European Court of Human Rights: Mosley v. the United Kingdom

IRIS 2011-7:1/1

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In the case Mosley v. the United Kingdom the European Court of Human Rights decided that the right of privacy guaranteed by Article 8 of the European Convention on Human Rights does not require the media to give prior notice of intended publications to those who feature in them. The applicant in this case is Max Rufus Mosley, the former president of the International Automobile Federation. In 2008, the Sunday newspaper News of the World published on its front page an article entitled “F1 Boss Has Sick Nazi Orgy with 5 Hookers”, while several pages inside the newspaper were also devoted to the story and included still photographs taken from video footage secretly recorded by one of the participants in the sexual activities. An edited extract of the video, in addition to still images, were also published on the newspaper’s website and reproduced elsewhere on the Internet. Mr Mosley brought legal proceedings against the newspaper claiming damages for breach of confidence and invasion of privacy. In addition, he sought an injunction to restrain the News of the World from making available on its website the edited video footage. The High Court refused to grant the injunction because the material was no longer private, as it had been published extensively in print and on the Internet. In subsequent privacy proceedings the High Court found that there was no public interest and thus no justification for publishing the litigious article and accompanying images, which had breached Mr. Mosley’s right to privacy. The court ruled that News of the World had to pay to Mr. Mosley 60,000 GBP in damages.

Relying on Article 8 (right to private life) and Article 13 (right to an effective remedy) of the European Convention, Mr. Mosley complained that, despite the monetary compensation awarded to him by the courts, he remained a victim of a breach of his privacy as a result of the absence of a legal duty on the part of the News of the World to notify him in advance of their intention to publish material concerning him, thus giving him the opportunity to ask a court for an interim injunction and prevent the material’s publication. The European Court found indeed that the publications in question had resulted in a flagrant and unjustified invasion of Mr. Mosley’s private life. The question which remained to be answered was whether a legally binding pre-notification rule was required. The Court recalled that states enjoy a certain margin of appreciation in respect of the measures they put in place to protect people’s right to private life. In the United Kingdom, the right to private life is protected with a number of measures: there is a system of self-regulation of the press; people can claim damages in civil court

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proceedings; and, if individuals become aware of an intended publication touching upon their private life, they can seek an interim injunction preventing publication of the material. As a pre-notification requirement would inevitably also affect political reporting and serious journalism, the Court stressed that such a measure would require careful scrutiny. In addition, a parliamentary inquiry on privacy issues had been recently held in the UK and the ensuing report had rejected the need for a pre-notification requirement. The Court further noted that Mr. Mosley had not referred to a single jurisdiction in which a pre-notification requirement as such existed nor had he indicated any international legal texts requiring states to adopt such a requirement. Furthermore, as any pre-notification obligation would have to allow for an exception if the public interest were at stake, a newspaper would have to be able to opt not to notify an individual if it believed that it could subsequently defend its decision on the basis of the public interest in the information published. The Court observed in that regard that a narrowly defined public interest exception would increase the chilling effect of any pre-notification duty. Anyway, a newspaper could choose, under a system in which a pre-notification requirement was applied, to run the risk of declining to notify, preferring instead to pay a subsequent fine. The Court emphasised that any pre-notification requirement would only be as strong as the sanctions imposed for failing to observe it. But at the same time the Court emphasised that particular care had to be taken when examining constraints which might operate as a form of censorship prior to publication. Although punitive fines and criminal sanctions could be effective in encouraging pre-notification, they would have a chilling effect on journalism, including political and investigative reporting, both of which attract a high level of protection under the Convention. Such as scheme would therefore run the risk of being incompatible with the Convention's requirements of freedom of expression, guaranteed by Article 10 of the Convention. Having regard to the chilling effect to which a pre-notification requirement risked giving rise, to the doubts about its effectiveness and to the wide margin of appreciation afforded to the UK in this area, the Court concluded that Article 8 did not require a legally binding pre-notification requirement.

Judgment by the European Court of Human Rights (Fourth Section), case of Mosley v. United Kingdom, No. 48009/08 of 10 May 2011

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