Bulletin No 4

Latest developments in the case-law of the European Court of Human Rights on freedom of expression

Freedom of Expression and Freedom of the Media

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Latest developments in the case-law of the European Court of Human Rights on Freedom of Expression

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Introduction

The Bulletin is prepared within the framework of the joint initiative of the European Union and the Council of Europe "Horizontal Facility for the Western Balkans and Turkey 2019–2022" and its action on "**Freedom of Expression and Freedom of the Media in South-East Europe (JUFREX)**".

In order to continue cooperation with the legal professionals and contribute to further improvement of knowledge in the field of freedom of expression and freedom of the media, we have prepared this Bulletin as an additional tool for sharing information on new trends and developments in the case-law of the European Court of Human Rights (the ECtHR; the Court).

While Bulletin No 1 covered the period April 2019–July 2020, Bulletin No 2 the period August 2020–January 2021, Bulletin No 3 covered period February 2021–July 2021, this one, Bulletin No 4, in front of you presents some of the relevant judgements delivered from July 2021 until January 2022.

During August 2021-January 2022, the European Court of Human Rights (hereinafter referred to as the Court, or the ECtHR) delivered 49 judgments and a further 17 admissibility decisions in freedom of expression cases.[1] The judgments concerned different thematic areas invoked under Article 10 of the European Convention of Human Rights (the ECHR; the Convention), ranging from newspaper bans to access to information, as well as protection and privacy issues. Most of the cases were brought by applicants claiming a violation of their right to freedom of expression; one was brought under Article 8 by applicants claiming that their right to respect for private life had been infringed by the failure of domestic authorities to protect them against hate speech. The judgments mostly reaffirmed well-established case law, whilst some further clarified European standards.

In the two main judgments selected for in-depth analysis in this Bulletin, the Court addresses the importance of adequate protection for the rights of sexual minorities, including their right to freedom of expression; and the extent to which States can restrict freedom of expression during a state of emergency. The first of these, *Association ACCEPT and others v. Romania*,[2] concerned a disruptive demonstration that had occurred at a screening of a film involving a same-sex family during the applicant association's LGBT History Month. The cinema had been invaded by protestors, allegedly carrying far-right paraphernalia, attendees had been abused, and the police had failed to provide protection and ensure that the event could take place, despite their presence at the scene. The second of the main judgments in this bulletin, *Dareskizb Ltd v. Armenia*, concerned actions taken by State authorities during a state of emergency following the presidential election of 2008, when the applicant company had been prevented from publishing its newspaper.

1 Under the system of the European Court of Human Rights, cases need to pass an admissibility stage. Sometimes, this results in a separate decision of the court which can set important standards, particularly as concerns so-called 'hate speech' cases which can be excluded as an 'abuse of rights' under Article 17 of the Convention.

2 The case was decided in the first half of last year but could not be included in the previous bulletin. Because of its importance, it was decided to include the case in the current bulletin.

This bulletin also summarises a further six cases dealing with a range of other issues: the so-called 'right to be forgotten', an emerging area of jurisprudence for the Court; political broadcasting; the right to freedom of expression of members of the judiciary; the right of access to information; the question of whether there is a right to 'anonymity' when leaving comments; and the line between strongly worded online political discourse and gratuitous 'insults'.

Overall, in nearly 80% (39 out of 49 cases) of freedom of expression cases brought under Article 10 that was declared admissible, a violation was found. The judgments in these cases all underline the obligation of the States parties to the Convention to uphold Convention standards in line with the principle of subsidiarity. During 2021, there was a 38% increase in cases that were communicated by the Court. In some of the judgments included in this Bulletin, the Court was highly critical of the domestic judiciary or of domestic legislation: in *Rovshan Hajiyev v. Azerbaijan*, the Court found a "manifestly unreasonable interpretation and application of the domestic law"; and in *Vedat Şorli v. Turkey*, the Court held that the respondent state should abolish the criminal law provision conferring special protection on the reputation of the head of state.

During the period under review the Grand Chamber of the Court, which considers cases that raise a serious question affecting the interpretation or application of the Convention or a serious issue of general importance, accepted two freedom of expression cases referred to it. The first, *Hurbain v. Belgium* (judgment of 22 June 2021, application no. 57292/16; referral accepted on 11 October 2021) concerns the so-called 'right to be forgotten', and was brought by a newspaper editor who had been forced to anonymise a newspaper report of a road accident in which a person had died. In its judgment of 22 June 2021, the Third Section of the Court had held that this had not violated his right to freedom of expression. The second, *Sanchez v. France* (judgment of 2 September 2021, application no. 45581/15; referral accepted on 17 January 2022), concerns the extent to which a politician may be held liable for content posted by others on their Facebook page. On 2 September 2021, the Fifth Section of the Court had held that the politician's conviction for failing to remove hate speech did not violate his right to freedom of expression. The Grand Chamber of the Court will now review both cases.

Finally, on a practical note, readers of this Bulletin who represent applicants to the European Court of Human Rights should note that, in accordance with articles 4 and 8 of Protocol no. 15, which entered into force on 1st August 2021, the time-limit for lodging applications has been reduced from 6 to 4 months after the final domestic decision taken. This applies to all cases in which the final domestic decision was taken after 1 February 2022.

Review of the most important freedom of expression cases

Biancardi v. Italy, judgment of 25 November 2021, application no. 77419/16

Facts of the case

In March 2008, the applicant, editor-in-chief of an online newspaper, had published an article concerning a fight and a stabbing in a local restaurant. The article named the restaurant, the persons involved (two brothers, V.X. and U.X. and their respective sons), as well as various other details. In September 2010, V.X. and the restaurant sent a formal notice to the applicant asking that the article be removed from the Internet. There was no response and in October, they lodged claims against Google Italy (later excluded from the proceedings) as well as the applicant. At a hearing in May 2011, the applicant indicated that he had de-indexed the article. The domestic court held that while there was no need to examine the complaint regarding the removal of the article, there had been a violation of the claimant's reputation for the duration of the period that the article had been easily accessible and awarded each claimant 5,000 euros (EUR) for non-pecuniary damage and EUR 2,310 for costs and expenses. The court reasoned that the article had been accessible from March 2008-May 2011, and that the information was easily accessible by searching for the claimants' names in a search engine. A Supreme Court appeal was dismissed.

The applicant complained to the European Court of Human Rights that his right to freedom of expression had been violated.

Court's judgment

The Court observed that the crux of the case was the online article's ease of access over a long period of time, and how it could be found by doing a search for the name of the person involved. The Court briefly discussed the technical terminology in question, explaining that "de-indexing" (and the similar terms "de-listing" and "de-referencing") indicate the removal of specific Internet pages from search results. Such de-indexing can be done by a search engine but also by a newspaper editor, using the "non-indexing" technique. In this case, the request for de-indexing had been made to the editor.

The Court restated the principles that are usually applicable in cases where the right to freedom of expression is to be balanced against the right to reputation, but held that because of the two distinguishing features of this case – the period for which the online article remained accessible, and the fact that the publication concerned a private individual not acting within a public context – strict application of these criteria would be inappropriate. Instead, the Court held that it would consider whether the findings of the domestic courts were based on relevant and sufficient grounds, with specific attention to (i) how long the article had been easily accessible online; (ii) the sensitivity of the information; and (iii) the gravity of the sanction imposed on the applicant.

Regarding the first point, the Court noted that while the criminal proceedings concerning the fight were still pending, the article had not been

updated or removed, despite the formal notice. The Court then considered that domestic and international precedent held that the relevance of the applicant's right to publish information decreased with the passage of time, while the applicant's reputational interests increased. The Court also emphasized that the sensitive nature of the data – criminal proceedings – should be taken into account. The Court considered furthermore that the amount of compensation awarded could not be regarded as excessive, given the circumstances of the case. Finally, the European Court of Human Rights emphasized that where the national authorities have undertaken the balancing exercise between freedom of expression and the right to respect for one's private life, it would require strong reasons for Court to substitute its view for that of the domestic courts. For all these reasons, the Court held that the compensation award made by the domestic courts did not violate the applicant's right to freedom of expression.

Note: Whilst finding no violation of the right to freedom of expression the Court emphasizes that "no requirement was imposed on the applicant to permanently remove the article from the Internet." The judgment picks up on what may turn out to be an influential dissenting opinion by Judge Pavli in *Hurbain v. Belgium*, judgment of 22 June 2021, application no. 57292/16 (a case that has been accepted for a Grand Chamber referral). The two main points of interest are the way it proposes new criteria in 'right to be forgotten' cases that do not fit the usual balancing test in privacy vs freedom of expression (the so-called Von Hannover and related Axel Springer criteria); and the focus on 'de-indexing' as a less harsh measure to protect reputational interests. However, the Court's reasoning, which may be characterised as somewhat minimalistic, has attracted criticism. For one, consideration of the public interest value of the information – normally a central part of any Article 10 case – is missing from the Court's new set of criteria. This area of law will no doubt continue to evolve; the next likely chapter being the Grand Chamber's decision in *Hurbain v. Belgium* (a hearing in that case, which concerns a court order to anonymize an online newspaper article published twenty years previously, will be held on 9 March, and judgment can be expected later this year).

Associazione Politica Nazionale Lista Marco Pannella and Radicali Italiani v. Italy, judgment of 31 August 2021, application no. 20002/13, and Associazione Politica Nazionale Lista Marco Pannella v. Italy, judgment of 31 August 2021, application no. 66984/14

Facts of the case

The applicants in these cases are political associations. The first case (application no. 20002/13) concerns the discontinuance of political television programmes known as 'political platforms'; the second case (application no. 66984/14) concerned the complaint that representatives of one of the associations had not been invited to appear on the most important news programmes broadcast by the public broadcaster, RAI, and that its campaigns and awareness-raising initiatives had not been featured.

In the second case, the applicant had made a formal complaint to the Communications Regulatory Authority, AGCOM. This had turned down the complaint on the grounds that the association had in fact enjoyed a sufficient presence similar to that of other political movements that did not have any members of parliament. AGCOM had been overruled by a domestic court not once but twice, and by the time the applicant was invited onto the television programmes in question more than two years had passed and one of the programmes had been cancelled. No compensatory airtime was offered.

The applicants complained to the European Court of Human Rights of a violation of their right to freedom of expression.

Court's reasoning

With regard to the first case (application no. 20002/13), the Court observed that in the Italian system that operated before it got cancelled, the organisation of "political platforms" on State-run channels required an instruction from a parliamentary commission. The Court noted that the system of "political platforms" dated back to the early 1970s, when society and the media were very different. The public was no longer interested in these programmes, which had been replaced with a broader range of news programmes that provided political parties an opportunity to convey their opinions and ideas in a different way. The applicant had not been the only group affected by this: all political groups and parties which had taken part in them had been equally affected. The Court went on to observe that the replacement of these "political platforms" by more in-depth political debates had given RAI greater editorial freedom and provided other possibilities for imparting political ideas and opinions through the broadcast media. The discontinuance of the "political platform" programme was part of a growing recognition of each channel's editorial autonomy, and did not violate the applicant's right to freedom of expression.

The Court did however find a violation of Article 13 (the right to an effective remedy): under the Italian legal system, there was no recourse to the decision of the parliamentary commission (which expressed the will of parliament) for groups such as the applicant.

In the second case (application no. 66984/14), the Court noted that the applicant had complained to the Communications Regulatory Authority, AGCOM, which, on two occasions, had refused to take action, despite court orders. Only in 2013, after a second case had been lodged with the domestic courts for failure to implement the first decision, were the applicant's representatives invited on two of the public broadcaster's TV programmes.

The Court considered that AGCOM's approach had been excessively formalistic. It had carried out an overall assessment of the applicant association's presence during all of the current affairs programmes on the channels in question, without taking into account the time at which the programmes were screened or their popularity. The Court also observed a discrepancy between the duty on the public broadcaster to represent different political opinions in a balanced manner, and the practice whereby groups classed as "political subjects" had preferential access to certain current-affairs programmes. As a result the applicant association had been absent from three very popular television programmes and had found itself effectively marginalised in media coverage. By the time the applicant was invited, this was only on two of the programmes as the third had been cancelled. No alternative airtime was offered, and the applicant association in the end only appeared on one of the programmes. For all these reasons, the Court found that the applicant's right to freedom of expression had been violated.[3]

Note: In both cases the Court strongly emphasised the importance of pluralism in the broadcast media, and especially in public broadcasting. Political programming has evolved from the days of providing "political platforms" outside of election times towards recognition of greater editorial freedom for the state broadcaster (which the Court acknowledges is an ongoing process) and allowing political movements to present their ideas and opinions in politics and news and current affairs programmes. However, it is crucial that there is equity in representation. A mathematical formula that calculates time as a percentage of overall broadcasting time is unlikely to help achieve this, given the differences in popularity of different programmes and the times at which they are broadcast. Any approach that results in the *de facto* exclusion or marginalisation

3 The Court held that the second applicant in application no. 20002/13 had not shown how it had been directly affected by the discontinuance of the "political platform" programmes and rejected its complaint.

of certain political groups or movements is likely to violate their right to freedom of expression.

Miroslava Todorova v. Bulgaria, judgment of 19 October 2021, application no. 40072/13

Facts of the case

In her capacity as President of the Bulgarian Union of Judges, the applicant frequently criticised the disciplinary body for the judiciary, the Supreme Judicial Council (SJC). A complaint was lodged against her by a fellow judge for delays in producing judgments, and in subsequent disciplinary proceedings the SJC found that the applicant had delayed the delivery of judicial decisions or the giving of reasons in 57 cases, amounting to a systematic failure to meet deadlines, and first imposed a salary reduction and then recommended her dismissal. Her appeal against the salary reduction was eventually dismissed; and while she won the appeal against her dismissal she was instead sanctioned with a demotion to a lower-level court for a period of two years. The applicant complained to the European Court of Human Rights of violations of her right to a fair trial, her right to respect for her private life, her right to freedom of expression, her right to be free from discrimination, and a violation of the prohibition on imposing restrictions on rights for purposes other than those for which they have been prescribed.

Court's reasoning

The Court found no violation of the applicant's right to a fair trial or her right to respect for private life. Considering her complaint under Article 10, which protects the right to freedom of expression, the Court considered that the disciplinary proceedings against the applicant had been bound up with her public statements. This meant that the disciplinary proceedings and the sanction imposed on her could have had a chilling effect on the applicant as well as on other judges. While the applicant had eventually won the appeal against her dismissal, the initial order of dismissal had been effective immediately and she had been removed from office for a year.

Furthermore, the European Court of Human Rights held that the domestic courts had failed to accompany their decisions with relevant and sufficient reasons to explain why the disciplinary proceedings and the sanctions imposed had been necessary and proportionate. Bearing in mind the fundamental importance of freedom of expression on matters of public concern such as the functioning of the justice system and the need to protect judicial independence, the Court therefore found a violation of the applicant's right to freedom of expression.

Unusually, the Court also found a violation of Article 18 of the Convention, which prohibits the restriction of rights for purposes other than those for which they have been prescribed. It observed that this was a fundamental aspect of the case. The Court noted that there had been controversy between the Bulgarian Union of Judges and the executive: the Minister of the Interior had made press statements targeting and criticising the applicant. The Supreme Judicial Council had come down particularly hard on the applicant, and the exceptional severity and disproportionate nature of the initial sanction of dismissal had been noted by broad sections of Bulgarian and international society. None of the statements that the applicant had made had been unlawful or incompatible with the judicial code of ethics, and it was alarming that the disciplinary procedure had been used to retaliate against her. Having regard to all the facts of the case, the Court considered that the main aim of the disciplinary proceedings had been to penalise and intimidate the applicant, constituting a violation of Article 18 read together with Article 10.

The Court did not consider that a separate issue arose under Article 14 (the right to non-discrimination in the enjoyment of rights).

Note: Members of the judiciary are expected to exercise a degree of moderation in their state-

ments, particularly if their authority or independence can be called into question (see *Wille v. Liechtenstein*, judgment of 28 October 1999, application no. 28396/95) but as the Court notes nothing in the applicant's statements was unlawful or unethical. While the Court observed that there had indeed been delays in the production of some judgments, the sanction that was imposed was unusually harsh. This led the Court down the road of finding an Article 18 violation: in short, this means that a restriction ostensibly imposed for one purpose really served an illegitimate aim (in this case, punishing the judge and setting an example for others). Article 18 violations indicate a serious failure of the rule of law, and with this judgment Bulgaria joins a small group of countries found to have been in breach of this provision (the others are Azerbaijan (with eleven violations), Georgia, Russia, Turkey, and Ukraine (with two or three violations each) and the Republic of Moldova (with one violation). This should be cause for strong concern and the Council of Europe's Committee on the Execution of Judgments can be expected to place this case under enhanced supervision.

Standard Verlagsgesellschaft Mbh v. Austria (No. 3), judgment of 7 December 2021, Application no. 39378/15

Facts of the case

The applicant is the publisher of a newspaper and online portal that carries articles and discussion forums. When registering as a user on the website, which allows commenting on the articles, individuals are required to provide their names and email addresses, and optionally their postal addresses. The website made clear that the applicant company would only disclose this information if required to do so by law. Moderators reviewed around 6,000 comments per day, deleting many, and the company provided user data to the appropriate authorities when it was clear that rights had been infringed.

Two articles about politicians attracted negative comments. One mentioned "corrupt politician-assholes forget, [but] we don't. ELECTION DAY IS PAYDAY!!!!!"; another suggested that a political party should have "been banned for their ongoing Nazi revival"; and a third stated, " [I]f we did not perpetually misunderstand [the meaning of] freedom of expression and if undermining our constitution and destabilising our form of government were consequently to be made punishable – or at least, if [anti-mafia law] were for once to be applied to the extreme-right scene in Austria – then [H.K.] would be one of the greatest criminals in the Second Republic".

Following complaints the comments were deleted but the company refused to disclose the identity of the commenters. The domestic courts ordered the disclosure of the users' details, stating that the political parties and politicians criticised in the comments had an overriding interest in disclosure. The applicant complained to the European Court of Human Rights, arguing that the order to disclose the personal details of users of its news portal violated its right to freedom of expression.

Court's reasoning

The Court devotes significant discussion to the question of whether there had been an interference with the right to freedom of expression of the applicant company on whose website the comments had been published. It found that while the commenters could not be considered as "sources", as the applicant had argued, there was nevertheless a strong link between the applicant's publication of articles and the comments that they attracted. The applicant's overall function was to further open discussion and to disseminate ideas and information with regard to topics of public interest, and an obligation to reveal user information would have a chilling effect on public debate. The Court reiterated that the right to anonymity, whilst not absolute, was a corollary of the right to freedom of expression: it was an important way of avoiding reprisals or unwanted attention, and promoted the free flow of

opinions, ideas, and information. This anonymity would not be effective if the applicant company could not defend it; and the order lifting anonymity had therefore interfered with the applicant's right to freedom of expression.

Following the usual 'three part test', the Court held that the interference had been prescribed law for the legitimate aim of protecting the reputation of others; it went on to consider whether the interference had been "necessary in a democratic society". The Court noted that the comments at issue had constituted neither hate speech nor incitement to violence, and had been about two politicians and a political party in a political debate of public interest. The domestic courts should have balanced the competing interests of reputation and freedom of expression. They had not done so, and had not given any reasons as to why the reputational interests of the plaintiffs had outweighed the applicant's interests in keeping its users' identities secret. For a balancing exercise in proceedings concerning the disclosure of user data, a *prima facie* examination may suffice, but even this requires at least some reasoning. The courts' failure to do so violated the applicant's right to freedom of expression.

Note: This case is the first to explicitly consider whether requiring an online media outlet to disclose user data constitutes an interference with the right to freedom of expression (in previous cases – *Delfi AS v. Estonia* [GC], judgment of 16 June 2015, application no. 64569/09, and *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, judgment of 2 February 2016, application no. 22947/13 – the point had not been raised). Here, the Court holds that the online forum is an integral part of the applicant's news operation: it invites its readers to make comments, provides a registration process, and moderates a large number of comments (it had indeed deleted the comments in question upon receiving complaints about them). At the domestic level the applicant company had attempted to rely on protection of sources arguments to prevent disclosure. This had failed before the domestic courts and the European Court of Human Rights also did not accept that line of reasoning, but instead held that the media outlet's integrated approach to comments and news articles along with the importance of anonymity meant that it could invoke its right to freedom of expression to resist the disclosure of user data. At the same time, the Court does not set a high bar for disclosure, emphasizing that "for a balancing exercise in proceedings concerning the disclosure of user data, a prima facie examination may suffice". But the Court goes on to say, "even a prima facie examination requires some reasoning and balancing." Judge Eicke dissents on the point of admissibility, discussing EU law (it is certainly true that this judgment raises questions) and warning of the possible negative impact on the ability of victims of abusive posts to gain access to justice.

Vedat Şorli v. Turkey, judgment of 19 October 2021, application no. 42048/19

Facts of the case

The applicant had been sentenced to 11 months and 20 days prison, with delivery of the judgment suspended for five years (meaning that if the applicant did not commit an intentional offence during that period, the conviction would be quashed) for insulting the President in two Facebook posts. He was held in pre-trial detention for two months and two days.

The first Facebook post was a caricature showing then-US President Barack Obama kissing the President of Turkey, shown in female dress, with a caption that said "Will you register ownership of Syria in my name, my dear husband?" The second post showed photos of the President of Turkey with the following comment: "May your blood-fuelled power be buried in the depths of the earth/May the seats you hold on to by taking lives be buried in the depths of the earth/May the lives of luxury you lead thanks to stolen dreams be buried in the depths of the earth/May your presidency, your power and your ambitions be buried in the depths of the earth".

The applicant's domestic appeals were unsuccessful; he complained to the European Court of Human Rights of a violation of his right to freedom of expression.

Court's reasoning

The Court observed that the applicant had been convicted under a provision of the Criminal Code which afforded a higher degree of protection to the President of the Republic than to others and which provided for more severe penalties. The Court reiterated that it had in numerous previous cases, against Turkey as well as other countries, ruled that such laws are not in keeping with the requirements of the European Convention on Human Rights (referencing amongst others *Colombani and Others v. France*, judgment of 25 June 2002, application no. 51279/99, *Otegi Mondragon v. Spain*, judgment of 6 November 2018, application no. 2034/07; *Artun and Güvener v. Turkey*, judgment of 26 June 2007, application no. 75510/01).

The Court went on to consider the harsh criminal penalty imposed on the applicant. It reiterated that persons representing the institutions of the State must show restraint in resorting to criminal proceedings when it comes to protecting their reputation. The Court emphasized that even when the sanction imposed is the lightest possible, such as a guilty verdict with a discharge or a token fine of only €1, it nevertheless constitutes a criminal sanction. The Court emphasized the chilling effect that criminal sanctions have on the right to freedom of expression. Turning to the facts of the present case, the Court considered that there had been no justification whatsoever for the applicant to have been placed in police custody and pre-trial detention, or for the imposition of any criminal sanction, and found a violation of the right to freedom of expression.

The Court then went on to consider Article 46 of the Convention, which provides that states must abide by judgments. Noting that the root of the case lay in the criminal law provision conferring enhanced protection to the reputation of the head of state, the Court held that reforming this law to bring it into line with Article 10 of the Convention would be appropriate.

Note: Insulting the head of state is a criminal offence in a number of European countries. Even if prosecutions are rare, such laws have a chilling effect on the right to freedom of expression and are, as the Court says, "not, in principle, in keeping with the spirit of the Convention". The Court also emphasizes the need for the utmost restraint in the use of criminal law to protect the reputation of public officials, emphasizing that even a light sanction is still a criminal conviction. The Court has made both these points before (see the cases referred to in the case summary, above), and the Council of Europe's Committee of Ministers issued a Declaration urging the same as long ago as 2004 (Declaration on freedom of political debate in the media, adopted 12 February 2004), yet law reform has been slow. The Court's finding under Article 46 that law reform would be appropriate emphasises the urgency of the reform required, and should be noted by other states who still have similar laws still on their statute books. .

Rovshan Hajiyev v. Azerbaijan, judgment of 9 December 2021, Application nos. 19925/12 and 47532/13

Facts of the case

The applicant, editor of a national newspaper, launched two access to information requests regarding possible threats to public health and the environment posed by a Soviet-era military radar station in Azerbaijan that had been operated by Russia until 2012. Independent studies had suggested that the station had caused serious public health issues and the President of Azerbaijan had appointed two commissions assessing these risks, in 2001 and in 2003. In 2010, the applicant asked the Ministry of Healthcare whether the commissions remained active and what report(s) had been produced. He was informed that a report had indeed been drawn up and transmitted to the Cabinet of Ministers, but that it was no longer in the possession of the ministry and so could not be provided. Attempts through the courts to compel the production of the report were futile. The applicant made a separate request to the Cabinet of Ministers, which did not provide a response. The

'non-response' was upheld by the courts which argued that under Azerbaijan's access to information legislation, there was no duty to disclose reports of commissions created for a specific purpose. The applicant complained to the European Court of Human Rights arguing a violation of his right to freedom of expression.

Court's reasoning

The Court first considered whether the case was admissible. It emphasized that a right of access to information held by a public authority may arise under Article 10 when the information requested is instrumental to the exercise of the right to freedom of expression. The criteria to be applied in such cases are (a) the purpose of the information request; (b) the nature of the information sought; (c) the role of the applicant; and (d) whether the information requested is ready and available. The Court noted that the applicant was a journalist and that he had expressly informed the relevant State authorities that he needed the information for his work as a journalist. The Court stated that the nature of the information was clearly of general public importance, and the report concerned was, in principle, ready and available. Making it available should not have posed any practical difficulties or an unreasonable burden for the authorities concerned. Article 10 was therefore applicable; the refusal had constituted an interference with the applicant's rights.

In considering whether the refusal could be justified, the Court focused on whether it had been "prescribed by law", as required under Article 10(2) of the Convention. Considering, first, the lawfulness of the response given by the Ministry of Healthcare, the Court noted that the domestic courts had not addressed whether it had been in compliance with domestic law (which had required the Ministry, if it truly did not have the report but knew which State entity did, to forward the request of its own motion). As concerns the non-response by the Cabinet of Ministers, this was also in breach of domestic law which required that a refusal to provide access to information should be made in writing and in a substantiated manner. The domestic courts had failed to address these shortcomings. The Court held furthermore that the domestic courts' reliance on a provision in domestic law that did not require the pro-active publication of reports of commissions created for a specific purpose was manifestly unreasonable: this provision was not intended to limit access to State-held information. On the contrary, it facilitated such access by requiring information owners to disclose certain types of often-sought information to the public at large. Access to information that did not belong to the types specifically listed in this provision could be sought on a case-by-case basis, through requests such as the one made by the applicant. There was therefore no legal basis to the denial of information, leading to a violation of the applicant's right to freedom of expression.

Note: The applicant found himself in a Kafka-esque situation where the Ministry of Healthcare denied still having the report; the Cabinet of Ministers which had the report refused to respond; and the domestic courts rubberstamped the non-actions of the State institutions through, in the words of the European Court of Human Rights, a "manifestly unreasonable interpretation and application of the domestic law". It used to be quite rare for the Court to find a violation of the right to freedom of expression on the basis that an interference was not "prescribed by law" (such cases almost always indicating quite fundamental failures in the rule of law). However, in the last four years, it has found such violations in 44 cases, with only Russia and Turkey found in breach more frequently than Azerbaijan. A few months before this judgment, the same section of the Court characterised the unlawful arrest, detention and conviction of opposition activists for dissemination of anti-government leaflets as "a flagrant arbitrary act and a negation of the very essence of the freedom of expression" (*Hasanov and Majidli v. Azerbaijan*, judgment of 7 October 2021, application nos. 9626/14 and 9717/14).

In-depth analysis of selected cases

Association ACCEPT and Others v. Romania, judgment of 1 June 2021, application no. 19237/16

Facts of the case

The applicants are a non-profit association that promotes the interests of lesbian, gay, bisexual and transgender (LGBT) people in Romania, and five Romanian nationals. During the association's LGBT History Month in February 2013, a screening of a film involving a same-sex family was held at the National Museum for the Romanian Peasant. The other five applicants attended the screening. The screening was meant to be followed by a discussion among the attendees, inspired by the movie, about the rights of same-sex families. Prior to the event, the applicant became aware that an "online mobilisation" was taking place on social media platforms calling for a counter-demonstration during the screening at the Museum. The applicant association requested police protection and ten officers, joined by a team of seven gendarmes who had been alerted by the director of the Museum, were stationed in the corridor outside the screening room.

About twenty people attended the screening, most of them invited attended. Just before the screening started, a group of fifty entered, some of them carrying flagpoles, shouting remarks such as "death to homosexuals", "faggots", "you filth", and insulting and threatening attendees. Some of them displayed fascist and xenophobic signs and brandished the flag of a far-right party. The intruders seemed to be associated with a far-right movement which is openly opposed, among other things, to same-sex marriage and same-sex adoptions. The organisers alerted the police officers who had been stationed outside the screening room. They entered, confiscated some flags and then left the room, despite the organisers' request to remain. The intruders then blocked the projector, forcing the organisers to halt the screening. As people started leaving the room, the police officers stationed in the corridor checked the identity papers of twenty-nine individuals, the majority of them from the group opposing the screening.

On 5 March 2013 the applicant association complained to the police about the incident, alleging incitement to discrimination, abuse of office by the restriction of rights, and the displaying of fascist, racist or xenophobic symbols in public. An investigation was opened and finally closed on November 2017, with no action taken. Several complaints by the applicants to the courts were in vain.

Court's reasoning

The applicants complained to the European Court of Human Rights of a violation of their right to respect for private life, their right to freedom of assembly, and their right to be free from discrimination (under Articles 8, 11 and 14 of the Convention and Article 1 Of Protocol No. 12 to the Convention).

The Court reiterated the authorities' duty to prevent hate crimes (whether physical attacks or verbal abuse) and to investigate the existence of

any possible discriminatory motive behind violence. Considering the case under Articles 8 and 14, which protect the right to respect for private life and the right to the non-discriminatory enjoyment of convention rights, the Court reiterated that States must have a system of criminal law in place that constitutes an effective deterrence against acts by private individuals which violate essential aspects of private life. This includes putting in place effective criminal sanctions against hate speech and incitement to violence. In addition, States are under a duty to protect as well as a duty to investigate incidents of hate speech.

With regard to the obligation to protect, the Court noted that police officers and gendarmes were present in sufficient numbers from the beginning of the incident. They were not overpowered, nor had they been caught unprepared. However, they had remained outside the cinema auditorium, where the incident was developing, and, to a large extent, refrained from intervening to de-escalate the situation, despite being prompted to do so by the organisers. When they did intervene they did not do so effectively, and they did not prevent the individual applicants from being bullied and insulted by the intruders. The Court observed that the authorities' decision to remain aside despite being aware of the content of the slurs being uttered seemed to indicate a certain bias against homosexuals, which also permeated their subsequent reporting on the incident at the cinema: police reports described the incident in terms that completely ignored the homophobia. The authorities had therefore failed in their duty to protect the applicants' in their enjoyment of their rights free from discrimination.

With regard to the obligation to investigate, the Court noted that despite the police having been present and a complaint having been lodged within two weeks of the incident, it took a year for the prosecutor's office to effectively start investigating and another three and a half years before it was closed. The Court held that such a passage of time is liable not only to undermine an investigation, but also to compromise definitively its chances of being ever completed. While the investigation should have been easy, the Court noted that that none of the intruders were ever formally accused by the prosecutor. The local authorities had concluded that the words "death to the homosexuals" did not constitute actionable hate speech, and had not taken the homophobic nature of the threats and insult into account at all. The verbal abuse that the applicants suffered was merely referred to as "discussions", or an "exchange of views". Furthermore, the domestic authorities had not taken into account that the organisation that appeared to have been behind the attacks was notoriously opposed to homosexual relations. This failure to take reasonable steps represented a violation of the obligation on the authorities to investigate homophobic attacks.

Considering the right to freedom of assembly, the Court reiterated that this requires states to ensure that protesters can hold a demonstration or assembly without having to fear that they will be subjected to violence – even if the assembly may annoy or give offence to persons opposed to the ideas or claims that that demonstration promotes. It covers private as well as public meetings. Genuine, effective freedom of peaceful assembly cannot be reduced to a mere duty on the part of the state not to interfere. Applying these principles to the case, and outlining the same police failures that it had identified under its Article 8/Article 14 reasoning summarised above, the Court held that that the authorities' clear failure to protect the applicants violated their right to freedom of assembly. The fact that the association eventually called off the screening itself and decided to hold it at a later date did not alter the Court's conclusion. The authorities were under an obligation to use any means possible to ensure that the applicants' right to peaceful assembly was respected.

General comments

The case raises two important issues: (1) the duty on the state to take action against hate speech, and (2) the duty on the state to take steps to facilitate the right to freedom of assembly free from violent protest.

As regards the second, the duty on the state to take steps to facilitate the effective enjoyment of rights is by now well-established (see, amongst others, the Court's judgment in *Identoba and Others v. Georgia*, judgment of 12 May 2015, application no. 73235/12).

As regards the first, the Court has increasingly made it clear that Article 8 requires states to act decisively and effectively to protect individuals or groups against hate speech: "Any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group ... Acts of violence such as ... making verbal threats may require the States to adopt adequate positive measures in the sphere of criminal-law protection. The increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies" (*R.B v. Hungary*, judgment of 12 April 2016, application no. 64602/12, paras. 78, 83). This applies to hate speech that is motivated by homophobia as well as racist, nationalist, religious, ethnic and misogynistic hate speech. In the case of *Beizaras and Levickas v. Lithuania* (application no. 41288/15, judgment of 14 January 2020), the Court held that because of the ease with which online posts can go viral, "even the posting of a single hateful comment [is] sufficient to be taken seriously". Given the proliferation of online hatred it can be expected that more cases will come to the Court, brought either by individuals convicted of hate speech or people targeted by it, allowing the Court to fine-tune its jurisprudence and guiding states on how to use the criminal law for the protection of human rights. One such case, as indicated in the introduction to this bulletin, is currently before the Grand Chamber: its judgment in *Sanchez v. France* will set an important standard in relation to a politician's duty to remove hate speech from their Facebook pages.

Dareskizb v. Armenia, judgment of 21 September 2021, application no. 61737/08

Facts of the case

The applicant is the publisher of a daily newspaper, "Haykakan Zhamanak" (Armenian Times), which was known to lean politically towards the then political opposition. Its application concerns a publication ban announced in the context of a state of emergency.

In 2008, before the announcement of presidential election results, the opposition candidate called on supporters to gather in the centre of Armenia's capital city, Yerevan. Thousands responded and set up a semi-permanent camp. After nine days of protest, the square where the camp was situated was cleared and sealed off. The protest then moved to another area, where violent clashes occurred with law-enforcement officers leading to ten deaths and numbers of people injured. A state of emergency was declared for a period of 20 days, which included restrictions imposed on the media. Armenia submitted a note to the Council of Europe stating that it would, for the duration of the emergency, derogate from or limit the application of a number of the rights in the European Convention on Human Rights, including the right to freedom of expression. One night, the applicant's newspaper was prevented from being printed by national security officers without a reason being given. The applicant did not attempt to print their newspaper for a further nine days, when the President of Armenia amended his initial decree, resulting in a "ban on publication or dissemination by mass media outlets of obviously false or destabilising information on State and internal issues, or of calls to participate in unsanctioned (illegal) activities, as well as publication and dissemination of such information and calls by any other means and forms". An attempt was made to republish the edition of the newspaper, which was prevented by national-security officers. A week later, following the lifting of the emergency publication of the newspaper restarted.

The applicant complained to the national courts about the actions of the national security officers; to have the enabling provisions, and in particular the presidential decree, declared unconstitutional; and to claim compensation. The Administrative Court refused to hear the case claiming that it lack jurisdiction and an appeal failed for the same reason. The Constitutional Court refused to hear the case claiming that the applicant lacked standing. The applicant then complained to the European Court of Human Rights.

Court's reasoning

The Court first considered Armenia's declaration that it would, for the duration of the emergency, derogate from or limit the application of the right to freedom of expression. Under Article 15 of the Convention, states have the right, in time of war or a public emergency threatening the life of the nation, to take measures derogating from their obligations under the Convention, provided that such measures are strictly proportionate to the exigencies of the situation and that they do not conflict with other obligations under international law. States do not have unlimited discretion in this matter: the Court may rule whether States have gone beyond the measures strictly required by the exigencies of the crisis. The Court reiterated that the natural and customary meaning of the words "other public emergency threatening the life of the nation" referred to "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed". In order to justify a derogation, the emergency should be actual or imminent; it should affect the whole nation to the extent that the continuance of the organised life of the community was threatened; and the crisis or danger should be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are clearly inadequate.

Applying these criteria to the situation, the Court noted that the events in question were a culmination of ten days of peaceful protest following a presidential election that many believed to have been flawed. There had been no indication of violence, nor that the demonstrators were the first to attack the police; on the contrary, credible reports indicated that the police used unjustified and excessive force against the demonstrators (discussed by the Court in *Mushegh Saghatelyan v. Armenia*, judgment of 20 September 2018, application no. 23086/08). While the Court acknowledged that tensions were running high, there was no evidence of a planned and organised disorder or an attempted coup d'etat. Crowds had remained mostly peaceful, and violence was committed by small groups of protesters using improvised objects as opposed to firearms or similar weapons. There was no evidence that any of the deaths occurred as a result of actions of the protesters. The Court concluded that there was no evidence that the opposition demonstrations could be characterised as a public emergency "threatening the life of the nation", nor that they represented a situation justifying a derogation. It therefore found that the derogation was invalid.

Turning to the ban on publishing the newspaper, the Court noted that the publication of the newspaper had been prevented despite its content not including hate speech or incitement to unrest; it appeared that the restrictions had been applied only because the newspaper had been critical of the authorities. Those restrictions had gone against the very purpose of Article 10 of the Convention and had not been necessary in a democratic society. The Court held furthermore that the domestic courts' refusal to hear the applicant's complaint impaired the very essence of the applicant company's right of access to court, in violation of Article 6 of the Convention.

General comments

This is an important decision (it is registered as a "key case" in the Court's online database) which indicates that States must not lightly impose a state of emergency: the rule of law applies even when in a country there is disorder or violence. As the judgment

indicates, the Court has already considered other cases stemming from the same period, finding violations of the rights to liberty, freedom of expression and freedom of association in cases where protests had been dispersed and protesters arrested (in addition to *Mushegh Saghatelyan v. Armenia*, see for example also *Myasnik Malkhasyan v. Armenia*, judgment of 15 October 2020, application no. 49020/08). This case was the first one to consider explicitly the derogation by Armenia under Article 15, pursuant to which it had been decreed that the mass media could only publish official government news and several independent media outlets had been prevented from publishing at all (in addition to the applicant, outlets including A1+ and Radio Free Europe/Radio Liberty had also been prevented from publishing, and the websites of several media outlets had been blocked). The judgment sets an important standard on Article 15, making it clear that rights may be derogated from only when there is an emergency that truly threatens "the life of the nation".

As well as the Article 15 ruling, the Court's discussion of Article 10 is equally important: even during an emergency, the Court emphasizes, "the Contracting States must bear in mind that any measures taken should seek to protect the democratic order from the threats to it, and every effort must be made to safeguard the values of a democratic society, such as pluralism, tolerance and broadmindedness." After all, "one of the principal characteristics of democracy is the possibility it offers of resolving problems through public debate ... Democracy thrives on freedom of expression."

Derogations are rare and prior to 2020 had been entered only by five states. Then came COVID-19. A number of States declared emergencies and derogated from several of the Convention rights, including the right to freedom of expression. In March 2020, Armenia notified the Council of Europe that it wished to derogate from its obligations under the Convention; amongst other things, it had issued a decree requiring the media to only publish "official information" and not to contradict it (Decision of the Government of the Republic of Armenia No 298-N of 16 March 2020). The derogation was only withdrawn in September 2020 (Note verbale, 16 September 2020). Only a very small number of states entered similarly restrictive derogations (COVID and Free Speech, Background Paper, Ministerial Conference, Cyprus 2020); all were criticised not only for the harsh nature of their clampdown but for pursuing a policy that actively hindered the resolution of the COVID-19 pandemic. Freedom of expression is not only the lifeblood of democracy, it also allows for scientific discussion and debate that ultimately leads to the finding of solutions.

Freedom of Expression and Freedom of the Media in South-East Europe (JUFREX)

The action is part of the "Horizontal Facility for the Western Balkans and Turkey 2019–2022" and it builds upon the results achieved during a previous regional European Union and Council of Europe Joint programme "Reinforcing Judicial Expertise on Freedom of Expression and the Media in South-East Europe (JUFREX)". The regional action is strongly interconnected with the six Beneficiary-specific JUFREX actions in: Albania, Bosnia and Herzegovina, Kosovo*, Montenegro, North Macedonia and Serbia.

JUFREX activities are implemented with the aim to:

- promote freedom of expression and freedom of the media in line with European standards;
- improve the application of those standards by engaging a range of actors responsible to apply such standards in their daily work, namely: judges, prosecutors, lawyers, police officers, representatives of media regulatory authorities, media actors and students;
- consolidate a platform for regional cooperation, discussion and exchange of good practices.

Where an enabling environment for freedom of expression and freedom of the media exists and the right to seek, impart and receive information is well protected, citizens can genuinely participate in the democratic processes. National training institutions for legal professionals (Judicial Academies and Bar Associations) play a vital role to make this become a reality.

All JUFREX activities are based on innovative and modern learning tools on freedom of expression and freedom of the media and adopt a dynamic methodology for adult learning and a peer-to-peer model.

The "Horizontal Facility for the Western Balkans and Turkey 2019-2022" is a joint initiative of the European Union and the Council of Europe that enables the Beneficiaries to meet their reform agendas in the fields of human rights, rule of law and democracy and to comply with the European standards, including where relevant within the framework of the EU enlargement process.

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* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

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