# A celebrity fight-back "par excellence".

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# A celebrity fight-back ''*par excellence*''

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Abstract
Having hardly had time to recover from the judgment in Campbell v. MGN Ltd., the Strasbourg judges' decision in von Hannover v. Germany (Application no. 59320/00, judgment of 24 June 2004. While the judgment is not yet reported, it has been published on the ECtHR website: http://cmiskp.echr.coe.int/tkp197/view.asp?item=1%26portal=hbkm%26action=html%26highlight=59320/00%26sessionid=1094295%26skin=hudoc-en) has landed a potentially bigger blow to the tabloid press and *paparazzi* alike. This article examines the victory of Princess Caroline of Monaco against the German press and evaluates the likely impact of the judgment on the delicate balance between the individual's right to privacy and the press's freedom of expression.

## A. Introduction

The recent attempts by a variety of so-called celebrities to defend their right to privacy against unwanted intrusion by the media have been well documented.[1] While the English courts have so far resisted the temptation to create a tort of privacy in its own right, the extraordinary facts in the Campbell case allowed the House of Lords to stretch the common action of breach of confidence for protection against unwanted publication of certain photographs. In assessing whether or not the publication of photographs is to be deemed lawful, the courts are faced with the dichotomy of a right to have one's privacy protected and the media's freedom of expression. Both are funda- mental human rights protected by Articles 8 and 10 of the European Convention on Human Rights 1950. Since the coming into force of the Human Rights Act 1998, courts in the UK, while not bound by the jurisprudence of the Strasbourg-based European Court of Human Rights, are nonetheless required to take decisions by that institution into account on the basis of Section 2 of the 1998 Act. Many have been surprised by the, albeit narrow, victory of Naomi Campbell over *The Mirror* newspaper, al- though some commentators have pointed out that, in respect of the photographs at issue, these were held to be protected by the law of confidence, and not to be published in the public interest, as they formed part of private information relating to medical treatment. On this basis, photographs taken in public places were exceptionally action- able under the law of breach of confidence.

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[1] See, for example, the Douglas v. Hello! litigation, the recent decision of the House of Lords in Campbell v. MGN Ltd. [2004] 2 All E.R. 995, and Ewan McGregor obtaining an injunction against Eliot Press SARL in the English High Court to stop the publication of unauthorised photographs of his children playing while on holiday on Mauritius.

## B. The application

Princess Caroline of Monaco, a well-known media celebrity, had largely unsuccessfully embarked on a crusade against parts of the German *Regenbogenpresse*. She complained that as soon as she left her house she was subject to hounding by paparazzi following her every move, taking photographs of the most innocuous of situations, such as her picking up her children from school, riding a bicycle, or enjoying a drink in a restaurant. While Princess Caroline agreed that the press played an important role in a democratic society in respect of informing and forming public opinion, she maintained that in her case the media acted as 'entertainment press desperate to satisfy the voyeuristic tendencies' of its readership and making huge profits in the process. In addition, she argued that in contrast to the laws of other European countries, notably France, German privacy law offered her insufficient protection. In a litany of cases brought in the German courts she had been partially successful of restraining publication of photographs of her children, as well as herself being in a 'secluded place'. That concept, she alleged, was unfairly restrictive and too difficult to satisfy, as she had to prove where and at what time such photos had been taken. Otherwise she would be deemed to have been in a public place, and left without a course of action.

The German Government, unsurprisingly, argued that German law struck a fair balance between the individual's right to privacy and the freedom of expression of the press. Princess Caroline was a 'figure of contemporary society *par excellence*', and as such the public had a legitimate interest in knowing how that person behaved in public. It was pointed out that photos taken in a public place could not be published if those were to shock the public; also, the Federal Court of Justice had held that publication of photos of the Princess with a close friend in a restaurant was unlawful, which indicated that her private life was protected even in public places.

The German Government had a close ally in the Association of Editors of German Magazines, one of two intervening parties in the case. Having pointed out that German law in this area was somewhere in between the strict French regime and English law, the Association pleaded that the press's role as watchdog should not be interpreted narrowly with regard to the public's legitimate interest in being informed on public figures who had become known for reasons other than being politicians. Moreover, *Burda* magazine, one of the publishers, argued that the Grimaldi family had sought media attention and therefore could not complain about the public interest in it.

## C. The judgment

The court unanimously found in favour of the applicant and held that there was a violation of Article 8 of the Convention.

### 1. Application of Article 8

The court stated that the notion of 'private life' includes aspects relating to personal identity, such as photographs of an individual. Pointing to its jurisprudence, for example Niemietz v. Germany,[2] 'private life' extends to the physical and psychological integrity of an individual:

''the guarantee afforded by Article 9 ( _ ) is primarily intended to ensure the development, *without outside interference*, of the personality of each individual in his relations with other human beings ( _ ). There is therefore a *zone of interaction* of a person with others, *even in a public context*, which may fall within the scope of 'private life'( _ )."[3]

As a consequence, the court had no problems to conclude that photographs like those featuring in the application fell within the scope of Princess Caroline's private life. She may indeed be a figure of contemporary society par excellence, but she still has a legitimate expectation of the protection of and the respect for her private life.

In addition, while the application did not concern a direct complaint against an action of the State, it concerned an alleged failure by the State to protect adequately an individual's fundamental human right. The court maintained that a State may be, regarding the effective respect for private or family life, under a 'positive obligation' to adopt measures designed to safeguard such respect, ''even in the sphere of the relations of individuals themselves.''[4]

[2] 23 November 1992, Series A no. 251-B, at p. 33, paragraph 29.
[3] Von Hannover v. Germany, op cit, paragraph 50.
[4] Ibid, paragraph 57.

## 2. Balancing privacy and freedom of expression

The court recognized that a balance had to be struck between the right to privacy on the one hand, and freedom of expression on the other in the light of such positive obligations. It agreed that the press played an important role within a democratic society in providing information and ideas on all matters of public interest, and the court's case law indicated that exaggeration and provocation were to a certain extent legitimate tools of journalistic freedom.[5] Information may even ''offend, shock or disturb.''[6]

However, in the present case, the publication of photographs showing the Princess on a shopping spree, for example, were not to be regarded as legitimate contribution to public debate. In the words of the court,

'a fundamental distinction needs to be made between reporting facts - even controversial ones - capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of ''watchdog'' in a democracy by contributing to ''imparting information and ideas on matters of public interest'' (Observer and Guardian v. UK), it does not do so in the latter case.'[7]

The sole purpose of publishing the photographs at issue was, in the view of the court, to ''satisfy the curiosity of a particular readership regarding the details of the applicant's private life'', and that, despite Princess Caroline being a well-known celebrity, would not be classed as a legitimate contribution to a debate of general interest to society. This merited a narrower interpretation of freedom of expression.

## 3. German law offers inadequate protection

The court stressed that Convention rights are not theoretical or illusory, but practical and effective.[8] Describing a person as public figure *par excellence* and using this as a basis to curb their legitimate expectation to privacy could only be used to justify the publication of information and photographs of such public figures exercising an official function. To extend this principle to such figures and their private lives was inappropriate. Moreover, to protect public figures' privacy only if they are in a 'secluded place' and requiring them to prove this tilted the balance too much in favour of freedom of expression, as this turned individual into fair game and subject to be photographed almost at will by the entertainment press.

## 4. A unanimous decision, but concurring views

While all seven judges were unanimous in their decision that German law protected individuals' privacy insufficiently, two judges offered a slightly different viewpoint on it. Judge Barreto was not entirely convinced that the right balance was struck. He argued that Princess Caroline was still a public figure, even if she did not perform an official public function. While admitting that finding the correct balance here was not straightforward, he was of the opinion that individuals who are high-profile celebrities by definition give up some of their privacy and need to accept some media intrusion. Judge Zupančič' opinion drifted into the same direction: ''he who willingly steps upon the public stage cannot claim to be a private person entitled to anonymity.'' While he opined that the German approach was too ''*Begriffsjurisprudenz*-like'', he argued that the courts have, under American influence, made a fetish of the freedom of the press. He called for the pendulum to swing ''back to a different kind of balance between what is private and secluded and what is public and unshielded.'' For this purpose, he suggested to return to a different test, namely the test on one's reasonable expectation of privacy that featured in Halford v. UK.[9]

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[5] For example, Observer and Guardian v. UK (1992) 14 E.H.R.R. 153; Prisma Press v. France, Nos. 66910/01 and 71612/01, 1 July 2003.

[6] Von Hannover v. Germany, op cit, paragraph 58.

[7] Ibid, paragraph 63.

[8] Ibid, paragraph 71.

[9] (1997) 24 E.H.R.R. 523.

## D. Possible consequences on the English approach?

Since the German government decided not to call for a re-hearing of the case before the Grand Chamber, the judgment does now stand. Tellingly, Wolfgang Hoffmann-Riem, a judge on the Federal Constitutional Court, while admitting to 'not being happy' about the decision, he still supported the decision not to ask for a re-hearing.[10] Fearing a confirmation rather than a reversal of the judgment, he maintained it would be better to wait on how the English courts, for example, react to it. Only if the tension between the right to privacy and the freedom of the press could not be relieved on the basis of this decision, would further clarification by the Grand Chamber be necessary. Arguably, the decision in von Hannover v. Germany is of great significance for the English courts, in particular in the light of recent judgments in Douglas v. Hello! and Campbell v. MGN Ltd.

It is clear that, strictly speaking, decisions by the ECtHR are not binding on the courts in the UK. However, Section 2 of the Human Rights Act 1998 requires the courts to take them into account. Tomlinson and Thomson point out that Article 8 has horizontal effect: the 'positive obligations' of the State extend to the protection of individuals' privacy against abuse by other private individuals.[11] So far, the UK government has resisted repeated calls by the judiciary to consider the creation of a formal law of privacy, as well as the courts themselves have resisted to create a tort of privacy based on common law. Forthcoming disputes could well focus on the argument that the State, or the courts as one emanation of the state, appear not to have struck the right balance between Articles 8 and 10, and are therefore failing to fulfil that obligation.

Another important point is that the publication of photographs showing a famous person in a *public* place was held *only exceptionally* to be unlawful under the law of confidence in Campbell v. MGN Ltd. In that case, the photographs of Naomi Campbell leaving a Narcotics Anonymous meeting was more akin to sensitive personal information relating to the supermodel's medical treatment. The decision in von Hannover appears to go much further, as it puts forward that the publication of individuals in public places is unlawful, unless they make a clear contribution to general public debate. This specific point could have far-reaching consequences on the entertainment press and paparazzi who may be forced to review their approach on how to 'exploit' celebrities for a revenue-raising story or photographs: how can photographs of members of the Royal Family on holiday, or strolling around a Scottish university town for that matter be possibly contributing to the general public debate? On the other hand, with regard to the rather paltry/conservative awards made by the UK courts for a breach of confidence (plus 'nominal damages' for unlawfully processing personal data contrary to the Data Protection Act 1998), will the entertainment press be willing to take the risk of court action by establishing contingency funds for this eventuality?

Further cases dealing with such subject matter are awaited with interest. At the moment, the balancing act between the privacy and freedom of the press dichotomy appears to be surrounded by unpredictability. It will be intriguing to witness whether the 'American influence' bemoaned by Judge Zupančič will lead to an American-style protection of an individual's image rights under the banner of the right to privacy, including the unlawful use of one's name or likeness? The case of Irvine v. Talksport Ltd.[12] where the former Formula One racing driver, Eddie Irvine, succeeded in a claim under the tort of passing off against Talksport for using his name without permission in advertising, and the action taken by the famous runner David Bedford against 'The Number' advertisements allegedly misappropriating his image or personality rights have already set the works in motion e will the movement gather in pace?

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[10] According to an article in *Die Welt*, 12 October 2004.
[11] H. Tomlinson OC and M. Thomson, ''Bad news for paparazzi - Strasbourg has spoken'' N.L.J., 9 July 2004, 1040, at 1041.
[12] [2003] 2 All E.R. 881.