

**IN THE EUROPEAN COURT OF HUMAN RIGHTS**

**In the Matter of**

**Application No. 48009/08**

**MAX MOSLEY**

**Applicant**

**v**

**UNITED KINGDOM**

**Respondent**

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**REQUEST UNDER ARTICLE 43 OF THE CONVENTION  
AND RULE 73 OF THE RULES OF COURT  
FOR THE CASE TO BE REFERRED TO THE GRAND CHAMBER**

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**Introduction**

1 On 10 May 2011, the Fourth Section of the Court gave judgment declaring this application admissible but holding that there had been no violation of Article 8 of the Convention.

2 Pursuant to Article 43 of the Convention, and Rule 73 of the Rules of Court, the Applicant requests that this case be referred to the Grand Chamber.

3 The Applicant submits that the case raises a serious question affecting the interpretation or application of the Convention and a serious issue of general importance: whether in cases in which a newspaper (or other publisher) intends to publish information concerning intimate, sexual details of an individual's private life, an effective remedy for the purposes of Article 8 requires that the press must give advance notice of publication to the person concerned so that he or she may seek an injunction from a court to prevent publication, with regulatory sanctions by way of a fine available in the event of a breach of the duty to give prior notification.

**The background to the issue for reference to the Grand Chamber**

4 The Fourth Section made a series of findings which establish the mischief in the present context:

(1) At paragraph 104 of the Judgment, the Court found that

"the present case resulted in a flagrant and unjustified invasion of the applicant's private life".

The News of the World newspaper had published an article and photographs of the Applicant engaged in private sexual activity.

(2) The Court held at paragraph 130 that

"the conduct of the newspaper in the Applicant's case is open to severe criticism".

As the Court noted, not merely had the newspaper published grossly intrusive articles about the private sexual activities of the Applicant, but it also published photographs and video footage obtained through clandestine recordings for which the newspaper had paid one of the women involved.

(3) The Court added at paragraph 131:

"the private lives of those in the public eye have become a highly lucrative commodity for certain sectors of the media".

5 The Fourth Section also accepted (at paragraph 114) that whereas the press performs a "public watchdog" role in other contexts,

"different considerations apply to press reports concentrating on sensational and, at times, lurid news, intended to titillate and entertain, which are aimed at satisfying the curiosity of a particular readership regarding aspects of a person's strictly private life ... . Such reporting does not attract the robust protection of Article 10 afforded to the press. As a consequence, in such cases, freedom of expression requires a more narrow interpretation".

**Is there an effective remedy for the mischief ?**

6 The question is whether the Applicant had an effective

remedy for the gross invasion of this intimate sexual aspect of his private life, for the purposes of Article 8 read on its own and with Article 13?

7 The case for the Applicant is that:

(1) The only effective remedy in this context is an injunction to prevent publication. Once the information is widely published, private life is irrevocably destroyed. Privacy cannot be restored by a court order.

(2) But the Applicant can only seek and obtain an injunction to prevent publication if he or she knows about the newspaper's intention to publish.

(3) The newspaper in this case (and in many others) conceals its intention to publish because it wishes to prevent the Applicant from seeking and obtaining an injunction (as the Fourth Section found at paragraph 128 of the Judgment). The newspaper knows that, once the information is published, very few victims will sue for damages, because that will guarantee further adverse publicity and very considerable expense, even if the proceedings should succeed.

8 The Fourth Section suggested (at paragraph 119 of the

Judgment) that there were four remedies available to the Applicant:

(1) The Court referred to the system of self-regulation through the Press Complaints Commission ("the PCC"). But the PCC has no power to impose any sanctions, whether before or after publication. Indeed, the Applicant cannot even ask the PCC to try to persuade the newspaper not to publish if the Applicant does not know about the proposed publication.

(2) The Court noted that the individual may commence civil proceedings which may result in an award of damages which "can reasonably be expected to have a salutary effect on journalistic practices". But such awards of damages do not, and cannot, restore the private life which has been irrevocably destroyed by the publication of which complaint is made. In any event, very few claimants are willing to bring legal proceedings which involve a public hearing in which the original disclosure is repeated and analysed with considerable additional publicity, and which involve considerable costs which even a substantial damages award and costs will not cover (as in the Applicant's case). Because the newspaper knows that (understandably) very few victims are willing to bring such legal proceedings, the risk of such proceedings has no "salutary effect on journalistic

practices". That is demonstrated by the fact that publication occurred in this case, and by the general practices condemned by the Court as explained in paragraph 4 above.

- (3) The Court said that "if an individual is aware of the pending publication relating to his private life, he is entitled to seek an interim injunction preventing publication of the material". But the problem is that if the individual does not know of the pending publication, as in the Applicant's case, he or she cannot seek and obtain an injunction. The victim does not know of the pending publication because the newspaper has deliberately decided not to give prior notice of publication because it wishes to avoid an application for an injunction which it knows or believes will be granted. See paragraph 11(7) below. In the Applicant's case the newspaper went to considerable lengths to keep their intention to publish secret.
- (4) The Court also referred to the Data Protection Act 1998. But this does not enable the subject to obtain an injunction to prevent publication of a newspaper article which destroys private life, or any other relevant remedy.

**The serious question or serious issue of general importance**

9 The serious question or serious issue of general importance is whether the Grand Chamber should accept that in cases where a newspaper, or other publisher, intends to disclose "intimate or sexual details of private life" (the phrase used by the Fourth Section at paragraph 125), the newspaper or other publisher should be required to give advance notice of the publication so that the individual concerned can seek an injunction from the court to prevent publication in breach of Article 8.

10 The Fourth Section was concerned that the Applicant was not limiting his proposed remedy to "intimate or sexual details of private life" (see paragraph 125 of the Judgment), and that a general obligation to give advance notification might have an inhibiting effect on investigative journalism. The Applicant is, of course, only concerned with cases of intended disclosure of intimate or sexual details of private life. He is, therefore, entirely content to confirm that his argument is limited to such cases.

11 The important issue for the Grand Chamber would be whether to accept the argument advanced by the Applicant on these central matters:

- (1) The Court has repeatedly recognised that intimate or sexual details of private life deserve the highest

degree of protection under Article 8 (see paragraph 5 above). Any interference with such "an intimate part of an individual's private life" requires a compelling justification if it is to be justified under Article 8(2). See Lustig-Prean v The United Kingdom, Judgment of the Court, 27 September 1999, paragraph 82.

- (2) As the Fourth Section recognised at paragraph 114 of its Judgment, the reporting of intimate or sexual details of private life

"does not attract the robust protection of Article 10 afforded to the press"

by contrast with such matters as, for example, "political reporting and serious investigative journalism". If the obligation to give prior notification of publication is confined to articles which reveal intimate or sexual secrets of private life, the Fourth Section's concerns about freedom of expression are (at least) very substantially reduced in force.

- (3) The Fourth Section was satisfied (paragraph 125) that "a satisfactory definition of those who would be subject to the requirement could be found". It would equally not be very difficult to draft the obligation



so that it is confined to "intimate or sexual details of private life".

- (4) Once intimate or sexual details of a person's private life are published, their privacy in relation to such matters is irrevocably destroyed.
- (5) Before privacy is permanently and seriously damaged by disclosure of intimate or sexual details of private life, an effective remedy for the purposes of Article 8 (read on its own and together with Article 13) requires that the subject of the disclosure should have an opportunity to ask a judge to rule on whether an interim injunction should be granted to restrain publication. That requires an obligation on the press to give prior notification, an obligation supported by regulatory sanctions, in particular a fine in appropriate cases.
- (6) If the newspaper or other publisher had such an obligation to notify, its rights under Article 10 would be fully protected by the Human Rights Act 1998 if an injunction to restrain publication were then to be sought. Section 12(3) states that an interim injunction is not to be granted

"unless the court is satisfied that the applicant is likely to establish [at a full

hearing] that publication should not be allowed".

Section 12(4) adds that

"The court must have particular regard to the importance of the Convention right to freedom of expression"

and to

"the extent to which ... it is, or would be, in the public interest for the material to be published".

- (7) The public interest in publication - which a judge would decide if notification were given of an intention to publish and an injunction were to be sought - must be distinguished from the distinct question of whether there might be a good reason for the newspaper not to give prior notice of the intention to publish. The Fourth Section confused these distinct issues at paragraph 126 of the Judgment. It would, of course, be open to the United Kingdom to legislate so as to recognise that there may be circumstances in which advance notification would be inappropriate (for example, if the subject would be likely to destroy evidence). But that does not affect the issue in the present case (and others like it) where (as the Fourth Section held at paragraph 128)

"there is no doubt that one of the main reasons,

if not the only reason, for failing to seek his comments was to avoid the possibility of an injunction being sought and granted ...".

Indeed, in 99% of cases prior notice is given to the subject of a newspaper story so his or her comments can be included. That was the evidence given on 23 April 2009 to the House of Commons Culture, Media and Sport Parliamentary Select Committee by the Chairman of the Editor's Code Committee of the Press Complaints Commission, Mr Paul Dacre, who is also the editor-in-chief of the Daily Mail newspaper. Newspapers fail to give prior notification in cases such as the present, because they wish to avoid an injunction to protect Article 8 rights.

- (8) In relation to disclosure of intimate or sexual details of private life, it is not consistent with Article 8 for the newspaper editor who is deciding whether to breach privacy also to be deciding whether to notify the subject of the newspaper so that he or she may bring the matter before the court for a judicial determination which would provide the only effective remedy for a serious breach of Article 8.
- (9) The Fourth Section queried (at paragraph 128 of the Judgment) whether a regulatory sanction such as a fine would deter a newspaper from refusing to give prior notification if so required by law. There is no

reason to doubt that for a regulatory body to have power to impose a fine on a newspaper which defied a legal obligation to give prior notification of an intention to publish intimate or sexual details of private life would have a very substantial deterrent effect. The regulatory body would have power to determine the amount of the financial sanction according to the circumstances of the case. Since the sanction would not depend on the victim being willing to bring proceedings in which the victim would need to give evidence about his or her intimate or sexual private life, such a sanction would have a far greater deterrent effect than the civil action for invasion of privacy.

- (10) The Fourth Section noted (at paragraph 124 of the Judgment) that no other contracting State imposes such a pre-publication requirement to notify (though many contracting States do apply a requirement for consent before publication). But no other contracting State has a press which habitually trades on the publication of the intimate, sexual details of people's private lives, as described in paragraphs 4 and 5 above. It is because of such journalistic malpractices, in breach of Article 8, that an effective remedy is required.

12 These are issues of very considerable general importance, especially in the United Kingdom where certain sections of the press, such as The News of the World, trade in the disclosure of intimate or sexual secrets of people's private lives. The United Kingdom Government and Parliament have left it to the courts to develop the law which protects Article 8 rights. It would greatly assist United Kingdom newspapers and the subjects of articles in them, and lawyers who have to advise in this area, and national judges who have to decide these cases, if the Grand Chamber would now accept this request to hear this case, and rule on the important issues raised.

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**Signature:**.....

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Dated 24<sup>th</sup> May 2011