# Reflections on balancing Articles 8 and 10 in the context of MPI - past, present and future

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## Abstract

This article examines speech/privacy balancing under the tort of misuse of private information, in order to argue that the past down-grading of privacy within the balancing act as a feature of pre-HRA jurisprudence, and of the early post-HRA years, could be replicated in future. It will be argued that the Strasbourg Court pays lip-service to the notion of the presumptive equality of Articles 8 and 10 ECHR, but it is nevertheless embracing the idea that the notoriety of the individual claiming privacy invasion should lead to a down-grading of their expectation of privacy when balancing the two Articles. This article proceeds to argue that, due to a range of current domestic factors, including recent judicial pronouncements as to the judges' role under the HRA, the Strasbourg stance as to balancing may be more forcefully embraced domestically in future, meaning that a down-grading of claimed privacy interests may tend to occur: the current domestic rule as to the presumptive parity of Articles 8 and 10 in MPI cases could be undermined. This article, therefore, is intended to send a warning to practitioners and commentators that those concerned with the value placed on private information in *Campbell* should be watchful for attempts by the domestic judiciary to revise the presumptive parity rule in light of the *Axel Springer* decision in future.

## Keywords

MPI, Article 8, Article 10 ECHR, s12(4) HRA

# Introduction

This article reflects on speech/privacy balancing under the tort of misuse of private information (MPI), the most controversial and complex aspect of the tort - which has also gone through a number of iterations. It will analyse those various iterations in terms of the past, present and future, arguing that the down-grading of privacy within the balancing act as a feature of the pre-Human Rights Act (HRA) jurisprudence, and of the early post-HRA years, could possibly be replicated in future. The pre-HRA years saw emerging signs that the doctrine of confidence was developing a fluidity of contour that could enable it to develop into a remedy for invasion of privacy,[1] but that fairly controversial development was not accompanied at the time by a judicial understanding of the presumptive equality of the values of both privacy and free expression, and the same can be said of the early post-HRA years as the new cause of action was acquiring a clearer shape in the courts, even though the courts were relying on two Convention rights of equal value under the HRA.

After that initial phase, however, the domestic courts largely rejected the notion of presumptive inequality between the two values; in service of so doing, they rejected not only the notion that the notoriety of the applicant should lead to a down-grading of his/her privacy, but also the idea that such an applicant may have partially waived their right to protect private information due to seeking prior publicity. But at the same time, it will be argued, the Strasbourg Court was tracing an opposing path in terms of its own balancing jurisprudence. While continuing to pay

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[1] See Helen Fenwick and Gavin Phillipson, 'The Doctrine of Confidence as a Privacy Remedy in the Human Rights Act Era' (2000) 63(5) *Modern Law Review* 660.

lip-service to the notion of the presumptive equality of the two rights, it was embracing the idea that the notoriety of the privacy claimant should lead to a down-grading of their expectation of privacy when balancing Articles 8 and 10, and that a version of the waiver argument should aid in so doing. On that basis, then, this article proceeds to argue that due to a range of current domestic factors, including in particular a recent judicial re-envisaging of the courts' role under the HRA, both those arguments accepted at Strasbourg may re-enter the domestic 'balancing' jurisprudence in MPI cases more forcefully than they have done so far. That would clearly mean that a down-grading of claimed privacy interests could well tend to occur in future under the balancing act, distracting from a lack of genuine public interest in the speech, and thereby enabling unjustified inflation of the weight of the Article 10 claim.

## The past – lack of presumptive parity domestically

### *Article 8 as a mere exception to Article 10 domestically*

This piece begins by reflecting briefly on the past position in the domestic courts. Presumptive equality between the two rights was not accepted for a time as a general proposition in the early post-HRA years; that was partly due to s12(4) HRA which begins: "The court must have particular regard to the Convention right of freedom of expression." That provision was intended to accord Article 10 priority – to create presumptive inequality between the two rights.

In certain very early post-HRA cases Article 8 was treated as merely an exception to Article 10, and not as a competing right of equal value, meaning that there was a failure to assess the

value of the speech claim. In *Mills v News Group Newspapers*[2] it was found: "To be justified, any curtailment of freedom of expression must be convincingly established by a compelling countervailing consideration...Freedom of expression is the rule and regulation of speech is the exception requiring justification".[3] On similar lines it was found in *A v B plc*:[4] "Any interference with the press has to be justified because it inevitably has some effect on the ability of the press to perform its role in society. This is the position irrespective of whether a particular publication is desirable in the public interest. The existence of a free press is in itself desirable and so any interference with it has to be justified".[5] The idea that it was important to allow newspapers to print private matters that the public feel some curiosity about, in order to ensure that a range of newspapers stay in business, was tantamount to an acceptance of depriving the privacy interest of almost all value. That stance found echoes in the Court of Appeal judgment in *Douglas I,* which lifted the injunction.[6]

The decisions in the House of Lords in *Re S*[7] and in *Campbell v MGN*[8] found that the two rights should be treated on a basis of presumptive parity, as discussed in the next section, but nevertheless in certain later decisions various dubious and flimsy reasons were found as to why Article 10 should prevail. Such findings arose in *Terry v Persons unknown*[9] and in *Ferdinand v MGN*[10] in which it was found that there is a need to enable public debate about possible anti-social conduct. Such findings implied that Article 10 may *de facto* take precedence over Article 8 quite readily. For a period, therefore, the two rights did not appear in reality to be being

[2] [2001] EMLR 41 (Ch).
[3] Ibid [15]. That was also impliedly accepted in *Venables v News Group Newspapers Ltd* [2001] 2 WLR 1038 (F).
[4] [2002] EWCA Civ 337; [2003] QB 195.
[5] Ibid [205].
[6] [2001] QB 967 (CA) 994.
[7] [2004] UKHL 47; [2005] 1 AC 593.
[8] [2004] UKHL 22; [2004] 2 AC 457. See for full discussion of *Campbell*, G Phillipson, Chapter 8 in *Landmark Cases in Privacy Law*, eds P Coe and P Wragg (Hart, 2023).
[9] [2010] EWHC 119 (QB).
[10] [2011] EWHC 2454 (QB).

treated as of equal value.

Reliance on the so-called 'waiver' argument also led to the creation of presumptive inequality between the two interests in protecting private information and free expression, but in a more insidious fashion. Under the action for breach of confidence, pre-HRA, the concept of waiver, or of implied consent to invasion of privacy by virtue of prior voluntary publicity, arose. Tambini and Heyward expressed the concept in these terms: "The [PCC] has made clear…that it will take into account the extent to which similar matters have been discussed by the complainant or…published before without complaint. Privacy is a right which can be compromised and those who talk about their private lives on their own terms must expect that there may be others who will do so, without their consent, in a less than agreeable way".[11] Receptivity was shown to the waiver argument in some pre-HRA cases concerning private information as recognised under the banner of the breach of confidence doctrine. *Woodward v Hutchins*[12] was the most well-known one: the Court of Appeal denied the applicants (pop singers) an injunction against a former employee in respect of newspaper articles giving detailed accounts of the singers' private lives. Bridge LJ found: "those who seek and welcome publicity of every kind bearing upon their private lives so long as it shows them in a favourable light are in no position to complain of an invasion of their privacy by publicity which shows them in an unfavourable light".[13] Clearly, that approach would often deny presumptive equality to Article 8 values in relation to those reflected under Article 10. "Implied consent" is not a defensible notion in such cases. The notion of waiver or estoppel clearly runs contrary to the principle of informational autonomy underlying the protection for private information offered

[11] Damian Tambini and Clare Heyward, 'Regulating the trade in secrets: policy options' in Clare Heyward and Damian Tambini (eds) *Ruled by Recluses? Privacy, Journalism and the Media After the Human Rights Act* (IPPR 2002) 85.
[12] [1977] 1 WLR 760 (CA).
[13] Ibid p 765. See also the similar approach in *Lennon v News Group Newspapers and Twist* [1978] FSR 573 (CA).

by Article 8.

On that basis this broad approach to the concept of waiver was rejected in post-HRA cases. For example, in *Douglas v Hello! Ltd (no.1)*: Brooke LJ found: "I did not obtain any assistance from [Counsel's] citation of the very general principles stated by members of this court in *Woodward v Hutchins*…a case which preceded modern developments in practice in relation to breach of confidence claims….".[14] A similar approach was taken in a succinct fashion in *Douglas II*: "To hold that those who have sought any publicity lose all protection would be to repeal Article 8's application to very many of those who are likely most to need it".[15] Instead, the court treated as relevant only the couple's approach to publicity in relation to the information in dispute – namely, the wedding itself. In other words, the mere fact that a claimant had sought publicity about his or her private life previously was not found to preclude a successful claim in respect of a non-consensual disclosure of private information, unless publicity had previously been sought in relation to the specific zone of his/her private life now in dispute. As Lord Hoffman found in *Campbell v MGN*:[16] "[Campbell] is a public figure who has had a long and symbiotic relationship with the media. In my opinion, that would not in itself justify publication. A person may attract or even seek publicity about some aspects of his or her life without creating any public interest in the publication of personal information about other matters".[17]

The concept of such a 'zonal waiver' still finds some traction in certain domestic cases, post-HRA, and so can aid in tipping the balance between Articles 8 and 10 towards Article 10,

[14] [2001] QB 967, 995 (CA).
[15] *Douglas v Hello! Ltd (No 5)* [2003] EWHC 786 (Ch); [2003] 3 All ER 996 [225].
[16] [2004] UKHL 22; [2004] 2 AC 457.
[17] Ibid [57].

although it has been rejected in some instances. As the Court of Appeal found in *McKennitt v Ash*,[18] "If information is my private property, it is for me to decide how much of it should be published. The zone argument completely undermines that reasonable expectation of privacy…".[19] But in *A v B*[20] the court had found that in identifying the scope of material to be viewed as within the public domain: "once such a claimant has chosen to lift the veil on his personal affairs, the test will be 'zonal'; that is to say, the court's characterisation of what is truly in the public domain will not be tied specifically to the details revealed in the past but rather focus upon the general area or zone of the claimant's personal life (e.g. drug addiction) which he has chosen to expose".[21] Similarly, in *Murray v Express Newspapers Plc*[22] the Court of Appeal found that if the parents of a child had courted publicity by "procuring the publication of photographs of the child in order to promote their own interests, the position would or might be quite different from a case like this, where the parents have taken care to keep their children out of the public gaze", indicating that the waiver argument would have had some weight had the parents sought publicity. The 'zonal' argument was also accorded some weight in *AAA v Associated Newspapers Ltd*:[23] the private information at stake concerned the paternity of an illegitimate child in an instance in which the father was a very well-known politician; since the mother of the child was found to have shown an ambivalent attitude to keeping the secret of the child's paternity, the privacy value of the information was found to have been diminished. Therefore when the stage of balancing the Article 8 and 10 interests was reached, the Article 10 claim more readily won out, again relying on a version of the zonal argument.[24] Therefore that argument cannot be entirely dismissed as a relic of the past history of MPI.

[18] [2006] EWCA Civ 1714; [2008] QB 73.
[19] Ibid [55].
[20] [2005] EWHC 1651 (QB); [2005] EMLR 36.
[21] Ibid [28].
[22] [2008] EWCA Civ 446; [2009] Ch 481.
[23] [2013] EWCA Civ 554.
[24] Ibid [26]-[37].

*Presumptive parity of the two rights at Strasbourg*

In the early post-HRA years, in contrast, Strasbourg accorded the two rights presumptive parity. Its stance was clarified in *Von Hannover* in 2005;[25] the Court impliedly treated the two rights on the basis of presumptive equality, and readily found that the Article 8 interest would prevail where the speech in question was of little or no value – consisting of celebrity tittle-tattle.[26] In a range of subsequent cases, including, for example, *Armonienė v Lithuania*,[27] the Court reiterated that the press has a duty to impart information and ideas on matters of public interest, but emphasised the "fundamental distinction…between reporting facts - even if controversial - capable of contributing to a debate in a democratic society and making tawdry allegations about an individual's private life".[28] In *Saaristo and others v Finland*,[29] in balancing the Articles 8 and 10 interests at stake and finding a breach of Article 10, the Court found: "the article did not only satisfy the curiosity of certain readers but it also contributed to an important matter of public interest in the form of political background information".[30] As discussed below, although such reiterations have not been departed from at Strasbourg expressly in later decisions (and they were heavily relied on in *PJS,* below),[31] they were undermined by reliance on the later, pivotal decision in *Axel Springer*[32] which delineated certain factors to be taken

[25] (2005) 40 EHRR 1. See also *Tammer v Estonia* (2003) 37 EHRR 43.
[26] Ibid para 66.
[27] (2009) 48 EHRR 53.
[28] Ibid para 39. See also: *Société Prisma Presse v France* App nos 66910/01 and 71612/01 (ECHR, 1 July 2003); *Leempoel & SA E Ciné Revue v Belgium* App no 64772/01 (9 November 2006) para 77; *Hachette Filipacchi Associés (ICI PARIS) v France* App no 12268/03 (ECHR, 23 July 2009) para 40; *MGN Ltd v United Kingdom* (2011) 53 EHRR 5 para 143; *Couderc and Hachette Filipacchi Associés v France* App no 40454/07 (ECHR, 10 November 2015).
[29] App no 184/06 (ECHR, 12 October 2010).
[30] Ibid para 67. See also *Standard Verlags GmbH v Austria (No 2)* App no 21277/05 (ECHR, 4 June 2009) para 52: "….idle gossip about the state of his or her marriage or alleged extra-marital relationships. The Court agrees that the latter does not contribute to any public debate in respect of which the press has to fulfil its role of 'public watchdog', but merely serves to satisfy the curiosity of a certain readership".
[31] *PJS v News Group Newspapers* [2016] UKSC 26; [2016] AC 1081.
[32] *Axel Springer v Germany* App no 39954/08 (2012) 55 EHRR 6.

into account in the balancing act, discussed below.

## The present - presumptive parity rule restored/maintained?

### *The domestic stance*

The Court of Appeal in *PJS*[33] considered that s12(4) HRA should be given effect and so would aid in enabling the Article 10 interest to prevail, finding that section 12 "enhances the weight which article 10 rights carry in the balancing exercise".[34] But the Supreme Court's decision in *PJS*, which was reaffirmed in *Bloomberg*,[35] found that the two rights should be treated on a basis of presumptive parity,[36] effectively emptying s12(4) of any meaning. Since it found that the sub-section did *not* enhance the weight to be accorded to the Article 10 argument, its stance amounted almost to a strike down of the sub-section. That was in the context of a 'kiss and tell' story concerning a very well-known figure, which was not viewed as constituting speech of any public interest value,[37] but the Court did not find that *had* the content been viewed as of public interest value, s12(4) would have given it added weight. *PJS* thus echoed the findings in *Campbell*[38] as to the presumptive parity rule, making it clear that it relies on a *general*

[33] [2016] EWCA Civ 393.
[34] Ibid [40].
[35] *Bloomberg v ZXC* [2022] UKSC 5; [2022] AC 1158 [46].
[36] See *PJS v News Group Newspapers* [2016] UKSC 26; [2016] AC 1081: 'As Lord Steyn made clear in In re S (A Child) [2005] 1 AC 593, para 17, each right has equal potential force in principle, and the question is which way the balance falls in the light of the specific facts and considerations in a particular case…' [51].
[37] Ibid [32], [24].
[38] *Campbell v NGN* [2004] UKHL 22; [2004] 2 AC 457. 'Neither article 8 nor article 10 has any pre-eminence over the other in the conduct of this [balancing] exercise': [113]. 'The parties agree that neither right takes precedence over the other. This is consistent with Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe, para 10: "The Assembly reaffirms the importance of everyone's right to privacy, and of the right to freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value"': [138].

presumption which then affects the way that the specific issues at stake affecting the weight of the Article 10 or Article 8 interests are evaluated. The Supreme Court in *Bloomberg,* while reiterating the need for acceptance of the parity of the rights,[39] did not, when turning from that general rule to the specifics of the case, disturb the Court of Appeal decision that the material in question was not viewed as of sufficient (or possibly, any) public interest so as to outweigh the privacy claim.[40]

The Supreme Court in *PJS* found very clearly that in the balancing exercise Articles 8 and 10 must be treated as of equal weight, and did not accept that the notoriety of the claimant should lead to a down-grading of the expectation of privacy: "criticism of conduct cannot be a pretext for invasion of privacy by disclosure of alleged sexual infidelity which is of no real public interest in a legal sense. It is beside the point that the appellant and his partner are in other contexts subjects of public and media attention".[41] The Court thus expressly disregarded the second factor, discussed below, put forward in *Axel Springer* as significant in the balancing act – the notoriety of the claimant. Its stance echoed that of Lord Hoffmann in *Campbell* who had said in relation to a celebrity that the "relatively *anodyne* nature of the additional details as to Naomi Campbell's drug addiction and treatment is highly significant because it distinguishes the case from cases in which….there is a public interest…".[42] A somewhat similar stance was taken in *Richard v BBC*, which concerned reporting on a criminal investigation into a very well-known figure: the presumptive parity rule was deployed, and, as discussed below, the

[39] *Bloomberg v ZXC* (n 35) [46].
[40] *ZXC v Bloomberg* [2020] EWCA Civ 611: [112] '[The first instance judge] accepted that the UKLEB investigation into X Ltd was a matter of public interest; and that there was a public interest in the media reporting of developments in the UKLEB investigation'. But see also [113]-[115]. For discussion see G. Phillipson and R. Craig, 'Privacy, Reputation and Anonymity until Charge: ZXC goes to the Supreme Court' (2021) 13(2) *Journal of Media Law* 153.
[41] *PJS* (n 36) [21].
[42] *Campbell* (n 8) [60]. Lord Nicholls in that instance similarly found that disseminating information about the claimant's attendance at the Narcotics Anonymous meetings was of a 'lower order' than other forms of journalistic speech, such as political speech (ibid [29]).

notoriety argument was not accepted as relating to a general rule;[43] the existence of a public interest in the coverage was also doubted.[44]

So something that purports to be a balancing exercise is conducted in MPI claims – balancing Articles 8 and 10, currently on the basis of their presumptive equality. Clearly, academics have questioned what judges really do when they purport to engage in this exercise, querying the reality of the presumption of equality. Wragg, for example, has argued that once content can be viewed as of public interest value, the Article 8 argument will tend to be overcome.[45] For example, a lack of a rigorous proportionality analysis might arise in a situation similar to the *PJS* one*,* but where it was judicially accepted that the claimant had projected a false image to the media as to espousing monogamy. Nevertheless, post-*PJS*, clear allegiance to the notion of the presumptive parity of the two rights is apparent.

## *A failure to maintain presumptive parity in reality at Strasbourg: the* Axel Springer *criteria*

The Strasbourg Court, in contrast, has, it is argued, traced an opposing path – from a strong stance in favour of privacy where the Article 10 claim was very weak – or virtually non-existent, as in *Von Hannover* in 2005[46] – to a weaker stance as regards affirming privacy protection in later cases. That represents the present day position at Strasbourg in which the

[43] See n 89 below and associated text.
[44] [2018] EWHC 1837 (Ch); [2019] Ch 169. Justice Mann began the balancing exercise by noting: 'As a matter of principle neither of them [the two rights] has primacy' [270]. On the public interest issue he found: 'Because an investigation at a general level was a matter of public interest, the identity of the subject of the investigation also attracted that characterisation. I do not think that it did. Knowing that Sir Cliff was under investigation might be of interest to the gossip-mongers, but it does not contribute materially to the genuine public interest in the existence of police investigations in this area' [282].
[45] Paul Wragg, 'Protecting Private Information of Public Interest: Campbell's Great Promise, Unfulfilled' (2015) 7(2) *Journal of Media Law* 225, 228-234.
[46] (2005) 40 EHRR 1.

value of private information can be downgraded where a 'public figure' is involved; the waiver argument has also insinuated itself into the jurisprudence. That position was affirmed in particular in *Von Hannover No 2,*[47] *Von Hannover No 3*,[48] and in *Axel Springer v Germany*.[49] *Axel Springer* is the leading decision; the key factors affecting the balance between Articles 8 and 10 were definitively delineated and have been relied on ever since. Six factors were identified, but the three most significant ones were: firstly, whether the privacy invading material contributed to a debate of general interest; secondly, whether the person whose privacy has been invaded (who may be the applicant unless the claim is based on an alleged violation of Article 10, as in that instance) could be deemed a 'public figure' and so could not claim the same protection for privacy as an unknown person; thirdly, that person's prior conduct in terms of seeking/accepting publicity. The Strasbourg Court found, as regards the application of the first factor in *Axel Springer*, that since the subject of the publicity, an actor, had faced a criminal charge and had coincidentally played a police officer, some public interest in the content arose, leading to a down-grading of the weight of his privacy interest. It is hard to see, however, that the fact that an actor playing a police officer undergoes arrest makes a contribution of any value to public debate; it appears more likely to satisfy amused curiosity due to the random coincidence.

In relation to the second factor it had been found domestically in the German Regional Court, but not the Court of Appeal, as to the subject of the publicity in *Axel Springer,* that "[he] had not courted the public to a degree that he could be considered to have waived his right to the

[47] *Von Hannover v Germany (no 2)* (2012) 55 EHRR 15.
[48] *Von Hannover v Germany (no 3)* (2019) 68 EHRR 10.
[49] *Axel Springer v Germany* App no 39954/08 (2012) 55 EHRR 6. For further discussion of this case-law see F. Brimblecombe and G. Phillipson (2018) 'Regaining Digital Privacy? The New "Right to be Forgotten" and Online Expression' Canadian Journal of Comparative and Contemporary Law, 4(1), 1-66.

protection of his personality rights".[50] The Court of Appeal nevertheless upheld the injunction imposed by the Hamburg Regional Court, thereby agreeing with the balancing exercise carried out by the lower court. But the Strasbourg Court considered that as quite a well-known actor playing the role of a police officer, his arrest had attracted attention due to the nature of the role he was playing, so "he was sufficiently well known to qualify as a public figure. That consideration thus reinforces the public's interest in being informed of X's arrest".[51] The notoriety generated was thus seen as adding to the public interest value of the story, so the Court partially elided the first two factors. In relation to the third factor, the Court found: "He had himself revealed details about his private life in a number of interviews…he had therefore actively sought the limelight, so that, having regard to the degree to which he was known to the public, his 'legitimate expectation' that his private life would be effectively protected was henceforth reduced".[52] There was clear acceptance therefore that the prior conduct of the claimant was relevant, which included the previous seeking of publicity – in effect, the waiver argument. These factors were enabled to affect the balancing of the rights under Articles 8 and 10 of the Convention, and tipped the balance towards Article 10.

While the Court considered the first factor to be satisfied because in that instance open justice principles could be viewed as being at stake,[53] it did *not* indicate that satisfaction of that factor *alone* would have led to the outweighing of the privacy interest. Not only did the Court appear

[50] Ibid para 97. See the somewhat similar findings in *Lahtonen v Finland* App no 29576/09 (ECHR, 17 January 2012).
[51] Ibid paras 96, 99. It was accepted that this second criteria *must* be applied in the balancing exercise as a general rule: one of the dissenting judges, Judge Lopez Guerra, found "this Court has established a series of criteria which must be followed when assessing how the domestic courts have balanced conflicting rights…" and he criticised the Grand Chamber's approach: "Analysing the same facts and using the same criteria and same balancing approach as the domestic courts, the Grand Chamber came to a different conclusion, giving more weight to the protection of the right to freedom of expression than to the protection of the right to privacy". The four other dissenting judges agreed.
[52] Ibid para 101. See for criticism of the findings in *Axel Springer*, K Hughes, Chapter 9 in *Landmark Cases in Privacy Law*, eds P Coe and P Wragg (Hart, 2023).
[53] Ibid para 96.

to view the first and second factors as having equal status, but it presented the second one as reflecting a *general* rule. The same criticism could be made of its treatment of the third. The threat to the presumptive parity rule thus arises from reliance on the notoriety of the victim of the privacy-invasion and from the application of this version of the waiver doctrine. Reliance on these two factors demands that if the victim of privacy-invasion is well known, and therefore, as would always be probable, had been in the 'lime-light', it should follow as a *general* rule that their privacy interest should be down-graded, clearly disturbing the notion of enabling the presumption of parity to infuse the whole balancing exercise.

The decision in *Von Hannover (no 3)*[54] applied those three *Axel Springer* factors; in relation to the first, the speech concerned the tendency of high earners to have second homes and on that flimsy basis it was considered that providing details about the Von Hannovers' home was a matter of general interest. There was also acceptance of use of an accompanying photograph, even where it added nothing to the narrative, so long as the content of the narrative, *not* the photo, could be viewed as of public interest. It may said that in both *Axel Springer* and *Von Hannover (no 3)* there was acceptance of a broad, unthinking classification of speech as of public interest, *despite* the reiterations discussed above at Strasbourg as to the need to differentiate between trivial facts about a celebrity and speech of genuine significance.[55] In relation to the second *Axel Springer* factor, the Court reaffirmed the point it had made in *Von Hannover v Germany (no 2)*[56] to the effect that the applicant and her husband must be regarded as public figures, and so were unable to claim the same protection for their private life as unknown private individuals.[57] The Court therefore re-emphasised in both the later *Von*

[54] *Von Hannover v Germany (no 3)* (2019) 68 EHRR 10.
[55] *Cf* the public interest matter in *PJS* (n 36) [83]. For the earlier Strasbourg stance on the public interest, which did not *also* focus on the notoriety of the victim of privacy-invasion, see n 25 and associated text.
[56] *Von Hannover v Germany (no 2)* (2012) 55 EHRR 15.
[57] *Von Hannover v Germany (no 3)* (n 54) para 50; *Von Hannover v Germany (no 2)* paras 110, 120.

*Hannover* cases its acceptance of differentiation between private individuals, unknown to the public, and public figures, finding that while the former can claim particular protection of their private life, the same protection cannot be assured in the case of the latter.[58] That demonstrated a clear rejection of the more privacy-respecting stance taken in the first *Von Hannover* case – the Princess's status as a very well-known person did not figure in the reasoning.

In *Axel Springer* and the later *Von Hannover* cases it was determined that if the balancing act had been fully conducted in the national courts, considering and applying the *Axel Springer* factors, Strasbourg will be reluctant to interfere, unless there are 'strong reasons' to do so on the basis that the national courts' determinations should attract a certain margin of appreciation, which appears to be wide.[59] A range of later cases at Strasbourg largely reaffirmed those findings as to the importance of those factors and the need to rehearse them domestically in order to attract a wide margin of appreciation. In *Biancardi v Italy*,[60] on specific facts relating to data retention on a search engine, the Court placed weight on the fact that the national authorities had carried out the balancing exercise properly in finding that Article 8 should prevail, meaning that a wide margin of appreciation would be granted. But, had the applicant been deemed to be a well-known person, the decision might well have gone in favour of finding a breach of Article 10 if the domestic courts had failed to apply the second *Axel Springer* factor fully. In *Marina v Romania*,[61] while the Court applied the *Axel Springer* factors, it showed less inclination to expand the boundaries of what constitutes a "debate of general interest" than was apparent in both *Von Hannover no 3* and *Axel Springer,* partly because the claimant could not be viewed as a public figure. It not only rejected the view of the Romanian courts as to the public interest value of the privacy-invading material, but also its view as to the notoriety of

[58] Ibid.
[59] *Von Hannover v Germany (no 3)* (n 54) para 46; *Axel Springer v Germany* (n 32) paras 85-88.
[60] App no 77419/16 (ECHR, 25 November 2021).
[61] App no 50469/14 (ECHR, 6 May 2020) (French).

the claimant.[62] The applicant's sister had sent a letter, which may have been intended to contain satirical elements, attacking the conduct of the applicant, to a local radio station; the presenters read out the letter without redacting parts of it. The Court found that "the fact that the applicant's sister decided to divulge family issues through the radio does not transform her behaviour into a matter of 'general interest'".[63]

The Court in *Marina* also appeared to acknowledge the force of the waiver argument in further finding that nothing in the applicant's behaviour had suggested a particular inclination to divulge aspects of his private life.[64] Since the Romanian courts, unlike the German courts, had not conducted the balancing exercise on the lines laid down in *Axel Springer*, apparently overlooking or misapplying some aspects of the tests, the Strasbourg Court clearly did not concede to them a wide or any margin of appreciation. The decision therefore reaffirmed the necessity of reliance on those tests, including the down-grading of privacy for well-known figures, and acceptance of the waiver argument, but found a breach of Article 8 when applying those tests to the specific facts. Similarly, in *Hájovský v. Slovakia,*[65] in which a reporter obtained information covertly about a man seeking a surrogate to mother his child, the Court found a breach of Article 8, appearing to concede a very narrow margin of appreciation only since the state had not fully applied the accepted *Axel Springer* factors or had misapplied them. The Strasbourg Court applied the factors in finding that the applicant was "not a public or newsworthy figure", and had not sought publicity, other than placing an anonymous advert for a surrogate in the press.[66] In terms of assessing the public interest, the Court further found that the domestic courts' conclusion that "the publication of the photographs was necessary for the

[62] Ibid paras 76-77.
[63] Ibid para 73.
[64] Ibid para 78.
[65] [2001] ECHR 59.
[66] Ibid paras 35,35.

purposes of news reporting was not substantiated by any relevant and convincing arguments".[67]

The emphasis on according a wide margin of appreciation where the domestic courts *had* correctly applied the *Axel Springer* criteria was reiterated by the Grand Chamber in the significant decision in *Hurbain v Belgium* in 2023,[68] in which those criteria were also slightly modified when considering the Article 8 right to be forgotten in relation to electronically archived material held by a media body and readily available for search purposes. The material did not concern someone in the public eye; it was also found domestically and at Strasbourg, to have limited public interest value since it lacked topicality. It concerned reporting on traffic accidents which included the applicant's involvement in a car crash some years previously, and as between a 'right to remember' and to be forgotten, the majority judges favoured the latter in the circumstances, partly because there had not been much media coverage of the crash, and the applicant had not reappeared in the limelight since that time.[69] The criteria to be adopted in relation to attracting media attention again, after the original incident which was the subject of the archiving, were not specified; possibly they could include *media* instigation of future publicity.[70] The Grand Chamber emphasised that the case concerned the electronic archived version of an article rather than the original version, adding that it was solely the continued availability online of the information, rather than its original publication per se, that was at issue. Thus, while in *Hurbain* the balancing exercise came down in favour of Article 8, the need for reliance on the *Axel Springer* factors was strongly reaffirmed, and the Strasbourg version of the waiver argument was arguably accorded an expansive treatment, albeit one

[67] Ibid para 43.
[68] App no 57292/16 (ECHR, 4 July 2023). For discussion, see Hugh Tomlinson, '*Hurbain v Belgium*, Grand Chamber upholds decision that order anonymising newspaper archive did not violate Article 10' (26 July 2023) INFORRM Blog <https://inforrm.org/2023/07/26/case-law-strasbourg-hurbain-v-belgium-grand-chamber-upholds-decision-that-order-anonymising-newspaper-archive-did-not-violate-article-10-hugh-tomlinson-kc> accessed 28 February 2024.
[69] Ibid, para 227.
[70] Ibid, para 227: "while a person's public profile may diminish over time, he or she may also return to the limelight at a later stage for a variety of reasons".

inapplicable to the facts of the case. This argument as to expansion of those factors to the detriment of the privacy interest is pursued further below.

### *Expanding the 'public figure' category?*

Recently an incremental expansion of the 'public figure' category (the second *Axel Springer* factor) appears to be creeping in to the Strasbourg jurisprudence, creating further potential for the down-grading of privacy interests within the balancing act. In *ML and WW v Germany*[71] two half-brothers, who had been convicted of murder but later released, sought to have a transcript of a report which had remained online in a radio station's archive for a number of years, anonymised – so that the facts remained but their identities were removed. Their argument was that they could never reintegrate into society if they were permanently known as murderers (although their convictions were not spent), partly due to the ready searchability of the archive. Their Article 8 claim at Strasbourg failed, partly on the basis that they could be viewed as public figures because in their search to prove their innocence they had previously involved the media.[72] While, clearly, archived information held online by media bodies is of value in providing the public with information even long after a particular incident, in itself of public interest, it is unclear that such value should be – in effect – bolstered on the basis that those involved in the incident in question had involved the media in relation to a potential miscarriage of justice.

The emphasis in the decisions discussed on a down-grading of the Article 8 interest where the applicants/subjects of privacy-invasion could be said to be in the public eye, whether due to

[71] App nos 60798/10 and 65599/10 (ECHR, 28 June 2018).
[72] Ibid, para 106.

their status as well-known figures, or due to the circumstances at the time in question, was augmented in *McCann and Healy v Portugal*.[73] It may readily be argued that the 'in the public eye'/'public figure' criterion has been incrementally expanding since the findings in *Axel Springer* and *Von Hannover No 3*, but this decision took such expansion a stage further. The case concerned a book, a documentary programme, and a newspaper interview, all alleging that the applicants' daughter had died inside their holiday flat and that the applicants had then hidden her body, fabricating her abduction to cover up their actions. The applicants unsuccessfully alleged a breach of Article 8 at Strasbourg due to lack of state interference with the publications, focusing on both invasion of their private lives and reputational harm. But the case is of particular interest due to the argument accepted at Strasbourg in relation to the Articles 8 and 10 balancing act, as to the down-grading of the McCanns' Article 8 interest since they were in the public eye. The Court considered that the question it had to answer was whether the domestic courts had undertaken the requisite balancing exercise in conformity in particular with the second *Axel Springer* criteria.[74] In relation to the question whether the McCanns were public figures, the Court agreed with the domestic findings on the point, stating that since they had sought media attention as part of their quest to find their daughter, they had "inevitably and knowingly laid themselves open to close scrutiny of their every word and deed".[75] Since the Portuguese courts had referred extensively to the *Axel Springer* criteria, including in particular the second, 'in the public eye' one, the state's margin of appreciation, it was found, had not been over-stepped.

It may be found that Strasbourg's stance as to the 'public figure' criterion has, since *Axel Springer*, moved well beyond encompassing persons who have in general a high public profile,

[73] App no 57195/17 (ECHR, 20 September 2022).
[74] Ibid para 84.
[75] Ibid para 88.

in itself a questionable notion in terms of down-grading their expectation of privacy, to include persons involved in incidents that catch public attention or where, after such an incident, they return to the limelight for unspecified reasons (that appeared to be implicit in *Hurbain*), and *also* instances in which, due to tragic or desperate circumstances, persons who seek or acquiesce in media attention due to necessity (*ML and WW v Germany* and *McCanns v Portugal*).

## *Conclusions: recent expansion of all three key* Axel Springer *criteria?*

The current position is, therefore, that, while reiterating that Articles 8 and 10 should be treated as of presumptively equal value, the Strasbourg Court will require "strong reasons" to substitute its view for that of the domestic courts where a balancing exercise between Articles 10 and 8 has been undertaken fully, domestically. That means that if those courts have considered the *Axel Springer* factors in detail, including the second requiring that a lower level of protection to privacy is afforded to figures deemed to be in the public eye, and have also taken account of the waiver argument (the third factor), then the Court will tend not to disturb the national findings. (But it may do if it disagrees with the national court's 'public figure' assessment, as in *Marina v Romania,* although it has also found that it is "primarily for the domestic courts to assess how well known a person is".)[76] There is also, it is argued, a tendency to conflate the idea of notoriety with that of public interest, thereby also inflating the *first Axel Springer* criterion, without referring to any additional value accorded to the coverage in question in terms of contributing to a debate of general interest. Thus, the status of the Von Hannovers as well-known figures aided in finding a justification for according their homes and activities a public interest value of a highly questionable nature. On similar lines, in terms of

[76] *Axel Springer v Germany* n 32, para 98.

conflating past behaviour (the third *Axel Springer* factor) with creating public interest value, the Court has further found that private persons can, by their behaviour, be taken to have entered the public domain so that the disclosure of their identities in newspaper reports can be deemed to have a direct bearing on matters of public interest.[77] Conflation of all three *Axel Springer* criteria with each other has also therefore tended to inflate them all.

The Strasbourg Court is now therefore clearly in danger of denying Article 8 protection to the very many of those who are most likely to need it,[78] and are most likely to be the target both of intrusive journalism and adverse social media attention. While the Court is paying lip-service to the presumptive equality of both rights, it is coming close to, or embracing, the position traced above domestically for a period post-HRA in which English courts, post-*Campbell*, paid such lip-service, but fell into a similar trap: in relation to well-known figures spurious arguments were found capable of supporting findings of a countervailing public interest. It may be found, not only that Strasbourg's reiteration of the need to distinguish between celebrity gossip and speech of genuine public interest, discussed above, is at times coming closer to resembling rhetoric rather than reality, but also that the 'public figure' and waiver arguments lead to a down-grading of privacy consonant with that achieved when such spurious arguments are deployed. It can readily be concluded that the three *Axel Springer* factors discussed would aid in down-grading the weight of the privacy interest within the balancing act if fully adhered to domestically in future.

[77] See the discussions in: *Flinkkilä and Others v Finland* App no 25576/04 (ECHR, 6 April 2010) paras 83 and 85; *Tuomela and Others v Finland* App no 25711/04 (ECHR, 6 April 2010) paras 56 and 58; *Jokitaipale and Others v Finland* App no 43349/05 (ECHR, 6 April 2010) paras 71 and 73; *Soila v Finland* App no 6806/06 (ECHR, 6 April 2010) paras 68 and 70; *Iltalehti and Karhuvaara v Finland* App no 6372/06 (ECHR, 6 April 2010) paras 60 and 62.
[78] See n 15 above.

## The future: absorbing Strasbourg's current down-grading of privacy into domestic law?

*The failed Bill of Rights Bill, clause 4*

This article now turns to possible futures in relation to the balancing act domestically. One possible future appeared to emerge with the advent of the BoR Bill. The nature of the Bill reflected the right-wing tendency in the UK to emphasise the creation of greater protection for free speech, especially when in conflict with privacy, as a key basis for the revision or repeal of the Human Rights Act (HRA) in order to replace it with a BoR. Thus the BoR Consultation paper stated as a justification for introducing the BoR Bill: "the government believes that the public interest is overwhelmingly assisted by protection for freedom of expression and in a free and vibrant media".[79] In relation to the Bill, Raab spoke of the need to affirm greater protection for free speech in the face of 'wokery'.[80] That idea was also unsurprisingly reflected in right-leaning parts of the press – one example was a triumphant *Daily Mail* headline in 2022 regarding the BoR: "Landmark law to wage war on woke: Free speech will be 'trump card' in new legislation that replaces Human Rights Act".[81] The BoR Bill clause 4 was intended to give Article 10 something close to a clear priority over Article 8 in various contexts, including the one under discussion. Clearly, the Bill is dead in the water for the foreseeable future: while it

[79] Department of Justice, *Human Rights Act Reform: A modern Bill of Rights* (Consultation Paper, CP 588, 2021) para 205.
[80] Nadeem Badshah, 'Raaby says UK Bill of Rights will stop free speech being whittled away by wokery' (25 March 2022) *the Guardian* <www.theguardian.com/law/2022/mar/25/raab-says-uk-bill-of-rights-will-stop-free-speech-being-whittled-away-by-wokery> accessed 27 January 2024.
[81] D. Barrett and C Ellicot, 11.5.22: https://www.dailymail.co.uk/news/article-10803431/Free-speech-trump-card-new-legislation-replaces-Human-Rights-Act.html, accessed 20 July 2024.

received its first reading,[82] it failed to make progress, probably due to the position of its sponsor, Dominic Raab, which began to look increasingly untenable in the run-up to his resignation.[83] After that, it was tacitly dropped,[84] and obviously will not be revived by the current Labour government.

But a similar attempt at creating a statutory re-balancing between the two rights may re-emerge in future, although it is clear – not imminently. As Fenwick has discussed in a recent publication,[85] clause 4, if it had been enacted as it stood, might well not have achieved the objective of creating presumptive inequality between the two rights in the MPI context in any event, as Rowbottom has also argued.[86] But the appetite to make the attempt was clearly there, embedded mainly in right-wing thinking – the same thinking that seemed to be behind the enactment of the Higher Education (Freedom of Speech) Act 2023, recently given Royal Assent, although paused at present (August 2024) by the Labour Education Secretary. Given the apparently flagship nature of clause 4, aimed at a re-balancing of Articles 8 and 10, to the detriment of Article 8, and the support the attempt enjoyed in particular newspapers, it appears probable that it may indeed re-emerge in some form – although probably not now for some years. The notion that judges have disregarded media freedom and usurped the function of Parliament in creating a European-style privacy law appears to be embedded in right-wing

[82] HC Deb 22 June 2022, vol 716, cols 845-865.
[83] See Michael Savage, Pippa Crerar and Toby Helm, "Dominic Raab facing more bullying claims from time as Brexit secretary", (12 November 2022) *the Guardian* <www.theguardian.com/politics/2022/nov/12/dominic-raab-facing-more-bullying-claims-from-time-as-brexit-secretary> accessed 27 January 2024.
[84] In response to a question about a Council of Europe debate on the UK's proposals to reform its human rights legislation (Parliamentary Assembly of the Council of Europe, Resolution 2505 (2023) 21 June 2023), Mike Freer MP responded on behalf of the Ministry of Justice: "Having carefully considered the Government's legislative programme in the round, we have decided not to proceed with the Bill of Rights Bill;" see Written Questions, answers and statements, UIN 191038 UK Parliament, 26 June 2023 <https://questions-statements.parliament.uk/written-questions/detail/2023-06-26/191038/> accessed 27 January 2024.
[85] Helen Fenwick, 'Raab's bill of rights and the challenges inherent in attempting a statutory re-balancing of articles 8 and 10 ECHR' (2023) 15(1) *Journal of Media Law* 1, 21.
[86] Jacob Rowbottom, 'Will the Bill of Rights enhance the protection of freedom of expression?' (9 June 2022) INFORRM Blog <https://inforrm.org/2022/06/29/will-the-bill-of-rights-bill-enhance-the-protection-of-free-speech-jacob-rowbottom/> accessed 27 January 2024.

thinking, and is therefore unlikely to be discarded. (Possibly ironically, the sponsors of clause 4 on the right failed to recognize that importing the potentially revised stance as to balancing Articles 8 and 10 discussed here, based on the relevant Strasbourg jurisprudence, might have achieved the outcome they were seeking.)

## *A more forceful and influential absorption of the three key tests from* Axel Springer *into domestic law?*

Might an alternative route via court action achieve something somewhat similar to the potential effect of clause 4 in future in terms of creating a re-balancing between Articles 8 and 10, to the detriment of Article 8? Signs of some acceptance of the *Axel Springer* factors which, as argued, tend to lead stealthily to such re-balancing, especially in relation to the 'public figure' criterion, are, unsurprisingly, already present in the domestic jurisprudence. In *Richard*[87] the court adverted to the claimant's status as a well-known figure, and his prior conduct, the second and third of the factors,[88] finding, "He was a known…popular public figure. I accept that to a degree, and in certain circumstances, a person who has placed himself or herself into public life has a diminished expectation of privacy….it does not follow that there is some sort of across the board diminution of the effect of privacy rights…It all depends on the extent of the self-induced publicity and the areas in which there has been, in effect, a sort of voluntary surrender".[89] The 'voluntary surrender' point should clearly be taken as a reference to the 'zonal waiver' argument (the third factor). There is some lack of clarity here in relation to the

[87] *Richard v BBC* [2018] EWHC 1837 (Ch); [2019] Ch. 169.
[88] Ibid [283]: "These are the second and third of the *Axel Springer* factors…".
[89] Ibid [284]. Justice Mann concluded: 'In the end I do not find that these two factors are particularly weighty ones in the BBC's favour. Public figures are not fair game for any invasion of privacy, and I do not consider that Sir Cliff's adoption of his public position and his stated views indicate that he has self-diminished the weight of his right to privacy….' [287].

degree of absorption of the second *Axel Springer* factor into domestic law: the statement that a well-known person has a 'diminished expectation of privacy', a finding which in itself was unqualified, is not entirely easy to reconcile with the following words which seek to build in some case-by-case qualifications. Nevertheless, the refusal of Justice Mann to rely on the second factor from *Axel Springer* as reflecting a *general* rule is to be welcomed since so doing, as argued above, clearly undermines the presumptive parity rule.

Some clear reluctance, then, is apparent in relation to the domestic reception of the second *Axel Springer* factor, and in so far as the third reflects the 'zonal waiver' argument discussed above, the caution evinced domestically in relation to that argument indicates similar reluctance. But might an intensification of the impact of those two factors on domestic MPI cases be imminent, possibly related to recent findings as to the judicial role under the HRA by the Supreme Court in *Elan-Cane*?[90] This article speculates that those findings, if applied in the MPI context, could lead to changes to the balancing act, which would tend to diminish the protection for private information under MPI. The factors that might, in combination or otherwise, influence the balancing act in a future hypothetical Supreme Court decision on MPI on facts resembling, but of a more sensitive nature than those in *Von Hannover (no 3)*, are enumerated below. Obviously MPI is a tort,[91] and at a superficial glance it might appear that the Supreme Court would therefore not be hedged in by findings as to the HRA, and from *Elan-Cane* itself, over issues relating to the common law's protection of privacy. But, unlike the generality of torts,[92] MPI was developed under the impetus of ss6 and 2 HRA;[93] therefore its development has been

[90] *R (Elan-Cane) v Secretary of State for the Home Department* [2021] UKSC 56; [2023] AC 559.
[91] See *Vidal-Hall* v *Google Inc* [2015] EWCA Civ 311 [21].
[92] Even where privacy is in issue in a different tortious context, as in *Fearn v Tate Gallery* [2023] UKSC 4 in the context of the tort of private nuisance, it was found that Article 8 ECHR and associated jurisprudence was irrelevant to determining the outcome of the case; instead domestic jurisprudence should determine it (ibid, [113]).
[93] See *Campbell v MGN* [2004] 2 AC 457 [11], [18].

heavily influenced by the relevant Strasbourg jurisprudence.[94] As discussed below, in *Elan-Cane* a new interpretation of s2 HRA (new in relation to other recent ones) was adopted which, if applied in the MPI context, could lead to the change under discussion, by enabling the second and third *Axel Springer* factors to have a greater influence domestically.

The hypothetical scenario envisaged in relation to a possible future claim in the Supreme Court might concern photographic intrusion accompanying a story about life-style choices of a well-known figure or as regards their relationships with family members, or others. Given the disinclination in the domestic courts to accept that disclosures of anodyne facts relating to an adult 'public figure' attract Article 8 protection,[95] the privacy interest would have to be of a more compelling and concerning nature than the one at issue in *Von Hannover No 3* in order to satisfy the test of finding a reasonable expectation of privacy at the first stage of the claim. But once the second stage was reached, the notoriety of the claimant could become relevant in relation to the balancing act, and that would also apply in relation to non-celebrities who have in some way attracted the media limelight, as in *McCanns v Portugal*. It is worth mentioning that the discussion below concerns factors potentially affecting the nature of the balancing act in future as the *second* stage in a hypothetical future MPI claim, rather than concerning those affecting the decision whether to maintain or reinstate an injunction, as in *PJS*. Nevertheless, although the decision in *PJS* arose at the injunction stage, it clearly accorded with the other domestic decisions discussed above in viewing the question whether the speech at issue had public interest value as pivotal.

[94] See, for example, *McKennit v Ash* [2006] EWCA CIV 1714; [2008] QB 73: 'the test propounded-of a reasonable expectation of privacy…is to be structured by reference to the Article 8 [Strasbourg] case law. It thus remains for the national court to apply that case law, as it currently stands..'.

[95] See *McKennitt v Ash* ibid, [12] – only the more sensitive revelations attracted Article 8 protection; see also Lady Hale's example in *Campbell* (n 8) regarding a snatched photo of Campbell that would *not* have given rise to a reasonable expectation of privacy, about Campbell merely going out to the shops for a bottle of milk (at [154]). See also *Murray v Express Newspapers* [2008] EWCA Civ 446; [2009] Ch 481: Article 8 was found to be engaged regarding non-sensitive facts since David was a *child* (at [45]).

## *A return to the* Ullah *stance on s2 HRA*

The judges on the current Supreme Court are arguably, it is suggested, of a more conservative, less HRA-friendly nature than were those who decided *PJS*, which may readily be characterised as an activist, progressive decision in terms of furthering a distinctive domestic development of the Convention rights. This use of the term 'conservative' is intended to denote a non-activist, backward-looking tendency, tending to lead to a reluctance in this context to take an expansive approach to Article 8,[96] and possibly to hark back – albeit in an unacknowledged fashion - to the pre-HRA common law priority accorded to freedom of expression and of the media.[97] In *Elan-Cane*, which also concerned Article 8, but in a very different context from the MPI one,[98] the Supreme Court took what could readily be termed a cautious, non-expansive approach to domestic development of Convention rights under the application of s2 HRA. The Court strongly reaffirmed the 'mirror principle' – that domestic courts should reflect the Strasbourg stance -[99] and expressly over-ruled the decision in *Re P*[100] in which the House of Lords, led by Baroness Hale, found that where Strasbourg had determined that an issue lay within a state's margin of appreciation, the domestic court could out-pace Strasbourg in taking an expansive approach to Article 8.

The Court in *Elan-Cane* further found that under s 2 courts could not rule contrary to Strasbourg

[96] It might be argued that the judges in *Bloomberg v ZXC* [2022] UKSC 5 *did* take an expansive approach to protecting private information, but that was in the context of a police investigation, creating potentially an extremely serious invasion of privacy.
[97] In *Fearn v Tate Gallery* [2023] UKSC 4 (see n 92 above) reliance on the common law rather than on Article 8 was strongly preferred.
[98] *R (Elan-Cane) v SSHD* (n 90) concerned the question whether there was a positive obligation under Article 8 placed on the Home Office to use the neutral term X on passports to denote gender in relation to a non-binary applicant.
[99] See eg Helen Fenwick and Roger Masterman, 'The Conservative Project to "Break the Link between British Courts and Strasbourg": Rhetoric or Reality?' (2017) 80(6) *Modern Law Review* 1111.
[100] *Re P (Northern Ireland)* [2008] UKHL 38; [2009] 1 AC 173.

rulings: Lord Reed considered that the established case law demonstrates that those courts should be 'aligned' with Strasbourg.[101] Clearly, there has been for some time an acceptance under s2 HRA that the ECHR and its jurisprudence can influence statutory interpretation and the development of the common law. But it had previously been accepted, in particular in *Ullah*,[102] that the domestic application of Convention rights under the Human Rights Act had to be based on the principles established in the case law of the European Court of Human Rights, rather than upon a distinct domestic interpretation of Convention rights. Thus, it had been found that if clear, constant Strasbourg jurisprudence was available, the domestic court should abide by it, and should not oppose Strasbourg.[103]

More recently, however, contrary to Lord Reed's contention in *Elan-Cane* as to established case-law, exceptions to the *Ullah* stance have been explored and created in the domestic courts,[104] although the idea that those courts could oppose settled Strasbourg determinations in finding or refusing to find a violation of a Convention right remained a fairly controversial one. But now, in a strong reaffirmation of the *Ullah* stance, that idea has expressly been rejected by the Supreme Court. *Elan-Cane* concerned the finding of a Convention violation under s4 HRA, which could conceivably be in question in the context under discussion here

[101] *R (Elan-Cane) v SSHD* (n 90) [107]. Lord Reed quoted Lord Hope in *Smith v Ministry of Defence* [2013] UKSC 41; [2014] AC 52 with approval: "Parliament never intended by enacting the Human Rights Act 1998 to give the courts of this country the power to give a more generous scope to the Convention rights than that which was to be found in the jurisprudence of the Strasbourg court. To do so would have the effect of changing them from Convention rights, based on the Treaty obligation, into free-standing rights of the court's own creation" (at [43]). See also [100].

[102] *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323.

[103] See the finding: 'Argentoratum locutum: iudicium non finitum-Strasbourg has spoken: the case is closed' in *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28; [2010] 2 AC 269 [98] per Lord Rodger. See also *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] AC 153 [106]. See further Fenwick and Masterman, n 99, 1116.

[104] See eg *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373. In *Re McLaughlin* [2018] UKSC 48; [2018] 1 WLR 4250 [49] Lord Mance departed from a clear Strasbourg ruling in *Shackell v UK* App no45851/99 (ECHR, 27 April 2000); he found that the restrictive approach in *Shackell* "should not be followed, at least domestically". See further on this point, Lewis Graham 'Going beyond, and going against, the Strasbourg Court' (11 January 2022) UK Constitutional Law Association <https://ukconstitutionallaw.org/2022/01/11/lewis-graham-going-beyond-and-going-against-the-strasbourg-court/> accessed 28 February 2024.

(in relation to s12(4) HRA and Article 8), but has *not* been, since, as discussed above, the courts have, especially in *PJS*, avoided that issue. However, the tenor of *Elan-Cane* indicates, not only that a violation of the ECHR should not be found where Strasbourg decisions would not support it (the specific issue at stake in that decision), but, more importantly in the MPI context, that under the HRA the domestic judges should follow Strasbourg rather than engaging domestically in an interpretative, creative project under the ECHR.[105] That does not necessarily mean that the reforming spirit originally activating the judges in the early post-HRA years in *creating* the new tort by according indirect horizontal effect to Article 8, might see a reversal. *Elan-Cane* would not oppose that expansion of the ambit of Article 8 in those years without an imprimatur from Strasbourg: *Re S* and *Campbell*, making it clear that Article 8 would apply between two private parties, were decided before the first *Von Hannover* decision came to the same conclusion; therefore Strasbourg decisions did not *oppose* that expansion.

Importantly, however, the findings in *Elan-Cane* as to s2 HRA would, it is argued, partially oppose the approach to the balancing act taken in *PJS*. Although it was the later decision, it did not rehearse or rely on the second and third *Axel Springer* factors discussed above, even though the applicant was very clearly a 'public figure' and could be said to have courted or enabled or acquiesced in media publicity about his relationship with his partner – the zonal waiver argument, the third factor. Thus, in the course of finding a potential violation of Article 8 if the injunction at issue was not reinstated, the Supreme Court did not align itself with the relevant, well-established Strasbourg jurisprudence, partly stemming from the Grand Chamber, especially the findings as to the correct conduct of the balancing act in *Axel*

[105] "Later cases have reaffirmed the linkage between Convention rights at the domestic and international levels"; the Court did not favour accepting "a distinct domestic interpretation of Convention rights": *R (Elan-Cane) v SSHD* (n 90) [100-101].

*Springer*. In *PJS* the Court focussed very directly on the Strasbourg jurisprudence which emphasises the differentiation that should be created between trivial gossip about celebrities, and speech of greater significance in society, as discussed above.[106] That issue – of considering whether any public interest in the speech in question exists – is clearly of great significance in the leading domestic cases, including *PJS*, as discussed, so in that respect those domestic findings largely cohere with the Strasbourg interpretation of the first *Axel Springer* factor, which is to the same effect.

But the Court in *PJS* did *not* advert to the two other *Axel Springer* factors, which are *not* fully in accordance with that stance on the public interest matter, and, indeed, can to an extent contradict it, in the sense that placing an emphasis on the notoriety of the victim of privacy-invasion and on their prior conduct appears able to undermine the impact of relying on the first factor. It could readily be argued then that a misalignment between the conduct of the balancing act in the MPI context domestically and at Strasbourg has arisen. Acceptance of such misalignment runs counter to the findings as to the role of s2 HRA from *Elan-Cane* since the Supreme Court reaffirmed that domestic courts should follow clear and constant Strasbourg jurisprudence: the *Axel Springer* factors clearly fall into that category, as discussed above. In this hypothetical future situation a change in the balancing test might, as a result of *greater* absorption of those factors, under the current conception of that role, especially as to the 'public figures' criterion, be brought about, to the detriment of the privacy interest.

In implied service, it is argued, of the notion of a reaffirmation of the *Ullah* principle, the Court in *Elan-Cane* also emphasised the importance of the margin of appreciation doctrine at

[106] See n 37 and associated text and *PJS* (n 36) [22]-[24].

Strasbourg in terms of its implicit impact domestically.[107] The Court – significantly - found that the margin of appreciation-based aspects of a Strasbourg decision could not be excised from the decision, and therefore in effect that those aspects could be incorporated into domestic law,[108] thereby accepting an indirect method of incorporating an international law doctrine into domestic law. It further found: "…one can conclude that the fact that Convention rights within the meaning of the Human Rights Act are domestic and not international rights does not in itself entail that domestic courts can interpret and apply Convention rights in a more expansive way than the European Court".[109] In relation to the balancing act, the Strasbourg Court has found, as discussed, that if the *Axel Springer* factors have been fully applied in balancing the two rights, the domestic courts' findings as to the outcome would not be disturbed without strong reasons. The implications of the findings from *Elan-Cane* as to the role accorded to the margin of appreciation applied in relation to the balancing act only seem to reinforce the points made above as to a possibility of a greater absorption of the second and third *Axel Springer* factors into domestic law, since the domestic court would appear to be free to determine the outcome of the act, within its margin, only once those factors, as well as the first one, had been fully deployed.

The key point is that a mismatch between the Strasbourg and the domestic approach to the balancing act has arisen, as discussed, since Strasbourg has accepted that the second *Axel Springer* factor should operate as a general rule, thereby undermining in unacknowledged fashion the presumptive parity rule. Further, the status of that factor appears to be viewed at Strasbourg as on a par with that of the first factor. As discussed, the approach of the domestic

[107] *R (Elan-Cane) v SSHD* (n 90) [78].
[108] Ibid [89]: "The European court's treatment of the margin of appreciation cannot therefore be severed from its interpretation of the Convention rights: it is part and parcel of the exercise of interpretation".
[109] Ibid [76].

judges so far has not reflected the Strasbourg stance: the presumptive parity rule has been fully maintained, and the first factor has much greater prominence in the domestic jurisprudence. But, given that the Strasbourg jurisprudence influences the balancing act via s2 HRA, the interpretation of s2 from *Elen Cane* discussed could provide a nudge to the judges to allow the Strasbourg approach greater traction within that act, meaning in particular that the second factor could be allowed to operate as a *general* rule, contrary to the approach taken in *Richard*.

### *Partially echoing clause 3(3)(a) BoR Bill and its underlying aim*

The Court affirmed a stance to be taken to s2 HRA in *Elan-Cane* which was similar in some respects to the approach to the 'reform' of s2 as envisaged in clause 3 BoR Bill, which would have replaced s2 HRA if the Bill had been enacted.[110] The clause evinced a determination to reduce the ambit of the Convention rights (apart from that of Article 10) in so far as their scope had been enlarged under the 'living instrument' doctrine at Strasbourg. That determination was to be realised under clause 3(3)(a), which provided that "a court may not adopt an interpretation of the right that expands the protection conferred by the right unless the court has no reasonable doubt that the Strasbourg Court would adopt that interpretation if the case were before it". In *Elan-Cane* the Court took the view that if Strasbourg had clearly adopted a particular stance on a certain issue then its stance should be followed domestically. But if it had not, the domestic court should *not* expand the right in question – Article 8 - to cover the matter at hand. Both those determinations would have been likely to have followed from the application of the s2 equivalent in the BoR Bill – clause 3 - if it had become law.

[110] The Consultation Paper foreshadowed such repeal: "We have witnessed a proliferation of human rights claims under the Human Rights Act, not all of which merit court time and public resources": Ministry of Justice, *Human Rights Act Reform: A Modern Bill of Rights, A consultation to reform the Human Rights Act 1998* (n 79) para 220.

It could be suggested that the Supreme Court in *Elan-Cane* was attempting to demonstrate that change to s2 HRA as put forward in the Consultation paper on the BoR was unnecessary since a reaffirmation of the mirror principle would do much of the work clause 3 (which had captured the proposals in the Paper as to remedying the apparent deficiencies of s2HRA)[111] was to be designed to do. In other words, given that the Paper and the later BoR Bill could quite readily be seen as an attack on the judiciary's stance under the HRA, the Supreme Court could be viewed as demonstrating that the attack was unfounded.

The determination in *Elan-Cane* as to s2HRA was clearly made in the context of the interpretation of international obligations as applied domestically, not as regards the development of the common law. But nevertheless is there a possibility, following the findings as to s2 HRA, and as to the margin of appreciation, that the same Court – which has already brought about a change reflecting, to an extent, clause 3 BoR Bill - could in future achieve something similar in respect of clause 4 in the context under discussion? Clearly, the context would differ since the Bill has now been dropped, but if the relevant findings from *Elan-Cane* were interpreted in an MPI claim to mean that under s2 the domestic courts should follow Strasbourg more closely, a greater absorption of the second and third *Axel Springer* factors affecting the balancing test at Strasbourg discussed above could arise, bringing about a re-balancing between Articles 8 and 10 to the detriment of Article 8, which would reflect the intention underlying clause 4. It is assumed, then, for the sake of this argument, that the Court in this hypothetical situation regarding an MPI claim would be prepared to apply the findings on the mirror principle from *Elan-Cane*, as regards the current interpretation of s2HRA,

[111] Ibid paras 112, 194; see further Fenwick and Masterman, n 99, 1125-1126.

thereby tending to tie the domestic balancing jurisprudence more firmly to the three key *Axel Springer* factors than occurred in *PJS* – and obviously departing from the *Campbell* stance.

### *Giving greater effect to s12(4) HRA*

The decision in *Elan-Cane* turned partly on respecting constitutional boundaries, on ensuring that judges did not usurp the function of the legislature.[112] In so doing it impliedly emphasised the importance of giving effect to relevant domestic legislation, although the Supreme Court accepted that if a court was taking a decision within the margin of appreciation accorded to it by Strasbourg it could interpret legislation in a manner that moved beyond the Convention protections.[113] But it could not declare a violation of a Convention guarantee under s4HRA since, where the matter at issue fell within the margin, no violation would be found at Strasbourg. These findings could have some relevance in the MPI context.

The courts, following the findings on this matter in *PJS*,[114] are disregarding the s12(4) direction given to them as to conducting the balancing act. It could be argued, on separation of powers grounds, that the Supreme Court in the future hypothetical MPI decision envisaged, taking account of the implications of *Elan-Cane,* could be disinclined to disregard the wording of s12(4) HRA since, clearly, a statutory provision linked to the interpretation of international obligations *would* be in question in the instance before the Court. From the

[112] The Court's reasoning on the issue of Parliamentary sovereignty was that if s4 HRA was interpreted so as to enable domestic courts to find legislation to be incompatible with the ECHR rights when the ECtHR had determined the issue to be within the margin of appreciation of the UK, that would allow domestic courts to use s4 to pressure Parliament to legislate compatibly with a solely domestic interpretation of its ECHR obligations: *R (Elan-Cane) v SSHD* (n 90) [75], [87], [108], [110].
[113] The Court referenced *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 (HL) in making that point (at [79]).
[114] See n 36 and associated text.

stance taken in *Elan-Cane* it could be questioned whether the Supreme Court was indeed observing the differing constitutional roles of the judiciary and legislature in *PJS* in disregarding the import of s12(4). That argument could be bolstered by noting that the judges in *Elan-Cane* considered that a legislative provision could be subject to an interpretation that departed from the Strasbourg one *if* the decision was within the margin accorded to them by Strasbourg.

In the MPI context, however, the margin only becomes operational at Strasbourg if the *Axel Springer* criteria have been discussed and applied by the domestic court, as the Strasbourg cases considered above emphasise. But the domestic courts are *not* within the margin in making a decision as to whether or not to apply those criteria at all. Therefore in order for a court in an MPI case to accept that the wording of s12(4) should be disregarded, it should first apply the *Axel Springer* criteria. Once it has done so it would be within the margin of appreciation Strasbourg has granted domestically in this context of balancing the two rights. But applying those criteria would tend to accord a lesser weight to Article 8 in the balancing act with Article 10, especially if the victim of the privacy invasion could be viewed as a 'public figure'. Therefore the impact of s12(4) would already have been given some weight within that act, before the point was reached at which the court could find that it was within the margin granted to it, enabling it to depart from Strasbourg on this matter.

The Court in the above situation could either indicate that s12(4) HRA should be given express effect, departing from the findings on that point in *PJS*, and adopting the stance taken by the Court of Appeal on the s12(4) issue.[115] Or it could, more insidiously, rely on the

[115] See n 34.

separation of powers argument above, and thereby give greater effect to the sub-section by introducing more clearly into domestic law than occurred in *Richard*, the Strasbourg notion from *Axel Springer* (the second criteria) as to the down-grading of privacy where a 'public' figure is involved who should not expect the same standard of protection for their private information as an ordinary citizen. So doing would, as argued, cohere with giving some effect to s12(4) HRA, and with the points made in *Elan-Cane* as to the correct role of s 2. Clearly, that would effect a change from the stance taken in *PJS* and in *Campbell* where, as mentioned, the material in question obviously did concern a very well-known figure, but that factor was expressly disregarded, so the privacy interest was not downgraded. The zonal waiver argument could also be allowed to have traction, referring to the use of it under the banner of 'the prior conduct of the person in question' (the third *Axel Springer* criterion).

A further possible reason for being inclined to accord greater weight to s12(4) – and possibly not only in relation to public/well-known figures - could be to create equivalence between data protection and the tort in terms of informational protectiveness, as the Court of Appeal sought to do in *Lloyd v Google.*[116] The Supreme Court then over-turned certain aspects of that decision, but the speech/privacy balancing act was *not* in issue and the Supreme Court did not address the question of equivalence between the two rights in relation to it. The search for creation of such equivalence in relation to that act had already been accepted domestically.[117] But in the hypothetical instance put forward above, steps towards creation

[116] *Lloyd v Google LLC* [2019] EWCA Civ 1599; [2020] QB 747: "The actions in tort for MPI and breach of the DPA both protect the individual's fundamental right to privacy; although they have different derivations, they are, in effect, two parts of the same European privacy protection regime" (at [53]). See also Helen Fenwick and Fiona Brimblecombe, 'Keeping control of personal information in the digital age: efficacy and equivalence of tortious and GDPR/DPA remedial relief?' (2022) 138 *Law Quarterly Review* 456.

[117] See *NT1 and NT2 v Google LLC* (Intervenor: The Information Commissioner) [2018] EWHC 799 (QB). It was found (at [166(4)]): 'Freedom of expression has an inherent value, but it also has instrumental benefits which may be weak or strong according to the facts of the case'. The close focus on both Articles 8 and 10 as of equal value involved lengthy consideration, extending from [136]-[172].

of such equivalence could be achieved by inflating the value to be accorded to the Article 10 interest, taking account of the journalistic exemption under the UK GDPR.[118] If, therefore, material could be termed journalistic in an MPI case, it could be argued that the stance taken towards it should resemble that which would be taken if the case concerned data protection.[119] As is clearly apparent, the term 'journalistic' has been very broadly interpreted in the data protection context to include the communication of information.[120] The content of the material at issue in the hypothetical scenario above could therefore be termed journalistic.

Further, as Tomlinson has pointed out, "under that [journalistic] exemption the subjective view of the controller (which must still be objectively reasonable) is relevant",[121] whereas under the tort the free expression side of the balance at the second stage is evaluated objectively. Creation of greater equivalence between MPI and data protection could be viewed as requiring greater protection to be given to the expression argument, injecting a subjective element and thus changing the current balance to be struck between privacy and speech in the MPI context. S12(4) itself is intended to accord greater weight to material termed 'journalistic'.[122] Clearly, even giving full weight to s12(4) HRA would *not* create a journalistic *exemption* in the MPI context – since the sub-section indicates that if the material is 'journalistic' that in itself would not be enough: the publication of the material would *also*

[118] Article 85(2) UK GDPR; DPA 2018 Sched 2, para 26.
[119] DPA 2018 s174(1)(a); s176(1)(b).
[120] DPA 2018 sched 2 part 5 para 26(1)(a); Case C-345/17 *Buivids v Datu valsts inspekcija* [2019] 1 WLR 4225 [55]–[56], [59], [62], [67], [69] (interpreting the term 'journalistic' as used in Article 9 Directive 95/46/EC).
[121] See Hugh Tomlinson, '*Hurbain v Belgium*, Order to anonymise newspaper archive did not violate Article 10' INFORRM, 7 July 2021 https://inforrm.org/2021/07/07/case-law-strasbourg-hurbain-v-belgium-order-to-anonymise-newspaper-archive-did-not-violate-article-10-hugh-tomlinson-qc-and-aidan-wills/ accessed 28 February 2024 (discussing the Chamber decision).
[122] "….where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to—(a) the extent to which—(i) the material has, or is about to, become available to the public; or (ii) it is, or would be, in the public interest for the material to be published; (b) any relevant privacy code."

have to be in the public interest. However, the wording of s12(4) clearly supports according presumptive priority to Article 10 over Article 8 – even if unacknowledged.

### *Stealthy re-balancing of the two rights: objectives?*

On the bases discussed, especially taking account of the recent reinterpretation of s2 HRA from *Elan-Cane*, the Supreme Court in the future scenario envisaged could import a change to the current balancing act under MPI. In that possible scenario, the Court would clearly place emphasis on considering any public interest value of the story in question, following the strong emphasis placed on so doing domestically, and under the first *Axel Springer* factor. So no express departure from the domestic stance on the matter would occur. But the Court could then *also* apply the two further factors, assuming that on the facts they were applicable, on the basis that under the *Elan-Cane* interpretation of the role of s2 HRA departure from clear and constant Strasbourg jurisprudence should not occur. The result might be that facts supporting a fairly weak argument in favour of finding public interest in the disclosures, *combined* with findings that the two other factors were satisfied on the facts, would lead to placing a greater weight on the media side of the balancing act than would have occurred absent that additional bolstering effect. Down-grading of the privacy interest within the act would inevitably follow, without necessarily acknowledging that a change in the direction of the domestic jurisprudence had occurred. Consideration of the public interest value of the story would still have clear prominence in the reasoning, but in an insidious change, would be less likely to determine the outcome of the balancing act than at present.

So, importantly, the Court in this hypothetical scenario would not need to affirm *expressly*

that the two rights should not be treated as being presumptively equal: it would fly in the face of domestic authority as well as clear and constant Strasbourg jurisprudence to do so. The Strasbourg Court, as discussed above, made that re-statement as to their equality in a number of decisions, including *Von Hannover (nos 2* and *3), Axel Springer* and *Hurbain v Belgium*.[123] Domestically, the Supreme Court in future could reaffirm that finding, but also import the idea of a down-grading of privacy in relation to a well-known figure without acknowledging the contradiction between the two findings as to presumptive equality but also as to such down-grading, arising in *Von Hannover no 3* and in *Axel Springer*. The position would reflect the one taken in *Ferdinand*, discussed above, in which the principle of presumptive equality between the two rights was reiterated, as it had to be post-*Campbell*, but in practice doubtful public interest grounds in relation to a well-known figure were allowed to prevail over the privacy interest, which was compelling as of a sensitive nature since it concerned a sexual liaison. The Court could find that *PJS* had turned on the lack of public interest in the privacy-invading material, but that where, as in *Axel Springer,* such interest *was* viewed as present, *and* the two further factors were also given weight, an implicit down-grading of the privacy interest in the balancing act could occur. It could thus import the outcomes in that decision into domestic law *regardless* of the influence of the margin of appreciation – following the findings on that point from *Elan-Cane*.

The motivation for engaging in such a down-grading of privacy could arise on the basis that in effect certain domestic decisions have expanded the protection accorded to private information under Article 8 even in the face of countervailing arguments in favour of speech, based on the higher protection it was accorded under the common law pre-HRA, the

[123] See n 32 and associated text. See also *Hurbain v Belgium* (n 68) [201].

provision of s12(4) HRA, and the *Axel Springer* criteria. Adopting such a stance would not precisely replicate clause 4 BoR Bill if the presumptive parity of the two rights was still accorded lip service, but it would lead to a stealthy down-grading of privacy, although largely only in relation to well-known persons, or those deemed to be in the 'limelight' as in the *McCanns v Portugal* instance.

It is clearly not being suggested that the Court in this hypothetical future scenario would be attempting to give effect to clause 4 even though the BoR Bill has been discarded. It is being suggested that *Elan-Cane* may mark or indicate a change in the stance of Supreme Court judges in relation to the ECHR as scheduled in the HRA – a return to a notion of a pre-HRA constitutional settlement which could reflect the favouring of free speech over privacy under the common law, bearing in mind that MPI was only developed under the impetus of s6 HRA, whereas a common law acceptance of seeking to protect free speech was already well established. Paul Wragg has pointed out that even where the House of Lords had affirmed the need to conduct the balancing act on the basis of the presumptive parity of the two rights, they did not in fact conduct a dual proportionality analysis in a manner genuinely founded on such parity.[124] Taking the stance discussed here would provide a further means of down-grading privacy interests stealthily while purporting to maintain such parity.

### *A more diffuse and incremental re-balancing?*

Following the above argument, the intention underlying clause 4 BoR Bill could in future in the MPI context be realised to an extent via a future decision of the Supreme Court, as

[124] In 'Campbell's great promise, unfulfilled'; see n 45.

envisaged here. But possibly it is likely that no one specific decision of the Court, creating a fairly clear change from the current conception of the balancing act, will arise in future. Instead, the Strasbourg case law discussed above, and in particular the *Axel Springer* criteria, may permeate domestic law to a greater extent than was foreshadowed in *Richard*. That would mean that a lack of rigorous scrutiny as to what is meant by the public interest where a 'public' figure is concerned comes to have greater impact, together with, and conflated with, some down-grading of the privacy protection in relation to such a figure. References to the zonal waiver argument, under the cloak of according consideration to the prior conduct of the person in question, may become more prominent, as may a superficial or almost non-existent consideration of the demands of proportionality within the parallel analysis. In the result, the stealthy down-grading of privacy in the balancing exercise as envisaged here may arise, but in a more insidious and incremental fashion.

## Conclusions

The idea that free speech – even if virtually worthless as unable to contribute to political debate or individual self-development – should take clear precedence over protection for private information appears to be embedded in the psyche of many on the right inside and outside Parliament. Powerful voices advocating media freedom appear in reality to be highly cognisant of the value of private information as a commercially-valuable commodity. Assuming that the BoR Bill does not re-emerge in future years, clause 4(1) will still stand as a lasting testimony to that tendency on the right. The clause may represent the high-water mark of an attempt to enshrine a re-balancing of Articles 8 and 10 in law, but this article is suggesting that such a re-balancing – even if largely unacknowledged – is not to be ruled out via a decision in the

Supreme Court such as the one this article has envisaged.

The commercial motivation underlying the struggle of parts of the media to place a provision on clause 4(1) lines on the statute book (having failed with s12(4) HRA) is underpinned by the realisation that without artificial bolstering from a provision such as clause 4(1), very weak speech claims, somewhat similar to the ones in *Von Hannover Nos 2 and 3*, or *PJS* will tend to be overcome domestically by privacy ones,[125] due to the nature of the private information usually at stake. It is only of value in commercial terms because it often pertains to a celebrity and includes a matter of perennial interest to the public – private, home and family life choices and predilections of such persons. But the speech value of satisfying public curiosity about such choices is inevitably low, while the privacy value at stake tends to be higher. Hence the clamour from voices on the right for a provision on clause 4(1) lines – to seek to infuse a spurious value into the speech claim, in order to enable it to overcome the privacy one. But, as discussed, such a value could also be inculcated by enabling, via the *Elan-Cane* interpretation of s2 HRA, Strasbourg's view that the privacy value of information pertaining to well-known figures can be down-graded, to be accepted domestically, especially where the margin of appreciation aspects of decisions in this context are in effect incorporated into domestic law.

So in terms of the past, present and future approach to the speech/privacy balancing act, in its future iteration it could possibly therefore come to resemble to an extent, and insidiously, the approach that was taken in the past, reflective of the common law position on free speech, as discussed. Clearly, this article is not advocating that approach; it is providing a warning against it, partly on the basis that the conceptually incoherent approach to the balancing act at Strasbourg should not be replicated domestically.

[125] See *PJS* (n 36) [24]; see also n 37 and associated text.

Thirteen years ago Sir David Eady expressed some dismay about the balancing act, viewing it as a daunting 'new methodology' of privacy, finding that judges were faced with a task that gave them too much discretion, requiring too much input from their personal predilections.[126] The *Axel Springer* factors, however, *do* provide a reasonably clear methodology, which was applied in *Richard*, but without, importantly, enabling the second factor to undermine the presumptive parity rule. In contrast, Strasbourg is promising the presumptive parity of the two rights but then undermining that promise, given the elevation to the status of a *general* rule of the second factor from *Axel Springer*. Pragmatically, that is understandable for an international Court in the service of accommodating the divergent approaches to balancing the two rights in various contracting states. As it does in other contexts, Strasbourg is relying on the margin of appreciation device, reflective of the principle of subsidiarity,[127] to navigate the greater weight placed on either privacy or expression at the different ends of the spectrum represented by the stances taken in the various states. But the Supreme Court clearly is not in that position: the potential movement towards disfavouring privacy discussed here should therefore be resisted in favour of fully maintaining the presumptive parity rule from *Campbell.* In future, following the *Elan-Cane* stance as to the role of the judiciary under the HRA, rehearsal of the key *Axel Springer* criteria may become more prevalent in the higher courts, as has already occurred in *Richard,* but rejection of their elevation into general rules would avoid undermining the parity

[126] See 'Privacy: the New Methodology, Part 1' Inforrm, 17.12.11, https://inforrm.org/2011/12/17/privacy-the-new-methodology-part-1-sir-david-eady/ (last accessed 30.7.24).

[127] See further: Andrew Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (OUP 2012); Helen Fenwick, 'Protocol 15, enhanced subsidiarity and a dialogic approach' in Ziegler et al (eds), *The UK and European Human Rights - A Strained Relationship* (Hart 2015); Kanstantsin Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015). Subsidiarity will be emphasised more strongly in the Court's judgments now that Protocol 15 is in force (it entered into force on 1 August 2021, as all the State Parties have now signed and ratified it). See European Court of Human Rights, 'Protocol No. 15 to the European Convention on Human Rights enters into force' Press Release, ECHR 242 (2021), 21st August 2021 < https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7088764-9588986&filename=Protocol%20No.%2015%20to%20the%20European%20Convention%20on%20Human%20Rights%20enters%20into%20force.pdf> accessed 28 February 2024.

principle.