Privacy Law

1. Introduction

English law was traditionally a negative rights culture –so that a citizen could do all that was not prohibited.[1] This was the position until the UK ratified the European Convention on Human Rights (ECHR) in 1953 but only with the Human Rights Act 1998 ("HRA") did the rights become domestically enforceable law. The ECHR binds the UK courts which is how it enters the law (the courts must interpret the law in a way compatible with it, including when there are disputes between private citizens) but it also directly binds public authorities (includes private ones with a public function).[2]

Article 8 ECHR provides for the right to respect for private and family life.

"(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society, in the interests of national security, public safety, or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights or freedoms of others."

This encompasses the reputation, honor, privacy and data rights of the individual.[3] Note that the right is not absolute and a public authority may interfere with it as provided for in subsection (2), which also encompasses the three part test applicable under the ECHR, an interference with a convention right must be: (1) be proscribed by law (and formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly); (2) pursue a legitimate aim and (3) be necessary and proportionate in a democratic society.

Under the ECHR, when two convention rights are in conflict, the court adopts an intense focus on the comparative importance of the specific rights engaged in the individual case together with the justifications for interfering with or restricting each right --and then applies the proportionality test.[4] Often the conflicting right will be Freedom of Expression under art.10 ECHR:

"10 (1)Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive[5] and impart information and ideas without interference by public authority and regardless of frontiers.[6] This

[1]Barendt, Freedom of Speech, OUP Second Edition, p. 40.

[2]By s.6 the court (as a public authority) is required to act compatibly with the ECHR and the case law of the European Court on Human Rights ("ECtHR").

[3]See the Spanish Supreme Court in *El Pais* decision 2015.

[4] *Axel Springer AG v Germany* (No.1) [2012] App. No. 39954/08 [89-95].

[5]The Public has a right to receive information under Art.10. This can be interpreted as a right to internet access-see Case C-275/06 *Promusicae v Telefonica, Yildirim v Turkey* [2012] App no. 3111/10.

[6]In the EU Charter of Fundamental Rights (EUChFR), binding member states this is protected in art.11.

article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Art. 10 is also not absolute and art.10 (2) says the right is subject to responsibilities and restrictions meeting the three step test (as above) and for one of the reasons listed in art.10 (2).

It's important to note that in the EU, art. 10 does not have US First Amendment type pre-eminence over other rights.

The rights that must be balanced against art.8 may be any of the other main rights in the ECHR such as art. 6 (to a fair trial).

2. What is private/when is art.8 engaged?

In the UK, the courts originally adapted the common law cause of action of breach of confidence to provide a remedy for a breach of the art.8 right to privacy but that has now given way to a free standing tort of "misuse of private information," see *PJS v News Group Newspapers Ltd* [2016] UKSC 16. This claim has two elements:

(1) The first stage is to ascertain whether the applicant has a reasonable expectation of privacy so as to engage art. 8; if not, the claim fails. [7]

(2) If art. 8 is engaged, then the second stage of the inquiry is to conduct "the ultimate balancing test" which has the four features identified in *In Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 A.C. 593 at [17] 9 (see below).

[7] The question of whether or not there is a reasonable expectation of privacy in relation to the information: *"…is a broad one, which takes account of all the circumstances of the case. They include the attributes of the claimant, the nature of the activity in which the claimant was engaged, the place at which it was happening, the nature and purpose of the intrusion, the absence of consent and whether it was known or could be inferred, the effect on the claimant and the circumstances in which and the purposes for which the information came into the hands of the publisher*": see *Murray v Express Newspapers* [2009] Ch 481 at [36]. The test established in *Campbell v MGN Ltd* [2004] UKHL 22 is to ask whether a reasonable person of ordinary sensibilities, if placed in the same situation as the subject of the disclosure, rather than the recipient, would find the disclosure offensive. The protection may be lost if the information is in the public domain. In this regard there is, per *Browne v Associated Newspapers Ltd* [2008] QB 103 at [61] ("…potentially an important distinction between information which is made available to a person's circle of friends or work colleagues and information which is widely published in a newspaper.)"

The remedies are injunctions and damages – the primary relief usually being an interim injunction to restrain publication or further publication, often against the mass media, known as a "privacy injunction." This is a very valuable remedy indeed (note that defamation in contrast cannot be injuncted as no 'prior restraints' are permitted to avoid censorship --as opposed to post publication restraints on repetition or republication). Pursuant to section 12(3) of the Human Rights Act 1998 an interim injunction should not be granted unless a court is satisfied that the applicant is likely – in the sense of more likely than not – to obtain an injunction following a trial."[8]

Privacy focuses on human autonomy, dignity and intrusion and recognizes that even famous people require a zone where they are free from harassment and intrusion. It is accepted that the following classes of information are generally private and their publication will usually engage art.8:

a. family life;
b. intimate relationships (usually the details versus the fact of[9])/sex life;
c. financial information and position;
d. physical and mental health;
e. medical conditions and treatment;
f. spent convictions and sentences;
g. photographs (of private activity);
h. images, facts and data about children.[10]

Art. 8 also protects the reputation, honor, and data rights of the individual.[11]

3. Balancing act

Where there are competing rights, the domestic courts will approach the ultimate balancing exercise in accordance with the guidance given by the House of Lords in *Re*

[8] See *Cream Holdings Ltd v Banerjee* [2005] 1 AC 253 [22] and *ETK v News Group Newspapers Ltd* [2011] EWCA Civ 439.

[9] See *Browne v Associated Newspapers Ltd* [2008] QB 103, *Donald v Ntuli* [2011] 1 WLR 294 and K v News Group [2011] 1 WLR 1827, Hutcheson v News Group Newspapers [2012] EML 2 and Trimingham v Associated Newspapers [2012] EWHC 1296

[10] See the Editors' Code at no. 6. "Children. (i) All pupils should be free to complete their time at school without unnecessary intrusion. (ii) They must not be approached or photographed at school without permission of the school authorities. (iii) Children under 16 must not be interviewed or photographed on issues involving their own or another child's welfare unless a custodial parent or similarly responsible adult consents.(iv) Children under 16 must not be paid for material involving their welfare, nor parents or guardians for material about their children or wards, unless it is clearly in the child's interest. (v) Editors must not use the fame, notoriety or position of a parent or guardian as sole justification for publishing details of a child's private life.

[11]See the Spanish Supreme Court in *El Pais* decision 2015. See also *Re Guardian News and Media* [2010] 2 AC 697, [42], *Mikolajova v Slovakia*, application no. 4479/03, [53]-[55], *Chauvy and Others v. France*, no. 64915/01, [70], *Pfeifer v. Austria*, no. 12556/03, [38] (held that States were under a positive obligation to protect individuals' right to reputation, as an element of their "private life" under art.8). See also *Sanchez Cardenas v. Norway*, no 12148/03, [33 and 38] and *A. v. Norway,* no. 28070/06, [64](holding that in order for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of gravity and in a manner causing prejudice to personal enjoyment of the right to respect for private life citing *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, [49] and *Karakó v. Hungary*, no. 39311/05, [23] (the Court considered that reputation had been deemed to be an independent right mostly when the factual allegations were of such a seriously offensive nature that their publication had an inevitable direct effect on the applicant's private life). See also *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, [40].

S (A Child) (Identifications: Restrictions on Publication) [2005] 1 AC 593 at [17]. Where both Article 8 and Article 10 rights are involved:

(i) neither article as such has precedence over the other;
(ii) 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;
(iii) the justifications for interfering with or restricting each right must be taken into account;
(iv) finally, the proportionality test or "ultimate balancing test" must be applied to each.

See *McKennitt v Ash* [2006] EWCA Civ 1714; [2008] QB 73 [47], *Mosley v News Group Newspapers Ltd* [2008] EWHC 687 (QB) [28].

The exercise of balancing article 8 and article 10 rights has been described as "analogous to the exercise of a discretion," see *AAA v Associated Newspapers Ltd* [2013] EWCA Civ 554 [8]. As *Von Hannover v Germany* (2004) 40 EHRR 1 makes clear at [76] *"the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest."* In addition, the following principles are relevant; how well known the person is, their prior conduct, the method by which the information was obtained (particularly for photographs), content, form and consequence of publication, severity of any sanction, if any. See *Axel Springer AG v Germany* [2012] ECtHR [89-95] and *Von Hannover v Germany (No.2) [109-113]*.

4. Public Interest

Famously this is not what the public are interested in. The working definition is in the Editors' Code as below. "*The public interest includes, but is not confined to:*

Detecting or exposing crime, or the threat of crime, or serious impropriety.
Protecting public health or safety.
Protecting the public from being misled by an action or statement of an individual or organization.
Disclosing a person or organization's failure or likely failure to comply with any obligation to which they are subject.
Disclosing a miscarriage of justice.
Raising or contributing to a matter of public debate, including serious cases of impropriety, unethical conduct or incompetence concerning the public.
Disclosing concealment, or likely concealment, of any of the above.
There is a public interest in freedom of expression itself.
The regulator will consider the extent to which material is already in the public domain or will or will become so.
Editors invoking the public interest will need to demonstrate that they reasonably believed publication - or journalistic activity taken with a view to publication – would both serve, and be proportionate to, the public interest and explain how they reached that decision at the time.

An exceptional public interest would need to be demonstrated to over-ride the normally paramount interests of children under 16."

Note that as applied to the art.10 analysis, there are many different types of speech and not all are equally deserving of the same degree of art. 10 protection.[12] See also *Mosley v United Kingdom*, the ECHR said *"there is a distinction to be drawn between reporting facts - even if controversial - capable of contributing to a debate of general public interest in a democratic society, and making tawdry allegations about an individual's private life.. In respect of the former, the pre-eminent role of the press in a democracy and its duty to act as a 'public watchdog' are important considerations in favour of a narrow construction of any limitations on freedom of expression. However, 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 (Von Hannover v Germany (2005) 40 EHRR 1, [65]; Hachette Filipacchi Associés (ICI PARIS) v France, no 12268/03, [40]; and MGN Ltd v United Kingdom [143]. 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 (see Société Prisma Presse v France (dec), nos 66910/01 and 71612/01, 1 July 2003; Von Hannover, above, [66]; Leempoel & SA E Ciné Revue v Belgium, no 64772/01, [77],; Hachette Filipacchi Associés (ICI PARIS), cited above, [40]; and MGN Ltd, cited above, [143]."*

There is however a constant public interest in anyone - particularly, the media - having the right to say what they want, *"freedom of expression is an important right for its own sake" and that is recognised by section 12(4) HRA which provides that "[t]he court must have particular regard to the importance of the Convention right to freedom of expression".* Often in practice, one person's desire to tell their story and their art.10 right to do so, will conflict with the art.8 right of another person who wishes to keep the same story private, see *Rhodes v OPO* [2015] UKSC 32. In this class is the "kiss and tell," story which does no more than satisfy readers' curiosity about the private lives of others and fails to serve any legally recognized public interest.[13]

[12] *"There are undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than others. Top of the list is political speech. The free exchange of information and ideas on matters relevant to the organization of the economic, social and political life of the country is crucial to any democracy. Without this, it can scarcely be called a democracy at all. This includes revealing information about public figures, especially those in elective office, which would otherwise be private but is relevant to their participation in public life. Intellectual and educational speech and expression are also important in a democracy, not least because they enable the development of individuals' potential to play a full part in society and in our democratic life. Artistic speech and expression is important for similar reasons, in fostering both individual originality and creativity and the free-thinking and dynamic society we so much value…. "*

[13] See *Couderc and Hachette Filipacchi Associés v France* (Application No 41454/07), paras 100-101 and *Axel Springer AG v Germany* (Application No 39954/08), [91] and see *PJS v News Group Newspapers Ltd* [2016] UKSC 16.

5. Public Figures

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--*Axel Springer AG v Germany* [2012] ECtHR 227. Positions where higher standards are expected means there will usually be public interest in the information which will usually contribute to a public debate on the individuals suitability for their position and discharge of their duties and responsibilities.[14] The following are public figures:

a. politicians;
b. past and present England Football captains and managers;
c. headmasters;
d. clergy;
e. civil servants;
f. surgeons/doctors;
g. journalists.

There has been considerable debate about sportsmen and others in sport. An England Football Manager was a public figure, see *McClaren* [2012] EWHC 2466. Mr. Max Mosley was held not to be a public figure, although the media tried to turn a kiss and tell into a "Sick Nazi Orgy" to make out public interest based on hypocrisy (as he had disclaimed his Father's fascist views). This failed as there was no public interest in the story. See *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB).[15]

In *Terry v Persons Unknown* [2010] EWHC 119 (QB), the fact that he was Captain at the time was relevant to his attempt to keep his affair private but the Court found it was really a defamation case to protect his reputation and sponsorships –but as there are no injunctions for libel, he had tried to frame the claim in privacy. The Court took view his wife knew already and he wanted to protect his earnings not his privacy and the application for an injunction failed on this basis. There have been decisions that make clear where there is a genuine family relationship to protect, the fact the claimant is a famous footballer (as opposed to the Captain, does not render him a public figure, see *Giggs* [2011] EWHC 1326).

Contrast, *Rio Ferdinand v MGN* [2011] EWHC 2484, where an article exposed his long affair and it was held although it was private, the Mirror's art. 10 rights trumped his privacy as he was a public figure as Captain and a role model and there was a public interest in correcting his hypocrisy (known as the False Image Doctrine) as Ferdinand had falsely presented himself as reformed family man and ran a media campaign to project a positive reputation and there was a valid public debate about whether he was suitable to be Captain after dismissal of Terry for his ex-marital affair. Further, the mistress had her own art. 10 right to tell her story.

However, generally it is well established that public figures are entitled to the enjoyment of art. 8 rights of privacy on the same basis as anyone else, see *Craxi v Italy* (No 2)

[14] See *A v B* [2003] QB 195 at [11].

[15] An injunction was refused as the video was so accessible abroad and on other websites that it was found to be futile. He was awarded damages of £60,000 plus his legal costs and his appeal to ECHR sought a pre-publication notification right but was denied. He also won damages in France and recently got an injunction against Google there.

(2004) 38 EHRR 47, [65] and *Von Hannover* (above) [73-75], and *McKennitt* (above) [62-64]. This includes their private life, as the judge noted in *AMC v News Group* [2015] EWHC 2361 "*I do not consider that being a public figure of and by itself makes the entire history of that person's sex life public property*" and further on the public interest noted "*I am conscious that there is a risk that the phrase 'socially harmful' can become a pretext for judging others by reference to a moral positions which those others do not, or might not, share. This is a particular risk for a court in an increasingly secular society in which some issues, especially questions of sexual conduct, do not attract the consensus which they once did.* "

There will be questions asked about whether a person has waived his privacy rights by courting publicity about some aspect of his life and this can call for a fact-intensive evaluation but the modern view is, as put in *McKennitt* at paragraph 55: *"If information is my private property, it is for me to decide how much of it should be published. The "zone" argument completely undermines that reasonable expectation of privacy."* The zone argument of which the Court of Appeal there disapproved was that once a person had courted publicity about some aspect of his life, then he permanently waived privacy in relation to that aspect of his life thereafter.

6. Public domain

The fact that the information is in the public domain is not determinative. As noted in Leveson Inquiry Report's conclusion at 3.4:

"There is a qualitative difference between photographs being available online and being displayed, or blazoned, on the front page of a newspaper such as the Sun. The fact of publication in a mass circulation newspaper multiplies and magnifies the intrusion, not simply because more people will be viewing the images, but also because more people will be talking about them. Thus, the fact of publication inflates the apparent newsworthiness of the photographs by placing them more firmly within the public domain and at the top of the news agenda."

There is substantial recent authority recognizing that even "the repetition of known facts about an individual may amount to unjustified interference.." see *JIH v News Group Newspapers Ltd* [2010] EWHC 2818 (QB) [59]. The law of privacy protects from further intrusion and harassment as well as just protecting the data, see *PJS v News Group Newspapers Ltd* [2016] UKSC 16[16] and *Von Hannover v Germany* (2005) 40 EHRR 1, [65]. See the judgment of Eady J in *CTB* [2011] EWHC 1326 (QB), where he refused an application by a newspaper to vary an interlocutory

[16] See *CTB v News Group Newspapers Ltd* [2011] EWHC 1326 (QB) and 1334 (QB) [23] ("It is important always to remember that the modern law of privacy is not concerned solely with information or 'secrets': it is also concerned importantly with intrusion. … [That] also largely explains why it is the case that the truth or falsity of the allegations in question can often be irrelevant: see eg *McKennitt v Ash* [2008] QB 73 at 80 and 87..24. It is fairly obvious that wall-to-wall excoriation in national newspapers, whether tabloid or 'broadsheet', is likely to be significantly more intrusive and distressing for those concerned than the availability of information on the Internet or in foreign journals to those, however many, who take the trouble to look it up. Moreover, with each exposure of personal information or allegations, whether by way of visual images or verbally, there is a new intrusion and occasion for distress or embarrassment.") cited in *PJS v News Group Newspapers Ltd* [2016] UKSC 16.

injunction because of what he referred to as "widespread coverage on the Internet" and the same approach was taken by Tugendhat J in a later judgment in the same case, *CTB* [2011] EWHC 1334 (QB). However, if the scale of publication has passed the point of no return, the court may not grant an injunction, see *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB).

7. Photographs

On the whole, photographs are a special case due to the degree of intrusion and exposure. Where they are of very intimate or private information such as sexual acts, there will very rarely be any argument on public domain, even if already published, see *Contostavlos v Mendahun* [2012] EWHC 850 (QB) at [25] and see *Rocknroll v News Group Newspapers Ltd* [2013] EWHC 24 (Ch). On the whole, a person including a celebrity can be photographed on the street (as there is no reasonable expectation of privacy), see *Campbell v MGN* [2004] 1 AC 457 unless they were engaged in a private activity when they do have the expectation despite the fact they are in public, as Princess Caroline did when with her children, see *Von Hannover v Germany (2005) 40 EHRR 1.* Note that children themselves are a special case and photographs taken of children out walking or shopping in public with their parents may not be published-- as a rule-- and a very strong public interest would be required to displace the rule. The cases to date have concerned the children of the famous, see *Murray v Express Newspapers* [2009] Ch 481 (images of J.K Rowling's child photographed in a stroller were private) and *Weller v Associated* [2015] EWCA 1176 (Civ.) (no public interest and the child's right to privacy in photographs shopping with family in LA overrode the Mail's art.10 rights).

8. Prior Restraints

Under the HRA §12, once a court has decided that a proposed publication is likely to be tortous, it then goes on to consider whether the applicant is also likely to establish at trial that publication should not be allowed. It must give special consideration to freedom of expression and it "enhances the weight" to be given to art.10. However, there is no pre-notification obligation on the media to give advance warning to the subject of a story who may be entitled to apply for a privacy injunction. While in defamation, there can be an obligation to put allegations to a subject (in order to claim the defence of responsible publication and as a matter of good practice), Mr. Mosley failed to have a similar obligation imposed in privacy cases in his appeal to the ECtHR,[17] which clarified that the state's obligation under the ECHR was limited to ensuring his privacy rights were "practical and effective," see *Mosley v United Kingdom* (Application No 48009/08) [20], (in its examination to date of the measures in place at domestic level to protect art. 8 rights in the context of freedom of expression, it [is] implicitly accepted that ex post facto damages provide an adequate

[17] "117. Finally, the Court has emphasised 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 on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest (see Observer and Guardian v United Kingdom (26 November 1991, (1992) 14 EHRR 153, para 60)."

remedy for violations of article 8 rights arising from the publication by a newspaper of private information).[18]

9. Other claims

Where there is a privacy claim, there will usually also be a viable data protection claim.

[18] This rule will give way when this is not so, as in *Armonienė v Lithuania* (damages had not provided an adequate remedy, because of the "derisory sum" that had been awarded).