any substantive difference between an appeal on a point of law and judicial review' (at [133]). By allowing for the availability of judicial review, the Supreme Court has therefore provided an effective appeal for unappealable decisions, substituting the opinion of the UT as to whether an appeal from the FTT should be allowed for that of the ordinary courts. The fact that the criteria the Supreme Court employed, for the purposes of delineating the availability of review, were the very criteria that are to dictate the availability of an appeal supports this conclusion.

It is surely correct to say that the rule of law means that the UT should not be allowed completely to misconstrue the four corners of its power. Nor should it be allowed to commit gross breaches of procedural justice. But the *Sivasubramaniam* approach adequately meets these concerns, whilst ensuring that judicial review does not serve as an effective appeal, frustrating the avenues of redress delineated by the Act. Judicial review is not, like appeal, concerned with settling important points of principle or practice. Rather, its concern is with vires – that is, ensuring that decision-makers act within the four corners of their power – as well as questions of procedural fairness. This is the primary focus of the *Sivasubramaniam* model, and it would have been preferable as a result. Such an approach would have maintained the orthodox constitutional basis for review, avoided flouting Parliament's express will, and ensured proportionate protection of the rule of law.

PHILIP MURRAY

STRASBOURG ON PRIVACY INJUNCTIONS

DESPITE rapid development since the landmark House of Lords decision in *Campbell* v. *MGN* [2004] 2 A.C. 457, the common law right to privacy remains fragile. Max Mosley's well known saga illustrates the point. The News of the World (NoW) published photographs and posted a link on its website showing Mosley engaged in what it called a "sick Nazi orgy with 5 hookers" (*Mosley* v. *United Kingdom* (2011) App. No 48009/08, at [9]). The video was viewed more than 1.4 million times on the first day and the paper edition sold more than three million copies ([11]). Mosley commenced an action for invasion of privacy against NoW. Ten days after the initial publication the High Court refused an interim injunction to have the material removed from NoW's website. Although the Court had no trouble finding the material highly intrusive and degrading, and concluded that there was no public interest in its disclosure, Eady J. considered that the material was by then so widely available that there was no practical point in

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issuing an injunction. Doing so, Eady J. said, would be a "vain" gesture (*Mosley* v. *News Group Newspapers Ltd*. [2008] EWHC 687 (QB), at [34]). Undeterred, Mosley pursued his lawsuit and at trial obtained damages of £60,000, the largest award to date for invasion of privacy (*Mosley* v. *News Group Newspapers Ltd*. [2008] EWHC 1777 (QB)).

This victory was nevertheless a somewhat shallow one for the right to privacy. As Eady J. noted, compensatory damages will usually be an inadequate remedy in cases of serious invasion of privacy because once the information is released the damage is already done (unlike defamation where finding the words were untrue can theoretically rehabilitate the claimant's reputation). Furthermore, because suing for damages will exacerbate the intrusion by keeping the information in the headlines (and, of course, cost a small fortune to boot), most claimants lacking Mosley's tenacity (and financial resources) will be deterred from pursuing a claim once the information has been published (*Mosley* v. *News Group Newspapers Ltd*. [2008] EWHC 1777 (QB), at [230]–[231]). What litigants like Mosley really want is to prevent the media from exposing aspects of their private lives in the first place – something (in light of Eady J.'s interim holding) they can only achieve if given an opportunity to object prior to publication. Enter *Mosley* v. *United Kingdom* (2011) App. No 48009/08 which concerned Mosley's claim before the European Court of Human Rights that the United Kingdom violated its positive obligations under Article 8 of the European Convention on Human Rights (which mandates respect for private life) by failing to impose a legal duty on NoW to notify him of its intended publication of his private information, thereby denying him the opportunity to apply for interim relief before widespread circulation destroyed this right.

The ECtHR rejected Mosley's claim on three related grounds. First, it held that, notwithstanding Eady J.'s observations on the inadequacy of damages where serious violations of privacy are concerned, its own jurisprudence had "implicitly accepted that *ex post facto* damages provide an adequate remedy for violations of Article 8" (at [120]). Secondly, it held that the United Kingdom enjoyed a wide margin of appreciation on the question of how best to balance privacy with freedom of expression. Critical to its determination here were the facts that: (i) this case concerned positive obligations (involving the application of Article 8 between private parties, rather than between individuals and the government); (ii) the United Kingdom already has a cause of action designed to redress privacy invasions; (iii) there is no European consensus on whether prior notification should be required; and (iv) the House of Commons Culture, Media and Sport Committee (the "Commons Committee") recently recommended against introducing a legally binding pre-notification requirement. Thirdly, the Court

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doubted the effectiveness of any prior notification rule in its own terms. It noted that any such rule would have to incorporate a public interest exception, which would permit the media to publish private information without notification where it reasonably believed doing so could be justified in the public interest. This exception, which the Court hinted should not be narrowly defined, would permit publication in many borderline cases where significant scope for disagreement exists on the public interest value of the material. The Court further observed that any prior notification rule would only be as strong as the sanctions imposed for violating it; and then suggested that any threat of punitive damages for the deliberate flouting of this rule would likely fall foul of Article 10 (which protects freedom of expression) since, to be justified, they would have to be set at punitively high levels, and this would have a chilling effect of investigative journalism. Taken together, these three points enabled the Court to conclude that "Article 8 does not require a legally binding pre-notification requirement" (*Mosley* v. *United Kingdom* (2011) App. No 48009/08, at [132]).This holding does not, of course, bar the development of a Convention-compliant pre-notification requirement in English law, since our courts are free to extend greater protection to Article 8 than that which the ECtHR determines is minimally required. As indicated above, the need for such a rule is clear (for a convincing discussion, see Phillipson (2009) 1 J. Med. L. 73; but see also Scott (2010) 2 J. Med. L 49). Although the Commons Committee advised against introducing a legally binding rule, it nevertheless recommended that the Editors' Code Book (which sets the standards of journalistic ethics and is enforced by the Press Complaints Commission) be amended to mandate pre-notification in serious cases subject to a public interest exception; and it further recommended that the courts should treat failures to comply with this Code Book guidance as an aggravating factor when assessing damages. Such an approach, it is submitted, would have the salutary effect of encouraging claimant notification and thereby afford victims the opportunity to prevent publication of their private information before it is too late. Interestingly, the ECtHR took special note of the Commons Committee's recommendations here, and, rather conspicuously, did not suggest that aggravated damages would fall foul of Article 10. Arguably, aggravated damages would not have the same chilling effect on expression that punitive damages are presumed to have. This is because aggravated damages (which are designed to compensate for special dignity harm) do not have a punitive purpose, and thus (unlike punitive damages, which do have this purpose) they need not be set at punitively high levels to justify their award.

CHRIS HUNT

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