

## Grand Chamber Seeks to Clarify Balancing of Article 10 and Article 8

Rónán Ó Fathaigh

The Grand Chamber of the European Court delivered two judgments recently concerning the appropriate balancing exercise where there is a conflict between the right to freedom of expression and the right to respect for private life. The judgments in [\*Von Hannover \(no. 2\) v. Germany\*](#) and [\*Axel Springer v. Germany\*](#) both concerned publication by newspapers of various details of well-known figures. Of the two, *Axel Springer* is arguably of more significance, and resulted in a divided Grand Chamber (12-5 majority) finding a violation of Article 10.

The applicant in *Axel Springer* was the publisher of the German tabloid newspaper *Bild*. The newspaper published a front page article detailing the arrest of a well-known television actor for possession of cocaine at a festival. The article noted that the actor had a previous conviction for importing a small amount of cocaine, and quoted the public prosecutor confirming the circumstances of the arrest.

The actor successfully applied to the German courts for an order prohibiting further publication of the article. The German courts held that the publication of the suspect's name was, as a general rule, a serious infringement of the "right to protection of personality rights". There had been no justification for publishing such details as the offence was minor, committed in a toilet, and fell within the "private sphere". Moreover, while the actor was well-known, he was not a "role model", and it was irrelevant that he had disclosed private details in the past to the press, including his previous conviction.

Following a confession, the actor was subsequently convicted for possession of cocaine, with a €18,000 fine being imposed. The newspaper published a second article detailing this conviction. The actor again successfully applied to the German courts for an order prohibiting any further publication of the second article, with the domestic courts applying similar reasoning to the initial proceedings.

The applicant made an application to the European Court, claiming a violation of the right to freedom of expression. Jurisdiction was relinquished to the Grand Chamber, with the main question for the Court being whether the interference with Article 10 had been "necessary in a democratic society".

The Grand Chamber firstly set out its well-established Article 10 jurisprudence, and also took the opportunity to reiterate that the right to protection of reputation was a right protected by Article 8. Of significance, the Court confirmed that in order for Article 8 to be engaged, an attack on a person's reputation must attain a certain level of seriousness and causing prejudice to this right (citing [\*A. v. Norway\*](#), para. 64). Moreover, it stated that Article 8 cannot be relied upon to complain of a loss of reputation which is the foreseeable consequences of a person's actions such as the commission of a criminal offence (citing [\*Sidabras and Džiautas v. Lithuania\*](#), para. 49).

The Grand Chamber stated as a matter of principle that Article 10 and Article 8 deserved "equal respect", and consequently the European Court may be required to verify whether the domestic

authorities struck a “fair balance” when these two values come into conflict. In this regard, the Grand Chamber enunciated its standard of review: where the domestic courts have engaged in the appropriate balancing exercise consistent with Article 10 principles, the European Court will require “strong reasons” to substitute its views for those of the domestic courts (citing [\*MGN Limited v. the United Kingdom\*](#) and [\*Palomo Sánchez v. Spain\*](#)). The Court then proceeded to set out the six criteria for such a balancing exercise, and applied it the German courts’ analysis:

(a) *Contribution to a debate of general interest*: The Court considered that the articles concerned an arrest and conviction, which were “public judicial facts”, which presented a degree of general interest. However, the degree of public interest may vary according to how well-known a person is.

(b) *How well-known is the person and subject matter*: the Court stated as a matter of principle that it was primarily for domestic courts to assess how well-known a person is. However, the Court noted the different conclusions reached in the German courts, and held the actor was sufficiently well-known to qualify as a “public figure”, which reinforced the public interest in being informed of his arrest and conviction.

(c) *Prior conduct of the person*: the Court held that the actor had “actively sought the limelight”, and coupled with his public figure status, meaning his “legitimate expectation” that his private life would be effectively protected was reduced.

(d) *Method of obtaining information and its veracity*: it was held that the articles had a sufficient factual basis, the truth of which was not in dispute, and the information had not been published in bad faith.

(e) *Content form and consequences of publication*: the manner in which a person is represented in an article or photograph is a factor to be taken into consideration. The Court held that the first article “merely related” to the actor’s arrest, with the second article only reporting on the sentences imposed at the end of a public hearing. For the Court, the article did not therefore reveal details about the actor’s “private life”.

(f) *Severity of sanction*: a final consideration was the severity of the sanctions, namely injunctions and fines totalling 11,000 euro, which the Court considered lenient, but capable of having a chilling effect.

In light of these considerations, the Court concluded that the interference with freedom of expression had not been necessary in a democratic society, as there was no reasonable relationship of proportionality between the restrictions and the legitimate aim pursued. The applicant was awarded 50,000 euro in damages and costs.

## **Comment**

The most significant aspect of this judgment is the reaffirmation by the Grand Chamber that the Court requires only “strong reasons” to substitute its view for those of the domestic courts where a balancing exercise between Article 10 and 8 has been under taken. The dissenting judges

disagreed with such an approach, on the basis that it resulted in the European Court acting as a “fourth instance” court. The dissent was of the view that as the German courts had not applied the relevant criteria in a “manifestly unreasonable” way, there had thus been no violation of Article 10.

However, it may be argued that the dissenting judges were somewhat inconsistent: the dissent argued on the one hand that the Court should not act as a fourth instance court, and yet relied without any criticism on the first [Von Hannover](#) judgment as authority, where the European Court came to a different conclusion as to the balance between Article 8 and 10, where four levels of German courts had concluded otherwise.

A second point is that the Grand Chamber has now confirmed that there exists a right to protection of reputation under Article 8. Although this right had been previously recognised by the Grand Chamber in [Cumpănă and Mazăre v. Romania](#) (para. 91), the point had not been argued by the parties in that case. In *Axel Springer*, however, it had been forcefully argued by the Media Lawyers Association, as a third party intervener, that Article 8 does not protect “reputation”. Moreover, there had been some strange applications of the right to reputation in cases such as [Sipos v. Romania](#) (see comment [here](#)), and some Sections of the Court questioning the very basis for protecting reputation under Article 8: see [Karakó v. Hungary](#).

The Grand Chamber has sought to end some of the confusion by qualifying the right as being engaged only where the attack on reputation attains a “certain level of seriousness” and “in a manner causing prejudice to personal enjoyment of the rights”. It remains to be seen whether this qualification will bring about much needed clarity in this area.

Finally, and in a similar vein to *Axel Springer*, it is worth pointing to a Chamber judgment delivered a week previous which further highlights the excesses associated with privacy rights prohibiting details of criminal proceedings being published. In [Lahtonen v. Finland](#), a Finnish journalist had been prosecuted and convicted for “dissemination of information violating private life”, over an article detailing criminal proceedings against a police officer for car theft. The journalist and publishing company were fined over 16,000 euro. The article had been based solely on public court documents, and a unanimous Fourth Section had no hesitation in finding a violation of Article 10.