IN THE EUROPEAN COURT OF HUMAN RIGHTS **Application No. 40454/07**

GRAND CHAMBER

BETWEEN:

Couderc and Hachette Filipacchi Associés

-v-

France

THIRD PARTY INTERVENTION BY THE MEDIA LEGAL DEFENCE INITIATIVE SUBMITTED IN ACCORDANCE WITH RULE 44 (3) OF THE RULES OF COURT

A. Introduction

1. This is a third party submission by the Media Legal Defence Initiative ("MLDI") pursuant to Rule 44 (3) of the Rules of Court.

2. This intervention is made with the permission of the President of the Grand Chamber of the European Court of Human Rights (the "Court" or "ECtHR") communicated to MLDI by letter of 16 January 2015. In accordance with the grant of permission, this submission is addressed solely to questions of principle raised by the case and does not seek to offer submissions or analysis in respect of its particular facts. The present submissions are made by MLDI which was granted permission to intervene. However, in preparing these submissions MLDI has taken the opportunity to consult with a number of national media organisations, including The New York Times, The Guardian, Reuters, NRC Media and Il Fatto Quotidiano. These organisations have seen the present submissions and endorse them.

3. MLDI is a charity that operates globally to help media organisations and journalists defend their rights. It offers both financial and substantive litigation support to small and independent media outlets as well as to individual journalists, and maintains close links with bar associations and media freedom organisations in Asia, Africa, Europe and Latin America. As part of our mandate, MLDI engages in strategic litigation to protect and promote media freedom.

B. Summary

4. MLDI considers that in the present case the Chamber broadly adopted the correct approach in balancing the right to free expression and the right to private and family life, including by affording careful consideration to the interests of Mdm. C and her son. This approach, and its application to the facts of the case, was both consistent with the established jurisprudence of the Court and correct as a matter of principle. Further, it is entirely consistent with the approach typically adopted in many Member States when applying Articles 8 and 10 ECHR in circumstances such as those in the present case. MLDI therefore respectfully invites the Grand Chamber to endorse the approach adopted by the Chamber.

C. Submissions

5. The special protection afforded to journalism, as an element of the right of free expression, is a settled principle within the jurisprudence of the Court and has been widely recognised by many other international and regional human rights mechanisms. In its General Comment 34: *Article 19: Freedom of Opinion and Expression*,[1] the UN Human Rights Committee observes [at § 13]:

> A free, uncensored and unhindered press or other media is essential in any society to ensure freedom of opinion and expression and the enjoyment of other Covenant rights. It constitutes one of the cornerstones of a democratic society. [...] The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion.

6. The Court has adopted a similar position on many occasions, having often held that "freedom of expression constitutes one of the essential foundations of a democratic society and that the

[1] UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of opinion and expression,* UN Doc. No. CCPR/C/GC/34 (12 September 2011), par. 13.

safeguards to be afforded to the press are of particular importance" (*Goodwin v. the United Kingdom*, (1996) 22 E.H.R.R. 123 [§ 29]; *Jersild v. Denmark*, (1994) 19 E.H.R.R. 1, [§ 31]). These principles have also been reiterated in a range of Council of Europe instruments[2] as well as a number of other international declarations.[3]

(i) Contribution to a Debate of General Interest

7. In balancing the right to private and family life against the right to free expression, an important factor concerns the extent to which an article contributes to a debate of general interest. This approach is now well established in many national legal systems.[4] Indeed, the Court has consistently described this aspect of the balancing exercise as an "essential criterion" (see *Von Hannover v. Germany* (No. 2), (2012) 55 E.H.R.R. 15, [at 109]). Given its importance, the nature and scope of the concept of a "debate of general interest" and the circumstances in which an article (and details or information included therein) makes a contribution to such a debate, is crucial.

8. In the present case, the Chamber adopted a broad approach as regards what constitutes a debate of general interest. MLDI respectfully submits that it was right to do so. Such a debate may relate to matters of social policy, governance, politics or crime/corruption (see *Egeland and Hanseid v. Norway*, *Merits*, 16 April 2009, Application No. 34438/04; *Leempoel & S.A. ED. Cine Revue v. Belgium*, Merits, 10 November 2006, Application No. 64772/01). However, it may also relate to matters less closely connected to fundamental democratic ideals, including, for instance, topical issues regarding sport or musicians, (see *Von Hannover v. Germany* (No. 2), (2012) 55 E.H.R.R. 15, [at 109]).

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2 Resolution No. 2: Journalistic Freedoms and Human Rights 4th European Ministerial Conference on Mass Media Policy (1994); CoE Recommendation No. R (2000) 7 on the Right of Journalists not to Disclose their Sources of Information, CoE Declaration by the Committee of Ministers on the Protection and Promotion of Investigative Journalism Adopted by the Committee of Ministers on 26 September 2007.

3 *E.g.* Inter-American Declaration of Principles on Freedom of Expression, Approved by the Inter American Commission on Human Rights during its 108 regular session and *Declaration of Principles on Freedom of Expression in Africa* adopted by the Inter-American Commission on Human Rights 17 - 23 October, 2002: Banjul, The Gambia.

4 See e.g. District Court Leuven (5th chamber), 22 May 2013, in the case of Pol Van Den Driessche v. Jan Antonissen and HUMO NV, Federal Supreme Court (*Bundesgerichtshof*), 18 September 2012, Az. VI ZR 291/10 (AfP 2012 552 et seq.), Ordonnance de référé du Tribunal de Grande Instance de Paris, 31 October 2014 in the case of Montebourg v. HFA, and Cass. civ. 1ère, 19 February 2004, n°02-11122, which highlights that a childbirth in a royal family could have political and dynastic consequences.

9. A broad approach to the concept of a debate of "general interest" has also been reflected in national case law. In a German case, the country's Federal Civil Supreme Court, held that a story concerning a prominent comedian's serious illness fell within the scope of a debate of general interest, given that the public were well aware of the comedian's departure from public life (*see* Judgment of the German Federal Civil Supreme Court, Az. VI ZR 291/10 18 September 2012). Similarly, in Belgium, the publication of information regarding the pregnancy of a prominent public figure was treated, in principle, as being capable of relating to a matter of general interest (*Cécile de France v. INADI*, 11 December 2007, District Court of Brussels). There can be little doubt that issues concerning succession to the throne in a hereditary monarchy constitute matters of public concern for purposes of Article 10 ECHR.

10. The present case, however, gives rise to a number of important issues regarding the application of the "public interest" test. The first concerns the proper approach in respect of matters of detail which do not, as such, contribute to a general public debate. The question arises as to whether elaboration of this kind can be justified by reference to their contribution to a general debate, even where such information is not essential for the article's "core" message. In a consistent line of jurisprudence the Court has distinguished between the "core" of a story which may pertain to matters of general public debate and other matters of detail which are not essential for such a debate (see e.g. *Ruusunen v. Finland*, Merits, 14 January 2014, Application No. 73579/10, [at 49-50]). (See also Chamber's judgment in present case [at 59]). This distinction often plays an important (even crucial) role in the Court's jurisprudence in dealing with cases such as the present.

11. MLDI submits that a degree of latitude ought to be accorded to journalists as to what matters of elaboration or detail are necessary from an editorial perspective and that the professional judgment of journalists and editors ought to be accorded proper weight in the balancing process. Context and colour is important for any piece of reporting. It gives the matter reported authenticity and affirms its veracity in the mind of the reader. Such context also provides an important means of engaging with readers, which is crucial for any report or article. These are important aspects of journalistic free expression.

12. In their joined dissenting opinions Judges Villiger, Zupancic and Lemmens, ("the Minority") were of the view that the article did not engage with a debate of general public importance. The Minority placed emphasis on the fact that the French Court of Appeal observed "the article did not (merely) disclose the existence of a "secret" child. It also (contained) numerous digressions derived from the confessions made by the child's mother regarding the circumstances of their

meeting, the (Prince's) feelings, his most intimate reactions in response to the news of the pregnancy and his attitude towards the child during private encounters in her flat".

13. While MLDI makes no comment on the specific facts of the present case, as a matter of principle MLDI submits that journalists and newspaper editors ought to be allowed a degree of latitude in exercising their professional judgments as to the detail it is necessary to include in a story to amplify and give colour to an article's "core" message, especially where it is clear the core of an article pertains to an issue of general public interest.

14. This principle has been recognised at the highest levels of the Courts of the United Kingdom in a consistent line of case law. In *Campbell v. MGN* [2004] UKHL 22, a case concerning a public figure attending a Narcotics Anonymous meeting, an issue arose in respect of the detail published alongside the "core" of the story. Lord Nicholls noted that journalists and editors should be permitted a degree of latitude as to professional judgments about the detail necessary to make a story. Lord Nicholls held [at 28] "[n]on-publication of this information would have robbed a legitimate and sympathetic newspaper story of attendant detail which added colour and conviction". Similarly, Lord Hoffmann asked [at 61-62] "[w]here the main substance of the story is conceded to have been justified, should the newspaper be held liable whenever the judge considers that it was not necessary to have published some of the personal information?" Answering this question, he held that a newspaper should not "be held strictly liable for exceeding what a judge considers to have been necessary. The practical exigencies of journalism demand that some latitude must be given. Editorial decisions have to be made quickly and with less information than is available to a court which afterwards reviews the matter at leisure". Lady Hale also supported this approach noting [at 169] "the importance of allowing a proper degree of journalistic margin … to deal with a legitimate story in its own way, without imposing unnecessary shackles on its freedom to publish detail and photographs which add colour and conviction" and that these factors "are part of the legitimate function of a free press and require to be given proper weight". This approach has consistently been adopted by courts in the United Kingdom, (*Flood v. Times Newspapers Limited* [2012] UKSC 11, [at 194]; *Jameel and others v. Wall Street Journal Europe Sprl* [2006] UKHL 44, [at 108]).

15. Courts in other Council of Europe jurisdictions have also adopted this approach. As the Grand Chamber will be aware, the facts in the present case were also adjudicated upon by the German Court of Appeal (*Oberlandesgericht)* in Karlsruhe in relation to the publication in Germany of the article concerning the Prince (see Judgment of the Court of Appeal Karlsruhe, 28 October 2005, Az. 14 U 169/05**)**. In its judgment, the Court of Appeal accepted that it was permissible, for instance, to publish a photo of the Prince and his son in the home environment (despite the

interference with privacy which this involved). The Court adopted this approach on grounds that the photo could be taken as providing important context and support for the proposition that the boy was the Prince's son and that the familial connection had been recognised in private by the Prince, even if not in public.

16. MLDI submits that "proper weight" ought to be attached to the professional judgments of journalists and editors as to the details necessary to make a story work. Even where the detail in a story does not directly contribute to a matter of "general debate", where such detail adds colour and conviction to a story, lending it further authenticity and credibility, a degree of latitude ought to be afforded to editors as to the inclusion of such information when proportionality is being assessed.

17. A number of other points are important, in MLDI's submission, on the question of a contribution to a general debate. First, the fact that a public debate on a particular question is not, at the time of publication, on-going or active, does not deprive an article of the ability to "contribute to a debate of general interest". In the present case, the Versailles Court of Appeal drew attention to "the lack of any topical news item or any debate on a matter of general interest which justified its being reported ... on the grounds of legitimate imparting of information to the public". The Court of Appeal also drew attention to the fact that the Monegasque Constitution made it impossible for children born outside wedlock to accede to the throne. In the Chamber judgment, the Minority raised these points to reinforce the proposition that the article did not contribute to a debate of general interest.

18. MLDI respectfully disagrees with these propositions as a matter of principle. A publication does not merely "contribute" to public debate by reporting, reflecting or commenting on existing debate in the public domain. A publication may also contribute to public debate by the very act of provoking discussion or thought about that which had not previously been the subject of live debate. Similarly, the fact that it was impossible for Mdm. C's son to accede to the throne under the Monegasque Constitution is also not relevant to the question of whether the article makes a contribution of public debate, at least insofar as the role of an article is to provoke debate or thought regarding whether that rule of law was useful or appropriate. As a matter of principle an article or publication can call into question the validity or propriety of a rule of law, even one of constitutional character.

(ii) The Importance of the Interests of Third Parties

19. MLDI submits that in assessing whether a restriction on free expression through the publication of ostensibly private information is "necessary in a democratic society", the Chamber were right to attach significant weight to the interest of Mdm. C and her son in giving expression to, and having recognised, Mdm. C's and the son's own identity. In its judgment, the Chamber found [62-63]:

> [W]hile the matters dealt with in this case came within the sphere of the Prince's private life, the Court reiterates that it was not only his private life that was at stake, but also that of the child's mother and the child himself. [...] [T]he private life of one person, in this instance the Prince, [cannot] act as a bar to the claims of another person, his son, to assert his existence and have his identity recognized.

20. MLDI respectfully supports this approach. It is notable that when the German Court of Appeal(*Oberlandesgericht)* in Karlsruhe, addressed the facts at issue in the present case (which arose in respect of the publication of the article concerning the Prince's illegitimate son in Germany), the appeal court placed very substantial weight on the views and interests of the child and his mother. The German Court found that it was for the child's mother, and not for the Prince, who had not recognised him, to decide whether the disclosure of the child's existence fell within the protected private sphere (see Judgment of the Court of Appeal Karlsruhe, 28 October 2005, Az. 14 U 169/05).

21. The decision of an individual, in circumstances such as the present case, to make known information about his or her own personal identity is an important factor in the balancing exercise conducted as part of the proportionality assessment. An individual's identity, including his or her family lineage and make-up, is evidently an important aspect of that individual's private and family life. The ECtHR has recognised the significance of official or social recognition of an individual's identity as an aspect of his or her private life on a number of occasions. The Court has, for instance, repeatedly recognised that private life may "embrace aspects of an individual's … social identity" and that "respect for private life must also comprise, to a certain degree, the right to establish relationships with other human beings (*see Mikulić v. Croatia*, Merits, 7 February 2002, Application No. 53176/99, [at 53]. See also *Pretty v. the United Kingdom*, [2002] 35 EHRR 1, [at 61], (also referring to Article 8, protecting an individual's "social identity").

22. In addition, as a function of personal autonomy, the decision to withhold or to give expression to information about one's personal identity and family is also an important aspect of private

and family life (as well as aspects of the right to free expression). In general, it is for each individual to decide what information others know about these aspects of one's life.

23. This is all the more so as regards a child for whom social identity as well as the recognition of that identity are especially important. The impact of a decision, measure or restriction on a child's identity is an important factor to be considered as part of a child's best interests under both Article 8 ECHR and Article 3 of the United Nations Convention on the Rights of the Child (see *General Comment 14 (2013), on the Right of a Child to Have His or Her Best Interests Taken as a Primary Consideration).*[5] MLDI notes that General Comment 14 expressly states that "the child's identity" is an essential element which must be taken into account in assessing and the child's best interests, in any decision affecting him or her (General Comment 14, [at 52, 55-57].

24. In circumstances such as those in the present case, it is important that the balancing exercise takes full account of the rights of all those forming the subject-matter of the story. This of course includes the right to private life of an individual (like the Prince) who wishes the information in the article to remain undisclosed. But it also includes the right to private life and free expression of those (like Mdm. C and her son) who wish to make public information relating to their own identity and background. The weight to be attached to these interests is all the greater where they relate to fundamental aspects of personal identity.

25. MLDI submits that a crucial aspect of one's right to private and family life concerns the capacity to determine, as regards matters of identity and personal history, the extent to which that information is made known to others. Preventing an individual from making public information about their personal or social identity represents a strong interference with that individual's private autonomy. As such, any restriction requires particularly rigorous scrutiny. In cases such as the present, the interests of third parties, such as Mdm. C and her son, must be accorded proper weight. With respect, it is submitted that the Chamber was right to adopt this approach.

(iii) Latitude Afforded in Scrutiny of Public Figures

26. As is well known, the Court has a long line of jurisprudence in the field of free expression making clear that the limits of permissible criticism of a politician or public figure are wider

[5] Committee on the Rights of Children, *General Comment No.14: on the right of the child to have his or her best interests taken as a primary consideration*, UN Doc. No. CRC/C/GC/14 (29 May 2013).

than in respect of a private individual (e.g. *Lingens v. Austria*, Merits, 8 July 1986, Application No. 9815/82; *Incal v. Turkey* 29 EHRR 449). In a constitutional monarchy heads of state carry out a fundamental representative role on behalf of the State. Such persons also often exercise power in other ways depending on the constitutional conventions or practices in the particular political system. This can involve publicly commenting on a range of matters of public concern or expressing views privately to politicians in respect of such matters. Moreover, in a constitutional monarchy questions of succession are matters of legitimate public scrutiny and interest. This is inherent in the very nature of a hereditary monarchy. Especially where matters of succession are concerned, issues which are ordinarily "private" in character are usually not without significance in the public domain.

27. This, in turn, has implications for the latitude which must be afforded to the press to report on such matters and the right of the public to be informed, where appropriate, in respect of them. The ECtHR has long emphasized "the essential role played by the press in a democratic society" (*Von Hannover v. Germany* (No. 2), (2012) 55 E.H.R.R. 15, [at 109]. The Court has also repeatedly held:

> The duty of the press "is to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise the press would be unable to play its vital role of "public watchdog". (*Von Hannover v. Germany* (No. 2), (2012) 55 E.H.R.R. 15, [at 102).

28. In *Társaság a Szabadságjogokért v. Hungary* (2009) 53 EHRR 130, the Court held [§ 27]:

> The most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society's "watchdogs", in public debate on matters of legitimate public concern.

29. In a hereditary monarchy, just as in other forms of political system, heads of state occupy an important and influential public office. Questions of succession to the throne, and therefore as to the future head of state, are of clear public interest. The role of the press as a "public watchdog" requires rigorous scrutiny of any sanctions imposed on the press in respect of such reporting. MLDI submits that the imposition of sanctions on journalists or media organisations in this context requires rigorous scrutiny.

(iv) Severity of Sanction Imposed

30. *Couderc and Hachette Filipacchi Associés* was subject to a fine of €50,000, together with the imposition of an obligation to publish a statement of culpability on the front cover of the Applicant's publication, occupying one third of the front page. A sanction of the latter sort is of significant gravity. It has the potential to harm the reputation of the magazine. It also has the potential to substantially impact on future sales given the importance of a front cover in marketing and selling a magazine. It is punitive in character. In addition, the sum the applicant was required to pay was, on any view, significant, especially since there is no question but that the article addressed a matter of public importance. In *Dammann v. Switzerland*, Merits, 25 April 2006, Application No. 77551/01 the Court observed [at 57] that while the relatively small fine at issue in that case had not prevented the applicant from exercising the right to free expression, it had nonetheless "amounted to a kind of censure which would be likely to discourage" the applicant from journalism. In respect of the publication of an article about wealthy, prominent individuals such as a hereditary monarch, damages of the order of € 50, 000 could have precisely the same effect and must be regarded as a serious sanction.

D. Conclusion

31. The approach of the Chamber to the issues of principle in the present case was, in MLDI's respectful submission, the right one. An appropriately broad approach was adopted in respect of the concept of a "general debate". Careful scrutiny was given to the rights and interests not only of the Prince and the applicant, but also the third parties, namely Mdm. C and her child. More generally, as illustrated by the jurisprudence from the United Kingdom, Germany, Belgium and France, MLDI submits that in applying the concept of "contribution to general debate" to a particular case, a degree of latitude should be afforded to editors in determining the kind of detail and colour which is necessary to include in article for journalistic reasons. As Lady Hale noted in *Campbell v. MGN*, [at 169] these judgments, "are part of the legitimate function of a free press and require to be given proper weight".

On behalf of Media Legal Defence Initiative,
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6 February 2015