

SUBMISSIONS ON BEHALF OF THE MEDIA LAWYERS ASSOCIATION (third party intervener)

*Von Hannover v Germany; Springer v Germany*

1. The Media Lawyers Association (“MLA”) is an association of in-house lawyers from newspapers, magazines, book publishers, broadcasters and news agencies. A list of its members is attached at **Annex 1**. MLA members publish information not only in the United Kingdom, but also in the European Community and throughout the world. MLA exists to promote and protect freedom of expression and the right of **everyone** to **impart** and to **receive** information, ideas and opinions. It is primarily (but not solely) concerned with “the media” and journalism. The exercise of the right to freedom of expression is important for everyone.

2. MLA has been granted permission to make written submissions in relation to the following applications: *Von Hannover v Germany* (Apps 40660/08 and 60641/08) in which a failure to grant relief is alleged to constitute a violation of Article 8 and *Springer v Germany* (App 39954/08), in which the grant of relief is said to violate Article 10.

3. In summary, MLA makes the following submissions (it does not address the facts of the applications before the court):

- (1) Article 8 does not create, or require the creation of, an ‘image right’.
- (2) Publication of a person’s photograph (or image) does not, of itself, necessarily engage their Article 8 rights; whether this is so depends upon all the circumstances; a certain level of seriousness is required before there will be any interference with the right.
- (3) The right to reputation is not a Convention right. Publication of a defamatory statement about a person does not, of itself, necessarily interfere with their Article 8 rights.
- (4) It is vital, in any balance between the Convention rights under Articles 8 and 10, that media reporting upon all matters of public interest or public concern is strongly protected.
- (5) The reporting of court proceedings (in particular, criminal proceedings) requires wide and strong protection.

4. MLA emphasises the importance of freedom of expression and the role of the media. It is well-established in Strasbourg jurisprudence (i) that it is incumbent on the media to impart information and ideas on *all* matters of public interest; (ii) that any restriction upon the Article 10(1) right to freedom of expression must be shown, on compelling grounds, to be “necessary” for the pursuit of one or more legitimate aims identified in Article 10(2) and must be “proportionate”; and (iii) that it is for the media (not the national courts or the ECtHR) to decide what techniques of reporting should be adopted<sup>1</sup>.

5. There are two important general considerations to highlight in the context of these applications. Firstly, the way in which information and ideas are conveyed has changed, not only in the mass media, but through social networking and the many available means of electronic communications. The use of images and recordings is now increasingly important.

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<sup>1</sup> See, eg, *Selisto v Finland* [2005] EMLR 8 at [59]; *Jersild v Denmark* (1994) 19 EHRR 1 at [31], [35]; *Bladet Tromsø v Norway* (2000) 29 EHRR 125 at [63]; *Thoma v Luxembourg* (2003) 36 EHRR 21; *Eerikäinen v Finland* (App 3514/02, 10 Feb 2009) at [65].

The media commonly use images as a very effective, sometimes vital, way of communicating information. Secondly, there is a very wide range of matters that are of public interest or public concern. It is vital that the media report upon all such matters, so that members of the public can receive information and ideas and informed debate can take place. On both of these points, a wide and robust protection for freedom of expression is required.

6. The Supreme Court of the United Kingdom recently affirmed the vital role of the media and the need to afford a wide editorial discretion: *Guardian News & Media*<sup>2</sup> at [63]:-  
“..Writing stories which capture the attention of readers is a matter of reporting technique, and the European court holds that article 10 protects not only the substance of ideas and information but also the form in which they are conveyed: *News Verlags GmbH & Co KG v Austria* .. More succinctly, Lord Hoffmann observed in *Campbell v MGN Ltd* [2004] AC 457..[59], “judges are not newspaper editors”. See also Lord Hope of Craighead in *re British Broadcasting Corpn* [2010] 1 AC 145, [25]. This is not just a matter of deference to editorial independence. The judges are recognising that editors know best how to present material in a way that will interest the readers of their particular publication and so help them to absorb the information. A requirement to report it in some austere, abstract form, devoid of much of its human interest, could well mean that the report would not be read and the information would not be passed on. Ultimately, such an approach could threaten the viability of newspapers and magazines, which can only inform the public if they attract enough readers and make enough money to survive.”

**Article 8 does not create, or require the creation of, an “image right”**

7. Article 8 guarantees the right to respect for private and family life, home and correspondence. As pointed out in numerous ECtHR decisions, while Article 8 may include a positive obligation on a member state to adopt measures to secure respect for private life between individuals, the state has a wide margin of appreciation as to what is required, particularly where there is a balance between competing interests or Convention rights.<sup>3</sup>

8. Article 8 does not create or require the creation of an “image right”, that is, the right of an individual to control the publication of any photograph, or other image, of them. In the judgment in *Von Hannover v Germany*<sup>4</sup> (which will be referred to as “*Von Hannover (1)*”) at [72], the ECtHR referred to the positive obligation on the state under Article 8 “..to protect private life **and the right to control the use of one’s image**” (emphasis added). The underlined words go too far; they require qualification and limitation (for reasons explained in 9 and 10 below).

9. The above observation in *Von Hannover (1)* is explicable, since the relevant German legislation at the time included a right to control the use of one’s image: section 22(1) of the Copyright (Arts Domain) Act provided that “images can only be disseminated with the

<sup>2</sup> [2010] UKSC 1, [2010] 2 WLR 325.

<sup>3</sup> See, for example, *Evans v UK* (2008) 46 EHRR 34 at [75], [77]; and see [81]: there is a particularly wide margin in relation to matters on which there is no consensus on the part of member states. Here, there is a wide divergence on the approach to be taken to privacy rights and freedom of expression; this resulted in the exclusion of these matters from “Rome II”: see the Response of the German Government (*Von Hannover*), Annex 3, Part IV, paras 27-33.

<sup>4</sup> App 59320/00, [2005] 40 EHRR 1.

express approval of the person concerned”: see the judgment at [18], [40-41]<sup>5</sup>. The ECtHR was, therefore, dealing with a case in which the member state had decided to create a right “to control the use of one’s image”. But it is important that the ECtHR should not suggest that *all* member states are required to create a similar right. There is no such requirement. This is a matter that falls within the very wide margin of appreciation in this area of law.

10. The assertion in *Von Hannover* at [50] that the concept of private life “extends” to “aspects relating to personal identity” such as “a person’s picture” was said to derive from *Schussel v Austria* (App 42409/98)<sup>6</sup>. But this requires further analysis. In *Schussel*, the relevant domestic legislation, section 78 of the Copyright Act, prohibited the publication of images “where the legitimate interests” of the person “would be injured”. This important qualification is not reflected in the *Von Hannover 1* judgment which, moreover, did not cite a key part of *Schussel* decision, which said that the applicant

“may be protected against the publication of his picture **where it constitutes an intrusion upon his privacy**, where his picture is distorted or where it is accompanied by disparaging statements”<sup>7</sup>

(emphasis added). In other words, something *more* than the mere publication of the person’s image was required. *Schussel* does not mean that Article 8(1) extends to any publication of a person’s image, so that, in every case, irrespective of the circumstances, publication would require justification under Article 8(2). *Von Hannover 1*, by suggesting otherwise, goes too far. In fact, publication of a person’s image “may” - or may not - fall within Article 8(1), *depending on the circumstances*.

11. There is no “image right” in the United Kingdom. Parliament has not enacted such a right and the courts, including appellate courts, have refused to create such a right at common law<sup>8</sup>. There are remedies which can protect misuse of an image, for example, where an image is used to suggest (falsely) that a person endorses a product, or where publication of a photograph gives rise to a defamatory allegation or infringes copyright, or where the circumstances of the publication are such as to intrude into the privacy of the person concerned (see below). Other remedies might be provided if photographs are taken in circumstances which amount to harassment, or where there has been any trespass or assault. There is sufficient protection for the right to respect for private life; Article 8(1) does not require that the UK must create an image right.

12. MLA notes that Resolution 1165 of the Parliamentary Assembly<sup>9</sup>, on the right to privacy did not suggest that there was (or should be) a right to control use of one’s image:

<sup>5</sup> As appears from [41], section 23(1) of that Act provided for exceptions, including that the publication of an image that portrayed “an aspect of contemporary society” was permitted, providing this did not “interfere with a legitimate interest” of the person concerned.

<sup>6</sup> An application under Article 8 was held to be inadmissible.

<sup>7</sup> The same limitations were included in *Podolskaya v Russia* 11626/02 (admissibility): “A person shall, in principle, be protected against the publication of his picture where it constitutes an intrusion upon his privacy, where the picture is distorted or where it is accompanied by disparaging statements”.

<sup>8</sup> See, for example, *OBG v Allan* [2008] 1 AC 1 HL at [124] (Lord Hoffmann) and [285] (Lord Walker, who noted that the courts of England and Wales had “consistently” rejected such a right); see also *Murray v Express Newspapers* [2009] Ch 481 CA at [54]; *Irvine v Talksport Ltd* [2002] 1 WLR 2355; *Elvis Presley Trademarks* [1999] RPC 567, 580-582, 597-598; *Douglas v Hello! Ltd* [2001] QB 967 CA at [74-75].

<sup>9</sup> Resolution № 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy; this was cited in *Von Hannover 1* (by the interveners): see [46].

while underlining the importance of privacy rights, it recommended that domestic legislation should prohibit chasing people to photograph or film them “in such manner that they are prevented from enjoying the normal peace and quiet” they could expect in private life or to prevent them from suffering physical harm: 14(v), as well as an effective remedy against trespass: 14(vi). It encouraged the media to produce their own guidelines. The Resolution therefore acknowledges that there should be remedies to protect against intrusion into private life, through harassment or other wrongful acts which may be associated with the taking of photographs. But it is striking that there was no assertion that there should be an “image right” to protect against any publication (without consent) of one’s image.

### Article 8 and photographs

13. The law of England and Wales, having taken into account Articles 8 and 10 of the Convention, now provides remedies for the “misuse of private information”. The cause of action requires a two-stage process:

“First, is the information private in the sense that it is in principle protected by Article 8? If no, that is the end of the case. If yes, the **second** question arises: in all the circumstances, must the interest of the owner of the private information yield to the right of freedom of expression conferred on the publisher by Article 10? The latter inquiry is commonly referred to as the balancing exercise.”<sup>10</sup>

The same approach is taken to all types of private information, including photographs..

14. At the first stage, the court must consider whether, in all the circumstances, the individual had a “reasonable expectation of privacy” in respect of the photograph.<sup>11</sup> This is an objective and broad question, which takes account of all the circumstances of the case, including the attributes of the claimant, the activity in which they were engaged, where it was happening, the nature and purpose of the intrusion, the absence of consent (and whether this was known or could be inferred), the effect of publication on the claimant and the circumstances in which the information came into the hands of the publisher<sup>12</sup>.

15. It is also important at this first stage to examine whether the alleged intrusion reached a sufficiently serious level to engage the Article 8(1) right. The court requires that there be a “certain level of seriousness”<sup>13</sup> and, if there is not, the matter falls outside the scope of Article 8 altogether.

16. The first-stage test depends entirely on the facts. What the photograph shows – and where it was taken – are, obviously, relevant factors. The publication of an anodyne photograph of an individual, taken in a public place, that does not include any “private”

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<sup>10</sup> *McKennitt v Ash* [2008] QB 73 CA at [11].

<sup>11</sup> See *McKennitt* (above); *Campbell v MGN Limited* [2004] 2 AC 457 HL at [21] (Lord Nicholls), [99] (Lord Hope); *R (Wood) v Cmr of Police of the Metropolis* [2010] 1 WLR 123 CA at [22].

<sup>12</sup> *Murray v Express Newspapers* [2009] Ch 481 CA at [35-36].

<sup>13</sup> *R (Wood) v Cmr of Police of the Metropolis* [2010] 1 WLR 123 CA at [22-23] (this “safeguard” was necessary to ensure that the core right protected by article 8, “however protean”, should not be “read so widely that its claims become unreal and unreasonable”); see also [44]; *R (Gillan) v Comr of Police of the Metropolis* [2006] 2 AC 307 HL at [28]; *M v Secretary of State for Work and Pensions* [2006] 2 AC 91 HL at [83]; and see *Murray* (above) at [17].

information, will not qualify<sup>14</sup>. The matter might be sufficiently serious if the photograph were to disclose intimate or sensitive information. The fact that a photograph is taken covertly does not mean that it will necessarily intrude into privacy: the activity depicted must be private in nature. An example often given to illustrate the kind of case that fails at the first stage is that of a photograph of a person engaged in an ordinary daily activity, in a public place, such as “popping to the shops”<sup>15</sup>, which is not “private” in any meaningful sense. There is no reason to hold that Article 8(1) is engaged in such a case: there is no intrusion. Another relevant factor is whether the individual has courted publicity: if they have done so, that may diminish (or eliminate) any reasonable expectation of privacy<sup>16</sup>.

17. This is consistent with the true rationale of Article 8 and the Strasbourg jurisprudence. The ECtHR (rightly) acknowledged in *Von Hannover 1* at [68] that the “context” in which the pictures had been taken was relevant. But it was in error in suggesting that there was an absolute rule that publication of a photograph would always fall within Article 8(1)<sup>17</sup>. It is unfortunate that, since *Von Hannover 1*, there have been other statements to the same (blanket) effect - that the publication of any photograph of an individual affects their private life. See, for example:

“The concept of private life covers personal information which individuals can legitimately expect should not be published without their consent and includes elements relating to a person’s right to their image. **The publication of a photograph thus falls within the scope of private life** (see *Von Hannover v. Germany...*)<sup>18</sup> (emphasis added).

Such statements go too far. There is no blanket rule. MLA asks the ECtHR to take this opportunity to set out a clear statement of the true position. Publication of a person’s photograph may – or may not – fall within the scope of private life; whether it does so will depend upon all the facts and circumstances of the case.

18. Strasbourg cases under Article 10 illustrate the fact that the publication of a person’s photograph does not always intrude into their right to privacy. The ECtHR, in deciding whether a restriction is justified by reference to the rights of others under Article 10(2), considers the content and context of what has been published. See, for example:

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<sup>14</sup> See Fenwick & Phillipson *Media Freedom Under the Human Rights Act* (OUP) (2006) at p679: in the absence of any “particularly personal or intimate aspect, normal activities carried on in public – walking, shopping, eating, riding a cycle or horse, are not, in this sense, generally seen as part of ‘private life’ in the Article 8 sense”.

<sup>15</sup> *Campbell v MGN Limited* [2004] 2 AC 457 HL at [154] (Baroness Hale); see also 25-27 (Lord Nicholls), [75-77] (Lord Hoffmann; [123-124] (Lord Hope); [151-153] (Baroness Hale); and see *John v Associated Newspapers* [2006] EMLR 27.

<sup>16</sup> See *Murray (above)* at [55-57].

<sup>17</sup> See the critique of *Von Hannover 1* by Fenwick & Phillipson (note 14 above) at p677-683. The authors suggest that the question might be whether the photograph “reveals or exposes some intimate aspect” of the person’s life or whether the cumulative impact of other factors, such as the “persistent taking and publishing” of photographs was such as to “give rise to a level of intrusion sufficient to breach Article 8”.

<sup>18</sup> See the five related decisions, all against Finland, given on 6 April 2010: *Jokitaipale* (App 43349/05) [2010] ECHR 444 at [63]; *Iltalehti and Karhuvaara* (App 6372/06) [2010] ECHR 445 at [52] *Flinkkila* (App 25576/04) [2010] ECHR 446 at [75]; *Soila* (App 6806/06) [2010] ECHR 449 at [60]; *Tuomela* (App 25711/04) [2010] ECHR 452 at [47]. See also *Sciacca v Italy* (App 50774/99) (2006) 43 EHRR 20 at [29]; and *Reklos v Greece* (App 1234/05) (2009) EMLR 16 at [38-40] (where statements about the need for image protection were made in the context of very unusual facts: a child had been photographed, without parental consent, while in a clinic accessible only to doctors and nurses: see [37]).

\* *News Verlag v Austria* (App 31457/96) at [59]: the publication of photographs of B. had not “encroached” upon his right to privacy; “with the possible exception of one wedding picture”, the photographs “did not disclose any details of his private life”. See also *Krone Verlag v Austria* (App 34315/96) at [37]: the photograph in question “did not disclose any details of [the] private life” of the person concerned<sup>19</sup>.

\* *Hachette Filipacchi v France* (App 71111/01) at [42]: the ECtHR referred to whether the image contained “very personal” or “even intimate” information about an individual or their family. Respect had been afforded to the magazine’s editorial freedom: its policy was to illustrate stories with “striking photographs”: [60].

\* *Egeland v Norway* (App 34438/04) at [59], [61]: the ECtHR referred to photographs which revealed “personal and intimate information”. The individual was shown in great distress and in tears; the photographs were taken when she was “at her most vulnerable psychologically”; and, therefore, although taken in a public place, were intrusive.

\* *Erikainen v Finland* (App 3514/02) at [70]: it was necessary to consider the significance of the fact that the photographs had been taken with the individual’s consent and for the purpose of publication (although for an earlier article and in a different context). The decision about techniques of reporting was to be made by the media, not the ECtHR (or national court): [65].

Each case turns on its facts. MLA submits that the facts and circumstances must be considered at the first stage to establish if there been any interference with the Article 8(1) right. If there has not, that is the end of the matter. If there has, then the second stage is to consider whether the intrusion is warranted under Article 8(2) will arise. The facts and circumstances will also be relevant at that stage, going into the overall balancing test.

19. It is important, where the media have published an individual’s photograph, that before weighing up the balance between Articles 8 and 10, the courts (domestic and ECtHR) should consider the prior question: does Article 8(1) apply at all? It does not follow from the fact that an individual’s image has been published that there has been an intrusion into private life which requires justification within Article 8(2). To proceed on that basis would be to impose an “image right”. Rather, the right approach is – before any balance – to examine all the circumstances to establish whether the person had a “reasonable expectation of privacy” in relation to the photograph and whether the alleged intrusion is above a required threshold of seriousness.

20. Finally, in this context, it is important to note that media codes of practice in the UK require that the right to privacy is respected: see, for example, the Press Complaints Commission (“PCC”) Code (press) and the section on privacy from the Ofcom code (broadcast media), which are attached as **Annex 2** and **3**. The PCC Code includes that it is unacceptable to photograph a person in a place where they have a “reasonable expectation of privacy” (note that it does not prohibit *all* photography without consent); editors are required to justify intrusions into an individual’s private life; it is relevant to take account of the individual’s own public disclosures of information (clause 3). That Code also prohibits harassment (clause 4). The Ofcom Code considers when a person has a “legitimate

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<sup>19</sup> Both *Krone Verlag* and *News Verlag* were mentioned in *Von Hannover 1* at [60].

expectation of privacy"<sup>20</sup>: the extent to which the information is in the public domain and whether the individual is already in the public eye are relevant factors; there may be circumstances in which an individual can reasonably expect privacy in a public place (where the activity is of a sufficiently "private nature"; see also 8.4). Any infringement of privacy should be with consent or "otherwise warranted" (8.5-8.8). There are special, and rigorous, rules about surreptitious filming 8.13-8.15. These Codes do not restrict the publication of a photograph (or other recording) of activities in a public place which are not "private" in nature. Both Codes take account of the Human Rights Act 1998 and set out rules that carefully balance the competing rights under Articles 8 and 10 of the Convention.

### Article 8 and reputation

21. Article 8(1) does not protect "reputation"<sup>21</sup>. However, in a series of cases, the ECtHR has said that the protection of reputation falls within Article 8(1), which has had the effect of elevating it to the status of a Convention right<sup>22</sup>. MLA submits that this is not warranted and that while the protection of reputation is properly considered under Article 10(2) (as a legitimate aim that may justify a restriction), it should not be treated as a right that has equal status to freedom of expression.

22. MLA raises this point in view of an obvious analogy that arises: just as an unqualified statement that any publication of a person's photograph falls within Article 8(1) goes too far (see above), so too does an unqualified statement that any publication of a defamatory statement falls within Article 8(1). If the right to reputation is to be treated as an aspect of the Article 8 right (though MLA maintains that it should not), then MLA asks the court to make clear that Article 8 does not have to be considered unless the attack on reputation includes the disclosure of private information and/or interferes materially with the claimant's private life and the circumstances show a failure to respect the right to private life that is above a required level of seriousness<sup>23</sup>. In short, Article 8(1) does not have to be considered in every case where a defamatory statement is published: it will depend on the circumstances. The approach of the ECtHR in *Karako v Hungary*<sup>24</sup> is to be preferred.

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<sup>20</sup> See the section headed "Practices to be followed (8.2-8.22)", with the sub-heading "Private lives, public places and legitimate expectations of privacy".

<sup>21</sup> Compare Article 12 of the Universal Declaration of Human Rights, which expressly protects privacy and "honour and reputation" from arbitrary attack (article 19 protects freedom of expression). The omission of such words from Article 8(1) was deliberate, not oversight.

<sup>22</sup> See, eg, *Radio France and Others v France* (2004) 40 EHRR 29. *Chauvy v France* (2005) 41 EHRR 29. *Cumpaña v Romania* (2004) 41 EHRR 200 at [91]; *Pfeifer v Austria* (2009) 48 EHRR 8 at [35]; *Petrenco v Moldova* (App 20928/05) at [52].

<sup>23</sup> Where, for example, a person is criticised in a public debate, relating to their performance of public functions, Article 8 should not be engaged at all (contrary to *Pfeifer v Austria* (2007) 48 EHRR 175 at [35], where the point was not disputed by the parties).

<sup>24</sup> *Karako v Hungary* (Application No. 39311/05), unreported, 28 April 2009. The interpretation of *Karako* by the Supreme Court in *Guardian News and Media* [2010] UKSC 1, [2010] 2 WLR 325 at [37-42] appears to proceed (wrongly) on the basis that any attack on reputation may fall within Article 8(1); so that the absence of any serious interference with private life, such as to undermine personal integrity, is a question that arises at the second stage (balancing Articles 8 and 10). MLA submits that the better approach is to treat the question of the nature and extent of impact upon private life as being matters directed to the first question: does Article 8(1) apply at all. Some defamatory statements have no impact upon a person's "private life": in such circumstances, why consider the Article 8(1) right to respect for privacy?

### Where Articles 8 and 10 do have to be balanced

23. As MLA has submitted, it is important, before balancing the rights under Articles 8 and 10, to first ask the question whether Article 8 applies at all. There is a threshold test, which should not be taken as read or as being easily satisfied.

24. Where both rights do apply, they have equal status. Whether the right to respect for privacy or freedom of expression prevails depends upon a close scrutiny of the facts<sup>25</sup>. It is possible for rational people, reasonably, to reach different conclusions as to the outcome of the balance between Articles 8 and 10<sup>26</sup>. It is particularly important, therefore, that the ECtHR should leave a proper margin of appreciation to member states to determine how the balance should be struck. The role of the Strasbourg court should be supervisory not directive. It should intervene only where the national authorities fail even to attempt to strike a balance or where their decision is outside any reasonable range of decisions.

25. The ECtHR has repeatedly acknowledged the vital role of the media in imparting information and ideas on "all matters of public interest", including in *Von Hannover (1)* at [58]<sup>27</sup>. However, other parts of that judgment appear to take an unduly narrow approach to the public interest, with the question whether the photograph to be published was capable of contributing to a debate in a democratic society being focused principally (if not exclusively) on the activities of politicians [63], [64]; and almost ruling out any such public interest where there is a private individual with no "official" function [72], [76]. In fact, the public interest depends upon *all* the circumstances: to focus on elected politicians would be far too narrow. The arts, sports and the activities of celebrities are matters which are capable of giving rise to debate on matters of public interest or concern<sup>28</sup>.

26. A related issue concerns the status of the person making the complaint. It is not only the private lives of politicians that may be of legitimate public interest. Resolution 1165 (see 12 above) notes at [7] that "public figures" are:

"... persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain."

The Association of German Magazine Publishers relied (rightly) upon that Resolution in *Von Hannover (1)*, submitting that the public's legitimate interest in being informed was not limited to politicians, but extended to public figures who had become known for other

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<sup>25</sup> Where both rights are in play, the following principles apply *Re S (A Child)* [2005] 1 AC 593 HL, [17] (Lord Steyn): "First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test."

<sup>26</sup> This has been recognised in the domestic court: *Browne v Associated Newspapers Ltd* [2008] QB 103 at [45] (it is a "balancing exercise upon which different judges could properly reach different conclusions").

<sup>27</sup> In *Von Hannover 1*, the ECtHR noted that there were many authorities to this effect, including *Observer & Guardian v UK* at [59]; *Bladet Tromso v Norway* at [59]. The same point was recently reiterated in the Finnish cases, referred to above: *Jokitaipale* at [61]; *Iltalehti and Karhuvaara* at [50] *Flinkkila* at [73]; *Soila* at [58]; *Tuomela* at [45].

<sup>28</sup> See, for example, *Nikowitz v Austria* (App 5266/03) at [25], where the ECtHR recognised that the publication in question "sought to make a critical contribution to an issue of general interest, namely society's attitude towards a sports star."

reasons; the press's role of "watchdog"; should not be narrowly interpreted; and, further, account should be taken of the fact that the "boundary between political commentary and entertainment was becoming increasingly blurred."

27. In the UK, the PCC Code includes examples of matters that may be in the public interest, to warrant an intrusion into private life: i) Detecting or exposing crime or serious impropriety; ii) Protecting public health and safety; iii) Preventing the public from being misled by an action or statement of an individual or organisation. It notes that there is a public interest in freedom of expression itself. The Ofcom Code at 8.1 offers a similar list of examples: revealing or detecting crime, protecting public health or safety, exposing misleading claims made by individuals or organisations or disclosing incompetence that affects the public. Both lists are non-exhaustive, being merely illustrations of the type of information which can engage the public interest, so that freedom of expression outweighs any privacy rights.

28. It is not possible to devise a comprehensive or definitive list of what "public interest" may outweigh privacy rights<sup>29</sup>. The principle, though, is clear<sup>30</sup>. It does not require further definition; it requires the widest possible interpretation.

29. When reporting on a matter of public interest, the inclusion of photographs, or other recorded images, is an important matter properly falling within the editor's discretion. In the recent *BBC case*<sup>31</sup>, the House of Lords acknowledged at [25] the importance of the media's freedom to exercise their own judgment in the presentation of journalistic material (as also emphasised in *Strasbourg*). Article 10 protects not only the substance of the ideas and the information expressed but also the form in which they are conveyed:

"In essence article 10 leaves it for journalists to decide what details it is necessary to reproduce to ensure credibility: see *Fressoz and Roire v France* (1999) 31 EHRR 28, para 54."

The courts rightly acknowledge that judges are not newspaper or broadcasting editors.

30. In short, when balancing Articles 8 and 10, the court must ensure that wide and strong protection is given to the media in reporting on all matters of public interest.

### **Reporting on criminal proceedings**

31. The ECtHR application in *Axel Springer* does not involve the publication of photographs (since the applicant did not appeal against the injunction for separate procedural considerations). However, it is important to emphasise the role of the media in reporting upon court proceedings, in particular, in criminal courts.

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<sup>29</sup> For example, the public interest may warrant the disclosure of private sexual conduct: *Mosley v News Group Newspapers* [2008] EMLR 20, [122-134] (although not on the facts); *A v B Plc* [2003] QB 195 CA; *Theakston v MGN Ltd* [2002] EMLR 22 (in each of these cases, the claimant was in the public arena, but not a politician or public official). The public interest in exposing conditions at a school outweighed pupils' privacy rights in *Leeds City Council v Channel Four* [2007] 1 FLR 678; see also *BKM Ltd v BBC* [2009] EWHC 3151 (Ch) (public interest in broadcast of undercover filming in a care home outweighed privacy rights).

<sup>30</sup> Section 12(4) of the Human Rights Act requires the court to have regard to the extent to which it "is, or would be, in the public interest for the material to be published" (as well as to any relevant privacy code).

<sup>31</sup> *In re British Broadcasting Corporation* [2010] 1 AC 145.

32. The inclusion of a person's name or other identifying detail (which may include their photograph) plays an important part in serving the public interest. This was acknowledged by the UK Supreme Court ruling in *Guardian News & Media*: [63] is cited above; at [64], the court endorsed what Lord Steyn had said in *Re S* [2005] 1 AC 593 HL at [34]:

"from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer."

The same considerations applied in the *Guardian News & Media* case itself (which reported upon "freezing order", rather than a criminal case): if the names of the parties were not revealed, the report of the proceedings would be "disembodied": readers would be "less interested" and editors would give the report a lower priority; so "informed debate about freezing orders would suffer".

33. It is important to preserve a wide editorial discretion as to what may be included in reports of court proceedings. Open justice is immensely important. As the Court of Appeal emphasised last week, in the context of preliminary hearings in relation to the criminal trial of a number of MPs, *R v Chaytor and others* [2010] EWCA Crim 1910 (CA 30 July 2010) at [95]:

"There are equally well established principles, both at common law, and under the Convention, that criminal proceedings should normally take place in public, and that the media generally provides an essential element in the process by which open justice, and ultimately a fair trial, is secured."

There should be no incursion into that important principle, except where strictly necessary in all the circumstances of the particular case.

34. There may well be cases where a defendant, or a witness, is protected by anonymity, where this is required in the interests of justice<sup>32</sup>. There may be occasions when publication would be likely to create a risk of prejudice to the proceedings (where identification is in issue). Outside these circumstances such as these, there should be no restriction upon the publication of matter relating to individuals in relation to the proceedings (including photographs). The law of contempt of court, together with the power of the court to make orders to protect individuals where strictly necessary, ensures that privacy rights are sufficiently respected.

### Conclusion

35. The issues raised by these applications are important, both as matters of principle and in terms of their practical application. MLA would be happy to assist the court further, if wanted, in the context of these applications on any matters arising from these submissions or relating to the exercise of the right to freedom of expression.

**HEATHER ROGERS QC**

6 August 2010

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<sup>32</sup> Eady J refused to prohibit publication of a photograph of a witness in a libel/privacy case (taken in the street) [www.timesonline.co.uk/tol/news/uk/article1545438.ece](http://www.timesonline.co.uk/tol/news/uk/article1545438.ece) (21 March 2007). For the statutory restriction on photographs being taken in court (including the court precincts): see Criminal Justice Act 1925, s41.