

## **Absence of Prior-Notification Requirement Does Not Violate Article 8: *Mosley v UK***

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This week the Fourth Section of the European Court delivered its much anticipated judgment in [\*Mosley v. the United Kingdom\*](#), which unanimously held that the absence of a prior-notification requirement on newspapers to give advance notice to a person before publishing private details does not violate Article 8.

The applicant in *Mosley* had successfully brought legal proceedings against a British newspaper for invasion of privacy over a series of articles which detailed the applicant's sexual encounter with a number of prostitutes. It was also alleged that the applicant had engaged in Nazi role play during the sexual encounter. The articles had been based on a clandestine recording, and the video was made available on the newspaper's website. The domestic courts found that there had been no Nazi element to the sexual activities, and held there had been a violation of the applicant's right to privacy, awarding £60,000 in damages.

Having been successful in the domestic proceedings, the applicant took the unusual step of making an application to the European Court. The applicant argued that the award of damages was not an adequate remedy for a violation of privacy, and that the only effective remedy would have been an injunction to prevent publication. It was argued that the failure of the United Kingdom to impose a legal duty upon newspapers to give prior-notification to a person before publishing private details was a violation of its positive obligations under Article 8. It was argued that such a duty would provide a person with the opportunity to seek an injunction to prevent publication.

The Court considered that the question before it was whether to ensure effective protection of the right to respect for private life, the positive obligations under Article 8 include a requirement of a legally binding pre-notification rule.

Before answering the question, the Court made a number of preliminary observations: the Court noted that there were already a number of measures in effect in the United Kingdom to ensure the protection of privacy, including a system of self-regulation of the press, the availability of civil proceedings, an entitlement to seek an interim injunction should a person be aware of an impending publication, and there was further protection under data protection legislation. Most importantly, the Court was of the opinion that it had implicitly accepted in its case law that ex post facto damages provide an adequate remedy for violations of Article 8 arising from publication by a newspaper of private information, referring to [\*Von Hannover v. Germany\*](#), and [\*Armonienė v. Lithuania\*](#).

The Court continued that there were three main issues relevant to the question before it: (a) the margin of appreciation; (b) the clarity of the proposed prior-notification rule; and (c) the chilling effect of a prior-notification requirement.

Firstly, in relation to the margin of appreciation, the Court reiterated that member states in principle enjoy a wide margin of appreciation relating to positive obligations under Article 8. It

noted that there was already a system in place to protect privacy, and the Court also referred to a UK parliamentary committee report which had concluded that a prior-notification requirement was undesirable. Of note, the Court held that notwithstanding the highly personal nature of the information disclosed concerning the applicant, this could have no bearing on the margin of appreciation, as the prior-notification requirement being called for would have an impact far beyond the applicant's case. Moreover, the Court noted that the applicant had not cited one single jurisdiction which had a prior-notification requirement in place. Thus, according to the Court, the United Kingdom enjoyed a wide margin of appreciation in terms of its positive obligations.

Secondly, the Court recognised that there were major concerns with the effectiveness of a prior-notification rule: the Court accepted that there would need to be some sort of 'public interest' defence to any such rule, which would be based on a reasonable belief. Otherwise, the Court noted, there would be a serious chilling effect on speech. It followed, according to the Court, that even had there been such a rule in effect in the applicant's case, it was probable that the newspaper would have chosen not to notify the applicant, as it would have taken the view of relying on a public interest defence.

Thirdly, and most importantly, the Court noted that any prior-notification rule would only be as effective as the sanctions imposed for non-observance of the rule. The Court considered that civil fines would be unlikely to deter newspapers publishing material without prior-notification, and made reference to the fact that the newspaper in the instant case would probably have run the risk of non-notification. Thus, punitive or criminal sanctions would be the only effective sanction, and the Court considered that such sanctions would have a broader chilling effect on political reporting and investigative journalism, which attract a high level of speech protection.

Finally, the Court emphasised that there was a particular need to look beyond the facts of the applicant's case and to consider the broader effect such a requirement would have on the press generally.

Having regard to the foregoing considerations, the Court concluded that Article 8 did not require a legally binding pre-notification requirement. Thus, the United Kingdom had not breached its positive obligations to adequately protect privacy, and there had been no violation of Article 8.

## **Comment**

As a preliminary point, it must be noted that the judgment delivered by the Fourth Section continues in the same vein as its other judgments delivered this year relating to freedom of expression: substantial, very well reasoned, heavy case citation, and unanimity (see [MGN Limited v. the United Kingdom](#), [Kasabova v. Bulgaria](#), and [Bozhkov v. Bulgaria](#)). This is in stark contrast to other speech related judgments delivered from other sections of the Court which suffer from sparse reasoning and selective citation (see, for example, [Sipos v. Romania](#)). It is more than obvious that third party interveners greatly assist in the quality of the reasoning, and this is only to be welcomed.

More substantially, it is worth noting the important principles which the Court sought to espouse: the Court seemed to be tempering the development of positive obligations under Article 8, noting the importance of a prudent approach to such developments (citing [\*Karakó v. Hungary\*](#)). The Court also reiterated that while Article 10 does not prohibit the imposition of prior restraints on publication, the dangers inherent in prior restraints are such that they call for the most careful scrutiny. However, it did sound a word of warning that sensationalist and lurid news reporting does not attract the robust protection of Article 10, where freedom of expression requires a narrow interpretation.

Finally, it is noteworthy that the Fourth Section has now applied the chilling effect consideration as a central tenet in its reasoning in all its speech related judgments in 2011, and none more so than in *Mosley*: the Court laid particular emphasis on the need to look beyond the facts of the particular case, and to focus on the broader chilling effect such a prior-notification rule would have.

All in all, the judgment in *Mosley* should be welcomed, and its unanimity would seem to suggest that a hearing before the Grand Chamber may not materialise.