

POSITIVE OBLIGATIONS OF MEMBER STATES TO PROTECT JOURNALISTS AND THE FREEDOM OF EXPRESSION

Although the essential objective of Article 10 of the Convention is to protect the individual against arbitrary interference by public authorities, Member States must, in addition, fulfil a range of positive obligations, as identified in the relevant judgments of the European Court of Human Rights. Such obligations comprise legal, administrative and practical measures aiming to ensure the safety and the security of journalists and to create a favourable or enabling environment for the freedom of expression. In particular, Member States must:

- put in place a comprehensive legislative framework that enables journalists and other media actors to contribute to public debate effectively and without fear. Such a framework must guarantee public access to information, confidentiality and security of communications and protection of journalistic sources and whistleblowers;

- prevent or suppress offences against journalists when they know, or should have known, of the existence of a real and immediate risk to the life or physical integrity of these individuals from the criminal acts of a third party. To achieve this, member States should take appropriate preventive operational measures, such as providing police protection, especially when it is requested by journalists or other media actors. Those measures should be effective and timely;

- take all necessary steps to bring the perpetrators of crimes against journalists and other media actors to justice, whether they are State actors or not. Investigations into killings, attacks and ill-treatment of journalists must be effective and therefore respect the essential requirements of adequacy, thoroughness, impartiality and independence, promptness and public scrutiny.

The positive obligation falling on Member States are to be fulfilled by all State authorities – executive, legislative and judicial (including agencies concerned with maintaining public order and national security), and at all levels – federal, national, regional and local. In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual. The scope of this obligation will vary, having regard to the diversity of situations existing in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Such an obligation should not impose an impossible or disproportionate burden on the domestic authorities.

Positive obligations to protect the life of a journalist following death threats and to create an enabling environment for the freedom of expression

Dink v. Turkey - 2668/07, 6102/08, 30079/08

14 September 2010

The applicants are a journalist, now deceased, and five of his close relatives. The first applicant, a Turkish national of Armenian extraction, was publication director and editor-in-chief of a Turkish-

¹ This document presents a non-exhaustive selection of the CoE instruments and of the ECHR relevant case law. Its aim is to improve the awareness of the acts or omissions of the national authorities likely to amount to a hindrance of Article 10 of the Convention. It is not a legal assessment of the alerts and should not be treated or used as such.

Armenian weekly newspaper. In 2003 and 2004 he wrote a series of articles for the newspaper in which he expressed his views on the identity of Turkish citizens of Armenian extraction. He commented, among other things, that Armenians' obsession with having their status as victims of genocide recognised had become their *raison d'être*, that this need on their part was treated with indifference by Turkish people and that, as a result, the traumas suffered by Armenians remained a live issue. In his view, the Turkish component in Armenian identity was both poison and antidote. He also wrote that "the purified blood that will replace the blood poisoned by the 'Turk' can be found in the noble vein linking Armenians to Armenia". He wrote a further article in which he referred to the Armenian origins of Atatürk's adopted daughter. Extreme nationalists reacted to the articles by staging demonstrations, writing threatening letters and lodging a criminal complaint. In 2005 a criminal court found the journalist guilty of denigrating "Turkishness" (Turkish identity) and imposed a suspended prison sentence on him.

Article 2 (right to life) :The Court considered that, in view of the reactions to the articles in question, the security forces could reasonably be considered to have been informed of the intense hostility towards the journalist in extreme nationalist circles. Furthermore, it appeared that two police departments and one gendarmerie department had been informed of the likelihood of an assassination attempt and even of the identity of the alleged instigators. The threat of an assassination could therefore be said to have been real and imminent. However, none of the three authorities concerned had taken action to prevent the crime. Admittedly, the journalist had not requested increased protection; however, he could not have known about the plan to assassinate him and it had therefore been for the authorities in question to take action. In sum, the latter had not taken the reasonable measures available to them to prevent a real and immediate risk to the journalist's life.

Conclusion: violation of Article 2 (non-compliance with positive obligation)

Article 10 (freedom of expression): States had positive obligations in relation to freedom of expression: they must not just refrain from any interference but must sometimes take protective measures even in the sphere of the relations of individuals between themselves. They were also required to create a favorable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear. In view of the authorities' failure to protect the journalist against the attack by members of an extreme nationalist group and his conviction in the absence of a pressing social need, the respondent State had not complied with its positive obligations with regard to the journalist's freedom of expression.

Conclusion: violation of Article 10 (non-compliance with positive obligation)

Death of a journalist allegedly as a result of a forced disappearance and failure of the authorities to protect his life

Gongadze v. Ukraine - 34056/02

8 November 2005

The applicant is the wife of a disappeared journalist, well known for his political independence and denunciation of corruption cases. She complained that the State authorities failed to protect the life of her husband.

The Court noted that the elements in its possession demonstrate with a high degree of probability that police officers were involved in his disappearance and murder. It noted that in an open letter of to the Prosecutor General, the disappeared journalist had reported several facts concerning the questioning of his relatives and colleagues by police officers about him and his surveillance by unknown persons. He had requested an investigation of these facts and the implementation of measures for his protection.

Despite clear indications in Mr Gongadze's letter about the inexplicable interest in him shown by law enforcement officers, the response of the investigative authorities was, in the eyes of the Court, not only formalistic, but also blatantly negligent. The authorities, primarily prosecutors, ought to have been aware of the vulnerable position in which a journalist who covered politically sensitive topics placed himself vis-à-vis those in power at the material time (as evidenced by the death of eighteen journalists in Ukraine since 1991). The Court considered therefore that the authorities failed to comply with their positive obligation to protect the journalist from a known risk to his life.

Conclusion: violation of Article 2 (non-compliance with positive obligation)

Death of a journalist and failure of the authorities to protect his life

Kılıç v. Turkey -22492/93

28 March 2000

The applicant alleged that the State was responsible, through lack of protection, for the death of his brother Kemal Kılıç, a journalist working for the newspaper Özgür Gündem.

The Court noted that Mr Kılıç had made a request for protection just two months before he had been shot dead by unknown gunmen. His petition showed that he had considered himself and others to be at risk because they worked for Özgür Gündem. Moreover, a 1993 report by a Parliamentary Investigation Commission informed the Prime Minister's Office that the authorities were aware of killings being carried out to eliminate alleged supporters of the PKK, including journalists. The Court noted the report provided strong substantiation for allegations, current at the time and since, that "contra-guerrilla" groups or terrorist groups were targeting individuals perceived to be acting against State interests, with the acquiescence, and possible assistance, of members of the security forces. Therefore, the authorities were aware, or ought to have been aware, of the risk to life incurred by Mr Kılıç derived from the activities of persons or groups acting with the knowledge or acquiescence of elements in the security forces. That said, the Court considered whether the authorities did all that could reasonably be expected of them to avoid that risk.

It found that, that, in addition to defects which removed the protection which Mr Kılıç should have received by law, there was an absence of any operational measures of protection. The Government disputed that they could have effectively provided protection against attacks. The Court was not convinced by this argument. It considered that a wide range of preventive measures were available which would have assisted in minimising the risk to Mr Kılıç's life and which would not have involved an impractical diversion of resources. On the contrary however, the authorities denied that there was any risk. There was no evidence that they took any steps in response to Mr Kılıç's request for protection either by applying reasonable measures of protection or by investigating the extent of the alleged risk to Özgür Gündem employees in with a view to taking appropriate measures of prevention.

The Court concluded that in the circumstances of this case the authorities failed to take reasonable measures available to them to prevent a real and immediate risk to the life of Mr. Kılıç.

Conclusion: violation of Article 2 (non-compliance with positive obligation)

Positive obligation to carry out effective investigations

Rizvanov v. Azerbaijan - 31805/06

17 July 2012

This case concerned an alleged failure of the domestic authorities to carry out an effective investigation

capable of identifying and punishing the police officer who had caused an Azeri journalist serious physical and mental suffering while he was covering a demonstration in Baku.

Prompt forensic examination was crucial as signs of injury might have disappeared rather quickly, resulting in the complete or partial loss of evidence before the forensic examination was carried out. Nevertheless, the applicant's complaint had not been handled with sufficient diligence: even though he brought his claim of ill-treatment to the Prosecutor General's Office in a prompt manner, the authorities failed to order a forensic examination until twenty-one days after the incident. A timely medical examination could have enabled the medical expert to reach a definitive conclusion as to the existence and time of infliction of the injuries. However, the investigation authorities refused on the one hand to attach any importance to the medical certificate provided by the applicant, while on the other hand they failed to procure a "proper" forensic report in a timely manner. In the Court's opinion, this deficiency undermined the overall effectiveness of the investigation.

The Court noted in addition several deficiencies in the criminal proceedings conducted at the domestic level. The reasoning provided for the prosecutor decision to discontinue the investigation did not contain any assessment of the witness testimonies in favour of the applicant. Furthermore, the investigation authorities ignored other evidence presented by the applicant, such as the tape recording and the photos, which prima facie appeared to be relevant.

Conclusion: violation of Article 3 (non-compliance with positive obligation)

Positive obligation to carry out effective investigations

**Najafli v. Azerbaijan - 2594/07
2 October 2012**

The case concerned a journalist who had been beaten by the police while covering an unauthorised demonstration in Baku. The criminal investigation was suspended on the grounds that the officers responsible for his injuries could not be identified. The Court noted that there had been significant procedural delays and the investigation had not been handled with sufficient diligence. There were also serious doubts as to whether the applicant had been informed of all the procedural steps in a timely manner. Most problematic, however, was the question of the independence and impartiality of the investigation: the task of identifying those responsible for the applicant's beating had been delegated to the same authority whose agents had allegedly committed the offence. The investigation had been suspended on inadequate grounds (an alleged inability to identify the police officers concerned). Lastly, the applicant had been deprived of the opportunity to effectively seek damages in civil proceedings, as he had been required to name specific police officers as defendants. That requirement had constituted an insurmountable obstacle, since the identification of those police officers was the task of the criminal investigation, which in that case was ineffective and lacked independence.

Conclusion: violation of Article 3 (non-compliance with positive obligation)

Positive obligation to carry out effective investigations

**Emin Huseynov v. Azerbaijan - 59135/09
7 August 2015**

The case concerned the alleged failure of the authorities to conduct effective investigations following the ill-treatment of a journalist arrested in Baku and subsequently admitted to intensive care in a hospital following his release from police custody.

The responding Government argued that it had taken the necessary steps to investigate Mr Huseynov's claim of ill-treatment by the police and had found that there was no need to institute criminal proceedings. However, according to the Court, the fact that the complaint was examined by an investigator – who apparently did not identify or question the police officers involved – from the same police station where the offence had allegedly occurred, and the fact that the spokesman for the Ministry of Internal Affairs told the media that Mr Huseynov had not been ill-treated even before the investigation was concluded, threw doubts on the independence and impartiality of the investigation.

Conclusion: violation of Article 3 (non-compliance with positive obligation)

Dismissal of a journalist and failure of domestic authorities to comply with their positive obligations

Fuentes Bobo v. Spain - [39293/98](#)

29 February 2000

The applicant was dismissed by the Spanish television company (TVE) because of his criticism of its management, which had been made during a radio programme. Various appeals by the applicant ended, in the last instance, with a judgment of the Constitutional Court, which dismissed an appeal *de amparo* by the applicant on the ground that there had been no violation of his right to the freedom of expression. The applicant complained that, among other things, his dismissal infringed his right to freedom of expression as set forth in Article 10 of the European Convention on Human Rights.

In response to a government argument that TVE was a legal person, the Court found that by virtue of its positive obligation, it was incumbent on the Spanish government to safeguard freedom of expression from threats stemming from private persons, meaning that the applicant's lawful dismissal constituted an interference with his freedom of expression.

Conclusion: violation of Article 3 (non-compliance with positive obligation)

Dismissal of trade-union members for publishing articles offending their colleagues - domestic authorities complied with their positive obligations

Palomo Sánchez and Others v. Spain [GC] – [28955/06, 28957/06, 28959/06 et al.](#)

12 September 2011

The applicants alleged that their dismissal, based on the content of a newsletter, had infringed their rights under Article 10, and that the real reason for their dismissal had been their trade-union activities, in violation of their right to freedom of assembly and association under Article 11.

The principal question was whether Spain was required to guarantee respect for the applicants' freedom of expression by annulling their dismissal. The measure complained of by the applicants, namely their dismissal, was not taken by a State authority but by a private company. Following the publication of the trade-union newsletter of March 2002 and the expressions contained therein, the disciplinary measure of dismissal for serious misconduct was taken against the applicants by their employer and confirmed by the domestic courts. Thus the applicants' dismissal was not the result of direct intervention by the national authorities. The responsibility of the authorities would nevertheless be engaged if the facts complained of stemmed from a failure on their part to secure to the applicants the enjoyment of the right enshrined in Article 10 of the Convention.

The Grand Chamber found no violation of Article 10, as in the particular circumstances of the case, the measure of dismissal taken against the applicants was not a manifestly disproportionate or excessive sanction capable of requiring the State to afford redress by annulling it or by replacing it with a more

lenient measure. The Court saw no reason to call into question the domestic courts' findings that the content of the newsletter had been offensive and capable of harming the reputation of others. A clear distinction had to be made between criticism and insult as the latter might, in principle, justify sanctions. Accordingly, the grounds given by the domestic courts had been consistent with the legitimate aim of protecting the reputation of the individuals targeted by the cartoon and articles in question, and the conclusion that the applicants had overstepped the limits of admissible criticism in labour relations could not be regarded as unfounded or devoid of a reasonable basis in fact.

Conclusion: no violation of Article 10 of the Convention (compliance with positive obligations)

Positive obligations : Failure of authorities to take adequate measures to enforce court order allowing journalists access to radio station

Frăsilă and Ciocîrlan v. Romania - [25329/03](#)

Judgment 10 May 2012

The first applicant was the manager of two companies, Radio M Plus and Tele M, which between them carried out various broadcasting activities. In August 2002, after Tele M had broadcast two reports about an influential local politician, the first applicant, who was facing financial pressure, was forced to sell the company in question. On the same day, the two companies formed a partnership for the production and transmission of radio programmes. The partnership agreement specified, among other things, that Radio M Plus, which was still managed by the first applicant and employed the second applicant as editor, was to continue broadcasting from its headquarters, which were in the same building as those of Tele M. However, from October 2002 onwards, both applicants were refused access to the radio station's editorial office by representatives of Tele M. In a decision of December 2002 the county court ordered Tele M to grant them access to the Radio M Plus editorial office. All attempts to enforce that decision were unsuccessful. Before the European Court, the applicants complained that the appropriate authorities had not provided them with effective assistance in securing the enforcement of the county court's final decision of December 2002, thereby preventing them from working as radio journalists and hence infringing their right to freedom of expression.

Although the authorities had not been directly responsible for the alleged restriction on the applicants' freedom of expression, it remained to be determined whether or not the respondent State had complied with any positive obligation it might have had to protect that freedom from interference by others. The case concerned the means by which to exercise the freedom of expression of a profession acknowledged by the Court as playing a crucial "watchdog" role in a democratic society. Moreover, the State was the ultimate guarantor of pluralism, especially in the audiovisual media, which often broadcast to a very large audience. This role became even more crucial where the independence of the press was jeopardised by outside pressure from those holding political and economic power. Accordingly, the Court attached particular importance to the fact that freedom of the press in Romania had been unsatisfactory at the relevant time, with the local press being directly or indirectly controlled by leading political or economic figures in the region. In the present case, the first applicant alleged that he had been pressured into selling his stake in a television company. In those circumstances, the State had been under an obligation to take effective steps to assist the applicants in securing the enforcement of the final decision in their favour.

The applicants had taken sufficient steps on their own initiative and made the necessary efforts to have the final decision enforced. However, the main legal means available to them, namely the bailiff system, had proved inadequate and ineffective. The bailiff had not called on the assistance of the police, as should have happened in view of the uncooperative attitude of the persons against whom the order had been made, and had taken no other steps to enforce the decision in question. By refraining from taking

the necessary effective measures to assist the applicants in the enforcement of the court decision, the national authorities had deprived the provisions of Article 10 of all useful effect and had hindered the applicants in pursuing their profession as radio journalists.

Conclusion: violation (non-compliance with positive obligations)

Additional information - European regulations and standards

- Recommendation of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers' Deputies
- Declaration of the Committee of Ministers on the protection of journalism and safety of journalists and other media actors, adopted by the Committee of Ministers on 30 April 2014 at the 1198th meeting of the Ministers' Deputies
- Resolution 2035 (2015) of the Parliamentary Assembly : Protection of the safety of journalists and of media freedom in Europe
- Resolution 1535 (2007) of the Parliamentary Assembly: "Threats to the lives and freedom of expression of journalists"
- OSCE Guidebook on Safety of Journalists (2014)