

Photographs in Public Places and Privacy

Kirsty Hughes

In the last few years, the European Court of Human Rights ('the Court') has considered a number of cases relating to photographs taken in public places, and it is now clear that the jurisprudence has evolved significantly since the early cases in which no protection was afforded to the privacy interests of those photographed. The most recent cases (*Reklos and Davourlis v Greece* and *Egeland and Hanseid v Norway*) have extended the protection afforded by Article 8 of the European Convention on Human Rights (ECHR) so that the right is engaged at the stage at which photographs are taken.¹ The author argues that whilst this development was necessary, there are a number of problems with the Court's approach and that further guidance from the Court is essential.

THEORIES OF PRIVACY-RELATED INTERESTS

To fully understand the significance of the Article 8 ECHR photography cases, one has to have some idea of how these cases relate to the protection of privacy. There are many different theories of privacy and privacy-related interests and it is beyond the scope and purpose of this commentary to examine the details of those theories here.² However, it

* Clare College, University of Cambridge.

1 (App No 1234/05) [2009] EMLR 16 and (App No 34438/04) [2009] ECHR 622, available on HUDOC.

2 The literature is extensive; a good starting point would be Ruth Gavison, 'Privacy and the Limits of the Law' (1980) 89(3) *Yale Law Journal* 421; Hyman Gross, 'Privacy and Autonomy' in J Rowland Pennock and JW Chapman (eds), *Nomos XII: Privacy* (Atherton, 1971); Nicole A Moreham, 'Privacy in the Common Law: A Doctrinal and Theoretical Analysis' (2005) 121 *Law Quarterly Review* 628; Nicole A Moreham, 'Privacy in Public Places' [2006] *Cambridge Law Journal* 606; Richard B Parker, 'A Definition of Privacy' (1974) 27 *Rutgers Law Review* 275; William L Prosser, 'Privacy' (1960) 48(3) *California Law Review* 383; James Rachels, 'Why Privacy is Important' (1975) *Philosophy & Public Affairs* 323; Jeffrey H Reiman, 'Privacy, Intimacy and Personhood' (1976) 6(1) *Philosophy & Public Affairs* 26; Thomas Scanlon, 'Thomson on Privacy' (1975) 4 *Philosophy & Public Affairs* 315; Daniel J Solove, 'Conceptualising Privacy' (2002) *California Law Review* 1087; Daniel Solove, 'A Taxonomy of Privacy' (2005–6) 154 *University of Pennsylvania Law Review* 477; Daniel Solove, *Understanding Privacy* (Harvard University Press, 2008); Beate Rössler, *The Value of Privacy* (Polity, 2005); Samuel D Warren and Louis D Brandeis, 'The Right to Privacy' (1890) *Harvard Law Review* 193; and Alan F Westin *Privacy and Freedom* (Atheneum, 1967).

is important to note that whilst some theorists restrict privacy-related interests to activities occurring in private places and the preservation of private information, other scholars have suggested that we have privacy-related interests in controlling access to ourselves even when we are in a public place.³ The argument presented here is premised upon the idea that our privacy-related interests include the preservation of private information but that they also relate to our capacity to limit unwanted access, including when we are in public places. This theory of privacy has implications for photography in public places, namely that a photograph obtained in a public place may interfere with the privacy-related interests of the person photographed because the photograph captures a private event and/or because the initial act of taking the photograph subjected the person photographed to unwanted access.⁴ Hence, assuming that Article 8 ECHR is intended to protect privacy-related interests, it is arguable that the right should apply to some cases in which photographs are obtained in public places.⁵

STRASBOURG JURISPRUDENCE ON PHOTOGRAPHS OBTAINED IN PUBLIC PLACES

Originally very little protection was afforded by the ECHR to applicants captured in photographs taken in public places. In *Friedl v Austria* the Commission was asked to consider whether the police had violated the applicants' Article 8 ECHR rights by taking photographs of the applicants participating in a public protest.⁶ The Commission held that the taking of photographs and their retention did not trigger the application of Article 8 ECHR, and in making that decision the Commission emphasised the fact that the photographs had not been taken in a private place (such as the home) and that they related to a public incident.⁷ In his concurring opinion Mr H Danelius characterised photography as a form of unwanted social interaction that must be tolerated, rather than an invasion of privacy:

³ Moreham 2005, *ibid*.

⁴ Nicole Moreham has considered the relevance of Art 8 ECHR to privacy claims where a photograph is published: see Moreham 2006 (n 2).

⁵ The ECHR does not contain an express right to privacy. However, as Art 8 ECHR was designed to implement Art 12 Universal Declaration of Human Rights (which does refer to privacy), it seems to have been intended that Art 8 ECHR would deal with privacy rights. Article 12 UNDHR states: 'no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.' Moreover, in some Art 8 cases the Court has referred to a right to privacy, eg, *Armonienė v Lithuania* (App No 36919/02) (2009) 48 EHRR 53. For discussion of the application of Art 8 ECHR to privacy claims where a photograph is published see Moreham 2006 (n 2).

⁶ (App No 15225/89) (1995) 21 EHRR 83.

⁷ *Ibid*, para 49.

The reason why the taking of photographs and the retention of the photographs were not regarded as an interference could be said to be mainly that, when the photographs were taken, the applicant was in a public place where anyone is in principle free to take photographs and where the taking of photographs can, in most circumstances, be considered a trivial act which must be tolerated by others, although some persons may indeed consider it unpleasant that someone else should take their photograph.⁸

The Court's decision in *Von Hannover v Germany* was a major turning point in its photography jurisprudence.⁹ A number of photographs of Princess Caroline of Monaco in public places had been published in German magazines. The Princess brought claims in Germany alleging that the press had invaded her privacy. German law distinguishes public figures of contemporary society *par excellence* from ordinary members of society. Public figures of *par excellence* status are afforded privacy under German law when they are in a secluded place, but not when they are in a public place. The Princess was held to be a public figure of *par excellence* status; therefore, she was only entitled to privacy when she was in a secluded place and the German courts could not provide her with a remedy. The Princess issued proceedings before the European Court of Human Rights alleging that Germany had failed to ensure that her private life was respected.

The Court held that the right to respect for private life includes activities occurring in public places and that there had been a violation of Article 8 ECHR. The case was noteworthy for the strong protection it afforded to private life and its breakdown of the public/private divide. However, the case was also disappointing because the Court focused upon the information that was published and neglected the way in which it had been obtained. The Court commenced its analysis by identifying statements of principle from its jurisprudence. First, 'the guarantee afforded by Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings'.¹⁰ Second, '[t]here 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"'.¹¹ These statements of principle suggest that Article 8 ECHR is sufficiently elastic to protect privacy-related interests in controlling access to self. However, the Court did not approach the case in this way when it came to applying these principles to the facts. At the core of the Court's analysis was that 'the concept of private life extends to aspects relating to personal identity, such as ... a person's picture'.¹² In examining the facts of the case the Court noted that this was a case that involved the dissemination of 'images containing very personal or even intimate information about an individual'.¹³ However, this was a fundamental mischaracterisation of the images. The

⁸ *Ibid*, Concurring Opinion Mr H Danelius.

⁹ (App No 59320/00) (2005) 40 EHRR 1.

¹⁰ *Ibid*, para 50.

¹¹ *Ibid*.

¹² *Ibid*, para 50.

¹³ *Ibid*, para 59.

photographs did not contain ‘very personal or even intimate information’; they were anodyne shots of the applicant engaged in daily activities. This is significant, because in approaching the case in this way the Court failed properly to address the key point, namely the harassment of the Princess by the paparazzi, even though it was clear from the Princess’s submissions and from her claim for damages that this was her primary concern.¹⁴ The Court acknowledged that harassment was an issue¹⁵ but it was given scant attention and does not appear to have played a prominent role in the Court’s assessment. Moreover, it was probably the failure to accord sufficient weight to the fact that the Princess had endured harassment that led the Court to exaggerate the nature of the images to reach the desired result.

The Court further developed its jurisprudence on the publication of photographs in *Sciacca v Italy*.¹⁶ In *Sciacca* the police took photographs of the applicant while she was being investigated for fraud, and these photographs were subsequently released to the media. The applicant alleged that the dissemination of the images violated Article 8 ECHR and the Court agreed. Significantly, the Court stated, in much more explicit terms than it had used in *Von Hannover*, that ‘the publication of a photograph falls within the scope of private life’.¹⁷ Thus, the Court made it clear in *Sciacca* that Article 8 ECHR will always be engaged where a photograph is published and that this had been the trigger for Article 8 ECHR in *Von Hannover*.¹⁸ This interpretation of Article 8 ECHR is too broad as it means that the publication of *any* photograph has to be justified. This places too heavy a burden upon those seeking to publish photographs, and this could have an adverse impact upon Article 10 ECHR. A better approach, which is more in keeping with the purpose of Article 8 ECHR, would be to consider whether the person captured in the photograph had a reasonable expectation of privacy; if he or she had such an expectation then Article 8 ECHR should apply.¹⁹

Thus, following *Von Hannover* and *Sciacca*, it was clear that the publication of a photograph would engage Article 8 ECHR, but it was not clear whether the act of taking a photograph could engage Article 8. In two recent cases the Court has applied Article 8 ECHR to the act of taking a photograph.

¹⁴ *Ibid*, paras 44, 83.

¹⁵ *Ibid*, para 59.

¹⁶ (App No 50774/99) (2006) 43 EHRR 20.

¹⁷ *Ibid*, para 29.

¹⁸ *Ibid*.

¹⁹ Nicole Moreham 2006 (n 2) has advocated this approach.

*REKLOS AND DAVOURLIS v GREECE*²⁰

In *Reklos* the Court was required to consider whether Greece had failed to protect the rights of a child by dismissing legal proceedings brought against a photographer who took the child's photograph without the child's consent or the consent of his parents. The applicants in *Reklos* were the parents of a newborn baby. Immediately after the baby's birth, he was placed in a sterile unit and access to the unit was limited to the doctors and nurses of the clinic. A professional photographer working in the hospital took photographs of the baby in the sterile unit and offered them to the applicants. The applicants objected to the photographs having been taken without their consent and demanded that the photographer hand over the negatives. The photographer refused to do so and the parents subsequently brought legal proceedings on the basis that the photographer had infringed the personality rights of their child. This claim was dismissed as 'too vague' by the Supreme Court of Greece and the parents lodged an application with the European Court of Human Rights. The applicants claimed that by dismissing their application the Supreme Court had violated Article 6 ECHR, the right to a fair trial, and the Court agreed.²¹

The applicants also alleged that there had been an unlawful interference with the child's right to respect for his private life.²² The Greek Government argued that there had been no interference with Article 8 ECHR, on the basis that the photographs had not been published; there had been no commercial exploitation of the baby's image; and the mental maturity of the baby was not sufficiently developed for the baby to sense any infringement of his personality rights.²³ The Court refused to deal with the general question of whether the right to the protection of one's image depends on the individual being aware of an interference.²⁴ The Court identified its task as being to determine 'whether the taking of the photographs in question without the parents' prior consent, together with the retention of the negatives, was capable of interfering with the baby's right to respect for its private life as guaranteed by Article 8 of the Convention ... [and therefore] whether the domestic courts afforded sufficient protection to the private life of the applicants' son'.²⁵

The Court accepted that it had to consider whether there had been an interference with the son's right to respect for private life even though the images had not been published, and it noted that earlier cases had been concerned with whether a publication

²⁰ (App No 1234/05) [2009] EMLR 16.

²¹ *Ibid*, paras 18–28.

²² *Ibid*, para 29.

²³ *Ibid*, paras 30, 31.

²⁴ *Ibid*, para 34.

²⁵ *Ibid*, para 34.

amounted to an interference.²⁶ The Court stated that Article 8 ECHR ‘encompasses the right to identity ... and the right to personal development, whether in terms of personality or of personal autonomy’.²⁷ Having accepted that these principles underpin Article 8 ECHR, the Court noted that one’s image is one of the most fundamental elements of one’s personal development, that it is therefore essential that an individual is able to control their image, and that to control it one must have the opportunity not only to refuse to consent to it being published but also to oppose its taking, conservation or reproduction by another.²⁸ Significantly the Court held that the effective protection of the right

presupposes, in principle and in the circumstances such as those of the present case, obtaining the consent of the person concerned at the time the picture is taken and not simply if and when it is published. Otherwise an essential attribute of personality would be retained in the hands of a third party and the person concerned would have no control over any subsequent use of the image.²⁹

In applying these principles to the facts of the case the Court held that the act of taking the photographs and the retention of those photographs had violated the applicant’s Article 8 ECHR right.³⁰

Some aspects of the Court’s decision in *Reklos* are welcome developments. In particular, it was argued above that an invasion of privacy may occur at the stage at which photographs are obtained if the act of taking the photograph involved subjecting the individual photographed to unwanted access. *Reklos* confirms that Article 8 ECHR may be engaged at this earlier stage and that the right is not restricted to the publication of those images. There are, however, a number of problems that arise from the Court’s decision.

The first is that it is unclear when Article 8 ECHR will be engaged, in particular whether Article 8 ECHR will always be engaged when a photograph is taken without the consent of the person photographed, or whether the right applies only in particular circumstances. In the paragraph quoted above the Court noted that the effective protection of Article 8 ECHR ‘presupposes, in principle and *in circumstances such as those of the present case*, obtaining the consent of the person concerned at the time the picture is taken’.³¹ In asserting that position the Court expressly referred to the circumstances it had identified in paragraph 37 of its judgment. That paragraph states:

²⁶ *Ibid*, para 38.

²⁷ *Ibid*, para 39.

²⁸ *Ibid*, para 40.

²⁹ *Ibid*, para 40.

³⁰ *Ibid*, paras 41–43.

³¹ *Ibid*, para 40; emphasis added.

Moreover, the Court would emphasise that in the present case the applicants' son did not knowingly or accidentally lay himself open to the possibility of having his photograph taken in the context of an activity that was likely to be recorded or reported in a public manner. On the contrary, the photographs were taken in a place that was accessible only to the doctors and nurses of the clinic ... and the baby's image, recorded by a deliberate act of the photographer, was the sole subject of the offending photographs.³²

It is unclear from this whether the Court is asserting that Article 8 ECHR will apply in any case in which an individual is photographed where the individual does not 'knowingly or accidentally lay himself open to the possibility of having his photograph taken in the context of an activity that was likely to be recorded or reported in a public manner'.³³ This is the 'broad interpretation': the right will apply in any case where the individual has not exposed himself to this possibility. This broad interpretation can obviously be interpreted in a more or less extensive manner depending upon what meaning is given to 'likely to be recorded or reported in a public manner', which could relate solely to journalism or could encompass state surveillance measures, such as CCTV.

An alternative reading, which we will call the 'narrow' interpretation, draws upon the second part of paragraph 37. It could be argued that Article 8 ECHR required consent to be sought because the child was in a place to which there was restricted access, the taking of the photograph of the child was a deliberate act, and the baby was the sole subject captured in the photograph. There is merit in this approach and it is submitted that these features should be considered relevant in determining whether Article 8 ECHR should apply in this context. Underpinning this analysis could be the question of whether the act constituted an invasion of privacy.³⁴ Nevertheless, it is not clear from the Court's decision whether Article 8 ECHR was engaged because the photograph was taken in these conditions, or whether it was engaged simply because it was not taken in the circumstances identified in the broad interpretation. Moreover, if the narrow interpretation is correct, then we would still need to know whether Article 8 ECHR will only be engaged where these factors are present or whether the right may be engaged in other circumstances.

Finally it is worth considering whether the Court is adopting a blanket approach to Article 8 ECHR in this context. In other words, does Article 8 ECHR apply whenever a photograph is taken without the consent of the individual photographed? If this is the case then the circumstances identified in paragraph 37 may simply be factors that the Court will consider when striking the balance between Articles 8 and 10 ECHR. This does not seem to fit with the Court's reference to the fact that the right 'presupposes in principle

³² *Ibid*, para 37.

³³ *Ibid*, para 37.

³⁴ Where a photograph is published, Nicole Moreham 2006 (n 2) has suggested that Article 8 ECHR should be applied by asking whether the applicant had a reasonable expectation of privacy. That approach would also work in this context.

and in circumstances such as those of the present case ... obtaining consent'.³⁵ Nevertheless, it is not clear which of these approaches the Court is advocating and it is perhaps worth noting that similar issues arose when the Court developed its jurisprudence in *Von Hannover* to accommodate the publication of photographs obtained in public places into Article 8 ECHR. At that time Gavin Phillipson suggested that it was unclear whether the Court was adopting an approach to the effect that the 'publication of an unauthorised photograph specifically taken of a particular person engaged in an everyday activity outside their official duties will involve a *prima facie* violation of Article 8'.³⁶ He termed this 'the absolutist interpretation'.³⁷ However, he also suggested that the Court's decision could be interpreted more narrowly, so that Article 8 ECHR would only be engaged in particular circumstances, for example where the photograph had been obtained as a result of harassment.³⁸ We now know that the Court has adopted the absolutist interpretation to the publication of photographs following *Sciacca*. Thus, given the Court's tendency towards a broad approach to Article 8 ECHR, it may well be that the Court will adopt a blanket approach, so that the taking of any photograph without the consent of the person photographed will engage Article 8 ECHR. This would be highly problematic, as it would require consent to be sought before any photograph could be taken. This needs to be considered in the light of the second problem with the Court's reasoning.

The second problem is that in addition to not knowing when consent should be sought, the Court's reasoning leaves us unsure as to when taking a photograph without consent will be justified. Guidance on this issue is essential, as restrictions upon photography will clearly have an impact upon the exercise by the media of their right to freedom of expression under Article 10 ECHR. However, the Court did not expressly refer to Article 10 ECHR in *Reklos*, either in relation to the photographer who took the photographs of the child or in general. In considering whether the interference was justified, the Court's reasoning was limited to the following:

In this connection it should be noted that the applicant's son, not being a public or newsworthy figure, did not fall within a category which in certain circumstances may justify, on public-interest grounds, the recording of a person's image without his knowledge or consent.³⁹

It is not apparent from this reasoning whether these are the only circumstances in which taking a photograph can be justified. If this is the only scenario in which taking a photograph is justified, then it would offer no protection to photographers who are not

³⁵ n 20, para 40; emphasis added.

³⁶ Gavin Phillipson, 'The Right of Privacy in England and Strasbourg Compared' in *New Dimensions in Privacy Law: International and Comparative Perspectives* (Cambridge University Press, 2006) 207.

³⁷ *Ibid.*

³⁸ *Ibid.*, 212.

³⁹ n 20, para 41.

involved in journalism. This would be particularly problematic if a blanket or broad interpretation is given to Article 8 ECHR. As a result, the Court's current approach could have a chilling effect on many forms of artistic photography which require the subject to be unaware that they are being photographed, for example, street photography.⁴⁰ Moreover, even if the interests of these photographers will be protected under Article 10 ECHR, it does not promote legal certainty to leave these issues to be resolved on a case-by-case basis. Photographers need to know in advance whether their acts are lawful or not. Thus further guidance is essential.

Another problem with the Court's decision is its reason for expanding Article 8 ECHR to include the act of taking a photograph without consent. It was argued above that the taking of photographs without the consent of the person photographed may constitute an invasion of privacy because the act involves unwanted access to self. However, the Court did not consider a general privacy right in determining that Article 8 ECHR applied in *Reklos*; instead it focused upon the right to one's *image*. It is questionable whether this is appropriate and/or desirable. By developing a right to one's image instead of a right to privacy, the Court has missed an opportunity to establish firm protection against other forms of unwanted access to the person. Moreover, whilst the protection of the right to one's image may seem logical to those from a civil law system, the identification of the right to one's own image as part of the armoury of fundamental human rights may be highly problematic in England, where we have not traditionally had such rights.⁴¹

Finally, it is worth noting that the Court failed to address a crucial question in *Reklos*, namely whether children need greater protection under Article 8 ECHR than adults. Children's experiences and understandings of privacy may be different to those of adults.⁴² They may also face different threats to their privacy and may be less able to take

⁴⁰ This concern was raised by professional and amateur photographers when the Australian Law Reform Commission proposed the introduction of a statutory cause of action for invasion of privacy; see Australian Law Reform Commission, 'For Your Information: Australian Privacy Law and Practice' (ALRC 108, 2008) para 74.95. The ALRC received a number of submissions from professional and amateur street artists who were concerned that the cause of action would prohibit street art and the taking of photographs in public places. The following is an example of the type of concern that was raised: 'The way I achieve my art is by strolling through streets and cities, photographing people and situations that depict a narrative of life and the world we live in. I'd like to think that the work I do is neither invasive nor arrogant ... but showing sides of life that happen every second of the day that many of us have become simply too busy to notice a lot of the time ... My ability to do this relies on the fact that as it stands, I can practically photograph anything that is in "public view".'

⁴¹ In the leading House of Lords decision in *Campbell v Mirror Group Newspapers* [2004] UKHL 22, [2004] AC 457, Baroness Hale expressly stated that 'we do not recognise a right to one's own image' (para 154).

⁴² Maxine Wolfe, 'Childhood and Privacy' in I Altman and JF Wohlwil (eds), *Human Behavior and Environment, Volume 3: Children and the Environment* (Plenum, 1978); Maxine Wolfe and Robert S Laufer, 'The Concept of Privacy in Childhood and Adolescence' in DH Carson (series ed) and ST Margulis (volume ed), *Man-Environment Interactions: Evaluations and Applications, Part II, Volume 6: Privacy* (Dowden, Hutchinson & Rose, 1975). The Australian Law Reform Commission (n 40) interviewed children and completed privacy workshops in schools as part of their privacy reform project. The University of Ottawa

steps to prevent invasions of privacy. Thus we may need to provide greater protection for children's privacy. In *Reklos* the Court gave no indication that the degree of protection afforded by Article 8 ECHR was affected by the fact that the case involved a child. This could imply that children are not afforded greater protection under Article 8 ECHR. Yet it seems unlikely that the Court meant to foreclose this possibility in *Reklos*, as it had already decided in that case to offer extensive protection to the right to one's image and thus the Court did not have to grant special protection to children to find that Article 8 ECHR was violated. Nevertheless, further guidance on this issue is desirable, as the English courts are already faced with the difficulty of determining how to deal with the privacy rights of children.⁴³ It would be preferable for the Court to assert that the child's right to privacy commands greater protection under Article 8 ECHR. Article 8 ECHR is capable of accommodating greater protection for children, particularly as the state is obliged to ensure that private individuals respect the rights of others, and thus the state may have to take further steps to ensure that the privacy rights of children are respected.

*EGELAND AND HANSEID v NORWAY*⁴⁴

Egeland was an Article 10 ECHR case but it also sheds light on the application of Article 8 where a photograph is taken without consent, and on the balance to be struck between Articles 8 and 10 in this context. The applicants were Editors-in-Chief of national newspapers who had been convicted and fined for publishing illegally taken photographs. It is contrary to Norwegian law to take photographs of a convicted person on his or her way to or from court and the published photographs consisted of images of an individual (who had just been convicted for murder) leaving the courtroom in a state of distress. The applicants asked the European Court of Human Rights to declare that Article 10 ECHR had been violated by the prohibition on the taking and publishing of photographs of individuals on their way to and from court. In examining the case the Court noted that it engaged both Articles 8 and 10 ECHR and that there had been an interference with Article 10 ECHR.⁴⁵ In reaching its decision the Court emphasised the fact that, whilst the photographs had been taken in a public place, the publication 'represented a particularly intrusive portrayal' of the convict as she had not consented to the taking of the photographs or to their publication.⁴⁶ The Court thus concluded that in prohibiting the

included a panel of children in their conference on privacy to discuss their uses and understanding of social networking sites on the internet: *Revealed I—A Conference on Privacy and Identity*, University of Ottawa, Canada, 25–27 October 2007.

⁴³ *Murray v Big Pictures (UK Ltd)* [2008] EWCA Civ 446. [2007] EMLR 583.

⁴⁴ (App No 3443804) [2009] ECHR 622, available on HUDOC.

⁴⁵ *Ibid*, paras 53, 65.

⁴⁶ *Ibid*, para 61.

taking and publication of the photographs Norway had acted within its margin of appreciation in assessing the need to protect the convict's privacy and the need to ensure the fair administration of justice.⁴⁷

Egeland confirms that taking a photograph without the consent of the person photographed may trigger Article 8 ECHR; the case was a significant improvement upon *Reklos* in a number of respects. First, the Court framed its discussion of Article 8 ECHR in the language of privacy rather than the right to one's image. Second, in making its decision the Court emphasised the vulnerability of the person photographed (the fact that the photographs portrayed the convict in a state of distress and in a reduced state of control) and that this meant that the need to protect the convict's privacy outweighed the need for press freedom.⁴⁸ This is an improvement upon *Reklos*, as whilst the Court's reasoning in that case neglected Article 10 ECHR, *Egeland* suggests that the Court is carefully balancing the competing needs of subjects captured in photographs (Article 8 ECHR) and freedom of expression (Article 10 ECHR). Moreover, the Court's analysis suggests that it is considering the needs of vulnerable people, whereas it ignored the vulnerability of children in considering the application of Article 8 in *Reklos*.

However, there are also a number of problems that emerge from the Concurring Opinion of Judge Rozakis in *Egeland*.⁴⁹ He agreed with the Court's decision but he criticised its reliance upon the margin of appreciation. He argued that the reasoning of the Court demonstrates that it did not defer to the national authorities and confine itself to a review of the merits; it had proceeded with 'an in-depth analysis of the circumstances of the case'.⁵⁰ He has made this point in relation to other cases and it appears to be a valid criticism of the judicial rhetoric involved in references to the margin of appreciation.⁵¹ In this context, Judge Rozakis objected to the Court's suggestion that the state should be afforded a wide margin of appreciation on the basis that:

In matters of clashes between freedom of expression (and more specifically the taking of photographs in a public place) and the right to private life, the Court has already developed the jurisprudence to the effect that the balance should be tipped in favour of private life.⁵²

Thus, according to Judge Rozakis, where a photograph is taken in a public place the balance between freedom of expression and the right to private life tips in favour of private life.⁵³ He suggests that this is inherent in paragraph 59 of *Egeland* (although this

⁴⁷ *Ibid*, para 65. The state had sought to defend its measure on the basis of the need to protect privacy and due process. The Court accepted that both were applicable but noted that for the Court the need to ensure the privacy of the convict was the predominant concern—see para 63.

⁴⁸ *Ibid*, para 61.

⁴⁹ *Ibid*, Concurring Opinion Judge Rozakis.

⁵⁰ *Ibid*, para C.

⁵¹ *Odièvre v France* (App No 42326/98) (2003) 38 EHRR 43.

⁵² *Egeland* (n 44) Concurring Opinion Judge Rozakis, para B.

⁵³ *Egeland* (n 44) Concurring Opinion Judge Rozakis.

is not readily apparent as the paragraph in question is a typical example of the Court's opaque judgments, which rely heavily upon cutting and pasting in statements from earlier decisions with little or no explanation of how they relate to the present case).⁵⁴ Nevertheless, assuming that he is right, Rozakis' explanation of the jurisprudence is troubling as it undermines Article 10 ECHR.⁵⁵ This is particularly problematic given the potential for a blanket or broad approach to the application of Article 8 ECHR, because once Article 8 ECHR is engaged it appears that Article 10 ECHR will almost always be trumped by Article 8 ECHR.

If this were correct, it would mean that the taking of a photograph in a public place without the consent of the person photographed would be severely restricted, if not prohibited, under the Convention. This would be a very strange position indeed and presumably the Court does not intend this to be the case. It is therefore essential that the Court provides more nuanced analysis than it has offered so far. In particular it needs to emphasise those core factors that presumably played a role in its decision-making, such as harassment by the media (*Von Hannover*), the vulnerability of the person photographed and the private nature of the event captured (*Reklos and Egeland*), rather than reverting to over-simplistic blanket statements.

CONCLUSION

It was inevitable that the Court would recognise that the taking of photographs in public places and the publication of those photographs could fall within Article 8 ECHR. This was necessary to ensure that privacy-related interests are fully protected by the right. In the context of photography, the person photographed may be more concerned about their 'feeling of intrusion' from having been secretly photographed or harassed by photographers than they are about the disclosure of the information captured in the

⁵⁴ The paragraph states: 'However, under the terms of Article 10 § 2, the exercise of the freedom of expression carries with it "duties and responsibilities", which also apply to the press. In the present case this relates to protecting "the reputation or rights of others" and "maintaining the authority and impartiality of the judiciary". These duties and responsibilities are particularly important in relation to the dissemination to the wide public of photographs revealing personal and intimate information about an individual (see *Von Hannover v Germany*, no 59320/00, § 59, ECHR 200 VI; *Hachette Filipacchi Associés c France*, no 71111/01, § 42, 14 juin 2007). The same applies when this is done in connection with criminal proceedings (see Principle 8 in the Appendix to Recommendation Rec(2003)13 of the Committee of Ministers to member States on the provision of information through media in relation to criminal proceedings, quoted at paragraph 21 above). The Court reiterates that the notion of private life in Article 8 of the Convention extends to a person's identity, such as a person's name or a person's picture (*Von Hannover*, cited above, § 50; see also *Schüssel v Austria*, no 42409/98, 21 February 2002); *Egeland* (n 44) para 9.

⁵⁵ For further discussion of the Court's approach to balancing Articles 8 and 10 ECHR see Eric Barendt, 'Balancing Freedom of Expression and Privacy: The Jurisprudence of the Strasbourg Court' [2009] 1 *Journal of Media Law* 49.

photograph, and the impact that these activities can have upon private life needed to be acknowledged by the Court. Thus the application of Article 8 ECHR at the stage at which the photograph is taken is desirable in some circumstances. However, the Court's reasoning in these cases is unsatisfactory and opaque and it leaves private individuals in a state of uncertainty as to the scope of their rights. This confusion is unsatisfactory for both those seeking privacy and professional and amateur photographers who might intrude on it. Finally, it is worth remembering that these issues are being couched in the language of human rights; it is not, or rather it should not be, a trivial matter to state that an act constitutes a human rights violation. The Court's current approach does not do justice to the importance of human rights. Further guidance is eagerly awaited.

Copyright of Journal of Media Law is the property of Hart Publishing Ltd. and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.