify the defamee so as to enable him to take out an injunction.
27. In paragraph 25, the Applicant says there is 'universal support amongst both academics and the judiciary' for the view that an injunction is the only effective remedy. This is not correct for the reasons given above, but in any event the examples given are not statements in favour of compulsory pre-publication notification. The notion that 'claimants with resolve and financial resources are likely to be few and far in between' is nonsense. The prospect of obtaining heavy and tax free damages, through lawyers operating on conditional fee arrangements with 100% uplifts, will encourage claimants who have suffered any gross privacy incursion. Indeed it has been widely reported that a number

---

<sup>34</sup> *Jameel and others v Wall Street Journal Europe Sprl* [2007] AC 359.

of persons who had their phones illegally bugged by a *News of the World* reporter have sued for damages, with the paper paying £700,000 in settlement to one litigant and a million to another. Sums of this size are a real deterrent to privacy invasion.

### **Margin of Appreciation**

28. In any event, there must be a very considerable margin of appreciation permitted to states in relation to Article 8.<sup>35</sup> What amounts to a respect for private life is very much a matter for domestic notions of morality (see *Wingrove v United Kingdom*<sup>36</sup>) and for the democratic process. It will be appreciated that questions of privacy protection have been regularly debated in the UK Parliament in recent years, and have been the subject of two reports by Sir David Calcutt, regular reports by the Press Complaints Commission and most recently by the House of Commons Culture and Sport Committee.
29. A law of privacy is being developed by the judiciary, and will of course be honoured by the media. A notice requirement imported by a court which knows collectively nothing about British traditions of 'publish and be damned' — about John Milton and *Areopagitica*, about John Wilkes and Tom Paine and Blackstone and Bentham and the rule against prior restraint — should not upset a local tradition that has for centuries protected freedom of speech. There is no European consensus on privacy, or on notice requirements, in any event. And there is no certain standard of morality: some would regard the Claimant's activity as morally questionable, whilst others would regard him as not bad for his age. The French are culturally amused at English infantile sexuality such as spanking fetishes said to develop in male public schools; the English deride a state that uses privacy laws to stop its citizens from hearing that fact that its President has an illegitimate child and a son involved in an illegitimate arms trade. The Swedes find British tabloids disgusting; the British find Swedish newspapers terminally boring. There is no 'universal bottom line', other than that children, family and home life always deserve protection and that well established categories of information (like personal medical records, diary contents, intimate personal relations with partners or details divulged to

<sup>35</sup> See the recent decision in *A v Norway*, Application No. 28070/06, Judgment of 9 April 2009.

<sup>36</sup> *Wingrove v United Kingdom* (1997) 24 EHRR 1.

professional counsellors) should be safeguarded. Any wider privacy law is a matter for national laws based on national morals and attitudes to privacy.

**GEOFFREY ROBERTSON QC**

**DOUGHTY STREET CHAMBERS**

**23 March 2010**



## ANNEX

### **BACKGROUND INFORMATION ABOUT THE INTERVENERS AND SUPPORTERS**

**The Media Legal Defence Initiative** is a non-governmental charity which works in all regions of the world to provide legal support to journalists and media outlets who seek to protect their right to freedom of expression. It is based in London and works closely with a world-wide network of experienced media and human rights lawyers, local, national and international organisations, donors, foundations and advisors who are all concerned with defending media freedom.

**Index On Censorship** is Britain's leading organisation promoting freedom of expression. With its global profile, its website provides up-to-the-minute news and information on free expression from around the world. Its events and projects put its causes into action. Its award-winning magazine shines a light on these vital issues through original, challenging and intelligent writing.

**The International Media Lawyers Association (IMLA)** is an international network of lawyers working in the areas of media law, media freedom and media policy, and committed to promoting and defending the fundamental human rights of freedom of expression and freedom of information. The founding Memorandum of the International Media Lawyers' Association was developed and approved by the Founding Meetings of the Association which took place in Tbilisi, Georgia on 22-23 February 2004 and in Belgrade, Serbia, on 5-6 March 2004. The Founding Meetings were the initiative of media lawyers, in particular the alumni of the Oxford Media Law Advocates Summer School, run by the University of Oxford's Programme in Comparative Media Law and Policy. This would be their first intervention thus marking its significance.

**European Publishers Council** The European Publishers Council (EPC) is a high level group of Chairmen and CEOs of Europe's leading media groups representing companies with newspapers, magazines, online publishing, journals, databases, books and broadcasting. It has been communicating with Europe's legislators since 1991 on issues that affect freedom of expression, media diversity, democracy and the health and viability of media in the European Union. Its membership comprises:

Mr Francisco Pinto Balsemão, Chairman and CEO, Impresa Publishing, Portugal  
Ms Sly Bailey, Chief Executive, Trinity Mirror plc, UK  
Dr Carlo de Benedetti, Chairman, Gruppo Editoriale L'Espresso, Italy  
Mr Carl-Johan Bonnier, Chairman, The Bonnier Group, Sweden  
Mr Oscar Bronner, Publisher & Editor in Chief, Der Standard, Austria  
Ms Rebekah Brooks, Chief Executive Officer, News International Ltd, UK  
Mr Bernd Buchholz, Chief Executive, Gruner + Jahr, Germany  
Dr Hubert Burda, Chairman and CEO, Burda Media, Germany  
Mr Juan Luis Cebrian, CEO, Grupo Prisa, Spain  
Dr Mathias Döpfner, Chief Executive, Axel Springer AG, Germany  
Mr Erik Engstrom, Chief Executive, Reed Elsevier,  
Ms Rona Fairhead, Chief Executive, Financial Times Group, UK  
Mr Tom Glocer, Chief Executive, Thomson Reuters

Dr Stefan von Holtzbrinck, President and Chairman of the Executive Board,  
 Verlagsgruppe Georg von Holtzbrinck GmbH, Germany  
 Mr Steffen Kragh, President and CEO, The Egmont Group, Denmark  
 Lambrakis Press Group, Greece  
 Mr Murdoch MacLennan, Chief Executive, Telegraph Media Group Ltd, UK  
 Ms Carolyn McCall, CEO, Guardian Media Group, UK  
 Mr James Murdoch, Chairman and CEO, News Corporation, Europe and Asia  
 Mr Piotr Niemczycki CEO, Agora, Poland  
 Sir Anthony O'Reilly, President Emeritus, Independent News & Media PLC, Ireland  
 Mr Didier Quillot, Chairman and CEO, Lagardère Active, France  
 Mr Michael Ringier, President, Ringier, Switzerland  
 The Rt. Hon. The Viscount Rothermere, Chairman, Daily Mail and General Trust, UK  
 Mr Rolv Erik Ryssdal, CEO, Schibsted, Norway  
 Mr Hannu Syrjanen, CEO, Sanoma Corporation, Finland  
 Mr Giorgio Valerio, CEO, RCS Quotidiani S.p.A Italy  
 Mr Christian Van Thillo, Chief Executive, De Persgroep, Belgium  
 Mr. Jose Manuel Vargas, CEO, Vocento, Spain

**The Mass Media Defence Centre (MMDC)** was established in 1996 with the central goal of promoting rights for freedom of expression and freedom of information, and supporting the development of an independent and responsible media. The MMDC is a not-for-profit organisation committed to the values of democracy and human rights. It is based in Central Russia and works all around Russia, conducting a wide range of activities, which include:

- monitoring, advocating and promoting freedom of expression, rule of law, and general respect for human rights;
- providing legal support and representing journalists and media outlets in courts (up to a 100 cases per year);
- promoting implementation of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the ECHR case-law on Article 10 (right to FOE), taking FOE cases to the European Court.
- promoting FOE and FOI principles, raising legal knowledge by:
- conducting training for journalists, media lawyers and advocates, judges, Human Rights, NGO's;
- publishing a wide range of materials on FOE/FOI issues,
- translation of ECHR case-law into Russian,
- creating and supporting an Internet-based legal database on Russian FOE/FOI court cases.
- providing legal expertise of regional statutory acts on information, and media activity, assisting state bodies and local authorities in working out of these documents.

The MMDC has been an active member of a world-wide network of NGOs dedicated to the protection of media freedoms for many years.

**Romanian Helsinki Committee APADOR-CH** (also known as the Romanian Helsinki Committee) is a Romania based non-governmental not-for-profit organisation which aims at promoting and protecting human rights and the rule of law. APADOR-CH is particularly interested in the right to freedom of expression and the freedom of media

and, through the lawyers it is working with, has supported several applicants before the European Court of Human Rights in Article 10 related cases (Sabou and Pircalab v. Romania, judgment of 28 September 2004, Stangu v. Romania, decision of 9 November 2004, Stangu and Scutelnicu v. Romania, judgment of 31 January 2006, Barb v. Romania, judgment of 7 October 2008, Folea v. Romania, judgment of 14 October 2008).'

**The Bulgarian Access to Information Programme (AIP) Foundation** was established on October 23, 1996 in Sofia, Bulgaria by journalists, lawyers, sociologists, and economists who work in the area of human rights. They joined efforts to promote the right to information and initiate a public debate on related issues. The mission of AIP is to facilitate implementation of Article 41 of the Bulgarian Constitution which establishes the rights of freedom of expression and access to information. Its in-house lawyers have defended several defamation cases in Bulgaria, and currently act for the applicants in the case of *Kasabova v. Bulgaria* (Application no. 22385/03).

**Global Witness** exposes the corrupt exploitation of natural resources and international trade systems, drives campaigns that end impunity, resource-linked conflict, and human rights and environmental abuses. Global Witness was the first organisation that sought to break the links between the exploitation of natural resources, and conflict and corruption; and the results of its (often undercover) investigations, and lobbying, have been not only a catalyst, but a main driver behind most of the major international mechanisms and initiatives that have been established to address these issues; including the Forest Law Enforcement and Governance (FLEG) process, the Kimberley Process (to exclude conflict or 'blood' diamonds from international trade) and the Extractive Industries Transparency Initiative (EITI). Global Witness is largely responsible for natural resources occupying the prominent role in the international agenda that they currently do. Because Global Witness publishes hard-hitting reports documenting the results of in-depth investigations which expose the role of numerous high profile politicians, officials, businesses and organised crime in the illicit and corrupt exploitation of natural resources, they are a front line target of those wishing to abuse privacy and libel laws to protect or launder their reputations. Thus far no successful case has been brought against them, but they have spent hundreds of thousands of pounds fighting off legal threats by rich individuals and businesses attempting to draw a veil of secrecy over their illicit activities.

Global Witness was jointly nominated for the 2003 Nobel Peace Prize for its work on conflict diamonds.