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## Photographing People in Public and the Protection of Privacy: The Jurisprudence of the European Court of Human Rights and Some Comparisons with England

- **ABSTRACT:** *This study examines certain aspects of privacy protection, addressing the questions of whether it is possible to consider a person's image (most often a photograph) as part of their private life and whether the protection of privacy can be claimed in public spaces. A thorough examination of the European Court of Human Rights (ECtHR) and English case law reveals that these questions can be answered affirmatively. Certain general principles emerge from this case law, which take into account the freedom to discuss public affairs, namely, the protection of freedom of speech and freedom of the press. Based on an examination of these, it seems that a connection with a matter that qualifies as a public affair justifies the protection of the freedom of the press, meaning that purely tabloid content does not enjoy such protection. This creates widespread protection for freedom of expression and freedom of the press and may also result in numerous frustrated privacy plaintiffs.*
- **KEYWORDS:** privacy, right to one's image, freedom of speech, freedom of the press.

### 1. Introduction

This study examines the aspect of privacy protection that is unique in several respects: Is it possible or necessary to consider a person's image (most often a photograph) as part of their private life? It is also possible to examine whether the

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protection of privacy can be claimed in public spaces or in places open to the public in general. Privacy in public spaces may seem like a conceptual contradiction. The study is based on an analysis of case law, examining and analyzing the case law of the European Court of Human Rights (ECtHR) and the English courts.

## **2. The European Court of Human Rights and Article 8 of the European Convention**

The European Convention on Human Rights (ECHR), which was announced for ratification in 1950 in Rome and finally entered into force in 1953, created an international court designed to protect human rights and fundamental freedoms and watch over the respect for human rights entailed by the Convention. If a court decision or other resolution of any authority is adopted in one of the Member States by which a fundamental right set out in the Convention is breached, and there are no further ways of reviewing that decision or for a resolution in said Member State (either because the decision was adopted by a court of highest instance or because the right of appeal was limited in the first place), the applicant may turn to the ECtHR. If the ECtHR finds the claim admissible, it will decide on the matter, and if it finds that the Convention has been violated, it may rule that the applicant should receive just satisfaction or compensation depending on the situation. The Court has no jurisdiction to overrule the decisions adopted by the authorities of the party states or their legislations, or to initiate the amendment of any provision of law, but an unfavorable decision is rarely without consequences in the country concerned.

Article 8 of the ECHR prescribes respect for private and family life, in particular the protection of one's home and correspondence. Paragraph 2 details the possible limitations of that right, which are as follows: national security, public safety, the economic well-being of the country, the prevention of disorder and crime, the protection of health and morals, and the protection of the rights and freedoms of others. These limitations may only apply if they conform to the prerequisites usually applicable to other fundamental rights under the Convention, and as such they must be: (a) prescribed by law, (b) in the interest of achieving a legitimate aim, and (c) necessary in a democratic society.

### **Article 8 – 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 is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for

the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The bases of these limitations are expressed in rather broad terms, but it should be remembered that the wording was drafted in 1950 in an entirely different European political and human rights environment. Limitations such as the economic well-being of a country or the protection of morals no longer have practical implications today. The scope of Article 8 was uncertain for a long time, as generic wording on the protection of private and family life did not necessarily enable the provision to be easily applied in practice. In recent decades, Article 8 has begun to function as a sort of catchall, which provides grounds for the ECtHR to accord protection to an applicant for violations of rights that do not fall under any other protected fundamental right.

Matters that do not fall under the scope of the Article include the right to marry, the right to found a family, equality of spouses, cases related to guardianship, visitation rights and alimony, adoption, inheritance, immigration, the right to integrity (more specifically school disciplinary actions and certain issues related to medical treatments), violations relating to homosexuality and transsexuality, rights of detainees, the right to housing, environmental rights, data protection rights, rights relating to public data, and of course the protection of private life versus freedom of the press and of speech.<sup>1</sup> In other words, the ECtHR enjoys a broader range of freedom than usual in interpreting Article 8, although Paragraph 2 states that the right may only be limited to protecting certain defined interests. In recent years, the Court has ensured broader protection of private life vis-à-vis the press and freedom of speech. Applicants who deem that their rights were not properly protected against the media by the law of their state (these rights primarily being the right to honor, reputation, one's own image, and private life) may turn to the ECtHR. Therefore, oddly, the violation of reputation, which tends to play a role in the external judgement of the individual by society, is subject to Article 8 and thereby falls within the scope of 'private life.'<sup>2</sup>

### 3. English law

English law does not recognize the general protection of privacy; there is no specific general tort related to privacy. However, this does not mean that interest in respecting privacy remains unprotected. There are separate torts for each of the most frequently occurring types of cases, and as the law has evolved, new,

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1 Ovey and White, 2006, pp. 241-299.

2 Barendt, 2009.

independent responses to specific problems have emerged, rather than regulations with general applications.

The torts of trespass and nuisance provide protection against harassment; the name, voice, and image of a person are protected by the tort of appropriation of personality, while the tort of breach of confidence offers protection against the publication of confidential information. This casuistic approach, which does not take a general approach, is supplemented here and there by laws that offer protection against certain special forms of violation of privacy (the Data Protection Act of 1998, the Post Office Act of 1969 protecting private correspondence, and the Interception of Communications Act of 1985 providing protection against illegal wiretapping). However, until recently, the tort of breach of confidence – suitable for protecting privacy – had not provided adequate protection in several manifestly unfair journalistic proceedings. Courts have consistently rejected the general introduction of privacy into the English legal order, although this has been gradually counterbalanced by widening the scope of possible applications for breach of confidence.

Misuse of private information is a fairly new common law tort that the English Courts recognized in *Campbell v MGN Ltd.*<sup>3</sup> This decision made it clear that the tort of ‘misuse of private information’ was to be distinguished in scope from that relating to ‘breach of confidence,’ as the former does not require an initial confidential relationship.

#### 4. Case law of the European Court of Human Rights

In the case of *Friedl v Austria*,<sup>4</sup> the European Commission of Human Rights<sup>5</sup> had to decide whether to accept an application alleging that the police had violated the applicant’s rights under Article 8 of the ECHR by taking photographs of applicants participating in a public demonstration. The Commission found that taking and storing photographs did not infringe on Article 8 of the European Convention on Human Rights. In its decision, the Commission stressed that the photographs were not taken on private property and that they were related to a public event.

One of the most frequently referenced ECtHR decisions is *Von Hannover v Germany* from 2004,<sup>6</sup> which is certainly the key case of the ‘being private in public’

3 *Campbell v MGN* [2004] 2 AC 457, HL.

4 *Friedl v Austria*, no. 15225/89, judgment of 31 January 1995.

5 The European Commission of Human Rights was a special body of the Council of Europe. Before 1998, individuals did not have direct access to the European Court of Human Rights; they had to apply to the commission, which, if it found the case to be well-founded, would launch a case in the Court on the individual’s behalf. In 1998, the Commission was abolished and, since then, individuals are allowed to take cases directly to the Court.

6 *Von Hannover v Germany*, no. 59320/00, judgment of 24 June 2004.

doctrine,<sup>7</sup> one which ‘radically altered the extent to which the media can lawfully intrude into the private lives of the rich and famous.’<sup>8</sup> The applicant in this case was Caroline, the Princess of Monaco, who was a favorite target of German tabloids. Before she lodged the claim, two tabloid papers published photographs of the princess taken by the paparazzi, showing her in various situations. Some of the images were taken on public streets and others in a restaurant, showing the princess having lunch with her new companion, while others were of Princess Caroline on the beach. Some of these pictures also include her children. The Princess turned to the courts complaining of a violation of her privacy. The German High Court only partially ruled in the Princess’s favor and stated the legality of disclosing images that were taken in public places and not in places restricted to the general public. The Federal Constitutional Court went on to say that the images showing the applicant’s underage child qualify as unlawful, as they violate the right to undisturbed family life, despite the fact that these images were taken in a public place.<sup>9</sup>

Furthermore, the ECtHR ruled that the disclosure of pictures taken under circumstances where the Princess would have had a reasonable expectation of privacy, for example, in the restaurant having lunch or on the beach, regardless of the fact that these qualify as public places, is a violation of Article 8 of the Convention. The statement of reasons for the decision is worthy of attention. The ECtHR states that although public figures are less able to protect their private life, their privacy is nonetheless acknowledged and protected by law. While freedom of expression extends to the disclosure of photographs, in this case, the rights of others, as well as the interest in the protection of their reputation, must also be taken into consideration. In addition, those affected by photographs published in the tabloids consider such disclosure to be a strong interference with their privacy, or even outright stalking or persecution.<sup>10</sup>

The Court considers that 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 ‘impart [ing] information and ideas on matters of public interest’ . . . it does not do so in the latter case.<sup>11</sup> . . . As in other similar cases it

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7 Krotoszynski, 2015, p. 1300.

8 Barnes, 2006, p. 614.

9 1 BvR 653/96, judgment of 15 December 1999.

10 *Von Hannover*, [59].

11 *Von Hannover*, [63].

has examined, the Court considers that the publication of the photos and articles in question, of which the sole purpose was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life, cannot be deemed to contribute to any debate of general interest to society, despite the applicant being known to the public.<sup>12</sup>

The public is obviously very interested in Princess Caroline's private life, but this in itself does not constitute an interest that trumps her rights.<sup>13</sup> The right to inform the public may, in some cases, extend to publishing details about the private life of certain public figures, especially politicians, in this case that does not apply. The sole aim of publishing the articles and photographs was to satisfy the curiosity of the audience by exposing the private life of the applicant, which cannot be considered necessary for a public debate.<sup>14</sup>

The Court reiterates the fundamental importance of protecting private life from the point of view of the development of every human being's personality. That protection – as stated above – extends beyond the private family circle and also includes a social dimension. The Court considers that anyone, even if they are known to the general public, must be able to enjoy a 'legitimate expectation' of protection of and respect for their private life. . . .<sup>15</sup>

Furthermore, increased vigilance in protecting private life is necessary to contend with new communication technologies which make it possible to store and reproduce personal data. . . . This also applies to the systematic taking of specific photos and their dissemination to a broad section of the public.<sup>16</sup>

Only ensuring weak protection of privacy for people like the applicant is not justified, as the interest in such people exhibited by the media and the general public lies merely in the fact that they are celebrities (in this case, a member of a royal family), and they do not exercise any important public functions.<sup>17</sup> The domestic courts did not adequately weigh these circumstances.

The Court . . . considers that the criteria on which the domestic courts based their decisions were not sufficient to protect the

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12 *Von Hannover*, [65].

13 Moosavian, 2014, pp. 242–243.

14 *Von Hannover*, [63]–[65].

15 *Von Hannover*, [69].

16 *Von Hannover*, [70].

17 *Von Hannover*, [72].

applicant's private life effectively. As a figure of contemporary society 'par excellence' she cannot – in the name of freedom of the press and the public interest – rely on protection of her private life unless she is in a secluded place out of the public eye and, moreover, succeeds in proving it (which can be difficult). Where that is not the case, she has to accept that she might be photographed at almost any time, systematically, and that the photos are then very widely disseminated even if, as was the case here, the photos and accompanying articles relate exclusively to details of her private life.<sup>18</sup>

Without a doubt, the Princess is a public figure, but she does not hold public powers and is not a politician. Furthermore, as a woman, under the laws of Monaco, she cannot inherit the throne either. As she is 'just' a celebrity, the unveiling of certain aspects of her private life to the public does not contribute to a democratic debate, and so the protection of her private life is more important than it would be for a public figure who is a politician. The freedom of the press and the monetary interests of the media are not sufficient to justify the limitations of the protection of privacy. 'Furthermore, the Court considers that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public.'<sup>19</sup>

Therefore, there was a breach of Article 8 of the Convention in this case. According to this decision, respect for celebrities' right to privacy is not limited to secluded places but can be extended to public places, with some restrictions in the case of public figures. The images do not have to portray the public figure in a humiliating or indecent manner in order to qualify as infringement, just as the pictures of Princess Caroline showed her in everyday situations and did not uncover any new, intimate information; in this instance, it is the interference in her privacy per se which qualifies as unlawful.<sup>20</sup> As a result, the manner in which the press obtained the photographs and whether they effectively stalked the affected individual, and hence whether these were *paparazzi* pictures, is a secondary question.<sup>21</sup> As Moreham puts it:

The scope of von Hannover is therefore far-reaching: It makes it clear people are not automatically free to publish images of others simply because they were in a public place at the time that the images were

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18 *Von Hannover*, [74].

19 *Von Hannover*, [77].

20 Cheung, 2009.

21 Hughes, 2009.

obtained, and that freedom of expression and public interests will be weak when information or images are published solely to satisfy readers' curiosity.<sup>22</sup>

In the second case,<sup>23</sup> initiated at the request of the Princess of Hannover, the ECtHR held that the publication of a single photograph attached to a newspaper article containing information of genuine public interest, showing her walking during a winter holiday with her third husband, did not infringe her right to privacy. This is because the article was about the health of the Princess's father, the Prince of Monaco, and the support that his family members gave him during his serious illness. The discussion of this topic was considered to be of public interest, and there was no allegation that the photograph had been taken by the reporter by harassment or surreptitiously (stealthily).

The third *Von Hannover* case<sup>24</sup> was based on an article published in the newspaper *7 Tage* in 2002, which included a picture of Princess Caroline and her husband on holiday along with several photos of their holiday home in Kenya. The pictures were illustrations from a newspaper article about how it has become common for the rich to rent out their holiday homes to paying guests. Caroline von Hannover filed a lawsuit against the publisher of the newspaper in question and requested a ban on further publication of her picture. The court of the first instance upheld her claim, but the court of the second instance dismissed it. The German Federal Court of Justice (BGH) agreed with the court of first instance and, referring to previous ECtHR rulings, held that the photograph and the article did not relate to a matter of public interest but to the central core of Caroline von Hannover's private life. The German Constitutional Court (BVerfG) found the reasoning of the BGH unacceptable and ordered a new procedure. In the new procedure, the Court gave priority to freedom of expression and explained why the article could contribute to a debate that is of public interest, and therefore dismissed the plaintiff's claim. The appeal against the new judgment of the Federal Court of Justice was unsuccessful, so Caroline von Hannover appealed a third time to the ECtHR. The ECtHR found that Germany did not violate Article 8 of the ECHR. According to the Court, the decision of the German courts that the article in question contributes to a debate on an issue of public interest cannot be considered unreasonable. The German courts carefully weighed the conflicting considerations in light of ECtHR case law and also took into account that the ECtHR considered the plaintiff to be a public figure, who was not entitled to the same degree of protection of her private life as a private individual.

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22 Moreham, 2006.

23 *Von Hannover v Germany* (No. 2), nos 40660/08 and 60641/08, judgment of 7 February 2012.

24 *Von Hannover v Germany* (No. 3), no. 8772/10, judgment of 19 September 2013.



In *Axel Springer v Germany*,<sup>25</sup> the ECtHR also ruled in favor of the freedom of the media outlet when it decided in favor of the complainant publisher. The background of the case was that the German courts had banned the publication of photographs depicting the arrest of a well-known actor on suspicion of drug abuse at the Oktoberfest in Munich. According to the ECtHR, the person was a public figure whose unlawful conduct was information of public interest; the circumstances of the arrest were such that the information could not conceivably remain secret; the publisher had received the information from law enforcement authorities; and there was no reason to suspect that the anonymity of the person concerned should have been guaranteed.

In *Peck v the United Kingdom*,<sup>26</sup> a decision had to be made about the scope of the right to private life in connection with photographs taken in a public place, this time depicting a private person. The applicant, Mr. Peck, had attempted suicide on the streets by cutting his wrists. However, his loss of blood was not fatal, so he continued, in a deranged state of mind, to roam the streets with the knife in his hands. Closed-circuit television (CCTV) cameras, installed on the streets of Brentwood not long before, recorded images of Peck. The applicant was recognizable in the recordings; although the suicide attempt itself was not visible, only a confused man could be seen walking the streets with a kitchen knife in his hands. The local government intended to release the recordings to prove the legitimacy of introducing the CCTV-cameras. Peck's objection and his request for an injunction were unsuccessful. After the images were broadcast on television, he did not sue, as it was obvious that he could not obtain any satisfaction on the grounds of the tort of breach of confidence, as the recordings were made in a public place, so he turned directly to the Strasbourg Court.

The ECtHR established a breach of the applicant's right to private life. Even though he was in a public space, he did not consequently become a public figure, and the disclosure of his image and the recordings represented a violation of his privacy that exceeded what would normally be acceptable in such a situation, especially as he was walking in the streets in a state of confusion.

The monitoring of the actions of an individual in a public place by the use of photographic equipment which does not record the visual data does not, as such, give rise to an interference with the individual's private life. On the other hand, the recording of the data and the systematic or permanent nature of the record may give rise to such considerations.<sup>27</sup>

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25 *Axel Springer v Germany*, no. 39954/08, judgment of 7 February 2012.

26 *Peck v the United Kingdom*, no. 44647/98, judgment of 28 April 2003.

27 *Peck*, [59].

The Court's standpoint that the observation of individuals in public places without recording any data does not raise any concerns with respect to the right to privacy is questionable. In the specific case, however, the images were recorded, and the Court accepted that the right to private life can apply even in public places.

[T]he Court notes that the present applicant did not complain that the collection of data through the CCTV-camera monitoring of his movements and the creation of a permanent record of itself amounted to an interference with his private life. Indeed, he admitted that that function of the CCTV system, together with the consequent involvement of the police, may have saved his life. Rather, he argued that it was the disclosure of that record of his movements to the public in a manner in which he could never have foreseen, which gave rise to such an interference.<sup>28</sup>

Therefore, the infringement was not the making of the recording per se, but its disclosure. The applicant did not have a public role, and his being on the street could not be categorized as a public appearance.

The present applicant was in a public street but he was not there for the purposes of participating in any public event and he was not a public figure. It was late at night, he was deeply perturbed and in a state of distress. While he was walking in public wielding a knife, he was not later charged with any offence. The actual suicide attempt was neither recorded nor therefore disclosed. However, footage of the immediate aftermath was recorded and disclosed by the Council directly to the public in its CCTV News publication. In addition, the footage was disclosed to the media for further broadcasting and publication purposes. . . . The applicant's identity was not adequately, or in some cases not at all, masked in the photographs and footage so published and broadcast. He was recognised by certain members of his family and by his friends, neighbours and colleagues.<sup>29</sup>

Accordingly, the Court considered that the disclosure by the local council of the relevant footage constituted serious interference with the applicant's right to respect of his private life.

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<sup>28</sup> *Peck*, [60].

<sup>29</sup> *Peck*, [62].

[T]he Court notes that the Council had other options available to it to allow it to achieve [its] objectives. In the first place, it could have identified the applicant through enquiries with the police and thereby obtained his consent prior to disclosure. Alternatively, the Council could have masked the relevant images itself. A further alternative would have been to take the utmost care in ensuring that the media, to which the disclosure was made, masked those images.<sup>30</sup>

In sum, the Court does not find that, in the circumstances of this case, there were relevant or sufficient reasons which would justify the direct disclosure by the Council to the public of stills from the footage in its own CCTV News article without the Council obtaining the applicant's consent or masking his identity, or which would justify its disclosures to the media without the Council taking steps to ensure so far as possible that such masking would be effected by the media. The crime-prevention objective and context of the disclosures demanded particular scrutiny and care in these respects in the present case.<sup>31</sup>

In the aftermath of *Peck*, the question of the limits of the right to private life on public streets still remained. Does this right extend to everyday situations?<sup>32</sup> *Peck* was most certainly in an extreme situation; hence, the question. Whatever the case may be, in the years following the decision, the ECtHR referred in a generic manner to the 'right to be left alone' in public places and to a reasonable expectation of respect for private life.<sup>33</sup>

## 5. English case law

A landmark case in English privacy law is *Campbell v MGN*. The applicant was supermodel Naomi Campbell, whose case went all the way to the House of Lords. It so happened that Campbell became a serious drug addict, a situation that she carefully concealed from the public and even denied. However, the *Daily Mirror* investigated the matter and exposed this side of the model's life in several articles. The paper reported that she was undergoing treatment at the Narcotics Anonymous rehabilitation facility, provided details of the treatment, and published photographs of Campbell as she was leaving the facility. Campbell

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30 *Peck*, [80].

31 *Peck*, [85].

32 Morgan, 2003, p. 448.

33 Hatzis, 2005, p. 145.

then filed a lawsuit against the publisher of the newspaper for the invasion of privacy.

The judges held that privacy does not require a prior confidential relationship or any relationship between the parties. The newspaper also invoked freedom of the press and the public-interest nature of the information in the lawsuit. These were taken into account by the judges, who ruled that reporting on addiction and treatment was allowed, but that publishing the details and photographs was illegal. As Campbell had previously misled the public, her hypocritical behavior justified the public being made aware of the bare facts, but there was no public interest in readers being privy to the details (as the court said, these details are ‘interesting’ to them but not in their interest), which could even jeopardize the results of the treatment. The Court (by a narrow majority of 3 to 2) found a violation of privacy. *Campbell v MGN Ltd* established that the tort of misuse of private information’ is distinguishable from that of breach of confidence, as it does not require an initial confidential relationship.

Even after this case, it was unclear whether English law generally accepted the private nature of photographs. This issue was first examined in *Murray v Express*.<sup>34</sup> The plaintiff was the minor son of author J. K. Rowling, and the case was brought to court following the publication of photographs of a child in a pram on a family outing on a street in Edinburgh. The photograph was taken surreptitiously with a telephoto lens, and neither the plaintiff nor his parents consented to the photograph being taken or its subsequent publication. The proceedings were brought to court on behalf of the baby based on the tort of misuse of private information. At first, the claim was dismissed on the grounds that the plaintiff had no reasonable prospect of success in legal action. However, the plaintiff successfully appealed: The Court of Appeal found that ‘the fact that [the plaintiff] is a child is, in our view, of greater significance than the judge thought.’<sup>35</sup>

Although the Court of Appeal held that the fact that there had been a misuse of private information was arguable, the issue was not decided because the parties reached an out-of-court settlement. Thus, while the misuse of private information’ may extend to taking and subsequently publishing certain photographs in public places, the framework for this has not been established, nor has the question of when the law protects photographs. However, the court set out criteria for determining whether a child has a reasonable expectation of the protection of their privacy. These are (1) the characteristics of the plaintiff, (2) the nature of the activity in which the plaintiff participated, (3) the place where the photographs were taken, (4) the nature and purpose of the invasion of privacy, (5) the absence of consent, (6) whether the effect on the plaintiff was known or could be inferred,

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34 *Murray v Express Newspapers* [2007] EWHC 1908, [2007] EMLR 583.

35 *Murray*, [45].

and (7) the circumstances and purposes under which the photograph was obtained by the publisher.<sup>36</sup>

*Weller v Associated Newspapers Ltd*<sup>37</sup> was initiated after the publication of photographs of three children of the well-known musician Paul Weller. The photos were taken in Los Angeles but published in a British tabloid. Weller was in a public space with his 16-year-old daughter, Dylan, and his 10-month-old twin children, and the children's faces were also recognizable in the pictures. Weller did not initially notice the photographer, but when he realized that his family was being photographed, he asked him to stop. The photographer promised to do so, but later returned and took more photographs. Legal proceedings were brought on behalf of the children in the United Kingdom under the Misuse of Private Information Act and the Data Protection Act. Since the data protection procedure overlapped with the procedure for the misuse of private information, the judge only dealt with the latter. In his analysis, the judge examined whether the right to privacy was a reasonable expectation and considered how to determine the balance between privacy and freedom of expression. The judge held that the children had a reasonable expectation of protection of their privacy and that the balance between Articles 8 and 10 of the European Convention on Human Rights in this case must tip in favor of privacy. Therefore, the publication of the photographs constituted an invasion of privacy, and hence, the judge awarded damages to Dylan and the twins. Therefore, the crucial issue in the Weller case was that the photographs identified the plaintiffs and that although the photographs were taken in a public space, it was nevertheless a private event.

The question remains whether reasonable expectations of privacy are limited to children. Unlike the Court of Appeal proceedings in *Murray*, the judge in *Weller* made no reference to this, so it is unclear whether his decision would have been different if the plaintiffs had not been children. As such, it is possible that the reasoning in *Weller* could also be applied to public figures in relation to photographs taken in public spaces.<sup>38</sup>

## 6. Important factors when determining the breach of privacy

The decisions examined above can be used to identify the criteria against which the question analyzed in this study can be judged. On the one hand, it has become clear that the image is to be interpreted within the private sphere and that the misuse of the image is a violation of the right to privacy. On deeper reflection,

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<sup>36</sup> *Murray* [36].

<sup>37</sup> *Weller v Associated Newspapers Ltd* [2014] EWHC 1163 (QB).

<sup>38</sup> Hughes, 2014, p. 188.

this is not self-evident in the case of people spending time in public spaces or places open to the public, whose faces are ‘public,’ meaning that they are visible to others. It is also clear from the cases presented that under certain circumstances, people also have the right to privacy in public spaces and places open to the public.

The notion of ‘privacy in a public place’ may, at first sight, appear to be a paradox; however, it is in fact very well justified, as ‘privacy’ is not linked to a specific physical place or space, but is primarily the nature of the activity carried out by the right holder that determines whether the right holder is entitled to protection at a given time. The physical space can, of course, be relevant: there is a stronger presumption that activities carried out in the home are protected, but not those carried out in a public space, on the street. At the same time, it is possible to carry out activities in a private home that cannot be considered part of private life (e.g., having an important discussion relating to public affairs at the kitchen table).

Another important aspect is the ‘reasonable expectation of privacy’ that emerges from the cases presented. On the street, in a public place, the privacy claim may not be as strong as if the right holder were in their home or in another private place. In public places, full protection of privacy cannot be guaranteed. However, knowing this, and knowing the nature of public places, the privacy that is normally afforded to those who are spending time there is easily identifiable (e.g., people sitting at the next table in a restaurant can see each other eating, and may overhear snippets of their conversation, but that is different from taking a photograph of the table with a telephoto lens or placing an audio recorder near it).

The face of a person venturing into a public place can therefore be both fully public and at the same time protected if someone disturbs him or her in an unusual or unexpected way and attempts to capture their image. The clash between privacy, which is also protected in public spaces, and the face being visible to others as a solid European ‘tradition’ can be observed in cases involving Muslim headscarves. (Although these cases were not started on the grounds of taking pictures without consent, they are, even so, an interesting addition to the question of the permitted use of public spaces.)

To date, two ECtHR decisions relate to wearing head scarves in public spaces, and the outcome of each case differs. The Court ruled against the applicant in *SAS v France*.<sup>39</sup> The applicant, in this case, was a practicing Muslim and a French citizen who objected to not being allowed to wear a veil covering her entire face as a result of the entry into force of legislation banning the covering up of the entire face in public places. The applicant emphasized that religious clothing is worn of an individual’s free will without pressure from others. It was also underlined that

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39 *SAS v France*, no. 43855/11, judgment of 26 June 2014.

she had worn the veil in the past, even if not all the time, and that she wished to wear it freely in the future, at any time she pleased. Finally, she pointed out that her intent was not to bother anyone but to express her religious, personal, and cultural beliefs and to find ‘inner peace.’<sup>40</sup> In other words, she based her reasoning mainly on the protection of freedom of speech and her right to privacy, in addition to the freedom of religion. The Court acknowledged that Article 8 of the Convention, on the right to private life, is strongly affected by the case; the freedom to choose one’s clothing and to be able to be in the street without disturbance are both questions falling under the scope of private life.

According to the ECtHR, for reasons of security, any state may prohibit wearing clothes that hinder the identification of a person, but such a blanket ban with such an effect is acceptable only if the risk to public order can generally be identified.<sup>41</sup> The French Government could not demonstrate such a risk. Another possible rationale for limitation is the ‘protection of the rights and freedoms of others.’ In this respect, the French Government pointed out that concealing one’s face makes living together impossible for the affected members of society and is against the minimum norms of civility that are necessary for social interactions.<sup>42</sup> The ECtHR accepted the above as legitimate arguments, simultaneously expressing that allowing full-face veils to be worn in public places is a choice to be made by society.

In *Dakir v Belgium*, the ECtHR found that the preservation of the conditions of ‘living together’ is an element of the ‘protection of the rights and freedoms of others.’ It, therefore, held that the contested restriction could be regarded as ‘necessary’ ‘in a democratic society,’ and that the question of whether it should be permitted to wear the full-face veil in public places in Belgium constituted a choice of society.<sup>43</sup>

Another case concerns the use of public spaces. The applicant in *Gough v the United Kingdom*<sup>44</sup> held a belief that the human body is inoffensive, so being naked in public must be allowed. His belief in ‘social nudity’ was expressed by naked walks. In 2003, he decided to walk naked across the whole length of the country, from Land’s End in England to John O’Groats in Scotland, earning the nickname ‘the naked rambler.’ Following these performances, he was arrested, prosecuted, convicted, and imprisoned many times over the course of a decade for public nudity. In his application, he argued that his right to free expression (Article 10) had been breached by the state authorities, and his right to private life (Article 8) had also been violated.

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40 SAS, [12].

41 SAS, [139].

42 SAS, [25] and [141].

43 *Dakir v Belgium*, App no 4619/12, judgment of 11 July 2017.

44 *Gough v the United Kingdom*, no. 49327/11, judgment of 28 October 2014.

The ECtHR declared – explicitly referring to the Article 10 complaint, but possibly with a more general scope – that a margin of appreciation for the state applies in cases involving public morals. The use of public spaces can therefore be restricted for reasons of public interest, and privacy in public places cannot be enjoyed without restrictions. There are, then, limits to the law on both sides: on the one hand, the general, common norms accepted in society and, on the other hand, the public's interest in being informed of public affairs, or the speaker's or reporter's freedom of speech or freedom of the press. The cases presented highlight the limited recognition of the rights of public figures and those involved in public affairs in relation to the photographs taken of them. If the freedom of the press and the purpose of the information justify it, the protection of the image may be overshadowed. This is confirmed by all three *Von Hannover* judgments, the *Axel Springer* case, and all the English cases, in particular the *Campbell* judgment. Freedom of the press also extends to tabloid media, as long as their materials are not produced solely for entertainment purposes, but are genuinely concerned with matters of public interest. Moreover, the scope of these matters of public interest is broad, as the cases presented here illustrate.

The way pictures are taken is also an important factor. If the photographer has harassed the person concerned, the balance may tip in favor of providing protection (see the first *Von Hannover* and *Weller* cases).<sup>45</sup> It is also worth recalling another decision of the Strasbourg Court, which, although it did not concern photographs taken in public places, set out criteria relevant to the issues discussed in this study.

In *Reklos*,<sup>46</sup> the Court had to consider whether Greece had failed to protect the rights of a child when it dismissed a case against a photographer who had taken a photograph of the child without the child's consent or the consent of the child's parents. In *Reklos*, the plaintiffs were parents of a newborn baby. Immediately after birth, the baby was placed in a sterile ward and only doctors and nurses from the clinic were allowed to enter. A professional photographer working at the hospital took photographs of the baby in the sterile ward and offered them to the plaintiffs. The plaintiffs complained that the photographs had been taken without their consent and demanded that the photographer hand over the negatives to them. The photographer refused to do so, and the parents took legal action on the grounds that the photographer had violated their child's personal rights. This claim was considered 'too vague' by the Greek Supreme Court, which led the parents to refer the case to the ECtHR. The applicants claimed that the Supreme Court, by dismissing their statement of claim, had violated Article 6 of the European Convention on Human Rights, the right to a fair trial. The Court

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45 Hughes, 2009, pp. 162–168.

46 *Reklos and Davourlis v Greece*, no. 1234/05, judgment of 15 Jan 2009.



agreed with them and accepted that it had to be considered whether there had been an interference with the boy's right to privacy, even if the photographs had not been published.

Deciding on cases involving photographs of people in special situations requires special judgement and individual consideration. In these cases, the interests in the right to information and in freedom of the press do not clearly prevail over the protection of privacy, even when the facts are linked to public affairs. Examples include the *Peck* decision and a Norwegian case, *Egeland and Hanseid v Norway*.<sup>47</sup> In this case, two Norwegian newspapers published photographs of an individual who had been convicted of triple murder just before the pictures were taken. In the published pictures, he is seen after the decision, emotionally broken, and sitting in a police car. According to the ECtHR, the sanction imposed by the Norwegian court for the publication of these pictures did not violate Article 10: Even though the seriousness of the crime and the circumstances of the conviction may have been of public interest, the life situations depicted in the pictures qualify as events that fall within the protected privacy of an individual, even of a criminal. Hence, the important considerations in judging a case are what the person was doing in the public place in question, how their conduct or the account of it can be linked to a public affair, and exactly where he or she was (the 'type' of public space it was).<sup>48</sup>

The last aspect worth highlighting is the priority given to protecting children's rights. Both the first *Von Hannover* decision and the *Weller* case were largely (the latter entirely) about child protection. It is clear that photographs of children are much less likely to be associated with public affairs and, because of their vulnerability, may inherently require stronger protection. In *Weller*, the extent to which a parent takes their child out in public and the fact that Paul Weller had previously explicitly protected his children from publicity were also considered. This raises the question of whether children whose parents regularly and knowingly display them in public, exploiting the public's interest in children to promote themselves, and seeking the favor of photographers are less likely to bring a case seeking redress for their grievances arising from (this time unwanted) photographs taken of them. Kirsty Hughes argues – convincingly – that it would be wrong to diminish children's rights because of their parents' conduct, and parents' conduct in this regard (even if they sought wide publicity by means of their minor child) cannot be considered a waiver.<sup>49</sup>

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47 *Egeland and Hanseid v Norway*, no. 34438/04, judgment of 16 April 2009.

48 Hughes, 2014, p. 189.

49 Hughes, 2014, pp. 190–191.

## 7. Conclusions

The questions posed in the introduction to this study have been adequately answered by case law over the last two decades. One's image needs to be interpreted as an aspect of privacy and that the protection of privacy can also be claimed in public spaces and places open to the public. In this respect, the European approach differs significantly from that of the US, where people in public spaces can essentially be photographed freely.<sup>50</sup> Certain general principles also emerge from European case law, which take into account the freedom to discuss public affairs, namely the protection of freedom of speech and freedom of the press. Based on the decisions examined, it seems that even a remote, indirect connection with a matter that qualifies as a public affair based on a broad interpretation of the concept is sufficient to justify the protection of freedom of the press, meaning that only purely tabloid content is excluded from protection. This creates an enhanced level of protection for this freedom and may also result in numerous frustrated privacy plaintiffs.

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50 See more in Gajda, 2022.

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