



Freedom of expression, the Media and Journalists

Case-law of the European Court of Human Rights

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Freedom of Expression, the Media and Journalists

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Foreword

It is my pleasure to introduce this new, fifth edition of the third e-book in the European Audiovisual Observatory's *IRIS Themes* series, prepared in collaboration with our partner organisation, the [Institute for Information Law \(IViR\)](#) of the University of Amsterdam.

The success of the first four editions has proved that a structured insight into the European Court of Human Rights' case-law on freedom of expression and media and journalistic freedoms has been a widely appreciated *vade mecum* on Article 10 of the **European** Convention on Human Rights. Our target group included lawyers, judges, law- and policy-makers, civil society actors, journalists and other media actors, academics, students, and indeed everyone with an interest in its subject matter. The high download figures (over 35,000 downloads in four years) as well as requests of translations have encouraged us to pursue on this path. The collection has therefore been widened to include the judgments or decisions that have been taken in the meantime.

This revised edition contains summaries of over 315 judgments or decisions by the Court and provides hyperlinks to the full text of each of the summarised judgments or decisions (via [HUDOC](#), the Court's online case-law database). It can be read in various ways: for initial orientation in the steadily growing Article 10 case-law; for refreshing one's knowledge of that case-law; for quick reference and checking, as well as for substantive research.

The summaries included in the e-book have been reported in [IRIS – Legal Observations of the European Audiovisual Observatory](#) between 1994 and 2019 and can be retrieved from our legal database, [IRIS Merlin](#). The summaries have not been re-edited for present purposes, although hyperlinks to other judgments or reference texts have been introduced, as relevant; subsequent developments (eg. referrals of Chamber judgments to the Grand Chamber) have been indicated, again as relevant, and the citational style has been standardised to conform with the Court's official reporting guidelines. Please see the [technical tips on page 3](#) in order to make optimal use of the navigational tools in this e-book.

The structure of the e-book is as follows:

1. [Table of cases](#): an overview of all the cases summarised, including bibliographic data, keywords, hyperlinks to the individual summaries and hyperlinks to the full texts of the judgments or decisions.
2. [Introduction by Dirk Voorhoof](#) to trends and developments in the European Court of Human Rights' case-law on [Article 10](#) of the European Convention on Human Rights in the period 1994-2019.
3. Compilation of case-law summaries.
4. [Appendices](#):

- I: [Cases reported in IRIS, but not included in the main selection](#) (i.e., cases that were struck off the list/in which friendly settlements were reached).
- II: [Overview of cases in alphabetical order](#).
- III: [Overview of cases by country](#).
- IV: [The European Convention on Human Rights](#) – full text (as amended by protocols).

Again, my warmest thanks go to Tarlach McGonagle (IViR), who not only conceived the idea of this e-book, but also designed and formatted it. I would like to thank him for his initiative and commitment. I am also very grateful to Dirk Voorhoof (Human Rights Centre, Ghent University and Legal Human Academy), who took care of the summaries of the judgments and the decisions of the Court. He has been a steadfast *IRIS* correspondent since the very early days of the publication and this e-book demonstrates the vast extent of his coverage of Article 10 case-law in *IRIS* over the years.

Thanks are also due to Rosanne Deen and Nanette Schumacher, former research interns at IViR, for their research assistance and for providing keywords and for standardising citations, respectively; to Ronan Ó Fathaigh, IViR, for providing keywords for new cases added to the third and fourth editions and for writing several of the new articles included in the present edition, and to Anne van der Sangen, research intern at IViR, who provided keywords for new cases in the present edition.

I would also like to remind readers of the focuses of the first two volumes in the *IRIS Themes* series: standard-setting on freedom of expression and the media by the Council of Europe's [\(I\) Committee of Ministers](#) and [\(II\) Parliamentary Assembly](#).

Strasbourg, April 2020

Maja Cappello

IRIS Coordinator

Head of the Department for Legal Information

European Audiovisual Observatory

**EUROPEAN COURT OF HUMAN RIGHTS
CASE-LAW ON ARTICLE 10, ECHR**

(arranged in chronological order)

Please note:

- Links in the first column lead directly to articles summarising the judgments or decisions in question.
- To navigate back to the page you were on before clicking on a link, either use the “backward” button in your toolbar (if you have one), or else click simultaneously on <Alt> + [arrow pointing left on the right-hand-side of your keyboard].
- Click on the link at the bottom of each summary to access the full text of the judgment or decision via the European Court of Human Rights’ HUDOC database.
- [Blue hyperlinks are to texts within this e-book](#); [red hyperlinks are to external sources](#).
- In the ‘Outcome’ column: V = Violation; NV = Non-Violation; I = Inadmissible. > GC indicates that the case was subsequently referred to the Grand Chamber of the Court in accordance with Article 43, ECHR. Whenever mentioned, numbers refer to ECHR articles other than Article 10.

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1	Otto-Preminger-Institut v. Austria	13470/87	20/09 /1994	NV	Cinema, blasphemous film, religion, artistic expression, margin of appreciation, art house cinema	Full text	47
2	Jersild v. Denmark	15890/89	23/09 /1994	V	News reporting, interviews, anti-racism, public watchdog, public function of press	Full text	48
3	Vereiniging Weekblad Bluf! v. the Netherlands	16616/90	09/02 /1995	V	National security, sensitive information, State secrets, impart information	Full text	49
4	Vereinigung Demokratischer Soldaten	15153/89	19/12 /1994	V	Political expression, critical reporting, criticism, rights of others, reputation	Full text	50

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6	Tolstoy Miloslavsky v. the United Kingdom	18139/91	13/07 /1995	V	Defamation, libel, crime reporting, disproportionate damages	Full text	52
7	Goodwin v. the United Kingdom	17488/90	27/03 /1996	V	Protection of sources, public interest, responsible journalism, chilling effect, whistle-blowing	Full text	53
8	Wingrove v. the United Kingdom	17419/90	25/11 /1996	NV	Blasphemous film, artistic expression, rights of others, general verification system for videos, political speech, public interest, margin of appreciation, morals or religion	Full text	55
9	De Haes & Gijssels v. Belgium	19983/92	24/02 /1997	V	Defamation, criticism, duties and responsibilities, mode of expression, exaggeration, provocation, authority and impartiality of the judiciary, protection of journalistic sources, alternative evidence	Full text	57
10	Oberschlick (No. 2) v. Austria	20834/92	01/07 /1997	V	Political expression, defamation, insult, offensive information, limits of acceptable criticism	Full text	58
11	Worm v. Austria	22714/93	29/08 /1997	NV	Authority and impartiality of the judiciary, journalism, prejudice, crime reporting, fair trial	Full text	59
12	Radio ABC v. Austria	19736/92	20/10 /1997	V	Private broadcasting, monopoly position of the media, positive obligations	Full text	60
13	Zana v. Turkey	18954/91	25/11 /1997	NV	Political expression, incitement to violence, terrorism	Full text	61

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15	Guerra v. Italy	14967/89	19/02 /1998	NV10; V8	Right to receive information, positive obligations, effective protection, privacy	Full text	61
16	Bowman v. the United Kingdom	24839/94	19/02 /1998	V	Political expression, monopoly position of the media, critical reporting	Full text	62
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18	Incal v. Turkey		09/06 /1998	V	Political expression, separatist propaganda, limits of acceptable criticism, public interest, hate speech	Full text	64
19	Ahmed & others v. the United Kingdom	22954/93	02/09 /1998	NV	Impart information, political expression, margin of appreciation	Full text	65
20	Hertel v. Switzerland	25181/94	25/08 /1998	V	Research paper, rights of others, necessity, commercial speech, academic freedom	Full text	66
21	Lehideux & Isorni v. France	24662/94	23/09 /1998	V	Advertisement, reputation, rights of others, abuse of rights, historical research, second world war	Full text	66
22	Steel & others v. the United Kingdom	24838/94	23/09 /1998	V	Necessity, public order, rule of law, authority of the judiciary, breach of peace, preventing disorder, rights of others	Full text	67
23	Fressoz & Roire v. France	29183/95	21/01 /1999	V	Confidential information, public interest, well-known information, privacy, journalistic ethics, tax reports, journalists committing offence and public interest	Full text	68
24	Janowski v. Poland	25716/94	21/01 /1999	NV	Journalism, insult, necessity, offensive and abusive verbal attacks	Full text	69

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26	Rekvényi v. Hungary	25390/94	20/05 /1999	NV	Politically neutral police force, national security, prevention of disorder	Full text	72
27	Arslan v. Turkey	23462/94	08/07 /1999	V	Offensive information, political expression, (separatist) propaganda, limits of acceptable criticism, right to receive information, duties and responsibilities, hate speech or promotion of violence, pluralism	Full text	73
28	Polat v. Turkey	23500/94	08/07 /1999	V	<i>Idem.</i>	Full text	73
29	Başkaya & Okçuoğlu v. Turkey	23536/94 and 24408/94	08/07 /1999	V	<i>Idem.</i>	Full text	73
30	Karataş v. Turkey	23168/94	08/07 /1999	V	<i>Idem.</i>	Full text	73
31	Erdoğdu and İnce v. Turkey	25067/94 and 25068/94	08/07 /1999	V	<i>Idem.</i>	Full text	73
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33	Okçuoğlu v. Turkey	24246/94	08/07 /1999	V	<i>Idem.</i>	Full text	73
34	Gerger v. Turkey	24919/94	08/07 /1999	V	<i>Idem.</i>	Full text	73

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37	Sürek v. Turkey (No. 2)	24122/94	08/07 /1999	V	<i>Idem.</i>	Full text	73
38	Sürek v. Turkey (No. 3)	24735/94	08/07 /1999	NV	<i>Idem.</i>	Full text	73
39	Sürek v. Turkey (No. 4)	24762/94	08/07 /1999	V	<i>Idem.</i>	Full text	73
40	Dalban v. Romania	28114/95	28/09 /1999	V	Political expression, exaggeration, criminal libel, duty of care for journalists, public function, privacy, public watchdog	Full text	75
41	Öztürk v. Turkey	22479/93	28/09 /1999	V	Political expression, incitement to crime, hatred or hostility, public interest, prevention of disorder or crime	Full text	75
42	Wille v. Liechtenstein	28396/95	28/10 /1999	V	Political expression, insult, critical reporting, public debate, margin of appreciation	Full text	77
43	Nilsen & Johnsen v. Norway	23118/93	25/11 /1999	V	Police brutality, defamation, receive and impart information, exaggeration, public debate, limits of acceptable criticism	Full text	77
44	Hashman & Harrup v. the United Kingdom	25594/94	25/11 /1999	V	Unlawful action, concept of behaviour contra bonos mores, foreseeability	Full text	77
45	T. v. the United Kingdom	24724/94	16/12 /1999	V 6	Fair trial, public interest	Full text	78
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48	Fuentes Bobo v. Spain	39293/98	29/02 /2000	V	Offensive information, criticism, horizontal effect of human rights, positive obligations, reputation, rights of others, employment relations, dismissal	Full text	80
49	Özgür Gündem v. Turkey	23144/93	16/03 /2000	V	Critical media reporting, separatist propaganda, racism, political expression, positive obligations, horizontal effect of human rights	Full text	80
50	Andreas Wabl v. Austria	24773/94	21/03 /2000	NV	Political expression, defamation, Nazism, offensive information	Full text	81
51	Bergens Tidende v. Norway	26132/95	02/05 /2000	V	Defamation, publication of photos, reputation, rights of others, good faith, public watchdog	Full text	82
52	Erdogdu v. Turkey	25723/94	15/06 /2000	V	Propaganda against the territorial integrity of the State, terrorism, access, receive information, prevention of disorder or crime	Full text	83
53	Constantinescu v. Romania	28871/95	27/06 /2000	NV	Criminal defamation, criticism, public debate, interview, rights of others, reputation	Full text	83
54	Sener v. Turkey	26680/95	18/07 /2000	V	Vital role of press, positive obligations, political expression, public interest, receive information	Full text	85
55	Tele 1 Privatfernsehgesellschaft MBH v. Austria	32240/96	21/09 /2000	V & NV	Allocation of broadcasting licence, impart information, monopoly position of the media	Full text	86

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58	Akkoç v. Turkey	22947/93 and 22948/93	10/10 /2000	NV	Interview, disciplinary sanction, separatist propaganda, incitement to violence, armed resistance or an uprising	Full text	89
59	Ibrahim Aksoy v. Turkey	28635/95, 30171/96 and 34535/97	10/10 /2000	V	Political expression, separatist propaganda, incitement to violence	Full text	89
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61	Jerusalem v. Austria	26958/95	27/02 /2001	V	Political expression, public debate, facts or value judgments	Full text	91
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63	Cyprus v. Turkey	25781/94	10/05 /2001	V	Conflict between State Parties, censorship of school-books, restricted distribution and importation media	Full text	93
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68	Thoma v. Luxembourg	38432/97	29/03 /2001	V	Responsible journalism, good name and reputation, quoting other media sources, public watchdog, public function of press	Full text	100
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73	Dichand & others v. Austria	29271/95	26/02 /2002	V	Political expression, criticism, offensive information, public interest, value judgments	Full text	104
74	Krone Verlag GmbH & Co. KG v. Austria	34315/96	26/02 /2002	V	Political expression, publication of photos, vital role of press, public interest, privacy	Full text	104
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103	Österreichischer Rundfunk v. Austria (dec.)	57597/00	25/05 /2004	I	Public broadcasting organisation, publication of photos without consent, private interest, neo-Nazism	Full text	138
104	Editions Plon v. France	56148/00	18/05 /2004	V	Privacy, public interest, medical confidentiality, journalistic ethics, rights of others	Full text	139
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258	Kaos GL v. Turkey	4982/07	22/11 /2016	V	Seizure of magazine, protection of minors, protection of public morals, LGBT, sexually explicit expression	Full text	398
259	Terentyev v. Russia	25147/09	26/01 /2017	V	Defamation proceedings, blogger, artistic criticism, statements of fact and value judgments	Full text	400
260	Selmani & Others v. the former Yugoslav Republic of Macedonia	67259/14	09/02 /2017	V	Forcible removal, journalists, press gallery, national parliament, protests, legitimate public concern, behaviour of elected representatives, necessary in democratic society	Full text	402
261	Rubio Dosamantes v. Spain	20996/10	21/02 /2017	V 8	Private life, positive obligations, television programme, public figure, disclosure of intimate details, sexual orientation	Full text	404
262	Orlovskaya Iskra v. Russia	42911/08	21/02 /2017	V	Electoral law, administrative offence, election campaigning, newspaper, normal journalistic coverage of a political debate	Full text	406
263	Rolf Anders Daniel Pihl v. Sweden (dec.)	74742/14	09/03 /2017	NV 8	Private life, positive obligations, website liability, anonymous online comment, chilling effect	Full text	408

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265	Milisavljević v. Serbia	50123/06	04/04 /2017	V	Criminal proceedings, insult, public figure, human rights activist, journalistic freedom of expression	Full text	412
266	Huseynova v. Azerbaijan	10653/10	13/04 /2017	V 2	Journalist murdered, right to life, positive obligations, failure to carry out an effective investigation, chilling effect	Full text	414
267	Herbert Haupt v. Austria (dec.)	55537/10	02/05 / 2017	NV 8	Private life, positive obligations, defamation, television comedy show, politician, artistic expression	Full text	416
268	Fouad Belkacem v. Belgium (dec.)	34367/14	27/06 /2017	NV	Criminal proceedings, incitement to discrimination, hatred and violence, public figure, YouTube videos, Article 17	Full text	418
269	Ghiulfer Predescu v. Romania	29751/09	27/06 /2017	V	Defamation, live television show, mayor, criminal groups, limits of acceptable criticism, public interest, sufficient factual basis, good faith, chilling effect	Full text	420
270	Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland [Grand Chamber]	931/13	27/06 /2017	NV 10 V 6	Privacy, personal data, taxation data, public interest, data journalism, magazine and SMS-service, extent of publication, processing of personal data, journalistic activities, margin of appreciation, fair balance, length of proceedings	Full text	422
271	Halldórsson v. Iceland	44322/13	04/07 /2017	NV	Defamation proceedings, journalist, audiovisual media, public figure, accurate factual basis, protection of journalistic sources	Full text	424

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274	Tamiz v. the United Kingdom (dec.)	3877/14	19/09 /2017	I	Anonymous defamatory comments, blog, personal honour and reputation, real and substantial tort, liability of information society service providers for illegal content.	Full text	430
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276	Fuchsmann v. Germany	71233/13	19/10 /2017	NV 8	Fair balance, allegations sufficiently serious, public figure, good faith	Full text	434
277	Frisk and Jensen v. Denmark	19657/12	05/12 /2017	NV	Incorrect factual basis, journalist, fair balance	Full text	436
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279	Magyar Kétfarkú Kutya Párt v. Hungary	201/17	23/01 /2018	V, >GC	Political party, communicative value, app for anonymously sharing photos of ballot papers, public interest, legitimate aim	Full text	440
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282	Alpha Doryforiki Tileorasi Anonymi Etairia v. Greece	72562/10	22/02 /2018	V 10 NV 10	Broadcast, secretly filmed, public figure, public place, private premises, fair balance	Full text	446

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287	Şahin Alpay v. Turkey	16538/17	20/03 /2018	V 5, 10	Journalist, critical views, arrest and pre-trial detention, military coup, public emergency threatening the life of the nation, danger democratic constitutional order, chilling effect, intimidation of civil society, silencing of dissenting voices	Full text	454

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289	GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland	18597/13	09/01 /2018	V	NGO, website quoting politician's speech, accusation of verbal racism, public debate, factual basis, chilling effect, fair balance	Full text	458
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291	Stern Taulats and Roura Capellera v. Spain	51168/15 and 51186/15	13/03 /2018	V	Burning photo of Spanish royal couple, criminal conviction, political expression, symbolic speech, permissible degree of provocation, not hate speech or incitement to hatred or violence	Full text	462
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293	Unifaun Theatre Productions Limited and Others v. Malta	37326/13	15/05 /2018	V	Theatrical production, blasphemous play, ban, not prescribed by law	Full text	466
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297	Centrum för Rättvisa v. Sweden	35252/08	19/06 /2018	NV 8, >GC	Confidentiality of online communication, privacy, surveillance, bulk interception, adequate and sufficient safeguards, margin of appreciation	Full text	475
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300	Savva Terentyev v. Russia	10692/09	28/08 /2018	V	Comments on blog, police officers, offensive, insulting and virulent, not incitement to hatred or violence, minor impact, criminal conviction, disproportionate, clear and precise definitions of offences	Full text	481

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304	E.S. v. Austria	38450/12	25/10 /2018	NV	Criminal conviction, disparagement of religious doctrines, Prophet Muhammad, paedophilia, margin of appreciation, co-existence of different religions, positive obligations, tolerance	Full text	488
305	Annen (No. 6) v. Germany	3779/11	18/10 /2018	NV	Anti-abortion campaigner, criminal conviction, online press release, stem cell research, personality rights, value judgements, public debate, margin of appreciation	Full text	490
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310	Richard Williamson v. Germany	64496/17	31/01 /2019 w	I	Broadcast television interview, YouTube, Holocaust denial, criminal conviction, Article 17, national historical context	Full text	501
311	Rebechenko v. Russia	10257/17	16/04 /2019	V	Blogger, YouTube video, reputation, political debate, good faith, value judgement, failure to analyse contents of video, discourage participation of the press, fair balance, pressing social need	Full text	503
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Introduction

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Since its inception in 1995, *IRIS – Legal Observations of the European Audiovisual Observatory* has given a prominent place to the European Court of Human Rights' (ECtHR, or 'the Court') jurisprudence on the right to freedom of expression and information, in particular as regards audiovisual media, film, journalism and more recently also online media. Its very first issue of January 1995 focused on two judgments with specific relevance for audiovisual media and film. The judgment in the case *Otto-Preminger-Institut v. Austria* (20 September 1994) concerned the seizure and forfeiture of a film (*Das Liebeskonzil*) considered blasphemous (at that time) by the Austrian authorities. The Court found no violation of [Article 10](#) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ('ECHR', or 'the European Convention'), that guarantees the right to freedom of expression and information. The ECtHR accepted the reasoning that the overwhelming majority of Tyroleans would be offended in their religious feelings by the mere fact of announcing and showing the film in a special featured programme in a *cinema*. In *Jersild v. Denmark* (23 September 1994), the ECtHR came to the conclusion that it was not necessary in a democratic society to convict a journalist for aiding and abetting in the dissemination of racist remarks made by extremist youths in a television programme. The Court was of the opinion that the punishment of a television news journalist for assisting in the dissemination of racist statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest. It also stated that it was not for the courts or judges "to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists" and that "**news reporting based on interviews**, whether edited or not, constitutes one of the most important means whereby the press is able to play its **vital role as public watchdog**". In this case, the ECtHR found a violation of Article 10 ECHR by the Danish authorities.

These were certainly not the first judgments of the ECtHR related to freedom of expression and information with special relevance for audiovisual media, film and journalism. Before 1995 when *IRIS* was launched, other landmark judgments on freedom of expression and media had already been delivered by the ECtHR, interpreting and applying the European Convention as a binding instrument of human rights protection in Europe. The ECtHR found violations of the right to freedom of expression and information in a series of interesting cases, such as: *Sunday Times no. 1 v. the United Kingdom* (26 April 1979; pre-trial reporting in the media); *Lingens v. Austria* (8 July 1986; right to criticise a politician and the distinction between allegations of facts and value-judgments, the latter not being susceptible of proof), and *Thorgeir Thorgeirson v. Iceland* (25 June 1992; the right to comment critically on alleged police brutalities).

The very first judgments with specific relevance for the **audiovisual media** were *Groppera Radio AG a.o. v. Switzerland* (28 March 1990) and *Autronic AG v. Switzerland* (22 May 1990). In *Groppera*, a ban on the retransmission by cable networks of the programmes of a Swiss radio station, having evaded the Swiss broadcasting law by establishing its transmitters in Italy, was not considered to be a violation of Article 10 ECHR. In *Autronic AG*, the refusal by the Swiss authorities to grant an authorisation to install a satellite dish for receiving television programmes broadcast by a telecommunications satellite was considered a violation of Article 10 ECHR, thereby explicitly recognising **the right to receive broadcast television programmes**. Many years later, in *Khurshid Mustafa and Tarzibachi v. Sweden* (16 December 2008), the Court emphasised the importance of

the right to receive **television programmes in one's own language** in a case where Swedish nationals of Iraqi origin had been forced to move from their rented flat as they had refused to remove a satellite dish in their flat after the landlord had initiated proceedings against them. The landlord considered the installation of a satellite antenna as a breach of the tenancy agreement that stipulated that "outdoor antennae" were not allowed to be set up on the house. The ECtHR, however, considered the eviction of the family as a disproportionate measure amounting to a violation of Article 10 ECHR.

One of the first ECtHR judgments to be brought to the attention of the *IRIS*-readership (*IRIS* 1996/4) was the judgment in the case of [Goodwin v. the United Kingdom](#). A few months earlier, the editorial in *IRIS* 1996/1 had already announced this forthcoming "landmark judgment" on the **protection of journalistic sources**. In its judgment of 27 March 1996, the ECtHR came to the conclusion that a disclosure order requiring a journalist to reveal the identity of his source and the fine imposed upon him for having refused to do so, constituted a violation of the right to freedom of expression and information as protected by Article 10 ECHR.

Another judgment reported in *IRIS* in 1996 was the case of [Wingrove v. the United Kingdom](#) (25 November 1996): the decision by the British Board of Film Classification (BBFC) to reject **classification of a blasphemous film** (*Visions of Ecstasy*) and hence the prohibition to distribute the film in the United Kingdom was not considered to be a breach of Article 10 of the Convention. It was certainly a controversial judgment at the time. In January 2012, the BBFC gave the film an 18-certificate, with no cuts or alterations to the original film's content, after the United Kingdom had repealed its blasphemy laws in 2008.

Over the last 25 years, *IRIS* has highlighted a long series of ECtHR judgments relating to freedom of expression, illuminating important developments and their consequences for media regulation and policy in the Council of Europe and its member states. In the first period, **1995-2000**, a substantial sample of the judgments dealing with freedom of expression, media and journalism could be reported on, selecting those cases with a general, important or innovative impact on the interpretation of Article 10 ECHR. Gradually, and especially **since 2001**, *IRIS* was confronted with an increasing amount of judgments being delivered by the European Court dealing with freedom of expression and information. As a strict selection had to be made every month, not all important judgments could be reported. Therefore, priority was given to those judgments with specific importance for the sector of film, broadcasting, audiovisual media services and later also the Internet. The selection of summaries of judgments dealing with Article 10 ECHR gives a valuable overview of the case-law in these fields, without excluding those judgments which are of general importance for the functioning of all media and journalism in a democratic society. The latter category of judgments includes the Court's case-law dealing with: **protection of journalistic sources** ([Goodwin v. the United Kingdom](#), [Roemen and Schmit v. Luxembourg](#), [Ernst a.o. v. Belgium](#), [Voskuil v. the Netherlands](#), [Tillack v. Belgium](#), [Financial Times a.o. v. the United Kingdom](#), [Sanoma Uitgevers B.V. v. the Netherlands](#), [Ressiot a.o. v. France](#), [Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands](#), [Saint-Paul Luxembourg S.A. v. Luxembourg](#), and more recently, [Nagla v. Latvia](#), [Görmüş a.o. v. Turkey](#), [Becker v. Norway](#) and [Big Brother Watch a.o. v. the United Kingdom](#)); **access to public or official documents** ([TASZ v. Hungary](#), [Kenedi v. Hungary](#), [Gillberg v. Sweden](#), [Youth Initiative for Human Rights v. Serbia](#), [Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria](#), [Roşianu v. Romania](#) and particularly the Grand Chamber judgment in [Magyar Helsinki Bizottság v. Hungary](#)) and **whistleblowing** ([Guja v. Moldova](#), [Matúz v. Hungary](#) and [Görmüş a.o. v. Turkey](#)). It also includes the case-law balancing the right to freedom of expression with the **right**

to privacy ([Peck v. the United Kingdom](#), [Radio France v. France](#), [Von Hannover no. 1](#), [no. 2](#) and [no. 3](#) v. Germany, [Plon v. France](#), [Tammer v. Estonia](#), [Radio Twist v. Slovakia](#), [Petrina v. Romania](#), [White v. Sweden](#), [Mosley v. the United Kingdom](#), [Avram a.o. v. Moldova](#), [Axel Springer AG no. 1 v. Germany](#), [Lillo-Stenberg and Sæther v. Norway](#), [Bohlen v. Germany](#), [Ernst August von Hannover v. Germany](#), [Couderc and Hachette Filipacchi Associés v. France](#), [Sousa Goucha v. Portugal](#) and [Rubio Dosamantes v. Spain](#)). Many other cases dealt with freedom of expression in relation to allegations of facts tarnishing the **good name and reputation** of others ([Perna v. Italy](#), [Pedersen and Baadsgaard v. Denmark](#), [Thoma v. Luxembourg](#), [Colombani v. France](#), [Klein v. Slovakia](#), [Mamère v. France](#), [Standard Verlags GmbH v. Austria](#), [Belpietro v. Italy](#), [Ristamäki and Korvola v. Finland](#), [Brosa v. Germany](#), [Salumäki v. Finland](#), [Axel Springer AG No. 2 v. Germany](#), [Erla Hlynsdóttir v. Iceland \(no. 3\)](#), [Morice v. France](#), [Niskasaari and Otavamedia Oy v. Finland](#), [De Carolis and France Télévisions v. France](#) and [Instytut Ekonomichnykh Reform, TOV v. Ukraine](#), [Terentyev v. Russia](#), [Pihl v. Sweden](#), [Ólafsson v. Iceland](#), [Milisavljević v. Serbia](#), [Halldórsson v. Iceland](#), [Ghiulfer Predescu v. Romania](#), [Herbert Haupt v. Austria](#), [Einarsson v. Iceland](#), [Frisk and Jensen v. Denmark](#), [Fuchsmann v. Germany](#), [Faludy-Kovács v. Hungary](#), [MAC TV s.r.o. v. Slovakia](#), [GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland](#), [Annen \(nos. 2 and 5\) v. Germany](#), [Annen \(no. 6\) v. Germany](#), [Egill Einarsson \(no. 2\) v. Iceland](#), [Høiness v. Norway](#) and [Tamiz v. the United Kingdom](#)) or disclosing **confidential information** ([Fressoz and Roire v. France](#), [Radio Twist v. Slovakia](#), [Stoll v. Switzerland](#), [Ricci v. Italy](#), [Pinto Coelho v. Portugal \(no. 2\)](#) and [Bédat v. Switzerland](#)). In a judgment of 28 June 2018, the ECtHR dismissed an Article 8 “right to be forgotten”-application in respect of online information on German media portals concerning a murder conviction of two persons ([M.L. and W.W. v. Germany](#)).

The Court also dealt with the (ab)use of **hidden cameras** ([Tierbefreier E.V. v. Germany](#), [Haldimann v. Switzerland](#) and [Alpha Doryforiki Tileorasi Anonymi Etairia v. Greece](#)) and with the making or publishing of pictures of suspects in crime or court reporting ([Axel Springer AG no. 1 v. Germany](#) and [Axel Springer SE and RTL Television GmbH v. Germany](#)). In other cases the Court determined the scope of the **right of newsgathering** by journalists and media workers, such as in [Dammann v. Switzerland](#), [Dupuis and others v. France](#), [Pentikäinen v. Finland](#), [Selmani and others v. the former Yugoslav Republic of Macedonia](#) and [Butkevich v. Russia](#). In [Szurovecz v. Hungary](#), the ECtHR has held that a refusal to grant a journalist access to an asylum seeker reception centre violated his right to freedom of expression under Article 10 ECHR. The ECtHR emphasized that newsgathering, including first-hand observation by a journalist reporting on a matter of significant public interest, is an essential part of journalistic research and press freedom. It also reiterated that the “watchdog” role of the media is a guarantee that the authorities can be held to account for their conduct. The Court’s findings in other cases show that journalists who commit (minor) offences during newsgathering activities, cannot invoke robust protection based on their rights to freedom of expression and information as guaranteed by Article 10 ECHR ([Diamant Salihu a.o. v. Sweden](#), [Brambilla a.o. v. Italy](#) and [Endy Gëşina-Torres v. Poland](#)).

In a case related to a violent attack on a journalist, the European Court reiterated that States, under their positive obligations of the Convention, are required to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear. Because of failures to carry out an effective investigation, the Court found that the criminal investigation of the journalist’s claim of ill-treatment was ineffective and that accordingly there had been a violation of Article 3 (prohibition of torture, or inhuman or degrading treatment) of the Convention under its procedural limb ([Uzeyir Jafarov v. Azerbaijan](#)). In other cases the Court found a violation of Article 2 ECHR (right to life). In [Huseynova v. Azerbaijan](#) it concluded that the domestic authorities had failed to carry out an adequate and effective investigation into the circumstances surrounding the killing of a

prominent independent journalist, and it held that there has been a violation of Article 2 ECHR under its procedural limb. [Khadija Ismayilova v. Azerbaijan](#) reveals how powerful persons and their environment sometimes use clearly illegal and immoral techniques in order to intimidate investigative journalists to make them stop critically reporting about their actions, policy or corruptive activities. The case mainly concerns a smear campaign against a well-known journalist, reporting about corruption and human rights violations in her country. The ECtHR found that the authorities had failed to comply with their positive obligations to protect the journalist's right to privacy and her freedom of expression under Article 8 and 10 ECHR.

It also became obvious that the impact of the European Convention on Human Rights increased as a result of the growing number of State Parties to the Convention in the 1990s, after the fall of the Berlin Wall in 1989. Consequently, the first judgments in which the ECtHR decided on alleged violations of Article 10 in the **new member states** were soon reported on in *IRIS*. In the new member states' transition towards democracy, transparency, pluralism and diversity, the Court's case-law demonstrated that the authorities in those states did not always adequately respect the right to freedom of expression and information (e.g., [Dalban v. Romania](#), [Feldek v. Slovakia](#), [Gaweda v. Poland](#), [Grinberg v. Russia](#), [Klein v. Slovakia](#), [Glas Nadezhda EOO & Elenkov v. Bulgaria](#), [Meltex Ltd. & Mesrop Movsesyan v. Armenia](#), [Filatenko v. Russia](#), [Manole a.o. v. Moldova](#), [Taranenko v. Russia](#), [Roşianu v. Romania](#), [Instytut Ekonomichnykh Reform, TOV v. Ukraine](#), [Terentyev v. Russia](#), [Selmani and others v. the former Yugoslav Republic of Macedonia](#), [Milisavljević v. Serbia](#), [Ghiulfer Predescu v. Romania](#), [Orlovskaya Iskra v. Russia](#), [Huseynova v. Azerbaijan](#), [Magyar Jeti Zrt v. Hungary](#), [Khadija Ismayilova v. Azerbaijan](#), [Brzeziński v. Poland](#) and [Szurovecz v. Hungary](#)). Reflecting the Court's case-law output, very often cases were reported in which the Court had found **violations by the Turkish authorities** regarding freedom of the media, the right of critical media reporting and freedom of (political) expression, such as in [Özgür Gündem v. Turkey](#), [Müslüm Gündüz v. Turkey](#), [Nur Radio and Özgür Radio v. Turkey](#), [Aydin Tatlav v. Turkey](#), [Nur Radyo Ve Televizyon Yayinciligi AS v. Turkey](#) and in [Bayar \(Nos. 1-8\) v. Turkey](#). In [Tuşalp v. Turkey](#), a case about a defamatory article criticising the Turkish Prime Minister, the Court came to the conclusion that the domestic courts had failed to establish convincingly any pressing social need for putting the Prime Minister's personality rights above the journalist's rights and the general interest in promoting the freedom of the press where issues of public interest are concerned. In 2018, the ECtHR delivered two important judgments in cases brought by two journalists detained in Turkey after the attempted coup d'état of 15 July 2016. In both cases, [Mehmet Hasan Altan v. Turkey](#) and [Şahin Alpay v. Turkey](#), it found a violation of the journalists' right to freedom of expression. The ECtHR clarified that the existence of a "public emergency threatening the life of the nation" must not serve as a pretext for limiting freedom of political debate, which is at the very core of the concept of a democratic society. Apart from Turkey also the record of the Russian Federation in terms of violations of the right to freedom of expression shows a deplorable approach by the authorities (see e.g. most recently [Kablis v. Russia](#), [Rebechenko v. Russia](#), [Butkevich v. Russia](#), [Stomakhin v. Russia](#), [Mariya Alekhina and others v. Russia](#), [Savva Terentyev v. Russia](#) and [Pryanishnikov v. Russia](#)).

In other judgments, the Court has made clear that **hate speech** is intolerable in a democratic society, whether it is directed against foreigners ([Féret v. Belgium](#)) or homosexuals ([Vejdeland a.o. v. Sweden](#)), or whether it concerns religious insult ([I.A. v. Turkey](#), [Fouad Belkacem v. Belgium](#) and [E.S. v. Austria](#)) or incitement to violence or terrorism ([Roj TV A/S v. Denmark](#)). Also a conviction for having published Nazi-symbols, accompanied with a picture and a quote from a notorious SS officer, as part of a vulgar and offensive blog post was not considered as a breach of Article 10 ECHR, the Court accepting that the German ban on symbols of unconstitutional organisations

was justified to maintain political peace and to prevent the revival of Nazism ([Hans Burkhard Nix v. Germany](#)). In [Richard Williamson v. Germany](#), the ECtHR found that the statements in an interview broadcast on Swedish television, published on YouTube and reported in German media, in which the applicant explicitly denied the existence of gas chambers and grossly minimized the killing of Jews under the Nazi regime could not count on the protection of the right to freedom of expression under Article 10 ECHR.

Some judgments found that too far-reaching restrictions had been imposed on **political advertising on television**, such as in [Verein gegen Tierfabriken v. Switzerland](#) and in [TV Vest SA and Rogaland Pensjonistparti v. Norway](#), while the Court accepted a general ban in Ireland on the broadcasting of **religious advertising** ([Murphy v. Ireland](#)) and a ban in the United Kingdom on **political advertising** on television ([Animal Defenders International v. the United Kingdom](#)). In [Sekmadienis Ltd. v. Lithuania](#), the ECtHR found in favour of an advertising company's freedom of commercial speech. The company had been imposed a fine for running a commercial campaign with religious symbols, containing a depiction of Christ and Mary likely to offend the feelings of religious people. According to the ECtHR, the advertisements did not appear to have been gratuitously offensive or profane, and nor had they incited hatred on the grounds of religious belief or attacked a religion in an unwarranted or abusive manner.

In [Orlovskaya Iskra v. Russia](#), the Court dealt with an application of the Russian Electoral Rights Act aimed at transparency of elections, including campaign finances, as well as at enforcing the voters' right to impartial, truthful and balanced information via mass media outlets. The Court found, however, that the application of the Electoral Rights Act interfered with a newspaper's editorial choice to publish a text taking a critical stance and to impart information and ideas on matters of public interest. The case of [Magyar Kétfarkú Kutya Párt v. Hungary](#) concerned a mobile app which allowed voters to anonymously share photographs of their ballot papers. The ECtHR held that a fine imposed on a political party for distributing the app had violated the party's right to freedom of expression. In [Brzeziński v. Poland](#), the Court held that there has been a violation of the applicant's right to freedom of expression as a politician, in election time. The case concerns in particular a provision in Poland's election law which allows a court, within 24 hours, to consider whether "untrue information" has been published, and to issue an order prohibiting its further distribution. This judgment illustrates that taking action against (alleged) "fake news", also in election periods, needs to respect the guarantees and safeguards of Article 10 ECHR.

In [Perinçek v. Switzerland](#), the Court ruled that Switzerland had violated Article 10 by convicting a Turkish politician of publicly denying the genocide against the Armenian people, distinguishing the genocide against the Armenian people from the negation of crimes of the **Holocaust**, committed by the Nazi regime. After referral, the Grand Chamber came to the conclusion that the statements at issue could not be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal law response in Switzerland. It confirmed the finding of a violation of Article 10 ECHR, while also emphasising that Article 17 of the Convention (abuse clause) can only be applied on an exceptional basis and in extreme cases, where it is "immediately clear" that freedom of expression is employed for ends manifestly contrary to the values of the Convention ([Perinçek v. Switzerland](#)). In some recent decisions, however, the Court has applied Article 17 ECHR. In [Fouad Belkacem v. Belgium](#), the ECtHR considered that Belkacem had attempted to deflect Article 10 of the Convention from its real purpose by using his right to freedom of expression for ends that were manifestly contrary to the spirit of the Convention. As the leader and spokesperson of the organisation "Sharia4Belgium", Belkacem had published a series of YouTube videos that incited to discrimination, hatred and

violence against non-Muslim groups and also promoted Sharia. In [E.S. v. Austria](#), the ECtHR referred to Article 9 ECHR (freedom of religion) that obliges the member states' authorities to ensure the peaceful co-existence of religious and non-religious groups and individuals under their jurisdiction by ensuring an atmosphere of mutual tolerance. The ECtHR agreed with the Austrian courts' approach that presenting objects of religious worship in a provocative way capable of hurting the feelings of the followers of that religion could be conceived as a malicious violation of the spirit of tolerance. From this perspective a criminal conviction because of an abusive attack on an object of religious veneration can be justified as necessary in a democratic society. In the Pussy Riot-case ([Mariya Alekhina and Others v. Russia](#)) the ECtHR found that the feminist punk band's pop-up performance in a cathedral could not be considered as incitement to religious hatred or violence. It also found that the punk band's right to freedom of expression has been violated on account of declaring the Pussy Riot video material available on the Internet as extremist and banning it. In [Stern Taulats and Roura Capellera v. Spain](#), the ECtHR came to the conclusion that the act of setting fire to a photograph of the royal couple during an anti-royalist demonstration neither constituted incitement to hatred or violence, as an act of this type should be interpreted as the symbolic expression of dissatisfaction and protest. The ECtHR held that the criminal conviction of the applicants for insult of the Crown was not necessary in a democratic society. In [Sinkova v. Ukraine](#), the ECtHR however concluded that a conviction for a performance-art protest at a war memorial, which had been filmed and published online, legitimately aimed at protecting morals and the rights of others and did not violate Article 10 ECHR.

Some cases relate to morality and forms of prior restraint. In [KAOS GL v. Turkey](#), the Court found that the aim of protecting public morals relied upon by the Turkish authorities had been insufficient to justify the prior censorship of an LGBT-magazine for more than five years. In [Unifaun Theatre Productions Limited and Others v. Malta](#), the ECtHR delivered a judgment regarding a peculiar application of the Maltese Cinema and Stage Regulations, banning the performance of a theatre play containing scenes that affected the morality and decency of the entire production. In [Pryanishnikov v. Russia](#), the Court delivered a judgment about the refusal to grant a film reproduction licence to a Russian film producer on the ground that he was suspected of producing and distributing pornographic films.

Other issues reflected in the ECtHR's case-law that have been regularly reported in *IRIS* concern: **media pluralism, non-discriminatory allocation of frequencies or broadcasting licences**, decisions by **independent media regulators** and procedural safeguards against arbitrary applications of media law provisions (e.g. [Demuth v. Switzerland](#), [Glas Nadezhda EOOD and Elenkov v. Bulgaria](#), [Meltex Ltd. & Mesrop Movsesyan v. Armenia](#), [Nur Radyo v. Turkey](#), [Özgür Radyo v. Turkey](#), [Manole a.o. v. Moldova](#), [Nur Radyo Ve Televizyon Yayincılığı A.Ş. v. Turkey](#), [RTBF v. Belgium](#) and [Sigma Radio Television Ltd. v. Cyprus](#)). In [Centro Europe 7 S.r.l. and Di Stefano v. Italy](#), the Grand Chamber of the ECtHR clarified that a situation whereby a powerful economic or political group in society is permitted to obtain a position of dominance over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom, undermines the fundamental role of freedom of expression in a democratic society, as enshrined in Article 10 ECHR. In a decision, the ECtHR confirmed the competence of a media regulatory body to interfere, in a proportionate way, with a journalist's or a radio station's freedom of expression. In the case at issue Ofcom, the independent regulator and competition authority for the United Kingdom communications industries, had launched an investigation into a radio interview about which it had received a series of complaints. Ofcom concluded that the broadcast had breached the Broadcasting Code, as it had amounted to gratuitous and offensive insult without contextual content or justification. No sanction or penalty was imposed either on the radio station or the

journalist other than the publication of the decision by Ofcom ([Jon Gaunt v. the United Kingdom](#)). In another judgment the Court found Sweden to be in breach of the European Convention because it had denied access to court for a person who wanted to bring defamation proceedings in Sweden arising out of the content of a trans-border television programme service (TV3) resorting under the jurisdiction of the United Kingdom. The European Court is of the opinion that requiring a Swedish national to bring defamation proceedings in the UK courts following an alleged defamatory TV programme broadcast by the London-based company Viasat Broadcasting UK, but targeting mostly, if not exclusively, a Swedish audience, was not reasonable and violated Article 6 § 1 ECHR, guaranteeing access to court ([Arlewin v. Sweden](#)).

In recent years, the cases reported in *IRIS* have also reflected the growing impact of the **Internet** and some of the specific legal issues related to it, such as in [Times Newspapers Ltd., nos. 1 & 2 v. the United Kingdom](#), in which the Court accepted the application of the so-called “*Internet publication rule*”, a British common-law rule according to which each publication of a defamatory statement can give rise to a separate cause of action, with the implication that a new cause of action accrues every time the defamatory material is accessed on the Internet. The Court recognised the importance of the media’s internet archives for education and historical research, emphasising the duty of the media to act in accordance with the principles of responsible journalism, including by ensuring the accuracy of historical information (see also [M.L. and W.W. v. Germany](#)). Another relevant case, also reported on in *IRIS*, was [Karttunen v. Finland](#), on the criminalisation of the possession and reproduction of child pornography, freely downloaded from the Internet, and its compatibility with freedom of (artistic) expression. In [Mouvement raëlien Suisse v. Switzerland](#), the Court found that the (illegal) content on a website referred to on a poster distributed by an organisation could help to justify the Swiss authorities’ decision to ban a poster campaign by that organisation. In this judgment, the Court also reiterated that the authorities are required, when they decide to restrict fundamental rights, to choose the means that cause the least possible prejudice to the rights in question. In [Prezhdarovi v. Bulgaria](#) the Court concluded that the confiscation of computers containing illegal software was not in accordance with the law and deprived the applicants of sufficient safeguards against abuse of their right to privacy. The Court has also delivered judgments with an important impact on Internet regulation and freedom of expression on the Internet, such as cases related to copyright protection in [Ashby Donald a.o. v. France](#) and [Neij and Sunde Kolmissopi \(The Pirate Bay\) v. Sweden](#), or in online defamation cases in [Węgrzynowski and Smolczewski v. Poland](#), [Terentyev v. Russia](#), [Fuchsmann v. Germany](#), [Annen \(no. 6\) v. Germany](#) and [Egill Einarsson \(no. 2\) v. Iceland](#).¹ [Delfi AS v. Estonia](#) concerns the liability of an Internet news portal for offensive comments that were posted by readers below one of its online news articles. The news portal was found liable for violating the personality rights of a plaintiff, although it had expeditiously removed the grossly offending comments posted on its website as soon as it had been informed of their insulting character. The [Grand Chamber of the Court](#) found that the news portal was not exempt from liability for grossly insulting remarks in its readers’ online comments. As Delfi’s involvement in making public readers’ comments on its news portal went beyond that of a passive, purely technical service provider, the provisions on the limited liability of ISPs did not apply. Delfi’s activities reflected those of a media publisher, running a commercially organised internet news portal and it was therefore held liable for the manifest expressions of hatred and threats to other persons’ physical integrity as expressed in its readers’ online comments ([Delfi AS v. Estonia](#)). In [Magyar](#)

¹ More information on the case-law of the ECtHR dealing with online media and ICT can be found in the Fact Sheet, “[New technologies](#)”, European Court of Human Rights Press Unit. Other interesting [fact sheets](#) focus on the Court’s case law regarding the protection of personal data, the right to the protection of one’s image, hate speech and the protection of journalistic sources.

[Tartalomsgálatók Egyesülete and Index.hu Zrt v. Hungary](#) the Court decided that a self-regulatory body and an Internet news portal were not liable for the offensive comments posted by their readers on their respective websites. The ECtHR found that by holding MTE and Index.hu liable for the alleged defamatory comments, the Hungarian courts had violated the right to freedom of expression. In [Pihl v. Sweden](#), the Court also applied a crucial distinction between illegal hate speech and defamation, limiting the liability of the operator of a blog when it (only) concerns defamation, and not incitement to violence (see also [Tamiz v. the United Kingdom](#) and [Høiness v. Norway](#)).

In [Cengiz a.o. v. Turkey](#) the Court found that the blocking of access to YouTube in Turkey for a period of more than two years amounted to a violation of the right to receive and impart information under Article 10 ECHR. The Court observed that YouTube as an Internet platform enabled information on political and social matters to be broadcast and citizen journalism to emerge. It found that there was no provision in the Turkish law allowing the domestic courts to impose the blanket blocking order of YouTube at issue. Also in [Ahmet Yildirim v. Turkey](#) and in [Kalda v. Estonia](#) the ECtHR guaranteed the right of access to the Internet.

Another interesting case is [Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland](#), on data protection and data journalism. A decision issued by the Finnish Data Protection Board that prohibited two media companies from publishing personal taxation data in the manner and to the extent the media companies had published these data before, was considered as a legitimate interference with the applicants' right to freedom of expression and information. The European Court agreed with the Finnish authorities that the applicants could not rely on the exception of journalistic activities (compare with CJEU 16 December 2008, [Case C-73/07](#)), as the publication of a too large amount of taxation data was not justified by a public interest. In [Ivashchenko v. Russia](#), the ECtHR found a violation of Article 8 ECHR (**right to privacy**) because of the inspection and copying of a journalist's laptop and storage devices by customs officials, without a reasonable suspicion that the laptop or the devices contained any 'extremist material'. In [Catt v. the United Kingdom](#), the collection, retention and further use of personal data of a political activist, for purposes of police intelligence, was found in breach of Article 8, while two other cases on **bulk interception** of personal communications for intelligence purposes have been referred to the Grand Chamber of ECtHR ([Centrum för Rättvisa v. Sweden](#) and [Big Brother Watch and Others v. the United Kingdom](#)).

The ECtHR has also dealt with a series of cases on **radical or extremist speech on the Internet**. In [Rebechenko v. Russia](#), the ECtHR valued the statements of a blogger as those of a "public watchdog". In [Mariya Alekhina and others v. Russia](#), the Court was of the opinion that declaring Pussy Riot's online video materials "extremist" and placing a ban on access to them violated Article 10 ECHR. In [Savva Terentyev v. Russia](#), the ECtHR has recognized a very high level of free speech-protection for insulting comments about police officers published on a blog spot. It confirmed that some of the wording in the blog spot was offensive, insulting and virulent, but it found that the (emotional) comments as a whole could not be seen as inciting to hatred or violence against police officers.

The ECtHR has recently issued another landmark judgment on freedom of expression in the digital environment. In the case of [Magyar Jeti Zrt v. Hungary](#), it made clear that holding media companies automatically liable for defamatory content hyperlinked in their reports violates the right to freedom of expression under Article 10 ECHR. The Court emphasized the very purpose of **hyperlinks** to allow Internet users to navigate to and from online material and to contribute to

the smooth operation of the Internet by making information accessible through linking it to each other.

The Court's case law regarding audiovisual media, media pluralism and freedom of expression in the online environment confirm the importance of the application of Article 10 of the European Convention for the economic, technical and regulatory developments in the European media landscape. The central issue remains that there should not be any restrictive interferences with the right to freedom of expression and information, unless it can be pertinently justified that the interference at issue is "necessary in a democratic society", without creating a risk of chilling effect. It is expected that the European Court of Human Rights will keep up its high standards of protection and promotion of the right to freedom of expression and information, also in the new media environment. Article 10 ECHR is a living and dynamic instrument for the protection of the right to freedom of expression and information in Europe's democracies. *IRIS* and the European Audiovisual Observatory will therefore continue reporting on the Court's case-law related to media, journalism and the Internet. This e-book has the ambition to be a useful tool for judges, prosecutors, lawyers, media professionals, policy makers and media regulators, as well as for students in journalism and law schools, to be informed and updated about the developments in the jurisprudence of the ECtHR on media, journalism and freedom of expression and to keep both a sharp eye and an aerial view over this domain of law and media practice which is crucial in our liberal democracies.

European Court of Human Rights: Seizure of "blasphemous" film does not violate Article 10 ECHR

Ad van Loon

European Audiovisual Observatory

In its judgment of 20 September 1994, the European Court of Human Rights held that the seizure and forfeiture of the film *Das Liebeskonzil* in May 1985 by the Austrian authorities, was not a violation of Article 10 of the European Convention on Human Rights.

In this case, the applicant - the Otto-Preminger-Institut für audiovisuelle Mediengestaltung (OPI) - had planned to show the film, in which God the Father is presented as old, infirm and ineffective, Jesus Christ as a 'mummy's boy' of low intelligence and the Virgin Mary as an unprincipled wanton. They conspire with the Devil to punish mankind for its immorality.

At the request of the Innsbruck diocese of the Roman Catholic Church, the Public Prosecutor instituted criminal proceedings against OPI's manager on charge of "disparaging religious doctrines" and seized the film under section 36 of the Austrian Media Act. On 10 October 1986 the Austrian Regional Court ruled that, since artistic freedom cannot be unlimited, in view of "the particular gravity in the instant case - which concerned a film primarily intended to be provocative and aimed at the Church - of the multiple and sustained violation of legally protected interests, the basic right of artistic freedom will in the instant case have to come second." The European Court of Human Rights accepted that the impugned measures pursued a legitimate aim under Article 10 par. 2, namely "the protection of the rights of others", i.e., the protection of the right of citizens not to be insulted in their religious feelings by the public expression of views of others. The Court ruled that the Austrian courts, when ordering the seizure and subsequent forfeiture of the film, justifiably held it to be an abusive attack on the Roman Catholic religion according to the conception of the Tyrolean public. Since their judgments show that the Austrian courts had due regard to the freedom of artistic expression and the content of the film can support the conclusions arrived at by the national courts, the Court ruled that the seizure does not constitute a violation of Article 10. In view of all the circumstances in this case, the Court considered that the Austrian authorities had not overstepped their margin of appreciation. This reasoning was also applied to the forfeiture of the film, which is said to be the normal sequel to the seizure.

- [Otto-Preminger-Institut v. Austria](#), 20 September 1994, Series A no. 295-A.

IRIS 1995-1/1

European Court of Human Rights: Journalistic coverage of racist statements protected by Article 10 ECHR

Ad van Loon

European Audiovisual Observatory

On 23 September 1994 the European Court of Human Rights ruled that the conviction and sentence of a fine to a Danish television journalist for aiding and abetting the dissemination of racist statements, constituted a violation of Article 10 of the European Convention for the protection on Human Rights. The journalist, Mr Jersild, had interviewed a group of young racists ("the Greenjackets") for the Sunday News Magazine, which interview was broadcast on 21 July 1985 on Danish television. The three youths interviewed by the applicant were charged with violating the Danish Penal Code for making racist statements and the journalist was subsequently charged with aiding them. On 24 April 1987 the Danish City Court sentenced the applicant to a fine of 1.000 Danish Krone because he had encouraged "the Greenjackets" to express their racist views and he had been well aware in advance that discriminatory statements of a racist nature were likely to be made during the interview.

The European Court of Human Rights focussed on the question whether the measures against the applicant were "necessary in a democratic society". The Court said that news reporting based on interviews constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog". The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to the discussion of matters of public interest. Taking the circumstances of the case into consideration, the Court held that the reasons for the applicant's conviction and sentence were not sufficient to establish convincingly that the interference with Mr Jersild's right to freedom of expression was "necessary in a democratic society". In particular, the means employed were considered disproportionate to the aim of protecting "the reputation or rights of others".

- [Jersild v. Denmark](#), 23 September 1994, Series A no. 298.

IRIS 1995-1/2

European Court of Human Rights: Bluf! v. the Netherlands

Ad van Loon

European Audiovisual Observatory

On 9 February 1995, the European Court of Human Rights ruled that the seizure by the Dutch authorities of the circulation of an issue of a left-wing weekly, containing a report of the Dutch internal security service, constituted a violation of Article 10 of the ECHR. In the Spring of 1987 the weekly, called Bluf!, got access to a quarterly report of the Dutch internal security service, which Bluf! decided to publish as a supplement to the issue of 29 April 1987. However, the Amsterdam Regional Court (Rechtbank) ordered the seizure of the circulation of the issue concerned before it was sent out to subscribers. Because the police had failed to take away the offset plates from the printing press, the staff of Bluf! managed to reprint the issue. The reprinted issues were sold on the streets of Amsterdam the next day, which was the Queen's birthday, a national holiday. The authorities decided not to put a stop to this circulation so as to avoid any public disorder. The request for the return of the confiscated copies was dismissed; the Dutch Supreme Court (Hoge Raad) held that the seizure of printed matter to be distributed was, in this case, justified under the Dutch Criminal Code. The European Court of Human Rights noted that the seizure amounted to an interference in Bluf!'s freedom to impart information and ideas. The Court ruled that, although the interference was "prescribed by law" and pursued a legitimate aim (the protection of national security), the seizure and withdrawal was not "necessary in a democratic society" and therefore constituted a violation of Article 10 ECHR. The Court based this ruling on its doubt whether the information in the report was sufficiently sensitive to justify preventing its distribution, and furthermore on the fact that, since the issue was reprinted and distributed, the information in question was made accessible to a large number of people; as a result, protecting the information as a State secret was no longer justified and the withdrawal of the issue no longer necessary to achieve the legitimate aim pursued.

- [Vereniging Weekblad Bluf! v. the Netherlands](#), 9 February 1995, Series A no. 306-A.

IRIS 1995-3/6

European Court of Human Rights: Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria

Ad van Loon

European Audiovisual Observatory

The European Court of Human Rights has held that the refusal of Austria to distribute a special interest magazine among Austrian soldiers, constituted a violation of Article 10 of the European Convention on Human Rights. The monthly magazine, called der Igel (the hedgehog) was aimed at the soldiers serving in the Austrian army; it contained information and articles - often of a critical nature - on military life. In 1987, the organisation that published der Igel requested the Austrian Federal Defence Minister to have der Igel distributed in the barracks in the same way as the other two military magazines. The minister decided that he would not authorise such a distribution. In his opinion, only publications adhering to the constitutional duties of the army, which did not damage its reputation and which did not lend column space to political parties, should be supplied on military premises. The second applicant in this case, Mr Gubi - at that time fulfilling his national service - had been ordered to stop the distribution of issue No. 3/87 of der Igel in his barracks. A disciplinary penalty for distributing the magazine was imposed on Mr Gubi, because of certain guidelines prohibiting the distribution of any publication in the barracks without prior authorisation of the commanding officer.

The European Court of Human Rights held that the refusal by the Minister of Defence to allow the distribution of der Igel in the same way as other magazines distributed by the army was disproportionate of the legitimate aim pursued. Prohibiting Mr Gubi to distribute the magazine also constituted a breach of Article 10 of the Convention, since the interference was not "necessary in a democratic society".

- [Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria](#), 19 December 1994, Series A no. 302.

IRIS 1995-3/7

European Court of Human Rights: Case of Prager and Oberschlick vs Austria

Ad van Loon

European Audiovisual Observatory

On 26 April 1995, the European Court of Human Rights held - by five votes to four - that Austria did not violate Article 10 of the European Convention for the protection of human rights and fundamental freedoms (freedom of expression) by fining a journalist and a publisher for publishing a defamatory article.

On 15 March 1987 the periodical Forum published an article by Mr Prager, which contained criticism of the judges sitting in the Austrian criminal courts, including an attack on Judge "J". Following an action for defamation brought by judge "J"., Mr Prager and Mr Oberschlick - publisher of Forum - were sentenced to pay fines and damages. The Regional Court also ordered the confiscation of the remaining stocks of the relevant issue of Forum. The Court ruled that the interference in the applicants' freedom of expression was "prescribed by law" and that the aim pursued (protection of a reputation and maintenance of the authority of the judiciary) was legitimate.

Although freedom of expression also applies to offensive information or ideas, the interference in this case was deemed not to be disproportionate to the legitimate aim pursued, and was therefore held to have been "necessary in a democratic society". In conclusion, the Court found that no violation of Article 10 was established.

- [*Prager and Oberschlick v. Austria*](#), 26 April 1995, Series A no. 313.

IRIS 1995-6/6

European Court of Human Rights: Defamation Award of £1.5m Violates Article 10 of the European Convention on Human Rights (Freedom of Expression)

Ad van Loon

European Audiovisual Observatory

In its judgment of 13 July 1995, the European Court of Human Rights has held that a defamation award of £1.5m constituted a violation of Article 10. The Court found that the award, having regard to its size taken in conjunction with the state of national (UK-) law at the relevant time, was not 'necessary in a democratic society' and thus was a violation of the applicant's rights under Article 10. The applicant, count Tolstoy Miloslavsky, wrote in March 1987 a pamphlet in which he accused lord Aldington of war crimes. An English jury awarded lord Aldington £1.5m in damages, which was approximately three times the largest amount previously awarded by an English libel jury. Having regard to the size of the award in this case in conjunction with the lack of adequate and effective safeguards at the relevant time against a disproportionately large award, the Court found that there had been a violation of the applicant's rights under Article 10 of the Convention.

- [*Tolstoy Miloslavsky v. the United Kingdom*](#), 13 July 1995, Series A no. 316-B.

IRIS 1995-8/4

European Court of Human Rights: The journalist's sources protected by Article 10 of the European Convention on Human Rights

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In its judgment of 27 March 1996 the Grand Chamber of the European Court of Human Rights with an 11 to 7 majority came to the conclusion that a disclosure order requiring a British journalist to reveal the identity of his source and the fine imposed upon him for having refused to do so, constitutes a violation of the freedom of expression and information as protected by Article 10 of the European Convention for the protection of human rights and fundamental freedoms.

In 1990 William Goodwin, a trainee-journalist working for "The Engineer", was found guilty by the House of Lords of Contempt of Court because he refused to disclose the identity of a person who previously supplied him with financial information derived from a confidential corporate plan of a private company. According to the House of Lords, the necessity of obtaining disclosure lay in the threat of severe damage to the private company which would arise if the information contained in their corporate plan was disseminated while their refinancing negotiations were still continuing. The disclosure order was estimated to be in conformity with Section 10 of the Contempt of Court Act of 1981, as the disclosure was held to be necessary in the interest of justice.

The European Court of Human Rights, however, is of the opinion that the impugned disclosure order is in breach of Article 10 of the European Convention on Human Rights. Although the disclosure order and the fine imposed upon Goodwin for having refused to reveal his source are "prescribed by law" and pursue a legitimate aim ("the protection of the rights of others"), the interference by the English courts in Goodwin's freedom of expression and information is not considered as necessary in a democratic society. The majority of the Court, and even the joint dissenters, firmly underline the principle that "protection of journalistic sources is one of the basic conditions for press freedom" and that "without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest". In its judgment the Court emphasizes that without protection of a journalist's sources "the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected". The Court considers that a disclosure order cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest. As the Court pointed out : "In sum, limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court". The European Court in casu is of the opinion that the interests of the private company in eliminating, by proceedings against the source, the (residual) threat of damage through dissemination of the confidential information, are not sufficient to outweigh the vital public interest in the protection of the applicant journalist's source.

The judgment of the European Court in the Goodwin case gives important and additional support in favour of the protection of journalistic sources as reflected already in some national laws and in international policy instruments on journalistic freedoms (see, for example, the Resolution of the European Parliament on the Confidentiality of Journalists' Sources, [OJEC, 14 February 1994, No C 44: 34](#) and the Resolution on Journalistic Freedoms and Human Rights, adopted in the framework of the [Council of Europe's Conference of ministers responsible for media policies, held in Prague, 7-8 December 1994](#) (see: [IRIS, 1995-1: 4](#)).

- [Goodwin v. the United Kingdom](#), 27 March 1996, *Reports of Judgments and Decisions* 1996-II.

IRIS 1996-4/4

European Court of Human Rights: Banning of blasphemous video not in breach of freedom of (artistic) expression

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On 25 November 1996, the European Court of Human Rights decided in the *Wingrove* case that the refusal to grant a distribution certificate in respect of a video work considered blasphemous, was not in breach of Article 10 of the European Convention of Human Rights (see also the decision by the European Court of Human Rights in the Case of [Otto Preminger vs. Austria](#) of 20 September 1994, Series A vol. 295, IRIS 1995-1: 3).

Nigel Wingrove, a film director residing in London, was refused a certificate by the British Board of Film Classification, because his videofilm "Visions of Ecstasy" was considered as blasphemous. The film evokes the erotic fantasies of a sixteenth century Carmelite nun, St Teresa of Avila, her sexual passions in the film being focused inter alia on the figure of the crucified Christ. As a result of the Board's determination, Wingrove would have committed an offence under the Video Recordings Act 1984 if he were to supply the video in any manner, whether or not for reward. The director's appeal was rejected by the Video Appeals Committee. Wingrove applied to the European Commission of Human Rights, relying on Article 10 of the European Convention for the protection of human rights and fundamental freedoms.

Although the Commission in its [report of 10 January 1995](#) (see [IRIS 1995-5: 4](#)) expressed the opinion that there had been a violation of Article 10 of the Convention, the Court comes to the conclusion, by seven votes to two, that there had been no violation of the applicant's freedom of (artistic) expression, the British authorities being fully entitled to consider that the impugned measure was justified as being necessary in a democratic society for the protection of the rights of others. The Court underlined that whereas there is little scope for restrictions on political speech or on debate of questions of public interest, a wider margin of appreciation is available to the national authorities restricting freedom of expression in relation to matters within the sphere of morals or especially, religion. The Court also took into consideration that the English law on blasphemy does not prohibit the expression, in any form, of views hostile to the Christian religion: it is the manner in which these views are advocated which makes them blasphemous.

On the other hand the Court did not find a counter argument in the fact that legislation on blasphemy exists only in few other European countries and that the application of these laws has become increasingly rare. Furthermore, the Court had no problem with the fact that the English law on blasphemy only extends to the Christian faith. Neither did the Court estimate the measure as disproportionate, although it was recognised that the measures taken by the authorities amounted to a complete ban of the film's distribution. Such a far-reaching measure involving prior restraint, was considered as necessary, because otherwise in practice, the film would escape any form of control by the authorities. The measure in other words had to be far-reaching in order to be effective. Having viewed the film for itself, the Court is satisfied that the decisions by the national authorities cannot be considered to be arbitrary or excessive. The Court ultimately reached the conclusion that the British authorities did not overstep their margin of appreciation and that the impugned measure against "Visions of Ecstasy" was not a violation of Article 10 of the Convention.

- [Wingrove v. the United Kingdom](#), 25 November 1996, *Reports of Judgments and Decisions* 1996-V.

IRIS 1997-1/8

European Court of Human Rights: The right of the press to criticise the courts

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On 24 February 1997 the European Court of Human Rights delivered its judgment in the case of two journalists on Humo the weekly publication against Belgium. The case concerned the order that two journalists pay damages and interest for the defamation of four judges of the Antwerp Court of Appeal. The applicants had been ordered by the Brussels Court of Appeal to pay the token sum of one Belgian franc in non-material damages, and to have the judgment published in the weekly publication Humo and six daily newspapers, at the applicants' expense. The judgment was upheld by the Court of Cassation. The Belgian courts felt that the journalists were at fault in attacking the honour and the reputation of the complainant judges by unjustifiable accusations and offensive insinuations in the disputed articles printed in Humo.

Like the [Commission](#) (see [IRIS 1996-3:4](#)), the Court felt that interference in the applicants' freedom of expression was not necessary in a democratic society, as demanded by Article 10, paragraph 2 of the European Convention on Human Rights. The Court recalled that the press plays a vital role in a democratic society and that its role, while respecting its duties and responsibilities, is to communicate information and ideas on all matters of general interest, including those which concerns the functioning of the judicial authorities. The Court held that, although the commentaries by the two journalists did indeed contain severe criticism, this was not out of keeping with the emotion and indignation aroused by the facts alleged in the articles at issue, in particular concerning incest and the way in which the courts were dealing with it. As regards the polemic, or indeed aggressive, tone used by the journalists, the Court recalled that, apart from the substance of the ideas and information expressed, Article 10 also protects their mode of expression. The Court therefore decided that "journalistic freedom also covers possible recourse to a degree of exaggeration or even provocation". Lastly, the Court held that the journalists based their work on extensive research and the opinions of a number of experts, and that only one passage was unacceptable. In conclusion, and in general, the Court held that, in view of the gravity of the matter and the questions at stake, the need to interfere in the exercise of the freedom of expression and information was not demonstrated. Article 10 of the Convention had therefore been violated (7 votes to 2).

Moreover, the Brussels Court of Appeal had rejected the journalists' application for communication of the contents of the case documents or to hear at least certain witnesses in order to assess the justification of the allegations made by the journalists. The Court held that this "outright rejection had put journalists at a substantial disadvantage vis-à-vis the plaintiffs". This contravened the principles of equality of arms and therefore Article 6 of the Convention had also been violated (unanimous decision).

- [De Haes and Gijssels v. Belgium](#), 24 February 1997, *Reports of Judgments and Decisions* 1997-I.

IRIS 1997-3/10

European Court of Human Rights: The Freedom of Critical Political Journalism - Oberschlick No 2 vs. Austria

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In its judgement of 1 July 1997 the European Court of Human Rights once more confirmed the high level of freedom of political speech guaranteed by Article 10 of the European Convention for the protection of human rights and fundamental freedoms. It is the fourth condemnation of Austria on this issue (see also ECtHR, 8 July 1986, [Lingens](#), Series A, Vol. 103; ECtHR, 23 May 1991, [Oberschlick](#) Series A, Vol. 204; ECtHR, 28 August 1992, [Schwabe](#) Series A, Vol. 242-B).

In October 1990 Jörg Haider, the leader of the Austrian Liberal Party (FPÖ), held a speech in which he glorified the role of the generation of soldiers in World War II, whatever side they had been on. Some time later this speech was published in Forum, a political magazine printed in Vienna. The speech was commented critically by Gerhard Oberschlick, editor of the magazine. In his commentary, Oberschlick called Haider an 'Idiot' (Trottel). On application by Haider, Oberschlick was found guilty for insult (Beleidigung) by the Austrian courts (Art. 115 Austrian Penal Code).

Oberschlick appealed to the European Commission of Human Rights, arguing that the decisions in which he was convicted for having insulted Mr Haider, had infringed his right to freedom of expression as secured by Article 10 of the European Convention on Human Rights. As the Commission in its report of 29 November 1995, the Court in its judgment of 1 July 1997 also comes to the conclusion that the conviction of Oberschlick by the Austrian Courts represented a disproportionate interference with the exercise of his freedom of (political) expression, an interference which is "not necessary in a democratic society".

The Court reiterates that freedom of expression is applicable not only to information and ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also the "those that offend, shock or disturb". The limits of acceptable criticism are wider with regard to a politician acting in his public capacity than in relation to a private individual. The Court takes into account that Mr Haider clearly intended to be provocative and consequently could expect strong reactions on his speech. In the Court's view, the applicant's article may certainly be considered polemical, but it didn't constitute a gratuitous personal attack, as the author provided an objectively understandable explanation why he considered Haider as an "Idiot". The Court comes to the conclusion that "it is true that calling a politician a Trottel in public may offend him. In the instant case, however, the word does not seem disproportionate to the indignation knowingly aroused by Mr. Haider". By seven votes to two, the Court decided that there is a breach of Article 10 of the Convention.

- [Oberschlick v. Austria \(no. 2\)](#), 1 July 1997, *Reports of Judgments and Decisions* 1997-IV.

IRIS 1997-7/4

European Court of Human Rights: Restriction on the Freedom of Expression Permitted for Maintaining the Authority and Impartiality of the Judiciary - Worm vs. Austria

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In its judgement of 29 August 1997 the European Court of Human Rights has ruled on an interesting case in the field of media and justice. Mr Alfred Worm, an Austrian journalist writing for the magazine *Profil*, was convicted by the Vienna Court of Appeal because of the publication of an article reporting on a pending trial against the former Minister of Finance, Mr Androsch. The trial concerned a case of tax evasion. The Court convicted Mr Worm of having exercised prohibited influence on criminal proceedings and imposed on him a fine of ATS 48,000 or 20 days of imprisonment in default of payment (Section 23 of the Austrian Media Act). According to the Vienna Court of Appeal there was no doubt that, at least with regard to the lay judges, the reading of the incriminated article published by Mr Worm was capable of influencing the outcome of the criminal proceedings against Mr Androsch. Mr Worm applied to the European Commission of Human Rights complaining that this conviction was in breach of Article 10 of the European Convention of Human Rights (freedom of expression and information). In its report of 23 May 1996 the Commission expressed the opinion that indeed there had been a violation of Article 10 of the Convention.

By a seven to two decision, the Court now reached the conclusion that the conviction of Mr Alfred Worm was not infringing Article 10 of the European Convention of Human Rights because this conviction is to be considered fully in accordance with the second paragraph of Article 10. The conviction as a matter of fact finds a legal basis in Section 23 of the Austrian Media Act which reads as follows : "Anyone who discusses, subsequent to the indictment (..) and before the judgement at first instance in criminal proceedings, the probable outcome of those proceedings or the value of evidence in a way capable of influencing the outcome of the proceedings shall be punished (..)". The conviction furthermore was aimed at maintaining the authority and impartiality of the judiciary, which means that it thus pursued a legitimate aim under the Convention. Finally, the Court comes to the conclusion that in casu the conviction was also necessary in a democratic society. Although the Court recognises that the States are not entitled to restrict all forms of public discussion on matters pending before the courts, it emphasises that every person, - including a public figure such as Mr Androsch -, is entitled to the enjoyment of the guarantees of a fair trial set out in Article 6 of the European Convention.

According to the Court this means that journalists, when commenting on pending criminal proceedings, may not publish statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial. The Court also states that it is the public prosecutor's role and not that of the journalist, to establish one's guilt. The Court paraphrases its judgement in the [Sunday Times \(No 1\)](#) case (26 April 1979, Series A vol. 30) by considering that it cannot be excluded that the public is becoming accustomed to the regular spectacle of pseudotrials in the news media which might in the long run have nefarious consequences for the acceptance of the courts as the proper forum for the determination of a person's guilt or innocence on a criminal charge. Against this background the European Court agreed with the Vienna Court of Appeal that the interference in the applicant's right to freedom of expression was justified and subsequently the Court decided that there was no breach of Article 10.

- [Worm v. Austria](#), 29 August 1997, *Reports of Judgments and Decisions* 1997-V.

IRIS 1997-8/6

European Court of Human Rights: Case Radio ABC vs. Austria

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Radio ABC (Alternative Broadcasting Corporation) in 1989 was refused a licence to set up a private local radio station for the Vienna region. After exhausting all national remedies, Radio ABC applied to the European Commission of Human Rights in 1991, relying on Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Commission, in its [report of 11 April 1996](#), considered unanimously that the refusal to grant a licence for private broadcasting was in breach of Article 10 of the Convention. The Court now in its judgement of 20 October 1997 comes to the same conclusion. The Court refers to its judgement in the [Case of Informationsverein Lentia vs. Austria](#) (ECourtHR, 24 November 1993, Series A, vol. 276), in which it decided that the restriction on the freedom to impart information by prohibiting private broadcasting, as this was based on the Austrian Broadcasting monopoly, was not necessary in a democratic society and hence was in breach of Article 10, par. 2 of the Convention. As in the period before the entry into force of the Regional Broadcasting Act (1 January 1994) there was no legal basis whereby an operating licence for a local radio station could be granted because of the broadcasting monopoly guaranteed to the ORF, the situation of Radio ABC was identical to that of the applicants in the Informationsverein Lentia case. Accordingly for this period it was undisputed that there was a breach of Article 10. But even in the next period, after the coming into force of the Regional Broadcasting Act in 1994, there was still a breach of Article 10 of the European Convention, because of the fact that the Constitutional Court in its judgement of 27 September 1995 annulled some provisions of the Regional Broadcasting Act, which led to the legal situation which existed before 1994, so that the violation of Article 10 was prolonged.

The Austrian Government at the hearing of 27 May 1997 however informed the Court of the amended version of the Regional Broadcasting Act of 1 May 1997, according to which new licence applications could be lodged in the period between 1 May and 12 June 1997. Although the European Court doesn't rule in abstracto whether legislation is compatible or not with the Convention, the Court nevertheless "notes with satisfaction that Austria has introduced legislation to ensure the fulfilment of its obligations under Article 10" of the European Convention. The Austrian Broadcasting Law opening access for private broadcasting finally seems to be in accordance with the freedom of expression and information as guaranteed by Article 10 of the European Convention on Human Rights (see also ECourtHR, 9 June 1997, *Telesystem Tirol Kabeltelevision vs. Austria*, see [IRIS 1997-7: 4](#)).

- [Radio ABC v. Austria](#), 20 October 1997, *Reports of Judgments and Decisions* 1997-VI.

IRIS 1997-10/3

European Court of Human Rights: Four Recent Judgments on the Freedom of Expression and Information

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1. *Zana vs. Turkey*, 25 November 1997 In this case the European Court of Human Rights comes to the conclusion that there was no breach of Article 10 of the European Convention for the protection of human rights and fundamental freedoms. Zana was convicted to several months of imprisonment in Turkey because of the publication of an interview in the newspaper *Cumhuriyet*, in which he said to support the PKK movement, although he disagreed with the massacres. And he added to this statement : "Anyone can make mistakes, and the PKK kill women and children by mistake...".

According to the Court this statement is both contradictory and ambiguous, because it is difficult simultaneously to support the PKK, "a terrorist organisation which resorts to violence to achieve its ends", and to declare oneself opposed to massacres. The Court notes that the interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey at the material time and that the publication of the interview had to be regarded as likely to exacerbate an already explosive situation in the region. The Court accordingly considers that the penalty imposed on Zana could reasonably be regarded as answering a "pressing social need" and hence as necessary in a democratic society. So there is no breach of Article 10 of the Convention.

2. *Grigoriades vs. Greece*, 25 November 1997 This case concerns the conviction of a lieutenant of the crime of insult to the army, insult which was contained in a letter the applicant sent to his unit's commanding officer. A sentence of three months was imposed on Grigoriades. According to the Court, Article 10 of the Convention which guarantees the freedom of expression and information, applies to military personnel as to all other persons within the jurisdiction of a Contracting State. The Court notes that the contents of the letter indeed included certain strong and intemperate remarks concerning the armed forces in Greece, but those remarks were made in the context of a general and lengthy discourse critical of army life and the army as an institution. Nor did the letter contain any insults directed against the recipient of the letter or any other person. The Court decides that the letter had no objective impact on military discipline and that the prosecution and conviction of Grigoriades cannot be justified as necessary in a democratic society. The Court comes to the conclusion that in this case Article 10 is violated by the Greek authorities.

3. *Guerra vs. Italy*, 19 February 1998 In this case a group of inhabitants of Manfredonia complained of the fact that they had not received proper information from the authorities on the hazards of the industrial activity of a local chemical factory. Nor were they informed on the safety plans or emergency procedures in the event of an accident. The Court finds no infringement of Article 10 of the Convention. The Court argues that this article on the freedom of expression and information "basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to him. That freedom cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion". Hence, no violation of Article 10. However the Court is of the opinion that the Italian authorities, by not giving essential information to the population involved, did not take the necessary steps to ensure effective protection of the applicants' right to respect for their private and family life and consequently violated Article 8 of the Convention.

4. *Bowman vs. United Kingdom*, 19 February 1998 (see [IRIS 1998-3: 3](#)) Mrs Bowman was prosecuted in the UK following the distribution of leaflets in election time. As the executive director of the Society for the Protection of the Unborn Child, Mrs Bowman campaigned against abortion. The leaflets contained information on the opinions of candidates standing for the general elections with regard to abortion. Mrs Bowman was charged with an offence under the Representation of the People Act 1983 which prohibits expenditure of more than five pounds sterling by an unauthorised person during the period before an election on conveying information to electors with a view to promoting or procuring the election of a candidate. Although Mrs Bowman at earlier occasions had been convicted for similar facts, this time she finally was acquitted by the Court. Nevertheless the European Court of Human Rights is of the opinion that the prosecution in itself can be regarded as an interference by the authorities in the applicants right of freedom of expression. The Court finds that the restrictive rule with regard to the distribution of leaflets in election time has the effect of a total barrier to Mrs Bowman's publishing information with a view to influencing the voters in favour of an anti-abortion candidate. At the same time there were no restrictions placed upon the freedom of the press to support or oppose the election of any particular candidate. The Court concludes that the restriction in question is disproportionate to the aim pursued ("securing equality between candidates") and hence violates Article 10 of the Convention.

- [Zana v. Turkey](#), 25 November 1997, *Reports of Judgments and Decisions* 1997-VII.
- [Grigoriades v. Greece](#), 25 November 1997, *Reports of Judgments and Decisions* 1997-VII.
- [Guerra and Others v. Italy](#), 19 February 1998, *Reports of Judgments and Decisions* 1998-I.
- [Bowman v. the United Kingdom](#), 19 February 1998, *Reports of Judgments and Decisions* 1998-I.

IRIS 1998-4/1

European Court of Human Rights: two recent judgements on the freedom of expression and information

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1. Schöpfer vs. Switzerland, 20 May 1998.

Conviction of a lawyer who criticised the local administration of justice at a press conference: no breach of Article 10 of the European Convention for the protection of human rights and fundamental freedoms. In 1992, Mr. Schoepfer, a lawyer and former politician, held a press conference in Lucerne at which he declared that in his local district human rights were flagrantly disregarded. More specifically, he complained about the pretrial detention of one of his clients. According to Mr. Schoepfer his client was detained without an arrest warrant. Mr. Schoepfer demanded the immediate resignation of the prefect and the district clerks. He pointed out that he was addressing the press as a last resort.

Shortly thereafter the Lucerne Bar's Supervisory Board started disciplinary proceedings against Mr. Schoepfer on the ground that his statements at the press conference breached his professional ethics as a lawyer. The Supervisory Board was of the opinion that the tone used by Mr. Schoepfer in his criticism was unacceptable and that he had made allegations which were untrue. Mr. Schoepfer was fined 500 Swiss francs. An appeal against this decision was dismissed by the Federal Court.

Mr. Schoepfer appealed to the European Commission of Human Rights alleging that the disciplinary penalty imposed on him constituted a breach of Article 10 of the Convention. Similar to the European Commission in its report of 9 April 1997, the European Court of Human Rights (ECHR) has now come to the conclusion that there has been no violation of Article 10 of the Convention.

With regard to the question whether the infringement of the applicant's right of freedom of expression was necessary in a democratic society in order to maintain the authority and impartiality of the judiciary, the Court reiterates that the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts and that the courts as guarantors of justice must enjoy public confidence. Considering the key role of lawyers in this field, the ECHR found it legitimate to expect lawyers to contribute to the proper administration of justice, and thus to maintain public confidence therein. The ECHR notes that Mr. Schoepfer first publicly criticised the administration of justice and only afterwards exercised a legal remedy which proved effective with regard to the complaint in question.

Recognising that the freedom of expression also extends to lawyers, who are certainly entitled to comment in public on the administration of justice, the ECHR, at the same time, emphasised that criticism must not overstep certain bounds. The right balance needs to be struck between the various interests involved, which include the public's right to receive information about questions arising from judicial decisions, the requirements of the proper administration of justice and the dignity of the legal profession. The Court concurred with the findings of the Bar Supervisory Board because it is better positioned than an international court to determine how, at a given time, the right balance can be struck in this context. Having regard also to the modest amount of the fine imposed on the applicant, the ECHR comes to the conclusion that there is no breach of Article 10 (seven votes to two).

2. *Incal vs. Turkey*, 9 June 1998.

Conviction for contributing to the preparation of a leaflet criticising the Government and supporting political action by the Kurdish population, is estimated a breach of Article 10 of the Convention. In 1992 Mr. Incal, a lawyer by profession but at the material time a member of the Izmir section of the People's Labour Party (HEP), was responsible for the editing of a leaflet criticising the local authorities for their campaign against the Kurdish population. Permission was asked to the Izmir prefecture in order to distribute the leaflet, but this was rejected because the leaflet was considered to contain separatist propaganda capable of inciting the people to resist the Government and commit criminal offences. Upon request of the public prosecutor's office, the National Security Court issued an injunction ordering the seizure of the leaflets and prohibiting their distribution. Criminal proceedings were started against Mr. Incal, who was sentenced by the Izmir Security Court to nearly seven months imprisonment and a fine, while the conviction also debarred Mr. Incal from the civil service and prevented him from participating in a number of political or social activities.

Mr. Incal turned to the European Commission. In its report of 25 February 1997 the Commission came to the conclusion that Article 10 was violated, as was Article 6 (right to a fair trial). The ECHR has now come to the same conclusion.

The Court reiterates its case law with regard to the essential role of the freedom of expression in a democratic society and emphasises the importance of this freedom particularly for political parties and their active members (see also ECHR, 30 January 1998, [United Communist Party of Turkey and Others vs. Turkey](#)). It is also underlined that the limits of permissible criticism are wider with regard to the Government than in relation to a private citizen, or even a politician. In a democratic system the actions and omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. The Court notes that the leaflet as a matter of fact contained virulent remarks about the policy of the Turkish Government and urged the population of Kurdish origin to band together to raise political demands and to organise "neighbourhood committees". According to the Court these appeals cannot, however, be taken as an incitement to violence, hostility or hatred between citizens. The Court also notes the radical nature of the interference by the Turkish police and by the judicial authorities and especially its preventive character. Referring to the problems linked to the prevention of terrorism in the region, the Court observes that the circumstances of the present case are not comparable to those found in the [Zana](#) case (see IRIS 1998-4: 3) and that Mr. Incal could not be held responsible in any way for the problems of terrorism in the Izmir region. The Court unanimously came to the conclusion that Mr. Incal's conviction was unnecessary in a democratic society and hence violated Article 10 of the Convention.

It is to be underlined that the Court also found a violation of Article 6 of the Convention because Mr. Incal as a civilian had to appear before a court partly composed of members of the armed forces. The Court comes to the conclusion that the applicant had legitimate cause to doubt the independence and impartiality of the Izmir National Security Court. This accordingly means a breach of Article 6, par. 1 of the Convention which inter alia guarantees a fair and public hearing by an independent and impartial tribunal in criminal cases.

- [Schöpfer v. Switzerland](#), 20 May 1998, *Reports of Judgments and Decisions* 1998-III.
- [Incal v. Turkey](#), 9 June 1998, *Reports of Judgments and Decisions* 1998-IV.

IRIS 1998-7/3

European Court of Human Rights: One Recent Judgement on the Freedom of Expression and Information

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Ahmed and others v. United Kingdom, 2 September 1998: Restrictions on the Political Activities by Local Government Officials

This case concerns the application of the Local Government and Housing Act 1989 and the Local Government Officers (Political Restrictions) Regulations 1990 according to which certain categories of (senior) local government officials are prohibited from taking part in certain kinds of political activities. Four local government officials and a trade union representing public sector workers applied to the European Commission alleging that the application of this legislation infringed, inter alia, their right to freedom of expression as guaranteed by Article 10 of the Convention. The European Court recognises that the guarantees contained in Article 10 of the Convention extend also to civil servants and that the effects of the legislation under dispute in various ways restricted the right of freedom of expression and the right to impart information and ideas to third parties in the political context. However, according to the Court this interference does not give rise to a breach of Article 10 of the Convention, because these restrictions are to be regarded as necessary in a democratic society (six votes to three). Referring also to the margin of appreciation, the Court notes that the measures were directed at the need to preserve the impartiality of carefully defined categories of officers whose duties involve the provision of advice to a local authority council or to its operational committees or who represent the council in dealings with the media. Hence the restrictions imposed can reasonably constitute a justifiable response to the maintenance of the impartiality of the local government officers and are likely to avoid a situation where in the eyes of the public the local government officers are linked with a particular party political line. The Court also came to the conclusion that there was no breach of Article 11 of the Convention (freedom of assembly), nor of Article 3 of Protocol No. 1 to the Convention (the right to fully participate in the electoral process).

- [*Ahmed and Others v. the United Kingdom*](#), 2 September 1998, *Reports of Judgments and Decisions* 1998-VI.

IRIS 1998-9/3

European Court of Human Rights: Three Recent Judgments on the Freedom of Expression and Information

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1. Hertel vs. Switzerland, 25 August 1998: the freedom of expression also extends to the criticising of certain economic goods, in casu microwave ovens.

In 1992 in an article in the quarterly Journal Franz Weber referred a research paper of Mr. Hertel on the effects on human beings of the consumption of food prepared in microwave ovens. According to the journal the research findings of Mr. Hertel scientifically proved the (carcinogenic) danger of microwave ovens. In an editorial by Mr. Weber it was argued that microwave ovens should be banned. Some extracts of the research paper were also published. The Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances started up proceedings against the editor of the journal and against Mr. Hertel under application of the Federal Unfair Competition Act (Section 3). While the application against the editor of the Journal was dismissed, in the case against Mr. Hertel the Berne Commercial Court allowed the application because the defendant had used unnecessarily wounding statements. Mr. Hertel was prohibited by the Court from stating that food prepared in microwave ovens was a danger to health and from using in publications and public speeches on microwave ovens the image of death. The imposed injunction was later confirmed by the Federal Court. Mr. Hertel applied to the European Commission for Human Rights, complaining especially of a violation of Article 10 of the European Convention of Human Rights. Just like the Commission in its report of 9 April 1997, the European Court comes to the conclusion that Mr. Hertel's freedom of expression was violated by this ban imposed on him by the Swiss Courts. Although the interference in the applicant's freedom of expression was prescribed by law and had a legitimate aim ("the protection of the rights of others"), the Court is of the opinion that the impugned measure was not necessary in a democratic society. The Court notes that there is a disparity between the measure and the behaviour it was intended to rectify. According to the Court "the effect of the injunction was partly to censor the applicant's work and substantially to reduce his ability to put forward in public views which have their place in a public debate whose existence cannot be denied". And the Court emphasised : "It matters little that this opinion is a minority one and may appear to be devoid of merit since, in a sphere in which it is unlikely that any certainty exists, it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas" (par. 50). By six votes to three the Court reached the conclusion that Article 10 of the European Convention was violated.

2. Lehideux and Isorni vs. France, 23 September 1998: a conviction because of an advertisement presenting in a positive light certain acts of Marshal Pétain is considered a violation of the right of freedom of expression.

On 13 July 1984 the newspaper Le Monde published a one-page advertisement bearing the title "People of France, you have short memories". The text presented Philippe Pétain, first as a soldier and later as French head of State under the Vichy Government, in a positive light. After a complaint by the National Association of Former Members of the Resistance a criminal procedure was started against Mr. Lehideux as the president of the Association for the Defence of the Memory of Marshal Pétain and against Mr. Isorni as the author of the text. The advertisement finally was estimated a public defence of the crimes of collaboration with the enemy, under application of section 23-24 of the Freedom of the Press Act of 29 July 1881 (Paris Court of Appeal 26 January 1990). The civil parties were awarded damages of one franc and publication of

excerpts from the judgment in *Le Monde* was ordered. The Court of Cassation in its judgment of 16 November 1993 was of the opinion that this conviction did not infringe the right to freedom of expression protected by Article 10 of the European Convention.

The European Court in Strasbourg, sitting in Grand Chamber (21 judges), has now reached a different conclusion. Although the interference in the applicants' right to freedom of expression was prescribed by law and pursued the protection of the reputation or rights of others and the prevention of disorder or crime, the criminal conviction of Lehideux and Isorni was not estimated as "necessary in a democratic society". Although the Court recognises that the litigious advertisement presented Pétain in an entirely favourable light and did not mention any of the offences for which he was sentenced to death by the High Court of Justice in 1945, the Court also underlines that the text explicitly contains a disapproval of "Nazi atrocities and persecutions" and of "German omnipotence and barbarism". Although the Court estimates the omissions in the advertisement of any reference to the responsibility of Pétain for the persecution and deportation to the death camps of tens of thousands of Jews "morally reprehensible", it evaluates the advertisement as a whole in the light of a number of circumstances of the case. Referring to the different decisions and judgments during the domestic proceedings, to the fact that the events in issue occurred more than forty years ago and to the circumstance that the publication in issue corresponds directly to the object of the associations which produced it without any other proceedings have ever been brought against them for pursuing their object, the Court reaches the conclusion that the impugned interference in the applicants' rights violates Article 10. The Court also refers to the seriousness of a criminal conviction for publicly defending the crimes of collaboration, having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies. Taking all this into consideration, the Court reaches the conclusion that the criminal conviction of the applicants was disproportionate and as such unnecessary in a democratic society. Therefore, the conviction of Lehideux and Isorni has been a breach of Article 10 (fifteen votes to six). Having reached this conclusion, the Court does not consider it appropriate to rule on the application of Article 17 of the Convention (prohibition of abuse of rights).

3. *Steel and others vs. United Kingdom*, 23 September 1998: the arrest and detention of protesters for breach of the peace and the freedom of expression.

The judgment of the European Court in the case *Steel and others* concerns 3 different cases with an analogue issue: the interference by the British authorities against protest and demonstrations by ecological or peace movement activists. In all 3 cases the applicants were arrested and kept in custody some time for reason of "breach of peace". The first applicant, Ms. Steel, took part in a protest against a grouse shoot. She walked in front of a hunter's shotgun, preventing him from firing. The second applicant, Ms. Lush, took part in a protest against the building of an extension to a motorway. Three other applicants had taken part in a protest against the sale of military helicopters : their protest took the form of the distribution of leaflets and holding up banners in front of a conference centre. The Court recognises that although the protest by the first and second applicant took the form of physically impeding the activities of which the applicants disapproved, this behaviour could be considered as the expression of an opinion within the meaning of Article 10. With regard to both cases the Court is of the opinion however that the detention and the imprisonment was to be considered as "necessary in democratic society" for the interest in maintaining public order, the rule of law and the authority of the judiciary. With regard to the detention of the protesters against the military helicopters, the Court is of the opinion that this interference was not "prescribed by law", since the peaceful distribution of

leaflets could not be considered as a breach of the peace. The Court does not find any indication that the applicants significantly obstructed or attempted to obstruct the conference taking place or that they took any other action likely to provoke others to violence. Additionally, the Court considered the interference in the applicants' right of freedom of expression as disproportionate to the aims of preventing disorder or protecting the rights of others. Unanimously the Court reached the conclusion that in this case there has been a violation of Article 10, just as there was a violation of Article 5, par. 1 of the Convention (right to liberty and security).

- [Hertel v. Switzerland](#), 25 August 1998, *Reports of Judgments and Decisions* 1998-VI.
- [Lehideux and Isorni v. France](#), 23 September 1998, *Reports of Judgments and Decisions* 1998-VII.
- [Steel and Others v. the United Kingdom](#), 23 September 1998, *Reports of Judgments and Decisions* 1998-VII.

IRIS 1998-10/3

European Court of Human Rights: First Judgments on Freedom of Expression and Information after Reorganisation of the Court

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1. *Fressoz and Roire v. France*: the right of journalists to receive and publish confidential documents under the protection of Article 10 of the European Convention on Human Rights.

In its first judgment after the reorganisation of the European Court of Human Rights in Strasbourg (1 November 1998, Protocol No. 11), the Court decided in favour of the protection of journalists and emphasised the importance of the freedom of the press and its vital role in a democratic society. The case concerns important aspects regarding the limits of journalistic freedom in reporting on matters of general interest. The applicants were both convicted in France for the publication of an article in the satirical newspaper *Le Canard enchaîné*. The article and the documents it contained showed that the managing director of Peugeot had received large pay increases while at the same time the management refused the demands of the workers at Peugeot for a pay rise. Mr. Fressoz, the publication director of the magazine at that time, and Mr. Roire, the journalist who wrote the article, were convicted for receiving and publishing photocopies that had been obtained through a breach of professional confidence by an unidentified tax official. They both claimed that these convictions violate their freedom of expression as protected by Article 10 of the European Convention. The Court emphasised that in principle journalists cannot be released from their duty to obey ordinary criminal law on the grounds that Article 10 affords them protection of freedom of expression. However, in particular circumstances the interest of the public to be informed and the vital role of the press may justify the publication of documents that fall under an obligation of professional secrecy.

Taking into consideration the fact that the article contributed to a public debate on a matter of general interest, that the information on the salary of Mr. Calvet as head of a major industrial company did not concern his private life, and that the information was already known to a large number of people, the Court was of the opinion that there was no overriding requirement for the information to be protected as confidential. It was true that the conviction was based on the publication of documents of which the divulgence was prohibited, but the information they contained was not confidential. The Court emphasised that in essence Article 10 of the Convention "leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility. It protects journalists' rights to divulge information on issues of general interest provided that they are acting in good faith and on an accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism" (par. 54). In the Court's view the publication of the tax assessments was relevant not only to the subject matter but also to the credibility of the information supplied, while at the same time the journalist had acted in accordance with the standards governing his profession as a journalist.

The final and unanimous conclusion of the Court, sitting in Grand Chamber, was that there was no reasonable relationship of proportionality between the legitimate aim pursued by the journalist's conviction and the means deployed to achieve that aim, given the interest a democratic society had in ensuring and preserving freedom of the press. The Court decided that there had been violated Article 10 of the Convention and awarded the applicants FRF 60.000 for costs and expenses.

2. *Janowski vs. Poland*: insulting civil servants acting in their official capacity is not allowed.

Mr. Janowski, a journalist, was convicted because he insulted two municipal guards. He offended the guards by calling them "oafs" and "dumb" during an incident which took place in a square, witnessed by several bystanders. Mr. Janowski argued before the European Court that his conviction violated his right of freedom of expression as protected by Article 10 of the Convention. In evaluating whether the interference in the applicant's right was necessary in a democratic society, the Court emphasised that civil servants must enjoy public confidence in conditions free of undue perturbation if they are to be successful in performing their tasks, and it may therefore prove necessary to protect them from offensive and abusive verbal attacks when on duty. According to the Court the applicant's remarks did not form part of an open discussion of matters of public concern and neither did they involve the issue of freedom of the press since the applicant, although a journalist by profession, was clearly acting as a private individual on this occasion. Not being persuaded that the applicant's conviction was to be considered as an attempt by the authorities to restore censorship and discouragement of the expression of criticism in the future, the Court decided by twelve votes to five that there had been no breach of Article 10 of the Convention.

- [Fressoz and Roire v. France \[GC\]](#), no. 29183/95, ECHR 1999-I.
- [Janowski v. Poland \[GC\]](#), no. 25716/94, ECHR 1999-I.

IRIS 1999-2/4

European Court of Human Rights: Two Recent Judgements on the Freedom of Expression and Information

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1. *Bladet Tromsø and Stensaas v. Norway*: defamatory allegations, the publication of a secret document and article 10 of the European Convention for the Protection of Human Rights In 1992, the newspaper company *Bladet Tromsø* and its editor, *Pal Stensaas*, were convicted by a Norway District Court for defamation. The newspaper had published several articles on seal hunting as well as an official - but secret - report that referred to a series of violations of the seal-hunting regulations (the *Lindberg* report). The article and the report more specifically made allegations against five crew members of the seal-hunting vessel *M/S Harmoni* who were held responsible for using illegal methods of killing seals. Although the names of the persons concerned were deleted, the crew members of the *M/S Harmoni* brought defamation proceedings against the newspaper and its editor. The District Court was of the opinion that some of the contested statements in the article and the report as a matter of fact were "null and void", and the newspaper and its editor were ordered to pay damages to the plaintiffs.

The European Court of Human Rights, however, reached the conclusion that the conviction by the Norwegian district court was in breach of Article 10 of the European Convention. The Court took account of the overall background against which the statements in question had been made, notably the controversy that seal hunting represented at the time in Norway and the public interest in these matters. The Court also underlined that the manner of reporting in question should not be considered solely by reference to the disputed articles but in the wider context of the newspaper's coverage of the seal hunting issue. According to the Court "the impugned articles were part of an ongoing debate of evident concern to the local, national and international public, in which the views of a wide selection of interested actors were reported". The Court emphasized that Article 10 of the Convention does not guarantee an unrestricted freedom of expression even with respect to media coverage of matters of public concern, as the crew members can rely on their right to protection of their honour and reputation or their right to be presumed innocent of any criminal offence until proven guilty. According to the Court some allegations in the newspaper's articles were relatively serious, but the potential adverse effect of the impugned statements on each individual seal hunter's reputation or rights was significantly attenuated by several factors. In particular, the Court was of the opinion that "the criticism was not an attack against all the crew members or any specific crew member". On the other hand, the Court underlined that the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research, because otherwise, the "vital public-watchdog role" of the press might be undermined. The Court reached the following conclusion: "Having regard to the various factors limiting the likely harm to the individual seal hunter's reputation and to the situation as it presented itself to *Bladet Tromsø* at the relevant time, the Court considers that the paper could reasonably rely on the official *Lindberg* report, without being required to carry out its own research into the accuracy of the facts reported. It sees no reason to doubt that the newspaper acted in good faith in this respect.". It should be mentioned that 4 of the 17 judges dissented manifestly with the majority. In the dissenting opinions, annexed to the judgement, it is argued why the articles are to be considered as defamatory towards private individuals. According to the minority, the Court had not given sufficient weight to the reputation of the seal hunters. The minority opinion also disagrees with the publication of the secret report and the fact that the newspapers took the allegations formulated in the report for granted: "How could it have been

"reasonable" to rely on this report when the newspaper was fully aware that the Ministry had ordered that the report not be made public immediately because it had contained possibly libellous comments concerning private individuals?". In an unusually sharp conclusion, the minority held that the Court sends the wrong signal to the press in Europe and that the judgement undermines respect for the ethical principles which the media voluntarily adhere to. Their final conclusion was: "Article 10 may protect the right for the press to exaggerate and provoke but not to trample over the reputation of private individuals".

However, let there be no misunderstanding: the judgement of 20 May 1999 in the case of *Bladet Tromsø v. Norway* has far reaching implications for the interpretation of the balance between journalistic freedom and the protection of the rights or reputation of individuals. It is obvious that a clear majority of the Court argues in favour of the public watchdog-function of the media and the critical reporting of matters of public concern. And albeit that this freedom is not wholly unrestricted, according to the actual jurisprudence of the Court, the freedom with respect to press coverage of matters of serious public concern is very wide.

2. *Rekvényi v. Hungary*: politics, police and freedom of expression

This case concerns the constitutional ban in Hungary on political activities by police officers and members of the armed forces. According to Mr. Rekvényi, a police officer living in Budapest, the ban not only violates his freedom of assembly and association (article 11), but also his freedom of (political) expression (article 10). Although the Court agreed that the curtailing of the applicant's involvement in political activities interfered with the exercise of his right of freedom of expression, the Court was of the opinion that this interference is in accordance with the second paragraph of article 10. As a matter of fact, the Court held that the interference is prescribed by law, has a legitimate aim (the protection of national security and public safety and the prevention of disorder) and is necessary in a democratic society. The Court recognized that it is a legitimate aim in any democratic society to have a politically neutral police force. On the other hand, the Court stated that the ban on political activities by policemen is not an absolute one and that in fact police officers remain entitled to undertake some activities enabling them to articulate their political opinions and preferences, e.g., policemen may promote candidates, participate in peaceful assemblies, make statements to the press, appear on radio and television or publish works on politics. The Court unanimously reached the conclusion that there had been no violation of article 10 or of article 11 of the Convention.

- [Bladet Tromsø and Stensaas v. Norway \[GC\]](#), no. 21980/93, ECHR 1999-III.
- [Rekvényi v. Hungary \[GC\]](#), no. 25390/94, ECHR 1999-III.

IRIS 1999-6/2

European Court of Human Rights: Thirteen Judgments on Freedom of Expression and Information (8 July 1999)

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On 8 July 1999 the European Court of Human Rights delivered judgments in thirteen cases against Turkey involving Article 10 of the Convention. In eleven of the thirteen cases the Court held that there was a violation of the freedom of expression as guaranteed by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. All the cases concerned various criminal convictions of the applicants arising from separatist propaganda against the Turkish nation and the territorial integrity of the State or (pro-Kurdish) propaganda against the indivisibility of the State contrary to the Prevention of Terrorism Act 1991. In all of the cases the European Court reiterated the fundamental principles underlying its former judgments relating to Article 10, according to which freedom of expression constitutes one of the essential foundations of a democratic society (see also [IRIS 1999-6: 3](#), [IRIS 1999-2: 4](#), [IRIS 1998-10: 4](#), [IRIS 1998-9:3](#), [IRIS 1998-7: 4](#), [IRIS 1998-4:3](#)). The Court emphasised once again that Article 10 of the Convention also protects information and ideas that "offend, shock or disturb" and recalled that there is little scope under Article 10 of the Convention for restrictions on political speech or on debate on questions of public interest. At the same time, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen: in a democratic society the actions or omissions of the government must be subject to the close scrutiny of public opinion. According to the Court, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. It is incumbent on the press to impart information and ideas on political issues, including divisive ones and the public has also a right to receive such information and ideas. On the other hand, the Court recognised the competence of state authorities to take measures to guarantee public order and hence to interfere with freedom of expression in cases of incitement to violence against individuals, public officials or a sector of the population. It was also emphasized that the duties and responsibilities which accompany the exercise of the right of freedom of expression by media professionals assume special significance in situations of conflict and tension and that particular caution is required when the views of representatives or organisations which resort to violence against the State are published. Such interviews involve a risk that the media might become a vehicle for the dissemination of hate speech and the promotion of violence.

After a thorough examination of the wording and the content of the publications concerned, and after considering the context of the political and the security situation in south-east Turkey, the Court in eleven of the cases came to the conclusion that the conviction and sentencing of the applicants was not necessary in a democratic society and that accordingly there had been a violation of Article 10 of the Convention. In all of these cases the Court was of the opinion that the impugned articles, news reporting, books or speeches could not be said to incite to violence. In most cases, the Court was also struck by the severity of the sanctions imposed (20 months imprisonment, substantial fines, seizures of books...): the nature and severity of the penalties were also factors which lead to the conclusion that the interferences were disproportionate. The Court also underlined that some of these convictions and sentences were capable of discouraging the contribution of the press to open discussion on matters of public concern.

In most of the cases the Court also found a violation of Article 6 of the Convention. The applicants had been denied the right to have their cases heard before an independent and impartial tribunal as they had been tried by the National Security Courts, in which one member of the bench of three judges was a military judge. In two cases the Court found no violation of Article 10 of the Convention. The Court was of the opinion that the impugned letters and the news commentary in a weekly review must be regarded as capable of inciting to further violence in the region. Hence, the conviction of the applicant in these two cases (Sürek [n°1](#) and [n°3](#)) could be regarded as answering a "pressing social need". The Court was of the opinion that what was at issue in these cases was "hate speech and the glorification of violence" and "incitement to violence". The two judgments that found no violation of Article 10 are also important from another point of view. It must be underlined that Sürek was convicted while he was the owner/publisher of the weekly review in which the readers' letters and the news commentary were published. Although he did not write the articles personally and only had a commercial and not an editorial relationship with the review, this could not exonerate him from criminal liability. Sürek was the owner and "as such he had the power to shape the editorial direction of the review", according to the Court, who held "that for that reason, he was vicariously subject to the "duties and responsibilities" which the review's editorial and journalistic staff undertake in the collection and dissemination of information to the public and which assume an even greater importance in situations of conflict and tension". The general importance of the judgments of 8 July 1999 lies in the fact that the Court again strongly emphasised the relation between freedom of expression, democracy and pluralism. In other case law of the Court it was underlined "that one of the principal characteristics of democracy is the possibility it offers of resolving a country's problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression".

Judgements:

- [Arslan v. Turkey \[GC\]](#), no. 23462/94, 8 July 1999.
- [Polat v. Turkey \[GC\]](#), no. 23500/94, 8 July 1999.
- [Başkaya and Okçuoğlu v. Turkey \[GC\]](#), nos. 23536/94 and 24408/94, ECHR 1999-IV.
- [Karataş v. Turkey \[GC\]](#), no. 23168/94, ECHR 1999-IV.
- [Erdoğdu and İnce v. Turkey \[GC\]](#), nos. 25067/94 and 25068/94, ECHR 1999-IV.
- [Ceylan v. Turkey \[GC\]](#), no. 23556/94, ECHR 1999-IV.
- [Okçuoğlu v. Turkey \[GC\]](#), no. 24246/94, 8 July 1999.
- [Gerger v. Turkey \[GC\]](#), no. 24919/94, 8 July 1999.
- [Sürek and Özdemir v. Turkey \[GC\]](#), nos. 23927/94 and 24277/94, 8 July 1999.
- [Sürek v. Turkey \(no. 1\) \[GC\]](#), no. 26682/95, ECHR 1999-IV.
- [Sürek v. Turkey \(no. 2\) \[GC\]](#), no. 24122/94, 8 July 1999.
- [Sürek v. Turkey \(no. 3\) \[GC\]](#), no. 24735/94, 8 July 1999.
- [Sürek v. Turkey \(no. 4\) \[GC\]](#), no. 24762/94, 8 July 1999.

IRIS 1999-8/5

European Court of Human Rights: Recent Judgments on the Freedom of Expression and Information (28 September 1999)

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On 28 September 1999 the European Court of Human Rights delivered its final judgment in two cases concerning Article 10 of the Convention.

In the case of *Dalban vs. Romania*, the "grand chamber" of the Court unanimously reached the conclusion that there has been a violation of the freedom of expression by the Romanian authorities. The case concerned an application by Mr. Ionel Dalban who was a journalist and ran a local weekly magazine, the *Cronica Romascană*. In 1994, Dalban was convicted for criminal libel because of some articles that exposed a series of frauds allegedly committed by a senator (R.T.) and the chief executive (G.S.) of a State-owned agricultural company, *Fastrom/State Farm*. Dalban died on 13 March 1998. His widow continued the proceedings in Strasbourg in the applicant's stead. In the meantime, on 2 March 1999 the Romanian Supreme Court quashed the conviction of Dalban and acquitted the applicant of the charge of libelling G.S. The proceedings in the case on the charge relating to Senator R.T. were discontinued due to Mr. Dalban's death. In its judgment of 28 September 1999 the European Court was of the opinion that the applicant's conviction constituted an "interference by public authority" with his right to freedom of expression, without the interference being necessary in a democratic society. The Court underlines that the articles in issue concerned a matter of public interest and that the press has to fulfil an essential function in a democratic society. According to the Court there was no proof that the description of events given in the articles was totally untrue. It is also emphasised that Dalban did not write about aspects of the private life of senator R.T., but about his behaviour and attitudes in his capacity as an elected representative of the people. The European Court could not agree with the Romanian courts that the fact that there had not been a court case against R.T. or G.S. was sufficient to establish that the information contained in Dalban's articles was false. The Court reached the conclusion that the applicant's conviction of a criminal offence and the sentencing to imprisonment amounted to a disproportionate interference with the exercise of his freedom of expression as a journalist.

The second case of 28 September 1999, *Öztürk vs. Turkey*, strongly reflects the Court's case-law of 8 July 1999 in the [Turkish cases](#) (IRIS 1999-8: 4-5). *Öztürk* was convicted for helping to publish and distribute a book that was considered by the Turkish courts to incite the people to crime, hatred and hostility. The book described the life (and torture in prison) of one of the founding members of the Communist Party of Turkey. While the publisher of the book was convicted, in a separate case the author of the book was acquitted. In evaluating the application of Article 10 of the Convention, the Strasbourg Court explicitly referred to its case-law of 8 July 1999, in which it emphasised that "there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest". The European Court was not convinced that in the long term the book could have had a harmful effect on the prevention of disorder or crime in Turkey. Nor was there any indication that Mr. *Öztürk* bore any responsibility whatsoever for the problems caused by terrorism in Turkey. Sitting in "grand chamber" the Court unanimously reached the conclusion that once again the Turkish authorities had violated the freedom of speech and of the press guaranteed by Article 10 of the Convention.

- [Dalban v. Romania \[GC\]](#), no. 28114/95, ECHR 1999-VI.
- [Öztürk v. Turkey \[GC\]](#), no. 22479/93, ECHR 1999-VI.

IRIS 1999-10/4

European Court of Human Rights: Recent Judgments on the Freedom of Expression and Information and on the Right of a Fair Trial and Media Coverage of a Court Case

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In a judgment delivered on 28 October 1999 in the case of *Wille v Liechtenstein*, the European Court of Human Rights held that there has been a violation of Article 10 of the Convention. On 25 November 1999 the European Court of Human Rights delivered judgment in two cases with regard to Article 10 of the Convention, one in a case against Norway, another in a case against the United Kingdom. In two judgments of 16 December 1999 the media coverage and extreme press interest in a court case were considered by the Court as relevant factors in the evaluation of the right of a fair trial (article 6 § 1 of the Convention).

The case of *Wille v Liechtenstein* has to do with a reprimand and the refusal by the Prince to re-appoint the president of the High Administrative Court. This interference by the Prince was considered to be a reaction against the opinions that the judge in a public lecture had expressed on a dispute of constitutional law, opinions which were also published in a newspaper. The Court found that such an interference by a State authority can give rise to a breach of Article 10 unless it can be shown that it was in accordance with paragraph 2 of Article 10. According to the Court, the element that the applicant's opinion had political implications was not in itself a sufficient reason for the impugned interference. Moreover, there was no evidence to conclude that the applicant's lecture contained any remarks on pending cases, severe criticism of persons of public institutions or insults to high officials or the Prince. Even allowing for a certain margin of appreciation, the Prince's action appeared disproportionate to the aim pursued and was considered by the Court as a violation of Article 10 of the Convention.

In the case of *Nilsen and Johnsen v Norway*, the Grand Chamber of the Court concluded that there was a violation of the applicants' freedom of expression. Nilsen and Johnsen, both policemen, were convicted in Norway because of defamatory statements published in the press. These public statements were made in response to various accusations of police brutality which were reported in a book and had received a lot of media coverage. The statements by Nilson and Johnson were considered by the Oslo City Court as having a defamatory character towards the author of the book, a professor of criminal law. According to the European Court in Strasbourg, the conviction by the Oslo City Court, upheld by the Norway Supreme Court, violated Article 10 of the European Convention for Human Rights. After referring to its classic principles with regard to the importance of freedom of expression and public debate in a democratic society, the European Court underlined that while there can be no doubt that any restrictions placed on the right to impart and receive information on arguable allegations of police misconduct call for a strict scrutiny on the part of the Court, the same must apply to speech aimed at countering such allegations since they form part of the same debate. In the Court's view, a degree of exaggeration should be tolerated in the context of such a heated public debate on affairs of general concern where professional reputations are at stake on both sides. The Court also noted that there was factual support for the assumption that false allegations of police brutality had been made by informers. For these reasons the Strasbourg Court was not satisfied that the litigious statements exceeded the limits of permissible criticism for the purpose of Article 10 of the Convention.

The judgment in the case of *Hashman and Harrup v United Kingdom* is one of the very rare examples in which the Court is of the opinion that an interference by a public authority with the freedom of expression and information is not "prescribed by law". In its judgment of 25 November

1999 the Grand Chamber of the Court had to evaluate the applicants' allegation of a violation of Article 10. Both applicants were held responsible by the Crown Court of Dorchester for unlawful actions and a deliberate attempt to interfere with fox-hunting. The behaviour of Hashman and Harrup was found to have been *contra bonos mores*, a behaviour which is to be considered as wrong rather than right in the judgment of the majority of contemporary fellow citizens. The applicants were bound over to be of good behavior for a period of one year. The Strasbourg Court however was of the opinion that the concept of behaviour *contra bonos mores* is so broadly defined that it does not comply with the requirement of foreseeability. The legal basis of such an interference by public authorities is imprecise and does not give the applicants sufficiently clear guidance as how they should behave in future. The Court also took into consideration that prior restraint on freedom of expression must call for the most careful scrutiny. With specific reference to the facts of the case the Court reached the conclusion that the interference did not comply with the requirement of Article 10 § 2 of the Convention that it be "prescribed by law".

It is interesting to note that the media coverage of, and the extremely high levels of press and public interest in, a court case can be regarded as relevant elements in evaluating whether someone is denied a fair hearing in breach of Article 6 § 1 of the Convention. In two judgments of 16 December 1999 in the cases *T. v United Kingdom* and *V. v United Kingdom* the Court came to the conclusion that the two applicants - who were both convicted for the abduction and murder of a two-year-old boy (James Bulger) - were not guaranteed sufficiently the right of a fair trial, taking into account that both were only eleven years old at the time of the trial before the Crown Court. According to the European Court, in respect of a young child charged with a grave offence attracting high levels of media and public interest, it is necessary to conduct the hearing in such a way as to reduce as far as possible the defendant's feelings of intimidation and inhibition. The Court *inter alia* took into consideration that the trial generated extremely high levels of press and public interest, to the extent that the judge in his summing-up referred to the problems caused to witnesses by the blaze of publicity and asked the jury to take this into account when assessing the evidence. In such circumstances the applicants were unable to participate effectively in the criminal proceedings against them. This led the European Court to the conclusion that in *casu* the applicants were denied a fair hearing in breach of Article 6 § 1 of the Convention.

- [Wille v. Liechtenstein \[GC\]](#), no. 28396/95, ECHR 1999-VII.
- [Nilsen and Johnsen v. Norway \[GC\]](#), no. 23118/93, ECHR 1999-VIII.
- [Hashman and Harrup v. the United Kingdom \[GC\]](#), no. 25594/94, ECHR 1999-VIII.
- [T. v. the United Kingdom \[GC\]](#), no. 24724/94, 16 December 1999.
- [V. v. the United Kingdom \[GC\]](#), no. 24888/94, ECHR 1999-IX.

IRIS 2000-1/2

European Court of Human Rights: Recent Judgment on the Freedom of Expression and Information and the Publication of Photographs of a Suspect

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On 11 January 2000 the European Court of Human Rights delivered judgment in the case *News Verlags GmbH & CoKG v. Austria*. The case concerns an injunction by the Vienna Court of Appeal prohibiting a magazine to publish photographs of a person (B) in the context of its court reporting. B was suspected of being responsible for a letter-bomb campaign in 1993. According to the Court, the prohibition on publishing such photographs in connection with reports on the criminal proceedings is to be considered as an interference with the applicant's freedom of expression and information. The Court agrees that the interference was prescribed by Austrian law and pursued a legitimate aim, as the injunction had the aim of protecting the reputation or rights of B as well as the authority and impartiality of the judiciary. The Court decided however that the injunction was disproportionate and hence violated article 10 of the Convention.

The Court recalled that "it is not for the Court, or for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists". Furthermore the media have not only the right, but even the duty, according to the Court to impart - in a manner consistent with their obligations and responsibilities - information and ideas on all matters of public concern, including reporting and commenting on court proceedings. The Court emphasised that the criminal case relating to the letter-bombs was a news item of major public concern at the time and that B was arrested as the main suspect. Although the injunction in no way restricted the applicant company's right to publish comments on the criminal proceedings against B, it was underlined, however, that it restricted the applicant's choice as to the presentation of its report, while undisputedly other media were free to continue to publish B's picture throughout the criminal proceedings against him. An absolute prohibition on publishing pictures of B in the press reports of the magazine "News" was considered by the Court to be a disproportionate measure. As the Court underlines: "The absolute prohibition on the publication of B's picture went further than was necessary to protect B against defamation or against violations of the presumption of innocence". It followed from these conclusions by the Court that the interference with the applicant's right to freedom of expression was not "necessary in a democratic society" and accordingly violated Article 10 of the Convention.

- [News Verlags GmbH & Co.KG v. Austria](#), no. 31457/96, ECHR 2000-I.

IRIS 2000-2/1

European Court of Human Rights: Recent Judgments on the Freedom of Expression and Information

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In the case *Fuentes Bobo v. Spain* the Court reached the conclusion that the dismissal of an employee of the public broadcasting organisation TVE was to be considered a violation of the right to freedom of expression. In 1993 Fuentes Bobo co-authored an article in the newspaper *Diario 16* criticising certain management actions within the Spanish public broadcasting organisation. Later in two radio programmes Fuentes Bobo made critical remarks about some TVE-managers. These remarks led to disciplinary proceedings that resulted in the applicant's dismissal in 1994. In its judgment of 29 February 2000 the Court (Fourth Section) was of the opinion that the dismissal of the applicant due to certain offensive statements was to be considered an interference by the Spanish authorities with the applicant's freedom of expression. The Court pointed out that Article 10 of the Convention is also applicable to relations between employer and employee and that the State has positive obligations in certain cases to protect the right of freedom of expression against interference by private persons. Although the interference was prescribed by law and was legitimate in order to protect the reputation or rights of others, the Court could not agree that the severe penalty imposed on the applicant met a "pressing social need". The Court underlined that the criticism by the applicant had been formulated in the context of a labour dispute within TVE and was to be included in a public discussion on the failings of public broadcasting in Spain at the material time. The Court also took into consideration that the offensive remarks attributed to the applicant appeared more or less to have been provoked during lively and spontaneous radio shows in which he participated. Because no other legal action had been taken against the applicant with regard to the "offensive" statements and because of the very severe character of the disciplinary sanction the Court finally came to the conclusion that the dismissal of Fuentes Bobo was a violation of Article 10 of the Convention.

In a judgment delivered on 16 March 2000 in the case of *Özgür Gündem v. Turkey* the European Court (Fourth Section) once more held that there has been a violation of Article 10 of the Convention by the Turkish authorities. *Özgür Gündem* was a daily newspaper published in Istanbul during the period from 1992 to 1994, reflecting Turkish Kurdish opinions. After a campaign that involved killings, disappearances, injuries, prosecutions, seizures and confiscation, the newspaper ceased publication. The applicants submitted that the State authorities had failed to provide protection for the newspaper and complained of the convictions arising from its reporting on the Kurdish issue that was estimated as constituting separatist propaganda and provoking racial and regional hatred. In respect of the allegations of attacks on the newspaper and its journalists, the Court was of the opinion that the Turkish authorities should have better protected *Özgür Gündem*. The Court considered that although the essential object of many provisions of the Convention is to protect the individual against arbitrary interference by public authorities, there may be positive obligations inherent in an effective respect for the rights concerned. The Court stated that genuine, effective exercise of freedom of expression "does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals". In the case of *Özgür Gündem* the Turkish authorities have not only failed in their positive obligation to protect the freedom of expression of the applicants. According to the Court the search operations, prosecutions and convictions for the reporting on the Kurdish problem and for criticising government policy violated Article 10 as well. The Court underlined that the authorities of a democratic State must

tolerate criticism, even if it may be regarded as provocative or insulting. The judgment also emphasised that the public enjoys the right to be informed of different perspectives on the situation in south-east Turkey, irrespective of how unpalatable those perspectives appear to the authorities. An important element was also that the reporting by Özgür Gündem was not to be considered as advocating or inciting the use of violence. The Court held unanimously that there was a breach of Article 10 of the Convention.

In a judgment of 21 March 2000 the European Court of Human Rights (Third Section) found no violation of the right to freedom of expression in the case of *Andreas Wabl v. Austria*. Wabl, a member of Parliament, has accused the newspaper *Kronen-Zeitung* of "Nazi journalism" after the newspaper had quoted a police officer calling for Wabl to have an AIDS-test. The police officer's arm had been scratched by Wabl in the course of a protest campaign. Proceedings against Wabl led to an injunction to prevent him repeating the impugned statement of "Nazi journalism". Although the article published in the *Kronen-Zeitung* was to be considered as defamatory, the Court had particular regard to the special stigma that attaches to activities inspired by National Socialist ideas and to the fact that according to Austrian legislation it is a criminal offence to perform such activities. The Court also took into account that the applicant was only prohibited from repeating the statement that the reporting in the *Kronen-Zeitung* amounted to "Nazi journalism" or the making of similar statements. Hence the applicant retained the right to voice his opinion regarding this reporting in other terms. The Court reached the conclusion that the Austrian judicial authorities were entitled to consider that the injunction was necessary in a democratic society and that accordingly there was no violation of Article 10 of the Convention.

- [Fuentes Bobo v. Spain](#), no. 39293/98, 29 February 2000.
- [Özgür Gündem v. Turkey](#), no. 23144/93, ECHR 2000-III.
- [Wabl v. Austria](#), no. 24773/94, 21 March 2000.

IRIS 2000-4/1

European Court of Human Rights: New Judgment on the Journalistic Freedom

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In a judgment delivered at Strasbourg on 2 May 2000 the European Court of Human Rights (Third Section) found unanimously that in the case of *Bergens Tidende* the Norwegian authorities have infringed Article 10 of the European Convention on Human Rights. The daily newspaper *Bergens Tidende*, its editor-in-chief and a journalist were convicted in 1994 by the Norwegian Supreme Court because of defamatory articles on the issue of plastic surgery. The articles, some of them accompanied by large colour photographs, described in detail how women had experienced their situation after allegedly failed operations and a lack of care and follow-up treatment by a certain Dr. R. The latter instituted defamation proceedings against the newspaper which finally led to a conviction by the Supreme Court. Because some accusations at the address of Dr. R. and the practices in his clinic were considered by the Court as not been proven, the newspaper, its editor-in-chief and the journalist who wrote the articles were ordered to pay the plaintiff amounts totalling Norwegian Krone (NOK) 4,709,861 (approximately 4 million French francs) in respect of damages and costs. According to the Supreme Court the fact that the newspaper only repeated the accusations made by others did not constitute a sufficient defence.

As so often, the dispute before the European Court related to whether the interference was "necessary in a democratic society" as it was undisputed that the interference was "prescribed by law", namely section 3-6 of the Norwegian Damage Compensation Act 1969 and pursued the legitimate aim of protecting "the reputation or rights of others". The Strasbourg Court observed at the outset that the impugned articles, which recounted the personal experiences of a number of women who had undergone cosmetic surgery, concerned an important aspect of human health and as such raised serious issues affecting the public interest. The Court also took note of the fact that the applicants had been acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism and attached considerable weight to the fact that in the present case the women's accounts of their treatment by Dr. R. had been found not only to have been essentially correct but also to have been accurately recorded by the newspaper. It was true that, as pointed out by the national courts, the women had expressed themselves in graphic and strong terms and that it was these terms which had been highlighted in the newspaper articles. However, reading the articles as a whole, the Strasbourg Court did not find that the statements were excessive or misleading. The Court also referred to its standard jurisprudence according to which "news reporting based on interviews constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog" (..), it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists".

In these circumstances the reasons relied on by the respondent State, although relevant, were not sufficient to show that the interference complained of was "necessary in a democratic society". The Court considered that there was no reasonable relationship of proportionality between the restrictions placed by the measures applied by the Supreme Court on the applicants' right to freedom of expression and the legitimate aim pursued. Accordingly there was a violation of Article 10 of the Convention.

- [Bergens Tidende and Others v. Norway](#), no. 26132/95, ECHR 2000-IV.
IRIS 2000-5/1

European Court of Human Rights: Recent Judgments on the Freedom of Expression. The Cases of Erdogdu v. Turkey and Constantinescu v. Romania

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Once again the European Court of Human Rights has held that the Turkish authorities have acted in breach of Article 10 of the Convention, this time by convicting Ümit Erdogdu, the editor of the review *İşçilerin Sesi* ("The Workers' Voice"). In 1993 Erdogdu was sentenced to six months' imprisonment and fined by the National Security Court: an article published in the review was considered to be propaganda against the territorial integrity of the State, which is an offence under the Prevention of Terrorism Act. The Court especially took into account that the article referred to parts of Turkish territory as Kurdistan and applauded acts of violence and the national resistance against the State by the PKK. In 1997 the National Security Court deferred sentencing Mr. Erdogdu, ordering that he would be sentenced if, within three years from the date of deferral, he was convicted in his capacity as editor of an offence with intent.

In a judgment delivered at Strasbourg on 15 June 2000 the European Court of Human Rights (Fourth Section) has found that by convicting Erdogdu the judicial authorities of Turkey violated Article 10 of the European Convention on Human Rights. According to the Strasbourg Court, the Turkish authorities did not take sufficient account of the freedom of the press or the right of the public to have access to a different perspective on the Kurdish problem. Although the Court underlined its awareness of the concerns of the authorities regarding the fight against terrorism, it was not persuaded that the litigious article would have highly detrimental consequences for the prevention of disorder and crime in Turkey. Nor was the article to be considered as an incitement to violence and hatred. As to the applicant's benefiting from a deferral of sentence, the Court was of the opinion that because this order only took effect if Mr. Erdogdu committed no further offences with intent as an editor, this was to be considered as a ban effectively censoring the applicant's exercise of his profession. The Court also regarded the ban as unreasonable, as it forced Mr. Erdogdu to refrain from publishing any article that would be considered contrary to the interests of the State. Such a limitation on freedom of journalistic expression was disproportionate because it meant that only ideas that were generally accepted, welcome or regarded as inoffensive or neutral could be expressed. Consequently, the Court concluded that there had been a violation of Article 10 of the Convention. The Turkish judge of the European Court of Human Rights, Judge Gölcüklü delivered a separate opinion. Although he voted with the majority of the Court, Judge Gölcüklü expressed his doubts on the political opportunity to protect the freedom of expression in a way that this freedom can be abused to undermine the democratic rights and freedoms itself.

In the case of *Constantinescu v. Romania*, the European Court of Human Rights in its judgment of 27 June 2000 (First Section) found no violation of Article 10 of the Convention. The case concerns the applicant's conviction for criminal defamation. Constantinescu, the president of a teachers' trade union, was convicted by the Bucharest District Court in 1994 following the publication in the press of comments he had made regarding an internal dispute in the Union and the functioning of the judicial system. More specifically, in an interview with a journalist of the newspaper *Tineretul Liber* Constantinescu had referred to three members of the previous trade union leadership who had refused to return money belonging to the Union after the election of new leaders as *delapidatori* (receivers of stolen goods). It was also mentioned that the new leadership of the Union had lodged a criminal complaint against them. The Bucharest District Court considered these statements by Constantinescu as defamatory, as he must have been aware

when making this remarks in the presence of journalists that the prosecution had dropped the charges against the three teachers concerned. Before the Strasbourg Court Constantinescu alleged a violation of Article 6 (fair trial) and Article 10 (freedom of expression) of the European Convention. He maintained that he had not been allowed to prove that his comments were true and had not been informed that the charges had been dropped by the prosecution when the article appeared. As a matter of fact, the European Court of Human Rights noted a violation of Article 6 of the Convention because the Bucharest District Court found the applicant guilty of defamation without affording him an opportunity to give evidence and defend his case. On the other hand, the Court found no violation of Article 10 of the Convention. The European Court of Human Rights underlined that the Bucharest District Court had based its conviction on the use of the defamatory word *delapidatori* by Constantinescu referring to the three teachers, and not on the fact that he had expressed opinions criticising the functioning of the system of justice in trade union disputes. The Court considered that Constantinescu could quite easily have voiced his criticism and contributed to a free public debate on trade union problems without using the word *delapidatori*, which explicitly refers to a criminal offence, of which the three teachers were never convicted. Accordingly, Constantinescu should have refrained from using this description. Hence, the Strasbourg Court reached the conclusion that the State's legitimate interest in protecting the reputation of the three teachers did not conflict with the applicant's interest in contributing to the aforementioned debate. The Court also found that the penalty imposed, namely a fine of 50,000 ROL (leu) and an award of 500,000 ROL (leu) to each teacher for non-pecuniary damage, was not disproportionate. It was within their margin of appreciation for the Romanian courts to consider the conviction of Constantinescu "necessary in a democratic society" in order to protect the rights of others, which is fully in accordance with para. 2 of Article 10 of the Convention. In a partially dissenting opinion judge Casadevall (Andorra) expressed his opinion that the arguments developed by the Romanian authorities were neither pertinent nor sufficient to legitimise the interference in the applicant's freedom of expression. Casadevall *inter alia* referred to the judgment of the Romanian Supreme Court in 1999 which annulled the applicant's conviction because the motive of intent to defame was not proven. According to Casadevall this judgment in itself contained an implicit confirmation of a violation of Article 10 of the European Convention.

- [Erdođdu v. Turkey](#), no. 25723/94, ECHR 2000-VI.
- [Constantinescu v. Romania](#), no. 28871/95, ECHR 2000-VIII.

IRIS 2000-7/1

European Court of Human Rights: Judgment on the Freedom of Expression in the Case Sener v. Turkey.

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Once again the European Court of Human Rights has held that the Turkish authorities have acted in breach of Article 10 (and Article 6) of the Convention, this time by convicting the owner and editor of the weekly review Haberle Yorumda Gerçek ("The Truth of News and Comments"). In 1994 Sener was sentenced to six months' imprisonment and a fine by the Istanbul State Security Court: an article published in the review was considered to be an offence under the Prevention of Terrorism Act 1991. In the proceedings before the European Court, the Turkish government asserted that the applicant was responsible for separatist propaganda since the article encouraged terrorist violence against the State. In the government's opinion, the message that the article conveyed was that the only means of resolving the Kurdish problem was the maintenance of terrorist activities against the State.

In its judgment of 18 July 2000, the European Court of Human Rights (Third Section) has summarised the basic principles established in its case law concerning Article 10 of the Convention, referring in particular to the essential role of journalism and the media in ensuring the proper functioning of political democracy. The Court also underlined, in line with its case law, that there was little scope under Article 10 paragraph 2 for restrictions on political speech or on debate on matters of public interest. In contrast with the Turkish judicial authorities, the European Court was of the opinion that although the impugned article contained certain phrases that were aggressive in tone, the article as a whole did not glorify violence, nor did it incite people to hatred, revenge or armed resistance. On the contrary, the Strasbourg Court considered the article to be an intellectual analysis of the Kurdish problem calling for an end to the armed conflict. The Court was of the opinion that the domestic authorities failed to give sufficient weight to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective might be for them. The Court finally came to the conclusion that by convicting Sener the Turkish judicial authorities infringed Article 10, of the European Convention on Human Rights.

The Court also reached the conclusion that because of the presence of a military judge on the bench of the Istanbul State Security Court, Sener was denied a fair trial, in breach of Article 6 § 1 of the Convention.

The Turkish judge Gölcüklü expressed a dissenting opinion and argued that in the present case he did not find any violation imputable to the respondent State.

- [Şener v. Turkey](#), no. 26680/95, 18 July 2000.

IRIS 2000-8/1

European Court of Human Rights: Recent Judgments on the Freedom of Expression

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In a judgment of 21 September 2000, the Austrian broadcasting legislation is once more being analysed by the Strasbourg Court (Second Section) from the perspective of Article 10 of the European Convention, this time after a complaint by a private organisation that did not obtain a licence to set up and operate a television transmitter in the Vienna area. In its judgment of 24 November 1993 in the [Informationsverein Lentia case](#), the European Court of Human Rights already decided that the monopoly of the Austrian public broadcasting organisation ORF was in breach of Article 10 of the European Convention on Human Rights and Fundamental Freedoms. This point of view was confirmed in a judgment of 20 October 1997 in the case of [Radio ABC v. Austria](#). The Court was of the opinion that at least until 1 May 1997 there was no legal basis whereby an operating licence could be granted to any radio station other than the Austrian Broadcasting Corporation, a situation which violated Article 10 of the European Convention (see IRIS 1997-10: 3). In its judgment of 21 September 2000, the European Court now notes that until 1 August 1996 it was not possible to obtain a licence to operate a television transmitter in Austria. Hence, the situation of Tele 1 was not different from that of the applicants in the Informationsverein Lentia case. Accordingly, there was a breach of Article 10 during that period. The Strasbourg Court notes, however, that as of 1 August 1996 private broadcasters were free to create and transmit their own programmes via cable network without any conditions being attached, while terrestrial television broadcasting was still reserved to the ORF. The Court is of the opinion that cable television broadcasting offered private broadcasters a viable alternative to terrestrial broadcasting as almost all households receiving television in Vienna had the possibility of being connected to the cable net. Thus, the interference with the applicant's right to impart information resulting from the impossibility of obtaining a licence for terrestrial broadcasting can no longer be regarded as a breach of Article 10. The Court did not decide on the question whether or not the Cable and Satellite Broadcasting Act, which came into force on 1 July 1997, is in breach of Article 10 of the Convention. The Court underlines that the applicant has not made notification of any cable broadcasting activities nor had it submitted an application for a satellite broadcasting licence. Consequently, it is not necessary for the Court to rule on this period as it is not its task to rule in abstracto whether legislation is compatible with the Convention. The Court comes to the conclusion that there has been a breach of Article 10 in the first period (from 30 November 1993 to 1 August 1996), while there has been no violation of this Article in the second period (from 1 August 1996 to 1 July 1997).

In a judgment delivered at Strasbourg on 28 September 2000 the European Court of Human Rights (Fourth Section) has found that by convicting Lopes Gomes da Silva the judicial authorities of Portugal infringed Article 10 of the European Convention on Human Rights. Lopes Gomes da Silva, the manager of the daily newspaper Público, was sentenced by the Lisbon Court of Appeal for criminal libel through the press. The conviction was the result of a criminal complaint by a candidate for the local elections in 1993, Mr. Silva Resende. In an editorial published in Público shortly before the elections, Lopes Gomes da Silva referred to Resende as a "grotesque and clownish candidature" and as an "incredible mixture of reactionary coarseness, fascist bigotry and vulgar anti-Semitism". Lopes Gomes da Silva was ordered to pay PTE 150.0000 as a criminal fine and to pay PTE 250.000 to Silva Resende in damages. In a unanimous decision the Strasbourg Court held that this conviction was a breach of Article 10 of the Convention. The Court once more emphasised the particular importance of the freedom of the press and underlined that the limits of acceptable criticism are wider with regard to a politician acting in his public capacity and that

journalists could resort to a degree of exaggeration or even provocation. By reproducing a number of extracts from recent articles by Silva Resende alongside his editorial, Lopes Gomes da Silva had complied with the rules of journalism, a matter to which the Court attached considerable importance. Although the penalty had been minor, the Court decided that the conviction for libel was not a measure that was reasonably proportionate to the legitimate aim pursued. Consequently, the Court concluded that there had been a violation of Article 10 of the Convention.

- [Tele 1 Privatfernsehgesellschaft mbH v. Austria](#), no. 32240/96, September 2000.
- [Lopes Gomes da Silva v. Portugal](#), no. 37698/97, ECHR 2000-X.

IRIS 2000-9/1

European Court of Human Rights: Finding against France on Violation of Article 10

Charlotte Vier
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Almost two years after [the Canard Enchaîné case](#), the European Court of Human Rights has again found that France has violated the principles contained in Article 10 of the Human Rights Convention.

The case concerned the finding against the director of a newspaper and a journalist who had reported on the proceedings brought by a company that managed hostels for immigrant workers against one of its former directors. It was taken on the basis of Article 2 of the Act of 2 July 1931, which prohibits the publication before the Courts reach a verdict, of any information concerning proceedings instigated by an individual. The Court of Appeal in Paris, to which the case had been referred, had considered that the ban contained in the 1931 act was compatible with Article 10 of the Convention inasmuch as it was aimed at guaranteeing the presumption of innocence and therefore fell within the scope of the restrictions on freedom of expression authorised by the Act.

As the Court of Cassation had rejected the appeal lodged against this decision, the plaintiffs took the case to the European Court of Human Rights ("Court"). In its decision of 3 October 2000, the Court recalled firstly that journalists writing articles on current criminal proceedings must respect the rights of the parties involved. In considering whether interference with the course of justice was involved, the Court noted that the disputed ban - which was absolute and general, covering any type of information - only concerned proceedings instigated by an individual and not those instigated by the Public Prosecutor or on the basis of an ordinary complaint. The judges expressed surprise at this difference of treatment, which did not appear to be based on any objective reason, since the ban prevents the press informing the public of facts which may be of public interest (here, the case brought against political figures and their allegedly fraudulent acts in managing a public-sector company).

The Court held that there were other mechanisms for protecting secrecy during investigation and enquiry procedures, such as Articles 11 and 91 of the Code of Criminal Procedure and in particular Article 9-1 of the Civil Code, which provides that everyone is entitled to the benefit of the presumption of innocence. In addition, the latter provision states that in the event of a person against whom a charge has been brought and proceedings instigated by an individual being presented publicly, before any verdict is passed, as being guilty of the facts being investigated or enquired into by the courts, the judge may, even in urgent matters, order the insertion in the publication concerned of an announcement putting a stop to the infringement of the presumption of innocence.

This range of provisions, which the Court found sufficient, made the total ban contained in the Act of 2 July 1931 unnecessary; France had therefore been found in violation of Article 10 since the ban was not proportionate to the pursuit of the legitimate aims intended.

- [Du Roy and Malaurie v. France](#), no. 34000/96, ECHR 2000-X.

IRIS 2000-9/2

European Court of Human Rights: Recent Judgments on the Freedom of Expression

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In a judgment of 10 October 2000 the European Court of Human Rights (first section) has held in the case of *Akkoç v. Turkey* that a disciplinary sanction because of an interview published in a newspaper, was not in breach of Article 10 of the Convention. The applicant, a former teacher, received a disciplinary punishment in 1994 for a statement made to the press in which she declared that at a meeting some teachers were assaulted by the police. In 1998, however, the Supreme Administrative Court decided that the disciplinary sanction was unlawful. In 1999 the Administrative Court adopted the reasoning of the Supreme Administrative Court and finally cancelled the disciplinary sanction imposed on the applicant. The Strasbourg Court decided that although five years and nine months is a considerable period of time, it did not deprive the domestic procedures of efficacy in providing adequate redress. The Administrative Court quashed the disciplinary sanction which thereby ceased, retrospectively, to have any effect, vindicating the applicant's right of freedom of expression. In such circumstances the applicant cannot longer claim to be a victim of an interference with her right of freedom of expression under Article 10 of the Convention.

In the same case, however, the Court found a violation of Article 2 of the Convention (right to life) and Article 3 of the Convention in respect of the torture of the applicant in police custody.

In another judgment of 10 October 2000 the European Court of Human Rights (3rd section) in the case of *Ibrahim Aksoy v. Turkey* concluded that Article 10 of the Convention had been violated. The applicant, a writer and former Member of Parliament, was convicted several times in Turkey for disseminating separatist propaganda. Neither the speech at a regional congress, nor the publication of an article in a weekly magazine, nor the content of a leaflet, could justify these convictions according to the Strasbourg Court. The Court was of the opinion that the speech, the article and the leaflet did not constitute an incitement to violence, armed resistance or an uprising. The Court emphasised that one of the principal characteristics of democracy is the possibility to resolve a country's problems through dialogue and without recourse to violence, even when it is irksome. According to the Strasbourg Court, the conviction of the applicant could not be regarded as necessary in a democratic society and hence violated Article 10 of the European Convention on Human Rights. This judgment is not final. Either party to the case may, within three months from the date of the judgment of a Chamber, request that the case be referred to the Grand Chamber (Art. 43-44 of the Convention).

- [Akkoç v. Turkey](#), nos. 22947/93 and 22948/93, ECHR 2000-X.
- [İbrahim Aksoy v. Turkey](#), nos. 28635/95, 30171/96 and 34535/97, 10 October 2000.

IRIS 2000-10/2

European Court of Human Rights: Judgment on the Freedom of Expression in the Case Tammer v. Estonia

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In a judgment in the case Tammer v. Estonia the European Court of Human Rights held unanimously that there had been no violation of Article 10 of the Convention. In 1997 Tammer, a journalist and editor of the Estonian daily newspaper Postimees, was convicted of the offence of insult under Article 130 of the Criminal Code. He was found guilty and had to pay a fine of 220 Estonian kroons because of the degradation of another person's honour or dignity in an improper form. Tammer was convicted after a private prosecution instituted by Ms. Laanaru, the second wife of Mr. Savisaar, the former Prime Minister of Estonia. The journalist had published an interview in his newspaper which contained some value judgments that were considered as insulting allegations with regard to Ms. Laanaru. More precisely, in an interview with the author who published a series of articles on the life of Ms. Laanaru, Tammer had raised the question if the publication of this kind of memoir did not make a hero of the wrong person. Tammer also formulated a critical value judgment in his question by putting it as follows: "A person breaking up another's marriage (abielulõhkuja), an unfit and careless mother deserting her child (rongaema): it does not seem to be the best example for young girls". After exhausting all national remedies before the Estonian courts, Tammer applied to the European Court of Human Rights alleging a violation of Article 10 of the Convention.

The Strasbourg Court however was of the opinion that the interference in the right of freedom of expression of Tammer met all three conditions of Article 10 paragraph 2. Tammer's conviction was prescribed by law, pursued a legitimate aim and was to be considered as necessary in a democratic society. The Court noted the assessment of the domestic courts concerning the nature and use of the words in the circumstances of the case and considered that the applicant journalist could have formulated his criticism of Ms. Laanaru's actions without resorting to insulting language. The Strasbourg Court did not find it established that the use of the impugned terms in relation to Ms. Laanaru's private life was justified in terms of public concern or that they bore on a matter of general importance. The Court considered that the domestic courts properly balanced the various interests involved in the case. Taking into account the margin of appreciation, the Court reached the conclusion that the national authorities were indeed justified in the circumstances in interfering with the exercise of the applicant's right, noting also the limited amount of the fine imposed on Tammer as a penalty. Therefore, there had not been a violation of Article 10 of the European Convention.

This judgment will become final in accordance with the circumstances set out in Article 44 paragraph 2 of the Convention.

- [Tammer v. Estonia](#), no. 41205/98, ECHR 2001-I.

IRIS 2001-3/1

European Court of Human Rights: Recent Judgment on Freedom of Expression in the Case of Jerusalem v. Austria

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In a judgment of 27 February 2001, the European Court of Human Rights once again recognised the importance of freedom of political debate in a democratic society, while re-emphasising the difference between factual allegations and value judgments. In the case of Jerusalem v. Austria, the applicant, Mrs Susanne Jerusalem, a member of the Vienna Municipal Council, alleged that an injunction prohibiting her from repeating certain statements violated her right to freedom of expression. In a speech in the course of a debate in the Municipal Council on the granting of public subsidies to associations, she had sharply criticised two associations, describing them as "sects" which had "a totalitarian character" and "fascist tendencies". The Regional Court granted an injunction prohibiting Mrs Jerusalem from repeating the statements. The injunction was upheld by the Court of Appeal and by the Supreme Court, both of which essentially reasoned that allegations such as "fascist tendencies" or "sects with a totalitarian character" were statements of fact which the applicant had failed to prove.

However, the European Court of Human Rights held unanimously that there had been a violation of Article 10 of the European Convention on Human Rights. The Court observed that the applicant was an elected politician and that freedom of expression is especially important for elected public representatives. The applicant's statements were made in the course of a political debate and, although not covered by immunity as they would have been in a session of the Regional Parliament, the forum was comparable to Parliament insofar as the public interest in protecting the participants' freedom of expression was concerned. According to the Court, "Parliament or such comparable bodies are the essential fora for political debate [in a democracy]. Very weighty reasons must be advanced to justify interfering with the freedom of expression exercised therein".

The Court regarded the statements of Mrs Jerusalem as value judgments and took into consideration the fact that she had offered documentary evidence which might have been relevant in showing that these value judgments were fair comment. By requiring the applicant to prove the truth of her statements, while at the same time depriving her of an effective opportunity to produce evidence to support them, the Austrian Courts had taken a measure that amounted to a disproportionate interference with her right to freedom of expression. The Court also stated that the requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 of the Convention. The Court concluded that the injunction preventing the repetition of the impugned statements was not necessary in a democratic society and hence violated Article 10.

The judgment will become final in accordance with Article 44 of the Convention, which governs the finalisation of judgments by the Court.

- [Jerusalem v. Austria](#), no. 26958/95, ECHR 2001-II.

IRIS 2001-4/2

European Court of Human Rights: Cases of B. and P. v. the United Kingdom

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In the cases of B. and P. v. the United Kingdom, the applicants complained that they had been barred from divulging information about the proceedings on custody rights over their children. The judge dealing with the case had ordered that no documents used in the proceedings should be disclosed outside the court. B. had also been warned by the judge that any publication of information obtained in the context of the proceedings would amount to contempt of court. As the case was not heard in public and the judgments were not publicly pronounced, B. and P. complained in Strasbourg that these restricting measures on the publicity of their court case ought to have been considered to be in breach of Article 6 § 1 (right to a fair hearing) and Article 10 (freedom of expression) of the European Convention on Human Rights.

In a judgment of 24 April 2001, the European Court of Human Rights (Third Section) noted that the proceedings in question concerned the residence of each man's son following the parents' divorce or separation, which were prime examples of cases where the exclusion of the press and public might be justified to protect the privacy of the child and parties and to avoid prejudicing the interests of justice. Concerning the publication of the judgments in question, the Court observed that anyone who could establish an interest was able to consult and obtain a copy of the full text of the judgments in child residence cases, while some of these judgments were routinely published, thus enabling the public to study the manner in which the courts generally approach such cases and the principles applied in deciding them. Under these circumstances, the Court reached the conclusion that there had been no violation of Article 6 § 1, either regarding the applicants' complaints about the public hearing or the public pronouncement of the judgments. Finally, the Court held that it was not necessary to examine separately the applicants' complaint under Article 10 of the Convention, thereby implying that the Court did not find a violation of Article 10 of the Convention either.

- [*B. and P. v. the United Kingdom*](#), nos. 36337/97 and 35974/97, ECHR 2001-III.

IRIS 2001-6/1

European Court of Human Rights: Case of Cyprus v. Turkey

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The judgment of the European Court of Human Rights (Grand Chamber) of 10 May 2001 deals with one of the few cases in which the applicant is the government of another State Party to the European Convention for the Protection of Human Rights and Fundamental Freedoms. In this case, the Government of the Republic of Cyprus alleged that due to Turkey's military operations in Northern Cyprus, and especially after the proclamation of the Turkish Republic of Northern Cyprus in 1983 ("the TRNC"), the Government of Turkey was to be considered responsible for continuing violations of several human rights. One of the violations arising out of the living conditions of Greek Cypriots in Northern Cyprus concerned freedom of expression and information, as protected by Article 10 of the Convention. More specifically, it was asserted that the TRNC authorities engaged in excessive censorship of school-books and restricted the importation and distribution of media, especially Greek-language newspapers and books whose content they disapproved. Referring to the Commission's report, the Court was of the opinion that there was not sufficient evidence that restrictions were imposed on the importation of newspapers, the distribution of books or on the reception of electronic media. The Court, on the other hand, found that during the period under consideration, a large number of school-books, no matter how innocuous their content, were unilaterally censored or rejected by the authorities. According to the Court, the respondent Government failed to provide any justification for this form of wide-ranging censorship which far exceeded the limits of confidence-building methods and amounted to a denial of the right to freedom of information. These measures of excessive censorship were considered by the Court to be a violation of Article 10 of the Convention.

- [Cyprus v. Turkey \[GC\]](#), no. 25781/94, ECHR 2001-IV.

IRIS 2001-6/2

European Court of Human Rights: Case of VGT Verein gegen Tierfabriken v. Switzerland

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In its judgment of 28 June 2001, the European Court of Human Rights has developed a remarkable approach with regard to the right of access to broadcast "non-commercial" television commercials. Although the judgment of the Court is essentially declaratory, it can be interpreted as affording arguments for a "right to an antenna", ie a right of access to a particular media controlled by a third person.

The case originates in an application against Switzerland because of the refusal in 1994 by the AG für das Werbefernsehen (Commercial Television Company, now Publisuisse) to broadcast a commercial concerning animal welfare at the request of the Verein gegen Tierfabriken (Association against industrial animal production - VGT). The television commercial was to be considered as a response to the advertisements of the meat industry, and ended with the words "eat less meat, for the sake of your health, the animals and the environment". The Commercial Television Company refused to broadcast the commercial, however, because it considered it to be a message with a clear political character, and Swiss broadcasting law prohibits political advertisements on radio and television. The applicant's administrative law appeal was dismissed by the Bundesgericht (Federal Court) on 20 August 1997, relying inter alia on the legitimate aim of the prohibition of political advertising stated in Section 18 Paragraph 5 of the Federal Radio and Television Act.

The European Court of Human Rights in its judgment of 28 June 2001 agreed that a ban on political advertisements on television as such can be considered to have a legitimate aim, in order to prevent financially-strong groups from obtaining a competitive advantage in politics and to spare the political process from undue commercial influence. Such a ban can also help to provide for a certain equality of opportunity between political movements in society, and to support the press which remained free to publish political advertisements. The Court also agreed that the commercial could be regarded as "political" within the meaning of Section 18 Paragraph 5 of the Swiss Federal Radio and Television Act. Indeed, rather than inciting the public to purchase a particular product, it reflected some controversial opinions on an actual debate in society.

On the decisive question of whether the refusal to broadcast the commercial was necessary in a democratic society, the Court took into account several factors. First of all, the Court observed that powerful financial groups obtain competitive advantages through commercial advertising and might therefore exercise pressure on, and eventually curtail, the freedom of the radio and television stations broadcasting the commercials. The Court underlined that such situations undermine the fundamental role of freedom of expression in a democratic society. Here, however, the applicant association, did not constitute a powerful financial group. Rather than seeking to abuse a competitive advantage, the association was intending to participate by means of its proposed commercial in an ongoing general debate on animal protection. Secondly: although a prohibition on political advertising can be compatible with the requirements of Article 10 of the Convention, the Court was of the opinion that Section 18 Paragraph 5 of the Swiss Federal Radio and Television Act was in casu not applied in accordance with Article 10 of the European Convention. According to the Strasbourg Court, the Swiss authorities had not demonstrated in a "relevant and sufficient" manner why the grounds generally advanced in support of the prohibition on political advertising also served to justify the interference in the particular

circumstances of the case. Furthermore, the Court underlined that the domestic authorities did not adduce the disturbing nature of any particular sequence, or of any particular words of the commercial as a ground for refusing to broadcast it. Finally, it was also taken into consideration that the Commercial Television Company was the sole entity responsible for the broadcasting of commercials during programmes broadcast nationally, which meant that there were few other possibilities to reach the entire Swiss public with the proposed advertisement.

In light of all these elements, the Court held unanimously that the refusal to broadcast VGT's commercial could not be considered as necessary in a democratic society and that consequently there had been a violation of Article 10 of the European Convention.

This judgment will become final in the circumstances set out in Article 44 of the Convention. Within 3 months any party in the case may request a rehearing by the Grand Chamber of the Court.

- [VgT Verein gegen Tierfabriken v. Switzerland](#), no. 24699/94, ECHR 2001-VI.

IRIS 2001-7/2

European Court of Human Rights: Case of Ekin Association v. France

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In a judgment of 17 July 2001, the European Court of Human Rights analysed Section 14 of the French Act on Freedom of the Press, 1881, from the perspective of Articles 10 and 14 of the European Convention. This provision of the French Act empowers the Minister of the Interior to impose a ban on the circulation or distribution of foreign publications. The Court noted that Section 14 of the 1881 Act does not state the circumstances in which the power can be used. In particular, there is no definition of the concept of "foreign origin" and no indication of the grounds on which a publication could be banned. With regard to the banning in 1987 of the book "Euskadi at war", published by the Basque cultural organisation Ekin, the Court was of the opinion that the applicant had not been given the possibility to rely on an effective judicial review to prevent the abuse of Section 14 of the French Freedom of the Press Act. According to the Court, this provision also appeared to be in direct conflict with the actual wording of Article 10 § 1 of the European Convention, which provides that the rights recognised in that Article subsist "regardless of frontiers". The Court ruled that a system of control on publications merely based on their foreign origin is indeed to be considered as a kind of discrimination. Finally, the Court held that the content of the book did not justify so serious an interference with the applicant's freedom of expression as that constituted by the ban imposed by the French Minister of the Interior. Besides the violation of Article 10 of the Convention, the Court also noted that the total length of the proceedings, more than nine years, could not be considered "reasonable", although the issue of the litigation was of particular importance. Consequently, there was also a violation of Article 6 § 1 of the Convention.

This judgment will become final in the circumstances set out in Article 44 of the Convention. Any party to the case may request a rehearing by the Grand Chamber of the Court within three months.

- [Association Ekin v. France](#), no. 39288/98, ECHR 2001-VIII.

IRIS 2001-8/2

European Court of Human Rights: Case of Feldek v. Slovakia

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In a judgment of 12 July 2001, the European Court of Human Rights decided, by five votes to two, that there had been a violation of Article 10 because of the conviction of a publicist who had sharply criticised the Slovak Minister of Culture and Education. This is the second time in only a short period that the Strasbourg Court has found a breach of the right to freedom of expression in Slovakia (See also: Judgment by the European Court of Human Rights (Second Section), Case of [Marônek v. Slovakia](#), Application no. 32686/96 of 19 April 2001).

After the publication in 1995 of a statement in several newspapers referring to the "fascist past" of the Minister of Culture and Education of the Slovak Republic, the author of this statement, Mr Feldek, was convicted by the Supreme Court. The Court applied Articles 11 and 13 of the Slovak Civil Code, which offer protection against the unjustified infringement of one's personal rights, civil and human dignity. The statement was indeed considered as having a defamatory character and Feldek was ordered to ensure the publication of the final judgment in five newspapers.

The judgment of the European Court of Human Rights recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest and that the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Emphasising the promotion of free political debate as a very important feature in a democratic society, the Court underlined that allowing broad restrictions on political speech in individual cases would undoubtedly affect respect for freedom of expression in general in the state concerned. In the Feldek case, the Court was satisfied that the value judgment referring to the "fascist past" of the Slovak Minister of Culture was based on information which was already known to the wider public. The Strasbourg Court refused to subscribe to a restrictive definition of the term "fascist past", as such an interpretation could also mean that a person participated in a fascist organisation, as a member, even if this was not coupled with specific activities propagating fascist ideals. The Court of Human Rights reached the conclusion that the Slovak Court of Cassation had not convincingly established any pressing social need for putting the protection of the personal right of a public figure above the applicant's right to freedom of expression and the general interest of promoting this freedom when issues of public interest are concerned. As the interference complained of by Feldek was not necessary in a democratic society, the Court found that there had been a violation of Article 10 of the Convention.

This judgment will become final in the circumstances set out in Article 44 of the Convention. Any party to the case may request a rehearing by the Grand Chamber of the Court within three months.

- [Feldek v. Slovakia](#), no. 29032/95, ECHR 2001-VIII.

IRIS 2001-8/3

European Court of Human Rights: Case of Perna v. Italy

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In its judgment of 25 July 2001, the European Court of Human Rights held unanimously that there had been a violation of Article 10 on account of the applicant's conviction for alleging, by means of symbolic expression, that a senior Italian judicial officer had sworn an oath of obedience to the former Italian Communist Party.

The applicant, Giancarlo Perna, who is a journalist, published an article in the Italian daily newspaper *Il Giornale* sharply criticising the communist militancy of a judicial officer, Mr G. Caselli, who was at that time the public prosecutor in Palermo. The article raised in substance two separate issues. Firstly, Perna questioned Caselli's independence and impartiality because of his political militancy as a member of the Communist Party. Secondly, Caselli was accused of an alleged strategy of gaining control of the public prosecutors' offices in a number of cities and the use of the pentito (i.e. criminal-turned-informer) T. Buscetta against Mr Andreotti, a former Prime Minister of Italy. After a complaint by Caselli, Perna was convicted for defamation pursuant to Articles 595 and 61 § 10 of the Criminal Code and Section 13 of the Italian Press Act. Throughout the defamation proceedings before the domestic courts, the journalist was not allowed to admit the evidence he sought to adduce. In 1999 Perna alleged a violation of Article 6 and Article 10 of the European Convention on Human Rights.

The refusal by the Italian Courts was not considered by the Strasbourg Court as a breach of Article 6 § 1 and 3(d) of the Convention, which guarantee everyone charged with a criminal offence the right to examine witnesses or to have witnesses examined on their behalf. The Court was of the opinion that the applicant had not explained how evidence from the witnesses he wished to call could have contributed any new information whatsoever to the proceedings.

After repeating the general principles of its case law on Article 10 of the Convention, the Court emphasised the distinction that is to be made between facts and value judgments in order to decide if there has been a breach of Article 10. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. The Court noted that the criticism directed at the complainant had a factual basis that was not disputed, namely Caselli's political militancy as a member of the Communist Party. By such conduct, a judicial officer inevitably exposes himself to criticism in the press, which may rightly see the independence and impartiality of the State legal service as a major concern of public interest. The Court agreed that the terms chosen by Perna and the use of the symbolic image of the "oath of obedience" to the Communist Party was hard-hitting, but it also emphasised that journalistic freedom covers possible recourse to a degree of exaggeration or even provocation. According to the Court, the conviction of Perna was a violation of Article 10 of the Convention as the punishment of a journalist for such kinds of criticism of a member of the judiciary is not necessary in a democratic society.

With regard, however, to Perna's assertions about the alleged strategy of gaining control over the public prosecutors' offices in a number of cities and especially the use of the pentito Buscetta in order to prosecute Mr Andreotti, the Court came to the conclusion that the conviction of Perna was not in breach of Article 10 of the Convention. In contrast to the general criticism in the impugned newspaper article, these allegations obviously amounted to the attribution of specific acts to the complainant. As this part of the article did not mention any evidence or cite any source

of information, the Court considered that these allegations were not covered by the protection of Article 10. Referring to the extremely serious character of such allegations against a judicial officer, with a lack of factual basis, the Court came to conclusion that this part of Perna's article indeed overstepped the limits of acceptable criticism.

This judgment will become final in the circumstances set out in Article 44 of the Convention. Any party to the case may request a rehearing by the Grand Chamber of the Court within three months.

- [Perna v. Italy](#), no. 48898/99, 25 July 2001.

Editor's note: This case was referred to the Grand Chamber, which returned its judgment on [6 May 2003](#).

IRIS 2001-8/4

European Court of Human Rights: Case *Thoma v. Luxembourg*

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In a judgment of 29 March 2001, the European Court of Human Rights once again recognised the importance of journalistic freedom in reporting on matters of public interest. Marc Thoma, a radio journalist working for RTL, alleged that his civil conviction for making a defamatory statement in a radio programme violated his right to freedom of expression. In that radio programme, he reported on alleged fraudulent practices in the field of reforestation work. These allegations were based on an article published in the newspaper *Tageblatt*. Following legal action by 63 Forestry Commission officials, the journalist was convicted of defamation by the Luxembourg courts.

The European Court held unanimously that there had been a violation of Article 10 of the European Convention on Human Rights. The Court recalled its general principles, emphasising the important role of the press in a democratic society. Although the European Court recognised that some of the applicant's remarks were very serious and that the officials of the Water and Forestry Commission were indirectly identifiable, it noted at the same time that the issue raised in the radio programme had been widely debated in the Luxembourg media and concerned a problem of public interest.

In particular, the fact that Thoma had based his defamatory remarks on an article published by a fellow journalist was a decisive element in this case. The European Court reiterated that punishing a journalist for assisting in the dissemination of statements made by another person would seriously hamper the contribution of the press to the discussion of matters of public interest and should not be envisaged unless there were particularly strong reasons for doing so. The Luxembourg courts had decided that a journalist who merely quoted from an article that had already been published would only escape liability if he formally distanced himself from that article. The European Court, however, is of the opinion that such a requirement for journalists to distance themselves systematically and formally from the content of a quotation that might defame or harm a third party was not reconcilable with the role of the press in providing information on current events, opinions and ideas. The Court noted that the applicant had taken the precaution of mentioning that he was quoting from a press article and that he had underlined that this article contained some "strongly worded" allegations. The Court also took into consideration the fact that the journalist had interviewed a third party, a woodlands owner, about whether he thought that the allegations of fraud in the reforestation sector were true. Under these circumstances, the Court was not sufficiently convinced that the conviction of the applicant was necessary in a democratic society in order to protect the reputation and rights of others.

- [*Thoma v. Luxembourg*](#), no. 38432/97, ECHR 2001-III.

IRIS 2001-9/1

European Court of Human Rights: Case *Marônek v. Slovakia*

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In a judgment of 19 April 2001, the Court also held that there had been a violation of Article 10 of the European Convention on Human Rights, this time in the case of *Marônek v. Slovakia*. In 1992, the daily newspaper *Smena* published an article on the problems experienced by Vladimir Marônek with the allocation of a flat that was the property of a State-owned company. The article stated that the flat allocated to Marônek had been unlawfully occupied by A., a public prosecutor. It also criticised the fact that Marônek had no possibility of using the flat. A few weeks later, the newspaper published an open letter written by Marônek, criticising the fact that the flat which was at his disposal was occupied by A., emphasising again that A. was a public prosecutor and adding: "[S]hould our newly-born democracy have such representatives of law, it will not outlive its childhood and we can bury it right away". Marônek and the newspaper were sued and convicted of defamation. Marônek alleged before the European Court that his right to freedom of expression had been violated.

The European Court noted that the purpose of Marônek's open letter was not only to resolve his individual problem, but also to urge others with a similar problem to take action. According to the Court, he expressed the view, apparently in good faith, that the resolution of the issue was important for strengthening the rule of law in a newly-born democracy. The open letter also raised issues of public interest, capable of affecting housing policy at a period when State-owned apartments were about to be denationalised. Taken as a whole, the statements of Marônek did not appear to be excessive and most of the events on which he had relied had earlier been made public in the *Smena* article. Furthermore, and most importantly, the European Court reached the conclusion that the domestic courts lacked sufficient reasons to justify the relatively high amount of compensation awarded to the claimants. According to the Court, there was no reasonable relationship of proportionality between the measures applied and the legitimate aim pursued (the protection of the rights and reputation of others). Accordingly, the Court held unanimously that there had been a violation of Article 10.

- [*Marônek v. Slovakia*](#), no. 32686/96, ECHR 2001-III.

IRIS 2001-9/2

European Court of Human Rights: Case *Bankovic and Others v. Belgium and Others*

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On 19 December 2001, the European Court of Human Rights announced its decision on admissibility in the case of *Bankovic and Others v. Belgium and 16 Other Contracting States*. The application was brought by six citizens of the Federal Republic of Yugoslavia (FRY) and concerned the bombing by the North Atlantic Treaty Organization (NATO) of the building of Radio Televizije Srbije (Radio-Television Serbia, RTS) during the Kosovo crisis in April 1999. The building was destroyed; 16 people were killed and 16 others were seriously injured. The applicants, all family members of the deceased or themselves injured in the bombing, complained that the bombardment of the RTS building violated not only Article 2 (right to life), but also Article 10 of the European Convention on Human Rights (freedom of expression).

The Court, however, unanimously declared the application inadmissible as the impugned act is to be considered as falling outside the jurisdiction of the respondent States. The Court came to the conclusion that there was no jurisdictional link between the persons who were victims of the act complained of and the respondent States. Accordingly, it was not satisfied that the applicants and their deceased relatives were capable of coming within the jurisdiction of the respondent States on account of the extra-territorial act in question. As to whether the exclusion of the applicants from the respondent States' jurisdiction would defeat the ordre public mission of the Convention and leave a regrettable vacuum in the Convention system of human rights protection, the Court's obligation was to have regard to the special character of the Convention as a constitutional instrument of European public order for the protection of individual human beings and its role was to ensure the observance of the engagements undertaken by the Contracting States within their legal space. The FRY clearly did not fall within this legal space and the Convention is not considered to be designed for application throughout the world, even in respect of the conduct of the Contracting States.

The Court concluded that the impugned action of the respondent States does not engage their Convention responsibility and that the application could therefore be declared inadmissible.

- [Banković and Others v. Belgium and Others \(dec.\) \[GC\]](#), no. 52207/99, ECHR 2001-XII.

IRIS 2002-1/2

European Court of Human Rights: Case of E.K. v. Turkey

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In 1994, E.K., the secretary of the Istanbul section of the Human Rights Association, was convicted in two separate judgments by the State Security Court, which found that she had expressed support for the activities of the PKK and that she had undermined the territorial integrity and unity of the Turkish Nation. The first conviction related to an article by E.K., published in the Istanbul daily newspaper, *Özgür Gündem*, and entitled, "The world owes a debt to the Kurdish people". The article contained the text of a lecture by E.K. at a conference held in the Belgian Parliament. The article criticised the repressive approach of Turkish policy in Kurdistan and the violation of human rights by the Turkish army. The second case concerned an article in a book that was edited by E.K. The article described the situation in Turkish prisons. The State Security Court sentenced E.K. to terms of two years' and of six months' imprisonment and imposed substantial fines on her, pursuant to the Anti-terrorism Act.

The applicant complained that her conviction in relation to the publication of the book constituted a violation of Article 7 (no punishment without law) and that both convictions infringed Article 10 (freedom of expression) and Article 6 (fair trial) of the European Convention on Human Rights and Fundamental Freedoms.

The Court unanimously declared the conviction in relation to the publication of the book to be an infringement of Article 7 of the Convention, as according to Turkish law, prison sentences could only be imposed on the editors of periodicals, newspapers and magazines - and not books. The Court also unanimously declared that both convictions were in breach of Article 10 of the Convention. The conviction in relation to the publication of the book applied a law which was no longer applicable at the time of the conviction by the State Security Court. Hence this interference by the Turkish public authorities was considered not to be prescribed by law. In more general and principled terms, the Court also found a breach of Article 10, as the Court emphasised once more the importance of freedom of expression, the role of the press in a genuine democracy and the right of the public to be properly informed. According to the Court, the impugned article published in *Özgür Gündem* did indeed sharply criticise the Turkish authorities, but it did not contain any incitement to violence, hostility or hatred between citizens. Nor was the conviction of the applicant as editor of the book to be considered "necessary in a democratic society". The Court emphasised that the impugned article was rather to be seen as a strong protest referring to a difficult political situation, and not as incitement to an armed struggle. Finally, with regard to the alleged violation of Article 6, the Strasbourg Court attached great importance to the fact that a civilian (lawyer, editor and human rights activist) had to appear before a court composed, even if only in part, of members of the armed forces. Hence the applicant could legitimately fear that because one of the judges of the State Security Court was a military judge, it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. In other words, E.K. had a legitimate cause and there were objective reasons to doubt the independence and impartiality of the State Security Court, which led to the finding of a violation of Article 6 of the Convention.

- [E.K. v. Turkey](#), no. 28496/95, 7 February 2002.

IRIS 2002-3/1

European Court of Human Rights: Three Violations of Article 10 by Austria

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In three judgments of 26 February 2002, all against Austria, the European Court of Human Rights found a breach of Article 10 of the European Convention on Human Rights.

The first case (*Unabhängige Initiative Informationsvielfalt v. Austria*) concerned the publication in the periodical *TATblatt* of a leaflet referring to "racist agitation" by the *Freiheitliche Partei Österreichs* (Austrian Freedom Party, FPÖ). The text criticised the racist policy proposals of the FPÖ and was followed by a list of addresses and telephone numbers of FPÖ members and offices, with an invitation to the readers of *TATblatt* to call the FPÖ politicians and tell them what they thought of them and their policy. The Austrian courts, following civil proceedings initiated by the FPÖ leader, Jörg Haider, were of the opinion that the statement concerning racial agitation was to be considered as an insult and went beyond the limits of acceptable criticism by reproaching the plaintiff with a criminal offence. An injunction not to repeat the statement was granted against the publisher of the magazine. The European Court, however, in its judgment of 26 February 2002, was of the opinion that the statement was to be situated in the context of a political debate and that it contributed to a discussion on subject matters of general interest, such as immigration and the legal status of aliens in Austria. The Court did not accept the qualification of the statement on "racist agitation" as an untrue statement of fact and considered the comment to be a value judgment, the truth of which is not susceptible of proof. In sum, the Court unanimously concluded that it could not find sufficient reasons to prevent the publisher from repeating the critical statement in question. For these reasons, the Court held that there had been a violation of Article 10 of the Convention.

In a second case (*Dichand and others v. Austria*), the Austrian courts had issued an order to retract and not to repeat some critical statements published in the *Neue Kronen Zeitung*. These statements firmly criticised the strategies and interests of a politician-lawyer, Mr. Graff, who was the defence lawyer of another media group. The European Court again disagreed with the Austrian courts: according to the European Court, the impugned statements were value judgments which had an adequate factual basis and represented a fair comment on issues of general public interest. The Court accepted the criticism of Mr. Graff as a politician who was in a situation where his business and political activities overlapped. It was recognised by the Court that the statement contained harsh criticism in strong, polemical language. However, the Court recalled its standard jurisprudence that Article 10 also protects information and ideas that offend, shock or disturb. The Court unanimously came to the conclusion that the interference by the Austrian authorities had violated Article 10 of the Convention.

In the third case (*Krone Verlag GmbH & Co. KG v. Austria*), the European Court of Human Rights found that the Austrian courts had failed to take into account the essential function fulfilled by the press in a democratic society and its duty to impart information and ideas on matters of public interest. The case concerned the publication of an article, accompanied by photographs of a politician who had allegedly received unlawful salaries. A permanent injunction was granted by an Austrian court prohibiting the applicant company from publishing the politician's picture in connection with the article in question or similar articles. According to the Strasbourg Court, there was no valid reason why the newspaper should have been prevented from publishing the picture, especially as the photographs did not disclose any details of the private life of the politician concerned. The Court also referred to the fact that the picture of the politician as a

member of the Austrian Parliament was included on the Austrian Parliament's Internet site. The interference with the newspaper's right to freedom of expression was therefore not necessary in a democratic society. Accordingly, the Court held unanimously that there had been a violation of Article 10 of the Convention.

- [Unabhängige Initiative Informationsvielfalt v. Austria](#), no. 28525/95, ECHR 2002-I.
- [Dichand and Others v. Austria](#), no. 29271/95, 26 February 2002.
- [Krone Verlag GmbH & Co. KG v. Austria](#), no. 34315/96, 26 February 2002.

IRIS 2002-4/2

European Court of Human Rights: Case of De Diego Nafría v. Spain

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In 1997, Mariano de Diego Nafría, a former civil servant with the rank of inspector at the Bank of Spain, was dismissed after he had written a letter to the Bank's inspectorate accusing the Governor and other senior officials of the Bank of different kinds of irregularities. After the Spanish Courts had confirmed the legitimate character of the dismissal of de Diego Nafría because of the defamatory character of the letter, de Diego Nafría alleged a violation of Article 10 of the European Convention (freedom of expression) before the European Court of Human Rights, submitting that the content of the letter reflected the truth and that the terms held to be offensive were taken out of context.

The European Court, by five votes to two, held that there had been no violation of Article 10, observing that the Spanish courts had pertinently and correctly weighed the conflicting interests against each other before concluding that the applicant had overstepped the acceptable limits of the right to criticise. The European Court was of the opinion that the judgment in which the Madrid High Court had ruled that it was insulting to make serious and totally unsubstantiated accusations against a number of directors of the Bank of Spain could not be considered unreasonable or arbitrary.

In the dissenting opinion it was emphasised that this case is very similar to the case of [Fuentes Bobo v. Spain](#) (see IRIS 2000-4: 2). In a judgment of 29 February 2000, the Court came to the conclusion in that case that the dismissal of the applicant because of his criticism of the management of the Spanish public broadcasting organisation, TVE, was to be considered a breach of Article 10 of the Convention. According to the dissenting judges, the Court should have taken the same approach in the instant case of de Diego Nafría. The dissenting judges referred in particular to the fact that the letter was not made public, nor distributed to the media, but was exclusively and directly addressed to the Bank's inspectorate. These observations and arguments could not, however, dissuade the majority of the European Court from reaching the conclusion that there had been no violation of Article 10 of the Convention, as the national courts had not exceeded their margin of appreciation in penalising the applicant.

- [De Diego Nafría v. Spain](#), no. 46833/99, 14 March 2002.

IRIS 2002-5/1

European Court of Human Rights: Case of Gawęda v. Poland

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In 1993 and 1994, the Polish authorities refused to register two of Mr. Gawęda's periodicals. The title of the first periodical was *The Social and Political Monthly - A European Moral Tribunal*, while the second request concerned the registration of a periodical under the title *Germany - a Thousand year-old Enemy of Poland*. Both requests for registration were dismissed by the Polish courts, which considered that the name of a periodical should be relevant to its content, in accordance with the 1984 Press Act and the Ordinance of the Minister of Justice on the registration of periodicals. With regard to the first periodical, the Polish courts were of the opinion that the proposed name implied that a European institution was supporting or publishing the magazine, which was untrue and misleading. With regard to the second title, the courts considered that the title was also in conflict with reality, in that it unduly concentrated on negative aspects of Polish-German relations, thus giving an unbalanced picture of the facts.

In a judgment of 14 March 2002, the European Court of Human Rights reached the conclusion that both refusals to register the title of a periodical magazine violated the applicant's freedom of expression, as guaranteed by the European Convention on Human Rights. The European Court did not consider the obligation to register a title of a newspaper or a magazine as such to be a violation of Article 10 of the Convention. However, as the refusal of registration amounted to an interference with the applicant's right to freedom of expression, this refusal must be in accordance with Article 10 § 2 of the Convention, which means in the first place that the interference with the freedom of expression of the applicant must be "prescribed by law". Referring to Article 20 of the Press Act and Article 5 of the Ordinance on the registration of periodicals, the Court was of the opinion that the applicable law was not formulated with sufficient precision, as the terms used in the Law and in the Ordinance are ambiguous and lack the clarity that one would expect in a legal provision of this nature. According to the Court, the legal provisions suggest rather that registration could be refused where the request for registration did not conform to the technical details specified in Article 20 of the Press Act. The refusal to allow registration because of the allegedly misleading title is to be considered as "inappropriate from the standpoint of freedom of the press".

The European Court also observed that in the present case, the domestic courts had imposed a kind of prior restraint on "a printed media" in a manner which entailed a ban on publication of entire periodicals on the basis of their titles. Such an interference would at least require a legislative provision which clearly authorised the courts to do so. According to the European Court, the interpretation given by the Polish courts to Article 5 of the Ordinance introduced new criteria, which were not foreseeable on the basis of the text specifying situations in which the registration of a title can be refused. Therefore, the Court was of the opinion that the nature of the interference with the applicant's exercise of his freedom of expression was not "prescribed by law" within the meaning of Article 10 § 2 of the Convention. Accordingly, the Court unanimously concluded that there had been a violation of Article 10 of the Convention.

- [Gawęda v. Poland](#), no. 26229/95, ECHR 2002-II.

IRIS 2002-5/2

European Court of Human Rights: Case of Nikula v. Finland

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In 1996, Anne Nikula, a lawyer living in Helsinki, lodged an application against Finland with the European Court of Human Rights, alleging that her freedom of expression had been violated by her conviction for defamation for having criticised the public prosecutor in her own capacity as defence counsel. In a memorial which the applicant read out before the court, the public prosecutor, Mr. T., was criticised for "role manipulation and unlawful presentation of evidence". After a private prosecution was initiated by Mr. T., Nikula was convicted in 1994 of public defamation committed without better knowledge. The Supreme Court upheld the criminal conviction in 1996, but restricted the sanction to the payment of damages and costs only.

In its judgment of 21 March 2002, the European Court of Human Rights reiterated that the special status of Sciences lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Given the key role of lawyers in this field, it is legitimate to expect them to maintain public confidence in the administration of justice. However, the Court referred as well to the possibility that an interference with the counsel's freedom of expression in the course of a trial could raise an issue under Article 6 of the Convention with regard to the right of an accused client to receive a fair trial. According to the Court, the "equality of arms" principle and more generally, the principle of a fair trial, militate in favour of free and even forceful argumentation between the parties, although this should not lead to unlimited freedom of expression for a defence counsel.

In evaluating the legitimacy of the applicant's conviction, the Court - referring to the Interights Amicus Curiae report - reiterated the distinction between the role of the prosecutor as the opponent of the accused, and that of the judge. This should provide increased protection for statements whereby an accused person criticises a prosecutor, as opposed to verbally attacking the judge or the court as a whole. The Court also noted that the applicant's submissions were confined to the courtroom, as opposed to criticism of a judge or prosecutor voiced in the media. More substantially, the Court underlined that the threat of an ex post facto review of a counsel's criticism of the public prosecutor is difficult to reconcile with defence counsels' duty to defend their clients' interests zealously. The assessment of a defence argument should not be influenced by the potential chilling effect of a criminal sanction or an obligation to pay compensation for harm suffered or costs incurred. According to the Court, it is only in exceptional cases that a restriction even by way of a lenient criminal sanction - of a defence counsel's freedom of expression can be accepted as necessary in a democratic society. In the Court's view, such reasons were not shown to exist in the Nikula case. Therefore, the restriction on Ms. Nikula's freedom of expression failed to answer any pressing social need. The Court held, by five votes to two, that there had been a violation of Article 10 of the Convention.

- [Nikula v. Finland](#), no. 31611/96, ECHR 2002-II.
- Amicus Curiae brief submitted to the European Court of Human Rights by Interights, the International Centre for the Legal Protection of Human Rights, pursuant to Rule 61 of the Rules of the Court, 26 March 2002.

IRIS 2002-6/1

European Court of Human Rights: Case of *McVicar v. the United Kingdom*

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In a judgment of 7 May 2002, the European Court of Human Rights ruled in a case in which the defamation of a well-known sports figure was the central issue. In September 1995, an article was published in the magazine, *Spiked*, in which the journalist John McVicar suggested that the athlete Linford Christie used banned performance-enhancing drugs. Mr. Christie brought an action in the High Court for defamation against McVicar. For the greater part of the proceedings, McVicar represented himself as he could not afford to pay legal fees because of the non-availability of legal aid for defamation actions. His defence was that the allegations made in the article were true in substance and in fact. The trial judge, however, refused to admit the evidence of two witnesses upon which McVicar wished to rely. The judge found that to allow both witnesses to give evidence would have been unfair to Mr. Christie as he would not have had time to call counter-evidence and further, he would only have been made aware of the details about his alleged drugtaking when the witnesses would have taken the stand. In 1998, the jury found that the article contained defamatory allegations and found that McVicar had not proved that the article was substantially true. McVicar was ordered to pay costs and was made the subject of an injunction preventing him from repeating the allegations.

McVicar lodged an application with the European Court alleging that the inability of a defendant in a libel action to claim legal aid constituted a violation of Articles 6 para. 1 (fair trial) and 10 (freedom of expression and information) of the European Convention on Human Rights. He also submitted that the exclusion of witness evidence at a trial, as well as the burden of proof which he faced in pleading a defence of justification, the order for costs and the injunction restricting future publication further violated Article 10 of the Convention.

The European Court was of the opinion that McVicar was not prevented from presenting his defence to the defamation action effectively in the High Court, nor that the proceedings were unfair by reason of his ineligibility for legal aid. The Court noted, inter alia, that the applicant was a well-educated and experienced journalist who would have been capable of formulating a cogent argument before the Court. Therefore, there had been no violation of Article 6 or of Article 10 of the Convention.

As for the exclusion of evidence, the order to pay the costs arising from the defamation proceedings and the injunction measure, the Court held that there had been no violation of Article 10 either. The Court considered the potential consequences of the allegations made in the article for an individual who had achieved fame and fortune purely as a result of his athletic achievements to be very grave. The Court also emphasised that the offending article in itself made no mention of any authoritative basis for the drug-taking allegation. For those reasons, the Court held unanimously that there had been no violation of Article 10 of the Convention either.

- [McVicar v. the United Kingdom](#), no. 46311/99, ECHR 2002-III.

IRIS 2002-7/3

European Court of Human Rights: Case of Colombani (Le Monde) v. France

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In a judgment of 25 June 2002, the European Court of Human Rights found a violation by France of the right to freedom of expression. The case concerns the conviction of the publishing director and of a journalist of the newspaper, Le Monde. Both had been convicted by the Court of Appeal of Paris in 1997 for defamation of the King of Morocco, Hassan II.

In its issue of 3 November 1995, Le Monde published an article about a confidential version of a report by the Geopolitical Drugs Observatory (OGD) on drug production and trafficking in Morocco. The report had been compiled at the request of the Commission of the European Communities. The article, which was sub-headed, "A confidential report casts doubt on King Hassan II's entourage", called into question the resolve of the Moroccan authorities, and principally the King, in combatting the increase in drug-trafficking on Moroccan territory. At the request of the King of Morocco, criminal proceedings were brought against Le Monde. Mr. Colombani, the publishing director, and Mr. Incyan, the journalist who wrote the article, were convicted by the Paris Court of Appeal under section 36 of the Law of 29 July 1881 for insulting a foreign head of state. According to the Court, the journalist had failed to check the allegations and the article was considered to have been inspired by malicious intent.

The European Court, however, did not agree with these findings, emphasising in the first place that when contributing to a public debate on issues that raised legitimate concerns, the press had - in principle - to be able to rely on official reports without being required to carry out its own separate investigations. The Strasbourg Court also referred to other French case-law which was inclined to recognise that the offence under section 36 of the Law of 29 July 1881 infringed freedom of expression as guaranteed by Article 10 of the European Convention. Recent French jurisprudence itself appears to accept that this provision and its application were not necessary in a democratic society, particularly since heads of state or ordinary citizens who have been the target of insulting remarks or whose honour or reputation has been harmed, have an adequate criminal remedy in recourse to a prosecution for defamation. The special status for heads of states that derogated from the general law could not be reconciled with modern practice and political conceptions. In the Court's view, such a privilege went beyond what was necessary in a democratic society. The Court therefore found that, owing to the special nature of the protection afforded by the relevant provision of the Law on Freedom of the Press of 1881, the offence of insulting foreign heads of state was liable to infringe freedom of expression without meeting a "pressing social need". For these reasons, the Court held unanimously that there had been a violation of Article 10 of the Convention.

- [Colombani and Others v. France](#), no. 51279/99, ECHR 2002-V.

IRIS 2002-9/1

European Court of Human Rights: Case of Wilson & the NUJ v. the United Kingdom

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In a judgment of 2 July 2002, the European Court of Human Rights found a violation by the United Kingdom of the right to freedom of assembly and association (Article 11 of the European Convention). The case concerns the use of financial incentives to induce employees to relinquish the right to union representation for collective bargaining. The case is especially interesting for the media sector, as it was brought before the Court of Human Rights jointly by David Wilson, a journalist working for the Daily Mail and by the National Union of Journalists (NUJ). Other applications by members of the National Union of Rail, Maritime and Transport Workers were later joined to this initial application by Wilson and the NUJ.

The case goes back to 1989 when Associated Newspapers Limited gave notice of its intention to de-recognise the NUJ and to terminate all aspects of collective bargaining. It also signalled that personal contracts were to be introduced with a 4.5% pay increase for journalists who signed and accepted the de-recognition. Wilson applied to the domestic courts, contesting the legality of the requirement to sign the personal contract and lose union rights, or accept a lower pay rise. After the House of Lords held that the collective bargaining over employment terms and conditions was not a sine qua non of union membership, Wilson and the NUJ lodged applications in Strasbourg, alleging that the law of the United Kingdom, by allowing the employer to de-recognise trade unions, failed to uphold their right to protect their interests through trade union representation and their right to freedom of expression, contrary to Articles 11 and 10 (and also in conjunction with Article 14 of the Convention (non-discrimination)).

With regard to Article 11, the Court is of the opinion that the absence in UK law of an obligation on employers to enter into collective bargaining did not give rise, in itself, to a breach of Article 11 of the Convention. However, the Court took the view that allowing employers to use financial incentives to induce employees to relinquish important union rights constituted a violation of Article 11. The Court referred to the fact that this feature of domestic law has been criticised by the Social Charter's Committee of Independent Experts and the International Labour Organisation's Committee on Freedom of Association. According to the Court, it is the State's responsibility to ensure that trade union members were not prevented or restrained from using their union to represent them in attempts to regulate their relations with their employers. The Court concluded that the United Kingdom had failed in its positive obligation to secure the enjoyment of the rights guaranteed under Article 11 of the Convention.

As the Court considered that no separate issue arose under Article 10 of the Convention that had not already been dealt with in the context of Article 11, it held that it was not necessary to examine the complaint from the perspective of Article 10. The Court also found that it was unnecessary to consider the complaint raised under Article 14 of the Convention.

- [*Wilson, National Union of Journalists and Others v. the United Kingdom*](#), nos. 30668/96, 30671/96 and 30678/96, ECHR 2002-V.

IRIS 2002-9/2

European Court of Human Rights: *Yagmurdereli v. Turkey* and *Seher Karatas v. Turkey*

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In two recent judgments, the European Court of Human Rights again found violations of the right to freedom of expression in Turkey.

The case of *Esber Yagmurdereli* concerns an application arising out of a sentence of ten months' imprisonment. The applicant, a lawyer, writer and doctor of philosophy, had given a speech at a meeting in 1991, in which he referred to Kurdistan as a part of the National Territory and to the terrorists acts carried out by the PKK as "a struggle for democracy and freedom". In 1994, he was convicted by the National Security Court for infringement of the anti-terrorist law: the content of his speech was considered to amount to separatist propaganda aimed at undermining the territorial integrity of the State and national unity.

The case of *Seher Karatas* concerns the conviction of the applicant, who was the publisher and editor of a fortnightly magazine, *Gençliğin Sesi* ("The Voice of Youth"). After the publication of an article, which urged young people to unite with the working-class and which criticised the actual political system as heading towards instability and crisis, Ms. Karatas was charged with inciting the people to hatred and hostility, contrary to Article 312 of the Turkish Criminal Code. The National Security Court found Karatas guilty of this offence and imposed a fine and a term of imprisonment of one year and eight months, with the prison sentence being converted into a fine.

In both cases, the European Court recognised the sensitivity of the security situation in south-east Turkey and referred to the need for the authorities to fight against terrorism and to be vigilant in repressing acts liable to increase violence. That is why the Court held that the interferences with the applicants' freedom of expression pursued legitimate aims of protecting national security and territorial integrity and preventing disorder and crime.

However, in both cases, the Court found that the applicants' comments had taken the form of a political speech, emphasising that the European Convention allowed very few restrictions on freedom of expression in the sphere of political speech or questions of general interest. The Court also noted that the Turkish authorities had not pointed to any passages containing a vindication of acts of terrorism, an incitement to hatred between citizens or a call for violence or bloody revenge. Accordingly, the Court concluded in both cases that the measures taken against the applicants could not be deemed to be necessary in a democratic society and held that there had been a violation of Article 10. The Court also found a violation of Article 6 para. 1, as both applicants, as civilians, had not had a fair trial owing to the presence of a military judge on the bench of the National Security Court.

- [*Yağmurdereli v. Turkey*](#), no. 29590/96, 4 June 2002.
- [*Seher Karataş v. Turkey*](#), no. 33179/96, 9 July 2002.

IRIS 2002-9/3

European Court of Human Rights: Case of Stambuk v. Germany

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In a judgment of 17 October 2002, the European Court of Human Rights came to the conclusion that a disciplinary action imposed on a doctor for disregarding a ban on advertising by medical practitioners by giving an interview to the press was to be considered a breach of Article 10 of the European Convention on Human Rights.

In 1995, a fine was imposed on the applicant, an ophthalmologist, by a district Disciplinary Court for Medical Practitioners. An article in a newspaper, including an interview with, and a photograph of, Mr. Stambuk was considered as disregarding a ban on advertising by medical practitioners. The interview in which Mr. Stambuk explained the successful treatment with a new laser technique that he applied was seen as a kind of self-promotion, in breach of the [Baden-Württemberg] Rules of Professional Conduct of the Medical Practitioners' Council. According to section 25(2) of this Code, a medical practitioner should not allow pictures or stories which have an advertising character, indicate the name or show a photograph, to be published in respect of his/her professional activities. According to section 27, the cooperation of a medical practitioner in informative publications in the press is only permissible if these publications are limited to objective information, without the practitioner being presented in the form of an advertisement. The Disciplinary Appeals Court for Medical Practitioners upheld the sanction, taking into account that Mr. Stambuk had not only allowed an article which would go beyond objective information on a particular operation technique to be published, but had deliberately acted so as to give prominence to his own person.

The European Court of Human Rights recognised that restrictions on advertising by medical practitioners in the exercise of their liberal profession have a legitimate aim in protecting the rights of others or to protect health. However, the question of whether, in casu, a disciplinary action was necessary in a democratic society, was answered in the negative by the European Court. The Court recalled that, for the citizen, advertising is a means of discovering the characteristics of services and goods offered. The Court recognised that owing to the special circumstances of particular business activities and professions, advertising or commercial speech may be restricted. The Court also accepted that the general professional obligation on medical practitioners to care for the health of each individual and for the community as a whole might indeed explain restrictions on their conduct, including rules on their public communications or participation in public communications on professional issues. These rules of conduct in relation to the press are, however, to be balanced against the legitimate interest of the public in information and are limited to preserving the good functioning of the profession as a whole. They should not be interpreted as putting an excessive burden on medical practitioners to control the content of press publications, while also taking into account the essential function fulfilled by the press in a democratic society by imparting information and ideas on all matters of public interest.

According to the Court, the article with the interview and a photo of Mr. Stambuk on the whole presented a balanced explanation of the specific operation technique, inevitably referring to the applicant's own experience. The article may well have had the effect of giving publicity to Mr. Stambuk and his practice, but, having regard to the principal content of the article, this effect proved to be of a secondary nature. According to the Court, the interference complained of by Mr. Stambuk did not achieve a fair balance between the interests at stake, namely the protection

of health and the interests of other medical practitioners and Mr. Stambuk's right to freedom of expression and the vital role of the press. In sum, there was a breach of Article 10 of the Convention.

- [Stambuk v. Germany](#), no. 37928/97, 17 October 2002.

IRIS 2002-10/3

European Court of Human Rights: Cases of Ayse Öztürk v. Turkey and Karakoç and Others v. Turkey

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With the adoption of friendly settlements in the cases of [Altan v. Turkey](#) on 14 May 2002 (see IRIS 2002-7: 2-3), [Ali Erol v. Turkey](#) on 20 June 2002, [Özler v. Turkey](#) on 11 July 2002, [Sürek \(no. 5\) v. Turkey](#) on 16 July 2002 (see IRIS 2002-9: 4) and [Mehmet Bayrak v. Turkey](#) on 3 September 2002 (see IRIS 2002-10: 3), several violations of the right to freedom of expression were recognised by the Turkish authorities. In two recent cases, the European Court of Human Rights again came to the conclusion that Article 10 of the European Convention on Human Rights had not been respected by the Turkish authorities.

In the case of Ayse Öztürk, the Court was asked to decide on the alleged violations of the right to freedom of expression after various seizures in 1994 of the fortnightly review Kizil Bayrak ("The Red Flag"), of which Ayse Öztürk was the owner and editor-in-chief at that time. The applicant was sentenced to imprisonment and fines, with these sentences being suspended for three years. The impugned articles published in the review were considered to amount to inciting hostility and hatred based on a distinction according to race or ethnic origin, or separatist propaganda. The seizures and convictions were based on Article 28 of the Constitution, Articles 36 para. 1, 86 and 312 of the Criminal Code and Article 8 para. 1 of the Prevention of Terrorism Act.

In its judgment of 15 October 2002, the Court, without underestimating the difficulties inherent in the fight against terrorism and referring to the security situation in south-east Turkey, came to the conclusion that the seizures of the review and the conviction of the applicant could not be considered as "necessary in a democratic society". The Court especially emphasised that none of the impugned articles constituted an incitement to violence and that the comments in those articles took the form of political speech. As regards the fact that the sentences were suspended, the Court was of the opinion that such measures were tantamount to a ban on the applicant exercising her profession, as it required her to refrain from criticising the government or other authorities in a way that could be considered contrary to the interests of the State. This measure restricted her ability to express ideas, notably regarding the Kurdish Issue, that were part of a public debate and forced her to restrict her freedom of expression - as a journalist - to ideas that were generally accepted or regarded as inoffensive or as a matter of indifference. According to the Court, the measures in question were to be considered a violation of Article 10 of the Convention.

In the case of Karakoç and others, the applicants, two trade union leaders and a representative of a newspaper, complained of an infringement of their right to freedom of expression after they had been convicted for committing the offence of separatist propaganda under Article 8 of the Prevention of Terrorism Act. The applicants were sentenced to several months' imprisonment in 1994 because of the publication of a statement in the press criticising the policy of the Turkish authorities in southeast Turkey and in which reference was made to "massacres and extrajudicial executions". Taking into consideration the essential role of the press and its role of public watchdog, the applicants were considered to have alerted public opinion to concrete acts that were liable to infringe fundamental rights. The statement of the applicants was therefore considered as political speech by representatives of unions and the press, criticising the policy of the government, without inciting to violence or terrorism. Consequently, the Court held that

there had been a violation of Article 10, as the applicants' sentences were disproportionate to the aims pursued and not necessary in a democratic society. The Court also found (once more) a breach of Article 6 para. 1 of the Convention, as civilians accused of terrorist offences should not be tried by a court that includes a military judge: this indeed constituted a legitimate ground for fearing bias on the part of the court in the instant case.

- [Ayşe Öztürk v. Turkey](#), no. 24914/94, 15 October 2002.
- [Karakoç and Others v. Turkey](#), nos. 27692/95, 28138/95 and 28498/95, 15 October 2002.

IRIS 2002-10/4

European Court of Human Rights: Case of Demuth v. Switzerland

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In 1997, Mr. Demuth complained to the European Court of Human Rights that the decision of the Swiss Bundesrat (Federal Council) refusing to grant Car Tv AG a broadcasting licence for cable television ran counter to Article 10 of the European Convention on Human Rights (freedom of expression). He considered that the refusal was arbitrary and discriminatory. In a decision of 16 June 1996, the Federal Council had decided that there was no right, either under Swiss law or under Article 10 of the European Convention, to obtain a broadcasting licence. With reference to the instructions for radio and television listed in Section 3 § 1 and Section 11 § 1 (a) of the Bundesgesetz über Radio und Fernsehen (Radio and Television Act - RTA), the Federal Council was of the opinion that the orientation of the programme content of Car Tv AG was not able to offer the required valuable orientation to comply with the general instructions for radio and television, as the programme focused mainly on entertainment and reports about automobiles.

In its judgment of 5 November 2002, the European Court confirmed its earlier case-law that the refusal to grant a broadcasting licence is to be considered as an interference with the exercise of the right to freedom of expression, namely the right to impart information and ideas under Article 10 para. 1 of the Convention. The question is whether such an interference is legitimate. According to the third sentence of Article 10 para. 1, Member States are permitted to regulate by means of a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. It remains to be determined, however, whether the manner in which the licensing system is applied satisfies the relevant conditions of paragraph 2 of Article 10.

The Court was of the opinion that the relevant provisions of the licensing system of the RTA were capable of contributing to the quality and balance of programmes. This was considered a sufficient legitimate aim, albeit not directly corresponding to any of the aims set out in Article 10 para. 2. The Court also referred to the particular political and cultural structures in Switzerland that necessitate the application of sensitive political criteria such as cultural and linguistic pluralism and a balanced federal policy. The Court saw no reason to doubt the validity of these considerations, which are of considerable importance for a federal State. Such factors, which encourage in particular pluralism in broadcasting may legitimately be taken into account when authorising radio and television broadcasts. The Court came to the conclusion that the Swiss Federal Council's decision, guided by the policy that television programmes shall to a certain extent also serve the public interest, did not go beyond the margin of appreciation left to national authorities in such matters. The Court also observed that the refusal to grant the requested licence was not categorical and did not exclude a broadcasting licence once and for all. Although the Court explicitly recognised that opinions may differ as to whether the Federal Council's decision was appropriate and whether the broadcasts should have been authorised in the form in which the request was presented, the Court reached the conclusion that the restriction of the applicant's freedom of expression was necessary in a democratic society. The Court took special note of the Government's assurance that a licence would indeed be granted to Car Tv AG if it included cultural elements in its programme. The Court considered it unnecessary to examine the Government's further ground of justification for refusing the licence, contested by the applicant, namely that there were only a limited number of frequencies available on cable television. By 6 votes to 1, the Court reached the conclusion that there had been no violation of

Article 10 of the Convention. The dissenting opinion of Judge G. Jörundsson is annexed to the judgment.

- [Demuth v. Switzerland](#), no. 38743/97, ECHR 2002-IX.

IRIS 2003-1/2

European Court of Human Rights: New Violations of Freedom of Political Expression in Turkey

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In two recent judgments, the European Court of Human Rights has come to the conclusion that freedom of political expression has been violated in Turkey.

In the case of *Yalçın Küçük v. Turkey*, the Court was of the opinion that the confiscation of copies of a book and the applicant's sentence to one year's imprisonment and a fine of TRL 100 million was an illegitimate infringement by the authorities of the right to freedom of expression. Küçük was convicted for separatist propaganda as the book he had published contained an interview with Abdullah Öcalan, the PKK leader. The book referred to the Kurdish separatist movement and to the programme for Kurdish cultural autonomy. In its judgment of 5 December 2002, the European Court of Human Rights recognised the need for the authorities to be alert to acts capable of fuelling additional violence in the region of south-east Turkey, but the Court found at the same time that the book did not constitute an incitement to violence, armed resistance or an uprising. The Court was also of the opinion that by confiscating copies of the book and convicting its author, the Turkish judicial authorities had failed to have sufficient regard to the general public's right to receive alternative forms of information and to assess the situation in south-east Turkey. Taking into account as well the nature and severity of the sentences imposed on the applicant, the interference with the applicant's right to freedom of expression was regarded as a breach of Article 10 of the European Convention on Human Rights.

In the case of *Dicle on behalf of the Democratic Party (DEP) v. Turkey*, the Court was asked to decide on an alleged breach of Article 9 (freedom of thought, conscience and religion), Article 10 (freedom of expression) and Article 11 (freedom of assembly and association) of the European Convention. The applicant alleged that the order of the Turkish Constitutional Court to dissolve the DEP, on the ground that its activities were liable to undermine the territorial integrity of the State and the unity of the nation, was a breach of several articles of the Convention. In its judgment of 10 December 2002, the European Court of Human Rights noted that the written declarations and the speeches of the leaders of the DEP that had led to the dissolution of the party were indeed fiercely critical of government policy towards citizens of Kurdish origin. However, the Court did not find those declarations and speeches to be contrary to fundamental principles, nor had the Constitutional Court established in accordance with the requisite standard that the DEP was seeking to undermine democracy in Turkey. Although one declaration made by the former president of the DEP in Iraq amounted to approval of the use of vio Media Law Section of the Communication Sciences Department Ghent University lence as a political tool, the Court was of the opinion that a single speech by a former leader of the party that had been made in another country, in a language other than Turkish and to an audience that was not directly concerned, could not be considered a sufficient reason to dissolve a political party. Consequently, the Court held that the dissolution of the DEP could not be regarded as "necessary in a democratic society" and therefore there had been a violation of Article 11. The Court considered it unnecessary to examine the case from the perspective of Articles 9 and 10, as the complaints concerned the same matters as those examined under Article 11.

- [Yalçın Küçük v. Turkey](#), no. 28493/95, 5 December 2002.
- [Dicle for the Democratic Party \(DEP\) of Turkey v. Turkey](#), no. 25141/94, 10 December 2002.

IRIS 2003-3/1

European Court of Human Rights: Case of A. v. United Kingdom

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Although the case of A. v. United Kingdom is not an Article 10 case, the judgment of the European Court of Human Rights of 17 December 2002 can be considered as an important confirmation of the principle of freedom of speech and political debate. The case concerns the question of whether the statements of a Member of Parliament (MP) in the House of Commons are protected by parliamentary privilege under Article 9 of the Bill of Rights 1689. During a parliamentary debate on housing policy in 1996, an MP made offensive and derogatory remarks about the behaviour of A. and her children. The MP called the family of A. "neighbours from hell", a phrase which was also quoted in the newspapers. Following the MP's speech and hostile reports in the press, A. received hate-mail addressed to her and she was also stopped in the street and subjected to offensive language. A. was re-housed by the housing association as a matter of urgency and her children were obliged to change schools. A letter of complaint to the relevant MP (which was forwarded to the Office of the Parliamentary Speaker) and a letter to the then Prime Minister, Mr. John Major, did not result in effective measures being taken against the MP. A. was informed about the absolute character of parliamentary privilege.

In Strasbourg, the applicant complained that the absolute nature of the privilege that protected statements about her made by the MP in Parliament violated, in particular, her right of access to the courts under Article 6 para. 1 of the European Convention. The European Court of Human Rights recognised the legitimate aim of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary. The Court emphasised that in a democracy, Parliament or such comparable bodies are the essential fora for political debate. The Court was of the opinion that the absolute immunity enjoyed by MPs is designed to protect the interests of Parliament as a whole, as opposed to those of individual MPs: "in all the circumstances of this case, the application of a rule of absolute Parliamentary immunity cannot be said to exceed the margin of appreciation allowed to States in limiting an individual's right of access to court" (para. 87). The Court emphasised, however, that no immunity attaches to statements made outside of Parliament, or to an MP's press releases, even if their content repeats statements made during the parliamentary debate itself.

The judgment reads: "[T]he Court agrees with the applicant's submissions to the effect that the allegations made about her in the MP's speech were extremely serious and clearly unnecessary in the context of a debate about municipal housing policy. The MP's repeated reference to the applicant's name and address was particularly regrettable. The Court considers that the unfortunate consequences of the MP's comments for the lives of the applicant and her children were entirely foreseeable. However, these factors cannot alter the Court's conclusion as to the proportionality of the parliamentary immunity at issue [...]. There has, accordingly, been no violation of Article 6 para. 1 of the Convention as regards the parliamentary immunity enjoyed by the MP" (paras. 88 and 89). The absence of legal aid for defamation proceedings in the United Kingdom was not considered to be a violation of Article 6 para. 1 of the Convention either. The applicant was deemed to have had sufficient possibilities to bring defamation proceedings in respect of the non-privileged press releases.

The Court also took into consideration the domestic law of the eight States that have made a third-party intervention in the case. Each of these laws makes provision for such an immunity, although the precise details of the immunities concerned vary. The Court believed that the rule

of parliamentary immunity, which is consistent with - and reflects - generally-recognised rules within the signatory States, the Council of Europe and the European Union, cannot in principle be regarded as imposing a disproportionate restriction on the right of access to the courts, as embodied in Article 6 para. 1. The Court found no violation of Article 8 (right to respect for private and family life), Article 13 (right to an effective remedy) or Article 14 (prohibition of discrimination).

- [A. v. the United Kingdom](#), no. 35373/97, ECHR 2002-X.

IRIS 2003-3/2

European Court of Human Rights: Case of Roemen and Schmit v. Luxembourg

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At the origin of this case lies an article in the *Lëtzebuerger Journal* in which Robert Roemen reported that a Minister was convicted of tax evasion, commenting that such conduct was all the more shameful coming from a public person who should set an example. The article reported that the Minister had been ordered to pay a tax fine of LUF 100.000 (nearly EUR 2.500). This information was based on an internal document that was leaked from the Land Registry and Land Property Office. The Minister lodged a criminal complaint and an investigation was opened in order to identify the civil servant(s) who had handled the file under a breach of confidence. Apart from carrying out searches at the journalist's home and workplace, the investigative judge also ordered a search of the office of the journalist's lawyer. Several applications lodged both by Roemen and Schmit because of the alleged violation of the protection of journalistic sources and the breach of confidentiality between the lawyer and her client (right of privacy) were dismissed. Finally, after the exhaustion of all domestic remedies, Roemen and Schmit lodged an application with the European Court of Human Rights.

The Court came to the conclusion that the searching of the journalist's home and office is to be considered as a violation of Article 10 of the European Convention on Human Rights. Confirming its case law, the Court considered that "having regard to the importance of the Belgium protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention, unless it is justifiable by an overriding requirement in the public interest" (see also ECourtHR 27 March 1996, [Goodwin v. United Kingdom](#), par. 39 - see IRIS 1996-4: 5). The Court recognised that the searches carried out in the journalist's home and place of work were prescribed by law and pursued the legitimate aim of maintaining the public order and preventing crime. However, because the article had discussed a matter of general interest, the search interferences could not be compatible with Article 10 of the Convention unless they were justified by an "overriding requirement in the public interest". The Court was of the opinion that the Luxembourg authorities had not shown that the balance between the interests at stake had been preserved. The Court underlined that the search warrant gave the investigative officers very wide powers to burst in on a journalist at his place of work and gave them access to all the documents in his possession. The reasons adduced by the Luxembourg authorities could not be regarded as sufficient to justify the searches of the journalist's home and place of work. Therefore the Court came to the conclusion that the investigative measures at issue had been disproportionate and had infringed Roemen's right to freedom of expression.

The judgment also confirmed the Court's case law on the point that, in principle, the confidentiality of communication between a lawyer and his or her client falls under the protection of privacy as guaranteed by Article 8 of the Convention (see also ECourtHR 16 December 1992, [Niemiets v. Germany](#)). The Court considered that the search carried out by the Luxembourg judicial authorities at the lawyer's office and the seizure of a document had amounted to an unacceptable interference with her right to respect for her private life, and hence amounted to a violation of Article 8 of the Convention. The Court emphasised that the search carried out at Ms Schmit's office clearly amounted to a breach of the journalist's source through the intermediary of his lawyer. The Court held that the search had therefore been

disproportionate to the legitimate aims pursued, particularly in view of the rapidity with which the search order had been carried out.

- [Roemen and Schmit v. Luxembourg](#), no. 51772/99, ECHR 2003-IV.

IRIS 2003-5/2

European Court of Human Rights: Case of Peck v. United Kingdom

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In the case of Peck v. United Kingdom the applicant complained about the disclosure to the media of closed circuit television (CCTV) footage, which resulted in images of him being published and broadcast widely. The local authority operating the CCTV system, the Brentwood Borough Council, had released the images to the media with the aim of promoting the effectiveness of the system in the detection and the prevention of crime. Extracts of the footage, *inter alia*, were included in an Anglia Television news programme and in the BBC programme "Crime Beat". The masking was considered inadequate by the Independent Television Commission (ITC) and the Broadcasting Standards Commission (BSC) as neighbours, colleagues, friends and family who saw the programmes recognised the applicant. The judicial authorities in the United Kingdom, on the other hand, did not consider that the disclosure of the CCTV material was a breach of the applicant's right to privacy under Article 8 of the European Convention.

The European Court of Human Rights, however, is of the opinion that the disclosure of the images to the media resulted in a breach of Article 8 of the Convention. The Court emphasises that the applicant was in a public street but that he was not there for the purposes of participating in any public event, nor was he a public figure. The image of the applicant was shown in the media, including the audio-visual media, which are commonly acknowledged as having "often a much more immediate and powerful effect than the print media". As a result, the Court considers that the unforeseen disclosure by the Council operating the CCTV system of the relevant footage constituted a serious interference with the applicant's right to respect for his private life. The Court also comes to the conclusion that the disclosure was not "necessary in a democratic society". Although the Court recognises that the CCTV system plays an important role in detecting and preventing crime and that this role is rendered more effective and successful through advertising the CCTV system and its benefits, the Council had other options available to achieve these objectives. The Council could have taken steps to obtain the applicant's prior consent to disclosure, it could have itself masked the images before making them available to the media, or it could have taken the utmost care in ensuring that the media to which the disclosure was made masked the images. The Court notes that the Council did not explore the first or second options and considers that the steps taken in respect of the third option were inadequate. The Court is of the opinion that the Council should have demanded written undertakings from the media to mask the images, a requirement that would have emphasised the need to maintain confidentiality. As such, the disclosure constituted a disproportionate and therefore unjustified interference with the private life of the applicant and a violation of Article 8 of the Convention.

With regard to the applicant's complaint that he had no effective domestic remedy to have his right to privacy protected in the United Kingdom, it is interesting to underline that the European Court is of the opinion that the power of the BSC and the ITC is not sufficient to consider the procedures before these bodies as an effective remedy, as they cannot make monetary compensation available to an aggrieved individual who may have been injured by an infringement of the relevant broadcasting regulation. Neither did the Court accept the Government's argument that any acknowledgment of the need to have a remedy would undermine the important conflicting rights of the press as guaranteed by Article 10 of the Convention, as the media could have achieved their objectives by properly masking the applicant's identity. Accordingly there has also been a violation of Article 13 of the Convention (right to effective remedy before a national authority).

- [Peck v. the United Kingdom](#), no. 44647/98, ECHR 2003-I.

IRIS 2003-6/2

European Court of Human Rights: Cordova no. 1 and Cordova no. 2 v. Italy

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In two judgments of 30 January 2003, the European Court of Human Rights made a restrictive application of defamatory and insulting allegations expressed by two Members of Parliament. In the case of Cordova no. 1, the senator and former Italian president, Francesco Cossiga, had insulted by way of some sarcastic letters a public prosecutor, Mr. Cordova, while in the case of Cordova no. 2, the same public prosecutor had been criticised in very offensive terms by a member of the Italian parliament, Mr. Vittorio Sgarbi. In both cases Mr. Cordova lodged a criminal complaint because of these insulting and defamatory statements. In the case of Cordova no. 1, the Italian Senate considered that the acts of which Mr. Cossiga was accused were covered by parliamentary immunity, as his opinions had been expressed in the performance of his parliamentary duties. In the case of Cordova no. 2, the Court of Cassation accepted also the immunity of Mr. Sgarbi, referring to the decision of the Italian Chamber of Deputies interpreting the concept of "parliamentary duties" as encompassing all acts of a political nature, even those performed outside Parliament. These findings made it impossible to continue the proceedings that were under way and deprived Cordova of the opportunity to seek compensation for the damages he alleged he had sustained.

The European Court of Human Rights, however, is of the opinion that the decisions applying parliamentary immunity to Mr. Cossiga's and Mr. Sgarbi's acts constituted a violation of Article 6 of the Convention (right to a fair trial - right of access to a court). The European Court, affirming its approach developed in the case of [A. v. United Kingdom](#) (ECtHR 17 December 2002, see IRIS 2003-3: 3), accepts that a State affords immunity to Members of its Parliament, as this principle constitutes a long-standing practice designed to ensure freedom of expression among representatives of the people and to prevent the possibility of politically-motivated prosecutions, interfering with the performance of parliamentary duties. Hence, the restriction on the applicant's right to a fair trial pursued the legitimate aims of protecting free speech in parliament and maintaining the separation of powers between the legislature and the judiciary. In both the Cordova no. 1 and Cordova no. 2 cases, the European Court notes, however, that the statements by Mr. Cossiga and Mr. Sgarbi were not related to the performance of their parliamentary duties in the strict sense, but appeared to have been made in the context of personal disputes. According to the Strasbourg Court, a denial of access to a court cannot be justified solely on the ground that the dispute might have a political character or might relate to political activity. The Court considers that the decisions that Mr. Cossiga and Mr. Sgarbi could not be prosecuted for their alleged insulting or defamatory statements with regard to Mr. Cordova, had upset the fair balance that should be struck between the demands of the general interest of the community and the requirements of protection of the individual's fundamental rights, such as the right to enjoy a good reputation and to have this enforced before an impartial judge. The Court attaches importance to the fact that, after the relevant resolutions had been passed by the Senate and the Chamber of Deputies, Mr. Cordova had no other reasonable alternative means available for the effective protection of his rights under the Convention. The Court accordingly held that there had been a violation of Article 6 of the Convention.

- [Cordova v. Italy \(no. 1\)](#), no. 40877/98, ECHR 2003-I.
- [Cordova v. Italy \(no. 2\)](#), no. 45649/99, ECHR 2003-I (extracts).

IRIS 2003-7/2

European Court of Human Rights: Case of Perna v. Italy

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In a judgment of 6 May 2003, the Grand Chamber of the European Court of Human Rights has overruled the Court in the case of [Perna v. Italy](#) (see IRIS 2001-8: 3). While the Strasbourg Court in 2001 had come to the conclusion that the conviction of the Italian journalist Giancarlo Perna violated Article 10 of the Convention, the Grand Chamber has now reached the conclusion that the conviction of the journalist for defamation was in accordance with the European Convention on Human Rights.

The case goes back to an article published in the newspaper *Il Giornale* in which Perna sharply criticised the communist militancy of a judicial officer, Mr. G. Caselli, who was at that time the public prosecutor in Palermo. The article raised in substance two separate issues. Firstly, Perna questioned Caselli's independence and impartiality because of his political militancy as a member of the Communist Party (PCI). Secondly, Caselli was accused of a strategy of gaining control of the public prosecutors' offices in a number of cities and of the manipulative use of a *pentito* (criminal-turned-informer) against Mr. Andreotti (a former Italian prime minister). After a complaint by Caselli, Perna was convicted for defamation in application of Articles 595 and 61 paragraph 10 of the Italian Criminal Code and Section 13 of the Italian Press Act. Throughout the defamation proceedings before the domestic courts, the journalist was refused admittance of the evidence he sought to adduce. In 1999 Perna alleged a violation of Article 6 and Article 10 of the European Convention.

The refusal to allow the journalist to prove the truth of his statements before the Italian Courts was not considered by the Strasbourg Court to be a breach of Article 6 paragraphs 1 and 3 (d) of the Convention, which guarantee everyone charged with a criminal offence the right to examine witnesses or to have witnesses examined on their behalf. The Court, in its judgment of 25 July 2001, was of the opinion that there were no indications that the evidence concerned could have contributed any new information whatsoever to the proceedings. The Grand Chamber has now confirmed this decision, emphasizing that it was not established that Perna's request to produce evidence would have been helpful in proving that the specific conduct imputed to Caselli had actually occurred.

With regard to Article 10 of the Convention, the Second Section of the European Court, in its judgment of 25 July 2001, argued that the criticism directed at Caselli had a factual basis which was not disputed, namely Caselli's political militancy as a member of the Communist Party. The Court agreed that the terms chosen by Perna and the use of the symbolic image of the "oath of obedience" to the Communist Party was hard-hitting, but it also emphasized that journalistic freedom covers possible recourse to a degree of exaggeration or even provocation. According to the Court, the conviction of Perna was a violation of Article 10 of the Convention, as the punishment of a journalist for such kinds of criticism of a member of the judiciary was considered not to be necessary in a democratic society. With regard, however, to Perna's speculative allegations about the alleged strategy of gaining control over the public prosecutors' offices in a number of cities and especially the use of the *pentito* Buscetta in order to prosecute Mr. Andreotti, the Court came to the conclusion that the conviction of Perna was not in breach of Article 10 of the Convention.

The Grand Chamber, in its judgment of 6 May 2003, has now come to the overall decision that the conviction of Perna did not violate Article 10 at all. The Court focuses on the article's overall content and its very essence, of which the unambiguous message was that Caselli had knowingly committed an abuse of authority, notably connected with the indictment of Mr. Andreotti, in furtherance of the alleged PCI strategy of gaining control of public prosecutors' offices in Italy. The Court is of the opinion that Perna at no time tried to prove that the specific conduct imputed to Caselli had actually occurred and that in his defence he argued, on the contrary, that he had expressed critical judgments that there were no need to prove. According to the Grand Chamber of the Court, the interference in Perna's freedom of expression could therefore be regarded as necessary in a democratic society to protect the reputation of others within the meaning of Article 10 paragraph 2 of the Convention.

- [Perna v. Italy \[GC\]](#), no. 48898/99, ECHR 2003-V.

IRIS 2003-8/2

European Court of Human Rights: Case of Pedersen and Baadsgaard v. Denmark

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In Strasbourg, two journalists of *Danmarks Radio* (Danish national television) complained about their conviction for defamation of a Chief Superintendent. The journalists, Pedersen and Baadsgaard, had produced two programmes about a murder trial in which they criticised the police's handling of the investigation. At the end of one of the programmes, the question was raised if it was the Chief Superintendent who had decided that a report should not be included in the case or who concealed a witness's statement from the defence, the judges and the jury. Both journalists were charged with defamation and convicted. They were sentenced to 20 day-fines of DKK 400 (EUR 53) and ordered to pay DKK 100.000 (EUR 13.400) compensation.

The European Court of Human Rights has now decided that this conviction breached neither Article 6 nor Article 10 of the European Convention. In its judgment of 19 June 2003, the Court, *inter alia*, emphasized that "[p]ublic prosecutors and superior police officers are civil servants whose task it is to contribute to the proper administration of justice. In this respect they form part of the judicial machinery in the broader sense of this term. It is in the general interest that they, like judicial officers, should enjoy public confidence. It may therefore be necessary for the State to protect them from accusations that are unfounded".

The Court is of the opinion that the television programme left the viewers with the impression that the named Chief Superintendent had taken part in the suppression of a report in a murder case, and thus committed a serious criminal offence. The Court accepts that journalists divulge information on issues of general interest, provided however "that they are acting in good faith and on accurate factual basis and provide 'reliable and precise' information in accordance with the ethics of journalism". The Court is of the opinion that it is doubtful, having regard to the nature and degree of the accusation, that the applicants' research was adequate or sufficient to substantiate their concluding allegation that the Chief Superintendent had deliberately suppressed a vital fact in a murder case. The Court also takes into consideration that the programme was broadcast at peak viewing time on a national TV station devoted to objectivity and pluralism, and accordingly, was seen by a wide public. The Court reiterates that the audio-visual media often have a much more immediate and powerful effect than the print media. The Court reaches the conclusion that the interference with the applicants' freedom of expression did not violate Article 10 of the Convention, as the conviction was necessary for the protection of the reputation and the rights of others. Three of the seven judges of the Court dissented, emphasizing the vital role of the press as public watchdog in imparting information of serious public concern.

- [Pedersen and Baadsgaard v. Denmark](#), no. 49017/99, 19 June 2003.

Editor's note: This case was referred to the Grand Chamber, which returned its judgment on [17 December 2004](#).

IRIS 2003-9/2

European Court of Human Rights: Case of Murphy v. Ireland

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In a judgment of 10 July 2003 the European Court of Human Rights unanimously held that the applicant's exclusion from broadcasting an advertisement announcing a religious event, was considered to be prescribed by law, had a legitimate goal and was necessary in a democratic society. The decision by the Irish Radio and Television Commission (IRTC) to stop the broadcast of the advertisement was taken in application of Section 10(3) of the Irish Radio and Television Act, which stipulates that no advertisement shall be broadcast which is directed towards any religious or political end (see [IRIS 1998-1: 6](#), [IRIS 1998-7: 9](#) and [IRIS 2003-2: 11](#)). The Court accepted that the impugned provision sought to ensure respect for the religious doctrines and beliefs of others so that the aims of the prohibition were the protection of public order and safety together with the protection of the rights and freedoms of others. Recognising that a wide margin of appreciation is available to the Member States when regulating freedom of expression in the sphere of religion, referring to the fact that religion has been a divisive issue and that religious advertising might be considered offensive and open to the interpretation of proselytism in Ireland, the Court was of the opinion that the prohibition on broadcasting the advertisement was not an irrelevant nor a disproportionate restriction on the applicant's freedom of expression. While there is not a clear consensus, nor a uniform conception of the legislative regulation of the broadcasting of religious advertising in Europe, reference was made to the existence in other countries of similar prohibitions on the broadcasting of religious advertising, as well as to Article 12 of [Directive 89/552/EEC of 3 October 1989](#) (Television without Frontiers Directive) according to which television advertising shall not prejudice respect for human dignity nor be offensive to religious or political beliefs. The Court also emphasized that the prohibition concerned only the audio-visual media, which have a more immediate, invasive and powerful impact, including on the passive recipient, and also the fact that advertising time is purchased and that this would lean in favour of unbalanced usage by religious groups with larger resources and advertising. For the Court it is important that the applicant, a pastor attached to the Irish Faith Centre, a bible based Christian ministry in Dublin, remained free to advertise in any of the print media or to participate as any other citizen in programmes on religious matters and to have services of his church broadcast in the audio-visual media. The Court indeed accepts that a total ban on religious advertising on radio and television is a proportionate measure: even a limited freedom to advertise would benefit a dominant religion more than those religions with significantly less adherents and resources. This would jar with the objective of promoting neutrality in broadcasting, and in particular, of ensuring a "level playing field" for all religions in the medium considered to have the most powerful impact. The Court reached the conclusion that the interference with the applicant's freedom of expression did not violate Article 10 of the Convention.

- [Murphy v. Ireland](#), no. 44179/98, ECHR 2003-IX (extracts).

IRIS 2003-9/3

European Court of Human Rights: Case of Ernst and Others v. Belgium

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Four Belgian journalists applied to the European Court of Human Rights, alleging (among other complaints) that searches and seizures by the judicial authorities at their newspaper's offices, their homes and the head office of the French speaking public broadcasting organisation *RTBF* constituted a breach of their freedom of expression under Article 10 and a violation of their right to privacy under Article 8 of the European Convention on Human Rights.

In 1995 searches were performed in connection with the prosecution of members of the police and the judiciary for breach of professional confidence following leaks in some highly sensitive criminal cases (the murder of the leader of the socialist party; investigations regarding industrial, financial and political corruption). The complaint lodged by the journalists against the searches and seizures at their places of work and homes was declared inadmissible by the Court of Cassation and the journalists were informed that no further action would be taken on their complaint.

The European Court, in its judgment of 15 July 2003, has come to the conclusion that the searches and seizures violated the protection of journalistic sources guaranteed by the right to freedom of expression and the right to privacy. The Court agreed that the interferences by the Belgian judicial authorities were prescribed by law and were intended to prevent the disclosure of information received in confidence and to maintain the authority and impartiality of the judiciary. The Court considered that the searches and seizures, which were intended to gather information that could lead to the identification of police officers or members of the judiciary who were leaking confidential information, came within the sphere of the protection of journalistic sources, an issue which called for the most careful scrutiny by the Court (see also ECourtHR 27 March 1996, [Goodwin v. United Kingdom](#) - see IRIS 1996-4: 5- and ECourtHR 25 February 2003, [Roemen and Schmit v. Luxembourg](#) - see IRIS 2003-5: 3). The Court emphasized the wide scale of the searches that had been performed, while at no stage had it been alleged that the applicants had written articles containing secret information about the cases. The Court also questioned whether other means could not have been employed to identify those responsible for the breaches of confidence, and in particular took into consideration the fact that the police officers involved in the operation of the searches had very wide investigative powers. The Court found that the Belgian authorities had not shown that searches and seizures on such a wide scale had been reasonably proportionate to the legitimate aims pursued and therefore came to the conclusion that there had been a violation of Article 10 of the Convention. The Court, for analogous reasons, also found a violation of the right to privacy protected by Article 8 of the Convention.

- [Ernst and Others v. Belgium](#), no. 33400/96, 15 July 2003.

IRIS 2003-9/4

European Court of Human Rights: Case of Karkin v. Turkey

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The case of Karkin v. Turkey concerns the conviction of the secretary of a union who was sentenced by the National Security Court in 1997 to one year's imprisonment for making a speech inciting the people to hatred and hostility creating discrimination based on membership of a social class and race, a criminal conviction in application of Article 312 of the Turkish Criminal Code. Although the European Court of Human Rights clearly stated in south-east Turkey and the need for the authorities to be alert to acts capable of fuelling additional violence in the region, the Court did not agree that the conviction and punishment of Karkin was to be considered necessary in a democratic society. The Court was of the opinion that the applicant's speech was "political in nature" and was expressed during a peaceful gathering, far away from the conflict zone. As these circumstances significantly limited the potential impact of the comments on "national security", "public order" or "territorial integrity" and as the penalties imposed on the applicant were severe, the Court unanimously concluded that there was a violation of Article 10 of the European Convention on Human Rights.

- [Karkin v. Turkey](#), no. 43928/98, 23 September 2003.

IRIS 2004-1/3

European Court of Human Rights: Case of Kizilyaprak v. Turkey

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In the case of Kizilyaprak v. Turkey, the European Court of Human Rights is of the opinion that the Turkish national authorities did not take sufficient account of the public's right to be informed from different perspectives on the situation in south-east Turkey. The conviction of Kizilyaprak concerned the publication of a book entitled "How we fought against the Kurdish people! A soldier's memoirs". In this book, a Turkish soldier described what he experienced during his military service in south-east Turkey. As the content of the book was considered as disseminating separatist propaganda and incitement to hatred based on ethnic and regional differences (Article 8 of the Prevention of Terrorism Act and Article 312 of the Criminal Code), the owner of the publishing house, Zeynel Abidin Kizilyaprak, was sentenced to six months imprisonment by the National Security Court in 1993. In a crucial consideration the Strasbourg Court is of the opinion that, although some passages in the book painted an extremely negative picture of the Turkish State and the army and reflected a very hostile tone, the content of the book did not constitute an incitement to violence, armed resistance or an uprising. Referring also to the severity of the conviction, the Court unanimously concluded that the Turkish authorities had violated Article 10 of the European Convention on Human Rights.

- [Kizilyaprak v. Turkey](#), no. 27528/95, 2 October 2003.

IRIS 2004-1/4

European Court of Human Rights: Case of Müslüm Gündüz v. Turkey

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In the case of Müslüm Gündüz v. Turkey, the European Court of Human Rights evaluated the necessity of a criminal conviction on the grounds of inciting the people to hatred and hostility. The applicant, in his capacity as the leader of an Islamic sect, during a TV-debate broadcast by *HBB* channel, demonstrated a profound dissatisfaction with contemporary democratic and secular institutions in Turkey by describing them as "impious". During the programme he also openly called for the introduction of the sharia. Because of these statements Müslüm Gündüz was found guilty by the state security court of incitement to hatred and hostility on the basis of a distinction based on religion. He was sentenced to two years' imprisonment.

In its judgment of 4 December 2003, the European Court of Human Rights came to the conclusion that this interference by the Turkish authorities with the applicant's right to freedom of expression violated Article 10 of the Convention. Although the applicant's conviction was prescribed by Turkish criminal law and had the protection of morals and the rights of others as well as the prevention of disorder or crime as legitimate goals, the Court was not convinced that the punishment of Müslüm Gündüz was to be considered as necessary in a democratic society. The Court observed that the applicant was invited to participate in the programme to present the sect and its nonconformist views, including the notion that democratic values were incompatible with its conception of Islam. This topic was the subject of widespread debate in the Turkish media and concerned an issue of general interest. The Court once more emphasised that Article 10 of the Convention also protects information and ideas that shock, offend and disturb. At the same time, however, there can be no doubt that expressions propagating, inciting or justifying hatred based on intolerance, including religious intolerance, do not enjoy the protection of Article 10. In the Court's view, the comments and statements of Müslüm Gündüz expressed during the lively television debate could not be regarded as a call to violence or as "hate speech" based on religious intolerance. The Court underlined that merely defending the sharia, without calling for the use of violence to establish it, cannot be regarded as "hate speech". Notwithstanding the margin of appreciation accorded to the national authorities, the Court was of the opinion that for the purposes of Article 10 there were insufficient arguments to justify the interference in the applicant's right to freedom of expression. By six votes to one the Court came to the conclusion that there had been a violation of Article 10. The Turkish Judge, M. Türmen, dissented with the majority of the Court. He was of the opinion that the statements of Müslüm Gündüz comprised "hate speech" and were offensive for the majority of the Turkish people who have chosen to live in a secular society.

- [Gündüz v. Turkey](#), no. 35071/97, ECHR 2003-XI.

IRIS 2004-2/2

European Court of Human Rights: Case of Abdullah Aydin v. Turkey

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The European Court of Human Rights, in its judgment of 9 March 2004, has come to the conclusion that Turkey has violated the freedom of expression guaranteed by Article 10 of the European Convention.

In the case of Abdullah Aydin v. Turkey, the applicant was convicted for making a speech during a meeting of the Ankara Democracy Forum criticising the Government's policy towards citizens of Kurdish origin and accusing the authorities of breaching human rights. The Ankara National Security Court in 1997 found Abdullah Aydin guilty of incitement to hatred and hostility on social, ethnic and regional differences, as he had drawn a distinction between the Turkish people and the Kurdish people and had not referred to the damage caused by the PKK (Workers' Party of Kurdistan). He was sentenced to one year's imprisonment and a fine.

Although the interference in the applicant's right to freedom of expression was prescribed by law (art. 312 paras. 1 and 2 Criminal Code) and pursued the legitimate aims of prevention of disorder and crime and the preservation of national security and territorial integrity, the European Court could not be convinced that the interference was necessary in a democratic society. The Court noted that the applicant indeed sharply criticised the Government's action and policy, but that his speech also contained repeated calls for peace, equality and freedom. For the European Court it is important that the speech at issue was political, was presented by a player on the Turkish political scene, during a meeting of a democratic platform, and especially that it did not encourage violence, armed resistance or insurrection. The Court also expressed the opinion that the applicant had been convicted not so much for his comments as for not referring to or denouncing the PKK's activities in south-east Turkey. Hence, the conviction was based especially on what the applicant had not said. The Court considered this an insufficient justification for the interference. Taking into account also the nature and severity of the penalties imposed, the Court unanimously reached the conclusion that the applicant's conviction had not been necessary in a democratic society and that there had been a violation of Article 10. In the same judgment, the Court also found a violation of Article 6 para. 1 of the Convention (right to a fair trial), referring to its standard opinion that civilians standing trial for offences under the Criminal Code had legitimate reason to fear that a national security court which included a military judge among its members might not be independent and impartial. The Court awarded the applicant EUR 10,000 for non-pecuniary damage and EUR 3,000 for costs and expenses.

- [Abdullah Aydin v. Turkey](#), no. 42435/98, 9 March 2004.

IRIS 2004-4/1

European Court of Human Rights: Case of Radio France v. France

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The European Court of Human Rights, in its judgment of 30 March 2004, has agreed with the French authorities that *Radio France*, its editorial director and a journalist were to be held liable for the offence of public defamation of a civil servant. In a series of news flashes and bulletins in 1997, *Radio France* had mentioned an article published in the weekly magazine *Le Point*, which alleged that the deputy prefect of Pithiviers in 1942 and 1943, Mr. Michel Junot, had supervised the deportation of a thousand Jews. In 1998, the editorial director and the journalist were convicted for public defamation and were ordered to pay a fine and damages of approximately EUR 10,000. *Radio France* was also ordered to broadcast an announcement reporting the judgment every two hours for a period of 24 hours. The Paris Court of Appeal decided that Michel Junot's honour and dignity had been damaged, in particular because of the fact that in the news flashes it was said that the former deputy prefect had supervised the deportation of a thousand Jews (while in reality he had not taken the decision regarding the deportation); also, by comparing Mr. Junot's situation with that of Maurice Papon (who effectively has been convicted by the assizes Court for participation in crimes against humanity) and by suggesting that he had not been a member of the Resistance (while there was substantial evidence that Junot had been active in the Resistance).

The Strasbourg Court recognized that the disputed broadcasts had taken place against the background of a public debate and that they mainly had quoted, with correct reference to their source, from a serious weekly magazine. However, some allegations in the news flashes on *Radio France* had not been published in *Le Point* and in the news flashes some facts were presented in a much more affirmative tone than in the magazine article. In view of the seriousness of the facts inaccurately attributed to Mr. Michel Junot and because the news flashes had been broadcast many times with national coverage (the audiovisual media being powerful instruments to reach and influence a large part of the population), the European Court came to the conclusion that the French jurisdictional authorities had correctly applied Article 10 of the Convention, as the exercise of freedom of expression can be restricted or penalized taking into account the duties and responsibilities of media and journalists. According to the Strasbourg Court, the journalists and the director of *Radio France* should have exercised the utmost caution, as they must have been aware of the consequences for Mr. Junot of the bulletins that were broadcast to the whole of France. The conviction of *Radio France*, its director and a journalist was considered to be prescribed by law (Articles 29, 31 and 41 Press Act 1881), to pursue a legitimate goal (protection of the reputation and the rights of others, with reference also to the right of privacy as guaranteed by Article 8 of the Convention) and to be necessary in a democratic society. The Court unanimously came to the conclusion that there had been no violation of Article 10 of the Convention. The Court also agreed that it was possible to consider the responsibility of the director in the circumstances of the case and that the order to broadcast the convicting judgment was to be considered as prescribed by law. Therefore, the Court also was of the opinion that there had been no breach of Article 6 para. 2, or of Article 7 para. 1 of the European Convention on Human Rights.

- [Radio France and Others v. France](#), no. 53984/00, ECHR 2004-II.

IRIS 2004-5/2

European Court of Human Rights: Case of von Hannover v. Germany

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The European Court of Human Rights in a judgment of 24 June 2004 has come to the conclusion that Germany has not awarded a sufficient level of protection to the right of privacy of Princess Caroline von Hannover. On several occasions Caroline von Hannover, the daughter of Prince Rainier III of Monaco, applied to the German courts for an injunction to prevent any further publication of a series of photographs which had appeared in the German magazines *Bunte*, *Freizeit Revue* and *Neue Post*. As Caroline von Hannover was undeniably to be considered as a contemporary public figure "*par excellence*", the German courts were of the opinion that she had to tolerate she appeared with her children or with a friend in a secluded place in a restaurant. Other photos however showing Caroline von Hannover on horseback, shopping, cycling or skiing were to be considered as falling under the right of the press to inform the public on events and public persons in contemporary society, just like a series of photographs showing the Princess in the *Monte Carlo Beach Club*.

In its judgment of 24 June, the Strasbourg Court agreed with Caroline von Hannover that the decisions of the German courts infringed her right to respect for her private life as guaranteed by Article 8 of the Convention. The Court recognizes that "the protection of private life has to be balanced against the freedom of expression guaranteed by Article 10 of the Convention", emphasizing at the same time that "the present case does not concern the dissemination of "ideas", but of images containing very personal or even intimate "information" about an individual. Furthermore, photos appearing in the tabloid press are often taken in a climate of continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution". In such circumstances, priority has to be given to respect for the right to privacy. As a matter of fact "a fundamental distinction needs to be made between reporting facts - even controversial ones - capable of contributing to a debate in a democratic society relating to politicians in the exercise of their functions, for example, and reporting details of the private life of an individual who, moreover, as in this case, does not exercise official functions. While in the former case the press exercises its vital role of "watchdog" in a democracy by contributing to "imparting information and ideas on matters of public interest", it does not do so in the latter case". According to the Court, the sole purpose of the publication of the photos was to satisfy the curiosity of a particular readership regarding the details of the applicant's private life. In these conditions freedom of expression requires a narrower interpretation. The Court also stated that "increased vigilance in protecting private life is necessary to contend with new communication technologies which make it possible to store and reproduce personal data. This also applies to the systematic taking of specific photos and their dissemination to a broad section of the public". In the Court's view, merely classifying the applicant as a figure of contemporary society "*par excellence*", does not suffice to justify an intrusion into her private life. The Court therefore considers that the criteria on which the domestic courts based their decisions were not sufficient to ensure the effective protection of the applicant's private life and that she should, in the circumstances of the case, have had a "legitimate expectation" of protection of her private life. The Court unanimously reached the conclusion that the German courts did not strike a fair balance between the competing rights and that there was a violation of Article 8 of the Convention.

- [Von Hannover v. Germany](#), no. 59320/00, ECHR 2004-VI.

IRIS 2004-8/2

European Court of Human Rights: Application by Österreichischer Rundfunk Declared Inadmissible

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The European Court of Human Rights, in a decision of 25 May 2004, has come to the conclusion that Austria has not violated Article 10 of the Convention by prohibiting in 1999 the *Österreichischer Rundfunk* (ORF) from publishing pictures of a person (B.) showing him as an accused during the well known letter-bomb campaign proceedings of some years before. B. had started proceedings in 1998 against the ORF requesting that the broadcasting company be prohibited from publishing without his consent pictures showing him as an accused in the courtroom, referring to the letter-bomb campaign without mentioning his final acquittal or if the impression was created that he was a neo-Nazi, was convicted of offences under the National Socialism Prohibition Act without mentioning that the imposed sentence had already been served or that he had been released on parole in the meanwhile. The Vienna Commercial Court and the Vienna Court of Appeal dismissed B.'s claims, arguing that B.'s interests were not infringed by the neutral disclosure of his picture, that no impression was given that he had been convicted of participating in the letter-bomb assassinations, and that he had indeed been convicted of a serious crime. Therefore, B. could not enjoy unlimited protection of his identity. On 1 June 1999, the Supreme Court however was of the opinion that the publication of B.'s picture by ORF had obviously interfered with his interests as it reminded the public of B.'s court appearance three years after his trial and his release on parole. The Supreme Court decided that there was no longer a public interest in having B.'s picture published and ordered the ORF to refrain from publishing or disseminating B.'s pictures without his consent showing him in the courtroom in the circumstances mentioned above.

The ORF complained under Article 10 of the Convention that the Supreme Court's judgment violated its right to freedom of expression. Without deciding on the Government's interesting preliminary objection contesting the ORF's *locus standi* within the meaning of Article 34 of the Convention (the applicant as a public broadcasting organisation being a governmental organisation), the Court unanimously reached the conclusion that the imposed measure by the Austrian Supreme Court did not violate Article 10 of the Convention and declared the application by the ORF inadmissible. The Court emphasizes the difference between the present case and the findings in the case of [News Verlags GmbH & CoKG v. Austria](#) (ECourtHR 11 January 2000, Appl. 31457/96, see IRIS 2000-2: 2), as the Austrian courts in that case had issued a total prohibition on publication of B.'s picture by News Verlags, whereas in the present case the ORF was only prohibited from doing so in a specific context. Furthermore, the report in the News Verlags case was published at a time when the pending criminal proceedings against B. were to be considered as a matter of great public interest. In the present case there was no public interest involved in the publication of the picture of B. and there was no need for another public stigmatisation. The Court is of the opinion that the private interest of B. in seeking to reintegrate himself into society after having been released on parole outweighed the public interest in the disclosure of his picture by the media. The Court also found that the prohibition at issue could not be described as amounting to a general prohibition against publishing B.'s picture and therefore found that the measure was also proportionate to the aim pursued within the meaning of Article 10 of the Convention. The complaint by ORF was considered manifestly ill-founded and hence declared inadmissible.

- [Österreichischer Rundfunk v. Austria \(dec.\)](#), no. 57597/00, 25 May 2004.

IRIS 2004-10/2

European Court of Human Rights: Case of Plon v. France

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This case concerns the prohibition of the distribution of the book written by Dr. Gubler " *Le Grand Secret* ", about the former president Mitterrand and how his cancer had been diagnosed and medically treated. The central question is: was the prohibition of the distribution of the book in 1996 to be considered as necessary in a democratic society in order to protect the deceased president's honour, his reputation and the intimacy of his private life? Many items of information revealed in the book were indeed legally confidential and were capable of infringing the rights of the deceased and his family. But was this a sufficient reason to legitimise a blanket ban of the book?

As to whether the interference by the French courts ordering the prohibition of the distribution of Dr. Gubler's book at the request of Mitterrand's widow and children met a pressing social need, the European Court emphasises in the first place that the publication of the book had taken place in the context of a general-interest debate. This debate had already been going on for some time in France and was related to the right of the public to be informed about the president's serious illnesses and his capacity to hold that office, being aware that he was seriously ill.

The European Court considered that the interim ban on the distribution of " *Le Grand Secret* " a few days after Mitterrand's death and until the relevant courts had ruled on its compatibility with medical confidentiality and the rights of others as necessary in a democratic society for the protection of the rights of President Mitterrand and his heirs and successors.

The ruling however, more than nine months after Mitterrand's death, to keep the ban on the book, is considered as a violation of Article 10 of the Convention. Moreover, at the time when the French court ruled on the merits of the case 40,000 copies of the book had already been sold, the book had been published on the internet and it had been the subject of much comment in the media. Accordingly, preserving medical confidentiality could no longer constitute a major imperative. The Strasbourg Court consequently considered that when the French court gave judgment there was no longer a pressing social need justifying the continuation in force of the ban on distribution of " *Le Grand Secret* ". While the Court found no violation in regard to the injunction prohibiting distribution of the book issued as an interim measure by the urgent applications judge (summary proceedings), the European Court comes to the conclusion that there has been a violation of Article 10 of the Convention in regard to the order maintaining that prohibition in force made by the civil court which ruled on the merits.

- [Editions Plon v. France](#), no. 58148/00, ECHR 2004-IV.

IRIS 2004-10/3

European Court of Human Rights: Final Judgment in the Case of Pedersen and Baadsgaard v. Denmark

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In Strasbourg, two journalists of *Danmarks Radio* (Danish National television) complained about their conviction for defamation of a Chief Superintendent. The journalists, Pedersen and Baadsgaard, had produced two programmes about a murder trial in which they had criticised the police's handling of the investigation. At the end of the programmes, the question was raised if it was the Chief Superintendent who had decided that a report should not be included in the case or who concealed a witness's statement from the defence, the judges and the jury. Both journalists were charged with defamation and convicted and sentenced to 20 day-fines of DKK 400, amounting to DKK 8,000 (equivalent to approximately EUR 1,078) and ordered to pay compensation to the estate of the deceased Chief Superintendent of DKK 100,000 (equivalent to approximately EUR 13,469). The domestic courts came to the conclusion that the journalists lacked a sufficient factual basis for the allegation that the named Chief Superintendent had deliberately suppressed a vital piece of evidence in the murder case. In a [Chamber judgment of 19 June 2003](#), the Court held by four votes to three, that there had been no violation of Article 10 (see IRIS 2003-9: 2). On 3 December 2003, the panel of the Grand Chamber accepted a request by the applicants for the case to be referred to the Grand Chamber. The Danish Union of Journalists was given leave to submit written comments. The Grand Chamber of the European Court of Human Rights in its judgment of 17 December 2004 has now also come to the conclusion, by nine votes to eight, that there had been no violation of Article 10. The Court emphasised that the accusation against the named Chief Superintendent was an allegation of fact susceptible of proof, while the applicants never endeavoured to provide any justification for their allegation, and its veracity had never been proven. The applicants also relied on just one witness. The allegation of deliberate interference with evidence, made at peak viewing time on a national TV station, was very serious for the named Chief Superintendent and would have entailed criminal prosecution had it been true. The offence alleged was punishable by up to nine years' imprisonment. It inevitably not only undermined public confidence in him, but also disregarded his right to be presumed innocent until proven guilty according to law. In the Court's view, the finding of a procedural failure in the conduct of the investigation in the murder case as such could not provide a sufficient factual basis for the applicants' accusation that the Chief Superintendent had actively tampered with evidence. The Court reached the conclusion that the interference in the applicants' freedom of expression did not violate Article 10 of the Convention, as the conviction was necessary for the protection of the reputation and the rights of others. Eight of the 17 judges of the Grand Chamber Court dissented, emphasizing the vital role of the press as public watchdog in imparting information of serious public concern and the fact that the applicants had conducted a large-scale search for witnesses when preparing their programmes and that they had a sufficient factual basis to believe that a report did not contain the full statement of an important witness. According to the minority of the judges, a chief superintendent of police must accept that his acts and omissions in an important case should be subject to close and indeed rigorous scrutiny.

- [Pedersen and Baadsgaard v. Denmark \[GC\]](#), no. 49017/99, ECHR 2004-XI.

IRIS 2005-2/3

European Court of Human Rights: Final Judgment in Case *Cumpana and Mazare v. Romania*

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Constantin Cumpana and Radu Mazare are both professional journalists who have been convicted in Romania of insult and defamation. In April 1994 they published an article in the *Telegraf* newspaper questioning the legality of a contract in which the Constanta City Council had authorised a commercial company, Vinalex, to perform the service of towing away illegally parked vehicles. The article, which appeared under the headline "Former Deputy Mayor D.M. and serving judge R.M. responsible for series of offences in Vinalex scam", was accompanied by a cartoon showing the judge, Mrs R.M., on the former deputy mayor's arm, carrying a bag marked "Vinalex" containing banknotes. Mrs R.M., who had signed the contract with Vinalex on behalf of the city council while employed by the council as a legal expert, brought proceedings against Cumpana and Mazare. She submitted that the cartoon had led readers to believe that she had had intimate relations with the former deputy mayor, despite the fact that they were both married. In 1995 both journalists were convicted of insult and defamation and sentenced to seven months' imprisonment. They were also disqualified from exercising certain civil rights and prohibited from working as journalists for one year. In addition, they were ordered to pay Mrs R.M. a specified sum for non-pecuniary damage. In November 1996 the applicants were granted a presidential pardon releasing them from their custodial sentence. In a [Chamber judgment of 10 June 2003](#) the Strasbourg Court held by five votes to two that there had been no violation of Article 10 of the Convention, emphasizing that the article and the cartoon were indeed damaging the authority, reputation and private life of judge R.M., overstepping the bounds of acceptable criticism. The Grand Chamber of the European Court in its judgment of 17 December 2004 has now unanimously come to the conclusion that there has been a violation of Article 10. As the allegations and insinuations in the article did not have a sufficient factual basis, the Court is of the opinion that the Romanian authorities were entitled to consider it necessary to restrict the exercise of the applicants' right to freedom of expression and that their conviction for insult and defamation had accordingly met a "pressing social need". However, the Court observes that the sanctions imposed on the applicants have been very severe and disproportionate. In regulating the exercise of freedom of expression in order to ensure adequate protection by law of individuals' reputations, States should avoid taking measures that might deter the media from fulfilling their role of alerting the public to apparent or suspected misuse of public power. The imposition of a prison sentence for a press offence is compatible with journalists' freedom of expression only in exceptional circumstances, notably where other fundamental rights had been seriously impaired, as, for example, in the case of hate speech or incitement to violence. In a classic case of defamation, such as the present case, imposing a prison sentence inevitably has a chilling effect. The order disqualifying the applicants from exercising certain civil rights is also to be considered particularly inappropriate and is not justified by the nature of the offences for which both journalists have been held criminally liable. The order prohibiting the applicants from working as journalists for one year is considered as a preventive measure of general scope contravening the principle that the press must be able to perform the role of public watchdog in a democratic society. The Court comes to the conclusion that, although the interference with both journalists' right to freedom of expression might have been justified as such, the criminal sanction and the accompanying prohibitions imposed on them by the Romanian courts have been manifestly disproportionate in their nature and severity to the legitimate aim pursued. The Court therefore holds that there has been a violation of Article 10 of the Convention.

- [Cumpănă and Mazăre v. Romania \[GC\]](#), no. 33348/96, ECHR 2004-XI.

IRIS 2005-2/4

European Court of Human Rights: Case of Steel and Morris v. the United Kingdom

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The European Court of Human Rights in a judgment of 15 February 2005 has come unanimously to the conclusion that the United Kingdom has violated Article 6 (fair trial) and Article 10 (freedom of expression) of the European Convention on Human Rights in a libel case opposing the McDonald's Corporation against two United Kingdom nationals, Helen Steel and David Morris, who had distributed leaflets as part of an anti-McDonald's campaign. In 1986 a six-page leaflet entitled "What's wrong with McDonald's?" was distributed by Steel and Morris and in 1990 McDonald's issued a writ against them claiming damages for libel. The trial took place before a judge sitting alone from June 1994 until December 1996. It was the longest trial in English legal history. On appeal the judgment of the trial judge was upheld in substance, the damages awarded were reduced by the Court of Appeal from a total of GBP 60,000 to a total of GBP 40,000 and leave to appeal to the House of Lords was refused. Throughout the trial and appeal proceedings Steel and Morris were refused legal aid: they represented themselves only with some help from volunteer lawyers. Steel and Morris applied to the European Court on 20 September 2000, complaining that the proceedings were unfair, principally because they were denied legal aid, although they were unwaged and dependant on income support.

The applicants also complained that the outcome of the proceedings constituted a disproportionate interference with their freedom of expression. With regard to the first complaint, under Article 6 para. 1 the Court is of the opinion that the denial of legal aid to the applicants had deprived them of the opportunity to present their case effectively before the Court and contributed to an unacceptable inequality of arms with McDonald's, who in this complex case, lasting 313 court days and involving 40,000 pages of documentation, had been represented by leading and junior counsel, experienced in defamation law and by two solicitors and other assistants. With regard to the second complaint, the Court reaches the conclusion that there has been a violation of Article 10 of the Convention. Although it is not in principle incompatible with Article 10 to place on a defendant in libel proceedings the onus of proving to the civil standard the truth of defamatory statements, it is considered essential by the Court that when a legal remedy is offered to a large multinational company to defend itself against defamatory allegations, also the countervailing interest in free expression and open debate must be guaranteed by providing procedural fairness and equality of arms to the defendants in such a case. The Court also emphasizes the general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities, as well as the potential "chilling" effect on others an award of damages for defamation in this context may have. Moreover, according to the Strasbourg Court, the award of damages was disproportionate to the legitimate aim served in order to protect the right and reputation of McDonalds, as the sum of GBP 40,000 was not in a reasonable relation of proportionality to the injury to reputation suffered. Given the lack of procedural fairness and the disproportionate award of damages, the Court found that there had been a violation of Article 10 in this case, which in the media has been labelled as the "McLibel" case. The United Kingdom is ordered to pay EUR 35,000 to the applicants in respect of non-pecuniary damages and EUR 47,311 in respect of costs and expenses related to the Strasbourg proceedings.

- [Steel and Morris v. the United Kingdom](#), no. 68416/01, ECHR 2005-II.

IRIS 2005-4/1

European Court of Human Rights: Case of Independent News and Media v. Ireland

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In a judgment of 16 June 2005, the European Court of Human Rights is of the opinion that a conviction to pay an award of damages of EUR 381.000 because of defamatory statements in a press article criticizing a politician is not to be considered as a violation of Article 10 of the European Convention of Human Rights.

In 1997 a High Court jury in Ireland found an article published in the Sunday Independent robustly criticizing a national politician, Mr. de Rossa, to be defamatory and awarded Mr. de Rossa IEP 300.000 (EUR 381.000) in damages. The award, which was upheld by the Supreme Court, was three times the highest libel award previously approved in Ireland. The litigious article referred to some activities of a criminal nature of Mr. de Rossa's political party and criticised his former privileged relations with the Central Committee of the Communist Party of the Soviet Union. According to the article, Mr. de Rossa's political friends in the Soviet Union "were no better than gangsters (..). They were anti-Semitic". In upholding the award of damages, the Supreme Court took into account a number of factors, including the gravity of the libel, the effect on Mr. de Rossa as leader of a political party and on his negotiations to form a government at the time of publication, the extent of the publication, the conduct of the first applicant newspaper and the consequent necessity for Mr. de Rossa to endure three long and difficult trials. Having assessed these factors, it concluded that the jury would have been justified in going to the top of the bracket and awarding as damages the largest sum that could fairly be regarded as compensation. While IEP 300,000 was a substantial sum, it noted that the libel was serious and grave, involving an imputation that Mr. de Rossa was involved in or tolerated serious crime and personally supported anti-Semitism and violent Communist oppression. "Bearing in mind that a fundamental principle of the law of compensatory damages is that the award must always be reasonable and fair and bear a due correspondence with the injury suffered and not be disproportionate thereto", the Supreme Court was not satisfied that "that the award made by the jury in this case went beyond what a reasonable jury applying the law to all the relevant considerations could reasonably have awarded and is not disproportionate to the injury suffered by the Respondent". The press groups publishing the Sunday Independent lodged an application before the Strasbourg Court, complaining that the exceptional damages award and the absence of adequate safeguards against disproportionate awards violated their rights under Article 10 of the Convention (freedom of expression). The application was also supported by some other Irish media groups and by the National Union of Journalists (NUJ).

Taking its judgment of 13 July 1995 in the case of [Tolstoy Miloslavsky v. U.K.](#) as a point of reference, the Court is of the opinion that the present jury award was sufficiently unusual as to require a review by the Court of the adequacy and effectiveness of the domestic safeguards against disproportionate awards. According to the Court, unpredictably large damages awards in libel cases are considered capable of having a chilling effect on the press and therefore require the most careful scrutiny. The Strasbourg Court however, referring to the judgment of the Irish Supreme Court upholding and legitimising the award of damages, comes to the conclusion, by 6 votes to 1, that there has been no violation of the right of freedom of expression in this case: "Having regard to the particular circumstances of the present case, notably the measure of appellate control, and the margin of appreciation accorded to a State in this context, the Court does not find that it has been demonstrated that there were ineffective or inadequate safeguards against a disproportionate award of the jury in the present case". In his dissenting opinion judge

Cabral Barreto of Portugal argues that the amount of damages which the publishing group of the Sunday Independent was ordered to pay was so high “that the reasonable relationship of proportionality between the interference and the legitimate aim pursued was not observed”. The 6 judges of the majority however came to the conclusion that there has not been a violation of Article 10 of the Convention.

- [*Independent News and Media and Independent Newspapers Ireland Limited v. Ireland*](#), no. 55120/00, ECHR 2005-V (extracts).

IRIS 2005-8/2

European Court of Human Rights: Case of Grinberg v. Russia

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In a judgment of 21 July 2005, the European Court of Human Rights has come to the conclusion that the Russian authorities overstepped the margin of appreciation afforded to member states by convicting a Russian citizen because of a defamatory statement in a press article criticizing a politician. It is the first judgment in which the European Court finds a violation of freedom of expression by the Russian authorities since the Russian Federation became a member of the Council of Europe and subscribed to the European Convention on Human Rights in 1996. The Strasbourg Court emphasizes the distinction that is to be made between statements of fact and value judgments and considers it unacceptable that the Russian law on defamation, as it stood at the material time, made no distinction between these notions, referring uniformly to statements and assuming that any statement was amenable of proof in civil proceedings. The case goes back to an article in the *Guberniya* newspaper written by Isaak Pavlovich Grinberg in 2002. The article criticised the elected Governor of the Ulyanovsk Region, the former General V.A. Shamanov for “waging war” against the independent press and journalists. The article also referred to the support by Mr. Shamanov for a colonel who had killed an 18-year-old Chechen girl, considering that Mr. Shamanov had “no shame and no scruples”. On 14 November 2002, the Leninskiy District Court of Ulyanovsk found that the assertion that Mr. Shamanov had no shame and no scruples impaired his honour, dignity and professional reputation and that Mr. Grinberg had not proved the truthfulness of this statement. The judgment was later confirmed by the Regional Court, while the Supreme Court, on 22 August 2003, dismissed Mr. Grinberg's application for the institution of supervisory-review proceedings.

Grinberg's complaint, under Article 10 of the Convention, that his right to impart information and ideas had been violated, turned out to be successful before the European Court in Strasbourg. The Court refers to its well-established case law considering freedom of expression as one of the essential foundations of a democratic society, emphasizing the essential function of the press to play its vital role of “public watchdog”, the fact that there is little scope under Article 10 para. 2 for restrictions on political speech and especially the distinction that is to be made in defamation cases between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The Court considers that the contested comment was a clear example of a value judgment that represented Mr. Grinberg's subjective appraisal of the moral dimension of Mr. Shamanov's behaviour who, in his eyes, only kept one promise after being elected as Governor, that of waging war against the independent press and journalists. The Court takes into account that the contested press article concerned an issue of public interest relating to the freedom of the media in the Ulyanovsk region and that it criticised an elected, professional politician in respect of whom the limits of acceptable criticism are wider than in the case of a private individual. The facts which gave rise to the criticism were not contested and Mr. Grinberg had after all expressed his views in an inoffensive manner. Nor did Mr. Grinberg's statements affect Mr. Shamanov's political career or his professional life. For these reasons the Strasbourg Court unanimously came to the conclusion that the domestic courts did not convincingly establish any pressing social need for putting the protection of the politician's personality rights above the applicant's right to freedom of expression and the general interest in promoting this freedom where issues of public interest are concerned. Accordingly, the Court came to the conclusion that there has been a violation of Article 10 of the Convention.

- [Grinberg v. Russia](#), no. 23472/03, 21 July 2005.

IRIS 2005-9/1

European Court of Human Rights: Case of I.A. v. Turkey

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The European Court of Human Rights in a judgment of 13 September 2005 has come to the conclusion that the Turkish authorities did not violate freedom of expression by convicting a book publisher for publishing insults against “God, the Religion, the Prophet and the Holy Book”. The managing director of the Berfin publishing house in France was sentenced to two years' imprisonment, which was later commuted to a fine.

The European Court in Strasbourg is of the opinion that this interference in the applicant's right to freedom of expression had been prescribed by law (art. 175 §§ 3 and 4 of the Turkish Criminal Code) and had pursued the legitimate aims of preventing disorder and protecting morals and the rights of others. The issue for the Court was to determine whether the conviction of the publisher had been necessary in a democratic society. This involved the balancing of the applicant's right to impart his ideas on religious theory to the public, on the one hand, and the right of others to respect for their freedom of thought, conscience and religion, on the other hand. The Court reiterates that religious people have to tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. A distinction is to be made however between “provocative” opinions and abusive attacks on one's religion. According to the Court, one part of the book indeed contained an abusive attack on the Prophet of Islam, whereas it is asserted that some of the statements and words of the Prophet were “inspired in a surge of exultation, in Aisha's arms... God's messenger broke his fast through sexual intercourse, after dinner and before prayer”. In the book it is stated that “Mohammed did not forbid sexual intercourse with a dead person or a living animal”. The Court accepts that believers could legitimately feel that these passages of the book constituted an unwarranted and offensive attack on them. Hence, the conviction of the publisher was a measure that was intended to provide protection against offensive attacks on matters regarded as sacred by Muslims. As the book was not seized and the publisher had only to pay an insignificant fine, the Court comes, by four votes to three, to the conclusion that the Turkish authorities did not violate the right to freedom of expression. According to the three dissenting opinions (of the French, Portuguese and Czech judges) the majority of the Court followed its traditional case law on blasphemy leaving a wide margin of appreciation to the Member States. According to the three dissenters, the Court should reconsider its jurisprudence in the case of [Otto-Preminger-Institut v. Austria](#) and [Wingrove v. United Kingdom](#), as this approach gave too much support to conformist speech and to the “*pensée unique*”, implying a cold and frightening approach to freedom of expression. The majority of the Court however (the Turkish, Georgian, Hungarian and San Marino judges) argued that the conviction of the book publisher met a pressing social need i.e. protecting the rights of others. Accordingly there has been no violation of Article 10 of the Convention.

- [I.A. v. Turkey](#), no. 42571/98, ECHR 2005-VIII.

IRIS 2005-10/3

European Court of Human Rights: Case of Wirtschafts-Trend Zeitschriften-Verlags GmbH v. Austria

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In a judgment of 27 October 2005, the European Court of Human Rights has come to the conclusion that the Austrian authorities violated freedom of expression by convicting Wirtschafts-Trend Zeitschriften-Verlags GmbH, a limited liability company based in Vienna which owns and publishes the weekly magazine Profil. In November 1998, Profil published a review of a book written by a Member of the European Parliament and member of the Austrian Freedom Party. Profil's article criticised the author of the book for his treatment of Jörg Haider, the former leader of the Austrian Freedom Party (FPÖ), in that he pardoned "his belittlement of the concentration camps as 'punishment camps'" (*"Dessen Verharmlosung der Konzentrationslager als 'Straflager'"*). Mr Haider successfully filed a compensation claim against Profil as the Wiener Neustadt Regional Court ordered the applicant company to pay EUR 3,633 in compensation to Mr Haider. It also ordered the forfeiture of that particular issue of the magazine and instructed the company to publish its judgment. In its reasoning, the court said that Mr Haider's words had been taken out of context and that the article gave the impression that he had played down the extent of crimes committed in concentration camps when using the term punishment camps, and that he had thereby infringed the National Socialism Prohibition Act.

In its judgment of 27 October 2005, the European Court reiterates that the limits of acceptable criticism are wider as regards a politician than as regards a private individual. The Court is of the opinion that Haider is a leading politician who has been known for years for his ambiguous statements about the National Socialist Regime and the Second World War and has, thus, exposed himself to fierce criticism inside Austria, but also at the European level. In the Court's view, Haider must therefore display a particularly high degree of tolerance in this context. In essence, the Strasbourg Court is not convinced by the domestic court's argument that the statement of belittling the concentration camps implied a reproach that Mr Haider had played down the extent of the Nazi crimes and therefore came close to a reproach of criminal behaviour under the Prohibition Act. The Court finds this conclusion somewhat far-fetched, as the standards for assessing someone's political opinions are quite different from the standards for assessing an accused person's responsibility under criminal law. According to the Court, the use of the term "punishment camp", which implies that persons are detained there for having committed punishable offences, may reasonably be criticised as a belittlement of the concentration camps all the more so if that term was applied by someone whose ambiguity towards the Nazi era is well-known. The undisputed fact that Mr Haider had used the term punishment camp instead of concentration camp was a sufficient factual basis for the applicant's statement, which was therefore not excessive in the circumstances. In conclusion, the Court finds that the reasons adduced by the domestic courts were not relevant and sufficient to justify the interference. Moreover, the Court notes that the applicant was not only ordered to pay compensation to Mr Haider and to publish the judgment finding it guilty of defamation, but that the courts also ordered the forfeiture of the issue of Profil which is a severe and intrusive measure. Thus, the interference was not proportionate either. Therefore, the Court unanimously came to the conclusion that the interference complained of was not "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention. Accordingly there has been a violation of Article 10 of the Convention.

- [Wirtschafts-Trend Zeitschriften-Verlags GmbH v. Austria](#), no. 58547/00, 27 October 2005.

IRIS 2006-1/3

European Court of Human Rights: Case of Tourancheau and July v. France (affaire *Libération*)

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In 1996, the French newspaper *Libération* published an article focusing on a murder case in which adolescents were involved. The criminal investigation was still pending when the article was published and two suspects, a young man, B. and his girlfriend, A., had been under investigation. The article in *Libération*, written by Patricia Tourancheau, reproduced extracts from statements made by A. to the police and the investigating judge, and comments from B. contained in the case file. On the basis of section 38 of the Freedom of Press Act of 29 July 1881, criminal proceedings were brought against Tourancheau and against the editor of *Libération*, Serge July. Section 38 of the 1881 Press Act prohibits the publication of any document of the criminal proceedings until the day of the court hearing. Both the journalist and the editor were found guilty and were each ordered to pay a fine of FRF 10,000 (approximately EUR 1,525). Their conviction was upheld on appeal and by the French Supreme Court, although payment of the fine was suspended. In the meantime, A. had been sentenced to eight years' imprisonment for murder and B. had received a five-year prison sentence for failure to assist a person in danger.

In its judgment of 24 November 2005, the Strasbourg Court has come to the conclusion that the conviction of Tourancheau and July was not to be considered as a violation of Art. 10 of the Convention. The Court noted that section 38 of the 1881 Press Act defined the scope of the legal prohibition clearly and precisely, in terms of both content and duration, as it was designed to prohibit publication of any document relating to proceedings concerning serious crimes or other major offences until the day of the hearing. The fact that proceedings were not brought systematically on the basis of section 38 of the 1881 Act, the matter being left to the discretion of the public prosecutor's office, did not entitle the applicants to assume that they were in no danger of being prosecuted, since being professional journalists they were familiar with the law. They had therefore been in a reasonable position to foresee that the publication of extracts from the case file in the article might subject them to prosecution. In the Court's view, the reasons given by the French courts to justify the interference with the applicants' right to freedom of expression had been "relevant and sufficient" for the purposes of Article 10 para. 2 of the Convention. The courts had stressed the damaging consequences of publication of the article for the protection of the reputation and rights of A. and B., for their right to be presumed innocent and for the authority and impartiality of the judiciary, referring to the possible impact of the article on the members of the jury. The Court took the view that the applicants' interest in imparting information concerning the progress of criminal proceedings and the interest of the public in receiving such information, were not sufficient to prevail over the considerations referred to by the French courts. The European Court further considered that the penalties imposed on the applicants were not disproportionate to the legitimate aims pursued by the authorities. In those circumstances, the Court held that the applicants' conviction had amounted to an interference with their right to freedom of expression which had been "necessary in a democratic society" in order to protect the reputation and rights of others and to maintain the authority and impartiality of the judiciary. It therefore held that there had been no violation of Article 10. The Cypriot, Bulgarian, Croatian and Greek judge formed the smallest possible majority (4/3 decision).

The judges Costa, Tulkens and Lorenzen (France, Belgium and Denmark) expressed a joint dissenting opinion, in which they argued why the conviction of the applicants is to be considered a clear violation of the freedom of expression. Neither the breach of the presumption of

innocence, nor the possible impact on the members of the jury are considered pertinent arguments in this case in order to legitimise the interference in the applicants' freedom of expression. According to the joint dissenting opinion, journalists must be able to freely report and comment on the functioning of the criminal justice system, as a basic principle enshrined in the [Recommendation of the Committee of Ministers 2003 \(13\) on the provision of information through the media in relation to criminal proceedings](#). Referring to the concrete elements reported in the newspaper's article and its context, the dissenting judges conclude that there is no reasonable and proportional relation between the imposed restrictions and the legitimate aim pursued. According to the dissenting judges Article 10 of the Convention has been violated.

- [Tourancheau and July v. France](#), no. 53886/00, 24 November 2005.

IRIS 2006-2/2

European Court of Human Rights: Nordisk Film & TV A/S v. Denmark

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In August 2002, by a judgment of the *Højesteret* (Danish Supreme Court), the applicant company, Nordisk Film, was compelled to hand over limited specified unedited footage and notes of a broadcast television programme investigating paedophilia in Denmark. In order to make the programme, a journalist went undercover. He participated in meetings of “The Paedophile Association” and, with a hidden camera, interviewed two members of the association who made incriminating statements regarding the realities of paedophilia in both Denmark and India, including advice on how to induce a child to chat over the internet and how easy it was to procure children in India. In the documentary, broadcast on national television, false names were used and all persons' faces and voices were blurred. The day after the programme was broadcast, one of the interviewed persons, called “Mogens”, was arrested and charged with sexual offences. For further investigation, the Copenhagen Police requested that the unshown portions of the recordings made by the journalist be disclosed. The journalist and the editor of the applicant company's documentary unit refused to comply with the request. The Copenhagen City Court and the High Court also refused to grant the requested court order having regard to the need of the media to be able to protect their sources. The Supreme Court, however, found against the applicant company, the latter was therefore compelled to hand over some parts of the unedited footage which solely related to “Mogens”. The court order explicitly exempted the recordings and notes that would entail a risk of revealing the identity of some persons (a victim, a police officer and the mother of a hotel manager), who were interviewed with the promise by the journalist that they could participate without the possibility of being identified. In November 2002, Nordisk Film complained in Strasbourg that the Supreme Court's judgment breached its rights under Article 10 of the Convention, referring to the European Court's case law affording a high level of protection to journalistic sources.

In its decision of 8 December 2005, the Strasbourg Court has come to the conclusion that the judgment of the Danish Supreme Court did not violate Article 10 of the Convention. The Strasbourg Court is of the opinion that the applicant company was not ordered to disclose its journalistic sources of information, rather, it was ordered to hand over part of its own research material. The Court is not convinced that the degree of protection applied in this case can reach the same level as that afforded to journalists when it concerns their right to keep their sources confidential under Article 10 of the Convention. The Court is also of the opinion that it is the State's duty to take measures designed to ensure that individuals within their jurisdiction are not subjected to inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment or sexual abuse of which the authorities had or ought to have knowledge. The European Court supports the opinion of the Danish Supreme Court that the non-edited recordings and the notes made by the journalist could assist the investigation and production of evidence in the case against “Mogens” and that it concerned the investigation of alleged serious criminal offences.

It is important to note that the Supreme Court's judgment explicitly guaranteed that material which entailed the risk of revealing the identity of the journalist's sources was exempted from the court order and that the order only concerned the handover of a limited part of the unedited footage as opposed to more drastic measures such as, for example, a search of the journalist's home and workplace. In these circumstances, the Strasbourg Court is satisfied that the order was

not disproportionate to the legitimate aim pursued and that the reasons given by the Danish Supreme Court in justification of those measures were relevant and sufficient. Hence, Article 10 of the Convention has not been violated. The application is manifestly ill-founded and is declared inadmissible.

The decision of the European Court makes it clear that the Danish Supreme Court's order to compel the applicant to hand over the unedited footage is to be considered as an interference in the applicant's freedom of expression within the meaning of Article 10 § 1 of the Convention. *In casu*, the interference however meets all the conditions of Article 10 § 2, including the justification as being "necessary in a democratic society". The Strasbourg Court is also of the opinion that the Danish Supreme Court and legislation (Art. 172 and 804-805 of the Administration of Justice Act) clearly acknowledge that an interference with the protection of journalistic sources cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement of public interest. It thereby reflects the approach developed in the Strasbourg Court's jurisprudence in the cases of [Goodwin v. UK](#) (1996), [Roemen and Schmit v. Luxembourg](#) (2003) and [Ernst and others v. Belgium](#) (2003).

- [Nordisk Film & TV A/S v. Denmark \(dec.\)](#), no. 40485/02, ECHR 2005-XIII.

IRIS 2006-3/3

European Court of Human Rights: Case of *Giniewski v. France*

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In 1994, the newspaper *Le quotidien de Paris* published an article with the headline “The obscurity of error”, concerning the encyclical “The splendour of truth” (*Veritatis Splendor*) issued by Pope John Paul II. The article was written by Paul Giniewski, a journalist, sociologist and historian and contained a critical analysis of the particular doctrine developed by the Catholic Church and its possible links with the origins of the Holocaust. A criminal complaint was lodged against the applicant, the newspaper and its publishing director, alleging that they had published racially defamatory statements against the Christian community. The defendants were found guilty of defamation at first instance but were acquitted on appeal. Ruling exclusively on the civil claim lodged by the *Alliance générale contre le racisme et pour le respect de l'identité française et chrétienne* (General Alliance against Racism and for Respect for the French and Christian Identity - AGRIF), the Orléans Court of Appeal ruled that Giniewski was to pay damages to the AGRIF and that its decision was to be published at his expense in a national newspaper. The Orléans Court of Appeal considered the article defamatory toward a group of persons because of their religious beliefs. The applicant unsuccessfully contested the decision before the French Supreme Court.

In a judgment of 31 January 2006, the European Court of Human Rights holds that the article in question had contributed to a debate on the various possible reasons behind the extermination of Jews in Europe: a question of indisputable public interest in a democratic society. In such matters, restrictions on freedom of expression are to be strictly interpreted. Although the issue raised in the present case concerned a doctrine endorsed by the Catholic Church, therefore a religious matter, an analysis of the article in question showed that it did not contain attacks on religious beliefs as such, but a view which the applicant had wished to express as a journalist and historian. The Court considered it essential that a debate on the causes of acts of particular gravity, resulting in crimes against humanity, take place freely in a democratic society. The article in question had, moreover, not been “gratuitously offensive” or insulting and had not incited disrespect or hatred. Nor had it cast doubt in any way on clearly established historical facts.

From this perspective, the facts were different from those in [I.A. v. Turkey](#) regarding an offensive attack on the Prophet of Islam (see IRIS 2005-10: 3) and those in [R. Garaudy v. France](#). The Court considered that the reasons given by the French courts could not be regarded as sufficient to justify the interference with the applicant's right to freedom of expression. Specifically with regard to the order to publish a notice of the ruling in a national newspaper at the applicant's expense, the Court considers that while the publication of such a notice did not in principle appear to constitute an excessive restriction on freedom of expression, the fact that it mentioned the criminal offence of defamation undoubtedly had a deterrent effect. The sanction thus imposed appeared disproportionate with regard to the importance and interest of the debate in which the applicant had legitimately sought to take part. The Court therefore held that there has been a violation of Article 10 of the Convention.

- [Giniewski v. France](#), no. 64016/00, ECHR 2006-I.
- [Garaudy v. France \(dec.\)](#), no. 65831/01, ECHR 2003-IX (extracts).

IRIS 2006-4/1

European Court of Human Rights: Case of *Özgür Radyo v. Turkey*

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In 1998 and 1999 the Istanbul radio station *Özgür Radyo* was given three warnings and its licence was twice suspended by *Radyo Televizyon Üst Kurulu* (Turkish broadcasting regulatory authority - RTÜK). The first suspension was for a period of 90 days, the second suspension period lasted 365 days. Some of *Özgür Radyo*'s programmes had touched on various themes such as corruption, the methods used by the security forces to tackle terrorism and possible links between the State and the Mafia. The radio station was sanctioned by RTÜK because one programme was considered defamatory and other programmes had allegedly incited people to engage in violence, terrorism or ethnic discrimination and stirred up hatred or offended the independence, the national unity or the territorial integrity of the Turkish State. The radio station turned to the administrative courts for an order setting aside each of the penalties, but its applications were dismissed.

In its complaint to the European Court of Human Rights, *Özgür Radyo* argued primarily that the penalties that had been imposed by the RTÜK entailed a violation of Article 10 of the European Convention (freedom of expression). There was no discussion as to the fact that the sanctions (both the warnings and the suspension of the licence) were prescribed by law (Art. 4 and 33 of the Turkish Broadcasting Act n° 3984 of 12 April 1991) and pursued a legitimate aim as listed in Article 10 para. 2 of the Convention. Thus, the decisive issue before the Court was whether the interference with the applicant's right to freedom of expression had been "necessary in a democratic society". In assessing the situation, the Court said it would have particular regard to the words that had been used in the programmes and to the context in which they were broadcast, including the background to the case and in particular the problems linked to the prevention of terrorism.

The Court emphasizes that the programmes covered very serious issues of general interest that had been widely debated in the media and that the dissemination of information on those themes was entirely consistent with the media's role as a "watchdog" in a democratic society. The Court also notes that the information concerned had already been made available to the public. Some of the programmes had only reproduced orally, without further comment, newspaper articles that had already been published and for which no one had been prosecuted. Moreover, *Özgür Radyo* had been diligent in explaining that it was citing newspaper articles and in identifying the sources. The Court also observes that although certain particularly acerbic parts of the programmes had made them to some degree hostile in tone, they had not encouraged the use of violence, armed resistance or insurrection and did not constitute hate speech. The Court strongly underlines that this is an essential factor to be taken into consideration. Finally the Court refers to the severity of the penalties that had been imposed on the applicant, especially in terms of the suspension of the licence, first for a period of 90 days and in a second decision for a period of one year. The latter being the maximum penalty prescribed in Art. 33 of the Turkish Broadcasting Act n° 3984. Taking into account all these elements of the case, the Strasbourg Court considers the penalties disproportionate to the aims pursued and, therefore, not "necessary in a democratic society". Consequently, the Court unanimously holds that there has been a violation of Article 10.

- [*Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. v. Turkey \(no. 1\)*](#), nos. 64178/00, 64179/00, 64181/00, 64183/00 and 64184/00, 30 March 2006.

IRIS 2006-5/2

European Court of Human Rights: Case of *Stoll v. Switzerland*

Dirk Voorhoof

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In December 1996, the Swiss ambassador to the United States drew up a “strategic document”, classified as “confidential”, concerning the possible strategies regarding the compensation due to Holocaust victims for unclaimed assets deposited in Swiss banks. The document was sent to the Federal Department of Foreign Affairs in Berne and to a limited list of other persons. Martin Stoll, a journalist working for *Sonntags-Zeitung*, also obtained a copy of this document, probably as a result of a breach of professional confidence by one of the initial recipients of such a copy. Soon afterwards, the *Sonntags-Zeitung* published two articles by Martin Stoll, featuring extracts from the document. Other newspapers soon followed suit. In 1999, Stoll was sentenced to a fine of CHF 800 (EUR 520) for publishing “official confidential deliberations” within the meaning of Article 293 of the Criminal Code. This provision not only targets the person who is responsible for the breach of confidence of official secrets, but also those who were accomplices in giving publicity to such secrets. The Swiss Press Council, to which the case also had been referred in the meantime, found that Stoll had irresponsibly made some extracts appear sensational and shocking by shortening the analysis and failing to sufficiently place the report in context.

In a judgment of 25 April 2006, the European Court of Human Rights held, by four votes to three, that the conviction of Stoll is to be considered as a breach of the journalist’s freedom of expression as guaranteed by Article 10 of the Human Rights’ Convention. For the Court, it is crucial that the information contained in the report manifestly raised matters of public interest, that the role of the media as critic and public watchdog also applies to matters of foreign and financial policy and that the protection of confidentiality of diplomatic relations, although justified, could not be secured at any price. The publication of the report did not undermine the very foundations of Switzerland. The Court therefore believes that the interests deriving from freedom of expression in a democratic society could legitimise the public discussion brought about by the document, initially classified as confidential. Fining Stoll for revealing the content of the document had amounted to a kind of censorship which would be likely to discourage him from expressing criticism of that kind again in the future. The Strasbourg Court considers the conviction of Stoll by the Swiss judiciary as liable to hamper the press in performing its task as purveyor of information and public watchdog. Furthermore, as Stoll had only been convicted for publishing parts of the document in the newspaper, the European Court believes the finding by the Swiss Press Council that he had neglected his professional ethics by presenting some extracts in a sensationalist way, should not be taken into account to determine whether or not publishing the document was legitimate. The Court once more underlines that press freedom also covers possible recourse to a degree of exaggeration, or even provocation. The dissenting opinion from Judges Wildhaber, Borrego Borrego and Šikuta emphasises the importance of respecting official secrets and Stoll’s lack of professionalism in ignoring some fundamental rules of journalistic ethics. The dissenting judges also consider it as an important element that the articles at hand had not contributed in a useful way to the public debate on the issue of the unclaimed assets deposited in Swiss Banks. The majority of the Court however held that there has been a violation of Article 10 of the Convention, as Stoll’s conviction was not necessary in a democratic society, having regard to the interest of a democratic society in ensuring and maintaining the freedom of the press.

- [Stoll v. Switzerland](#), no. 69698/01, 25 April 2006.

Editor's note: This case was referred to the Grand Chamber, which returned its judgment on [10 December 2007](#).

IRIS 2006-6/2

European Court of Human Rights: Case of Dammann v. Switzerland

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In a judgment of 25 April 2006, the Court unanimously held that the Swiss authorities violated Article 10 of the Convention by convicting a journalist, Viktor Dammann, for inciting an administrative assistant of the public prosecutor's office to disclose confidential data. The assistant had forwarded data relating to criminal records of suspects in a spectacular robbery. By punishing the journalist in this case, a step had been taken prior to publication and such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. It was thus likely to hamper the press in its role as provider of information and public watchdog. Furthermore, no damage had been done to the rights of the persons concerned, as the journalist had himself decided not to publish the data in question. In these circumstances, the Court considered that Dammann's conviction had not been reasonably proportionate to the pursuit of the legitimate aim in question, having regard to the interest of a democratic society in ensuring and maintaining the freedom of the press.

- [Dammann v. Switzerland](#), no. 77551/01, 25 April 2006.

IRIS 2006-6/3

European Court of Human Rights: Case of *Tatlav v. Turkey*

Dirk Voorhoof

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In 1992, Erdoğan Aydın Tatlav, a journalist living in Istanbul, published a five volume book under the title *İslamiyet Gerçeği* (The Reality of Islam). In the first volume of the book he criticised Islam as a religion legitimising social injustice by portraying it as “God’s will”. Following a complaint on the occasion of the fifth edition of the book in 1996, the journalist was prosecuted for publishing a work intended to defile one of the religions (Art. 175 of the Criminal Code). He was sentenced to one year’s imprisonment, which was reduced to a fine.

Tatlav complained before the European Court of Human Rights that this conviction was in breach of Article 10 of the Convention, referring to the right of freedom of expression “without interference by public authority”. Essentially, the Court assessed whether the interference in the applicant’s right in view of protecting the morals and the rights of others could be legitimised as “necessary in a democratic society”. The Court is of the opinion that certain passages of the book contained strong criticism of religion in a socio-political context, but that these passages had no insulting tone and did not contain an abusive attack on Muslims or on sacred symbols of Muslim religion (see [*I.A. v. Turkey*] IRIS 2005-10: 3). The Court did not exclude that Muslims could nonetheless feel offended by the caustic commentary on their religion, but this was not considered to be a sufficient reason to justify the criminal conviction of the author of the book. The Court also took account of the fact that although the book had first been published in 1992, no proceedings had been instituted until 1996, when the fifth edition was published. It was only following a complaint by an individual that proceedings had been brought against the journalist. With regard the punishment imposed on Tatlav, the Court is of the opinion that a criminal conviction involving, moreover, the risk of a custodial sentence, could have the effect of discouraging authors and editors from publishing opinions about religion that are non-conformist and could impede the protection of pluralism, which is indispensable for the healthy development of a democratic society. Taking into consideration all these elements of the case, the Strasbourg Court considers the interference by the Turkish authorities disproportionate to the aims pursued. Consequently, the Court holds unanimously that there has been a violation of Article 10 of the Convention (see IRIS 2006-4: 2).

- [Aydın Tatlav v. Turkey](#), no. 50692/99, 2 May 2006.

IRIS 2006-7/2

European Court of Human Rights: Case of Erbakan v. Turkey

Dirk Voorhoof

Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

The European Court of Human Rights held by six votes to one that the criminal proceedings instituted in 1998 against the leader of a political party - because of a public speech during an election campaign in 1994 - and the ensuing sentence of imprisonment delivered by the State Security Court, had been a violation of Article 10 of the European Convention on Human Rights. In its judgment, the Court especially considered the interest of a democratic society in ensuring and maintaining freedom of political debate. The Court also found there was a breach of Article 6 § 1 of the Convention, as civilians standing trial for offences under the Criminal Code had legitimate reason to fear that a State Security Court which included a military judge among its members might not be independent and impartial.

The case concerns the application of Necmettin Erbakan, who was Prime Minister of Turkey from June 1996 to June 1997. In 1997 and 1998, he was the chairman of *Refah Partisi* (the Welfare Party), a political party which was dissolved in 1998 for engaging in activities contrary to the principles of secularism (see also [ECHR, 13 February 2003](#)). In February 1994, the applicant gave a public speech in Bingöl, a city in south-east Turkey. More than four years later criminal proceedings were brought against Erbakan for incitement to hatred or hostility through comments made in his 1994 speech about distinctions between religions, races and regions (Article 312 § 2 of the Criminal Code). The applicant contested the accusations against him, in particular disputing the authenticity and reliability of a video cassette, produced by the public prosecutor's office, containing a recording of the speech. In March 2000, the State Security Court convicted Erbakan and sentenced him to one year's imprisonment and a fine. In reaching its judgment, the State Security Court took into account the situation at the material time in the city of Bingöl, where the inhabitants had been victims of terrorist acts perpetrated by an extremist organisation. It concluded that the applicant, in particular by making a distinction between "believers" and "non-believers", had overstepped the acceptable limits of freedom of political debate. A few months later, the Court of Cassation dismissed the applicant's appeal on points of law and upheld the conviction. In January 2001, pursuant to Laws no. 4454 and 4616, the State Security Court stayed the execution of the sentence, a decision which was confirmed by the Court of Diyarbakir in April 2005.

Relying on Article 10 of the Convention, the applicant complained before the European Court of Human Rights that his conviction had infringed his right to freedom of expression.

In its judgment of 6 July 2006, the Court held that by using religious terminology in his speech, Erbakan had indeed reduced diversity - a factor inherent in any society - to a simple division between "believers" and "non-believers" and had called for a political line to be formed on the basis of religious affiliation. The Court also pointed out that combating all forms of intolerance and hate speech was an integral part of human rights protection and that it was crucially important that politicians avoid making comments in their speeches likely to foster such intolerance. However, in view of the fundamental nature of freedom of political debate in a democratic society, a severe penalty in relation to political speech can only be justified by compelling reasons. The Court noted in this perspective that the Turkish authorities had not sought to establish the content of the speech in question until five years after the rally, and had done so purely on the basis of a video recording the authenticity of which was disputed. The

Court concluded that it was particularly difficult to hold the applicant responsible for all the comments cited in the indictment. Furthermore, it had not been established that the speech had given rise to, or been likely to give rise to, a “present risk” and an “imminent danger”. Also taking into account the severity of the one year’s imprisonment sentence, the Court found that the interference in the applicant’s freedom of expression had not been necessary in a democratic society. The Court accordingly held that there had been a violation of Article 10.

- [Erbakan v. Turkey](#), no. 59405/00, 6 July 2006.

IRIS 2006-8/1

European Court of Human Rights: Case of *Sdružení Jihočeské Matky v. Czech Republic*

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The European Court of Human Rights has, on several occasions, recognised “the right of the public to be properly informed” and “the right to receive information”, but until recently the Court was very reluctant to derive from Article 10 of the European Convention on Human Rights a right to have access to public or administrative documents. In the cases of [Leander v. Sweden](#) (1987), [Gaskin v. United Kingdom](#) (1989) and [Șîrbu v. Moldova](#) (2004)), the Strasbourg Court has indeed recognised “that the public has a right to receive information as a corollary of the specific function of journalists, which is to impart information and ideas on matters of public interest”. However, the Court was of the opinion that the freedom to receive information basically prohibits a government from restricting a person from receiving information that others wish or may be willing to impart to that person. It was decided in these cases that the freedom to receive information as guaranteed by Article 10 could not be construed as imposing on a State a positive obligation to disseminate information or to disclose information to the public.

In a recent decision (10 July 2006) on an application’s admissibility, the European Court of Human Rights has, for the first time, applied Article 10 of the Convention in a case where a request for access to administrative documents was refused by the authorities. The case concerns a refusal to grant an ecological NGO access to documents and plans regarding a nuclear power station in Temelin, Czech Republic. Although the Court is of the opinion that there has not been a breach of Article 10, it explicitly recognised that the refusal by the Czech authorities is to be considered as an interference with the right to receive information as guaranteed by Article 10 of the Convention. Hence, the refusal must meet the conditions set out in Article 10 para. 2. In the case of *Sdružení Jihočeské Matky v. Czech Republic*, the Court refers to its traditional case law, emphasising that the freedom to receive information “aims largely at forbidding a State to prevent a person from receiving information which others would like to have or can consent to provide”. The Court is also of the opinion that it is difficult to derive from Article 10 a general right to have access to administrative documents, The Court, however, recognises that the refusal to grant access to administrative documents, *in casu* relating to a nuclear power station, is to be considered as an interference in the applicant’s right to receive information. Because the Czech authorities have reasoned in a pertinent and sufficient manner the refusal to grant access to the requested documents, the Court is of the opinion that there has been no breach of Article 10 para. 2 of the Convention in this case. The refusal was justified in the interest of protecting the rights of others (industrial secrets), national security (risk of terrorist attacks) and public health. The Court also emphasised that the request to have access to essentially technical information about the nuclear power station did not reflect a matter of public interest. For these reasons, it was obvious that there had not been an infringement of Article 10 of the Convention, thus, the Court declared the application inadmissible.

The ruling in the case of *Sdružení Jihočeské Matky* is nonetheless important as it contains an explicit and undeniable recognition of the application of Article 10 in cases of a rejection of a request for access to public or administrative documents. The right to access administrative documents is not an absolute one and can indeed be restricted under the conditions of Article 10 para. 2, which implies that such a rejection must be prescribed by law, have a legitimate aim and must be necessary in a democratic society. The Court’s decision of 10 July 2006 gives

additional support and opens new perspectives for citizens, journalists and NGOs for accessing administrative documents in matters of public interest.

- [Sdružení Jihočeské Matky v. Czech Republic \(dec.\)](#), no. 19101/03, 10 July 2006.

IRIS 2006-9/1

European Court of Human Rights: Case of Monnat v. Switzerland

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In a judgment of 21 September 2006, the European Court of Human Rights has come to the conclusion that the Swiss authorities have violated the freedom of expression of a journalist by placing a programme broadcast by the Swiss Public Broadcasting Corporation SSR under a legal embargo. In 1997, the SSR broadcast a critical documentary on the position of Switzerland during the Second World War. The documentary was part of a news programme, entitled *Temps présent* ("Present time"), for which the applicant, Daniel Monnat, was then responsible. The programme described the attitude of Switzerland and of its leaders, emphasising their alleged affinity with the far right and their penchant for a rapprochement with Germany. It also contained an analysis of the question of anti-Semitism in Switzerland and of its economic relations with Germany, focusing on the laundering of Nazi money by Switzerland and on the role of Swiss banks and insurance companies in the matter of unclaimed Jewish assets. The programme elicited reactions from members of the public. Viewers' complaints, within the meaning of section 4 of the Federal Broadcasting Act, were filed with the *Autorité indépendante d'examen des plaintes en matière de radiotélévision* (Independent Broadcasting Complaints Commission). The Complaints Commission was of the opinion that the programme had breached the duty to report objectively in such a way as to reflect the plurality and diversity of opinion. The Complaints Commission found against the SSR and requested the broadcasting company to take appropriate measures. The Commission particularly found that the method used, namely politically engaged journalism, had not been identified as such. The News Editors' Conference of SSR informed the Complaints Commission that it had taken note of its decisions and would take them into account when dealing with sensitive issues. Being satisfied with the measures, the Commission declared the proceedings closed. In the meantime, the registry of the court of Geneva decided to place the programme under a legal embargo, which led to the suspension of the sale of videotapes of the programme.

Mr. Monnat alleged before the European Court of Human Rights that the programme scrutiny introduced by Swiss law and the decision of the Complaints Commission, upheld by the Federal Court, had hampered him in the exercise of his freedom of expression, as provided for by Article 10 of the European Convention on Human Rights. The Court dismissed the applicant's complaint as to the inappropriateness of the programme scrutiny introduced by the Federal Broadcasting Act, because he was challenging general legal arrangements in abstract terms. However, in his capacity as a programme-maker he could claim to be the victim of a violation of the Convention because of the legal embargo.

The Strasbourg Court noted that the impugned programme had undoubtedly raised a question of major public interest, at a time when Switzerland's role in the Second World War was a popular subject in the Swiss media and divided public opinion in that country. As regards the journalist's duties and responsibilities, the Court was not convinced that the grounds given by the Federal Court had been "relevant and sufficient" to justify the admission of the complaints, even in the case of information imparted in a televised documentary on a state-owned television channel. As to the sanctions imposed in this case, the Court noted that whilst they had not prevented the applicant from expressing himself, the admission of the complaints had nonetheless amounted to a kind of censorship, which would be likely to discourage him from making criticisms of that kind again in future. In the context of debate on a subject of major public interest, such a sanction would be likely to deter journalists from contributing to public discussion of issues affecting the

life of the community. By the same token, it was liable to hamper the media in performing their task as purveyor of information and public watchdog. Moreover, the censorship had subsequently taken on the form of a legal embargo on the documentary, formally prohibiting the sale of the product in question. For these reasons, the Court considered that there had been a violation of Article 10 of the Convention.

- [Monnat v. Switzerland](#), no. 73604/01, ECHR 2006-X.

IRIS 2006-10/2

European Court of Human Rights: Case of *White v. Sweden*

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In 1996, the two main evening newspapers in Sweden, *Expressen* and *Aftonbladet*, published a series of articles in which various criminal offences were ascribed to Anthony White, a British citizen residing in Mozambique. The articles also included an assertion that he had murdered Olof Palme, the Swedish Prime Minister, in 1986. Mr White was a well-known figure whose alleged illegal activities had already been at the centre of media attention. The newspapers also reported statements of individuals who rejected the allegations made against Mr White. In an interview published in *Expressen*, Mr White denied any involvement in the alleged offences.

Mr White brought a private prosecution against the editors of the newspapers for defamation under the Freedom of Press Act and the Swedish Criminal Code. The District Court of Stockholm acquitted the editors and found that it was justifiable to publish the statements and pictures, given that there was considerable public interest in the allegations. It further considered that the newspapers had a reasonable basis for the assertions and that they had performed the checks that were called for in the given circumstances, taking into regard the constraints of a fast news service. The Court of Appeal upheld the District Court's decision.

Mr White complained before the European Court of Human Rights in Strasbourg that the Swedish courts had failed to provide due protection for his name and reputation. He relied on Article 8 (right to respect for private and family life) of the Convention. The European Court found that a fair balance must be struck between the competing interests, namely freedom of expression (Article 10) and the right to respect for privacy (Article 8), also taking into account that under Article 6 § 2 of the Convention individuals have a right to be presumed innocent of any criminal offence until proven guilty in accordance with the law. The Court first noted that as such the information published in both newspapers was defamatory. The statements clearly tarnished his reputation and disregarded his right to be presumed innocent until proven guilty as it appeared that Mr. White had not been convicted of any of the offences ascribed to him. However in the series of articles, the newspapers had endeavoured to present an account of the various allegations made which was as balanced as possible and the journalists had acted in good faith. Moreover, the unsolved murder of the former Swedish Prime Minister Olof Palme and the ongoing criminal investigations were matters of serious public interest and concern. The Strasbourg Court considered that the domestic courts made a thorough examination of the case and balanced the opposing interests involved in conformity with Convention standards. The European Court found that the Swedish courts were justified in finding that the public interest in publishing the information in question outweighed Mr White's right to the protection of his reputation. Consequently, there had been no failure on the part of the Swedish State to afford adequate protection of the applicant's rights. For these reasons, the Court considered that there had been no violation of Article 8.

- [White v. Sweden](#), no. 42435/02, 19 September 2006.

IRIS 2006-10/3

European Court of Human Rights: Case of Klein v. Slovakia

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In March 1997, the weekly magazine *Domino Efekt* published an article written by Martin Klein, a journalist and film critic. In this article, Klein criticised Archbishop Ján Sokol's televised proposal to halt the distribution of the film "The People v. Larry Flint" and to withdraw the poster advertising it. The article contained slang terms and innuendos with oblique vulgar and sexual connotations, allusions to the Archbishop's alleged cooperation with the secret police of the former communist regime and an invitation to the members of the Catholic Church to leave their church.

On complaints filed by two associations, criminal proceedings were brought against Klein. The journalist was convicted of public defamation of a group of inhabitants of the Republic for their belief. For this criminal offence, he was sentenced to a fine of EUR 375, in application of Article 198 of the Slovakian Criminal Code. The Regional Court of Košice considered the article in question as vulgar, ridiculing and offending, hence not eligible for protection under Article 10 of the European Convention. It concluded that the content of Klein's article had violated the rights, guaranteed by the Constitution, of a group of adherents to the Christian faith.

Contrary to the domestic courts' findings, the European Court of Human Rights was not persuaded that the applicant had discredited and disparaged a section of the population on account of their Catholic faith. The applicant's strongly-worded pejorative opinion related exclusively to the Archbishop, a senior representative of the Catholic Church in Slovakia. The fact that some members of the Catholic Church could have been offended by the applicant's criticism of the Archbishop and by the statement that he did not understand why decent Catholics did not leave that Church could not affect that position. The Court accepts the applicant's argument that the article neither unduly interfered with the right of believers to express and exercise their religion, nor denigrated the content of their religious faith. Given that the article exclusively criticised the person of the Archbishop, convicting the applicant of defamation of others' beliefs was in itself inappropriate in the particular circumstances of the case.

For those reasons, and despite the vulgar tone of the article, the Court found that it could not be concluded that by publishing the article the applicant had interfered with the right to freedom of religion of others in a manner justifying the sanction imposed on him. The interference with his right to freedom of expression therefore neither corresponded to a pressing social need, nor was it proportionate to the legitimate aim pursued. The Court held unanimously that the interference with the applicant's right to freedom of expression was not "necessary in a democratic society" and that there had been a violation of Article 10 of the European Convention.

- [Klein v. Slovakia](#), no. 72208/01, 31 October 2006.

IRIS 2007-1/1

European Court of Human Rights: Case of Leempoel & S.A. Ed. Ciné Revue v. Belgium

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In a judgment of 9 November 2006, the European Court of Human Rights found no violation of freedom of expression in a case concerning the withdrawal from sale and ban on distribution of an issue of the Belgian weekly magazine *Ciné Télé Revue*. On 30 January 1997, the magazine published an article containing extracts from the preparatory file and personal notes that an investigating judge, D., had handed to a parliamentary commission of inquiry. The article was advertised on the front cover of the magazine via the headline, which was superimposed on a photograph of the judge. The disclosures received substantial press coverage, as the issue was related to the “Dutroux case” and the manner in which the police and the judiciary had handled the investigations into the disappearance, kidnapping, sexual abuse and murder of several children.

Following a special judicial procedure for urgent applications before a judge in Brussels, investigating judge D. obtained an injunction for the magazine editor and its publisher to take all necessary steps to remove every copy of the magazine from sales outlets and the prohibition of the subsequent distribution of any copy featuring the same cover and the same article. The court order was based on the grounds that the published documents were subject to the rules on confidentiality of parliamentary inquiries and that their publication appeared to have breached the right to due process and also the judge’s right to respect for her private life.

In an application before the European Court of Human Rights, the applicants complained that the ruling against them infringed Article 10 of the Convention and they maintained that Article 25 of the Belgian Constitution, which forbids censorship of the press, afforded a greater degree of protection than Article 10 of the Convention and that its application should accordingly have been safeguarded by Article 53 of the Convention (the Convention’s rights and freedoms being “minimum rules”).

The Court noted that although the offending article was related to a subject of public interest, its content could not be considered as serving the public interest. Moreover, the parliamentary commission’s hearings had already received significant media exposure, including via live broadcasts on television. The Court found that the article in question contained criticism that was especially directed against the judge’s character and that it contained in particular a copy of strictly confidential correspondence which could not be regarded as contributing in any way to a debate of general interest to society. The use of the file handed over to the commission of inquiry and the comments made in the article had revealed the very essence of the “system of defence” that the judge had allegedly adopted or could have adopted before the commission. The Court is of the opinion that the adoption of such a “system of defence” belonged to the “inner circle” of a person’s private life and that the confidentiality of such personal information had to be guaranteed and protected against any intrusion. As the Court found that the article in question and its distribution could not be regarded as having contributed to any debate of general interest to society it considered that the grounds given by the Belgian courts to justify the ban on the distribution of the litigious issue of the magazine were relevant and sufficient and that the interference with the applicants’ right to freedom of expression was proportionate to the aim pursued. The Court considered that such interference could be seen as “necessary in a democratic society” and did not amount to a violation of Article 10.

With regard to the alleged negligence to apply Article 53, the Court referred back to its finding that the interference in question had been “prescribed by law” and further observed that the decision to withdraw the magazine from circulation did not constitute a pre-publication measure but, having been taken under the special procedure for urgent applications, sought to limit the extent of damage already caused. As such interference was not considered by the Belgian Court of Cassation as a form of censorship, the European Court did not consider it necessary to examine separately the complaint under Article 53 based on an alleged breach of Article 25 of the Belgian Constitution.

- [Leempoel & S.A. ED. Ciné Revue v. Belgium](#), no. 64772/01, 9 November 2006.

IRIS 2007-3/1

European Court of Human Rights: Case of Radio Twist v. Slovakia

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In a judgment of 19 December 2006, the European Court of Human Rights considered the sanctioning of a radio station to be a violation of freedom of expression as guaranteed by Article 10 of the Convention. The applicant, Radio Twist is a radio broadcasting company that was convicted for broadcasting the recording of a telephone conversation between the State Secretary at the Ministry of Justice and the Deputy Prime Minister in a news programme. The recording was accompanied by a commentary, clarifying that the recorded dialogue related to a politically influenced power struggle in June 1996 between two groups which had an interest in the privatisation of a major national insurance provider. Mr. D., the Secretary at the Ministry of Justice subsequently filed a civil action against Radio Twist for protection of his personal integrity. He argued that Radio Twist had broadcast the telephone conversation despite the fact that it had been obtained in an illegal manner. Radio Twist was ordered by the Slovakian courts to offer Mr. D. a written apology and to broadcast that apology within 15 days. The broadcasting company was also ordered to pay compensation for damage of a non-pecuniary nature, as the Slovakian courts considered that the dignity and reputation of Mr. D. had been tarnished. This was, in particular, related to the broadcasting of the illegally tapped conversation, which was considered an unjustified interference in the personal rights of Mr. D., as the protection of privacy also extends to telephone conversations of public officials.

The Strasbourg Court however disagreed with these findings of the Slovakian Courts. Referring to the general principles that the European Court of Human Rights has developed in its case law regarding freedom of expression in political matters, regarding the essential function of the press in a democratic society, and regarding the limits of acceptable criticism of politicians, the Court emphasised that the context and content of the recorded conversation was clearly political and that the recording and commentary contained no aspects relevant to the concerned politician's private life. Furthermore, the Court referred to the fact that the news reporting by Radio Twist did not contain untrue or distorted information and that the reputation of Mr. D. seemed not to have been tarnished by the impugned broadcast, as he was shortly afterwards elected as a judge of the Constitutional Court. The Court points out that Radio Twist was sanctioned mainly due to the mere fact of having broadcast information that had been illegally obtained by someone else who had forwarded this to the radio station. The Court was, however, not convinced that the mere fact that the recording had been obtained by a third person contrary to the law could deprive the broadcasting company of the protection afforded by Article 10 of the Convention. The Court also noted that it was, at no stage, alleged that the broadcasting company or its employees or agents were in any way liable for the recording or that its journalists transgressed criminal law while obtaining or broadcasting it. The Court observed that there was no indication that the journalists of Radio Twist acted in bad faith or that they pursued any objective other than reporting on matters which they felt obliged to make available to the public. For these reasons, the Court concluded that by broadcasting the telephone conversation in question, Radio Twist did not interfere with the reputation and rights of Mr. D. in a manner that could justify the sanction imposed upon it. Hence the interference with its rights to impart information did not correspond to a pressing social need. The interference was not necessary in a democratic society, thus it amounted to a violation of Article 10 of the Convention.

- [Radio Twist a.s. v. Slovakia](#), no. 62202/00, ECHR 2006-XV.

IRIS 2007-3/2

European Court of Human Rights: Case of Mamère v. France

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On 11 October 2000, the Paris Criminal Court found Mr. Noël Mamère, a leading member of the ecologist party *Les Verts* and Member of Parliament, guilty of having publicly defamed Mr. Pellerin, the director of the Central Service for Protection against Ionising Radiation (SCPRI). Mr. Mamère was ordered to pay a fine of FRF 10,000 (app. EUR 1,525). The Paris Court of Appeal upheld the conviction considering that Mr. Mamère's comments during a television programme were defamatory as they had compromised Mr. Pellerin's "honour and reputation" by accusing him of repeatedly having "knowingly provided, in his capacity as a specialist on radioactivity issues, erroneous or simply untrue information about such a serious problem as the Chernobyl disaster, which could potentially have had an impact on the health of the French population". The Court found that Mr. Mamère had not acted in good faith, as he had not adopted a moderate tone in insisting forcefully and peremptorily that Mr. Pellerin had repeatedly sought to lie and to distort the truth about the consequences of the Chernobyl nuclear accident (the latter occurred in the spring of 1986). Mr. Mamère had also attributed "pejorative characteristics" to Mr. Pellerin by using the adjective "sinister" and by saying that he suffered from "the Asterix complex". In May 2006, following a complaint by certain individuals suffering from thyroid cancer, the Commission for Research and Independent Information on Radioactivity (CRIIRAD) and the French Association of Thyroid Disease Sufferers (AFMT) recognised that the official services at the time had lied and had underestimated the contamination of soil, air and foodstuffs following the Chernobyl disaster.

In its judgment of 7 November 2006, the Strasbourg Court observed that the conviction of Mr. Mamère for aiding and abetting public defamation of a civil servant had constituted an interference with his right to freedom of expression as guaranteed in the Freedom of the Press Act of 29 July 1881. It also considered that it had pursued one of the legitimate aims listed in Article 10 § 2, namely the protection of the reputation of others (in this case the reputation of Mr. Pellerin). The Court, however, considered the interference as not necessary in a democratic society, as the case obviously was one in which Article 10 required a high level of protection of the right to freedom of expression. The Court underlined that the applicant's comments concerned topics of general concern, namely the protection of the environment and of public health. Mr. Mamère had also been speaking in his capacity as an elected representative committed to ecological issues, so that his comments were to be regarded as being a political or "militant" expression. The Court reiterated that those who have been prosecuted on account of their comments on a matter of general concern should have the opportunity to absolve themselves of liability by establishing that they have acted in good faith and, in the case of factual allegations, by proving that they were true. In the applicant's case, the comments made were value judgments as well as factual allegations, so the applicant should have been offered both those opportunities. As regards the factual allegations, since the acts criticised by the applicant had occurred more than ten years earlier, the 1881 Freedom of the Press Act barred him from proving that his comments were true. While in general the Court could see the logic of such a prescription, it considered that where historical or scientific events were concerned, it might on the contrary be expected that over the course of time the debate would be enriched by new information that could improve people's understanding of reality. Furthermore, the Court was not persuaded by the reasoning of the French Court as to Mr. Mamère's lack of good faith and the insulting character of some of his statements. According to the Strasbourg Court, Mr.

Mamère's comments could be considered sarcastic but they remained within the limits of acceptable exaggeration or provocation. Furthermore, the question of Mr. Pellerin's personal and "institutional" liability was an integral part of the debate on a matter of general concern: as director of the SCPRI he had had access to the measures being taken and had on several occasions made use of the media to inform the public of the level of contamination, or rather, one might say, the lack of it, within the territory of France. In those circumstances, and considering the extreme importance of the public debate in which the comments had been made, Mr. Mamère's conviction for defamation could not be said to have been proportionate and hence "necessary in a democratic society". The Court therefore held that there had been a violation of Article 10.

- [Mamère v. France](#), no. 12697/03, ECHR 2006-XIII.

IRIS 2007-3/3

European Court of Human Rights: Case of *Österreichischer Rundfunk v. Austria*

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In a judgment of 7 December 2006, the European Court of Human Rights found that the Austrian authorities had acted in violation of the right to freedom of expression. The case concerned a reaction to a news item on the Austrian public television channel Österreichischer Rundfunk (ORF). In a news programme broadcast by ORF in 1999, a picture was shown of a person, Mr. S., who had been released on parole a few weeks earlier. Mr. S. was convicted to eight years imprisonment in 1995 because he had been found to be a leading member of a neo-Nazi organisation. At the request of Mr. S., the Austrian courts prohibited ORF from showing his picture in connection with any report stating that he had been convicted under the *Verbotsgesetz* (National Socialist Prohibition Act) either once the sentence had been executed or once he had been released on parole. The courts found that the publication of Mr. S.'s picture in that context had violated his legitimate interests within the meaning of both Section 78 of the Copyright Act and Section 7a of the Media Act ("right to one's image").

The ORF complained in Strasbourg that the Austrian courts' decisions violated its right to freedom of expression as provided in Article 10 of the European Convention on Human Rights. Despite its being a public broadcasting organisation, the European Court of Human Rights was of the opinion that ORF does not qualify as a governmental organisation and hence may claim to be a "victim" of an interference by the Austrian authorities in its right to freedom of expression, within the meaning of articles 34 and 35 of the Convention (see [IRIS 2004-5: 3](#)). Referring *inter alia* to the guarantee of the ORF's editorial and journalistic independence and its institutional autonomy as a provider of a public service, the Court was of the opinion that the ORF does not fall under government control. As to the question of the prohibition to show Mr. S.'s picture in the context of his conviction under the Prohibition Act, the Court took into account several elements: the Court referred to the position of the ORF as a public broadcaster with an obligation to cover any major news item in the field of politics, to Mr. S.'s position as a well-known member of the neo-Nazi scene in Austria and to the nature and subject-matter of the news report, the latter being of relevance to the public interest. The Court furthermore underlined the fact that the injunction granted by the domestic courts was phrased in very broad terms and that the news item on ORF referred to persons recently released on parole after having been convicted of crimes with a clear political relevance. Taking into account all these elements the Strasbourg Court found that the reasons adduced by the Austrian courts to justify the injunction were not relevant and sufficient to warrant the interference in ORF's right to freedom of expression. Thus, there had been a violation of Article 10.

- [Österreichischer Rundfunk v. Austria](#), no. 35841/02, 7 December 2006.

IRIS 2007-3/4

European Court of Human Rights: Case of Nikowitz and Verlagsgruppe News GmbH v. Austria

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In a judgment of 22 February 2007, the European Court of Human Rights (ECHR) considered the convictions of both a journalist and a publishing company as being violations of the right to freedom of expression as guaranteed by Article 10 of the Convention. The case concerned an article in the magazine *Profil* about a road accident in which the well-known Austrian skiing champion, Hermann Maier, injured his leg. The article, written by the journalist Rainer Nikowitz, suggested that one of Mr. Maier's competitors, the Austrian skiing champion Stephan Eberharter, was pleased with the accident because he would finally be able to win something, and that he even hoped his competitor would break his other leg too. The article was satirical and was written in response to public hysteria following the accident. It was accompanied by a portrait of Mr. Maier together with the caption: "Hero Hermann's leg is causing millions of Austrians pain".

Subsequently, Mr. Eberharter brought a private prosecution for defamation against Mr. Nikowitz and a compensation claim under the *Mediengesetz* (Media Act) against the publishing company. In 2001, the Vienna *Landesgericht* (Regional Criminal Court) found Mr. Nikowitz and the publishing company guilty of defamation. Apart from the order to pay a suspended fine, costs and compensation for damages, the Court also ordered Verlagsgruppe News to publish extracts of the judgment. Mr. Nikowitz and Verlagsgruppe News appealed unsuccessfully to the Vienna Court of Appeal, which found that the satirical meaning of the article would be lost on the average reader, and that the personal interests of Mr. Eberharter outweighed the right to freedom of artistic expression.

The European Court of Human Rights, however, approached the case from another perspective, emphasising that the article in question dealt with an incident that had already attracted the attention of the Austrian media, and that it was written in an ironic and satirical style and intended as a humorous commentary. The article also sought to make a critical contribution to an issue of general interest, namely the attitude of society towards a sports star. It could, at most, be understood as the author's value judgment of Mr. Eberharter's character, expressed in the form of a joke. According to the ECHR, the article remained within the limits of acceptable satirical comment in a democratic society. The Court was also of the opinion that the Austrian courts showed no moderation in interfering with the applicant's rights by convicting the journalist of defamation and ordering him to pay a fine, and by ordering the publishing company to pay compensation and to publish the judgment. It followed that the interference under complaint was not "necessary in a democratic society" and therefore there had been a violation of Article 10.

- [Nikowitz and Verlagsgruppe News GmbH v. Austria](#), no. 5266/03, 22 February 2007.

IRIS 2007-4/1

European Court of Human Rights: Case of *Tønsberg Blad AS and Marit Haukom v. Norway*

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In 2000, the Norwegian newspaper *Tønsberg Blad* published an article about a list drafted by the Municipal Council of Tjøme. The list identified property owners suspected of breaching permanent residence requirements applying to certain properties. The article referred to a well-known singer and a well-known businessman (Mr. Rygh) stating that they might be “forced to sell their properties at Tjøme”. The article included a small photo of Mr. Rygh with the caption: “it must be due to a misunderstanding, says Tom Vidar Rygh”. A few weeks later, after being informed that the Rygh family’s property had been removed from the list, the newspaper published an additional article, which noted that Mr. Vidar Rygh and the singer had “got off” the list. The newspaper criticised the fact there were “major loopholes” in the system, in that the regulations did not apply to houses that had been built by the owners. In a further article, entitled “*Tønsberg Blad clarifies*”, the paper stated that the properties belonging to the singer and the Rygh family had been removed from the list in question, as the regulations did not apply to their properties.

Mr. Rygh brought private criminal proceedings against the newspaper and its editor-in-chief, Mrs. Haukom. Under Article 253 of the Penal Code (defamation), *Lagmannsrett* (the High Court) declared the impugned statements to be null and void and ordered the publishing firm and the editor-in-chief to pay Mr. Rygh NOK 50,000 in compensation for non-pecuniary damage. The Court was of the opinion that there had not been sufficient evidence for the allegations against Mr. Rygh. The Supreme Court upheld the conviction and ordered *Tønsberg Blad* and Haukom to pay Mr Rygh NOK 673,879 for costs.

In their case taken before the European Court of Human Rights, *Tønsberg Blad* and Haukom complained, under Article 10 of the Convention, that the Norwegian Courts’ decisions had entailed an interference with their right to freedom of expression that could not be regarded as necessary in a democratic society.

The ECHR, in the first place, found that the purpose of the article was to illustrate a problem about which the public had an interest in being informed. Indeed, a possible failure of a public figure to observe laws and regulations aimed at protecting serious public interests, even in the private sphere, might in certain circumstances constitute a matter of legitimate public interest. The Court recalled that protection of the right of journalists to impart information on issues of general interest required that they act in good faith and on an accurate factual basis and provide “reliable and precise” information in accordance with the ethics of journalism. Even though the news item had been presented in a somewhat sensationalist style, the overall impression given by the newspaper report was that, rather than inviting the reader to reach any foregone conclusion about any failure on Mr. Rygh’s part, it had raised question marks with respect to both whether he had breached the requirements in question, and whether those requirements should be maintained, modified or repealed. The ECHR was of the opinion that the overall news coverage by *Tønsberg Blad* on that matter was presented in a balanced way and that the disputed allegations were presented with precautionary qualifications. The Court does not find that the impugned accusation was capable of causing such injury to personal reputation as could weigh heavily in the balancing exercise to be carried out under the necessity test in Article 10 § 2 of the Convention.

As to the question of whether the applicants had acted in good faith and complied with the ordinary journalistic obligation to verify a factual allegation, the European Court found substantial evidence to corroborate the newspaper's contention that the Municipality at the time held the view that Mr. Rygh was in breach of the relevant residence requirements. The journalist could not in the Court's opinion be blamed for not having ascertained for himself, whether the residence requirements were applicable to Mr. Rygh's property. On the contrary, in view of the relatively minor nature and limited degree of the defamation at issue and the important public interests involved, the Court was satisfied that the newspaper had taken sufficient steps to verify the truth of the disputed allegation and acted in good faith.

However, the applicants had had to face judicial defamation proceedings pursued at three levels. These proceedings had led to their statements being declared null and void and to their being ordered to pay the plaintiff NOK 50,000 in compensation for non-pecuniary damage and to reimburse him NOK 673,829 for his legal expenses, in addition to bearing their own costs. In the circumstances, the proceedings had resulted in an excessive and disproportionate burden being placed on the applicants, which was capable of having a chilling effect on press freedom in the relevant State.

The ECHR came to the conclusion that the reasons relied on by the Norwegian authorities, although relevant, were not sufficient to show that the interference complained of had been "necessary in a democratic society". The Court considered that there had been no reasonable relationship of proportionality between the restrictions placed by the measures applied by the Supreme Court on the applicants' right to freedom of expression and the legitimate aim pursued. Accordingly, there has been a violation of Article 10 of the Convention.

- [Tønsbergs Blad A.S. and Haukom v. Norway](#), no. 510/04, 1 March 2007.

IRIS 2007-5/101

European Court of Human Rights: Case of Colaço Mestre and SIC v. Portugal

Dirk Voorhoof

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The European Court of Human Rights has once again ruled in favour of freedom of expression, this time regarding an interview on television. The Court considered the conviction of a journalist, Mr. Colaço Mestre and of the broadcasting company, Sociedade Independente de Comunicação (SIC), as a violation of the freedom of expression guaranteed by Article 10 of the Convention. In 1996, as part of a television programme entitled *Os donos da bola* (masters of the ball), SIC broadcast an interview conducted by Mr. Colaço Mestre with Gerhard Aigner, who at the time was General Secretary of UEFA. The interview, in French, focused on allegations concerning the bribery of referees in Portugal and the actions of Mr. Pinto da Costa, the then President of the Portuguese Professional Football League and Chairman of the football club FC Porto. Mr. Colaço Mestre described Mr. Pinto da Costa as “the referees’ boss” and seemed to be eliciting comments from his interviewee about the concurrent functions exercised by Mr. Pinto da Costa at the time. Mr. Pinto da Costa lodged a criminal complaint against Mestre and SIC accusing them of defamation. The Oporto Criminal Court sentenced Mr. Colaço Mestre to a fine or an alternative 86-day term of imprisonment, and ordered the journalist and the television channel to pay the claimant damages of approximately EUR 3,990. In 2002 the Oporto Court of Appeal dismissed an appeal lodged by Mestre and SIC and upheld their conviction

The European Court of Human Rights, however, is of the opinion that this sanction was a breach of Article 10 of the Convention. The Court noted that Mr. Pinto da Costa played a major role in Portuguese public life and that the interview concerned the debate on bribery in football, a question of public interest. Moreover, the interview had not addressed the private life, but solely the public activities of Mr. Pinto da Costa as Chairman of a leading football club and President of the National League. As to the expressions used during the interview, the Court considered that there had been no breach of journalistic ethics. In the context of the heated debate at the time about bribery of Portuguese referees, the interview had been broadcast in a Portuguese football programme intended for an audience with a particular interest in, and knowledge of, the subject-matter. The Court further considered that the fact that Mr. Colaço Mestre had not been speaking in his mother tongue when he conducted the interview with the UEFA-Secretary General, which might have had an impact on the wording of his questions. The Court also found that the punishment of a journalist by sentencing him to pay a fine, together with an award of damages against him and the television channel employing him, might seriously hamper the contribution of the press to the discussion of matters of public interest and should not be envisaged unless there were particularly strong reasons for doing so. However, that was not the case here. In those circumstances the Court considered that, whilst the reasons advanced by the Portuguese courts to justify the applicants’ conviction might be regarded as relevant, they were not sufficient and, accordingly, did not serve to meet a pressing social need. The Court therefore held that there had been a violation of Article 10.

- [Colaço Mestre and SIC – Sociedade Independente de Comunicação, S.A. v. Portugal](#), nos. 11182/03 and 11319/03, 26 April 2007.

IRIS 2007-6/1

European Court of Human Rights: Case of Dupuis and Others v. France

Dirk Voorhoof

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In a judgment of 7 June 2007, the European Court of Human Rights expressed the unanimous opinion that the French authorities have violated the freedom of expression of two journalists and a publisher (Fayard). Both journalists were convicted for using confidential information published in their book *Les Oreilles du Président* (The Ears of the President). The book focused on the “Elysée eavesdropping operations”, an illegal system of telephone tapping and record-keeping, orchestrated by the highest office of the French State and directed against numerous figures of civil society, including journalists and lawyers. The French Courts found the two journalists, Dupuis and Pontaut, guilty of the offence of using information obtained through a breach of the confidentiality of the investigation, or of professional confidentiality. It was also argued that the publication could be detrimental to the presumption of innocence of Mr. G.M., the deputy director of President Mitterrand’s private office at the time of the events, who was placed under formal investigation for breach of privacy under suspicion of being the responsible person for the illegal telephone tapping.

The ECHR observed that the subject of the book concerned a debate of considerable public interest, a state affair, which was of interest to public opinion. The Court also referred to the status of Mr. G.M. as a public person, clearly involved in political life at the highest level of the executive wherein the public had a legitimate interest in being informed about the trial, and in particular, about the facts dealt with or revealed in the book. The Court found it legitimate that special protection should be granted to the confidentiality of the judicial investigation, in view of the stakes of criminal proceedings, both for the administration of justice and for the right of persons under investigation to be presumed innocent. However, at the time the book was published, the case had already been widely covered in the media and it was already well known that Mr. G.M. had been placed under investigation in this case. Hence, the protection of the information on account of its confidentiality did not constitute an overriding requirement. The Court also questioned whether there was still an interest in keeping information confidential when it had already been at least partly made public and was likely to be widely known, having regard to the media coverage of the case. The Court further considered that it was necessary to take the greatest care in assessing the need to punish journalists for using information obtained through a breach of the confidentiality of an investigation or of professional confidentiality when those journalists are contributing to a public debate of such importance, thereby playing their role as “watchdogs” of democracy. According to the Court, the journalists had acted in accordance with the standards governing their profession as journalists: the impugned publication was relevant, not only to the subject matter, but also to the credibility of the information supplied. Lastly, the Court underlined the fact that the interference with freedom of expression might have a chilling effect on the exercise of that freedom - an effect that the relatively moderate nature of the fine, as in the present case, would not sufficiently negate. As the conviction of the two journalists had constituted a disproportionate interference with their right to freedom of expression, it was therefore not necessary in a democratic society. Accordingly, there has been a violation of Article 10 of the Convention.

- [Dupuis and Others v. France](#), no. 1914/02, 7 June 2007.

IRIS 2007-7/1

European Court of Human Rights: Case of Hachette Filipacchi Associés (Paris-Match) v. France

Dirk Voorhoof

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Shortly after the Prefect of Corsica, Claude Erignac, was murdered in Ajaccio in February 1998, an issue of the weekly magazine *Paris-Match* featured an article entitled “*La République assassinée*” (The murdered Republic). The article was illustrated by a photograph of the Prefect’s body lying on the road, facing the camera. The widow and children of Prefect Erignac sought injunctions against several companies, including the publishing company of *Paris-Match*, Hachette Filipacchi Associés. They contended that publication of the photograph of the bloodied and mutilated body of their relative was not information, which could possibly be useful to the public, but was prompted purely by commercial considerations and constituted a particularly intolerable infringement of their right to respect for their privacy. The urgent applications judge issued an injunction requiring the Hachette Filipacchi company to publish at its own expense in *Paris-Match* a statement informing readers that Mrs. Erignac and her children had found the photograph showing the dead body of Prefect Erignac deeply distressing. A few days later the Paris Court of Appeal upheld the injunction, noting, among other considerations, that publication of the photograph, while Prefect Erignac’s family were still mourning his loss, and given the fact that they had not given their consent, constituted a gross intrusion in their grief, and accordingly of the intimacy of their private life. It ruled that such a photograph infringed human dignity and ordered the Hachette Filipacchi company to publish at its own expense in *Paris-Match* a statement informing readers that the photograph had been published without the consent of the Erignac family, who considered its publication an intrusion in the intimacy of their private life. On 20 December 2000, the *Cour de Cassation* (Supreme Court) dismissed an appeal on points of law by the applicant company.

Relying on Article 10, the publishing house of *Paris-Match* complained before the European Court of Human Rights regarding the injunction requiring it to publish, on pain of a coercive fine, a statement informing readers that the photograph had been published without the consent of the Erignac family.

The Court considered that the obligation to publish a statement amounted to an interference by the authorities in the company’s exercise of its freedom of expression. The Court noted that the practice of requiring publication of a statement was sanctioned by a long tradition of settled French case-law and was regarded by the French courts as “one of the ways of making good damage caused through the press”. It considered that this case-law satisfied the conditions of accessibility and foreseeability required for a finding that this form of interference was “prescribed by law” within the meaning of Article 10 § 2 of the Convention.

The Court also considered that the interference complained of had pursued a legitimate aim (the protection of the rights of others) and it noted that the rights concerned fell within the scope of Article 8 of the Convention, guaranteeing the right to respect for private and family life. The crucial question that the Court had to answer was whether the interference had been “necessary in a democratic society”, within the framework of duties and responsibilities inherent in the exercise of freedom of expression. In this respect, the Court reiterated that the death of a close relative and the ensuing mourning, which were a source of intense grief, must sometimes lead the authorities to take the necessary measures to ensure respect for the private and family lives of the persons concerned. In the present case, the offending photograph had been published only

a few days after the murder and after the funeral. The Court considered that the distress of Mr. Erignac's close relatives should have led journalists to exercise prudence and caution, given that he had died in violent circumstances which were traumatic for his family, who had expressly opposed publication of the photograph. The result of the publication, in a magazine with a very high circulation, had been to heighten the trauma felt by the victim's close relatives in the aftermath of the murder, so that they were justified in arguing that there had been an infringement of their right to respect for their privacy.

The Court also considered that the wording of the statement *Paris-Match* had been ordered to publish, revealed the care the French courts had taken to respect the editorial freedom of *Paris-Match*. That being so, the Court considered that of all the sanctions which French legislation permitted, the order to publish the statement was the one which, both in principle and as regards its content, was the sanction entailing the least restrictions on the exercise of the applicant company's rights. It noted that the Hachette Filipacchi company had not shown in what way the order to publish the statement had actually had a restrictive effect on the way *Paris-Match* had exercised and continued to exercise its right to freedom of expression.

The Court concluded that the order requiring *Paris-Match* to publish a statement, for which the French courts had given reasons which were both "relevant and sufficient", had been proportionate to the legitimate aim it pursued, and therefore "necessary in a democratic society". Accordingly, the Court held by five votes to two that there had been no violation of Article 10 of the European Convention on Human Rights. The two dissenting judges expressed their firm disagreement with the finding of the majority in two separate dissenting opinions, annexed to the judgment.

- [Hachette Filipacchi Associés v. France](#), no. 71111/01, 14 June 2007.

IRIS 2007-8/105

European Court of Human Rights: Case of Lionarakis v. Greece

Dirk Voorhoof

Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

In 1999 Nikitas Lionarakis, the presenter and coordinator of a radio programme broadcast live by the Hellenic Broadcasting Corporation ERT, invited the journalist E.V. to debate various aspects of Greek foreign policy. During the broadcast, E.V. raised the subject of “the Öcalan case”. He referred to the fact that Öcalan, the ex-leader of the PKK who was prosecuted by the Turkish authorities for terrorism, had been helped by certain persons in Greece to illegally enter the country and to escape to Kenya. E.V. referred to F.K., a lawyer who had stood as a candidate in past legislative and European elections and who had been actively involved in the Öcalan case, being a contact for Öcalan after he escaped to Kenya. F.K. also had given several interviews in the press after Öcalan had been arrested by the Turkish authorities. According to the interviewed journalist, F.K. was, along with several others, to be considered as belonging to a “para-state”, belonging to a network of “vociferous criminals of the press” and being “neurotic pseudo-patriots”. In June 1999 F.K. brought an action for damages alleging insult and defamation by Lionarakis, ERT and E.V. The domestic courts found against Lionarakis and ordered him to pay EUR 161,408 for the damage sustained, an amount that was, after a settlement reached with F.K. in the domestic courts, reduced to EUR 41,067.48.

Lionarakis complained under Article 10 of a violation of his right to freedom of expression, arguing that he should not be held liable for remarks made by a third party during a radio programme of a political nature. The Court held unanimously that there had been a violation of Article 10 of the Convention, particularly when taking into account the fact that the insulting or defamatory statements were to be considered as value judgments, which had some factual basis. According to the Court, the domestic courts had failed to make a distinction between allegations of facts and value judgments. The Court also underlined the fact that these value judgments had been expressed orally, during a political type programme being broadcast live, while the programme also had a format that invited the participants to a free exchange of opinions. The Court considered, in particular, that the journalist and coordinator could not be held liable in the same way as the person who had made remarks that were possibly controversial, insulting or defamatory. It reiterated that requiring that journalists distance themselves systematically and formally from the content of a statement that might defame or harm a third party is not reconcilable with the press’s role of providing information on current events, opinions and ideas. Finally, the Court referred to the fact that F.K. was not a “simple private” person, but a contemporary public figure and that the amount of damages the journalist was compelled to pay as compensation was rather arbitrary and possibly too high. As the interference in the freedom of expression of Lionarakis had not sufficiently and pertinently been justified by the Greek authorities, the Court concluded that the inference was not necessary in a democratic society and amounted to a violation of Article 10 of the Convention. The Court also found a violation of Article 6 § 1 in this case (right to a fair hearing), as Lionarakis had been denied the right of access to the Court of Cassation.

- [Lionarakis v. Greece](#), no. 1131/05, 5 July 2007.

IRIS 2007-9/1

European Court of Human Rights: Case of Glas Nadezhda EOOD and Elenkov v. Bulgaria

Dirk Voorhoof

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In 2000 Glas Nadezhda EOOD, managed by Mr. Elenkov, applied to the Bulgarian State Telecommunications Commission (STC) for a licence to set up a radio station to broadcast Christian programmes in and around Sofia. The STC refused to grant the licence, basing its refusal on the decision taken by the National Radio and Television Committee (NRTC) which found that, on the basis of the documents submitted by Glas Nadezhda EOOD, the proposed radio station would not meet its requirements to make social and business programmes or to target regional audiences. The proposal also failed to fully meet the requirements to produce original programmes, to ensure audience satisfaction and to provide the professional and technological resources required.

Glas Nadezhda EOOD brought proceedings before the Supreme Administrative Court for judicial review of the decisions of both STC and NRTC, but finally the Court held that the NRTC had total discretion in assessing whether an application for a broadcasting licence had met certain criteria and that this discretion was not open to judicial scrutiny. In the meantime, Mr. Elenkov attempted to obtain a copy of the minutes of the NRTC's deliberations, which were meant to be available to the public under the Access to Public Information Act 2000. Despite his requests and a court order, Mr. Elenkov was not given access to those minutes.

Relying on Articles 9 (freedom of thought, conscience and religion) and 10 (freedom of expression), the applicants complained that they had been refused a broadcasting licence. They also complained under Article 13 (right to an effective remedy) about the ensuing judicial review proceedings.

The Court is of the opinion that the interference in the freedom of expression of the applicants did not meet the requirements of lawfulness as prescribed by Article 10 § 2. The NRTC had not held any form of public hearing and its deliberations had been kept secret, despite a court order obliging it to provide the applicants with a copy of its minutes. Furthermore, the NRTC had merely stated in its decision that Glas Nadezhda EOOD had not, or had only partially, addressed a number of its criteria. No reasoning was given to explain why the NRTC came to that conclusion. In addition, no redress had been given for that lack of reasoning in the ensuing judicial review proceedings because it had been held that the NRTC's discretion was not subject to review. This, together with the NRTC's vagueness concerning certain criteria for programmes, had denied the applicants legal protection against arbitrary interference with their freedom of expression. The Court notes that the guidelines adopted by the Committee of Ministers of the Council of Europe in the broadcasting regulation domain call for open and transparent application of the regulations governing the licensing procedure and specifically recommend that "[a]ll decisions taken ... by the regulatory authorities ... be ... duly reasoned [and] open to review by the competent jurisdictions" ([Recommendation Rec \(2000\)23 on the independence and functions of regulatory authorities for the broadcasting sector](#)). Consequently, the Court concludes that the interference with the applicants' freedom of expression had not been lawful and held that there had been a violation of Article 10.

Having regard to its findings under Article 10, the Court considers that it is not necessary to additionally examine whether there has been a violation of Article 9 of the Convention. The Court

on the other hand comes to the conclusion that there has been a violation of Article 13. The Court observes that the Supreme Administrative Court made it clear that it could not scrutinise the manner in which that body had assessed the compliance of Glas Nadezhda EOOD's programme documents with the relevant criteria, as that assessment was within the NRTC's discretionary powers. The Supreme Administrative Court thus refused to interfere with the exercise of the NRTC's discretion on substantive grounds and did not examine the issues relevant to the merits of the applicants' Article 10 grievance. Referring to its case law in similar cases, the Court concludes that the approach taken by the Supreme Administrative Court - refusing to interfere with the exercise of the NRTC's discretion on substantive grounds - fell short of the requirements of Article 13 of the Convention.

- [Glas Nadezhda EOOD and Anatoliy Elenkov v. Bulgaria](#), no. 14134/02, 11 October 2007.

IRIS 2008-1/1

European Court of Human Rights: Case of Filatenko v. Russia

Dirk Voorhoof

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In the year 2000, the journalist Aleksandr Grigoryevich Filatenko was convicted of defamation. The reason behind the defamation proceedings was a critical question he formulated during a broadcast live show he was presenting as a journalist working for Tyva, the regional state television and radio broadcasting company in the Tyva Republic of the Russian Federation. The controversial question, based on a question raised by a viewer phoning in, referred to an incident during which the Tyva Republic flag had been torn off a car, which was campaigning in support of the Otechestvo Party candidate. It was a matter of disagreement as to how Filatenko had worded that question during the programme. The opinion of the plaintiff was that Filatenko had presented the incident as if the Tyva flag had been torn down and stamped on by people from the Edinstvo Campaign Headquarters. Filatenko denied having made any such allegation: he only admitted to having specified that the incident had taken place near the Edinstvo Campaign Headquarters. In the defamation proceedings brought against Filatenko and the broadcasting company by members of the Edinstvo Movement, the Kyzyl District Court accepted the plaintiff's version as to how the question had been worded. As the video recording of the show had been lost, the district court relied solely on witness testimonies confirming the plaintiff's version of Filatenko's wording of the question. Filatenko was found guilty of defamation and ordered to pay approximately EUR 347 compensation for damages. Tyva was ordered to broadcast a rectification in the same time slot as the original show.

In a judgment of 6 December 2007, the European Court of Human Rights was of the opinion that this conviction and court order violate Article 10 of the European Convention on Human Rights. The Court reiterated that, as a general rule, any opinions and information aired during an electoral campaign should be considered part of a debate on questions of public interest and that there is little scope under Article 10 for restrictions on such debate. Similarly, punishing a journalist for having worded a question in a certain way, thus seriously hampering the contribution of the press to a matter of public interest, should not be envisaged unless there is a particularly strong justification. Therefore, the timing (just before elections) and format of the show (live and aimed at encouraging lively political debate), required very good reasons for any kind of restriction on its participants' freedom of expression. The European Court found that the Russian courts have failed to make an acceptable assessment of the relevant facts and have not given sufficient reasons for finding that Filatenko's wording of the question had been defamatory. Furthermore, there was no indication that the assumed allegation contained in Filatenko's question had represented an attack on anyone's personal reputation. The Court was also of the opinion that there could be no serious doubts about Filatenko's good faith. He had merely requested a reaction from the show's participants on an event of major public concern, without making any affirmations. According to the European Court Filatenko could not be criticised for having failed to verify facts, given the obvious constraints of a live television show, while a representative of the Edinstvo political movement had been present and invited to respond to the question. The Court therefore concluded that the interference with Filatenko's freedom of expression had not been sufficiently justified, and hence violated Article 10 of the Convention.

- [Filatenko v. Russia](#), no. 73219/01, 6 December 2007.

IRIS 2008-3/1

European Court of Human Rights: Grand Chamber Judgment in Case of Stoll v. Switzerland

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In December 1996 the Swiss ambassador to the United States drew up a “strategic document”, classified as “confidential”, concerning possible strategies with regard the compensations due to Holocaust victims for unclaimed assets deposited in Swiss banks. The report was sent to the Federal Department of Foreign Affairs in Bern and to a limited list of other persons. Martin Stoll, a journalist working for the *Sonntags-Zeitung*, also obtained a copy of this document, probably as a result of a breach of professional confidence by one of the persons who had received a copy of this strategic paper. Shortly afterwards the *Sonntags-Zeitung* published two articles by Martin Stoll, accompanied by extracts from the document. In the following days other newspapers also published extracts from the report. In 1999, Stoll was sentenced to a fine of CHF 800 (EUR 520) for publishing “official confidential deliberations” within the meaning of Article 293 of the Criminal Code. This provision not only punishes the person who is responsible for the breach of confidence of official secrets, but also those who helped, as an accomplice, to publish such secrets. The Swiss Press Council, to which the case had also been referred in the meantime, found that the way in which Stoll had focused on the confidential report, by shortening the analysis and failing to place the report sufficiently into context, had irresponsibly made some extracts appear sensational and shocking. In a [judgment of 25 April 2006](#), the Strasbourg Court of Human Rights held, by four votes to three, that the conviction of Stoll was to be considered as a breach of the journalist’s freedom of expression as guaranteed by Article 10 of the Human Rights Convention. For the Court, it was of crucial importance that the information contained in the report manifestly raised matters of public interest, that the role of the media as critic and watchdog also applies to matters of foreign and financial policy and that the protection of confidentiality of diplomatic relations, although a justified principle, could not be protected at any price. Furthermore, as Stoll had only been convicted because he published parts of the document in the newspaper, the European Court was of the opinion that the finding by the Swiss Press Council that he had neglected his professional ethics by focusing on some extracts in a sensationalist way, should not be taken into account to determine whether or not the publishing of the document was legitimate.

In a judgment of 10 December 2007, the Grand Chamber of the European Court of Human Rights has now, with twelve votes to five, overruled this finding of a violation of Article 10. Although the Grand Chamber recognises that the information contained in the ambassador’s paper concerned matters of public interest and that the articles from Stoll were published in the context of an important public, impassioned debate in Switzerland with an international dimension, it is of the opinion that the disclosure of the ambassador’s report was capable of undermining the climate of discretion necessary to the successful conduct of diplomatic relations, and of having negative repercussions on the negotiations being conducted by Switzerland. The judgment underlines that the fact that Stoll did not himself act illegally by obtaining the leaked document is not necessarily a determining factor in assessing whether or not he complied with his duties and responsibilities: as a journalist he could not claim in good faith to be unaware that disclosure of the document in question was punishable under Article 293 of the Swiss Criminal Code. Finally the Court emphasised that the impugned articles were written and presented in a sensationalist style, that they suggested inappropriately that the ambassador’s remarks were anti-Semitic, that they were of a trivial nature and were also inaccurate and likely to mislead the reader. Similar to the Swiss Press Council, the Court observes a number of shortcomings in the form of the

published articles. The Court comes to the conclusion that the “truncated and reductive form of the articles in question, which was liable to mislead the reader as to the ambassador’s personality and abilities, considerably detracted from the importance of their contribution to the public debate” and that there has been no violation of Article 10 of the Convention. The five dissenting judges expressed the opinion that the majority decision is a “dangerous and unjustified departure from the Court’s well-established case-law concerning the nature and vital importance of freedom of expression in democratic societies”. The judgment of the Grand Chamber also contrasts remarkably with the principle enshrined in the 19 December 2006 Joint Declaration by the UN, OSCE, OAS and ACHPR according to which “journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it” [see [IRIS 2007-2: Extra](#)].

- [Stoll v. Switzerland \[GC\]](#), no. 69698/01, ECHR 2007-V.

IRIS 2008-3/2

European Court of Human Rights: Cases of Nur Radyo and Özgür Radyo v. Turkey

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In two judgments the European Court of Human Rights considered the suspension of broadcasting licences by the *Radio ve Televizyon Üst Kurulu* (Turkish Radio and Television Supreme Council – RTÜK) as a breach of Article 10 of the Convention.

In the case of *Nur Radyo Ve Televizyon Yayıncılığı A.Ş.* the applicant company complained about the temporary broadcasting ban imposed on it by the RTÜK. In 1999 RTÜK censured Nur Radyo for broadcasting certain comments by a representative of the Mihr religious community, who had described an earthquake in which thousands of people had died in the Izmit region of Turkey (August 1999) as a “warning from Allah” against the “enemies of Allah”, who had decided on their “death”. The RTÜK found that such comments breached the rule laid down in section 4 (c) of Law no. 3984 prohibiting broadcasting that was contrary to the principles forming part of the general principles laid down in the Constitution, to democratic rules and to human rights. As the applicant company had already received a warning for breaching the same rule, the RTÜK decided to suspend its radio broadcasting licence for 180 days. Nur Radyo challenged this measure in the Turkish courts, but to no avail. Finally it applied before the European Court of Human Rights, alleging a violation of its right to freedom of expression. Nur Radyo argued, in particular, that it had put forward a religious explanation for the earthquake, which all listeners were free to support or oppose. The European Court acknowledged the seriousness of the offending comments and the particularly tragic context in which they were made. It also notes that they were of a proselytising nature in that they accorded religious significance to a natural disaster. However, although the comments might have been shocking and offensive, they did not in any way incite to violence and were not liable to stir up hatred against people. The Court reiterated that the nature and severity of the penalty imposed were also factors to be taken into account when assessing the proportionality of an interference. It therefore considered that the broadcasting ban imposed on the applicant company had been disproportionate to the aims pursued, which constitutes a violation of Article 10 of the Convention.

In the other case, the applicant company was *Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş.* The case concerned the 365-day suspension of the company’s operating licence on account of a song that it had broadcast. The RTÜK took the view that the words of the offending song infringed the principle set forth in section 4(g) of Law no. 3984, prohibiting the broadcasting of material likely to incite the population to violence, terrorism or ethnic discrimination, and of a nature to arouse feelings of hatred. After exhausting all national remedies, *Özgür Radyo-Ses Radyo Televizyon* lodged a complaint in Strasbourg under Article 10 of the Convention that the Turkish authorities had interfered with its right to freedom of expression in a manner that could not be regarded as necessary in a democratic society. In its judgment, the European Court considered that the song reflected a political content and criticised the military. The song however referred to events that took place more than 30 years ago. Over and above, the lyrics of the song were very well known in Turkey and the song had been distributed over many years, with the authorisation of the Ministry of Culture. According to the Court the song did present a risk of inciting to hatred or hostility amongst the population. There was no pressing social need for the interference and the sanction suspending the broadcaster’s licence for such a long period was not proportionate to the legitimate aim of the protection of public order. The Court found that there had been a violation of Article 10 of the Convention.

- [Nur Radyo Ve Televizyon Yayıncılığı A.Ş. v. Turkey](#), no. 6587/03, 27 November 2007.
- [Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. v. Turkey \(no. 2\)](#), no. 11369/03, 4 December 2007.

IRIS 2008-3/3

European Court of Human Rights: Cases of Voskuil v. the Netherlands and Tillack v. Belgium

Dirk Voorhoof

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In two recent judgments, the European Court of Human Rights has given substantial protection to journalists' right of non-disclosure of their sources under Article 10 of the Convention. The case of Voskuil v. the Netherlands concerns Mr Voskuil's allegations that he was denied the right not to disclose his source for two articles he had written for the newspaper *Sp!ts* and that he was detained for more than two weeks in an attempt to compel him to do so. Voskuil had been summoned to appear as a witness for the defence in the appeal proceedings concerning three individuals accused of arms trafficking. The court ordered the journalist to reveal the identity of a source, in the interests of those accused and the integrity of the police and judicial authorities. Voskuil invoked his right to remain silent (*zwijgrecht*) and, subsequently, the court ordered his immediate detention. Only two weeks later, the Court of Appeal decided to lift the order for the applicant's detention. It considered that the report published by the applicant was implausible and that the statement of Voskuil was no longer of any interest in the proceedings concerning the arms trafficking. In Strasbourg, Voskuil complained of a violation of his right to freedom of expression and press freedom, under Article 10 of the Convention. The European Court recalled that the protection of a journalist's sources is one of the basic conditions for freedom of the press, as reflected in various international instruments, including the Council of Europe's [Committee of Ministers Recommendation No. R \(2000\) 7](#). Without such protection, sources might be deterred from assisting the press in informing the public on matters of public interest and, as a result, the vital public-watchdog role of the press might be undermined. The order to disclose a source can only be justified by an overriding requirement in the public interest. In essence, the Court was struck by the lengths to which the Netherlands authorities had been prepared to go to learn the source's identity. Such far-reaching measures cannot but discourage those who have true and accurate information relating to an instance of wrongdoing from coming forward in the future and sharing their knowledge with the press. The Court found that the Government's interest in knowing the identity of the journalist's source had not been sufficient to override the journalist's interest in concealing it. There had, therefore, been a violation of Article 10.

The other case concerns the journalist H.M. Tillack, who complained of a violation, by the Belgian authorities, of his right to protection of sources. Tillack, a journalist working in Brussels for the weekly magazine *Stern*, was suspected of having bribed a civil servant, by paying him EUR 8,000, in exchange for confidential information concerning investigations in progress in the European institutions. The European Anti-Fraud Office OLAF opened an investigation in order to identify Tillack's informant. After the investigation by OLAF failed to unmask the official at the source of the leaks, the Belgian judicial authorities were requested to open an investigation into an alleged breach of professional confidence and bribery involving a civil servant. On 19 March 2004, Tillack's home and workplace were searched and almost all his working papers and tools were seized and placed under seal (16 crates of papers, two boxes of files, two computers, four mobile phones and a metal cabinet). Tillack lodged an application with the European Court of Human Rights, after the Belgian Supreme Court rejected his complaint under Article 10 of the Convention. The European Court emphasised that a journalist's right not to reveal her or his sources could not be considered a mere privilege, to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but was part and parcel of the right to information and should be treated with the utmost caution (even more so in the applicant's case, since he had been under suspicion because of vague, uncorroborated rumours, as subsequently confirmed

by the fact that no charges were placed. The Court also took into account the amount of property seized and considered that although the reasons given by the Belgian courts were “relevant”, they could not be considered “sufficient” to justify the impugned searches. The European Court accordingly found that there had been a violation of Article 10 of the Convention.

- [Voskuil v. the Netherlands](#), no. 64752/01, November 2007.
- [Tillack v. Belgium](#), no. 20477/05, 27 November 2007.

IRIS 2008-4/2

European Court of Human Rights: case of *Guja v. Moldova*

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The European Court of Human Rights recently delivered a judgement on a very particular and interesting case, concerning the position of a “whistle-blower” who leaked two letters to the press and was subsequently dismissed. The Court held that the divulgence of the internal documents to the press was *in casu* protected by Article 10 of the Convention, which guarantees the right to freedom of expression, including the right to receive and impart information and ideas. The applicant, Mr. Guja, was Head of the Press Department of the Moldovan Prosecutor General’s Office, before he was dismissed, on the grounds that he had handed over two secret letters to a newspaper and that, before doing so, he had failed to consult the heads of other departments of the Prosecutor General’s Office, a behaviour which constituted a breach of the press department’s internal regulations. Guja was of the opinion that the letters were not confidential and that, as they revealed that the Deputy Speaker of Parliament, Vadim Mişin, had exercised undue pressure on the Public Prosecutor’s Office, he had acted in line with the President’s anti-corruption drive and with the intention of creating a positive image of the Office. Guja brought a civil action against the Prosecutor General’s Office seeking reinstatement, but this action was not successful. Relying on Article 10 of the Convention, he complained to the European Court of Human Rights about his dismissal.

The European Court held that, given the particular circumstances of the case, external reporting, even to a newspaper, could be justified, as the case concerned the pressure exerted by a high-ranking politician on pending criminal cases. At the same time, the Public Prosecutor had given the impression that he had succumbed to political pressure. The Court also referred to the reports of international non-governmental organisations (the International Commission of Jurists, Freedom House, and the Open Justice Initiative), which had expressed concern about the breakdown of the separation of powers and the lack of judicial independence in Moldova. There is no doubt that these are very important matters in a democratic society, about which the public has a legitimate interest in being informed and which fall within the scope of political debate. The Court considered that the public interest in the provision of information on undue pressure and wrongdoing within the Prosecutor’s Office is so important in a democratic society, that it outweighs the interest in maintaining public confidence in the Prosecutor General’s Office. The open discussion of topics of public concern is essential to democracy and it is of great importance if members of the public are discouraged from voicing their opinions on such matters. The Court, being of the opinion that Guja had acted in good faith, finally noted that it was the heaviest sanction possible (dismissal) that had been imposed on the applicant. The sanction not only had negative repercussions on the applicant’s career, but could also have a serious chilling effect on other employees from the Prosecutor’s Office and discourage them from reporting any misconduct. Moreover, in view of the media coverage of the applicant’s case, the sanction could also have a chilling effect on other civil servants and employees.

Being mindful of the importance of the right to freedom of expression on matters of general interest, of the right of civil servants and other employees to report illegal conduct and wrongdoing at their place of work, the duties and responsibilities of employees towards their employers and the right of employers to manage their staff, and having weighed up the other different interests involved in the applicant’s case, the Court came to the conclusion that the interference with the applicant’s right to freedom of expression, in particular his right to impart

information, was not “necessary in a democratic society”. Accordingly, there has been a violation of Article 10 of the Convention.

- [Guja v. Moldova \[GC\]](#), no. 14277/04, ECHR 2008.

IRIS 2008-6/1

European Court of Human Rights: Case of Yalçın Küçük (nr. 3) v. Turkey

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On 22 April 2008, the European Court of Human Rights found a breach of freedom of expression in the case of Yalçın Küçük (nr. 3) v. Turkey. Küçük, a university professor and a writer, who was prosecuted on account of various speeches he gave and articles he wrote concerning the Kurdish question. In 1999, the Ankara State Security Court found him guilty of inciting hatred and hostility, of emitting separatist propaganda and of belonging to an armed group (art. 312 § 2 and art. 168 § 2 of the Criminal Code and art. 8 of the Antiterrorism Act nr. 3713). He was also convicted of assisting an armed group (art. 169 Criminal Code) on the basis of an interview for Med-TV in which Küçük had welcomed the PKK-leader Abdullah Öcalan as “Mister President” and had invited him to make a statement about the Kurdish question.

Küçük had to undergo a prison sentence of six years and six months and was ordered to pay a fine of EUR 1,300. Relying on Article 6 § 1 and Article 10 of the European Convention on Human Rights, he complained that the proceedings had been unfair and that his right to freedom of expression had been breached.

The European Court in its judgment of 22 April 2008 considered that the grounds adopted by the Turkish courts could not be regarded in themselves as sufficient to justify interference with Küçük’s right to freedom of expression. While certain comments in the offending articles and speeches sought to justify separatism, which thus made them hostile in tone, taken as a whole they did not, however, advocate the use of violence, armed resistance or an uprising and did not constitute hate speech, which, in the Court’s view, was the essential factor to be taken into consideration. One speech by Küçük, however, contained a sentence considered as incitement to violence and therefore could not invoke the protection guaranteed by Article 10 of the Convention.

The European Court, referring to the nature and the severity of the sanctions, found that Küçük’s conviction as a whole had been disproportionate to the aims pursued and, accordingly, was not “necessary in a democratic society”. The Court in particular referred to the severity of the sentence of imprisonment for six years and six months. The Court held, unanimously, that there had been a violation of Article 10 and that it did not need to examine the complaints submitted under Article 6 of the Convention. It awarded Küçük EUR 3,000 in respect of non-pecuniary damage.

- [Yalçın Küçük v. Turkey \(no. 3\)](#), no. 71353/01, 22 April 2008.

IRIS 2008-7/1

European Court of Human Rights: Case of Meltex Ltd. and Mesrop Movsesyan v. Armenia

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In a judgment of 17 June 2008 the European Court of Human Rights held unanimously that the refusal by the Armenian authorities, on several occasions, to grant the Meltex television company requests for broadcasting licences amounted to a violation of Article 10 of the European Convention on Human Rights. The Court firstly recognized that the independent broadcasting company Meltex was to be considered as a “victim” of an interference with its freedom of expression by the Armenian public authorities: by not recognising the applicant company as the winner in the calls for tenders it competed in, the NTRC (National Radio and Television Commission) effectively refused the applicant company's bids for a broadcasting licence and such refusals do indeed constitute interferences with the applicant company's freedom to impart information and ideas. The Court also made clear that States, however, are permitted to regulate by means of a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects, and that the grant of a licence may also be made conditional on matters such as the nature and objectives of a proposed station, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments. The compatibility of such interferences must be assessed in light of the requirements of paragraph 2 of Article 10 of the Convention, which means *inter alia* that the interference must be prescribed by law in a way that guarantees protection against arbitrary interferences by public authorities. Indeed, the manner in which the licensing criteria are applied in the licensing process must provide sufficient guarantees against arbitrariness, including the proper reasoning by the licensing authority of its decisions denying a broadcasting licence (see IRIS 2008-1: 3, ECtHR 11 October 2007, [Glas Nadezhda FOOD and Elenkov v. Bulgaria](#)).

The Court noted that the NTRC's decisions had been based on the Broadcasting Act (2000) and other complementary legal acts defining precise criteria for the NTRC to make its choice, such as the applicant company's finances and technical resources, its staff's experience and whether it produced predominately in-house Armenian programmes. However, the Broadcasting Act had not explicitly required at that time that the licensing body give reasons when applying those criteria. Therefore, the NTRC had simply announced the winning company without providing any explanation as to why that company, and not Meltex, had met the requisite criteria. There was no way of knowing on what basis the NTRC had exercised its discretion to refuse a licence. On this point, the Court noted that the guidelines adopted by the Committee of Ministers of the Council of Europe in the broadcasting regulation domain call for open and transparent application of the regulations governing the licensing procedure and specifically recommend that “all decisions taken ... by the regulatory authorities ... be ... duly reasoned” ([Rec. \(2000\)23](#) - See also [Declaration of the Committee of Ministers of 26 March 2008 on the independence and functions of regulatory authorities for the broadcasting sector](#)). The Court further took note of the relevant conclusions reached by the [PACE in its Resolution of 27 January 2004 concerning Armenia](#), where it stated that “the vagueness of the law in force had resulted in the NTRC being given outright discretionary powers”. The Court considered that a licensing procedure whereby the licensing authority gives no reasons for its decisions does not provide adequate protection against arbitrary interferences by a public authority with the fundamental right to freedom of expression. The Court therefore concluded that the interference with Meltex's freedom to impart information and ideas, namely the seven denials of a broadcasting licence, had not met the

requirement of lawfulness under the European Convention and hence violated Article 10 of the Convention.

- [Meltex Ltd and Movsesyan v. Armenia](#), no. 32283/04, 17 June 2008.

IRIS 2008-8/1

European Court of Human Rights: case of Flux nr. 6 v. Moldova on Journalistic Ethics

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After several successful complaints before the Strasbourg Court of Human Rights related to the freedom of critical journalistic reporting, this time the European Court, by four votes to three, came to the conclusion that the conviction of the Moldovan newspaper Flux was not to be considered a violation of Article 10 of the Convention. The approach taken by the majority of the Court regarding the (lack of) journalistic ethical quality of the litigious articles published by Flux is strikingly different to that of the dissenting judges.

In 2003 Flux published an article about a High School in Chisinau, sharply criticising its principal. The article merely quoted an anonymous letter Flux had received from a group of students' parents. The letter alleged *inter alia* that the school's principal used the school's funds for inappropriate purposes and that he had received bribes of up to USD 500 for enrolling children in the school. Flux refused a short time later to publish a reply from the school's principal. The text of the reply was then published in another newspaper, the Jurnal de Chisinau . The reply stated that Flux had published an anonymous letter without even visiting the school or conducting any form of investigation, which showed that its aim was purely sensationalism . It was said that Flux had acted contrary to journalistic ethics. Flux reacted to this reply by publishing a new article, repeating some of the criticism published in the first article and arguing that Flux would certainly find persons willing to testify in front of a court about the bribes. The principal then brought civil proceedings for defamation against Flux and the district court found the allegations of bribery to be untrue and defamatory. The court stated that it had no reason to believe the three witnesses who had testified in court that bribes were taken for the enrolment of children in the school. The district court expressed the opinion that "to be able to declare publicly that someone is accepting bribes, there is a need for a criminal-court decision finding that person guilty of bribery". Since there was no such finding against the principal, he should not have been accused of bribery, according to the Moldovan district court. The judgment of the district court was confirmed by the Court of Appeal of Chisinau and the appeal with the Supreme Court of Justice was dismissed. The newspaper was ordered to issue an apology and to pay the principal MDL 1,350, the equivalent of EUR 88 at the time.

Flux complained to Strasbourg under Article 10 of the Convention that the Moldovan courts' decisions constituted an interference with its right to freedom of expression that could not be regarded as necessary in a democratic society. The European Court, in its judgment of 29 July 2008, attached major importance to the fact that, despite the seriousness of the accusations of bribery, the journalist of Flux who wrote the article made no attempt to contact the principal to ask his opinion on the matter nor conducted any form of investigation into the matters mentioned in the anonymous letter. Furthermore, a right of reply was refused by Flux to the principal, although the language used in this reply was not offensive. Flux's reaction to the reply published in Jurnal de Chisinau was regarded by the Court as a form of reprisal for questioning the newspaper's professionalism. The Court underlined however that it does not accept the reasoning of the district court, namely that the allegations of serious misconduct levelled against the principal of the school should have first been proved in criminal proceedings. But the Court also made clear that the right to freedom of expression cannot be taken to confer on newspapers an absolute right to act in an irresponsible manner by charging individuals with criminal acts in the absence of a basis in fact at the material time and without offering them the possibility to counter

the accusations. As there are limits to the right to impart information to the public, a balance must be struck between that right and the rights of those injured, including the right to be presumed innocent of any criminal offence until proven guilty. The Court also referred to the unprofessional behaviour of the newspaper and the relatively modest award of damages which it was required to pay in the context of a civil action and finds that the solution of the domestic courts struck a fair balance between the competing interests involved. The Court came to the conclusion that the newspaper acted in flagrant disregard of the duties of responsible journalism and thus undermined the Convention rights of others, while the interference with the exercise of its right to freedom of expression was justified. On these grounds, the Court held by four votes to three that there has been no violation of Article 10 of the Convention.

The three dissenting judges in their joint opinion made clear however that they voted without hesitation in favour of a finding of a violation of Article 10. They argued that in this case the Court attached more value to professional behaviour on behalf of journalists than to the unveiling of corruption. According to the dissenters, the facts show that the newspaper made enquiries about persistent rumours, found three witnesses whose integrity has not been questioned and who supported the allegations of corruption on oath. The dissenters underlined that the Court has penalised the newspaper not for publishing untruths, but for so-called “unprofessional behaviour”. The dissenting opinions expressed the fear that this judgment of the Court has thrown the protection of freedom of expression as far back as it possibly could, stating that “Even if alarming facts are sufficiently borne out by evidence, in the balancing exercise to establish proportionality, disregard for professional norms is deemed by Strasbourg to be more serious than the suppression of democratic debate on public corruption. To put it differently, in the Court's view the social need to fight poor journalism is more pressing than that of fighting rich corruption. The 'chilling effect' of sanctions against press freedom dreaded by the Court's old case-law has materialised through the Court's new one. (..) The serious inference of this judgment is that freedom of expression also ceases to exist when it is punished for pushing forward for public debate allegations of public criminality made by witnesses certified as credible but in a manner considered unprofessional. When subservience to professional good practice becomes more overriding than the search for truth itself it is a sad day for freedom of expression”.

- [Flux v. Moldova \(no. 6\)](#), no. 22824/04, 29 July 2008.

IRIS 2008-9/1

European Court of Human Rights: Case of *Petrina v. Romania*

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In 1997, during a television programme that focused on the problems with access to administrative documents stored in the archives of the former Romanian State security services, C.I., a journalist with the satirical weekly 'Cațavencu', alleged that a politician, Liviu Petrina, had been active in the secret police Securitate. A few weeks later, the same journalist published an article reiterating his allegations. Similar allegations of collaboration by Petrina with the Securitate under the regime of Ceaușescu were also published by another journalist, M.D. Petrina lodged two sets of criminal proceedings against the journalists, C.I. and M.D., for insult and defamation, but both journalists were acquitted. The Romanian Courts referred to the European Court's case law regarding Article 10 of the Convention, guaranteeing the right of journalists to report on matters of public interest and to criticise politicians, esp. as the allegations expressed by the journalists had been general and indeterminate. A few years later, however, a certificate was issued by the national research council for the archives of the State Security Department Securitate, stating that Petrina was not among the people listed as having collaborated with the Securitate.

Following the acquittal of the two journalists by the Romanian Courts, Petrina complained in Strasbourg that his right to respect for his honour and his good name and reputation had been violated, relying on Article 8 of the Convention (right to respect for private and family life). The Court accepted that the acquittal of the journalists could raise an issue under the positive obligations of the Romanian authorities to help with ensuring respect of Petrina's privacy, including his good name and reputation.

The European Court recognised that the discussion on the collaboration of politicians with the Securitate was a highly sensitive social and moral issue in the Romanian historical context. However, the Court found that, in spite of the satirical character of Cațavencu and in spite of the mediatisation of the debate, the articles in question were intended to offend Petrina, as there was no evidence at all that Petrina had ever belonged to the Securitate. It also found that the allegations were very concrete and direct, not "general and undetermined", and were devoid of irony or humour. The Court did not believe that C.I. and M.D. could invoke, in this case, the right of journalists to exaggerate or provoke, as there was no factual basis at all for the allegations. The journalists' allegations overstepped the bounds of acceptability, accusing Petrina of having belonged to a group that used repression and terror to serve the regime of Nikolai Ceaușescu.

Accordingly, the European Court was not convinced that the reasons given by the domestic courts for protecting the journalists' freedom of expression (Article 10) were sufficient to take precedence over Petrina's reputation, as protected under Article 8 of the Convention. The Court found unanimously that there had been a violation of Article 8 of the Convention. Petrina was awarded 5,000 EUR in non-pecuniary, moral damages.

- [Petrina v. Romania](#), no. 78060/01, 14 October 2008.

IRIS 2009-1/1

European Court of Human Rights: case of Leroy v. France

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In 2002, the French cartoonist Denis Leroy (pseudonym Guezmer) was convicted for complicity in condoning terrorism because of a cartoon published in a Basque weekly newspaper Ekaitza. On 11 September 2001, the cartoonist submitted to the magazine's editorial team a drawing representing the attack on the twin towers of the World Trade Centre, with a caption which parodied the advertising slogan of a famous brand: "We have all dreamt of it... Hamas did it" (Cfr. "Sony did it"). The drawing was published in the magazine on 13 September 2001. In its next issue, the magazine published extracts from letters and emails received in reaction to the drawing. It also published a reaction of the cartoonist himself, in which he explained that when he made the cartoon he was not taking into account the human suffering ("*la douleur humaine*") caused by the attacks on WTC. He emphasized that his aim was to illustrate the decline of the US-symbols and he also underlined that cartoonists illustrating actual events do not have much time for distanced reflection: "*Quant un dessinateur réagit sur l'actualité, il n'a pas toujours le bénéfice du recul*". He also explained that his real intention was governed by political and activist expression, namely that of communicating his anti-Americanism through a satirical image and illustrating the decline of American imperialism.

The public prosecutor, on request of the regional governor, brought proceedings against the cartoonist and the newspaper's publishing director in application of Article 24, section 6 of the French Press Act of 1881, which penalizes, apart from incitement to terrorism, also condoning (glorifying) terrorism: "*l'apologie du terrorisme*". The publishing director was convicted for condoning terrorism, while Mr. Leroy was convicted for complicity in condoning terrorism. Both were ordered to pay a fine of EUR 1,500 each, to publish the judgment at their own expense in Ekaitza and in two other newspapers and to pay the costs of the proceedings. The Pau Court of Appeal held that "by making a direct allusion to the massive attacks on Manhattan, by attributing these attacks to a well-known terrorist organisation and by idealising this lethal project through the use of the verb 'to dream', [thus] unequivocally praising an act of death, the cartoonist justifies the use of terrorism, identifies himself through his use of the first person plural ("We") with this method of destruction, which is presented as the culmination of a dream and, finally, indirectly encourages the potential reader to evaluate positively the successful commission of a criminal act."

The cartoonist lodged an application with the European Court of Human Rights, relying on Article 10 of the Convention guaranteeing freedom of expression. Mr. Leroy complained that the French courts had denied his real intention, which was governed by political and activist expression, namely that of communicating his anti-Americanism through a satirical image. Such an expression of an opinion, he argued, should be protected under Article 10 of the Convention. The Court considered that Mr. Leroy's conviction amounted indeed to an interference with the exercise of his right to freedom of expression. It refused to apply Article 17 of the Convention (prohibition of abuse of rights) in this case, although the French government invoked this article arguing that the cartoon, by glorifying terrorism, should be considered as an act aimed at the destruction of the rights and freedoms guaranteed by the European Convention for the protection of Human Rights and that, therefore, the cartoonist could not rely at all on the freedom of expression guaranteed by the Convention. The Court underlined that the message of the cartoon - the destruction of US imperialism - did not amount to a denial of the fundamental values of the

Convention, in contrast e.g. with incitement to racism, anti-Semitism, Holocaust negationism and Islamophobia. Hence, in principle the cartoon was entitled to Article 10 protection. As the conviction of Mr. Leroy was prescribed by French law and pursued several legitimate aims, having regard to the sensitive nature of the fight against terrorism, namely the maintenance of public safety and the prevention of disorder and crime, it especially remained to be determined whether the interference by the French authorities was “necessary in a democratic society”, according to Article 10 § 2 of the Convention.

The Court noted at the outset that the tragic events of 11 September 2001, which were at the origin of the impugned expression, had given rise to global chaos, and that the issues raised on that occasion were subject to discussion as a matter of public interest. The Court however considered that the drawing was not limited to criticism of American imperialism, but supported and glorified the latter’s violent destruction. It based its finding on the caption which accompanied the drawing and noted that the applicant had expressed his moral support for those whom he presumed to be the perpetrators of the attacks of 11 September 2001. Through his choice of language, the applicant commented approvingly on the violence perpetrated against thousands of civilians and diminished the dignity of the victims, as he submitted his drawing on the day of the attacks and it was published on 13 September, with no precautions on his part as to the language used. In the Court’s opinion, this factor - the date of publication - was such as to increase the cartoonist’s responsibility in his account of, and even support for, a tragic event, whether considered from an artistic or a journalistic perspective. Also the impact of such a message in a politically sensitive region, namely the Basque Country, was not to be overlooked. According to the Court, the cartoon had provoked a certain public reaction, capable of stirring up violence and demonstrating a plausible impact on public order in the region. All in all, the Court considered that the grounds put forward by the domestic courts in convicting Mr. Leroy had been “relevant and sufficient”. Having regard to the modest nature of the fine and the context in which the impugned drawing had been published, the Court found that the measure imposed on the cartoonist was not disproportionate to the legitimate aim pursued. Accordingly, there has not been a violation of Article 10 of the Convention.

- [Leroy v. France](#), no. 36109/03, 2 October 2008.

IRIS 2009-2/1

European Court of Human Rights: Case of TV Vest SA and Rogaland Pensjonistparti v Norway

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On 11 December 2008, the European Court of Human Rights delivered a judgment regarding a ban on political advertising on television. The crucial question the Court had to decide was whether a blanket ban on political advertisements on TV, as it was applied in Norway, was to be considered “necessary in a democratic society” within the meaning of Article 10 of the European Convention on Human Rights. In principle, there is little scope under Article 10 of the Convention for restrictions on political speech or on debate on questions of public interest. However, a ban on paid political advertisements on TV exists in many countries in Europe, such as the UK, Sweden, Denmark, France, Belgium and Norway. According to Art. 3, 1 (3) of the Norwegian Broadcasting Act 1992, broadcasters “cannot transmit advertisements for life philosophy or political opinions through television”. The Court has now decided unanimously that an application of this ban was in breach of Article 10 of the Convention.

The case goes back to the application by TV Vest AS Ltd., a television company in Stavanger, on the west coast of Norway, and the regional branch of a Norwegian political party, *Rogaland Pensjonistparti* (the Rogaland Pensioners Party). A fine was imposed on TV Vest for broadcasting adverts for the Pensioners Party, in breach of the Broadcasting Act. This fine had been imposed by the *Statens medieforvaltning* (State Media Administration) and had been confirmed by the *Høyesterett* (Supreme Court), which found, *inter alia*, that allowing political parties and interest groups to advertise on television would give richer parties and groups more scope for marketing their opinions than their poorer counterparts. The Supreme Court also maintained that the Pensioners Party had many other means available to put across its message to the public. The Pensioners Party had argued that it was a small political party, representing only 1.3 % of the electorate, without powerful financial means or support from strong financial groups, that it seldom got any focus in editorial television broadcasting and, thus, had a real need to establish direct communication between itself and the electorate. The Party was never identified either in national or local opinion polls.

The European Court said that to accept that the lack of consensus in Europe regarding the necessity to ban political advertisements on TV spoke in favour of granting States greater discretion than would normally be allowed in decisions with regard to restrictions on political debate. The Court however came to the conclusion that the arguments in support of the prohibition in Norway, such as the safeguarding of the quality of political debate, guaranteeing pluralism, maintaining the independence of broadcasters from political parties and preventing powerful financial groups from taking advantage through commercial political advertisements on TV were relevant, but not sufficient, reasons to justify the total prohibition of this form of political advertising. The Court especially noted that the Pensioners Party did not come within the category of parties or groups that had been the primary targets of the prohibition. In contrast to the major political parties, which were given a large amount of attention in the edited television coverage, the Pensioners Party was hardly ever mentioned on Norwegian television. Therefore, paid advertising on television had become the only way for the Party to get its message across to the public through that type of medium.

The Court was not persuaded that the ban had the desired effect and it explicitly rejected the view expounded by the Norwegian Government that there was no viable alternative to a blanket

ban. In the Court's view, there was no reasonable relationship of proportionality between the legitimate aim pursued by the prohibition on political advertising and the means employed to achieve that aim. The restriction that the prohibition and the imposition of the fine entailed on the applicants' exercise of their freedom of expression could not therefore be regarded as having been necessary in a democratic society. Accordingly, there had been a violation of Article 10 of the Convention.

- [TV Vest AS and Rogaland Pensjonistparti v. Norway](#), no. 21132/05, ECHR 2008 (extracts).

IRIS 2009-3/1

European Court of Human Rights: Case of Khurshid Mustafa and Tarzibachi v. Sweden

Dirk Voorhoof

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The applicants, Adnan Khurshid Mustafa and his wife, Welda Tarzibachi, are Swedish nationals of Iraqi origin. Relying on Article 10 (freedom to receive information) and Article 8 (right to respect for private and family life), they complained that they and their three children had been forced to move from their rented flat in Rinkeby (a suburb of Stockholm) in June 2006. The reason for their eviction was their refusal to remove a satellite dish in their flat after the landlord had initiated proceedings against them, because he considered the installation of a satellite antenna as a breach of the tenancy agreement that stipulated that “outdoor antennae” were not allowed to be set up on the house. The proceedings continued even after Mr. Khursid Mustafa and Mrs. Tarzibachi had dismantled the outdoor antenna and replaced it with an antenna installation in the kitchen on an iron stand from which an arm, on which the satellite dish was mounted, extended through a small open window. Eventually, the Swedish Court of Appeal found that the tenants had disregarded the tenancy agreement and that they should dismantle the antenna, if the tenancy agreement were not cancelled. The Swedish Court was of the opinion that the tenants were fully aware of the importance the landlord attached to the prohibition of the installation of satellite antennae and that, although the installation in the kitchen did not pose a real safety threat, their interests in keeping the antenna installation, based on their right to receive television programmes of their choice, could not be permitted to override the weighty and reasonable interest of the landlord that order and good custom be upheld.

The fact that the case involved a dispute between two private parties was not seen as sufficient reason for the European Court to declare the application inadmissible. Indeed, the Court found that the applicants’ eviction was the result of a domestic court’s ruling, making the Swedish State responsible, within the meaning of Article 1 of the Convention, for any resultant breach of Article 10 of the Convention. The European Court observed that the satellite dish enabled the applicants to receive television programmes in Arabic and Farsi from their country of origin (Iraq). That information included political and social news and was of particular interest to them as an immigrant family who wished to maintain contact with the culture and language of their country of origin. At the time, there were no other means for the applicants to gain access to such programmes and the dish could not be placed anywhere else. Nor could news obtained from foreign newspapers and radio programmes in any way be equated with information available via television broadcasts. It was not shown that the landlord had installed broadband or internet access or other alternative means which might have given the tenants in the building the possibility of receiving these television programmes. Furthermore, the landlord’s concerns about safety had been examined by the domestic courts, who had found that the installation had been safe. And there were certainly no aesthetic reasons to justify the removal of the antenna, as the flat was located in one of Stockholm’s suburbs, in a tenement house with no particular aesthetic aspirations. Moreover, the applicants’ eviction, with their three children, from their home, a flat in which they had lived for more than six years, was disproportionate to the aim pursued, namely the landlord’s interest in upholding order and good custom. The Court therefore concluded that the interference with the applicants’ right to freedom of information had not been “necessary in a democratic society”: Sweden had failed in its positive obligation to protect the right of the applicants to receive information. The European Court held unanimously that there had been a violation of Article 10, while it further held unanimously that there was no need to examine the

complaint under Article 8. The applicants were awarded EUR 6,500 in respect of pecuniary damage, EUR 5,000 in respect of non-pecuniary damage and EUR 10,000 for costs and expenses.

- [*Khurshid Mustafa and Tarzibachi v. Sweden*](#), no. 23883/06, 16 December 2008.

IRIS 2009-4/1

European Court of Human Rights: Case of Times Newspapers Ltd. (nos. 1 and 2) v. UK

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The European Court of Human Rights has held unanimously that there had been no violation of Article 10 of the European Convention on Human Rights in the case of Times Newspapers v. the UK, because the British courts' finding that the Times Newspapers Ltd had libelled G.L. by the continued publication on its Internet site of two articles did not represent a disproportionate restriction on the newspaper's freedom of expression.

The applicant in this case, Times Newspapers Ltd, is the owner and publisher of The Times newspaper, registered in England. It published two articles, in September and October 1999 respectively, reporting on a massive money-laundering scheme carried out by an alleged Russian mafia boss, G.L., whose name was set out in full in the original article. Both articles were uploaded onto The Times website on the same day as they were published in the paper version of the newspaper. In December 1999, G.L. brought proceedings for libel against the Times Newspapers Ltd, its editor and the two journalists who signed the two articles printed in the newspaper. The defendants did not dispute that the articles were potentially defamatory, but contended that the allegations were of such a kind and seriousness that they had a duty to publish the information and the public had a corresponding right to know. While the first libel action was underway, the articles remained on The Times website, where they were accessible to Internet users as part of the newspaper's archive of past issues. In December 2000, G.L. brought a second action for libel in relation to the continuing Internet publication of the articles. Following this, the defendants added a notice to both articles in the Internet archive announcing that they were subject to libel litigation and were not to be reproduced or relied on without reference to the Times Newspapers Legal Department.

Times Newspapers subsequently argued that only the first publication of an article posted on the Internet should give rise to a cause of action in defamation and not any subsequent downloads by Internet readers. Accordingly, Times Newspapers submitted, the second action had been commenced after the limitation period for bringing libel proceedings had expired. The British courts disagreed, holding that, in the context of the Internet, the common law rule according to which each publication of a defamatory statement gives rise to a separate cause of action meant that a new cause of action accrued every time the defamatory material was accessed ("the Internet publication rule").

Relying on Article 10 (freedom of expression) of the Convention, the Times Newspapers Ltd complained before the Strasbourg Court that the Internet publication rule breached its freedom of expression by exposing them to ceaseless liability for libel. The European Court noted that while Internet archives were an important source for education and historical research, the press had a duty to act in accordance with the principles of responsible journalism, including by ensuring the accuracy of historical information. Further, the Court observed that limitation periods in libel proceedings were intended to ensure that those defending actions were able to defend themselves effectively and that it was, in principle, for contracting States to set appropriate limitation periods. The Court considered it significant that, although libel proceedings had been commenced in respect of the two articles in question in December 1999, no qualification was added to the archived copies of the articles on the Internet until December 2000. The Court noted that the archive was managed by the applicant itself and that the domestic

courts had not suggested that the articles be removed from the archive altogether. Accordingly, the Court did not consider that the requirement to publish an appropriate qualification to the Internet version of the articles constituted a disproportionate interference with the right to freedom of expression. There was accordingly no violation of Article 10.

Having regard to this conclusion, the Court did not consider it necessary to consider the broader chilling effect allegedly created by the Internet publication rule. It nonetheless observed that, in the present case, the two libel actions related to the same articles and both had been commenced within 15 months of the initial publication of the articles. The Times Newspaper's ability to defend itself effectively was therefore not hindered by the passage of time. Accordingly, the problems linked to ceaseless liability did not arise. However, the Court emphasised that, while individuals who are defamed must have a real opportunity to defend their reputations, libel proceedings brought against a newspaper after too long a period might well give rise to a disproportionate interference with the freedom of the press under Article 10 of the Convention.

- [Times Newspapers Ltd v. the United Kingdom \(nos. 1 and 2\)](#), nos. 3002/03 and 23676/03, ECHR 2009.

IRIS 2009-5/1

European Court of Human Rights: Case of Faccio v. Italy

Dirk Voorhoof

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The European Court of Human Rights has declared inadmissible the application in a case concerning the sealing by the authorities of a television set because a person had not paid his licence fee.

In 1999, the applicant, Mr. Faccio, filed a request with the *Radiotelevisione italiana* (RAI) subscriptions bureau to terminate his subscription to the public television service. On 29 August 2003, the tax police sealed his television set in a nylon bag so that it could no longer be used. Relying on Article 10 (freedom of expression) and Article 8 (right to respect for private and family life) of the European Convention on Human Rights, Mr. Faccio complained before the Court of a violation of his right to receive information and of his right to respect for his private and family life. He alleged that the act of making his television set unusable was a disproportionate measure, as it also prevented him from watching private channels. He further relied on Article 1 of Protocol No. 1 (protection of property) to the Convention.

The European Court of Human Rights noted that it was not in dispute that the sealing of the television set had constituted interference with the applicant's right to receive information and with his right to respect for his property and for his private life. It further found that the measure, taken under the provisions of Italian law, had pursued a legitimate aim: to dissuade individuals from failing to pay a tax or, in other words, to dissuade them from terminating their subscriptions to the public television service. The licence fee represents a tax that is used for the financing of the public broadcasting service. In the Court's view, regardless of whether or not Mr. Faccio wished to watch programmes on public channels, the mere possession of a television set obliged him to pay the tax in question. Moreover, a system whereby viewers would be able to watch only private channels without paying the licence fee, assuming that this were technically feasible, would amount to depriving the tax of its very nature, since it is a contribution to a community service and not the price paid by an individual in return for receiving a particular channel.

In view of the foregoing considerations and the reasonable amount of the tax (which, by way of example, amounts to EUR 107.50 for 2009), the Court concluded that the measure consisting of sealing the applicant's television set in a bag was proportionate to the aim pursued by the Italian authorities. It thus declared the application manifestly ill-founded.

- [Bruno Antonio Faccio v. Italy \(dec.\)](#), no. 33/04, 31 March 2009.

IRIS 2009-6/1

European Court of Human Rights: Case of A. v. Norway

Dirk Voorhoof

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The European Court in a recent judgment clarified the relation of the freedom of the press (Art. 10) vis à vis the right of privacy (Art. 8) and the presumption of innocence (Art. 6 para. 2) in a case of crime-reporting in the media. The applicant, A, is a Norwegian national with a criminal past. The case concerns A's complaint about the unfavourable outcome of a defamation suit he brought against the Fædrelandsvennen newspaper, following its publication of two articles concerning the preliminary investigation into a murder case which implicated him. A had been questioned as a possible witness about the murder of two young women, but was released after 10 hours. The police's interest in A attracted considerable media attention. Fædrelandsvennen disclosed details of A's criminal convictions and stated that he had allegedly been seen by witnesses in the very same area and at the same time as the girls were killed. A television station, TV2, also reported in a news broadcast on the case and presented A as a murderer.

A brought defamation proceedings against the Fædrelandsvennen newspaper and TV2, as further investigation and proceedings made it clear that he had nothing to do with the murder case. The Norwegian courts found in his favour and awarded him compensation as regards the TV2 report. In respect of the newspaper articles, however, the domestic courts agreed that the publications had been defamatory, in as much as they were capable of giving the ordinary reader the impression that the applicant was regarded as the most probable perpetrator of the murders, yet concluded that, on balance, the newspaper had been right to publish the articles, as it had acted in the interest of the general public, which had the right to be informed of the developments in the investigation and the pursuit of the perpetrators. Relying on Article 6§2 (presumption of innocence) and Article 8 (right to respect for private and family life), A complained in Strasbourg that the domestic courts' findings - to the extent that the Fædrelandsvennen newspaper was found to have a right to publish defamatory material about him - had negatively affected his right to be presumed innocent until proven otherwise, as well as his private life.

The Court dismissed A's allegations under Article 6 para. 2, as it found that Article not applicable to the matters at hand, given in particular that no public authority had charged A with a criminal offence and that the disputed newspaper publications did not amount to an affirmation that he was guilty of the crimes in question. The Court, however, was of the opinion that the articles had been defamatory in nature, as they had given the impression that the applicant had been a prime suspect in the murder case of the two girls. While it is undisputed that the press have the right to deliver information to the public and the public have the right to receive such information, these considerations did not justify the defamatory allegations against A and the consequent harm done to him. Indeed, the applicant had been persecuted by journalists seeking to obtain pictures and interviews from him, this being during a period in his life when he had been undergoing rehabilitation and reintegration into society. As a result of the journalistic reports, he found himself unable to continue his work, had to leave his home and was driven to social exclusion. In the Court's view there was no reasonable relationship of proportionality between the interests relied on by the domestic courts in safeguarding Fædrelandsvennen' freedom of expression and those of the applicant in having his honour, reputation and privacy protected. The Court was therefore not satisfied that the national courts struck a fair balance between the newspaper's freedom of expression under Article 10 and the applicant's right to respect for his private life under Article 8, notwithstanding the wide margin of appreciation available to the

national authorities. The Court concluded that the publications in question had gravely damaged A's reputation and honour and had been especially harmful to his moral and psychological integrity and to his private life, in violation of Article 8.

- [A. v. Norway](#), no. 28070/06, 9 April 2009.

IRIS 2009-6/2

European Court of Human Rights: Case of TASZ v. Hungary

Dirk Voorhoof

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In April 2009, the European Court of Human Rights delivered an important judgment in which it recognised the right of access to official documents. The Court made it clear that, when public bodies hold information that is needed for public debate, the refusal to provide documents in this matter to those who are requesting access, is a violation of the right to freedom of expression and information guaranteed under Article 10 of the Convention. The case concerns a request by the *Társaság a Szabadságjogokért* (Hungarian Civil Liberties Union - TASZ) to Hungary's Constitutional Court to disclose a parliamentarian's complaint questioning the legality of new criminal legislation concerning drug-related offences. The Constitutional Court refused to release the information. As the Court found that the applicant was involved in the legitimate gathering of information on a matter of public importance and that the Constitutional Court's monopoly of information amounted to a form of censorship, it concluded that the interference with the applicant's rights was a violation of Article 10 of the Convention.

The European Court's judgment refers to the "censorial power of an information monopoly", when public bodies refuse to release information needed by the media or civil society organisations to perform their "watchdog" function. The Court refers to its consistent case law, in which it has recognised that the public has a right to receive information of general interest and that 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 the public debate on matters of legitimate public concern, including measures which merely make access to information more cumbersome. It is also underlined that the law cannot allow arbitrary restrictions, which may become a form of indirect censorship should the authorities create obstacles to the gathering of information, this by itself being an essential preparatory step in journalism and inherently a protected part of press freedom. The Court emphasised once more that the function of the press, including the creation of forums of public debate, is not limited to the media or professional journalists. Indeed, in the present case, the preparation of the forum of public debate was conducted by a non-governmental organisation. The Court recognises the important contribution of civil society to the discussion of public affairs and categorised the applicant association, which is involved in human rights litigation, as a social "watchdog". The Court is of the opinion that, in these circumstances, the applicant's activities warrant similar Convention protection to that afforded to the press. Furthermore, given that the applicant's intention was to impart to the public the information gathered from the constitutional complaint in question, and thereby to contribute to the public debate concerning legislation on drug-related offences, its right to impart information was clearly impaired.

It should be emphasised that the European Court's judgment is obviously a further step in the direction of the recognition by the Court of a right of access to public documents under Article 10 of the Convention, although the Court is still reluctant to affirm this explicitly. The Court recalls that "Article 10 does not (..) confer on the individual a right of access to a register containing information on his personal position, nor does it embody an obligation on the Government to impart such information to the individual" and that "it is difficult to derive from the Convention a general right of access to administrative data and documents". But the judgment also states that "the Court has recently advanced towards a broader interpretation of the notion of "freedom to receive information" (..) and thereby towards the recognition of a right

of access to information”, referring to its decision in the case of [Sdružení Jihočeské Matky v. Czech Republic](#) (ECHR 10 July 2006, Appl. No. 19101/03). The Court notes that “the right to freedom to receive information basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him”. In this case, the information sought by the applicant was ready and available and did not require the collection of any data by the Government. Therefore, the Court considers that the State had an obligation not to impede the flow of information sought by the applicant.

- [Társaság a Szabadságjogokért v. Hungary](#), no. 37374/05, 14 April 2009.

IRIS 2009-7/1

European Court of Human Rights: Case of Kenedi v. Hungary

Dirk Voorhoof

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In May 2009, the Court confirmed once more the applicability of the right to freedom of expression and information guaranteed under Article 10 of the Convention to matters of access to official documents. The case concerns the attempt by a historian, Mr. János Kenedi, to have access to certain documents deposited at the Ministry of the Interior regarding the functioning of the State Security Services in Hungary in the 1960s. Mr Kenedi, who had previously published several books on the functioning of secret services in totalitarian regimes, complained to the European Court about the Hungarian authorities' protracted reluctance to enforce a court order granting him unrestricted access to these documents. For several years Kenedi tried to get access to the relevant information from the Ministry, but to no avail. After continued refusals, he obtained domestic court orders to enforce access. The Ministry, however, continued to obstruct him, for example by requiring that Kenedi sign a declaration of confidentiality. Kenedi refused, among other reasons because the Court order had not mentioned confidentiality as a requirement. At the time of the proceedings in Strasbourg, Kenedi still had not been granted access to all the documents he had requested.

The European Court held unanimously that there had been a violation of Article 6 § 1 (right to a fair hearing) of the European Convention on Human Rights, on account of the excessive length of the proceedings - over ten years - that Mr Kenedi had launched so as to gain and enforce his access to documents concerning the Hungarian secret services. Article 10 (freedom of expression and information) was also violated in the Court's view. It reiterated that "access to original documentary sources for legitimate historical research was an essential element of the exercise of the applicant's right to freedom of expression". The Court noted that Mr Kenedi had obtained a court judgment granting him access to the documents in question, while the domestic courts had repeatedly found in his favour in the ensuing enforcement proceedings. The administrative authorities had persistently resisted their obligation to comply with the domestic judgment, thus hindering Mr Kenedi's access to documents he needed to write his study. The Court concluded that the authorities had acted arbitrarily and in defiance of domestic law. Their obstructive actions had also led to the finding of a violation of Article 6 § 1 of the Convention. The Court held, therefore, that the authorities had misused their powers by delaying Mr Kenedi in the exercise of his right to freedom of expression, in violation of Article 10.

Finally, Article 13 ECHR (effective remedy) had also been violated, since the Hungarian system did not provide for an effective way of remedying the violation of Mr Kenedi's freedom of expression in this situation. The Court found that the procedure available in Hungary at the time and designed to remedy the violation of Mr Kenedi's Article 10 rights had proven ineffective. There had, therefore, been a violation of Article 13, in conjunction with Article 10 of the Convention.

Again, the Court does not formulate a general right of access to (official) documents. The Court is however of the opinion that the granting of access was necessary for the applicant to accomplish the publication of a historical study. The Court noted that the intended publication fell within the applicant's freedom of expression, as guaranteed by Article 10 of the Convention.

- [Kenedi v. Hungary](#), no. 31475/05, 26 May 2009.

IRIS 2009-7: Extra

European Court of Human Rights: Case of Féret v. Belgium

Dirk Voorhoof

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In an interesting but highly controversial judgment, the European Court focused on the limits of freedom of expression in a case of incitement to hatred and discrimination (“hate speech”). The Court held by four votes to three that there had been no violation of Article 10 of the European Convention of Human Rights in respect of the conviction of the chairman of the Belgian political party “Front National”, Mr. Daniel Féret. Mr. Féret was convicted by a Belgian criminal court for publicly inciting to racism, hatred and discrimination, following complaints concerning leaflets distributed by the Front National during election campaigns.

Between July 1999 and October 2001, the distribution of leaflets and posters by the Front National led to complaints by individuals and associations for incitement to hatred, discrimination and violence, filed under the law of 30 July 1981, which penalised certain acts and expressions inspired by racism or xenophobia. Mr. Féret was the editor in chief of the party’s publications and was a member of the Belgian House of Representatives at the time. His parliamentary immunity however was waived at the request of the Public Prosecutor and in November 2002 criminal proceedings were brought against Féret as author and editor-in-chief of the offending leaflets, which were also distributed on the Internet on the website of Féret and Front National.

In 2006, the Brussels Court of Appeal found that the offending conduct on the part of Mr. Féret had not fallen within his parliamentary activity and that the leaflets contained passages that represented a clear and deliberate incitement to discrimination, segregation or hatred, for reasons of race, colour or national or ethnic origin. The court sentenced Mr. Féret to 250 hours of community service related to the integration of immigrants, commutable to a 10-month prison sentence. It declared him ineligible to stand for parliament for ten years and ordered him to pay EUR 1 to each of the civil parties.

Relying on Article 10 of the European Convention on Human Rights, Féret applied to the European Court of Human Rights alleging that the conviction for the content of his political party’s leaflets represented an excessive restriction on his right to freedom of expression. The European Court however disagreed with this assumption, as it considered that the sanction by the Belgian authorities was prescribed by law sufficiently precisely and was necessary in a democratic society for the protection of public order and for the protection of the reputation and the rights of others, thereby meeting the requirements of Article 10 § 2 of the Convention. The European Court observed that the leaflets presented immigrant communities as criminally-minded and keen to exploit the benefits they derived from living in Belgium and that they also sought to make fun of the immigrants concerned, with the inevitable risk of arousing, particularly among less knowledgeable members of the public, feelings of distrust, rejection or even hatred towards foreigners. Although the Court recognised that freedom of expression is especially important for elected representatives of the people, it reiterated that it was crucial for politicians, when expressing themselves in public, to avoid comments that might foster intolerance. The impact of racist and xenophobic discourse was magnified by the electoral context, in which arguments naturally become more forceful. To recommend solutions to immigration-related problems by advocating racial discrimination was likely to cause social tension and undermine

trust in democratic institutions. In the present case there had been a compelling social need to protect the rights of the immigrant community, as the Belgian courts had done. With regard to the penalty imposed on Mr. Féret, the European Court noted that the Belgian authorities had preferred a 10-year period of ineligibility to stand for parliament rather than a penal sanction, in accordance with the Court's principle of restraint in criminal proceedings. The Court thus found that there had been no violation of Article 10 of the Convention. The Court furthermore found that Article 17 of the Convention (abuse clause) was not applicable in this case. Three dissenting judges disagreed with the findings of the Court on the non-violation of Article 10, arguing that the leaflets were in essence part of a sharp political debate during election time. The dissenting judges expressed the opinion that the leaflets did not incite to violence nor to any concrete discriminatory act and that criminal convictions in the domain of freedom of political debate and hate speech should only be considered as necessary in a democratic society in cases of direct incitement to violence or discriminatory acts. They argued that the reference to a potential impact of the leaflets in terms of incitement to discrimination or hatred does not sufficiently justify an interference with freedom of expression. The dissenting judges also emphasised the disproportionate character of the sanction of 250 hours of community service or a 10-month suspended prison sentence, together with the Belgian Court's decision declaring Mr. Féret's ineligibility to stand for parliament for a period of ten years. The majority of the European Court however could not be persuaded by the dissenting judges' arguments: the four judges of the majority were of the opinion that the Belgian authorities acted within the scope of the justified limitations restricting freedom of political expression, as the litigious leaflets contained, in the eyes of the Court, incitement to hatred and discrimination based on nationality or ethnic origin.

- [Féret v. Belgium](#), no. 15615/07, 16 July 2009.

IRIS 2009-8/1

European Court of Human Rights: Case of Wojtas-Kaleta v. Poland

Dirk Voorhoof

Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

In one of its recent judgments the European Court of Human Rights found that the freedom of expression of a journalist employed by the Polish public television broadcaster (Telewizja Polska Spółka Akcyjna, TVP) had been unduly restricted. The journalist, Helena Wojtas-Kaleta, received a disciplinary sanction after criticising in public the direction the TVP had taken. This sanction, and its confirmation by the Polish courts, was found to constitute a violation of Article 10 of the European Convention for Human Rights.

In 1999 the national newspaper *Gazeta Wyborcza* published an article reporting that two classical music programmes had been taken off the air by TVP. The article quoted an opinion expressed by Ms Wojtas-Kaleta in her capacity as the President of the Polish Public Television Journalists' Union, in which she criticised this decision of the director of TVP. In addition, Ms Wojtas-Kaleta signed an open letter in protest at the above measure. The letter was addressed to the Board of TVP and stated among other things that, while classical music is the heritage of the nation, its continuous dissemination was seriously jeopardised by reducing its time on the air and by instead polluting air time with violence and pseudo-musical kitsch. Ms Wojtas-Kaleta was reprimanded in writing by her employer for failing to observe the company's regulations, which required her to protect her employer's good name. Following an unsuccessful objection to the reprimand, she brought a claim against TVP before the district court, requesting the withdrawal of the reprimand. However, first the district court and subsequently the court of appeal dismissed her claim and found that Ms Wojtas-Kaleta had behaved in an unlawful manner and that this was a necessary and sufficient prerequisite for the disciplinary measure imposed on her. The courts found that she had acted to the detriment of her employer by breaching her obligation of loyalty and, consequently, the employer had been entitled to impose the reprimand.

Ms Wojtas-Kaleta complained in Strasbourg that the Polish judicial authorities had violated her freedom of expression by taking into account merely her obligations as an employee, while disregarding her right as a journalist to comment on matters of public interest. The Court considered that, where a State has decided to create a public broadcasting system, the domestic law and practice have to guarantee that the system provides a pluralistic audiovisual service. The Polish public television company had been entrusted with a special mission including, among other things, assisting the development of culture, with emphasis on the national intellectual and artistic achievements. In her comments and open letter Ms Wojtas-Kaleta had essentially referred to widely-shared concerns of public interest about the declining quality of music programmes on public television, while her statements had relied on a sufficient factual basis and, at the same time, amounted to value judgments which were not susceptible to proof. The Court further noted that Ms Wojtas-Kaleta had to enjoy freedom of expression in all her capacities: as an employee of a public television company, as a journalist or as a trade union leader. The Court observed that the Polish courts took no note of her argument that she had been acting in the public interest. They limited their analysis to a finding that her comments amounted to acting to the employer's detriment. As a result, they did not examine whether or how the subject matter of Ms Wojtas-Kaleta's comments and the context in which they had been made could have affected the permissible scope of her freedom of expression. Such an approach is not compatible with Convention standards. The Court noted that the tone of the impugned statements was measured and that she did not make any personal accusations against named

members of the management. Finally, the journalist's good faith had never been challenged either by her employer or by the domestic authorities involved in the proceedings. Being mindful of the importance of the right to freedom of expression on matters of general interest, Ms Wojtas-Kaleta's professional obligations and responsibilities as a journalist, and of the duties and responsibilities of employees towards their employers, as well as having weighed up the other different interests involved in the present case, the Court came to the conclusion that the interference with her right to freedom of expression was not "necessary in a democratic society". Accordingly, the Court held that there had been a violation of Article 10.

- [Wojtas-Kaleta v. Poland](#), no. 20436/02, 16 July 2009.

IRIS 2009-9/1

European Court of Human Rights: Case of Manole a.o. v Moldova

Dirk Voorhoof

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The European Court of Human Rights found that from February 2001 until September 2006 the Moldovan authorities violated freedom of expression by not sufficiently guaranteeing the independence of Teleradio-Moldova (TRM), the State-owned broadcasting company, which became a public broadcasting company in 2002. Nine journalists, editors and producers, who were all employed by TRM during that period, complained that the public broadcasting company was subjected to political control by the government and the ruling political party, with a lack of guarantees of pluralism in its editorial policy and news and information programmes. Relying on Article 10 of the European Convention, they complained that as journalists at TRM they were subjected to a censorship regime. They also claimed that the political control over news and political information worsened after February 2001, when the Communist Party won a large majority in Parliament: senior TRM management was replaced by those who were loyal to the Government, only a trusted group of journalists were used for reports of a political nature, which were then edited to present the ruling party in a favourable light, other journalists were reprimanded, interviews were cut and programmes were taken off the air, while opposition parties were allowed only very limited opportunities to express their views. After a strike by TRM journalists protesting against the government's media policy and control over TRM, a large number of journalists were not retained in their posts during a structural reorganisation of TRM. The journalists claimed that they were dismissed for political reasons and appealed the decision in court. They were unsuccessful, however. In the meantime, a number of reports by international organisations and non-governmental organisations, such as the Council of Europe, the OSCE and the Moldovan Centre for Independent Journalism (IJC), affirmed that domestic law in Moldova did not sufficiently guarantee the independence of editorial policy at TRM and that the political parties of the opposition were not adequately represented in TRM news and information programmes. The nine journalists lodged an application with the European Court in March 2002, arguing that their right to freedom of expression had been violated, due to the censorship regime imposed on them. They also claimed that the Moldovan State had not discharged its positive obligations under Article 10, because it had failed to enact legislation which would offer safeguards against abusive interferences by public authorities.

In its judgment, the European Court took as the starting point of its reasoning the fundamental truism that there can be no democracy without pluralism. A situation whereby a powerful economic or political group in a society is permitted to obtain a position of dominance over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society, as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. The Court further observed that it is the State itself that must be the ultimate guarantor of pluralism and that the State has a duty to ensure that the public has access through television and radio to impartial and accurate information and a range of opinions and comments, reflecting the diversity of political outlook within the country. Journalists and other professionals working in the audiovisual media should not be prevented from imparting this information and commentary. Furthermore, it is indispensable for the proper functioning of democracy that a (dominant) public broadcaster transmits impartial, independent and balanced news, information and comment and, in addition, provides a forum for public discussion in which as broad a spectrum as possible of

views and opinions can be expressed. The Court concluded, on the basis of the evidence and reports by the Council of Europe, the OSCE and IJC, that there was a significant bias towards reporting on the activities of the President and the Government in TRM's television news and other programming and that this policy by TRM had indeed affected the applicants as journalists, editors and producers at TRM. The Court also found that domestic law from February 2001 onwards did not provide any guarantee of political balance in the composition of TRM's senior management and supervisory body nor any safeguard against interference from the ruling political party in the bodies' decision-making and functioning. Also, after 2002, there was no safeguard to prevent 14 of the 15 members of the Observers' Council being appointees loyal to the ruling party, despite the fact that this Council was precisely responsible for appointing TRM's senior management and monitoring its programmes for accuracy and objectivity. In the light, in particular, of the virtual monopoly enjoyed by TRM over audiovisual broadcasting in Moldova, the Court found that the Moldovan State authorities failed to comply with their positive obligation. The legislative framework throughout the period in question was flawed: it did not provide sufficient safeguards against the control of TRM's senior management, and thus its editorial policy, by the political organ of the Government. As Moldovan law did not provide any mechanism or effective domestic remedy to challenge at the national level the administrative practice of censorship and political control over TRM, the Court also rejected the Moldovan Government's objection that the applicants had not exhausted the remedies available to them under national law, as required by Article 35 para. 1 of the Convention. On that basis, the Court found a violation of Article 10 of the Convention.

- [Manole and Others v. Moldova](#), no. 13936/02, ECHR 2009.

IRIS 2009-10/1

European Court of Human Rights: Case of Verein Gegen Tierfabriken Schweiz (VgT) v Switzerland

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After two earlier judgments by the European Court of Human Rights, the Grand Chamber of the Court again held that there has been a violation of Article 10 (freedom of expression) of the European Convention on Human Rights on account of the continued prohibition on broadcasting on Swiss Television a commercial by an animal rights association. In response to various advertisements produced by the meat industry, Verein gegen Tierfabriken Schweiz (VgT) made a television commercial expressing criticism of battery pig-farming, including a scene showing a noisy hall with pigs in small pens. The advertisement concluded with the exhortation: "Eat less meat, for the sake of your health, the animals and the environment!" Permission to broadcast the commercial was refused on 24 January 1994 by the Commercial Television Company and at final instance by the Federal Court, which dismissed an administrative law appeal by VgT on 20 August 1997. The commercial was considered to be political advertising, prohibited under the Swiss Broadcasting Act. VgT lodged an application with the European Court of Human Rights, which in a [judgment of 28 June 2001](#) (see IRIS 2001-7: 2) held that the Swiss authorities' refusal to broadcast the commercial in question was a breach of freedom of expression. According to the European Court, VgT had simply intended to participate in an ongoing general debate on the protection and rearing of animals and the Swiss authorities had not demonstrated in a relevant and sufficient manner why the grounds generally advanced in support of the prohibition on political advertising could also serve to justify interference in the particular circumstances of the case. The Court found a violation of Article 10 of the Convention and awarded VgT CHF 20,000 (approximately EUR 13,300 at the time) in costs and expenses.

On 1 December 2001, on the basis of the European Court's judgment, VgT applied to the Swiss Federal Court for a review of the final domestic judgment prohibiting the commercial from being broadcast. In a judgment of 29 April 2002 the Federal Court however dismissed the application, holding among other things that VgT had not demonstrated that there was still any purpose in broadcasting the commercial. As the Committee of Ministers of the Council of Europe, which is responsible for supervising the execution of the European Court's judgments, had not been informed that the Federal Court had dismissed VgT's application for a review, it adopted a final resolution regarding the case in July 2003, referring to the possibility of applying to the Federal Court to reopen the proceedings.

In July 2002, VgT lodged an application with the European Court concerning the Federal Court's refusal of its request to reopen the proceedings and the continued prohibition on broadcasting its television commercial. In a Chamber judgment of 4 October 2007, the European Court held by five votes to two that there had been a violation of Article 10. On 31 March 2008, the panel of the Grand Chamber accepted a request by the Swiss Government for the case to be referred to the Grand Chamber under Article 43 of the Convention. The Swiss government argued inter alia that the application by VgT was inadmissible, as it concerned a subject - execution of the Court's judgments - which, by virtue of Article 46, fell within the exclusive jurisdiction of the Committee of Ministers of the Council of Europe. The Grand Chamber of the European Court reiterated that the findings of the European Court of a violation were essentially declaratory and that it was the Committee of Ministers' task to supervise execution. The Committee of Ministers' role in that sphere did not mean, however, that measures taken by a respondent State to remedy a violation found by the Court could not raise a new issue and thus form the subject of a new application. In

the present case, the Federal Court's judgment of 29 April 2002 refusing to reopen the proceedings had been based on new grounds and therefore constituted new information of which the Committee of Ministers had not been informed and which would escape all scrutiny under the Convention if the Court were unable to examine it. Accordingly, the Government's preliminary objection on that account was dismissed.

On the merits of the case, the Court firstly noted that the refusal of VgT's application to reopen the proceedings following the Court's judgment of 28 June 2001 constituted fresh interference with the exercise of its rights under Article 10 para. 1. The Court emphasized that freedom of expression is one of the preconditions for a functioning democracy and that genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but could also require positive measures. In the present case, Switzerland had been under an obligation to execute the Court's judgment of 28 June 2001 in good faith, abiding by both its conclusions and its spirit. In view of this, the reopening of domestic proceedings had admittedly been a significant means of ensuring the full and proper execution of the Court's judgment, but could certainly not be seen as an end in itself, especially since the Federal Court dismissed the application of VgT on overly formalistic grounds. Moreover, by deciding that VgT had not sufficiently shown that it still had an interest in broadcasting the commercial, the Federal Court did not offer an explanation of how the public debate on battery farming had changed or become less topical since 1994, when the commercial was initially meant to have been broadcast. Nor did it show that after the European Court's judgment of 28 June 2001 the circumstances had changed to such an extent as to cast doubt on the validity of the grounds on which the Court had found a violation of Article 10. The European Court also rejected the argument that VgT had alternative options for broadcasting the commercial in issue, for example via private and regional channels, since that would require third parties, or VgT itself, to assume a responsibility that falls to the national authorities alone: that of taking appropriate action on a judgment of the European Court. Finally the argument that the broadcasting of the commercial might be seen as unpleasant, in particular by consumers or meat traders and producers, could not justify its continued prohibition, as freedom of expression is also applicable to "information" or "ideas" that offend, shock or disturb. Such are indeed the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society". In the absence of any new grounds that could justify continuing the prohibition from the standpoint of Article 10, the Swiss authorities had been under an obligation to authorise the broadcasting of the commercial, without taking the place of VgT in judging whether the debate in question was still a matter of public interest. The Court therefore held by 11 votes to six that there had been a violation of Article 10. Under Article 41 (just satisfaction) of the Convention the Court awarded VgT EUR 4,000 in costs and expenses.

- [Verein gegen Tierfabriken Schweiz \(VgT\) v. Switzerland \(no. 2\) \[GC\]](#), no. 32772/02, ECHR 2009.

IRIS 2009-10/2

European Court of Human Rights: Case of Pasko v. Russia

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The European Court of Human Rights found no violation of Article 10 of the Convention in the highly controversial case of Pasko v. Russia. The case concerns Grigoriy Pasko, a Russian national who at the time of the events was a naval officer and worked as a military journalist on the Russian Pacific Fleet's Newspaper "Boyevaya Vakhta". Mr Pasko had been reporting on problems of environmental pollution, accidents with nuclear submarines, transport of military nuclear waste and other issues related to the activities of the Russian Pacific Fleet. Mr Pasko had also been in contact on a free-lance basis with a Japanese TV station and a newspaper and had supplied them with openly available information and video footage. These contacts with Japanese journalists and a Japanese TV station and newspaper were pursued by Mr Pasko of his own volition and were not reported to his superiors.

In November 1997, Mr Pasko was searched at the Vladivostok airport before flying to Japan. A number of his papers were confiscated with the explanation that they contained classified information. He was arrested upon his return from Japan and charged with treason through espionage for having collected secret information with the intention of transferring it to a foreign national. Mr Pasko was sentenced in December 2001 to four years' imprisonment by the Pacific Military Fleet Court, as he was found guilty of treason through espionage for having collected secret and classified information containing actual names of highly critical and secure military formations and units, with the intention of transferring this information to a foreign national. He was released on parole in January 2003.

Relying on Articles 7 (no punishment without law) and 10 of the European Convention of Human Rights, Mr Pasko complained that the Russian authorities had applied criminal legislation retrospectively and had subjected him to an overly broad and politically motivated criminal persecution as a reprisal for his critical publications. The Court considered that the essence of the case was the alleged violation of Article 10, since Mr Pasko's complaints under Article 7 concerned the same facts as those related to Article 10. The Court therefore decided to examine the complaints under Article 10 only.

After having accepted that the Russian authorities acted on a proper legal basis, the Court observed that, as a serving military officer, the applicant had been bound by an obligation of discretion in relation to anything concerned with the performance of his duties. The domestic courts had carefully scrutinised each of his arguments. The courts had found that he had collected and kept, with the intention of transferring to a foreign national, information of a military nature that had been classified as a State secret and which had been capable of causing considerable damage to national security. Finally, the applicant had been convicted of treason through espionage as a serving military officer and not as a journalist. According to the European Court, there was nothing in the materials of the case to support the applicant's allegations that his conviction had been overly broad or politically motivated or that he had been sanctioned for any of his publications. The Court found that the domestic courts had struck the right balance of proportionality between the aim of protecting national security and the means used to achieve that purpose, namely the sentencing of the applicant to a "lenient sentence", much less severe than the minimum stipulated in law. Accordingly, the Court held by six votes to one that there had not been a violation of Article 10.

- [Pasko v. Russia](#), no. 69519/01, 22 October 2009.

IRIS 2010-1/1

European Court of Human Rights: Case of *Ürper a.o. v. Turkey*

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The Court's judgment in the case of *Ürper a.o. v. Turkey* firmly condemns the bans on the future publication of four newspapers. At the material time the applicants were the owners, executive directors, editors-in-chief, news directors and journalists of four daily newspapers published in Turkey: *Ülkede Özgür Gündem*, *Gündem*, *Güncel* and *Gerçek Demokrasi*. The publication of all four newspapers was suspended, pursuant to section 6(5) of the Prevention of Terrorism Act (Law no. 3713) by various Chambers of the Istanbul Assize Court, between 16 November 2006 and 25 October 2007, for periods ranging from 15 days to a month in response to various news reports and articles. The impugned publications were deemed to publish propaganda in favour of a terrorist organisation, the PKK/KONGRA-GEL, as well as to express approval of crimes committed by that organisation and its members.

The applicants alleged, under Article 10 of the Convention, that the suspension of the publication and distribution of their newspapers constituted an unjustified interference with their freedom of expression. The European Court reiterates that Article 10 of the Convention does not, in its terms, prohibit the imposition of prior restraints on publication. However, the dangers inherent in prior restraints are such that they call for the most careful scrutiny. This is especially true as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period of time, may well deprive it of all its value and interest. As freedom of the press was at stake in the present case, the national authorities had only a limited margin of appreciation to decide whether there was a "pressing social need" to take the measures in question. The Court was of the opinion that, as opposed to earlier cases that have been brought before it, the restraints under scrutiny were not imposed on particular types of news reports or articles, but on the future publication of entire newspapers, whose content was unknown at the time of the national court's decisions. In the Court's view, both the content of section 6(5) of Law no. 3713 and the judges' decisions in the instant case stem from the hypothesis that the applicants, whose "guilt" was established without trial in proceedings from which they were excluded, would re-commit the same kind of offences in the future. The Court found, therefore, that the preventive effect of the suspension orders entailed implicit sanctions on the applicants to dissuade them from publishing similar articles or news reports in the future and to hinder their professional activities. The Court considered that less draconian measures could have been envisaged, such as the confiscation of particular issues of the newspapers or restrictions on the publication of specific articles. The Court concluded that by suspending the publication and distribution of the four newspapers involved, albeit for short periods, the domestic courts largely overstepped the narrow margin of appreciation afforded to them and unjustifiably restricted the essential role of the press as a public watchdog in a democratic society. The practice of banning the future publication of entire periodicals on the basis of section 6(5) of Law no. 3713 went beyond any notion of a "necessary" restraint in a democratic society and, instead, amounted to censorship. There has accordingly been a violation of Article 10 of the Convention.

- [*Ürper and Others v. Turkey*](#), nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07, 20 October 2009.

IRIS 2010-1/2

European Court of Human Rights: Case of Financial Times a.o. v. UK

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Eight years ago the British courts decided in favour of a disclosure order in the case of *Interbrew SA v. Financial Times and others*. The case concerned an order against four newspapers (FT, The Times, The Guardian and The Independent) and the news agency Reuters to deliver up their original copies of a leaked and (apparently) partially forged document about a contemplated takeover by Interbrew (now: Anheuser Bush InBev NV) of SAB (South African Breweries). In a judgment of 15 December 2009, the European Court of Human Rights (Fourth Section) came to the conclusion that this disclosure order constituted a violation of the right of freedom of expression and information, which includes press freedom and the right of protection of journalistic sources, as protected by Article 10 of the European Convention of Human Rights.

On the basis of a leaked report by a person X and further investigations by journalists, the British media in November and December 2001 reported that Interbrew (now: Anheuser Bush InBev NV) had been plotting a bid for SAB. The media coverage had a clear impact on the market on shares of Interbrew and SAB, with Interbrew's share price decreasing, while both the share price and the volume of SAB's shares traded obviously increased. At the request of Interbrew, the High Court on 19 December 2001 ordered delivery up of the documents under the so-called Norwich Pharmacal principle. This principle implies that if a person through no fault of his own becomes involved in the wrongdoing of others so as to facilitate that wrongdoing, he comes under a duty to assist the person who has been wronged by giving him full information and disclosing the identity of the wrongdoer. The four newspapers and the news agency were ordered not to alter, deface, dispose or otherwise deal with the documents received by person X and to deliver up the documents to Interbrew's solicitor within 24 hours. The newspapers and Reuters appealed, but the disclosure order was confirmed by the Court of Appeal. In the London Court's judgment it was emphasised that what mattered critically in this case was the source's purpose: "It was on any way a maleficent one, calculated to do harm whether for profit or for spite, and whether to the investing public or Interbrew or both." The public interest in protecting the source of such a leak was considered not sufficient to withstand the countervailing public interest in letting Interbrew seek justice in the courts against the source. It was also underlined that there is "no public interest in the dissemination of falsehood", as the judge had found that the document, leaked by person X to the media, was partially forged. The Court of Appeal said: "While newspapers cannot be asked to guarantee the veracity of everything they report, they in turn have to accept that the public interest in protecting the identity of the source of what they have been told is disinformation may not be great." Accordingly, the Court of Appeal dismissed the appeals. On 9 July 2002, the House of Lords refused the newspapers leave to appeal, following which Interbrew required that the newspapers and Reuters comply with the court order for delivery up of the documents. The newspapers and Reuters however continued to refuse to comply and applied to the European Court of Human Rights, arguing that their rights under Article 10 of the Convention had been violated.

The European Court of Human Rights came to the conclusion that the British judicial authorities in the *Interbrew* case did indeed neglect the interests related to the protection of journalistic sources, by overemphasising the interests and arguments in favour of source disclosure. The Court accepted that the disclosure order in the *Interbrew* case was prescribed by law (Norwich Pharmacal and Section 10 of the Contempt of Court Act 1981) and was intended to protect the

rights of others and to prevent the disclosure of information received in confidence, both of which are legitimate aims. The Court however did not consider the disclosure order to be necessary in a democratic society. First, the Court in general terms reiterated that freedom of expression constitutes one of the essential foundations of a democratic society and that, in that context, the safeguards guaranteed to the press are particularly important: “protection of journalistic sources is one of the basic conditions for press freedom. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital “public watchdog” role of the press may be undermined and the ability of the press to provide accurate and reliable reporting may be adversely affected” (§59). Disclosure orders in relation to journalistic sources have a detrimental impact not only on the source in question, whose identity may be revealed, but also on the newspaper against which the order is directed, whose reputation may be negatively affected in the eyes of future potential sources by the disclosure, and on the members of the public, who have an interest in receiving information imparted through anonymous sources and who are also potential sources themselves. The Court accepted that it may be true that the public perception of the principle of non-disclosure of sources would suffer no real damage when overridden in circumstances where it is clear that a source was acting in bad faith with a harmful purpose and disclosed intentionally falsified information. The Court made clear however that domestic courts should be slow to assume, in the absence of compelling evidence, that these factors are present in any particular case. The Court emphasised most importantly that “the conduct of the source can never be decisive in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into consideration in carrying out the balancing exercise required under Article 10 §2” (§63).

Applying these principles to the *Interbrew* case, the European Court of Human Rights came to the conclusion that the British Courts had given too much weight to the alleged bogus character of the leaked document and to the assumption that the source had acted *mala fide*. While the Court considered that there may be circumstances in which the source’s harmful purpose would in itself constitute a relevant and sufficient reason to make a disclosure order, the legal proceedings against the four newspapers and Reuters did not allow X’s purpose to be ascertained with the necessary degree of certainty. The Court therefore did not place significant weight on X’s alleged purpose in the present case, but did clearly emphasise the public interest in the protection of journalistic sources. The Court accordingly found that *Interbrew*’s interests in eliminating, by proceedings against X, the threat of damage through future dissemination of confidential information and in obtaining damages for past breaches of confidence were, even if considered cumulatively, insufficient to outweigh the public interest in the protection of journalists’ sources. The judicial order to deliver up the report at issue was considered to constitute a violation of Article 10 of the Convention. The European Court was unanimous in its judgment, although it took the Court seven years to come to its conclusion.

- [Financial Times Ltd and Others v. the United Kingdom](#), no. 821/03, 15 December 2009.

IRIS 2010-2/1

European Court of Human Rights: Case of Laranjeira Marques da Silva v. Portugal

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In one of its first judgments of 2010 the European Court of Human Rights has clarified how court and crime reporting can rely on the right to freedom of expression guaranteed by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Convicting a journalist or a publisher for breach of the secrecy of a criminal investigation or because of defamation of a politician can only be justified when it is necessary in a democratic society and under very strict conditions.

The applicant in this case, Mr Laranjeira Marques da Silva, was the editor of the regional weekly newspaper Notícias de Leiria at the relevant time. In 2000 he wrote two articles about criminal proceedings brought against J., a doctor and politician well-known in the region, for the sexual assault of a patient. In an editor's note he called upon readers to supply further testimonies relating to other possible incidents of a similar nature involving J. A short time later Mr Laranjeira Marques da Silva was charged with a breach of the *segredo de justiça*, a concept similar to confidentiality of judicial investigation, and with the defamation of J. The Leiria District Court held in 2004 that Mr Laranjeira Marques da Silva had overstepped his responsibilities as a journalist and had aroused widespread suspicion of J. by insinuating, without justification, that the latter had committed similar acts involving other victims. He was found guilty of a breach of the *segredo de justiça* and of defamation. He was sentenced to a daily fine payable within 500 days and ordered to pay EUR 5,000 in damages to J. On appeal, the applicant challenged his conviction concerning the *segredo de justiça* on the ground that he had obtained access to the information in question lawfully. On the defamation issue, he argued that he had simply exercised his right to freedom of expression and that his articles had been based on fact and, moreover, were related to a subject of general interest. The Court of Appeal dismissed his appeal in 2005. A constitutional appeal and later an extraordinary appeal seeking harmonisation of the case law with the Supreme Court were also unsuccessful. In Strasbourg, Mr. Laranjeira Marques da Silva complained essentially that his conviction had infringed his right to freedom of expression.

As to the applicant's conviction for breach of the *segredo de justiça*, the European Court was of the opinion that the Portuguese authorities' interference with his freedom of expression had been "prescribed by law" and that the interference in question had pursued the legitimate aim of protecting the proper administration of justice and the reputation of others. The Court however pointed out that neither the concern of safeguarding the investigation nor the concern of protecting the reputation of others can prevail over the public's interest in being informed of certain criminal proceedings conducted against politicians. It stressed that in this case there was no evidence of any damaging effects on the investigation, which had been concluded by the time the first article was published. The publication of the articles did not breach the presumption of innocence, as the case of Mr. J. was in hands of professional judges. Furthermore, there was nothing to indicate that the conviction of Mr. Laranjeira Marques da Silva had contributed to the protection of the reputation of others. The Court held unanimously that the interference with the right of freedom of expression of the applicant was disproportionate and that therefore there had been a violation of Article 10.

As to the conviction for defamation, the Court accepted that the disputed articles dealt with matters of general interest, as the public had the right to be informed about investigations concerning politicians, including investigations which did not, at first sight, relate to their political activities. Furthermore, the issues before the courts could be discussed at any time in the press and by the public. As to the nature of the two articles, the Court pointed out that Mr Laranjeira Marques da Silva had simply imparted information concerning the criminal proceedings in question, despite adopting a critical stance towards the accused. The Court observed that it was not its place or that of the national courts to substitute their own views for those of the press as to what reporting techniques should be adopted in the journalistic coverage of a court case. As to the editor's note, the Court took the view that, notwithstanding one sentence that was more properly to be regarded as a value judgment, it had a sufficient factual basis in the broader context of the media coverage of the case. Hence, while the reasons given by the national courts for Mr Laranjeira Marques da Silva's conviction had been relevant, the authorities had not given sufficient reasons justifying the necessity of the interference with the applicant's right to freedom of expression. The Court further noted that the penalties imposed on the applicant had been excessive and liable to discourage the exercise of media freedom. The Court therefore held, by five votes to two, that the conviction for defamation did not correspond to a pressing social need and that there had been a violation of Article 10 of the Convention.

- [Laranjeira Marques da Silva v. Portugal](#), no. 16983/06, 19 January 2010.

IRIS 2010-3/1

European Court of Human Rights: Case of *Alfantakis v. Greece*

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The European Court of Human Rights recently delivered a judgment on the right to freedom of expression of a lawyer convicted for the insult and defamation of a public prosecutor during a television interview. In a case that received considerable media coverage, Georgis Alfantakis, a lawyer in Athens, was representing a popular Greek singer (A.V.). The singer had accused his wife, S.P., of fraud, forgery and use of forged documents causing losses to the State of nearly EUR 150,000. On the recommendation of the public prosecutor at the Athens Court of Appeal, D.M., it was decided not to bring charges against S.P. While appearing live as a guest on Greece's main television news programme 'Sky', Mr Alfantakis expressed his views on the criminal proceedings in question, commenting in particular that he had "laughed" on reading the public prosecutor's report, which he described as a "literary opinion showing contempt for his client". The public prosecutor sued Mr Alfantakis for damages, arguing that his comments had been insulting and defamatory. Mr Alfantakis was ordered by the Athens Court of Appeal to pay damages of about EUR 12,000. Alfantakis applied to the European Court of Human Rights, relying on Article 10 of the European Convention of Human Rights. He complained about the civil judgment against him which he considered an unacceptable interference in his freedom of expression.

According to the European Court it was not disputed that the interference by the Greek authorities with Alfantakis's right to freedom of expression had been 'prescribed by law' - by both the Civil Code and the Criminal Code - and had pursued the legitimate aim of protecting the reputation of others. The Court took notice of the fact that the offending comments were directed at a member of the national legal service, thus creating the risk of a negative impact both on that individual's professional image and on public confidence in the proper administration of justice. Lawyers are entitled to comment in public on the administration of justice, but they are also expected to observe certain limits and rules of conduct. However, instead of ascertaining the direct meaning of the phrase uttered by the applicant, the Greek courts had relied on their own interpretation of what the phrase might have implied. In doing so, the domestic courts relied on particularly subjective considerations, potentially ascribing to the applicant intentions he had not in fact had. Nor had the Greek courts made a distinction between facts and value judgments, instead simply determining the effect produced by the phrases "when I read it, I laughed" and "literary opinion". The Greek courts had also ignored the extensive media coverage of the case, in the context of which Mr Alfantakis's appearance on the television news was more indicative of an intention to defend his client's arguments in public than of a desire to impugn the public prosecutor's character. Lastly, they had not taken account of the fact that the comments had been broadcast live and could therefore not be rephrased. The Court came to the conclusion that the civil judgment ordering Mr Alfantakis to pay damages was not based on sufficient and pertinent arguments and therefore had not met a "pressing social need". Hence, there had been a violation of Article 10. The Court awarded Mr Alfantakis EUR 12,939 in pecuniary damages.

- [Alfantakis v. Greece](#), no. 49330/07, 11 February 2010.

IRIS 2010-4/2

European Court of Human Rights: Flinkkilä a.o. and four other connected cases v. Finland

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The European Court of Human Rights in five judgments of 6 April 2010 came to the conclusion that Finland had violated the right of freedom of expression by giving too much protection to the right of private life under Article 8 of the Convention. In all five cases the Court was of the opinion that the criminal conviction of journalists and editors-in-chief and the order to pay damages for disclosing the identity of a public person's partner amounted to an unacceptable interference with the freedom of expression guaranteed by Article 10 of the European Convention of Human Rights.

All applicants in all five cases were journalists, editors-in-chief and publishing companies that were involved in the publishing in 1997 of a total of nine articles in a newspaper and in several magazines concerning A., the National Conciliator at the time, and B., his female partner. The articles focused primarily on the private and professional consequences for A. of an incident in 1996. This incident, including the revelation of B.'s identity, had earlier been reported upon in the Finnish print media and on television. During that incident A. and B. entered A.'s home late at night while A.'s wife was there and, as a result of an ensuing fight, B. was fined and A. was sentenced to a conditional term in prison. A few weeks later, a newspaper and several magazines revisited the incident and the court case, this time with more background information, interviews or comments. All articles mentioned B. by name and in addition gave other details about her, including her age, name of her workplace, her family relationships and her relationship with A., as well as her picture.

A. and B. requested that criminal investigations be conducted in respect of the journalists for having written about the incident and the surrounding circumstances. The journalists and media companies were ordered by the domestic courts to pay fines and damages for the invasion of B.'s private life. The Finnish courts found in particular that, since B. was not a public figure, the fact alone that she happened to be the girlfriend of a well-known person in society was not sufficient to justify revealing her identity to the public. In addition, the fact that her identity had been revealed previously in the media did not justify subsequent invasions of her private life. The courts further held that even the mere dissemination of information about a person's private life was sufficient to cause them damage or suffering. Therefore, the absence of intent to hurt B. on the part of the applicants was irrelevant. The Finnish courts concluded that the journalists and the media had had no right to reveal facts relating to B.'s private life or to publish her picture as they did.

The journalists, editors-in-chief and media companies complained under Article 10 of the Convention about their convictions and the high amounts they had to pay in damages to B. Having examined in earlier case law the domestic Criminal Code provision in question, the European Court found its contents quite clear: the spreading of information, an insinuation or an image depicting the private life of another person, which was conducive to causing suffering, qualified as an invasion of privacy. In addition, even the exception stipulated in that provision - concerning persons in a public office or function, in professional life, in a political activity or in another comparable activity - was equally clearly worded. Even though there had been no precise definition of private life in the law, if the journalists or the media had had any doubts about the remit of that term, they should have either sought advice about its content or refrained from

disclosing B.'s identity. In addition, the applicants were professional journalists and therefore could not claim not to have known the boundaries of the said provision, since the Finnish Guidelines for Journalists and the practice of the Council for Mass Media, albeit not binding, provided even stricter rules than the Criminal Code.

However, there had been no evidence, or indeed any allegation, of factual misrepresentation or bad faith on the part of the applicants. Nor had there been any suggestion that they had obtained information about B. by illicit means. While it had been clear that B. was not a public figure, she was involved in an incident together with a well-known public figure with whom she had been in a close relationship. Therefore, B. could have reasonably been seen as having entered the public domain. In addition, the disclosure of B.'s identity was of clear public interest in view of A.'s conduct and his ability to continue in his post as a high-level public servant. The incident was widely publicised in the media, including in a programme broadcast nationwide on prime-time television. Thus, the articles in question had not disclosed B.'s identity in this context for the first time. Moreover, even if the events were presented in a somewhat colourful manner to boost sales of the magazines, this was not in itself sufficient to justify a conviction for breach of privacy. Finally, in view of the heavy financial sanctions imposed on the applicants, the European Court noted that B. had already been paid a significant sum in damages by the television company for having exposed her private life to the general public. Similar damages had been ordered to be paid to her also in respect of other articles published in other magazines by the other applicants listed above, which all stemmed from the same facts. Accordingly, in view of the severe consequences for the applicants in relation to the circumstances of the cases, the European Court held that there had been a violation of Article 10 of the Convention in all five cases.

Under Article 41 of the Convention (just satisfaction), the Court held that Finland was to pay the applicants sums ranging between EUR 12,000 and EUR 39,000 for pecuniary damages, between EUR 2,000 and EUR 5,000 for non-pecuniary damages and between EUR 3,000 and EUR 5,000 in respect of costs and expenses.

- [*Flinkkilä and Others v. Finland*](#), no. 25576/04, 6 April 2010.
- [*Jokitaipale and Others v. Finland*](#), no. 43349/05, 6 April 2010.
- [*Ittalehti and Karhuvaara v. Finland*](#), no. 6372/06, 6 April 2010.
- [*Soila v. Finland*](#), no. 6806/06, 6 April 2010.
- [*Tuomela and Others v. Finland*](#), no. 25711/04, 6 April 2010.

IRIS 2010-5/2

European Court of Human Rights: *Renaud v. France*

Dirk Voorhoof

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The European Court of Human Rights recently delivered a judgment regarding defamation and insult on the Internet. The Court was of the opinion that the sharp and polemical criticism of the public figure in question was part of an ongoing emotional political debate and that the criminal conviction for defamation and insult amounted to a violation of the freedom of expression guaranteed by Article 10 of the European Convention of Human Rights.

The applicant in the case was Patrice Renaud. He is the founder of a local association (*Comité de défense du quartier sud de Sens*) opposing a big construction project planned in the city of Sens. To this end he also initiated a website, sharply criticising the mayor of Sens, who supported and promoted the building project. In 2005, and on appeal in 2006, Renaud was convicted in criminal proceedings for defamation and for publicly insulting a citizen discharging a public mandate, on account of remarks concerning the mayor of Sens. On the website he had inter alia compared the urban policy of the mayor to the policy of the former Romanian dictator Ceaucescu. Renaud was convicted for defamation because of the specific allegation that the mayor was stimulating and encouraging delinquency in the city centre in order to legitimise her policy of security and public safety. Also the insinuation that the mayor was illegally putting public money in her own pockets was considered defamatory, while the article on the association's website in which Renaud had written that the mayor was cynical, schizophrenic and a liar was considered to be a public insult. Renaud was ordered to pay a fine of EUR 500 and civil damages to the mayor of EUR 1,000.

Relying on Article 10 (freedom of expression), Renaud complained of his conviction before the European Court of Human Rights.

The European Court recognised that the applicant, being the chairman of the local association of residents opposing the construction project and the webmaster of the Internet site of the association, was participating in a public debate when criticising public officials and politicians. The Court admitted that some of the phraseology used by Renaud was very polemic and virulent, but stated that on the other hand a mayor must tolerate such kind of criticism as part of public debate which is essential in a democracy. The Court was of the opinion that when a debate relates to an emotive subject, such as the daily life of the local residents and their housing facilities, politicians must show a special tolerance towards criticism and that they have to accept "*les débordements verbaux ou écrits*" (free translation: "oral or written outbursts"). The Court considered the allegations of Renaud to be value judgments with a sufficient factual basis and came to the conclusion that the French judicial authorities had neglected the interests and importance of freedom of expression in the matter at issue. The conviction of Renaud was thus an interference with his right to freedom of expression which did not meet any pressing social need, while at the same time such a conviction risks engendering a chilling effect on participation in public debates of this kind. Therefore, the European Court found a violation of Article 10 of the Convention.

- [Renaud v. France](#), no. 13290/07, 25 February 2010.

IRIS 2010-6/1

European Court of Human Rights: Jean-Marie Le Pen v. France

Dirk Voorhoof

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A few years ago, Le Pen, the president of the French National Front party, was fined EUR 10,000 for incitement to discrimination, hatred and violence towards a group of people because of their origin or their membership or non-membership of a specific ethnic group, nation, race or religion, on account of statements he had made about Muslims in France in an interview with the *Le Monde* daily newspaper. In the interview, Le Pen asserted, among other things, that “the day there are no longer 5 million but 25 million Muslims in France, they will be in charge”.

He was subsequently sentenced to another fine after he commented on the initial fine, in the following terms, in a weekly magazine: “When I tell people that when we have 25 million Muslims in France we French will have to watch our step, they often reply: ‘But Mr Le Pen, that is already the case now!’ - and they are right.” The French courts held that Le Pen’s freedom of expression was no justification for statements that were an incitement to discrimination, hatred or violence towards a group of people. The Court of Cassation dismissed an appeal lodged by Le Pen in which he argued that his statements were not an explicit call for hatred or discrimination and did not single out Muslims because of their religion and that the reference to Islam was aimed at a political doctrine and not a religious faith.

In a decision of 20 April 2010 the European Court declared the application of Le Pen, which relied on Article 10 ECHR (freedom of expression), manifestly ill-founded and hence inadmissible.

The Court was of the opinion that the French authorities’ interference with Le Pen’s freedom of expression, in the form of a criminal conviction, was prescribed by law (Arts. 23-24 of the French Press Freedom Act - *Loi sur la Liberté de la Presse*) and pursued the legitimate aim of protecting the reputation or rights of others. Again it was crucial to decide whether or not the conviction of Le Pen was to be considered necessary in a democratic society, taking into account the importance of freedom of expression in the context of political debate in a democratic society. The Court reiterated that freedom of expression applies not only to “information” or “ideas” that were favourably received, but also to those that offend, shock or disturb. Furthermore, anyone who engages in a debate on a matter of public interest can resort to a degree of exaggeration, or even provocation, provided that they respect the reputation and rights of others. When the person concerned is an elected representative, like Le Pen, who represents his voters, takes up their concerns and defends their interests, the Court has to exercise the strictest supervision of this kind of interference with freedom of expression. Le Pen’s statements had indeed been made in the context of a general debate on the problems linked to the settlement and integration of immigrants in their host countries. Moreover, the varying importance of the problems concerned, which could conceivably generate misunderstanding and incomprehension, required that considerable latitude be left to the State in assessing the need for interference with a person’s freedom of expression.

In this case, however, Le Pen’s comments had certainly presented the Muslim community as a whole in a disturbing light likely to give rise to feelings of rejection and hostility. He had set the French as a group against a community whose religious convictions were explicitly mentioned and whose rapid growth was presented as an already latent threat to the dignity and security of the French people. The reasons given by the domestic courts for convicting Le Pen had thus been relevant and sufficient. In addition, the penalty imposed had not been disproportionate. The

Court recognised that the fine imposed on Le Pen was significant, but underlined the fact that Le Pen under French law had risked a sentence of imprisonment. Therefore, the Court did not consider the sanction to be disproportionate. On these grounds the Court found that the interference with Le Pen's enjoyment of his right to freedom of expression had been "necessary in a democratic society". LePen's complaint was accordingly rejected.

Le Pen is confronted with a boomerang effect of the Court's case law, as in an earlier case the Grand Chamber of the European Court had found that defamatory and insulting statements about Le Pen published in a book were not protected by Article 10 of the Convention, as these statements were to be considered as a form of hate speech. The Grand Chamber in *Lindon, Otchakovsky-Laurens and July v. France* had regard "to the nature of the remarks made, in particular to the underlying intention to stigmatise the other side, and to the fact that their content is such as to stir up violence and hatred, thus going beyond what is tolerable in political debate, even in respect of a figure who occupies an extremist position in the political spectrum" (*Lindon, Otchakovsky-Laurens and July v. France*, 22 October 2007, §57). It is precisely this argument, that hate speech is beyond what is tolerable in political debate, which has now turned against Le Pen.

- [Jean-Marie Le Pen v. France \(dec.\)](#), no. 18788/09, 20 April 2010.

IRIS 2010-7/1

European Court of Human Rights: Akdaş v. Turkey

Dirk Voorhoof

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The applicant in this case, Rahmi Akdaş is a publisher, residing in Bandırma, Turkey. In 1999 he published the Turkish translation of the erotic novel “Les onze mille verges” by the French writer Guillaume Apollinaire (“The Eleven Thousand Rods”, “On Bir Bin Kırbaç” in Turkish). The novel contains graphic descriptions of scenes of sexual intercourse, including various practices such as sadomasochism, vampirism and paedophilia. Akdaş was convicted under the Criminal Code for publishing obscene or immoral material liable to arouse and exploit sexual desire among the population. The publisher argued that the book was a work of fiction, using literary techniques such as exaggeration or metaphor and that the post face to the edition in question was written by specialists in literary analysis. He added that the book did not contain any violent overtones and that the humorous and exaggerated nature of the text was more likely to extinguish sexual desire.

The criminal court of Istanbul ((Istanbul Asliye Ceza Mahkemesi) ordered the seizure and destruction of all copies of the book and Akdaş was given a “severe” fine of EUR 1,100, a fine that may be converted into days of imprisonment. In a final judgment of 11 March 2004, the Court of Cassation quashed the part of the judgment concerning the order to destroy copies of the book in view of a 2003 legislative amendment. It upheld the remainder of the judgment. Akdaş paid the fine in full in November 2004.

Relying on Article 10, Akdaş complained about this conviction and about the seizure of the book. Before the European Court it was not disputed that there had been an interference with Akdaş’ freedom of expression, that the interference had been prescribed by law and that it had pursued a legitimate aim, namely the protection of morals. The Court however found the interference not necessary in a democratic society. The Court reiterated that those who promoted artistic works also had “duties and responsibilities”, the scope of which depended on the situation and the means used. As the requirements of morals vary from time to time and from place to place, even within the same State, the national authorities are supposed to be in a better position than the international judge to give an opinion on the exact content of those requirements, as well as on the “necessity” of a “restriction” intended to satisfy them.

Nevertheless, the Court had regard in the present case to the fact that more than a century had elapsed since the book had first been published in France (in 1907), to its publication in various languages in a large number of countries and to the recognition it had gained through publication in the prestigious “La Pléiade” series. Acknowledgment of the cultural, historical and religious particularities of the Council of Europe’s member states could not go so far as to prevent public access in a particular language, in this instance Turkish, to a work belonging to the European literary heritage. Accordingly, the application of the legislation in force at the time of the events had not been intended to satisfy a pressing social need. In addition, the heavy fine imposed and the seizure of copies of the book had not been proportionate to the legitimate aim pursued and had thus not been necessary in a democratic society, within the meaning of Article 10. For that reason, the Court found a violation of Akdaş’ right to freedom of expression.

- [Akdaş v. Turkey](#), no. 41056/04, 16 February 2010.

IRIS 2010-8/1

European Court of Human Rights: Fatullayev v. Azerbaijan

Dirk Voorhoof

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Having been convicted of defamation and threat of terrorism and while serving a prison sentence, the founder and chief editor of the newspapers *Gündəlik Azərbaycan* and *Realny Azerbaijan*, Mr. Fatullayev, applied successfully before the European Court of Human Rights against a violation of his freedom of expression and right to a fair trial. The European Court ordered the Azerbaijani authorities to release Fatullayev immediately.

In 2007 two sets of criminal proceedings were brought against Fatullayev in connection with two articles published by him in *Realny Azerbaijan*. The first set of criminal proceedings related to an article and to separate Internet postings. The statements made in the article and the postings differed from the commonly accepted version of the events that took place at the town of Khojaly during the war in Nagorno-Karabakh, according to which hundreds of Azerbaijani civilians had been killed by the Armenian armed forces with the reported assistance of the Russian army. Four Khojaly survivors and two former soldiers involved in the Khojaly battle brought a criminal complaint against Fatullayev for defamation and for falsely accusing Azerbaijani soldiers of having committed an especially grave crime. The courts upheld the claims, convicted Fatullayev of defamation and sentenced him to imprisonment for a term of two years and six months. Fatullayev was arrested in the courtroom and taken to a detention centre. In addition, in civil proceedings brought against Fatullayev before the above-mentioned first set of criminal proceedings, he was ordered to publish a retraction of his statements, an apology to the refugees from Khojaly and the newspaper's readers and to pay approximately EUR 8,500 personally, as well as another EUR 8,500 on behalf of his newspaper, in respect of non-pecuniary damages.

The second set of criminal proceedings related to an article entitled "The Aliyevs Go to War". In it Fatullayev expressed the view that, in order for President Ilham Aliyev to remain in power in Azerbaijan, the Azerbaijani government had sought the support of the United States in exchange for Azerbaijan's support for US "aggression" against Iran. He speculated about a possible US-Iranian war in which Azerbaijan could also become involved and provided a long and detailed list of strategic facilities in Azerbaijan that would be attacked by Iran if such a scenario developed. He concluded that the Azerbaijani government should have maintained neutrality in its relations with both the US and Iran and that it had not realised all the dangerous consequences of the geopolitical game it was playing, like for example the possible deaths of Azeris in both Azerbaijan and Iran. Before Fatullayev was formally charged with the offence of threat of terrorism, the Prosecutor General made a statement to the press, noting that Fatullayev's article constituted a threat of terrorism. A short time later, Fatullayev was indeed found guilty as charged and convicted of threat of terrorism. The total sentence imposed on him was imprisonment for eight years and six months. In his defence speech at the trial and in his appeals to the higher courts, Fatullayev complained that his presumption of innocence was breached as a result of the Prosecutor General's statement to the press and that his right to freedom of expression as a journalist was violated. His complaints were summarily rejected.

Apart from finding breaches of Art. 6 § 1 (right to a fair trial, no impartial tribunal) and Art. 6 § 2 (breach of presumption of innocence) of the European Convention of Human Rights, the Court found that the conviction of Fatullayev in both criminal cases amounted to a manifest violation of Article 10 of the Convention.

With regard to the first criminal conviction, the Court acknowledged the very sensitive nature of the issues discussed in Fatullayev's article and that the consequences of the events in Khojaly were a source of deep national grief. Thus, it was understandable that the statements made by Fatullayev may have been considered shocking or disturbing by the public. However, the Court recalled that freedom of information applies not only to information or ideas that were favourably received, but also to those that offend, shock or disturb. In addition, it is an integral part of freedom of expression to seek historical truth. Various matters related to the Khojaly events still appear to be open to ongoing debate among historians and as such should have been a matter of general interest in modern Azerbaijani society. It is essential in a democratic society that a debate on the causes of acts of particular gravity which might amount to war crimes or crimes against humanity should be able to take place freely. Further, the press plays the vital role of a "public watchdog" in a democratic society. Although it ought not to overstep certain bounds, in particular in respect of the reputation and rights of others, the duty of the press is to impart information and ideas on political issues and on other matters of general interest. The Court considered that the article had been written in a generally descriptive style with the aim of informing Azerbaijani readers of the realities of day-to-day life in the area in question. The public was entitled to receive information about what was happening in the territories over which their country had lost control in the aftermath of the war. Fatullayev had attempted to convey, in a seemingly unbiased manner, various ideas and views of both sides in the conflict and the article had not contained any statements directly accusing the Azerbaijani military or specific individuals of committing the massacre and deliberately killing their own civilians.

As regards the Internet postings, the Court accepted that, by making those statements without relying on any relevant factual basis, the applicant might have failed to comply with the journalistic duty to provide accurate and reliable information. Nevertheless, taking note of the fact that he had been convicted of defamation, the Court found that those postings had not undermined the dignity of the Khojaly victims and survivors in general and, more specifically, the four private prosecutors who were Khojaly refugees. It therefore held that the domestic courts had not given "relevant and sufficient" reasons for Fatullayev's conviction of defamation. In addition, the Court held that the imposition of a prison sentence for a press offence would be compatible with journalists' freedom of expression only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in cases of hate speech or incitement to violence. As this had not been the case, there had been no justification for the imposition of a prison sentence on Fatullayev. There had accordingly been a violation of Article 10 of the Convention in respect of his first criminal conviction.

With regard to the second criminal conviction, the Court reached a similar conclusion. The article "The Aliyevs Go to War" had focused on Azerbaijan's specific role in the dynamics of international politics relating to US-Iranian relations. As such, the publication had been part of a political debate on a matter of general and public concern. The applicant had criticised the Azerbaijani Government's foreign and domestic political moves. At the same time, a number of other media sources had also suggested during that period that, in the event of a war, Azerbaijan was likely to be involved and speculated about possible specific Azerbaijani targets for Iranian attacks. The fact that the applicant had published a list of specific possible targets in itself had neither increased nor decreased the chances of a hypothetical Iranian attack. The applicant, as a journalist and a private individual, had not been in a position to influence or exercise any degree of control over any of the hypothetical events discussed in the article. Neither had Fatullayev voiced any approval of any such possible attacks or argued in favour of them. It had been his

task, as a journalist, to impart information and ideas on the relevant political issues and express opinions about possible future consequences of specific decisions taken by the Government. Thus, the domestic courts' finding that Fatullayev had threatened the State with terrorist acts had been arbitrary. The Court considered that Fatullayev's second criminal conviction and the severity of the penalty imposed on him had constituted a grossly disproportionate restriction of his freedom of expression. Further, the circumstances of the case had not justified the imposition of a prison sentence on him. There had accordingly been a violation of Article 10 in respect of Fatullayev's second criminal conviction as well.

In application of Article 46 of the Convention (execution of the judgment), the Court noted that Fatullayev was currently serving the sentence for the press offences in respect of which it had found Azerbaijan in violation of the Convention. Having considered it unacceptable that the applicant still remained imprisoned and the urgent need to put an end to the violations of Article 10, the Court held, by six votes to one, that Azerbaijan had to release the applicant immediately. Under Article 41 (just satisfaction) of the Convention, the Court held that Azerbaijan is to pay Fatullayev EUR 25,000 in respect of non-pecuniary damages and EUR 2,822 in respect of costs and expenses.

- [Fatullayev v. Azerbaijan](#), no. 40984/07, 22 April 2010.

IRIS 2010-8/2

European Court of Human Rights: Andreescu v. Romania

Dirk Voorhoof

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The applicant, Gabriel Andreescu, is a well-known human rights activist in Romania. He was among those who campaigned for the introduction of Law No. 187, which gives all Romanian citizens the right to inspect the personal files held on them by the Securitate (the former Romanian intelligence service and secret police). The law also allows access to information of public interest relating to persons in public office who may have been Securitate agents or collaborators. A public agency, the *Consiliul Național pentru Studierea Arhivelor Securității* (National Council for the Study of the Archives of the Securitate - CNSAS) is responsible for the application of Law No. 187. In 2000, Andreescu submitted two requests to the CNSAS: one to be allowed access to the intelligence file on him personally and the other seeking to ascertain whether or not the members of the Synod of the Romanian Orthodox Church had collaborated with the Securitate. He received no reply and organised a press conference at which he criticised A.P., a member of the CNSAS, making reference to some of A.P.'s past activities. Andreescu's remarks on A.P.'s past received widespread media coverage.

A.P. made a criminal complaint against Andreescu accusing him of insult and defamation. After being acquitted in first instance, Andreescu was ordered by the Bucharest County Court to pay a criminal fine together with a high amount in compensation for non-pecuniary damage. The appeal Court ruled that he had not succeeded in demonstrating the truth of his assertion that A.P. had collaborated with the Securitate. Furthermore, a certificate issued by the CNSAS had meanwhile stated that A.P. had not collaborated.

Relying on the European Convention of Human Rights and Fundamental Freedoms, Andreescu lodged an application with the European Court of Human Rights concerning his conviction for defamation. Although the interference by the Romanian authorities with Andreescu's freedom of expression had been prescribed by law and had pursued the legitimate aim of protecting A.P.'s reputation, the European Court considered that the sanction was a violation of Article 10 of the Convention. The Court held that Andreescu's speech had been made in the specific context of a nationwide debate on a particularly sensitive topic of general interest, namely the application of the law concerning citizens' access to the personal files kept on them by the Securitate, enacted with the aim of unmasking that organisation's nature as a political police force, and on the subject of the ineffectiveness of the CNSAS's activities. In that context, it had been legitimate to discuss whether the members of that organisation satisfied the criteria required by law for holding such a position. Andreescu's remarks had been a mix of value judgments and factual elements and he had especially alerted public opinion to the fact that he was voicing suspicions rather than certainties. The Court noted that those suspicions had been supported by references to A.P.'s conduct and to undisputed facts, such as his membership with the transcendental meditation movement and the modus operandi of Securitate agents. According to the Court, Andreescu had acted in good faith in an attempt to inform the public. As his remarks had been made orally at a press conference, he had no opportunity of rephrasing, refining or withdrawing them. The European Court was also of the opinion that the Romanian court, by convicting Andreescu, had paid no attention to the context in which the remarks at the press conference had been made. It had certainly not given "relevant and sufficient" reasons for convicting Andreescu. The Court noted furthermore that the high level of damages - representing more than 15 times the average salary in Romania at the relevant time - could be considered as a measure apt to deter the media

and opinion leaders from fulfilling their role of informing the public on matters of general interest. As the interference with Andreescu's freedom of expression had not been justified by relevant and sufficient reasons, the Court held that there had been a violation of Article 10. It also found a breach of Article 6 § 1 of the Convention (right to fair trial) due to Andreescu's conviction without evidence being taken from him in person, especially after he had been acquitted at first instance. The Court held that Romania was to pay Andreescu EUR 3,500 in respect of pecuniary damage, EUR 5,000 for non-pecuniary damage and EUR 1,180 for costs and expenses.

- [Andreescu v. Romania](#), no. 19452/02, 8 June 2010.

IRIS 2010-9/1

European Court of Human Rights: Aksu v. Turkey

Dirk Voorhoof

Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

In 2000 the Turkish Ministry of Culture published a book entitled “The Gypsies of Turkey”, written by an associate professor. A few months later Mr. Mustafa Aksu, who is of Roma/Gypsy origin, filed a petition with the Ministry of Culture on behalf of the Turkish Gypsy associations. In his petition, he stated that in twenty-four pages of the book Gypsies were presented as being engaged in illegitimate activities, living as “thieves, pickpockets, swindlers, robbers, usurers, beggars, drug dealers, prostitutes and brothel keepers” and being polygamist and aggressive. Gypsy women were presented as being unfaithful to their husbands and several other expressions were humiliating and debasing to Gypsies. Claiming that the expressions constituted criminal offences, Mr. Aksu requested that the sale of the book be stopped and all copies seized. During the same period Mr. Aksu also took an action in regard to a dictionary entitled “Turkish Dictionary for Pupils” which was financed by the Ministry of Culture. According to Mr. Aksu, certain entries in the dictionary were insulting to, and discriminatory against, Gypsies. The Ministry of Culture and later the judicial authorities in Ankara however rejected these complaints and Mr. Aksu lodged two applications with the European Court of Human Rights. He submitted that the remarks in the book and the expressions in the dictionary reflected clear anti-Roma sentiment, that he had been discriminated against on account of his ethnic identity and that his dignity had been harmed because of the numerous passages in the book which used discriminatory and insulting language. He argued that the refusal of the domestic courts to award compensation demonstrated an obvious bias against the Roma and he therefore invoked Articles 6 (fair trial) and 14 (non-discrimination) of the Convention. The Court considered, however, that it was more appropriate to deal with the complaints under Article 14 of the Convention in conjunction with Article 8 (right of privacy) of the Convention.

In its judgment of 27 July 2010 the Court began by referring to the vulnerable position of Roma/Gypsies, the special needs of minorities and the obligation of the European states to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves, but also to preserve a cultural diversity of value to the whole community. The Court also emphasised that racial discrimination requires that the authorities exert special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat. Regarding the book, the Court accepted that the passages and remarks cited by Mr. Aksu, when read on their own, appear to be discriminatory or insulting. However, when the book is examined as a whole it is not possible to conclude that the author acted with bad faith or had any intention of insulting the Roma community. The conclusion to the book also clarified that it was an academic study that had conducted a comparative analysis and focused on the history and socio-economic living conditions of the Roma people in Turkey. The passages referred to by Mr. Aksu were not the author's own comments, but examples of the perception of Roma people in Turkish society, while the author sought to correct such prejudices and make it clear that the Roma people should be respected. Bearing these considerations in mind and stressing its subsidiary role, which leaves a broad margin of appreciation to the national authorities, the Court was not persuaded that the author of the book had insulted the applicant's integrity or that the domestic authorities had failed to protect the applicant's rights. Regarding the dictionary, the Court observed that the definitions provided therein were prefaced with the comment that the terms were of a metaphorical nature. Therefore it found no reason to depart

from the domestic courts' findings that Mr. Aksu's integrity was not harmed and that he had not been subjected to discriminatory treatment because of the expressions described in the dictionary. The Court concluded that in the present cases it cannot be said that Mr. Aksu was discriminated against on account of his ethnic identity as a Roma or that there was a failure on the part of the authorities to take the necessary measures to secure respect for the applicant's private life.

Three dissenting judges, including the president of the second section of the Court, expressed their concern about the approach of the majority, as various passages of the book convey a series of highly discriminatory prejudices and stereotypes that should have given rise to serious explanation by the author and are more forceful in tone than the work's concluding comments. The dissenting judges also found that the dictionary contained seriously discriminatory descriptions and that in a publication financed by the Ministry of Culture and intended for pupils, the Turkish authorities had an obligation to take all measures to ensure respect for Roma identity and to avoid any stigmatisation. They also referred to data and reports collected by the European Union's Fundamental Rights Agency (FRA) showing that more vigilance is needed towards Roma. These arguments and references however could not persuade the (slim) majority of the Court, which accepted that the publication of the book and the dictionary were not to be considered as violating the rights of Mr. Aksu under Articles 14 and 8 of the Convention.

- [Aksu v. Turkey](#), nos. 4149/04 and 41029/04, 27 July 2010.

Editor's note: This case was referred to the Grand Chamber, which returned its judgment on [15 March 2012](#).

IRIS 2010-10/1

European Court of Human Rights: Sanoma Uitgevers B.V. v. the Netherlands

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On 31 March 2009 the Chamber of the Third Section of the European Court of Human Rights (ECtHR) delivered a highly controversial judgment in the case of [Sanoma Uitgevers B.V. v. the Netherlands](#). In a 4/3 decision, the Court was of the opinion that the order to hand over a CD-ROM with photographs in the possession of the editor-in-chief of a weekly magazine claiming protection of journalistic sources did not amount to a violation of Article 10 of the European Convention of Human Rights. The finding and motivation of the majority of the Chamber was not only strongly disapproved of in the world of media and journalism, but was also firmly criticised by the dissenting judges. Sanoma Uitgevers B.V. requested a referral to the Grand Chamber, this request being supported by a large portion of the media, NGOs advocating media freedom and professional organisations of journalists. On 14 September 2009, the panel of five Judges decided to refer the case to the Grand Chamber in application of Article 43 of the Convention. By referring the case to the Grand Chamber the panel accepted that the case raised a serious question affecting the interpretation or application of Article 10 of the Convention and/or concerned a serious issue of general importance.

On 14 September 2010, the 17 judges of the Grand Chamber unanimously reached the conclusion that the order to hand over the CD-ROM to the public prosecutor was a violation of the journalists' rights to protect their sources. It noted that orders to disclose sources potentially had a detrimental impact, not only on the source, whose identity might be revealed, but also on the newspaper or publication against which the order was directed, whose reputation might be negatively affected in the eyes of future potential sources by the disclosure, and on members of the public, who had an interest in receiving information imparted through anonymous sources. Protection of journalists' sources is indeed to be considered "a cornerstone of freedom of the press, without which sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information to the public may be adversely affected". In essence, the Grand Chamber was of the opinion that the right to protect journalistic sources should be safeguarded by sufficient procedural guarantees, including the guarantee of prior review by a judge or an independent and impartial decision-making body, before the police or the public prosecutor have access to information capable of revealing such sources. Although the public prosecutor, like any other public official, is bound by the requirements of basic integrity, in terms of procedure he or she is a "party" defending interests potentially incompatible with journalistic source protection and can hardly be seen as being objective and impartial so as to make the necessary assessment of the various competing interests. Since in the case of *Sanoma Uitgevers B.V. v. the Netherlands* an ex ante guarantee of a review by a judge or independent and impartial body was not in existence, the Grand Chamber was of the opinion that "the quality of the law was deficient in that there was no procedure attended by adequate legal safeguards for the applicant company in order to enable an independent assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources". Emphasizing the importance of the protection of journalistic sources for press freedom in a democratic society, the Grand Chamber of the European Court found a violation of Article 10 of the Convention. The judgment implies that member states of the Convention should build procedural safeguards into their national law in terms of judicial review or other impartial assessment by an independent body based on clear

criteria of subsidiarity and proportionality and prior to any disclosure of information capable of revealing the identity or the origin of journalists' sources.

- [Sanoma Uitgevers B.V. v. the Netherlands \[GC\]](#), no. 38224/03, 14 September 2010.

IRIS 2010-10/2

European Court of Human Rights: Gillberg v. Sweden

Dirk Voorhoof

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The European Court of Human Rights has delivered a judgment in an interesting case with a peculiar mix of issues related to freedom of expression, academic research, medical data, privacy protection and access to official documents. The defendant state is Sweden, a country very familiar with the principle and practice of access to official documents. The right of access to official documents has a history of more than two hundred years in Sweden and is considered one of the cornerstones of Swedish democracy. The case shows how access to official documents, including research documents containing sensitive personal data, can be granted to researchers, albeit under strict conditions. It furthermore demonstrates that Sweden applies effective procedures to implement orders granting access to official documents: those who refuse to grant access to official documents after a court decision has so ordered can be convicted on the basis of criminal law. The case reflects the idea that progress in scientific knowledge would be hindered unduly if the research methodology of a study or scientific data analysis and the conclusions build on the data were not open to scrutiny, discussion and debate, albeit under strict conditions of privacy protection regarding medical data.

In this case, a Swedish professor at the University of Gothenburg, Mr. Gillberg, has been responsible for a long-term research project on hyperactivity of children and attention-deficit disorders. Certain assurances were made to the children's parents and later to the young people themselves concerning the confidentiality of the collected data. According to Mr. Gillberg, the university's ethics committee had made it a precondition for the project that sensitive information about the participants would be accessible only to himself and his staff and he had therefore promised absolute confidentiality to the patients and their parents. The research papers, called the Gothenburg study, were voluminous and consisted of a large number of records, test results, interview replies, questionnaires and video and audio tapes. They contained a very large amount of privacy-sensitive data about the children and their relatives.

Some years later, two other researchers not connected to the University of Gothenburg requested access to the research material. One had no interest in the personal data as such but in the method used and the evidence the researchers had for their conclusions, the other wanted access to the material to keep up with current research. Both requests were refused by the University of Gothenburg, but the two researchers appealed against the decisions. The Administrative Court of Appeal found that the researchers should be granted access to the material, as they had shown a legitimate interest and could be assumed to be well acquainted with the appropriate ways of handling confidential data. It was also considered to be important to the neuropsychiatric debate that the material in question be exposed to independent and critical examination. A list of conditions was set for each of the two researchers, which included restrictions on the use of the material and the prohibition of removing copies from the university premises. Notified by the university's vice-chancellor that the two researchers were entitled to access by virtue of the judgments, first Mr. Gillberg and later the university refused to give access to the researchers. The university decisions were annulled however by two judgments of the Administrative Court of Appeal. A few days later, the research material was destroyed by a few colleagues of Mr. Gillberg.

The Swedish Parliamentary Ombudsman brought criminal proceedings against Mr. Gillberg, who a short time later was convicted of misuse of office. Mr. Gillberg was given a suspended sentence

and a fine of the equivalent of EUR 4,000. The university's vice president and the officials who had destroyed the research material were also convicted. Mr. Gillberg's conviction was upheld by the Court of Appeal and leave to appeal to the Supreme Court was refused. A short time later, Mr. Gillberg lodged an application with the Strasbourg Court of Human Rights. He complained in particular that his criminal conviction breached his rights under Articles 8 (right of privacy, including personal reputation) and 10 (freedom of expression) of the Convention. Mr. Gillberg also complained under Articles 6 (fair trial) and 13 (effective remedy) of the Convention that in the civil proceedings concerning access to the research material he did not have a standing before the Administrative Courts. Several times Mr. Gillberg's requests for relief for substantive defects to the Supreme Administrative Court were refused because he could not be considered a party to the case. As Mr. Gillberg lodged his application before the Court more than six months after these judgments, this part of the application had been submitted too late and was rejected pursuant to Article 35 §§1 and 4 of the Convention. While on the face of it the case raised important ethical issues involving the interests of the children participating in the research, medical research in general and public access to information, the Court considered itself to only be in a position to examine whether Mr. Gillberg's criminal conviction for refusing to execute a court order granting access to official documents was compatible with the Convention. The Court found that the conviction of Mr. Gillberg did not as such concern the university's or the applicant's interest in protecting professional secrecy with clients or the participants in the research. That part was settled by the Administrative Court of Appeal's judgments. For reasons of inadmissibility of the application regarding the judgments of the Administrative Courts, the European Court was prevented from examining any alleged violation of the Convention by these judgments.

Regarding the remaining and hence crucial complaints under Article 8 and 10, Mr. Gillberg emphasised that there had been a promise of confidentiality to the participants in the research, as a precondition for carrying out his research and that the order to grant access to the research material and his conviction for refusing to do so amounted to a violation of his right to private life and his right to negative freedom of expression (the right to refuse to communicate).

The European Court left the question whether there had been an interference with Mr. Gillberg's right to respect for his private life for the purpose of Article 8 open, because even assuming that there had been such an interference, it found that there had been no violation of that provision. According to the Court, Convention States have to ensure in their domestic legal systems that a final binding judicial decision did not remain inoperative to the detriment of one party; the execution of a judgment is an integral part of a trial. The Swedish State therefore had to react to Mr. Gillberg's refusal to execute the judgments granting the two external researchers access to the material. The Court noted Mr. Gillberg's argument that the conviction and sentence were disproportionate to the aim of ensuring the protection of the rights and freedoms of others, because the university's ethics committee had required an absolute promise of confidentiality as a precondition for carrying out his research. However, the two permits by the committee he had submitted to the Court did not constitute evidence of such a requirement. The Swedish courts had moreover found that the assurances of confidentiality given to the participants in the study went further than permitted by the Secrecy Act. As regards Mr. Gillberg's argument that the Swedish courts should have taken into account as a mitigating circumstance the fact that he had attempted to protect the privacy and integrity of the participants in the research, the European Court agreed with the Swedish criminal courts that the question of whether the documents were to be released had been settled in the proceedings before the administrative courts. Whether or not the university considered that they were based on erroneous or insufficient grounds had no significance for the validity of the administrative courts' judgments. It had thus been incumbent

on the university administration to release the documents and Mr. Gillberg had intentionally failed to comply with his obligations as a public official arising from the judgments. The Court therefore did not find that his conviction or sentence was arbitrary or disproportionate to the legitimate aims pursued. It concluded, by five votes to two, that there had been no violation of Article 8 of the Convention.

With regard to the alleged violation of the right to freedom of expression under Article 10 of the Convention, Mr. Gillberg invoked his "negative right" to remain silent. The Court accepted that some professional groups indeed might have a legitimate interest in protecting professional secrecy as regards clients or sources and it even observed that doctors, psychiatrists and researchers may have a similar interest to that of journalists in protecting their sources. However, Mr. Gillberg had been convicted for misuse of office for refusing to make documents available in accordance with the instructions he received from the university administration after a Court decision; he was thus part of the university that had to comply with the judgments of the administrative courts. Moreover, his conviction did not as such concern his own or the university's interest in protecting professional secrecy with clients or the participants in the research. The Court unanimously concluded that there had been no violation of Article 10 of the Convention.

The judgment of the European Court is certainly an eye-opener for many actors in countries of the Council of Europe working in the domain of access to official or administrative documents, academic research, the processing of sensitive personal data and data protection authorities. The jurisprudence of the Swedish courts and of the European Court of Human Rights demonstrates that confidentiality of data used for scientific research and protection of sensitive personal data is to be balanced against the interests and guarantees related to transparency and access to documents of interest for the research society or society as a whole. The concurring opinion of Judge Ann Power, which is annexed to the judgment in the case of *Gillberg v. Sweden*, elaborates the importance of this approach by emphasising that "the public has an obvious interest in the findings and implications of research. Progress in scientific knowledge would be hampered unduly if the methods and evidence used in research were not open to scrutiny, discussion and debate. Thus, the requests for access, in my view, represented important matters of public interest", without however disregarding the principles and values of protection of personal data.

- [Gillberg v. Sweden](#), no. 41723/06, 2 November 2010.

Editor's Note: This case was referred to the Grand Chamber, which returned its judgment on [3 April 2012](#).

IRIS 2011-1/1

European Court of Human Rights: Nur Radyo Ve Televizyon Yayıncılığı A.Ş. v. Turkey

Dirk Voorhoof

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In 2002 the Turkish Broadcasting Authority (Radio ve Televizyon Üst Kurulu - the “RTÜK”) revoked the broadcasting licence of Nur Radyo Ve Televizyon Yayıncılığı A.Ş. (Nur Radyo), a broadcasting company established in Istanbul at that time. In its motivation the RTÜK mainly referred to the fact that, despite six temporary broadcasting bans for programmes that had breached the constitutional principle of secularism or had incited hatred, Nur Radyo had continued to broadcast religious programmes. The RTÜK referred in particular to a programme “along the editorial line of Nur Radyo” that was broadcast on 19 November 2001 - during one of the bans - from Bursa. That concerned a pirate broadcast, transmitted via satellite and terrestrial links. RTÜK held Nur Radyo responsible for it and considered this new violation of the Turkish law as justifying the revocation of its broadcasting licence. In addition, criminal proceedings were initiated against the managers of Nur Radyo, in their personal capacity, on account of the pirate broadcast of 19 November 2001. The managers were acquitted, as the criminal court found that there was insufficient evidence of their presumed responsibility for the broadcasting of the pirated programme. Nur Radyo subsequently sought the review and immediate suspension of the RTÜK’s decision to revoke its broadcasting licence, but was unsuccessful.

Nur Radyo then lodged an application with the European Court of Human Rights, arguing in particular that the revocation of its broadcasting licence had constituted an unjustified interference with its right to freedom of expression, as guaranteed by Article 10 of the European Convention on Human Rights.

The European Court noted that, in essence, the revocation of the licence was a reaction to a pirate broadcast, via satellite and terrestrial links, using a frequency that had not been allocated to the company and that came from Bursa, whereas Nur Radyo’s broadcasting centre was in Istanbul. It further noted that the main reason why the RTÜK had found Nur Radyo to be responsible for that programme was because it reflected its editorial line. However, the criminal court had acquitted the managers of the company for lack of evidence of any responsibility for the pirate broadcast in question. The European Court thus took the view that it had been arbitrary to include the seventh programme in the aggregate assessment of the offences that led to the revocation. It concluded that the additional penalty imposed on Nur Radyo on the basis of offences for which other sanctions had already been imposed was not compatible with the principle of the rule of law. The European Court accordingly found that the breach of the freedom of expression of Nur Radyo had not been necessary in a democratic society and that there had been a violation of Article 10 of the Convention.

- [Nur Radyo Ve Televizyon Yayıncılığı A.Ş. v. Turkey \(no. 2\)](#), no. 42284/05, 12 October 2010.

IRIS 2011-2/1

European Court of Human Rights: MGN Limited v. United Kingdom

Dirk Voorhoof

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Ten years ago, in 2001, the newspaper Daily Mirror published an article on its front page under the title: “Naomi: I am a drug addict”. Another longer article inside the newspaper elaborated on top model Naomi Campbell’s addiction treatment, illustrated by photos taken secretly near the Narcotics Anonymous centre she was attending at the time. As the newspaper continued to publish more articles and new pictures related to her attendance at Narcotics Anonymous, Ms. Campbell sued the Daily Mirror for breach of her privacy. At a final stage of the domestic proceedings, the House of Lords found that the publication of the articles could have been justified as a matter of public interest, as Ms Campbell had previously publicly denied drug use. The publication of the pictures however, in combination with the articles, had breached her right to the respect for her private life. Apart from a modest award of damages of 3500 GBP, the Daily Mirror’s publishing group, MGN, was ordered to pay Ms. Campbell’s legal costs, including the “success fees” agreed between Ms Campbell and her lawyers. The total amount of the legal costs was more than 1 million GBP.

Relying on Article 10 of the European Convention MGN lodged an application with the European Court of Human Rights, complaining that the finding by the British courts that it had breached Ms Campbell’s privacy disregarded the right to freedom of expression. MGN also argued that the requirement to pay disproportionately high success fees amounted to a violation of Article 10 of the Convention. This part of the application was supported by third parties, such as the Open Society Justice Initiative, the Media Legal Defence Initiative, Index on Censorship and Human Rights Watch, all referring to the chilling effect of high costs in defamation proceedings in the United Kingdom on NGOs and small media organisations.

Regarding the breach of privacy, the European Court recalled that a balance had to be struck between the public interest in the publication of the articles and the photographs of Ms Campbell and the need to protect her private life. By six votes to one the Court held that there was no breach of Article 10. The Court agreed with the reasoning of the House of Lords that the public interest had already been satisfied by the publication of the articles, while adding that the photographs was a disproportionate breach of her right to respect for her private life. Therefore, the interference in the right to freedom of expression of the Daily Mirror was considered necessary in a democratic society in order to protect the rights of Ms Campbell.

However, the order to pay the success fees of up to more than 365.000 GBP was considered by the European Court as a disproportionate interference in the right to freedom of expression, having regard to the legitimate aims sought to be achieved. The Court took into consideration that the system of recoverable success fees may have a chilling effect on media reporting and hence on freedom of expression. The Court unanimously found a violation of Article 10 of the Convention.

- [MGN Limited v. the United Kingdom](#), no. 39401/04, 18 January 2011.

IRIS 2011-3/1

European Court of Human Rights: Yleisradio Oy a.o. v. Finland

Dirk Voorhoof

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In 2004 Yleisradio Oy broadcast a current affairs programme focusing on some legal aspects of incest cases in the context of child custody disputes. Genuine cases were used as examples. In one case, A. appeared undisguised and using his own first name. He was introduced as a 55-year old driver from Helsinki and it was further announced that A. had been convicted and sentenced to imprisonment for sexual abuse of his two children, X. and Y., their gender and current age being mentioned. The judgment concerning A.'s conviction for sexual offences had been declared confidential by the Court of Appeal and the case file had also been declared confidential. However, some information included in that file was revealed during the programme and some details about the court proceedings and the conduct of the children's mother were mentioned. Z., the children's mother, filed a criminal complaint and the public prosecutor charged A., the editor and the editor-in-chief on grounds of dissemination of information violating personal privacy and aggravated defamation.

The Supreme Court concluded that it was probable that several persons could have connected A. with X. and Y. on the basis of the information given in the programme and that information had been disseminated violating the personal privacy of X., Y. and Z., although the disclosure of this confidential information had not been based on the need to inform the public. On the contrary, it had been necessary to conceal that information. A. and the two journalists were fined and ordered to pay damages and costs. The broadcasting company and its two journalists complained under Article 10 of the European Convention that the Supreme Court's judgment violated their right to freedom of expression.

Although the European Court was of the opinion that the programme clearly involved an element of general importance and that in such situations any restrictions on freedom of expression should be imposed with particular caution, it noted that the two under-age victims of sexual offences and their mother were private persons and that sensitive information about their lives was revealed on air nationwide. The European Court did not find arbitrary the Finnish Supreme Court's finding that the relevant criminal provision did not, in general, require that the victims be recognised de facto and that, in this particular case, it was probable that several people, even if a very limited group, could have connected the victims to the person interviewed. The Court was satisfied that the reasons relied on by the Supreme Court were relevant and sufficient to show that the interference complained of was "necessary in a democratic society" and that a fair balance between the competing interests was struck. Unanimously, the Court rejected the application by Yleisradio Oy and its editor and editor-in-chief as being manifestly ill-founded. For these reasons the Court unanimously declared the application inadmissible. Hence Article 10 of the Convention was not found to be violated in this case.

- [Yleisradio Oy a.o. v. Finland \(dec.\)](#), no. 30881/09, 12 June 2009.

IRIS 2011-4/1

European Court of Human Rights: Otegi Mondragon v. Spain

Dirk Voorhoof

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In a judgment of 15 March the European Court of Human Rights decided that an elected representative's conviction for causing serious insult to the King of Spain was contrary to his freedom of expression. The case concerns the criminal conviction of a politician of a Basque separatist political party, Mr. Arnaldo Otegi Mondragon, following comments made to the press during an official visit by the King to the province of Biscay. During a press conference Otegi Mondragon, as spokesperson for his parliamentary group, Sozialista Abertzaleak, stated in reply to a journalist's question that the visit of the King to Biscay was a "genuine political disgrace". He said that the King, as "supreme head of the Guardia Civil (police) and of the Spanish armed forces" was the person in command of those who had tortured those detained in a recent police operation against a local newspaper, amongst them the main editors of the newspaper. Otegi Mondragon called the King "he who protects torture and imposes his monarchical regime on our people through torture and violence". Otegi Mondragon was convicted for insult of the King on the basis of Article 490 §3 of the Criminal Code and sentenced to one year's imprisonment and suspension of his right to vote during that period. The Spanish courts categorised the impugned comments as value judgments and not statements of fact, affecting the inner core of the King's dignity, independently of the context in which they had been made. The European Court of Human Rights, however, considers this criminal conviction a violation of Article 10 of the Convention, as Otegi Mondragon's remarks had not been a gratuitous personal attack against the King nor did they concern his private life or his personal honour. While the Court acknowledged that Otegi Mondragon's language could be considered provocative, it reiterated that it was permitted, in the context of a public debate of general interest, to have recourse to a degree of exaggeration, or even provocation. The King being the symbol of the State cannot be shielded from legitimate criticism, as this would amount to an over-protection of Heads of State in a monarchical system. The phrases used by Otegi Mondragon, addressed to journalists during a press conference, concerned solely the King's institutional responsibility as Head of State and a symbol of the State apparatus and of the forces which, according to Otegi Mondragon, had tortured the editors of a local newspaper. The comments in issue had been made in a public and political context that was outside the "essential core of individual dignity" of the King. The European Court further emphasised the particular severity of the sentence. While the determination of sentences was in principle a matter for the national courts, a prison sentence imposed for an offence committed in the area of political discussion was compatible with freedom of expression only in extreme cases, such as hate speech or incitement to violence. Nothing in Otegi Mondragon's case justified such a sentence, which inevitably had a dissuasive effect. Thus, even supposing that the reasons relied upon by the Spanish courts could be accepted as relevant, they were not sufficient to demonstrate that the interference complained of had been "necessary in a democratic society". The applicant's conviction and sentence were thus disproportionate to the aim pursued, in violation of Article 10 of the Convention.

- [Otegi Mondragon v. Spain](#), no. 2034/07, ECHR 2011.

IRIS 2011-5/3

European Court of Human Rights: RTBF v Belgium

Dirk Voorhoof

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In a judgment of 29 March 2011 the European Court found a violation of Article 10 of the European Convention on Human Rights in the case *Radio-télévision belge de la communauté française (RTBF) v Belgium*. The case concerned an interim injunction ordered by an urgent-applications judge against the RTBF, preventing the broadcasting of a programme on medical errors and patients' rights. The injunction prohibited the broadcasting of the programme until a final court decision in a dispute between a doctor named in the programme and the RTBF. As the injunction constituted an interference by the Belgian judicial authorities with the RTBF's freedom of expression, the European Court in the first place had to ascertain whether that interference had a legal basis. Whilst Article 10 does not prohibit prior restraints on broadcasting, such restraints require a particularly strict legal framework, ensuring both tight control over the scope of bans and effective judicial review to prevent any abuse. As news is a perishable commodity, delaying its publication, even for a short period, might deprive it of all its interest. In ascertaining whether the interference at issue had a legal basis, the Court observed that the Belgian Constitution authorised the punishment of offences committed in the exercise of freedom of expression only once they had been committed and not before. Although some provisions of the Belgian Judicial Code permitted in general terms the intervention of the urgent-applications judge, there was a discrepancy in the case law as to the possibility of preventive intervention in freedom of expression cases by that judge. The Belgian law was thus not clear and there was no constant jurisprudence that could have enabled the RTBF to foresee, to a reasonable degree, the possible consequences of the broadcasting of the programme in question. The European Court observed that, without precise and specific regulation of preventive restrictions on freedom of expression, many individuals fearing attacks on them in television programmes - announced in advance - might apply to the urgent-applications judge, who would choose different solutions to their cases and that this would not be conducive to preserving the essence of the freedom of imparting information. Although the European Court considers a different treatment between audiovisual and print media not unacceptable as such, e.g., regarding the licensing of radio and television, it did not agree with the Belgian Court of Cassation decision to refuse to apply the essential constitutional safeguard against censorship of broadcasting. According to the European Court, this differentiation appeared artificial, while there was no clear legal framework to allow prior restraint as a form of censorship on broadcasting. The Court was of the opinion that the legislative framework, together with the case-law of the Belgian courts, did not fulfil the condition of foreseeability required by the Convention. As the interference complained of could not be considered to be prescribed by law, there had thus been a violation of Article 10 of the Convention. The judgment contains an important message to all member states of the European Convention on Human Rights: prior restraints require a particularly strict, precise and specific legal framework, ensuring both tight control over the scope of bans both in print media and in audiovisual media services, combined with an effective judicial review to prevent any abuse by the domestic authorities.

- [RTBF v. Belgium](#), no. 50084/06, ECHR 2011.

IRIS 2011-6/1

European Court of Human Rights: Mosley v. the United Kingdom

Dirk Voorhoof

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In the case *Mosley v. the United Kingdom* the European Court of Human Rights decided that the right of privacy guaranteed by Article 8 of the European Convention on Human Rights does not require the media to give prior notice of intended publications to those who feature in them. The applicant in this case is Max Rufus Mosley, the former president of the International Automobile Federation. In 2008, the Sunday newspaper *News of the World* published on its front page an article entitled “F1 Boss Has Sick Nazi Orgy with 5 Hookers”, while several pages inside the newspaper were also devoted to the story and included still photographs taken from video footage secretly recorded by one of the participants in the sexual activities. An edited extract of the video, in addition to still images, were also published on the newspaper’s website and reproduced elsewhere on the Internet. Mr Mosley brought legal proceedings against the newspaper claiming damages for breach of confidence and invasion of privacy. In addition, he sought an injunction to restrain the *News of the World* from making available on its website the edited video footage. The High Court refused to grant the injunction because the material was no longer private, as it had been published extensively in print and on the Internet. In subsequent privacy proceedings the High Court found that there was no public interest and thus no justification for publishing the litigious article and accompanying images, which had breached Mr. Mosley’s right to privacy. The court ruled that *News of the World* had to pay to Mr. Mosley 60,000 GBP in damages.

Relying on Article 8 (right to private life) and Article 13 (right to an effective remedy) of the European Convention, Mr. Mosley complained that, despite the monetary compensation awarded to him by the courts, he remained a victim of a breach of his privacy as a result of the absence of a legal duty on the part of the *News of the World* to notify him in advance of their intention to publish material concerning him, thus giving him the opportunity to ask a court for an interim injunction and prevent the material’s publication. The European Court found indeed that the publications in question had resulted in a flagrant and unjustified invasion of Mr. Mosley’s private life. The question which remained to be answered was whether a legally binding pre-notification rule was required. The Court recalled that states enjoy a certain margin of appreciation in respect of the measures they put in place to protect people’s right to private life. In the United Kingdom, the right to private life is protected with a number of measures: there is a system of self-regulation of the press; people can claim damages in civil court proceedings; and, if individuals become aware of an intended publication touching upon their private life, they can seek an interim injunction preventing publication of the material. As a pre-notification requirement would inevitably also affect political reporting and serious journalism, the Court stressed that such a measure would require careful scrutiny. In addition, a parliamentary inquiry on privacy issues had been recently held in the UK and the ensuing report had rejected the need for a pre-notification requirement. The Court further noted that Mr. Mosley had not referred to a single jurisdiction in which a pre-notification requirement as such existed nor had he indicated any international legal texts requiring states to adopt such a requirement. Furthermore, as any pre-notification obligation would have to allow for an exception if the public interest were at stake, a newspaper would have to be able to opt not to notify an individual if it believed that it could subsequently defend its decision on the basis of the public interest in the information published. The Court observed in that regard that a narrowly defined public interest exception would increase the chilling effect of any pre-notification duty. Anyway, a newspaper could choose, under

a system in which a pre-notification requirement was applied, to run the risk of declining to notify, preferring instead to pay a subsequent fine. The Court emphasised that any pre-notification requirement would only be as strong as the sanctions imposed for failing to observe it. But at the same time the Court emphasised that particular care had to be taken when examining constraints which might operate as a form of censorship prior to publication. Although punitive fines and criminal sanctions could be effective in encouraging pre-notification, they would have a chilling effect on journalism, including political and investigative reporting, both of which attract a high level of protection under the Convention. Such a scheme would therefore run the risk of being incompatible with the Convention's requirements of freedom of expression, guaranteed by Article 10 of the Convention. Having regard to the chilling effect to which a pre-notification requirement risked giving rise, to the doubts about its effectiveness and to the wide margin of appreciation afforded to the UK in this area, the Court concluded that Article 8 did not require a legally binding pre-notification requirement.

- [Mosley v. the United Kingdom](#), no. 48009/08, 10 May 2011.

IRIS 2011-7/1

European Court of Human Rights: Sigma Radio Television Ltd. v. Cyprus

Dirk Voorhoof

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This case concerns a complaint by a broadcasting company regarding a number of decisions by the Cyprus Radio and Television Authority (CRTA) imposing fines on the company for violations of legislation concerning radio and television programmes in its broadcasts and the alleged unfairness of the related domestic proceedings. The breaches found by the CRTA concerned advertisements for children's toys; the duration of advertising breaks; the placement of sponsors' names during news programmes; product placement in a comedy series; news programmes that lacked objectivity or contained material unsuitable for minors or were disrespectful of crime victims and their relatives; films, series and trailers that contained offensive remarks and inappropriate language or included scenes of violence unsuitable for children; and, in one particular case, racist and discriminatory remarks in an entertainment series.

Sigma RTV alleged substantially that it had been denied a fair hearing before an independent and impartial tribunal, invoking Article 6 of the Convention. In this connection it complained about the proceedings before the CRTA and the judicial review proceedings before the Supreme Court. Sigma RTV's grievance as to the proceedings before the CRTA concentrated on the multiplicity of its functions in prosecuting, investigating, trying and deciding cases and imposing sanctions. In addition, Sigma RTV complained that the members and staff of the CRTA had a direct and personal interest in imposing fines, as the amounts thus collected were deposited in the CRTA's Fund, from which their salaries and/or remuneration were paid.

The European Court notes that a number of uncontested procedural guarantees were available to Sigma RTV in the proceedings before the CRTA: the company was given details of the probable violation or the complaint made against it and the reasoned decisions were arrived at after a hearing had been held, while Sigma RTV was able to make written submissions and/or oral submissions during the hearing. Furthermore, it was open to Sigma RTV to make a wide range of complaints in the context of the judicial review proceedings before the CRTA. Despite the existence of these safeguards, the combination of the different functions of the CRTA and, in particular, the fact that all fines are deposited in its own fund for its own use, gives rise, in the Court's view, to legitimate concerns that the CRTA lacks the necessary structural impartiality to comply with the requirements of Article 6. Nonetheless, the Court reiterates that even where an adjudicatory body, including an administrative one as in the present case, which determines disputes over "civil rights and obligations" does not comply with Article 6 §1 in some respect, no violation of the Convention can be found if the proceedings before that body are "subject to subsequent control by a judicial body that has 'full' jurisdiction and does provide the guarantees of Article 6 §1". Although the Supreme Court could not substitute its own decision for that of the CRTA and its jurisdiction over the facts was limited, it could have annulled the decisions on a number of grounds, including if the decision had been reached on the basis of a misconception of fact or law, if there had been no proper enquiry or a lack of due reasoning, or on procedural grounds. The European Court notes that indeed the Supreme Court examined all the above issues, point by point, without refusing to deal with any of them and that the Supreme Court gave clear reasons for the dismissal of the Sigma RTV's points. The Court came to the conclusion that Sigma RTV's allegations as to shortcomings in the proceedings before the CRTA, including those concerning objective partiality and the breach of the principles of natural justice, were subject to review by the Supreme Court and that the scope of the review of the Supreme Court in the

judicial review proceedings in the present case was sufficient to comply with Article 6 of the Convention.

The Court also dismissed Sigma RTV's complaints regarding the alleged violation of Article 10 of the Convention as all decisions by the CRTA were in accordance with Art. 10 §2, the sanctions and fines being prescribed by law, being proportionate and being pertinently justified on the basis of legitimate aims. These aims, in general, included the protection of consumers and children from unethical advertising practices, the protection of children from broadcasts containing violence or any other material likely to impair their physical, mental or moral development, the importance of ensuring that viewers were informed of the true content of the broadcasts by the use of appropriate acoustic and visual warnings, the protection of pluralism of information, the need for a fair and accurate presentation of facts and events and the protection of the reputation, honour, good name and privacy of persons involved in or affected by the broadcast. The Court found therefore, that the interference with Sigma RTV's exercise of their right to freedom of expression in these cases can reasonably be regarded as having been necessary in a democratic society for the protection of the rights of others. The Court accordingly declared inadmissible, as manifestly ill-founded, Sigma RTV's complaints under Article 10 in respect of the CRTA's decisions. One complaint however received a more thorough analysis on the merits: the complaint regarding the racist and discriminatory content of a fictional series. The Court emphasises that it is particularly conscious of the vital importance of combating racial and gender discrimination in all its forms and manifestations and that the CRTA could not be said in the circumstances to have overstepped its margin of appreciation in view of the profound analysis at the national level, even though the remarks had been made in the context of a fictional entertainment series. Lastly, as to the proportionality of the impugned measure, the Court found, bearing in mind the amount of the fine and the fact that the CRTA, when imposing the fine, took into account the repeated violations by the applicant in other episodes of the same series, that the fine imposed (approximately EUR 3,500) was proportionate to the aim pursued. Accordingly, there has been no violation of Article 10 of the Convention.

Finally the Court also dismissed the complaint regarding the alleged discrimination against Sigma RTV, operating as a private broadcaster under stricter rules, restrictions and monitoring than the national public broadcasting company in Cyprus, CyBC. The European Court was of the opinion that, given the differences in the legal status and the applicable legal frameworks and the different objectives of private stations and the CyBC in the Cypriot broadcasting system, it cannot be said that they are in a comparable position for the purposes of Article 14 of the Convention. The Court found, therefore, that the present case does not indicate discrimination contrary to Article 14 of the Convention.

- [Sigma Radio Television Ltd v. Cyprus](#), nos. 32181/04 and 35122/05, 21 July 2011.

IRIS 2011-8/3

European Court of Human Rights: Sipoș v. Romania

Dirk Voorhoof

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In a remarkable judgment the European Court of Human Rights has come to the conclusion that Romania breached the right of privacy of a journalist when the Romanian courts acquitted the director and the coordinator of the press office of the Romanian Television Company (SRTV) in criminal defamation and insult proceedings.

At the heart of the case lies a press release published by the management of the Romanian State TV channel, after removing the applicant, Ms. Maria Sipoș, from a programme that she produced and presented on the National State channel România 1. Following her replacement as a presenter, Ms. Sipoș made a number of statements to the press alleging that SRTV was engaged in censorship. The broadcaster responded in turn by issuing a press release, explaining that Ms. Sipoș had been replaced due to audience numbers. The press release, quoted by six national newspapers, also made reference to Ms. Sipoș' emotional state due to family problems, it questioned her discernment, referred to allegedly antagonistic relations between her and her colleagues and suggested she was a victim of political manipulation. Ms. Sipoș claimed that SRTV's press release had infringed her right to her reputation, and she brought criminal proceedings before the Bucharest District Court against the channel's director and the coordinator of the SRTV's press office, accusing both of insults and defamation. The Bucharest County Court acknowledged that the press release contained defamatory assertions about Ms. Sipoș, but having regard to the fact that the defendants had not intended to insult or defame her and in view of their good faith, it dismissed Ms. Sipoș' claims.

Before the European Court of Human Rights Ms. Sipoș complained that the Romanian authorities had failed in their obligation, under Article 8 of the Convention, to protect her right to respect for her reputation and private life against the assertions contained in the press release issued by the SRTV. Referring to the positive obligations a State has in securing respect for private life, even in the sphere of relations between private individuals, the European Court clarified that it had to determine whether Romania had struck a fair balance between, on the one hand, the protection of Ms. Sipoș' right to her reputation and to respect for her private life, and on the other, the freedom of expression (Article 10) of those who had issued the impugned press release. For that purpose the Court examined the content of the press release and found, in particular, that the assertions presenting Ms. Sipoș as a victim of political manipulation were devoid of any proven factual basis, since there was no indication that she had acted under the influence of any particular vested interest. As regards the remarks about her emotional state, the Court noted that they were based on elements of her private life whose disclosure did not appear necessary. As to the assessment about Ms. Sipoș' discernment, it could not be regarded as providing an indispensable contribution to the position of the SRTV, as expressed through the press release, since it was based on elements of the applicant's private life known to the SRTV's management. The Court noted that, given the chilling effect of criminal sanctions, a civil action would have been more appropriate, but it concluded nonetheless that the statements had crossed the acceptable limits and that the Romanian courts had failed to strike a fair balance between protecting the right to reputation and freedom of expression. Thus, there had been a violation of Article 8, and Ms. Sipoș was awarded EUR 3,000 in damages.

One dissenting judge, Judge Myer, drew attention to a particular issue in this case. Although the Third Chamber of the Court recognized that criminal sanctions have a chilling effect on speech and that it would have been more appropriate to initiate the civil proceedings available to the applicant, nevertheless the majority of the European Court found that the criminal sanction of the director and press officer of the SRTV was necessary in a democratic society in order to protect Ms. Sipoș' right to her reputation and private life, an approach that contrasts with [Resolution 1577\(2007\) of the Parliamentary Assembly of the Council of Europe](#) urging the decriminalization of defamation and insult.

- [Sipoș v. Romania](#), no. 26125/04, 3 May 2011.

IRIS 2011-9/1

European Court of Human Rights: Karttunen v Finland

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The European Court of Human Rights has delivered a decision regarding the criminalization of the possession, reproduction and public display of child pornography, freely downloaded from the Internet, and its compatibility with freedom of (artistic) expression. The issue before the European Court was whether the conviction of an artist for including child pornography in a work exhibited at an art exhibition violated the right to freedom of expression under Article 10 of the European Convention of Human Rights.

Ms. Ulla Annikki Karttunen is a Finnish artist who exhibited her work “the Virgin-Whore Church” in an art gallery in Helsinki in 2008. The work included hundreds of photographs of teenage girls or otherwise very young women in sexual poses and acts. The pictures had been downloaded from free Internet pages. One day after the opening of the exhibition, the police seized the pictures and the exhibition was closed down. The police also seized Karttunen’s computer and the public prosecutor pressed charges against the artist. The domestic courts convicted the artist of possessing and distributing sexually obscene pictures depicting children under the age of 18, also referring to the finding that some of the pictures were of an extremely violent or degrading nature. Even though the artist’s intention had not been to commit a criminal act but, on the contrary, to criticise easy Internet access to child pornography, the possession and distribution of sexually obscene pictures depicting children were still to be considered criminal acts according to Chapter 17, sections 18/19 of the Finnish Penal Code. Taking into account that Karttunen had intended to provoke general discussion about child pornography and that the crimes were minor and excusable, the Finnish court did not impose any sanctions on the artist. Instead, all the pictures were ordered to be confiscated.

Karttunen complained in Strasbourg under Article 10 of the Convention that her right as an artist to freedom of expression had been violated. She argued that she had incorporated the pornographic pictures into her work in an attempt to encourage discussion and raise awareness of how widespread and easily accessible child pornography was. The European Court noted that the artist’s conviction, even if no sanction was imposed on her, constituted an interference with her right to freedom of expression, as guaranteed by Article 10 Â§ 1 of the Convention. As the interference was prescribed by law and pursued the legitimate aim of protecting morals as well as the reputation or rights of others, within the meaning of Article 10 Â§ 2, it still was to be determined whether the interference in the artist’s freedom of artistic expression was necessary in a democratic society. The European Court considered that the domestic courts had adequately balanced the artist’s freedom of expression with the countervailing interests. The Court referred to the finding by the Finnish courts that the possession and public display of child pornography was still subject to criminal liability, the criminalization of child pornography and the artist’s conviction being mainly based on the need to protect children against sexual abuse, as well as violation of their privacy and on moral considerations. The Court also noted that the domestic courts had acknowledged the artist’s good intentions, by not imposing any sanctions. Having regard as well to the aspect of “morals” involved and to the margin of appreciation afforded to the state in this area, the Court considered that the interference was proportionate to the legitimate aim pursued. Thus, the Court concluded that “it does not follow from the applicant’s claim that her conviction did not, in all the circumstances of the case, respond to a genuine social

need". The Court declared the artist's application manifestly ill-founded and therefore inadmissible.

- [Karttunen v Finland \(dec.\)](#), no. 1685/10, 10 May 2011.

IRIS 2011-10/3

European Court of Human Rights: Avram and other v Moldova

Dirk Voorhoof

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In a judgment of 5 July 2011 the European Court of Human Rights found that five women broadcast on national television in a sauna romp with police officers should have received higher financial compensation for the breach of their privacy. This judgment became final on 5 October 2011.

The applicants in this case are five young women, all friends, who complained about the broadcasting on Moldovan national television of an intimate video footage showing them in a sauna with five men, four of whom were police officers. At the time, three of the applicants were journalists, the first two for the investigative newspaper *Accente*. The women claimed that they first had contact with the police officers when the editor in chief of *Accente* was arrested on charges of corruption and that, from that point on, the officers provided them with material for their articles. One of the applicants had even become romantically involved with one of the officers. The footage was used in a programme on national television about corruption in journalism and notably in the newspaper *Accente*. It showed the applicants, apparently intoxicated, in a sauna in their underwear, with two of them kissing and touching one of the men and one of them performing an erotic dance. The faces of the men were covered in the video, whereas those of the applicants were not. The video was paused from time to time in order to allow the women to be recognized more easily. The applicants alleged in particular that the video had been secretly filmed by the police officers and used to try to blackmail them into not publishing an article on illegalities at the Moldovan Ministry of Internal Affairs. Indeed the video was sent to the National Television Service only after the first two applicants had had the article published in their newspaper.

The five applicants brought civil proceedings both against the Ministry of Internal Affairs, for arranging the secret filming and giving documents of a private nature to national television, and against National Television, for then broadcasting the images of a private nature. They requested compensation for a breach of their right to respect for their private and family life under Article 8 of the European Convention. In August 2008 the Supreme Court of Justice in Moldova gave a final ruling in which it dismissed the complaint against the Ministry of Internal Affairs concerning the secret filming on account of lack of evidence. It held, however, that the Ministry was responsible for handing documents of a private nature concerning Ms. Avram over to the National Television Service and that National Television was then responsible for the broadcasting of the sauna scene, in breach of Article 8 of the Convention. The Supreme Court ordered the National Television Service to pay each applicant EUR 214 and the Ministry of Internal Affairs a further EUR 214 to Ms. Avram, these being the maximum amounts allowed under Article 7/1 of the Moldovan old Civil Code by way of compensation for damage to a person's honour or dignity.

Relying on Article 8 of the Convention (right to respect for private and family life), the applicants complained that the domestic authorities had failed to properly investigate the secret filming in the sauna and that the compensation awarded to them for the broadcasting was not proportionate to the severity of the breach of their right to respect for their private lives. In its judgment, the European Court reiterates that the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which includes, inter alia, the right to establish and develop relationships with other people. It encompasses elements such as sexual life, the

right to live privately and away from publicity and unwanted attention. The Court sees no reason to depart from the conclusion of the national courts, which acknowledged that there had been interference with the applicants' right to privacy in respect of both the secret filming and the broadcasting of the video on television and the defamation. The Court furthermore made clear that a State that awards compensation for a breach of a Convention right cannot content itself with the fact that the amount granted represents the maximum under domestic law. The Court found that the amounts awarded by the Supreme Court of Justice to the applicants were too low to be considered proportionate with the gravity of interference with their right to respect for their private lives, taking into account that the broadcasting of the video on national television had dramatically affected the private, family and social lives of the applicants. There has, accordingly, been a breach of Article 8 of the Convention. In terms of compensation for non-pecuniary damage the Court awarded sums between EUR 4,000 and 6,000 to each of the applicants. The Court also awarded them jointly with a sum of EUR 1,500 for costs and expenses.

- [Avram and Others v. Moldova](#), no. 41588/05, 5 July 2011.

IRIS 2012-1/1

European Court of Human Rights: Standard Verlags GmbH v Austria

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In its first judgment of 2012 related to (journalistic) freedom of expression, the European Court of Human Rights dealt with an interesting application of the right of the media to report on criminal cases in an early stage of investigation. The judgment also focuses in a peculiar way on the notion of a “public figure”. The case concerns an article published by the Austrian newspaper Der Standard, reporting on the enormous speculation losses incurred by a regional bank, Hypo Alpe-Adria. The article reported on the criminal investigation into embezzlement that had been opened by the public prosecutor in respect of the senior management of the bank. It identified some of the persons involved, including Mr Rauscher, the head of the bank’s treasury. Mr Rauscher brought proceedings against the newspaper’s company for disclosing his identity in that article and, as a result, he was awarded EUR 5,000 in compensation. In its judgment the Vienna Court of Appeal found that Mr Rauscher’s interest in the protection of his identity and the presumption of innocence outweighed the newspaper’s interest in disclosing his name.

The Strasbourg Court however, after being requested to evaluate the interference in Der Standard’s freedom of expression under the scope of Article 10 of the Convention, came to another conclusion in balancing the newspaper’s right to freedom of expression against Mr Rauscher’s right to protection of his identity. The European Court agreed with the finding by the Austrian courts that Mr Rauscher, as a senior employee of the bank in issue, was not a “public figure” and that the fact that his father had been a politician did not make him a public figure. The Strasbourg Court also agreed with the assessment that Mr Rauscher had not entered the public arena. However, the Court observed that the question of whether or not a person, whose interests have been violated by reporting in the media, is a public figure is only one element among others to be taken into account in answering the question whether the newspaper was entitled to disclose the name of that person. Another important factor that the Court has frequently stressed when it comes to weighing conflicting interests under Article 10 (freedom of expression) on the one hand and Article 8 (right to privacy) on the other hand is the contribution made by articles or photos in the press to a debate of general interest. The European Court emphasised that the article in Der Standard dealt with the fact that politics and banking are intertwined and reported on the opening of an investigation by the public prosecutor. In this connection the Court reiterated that there is little scope under Article 10 of the Convention for restrictions on political speech or on debates on questions of public interest. It accepted the Vienna Court of Appeal’s finding that the disclosure of a suspect’s identity may be particularly problematic at the early stage of criminal proceedings. However, as the article at issue was not a typical example of court reporting, but focused mainly on the political dimension of the banking scandal at hand, revealing the names of some persons involved, including senior managers of the bank, it was legitimate. The Court considered that, apart from reporting the fact that the public prosecutor had opened an investigation into the bank’s senior management on suspicion of embezzlement, the impugned litigious article did not deal with the conduct or contents of the investigation as such. Instead the focus was on the extent to which politics and banking are intertwined and on the political and economic responsibility for the bank’s enormous losses. In such a context, names, persons and personal relationships are clearly of considerable importance and it is difficult to see how the newspaper could have reported on these issues in a meaningful manner without mentioning the names of all those involved, including Mr Rauscher. The Court therefore considered that the domestic courts had overstepped the narrow margin of

appreciation afforded to them with regard to restrictions on debates on subjects of public interest. It follows that the interference with the newspaper's right to freedom of expression was not "necessary in a democratic society". Consequently, the Court concluded that there had been a violation of Article 10 of the Convention. The Court awarded Standard Verlags GmbH EUR 7,600 for pecuniary damages and EUR 4,500 for costs and expenses.

- [Standard Verlags GmbH v. Austria \(no. 3\)](#), no. 34702/07, 10 January 2012.

IRIS 2012-2/2

European Court of Human Rights: Axel Springer AG v. Germany

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In two judgments of 7 February 2012 the Grand Chamber of the European Court of Human Rights has balanced the right to freedom of expression by the media (Article 10 of the Convention) with celebrities' personality rights and their right of privacy (Article 8 of the Convention). The overall conclusion is that media coverage including pictures of celebrities is acceptable when the media reporting concerns matters of public interest or at least to some degree contributes to a debate of general interest. In the case of *Von Hannover v. Germany* (no. 2), the Court held unanimously that the publication of a picture of Princess Caroline of Monaco illustrating an article about the Principality of Monaco and the refusal by the German Courts to grant an injunction against it, did not amount to a violation of the right of privacy of the Princess. The European Court is of the opinion that the Princess, irrespective of the question to what extent she assumed official functions, is to be regarded as a public person. The article with the picture at issue did not solely serve entertainment purposes and there was nothing to indicate that the photo had been taken surreptitiously or by equivalent secret means such as to render its publication illegal.

The judgment in the case *Axel Springer AG v. Germany* concerns the media coverage by the newspaper *Bild* of the arrest and conviction of a famous TV-actor (X), found in possession of drugs. X had played the part of Police Superintendent as the hero of a popular television series on German TV, reaching between 3,000,000 and 4,700,000 viewers per episode. X brought injunction proceedings against the publishing company of *Bild* because of the publication of two articles, one reporting that X was arrested for possession of cocaine and another, a year later, that he was convicted of the same offence. The German courts granted X's request to prohibit any further publication of the two articles and the photos illustrating these articles. Although these injunctions were prescribed by law and pursued the legitimate aim of protecting the reputation of X, the Grand Chamber of the European Court is of the opinion that the interference by the German judicial authorities cannot be considered necessary in a democratic society. The Court noted that the arrest and conviction of X concerned public judicial facts of which the public has an interest in being informed. It is also emphasized that there was a close link between the popularity of the actor in question and his character as a TV-actor, playing a police superintendent, whose mission was law enforcement and crime prevention. This element increased the public's interest in being informed of X's arrest for a criminal offence. The Court also observed that X was arrested in public, in a tent at the beer festival in Munich. According to the Court there were no sufficiently strong grounds for believing that *Bild* should preserve X's anonymity, having regard to the nature of the offence committed by X, the degree to which X was well-known to the public, the circumstances of his arrest and the veracity of the information in question. Furthermore the articles in *Bild* did not reveal details about X's private life, but mainly concerned the circumstances of and events following his arrest. They contained no disparaging expression or unsubstantiated allegation. The fact that the first article contained certain expressions which, to all intents and purposes, were designed to attract the public's attention cannot in itself raise an issue, according to the Court. Finally the Court finds that the injunction against the articles in *Bild* was capable of having a chilling effect on the applicant company. In conclusion, the grounds advanced by the German authorities, although relevant, are not sufficient to establish that the interference complained of by Springer Verlag AG was necessary in a democratic society. Despite the margin of appreciation enjoyed by Contracting States, the Court considers that there is no reasonable relationship of proportionality between,

on the one hand, the restrictions imposed by the national courts on Bild's right to freedom of expression and, on the other hand, the legitimate aim pursued. Accordingly, there has been a violation of Article 10 of the Convention. Germany is ordered to pay EUR 50,000 in respect of pecuniary damages and costs and expenses to Springer Verlag AG.

Five judges dissented with the finding of a violation of Article 10, mainly arguing that the European Court should have respected a broader margin of appreciation for the German courts. According to the five dissenting judges it is not the task of the Strasbourg Court to act as a "fourth instance to repeat anew assessments duly performed by the domestic courts". The majority of 12 judges of the Grand Chamber however found that the interference in Bild's reporting by the German authorities amounted to a violation of Article 10 of the European Convention, especially taking into account 6 criteria of the media content: the contribution to a debate of general interest, the fact that the reporting concerned a public figure, the subject of the report, the prior conduct of the person concerned, the method of obtaining the information and its veracity, the content, form and consequences of the media content and the severity of the sanction imposed. In essence the European Court found that the injunctions against Bild were capable of having a chilling effect on the applicant's freedom of expression.

- [Axel Springer AG v. Germany \[GC\]](#), no. 39954/08, 7 February 2012.
- [Von Hannover v. Germany \(no. 2\) \[GC\]](#), nos. 40660/08 and 60641/08, ECHR 2012.

IRIS 2012-3/1

European Court of Human Rights: Tuşalp v. Turkey

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On 21 February 2012, the European Court of Human Rights has once again found an unjustified interference with the right to freedom of expression and press freedom by the Turkish authorities. The peculiarity this time is that the Prime Minister, Mr Recep Tayyip Erdoğan, himself lies at the centre of the violation of the European Convention by the Strasbourg Court. In the case *Tuşalp v. Turkey* the European Court was asked to consider whether two defamation actions taken by the Prime Minister of Turkey against a journalist for protection of his personality rights were compatible with Article 10 of the European Convention. The applicant was Erbil Tuşalp, a journalist and author of several books. He criticised in two articles, published in the newspaper *Birgün*, the alleged illegal conduct and corruption of high-ranking politicians, also including the Prime Minister in his commentary. The Prime Minister brought civil actions for compensation against the journalist and the publishing company before the Turkish courts on the ground that certain remarks in the articles constituted an attack on his personality rights. The Turkish courts considered that the remarks made in the articles indeed went beyond the limits of acceptable criticism and belittled the Prime Minister in the public and the political arena. According to the domestic courts, Tuşalp had published allegations of a kind that one cannot make about a Prime Minister, including the second article that had alleged that the Prime Minister had psychological problems and that he had a hostile attitude suggesting he was mentally ill. The journalist and publishing company were ordered to pay TRY 10,000 (EUR 4,300) in compensation.

The European Court of Human Rights however disagreed with the findings of the Turkish courts. The Court considered that the articles concerned comments and views on current events. Both articles focused on very important matters in a democratic society which the public had an interest in being informed about and fell within the scope of political debate. The Court also considered the balance between Tuşalp's interest in conveying his views, and the Prime Minister's interests in having his reputation protected and being protected against personal insult. The European Court considers that, even assuming that the language and expressions used in the two articles in question were provocative and inelegant and certain expressions could legitimately be classed as offensive, they were, however, mostly value judgments. These value judgments were based on particular facts, events or incidents which were already known to the general public, as some of the quotations compiled by Tuşalp for the purposes of the domestic proceedings demonstrate. They therefore had sufficient factual basis. As to the form of the expressions, the Court observes that the author chose to convey his strong criticisms, coloured by his own political opinions and perceptions, by using a satirical style. According to the Court offensive language may fall outside the protection of freedom of expression if it amounts to wanton denigration, for example where the sole intent of the offensive statement is to insult. But the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression as it may well serve merely stylistic purposes. Style constitutes part of communication as a form of expression and is as such protected together with the content of the expression. However, in the instant case, the domestic courts, in their examination of the case, omitted to set the impugned remarks within the context and the form in which they were expressed.

The European Court is of the opinion that various strong remarks contained in the articles in question and particularly those highlighted by the domestic courts could not be construed as a gratuitous personal attack against the Prime Minister. In addition, the Court observes that there

is nothing in the case file to indicate that the applicant's articles have affected the Prime Minister's political career or his professional and private life. The Court comes to the conclusion that the domestic courts failed to establish convincingly any pressing social need for putting the Prime Minister's personality rights above the journalist's rights and the general interest in promoting the freedom of the press where issues of public interest are concerned. The Court therefore considers that in making their decisions the Turkish courts overstepped their margin of appreciation and that they have interfered with the journalist's freedom of expression in a disproportionate way. The amount of compensation which Tuşalp was ordered to pay, together with the publishing company, was significant and such sums could deter others from criticising public officials and limit the free flow of information and ideas. The Court concluded that the Turkish courts had failed to establish any "pressing social need" for putting the Prime Minister's personality rights above the right to freedom of expression and the general interest in promoting press freedom. There had thus been a violation of Article 10.

- [Tuşalp v. Turkey](#), nos. 32131/08 and 41617/08, 21 February 2012.

IRIS 2012-4/1

European Court of Human Rights: Aksu v. Turkey (Grand Chamber)

Dirk Voorhoof

Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

For the facts of this case we refer to IRIS 2010-10/1 in which the Court's [Chamber judgment](#) of 27 July 2010 was reported. In essence Mr. Mustafa Aksu, who is of Roma/Gypsy origin, complained in Strasbourg that two publications financed or supported by the Ministry of Culture in Turkey, had offended him in his Roma identity, under Article 14 (the anti-discrimination provision) in conjunction with Article 8 (right to privacy). The action of Mr. Aksu was directed against a book entitled "The Gypsies of Turkey" and a dictionary entitled "Turkish Dictionary for Pupils", both containing insulting, denigrating or stereotyping statements about Roma. In its judgment of 27 July 2010 the European Court was not persuaded that the author of the book insulted Mr. Aksu's integrity or that the domestic authorities had failed to protect his rights. Regarding the dictionary, the Court observed that the definitions provided therein were prefaced with the comment that the terms were of a metaphorical nature. The European Court found no reason to depart from the domestic courts' findings that Mr. Aksu's integrity was not harmed and that he had not been subjected to discriminatory treatment because of the expressions described in the dictionary. The Court, with the smallest majority, concluded that it could not be said that Mr. Aksu was discriminated against on account of his ethnic identity as a Roma or that there was a failure on the part of the Turkish authorities to take the necessary measures to secure respect for Mr. Aksu's private life (see also IRIS 2010-10/1).

The Grand Chamber has now confirmed that Mr. Aksu's rights under the Convention have not been violated. The Grand Chamber decided not to examine the complaint under the anti-discrimination provision. According to the Court "the case does not concern a difference in treatment, and in particular ethnic discrimination, as the applicant has not succeeded in producing prima facie evidence that the impugned publications had a discriminatory intent or effect. The case is therefore not comparable to other applications previously lodged by members of the Roma community". The main issue in the present case is whether the impugned publications, which allegedly contained racial insults, constituted interference with Mr. Aksu's right to respect for his private life and, if so, whether this interference was compatible with the said right. The Court therefore examined the case under Article 8 of the Convention only, clarifying that the notion of personal autonomy is an important principle and that it can embrace multiple aspects of the person's physical and social identity. The Court accepts that an individual's ethnic identity must be regarded as another such element and that in particular, 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. However, in applying the protection of privacy under Article 8 of the Convention, the Court emphasises that due regard should be given to the requirements of freedom of expression under Article 10 of the Convention.

With regard to the book the Court explains that the Turkish courts attached importance to the fact it had been written by an academic and that it was to be considered as an academic work. It is therefore consistent with the Court's case-law to submit to careful scrutiny any restrictions on the freedom of academics to carry out research and to publish their findings. The Court explains why it is satisfied that in balancing the conflicting fundamental rights under Articles 8 and 10 of the Convention, the Turkish courts made an assessment based on the principles resulting from

the Court's well-established case law. Although no violation of Article 8 was found, the Court nonetheless reiterated that the vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle, both in the relevant regulatory framework and in reaching decisions in particular cases. Therefore it is clear that in a dictionary aimed at pupils, more diligence is required when giving the definitions of expressions which are part of daily language but which might be construed as humiliating or insulting. In the Court's view, it would have been preferable to label such expressions as "pejorative" or "insulting", rather than merely stating that they were metaphorical. According to the Court, States should promote critical thinking among pupils and equip them with the necessary skills to become aware of and react to stereotypes or intolerant elements contained in the material they use. The Court also emphasises that the authorities and Government should pursue their efforts to combat negative stereotyping of the Roma. Finally the Court considers that the domestic authorities did not overstep their margin of appreciation and did not disregard their positive obligation to secure to Mr. Aksu effective respect for his private life. By 16 votes to one the Grand Chamber holds that there hasn't been a violation of Article 8 the Convention.

- [Aksu v. Turkey \[GC\]](#), nos. 4149/04 and 41029/04, ECHR 2012.

IRIS 2012-5/1

European Court of Human Rights: Vejdeland and others v. Sweden

Dirk Voorhoof

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In a judgment of 9 February 2012 the European Court has ruled that Sweden did not violate the right to freedom of expression in a case about ‘hate speech’. The criminal conviction of the applicants for distributing leaflets that contained anti-gay offensive statements was considered necessary in a democratic society in order to protect the rights of homosexuals. It is the first time that the Court applies the principles relating to freedom of expression and ‘hate speech’ in the context of sexual orientation.

In 2004 Mr Vejdeland, together with three other persons, went to an upper secondary school and distributed approximately a hundred leaflets by leaving them in or on the pupils’ lockers. The episode ended when the school’s principal intervened and made them leave the premises. The originator of the leaflets was an organisation called National Youth. Vejdeland and his companions were charged with agitation against a national or ethnic group (hets mot folkgrupp) because of the offensive and denigrating statements toward homosexuals. Vejdeland disputed that the text in the leaflets expressed hatred against homosexuals and he claimed that, in any event, he had not intended to express contempt for homosexuals as a group; the purpose had been to start a debate about the lack of objectivity in the education dispensed in Swedish schools. Vejdeland and his companions were convicted by the District Court, but the Court of Appeal rejected the charges on the ground that a conviction would amount to a violation of their right to freedom of expression as guaranteed by the European Convention on Human Rights. The Swedish Supreme Court finally overruled this judgment and convicted Vejdeland and the others of agitation against a national or ethnic group. According to the Supreme Court the leaflets were formulated in a way that was offensive and disparaging for homosexuals as a group and in violation of the duty under Article 10 to avoid as far as possible statements that are unwarrantably offensive to others thus constituting an assault on their rights, and without contributing to any form of public debate which could help to further mutual understanding. The purpose of the relevant sections in the leaflets could have been achieved without statements that were offensive to homosexuals as a group. Vejdeland and his companions complained that the judgment of the Supreme Court constituted a violation of their freedom of expression as protected by Article 10 of the Convention.

The European Court accepted Vejdeland’s argument that the leaflets had been distributed with the aim of starting a debate about the lack of objectivity of education in Swedish schools. But the Court also agrees with the Swedish Supreme Court that even if this is an acceptable purpose, regard must be paid to the wording of the leaflets. The Strasbourg Court observes that, according to the leaflets, homosexuality was “a deviant sexual proclivity” that had “a morally destructive effect on the substance of society”. The leaflets also alleged that homosexuality was one of the main reasons why HIV and AIDS had gained a foothold and that the “homosexual lobby” tried to play down paedophilia. In the Court’s opinion, although these statements did not directly recommend individuals to commit hateful acts, they are serious and prejudicial allegations. The Court reiterates that inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Indeed, attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner. In this regard, the Court stresses that discrimination based on sexual orientation is as

serious as discrimination based on “race, origin or colour”. Furthermore, the leaflets were left in the lockers of young people who were at an impressionable and sensitive age and who had no possibility to decline to accept them. The European Court refers to the findings by the Supreme Court stressing that along with freedoms and rights people also have obligations and that one such obligation is, as far as possible, to avoid statements that are unwarrantably offensive to others, constituting an assault on their rights. The statements in the leaflets are considered unnecessarily offensive and the applicants had left the leaflets in or on the pupils’ lockers, thereby imposing them on the pupils. The European Court also notes that the applicants were not sentenced to imprisonment, although the crime of which they were convicted carries a penalty of up to two years’ imprisonment. Instead, three of them were given suspended sentences combined with fines ranging from approximately EUR 200 to EUR 2,000, and the fourth applicant was sentenced to probation. The Court does not find these penalties excessive in the circumstances. The conviction of Vejdeland and the other applicants and the sentences imposed on them were not considered disproportionate to the legitimate aim pursued and the reasons given by the Swedish Supreme Court in justification of those measures were relevant and sufficient. The interference with the applicants’ exercise of their right to freedom of expression could therefore reasonably be regarded by the Swedish authorities as necessary in a democratic society for the protection of the reputation and rights of others. These considerations were sufficient to enable the Court to conclude that the application did not reveal a violation of Article 10 of the Convention. Although the Court unanimously came to this conclusion, the concurring opinions of five of the seven judges indicate that there was still some hesitation on the argumentation why there was no violation of Article 10 and why the distribution and content of the leaflets amounted to a form of ‘hate speech’ against homosexuals.

- [Vejdeland v. Sweden](#), no. 1813/07, 9 February 2012.
- Fact sheet produced by the European Court of Human Rights on Hate Speech, February 2012 [**Editor’s note: [link to updated version of fact sheet \(June 2015\)](#)**].

IRIS 2012-5/2

European Court of Human Rights: Gillberg v. Sweden (Grand Chamber)

Dirk Voorhoof

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The Grand Chamber of the European Court has, more firmly than in its [Chamber judgment of 2 November 2010](#) (see IRIS 2011/1-1), confirmed that a Swedish professor, Mr. Gillberg, could not rely on his right to privacy under Article 8, nor on his (negative) right to freedom of expression and information under Article 10 of the Convention to justify his refusal to give access to a set of research materials belonging to Gothenburg University, on request of two other researchers, K and E. Mr. Gillberg was convicted of misuse of office. He was given a suspended sentence and a fine of the equivalent of EUR 4,000. In Strasbourg Mr. Gillberg complained that his criminal conviction breached his rights under Articles 8 and 10.

As to the alleged breach of Article 8 of the Convention, the Court is of the opinion that the conviction of Mr. Gillberg did not affect his right to privacy. The Court confirmed that Article 8 cannot be relied on in order to complain of a loss of reputation that is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence. As there was no indication that the impugned conviction had any repercussions on Mr. Gillberg's professional activities that went beyond the foreseeable consequences of the criminal offence of which he was convicted, his rights under Article 8 had not been affected.

Regarding the alleged breach of Article 10, the Court clarified that in the present case the applicant was not prevented from receiving and imparting information or in any other way prevented from exercising his "positive" right to freedom of expression. Indeed Mr. Gillberg argued that he had a "negative" right to refuse to make the disputed research materials available, and that consequently his conviction was in violation of Article 10 of the Convention. The Court is of the opinion that the finding that Mr. Gillberg would have a right under Article 10 of the Convention to refuse to give access to the research materials in this case would not only run counter to the property rights of the University of Gothenburg, but "it would also impinge on K's and E's rights under Article 10, as granted by the Administrative Court of Appeal, to receive information in the form of access to the public documents concerned".

The Court also rejected the claim by Mr. Gillberg that he could invoke a right similar to that of journalists in having their sources protected under Article 10 of the Convention. The Court is of the opinion that Mr. Gillberg's refusal to comply with the judgments of the Administrative Court of Appeal, by denying K and E access to the research materials, hindered the free exchange of opinions and ideas on the research in question, notably on the evidence and methods used by the researchers in reaching their conclusions, which constituted the main subject of K's and E's interest. In these circumstances the Court found that Mr. Gillberg's situation could not be compared to that of journalists protecting their sources. On these grounds the Grand Chamber reached the conclusion that the rights of Mr. Gillberg under Articles 8 and 10 of the Convention had not been affected and that these rights did not apply in the instant case.

- [Gillberg v. Sweden \[GC\]](#), no. 41723/06, 3 April 2012.

IRIS 2012-6/1

European Court of Human Rights: Frăsilă and Ciocîrlan v. Romania

Dirk Voorhoof

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The case concerns the ineffectiveness of the enforcement of a court decision giving journalists the right of access to the premises of a local radio station where they worked (Radio M Plus). Access to their work premises had been obstructed by the representatives of the broadcasting company Tele M, situated in the same building. In a decision of 6 December 2002 the NeamÅ£ County Court ordered Tele M to grant Frăsilă and Ciocîrlan access to the Radio M Plus editorial office and held that the obstruction of their access by representatives of the Tele M company constituted an unlawful act that might be detrimental to the activities of the radio station of which they were the manager and editor respectively. Several attempts to have the court decision enforced failed, including a criminal complaint against the representatives of Tele M. Relying on Article 10 Frăsilă and Ms Ciocîrlan complained in Strasbourg that the authorities had failed to assist them in securing the enforcement of a final judicial decision ordering third parties to grant them access to the editorial office at the radio station where they worked as journalists.

The Court emphasized that genuine, effective exercise of freedom of expression is a precondition of a functioning democracy. The right to freedom of expression does not depend merely on the State's duty not to interfere but could require positive measures of protection, even in the sphere of relations between individuals. In determining whether the State had a positive obligation in that regard, the Court reiterated that it took into account the nature of the freedom of expression at stake, its capacity to contribute to public debate, the nature and scope of the restrictions imposed on freedom of expression, the existence of alternative means of exercising this freedom and the weight of the competing rights of others or the general public.

Although in this case the authorities did not bear any direct responsibility for the restriction on the applicants' freedom of expression, it was still necessary to determine whether or not the authorities had complied with any positive obligation they might have had to protect freedom of expression from interference by others. The Court observed that the case concerned the practice of a profession that played a crucial "watchdog" role in a democratic society, and that an essential element of freedom of expression, namely the means of exercising it, had therefore been at stake for Frăsilă and Ciocîrlan. The Court reiterated that the State was the ultimate guarantor of pluralism and that this role became even more crucial where the independence of the media was at risk as a result of outside pressure from those holding political and economic power, as it had been reported. As to whether the State had complied with its positive obligation, the Court observed that Frăsilă and Ciocîrlan had taken sufficient steps on their own initiative and made the necessary efforts to secure the enforcement of the court decision, but that the main legal means available to them for achieving this had proved inadequate and ineffective. Accordingly, the Court found that by refraining from taking the necessary measures to assist Frăsilă and Ciocîrlan in the enforcement of the court decision, the national authorities had deprived the provisions of Article 10 of the Convention of all useful effect. There had therefore been a violation of the right to freedom of expression.

- [Frăsilă and Ciocîrlan v. Romania](#), no. 25329/03, 10 May 2012.

IRIS 2012-7/1

European Court of Human Rights: Case Centro Europa 7 S.r.l. and Di Stefano v. Italy

Dirk Voorhoof

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In 2009 Centro Europa 7 complained in Strasbourg that for a period of almost ten years the Italian Government had not allocated it any frequencies for analogue terrestrial television broadcasting, while the company had already obtained a licence for TV broadcasting in 1999. The company submitted that the failure to apply the broadcasting law of 1997, the refusal to enforce the Constitutional Court's judgments imposing the effective allocation of frequencies for new private TV stations and the duopoly existing in the Italian television market (RAI and Mediaset) were in breach of Article 10 of the Convention. In this regard Centro Europa 7 especially referred to the private broadcaster Mediaset - owned by the family of Prime Minister Silvio Berlusconi - being treated preferentially and being the reason for the years-long postponing of making frequencies available to other broadcasting companies.

The Grand Chamber of the European Court of Human Rights reiterates that a situation whereby a powerful economic or political group in society is permitted to obtain a position of dominance over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest, which the public is moreover entitled to receive. It also clarifies that in such a sensitive sector as the audiovisual media, in addition to its negative duty of non-interference the State has a positive obligation to put in place an appropriate legislative and administrative framework in order to guarantee effective pluralism. It recognises that the failure to allocate frequencies to Centro Europa 7 deprived the licence it obtained in 1999 of all practical purpose since the activity it authorised was de facto impossible to carry out for nearly ten years, until June 2009. This substantial obstacle amounted to an interference with Centro Europa 7's exercise of its right to impart information and ideas. According to the European Court this interference was not justified under the scope of Article 10§2 of the Convention as it was not 'prescribed by law'.

The Court indeed finds that the Italian legislative framework until 2009 lacked clarity and precision and did not enable Centro Europa 7 to foresee, with sufficient certainty, the point at which it might be allocated the frequencies and be able to start performing the activity for which it had been granted a licence in 1999, notwithstanding the successive findings of the Constitutional Court and the CJEU that the Italian law and practice was in breach of constitutional provisions and EU law. Furthermore the laws in question were couched in vague terms which did not define with sufficient precision and clarity the scope and duration of the transitional schemes for the allocation of frequencies. The Court also notes that the authorities did not observe the deadlines set in the licence, as resulting from Law no. 249/1997 and the judgments of the Constitutional Court, thereby frustrating Centro Europa 7's expectations. The Italian Government has not shown that the company had effective means at its disposal to compel the authorities to abide by the law and the Constitutional Court's judgments. Accordingly, it was not afforded sufficient guarantees against arbitrariness. For these reasons the Court considers that the legislative framework in Italy at the time did not satisfy the foreseeability requirement under the Convention and deprived the company of the measure of protection against arbitrariness required by the rule of law in a democratic society. This shortcoming resulted, among other things, in reduced competition in the audiovisual sector. It therefore amounted to a failure by the State to

comply with its positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective media pluralism.

These findings were sufficient to conclude that there has been a violation of Centro Europa 7's rights to the freedom to express and impart ideas and information under Article 10 of the Convention. The Court reached the same finding in relation to Article 1 of Protocol No. 1 (right of property) being violated, as the interference with the Centro Europa 7 company's property rights did not have a sufficiently foreseeable legal basis either within the meaning of the Courts case-law.

Centro Europa 7's claim of EUR 10,000,000 in respect of non-pecuniary damage was also awarded. The Court considered it appropriate to award this lump sum in compensation for the losses sustained and the loss of earnings resulting from the impossibility of making use of the licence by Centro Europa 7. In addition, the Court considered that the violations it had found of Article 10 of the Convention and Article 1 of Protocol No. 1 in the instant case must have caused Centro Europa 7 "prolonged uncertainty in the conduct of its business and feelings of helplessness and frustration". The Court also took into account that Centro Europa 7 already has been awarded compensation at domestic level, referring to the judgment of 20 January 2009 of the Consiglio di Stato awarding the company the amount of EUR 1,041,418 in compensation.

- [Centro Europa 7 S.r.l. and Di Stefano v. Italy \[GC\]](#), no. 38433/09, ECHR 2012.

IRIS 2012-7/2

European Court of Human Rights: Mouvement raëlien suisse v. Switzerland

Dirk Voorhoof

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The applicant association is the Swiss branch of the Raëlien Movement, an international association whose members believe life on earth was created by extraterrestrials. The association sought to conduct a poster campaign, but the local authorities refused permission on the grounds of public order and morals. The domestic courts upheld this decision, arguing that although the poster itself was not objectionable, because the Raëlien website address was included, one had to have regard to the documents and content published on that website. The courts held that the poster campaign could be banned on the basis that: (a) there was a link on the website to a company proposing cloning services; (b) the association advocated “geniocracy” i.e. government by those with a higher intelligence; and (c) there had been allegations of sexual offences against some members of the association. Mouvement raëlien made an application to the European Court arguing that the ban on its poster campaign was a violation of its right to freedom of expression under Article 10 of the European Convention. In January 2011, the [First Section of the Court](#) held that there had been no violation of Article 10. In its judgment of 13 July 2012 the Grand Chamber has affirmed this finding, with a 9-8 vote.

The Court reasoned that because the main aim of the poster and website was to merely draw people to the cause of the Raëlien Movement, the speech at issue was to be categorised as somewhere between commercial speech and proselytising speech. The Court takes the view that the type of speech in question is not political because the main aim of the website in question is to draw people to the cause of the applicant association and not to address matters of political debate in Switzerland. The Court clarifies that for this reason the management of public billboards in the context of poster campaigns that are not strictly political may vary from one State to another, or even from one region to another within the same State. The examination by the local authorities of the question whether a poster satisfies certain statutory requirements - for the defence of interests as varied as, for example, the protection of morals, road traffic safety or the preservation of the landscape - thus falls within the margin of appreciation afforded to States, as the authorities have a certain discretion in granting authorisation in this area.

The Court takes the view that the national authorities were reasonably entitled to consider, having regard to all the circumstances of the case, that it was indispensable to ban the campaign in question in order to protect health and morals, to protect the rights of others and to prevent crime. The judgment also comments on the controversial approach of banning the poster mainly on account of the content of the association’s website the poster referred to, while the association remained free to communicate via that same website, the website indeed itself not being prohibited, blocked or prosecuted for illegal content. In the Court’s view, however, such an approach is justified: to limit the scope of the impugned restriction to the display of posters in public places was a way of ensuring the minimum impairment of the applicant association’s rights. The Court reiterates that the authorities are required, when they decide to restrict fundamental rights, to choose the means that cause the least possible prejudice to the rights in question. In view of the fact that the applicant association is able to continue to disseminate its ideas through its website, and through other means at its disposal such as the distribution of leaflets in the street or in letter-boxes, the impugned measure cannot be said to be disproportionate. The majority of the Grand Chamber concluded that the Swiss authorities did not overstep the broad margin of appreciation afforded to them in the present case, and the

reasons given to justify their decisions were “relevant and sufficient” and met a “pressing social need”. Accordingly, there has been no violation of Article 10 of the Convention.

- [Mouvement raëlien suisse v. Switzerland \[GC\]](#), no. 16354/06, ECHR 2012.

IRIS 2012-8/2

European Court of Human Rights: Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland

Dirk Voorhoof

Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

The applicant company, the Swiss Radio and Television Company (SSR) is a radio and television broadcaster based in Zurich. In 2004 it requested permission to have access to the Hindelbank Prison in order to prepare a television interview with A., a prisoner serving a sentence for murder. SSR wished to integrate this interview in the programme “Rundschau”, a weekly programme covering political and economic questions, in a feature concerning the trial of another person who had been accused of murder in the same case. SSR’s request was refused by the prison authorities who referred to the need to maintain peace, order and safety and to ensure equal treatment among prisoners. SSR complained about this refusal, on account of which it was unable to broadcast the planned interview in its “Rundschau” programme. SSR submitted that an interview with A., who had given her consent, was a matter of public interest given that even after her conviction, the case had continued to attract a great deal of media interest. But all appeals before the Swiss courts failed, as it was argued that the entitlement to film in prisons could endanger prisoner rehabilitation and violate the personality rights of prisoners. It was also argued that the organisation and supervision measures required for television filming exceeded what could reasonably be expected of the prison authorities. It was suggested that instead of filming in the prison, an audio recording or a simple interview could suffice, as images of the prisoner were not necessary for the purposes of a thematic report. Relying on Article 10, SSR complained in Strasbourg that it had not been granted permission to film an interview with a prisoner inside a prison. It argued that this refusal amounted to a violation of its right to freedom of expression and information.

The European Court observed that in determining an issue of freedom of expression in the context of a very serious television broadcast devoted to a subject of particular public interest, the Swiss authorities had limited discretion to judge whether or not the ban on filming had met a “pressing social need”. While acknowledging that there had, at the outset, been grounds to justify the ban on filming - in particular with regard to the presumption of innocence of the person who was the subject of the programme and whose trial was imminent and the interests of the proper administration of justice - the Court observed that the grounds for the courts’ refusal had not been relevant or sufficient, either from the point of view of the other prisoners’ rights (privacy and rehabilitation) or from the point of view of maintaining order or security reasons. Furthermore, the Swiss courts had not examined the technical aspects submitted by SSR regarding the limited impact of the filming. As regards the duty of the authorities to protect A., the European Court noted that she had given her full and informed consent to the filming. The Court reiterated lastly, with regard to the alternatives to filming proposed by the Swiss authorities, that since Article 10 also protected the form by which ideas and information were conveyed, it was not for this Court, or for the national courts, to substitute their own views for those of the media as to what technique of reporting should be adopted by journalists. The telephone interview with A. broadcast by SSR in another programme had not in any way remedied the interference caused by the refusal to grant permission to film in prison. While reiterating that the national authorities in principle were better placed than the Court to make decisions concerning access by third parties to a prison, the Court emphasized that in matters of media reporting on issues of public interest, the margin of appreciation of the domestic authorities is reduced and any interference in this context must be convincingly justified on pertinent and

sufficient grounds. The Court concluded that the absolute ban imposed on SSR's filming in the prison did not respond to this condition and had not met a "pressing social need". For that reason, the majority of the Court, with a 5/2 decision (the German and the Swiss judge dissented), came to the conclusion that there has been a violation of Article 10 of the Convention.

- [Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland](#), no. 34124/06, 21 June 2012.

IRIS 2012-8/3

European Court of Human Rights: *Ressiot and Others v. France*

Dirk Voorhoof

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Once again the European Court has emphasised the importance of the protection of journalists' sources, this time in a case concerning searches and seizures carried out at the French sporting daily L'Equipe, the weekly magazine Le Point and at the homes of some of their journalists. This judgment comes only a few months after the judgment of the European Court found a violation of Article 10 of the European Convention by the French authorities for disrespecting the protection of journalists' sources (ECtHR 12 April 2012, [Martin and Others v. France](#), Appl. Nr. 30002/08).

The case *Ressiot and Others v. France* concerns investigations carried out at the premises of L'Equipe and Le Point and at the homes of five journalists accused of breaching the confidentiality of a judicial investigation. Both newspapers had published a series of articles about an ongoing investigation into alleged doping by the Cofidis cycle racing team in the Tour de France, an investigation carried out by the Drugs Squad. The French authorities wanted to identify the source of the leaks the journalists were obviously relying upon. Searches, seizures and telephone tapping were ordered. The five journalists requested that all the material seized and gathered during the searches at the newspapers' offices and at their homes be declared null and void. While some of the investigative measures were considered null and void by the French courts, the seizure and placing under seal of certain materials were considered to be legitimate interferences, not violating the rights of the journalists. The five journalist lodged an application with the European Court of Human Rights, complaining that the investigations into their actions had been carried out in violation of Article 10 of the Convention.

In its judgment the Court reiterates the importance of the protection of journalistic sources as one of the cornerstones of freedom of the press. Without such protection, sources might be deterred from assisting the press in informing the public. As a result, the vital public-watchdog role of the press might be undermined and the ability of the press to provide accurate and reliable information might be adversely affected. The Court accepts that the interference by the French authorities out of concern for the confidentiality of the investigation had been aimed at preventing the disclosure of confidential information, protecting the reputation of others, ensuring the proper conduct of the investigation and therefore protecting the authority and impartiality of the judiciary. According to the Court journalists cannot, in principle, be released from their duty to obey the ordinary criminal law. The Court, however, notes that when the searches were carried out and the telephone calls tapped, the sole aim had been to identify the source of the information published in the newspaper articles, while the right of journalists not to disclose their sources could not be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but was part and parcel of the right to information. In this case there was no overriding social need to justify the interference with the journalists' sources. The means used by the French authorities were not reasonably proportionate to the legitimate aims pursued having regard to the interest of a democratic society in ensuring and maintaining the freedom of the press. Hence the Court, unanimously, comes to the conclusion that there has been a violation of Article 10 of the Convention.

- [Ressiot and Others v. France](#), no. 15054/07 and 15066/07, 28 June 2012.

IRIS 2012-9/2

European Court of Human Rights: Szima v. Hungary

Dirk Voorhoof

Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

The applicant in this case, Ms Judit Szima, was the chairperson of the Tettrekész Police Trade Union. She published a number of writings on the Trade Union's website, which was effectively under her editorial control. In some of these writings she sharply criticized the police management, also referring to outstanding remunerations due to police staff, alleged nepotism and undue political influence in the force, as well as dubious qualifications of senior police staff. In 2010 Szima was convicted for instigation to insubordination. The Military Bench of the Budapest Court of Appeal confirmed her sentence as a fine and demotion. It held that the publication of the posted articles and statements on Tettrekész's website had gone beyond Szima's freedom of expression, given the particularities of the armed body to which she belonged. According to the Hungarian authorities, the views contained in the website articles constituted one-sided criticism whose truthfulness could and should not be proven.

The Strasbourg Court confirms that the accusations by Szima of the senior police management of political bias and agenda, transgressions, unprofessionalism and nepotism were indeed capable of causing insubordination. The Court also observes that "it is true that Szima was barred from submitting evidence in the domestic proceedings - a matter of serious concern - however, in her attacks concerning the activities of police leadership, she failed to relate her offensive value judgments to facts". The Court is of the opinion that Szima "has uttered, repeatedly, critical views about the manner in which police leaders managed the force, and accused them of disrespect of citizens and of serving political interests in general", and that these views "overstepped the mandate of a trade union leader, because they are not at all related to the protection of labour-related interests of trade union members" (§ 31). In view of the margin of appreciation applicable, in order to maintain discipline by sanctioning accusatory opinions that undermine trust in, and the credibility of, the police leadership, the European Court accepts that there was a sufficient "pressing social need" to interfere with Szima's freedom of expression. It also found that the relatively mild sanction imposed on the applicant - demotion and a fine - could not be regarded as disproportionate in the circumstances. By six votes to one, the Court concluded that there has been no violation of Article 10 read in the light of Article 11 of the Convention.

The outcome of the case is somewhat surprising, as the Court firmly took as its starting point that "the members of a trade union must be able to express to their employer their demands by which they seek to improve the situation of workers in their company. A trade union that does not have the possibility of expressing its ideas freely in this connection would indeed be deprived of an essential means of action. Consequently, for the purpose of guaranteeing the meaningful and effective nature of trade union rights, the national authorities must ensure that disproportionate penalties do not dissuade trade union representatives from seeking to express and defend their members' interests" (§ 28).

As the sole dissent, the president of the Chamber, Judge Tulkens, vehemently disagreed with the reasoning of the Court. Tulkens refers to the finding by the Court's majority that Szima's critical remarks had overstepped the mandate of a trade union leader, because some of them were "not at all related to the protection of labour-related interests of trade union members". Tulkens wonders whether the Court itself has not overstepped its mandate by casting this judgment on

the role of a trade union leader and on the “legitimate” scope of trade-union activities. In Tulkens’ view, the majority of the Court dismissed artificially the trade-union dimension of this case and, also neglected the importance of freedom of expression in a democratic society.

- [Szima v. Hungary](#), no. 29723/11, 9 October 2012.

IRIS 2013-1/1

European Court of Human Rights: Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands

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For the third time in a short period, the European Court of Human Rights has found that the Netherlands authorities have disrespected the right of journalists to protect their sources. This time the Court is of the opinion that the telephone tapping and surveillance of two journalists by the Netherlands security and intelligence services (AIVD) lacked a sufficient legal basis as the law did not provide safeguards appropriate to the use of powers of surveillance against journalists with a view to discovering their sources. Also an order to surrender leaked documents belonging to the security and intelligence services is considered as a violation of the journalists' rights as guaranteed by Article 10 of the Convention.

The case concerns the actions taken by the domestic authorities against two journalists of the national daily newspaper De Telegraaf after having published articles about the Netherlands secret service AIVD, suggesting that highly secret information had been leaked to the criminal circuit, and more precisely to the drugs mafia. The journalists were ordered by the National Police International Investigation Department to surrender documents pertaining to the secret services' activities. The two journalists had also been subject to telephone tapping and observation by AIVD agents. Their applications in court regarding these measures failed, at the level of the Regional Court in The Hague as well as at the level of the Supreme Court (Hoge Raad). It was emphasized that the AIVD investigation was intended to make an assessment of the leaked AIVD-files and, within that framework, it was considered necessary and proportionate to use special powers against the journalists in possession of the leaked files. Also the phone tapping was considered to meet the criteria of necessity, proportionality and subsidiarity.

The European Court however disagrees with this approach by the Netherlands' authorities. Referring to its earlier case law regarding the protection of journalists' sources, the European Court reemphasized the necessity of the "ex ante" character of a review by a judge, a court or another independent body, as the police or a public prosecutor cannot be considered to be objective and impartial so as to make the necessary assessment of the various competing interests. The Court applies this approach also in the present case, as the use of special powers of surveillance and telephone tapping against the journalists appeared to have been authorised by the Minister of the Interior, or by an official of the AIVD, without prior review by an independent body with the power to prevent or terminate it. Therefore, the Court finds that the law did not provide safeguards appropriate to the use of powers of surveillance against journalists with a view to discovering their sources. Regarding the second issue, the Court agrees that the order to surrender the leaked documents to the AIVD was prescribed by law, that the lawfulness of that order was assessed by a court and that it also pursued a legitimate aim. The Strasbourg Court however estimates the interference with the right of journalists to protect their sources in casu not necessary in a democratic society, as none of the reasons invoked by the AIVD are considered relevant and sufficient by the European Court.

As a consequence of this judgment, the legal framework and the operational practices of many security and intelligence services in Europe will need to be modified, in order to guarantee the rights of journalists under Article 10 of the Convention. Without guarantees of an ex ante review by a judge or an independent body, surveillance or telephone tapping or other coercive measures

against journalists by security and intelligence services are inevitably to be considered as breaches of the rights of journalists covered by Article 10.

- [Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands](#), no. 39315/06, 22 November 2012.

IRIS 2013-2/2

European Court of Human Rights: Nenkova-Lalova v. Bulgaria

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In a controversial judgment, with a 4/3 decision, the European Court of Human Rights dismissed the claim by a journalist, Ms. Nenkova-Lalova, regarding her dismissal from the Bulgarian public broadcaster BNR. The BNR journalist complained that her disciplinary dismissal, ostensibly on technical grounds regarding the way she had hosted one of her regular weekly radio shows, had in reality been a sanction for the way in which she had exposed corrupt practices during one of her radio shows. In that talk show unpleasant facts were revealed about the then ruling political party. However, as Nenkova-Lalova essentially had breached employment discipline within the meaning of the Bulgarian Labour Code and BNR regulations, the European Court agreed with the findings of the Sofia Court of Appeal and the Bulgarian Supreme Court that there had been no violation of Article 10 of the Convention.

The European Court accepts that Nenkova-Lalova's dismissal did amount to an interference with her rights under Article 10 of the Convention, but the dismissal was justified as it was prescribed by law, it pursued the legitimate aim of protecting the rights of others and was "necessary in a democratic society". The European Court is of the opinion that Nenkova-Lalova's dismissal was based on her wilful disregard of an editorial decision concerning an issue of the internal organisation of the BNR, related to the presentation of a radio show and the journalists (not) participating in it. The Court observes that there had not been any limitations on the topics to be discussed during her show, or on the substantive content or manner of presentation of the information broadcast during the show. Therefore the Court cannot agree with the applicant that her dismissal was intended to prevent the dissemination of information of public interest: her capacity as a journalist "did not automatically entitle her to pursue, unchecked, a policy that ran counter to that outlined by her employer, to flout legitimate editorial decisions taken by the BNR's management and intended to ensure balanced broadcasting on topics of public interest, or to have unlimited access to BNR's air. There is nothing in the facts of the present case to suggest that the decisions of the BNR's management in relation to the applicant's show were taken under pressure from the outside or that the BNR's management was subject to outside interferences". The Court also comes to the conclusion that although it is true that a dismissal by way of disciplinary sanction is a severe measure, it cannot be overlooked that the facts showed that her employer could not trust her to perform her duties in good faith. Insisting that employment relations should be based on mutual trust applies even more when it comes to journalists employed by a public broadcasting organisation. In sum, the Court does not consider that Nenkova-Lalova has established that her dismissal was intended to stifle her freedom to express herself rather than enable the public broadcasting organisation by which she was employed - the BNR - to ensure the requisite discipline in its broadcasts, in line with its "duties and responsibilities" under Article 10 of the Convention. There has therefore been no violation of that provision. The three dissenting judges are of the opinion that the functioning of the BNR and especially the manner in which decisions relevant to the editorial choices of journalists hosting programmes were dealt with, did not offer the necessary safeguards for the rights, activities, performance and independence of the journalists in their relationship with the public employer. They also consider that the act attributed to Nenkova-Lalova taken within this context of a rather unclear division of responsibilities as concerns editorial choices within a given programme does not appear to have been so grave or so far-reaching in its effects as to have irrevocably breached the mutual trust between employer and employee. The opinion that the

Bulgarian authorities have violated Article 10 of the Convention however is not shared by the majority of the Court. Four of the seven judges indeed found that the dismissal of the BNR journalist did not amount to a breach of Article 10.

- [Nenkova-Lalova v. Bulgaria](#), no. 35745/05, 11 December 2012.

IRIS 2013-4/1

European Court of Human Rights: Ahmet Yildirim v Turkey

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The European Court of Human Rights has reinforced the right of individuals to access the internet in a judgment against wholesale blocking of online content. A Turkish PhD student named Ahmet Yildirim claimed before the European Court that he had faced “collateral censorship” when his Google-hosted website was shut down by the Turkish authorities as a result of a judgment by a criminal court order to block access to Google Sites in Turkey. The court injunction was promulgated in order to prevent further access to one particular website hosted by Google, which included content deemed offensive to the memory of Mustafa Kemal Atatürk, the founder of the Turkish Republic. Due to this order Yildirim’s academically-focused website, which was unrelated to the website with the allegedly insulting content regarding the memory of Atatürk, was effectively blocked by the Turkish Telecommunications Directorate (TIB). According to TIB, blocking access to Google Sites was the only technical means of blocking the offending site, as its owner was living outside Turkey. Yildirim’s subsequent attempts to remedy the situation and to regain access to his website hosted by the Google Sites service were unsuccessful.

The European Court is unanimously of the opinion that the decision taken and upheld by the Turkish authorities to block access to Google Sites amounted to a violation of Article 10 of the European Convention on Human Rights and Fundamental Freedoms, guaranteeing the freedom to express, receive and impart information and ideas 'regardless of frontiers'. The Court is of the opinion that the order, in the absence of a strict legal framework, was not prescribed by law. Although the order might have had a legitimate aim, as it was aimed at blocking a website allegedly insulting the memory of Atatürk, the order was not sufficiently based on a strict legal framework regulating the scope of a ban and affording the guarantee of judicial review to prevent possible abuses. The Court clarifies that a restriction on access to a source of information is only compatible with the Convention if a strict legal framework, containing such guarantees, is in place. The judgment further makes clear that the Turkish courts should have had regard to the fact that such a measure would render large amounts of information inaccessible, thus directly affecting the rights of internet users and having a significant collateral effect. It is also observed that the Turkish law had conferred extensive powers to an administrative body, the TIB, in the implementation of a blocking order originally issued in relation to a specified website. Moreover, there was no evidence that Google Sites had been informed that it was hosting content held to be illegal, or that it had refused to comply with an interim measure concerning a site that was the subject of pending criminal proceedings. Furthermore, the criminal court had not made any attempt to weigh up the various interests at stake, in particular by assessing whether it was necessary and proportionate to block all access to Google Sites. The European Court observes that the Turkish law obviously did not require the court to examine whether the wholesale blocking of Google was justified. Such a measure that renders large amounts of information on the internet inaccessible must be considered however to effect directly the rights of Internet users, having a significant collateral damage on their right of access to the Internet. As the effects of the measure have been arbitrary and the judicial review of the blocking of access to internet websites has been insufficient to prevent abuses, the interference with Mr. Yildirim’s rights amounts to a violation of Article 10 of the Convention by the Turkish authorities.

With this judgment the European Court of Human Rights has explicitly reinforced the right of individuals to access the internet, as in its ruling against the wholesale blocking of online

content, it asserted that the internet has now become one of the principal means of exercising the right to freedom of expression and information.

- [Ahmet Yıldırım v. Turkey](#), no. 3111/10, ECHR 2012.
- Fact sheet of December 2012 on the European Court's case law on New Technologies
[Editor's note: [link to updated version of fact sheet](#)].

IRIS 2013-2/1

European Court of Human Rights: Ashby Donald and others v. France

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For the first time in a judgment on the merits, the European Court has clarified that a conviction based on copyright law for illegally reproducing or publicly communicating copyright-protected material can be regarded as an interference with the right of freedom of expression and information under Article 10 of the European Convention. Such interference must be in accordance with the three conditions enshrined in the second paragraph of Article 10 of the Convention. Due to the important wide margin of appreciation available to the national authorities in this particular case, the impact of Article 10 however is very modest and minimal.

All three applicants in this case are fashion photographers. They were convicted in France for copyright infringement following the publication of pictures on the Internet site Viewfinder. The photos were taken at fashion shows in Paris in 2003 and published without the permission of the fashion houses. The three fashion photographers were ordered by the Court of Appeal of Paris to pay fines of between EUR 3,000 and EUR 8,000 and an award of damages to the French design clothing Federation and five fashion houses, amounting in total to EUR 255,000. The photographers were also ordered to pay for the publication of the judgment of the Paris Court of Appeal in three professional newspapers or magazines. In its judgment of 5 February 2008 the Supreme Court (Court de Cassation) dismissed the applicants' argumentation based on Article 10 of the Convention and on Article 122-9° of the Code de la Propriété Intellectuelle (French Copyright Act). The Supreme Court was of the opinion that the Court of Appeal had sufficiently justified its decision, as the applicants could not rely on an exception in French copyright law, allowing the reproduction, representation or public communication of works exclusively for news reporting and information purposes.

In Strasbourg the applicants complained in particular of a breach of their rights under Article 10 of the European Convention. The Court explicitly recognises the applicability of Article 10 in this case, considering the conviction of the applicants and the order to pay damages as an interference with their right to freedom of expression, which also includes the publication of pictures on the internet. The Court, however, is of the opinion that a wide margin of appreciation is to be given to the domestic authorities in this case, as the publication of the pictures of models at a fashion show and the fashion clothing shown on the catwalk in Paris was not related to an issue of general interest to society and concerned a kind of "commercial speech". Furthermore, the member states are considered to be in a position to balance conflicting rights and interests, such as the right of freedom of expression under Article 10 of the Convention with the right of property (including intellectual property), as protected by Article 1 of the First Protocol to the Convention.

The European Court agrees with the French Court's finding that the applicants reproduced and represented the pictures without the authorisation of the copyright holders, hence infringing the rights of the intellectual property of others. The European Court refers to the reasoning by the Paris Court, emphasizing that it saw no reason to consider "that the national judge had overstepped his/her margin of appreciation by giving prevalence to the rights of fashion creators over the right to freedom of expression of the applicants". The European Court does not find the fines and the award of damages disproportionate to the legitimate aim pursued, arguing that the applicants gave no evidence that these sanctions had "financially strangled" them and referring

to the guarantees of a fair trial not being under dispute in this matter. In these circumstances and taking into account the particularly important margin of appreciation of the national authorities, the Court concludes unanimously that there is no violation of Article 10 of the Convention.

- [Ashby Donald and Others v. France](#), no. 36769/08, 10 January 2013.

IRIS 2013-3/1

European Court of Human Rights: Fredrik Neij and Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden

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Only a few weeks after the Strasbourg Court's judgment in the case of [Ashby Donald and others v. France](#) (ECtHR 10 January 2013, see IRIS 2013-3/1), the Court has decided a new case of conflicting rights, opposing copyright as intellectual property right under Article 1 of the First Protocol and freedom of expression guaranteed by Article 10 of the Convention. The case concerned the complaint by two of the co-founders of The Pirate Bay, that their conviction for complicity to commit crimes in violation of copyright law had breached their freedom of expression and information. During 2005 and 2006, Fredrik Neij and Peter Sunde Kolmisoppi were involved in different aspects of one of the world's largest file-sharing services on the Internet, the website The Pirate Bay (TPB). TPB made it possible for users to come into contact with each other through torrent files. The users could then, outside TPB's computers, exchange digital material through file-sharing. In 2008 Neij and Sunde were charged with complicity to commit crimes in violation of the Swedish Copyright Act. Several companies in the entertainment business brought private claims within the criminal proceedings procedure against the defendants and demanded compensation for the illegal use of copyright-protected music, films and computer games. In 2010 Neij and Sunde were convicted and sentenced to prison sentences of ten and eight months respectively, and ordered to pay damages of approximately EUR 5 million. Neij and Sunde complained under Article 10 of the Convention that their right to receive and impart information had been violated when they were convicted for other persons' use of TPB. They also alleged that they could not be held responsible for other people's use of TPB, the initial purpose of which was merely to facilitate the exchange of data on the Internet.

In its decision of 19 February 2013 the European Court affirmed that the applicants have put in place the means for others to impart and receive information within the meaning of Article 10 of the Convention and that consequently the convictions of Neij and Sunde interfered with their right to freedom of expression. Such interference breaches Article 10 unless it was "prescribed by law", pursued one or more of the legitimate aims referred to in Article 10 § 2 and was "necessary in a democratic society" to attain such aim or aims.

That the interference by the Swedish authorities was prescribed by law and pursued the legitimate aim of the protection of rights of others and prevention of crime, was not under discussion. Again the crucial question was whether this interference corresponded to a pressing social need, meeting the test of necessity in a democratic society. The Court argued that the Swedish authorities had a particularly wide margin of appreciation to decide on the matter - especially since the information at stake was not given the same level of protection as political expression and debate - and that their obligation to protect copyright under both the Copyright Act and the Convention had constituted weighty reasons for the restriction of the applicants' freedom of expression. Due to the nature of the information at hand and the balancing interest of conflicting Convention rights, the wide margin of appreciation the national authorities could rely on in this case, was therefore particularly important. The Swedish courts advanced relevant and sufficient reasons to consider that the activities of Neij and Sunde within the commercially run TPB amounted to criminal conduct requiring appropriate punishment. In reaching this conclusion, the European Court had regard to the fact that the domestic courts found that Neij and Sunde had not taken any action to remove the torrent files infringing copyright, despite

having been urged to do so. Instead they had been indifferent to the fact that copyright-protected works had been the subject of file-sharing activities via TPB. Therefore, the Court concluded that the interference with the right to freedom of expression of Neij and Sunde had been necessary in a democratic society. It rejected the application under Article 10 of the Convention as manifestly ill-founded.

- [Fredrik Neij and Peter Sunde Kolmisoppi v. Sweden \(dec.\)](#), no. 40397/12, ECHR 2013.

IRIS 2013-5/2

European Court of Human Rights: *Eon v. France*

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In a Chamber judgment of 14 March 2013 the European Court of Human Rights made clear that the French president should not be overprotected against insulting statements, especially when these statements, with a satirical undertone, have been uttered as part of a public or political debate.

The case concerns the criminal conviction of Hervé Eon, a socialist and anti-GM activist living in Laval, for insulting the President of France, Mr. Sarkozy. In 2008, during a visit to Laval by the President of France, Eon waved a small placard reading “Casse toi pov’con” (“Get lost, you sad prick”), an allusion to a much publicised phrase that the President himself had uttered earlier that year at the International Agricultural Show in response to a farmer who had refused to shake his hand. The phrase had given rise to extensive comment and media coverage and had been widely circulated on the Internet and used as a slogan at demonstrations. Eon was immediately arrested by police and taken to the police station. He was prosecuted by the public prosecutor for insulting the president, an offence punishable under section 26 of the Freedom of the Press Act of 29 July 1881. The court of first instance of Laval found, in particular, that by repeating the phrase in question, Eon had clearly intended to cause offence to the head of State. Eon was fined EUR 30, a penalty that was suspended. The judgment was upheld by the court of appeal of Angers. Subsequently, an appeal to the Supreme Court (Court de Cassation) was dismissed. Eon lodged an application with the European Court of Human Rights, arguing that his conviction for insulting the President of France had infringed his freedom of expression.

While accepting that the phrase in issue, taken literally, was offensive to the French President, the European Court considered that the showing of the placard with the slogan should be examined within the overall context of the case. The European Court emphasized the importance of free discussion of matters of public interest. The Court considered that Eon’s repetition of a phrase uttered earlier by the President had not targeted the latter’s private life or honour; nor had it simply amounted to a gratuitous personal attack against him. Instead, the Court took the view that Eon’s criticisms had been political in nature. There was therefore little scope under Article 10 for restrictions on freedom of expression in the political sphere. The Court reiterated that politicians inevitably and knowingly laid themselves open to close public scrutiny of their words and deeds and consequently had to display a greater degree of tolerance towards criticism directed at them. Furthermore, by echoing an abrupt phrase that had been used by the President himself and had attracted extensive media coverage and widespread public comment, much of it humorous in tone, Eon had chosen to adopt a satirical approach. Since satire was a form of expression and comment that naturally aimed to provoke and agitate, any interference with the right to such expression had to be examined with particular care. The European Court held that criminal penalties for an expression and conduct such as that displayed by Eon were likely to have a chilling effect on satirical contributions to discussion of matters of public interest, such discussion being fundamental to a democratic society. The criminal penalty imposed on Eon, although modest, had thus been disproportionate to the aim pursued and unnecessary in a democratic society. The European Court therefore found a violation of Article 10 of the Convention.

- [Eon v. France](#), no. 26118/10, 14 March 2013.

IRIS 2013-5/1

European Court of Human Rights: Saint-Paul Luxembourg S.A. v. Luxembourg

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Ten years after the finding by the European Court of a violation of Articles 8 (right to respect for private and family life) and 10 (freedom of expression and information) of the European Convention of Human Rights in the case [Roemen and Schmit v. Luxembourg](#) (25 February 2003, IRIS 2003/5-3), the Luxembourg authorities have again been found in breach of these Articles by issuing a search and seizure warrant disrespecting the protection of journalistic sources.

In 2009 a judicial investigation was opened concerning an article in the newspaper Contacto, published by Saint-Paul Luxembourg S.A. The article described the situation of families who had lost the custody of their children. A social worker who was mentioned in the article and his employer, the central social welfare department, had lodged a complaint with the Attorney General, alleging defamation of the social worker in question and also of the judicial and social welfare system in Luxembourg in general. An investigating judge issued a search and seizure warrant of the offices of the publishing house in order to identify the author of the article at issue. A few days later, police officers presented themselves at the premises of the newspaper, with the search warrant. The journalist who had written the article (his name was partly mentioned under the article), was formally identified and he handed over a copy of the newspaper, a notebook and various documents used in preparing the article. During the search one of the police officers also introduced a USB-stick in the computer of the journalist, eventually copying files from that computer. A short time later the applicant company and the journalist applied to the District Court to have the warrant set aside and the search and seizure operation declared null and void, but this claim was rejected. Later the Court of Appeal upheld the warrant.

Relying on Article 8, Saint-Paul Luxembourg S.A. alleged that the search of the newspaper had infringed the inviolability of its “home” and had been disproportionate. Relying on Article 10 it argued that the measure in question had consisted of an attempt to identify the journalist’s sources and had had an intimidating effect. With regard to Article 8 of the Convention, the European Court is of the opinion that the investigating judge could have opted for a less intrusive measure than a search in order to confirm the identity of the article’s author, as it was rather obvious which journalist of Contacto had written the article at issue. As the search and seizure operation was not necessary and had not been reasonably proportionate to the legitimate aims pursued, the European Court held that there had been a violation of Article 8 of the Convention. The Strasbourg Court also considered that the warrant in question had given the police officers access to information that the journalist had not intended for publication and that would have made it possible to identify his sources. The purpose of the warrant had been to search for “and seize any documents or items, irrespective of form or medium, connected with the alleged offences”. Being formulated in such broad terms, the warrant had conferred extensive powers on the investigating officers. The search and seizure operation had been disproportionate in so far as it had enabled the police officers to identify the journalist’s sources and the warrant itself had not been sufficiently limited in scope to avoid the possibility of such abuse. Since the sole purpose of the search had been to ascertain the identity of the journalist who had written the article, a more narrowly-worded warrant would have sufficed. The European Court therefore also found a violation of Article 10 of the Convention.

- [Saint-Paul Luxembourg S.A. v. Luxembourg](#), no. 26419/10, 18 April 2013.

IRIS 2013-6/2

European Court of Human Rights: Animal Defenders International v. the United Kingdom

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The Grand Chamber of the European Court held, by nine votes to eight, that the UK's ban on political advertising on television did not violate Article 10 of the Convention. The majority opinion in this controversial judgment reflects a somewhat particular approach compared to the Court's previous case law on political advertising, such as in *VgT Vereinigung gegen Tierfabriken v. Switzerland* (see [IRIS 2001-7/2](#) and [IRIS 2009-10/2](#)). Essentially the judgment in the case of *Animal Defenders International v. UK* accepts that a total ban on political advertising on television, characterized by a broad definition of the term "political", with no temporal limitations and no room for exceptions, is in accordance with the right to freedom of political expression. The dissenting opinions attached to the judgment argued for a radically different approach, but their arguments could not convince the majority of the Grand Chamber.

The applicant in this case is an NGO (Animal Defenders International, "ADI") campaigning against the use of animals in commerce, science and leisure, seeking to achieve changes in law and public policy and to influence public and parliamentary opinion to that end. In 2005, ADI began a campaign directed against the keeping and exhibition of primates in zoos and circuses and their use in television advertising. As part of the campaign, it wished to screen a TV advertisement with images of a girl in chains in an animal cage followed by a chimpanzee in the same position. It submitted the advert to the Broadcast Advertising Clearance Centre ("the BACC"), for a review of its compliance with relevant laws and codes. The BACC refused to clear the advert, drawing attention to the political nature of ADI's objectives, referring to section 321(2) of the Communications Act 2003, which prohibits advertisements "directed towards a political end". The refusal to broadcast the advert was confirmed by the High Court and later reached the House of Lords, which held that the ban on political advertising and its application in this case did not violate Article 10 of the European Convention. ADI subsequently submitted an application to the European Court, arguing that the refusal of their advert breached Article 10 of the Convention.

In the first part of its reasoning, the Court emphasizes that both ADI and the UK authorities had the same objective of maintaining a free and pluralist debate on matters of public interest, and more generally, of contributing to the democratic process as a legitimate aim. The Court weighed in the balance, on the one hand, ADI's right to impart information and ideas of general interest which the public is entitled to receive, with, on the other hand, the authorities' desire to protect the democratic debate and process from distortion by powerful financial groups with advantageous access to influential media.

The Court had three main considerations in making its assessment: the legislative process by which the ban had been adopted and any review by the judicial authorities; the impact of the ban and any steps that might have been taken to moderate its effect; and, what happens in other countries, particularly those where the Convention applies. As far as the process was concerned, account was taken of the fact that the complex regulatory regime governing political broadcasting in the United Kingdom had been subjected to exacting and pertinent reviews and validated by both parliamentary and judicial bodies. The Court also referred to the influential, immediate and powerful impact of the broadcast media, while there is no evidence that the development of the internet and social media in recent years in the United Kingdom has shifted this influence to the extent that the need for a ban specifically on broadcast media should be

undermined, internet and social media not having “the same synchronicity or impact as broadcasted information”. The Court also noticed that the ban was relaxed in a controlled fashion for political parties - the bodies most centrally part of the democratic process - by providing them with free party political, party election and referendum campaign broadcasts. The European Court agreed with the UK authorities that allowing a less restrictive prohibition could give rise to abuse and arbitrariness, such as wealthy bodies with agendas being fronted by social advocacy groups created for that precise purpose or creating a large number of similar interest groups, thereby accumulating advertising time. Given the complex regulatory background, this form of control could lead to uncertainty, litigation, expense and delay.

As to the impact of the ban, the Court noted that the ban only applied to advertising and that ADI had access to alternative media, both radio and television and also non-broadcast, such as print media, the internet and social media, demonstrations, posters and flyers. Finally, because there is no European consensus on how to regulate paid political advertising in broadcasting, this broadens the margin of appreciation to be accorded to the UK authorities in this case. Accordingly, the majority of the Court considers the reasons adduced by the authorities, to justify the prohibition of ADI’s advertisement to be relevant and sufficient. The prohibition cannot therefore be considered to amount to a disproportionate interference with ADI’s right to freedom of expression. Hence there is no violation of Article 10 of the Convention.

- [Animal Defenders International v. the United Kingdom \[GC\]](#), no. 48876/08, ECHR 2013 (extracts).

IRIS 2013-6/1

European Court of Human Rights: Meltex Ltd v. Armenia

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On 17 June 2008, the European Court of Human Rights delivered a judgment in the case of [Meltex Ltd and Movsesyan v. Armenia](#) (see IRIS 2008-8/1). The Court held that there had been a breach of Article 10 of the Convention as the refusal by the Armenian National Radio and Television Commission (NTRC) to allocate a broadcasting license to Meltex, amounted to an interference with Meltex' freedom to impart information and ideas that did not meet the Convention requirement of lawfulness. The Court noted, in particular, that a procedure that did not require a licensing body to justify or motivate its decisions did not provide adequate protection against arbitrary interference by a public authority with the fundamental right to freedom of expression. In 2009 Meltex complained in Strasbourg that the Armenian authorities had failed to enforce the Court's judgment of 17 June 2008. In particular, relying on the Court's Grand Chamber judgment in the case of [Verein gegen Tierfabriken Schweiz \(VgT\) v. Switzerland \(no. 2\)](#) (see IRIS 2009-10/2), Meltex claimed that the refusal of the Court of Cassation in Armenia to reopen its case constituted a fresh violation of its freedom of expression under Article 10 of the Convention.

In its decision of 21 May 2013, the European Court of Human Rights reiterates that a judgment in which the Court finds a breach of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction. The State must also take the appropriate general or individual measures required to put an end to the violation found by the Court and to redress so far as possible the effects of that violation. Subject to monitoring by the Committee of Ministers, the respondent State however remains free to choose the means by which it will discharge its legal obligations under the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment. The European Court itself does not have jurisdiction to verify whether a State has complied with the obligations imposed on it by one of the Court's judgments. The situation is different however when it concerns a new interference or a new issue. A "new issue" can result from the continuation of the violation that formed the basis of the Court's initial decision, but the determination of the existence of a "new issue" very much depends on the specific circumstances of a given case. In *Meltex Ltd and Movsesyan v. Armenia*, the Committee of Ministers [ended its supervision](#) of the execution of the Court's judgment of 17 June 2008, after the refusal by the Court of Cassation to reopen the proceedings. Although the Committee of Ministers had been informed that the Court of Cassation had dismissed the application to reopen the proceedings, in its resolution the Committee of Ministers declared itself satisfied with the individual and general measures taken by the Republic of Armenia to execute the Court's judgment. That being so, the Court finds that it has no jurisdiction to examine Meltex' complaint as it did not contain a new issue and therefore the application is incompatible *ratione materiae* with the provisions of the Convention. The Court rejected the application under Article 10 of the Convention as manifestly ill-founded.

- [Meltex Ltd. v. Armenia \(dec.\)](#), no. 45199/09, ECHR 2013.

IRIS 2013-7/2

European Court of Human Rights: Youth Initiative for Human Rights v. Serbia

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In its judgment of 25 June 2013, the European Court of Human Rights has recognised more explicitly than ever before the right of access to documents held by public authorities, based on Article 10 of the Convention (right to freedom of expression and information). The judgment also emphasised the importance of NGOs acting in the public interest.

The case concerns an NGO, known as Youth Initiative for Human Rights, that is monitoring the implementation of transitional laws in Serbia with a view to ensuring respect for human rights, democracy and the rule of law. The applicant NGO requested the intelligence agency of Serbia to provide it with some factual information concerning the use of electronic surveillance measures used by that agency in 2005. The agency at first refused the request, relying on the statutory provision applicable to secret information. After an order by the Information Commissioner that the information at issue should be disclosed under the Serbian Freedom of Information Act 2004, the intelligence agency notified the applicant NGO that it did not hold the requested information. Youth Initiative for Human Rights complained in Strasbourg about the refusal to have access to the requested information held by the intelligence agency, notwithstanding a final and binding decision of the Information Commissioner in its favour.

The European Court is of the opinion that as Youth Initiative for Human Rights was obviously involved in the legitimate gathering of information of public interest with the intention of imparting that information to the public and thereby contributing to the public debate, there has been an interference with its right to freedom of expression as guaranteed by Article 10 of the Convention. The Court recalls that the notion of “freedom to receive information” embraces a right of access to information. Although this freedom may be subject to restrictions that can justify certain interferences, the Court emphasises that such restrictions ought to be in accordance with domestic law. The Court is of the opinion that the refusal to provide access to public documents did not meet the criterion as being prescribed by law. It refers to the fact that the intelligence agency indeed informed the applicant NGO that it did not hold the information requested, but for the Court it is obvious that this “response is unpersuasive in view of the nature of that information (the number of people subjected to electronic surveillance by that agency in 2005) and the agency’s initial response”. The Court comes to the conclusion that the “obstinate reluctance of the intelligence agency of Serbia to comply with the order of the Information Commissioner” was in defiance of domestic law and tantamount to arbitrariness, and that accordingly there has been a violation of Article 10 of the Convention. It is interesting to note that the Court reiterates in robust terms that an NGO can play a role as important as that of the press in a democratic society: “when a non-governmental organisation is involved in matters of public interest, such as the present applicant, it is exercising a role as a public watchdog of similar importance to that of the press”. Finally, as a measure under Article 46 of the Convention, the Court ordered the Serbian State to ensure, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the intelligence agency of Serbia to provide the applicant NGO with the information requested.

- [Youth Initiative for Human Rights v. Serbia](#), no. 48135/06, 25 June 2013.

IRIS 2013-8/1

European Court of Human Rights: Nagla v. Latvia

Dirk Voorhoof

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Once again the European Court of Human Rights has found a breach of Article 10 of the Convention in a case of protection of journalistic sources. The Court is of the opinion that the Latvian investigating authorities failed to adequately protect the sources of a journalist of the national television broadcaster Latvijas televīzija (LTV), Ms Nagla. The journalist's home was searched and data storage devices were seized following a broadcast she had aired informing the public of an information leak from the State Revenue Service (Valsts ieņēmumu dienests - VID) database. Almost three months after the broadcast of the programme on LTV, Ms Nagla's home was searched, and a laptop, an external hard drive, a memory card, and four flash drives were seized with the aim of collecting information concerning the data leaks at VID. The search warrant was drawn up by the investigator and authorised by a public prosecutor. Relying on Article 10 of the European Convention, Ms Nagla complained that the search of her home meant that she had been compelled to disclose information that had enabled a journalistic source to be identified, violating her right to receive and impart information.

According to the Court the concept of journalistic "source" refers to "any person who provides information to a journalist", while "information identifying a source" includes, as insofar as they are likely to lead to the identification of a source, both "the factual circumstances of acquiring information from a source by a journalist" and "the unpublished content of the information provided by a source to a journalist". While recognising the importance of securing evidence in criminal proceedings, the Court emphasises that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources. The Court confirms that a search conducted with a view to identifying a journalist's source is a more drastic measure than an order to divulge the source's identity, and it considers that it is even more so in the circumstances of the present case, where the search warrant was drafted in such vague terms as to allow the seizure of "any information" pertaining to the crime under investigation allegedly committed by the journalist's source, irrespective of whether or not his identity had already been known to the investigating authorities. The Court reiterates that limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court. It also emphasises that any search involving the seizure of data storage devices such as laptops, external hard drives, memory cards and flash drives belonging to a journalist raises a question of the journalist's freedom of expression including source protection and that the access to the information contained therein must be protected by sufficient and adequate safeguards against abuse. The scarce motivation of the domestic authorities as to the perishable nature of evidence linked to cybercrimes in general, cannot be considered sufficient in the present case, given the investigating authorities' delay in carrying out the search and the lack of any indication of impending destruction of evidence. The Court finds that the investigating judge failed to establish that the interests of the investigation in securing evidence were sufficient to override the public interest in the protection of the journalist's freedom of expression, including source protection. Because of the lack of relevant and sufficient reasons, the interference with Ms Nagla's freedom to impart and receive information did not correspond to a "pressing social need", hence there was a violation of Article 10 of the Convention.

- [Nagla v. Latvia](#), no. 73469/10, 16 July 2013.

IRIS 2013-8/2

European Court of Human Rights: Węgrzynowski and Smolczewski v. Poland

Dirk Voorhoof

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The European Court of Human Rights (ECHR) has recently clarified the application of freedom of expression when conflicting with personality rights in the environment of online news media and digital archives. The case concerns the complaint by two lawyers that a newspaper article damaging to their reputation - which the Polish courts, in previous libel proceedings, had found to be based on insufficient information and in breach of their rights - remained accessible to the public on the newspaper's website. They complained that the Polish authorities, by refusing to order that the online version of the news article should be removed from the newspaper's website archive, breached their rights to respect for their private life and reputation as protected by Article 8 of the European Convention on Human Rights.

In its judgment, the Court emphasises the potential impact of online media, stating that the Internet is "an information and communication tool particularly distinct from the printed media, especially as regards the capacity to store and transmit information". The Court stresses the substantial contribution made by Internet archives to preserving and making available news and information and it reiterates that news archives "constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free. While the primary function of the press in a democracy is to act as a 'public watchdog', archives have a valuable secondary role in maintaining and making available to the public archives containing news which has previously been reported". According to the Court the internet "is not and potentially never be subject to the same regulations and control" as the traditional media. The Court, however, also recognises that "the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press". Therefore it accepts that the policies governing reproduction of material from the printed media and the Internet may differ, taking also into consideration technology's specific features in order to secure the protection and promotion of the rights and freedoms at issue.

Turning to the particular circumstances of the case, the Court is of the opinion that the newspaper was not obliged to completely remove from its Internet archive the article at issue, as was requested by the two lawyers. The Court firmly states "that it is not the role of judicial authorities to engage in rewriting history by ordering the removal from the public domain of all traces of publications which have in the past been found, by final judicial decisions, to amount to unjustified attacks on individual reputations" and it also refers to the legitimate interest of the public to have access to the public Internet archives of the press, as being protected under Article 10 of the Convention. The Court is of the view that the alleged violations of rights protected under Article 8 of the Convention should be redressed by more adequate remedies available under domestic law and it refers to the observation by the Warsaw Court of Appeal in the present case, that it would have been desirable to add a comment to the article on the website informing the public of the outcome of the civil proceedings in the earlier libel case regarding the printed version of the article. The Court observes that in the proceedings at the domestic level the applicants did not submit a specific request for the information to be rectified by means of the addition of a reference to the earlier judgments in their favour. It follows from the Court's judgment that a rectification or a reference to the judgment in the libel case about the printed version of the article at issue, would have been a pertinent and sufficient interference with the

rights of the newspaper in order to secure in its online archives the effective protection of the applicants' rights. Hence, the Court accepts that the Polish authorities complied with their obligation to strike a balance between the rights guaranteed by Article 10 and Article 8 of the Convention. The requested limitation on freedom of expression for the sake of the applicants' reputation in the circumstances of the present case would have been disproportionate under Article 10 of the Convention. Therefore the Court comes to the conclusion that there has been no violation of Article 8 of the Convention.

- [Węgrzynowski and Smolczewski v. Poland](#), no. 33846/07, 16 July 2013.

IRIS 2013-9/1

European Court of Human Rights: Von Hannover no. 3 v. Germany

Dirk Voorhoof

Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

The European Court of Human Rights has delivered a new judgment regarding a complaint by Princess Caroline von Hannover that the German courts had not sufficiently protected her right to privacy as guaranteed by Article 8 of the Convention, by giving too much weight to the right of the press as guaranteed by Article 5 of the German Constitution and Article 10 of the European Convention (see earlier also [Von Hannover no. 1 v. Germany](#), IRIS 2004-8/2 and [Von Hannover no. 2 v. Germany](#), IRIS 2012-3/1). This time the Princess of Monaco lodged an appeal in Strasbourg relating to the refusal by the German courts to grant an injunction prohibiting any further publication of a photograph of her and her husband. The photograph that was the subject of the litigation was published in the magazine 7 Tage in 2002. It was taken without the Princess' knowledge while on holiday and it illustrated an article about the trend among the very wealthy towards letting out their holiday homes. With reasoning similar to that of Von Hannover no. 2, the European Court could not find a violation of Article 8 of the Convention.

The European Court refers to its judgments in [Axel Springer AG v. Germany](#) and [Von Hannover no. 2 v. Germany](#) (see IRIS 2012-3/1) in which it set forth the relevant criteria for balancing the right to respect for private life (Article 8) against the right to freedom of expression (Article 10). These were: contribution to a debate of general interest; how well-known the person concerned was; the subject of the report; the prior conduct of the person concerned; the content, form and consequences of the publication; and, in the case of photographs, the circumstances in which they were taken. The Court refers to the findings by the German courts that, while the photograph in question had not contributed to a debate of general interest, the article with the litigious picture, however, reported on the current trend among celebrities towards letting out their holiday homes, which constituted an event of general interest. The article did not contain particular information concerning the private life of the Princess, as it focused on practical aspects relating to the Von Hannover's villa and its letting. The Court also referred to the fact that the Princess and her husband were to be regarded as public figures who could not claim protection of their private lives in the same way as individuals unknown to the public. The European Court concluded that the German courts had not failed to comply with their positive obligations to protect the right of privacy in its confrontation with the freedom of press. Therefore there had been no violation of Article 8 of the Convention.

- [Von Hannover v. Germany \(no. 3\)](#), no. 8772/10, 19 September 2013.

IRIS 2013-10

European Court of Human Rights: **Belpietro v. Italy**

Dirk Voorhoof

Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

The European Court of Human Rights has delivered a new judgment against Italy for interfering with the freedom of expression and public statements related to the “war” between judges, prosecutors and the police in the context of combating the Mafia (see also [Perna v. Italy \(GC\)](#), see IRIS 2003-8/2). The judgment reflects a tension between the freedom of parliamentary speech on the one hand, and the restrictions and obligations on the media reproducing or publishing statements by politicians covered by their parliamentary immunity on the other hand (see also [Cordova no.1 and no.2 v. Italy](#), see IRIS 2003-7/2).

The applicant in this case is Maurizio Belpietro, who at the relevant time was editor of the national daily newspaper *Il Giornale*. In court in Strasbourg he complained about his conviction for defamation after publishing an article by an Italian Senator, R.I. The article by the Senator was a robust opinion piece analysing the lack of results in combating the Mafia in Palermo. The Senator more particularly criticised the Italian judiciary and especially accused some members of the public prosecutors’ office in Palermo of using political strategies in their fight against the Mafia. Two prosecutors, Guido Lo Forte and Giancarlo Gaselli considered some of the allegations in the Senator’s article as damaging to their professional and personal reputations. They lodged a complaint for defamation against Senator R.I. and Belpietro. Regarding the liability of the editor of *Il Giornale*, the prosecutors relied on Article 57 of the Criminal Code, making the editor or assistant editor of a newspaper responsible for lack of control when publishing defamatory statements without a sufficient factual basis.

Separate proceedings were brought against Senator R.I. which ended in 2007 with a finding that there was no case to answer, on the grounds that the Senator had expressed his views in his capacity as a member of the Senate, and was thus shielded by his parliamentary immunity based on Article 68§1 of the Italian Constitution. The Senate accepted that the statements published by Senator R.I. were related to the exercise of his parliamentary functions. Belpietro however was sentenced to a suspended term of four months’ imprisonment and he was ordered to pay substantial sums to each of the civil parties, adding to a total amount of EUR 110,000. The Court of Appeal of Milan considered some of the allegations against the members of the judiciary as defamatory of Lo Forte and Caselli.

Belpietro made an application to the Strasbourg Court, alleging that his conviction for defamation had amounted to a violation of his freedom of expression guaranteed by Article 10 of the Convention. After reiterating extensively the general principles of its relevant case law on the issue, including the balance that has to be found between the prosecutors’ right to his reputation based on Article 8 and the newspaper editor’s right to freedom of expression based on Article 10, the European Court is of the opinion that the Italian authorities did not breach Article 10 in finding Belpietro liable for publishing the defamatory article of Senator R.I. Although the Court recognises that the article concerned an issue of importance to society that the public had the right to be informed about, it emphasises that some of the allegations against Lo Forte and Caselli were very serious, without sufficient objective basis. Furthermore, the Court refers to the obligation of an editor of a newspaper to control what is published, in order to prevent the publication of defamatory articles in particular. This duty does not disappear when it concerns an article written by a member of parliament, as otherwise, according to the Court, this would

amount to an absolute freedom of the press to publish any statement of members of parliament in the exercise of their parliamentary mandate, regardless of its defamatory or insulting character. The Court also refers to the fact that Senator R.I. had already been convicted in the past for defamation of public officials and to the fact that the newspaper had given a prominent place to the Senator's article in the newspaper. However, as the Court considers the sanction of imprisonment and the high award of damages as disproportionate to the aim pursued, it comes to the conclusion that solely for that reason the interference by the Italian authorities amounted to a breach of Article 10 of the Convention. The Court especially draws attention to the fact that a sentence of imprisonment (even if suspended) can have a significant chilling effect and that the conviction was essentially because of not having executed sufficient control before publishing a defamatory article. Therefore there were no exceptional circumstances justifying such a severe sanction. A unanimous Court concludes that Italy has violated Article 10 of the Convention, awarding Belpietro just satisfaction in terms of EUR 10,000 non-pecuniary damage and EUR 5,000 for costs and expenses.

- [Belpietro v. Italy](#), no. 43612/10, 24 September 2013.

IRIS 2013-10/1

European Court of Human Rights: Ricci v. Italy

Dirk Voorhoof

Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

In its judgment in the case of Ricci v. Italy the European Court of Human Rights found that the suspended prison sentence of a TV presenter for disclosing confidential images violated Article 10 of the Convention. The Court is of the opinion that the nature and severity of the prison sentence constituted a disproportionate interference with the applicant's right to freedom of expression. The Court's judgment confirms that prison sentences for defamation of public persons or for making confidential information public, in principle amount to a breach of Article 10 of the Convention (see also ECtHR (GC) 17 December 2004, [Cumpănă and Mazăre v. Romania](#), IRIS 2005-2/4 and ECtHR 24 September 2013, [Belpietro v. Italy](#), IRIS 2013-10/1).

The case of Ricci v. Italy concerns a broadcast of the satirical television programme *Striscia la notizia* on Canale 5, of which Antonio Ricci is the producer and presenter. The programme contained intercepted images of a row between a writer and Gianni Vattimo, a philosopher, during the recording of a programme to be broadcast on RAI. Because Vattimo had not signed a document allowing it to be broadcast on RAI, the pieces of footage used were considered as confidential internal data. However Ricci had obtained access to the footage and he integrated them into a programme on Canale 5, meant to illustrate that the nature of television aimed at creating entertainment rather than informing the public. The RAI lodged a criminal complaint for fraudulent interception and disclosure of confidential communications by Ricci, in breach of Article 617 quater of the Criminal Code. Vattimo also joined the proceedings as a civil party. Ricci was ordered to pay the RAI and Vattimo damages and he was given a suspended prison sentence of four months and five days. However, the Court of Cassation declared the offence time-barred and quashed the Court of Appeal's judgment without remitting it. It upheld the order that Ricci was to compensate the civil parties and to pay RAI's legal costs. The civil courts later ordered Ricci to pay EUR 30,000 damages to Vattimo.

Although the European Court agrees with the Italian judicial authorities that Ricci's programme had breached Article 617 quater of the Criminal Code, it clarifies that the protection of the confidentiality of communications in a data-transmission system had to be balanced against the exercise of freedom of expression. As in many other recent cases, the Court applies a balancing test between the right to privacy protected by Article 8 of the Convention (protection of confidential communication and reputation rights) and the right to freedom of expression guaranteed by Article 10. This balancing test leaves a broad margin of appreciation to national authorities, but nevertheless a set of criteria needs to be taken into consideration. The Court accepted Ricci's argument that the broadcast footage concerned a subject of general interest, namely the denunciation of the "real nature" of television in modern society. However other means were available to Ricci to broadcast this message, without involving any breach of the confidentiality of communications. According to the Court the programme was also aimed at ridiculing and stigmatising some individuals. Furthermore Ricci, as a media professional, could not have been unaware that disclosing the footage amounted to a breach of the confidentiality of RAI's communications. Accordingly, Ricci had not acted in accordance with the ethics of journalism. Therefore his conviction had not constituted, in itself, a violation of Article 10. Because of the nature and severity of the sanctions imposed on Ricci, however, the Court is of the opinion that the interference by the Italian authorities was disproportionate, referring to Ricci's sentence of imprisonment for four months and five days. Even though it had been a

suspended sentence, which was later annulled by the Court of Cassation, that conviction must have had a significant chilling effect, while there were no exceptional circumstances justifying recourse to such a harsh sanction. Consequently, on account of the nature and quantum of the sentence imposed on Ricci, the Court comes to the conclusion that the interference with his right to freedom of expression was not proportionate to the legitimate aims pursued. The Court for that reason finds a violation of Article 10 of the Convention.

- [Ricci v. Italy](#), no. 30210/06, 8 October 2013.

IRIS 2014-1/1

European Court of Human Rights: Delfi AS v. Estonia

Dirk Voorhoof

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On 10 October 2013, the European Court of Human Rights found that one of Estonia's largest news portals on the Internet, Delfi, is not exempt from liability for grossly insulting remarks in its readers' online comments. The news portal was found liable for violating the personality rights of the plaintiff (a captain of industry), although it had expeditiously removed the grossly offending comments posted on its website as soon as it had been informed of their insulting character. The European Court, in a unanimous decision, found no violation of Article 10 ECHR.

The European Court accepted the Estonian authorities' approach that Delfi's news portal is to be considered as a publisher, rather than as an internet service provider (ISP). The consequence is that, as a publisher, Delfi could not rely on the specific provisions of the Directive 2001/31/EC on Electronic Commerce (Art. 14-15) and the Estonian Information Society Services Act (Sections 10-11) exempting internet service providers, including host-providers, from liability in cases where they expeditiously remove or disable access to content emanating from third parties, as soon as they obtain knowledge or become aware of the illegal nature of the information. The E-Commerce Directive and the Estonian Act also guarantee that no general obligation to monitor should be imposed on the internet service providers, nor a general obligation to seek facts or circumstances indicating illegal activity. The general principle is indeed that expeditious removal upon (notified) knowledge of illegal content exempts the ISP from liability. The reason why Delfi could not rely on the ISP liability exemption is that the news portal had integrated the readers' comments into its news portal and that it had invited the users to post comments, having also an economic interest in exploiting its news platform with the integrated comment environment. Because Delfi was considered a provider of content services, rather than a provider of technical services, it should have effectively prevented clearly unlawful comments from being published. The European Court did not challenge this finding by the Estonian courts, restricting its supervisory role to ascertaining whether the effects of the non-treating of Delfi as an ISP were compatible with Article 10 of the Convention.

The Court found that the interference with Delfi's right to freedom of expression was prescribed by law and was necessary in a democratic society to protect the rights of others. This finding was based on a set of arguments. The Court considered that Delfi should have anticipated that the users' comments could go beyond the boundaries of acceptable criticism and that therefore it should have taken steps in order to avoid being held liable for an infringement of other persons' reputations. Next, the Court is of the opinion that the word-based technical filter that was installed to delete vulgarities, threats or obscene expressions, was shown to be insufficient. Also the notice-and-take-down facility according to which anyone, by simply clicking on a button designed for that purpose, could notify inappropriate comments to the administrators of the portal, had not prevented the grossly insulting comments from being published on the platform. The Court is of the opinion that Delfi exercised a substantial degree of control over the comments published on its portal, although it did not make as much use of this possibility as it could have done. As Delfi allowed comments by non-registered users, and as it would appear disproportionate to put the onus of identifying authors of the offensive comments on the injured person, the Court is of the opinion that Delfi must be considered to have assumed a certain degree of responsibility for these comments and that it should have prevented defamatory or insulting statements from being made public. The Court refers to the danger that information

once made public on the internet will remain and circulate forever. Finally the Court noted that Delfi was ordered to pay EUR 320 in non-pecuniary damages, being by no means a disproportionate sanction for a professional media platform such as Delfi. Based on these elements and “in particular the insulting and threatening nature of the comments” the Court came to the conclusion that the Estonian courts’ finding that Delfi was liable for the defamatory comments posted by readers on its Internet news portal was a justified and proportionate interference with Delfi’s right to freedom of expression.

- [Delfi AS v. Estonia](#), no. 64569/09, 10 October 2013.

Editor’s note: This case was **referred** to the Grand Chamber, which returned its judgment on [16 June 2015](#).

IRIS 2014-1/2

European Court of Human Rights: Ristamäki and Korvola v. Finland

Dirk Voorhoof

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In 2008 Juha Arvo Mikael Ristamäki and Ari Jukka Korvola were convicted of defamation. Ristamäki is an editor working in the news service of a national Finnish broadcaster, while Korvola was his direct superior at the time. The reason for the conviction of the two journalists was the broadcast of a current affairs programme criticising the lack of co-operation between the authorities concerning a specific investigation into economic crime. It was revealed that the tax authorities had refused the request of the National Bureau of Investigation to conduct a tax inspection of the functioning of two companies. Reference was made in that connection to K.U., a well-known Finnish businessman who, at the time, was standing trial for economic offences. The public prosecutor initiated criminal proceedings against Ristamäki and Korvola. He maintained that Ristamäki, by editing the programme, and Korvola by allowing its broadcast, had intentionally made false insinuations about K.U. such that their conduct had been conducive to causing suffering to the latter, subjecting him to contempt and causing him damage. The Helsinki District Court convicted Ristamäki and Korvola of defamation pursuant to Chapter 24, section 9, subsection 1, point 1, of the Penal Code. They were sentenced to 30 day-fines each, amounting to approximately EUR 2,000 and they were ordered to pay K.U. EUR 1,800 for suffering and EUR 1,500 in legal costs. The Court of Appeal and later the Supreme Court dismissed the appeals by the journalists.

The European Court disagrees with the findings of the Finnish courts. The Court refers to its reasoning in [Axel Springer AG](#) and [Von Hannover no. 2](#) (see IRIS 2012-3/1) and to the relevant criteria to be applied when balancing the protection of one's reputation (Article 8) with the freedom of expression (Article 10). The Court emphasises that the TV programme was clearly aimed at disclosing a malfunctioning of the administration in two specific cases that both involved influential persons. Both of these persons, including K.U., were mentioned in the programme rather as examples, as the major part of the programme focused on the tax authorities. The unsuccessful criminal investigation of economic crime, and the unwillingness of the tax authorities to contribute to this investigation, was a matter of legitimate public interest. The facts set out in the programme at issue were not in dispute and they were presented in an objective manner, in a non-provocative style and without exaggeration. There is no evidence, or indeed any allegation, of factual misrepresentation or bad faith on the part of the journalists. Neither are there any indications that details of the programme or the photograph of K.U. were obtained by subterfuge or other illicit means: the programme was based on information given by the police authorities and K.U.'s photograph was taken at a public event. From the point of view of the general public's right to receive information about matters of public interest, and thus from the standpoint of the media, there were justified grounds for reporting the matter to the public. The Court observes that the domestic courts did not, in their analysis, attach any importance to the journalists' right to freedom of expression, nor did they balance it in any considered way against K.U.'s right to reputation. It is not clear in the reasoning of the domestic courts what pressing social need in the present case justified protecting K.U.'s rights over the rights of the journalists. In the Court's opinion the reasons relied on by the domestic courts, although relevant, were not sufficient to show that the interference complained of was "necessary in a democratic society". Having regard to all the factors of the case, and notwithstanding the margin of appreciation afforded to the State in this area, the Court considers

that the Finnish courts failed to strike a fair balance between the competing interests at stake. There has therefore been a violation of Article 10 of the Convention.

- [Ristamäki and Korvola v. Finland](#), no. 66456/09, 29 October 2013.

IRIS 2014-1/3

European Court of Human Rights: Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria

Dirk Voorhoof

Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

In a new judgment on the right of access to public documents, the Strasbourg Court has further clarified and expanded the scope of the application of Article 10 of the Convention. The applicant in this case is an NGO, the Austrian association for the preservation, strengthening and creation of an economically sound agricultural and forestry land ownership (OVESSG). In 2005 the association twice requested the Tyrol Real Property Transaction Commission, which is responsible for approving agricultural and forest land transactions, to provide OVESSG with the decisions the Commission had issued over a certain period of time, eventually in an anonymised form. OVESSG indicated that it would reimburse the resulting costs. However, the association's requests were refused on the ground that they did not fall within the scope of the Tyrol Access to Information Act. Moreover, even if the request did fall within its scope, pursuant to the Act an authority did not have the duty to provide the requested information if doing so would require so much resources that its functioning would be affected and would jeopardise the fulfilment of the Commission's other tasks. The association's complaints to the Administrative Court and the Constitutional Court were rejected. OVESSG then complained in Strasbourg that its right to receive information, guaranteed by Article 10 of the Convention, had been violated.

The Court considers that the refusal to give OVESSG access to the requested documents amounted to an interference with its rights under Article 10, as the association was involved in the legitimate gathering of information of public interest with the aim of contributing to public debate. As it was accepted that the refusal was prescribed by law, based on the Tyrol Access to Information Act, and that it pursued the legitimate aim of the protection of the rights of others, the Court had next to decide whether the refusal to grant access to the documents was justified, which means, in the terms of Article 10§ 2, being necessary in a democratic society. The Court refers to the development in its case law regarding Article 10 and access to information. It recalls that it has held that the right to receive information cannot be construed as imposing on a State positive obligations to collect and disseminate information of its own motion. However, the Court noted that it had recently advanced towards a broader interpretation of the notion of the freedom to receive information and thereby towards the recognition of a right of access to information. The Court also refers to its case-law stating that the most careful scrutiny was called for when authorities enjoying an information monopoly interfered with the exercise of the function of a social watchdog (see [Társaság a Szabadságjogokért v. Hungary](#), (IRIS 2009-7/1) and [Youth Initiative for Human Rights v. Serbia](#), (IRIS 2013-8/1)).

The Court finds that the Tyrol Real Property Transaction Commission had not given sufficient reasons to justify its refusal to grant OVESSG access to the requested documents. The European Court observes that in contrast with similar authorities in other regions in Austria, the Tyrol regional authority had chosen not to publish its decisions and thus, by its own choice, held an information monopoly. The unconditional refusal by the Tyrol Real Property Transaction Commission thus made it impossible for OVESSG to carry out its research in respect of one of the nine Austrian Länder, namely Tyrol, and to participate in a meaningful manner in the legislative process concerning amendments to real property transaction law in Tyrol. The Court therefore concludes that the interference with the applicant association's right to freedom of expression

and information cannot be regarded as having been necessary in a democratic society. In a 6-1 vote it found a violation of Article 10 of the Convention.

- [*Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria*](#), no. 39534/07, 28 November 2013.

IRIS 2014-2/2

European Court of Human Rights: Perinçek v. Switzerland

Dirk Voorhoof

Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

On 17 December 2013, the European Court of Human Rights ruled by five votes to two, that Switzerland violated the right to freedom of expression by convicting Doğu Perinçek, chairman of the Turkish Workers' Party, of publicly denying the existence of the genocide against the Armenian people. On several occasions, Perinçek had described the Armenian genocide as "an international lie". The Swiss Courts found Perinçek guilty of racial discrimination within the meaning of Article 261bis of the Swiss Criminal Code. This Article punishes inter alia the denial, gross minimisation or attempt at justification of a genocide or crimes against humanity, publicly expressed with the aim of lowering or discriminating against a person or a group of persons by reference to race, ethnic background or religion in a way that affects the human dignity of the person or group of persons concerned. According to the Swiss Courts, the Armenian genocide, like the Jewish genocide, was a proven historical fact, recognised by the Swiss Parliament, while Perinçek's motives in denying this historical fact were of a racist tendency and did not contribute to the historical debate. Relying on Article 10 of the European Convention, Perinçek complained before the Strasbourg Court that the Swiss authorities had breached his right to freedom of expression.

First the European Court found that Perinçek had not committed an abuse of his rights within the meaning of Article 17 of the Convention. The Court underlined that the free exercise of the right to openly discuss questions of a sensitive and controversial nature was one of the fundamental aspects of freedom of expression and distinguished a tolerant and pluralistic democratic society from a totalitarian or dictatorial regime. The Court emphasized that the limit beyond which comments may engage Article 17 lay in the question of whether the aim of the speech was to incite hatred or violence, aiming at the destruction of the rights of others. The rejection of the legal characterisation as "genocide" of the events of 1915 was not such as to incite hatred against the Armenian people.

Next, from the perspective of Article 10 of the Convention, the Court agreed with the Swiss courts that Perinçek could not have been unaware that by describing the Armenian genocide as an "international lie", he was exposing himself, being on Swiss territory, to a criminal sanction "prescribed by law". The Court also found that the aim of the application of Article 261bis of the Swiss Criminal Code was to protect the rights of others, namely the honour of the relatives of victims of the atrocities perpetrated by the Ottoman Empire against the Armenian people from 1915 onwards.

The crucial question was whether the prosecution and conviction of Perinçek was "necessary in a democratic society". The Court was of the opinion that the discussion about the Armenian "genocide" was of great interest to the general public and that Perinçek had engaged in speech of a historical, legal and political nature which was part of a heated debate. Accordingly, this limited the margin of appreciation of the Swiss authorities in deciding whether the interference with Perinçek's freedom of expression was justified and necessary in a democratic society. Essential for the Court is that it is still very difficult to identify a general consensus about the qualification of the Armenian "genocide". Only about 20 States out of the 190 in the world have officially recognised the Armenian genocide. Furthermore the notion of "genocide" is a precisely defined and narrow legal concept, difficult to substantiate. Historical research is by definition

open to discussion and a matter of debate, without necessarily giving rise to final conclusions or to the assertion of objective and absolute truths. In this connection, the Court clearly distinguished the present case from those concerning the negation of the crimes of the Holocaust, committed by the Nazi regime. The Court therefore took the view that Switzerland had failed to show how there was a social need in that country to punish an individual for racial discrimination on the basis of declarations challenging the legal characterisation as “genocide” of acts perpetrated on the territory of the former Ottoman Empire in 1915 and the following years. The European Court also referred to the General Comment nr. 34 of the United Nations Human Rights Committee on Article 19 ICCPR, opposing “general prohibitions on expression of historical views”. According to the UN HRC “laws that penalise the promulgation of specific views about past events, so called “memory-laws”, must be reviewed to ensure they violate neither freedom of opinion nor expression”.

In conclusion, the Court expressed its doubt that Perinçek’s conviction had been dictated by a “pressing social need”. It pointed out that it had to ensure that the sanction did not constitute a kind of censorship that would lead people to refrain from expressing criticism as part of a debate of general interest, because such a sanction might dissuade persons from contributing to the public discussion of questions that are of interest for the life of the community. The Court found that the grounds given by the national authorities in order to justify Perinçek’s conviction were insufficient and that the domestic authorities had overstepped their narrow margin of appreciation in this case in respect of a matter of debate of undeniable public interest. The Court considered the criminal conviction of Perinçek, for denial that the atrocities perpetrated against the Armenian people in 1915 and following years constituted genocide, was unjustified. Accordingly there has been a violation of Article 10.

- [Perinçek v. Switzerland](#), no. 27510/08, 17 December 2013.

Editor’s note: This case was [referred to the Grand Chamber on 2 June 2014](#), which [returned its judgment on 15 October 2015](#).

IRIS 2014-2/1

European Court of Human Rights: Lillo-Stenberg and Sæther v. Norway

Dirk Voorhoof

Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

The applicants in this case are Lars Lillo-Stenberg and Andrine Sæther, respectively a well-known musician and an actress in Norway, who complained about press invasion of their privacy during their wedding on 20 August 2005. The wedding took place outdoors on an islet in the Oslo fjord that was accessible to the public. Without the couple's consent, the weekly magazine *Se og Hør* subsequently published a two-page article about the wedding accompanied by six photographs. The pictures were obtained by hiding and using a strong telephoto lens from a distance of approximately 250 metres. The pictures showed the bride, her father and bridesmaids arriving at the islet in a small rowing boat, the bride being brought to the groom by her father and the bride and groom returning to the mainland on foot by crossing the lake on stepping stones. The couple brought compensation proceedings against the magazine and won at the first two instances, but finally the Supreme Court found against the couple, by three votes to two. It considered that they had married in a place that was accessible to the public, easily visible and at a popular holiday location. Furthermore the article was neither offensive nor negative. Relying on Article 8 (right to respect for private and family life), Lars Lillo-Stenberg and Andrine Sæther complained that their right to respect for private life had been breached by the Supreme Court's judgment.

The European Court starts from the premise that the present case requires an examination of the fair balance that has to be struck between the applicants' right to the protection of their private life under Article 8 of the Convention and the publisher's right to freedom of expression as guaranteed by Article 10. The Court confirms "that a person's image constitutes one of the chief attributes of his or her personality, as it reveals the person's unique characteristics and distinguishes the person from his or her peers. The right to the protection of one's image is thus one of the essential components of personal development. It mainly presupposes the individual's right to control the use of that image, including the right to refuse publication thereof" and that "even where a person is known to the general public, he or she may rely on a "legitimate expectation" of protection of and respect for his or her private life". The Court again applies a number of criteria it considers relevant where the right of freedom of expression is being balanced against the right to respect for private life. The relevant criteria are: (i) contribution to a debate of general interest; (ii) how well known is the person concerned and what is the subject of the report?; (iii) prior conduct of the person concerned; (iv) method of obtaining the information and its veracity/circumstances in which the photographs were taken; and (v) content, form and consequences of the publication. In the opinion of the European Court, both the majority and the minority of the Norwegian Supreme Court had carefully balanced the right of freedom of expression with the right to respect for private life, and had explicitly taken into account the criteria set out in the Court's case law that existed at the relevant time (notably [Von Hannover \(no. 2\)](#) and [Axel Springer AG](#), see IRIS 2012-3/1). The Court considered that there was an element of general interest in the article about the applicants' wedding and that the article did not contain any elements that could damage their reputations. Since the wedding took place in an area that was accessible to the public, easily visible, and a popular holiday location, it was likely to attract the attention of third parties. Being well-known public figures in Norway, these circumstances certainly lowered their legitimate expectation of privacy, while on the other hand no pictures were published of the private marriage ceremony itself. Although the Court considers that "opinions may differ on the outcome of a judgment", it sees no sufficient, strong reasons to substitute its view for that of the majority of the Norwegian Supreme Court. Having regard to the

margin of appreciation enjoyed by the national courts when balancing competing interests, the Court concludes that the Supreme Court did not fail to comply with its obligations under Article 8 of the Convention. The interference with the right of privacy of the applicants was sufficiently justified by the right to freedom of expression of the magazine *Se og Hør*.

- [Lillo-Stenberg and Sæther v. Norway](#), no. 13258/09, 16 January 2014.

IRIS 2014-3/1

European Court of Human Rights: Tierbefreier E.V. v. Germany

Dirk Voorhoof

Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

Tierbefreier E.V. is an association based in Germany that militates in favour animal rights. A court decision prevented the association from disseminating film footage, which was secretly taken by a journalist on the premises of a company performing experiments on animals for the pharmaceutical industry (C. company). The journalist used his footage to produce documentary films of different lengths, critically commenting on the way in which laboratory animals were treated. His films, or extracts from them, were shown on different TV channels. Largely based on the journalist's footage, Tierbefreier produced a film of about 20 minutes, with the title "Poisoning for profit" and made it available on its website. The film contained the accusation that the legal regulations on the treatment of animals were being disregarded by C. company and closed with the statement that medicines were not being made safer by poisoning monkeys. On the request of C. company, relying on its personality rights, which encompassed the right not to be spied upon by the use of hidden cameras, Tierbefreier was ordered by a court injunction to desist from publicly showing the film footage taken by the journalist on the C. company's premises or to make it otherwise available to third persons. According to the German courts Tierbefreier could not rely on its right to freedom of expression, as the manner in which it had presented the footage did not respect the rules of the intellectual battle of ideas. Relying on Article 10 of the European Convention on Human Rights, Tierbefreier lodged an appeal before the Strasbourg Court, complaining that the injunction had violated its right to freedom of expression. The association further relied on Article 14 (prohibition of discrimination) in conjunction with Article 10, complaining that it had been discriminated against in comparison with the journalist and other animal rights activists who had merely been prohibited from disseminating specific films, but had been allowed to continue the publication of the footage in other contexts.

The European Court endorses the assessment that the injunction interfered with Tierbefreier's right to freedom of expression. But as it was prescribed by law, pursued the legitimate aim of protecting the C. company's reputation and was considered "necessary in a democratic society", the Court found no violation of Article 10 of the Convention. The Court observed that the domestic courts carefully examined whether a decision to grant the injunction in question would violate the applicant association's right to freedom of expression, fully acknowledging the impact of the right to freedom of expression in a debate on matters of public interest. The Court points out that there was no evidence however that the accusations made in the film "Poisoning for profit", according to which the C. company systematically flouted the law, were correct. Furthermore, Tierbefreier had employed unfair means when militating against the C. company's activities and they could be expected to continue to do so if allowed to make further use of the footage. The Court also referred to the German courts' findings that the further dissemination of the footage would seriously violate the C. company's rights, especially since the footage had been produced by a former employee of the C. company, who had abused his professional status in order to secretly produce film material within that company's private premises. The Court finally notes that the interference at issue did not concern any criminal sanctions, but a civil injunction preventing Tierbefreier from disseminating specified footage. It referred to the fact that Tierbefreier remained fully entitled to express its criticism on animal experiments in other, even one-sided ways. The Court considers that the German courts struck a fair balance between Tierbefreier's right to freedom of expression and the C. company's interests in protecting its

reputation. Hence, there has been no violation of Article 10 of the Convention taken separately. As the German courts also gave relevant reasons for treating Tierbefreier differently from the other animal rights activists and the journalist with regard to the extent of the civil injunction, the European Court accordingly also finds that there has been no violation of Article 14 in conjunction with Article 10 of the Convention.

- [Tierbefreier e.V. v. Germany](#), no. 45192/09, 16 January 2014.

IRIS 2014-3/2

European Court of Human Rights: Pentikäinen v. Finland

Dirk Voorhoof

Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

In a judgment of 4 February 2014, the European Court found that a Finnish press photographer's conviction for disobeying the police while covering a demonstration did not breach his freedom of expression. The applicant, Mr Pentikäinen, is a photographer and journalist for the weekly magazine Suomen Kuvalehti. He was sent by his employer to take photographs of a large demonstration in Helsinki. At a certain point, the police decided to interrupt the demonstration which had turned violent. It was announced over loudspeakers that the demonstration was over and that the crowd should leave the scene. After further escalation of violence, the police considered that the event had turned into a riot and decided to seal off the demonstration area. When leaving, the demonstrators were asked to show ID and their belongings were checked. However, a core group of around 20 people remained in the demonstration area, including Mr Pentikäinen, who assumed the order to leave the area only applied to the demonstrators and not to him, doing his work as a journalist. He also tried to make clear to the police that he was a representative of the media, referring to his press badge. A short time later the police arrested the demonstrators, including Mr Pentikäinen. He was detained for more than 17 hours and short time later the public prosecutor brought charges against him. The Finnish courts found the journalist guilty of disobeying the police, but they did not impose any penalty on him, holding that his offence was excusable.

In Strasbourg Mr Pentikäinen complained that his rights under Article 10 (freedom of expression) had been violated by his arrest and conviction, as he had been prevented from doing his job as a journalist. The European Court recognised that Mr Pentikäinen, as a newspaper photographer and journalist, had been confronted with an interference in his right to freedom of expression. However, as the interference was prescribed by law, pursued several legitimate aims (the protection of public safety and the prevention of disorder and crime) and was to be considered necessary in a democratic society, there was no violation of his right under Article 10 of the Convention. The European Court especially referred to the fact that Mr Pentikäinen had not been prevented from taking photos of the demonstration and that no equipment or photos had been confiscated. There was no doubt that the demonstration had been a matter of legitimate public interest, justifying media reporting on it, and Mr Pentikäinen was not prevented from doing so. His arrest was a consequence of his decision to ignore the police orders to leave the area, while there was also a separate secure area which had been reserved for the press. It was also doubtful whether Mr Pentikäinen had made it sufficiently clear to the police when being arrested that he was a journalist. Furthermore, although Mr Pentikäinen was found guilty of disobeying the police, no penalty had been imposed on him and no entry of his conviction had been made on his criminal record. The Court also considered that the fact that the applicant was a journalist did not give him a greater right to stay at the scene than the other people and that the conduct sanctioned by the criminal conviction was not his journalistic activity as such, but his refusal to comply with a police order at the very end of the demonstration, when the latter was judged by the police to have become a riot. The European Court concluded therefore, by five votes to two, that the Finnish courts had struck a fair balance between the competing interests at stake and accordingly came to the conclusion that there had been no violation of Article 10.

According to the separate dissenting opinion of two judges it has not been substantiated why it was necessary in a democratic society to equate a professional journalist, operating within

recognised professional limits in covering the demonstration, with any of the people taking part in the demonstration and to impose drastic criminal restraints on him. The dissenting judges criticised sharply the imposition of restrictions on a journalist's freedom of expression through his arrest, detention, prosecution and conviction for a criminal offence simply because he had the courage to do his duty in furtherance of the public interest. According to the dissenting judges, the case reveals a one-sided attitude on the part of the Finnish authorities, one likely to create a "chilling effect" on press freedom.

- [Pentikäinen v. Finland](#), no. 11882/10, 4 February 2014.

Editor's note: This case was [referred to the Grand Chamber on 2 June 2014](#), which [returned its judgment on 20 October 2015](#).

IRIS 2014-4/2

European Court of Human Rights: Bayar (nos. 1-8) v. Turkey

Dirk Voorhoof

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In eight judgments of 25 March 2014 the European Court of Human Rights has once more found gross violations of the right to freedom of expression and information in Turkey. Each of the judgments concerns the criminal conviction for publishing declarations from an illegal armed organisation. The applicant in all of the eight cases is Hasan Bayar, the editor-in-chief of the *Ülkede Özgür Gündem*, a daily newspaper based in Istanbul. In 2004 the newspaper published a series of statements and articles expressing, in various ways, the positions of the PKK (the Kurdistan Workers' Party), as well as statements by its leaders. It also published appeals from prisoners to the Turkish Government to negotiate with Mr Öcalan, the PKK leader. Other articles described events linked to Mr Öcalan's incarceration. Some of the statements from the PKK or Congra-Gel or PJA, a branch of the PKK, concerned the political situation of the Kurds, the role of women in society and appeals for democratisation and peace. One article, reproducing declarations of the leader of Congra-Gel, protested against the visit of the Turkish Prime Minister to Iran. After the publication of each article, the public prosecutor charged Mr Bayar and the owner of the newspaper with spreading propaganda via the press, and publishing material from an illegal armed organisation. On each occasion Mr Bayar and the owner of the newspaper were convicted in application of the anti-terrorism act nr. 3713 and they were ordered to pay a fine. Mr Bayar appealed to the Court of Cassation against each of these decisions, arguing that his rights as guaranteed by Article 10 of the European Convention had been violated. However, all Mr Bayer's appeals were declared inadmissible.

The Strasbourg Court is of the opinion that Mr Bayer's right under Article 6 (right to a fair trial) was violated, as the Court of Cassation had wrongfully declared his appeals inadmissible. The European Court also found that Mr Bayer's right to freedom of expression under Article 10 was violated, as the Court saw no pertinent reason to justify Mr Bayer's conviction. The Court said that it was aware of the difficulties the fight against terrorism was confronted with, but it emphasised at the same time the importance of the right to freedom of expression, by notifying that the impugned articles did not encourage violence, armed resistance or insurrection and did not constitute hate speech. According to the Court this was crucial, and it could not find any pertinent and sufficient reasons to justify any of the interferences with the editor-in-chief's right to freedom of expression. Unanimously, the Court awarded Mr Bayer - in all the cases taken together - the total sum of EUR 6,133 (pecuniary damage), EUR 10,400 (non-pecuniary damage), and EUR 4,000 (costs and expenses).

- *Bayar v. Turkey (nos. 1-8)*, nos. [39690/06](#), [40559/06](#), [48815/06](#), [2512/07](#), [55197/07](#), [55199/07](#), [55201/07](#), [55202/07](#), 25 March 2014.

IRIS 2014-5/1

European Court of Human Rights: Brosa v. Germany

Dirk Voorhoof

Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

The European Court of Human Rights has delivered an interesting judgment on the right to freedom of political expression, during pre-election time. The applicant, Mr Ulrich Brosa alleged that a court injunction in Germany, prohibiting him from distributing a leaflet that he had drawn up on the occasion of mayoral elections, had violated his right to freedom of expression. The injunction at issue prohibited Brosa from distributing a leaflet in which he called not to vote for a candidate, F.G. for the office of local mayor, who allegedly provided cover for a neo-Nazi organisation, Berger-88. The injunction also prevented Brosa from making other assertions of fact or allegations that might depict F.G. as a supporter of neo-Nazi organisations. Any contravention was punishable by a fine of up to EUR 250,000 or by imprisonment of up to six months. The German courts found that to claim that someone was supporting a neo-Nazi organisation amounted to an infringement of that individual's honour and social reputation and to his personality rights, while Brosa had failed to provide sufficient evidence to support his allegation against F.G. In Strasbourg, Brosa complained that the injunction had breached his right to freedom of expression, as provided for in Article 10 of the Convention.

Examining the particular circumstances of the case, the Court refers to the following elements to be taken into account: (1) the position of the applicant, (2) the position of the plaintiff in the domestic proceedings, (3) the subject-matter of the publication and finally (4) the classification of the contested statement by the domestic courts.

As to the position of Brosa, the Court notes that he is a private individual, participating however in a public discussion on the political orientation of an association. F.G. was an elected town councillor who was running for the office of mayor at the time in question. This status of F.G. as a politician made the limits of acceptable criticism wider than as regards a private individual. The subject-matter of the publication concerned a leaflet asking citizens not to vote for F.G. as mayor, primarily on the basis of his attitude vis-à-vis an association having an extremist right-wing orientation. Brosa's leaflet, disseminated in the run-up to the mayoral elections was therefore of a political nature on a question of public interest at the material time and location, leaving little scope for restrictions on political speech or on debate of questions of public interest. As regards the qualification of the impugned statement by the domestic courts, the Court considers it to consist of two elements: firstly, the allegation that the association Berger-88 was a neo-Nazi organisation that, moreover, was particularly dangerous; and, secondly, the allegation that F.G. had "covered" for the organisation. The Court admits that, in substance, the reference to the neo-Nazi background and the dangerous character of Berger-88 was not devoid of factual basis, while the Court also reminds us of the fact that the association was monitored by the German Intelligence Services on suspicion of extremist tendencies. The European Court holds the opinion that that the German courts in this case required a disproportionately high degree of factual proof to be established. It also considers that the statement that F.G. has covered the neo-Nazi organisation at issue was part of an ongoing debate. The Court finds that this statement had a sufficient factual basis, referring to F.G.'s public statements, emphasizing that the association had no extreme right-wing tendencies and calling Brosa's statements "false allegations". According to the Court, Brosa's leaflet did not exceed the acceptable limits of criticism. Therefore the Court comes to the conclusion that the German courts failed to strike a fair balance between the relevant interests and to establish a "pressing social need" for putting the protection of the

personality rights of F.G. above Brosa's right to freedom of expression, even in the context of a civil injunction rather than criminal charges or monetary compensation claims. Under these circumstances, the Court considers that the domestic courts overstepped the margin of appreciation afforded to them and that the interference was disproportionate to the aim pursued and not "necessary in a democratic society". There has been, accordingly, a violation of Article 10 of the Convention. The Court held that Germany was to pay Mr Brosa EUR 3,000 in respect of non-pecuniary damage and 2,683 euros in respect of costs and expenses.

- [Brosa v. Germany](#), no. 5709/09, 17 April 2014.

IRIS 2014-6/1

European Court of Human Rights: *Salumäki v. Finland*

Dirk Voorhoof

Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

Can a title of a newspaper article that could be interpreted as damaging the reputation of a public person justify a criminal conviction of the journalist who wrote the article, while the article itself is written in good faith and does not contain any factual errors or defamatory allegations? That is the question the European Court needed to answer in a recent case against Finland. The applicant in this case is Tiina Johanna Salumäki, a journalist working for the newspaper *Iltasanomat*. Ms Salumäki published an article concerning the investigation into a homicide (of P.O.). The front page of the newspaper carried a headline asking whether the victim of the homicide had connections with K.U., a well-known Finnish businessman. A photograph of K.U. appeared on the same page. Next to the article was a separate column mentioning K.U.'s previous conviction for economic crimes. The Helsinki District Court convicted the journalist, Salumäki, and the newspaper's editor-in-chief at the time, H.S., of defaming K.U. as the title of their article insinuated that K.U. had been involved in the killing, even though it was made clear in the text of the article itself that the homicide suspect had no connections with K.U. Along with H.S., Salumäki was ordered to pay damages and costs to K.U. This judgment was subsequently upheld on appeal and the Supreme Court finally refused leave to appeal. Salumäki complained that her conviction had amounted to a violation of Article 10 (freedom of expression) of the European Convention on Human Rights. She argued that the information presented in the article was correct and that the title of the article only connected K.U. to the victim and did not insinuate that K.U. had connections with the perpetrator, or that he was involved in the homicide.

The Court explains that it had to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention that may come into conflict with each other in certain cases, namely, on the one hand, the freedom of expression protected by Article 10 and, on the other, the right to respect for private life, including the right of reputation, enshrined in Article 8. The Court applies the criteria developed by the Grand Chamber in [Axel Springer Verlag and Von Hannover \(no. 2\)](#) (IRIS 2012/3-1) in order to find out whether the domestic authorities indeed struck a fair balance between the rights protected by Articles 8 and 10 of the Convention. First the Court emphasises that the criminal investigation into a homicide was clearly a matter of legitimate public interest, having regard in particular to the serious nature of the crime: "From the point of view of the general public's right to receive information about matters of public interest, and thus from the standpoint of the press, there were justified grounds for reporting the matter to the public". The Court also recognised that "the article was based on information given by the authorities and K.U.'s photograph had been taken at a public event", while "the facts set out in the article in issue were not in dispute even before the domestic courts. There is no evidence, or indeed any allegation, of factual errors, misrepresentation or bad faith on the part of the applicant". Nevertheless the decisive factor in this case was that, according to the domestic courts, the title created a connection between K.U. and the homicide, implying that he was involved in it. Even though it was specifically stated in the text of the article that the homicide suspect had no connections with K.U., this information only appeared towards the end of the article. The Court was of the opinion that Salumäki must have considered it probable that her article contained a false insinuation and that this false insinuation was capable of causing suffering to K.U. The Court also refers in this context to the principle of presumption of innocence under Article 6 §2 of the Convention and emphasises that this principle may be relevant also in the context of Article 10, in situations in which nothing is clearly stated but only insinuated. The

Court therefore concluded that what the journalist had written was defamatory, as it implied that K.U. was somehow responsible for P.O.'s murder. According to the Court, "it amounted to stating, by innuendo, a fact that was highly damaging to the reputation of K.U." and at no time did Salumäki attempt to prove the truth of the insinuated fact, nor did she plead that the insinuation was a fair comment based on relevant facts. Having regard to all the foregoing factors, including the margin of appreciation afforded to the State in this area, the Court considered that the domestic courts struck a fair balance between the competing interests at stake. There has therefore been no violation of Article 10 of the Convention.

- [Salumäki v. Finland](#), no. 23605/09, 29 April 2014.

IRIS 2014-6/2

European Court of Human Rights: *Taranenko v. Russia*

Dirk Voorhoof

Ghent University (Belgium) & Copenhagen University (Denmark) & Member of the Flemish Regulator for the Media

The European Court's judgment in the case of *Taranenko v. Russia* illustrates how Article 10, in conjunction with Article 11 (freedom of assembly and association), also protects collective action, expressive conduct and distribution of leaflets as a form of protected speech. The case concerns the detention and conviction of Ms Taranenko, a participant in a protest against the politics of President Putin in 2004. The protesters had occupied the reception area of the President's Administration building in Moscow and locked themselves in an office. They waved placards with "Putin, resign!" («Путин, уйди!») and distributed leaflets with a printed address to the President that listed ten ways in which he had failed to uphold the Russian Constitution, and a call for his resignation. One of the protesters, Ms Taranenko, complained in Strasbourg about the way the Russian authorities have treated, detained, prosecuted and convicted her for participating in this protest action, claiming that her right to freedom of expression and her right of peaceful assembly had been violated.

The Court reiterated that "the right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Thus, it should not be interpreted restrictively". The Court also emphasised that any measures interfering with freedom of assembly and expression "other than in cases of incitement to violence or rejection of democratic principles do a disservice to democracy and often even endanger it". The Court noted that the issues of freedom of expression and freedom of peaceful assembly are closely linked in the present case: "Indeed, the protection of personal opinions, secured by Article 10 of the Convention, is one of the objectives of freedom of peaceful assembly as enshrined in Article 11 of the Convention". The European Court underlined that the protest, although involving some disturbance of public order, had been largely non-violent and had not caused any bodily injuries. The participants in the protest action came to the President's Administration building to meet officials, hand over a petition criticising the President's policies, distribute leaflets and talk to journalists. The aim of the protesters in Moscow was indeed to obtain media-exposure, in which they effectively succeeded. The disturbance that followed was not part of their initial plan but a reaction to the guards' attempts to stop them from entering the building. In this context, the Court had to examine with particular scrutiny the prison sentence as a sanction imposed by the national authorities for non-violent conduct. The Court found in particular that while a sanction for Ms Taranenko's actions might have been warranted by the demands of public order, her detention pending trial of almost one year and the suspended prison sentence of three years imposed on her had to have had a deterring effect on protesters. The Court considered the pre-trial detention and the prison sentence as an "unusually severe sanction" having a chilling effect on Ms Taranenko and other persons taking part in protest actions. The Court referred to the "exceptional seriousness of the sanctions" as being disproportionate and therefore concluded that the interference had not been necessary in a democratic society for the purposes of Article 10. There had accordingly been a violation of Article 10 interpreted in the light of Article 11 of the Convention.

- [Taranenko v. Russia](#), no. 19554/05, 15 May 2014.

IRIS 2014-7/1

European Court of Human Rights: Roşiiianu v. Romania

Dirk Voorhoof

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The European Court of Human Rights has again reiterated that collecting information and guaranteeing access to documents held by public authorities is a crucial right for journalists in order to be able to report on matters of public interest, helping to implement the right of the public to be properly informed on such matters. In the case of Ioan Romeo Roşiiianu, a presenter of a regional television programme, the Court came to the conclusion that the Romanian authorities had violated Article 10 of the European Convention on Human Rights by refusing access to documents of a public nature, which he had requested at Baia Mare, a city in the north of Romania. The Court's judgment clarifies that efficient enforcement mechanisms are necessary in order to make the right of access to public documents under Article 10 practical and effective.

In his capacity as a journalist, Roşiiianu had contacted the Baia Mare municipal authorities, requesting disclosure of several documents, as part of his investigation into how public funds were used by the city administration. His requests were based on the provisions of Law no. 544/2001 on freedom of public information. As the reply from the mayor did not contain the requested information, Roşiiianu applied to the administrative court. In three separate decisions, the Cluj Court of Appeal ordered the mayor to disclose most of the requested information. The Court of Appeal noted that, under Article 10 of the European Convention on Human Rights and Law no. 544/2001 on freedom of public information, Roşiiianu was entitled to obtain the information in question, which he intended to use in his professional activity. The letters sent by the mayor of Baia Mare did not represent adequate responses to those requests. The Cluj Court of Appeal ordered the mayor to pay the applicant EUR 700 in respect of non-pecuniary damages, and held that his refusal to disclose the requested information amounted to a denial of the right to receive and impart information, as guaranteed by Article 10 of the European Convention. Mr Roşiiianu applied for enforcement of the decisions, but the mayor refused to comply. The decisions delivered by the Cluj Court of Appeal remained unenforced.

Roşiiianu complained about the failure to execute the judicial decisions, relying on Article 6 §1 (right to a fair hearing). Relying on Article 10, he alleged that the failure to execute the decisions of the Cluj Court of Appeal amounted to a violation of his right to freedom of expression.

With regard to the complaint under Article 6 §1 of the Convention, it is observed that the mayor had suggested that Roşiiianu should come in person to the town hall to obtain several thousand photocopied pages, which would have included having to pay for the reproduction costs, but that the domestic courts had concluded that such an invitation could not possibly be considered as an execution of a judicial decision ordering the disclosure of information of a public nature. The European Court found that the non-enforcement of the final judicial decisions ordering disclosure to Mr Roşiiianu of public information had deprived Roşiiianu of effective access to a court, which amounted to a violation of Article 6 §1 of the Convention.

With regard to the complaint under Article 10, the Court noted that Roşiiianu was involved in the legitimate gathering of information on a matter of public importance, namely the activities of the Baia Mare municipal administration. The Court reiterated that in view of the interest protected by Article 10, the law cannot allow arbitrary restrictions that may become a form of indirect censorship should the authorities create obstacles to the gathering of information.

Gathering information is indeed an essential preparatory step in journalism and is an inherent, protected part of press freedom. Given that the journalist's intention had been to communicate the information in question to the public and thereby to contribute to the public debate on good public governance, his right to impart information had clearly been impaired. The Court found that there had not been adequate execution of the judicial decisions in question. It also observed that the complexity of the requested information and the considerable work required in order to select or compile the requested documents had been referred to solely to explain the impossibility of providing that information rapidly, but could not be a sufficient or pertinent argument to refuse access to the requested documents. The Court concluded that the Romanian authorities had adduced no argument showing that the interference in Roşianu's right had been prescribed by law, or that it pursued one or several legitimate aims, hence finding a violation of Article 10 of the Convention. The Court held that Romania was to pay the applicant EUR 4,000 in respect of non-pecuniary damage and EUR 4,748 in respect of costs and expenses.

- [Roşianu v. Romania](#), no. 27329/06, 24 June 2014.

IRIS 2014-8/4

European Court of Human Rights: Axel Springer AG v. Germany (No. 2)

Dirk Voorhoof

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In a judgment of 10 July 2014, the European Court found that the publication by the daily newspaper *Bild* of suspicions concerning the former German Chancellor, Gerhard Schröder, was covered by journalistic freedom. In Strasbourg, the publisher of *Bild*, Axel Springer AG, had lodged a complaint arguing that the German courts had interfered with the right to freedom of expression and critical press reporting in a way that violated Article 10 of the Convention.

An article in *Bild* had repeated a series of suspicions and doubts on the part of Mr Thiele – the deputy president of the Liberal Democratic Party’s (FDP) parliamentary group – with regard to Schröder’s appointment as chairman of the supervisory board of the German-Russian consortium Konsortium Nordeuropäische Gaspipeline (NEGP). Thiele had insinuated that Mr Schröder had resigned from his political functions because he had been offered a lucrative post in the consortium headed by the Russian company Gazprom. In this regard, references were made to an agreement on construction of a pipeline that was signed in April 2005, in the presence of Mr Schröder and the Russian President Vladimir Putin. Having complained to the German courts, Mr Schröder obtained an order banning further publication of the passage, which reported Mr Thiele’s comments and insinuations of corruption.

The European Court sharply disagrees with the reasoning and findings of the German courts. The Court refers to the relevant criteria it has taken into consideration in earlier cases (see [Von Hannover v. Germany \(No. 2\)](#) and [Axel Springer AG v. Germany \(No. 1\)](#), (see IRIS 2012-3/1) when dealing with the conflicting rights of freedom of expression guaranteed by Article 10 and the right to protection of one’s reputation under Article 8 of the Convention as part of the right to private life.

First the Court notes that the article in *Bild* did not recount details of Mr Schröder’s private life with the aim of satisfying public curiosity, but related to Mr Schröder’s conduct in the exercise of his term of office as Federal Chancellor and his controversial appointment to a German-Russian gas consortium shortly after he ceased to hold office as Chancellor. Furthermore, there were sufficient facts, which could justify suspicions with regard to Mr Schröder’s conduct. Such suspicions amounted to the expression of a value judgment, without concrete allegations of Schröder having committed criminal offences. The Court also observes that Mr Thiele’s questions were not the only comments to be reproduced in the *Bild* article, but supplemented a series of statements made by different political figures from various political parties.

As well as this, the Court could not subscribe to the German court’s opinion that the article in *Bild* should have also contained elements in favour of the former Chancellor. The former Chancellor had a duty to show a much greater degree of tolerance than a private citizen. In the political arena, freedom of expression is of the utmost importance and the press has a vital role as public “watchdog”. The punishment of a journalist for assisting in the dissemination of statements made by another person would seriously hamper the contribution of the press to discussions of matters of public interest. The Court also considers that a newspaper cannot be required to systematically verify the merits of every comment made by one politician about another, when such comments are made in the context of a current political debate. As to the severity of the measure imposed, the Court notes that although only a civil-law ban on further

publication of the impugned passage in the *Bild* article had been imposed, it nonetheless considers that this prohibition could have had a chilling effect on the newspaper's freedom of expression.

The Court concludes unanimously that *Bild* has not exceeded the limits of journalistic freedom in publishing the disputed passage. The German courts have not convincingly established the existence of any pressing social need for placing the protection of Mr Schröder's reputation above the newspaper's right to freedom of expression and the general interest in promoting this freedom where issues of public interest were concerned. There had therefore been a violation of Article 10 of the Convention.

- [Axel Springer AG v. Germany \(no. 2\)](#), no. 48311/10, 10 July 2014.

IRIS 2014-9/3

European Court of Human Rights: Prezhdarovi v. Bulgaria

Dirk Voorhoof

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In an unexpected judgment, the European Court of Human Rights found a violation of the right to respect for private life, as it considered that the confiscation of computers containing illegal software was not “in accordance with the law”, as required by Article 8 of the European Convention of Human Rights (ECHR). Rumen Trifonov Prezhdarov and Anna Aleksandrovna Prezhdarova had started a business in their garage renting computers to clients, without having the necessary software licence for reproduction and distribution of the software and games that were installed on the computers. After a complaint by a manager of a company that distributed computer games, the district prosecutor ordered a police inquiry. Three weeks later the police inspected the applicants’ computer club and found that five computers contained computer games. Prezhdarov was invited to present documents, such as purchase invoices or any other evidence of his title to the games. As he failed to do so, the police seized the computers. Several requests to return the computers, due to the fact that they contained personal data, were dismissed. During the further criminal proceedings and trial, the computers remained confiscated. Prezhdarov was convicted for illegally distributing computer games and for illegally reproducing computer programmes and films. He was sentenced to one year and six months’ imprisonment, suspended for three years, and ordered to pay a fine in the amount of BGN 4,000. The confiscated computers were not returned after sentencing.

Prezhdarov and Prezhdarova, relying on Article 8 ECHR, complained that the search in their garage and the seizure of five computers had not been conducted in accordance with the law. They argued, in particular, that private documents contained in the seized computers, which were unrelated to the criminal proceedings against the first applicant, had been caught up in the search-and-seizure operation.

The European Court of Human Rights emphasised that, in the context of search and seizure, the domestic law must provide for sufficient safeguards against arbitrary interference with Article 8 ECHR. The Court accepted that Bulgarian law allowed the police to conduct an immediate search-and-seizure operation outside the criminal proceedings if that was the only possibility of collecting and securing evidence. The Court, however, expressed its doubts of whether the circumstances in the present case were really pressing, given that the prosecutor ordered the said operation three weeks before it was conducted. Therefore, the authorities had enough time to collect more information regarding the alleged criminal conduct, to open criminal proceedings, and to submit a prior request to the Court.

Furthermore, the Court considered that the absence of a prior judicial warrant was not counterbalanced by the availability of a retrospective and effective judicial review. The Bulgarian court that approved the measure did not consider the scope of the operation, and did not make a distinction between information that was necessary for the investigation, and information that was not relevant. The European Court of Human Rights accepted that, as a matter of principle, the retention of the computers for the duration of the criminal proceedings pursued the legitimate aim of securing physical evidence in an ongoing criminal investigation. However, it was of the opinion that the lack of any consideration of the relevance of the seized information for the investigation, and of the applicants’ complaint regarding the personal character of some of the information stored on the computers, rendered the judicial review formalistic and deprived

the applicants of sufficient safeguards against abuse. Therefore, the Court considered that even assuming that there existed a general legal basis in Bulgarian law for the impugned measure, the applicants in the present case were not offered sufficient guarantees for their right to respect for their private life before or after the search-and-seizure operation. In these circumstances, the Court found that the interference with the applicants' right to respect for their private life was not "in accordance with the law" as required by Article 8 § 2 of the Convention and hence violated Article 8 of the Convention. Consequently, the Court did not need to examine whether the impugned measure had a legitimate aim and was proportionate.

One judge, Faris Vehabović, dissented, arguing that as Prezhdarov was sentenced for illegal use of software, it appeared that through his request for return of the confiscated computers (together with software installed on them), he was in fact seeking to regain possession of intellectual property acquired by committing a criminal act. In any democratic country, according to judge Vehabović, it would be unprecedented that property acquired as a result of a criminal act be returned to a convicted person, even if that property contained personal data, in order to satisfy the requirements of Article 8 under the concepts of "home" or "private life". But this argument could not persuade the majority of the Court that found a violation of Article 8.

- [Prezhdarovi v. Bulgaria](#), no. 8429/05, 30 September 2014.

IRIS 2014-10/1

European Court of Human Rights: Matúz v. Hungary

Dirk Voorhoof

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In its judgment in the case of Matúz v. Hungary, the European Court of Human Rights confirmed the importance of whistleblower protection, in this case for a journalist who alarmed public opinion regarding censorship within the public broadcasting organisation in Hungary. The case concerned the dismissal of a television journalist, Gábor Matúz, working for the State television company Magyar Televízió Zrt., after having revealed several instances of alleged censorship by one of his superiors.

Matúz first contacted the television company's president and sent a letter to its board, informing them that the cultural director's conduct in modifying and cutting certain programme content amounted to censorship. A short time later, an article appeared in the online version of a Hungarian daily newspaper, containing similar allegations and inviting the board to end censorship in the television company. A few months later, Matúz published a book containing detailed documentary evidence of censorship exercised in the State television company. Subsequently, Matúz was dismissed with immediate effect. Matúz challenged his dismissal in court, but he remained unsuccessful in his legal action in Hungary. After exhausting all national remedies, he lodged a complaint in Strasbourg, arguing a violation of his rights under Article 10 of the Convention. He submitted that he had the right and obligation to inform the public about alleged censorship at the national television company. The Hungarian government argued that by publishing the impugned book without prior authorisation and by revealing confidential information in that book, Matúz had breached his duties, leading to his summary - and justified - dismissal.

The European Court accepted that the legitimate aim pursued by the impugned measure was the prevention of the disclosure of confidential information, as well as "the protection of the reputation or rights of others" within the meaning of Article 10 § 2 of the Convention. Once more, the central question was whether the interference was "necessary in a democratic society". The Court referred to its standard case law on freedom of expression and journalistic reporting on matters of public interest and also observed that the present case bears a certain resemblance to the cases of [Fuentes Bobo v. Spain](#) (see IRIS 2000-4/1) and [Wojtas-Kaletka v. Poland](#) (see IRIS 2009-9/1), in which it found violations of Article 10 in respect of journalists who had publicly criticised the public television broadcaster's management.

The relevant criteria regarding the balancing of the right to freedom of expression of a person bound by professional confidentiality against the right of employers to manage their staff have been laid down in the Court's case-law since its Grand Chamber judgment in the case of [Guja v. Moldova](#) (§§74-78) (see IRIS 2008-6/1). These criteria are: (a) public interest involved in the disclosed information; (b) authenticity of the information disclosed; (c) the damage, if any, suffered by the authority as a result of the disclosure in question; (d) the motive behind the actions of the reporting employee; (e) whether, in the light of the duty of discretion owed by an employee toward his or her employer, the information was made public as a last resort, following disclosure to a superior or other competent body; and (f) the severity of the sanction imposed. The Court emphasised that the content of the book essentially concerned a matter of public interest and it confirmed that it was not in dispute that the documents published by Matúz were authentic and that his comments had a factual basis. The Court also noted that the journalist had

included the confidential documents in the book with no other intention than to corroborate his arguments on censorship and that there was no appearance of any gratuitous personal attack either (par. 46). Furthermore, the decision to make the impugned information and documents public was based on the lack of any response following his complaint to the president of the television company and letters to the board. Hence the Court was “satisfied that the publication of the book took place only after the applicant had felt prevented from remedying the perceived interference with his journalistic work within the television company itself - that is, for want of any effective alternative channel” (par. 47). The Court also noted that “a rather severe sanction was imposed on the applicant”, namely the termination of his employment with immediate effect (par. 48).

The Court was of the opinion that the approach by the Hungarian judicial authorities neglected to sufficiently apply the right of freedom of expression. The Court concluded that the interference with the applicant’s right to freedom of expression was not “necessary in a democratic society”. Accordingly, the Court unanimously found that there has been a violation of Article 10 of the Convention.

- [Matúz v. Hungary](#), no. 73571/10, 21 October 2014.

IRIS 2015-1/1

European Court of Human Rights: Urechean and Pavlicenco v. Moldova

Dirk Voorhoof

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In a case against Moldova, the European Court of Human Rights has decided that blanket immunity in defamation proceedings in order to guarantee the free speech rights of a president, violates the European Convention on Human Rights. The Court has examined many cases concerning limitations on the right of access to court in defamation cases by operation of parliamentary immunity (see e.g. [[A. the United Kingdom](#)] IRIS 2003-3/2, [[Cordova v. Italy \(Nos. 1 & 2\)](#)] IRIS 2003-7/2 and [[Belpietro v. Italy](#)] IRIS 2013-10/1), but this was the first occasion on which the Court had to address immunity from a civil libel suit which benefits a president and a head of State.

The applicants, Mr Urechean and Mrs Pavlicenco, were opposition politicians at the time. In two television programmes, the Moldovan president had been interviewed by journalists on various topics such as the economy, justice, foreign relations and elections. In the interviews the president stated, among other things, that Mr Urechean, as the mayor of Chişinău, had created “a very powerful mafia-style system of corruption” and that Mrs Pavlicenco “came straight from the KGB”. Both politicians brought libel suits against the president, but the Moldovan courts held that the president enjoyed immunity and could not be held liable for opinions which he expressed in the exercise of his mandate. Before the European Court of Human Rights, the applicants contended that the refusal of the domestic courts to examine the merits of their libel actions constituted a violation of their right of access to court under Article 6, paragraph 1, of the Convention.

It was undisputed that there was a limitation of the applicants’ right of access to a court as a result of the domestic courts’ refusal to examine the merits of their libel actions against the president. The parties also agreed that the limitation of that right was prescribed by law and pursued a legitimate aim. The question for the Court was whether a fair balance had been struck between the competing interests involved, namely between the public’s interest in protecting the president’s freedom of speech in the exercise of his functions and the applicants’ interest in having access to a court and obtaining a reasoned answer to their complaints.

The Court found that, in the circumstances of the case, such a fair balance had not been struck. Although a head of State’s task is not, unlike that of a member of Parliament, to be actively involved in public or political debates, the Court considered that it should be acceptable in a democratic society for States to afford some functional immunity to their heads of State in order to protect their free speech in the exercise of their functions and to maintain the separation of powers in the State. Nevertheless, such immunity, being an exception from the general rule of civil responsibility, should be regulated and interpreted in a clear and restrictive manner. In particular, the Court was of the opinion that the Moldovan courts had not addressed the question of whether the then-president of Moldova had made the statements about the applicants in the exercise of his mandate. Nor did the relevant constitutional provision define the limits of presidential immunity in libel actions. The Court furthermore observed that the immunity afforded to the president was perpetual and absolute and could not be lifted. The Court considered that conferring such blanket immunity on the head of State in the application of the rule of immunity was to be avoided.

The lack of alternative means of redress was another issue considered by the Court, as the Government submitted that the applicants, being politicians, should have resorted to the media to express their points of view on the President's allegations about them. The Court however considered relevant its findings in [Manole and Others v. Moldova](#) (see IRIS 2009-10/1), which provided that at the material time there were only two television channels with national coverage in Moldova, one of which was involved in the present case and refused to offer airtime to one of the applicants, the other being State television. In view of that and of the findings in *Manole and others* concerning the administrative practice of censorship on State television, the Court was not persuaded that the applicants had at their disposal an effective means of countering the accusations made against them by the head of State during the television interviews at issue.

The Court concluded, by four votes to three, that the manner in which the immunity rule was applied in the instant case constituted a disproportionate restriction on the applicants' right of access to a court and hence violated Article 6, paragraph 1, of the Convention. According to the dissenting judges, the Moldovan courts had sufficiently established that the president's statements fell within the exercise of his mandate. They also contended that the findings in *Manole and others* concerning the practice of censorship on State television were totally irrelevant to the instant case. According to the dissenters, the applicants could have relied on their right of reply or on other national legislation providing for a number of alternative means of redress in cases of defamation of honour, dignity and professional reputation. Furthermore, in their capacity as politicians the applicants fell within the category of persons open to close scrutiny of their acts, not only by the press, but also - and above all - by bodies representing the public interest, the risk of some uncompensated damage to reputation being, as a consequence, inevitable. On this basis, the dissenters found no violation of Article 6, paragraph 1.

- [Urechean and Pavlicenco v. the Republic of Moldova](#), nos. 27756/05 and 41219/07, 2 December 2014.

IRIS 2015-2/2

European Court of Human Rights: Uzeyir Jafarov v. Azerbaijan

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In a case related to a violent attack on a journalist, the European Court reiterated that the States have positive obligations under the European Convention on Human Rights to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear. Because of failures to carry out an effective investigation, the European Court found that the criminal investigation of a journalist's claim of ill-treatment was ineffective and that accordingly there has been a violation of Article 3 (prohibition of torture or inhuman or degrading treatment) of the Convention under its procedural limb.

In 2007, Uzeyir Jafarov had been the victim of a violent attack by two men, only a few hours after publishing an article in a newspaper in which he accused a senior military officer of corruption and illegal activities. The journalist was hit several times with a hard blunt object and he was also punched by his aggressors. The attack took place just in front of the newspaper's office. Having heard the journalist's screams, his colleagues came out of the office and the assailants left the scene of the incident by car. The journalist however recognised one of his two assailants: this person (N.R.) was a police officer from the Yasamal District Police Office. Also, other journalists could confirm that they had seen N.R. standing outside the newspaper's office on the day of the attack. Although formally a criminal investigation was started in connection with the attack on the journalist, no further steps were taken in order to identify the perpetrators. In a newspaper interview the Minister of Internal Affairs was questioned about the attack on Uzeyir Jafarov. In that interview the Minister stated that the journalist had staged the attack on himself. The same day, the journalist lodged a complaint with the Prosecutor General, complaining of the police authorities' failure to conduct an effective investigation. But this action had no further result.

Relying on Article 3 of the European Convention, the journalist complained that State agents had been behind the attack on him and that the domestic authorities had failed to carry out an effective investigation in respect of his ill-treatment. In particular, the journalist pointed out that the investigator had failed to order an official identity parade including the police officer N.R. who had been one of his aggressors, to question his colleagues from the newspaper as witnesses and to obtain video recordings from security cameras situated in the vicinity of the scene of the incident. The European Court found numerous shortcomings in the investigation carried out by the domestic authorities. The Court inter alia referred to the fact that the journalist's complaint was examined by the police office where the officer who had allegedly committed the offence was based. In the Court's view, an investigation by the police into an allegation of misconduct by one of its own officers could not be independent in these circumstances. The Court also noted that, despite explicit requests by the journalist, the domestic authorities failed to take all steps reasonably available to them to secure the evidence concerning the attack. The Court further considered that the public statement by the Minister of Internal Affairs showed that during the investigation the domestic authorities were more concerned with proving the lack of involvement of a State agent in the attack on the journalist than with discovering the truth about the circumstances of that attack. In particular, it does not appear that adequate steps were taken to investigate the possibility that the attack could have been linked to Uzeyir Jafarov's work as a journalist. On the contrary, it appears that the responsible authorities had already discarded that

possibility in the early stages of the investigation and with insufficient reason. These elements were sufficient to enable the Court to conclude that the investigation of the journalist's claim of ill-treatment was ineffective. There has accordingly been a violation of Article 3 of the Convention under its procedural limb.

According to the European Court, it was not possible however to establish that the journalist had been subjected to the use of force by a State agent or that a State agent had been behind the attack on the journalist with the aim of interfering with his journalistic work. The Court considered that the present case should also be distinguished from other cases, where the domestic authorities – which were aware of a series of violent actions against a newspaper and persons associated with it – did not take any action to protect the newspaper and its journalists. In the present case, by contrast, neither the journalist nor the newspaper had been subjected to violent actions before. Moreover, the journalist had not lodged any request for protection with the domestic authorities before the attack on him. The Court emphasised that its inability to reach any conclusions as to whether there has, in substance, been treatment prohibited by Article 3 of the Convention, derived to a large extent from the failure of the domestic authorities to carry out an effective investigation at the relevant time. However, the Court could not establish a substantive violation of Article 3 of the Convention in respect of the attack on the journalist.

Finally the Court's task was also to establish whether or not the journalist's right to freedom of expression had been violated on account of the domestic authorities' failure to conduct an effective investigation into the attack on him. The Court noted that the journalist's allegations in this respect arise out of the same facts as those already examined under Article 3 of the Convention and found to be a violation of Article 3. Having regard to those findings, the Court considered that the complaint under Article 10 of the Convention did not raise a separate issue and that therefore it was not necessary to examine the complaint again under Article 10 of the Convention. The Government of the Republic of Azerbaijan is ordered to pay the journalist a sum of EUR 10,000 in respect of non-pecuniary damage and EUR 4,400 in respect of costs and expenses.

- [Uzeyir Jafarov v. Azerbaijan](#), no. 54204/08, 29 January 2015.

IRIS 2015-3/1

European Court of Human Rights: *Bohlen and Ernst August von Hannover v. Germany*

Dirk Voorhoof

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In two cases related to humorous cigarette advertisements, the European Court of Human Rights found that there had been no reason for the domestic authorities to interfere with the freedom of commercial speech in order to protect the right of reputation and the right to their own names of two public persons referred to in the advertisements, without their consent. The European Court found, in particular, that the German Federal Court of Justice had struck a fair balance between freedom of expression (Article 10) and the right to privacy (Article 8).

The first applicant, Dieter Bohlen, is a well-known musician and artistic producer in Germany, while the second applicant, Ernst August, is the husband of Princess Caroline of Monaco. In 2000, the company British American Tobacco (Germany) used in an advertisement campaign the first names and references to events associated with Mr. Bohlen and Mr. Von Hannover, who both sought injunctions prohibiting the distribution of the advertisements. The cigarette manufacturer immediately stopped the advertisement campaign, but refused to pay the sums the applicants claimed in compensation for the use of their first names. The Hamburg Regional Court and the Court of Appeal upheld the claims and awarded the applicants EUR 100 000 and EUR 35 000 respectively. However, the Federal Court of Justice quashed the Court of Appeal judgments and held that, despite their commercial nature, the advertisements in question were apt to help shape public opinion and had not exploited the applicants' good name or contained anything degrading. On this basis, it dismissed the applicants' claims seeking financial compensation. Mr. Bohlen and Mr. Von Hannover lodged applications with the European Court of Human Rights, complaining that the ruling of the Federal Court of Justice had breached their right to privacy and their right to their own names, protected by Article 8 of the European Convention on Human Rights.

The European Court reiterated the relevant criteria laid down in its case-law for assessing the manner in which the domestic courts had balanced the right to respect for private life against the right to freedom of expression: the contribution to a debate of general interest, the extent to which the person in question was in the public eye, the subject of the report, the prior conduct of the person concerned and the content, form and impact of the publication. The Court gave the opinion that the advertisements were able to contribute to a debate of general interest to some degree, as they dealt in a satirical manner with events that had been the subject of public debate. It also considered that the applicants were sufficiently well-known to be unable to claim the same degree of protection of their private lives as persons who were unknown to the public at large or have not been in the public eye before. Furthermore, the image of and references to the applicants in the advertisements had not been degrading, while they obviously had a humorous character. The Court agreed with the finding by the German Federal Court of Justice that, in this case, priority was to be given to the right to freedom of expression of the tobacco company and that the dismissal of the applicants' claim for financial compensation was justified, as they already had obtained the suspension of the distribution of the advertisements at issue. Hence a fair balance had been struck between freedom of expression and the right to respect for private life. The European Court found therefore, by six votes to one, that in both cases there had been no violation of Article 8 of the European Convention on Human Rights.

- [Bohlen v. Germany](#), no. 53495/09, 19 February 2015.
- [Ernst August von Hannover v. Germany](#), no. 53649/09, 19 February 2015.

IRIS 2015-5/1

European Court of Human Rights: Haldimann and Others v. Switzerland

Dirk Voorhoof

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In a case concerning the conviction of four journalists for having recorded and broadcast an interview using hidden cameras, the European Court of Human Rights found, by six votes to one, that the Swiss authorities had violated the journalists' rights protected under Article 10 on freedom of expression of the European Convention on Human Rights. The Court emphasised that the use of hidden cameras by the journalists was aimed at providing public information on a subject of general interest, whereby the person filmed was targeted not in any personal capacity, but as a professional broker. The Court found that the interference with the private life of the broker had not been serious enough to override the public interest in information on denouncing malpractice in the field of insurance brokerage (on the use of hidden cameras, see also [Tierbefeier E.V. v. Germany](#), IRIS 2014-3/2).

In 2003, the Swiss German-language television channel SF DRS prepared a documentary on sales of life insurance products, against a background of public discontent with the practices used by insurance brokers. One of the SF DRS journalists presented herself as a customer while meeting with an insurance broker. Two hidden cameras were placed in the room in which the meeting took place. At the end of the meeting the journalist revealed that the conversation had been in reality an interview that had been filmed for journalistic purpose. The broker tried to obtain an injunction against the programme, but that request was dismissed. A short time later, sequences from the recording were broadcast on television, with the broker's face and voice disguised. After a complaint by the broker, a prosecution was started against the journalists involved in the making and editing of the programme, on charges of illegal recording of a conversation by others. Although acknowledging the major public interest in securing information on practices in the field of insurance, the journalists were convicted for recording and communicating a conversation by others without authorisation. The journalists complained before the European Court of Human Rights that their sentence to a payment of between four to 12 day-fines amounted to a disproportionate interference with their right to freedom of expression as protected under Article 10.

The Court reiterated its case law on attacks on the personal reputations of public figures and the six criteria which it has established in its Grand Chamber judgment of 7 February 2012 in the case of [Axel Springer AG v. Germany](#) (see IRIS 2012-3/1), weighing freedom of expression against the right to private life: (1) contributing to a debate of general interest, (2) ascertaining how well-known the person being reported on is and the subject of the report/documentary, (3) that person's prior conduct, (4) the method of obtaining the information and its veracity, (5) the content, form and repercussions of the journalistic output, and (6) the penalty imposed. The Court applied those criteria to the present case, while taking into consideration that the broker was not a well-known public figure. The Court noted that the documentary in question had not been geared towards criticising the broker personally, but rather towards denouncing specific commercial practices and the inadequate protection of consumers' rights in the sector of insurance brokers. Hence the report concerned an issue of interesting public debate, while Article 10 protects journalists in relation to such reporting under the proviso that they are acting in good faith and on an accurate factual basis, while providing "reliable and precise" information in accordance with the ethics of journalism. The Court noted that the veracity of the facts as presented by the journalists had indeed never been contested and that it was not established

that the journalists had deliberately acted in breach of the ethics of journalism. The recording on the other hand had been broadcast in the form of a report which was particularly negative in so far as the broker was concerned, using audiovisual media, which are often considered to have a more immediate and powerful effect than the written press. However, a decisive factor was that the journalists had disguised the broker's face and voice and that the interview had not taken place on his usual business premises. Therefore the Court held that the interference with the private life of the broker had not been serious enough to override the public's interest in receiving information on the alleged malpractice in the field of insurance brokerage. Despite the relative leniency of the penalties of 12 day-fines and four day-fines respectively, the criminal sentence by the Swiss court had been liable to discourage the media from expressing criticism, even though the journalists had not been prevented from broadcasting their documentary. The Court therefore concluded that there had been a violation of Article 10.

- [Haldimann and Others v. Switzerland](#), no. 21830/09, ECHR 2015.

IRIS 2015-4/1

European Court of Human Rights: Morice v. France (Grand Chamber)

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The Grand Chamber has overruled an earlier finding of non-violation of the right to freedom of expression of a lawyer ([Chamber, Fifth Section, 11 July 2013](#)). With an extensively elaborated reasoning, the Grand Chamber unanimously came to the conclusion that the applicant lawyer's conviction for the defamation of two investigative judges violated Article 10 of the Convention. It found that the lawyer, Morice, had expressed value judgments in the newspaper *Le Monde* with a sufficient factual basis and that his remarks concerning a matter of public interest had not exceeded the limits of the right to freedom of expression.

The judgment refers to the specific status of lawyers that gives them a central position in the administration of justice as intermediaries between the public and the courts. As a result, lawyers play a key role in ensuring that the courts, whose mission is fundamental in a State based on the rule of law, enjoy public confidence. This, however, does not exclude lawyers from the right to freedom of expression, in particular to comment in public on the administration of justice, provided that their criticism does not overstep certain bounds. Those bounds lie in the usual restrictions on the conduct of members of the Bar, with their particular reference to "dignity", "honour" and "integrity" and to "respect for ... the fair administration of justice".

The judgment analyses more concretely (a) the applicant's status as a lawyer, (b) the contribution to a debate on a matter of public interest, (c) the nature of the impugned remarks, (d) the specific circumstances of the case and (e) the sanctions imposed. As regards (a) the applicant's status as a lawyer, the Court reiterated its case-law to the effect that a distinction had to be drawn depending on whether the lawyer was speaking inside or outside the courtroom. Remarks made in the courtroom remained there and thus warrant a high degree of tolerance to criticism, especially since the lawyer's freedom of expression may raise questions as to his client's right to a fair trial: the principle of fairness thus also militates in favour of a free and even forceful exchange of argument between the parties. In the present case however the Court stated that it did not see how Morice's statements could have directly contributed to his task of defending his client. The Court also took the view that lawyers cannot be equated with journalists. It stated that their respective positions and roles in society are intrinsically different. Regarding (b) the contribution to a debate on a matter of public interest, the Court took the view that the impugned remarks published in *Le Monde* concerned a high-profile case that created discussion about the functioning of the judiciary. As such, a context of a debate on a matter of public interest calls for a high level of protection of freedom of expression, while only a particularly narrow margin of appreciation is left to the domestic authorities, leading to a strict scrutiny by the European Court as to whether the interference at issue can be justified as being necessary in a democratic society. As regard (c) on the nature of the impugned remarks, the Court was of the opinion that they were more value judgments than pure statements of fact, reflecting mainly an overall assessment of the conduct of the investigating judges in the course of the investigation. Furthermore, the remarks had a sufficient factual basis and could not be regarded as misleading or as a gratuitous attack on the reputation or the integrity of the two investigative judges. With regard to (d) and the specific circumstances of the case, the Grand Chamber reiterated that lawyers cannot be held responsible for everything appearing in an interview published by the press or for actions by the press. Furthermore, the Grand Chamber stated its opinion that Morice's statements could not be reduced to the mere expression of personal animosity, as their aim was to reveal shortcomings

in the justice system. According to the Court, “a lawyer should be able to draw the public’s attention to potential shortcomings in the justice system; the judiciary may benefit from constructive criticism”. The Grand Chamber also considered that respect for the authority of the judiciary cannot justify an unlimited restriction on the right to freedom of expression. Although the defence of a client by his lawyer must be conducted not in the media, but in the courts of competent jurisdiction, involving the use of any available remedies, the Grand Chamber accepted that there might be “very specific circumstances” justifying a lawyer making public statements in the media, such as in the case at issue. The Court found that Morice’s statements were not capable of undermining the proper conduct of the judicial proceedings and that his conviction could not serve to maintain the authority of the judiciary. Finally, with regard to (e) on the imposed sanction, the Court referred to its findings on many occasions that interference with freedom of expression may have a chilling effect on the exercise of that freedom, especially in cases of criminal defamation. In view of the foregoing, the Grand Chamber reached the conclusion, unanimously, that there has been a violation of Article 10 of the Convention.

- [Morice v. France \[GC\]](#), no. 29369/10, 23 April 2015.

IRIS 2015-6/1

European Court of Human Rights: Erla Hlynsdóttir v. Iceland (no. 3)

Dirk Voorhoof

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Once again, the European Court of Human Rights (ECtHR) has rejected a finding by national courts that journalistic reporting about a criminal case had overstepped the limits of freedom of expression. The Court emphasised the role of the media in a democratic society in informing the general public of serious criminal proceedings and it referred again to the notion of “responsible journalism”. The Court found unanimously that the interference with the journalist’s rights had violated Article 10 of the European Convention on Human Rights (ECHR).

The applicant in this case was Ms. Erla Hlynsdóttir. She was a journalist, working for the newspaper DV. In 2007, the newspaper DV published an article on the ongoing criminal proceedings against Mr. A and his co-accused, Mr. B, before the Reykjavík District Court. A picture of Mr. A was published on the front page of the newspaper showing him walking into the courtroom. There was a large headline under the photograph which read “Scared cocaine smugglers” and underneath it was written that both the accused were afraid of retaliation by their accomplices and had therefore refused to identify them. Mr. A’s name also appeared on the front page. Both on the front page and in the newspaper’s article written by Erla Hlynsdóttir it was mentioned that Mr. A and his co-accused could expect prison sentences. Reference was made to the indictment by the Director of Public Prosecutions requesting a punishment of seven to eight years’ imprisonment in respect of Mr. A, for importing nearly 3.8 kilograms of cocaine, intended for sale, together with an unknown accomplice. A punishment of three to four years was requested in respect of Mr. B, who was charged in the case with removing the alleged drugs from a vehicle, in cooperation with Mr. A. After being acquitted by the Icelandic courts, Mr. A lodged defamation proceedings against Mr. SME, the editor of DV at the time, and the journalist who wrote the article, Erla Hlynsdóttir. The Supreme Court declared null and void the words “cocaine smugglers” on the front page and the statement referring to the removal of drugs in a vehicle. Both Erla Hlynsdóttir and the editor were ordered to pay approximately EUR 575 in compensation for non-pecuniary damage and about EUR 290 for the costs of publishing the judgment.

The ECtHR first reiterated that the most careful scrutiny on the part of the Court is called for when, as in the present case, the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern. In the Court’s view, a journalist’s good faith should be assessed on the basis of the knowledge and information which was available to him or her at the time of writing the item(s) in question. Thus, it is not decisive for the purpose of the present case that Mr. A was later acquitted of the charges brought against him by the Director of Public Prosecutions. Although the ECtHR fully agreed with the Icelandic Supreme Court that it is for the courts and not the media to determine whether an accused is guilty of an offence, it also recognised the right of the media to report on ongoing court cases on the basis of available and correct information, such as an indictment by the public prosecutor and information gathered at the public hearing. The Court was of the opinion that the rendering of an indictment in a media coverage after it has been read out at a trial hearing is a kind of situation where there may be special grounds for dispensing the press from its ordinary obligation to verify factual statements that are defamatory of private individuals. With regard the labelling on the front page of the accused as “cocaine smugglers”, the ECtHR emphasised that was not the applicant journalist, but to the editor who

was deemed to have defamed Mr. A thereby. The journalist cannot be found responsible and liable for this statement in the newspaper and therefore the interference with her right to freedom of expression in this manner cannot be justified. The European Court came to the conclusion that the respondent State failed to sufficiently show that Erla Hlynsdóttir acted in bad faith or otherwise inconsistently with the diligence expected of a responsible journalist reporting on a matter of public interest. Therefore, there has been a violation of Article 10 of the European Convention on Human Rights. The Court reiterated though that, in assessing the relevance and sufficiency of the national courts' findings, the Court, in accordance with the principle of subsidiarity, must take into account the extent to which the domestic courts balanced the conflicting rights implicated in the case, in the light of the Court's established case-law in this area. As the European Court found that the reasoning of the national courts demonstrated a lack of sufficient engagement with the general principles of the Court under Article 10 of the ECHR, it disagreed with the domestic courts' finding that the interference with the applicant's rights could be justified as being necessary in a democratic society. The judgment shows once again how diligent and responsible journalism reporting on issues of public interest receives a very high level of protection by the ECtHR and that in such cases, notwithstanding its references to the subsidiarity principle, the Court applies a strict scrutiny over the findings and arguments by the domestic courts.

- [Erla Hlynsdottir v. Iceland \(no. 3\)](#), no. 54145/10, 2 June 2015.

IRIS 2015-7/2

European Court of Human Rights: Delfi AS v. Estonia (Grand Chamber)

Dirk Voorhoof

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On 16 June 2015, the Grand Chamber of the European Court of Human Rights (ECtHR) delivered the long-awaited final judgment in the case of Delfi AS v. Estonia, deciding on the liability of an online news portal for the offensive comments posted by its readers below one of its online news articles. It was the first case in which the European Court has been called upon to examine, from the perspective of the right to freedom of expression, a complaint about liability for user-generated comments on an internet news portal. By a [Chamber judgment](#) of 10 October 2013, the ECtHR had first unanimously held that there had been no violation of the right to freedom of expression as guaranteed by Article 10 of the European Convention of Human Rights (see IRIS 2014-1/2). The Court confirmed the findings by the domestic courts that the Delfi news platform was to be considered a provider of content services, rather than a provider of technical services, and that therefore it should have effectively prevented clearly unlawful comments from being published. The fact that Delfi had immediately removed insulting content after having received notice of it did not suffice to exempt Delfi from liability. The reason why Delfi could not rely on the limited liability regime for internet service providers (ISPs) of Article 12 to 15 of the Directive 2001/31/EC on Electronic Commerce (no liability in case of expeditious removal after obtaining actual knowledge of illegal content and no duty of pre-monitoring) was, according to the Estonian courts, that the news portal had integrated the readers' comments into its news portal, it had some control over the incoming or posted comments and it had invited the users to post comments, while it also had an economic interest in exploiting its news platform through the integrated comment environment. The European Court did not challenge this finding by the Estonian courts, restricting its supervisory role to ascertaining whether the effects of refusing to treat Delfi as an ISP were compatible with Article 10 of the Convention. The Chamber's judgment however did not become final as, on 17 February 2014, the panel of five judges, in application of Article 43 of the Convention, decided to [refer the case to the Grand Chamber](#) of the ECtHR (see IRIS 2014-4/1).

The Grand Chamber has now confirmed the non-finding of a breach of Article 10 of the Convention, on very similar, but not identical grounds as those given in the Chamber's judgment. The Grand Chamber started by considering that the case concerns the "duties and responsibilities" of Internet news portals, under Article 10 paragraph 2 of the Convention, when they provide for economic purposes a platform for user-generated comments on previously published content and some users - whether identified or anonymous - engage in clearly unlawful speech, which infringes the personality rights of others and amounts to hate speech and incitement to violence against them. The Grand Chamber is of the opinion that the Estonian courts' finding of liability against Delfi was a justified and proportionate restriction on the portal's freedom of expression. The Court agreed that the Information Society Services Act transposing the E-Commerce Directive into Estonian law, including the provisions on the limited liability of ISPs, did not apply to the present case, since the latter related to activities of a merely technical, automatic and passive nature, while Delfi's activities reflected those of a media publisher running an internet news portal. Delfi's involvement in making public the comments on its news articles on its news portal went beyond that of a passive, purely technical service provider. The Grand Chamber was of the opinion that the interference by the Estonian authorities in Delfi's freedom of expression was sufficiently foreseeable and sufficiently precisely prescribed by law and was justified by the legitimate aim of protecting the reputation and rights of others. While the Court

acknowledged that important benefits can be derived from the Internet in the exercise of freedom of expression, it was also mindful that liability for defamatory or other types of unlawful speech must, in principle, be retained as an effective remedy for violations of personality rights.

The Court emphasised that the case concerned a large professionally managed Internet news portal run on a commercial basis, which published news articles of its own and invited its readers to comment on them. The Grand Chamber agreed with the Chamber's finding that Delfi must be considered to have exercised a substantial degree of control over the comments published on its portal. It noted that Delfi cannot be said to have wholly neglected its duty to avoid causing harm to third parties, but that the automatic word-based filter used by Delfi failed to filter out odious hate speech and speech inciting violence posted by readers and thus limited its ability to expeditiously remove the offending comments. The Court recalled that the majority of the words and expressions in question did not include sophisticated metaphors or contain hidden meanings or subtle threats: they were manifest expressions of hatred and blatant threats to the physical integrity of the insulted person. Thus, even if the automatic word-based filter may have been useful in some instances, the facts of the present case demonstrate that it was insufficient for detecting comments that can be qualified as "hate speech" and do not constitute protected speech under Article 10 of the Convention. The Court noted that, as a consequence of this failure of the filtering mechanism, such clearly unlawful comments remained online for six weeks. The Court considered that a large news portal's obligation to take effective measures to limit the dissemination of hate speech and speech inciting violence - the issue in the present case - can by no means be equated to "private censorship". The Grand Chamber attached weight to the consideration that the ability of a potential victim of hate speech to continuously monitor the Internet is more limited than the ability of a large commercial Internet news portal to prevent or rapidly remove such comments. By way of conclusion, the Grand Chamber took the view that the steps taken by Delfi to remove the offensive comments had been insufficient. Furthermore, the compensation of EUR 320 that Delfi had been obliged to pay for non-pecuniary damages was not to be considered as an excessive interference with the right to freedom of expression of the applicant media company. Therefore, the Grand Chamber found that the domestic courts' imposition of liability on Delfi was based on relevant and sufficient grounds and that this measure did not constitute a disproportionate restriction on Delfi's right to freedom of expression. By fifteen votes to two, the Grand Chamber held there has been no violation of Article 10 of the Convention.

It is important to draw attention to one of the Grand Chamber's considerations that the Delfi case does not affect "other fora on the Internet" where third-party comments can be disseminated, for example Internet discussion fora or bulletin boards where users can freely set out their ideas on any topic without the discussion being channelled by any input from the forum's manager. The Grand Chamber's finding is also not applicable to a social media platform where the platform provider does not offer any content and where the content provider may be a private person running the website or a blog as a hobby. The Court indeed emphasised very strongly that the case concerned a professionally managed Internet news portal, run on a commercial basis.

The Grand Chamber also made clear that the impugned comments in the present case mainly constituted hate speech and speech that directly advocated acts of violence. Hence, the establishment of their unlawful nature did not require any linguistic or legal analysis by Delfi, since the remarks were on their face manifestly unlawful. According to the Grand Chamber its judgment is not to be understood as imposing a form of "private censorship".

- [Delfi AS v. Estonia \[GC\]](#), no. 64569/09, 16 June 2015.

IRIS 2015-7/1

European Court of Human Rights: *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*

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After proceedings at national level over eight years, and after a preliminary ruling by the EU Court of Justice on 16 December 2008 ([Case C-73/07](#)), the European Court of Human Rights has delivered a judgment in a highly interesting case of conflicting rights between the right of privacy and the right to freedom of expression, in the domain of protection of personal data and data journalism. The Court comes to the conclusion that a prohibition issued by the Finnish Data Protection Board that prohibited two media companies (*Satakunnan Markkinapörssi Oy* and *Satamedia Oy*) from publishing personal data in the manner and to the extent *Satamedia* had published these data before, is to be considered as a legitimate interference in the applicants' right to freedom of expression and information. More precisely the Finnish authorities forbade *Satamedia* from collecting, saving and processing to a large extent taxation data, with the result that an essential part of the information published in the applicant's magazine *Veropörssi* could no longer be published and an SMS-service was discontinued. The European Court agrees with the Finnish authorities that the applicants could not rely on the exception of journalistic activities as the publication of the large amount of taxation data by *Satamedia* was not justified by a public interest. The Court accepts the approach of the Finnish Supreme Administrative Court that it was necessary to interpret *Satamedia's* freedom of expression strictly in order to protect the right of privacy of Finnish citizens.

The European Court recognises however the general subject-matter which was at the heart of the publication in question, namely the taxation data about natural persons' taxable income and assets, while such data are a matter of public record in Finland, available to everyone. The Court agrees that *as such* this taxation information was a matter of public interest. The Court also emphasises that such data are public in Finland, in accordance with the Act on the Public Disclosure and Confidentiality of Tax Information, and that there was no suggestion that *Satamedia* had obtained the taxation data by subterfuge or other illicit means. The Court equally observes that the accuracy and reliability of the published information was not in dispute. According to the European Court the only problematic issue was the extent of the published information by *Satamedia*, as the *Veropörssi* magazine had published in 2002 taxation data on 1.2 million persons. According to the domestic authorities the publishing of taxation information to such an extent could not be considered as journalism, but as processing of personal data which *Satamedia* had no right to do. The Court's judgment also contains a reference to the preliminary ruling of the EU Court of Justice of 16 December 2008, which found that the activities of *Satamedia* related to data from documents which were in the public domain under Finnish legislation, could be classified as "journalistic activities", if their object was to disclose to the public information, opinions or ideas, irrespective of the medium which was used to transmit it.

Leaving a broad margin of appreciation, the European Court of Human Rights accepts the finding by the Finnish authorities that the publication of personal data by *Satamedia* could not be regarded as journalistic activity, in particular because that derogation for journalistic purpose in the Personal Data Act (see also Article 9 of Protection of Personal Data Directive 95/46/EC of 24 October 1995) was to be interpreted strictly. The European Court is of the opinion that the Finnish judicial authorities have attached sufficient importance to *Satamedia's* right to freedom of expression, while also taking into consideration the right to respect for private life of those taxpayers whose taxation information had been published. The Court finds that the restrictions on

the exercise of Satamedia's freedom of expression were established convincingly by the Supreme Administrative Court, in line with the Court's case-law. In such circumstances the Court would require strong reasons to substitute its own view for that of the domestic courts.

The Court finally notes that Satamedia was not prohibited generally from publishing the taxation information about private persons, but only to a certain extent. The fact that the prohibition issued led to the discontinuation of *Veropörssi* magazine and Satamedia's SMS-service was, according to the Court, not a direct consequence of the interference by the Finnish authorities, but an economic decision made by Satamedia itself. The Court also takes into account that the prohibition laid down by the domestic authorities was not a criminal sanction, but an administrative one, and thereby a less severe sanction than a criminal one. Having regard to all the foregoing factors, and taking into account the margin of appreciation afforded to the State in this area, the Court considers that the domestic courts struck a fair balance between the competing interests at stake. Therefore there has been no violation of Article 10 of the Convention. Only one judge dissented, emphasising that the majority's approach does not follow the established case-law of the Court finding a violation of Article 10 in cases where national authorities have taken measures to protect publicly available and known information on matters of public interest from disclosure. The dissenting opinion also states that no negative effect or harm was identified as having been inflicted upon any individual, nor had society been otherwise imperilled through the publication of the taxation data at issue. It states further that "regrettably, the majority agreed with the respondent state that the applicant companies' activities did not fall within the exception for the purposes of journalism in the Personal Data Act" and that this can lead to an interpretation "that journalists are so limited in processing data that the entire journalistic activity becomes futile (.), particularly in the light of the dynamic and evolving character of media".

Apart from rejecting the applicants' arguments with regard to their right to freedom of expression and information under Article 10 of the Convention, the Court also rejected Satamedia's claim that Article 14 of the Convention was violated. Satamedia had argued that they had been discriminated against vis-à-vis other newspapers which had been able to continue publishing the taxation information in question. According to the European Court, Satamedia could not be compared with other newspapers publishing taxation data as the quantity published by them was clearly greater than elsewhere. Therefore Satamedia's situation was not sufficiently similar to the situation of other newspapers, and hence there was no discrimination in the terms of Article 14. Indeed, in order for an issue to arise under Article 14 there must be a difference in treatment in relevantly similar situations, the latter not being the case in this context. The Court found this part of the application manifestly ill-founded and therefore inadmissible.

The Court did find however a violation of Article 6 § 1 (fair trial) of the Convention in this case, as the length of the proceedings at domestic level (six years and six months) was excessive and failed to meet the "reasonable time" requirement, even taking into account the complexity of the case.

- [Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland](#), no. 931/13, 21 July 2015.
- Judgment of the Court of Justice of the European Union (Grand Chamber) in [Case C-73-07 Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy](#), 16 December 2008.

Editor's note: This case was referred to the Grand Chamber on 14 December 2015, which returned [its judgment on 27 June 2017](#).

IRIS 2015-8/1

European Court of Human Rights: Niskasaari and Otavamedia Oy v. Finland

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An interesting judgment of the European Court of Human Rights (ECtHR) recently became final, in which the Court confirmed the right of journalists to express severe criticism in strong wording on matters of public interest. The judgment clarifies that this right is also protected under Article 10 of the European Convention on Human Rights (ECHR) when the criticism relates to journalistic reporting by other media, and focuses in casu on a journalist who produced two TV documentaries broadcast by the Finnish public service broadcaster.

In this case, the journalist, Mikko Veli Niskasaari, and the media company Otavamedia Oy, were found liable for defamation of a journalist who had been criticised for having manipulated a documentary. The criticism had been uttered in Seura magazine, and on two internet discussion forums, calling the journalists of the Finnish public service broadcaster who produced two documentaries on forest protection “liars”. According to Niskasaari, some figures and data in the documentary were fabricated, and one of the journalists who made the documentary was “lying cold-bloodedly and intentionally”. Niskasaari was convicted in Finland because there was no evidence that the journalist had disseminated wrong or misleading information in the documentaries in question. As a consequence, Niskasaari had not had strong reason or probable cause to hold his own accusations to be true, and to call the journalist a liar. Niskasaari was convicted under criminal law and was ordered to pay a fine (EUR 240) and damages (EUR 2000) to the complainant journalist. The media company was ordered, together with Niskasaari, to pay EUR 4000 in damages to the complainant, as well as the latter’s costs and expenses of EUR 25500. The criminal conviction and civil damages were based on Chapter 24, section 9, of the Penal Code (defamation) and Chapter 5, section 6, of the Tort Liability Act (dissemination of information that violates private life or reputation).

According to the ECtHR, there is no doubt that the measures against Niskasaari and Otavamedia Oy were prescribed by law, fulfilling the requirements of precision and clarity, and were pursuing the legitimate aim of protecting the reputation or rights of others. The Court, however, finds unanimously that the Finnish authorities have violated the right to freedom of expression of the applicant journalist and media company, as the interference with their rights under Article 10 of the European Convention is not considered necessary in a democratic society. According to the Court’s case law a number of criteria are relevant when examining the necessity of an interference with the right to freedom of expression in the interests of the “protection of the reputation or rights of others”, namely (i) contribution to a debate of general interest; (ii) how well-known the person concerned is and what the subject of the report is; (iii) prior conduct of the person concerned; (iv) method of obtaining the information and its veracity; (v) content, form and consequences of the publication; and (vi) severity of the sanction imposed.

In the case at issue, the ECtHR is of the opinion that it was not clear from the reasoning in the judgments of the domestic courts what “pressing social need” was taken to justify protecting the TV-journalist’s right to reputation over the freedom of expression of Niskasaari and Otavamedia Oy, particularly as it concerned a debate between two professional journalists discussing the limits of critical and investigative journalism. The European Court considers that journalists who use strong expressions and pursue so-called investigative journalism in a TV-documentary could

be expected to tolerate even severe criticism of their activities. It emphasises that it is relevant for the judicial balancing exercise, that the complainant TV-journalist, while entitled to benefit from the protection afforded to every individual's reputation by Article 8, was himself an investigative journalist involved in making TV documentaries on controversial issues for a public broadcasting company. Hence the journalist was engaged in an activity very much in the public domain in a manner and in circumstances "where he could himself expect to be the subject of robust scrutiny, comment and criticism regarding his professional conduct". The Court is of the opinion that the Court of Appeal did not pay sufficient attention to this "journalistic" hue of the case. The ECtHR also points out that Seura magazine provided the reporters who had made the TV-documentaries in question, including the complainant, with an opportunity to reply to the first applicant's criticism. In response to this reply, the magazine subsequently published a page-long counter-reply by Niskasaari. The Court notes that different statistical information existed as far as the conserved forest area in Finland was concerned and that it could not therefore be said that the figures given by the complainant TV-journalist were fabricated. However, the domestic courts did not, as required by Article 10 of the ECHR, proceed to a sufficient evaluation of the actual impact of Niskasaari's right to freedom of expression on the outcome of the case. In particular, the Appeal Court did not balance his right to freedom of expression under Article 10 of the European Convention, on the basis of the relevant criteria, in any considered way against the complainant's conflicting right to reputation, under Article 8 of the Convention. Nor is it clear whether, according to the Appeal Court, the resultant interference with Niskasaari's freedom of expression was proportionate to the legitimate aim pursued. The European Court regards the amount of compensation (EUR 4000) as substantial, given that the maximum compensation afforded to victims of serious violence varies between EUR 3000 and EUR 5000. Having regard to all the foregoing factors, and notwithstanding the margin of appreciation afforded to the State in this area, the Court considers that the domestic courts failed to undertake an assessment capable of striking a fair balance between the competing interests at stake under Articles 8 and 10 of the European Convention. Therefore the ECtHR concludes that the reasons relied upon by the domestic courts, although relevant, were not sufficient to show that the interference complained of was "necessary in a democratic society". Accordingly, the Finnish authorities were found to have violated Article 10 of the ECHR.

- [Niskasaari and Otavamedia Oy v. Finland](#), no. 32297/10, 23 June 2015.

IRIS 2015-10/1

European Court of Human Rights: *Perinçek v. Switzerland*

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On 17 December 2013 the Second Section of European Court of Human Rights (ECtHR) ruled by five votes to two that Switzerland violated the right to freedom of expression by convicting Doğu Perinçek, chairman of the Turkish Workers' Party, for publicly denying the existence of the genocide against the Armenian people ([IRIS 2014-2/1](#) and [IRIS 2014-7/2](#)). After referral, on 15 October 2015 the Grand Chamber confirmed by ten votes to seven the finding of a violation of Article 10 of the European Convention on Human Rights (ECHR). In several public speeches, Perinçek had described the Armenian genocide as “an international lie”. The Swiss courts found that Perinçek’s denial that the Ottoman Empire had perpetrated the crime of genocide against the Armenian people in 1915 and the following years, was in breach with Article 261bis § 4 of the Swiss Criminal Code. This article punishes inter alia the denial, gross minimisation or attempt of justification of a genocide or crimes against humanity. According to the Swiss courts, the Armenian genocide, like the Jewish genocide, is a proven historical fact. Relying on Article 10 ECHR, Perinçek complained before the European Court that his criminal conviction and punishment for having publicly stated that there had not been an Armenian genocide had breached his right to freedom of expression.

The Grand Chamber, in a 128-page judgment, is of the opinion that the Swiss authorities only had a limited margin of appreciation to interfere with the right to freedom of expression, and it takes a set of criteria into consideration when assessing whether Perinçek’s conviction can be considered as “necessary in a democratic society”. Therefore the Court looks at the nature of Perinçek’s statements; the context in which they were interfered with; the extent to which they affected the Armenians’ rights; whether there is a consensus among the High Contracting Parties on the need to resort to criminal law sanctions in respect of such statements; the existence of any international law rules bearing on this issue; the method employed by the Swiss courts to justify the applicant’s conviction; and the severity of the interference.

The European Court considers Perinçek’s statements as a part of a heated debate of public concern, touching upon a long standing controversy, not only in Armenia and Turkey, but also in the international arena. His statements were certainly virulent, but were not to be perceived as a form of incitement to hatred, violence or intolerance. The Grand Chamber emphasises that it is “aware of the immense importance attached by the Armenian community to the question whether the tragic events of 1915 and the following years are to be regarded as genocide, and of that community’s acute sensitivity to any statements bearing on that point. However, it cannot accept that the applicant’s statements at issue in this case were so wounding to the dignity of the Armenians who suffered and perished in these events and to the dignity and identity of their descendants as to require criminal law measures in Switzerland”.

After analysing the relevant criteria and case-specific elements, and after balancing the conflicting rights at issue (freedom of expression under Article 10 versus the right of reputation and (ethnic) dignity under Article 8), the majority of the Grand Chamber concludes that Perinçek’s right to freedom of expression has been violated by the Swiss authorities. The Grand Chamber summarises its finding as follows: “Taking into account all the elements analysed above - that the applicant’s statements bore on a matter of public interest and did not amount to a call for hatred or intolerance, that the context in which they were made was not marked by heightened

tensions or special historical overtones in Switzerland, that the statements cannot be regarded as affecting the dignity of the members of the Armenian community to the point of requiring a criminal law response in Switzerland, that there is no international law obligation for Switzerland to criminalise such statements, that the Swiss courts appear to have censured the applicant for voicing an opinion that diverged from the established ones in Switzerland, and that the interference took the serious form of a criminal conviction - the Court concludes that it was not necessary, in a democratic society, to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake in the present case". On these grounds, ten of the 17 judges come to the conclusion that the Swiss authorities have breached Article 10 of the Convention. The Grand Chamber majority also confirms that Article 17 (abuse clause) can only be applied on an exceptional basis and in extreme cases, where it is "immediately clear" that freedom of expression is employed for ends manifestly contrary to the values of the Convention. As the decisive issue whether Perinçek had effectively sought to stir up hatred or violence and was aiming at the destruction of the rights under the Convention was not "immediately clear" and overlapped with the question whether the interference with his right to freedom of expression was necessary in a democratic society, the Grand Chamber decided that the question whether Article 17 was applicable had to be joined with the examination of the merits of the case under Article 10 of the Convention. As the Court found that there has been a breach of Article 10 of the Convention, there were no grounds to apply Article 17 of the Convention.

Seven judges however, including the president of the Court, argued that the conviction of Perinçek in Switzerland did not amount to a breach of his right to freedom of expression. Four of them also argued that Article 17 (abuse clause) should have been applied in this case. The dissenting judges emphasise "that the massacres and deportations suffered by the Armenian people constituted genocide is self-evident. The Armenian genocide is a clearly established fact. To deny it is to deny the obvious", immediately admitting however that this is not the (relevant) question in the case at issue. According to the dissenting judges the real issue at stake is "whether it is possible for a State, without overstepping its margin of appreciation, to make it a criminal offence to insult the memory of a people that has suffered genocide". They confirm that, in their view, this is indeed possible.

- [Perinçek v. Switzerland \[GC\]](#), no. 27510/08, ECHR 2015 (extracts).

IRIS 2016-1/1

European Court of Human Rights: Pentikäinen v. Finland

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On 20 October 2015 the Grand Chamber of the European Court of Human Rights (ECtHR) confirmed that the interference with a press photographer's right to freedom of expression and newsgathering as a result of disobeying a police order to leave the scene of a demonstration that had turned into a riot, can be said to have been "necessary in a democratic society" within the meaning of Article 10 of the European Convention on Human Rights (ECHR). The Grand Chamber comes to the same conclusion as the earlier judgment of the Fourth Section finding that the arrest, detention, prosecution and conviction of the journalist did not violate Article 10 ECHR (see [IRIS 2014-4/2](#) and [IRIS 2014-7/2](#)).

The applicant, Markus Pentikäinen, is a photographer and journalist for the weekly magazine Suomen Kuvalehti. He was sent by his employer to take photographs of a large demonstration against the Asia-Europe meeting in Helsinki, and to conduct an extensive report on the demonstration for the paper version of the magazine and also to publish it online immediately, once the demonstration had ended. At a certain moment, the police decided to interrupt the demonstration, which had turned violent, and to seal off the demonstration area. It was announced over loudspeakers that the demonstration was stopped and that the crowd should leave the scene. The police continued to order the crowd to disperse, stating that any person who did not leave would be apprehended.

Hundreds of people then left voluntarily via several exit routes established by the police. When leaving, they were asked to show their identity cards and their belongings were checked. At one point, a police officer told Pentikäinen personally that he had one last chance to leave the scene. Pentikäinen told the police officer that he was reporting for Suomen Kuvalehti and that he was going to follow the event to its end. After the situation inside the cordon had already been peaceful for an hour with around only 20 demonstrators left, the police apprehended the protesters that had not left the scene yet, including Pentikäinen. He told the apprehending officer that he was a journalist and he presented his press card, which the police officer later confirmed. In addition, at the police station, the police were aware that Pentikäinen was a member of the press. He was detained for about 18 hours and later the public prosecutor brought charges against him. The Finnish courts found the journalist guilty of disobeying the police, but they did not impose any penalty on him, holding that his offence was excusable. Apart from the acceptance that the impugned measures were prescribed by law, the Grand Chamber also considers them necessary in a democratic society, as pertinently and sufficiently motivated by the Finnish authorities. In general terms the Court is of the opinion that "a journalist cannot claim an exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising the right to freedom of expression, the offence in question was committed during the performance of his or her journalistic functions". According to the Grand Chamber "the present case does not concern the prohibition of a publication (public disclosure of certain information) or any sanctions imposed in respect of a publication. What is at stake in the present case are measures taken against a journalist who failed to comply with police orders while taking photos in order to report on a demonstration that had turned violent" (§ 93). The Grand Chamber also endorses the argument of the Finnish Government, stating that "the fact that the applicant was a journalist did not entitle him to preferential or different treatment in comparison to the other people left at the scene".

The judgment refers to the obligation of a journalist to behave in a “responsible” way, which includes obeying lawful orders by the police: “Against the background of this conflict of interests, it has to be emphasised that the concept of responsible journalism requires that whenever a journalist - as well as his or her employer - has to make a choice between the two duties and if he or she makes this choice to the detriment of the duty to abide by ordinary criminal law, such journalist has to be aware that he or she assumes the risk of being subject to legal sanctions, including those of a criminal character, by not obeying the lawful orders of, inter alia, the police”. The Grand Chamber agrees with the Finnish authorities that the impugned measures taken against Pentikäinen were necessary and proportionate for the protection of public safety and the prevention of disorder and crime. That includes not only his apprehension, but also the near 18-hour detention, the prosecution, and finally the criminal conviction for having disobeyed the police.

The majority of the Grand Chamber, by thirteen votes to four, comes to the conclusion that there has been no violation of Article 10 of the Convention. The Court recalls that it “clearly transpires from the case file that the authorities did not deliberately prevent or hinder the media from covering the demonstration in an attempt to conceal from the public gaze the actions of the police with respect to the demonstration in general or to individual protesters (..). Indeed, the applicant was not prevented from carrying out his work as a journalist either during or after the demonstration”. It also stresses that “this conclusion must be seen on the basis of the particular circumstances of the instant case, due regard being had to the need to avoid any impairment of the media’s “watch-dog” role”. The dissenting judges consider the reasoning and finding by the majority of the Grand Chamber “a missed opportunity”, neglecting the rights of journalists to observe public demonstrations effectively and unimpeded, so long as they do not take a direct and active part in hostilities. The four dissenters emphasise “the fundamental role of the press in obtaining and disseminating to the public information on all aspects of governmental activity”. In a statement of 12 November 2015 published on the Council of Europe’s Platform to promote the protection of journalism and the safety of journalists, the EFJ, the IFJ, Index on Censorship and Article 19 call on Finland and other Council of Europe member states to adopt a clear legal framework for the treatment of journalists during protests, in order to ensure the right balance between press freedom and public order during protests and demonstrations.

- [Pentikäinen v. Finland \[GC\]](#), no. 11882/10, ECHR 2015.
- EFJ, IFJ, Article 19, Index, “Finland: Unclear Legal Framework for Guaranteeing Journalists’ Rights Covering Protests” 12 November 2015 [Ed.: via the Council of Europe [Platform to promote the protection of journalism and safety of journalists](#)].

IRIS 2016-1/2

European Court of Human Rights: Couderc and Hachette Filipacchi Associés v. France

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The Grand Chamber's judgment in *Couderc and Hachette Filipacchi Associés v. France* elaborates on the appropriate standards for privacy and media coverage on issues related to the private life of public persons (see also [IRIS 2014-3/1](#)). In 2005, the French magazine *Paris Match* was ordered to pay EUR 50,000 in damages and to publish a statement detailing the judgment of the Versailles Court of Appeal finding a breach of privacy, because of an article which caused damage to Albert II of Monaco. The impugned article in *Paris Match* contained an interview with the former lover of Albert Grimaldi, Ms Coste, who claimed that Albert Grimaldi, who had become the reigning prince of Monaco, was the father of her son. In particular, the interview described the circumstances in which Ms Coste had met the Prince, their intimate relationship, their feelings, and the manner in which the Prince had reacted to the news of Ms Coste's pregnancy and had behaved towards the child at his birth and afterwards. Ms Conte also revealed that she was living in the Prince's Paris apartment and that she received an allowance from him, being the mother of his illegitimate child. The article was illustrated by several photographs showing the Prince with the child in his arms and with Ms Coste. Considering that the publication of the article in *Paris Match* interfered with his right to private life and to protection of his own image, the Prince had brought proceedings against *Paris Match*, seeking damages from the publishing company and an order to publish the court's ruling. The French Court of Cassation confirmed the finding of the invasion of Albert Grimaldi's privacy, inter alia on the grounds that "every person, whatever his rank, birth, fortune or present or future functions, is entitled to respect for his private life".

The publication director, Ms Couderc, and the publishing company, of the weekly magazine *Paris Match* lodged an application with the European Court of Human Rights (ECtHR) against France, complaining about an unjustified interference with their right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The Fifth Section of the ECtHR, in a [judgment of 12 June 2014](#), held, by four votes to three, that there had been a violation of Article 10 of the Convention. The Chamber judgment, however, did not become final. On request of the French Government, the case was referred to the Grand Chamber. In its judgment of 10 November 2015, the Grand Chamber confirms the finding of a violation of Article 10 ECHR. The Court refers to the relevant criteria applied in other cases in which the rights under Article 8 and 10 needed to be balanced. These criteria are: 1. contribution to a debate of public interest and the subject of the news report; 2. the degree of notoriety of the person affected; 3. the prior conduct of the person concerned; 4. the content, form and consequences of the publication; 5. the circumstances in which the photographs were taken, the way in which the information was obtained and its veracity; and 6. the gravity of the penalty imposed on the journalists or publishers.

In relation to the first aspect, the Court finds that the birth of the Prince's illegitimate son could not come solely within the private sphere of Albert Grimaldi, as the disclosure of the Prince's fatherhood could be understood as constituting information on a question of public interest, as at the material time the child's birth was not without possible dynastic and financial implications. According to the Court, the impugned information also had a political dimension. It further emphasises "that the press's contribution to a debate of public interest cannot be limited merely to current events or pre-existing debates. Admittedly, the press is a vector for disseminating debates on matters of public interest, but it also has the role of revealing and bringing to the

public's attention information capable of eliciting such interest and of giving rise to such a debate within society".

The Grand Chamber is particularly critical of the domestic courts' failure to weigh up the Prince's right to privacy with that of his son and the child's mother. Ms Coste had willingly given the interview and revealed certain details of her private affair with the Prince. The resulting disputed article had made clear that her son's right to public recognition by his father was of utmost importance to her, and was a key reason for her decision to publicise the issue. Hence, Ms Coste "was certainly not bound to silence" and the Prince's private life was not the sole subject of the article. It also concerned the private life of Ms Coste and her son, her pregnancy, her own feelings, the birth of her son, a health problem suffered by the child and their life together. The Court emphasises "that the combination of elements relating to Ms Coste's private life and to that of the Prince had to be taken into account in assessing the protection due to him".

The Court also refers to the fairness of the means used to obtain the information and reproduce it for the public, and the respect shown for the person who is the subject of the news report: Ms Coste herself contacted Paris Match, the veracity of the information is not disputed and the pictures which illustrate the interview were handed over voluntarily by Ms Coste to Paris Match. In addition, the photographs taken with the Prince were not taken without his knowledge and were taken in public places, raising no particular issues. The magazine furthermore cannot be criticised for enhancing the article and striving to present it attractively, provided that this does not distort or deform the information published and is not such as to mislead the reader. With regard to the photographs illustrating the article which show the Prince holding the child, the Court reiterates that Article 10 ECHR leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility. While there is no doubt that these photographs fell within the realm of the Prince's private life and that he had not consented to their publication, their link with the impugned article however was not tenuous, artificial or arbitrary, and their publication could be justified by the fact that they added credibility to the account of events. The pictures were neither defamatory, depreciatory or pejorative for the Prince's image.

The Court finally reiterates that in the context of assessing proportionality, "any undue restriction on freedom of expression effectively entails a risk of obstructing or paralysing future media coverage of similar questions", while the order to pay EUR 50,000 in damages and to publish a statement detailing the judgment cannot be considered as insignificant penalties.

The Court concluded that the arguments for the protection of the Prince's private life and his right to his own image, although relevant, cannot be regarded as sufficient to justify the interference at issue. The French courts did not give due consideration to the principles and criteria as laid down by the Court's case-law for balancing the right to respect for private life and the right to freedom of expression. They thus exceeded the margin of appreciation afforded to them and failed to strike a reasonable balance of proportionality between the measures restricting Paris Match's right to freedom of expression, and the legitimate aim pursued. The Court therefore, unanimously, concludes that there has been a violation of Article 10 of the Convention.

- [Couderc and Hachette Filipacchi Associés v. France \[GC\]](#), no. 40454/07, ECHR 2015 (extracts).

IRIS 2016-1/3

European Court of Human Rights: Cengiz and others v. Turkey

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On 1 December 2015, the European Court of Human Rights (ECtHR) delivered a judgment dealing with a blocking order in Turkey of the popular video-sharing website YouTube. The Court found that the blocking of access to YouTube amounted to a violation of the right to receive and impart information under Article 10 of the European Convention of Human Rights (ECHR). The Court observed that YouTube, as an Internet platform, enabled information on political and social matters to be broadcast and citizen journalism to emerge. The Court found that there was no provision in the Turkish law allowing domestic courts to impose the blanket blocking order of YouTube at issue.

Pursuant to a law regulating Internet publications and combating Internet offences, in May 2008 the Ankara Criminal Court of First Instance ordered the blocking of access to YouTube on the ground that the website contained some ten videos which it was claimed were insulting to the memory of Atatürk. Arguing that this restriction interfered with their right to freedom to receive or impart information and ideas, Serkan Cengiz, Yaman Akdeniz and Kerem Altıparmak challenged the decision and requested, in their capacity as users, that the measure be lifted. They also alleged that the measure had an impact on their professional academic activities, as all three occupied academic positions in different universities, where they teach law. The Ankara Criminal Court of First Instance rejected their request on the ground that the blocking order had been imposed in accordance with the law and that the applicants did not have standing to challenge the blocking order. In total the YouTube website was blocked for a period of two and a half years. On 30 October 2010, the blocking order was lifted by the public prosecutor's office following a request from the company owning copyright of the videos in question.

The three law professors lodged an application before the Strasbourg Court, mainly relying on Article 10 ECHR. As active users, they complained about the impact of the blocking order on their right to freedom to receive and impart information and ideas. Relying on Article 46 (concerning the binding force and execution of judgments), they also requested that the Court indicate to the Turkish Government which general measures could be taken to put an end to the situation complained about.

The Court first considered it necessary to determine whether the applicants had victim status as required by the Convention. It noted that although the applicants were not directly affected by the blocking order, they had actively used YouTube for professional purposes, particularly downloading or accessing videos used in their academic work. It also observed that YouTube was an important source of communication and that the blocking order precluded access to specific information which it was not possible to access by other means. Moreover, the platform permitted the emergence of citizen journalism which could impart political information not conveyed by traditional media. The Court accordingly accepted that in the present case YouTube had been an important means by which Cengiz, Akdeniz and Altıparmak could exercise their right to receive and impart information or ideas and that they could legitimately claim to have been affected by the blocking order even though they had not been directly targeted by it. In the Court's view, the blocking order at issue could be regarded as an interference by a public authority with the exercise of the rights guaranteed by Article 10 ECHR. The Court went on to observe that the blocking order had been imposed under Section 8(1) of Law no. 5651, while in its judgment in

the case of [Ahmet Yıldırım v. Turkey](#) (see IRIS 2013-2/1) concerning a blocking order of Google Sites, it had already found that this law did not authorise the blocking of access to an entire Internet site on account of one element of its content. Under Section 8(1), a blocking order could only be imposed on a specific publication, hence there was no legislative provision allowing the Turkish judicial authorities to impose a blanket blocking order on access to YouTube. Therefore the interference with the applicants' rights had not satisfied the condition of lawfulness required by Article 10 § 2 ECHR. The European Court also found that Cengiz, Akdeniz and Altıparmak had not enjoyed a sufficient degree of protection. Finally the Court did not consider it necessary to rule on Article 46 of the Convention, as it observed that Law no. 5651 has been amended and now allowed, under certain conditions, blocking orders to be imposed on an entire website. However, as the new Act was not of concrete application in the present case, the Court did not consider it necessary to elaborate and rule on this aspect of the case.

- [Cengiz and Others v. Turkey](#), nos. 48226/10 and 14027/11, ECHR 2015 (extracts).

IRIS 2016-2/1

European Court of Human Rights: Görmüş a.o. v. Turkey

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The European Court of Human Rights (ECtHR) has once more confirmed the strong protection that is to be given to journalists' sources, in a case also related to the disclosure of confidential information and the protection of whistle-blowers. The Court is of the opinion that the Turkish authorities have violated the right to freedom of expression of journalists, reporting on important matters related to the armed forces.

The magazine Nokta published an article based on documents classified "confidential" by the Chief of Staff of the armed forces in Turkey. It revealed a system for classifying publishing companies and journalists according to whether they were "favourable" or "hostile" to the armed forces, so that specific journalists could be excluded from covering activities organised by the army. Following a complaint by the Chief of Staff of the armed forces, the Military Court ordered a search of all the magazine's premises, demanding electronic and paper copies of the files stored on all private and professional computers. The Military Court considered the search and seizure lawful, as these measures had only been intended to elucidate the circumstances surrounding the disclosure of a document classified as "secret", and not to identify those responsible for the leak of the confidential information. The Military Court also pointed out that the Criminal Code made it an offence to procure, use, possess or publish information whose disclosure was prohibited for the purposes of protecting State security, and that journalists were not exempted from criminal liability in that connection. The director of the magazine, the editors and some journalists lodged an application with the Strasbourg Court complaining of a violation of their right to freedom of expression and information (Article 10 ECHR).

The European Court held that the article published by Nokta, on the basis of "confidential" military documents, was capable of contributing to public debate. It emphasised the need to protect journalistic sources, including when those sources are State officials highlighting unsatisfactory practices in their workplace. It considered the seizure, retrieval and storage by the authorities of all of the magazine's computer data, with a view to identifying the public-sector whistle-blowers, as a disproportionate interference with the right to freedom of expression and information. The action taken by the authorities had undermined the protection of sources to a greater extent than an order requiring them to reveal the identity of the sources, since the indiscriminate retrieval of all the data had revealed information that was unconnected to the acts in issue. The Court also held that the impugned interference by the Turkish authorities could risk deterring potential sources from assisting the press in informing the public of matters involving the armed forces, including when they concerned a public interest. In the Court's view, this intervention was likely not only to have very negative repercussions on the relationships of the journalists in question with their sources, but could also have a serious and chilling effect on other journalists or other whistle-blowers who were State officials, and could discourage them from reporting any misconduct or controversial acts by public authorities.

Furthermore, the Court noted that the reasons for which the contested documents had been classified as confidential were not justified, as the government had not shown that there had been a detrimental impact as a result of their disclosure. Thus, the Court considered that the contested article had been highly pertinent in the debate on discrimination against the media by

State bodies, especially as the style used in the article and the time of its publication had not raised any difficulty that was such as to damage the interests of the State. The Court is also of the opinion that the journalists of Nokta had acted in accordance with professional ethics, and that they had had no intention other than to inform the public of a topic of general interest. The Court unanimously concluded that the Turkish authorities have violated Article 10 of the ECHR, holding that the interference with the journalists' right to freedom of expression, did not meet a pressing social need, had not been proportionate to the legitimate aim pursued and that, in consequence, it had not been necessary in a democratic society.

- [Görmüş and Others v. Turkey](#), no. 49085/07, 19 January 2016.

IRIS 2016-4/3

European Court of Human Rights: Kalda v. Estonia

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For the first time the European Court of Human Rights (ECtHR) has stated that denying a prisoner access to the Internet may amount to a violation of Article 10 of the European Convention of Human Rights (ECHR). In Estonia, Mr Kalda, who is serving a life sentence in prison, requested from the governor of the prison access to the online version of the State Gazette, to the decisions of the Supreme Court and administrative courts, and to the HUDOC database of the ECtHR. The governor refused this request, and so did the Administrative Court and the Tallinn Court of Appeal. The Supreme Court, however, decided that the refusal of the prison administration to grant detainees access to the rulings of the administrative courts and of the ECtHR interfered with their right to freely obtain information disseminated for public use, and considered the refusal unlawful. Some time later, Mr Kalda made a new application, requesting to be granted access to the Internet sites www.coe.ee of the Council of Europe Information Office in Tallinn, www.oiguskantsler.ee, the website of the Chancellor of Justice and www.riigikogu.ee, the website of the Estonian Parliament. He argued that he was involved in a number of legal disputes with the prison administration and that he needed access to those Internet sites in order to be able to defend his rights in court. Again Mr Kalda's request was refused. The Supreme Court this time concluded that the prohibition of detainees' access to the three Internet sites at issue was justified by the need to achieve the aims of imprisonment and in particular the need to secure public safety. Mr Kalda lodged an application with the ECtHR, complaining that the Estonian authorities' refusal to grant him access to certain websites violated his right to receive information "without interference by public authority", in breach of Article 10 of the ECHR.

In its judgment of 19 January 2016, the European Court reiterated that the right to receive information basically prohibits a government from preventing a person from receiving information that others wished or were willing to impart. It also emphasises that in the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general. However, as imprisonment inevitably involves a number of restrictions on prisoners' communications with the outside world, including on their ability to receive information, the Court considered that Article 10 of the Convention cannot be interpreted as imposing a general obligation to provide access to the Internet, or to specific Internet sites, for prisoners. Nevertheless, since access to certain sites containing legal information is granted under Estonian law, the restriction of access to other sites that also contain legal information constitutes an interference with the right to receive information. Therefore the Court needed to examine whether this interference met the conditions of Article 10 paragraph 2 of the Convention. As there was no discussion that the interference with Mr Kalda's right to receive information was prescribed by the Imprisonment Act and pursued the legitimate aims of the protection of the rights of others and the prevention of disorder and crime, the ultimate question was whether the refusal to grant access to the websites at issue was necessary in a democratic society.

The Court noted that the websites to which Mr Kalda wished to have access predominantly contained legal information and information related to fundamental rights, including the rights of prisoners. It considers that the accessibility of such information promotes public awareness

and respect for human rights and gives weight to Mr Kalda's argument that the Estonian courts used such information and that he needed access to it for the protection of his rights in the court proceedings. The Court drew attention to the fact that in a number of Council of Europe and other international instruments, the public-service value of the Internet and its importance for the enjoyment of a range of human rights has been recognised. By referring to the 2003 Declaration on freedom of communication on the Internet of the Committee of Ministers of the Council of Europe (see [IRIS 2003-7/3](#)) and to the 2011 report to the Human Rights Council ([A/HRC/17/27](#)) of the UN Human Rights Council's Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (see also [IRIS 2011-8/2](#)), the Court held that Internet access has increasingly been understood as a right, and that calls have been made to develop effective policies to attain universal access to the Internet and to overcome the "digital divide". The Court considered that these developments reflect the important role the Internet plays in people's everyday lives, as an increasing amount of services and information is only available on the Internet.

Finally the Court notes that under the Imprisonment Act, prisoners in Estonia have been granted limited access to the Internet via computers specially adapted for that purpose and under the supervision of the prison authorities. Thus, arrangements necessary for the use of the Internet by prisoners have in any event been made and the related costs have been borne by the authorities. While the security and economic considerations cited by the domestic authorities may be considered relevant, the Court noted that the domestic courts undertook no detailed analysis as to the security risks allegedly emerging from the access to the three additional websites in question, also having regard to the fact that these were websites of State authorities and of an international organisation. The Court also considered that the Estonian authorities have failed to convincingly demonstrate that giving Mr Kalda access to three additional websites would have caused any noteworthy additional costs. In these circumstances, the Court is not persuaded that sufficient reasons have been put forward in the present case to justify the interference with Mr Kalda's right to receive information. The Court concluded, by six votes to one, that the interference with Mr Kalda's right to receive information, in the specific circumstances of the present case, could not be regarded as having been necessary in a democratic society. Accordingly it found a violation of Article 10 of the ECHR.

In his dissenting opinion, the Danish judge Kjølbros found that there is no violation of Article 10 and that Mr Kalda's application should have been dismissed. He also argues that the question of prisoners' right to access to the Internet is a novel issue in the Court's case law and that given the general importance of prisoners' access to the Internet, as well as the practical and financial implications of granting prisoners access to the Internet, the question should not have been decided by a Chamber, but by the Grand Chamber. In the meantime, the Estonian Government has announced a request for a referral to the Grand Chamber in this case.

- [Kalda v. Estonia](#), no. 17429/10, 19 January 2016.

IRIS 2016-4/2

European Court of Human Rights: *de Carolis and France Télévisions v. France*

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The European Court of Human Rights (ECtHR) has confirmed the robust Article 10 protection for investigative journalism expressed in a television documentary, holding that a conviction for defamation of a Saudi Arabian prince violated the right to freedom of expression as guaranteed by Article 10 of the European Convention of Human Rights (ECHR).

In 2006, Prince Turki Al Faisal brought defamation proceedings against France Télévisions, Patrick de Carolis as its director, and a journalist, after the broadcasting on the TV channel France 3 of a documentary entitled “11 September 2001: the prosecution case”. The documentary investigated why there had still been no trial five years after the events of 11 September. It focused on the complaints lodged by families of the victims of the 9/11 attacks in the US and the proceedings against persons suspected of having helped or funded al-Qaeda. The documentary highlighted the claimants’ concerns that the trial might be jeopardised by the economic links between the US and Saudi Arabia. Mr de Carolis and the journalist who made the documentary were found guilty of public defamation against the Prince and the Court declared France 3 civilly liable for the damage caused. In essence the French courts found that the journalist should have demonstrated prudence and objectivity, because she had referred to extremely serious accusations against Prince Turki Al Faisal, accusations that had not yet been examined by a court of law.

Before the ECtHR, France 3 and its director complained of a violation of their right to freedom of expression. The European Court undertook a detailed examination of the content of the documentary and of the way in which the subject was dealt with, in particular the excerpts accusing Prince Turki Al Faisal of having assisted and financed the Taliban as head of the intelligence service in Saudi Arabia. The Court reached the conclusion that the allegations in the documentary had a sufficient factual basis, and that the documentary was balanced and did not contravene the standards of responsible journalism. As regards the sanctions, the fine to which Mr de Carolis had been sentenced and the civil liability finding against France 3 were considered a disproportionate interference with their right to freedom of expression. The Court is of the opinion that a moderate criminal sanction, combined with civil damages, does not take away the risk of a chilling effect that a criminal conviction may have on the right to freedom of expression. As the interference by the French authorities was not necessary in a democratic society, the Court unanimously came to the conclusion that Article 10 has been violated. The French government is ordered to pay the applicants EUR 11,500 in respect of pecuniary damages, and EUR 30,000 in respect of costs and expenses.

- [*De Carolis and France Télévisions v. France*](#), no. 29313/10, 21 January 2016.

IRIS 2016-4/4

European Court of Human Rights: Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary

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On 2 February 2016 the European Court of Human Rights (ECtHR) held that a self-regulatory body (Magyar Tartalomszolgáltatók Egyesülete, MTE) and an Internet news portal (Index.hu Zrt) were not liable for the offensive comments posted by their readers on their respective websites. Anonymous users of MTE and Index.hu had posted vulgar and offensive online comments criticising the misleading business practices of a real estate website. The European Court found that by holding MTE and Index.hu liable for the comments, the Hungarian courts have violated the right to freedom of expression. The present judgment is the first in which the principles set forth in the Grand Chamber's judgment in [Delfi AS v. Estonia](#) were tested (see IRIS 2015-7/1).

The case started in Hungary in 2010, when a real estate company brought a civil action claiming an infringement of its personality rights, on the basis that its right to a good reputation had been violated by readers' comments posted on MTE and Index.hu. The operators of the websites immediately removed the allegedly offending comments from their websites. In the subsequent proceedings the domestic courts found that the comments at issue were insulting and went beyond the acceptable limits of freedom of expression. They rejected the applicants' argument that they were only intermediaries and that their sole obligation was to remove certain content in the event of a complaint. As the comments attracted the applicability of the Hungarian Civil Code rules on personality rights, and since the comments were injurious for the plaintiff, the operators of the websites bore objective liability for their publication. As the applicants were not intermediaries, they could not invoke the limited liability of hosting service providers, as provided in the [Directive 2000/31/EC on Electronic Commerce](#). Therefore the applicants were held liable for the offensive comments on their websites and they were ordered to pay the court fees, including the costs of the plaintiff's legal representation. No award for non-pecuniary damages was imposed.

MTE and Index.hu complained that the rulings of the Hungarian courts establishing objective liability on Internet websites for the contents of users' comments amounts to a violation of freedom of expression as provided in Article 10 of the European Convention on Human Rights (ECHR). As a consequence, liability for comments could only be avoided either by pre-moderation or by disabling commenting altogether: both solutions would work against the very essence of free expression on the Internet by having an undue chilling effect. They argued that the application of the "notice and take down" rule, as a characteristic of the limited liability for internet hosting providers, was the adequate way of enforcing the protection of reputation of others.

Referring to *Delfi AS v. Estonia*, the European Court takes as its starting point that the provisions of the Hungarian Civil Code made it foreseeable for a media publisher running a large Internet news portal for economic purposes (Index.hu) and for a self-regulatory body of Internet content providers (MTE), that they could, in principle, be held liable under domestic law for unlawful comments of third-parties. Thus, the Court considers that the applicants were able to assess the risks related to their activities and that they must have been able to foresee, to a reasonable degree, the consequences which these could entail. It therefore concludes that the interference

in issue was “prescribed by law” within the meaning of the second paragraph of Article 10. The decisive question remained whether there was a need for an interference with freedom of expression in the interests of the “protection of the reputation or rights of others”. By referring to its Grand Chamber’s judgment in *Delfi AS* again, the Court confirms that Internet news portals, in principle, must assume duties and responsibilities. However, because of the particular nature of the Internet, these duties and responsibilities may differ to some degree from those of a traditional publisher, notably as regards third-party content. The Court is of the opinion that the present case was different from *Delfi AS*: though offensive and vulgar, the incriminated comments did not constitute clearly unlawful speech; and they certainly did not amount to hate speech or incitement to violence, as they did in *Delfi AS*. Next the Court applied the relevant criteria developed in its established case-law for the assessment of whether the interference in situations not involving hate speech or calls to violence is proportionate. These criteria are: (1) the context and content of the impugned comments; (2) the liability of the authors of the comments; (3) the measures taken by the website operators and the conduct of the injured party; (4) the consequences of the comments for the injured party; and (5) the consequences for the applicants.

The Court considers that the Hungarian courts, when deciding on the notion of liability in the applicants’ case, had not carried out a proper balancing exercise between the competing rights involved, namely between the applicants’ right to freedom of expression and the real estate website’s right to respect for its commercial reputation. Notably, the Hungarian authorities accepted at face value that the comments had been unlawful as being injurious to the reputation of the real estate websites. The European Court however is of the opinion that the comments were related to a matter of public interest, being posted in the context of a dispute over the business policy of the real estate company perceived as being harmful to a number of clients. It also observes that the expressions used in the comments, albeit belonging to a low register of style, are common in communication on many Internet portals - a consideration that reduces the impact that can be attributed to those expressions.

Apart from that, the conduct of the applicants in providing a platform for third-parties to exercise their freedom of expression by posting comments is to be considered as a journalistic activity of a particular nature. Interferences with such activities, including the dissemination of statements made by other persons, may seriously hamper the contribution of the press to discussion of matters of public interest, and should not be envisaged unless there are particularly strong reasons for doing so. The Court continues to state that the applicants took certain measures to prevent defamatory comments on their portals or to remove them. Both applicants had a disclaimer in their general terms and conditions and had a notice-and-take-down system in place, whereby anybody could indicate unlawful comments to the service provider so that they could be removed. Holding the applicants liable merely for allowing unfiltered comments breaching the law would require excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet.

The Court also emphasises that there is a difference between the commercial reputational interests of a company and the reputation of an individual concerning his or her social status. Furthermore there were already ongoing inquiries into the plaintiff company’s business conduct. Consequently the Court is not convinced that the comments in question were capable of making any additional and significant impact on the attitude of the consumers concerned.

The Court is of the view that the decisive question when assessing the consequence for the applicants is not the absence of damages payable, but the manner in which Internet portals can be held liable for third-party comments. Such liability may have foreseeable negative consequences for the comment environment of an Internet portal, for example by impelling it to close the commenting space altogether. For the Court, these consequences may have, directly or indirectly, a chilling effect on the freedom of expression on the Internet, this being particularly detrimental for a non-commercial website such as MTE. The Court is of the opinion that the Hungarian courts paid no heed to what was at stake for the applicants as protagonists of the free electronic media, as they did not embark on any assessment of how the application of civil-law liability to a news portal operator would affect freedom of expression on the Internet. Indeed, when allocating liability in the case, those courts did not perform any balancing analysis between this interest and that of the plaintiff at all.

Finally, the Court refers once more to *Delfi AS*, in which it found that if accompanied by effective procedures allowing for rapid response, the notice-and-take-down-system could function in many cases as an appropriate tool for balancing the rights and interests of all those involved. The Court sees no reason to hold that such a system could not have provided a viable avenue to protect the commercial reputation of the plaintiff. It is true that, in cases where third-party user comments take the form of hate speech and direct threats to the physical integrity of individuals, the rights and interests of others and of the society as a whole might entitle Contracting States to impose liability on Internet news portals if they failed to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties. As the present case did not involve such utterances, the European Court comes to the conclusion that the rigid stance of the Hungarian courts reflects a notion of liability which effectively precludes the balancing between the competing rights according to the criteria laid down in the Court's case law. All these considerations are sufficient for the Court to conclude that there has been a violation of Article 10 of the Convention.

- [Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary](#), no. 22947/13, 2 February 2016.

IRIS 2016-3/2

European Court of Human Rights: Arlewin v. Sweden

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On 1 March 2016 the European Court of Human Rights (ECtHR) found Sweden in breach of the European Convention on Human Rights (ECHR) because it had denied access to court to a person who wanted to bring defamation proceedings in Sweden arising out of the content of a trans-border television programme service (TV3), suggesting that they resort to the jurisdiction of the United Kingdom. The European Court is of the opinion that requiring a Swedish national to bring defamation proceedings in the UK courts following an alleged defamatory TV programme broadcasted by the London-based company Viasat Broadcasting UK, but targeting mostly, if not exclusively, a Swedish audience, was not reasonable and violated Article 6 paragraph 1 of the Convention, which guarantees access to a court.

The programme in question had been broadcast live in Sweden and had accused Mr Arlewin, the applicant, of organised crime in the media and advertising sectors. Mr Arlewin brought a private prosecution for gross defamation against X. X was the anchorman of the television show and the CEO of Strix Television AB, the company that produced the TV3 programme. The Swedish courts subsequently found it did not have jurisdiction to examine Mr Arlewin's complaint, finding that the UK-based company under jurisdiction of the UK authorities, which broadcasted the TV3 programme, was responsible for its content. Mr Arlewin appealed to the Supreme Court, alleging that the Swedish courts' position ran contrary to EU law. He also requested that a question concerning the interpretation of the [Brussels I Regulation No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters](#) be referred to the Court of Justice of the European Union (CJEU) for a preliminary ruling. According to him, the regulation entitled a person claiming non-contractual damages to bring actions in the territory where the harm had actually occurred, namely in Sweden, in his case. The Supreme Court rejected Mr Arlewin's referral request, and refused leave to appeal in the case. Finally in Strasbourg, Mr Arlewin complained that the Swedish courts refused to examine the defamation case brought by him against X on the merits, and thereby failed to provide him with an effective remedy to protect his reputation. The Swedish Government argued that in application of the [Audiovisual Media Services Directive 2010/13/EU](#), Viasat Broadcasting UK was a company established in the UK and that the editorial decisions about their audiovisual media service were taken in the UK. Therefore the UK, through its Office of Communication ("Ofcom"), had supervisory jurisdiction over TV3's broadcasts.

According to the Strasbourg Court, the jurisdiction over broadcasters vested in one State under the AVMS Directive did not have general application, extending to matters not regulated therein. It also referred to Article 28 of the Directive, addressing the situation where a person's reputation and good name have been damaged by incorrect facts presented in a programme. This provision however only discusses a right of reply or equivalent remedies, and does not deal with defamation proceedings and an appurtenant claim for damages. The European Court was thus not convinced that the AVMS Directive determines, even for the purposes of EU law, the country of jurisdiction in which an individual brings a defamation claim and wishes to sue a journalist or a broadcasting company for damages. Rather, jurisdiction under EU law is regulated by the Brussels I Regulation No. 44/2001. According to Articles 2 and 5 of the Regulation, both the UK and Sweden appear to have jurisdiction over the present matter: X is domiciled in Sweden

whereas Viasat Broadcasting UK is registered and established in the UK, and the harmful event could be argued to have occurred in either country, as the television programme was broadcast from the UK and the alleged injury to the applicant's reputation and privacy manifested itself in Sweden. The CJEU has earlier had the occasion to interpret and apply Article 5(3) of the Brussels I Regulation No. 44/2001, allowing courts assuming jurisdiction in a member State, not only in the place where the defendant has his residence, but also in the "place where the harmful event occurred" or where the centre of the alleged victim's interests is based. Hence three options were available to hear an action for damages caused by the publication of a defamatory newspaper article or an Internet publication, according to EU law (CJEU in eDate Advertising and Martinez (Joined Cases C-509/09 and C-161/10)) (see [IRIS 2012/1: Extra](#)). According to the European Court it may be assumed that the same would apply to a broadcast via satellite.

While leaving open the question of whether a binding provision of EU law could justify the Swedish position, the ECtHR found that the Swedish Government had not shown that Swedish jurisdiction was barred in the case due to the existence of such a provision. Rather, jurisdiction was excluded by virtue of the relevant provisions of domestic law. The European Court found in particular that the programme and its broadcast were, for all intents and purposes, entirely Swedish and that the alleged harm to Mr Arlewin had occurred in Sweden. In those circumstances, the Swedish State had an obligation under Article 6 paragraph 1 ECHR to provide Mr Arlewin with an effective access to court. However, Mr Arlewin had been put in a situation in which he could not hold anyone responsible under Swedish law for his allegation of defamation. Requiring him to take proceedings in the UK courts could not be said to have been a reasonable, effective and practical alternative for him. In the European Court's view, the limitations on Mr Arlewin's right of access to court had therefore been too far-reaching and could not, in his particular case, be considered proportionate.

The Court is unanimous in finding a violation of Article 6 paragraph 1 of the Convention and ordered Sweden to pay Mr Arlewin EUR 12,000 in respect of non-pecuniary damage and EUR 20,000 in respect of costs and expenses.

- [Arlewin v. Sweden](#), no. 22302/10, 1 March 2016.

IRIS 2016-4/1

European Court of Human Rights: *Sousa Goucha v. Portugal*

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In finding that there had been no violation of the right to privacy and the right to reputation, the European Court of Human Rights (ECtHR) upheld a high level of freedom of expression in a case concerning a joke in a TV-programme about the sexual orientation of a television celebrity in Portugal. For the ECtHR it was important that the domestic courts, in dismissing the defamation complaint by Mr Sousa Goucha, took into account the context in which the joke had been made, and referred to the playful and irreverent style of the television comedy show and its usual humour. It also noted that Mr Sousa Goucha, as a well-known television host, is a public figure, who had earlier publicly declared his homosexuality.

Mr Sousa Goucha lodged a criminal complaint for defamation and insult against the television company (RTP), the production company, the television presenter, and the directors of programming and content, following the joke made during the broadcast of a late-night comedy show on television. Mr Sousa Goucha alleged that the joke, which had included him in a list of best female television hosts, damaged his reputation as it had conflated his gender with his sexual orientation. The Portuguese courts, however, dismissed his claim for damages as ill founded. They considered that for a reasonable person, the joke would not be perceived as defamatory because it referred to aspects of Mr Sousa Goucha's characteristics, behaviour, and way of expressing himself, which could be seen as feminine.

Relying on Article 14 of the European Convention of Human Rights (ECHR), Mr Sousa Goucha submitted an application to the ECtHR, alleging that the domestic courts had discriminated against him because of his sexuality, which he had made public. According to the ECtHR, the case also deserved an analysis from the perspective of Article 8 of the Convention, as the right of reputation is protected under that provision, while the concept of "private life" also covers the moral integrity of a person and can therefore embrace multiple aspects of a person's identity, such as gender identity and sexual orientation. The Court stated that sexual orientation is a profound element of a person's identity, and that gender and sexual orientation are two distinctive and intimate characteristics. However, the Court reiterated that in order for Article 8 to be triggered, the attack on personal honour and reputation must have a certain level of seriousness and such a manner as to cause prejudice to personal enjoyment of the right to respect for private life. The main issue in the present case was whether a fair balance had been achieved between Mr Sousa Goucha's right to protection of his reputation, which is an element of his "private life" under Article 8, and the other parties' right to freedom of expression, as guaranteed by Article 10 of the ECHR.

It is in this balancing exercise that the Court first noted that Mr Sousa Goucha is a well-known television host in Portugal and thus a "public figure". The Court then recalled that it had been required on numerous occasions to consider disputes involving humour and satire, and reiterated that satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care. Additionally, the Court also referred to the judgment of the Court of Justice of the European Union (CJEU) in the case of *Deckmyn v. Vandersteen* ([IRIS 2014-9/5](#)), acknowledging that a particularly

wide margin of appreciation should be given to parody in the context of freedom of expression. It must also be noted, however, that the joke was not made in the context of a debate of public interest and, as such, no matters of public interest were at stake. On the other hand, the Court considered that the joke would not be perceived as defamation by a reasonable person, and it referred to Mr Sousa Goucha's characteristics, his behaviour, and way of expressing himself. Also of particular importance is the playful and irreverent style of the television comedy show and its usual humour. The Court considered that the domestic courts had convincingly established the need for placing the protection of freedom of expression above Mr Sousa Goucha's right to protection of reputation. The Court noted that they also took into account the lack of intent to attack the applicant's reputation and assessed the way in which a reasonable spectator of the comedy show in question would have perceived the impugned joke, as opposed to merely considering what the applicant felt or thought towards the joke. A limitation on freedom of expression for the sake of the applicant's reputation would therefore have been disproportionate under Article 10 of the Convention. The Court concluded that the domestic courts had struck a fair balance between the television show's freedom of expression under Article 10 and Mr Sousa Goucha's right to have his reputation respected under Article 8. In sum, the Court found no reason to substitute its view for that of the domestic courts.

With regard to the complaint under Article 14 ECHR (discrimination), the Court was of the opinion that the refusal to prosecute the TV-broadcaster and persons responsible for the impugned TV-programme for defamation was not due to because he was homosexual. Rather, the Court stated that it was due to the weight given to freedom of expression in the circumstances of the case, and the lack of intention to attack the Mr Sousa Gaucho's honour. The Court stated that although the relevant passages were "debatable" and "could have been avoided", they did not have discriminatory intent. Consequently, in the absence of any firm evidence, it was not possible to speculate whether his sexual orientation had any bearing on the domestic courts' decisions. Therefore, the Court stated that it cannot be said that the Mr Sousa Goucha was discriminated against on the grounds of his sexual orientation, and accordingly, there had been no violation of Article 14 read together with Article 8.

- [Sousa Goucha v. Portugal](#), no. 70434/12, 22 March 2016.

IRIS 2016-6/1

European Court of Human Rights: Pinto Coelho v. Portugal (No. 2)

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In a judgment of 22 March 2016 the European Court of Human Rights (ECtHR) found that Portugal has violated a journalist's right to report about the hearing in a criminal case. The ECtHR emphasised that the domestic court hearing was public and that the criminal conviction of the journalist for having broadcast unauthorised recordings of the statements of witnesses during the hearing was not necessary in a democratic society. Therefore the journalist's conviction amounted to a breach of Article 10 of the European Convention of Human Rights (ECHR).

The applicant in this case was Sofia Pinto Coelho, a TV-journalist and legal affairs correspondent. She was convicted for having broadcast in news report excerpts that included sound recordings from a court hearing, obtained without permission from the judge. The case on which Pinto Coelho had reported concerned the criminal conviction of an 18-year-old man for aggravated theft of a mobile phone. In her TV-report Ms Pinto Coelho argued that the defendant should have been acquitted, alleging a judicial error. She included in her report shots of the courtroom, extracts of sub-titled sound recordings, and the questioning of prosecution and defence witnesses, in which their voices and those of the three judges were digitally altered. The excerpts were followed by Ms Pinto Coelho's commentary, in which she tried to demonstrate that the victims had not recognised the defendant during the trial, supporting the defendant's claim that he had been at work at the time of the incident.

A short time later the president of the domestic court, who had presided over the case, lodged a complaint against Ms Pinto Coelho. No permission had been given to broadcast extracts of the recordings of the court hearing, and the failure to obtain such authorisation breached Article 348 of the Criminal Code. After being convicted of non-compliance with a legal order and ordered to pay a fine of EUR 1,500, and after exhausting all national remedies, Ms Pinto Coelho submitted an application to the ECtHR in Strasbourg, alleging a breach of her right as a journalist to freedom of expression and information, under Article 10 of the ECHR.

In essence, in this case the ECtHR had to balance the right of the journalist to inform the public and the public's right to receive information against the right of those who testified to respect for their private lives and against the interest of maintaining the authority and impartiality of the judiciary. The Court reiterated that in principle journalists must obey the law, which includes when reporting on a criminal case of public interest. The Court stated that although Ms Pinto Coelho had not obtained the recordings of the hearing in an illicit way, as a journalist she must have been aware that the unauthorised broadcasting of the recordings violated Article 348 of the Criminal Code. The Court took into consideration, however, the fact that when the news report was broadcast the case had already been decided, and hence there was no indication that the broadcast of the audio extracts could have negatively influenced the proper administration of justice. Furthermore, the hearing was public and none of the witnesses whose evidence had been broadcast had filed any complaint. The Court also considered it relevant to emphasise that the witnesses' voices were distorted, which reduced the interest invoked by the Portuguese judicial authorities referring to the right to have the witnesses' and judges' voices protected under the right of privacy. The Court reiterated that Article 10 also protects the mode of expression of ideas and information, and that it is not for judges to substitute their own views for those of the press

as to how a story should be presented. According to the ECtHR the domestic authorities had not sufficiently justified the criminal sanction imposed, despite the fact that it might have a chilling effect on journalistic reporting on matters of public interest. By six votes to one, the Court found a violation of Article 10 of the Convention. The Court held that the finding of a violation constituted sufficient just satisfaction for any non-pecuniary damage sustained by Ms Pinto Coelho. It further awarded her EUR 1,500 in respect of pecuniary damage and EUR 4,623.84 in respect of costs and expenses.

- [Pinto Coelho v. Portugal \(no. 2\)](#), no. 48718/11, 22 March 2016.

IRIS 2016-6/2

European Court of Human Rights: Bédat v. Switzerland (Grand Chamber)

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In a judgment of 29 March 2016, the Grand Chamber of the European Court of Human Rights (ECtHR) in *Bédat v. Switzerland* found that a criminal conviction of a journalist, Arnaud Bédat, for having published documents covered by investigative secrecy in a criminal case is no violation of Article 10 of the European Convention of Human Rights (ECHR). The Grand Chamber is of the opinion that the Swiss authorities acted within their margin of appreciation and that recourse to criminal proceedings and the penalty imposed on the journalist did not amount to a disproportionate interference in the exercise of his right to freedom of expression.

The article published by Bédat in the weekly magazine *L'Illustré* concerned 'M.B.' and the criminal proceedings against him for having driven his car into pedestrians. The incident, in which three people died and eight others were injured, had caused great public outcry and controversy in Switzerland. The article contained a personal description of M.B., a summary of the questions put by the police officers and the investigating judge, and M.B.'s replies. It also contained the information that M.B. had been charged with premeditated murder and, in the alternative, with murder, and it was mentioned that M.B. appeared to show no remorse. The article was accompanied by several photographs of letters which M.B. had sent to the investigating judge. Criminal proceedings were brought against the journalist on the initiative of the public prosecutor for having published secret documents, in breach of Article 293 of the Swiss Criminal Code. It emerged from the investigation that one of the parties claiming damages in the proceedings against M.B. had photocopied the case file and lost one of the copies in a shopping centre. An unknown person had then brought the copy to the offices of the magazine which had published the impugned article. Bédat was found guilty of making public a series of documents which were at that stage to be considered protected as part of the secrecy of the criminal investigation, and he was ordered to pay a fine of 4,000 Swiss Francs (EUR 2,667). Bédat lodged a complaint before the ECtHR, arguing that this conviction had resulted in a violation of his right to freedom of expression.

On 1 July 2014 the [Second Section of the ECtHR](#) found that the article reported on an important case and that although the interference was prescribed by law and pursued legitimate aims, it considered that the sanction did not respond to a pressing social need, not being sufficiently motivated and being disproportionate. Therefore, the majority of the Court, by four votes to three, found that the criminal fine imposed on the journalist breached Article 10 of the European Convention on Human Rights (ECHR).

While the Grand Chamber agrees with the Chamber that the interference was prescribed by law and pursued legitimate aims, namely of preventing the disclosure of information received in confidence, maintaining the authority and impartiality of the judiciary and protecting the reputation and the rights of others, the majority of the Grand Chamber, with 15 votes to two, comes to another conclusion on whether the fine imposed on the journalist was necessary in a democratic society. The Grand Chamber reiterates that the protection afforded to journalists by Article 10 of the ECHR "is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism. The concept of responsible journalism, as a professional activity which enjoys the protection of Article

10 of the ECHR, is not confined to the contents of information which is collected and/or disseminated by journalistic means (.); the concept of responsible journalism also embraces the lawfulness of the conduct of a journalist, and the fact that a journalist has breached the law is a relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly". The Grand Chamber clarifies that it must adjudicate on a conflict between two rights which enjoy equal protection under the Convention, and the Court must weigh up the competing interests. Reference is made to cases where the right to privacy (Article 8) and the right to freedom of expression (Article 10) are conflicting (see [IRIS 2012-3/1](#)) and the Court considers that an analogous reasoning must be applied in weighing up the rights secured under Article 10 and Article 6 paragraph 1 respectively. In such an approach to balancing rights, that the Court considers that where the national authorities have assessed the interests at stake in compliance with the criteria laid down in the Court's case-law, strong reasons are required if it is to substitute its view for that of the domestic courts.

The Grand Chamber takes into consideration six criteria as part of its balancing test:

(i) How the applicant came into possession of the information at issue: although Bédard had not obtained the information by unlawful means, as a professional journalist he must have been aware of the confidential nature of the information which he was planning to publish. It was not disputed that the publication of the information in question fell within the scope of Article 293 of the Swiss Criminal Code.

(ii) Content of the impugned article: the Court qualifies the impugned article about M.B. as portraying "a highly negative picture of him, adopting an almost mocking tone". The article had "a sensationalist tone", and it formulated a series of questions which the judicial authorities were called upon to answer, at both the investigation and the trial stages.

(iii) Contribution of the impugned article to a public-interest debate: according to the Court, the journalist failed to demonstrate how publishing records of interviews, statements by the accused's wife and doctor, and letters sent by the accused to the investigating judge concerning banal aspects of his everyday life in detention, could have contributed to any public debate on the ongoing investigation.

(iv) Influence of the impugned article on the criminal proceedings: according to the Court it is "undeniable that the publication of an article slanted in that way at a time when the investigation was still ongoing entailed an inherent risk of influencing the course of proceedings in one way or another, whether in relation to the work of the investigating judge, the decisions of the accused's representatives, the positions of the parties claiming damages, or the objectivity of the trial court, irrespective of its composition". The Court agrees with the findings by the Swiss Courts that the records of interviews and the accused's correspondence had been discussed in the public sphere before the conclusion of the investigation, before the trial and out of context, in a manner liable to influence the decisions taken by the investigating judge and the trial court.

(v) Infringement of the accused's private life: the Court agrees that the criminal proceedings brought against Bédard conformed with the positive obligation incumbent on Switzerland under Article 8 to protect the accused's private life. It also notes that when the impugned article was published the accused was in prison, and therefore in a situation of vulnerability.

(vi) Proportionality of the penalty imposed: the Court considers that the recourse to criminal proceedings and the penalty imposed on Bédat did not amount to disproportionate interference in the exercise of his right to freedom of expression. The penalty was imposed for breaching the secrecy of a criminal investigation, and its purpose was to protect the proper functioning of the justice system and the rights of the accused to a fair trial and to respect for his private life. Therefore the Court states that such a penalty could not be considered liable to have a deterrent effect on the exercise of freedom of expression by Bédat or any other journalist wishing to inform the public about ongoing criminal proceedings. Accordingly, the Court sees no strong reason to substitute its own view for that of the domestic courts. Furthermore, having regard to the margin of appreciation available to States and to the fact that the balancing the various competing interests was properly conducted by the Swiss Federal Court, the Grand Chamber concludes that there has been no violation of Article 10 of the ECHR.

Two judges strongly dissented, Judges López Guerra and Yudkivska, the latter expressing the view that “(t)his Court had always regarded the press as the servant of an effective judicial system, granting little scope for restrictions on freedom of expression in such matters as the public interest in the proper administration of justice. ... the present judgment constitutes a regrettable departure from this long-established position”.

- [Bédat v. Switzerland \[GC\]](#), no. 56925/08, ECHR 2016.
- [A.B. v. Switzerland](#), no. 56925/08, 1 July 2014.

IRIS 2016-5/1

European Court of Human Rights: Diamant Salihu and others v. Sweden

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A recent decision of the European Court of Human Rights (ECtHR) found that journalists who commit (minor) offences during newsgathering activities cannot invoke robust protection based on their rights to freedom of expression and information, as guaranteed by Article 10 of the European Convention on Human Rights (ECHR). Journalists of the Swedish newspaper Expressen had undertaken to demonstrate the easy availability of illegal firearms by purchasing one. The Swedish courts were of the opinion that the editor and the journalists could not be exempted from criminal liability as they had wilfully breached the Swedish Weapons Act. In a unanimous decision, the ECtHR confirmed the necessity of the journalists' criminal conviction. It declared the application for alleged breach of the right of journalistic newsgathering under Article 10 of the Convention manifestly ill founded.

In 2010, a series of shootings took place in southern Sweden, prompting lively public debate and calls for more stringent firearms control. Thomas Mattsson, Andreas Johansson and Diamant Salihu, the editor-in-chief, news editor and a journalist at the tabloid newspaper Expressen, decided to prepare a news story on the easy availability of illegal firearms. They successfully contacted several people who claimed that they could sell them a gun. Salihu bought one, while a photographer of Expressen was present during the transfer, with Johansson listening in via a mobile telephone for safety reasons. On arrival in their hotel, they called the police, photographed the weapon and put it in the hotel room's security box, until the police collected it half an hour later. The next day Expressen published an article portraying the events, including a large photograph of the firearm and a description of the contact leading up to its purchase.

Shortly after, the public prosecutor decided to press charges against the journalists, and all three were convicted for (incitement to) a weapons offence. The District Court and later the Court of Appeals found that the journalists had shown clear intent to commit punishable actions, and could not rely on the protection of Article 10 of the ECHR in this case. The journalists were not on trial for publishing an article, but for actions taken before the publishing. Furthermore, their actions appeared to be premeditated risk-taking to create sensational news, while it had not been necessary for the journalists to complete the purchase of the firearm and to subsequently transport it in order to fulfil their journalistic mission. Their aim - to investigate whether illegal weapons were easily accessible in Sweden - had already been achieved when Salihu received the offer to buy the firearm.

The Supreme Court upheld the journalists' conviction, removing the suspended sentences, but increasing the level of the criminal fines from 30 to 80 day fines, which amounted, in total, to approximately EUR 8,400 for Mattsson, EUR 5,700 for Johansson and EUR 4,400 for Salihu. The Supreme Court emphasised the strong societal interest in controlling the handling of weapons, although it also recognised the journalistic purpose behind the purchase of the firearm. According to the Supreme Court, the question of whether it was easy to buy weapons could, however, have been illustrated by other means, and the weight of the journalistic interest was not sufficient to justify completion of the purchase of the firearm. With regard to the proportionality of the sanction, the Supreme Court noted that the conviction was not for the actual publication of the article, and that the sentences imposed were below those normally prescribed for the crime, in

view of the journalistic context and the precautions the journalists had taken after obtaining the weapon. The Expressen journalists subsequently lodged an application before the European Court of Human Rights, complaining that their conviction was unlawful (constituting a breach of Article 7 ECHR) and violated their rights as journalists guaranteed under Article 10 ECHR.

In its decision of 10 May 2016, the ECtHR dismissed the double complaint. With regard to the alleged violation of Article 10 of the Convention, the Court finds that the journalists' convictions were lawful and pursued the legitimate aims of the protection of public safety and prevention of disorder and crime. Regarding the decisive question of whether the interference was "necessary in a democratic society", the Court refers to the fundamental principles concerning this issue, elaborated in some of its Grand Chamber judgments such as in [Stoll v. Switzerland](#) (see IRIS 2008-3/2) and recently in [Bédat v. Switzerland](#) (see IRIS 2016-5/1). Referring to its Grand Chamber judgment in [Pentikäinen v. Finland](#) (see IRIS 2016-1/2), it reiterated, "notwithstanding the vital role played by the media in a democratic society, journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that, as journalists, Article 10 affords them a cast-iron defence. In other words, a journalist cannot claim an exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising the right to freedom of expression, the offence in question was committed during the performance of his or her journalistic functions".

Turning to the facts, the ECtHR endorsed the main arguments developed by the domestic courts: the journalists wilfully infringed ordinary criminal law, they could have illustrated the easy availability of firearms in other ways, and the weight of the journalistic interest did not justify actually purchasing the firearm. The ECtHR furthermore observes that the question of the applicants' rights under Article 10 ECHR had been the subject of arguments, including during hearings, before all three domestic instances. The domestic courts had stressed the importance of journalists' role in society and made a balanced evaluation of all interests at stake. Taking into account the margin of appreciation afforded to the State in this area, and explicitly referring to the principle of subsidiarity, the ECtHR found that the reasons relied upon by the domestic courts were relevant and sufficient for the purposes of Article 10 ECHR, and that they struck a fair balance between the competing interests at stake. The conclusion is that the domestic courts were entitled to decide that the interference complained of was "necessary in a democratic society". The application was thus considered manifestly ill founded and therefore inadmissible.

- [Diamant Salihu and others v. Sweden \(dec.\)](#), no. 33628/15, 10 May 2016.

IRIS 2016-8/1

European Court of Human Rights: Instytut Ekonomichnykh Reform, TOV v. Ukraine

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In a judgment of 2 June 2016 the European Court of Human Rights (ECtHR) found that Ukraine had violated the right to freedom of expression by convicting a media company of the defamation of a political public figure. Although the impugned article had a highly sarcastic and offensive tone, the Court confirmed that journalistic freedom covers possible recourse to a degree of exaggeration, or even provocation, especially in the context of a public debate and discussions in the media on important features of political life.

The case concerns defamation proceedings brought in 2007 against the editorial company (Instytut Ekonomichnykh Reform - IER) of one of the nationwide newspapers in Ukraine, the Evening News. At the time, the newspaper was closely associated with Yuliya Tymoshenko, a political leader in Ukraine and the then major rival of Prime Minister Mr Victor Yanukovych's. In May 2007, the newspaper published an article critical of Ms Ganna German, one of the main spokespeople for Mr Yanukovych. Ms German was also elected as a Member of Parliament on the list of the Party of Regions, led by Mr Yanukovych. At the material time she frequently presented the views of both her party and Mr Yanukovych on various television and radio programmes and debates. The article in the Evening News especially criticised the way Ms German, in an interview on the BBC, had commented on the institutional and political crisis in Ukraine, defending Mr Yanukovych's and the Party of Regions' policy. The article also suggested that Ms German had become a Member of Parliament for the sole purpose of obtaining a flat in Kyiv.

In July 2007, Ms German brought a defamation claim against IER and the author of the article. The Kyiv Pecherskyy District Court found that some of the statements in the article constituted statements of fact that had not been verified or proved by either of the defendants, and were negative about and insulting to Ms German. Therefore, IER was ordered to retract the information about the acquisition by Ms German of the flat in Kyiv, by publishing the operative part of its judgment. IER was also ordered to pay the plaintiff UAH 1,700, approximately EUR 300, in compensation for non-pecuniary damage. After exhaustion of all remedies at the domestic level, IER lodged an application with the ECtHR, complaining of a violation of its right to freedom of expression under Article 10 of the European Convention of Human Rights (ECHR).

The Ukraine Government agreed that the judgments of the domestic courts had constituted an interference with the applicant company's freedom of expression. However, it considered that the interference had been prescribed by law, being based on the relevant provisions of the Civil Code and the Information Act, and it had pursued the legitimate aim of protecting the reputation or rights of others. The Government also referred to the ECtHR's decision in [Vitrenko and Others v. Ukraine](#) (no. 23510/02, 16 December 2008), which, according to the government, supported the principle that even during an election campaign an individual could not be subjected to unfair accusations by his opponent. Therefore, the interference was to be considered necessary in a democratic society. The government also submitted that the interference had been proportionate and had not put an undue burden on the applicant company's right to freedom of political comment.

In a unanimous decision the ECtHR disagreed with both the findings by the Ukrainian courts and the government's arguments as to the necessity of the disputed interference with IER's right to freedom of expression.

The ECtHR reiterated that Article 10 (2) of the ECHR allows little scope for restrictions on political speech or debate on matters of public interest. The Court stated that whilst a politician is certainly entitled to have his reputation protected, even when he is not acting in his private capacity, in such cases the requirements of that protection have to be balanced with the interests of the open discussion of political issues. The Court also recalled that satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. The Court observed that at the relevant time the struggle between Yulia Tymoshenko and Victor Yanukovich and their allies was an important feature of Ukrainian political life. The impugned article constituted the sarcastic reaction of the Evening News' journalist to Ms German's participation in a BBC radio programme, during which she had commented on the popularity of her party. The Court considered that the subject matter of the impugned article, namely the author's speculation as to Ms German's motives for making her statements and supporting the Party of Regions, was of significant public interest.

In contrast with the findings by the domestic courts, the ECtHR was of the opinion that the statements concerning the acquisition of the flat were value judgments, having a sufficient factual basis. In this perspective the Court observed that the impugned statements were not particularly serious in tone. They were also not particularly damaging in substance, given that the author did not accuse Ms German of specific illegal or immoral conduct, even though he ascribed to her less than admirable motives. Read in the context of a highly-charged political debate, and in the context of the article as a whole, the expressions found untrue by the domestic courts were supposed to illustrate the author's opinion that Ms German's expression of her political opinions was insincere and guided by considerations of material gain. The Court furthermore referred to the "highly sarcastic language" of the article, reaffirming that Article 10 also protects information and ideas that offend, shock, or disturb. In addition, the Court stated that the extension of journalistic freedom to protect recourse to a degree of exaggeration, or even provocation, is an important principle, established in the Court's case law. According to the ECtHR, the domestic courts failed to explain why they considered that the impugned statements, satirical in tone as they were, went beyond the permissible level of exaggeration or provocation, given the impugned article's contribution to a debate of public interest and its subject's role as a prominent politician and the essential role played by the press in a democratic society. The domestic courts focussed on the a person's right to protection of their reputation, without sufficiently considering the right to freedom of expression of the applicant media company. Furthermore, while the sanction imposed on the applicant company was relatively modest, it nevertheless had symbolic value and could still have a chilling effect on the applicant company and other participants in the public debate. For all these reasons, the Court was not convinced that the balancing exercise had been undertaken by the national authorities in conformity with the criteria laid down in its case law. It thus concluded that the necessity of the interference with the media company's exercise of freedom of expression had not been demonstrated, and that, accordingly, there had been a violation of Article 10 of the ECHR.

- [Instytut Ekonomichnykh Reform, TOV v. Ukraine](#), no. 61561/08, 2 June 2016.
- [Vitrenko and Others v. Ukraine \(dec.\)](#), no. 23510/02, 16 December 2008.

IRIS 2016-7/1

European Court of Human Rights: Brambilla and others v. Italy

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The legality and acceptability of some controversial practices by journalists was at the heart of a recent case before the European Court of Human Rights (ECtHR). The case concerns the conviction of three journalists in Italy who intercepted radio communications between police officers (carabinieri) in order to arrive quickly at crime scenes and report on them for their local online newspaper. Stressing the notion of responsible journalism and noting that the decisions of the domestic courts had been duly reasoned and had focused primarily on the need to protect national security and prevent crime and disorder, the Court confirms the duty of journalists to comply with domestic law, which prohibits the interception by any persons of communications not addressed to them, including those of law-enforcement agencies. The Court also notes that the penalties ordered by the domestic courts, consisting of the seizure of the radio equipment and the imposition of suspended custodial sentences, were not disproportionate. It emphasises that the newspaper and the journalists have not been prevented or prohibited from bringing news items to the attention of the public.

The applicants in this case were Mr Brambilla, the director of a local online newspaper, and Mr De Salvo and Mr Alfano, both journalists working for that newspaper. While using radio equipment to intercept the frequencies used by the police, they gained access to communications about a police patrol on its way to a location where weapons were being stored illegally. Mr De Salvo and Mr Alfano went to the scene immediately, but they were stopped and searched by the police on their arrival. The police found equipment in their car capable of intercepting radio communications between law-enforcement officers. A short time later, in the offices of Mr De Salvo and Mr Alfano, more items capable of intercepting police communications were seized. Subsequent criminal proceedings were instituted against the director of the newspaper and the two journalists, and all three were convicted, with suspended custodial sentences imposed. The Milan Court of Appeal, and finally the Court of Cassation, found that the communications had been confidential and that their interception was punishable under the Criminal Code, taking the view that the right to press freedom could not take precedence in a case concerning the illegal interception of communications between law-enforcement officers.

Relying on Article 10 of the European Convention on Human Rights (ECHR), the director of the newspaper and the two journalists complained about the search of their vehicle and their offices, the seizure of their radio equipment and their conviction. They argued that these actions and convictions amounted to a violation of their right to freedom of expression and information.

The European Court agrees with the domestic courts that the newspaper and the journalists have not been prohibited from bringing the news items to the public's attention, as their convictions were based solely on the possession and use of radio equipment to intercept communications between law-enforcement officers. The ECtHR reiterated that the notion of responsible journalism required that, where journalists acted to the detriment of the duty to abide by ordinary criminal law, they had to be aware that they risked being subjected to legal sanctions, including those of a criminal character. It noted that in seeking to obtain information for publication in a local newspaper, the journalists and the director of the newspaper had routinely intercepted police communications. This contravened the domestic criminal law, which in general terms

prohibited the interception by any persons of conversations not addressed to them, including conversations between law-enforcement officers. The Court observed that the penalties imposed on the applicants consisted of the seizure of their radio equipment and the imposition of custodial sentences of one year and three months in the case of the two journalists and six months in the case of the director of the newspaper. However, as these sentences had been suspended, the penalties the ECtHR found that it were not disproportionate and that the Italian courts had made an appropriate distinction between the journalists' duty to comply with domestic law and the pursuit of their journalistic activity, which had not been otherwise restricted. Accordingly, the ECtHR held that there had been no violation of Article 10 of the Convention.

This is the third time in 2016 that the ECtHR has found no infringement of journalists' rights in cases related to illegal preparatory acts of newsgathering. The case of [Boris Erdtmann v. Germany](#) (Application no. 56328/10, 5 January 2016) concerned the conviction of a journalist for carrying a weapon on board an aeroplane. After the terrorist attacks of 11 September 2001 in New York, Mr Erdtmann researched the effectiveness of security checks at German airports and made a short television documentary about his investigation and findings, filmed with a hidden camera. The ECtHR found that the criminal conviction of the journalist was pertinent and necessary in a democratic society and that there was no appearance of a violation of the journalist's rights under Article 10 ECHR. Also in the case of [Salihu and others v. Sweden](#) (see IRIS 2016-8/1) the ECtHR held that the journalists' convictions for illegally purchasing a firearm were lawful and necessary, while they pursued the legitimate aims of the protection of public safety and prevention of disorder and crime. In each of these cases however, the domestic courts, by deciding on the nature and severity of the criminal sanction, took into consideration the pursuit of journalistic activity, which had not been otherwise restricted. The interferences with the journalists' right to freedom of expression and information in each of these cases finally resulted in only lenient sentences or convictions for the journalists, while without the journalistic context more severe sanctions could have been imposed. In such circumstances, the ECtHR was satisfied that the interferences with the journalists' right to freedom of expression and information at issue do not discourage the press from investigating a certain topic or expressing an opinion on topics of public debate.

- [Brambilla and Others v. Italy](#), no. 22567/09, 23 June 2016.
- [Boris Erdtmann v. Germany \(dec.\)](#), no. 56328/10, 5 January 2016.

IRIS 2016-9/1

European Court of Human Rights: Jon Gaunt v. the United Kingdom

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A recent decision of the European Court of Human Rights (ECtHR) clarifies that journalistic freedom of expression does not encompass the right to insult and offend an interviewee during a radio interview, including a politician. It also confirms the competence of a media regulatory body to interfere with a journalist's or a radio station's freedom of expression in a proportionate way. In the case at issue *Ofcom*, the independent regulator and competition authority for the United Kingdom communications industries, had launched an investigation into a radio interview about which it received a series of complaints. *Ofcom* concluded that the broadcast had breached the Broadcasting Code, as it had amounted to gratuitous and offensive insult without contextual content or justification. No sanction or penalty was imposed either on the radio station or the journalist, other than the publication of the decision by *Ofcom*.

The case concerns an interview on *Talksport*, a speech-based radio station on which Jon Gaunt presented a programme which covered a broad range of news issues, often with a combative and hard-hitting interview style. In 2008 Gaunt conducted a live interview with M.S., the Cabinet Member for Children's Services for Redbridge London Borough Council. The interview concerned the Council's proposal to ban smokers from becoming foster parents on the ground that passive smoking could harm foster children. Gaunt showed a specific interest in the issue, as he spent some of his childhood in the care system himself. In a newspaper column he had expressed his appreciation for his foster mother who lavished love and care, although she "smoked like a chimney". The first part of the interview was reasonably controlled, giving M.S. the opportunity to explain his Council's policy. The rest of the interview, however, degenerated into a shouting match from the point when Gaunt first called M.S. "a Nazi", an insult that was repeated several times. The journalist also called the interviewee an "ignorant pig", while the whole interview style became gratuitously offensive and could be described as a rant. Within ten minutes of the end of the interview, Gaunt apologised to the listeners, accepting that he did not "hold it together", that he had been "unprofessional", and that he had "lost the rag". One hour after the end of the broadcast, he made a further apology for having called M.S. a Nazi. The same day Gaunt was suspended from his programme and a short time later *Talksport* terminated his contract without notice.

Following the broadcast, *Ofcom* received 53 complaints about Gaunt's conduct during the interview. In a response to *Ofcom*, *Talksport* stated that it regretted what had happened and accepted that the interview "fell way below the acceptable broadcasting standards which it expected and demanded". It regretted that Gaunt's language had been offensive, and that the manner in which the interview was conducted had been indefensible. Subsequently *Ofcom* concluded that the broadcast had breached Rules 2.1 and 2.3 of the Broadcasting Code as it fell short of the generally accepted standards applied to broadcast content and included offensive material which was not justified by the context. In reaching this conclusion, *Ofcom* took into account the extremely aggressive tone of the interview style and the seriousness which the broadcaster attached to the incident, as demonstrated by its prompt investigation and dismissal of the journalist, as well as Gaunt's two on-air apologies. Gaunt applied for a judicial review of *Ofcom*'s decision on the ground that it disproportionately interfered with his freedom of expression and infringed his rights under Article 10 of the European Convention on Human

Rights. After the national courts dismissed Gaunt's complaint (see [IRIS 2010-8/30](#)), he lodged an application before the ECtHR.

Although the ECtHR would not exclude the possibility that Ofcom's finding was at least capable of interfering with the journalist's freedom of expression (while Ofcom's finding was only directed to Talksport), it finds Gaunt's complaint manifestly ill-founded and therefore inadmissible. The Court found that the interference with Gaunt's freedom of expression was prescribed by law and was justified and proportionate. The ECtHR agrees that the national authorities have weighed up the interests at stake in compliance with the criteria laid down in the Court's case-law. In assessing Gaunt's Article 10 complaint, the national courts took properly into account that the interview was with a politician and involved political speech on a matter of general public interest, before concluding that his freedom of expression did not extend to what had amounted to gratuitous, offensive insult and abuse without contextual content or justification; "hectoring" and "bullying"; and a "particularly aggressive assault on M.S. and his opinions". The ECtHR reiterates that a degree of exaggeration, or even provocation, is permitted, while it has repeatedly held that this does not extend to "manifestly insulting language" or a "gratuitous personal attack". In the Court's view, the content of the interview with M.S. certainly came close to being a "gratuitous personal attack" without any appreciable contribution to the subject being discussed. In deciding what is capable of offending a broadcast audience, weight must be given both to the opinion of the domestic courts and, to an even greater extent, to that of a specialist regulator of broadcast standards - such as Ofcom - which has considerable experience of balancing the parameters of potentially offensive content with the fluctuating expectations of contemporary radio audiences. Hence, the ECtHR shows reluctance to substitute its view on whether or not the interview amounted to a "gratuitous personal insult" for that of the specialist regulator, which has been confirmed by the domestic courts at two levels of jurisdiction. The Court is of the opinion that the publication of the Ofcom finding was proportionate to the legitimate aim of the protection of the rights of others. There has been accordingly no violation of Gaunt's right to freedom of expression under Article 10 of the Convention.

- [Jon Gaunt v. the United Kingdom \(dec.\)](#), no. 26448/12, 6 September 2016.

IRIS 2016-10/2

European Court of Human Rights: Magyar Helsinki Bizottság v. Hungary

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On 8 November 2016, the Grand Chamber of the European Court of Human Rights (ECtHR) delivered a landmark judgment on the right of access to public documents. It found that the Hungarian authorities' refusal to provide the Hungarian Helsinki Committee, Magyar Helsinki Bizottság (MHB), with information relating to the work of ex officio defence counsels was in breach of Article 10 of the European Convention on Human Rights (ECHR), which guarantees the right to freedom of expression. The Court noted that the information requested from the police by MHB was necessary for it to complete the study on the functioning of the public defenders' system MHB was conducting in its capacity as a non-governmental human-rights organisation, with a view to contributing to discussion on an issue of obvious public interest. In the Court's view, by denying MHB access to the requested information the Hungarian authorities had impaired the NGO's exercise of its freedom to receive and impart information, in a manner striking at the very substance of its Article 10 rights. The Grand Chamber's judgment is a victory for journalists, bloggers, academics, and NGOs, who rely on access to public documents in order to conduct investigations as part of their role as "public watchdogs".

Article 10 ECHR stipulates that "everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers (...)". This article does not mention a right of access to public documents, nor a right to seek information. Neither is there a self-standing right of access to State-held information under the ECHR, nor a corresponding obligation for public authorities to disclose such information. Nonetheless, since 2009 the Court in its case law recognises that such a right or obligation may be instrumental and necessary for effective protection of the rights under Article 10 (see [Társaság a Szabadságjogokért v. Hungary](#) (IRIS 2009-7/1), [Kenedi v. Hungary](#) (IRIS 2009-7:Extra), [Gillberg v. Sweden](#) (IRIS [2011-1/1](#) and [2012-6/1](#)), [Youth Initiative for Human Rights v. Serbia](#) (IRIS 2013-8/1), [Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines Wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria](#) (IRIS 2014-2/2) and [Roşianu v. Romania](#) (IRIS 2014-8/4)). Apart from these developments in its case law, the Court also referred to national and international sources of law recognising a right of access to public documents. This led the Court to consider a right of access to information as a crucial instrument for the exercise of the right to receive and impart information as guaranteed by Article 10 of the Convention: "For the Court, in circumstances where access to information is instrumental for the exercise of the applicant's right to receive and impart information, its denial may constitute an interference with that right. The principle of securing Convention rights in a practical and effective manner requires an applicant in such a situation to be able to rely on the protection of Article 10 of the Convention". The Court further concentrated on the role of civil society and participatory democracy, and emphasised that access to public documents by the press and NGOs can contribute to "transparency on the manner of conduct of public affairs and on matters of interest for society as a whole and thereby allows participation in public governance". It considers "that civil society makes an important contribution to the discussion of public affairs", and that "the manner in which public watchdogs carry out their activities may have a significant impact on the proper functioning of a democratic society. It is in the interest of democratic society to enable

the press to exercise its vital role of “public watchdog” in imparting information on matters of public concern ... just as it is to enable NGOs scrutinising the State to do the same thing. Given that accurate information is a tool of their trade, it will often be necessary for persons and organisations exercising watchdog functions to gain access to information in order to perform their role of reporting on matters of public interest. Obstacles created in order to hinder access to information may result in those working in the media or related fields no longer being able to assume their “watchdog” role effectively, and their ability to provide accurate and reliable information may be adversely affected”.

Before Article 10 can come into play, however, the information requested should not only be instrumental for the exercise of the right to freedom of expression: the information to which access is sought must also meet a “public-interest test” for the disclosure to be considered necessary under Article 10. In addition, whether the person seeking access to the information in question does so with a view to informing the public in the capacity of a public “watchdog” and whether the information requested is “ready and available” are also an “important consideration” for the Court.

After finding that the denial to give MHB access to the requested information was an interference with MHB’s rights under Article 10, the Court explained why this amounted to a violation of Article 10. First, it considered that the information requested by MHB was “necessary” for it to exercise its right to freedom of expression. Second, the Court does not find that the privacy rights of the public defenders would have been negatively affected had the MHB’s request for information been granted. Although the information request by MHB concerned personal data, it did not involve information outside the public domain. According to the Court the relevant Hungarian law, as interpreted by the domestic courts, excluded any meaningful assessment of MHB’s freedom-of-expression rights under Article 10. Therefore the Court considered that the arguments advanced by the Hungarian Government, although relevant, were not sufficient to show that the interference complained of was “necessary in a democratic society”. By 15 votes to two the Grand Chamber comes to the conclusion that there has been a violation of Article 10 of the Convention.

- [Magyar Helsinki Bizottság v. Hungary](#) [GC], no. 18030/11, ECHR 2016.

IRIS 2017-1/1

European Court of Human Rights: Kaos GL v. Turkey

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The case of Kaos GL v. Turkey is an example of a case whose findings breach Article 10 of the European Convention on Human Rights (ECHR) on the right to freedom of expression of a particular kind. The case concerns the seizure of all the copies of a magazine published by Kaos GL, a cultural research and solidarity association for lesbian, gay, bisexual, and transgender people (“LGBT”). The European Court of Human Rights (ECtHR) found that the aim of protecting public morals relied upon by the Turkish authorities had been insufficient to justify the prior-censorship of the LGBT-magazine for more than five years. The judgment also shows the European Court’s willingness to extend the protection of Article 10 ECHR to sexually explicit expression, while demonstrating the need for proportionate interferences with the right to freedom of expression in the light of the protection of minors against sexually explicit content. In 2006, the Criminal Court of First Instance of Ankara, at the request of the Chief Prosecutor, ordered the seizure of the 375 copies of issue 28 of the magazine Kaos GL with a view to launching criminal investigations. The issue in question contained articles and interviews on pornography related to homosexuality, illustrated with explicit images. The Criminal Court considered that the content of some of the articles and some of the images published were contrary to the principle of protection of public morals. An appeal against this decision was dismissed, while the president and editor-in-chief of Kaos GL magazine, Mr Güner, was subsequently charged with publishing obscene images via the press, an offence punishable under Article 226 § 2 of the Turkish Penal Code. In particular, a painting reproduced in the magazine, which showed a sexual act between two men whose sexual organs were visible, was considered obscene and pornographic. In 2007, however, the Ankara Criminal Court acquitted Mr Güner of the charge against him. It held that not all the factors constituting the offence were present. It also ordered the return of all the copies of the magazine seized, although the execution of this order was not implemented by the Turkish authorities. In 2012, the Court of Cassation upheld the judgment of the Ankara Criminal Court. In the meantime, relying on its right to freedom of expression, Kaos GL lodged an application before the ECtHR, complaining of the seizure and continued confiscation of its issue 28 and the criminal proceedings brought against Mr Güner.

While the European Court decided that Kaos GL’s complaint about the criminal proceedings against Mr Güner was inadmissible *ratione personae*, it substantially evaluated whether the seizure and confiscation of the magazine amounted to a justified interference with the magazine’s right to freedom of expression guaranteed by Article 10 ECHR. While there was no doubt that the seizure of all copies of the magazine was prescribed by law and pursued the legitimate aim of protecting morals, the European Court considered that the reasons given by the domestic court were not convincing with regard to the necessity and the proportionate character of their seizure and confiscation. According to the Court, there was nothing in the decision of the Criminal Court to seize the magazines to suggest that the judge had examined in detail the compatibility of the magazine’s content with the principle of protection of public morals. Nor did the Criminal Court’s decision to dismiss the appeal against the seizure decision set out any further relevant details or reasoning. The European Court accordingly considered that the protection of public morals argument, advanced in such a broad, unreasoned manner, had been insufficient to justify the decision to seize and confiscate all the copies of issue 28 of Kaos GL for over five

years. Based on its own analysis of the impugned publication, having regard to the content of the articles and referring to the explicit nature of some of the images in the magazine at issue, the Court expressed the opinion that issue 28 of Kaos GL could be considered as a publication specifically aimed at a certain social category. Despite its intellectual and artistic characteristics, some of the content could indeed be considered as possibly offending the sensitivities of a non-warned public. The Court accepted that the measures taken to prevent access by specific groups of individuals - including minors - to this publication might have met a pressing social need. However, it emphasised that the domestic authorities had not attempted to implement a less harsh preventive measure than the seizure of all the copies of the magazine, for example by prohibiting its sale to persons under the age of 18 or requiring special packaging with a warning for minors. Even if the issue seized, accompanied by a warning for persons under the age of 18, could have been distributed after the return of the confiscated copies, that is to say after the Court of Cassation judgment of 29 February 2012, the Court held that the confiscation of the copies of the magazine and the delay of five years and seven months in distributing the publication could not be considered as proportionate to the aim pursued. The Court therefore held that the seizure of all the copies of issue 28 of the magazine Kaos GL amounted to a disproportionate interference with the exercise of Kaos GL's right to freedom of expression and had not been "necessary in a democratic society". The Court is unanimous in finding that therefore there has been a violation of Article 10 ECHR.

- [Kaos GL v. Turkey](#), no. 4982/07, 22 November 2016.

IRIS 2017-2/1

European Court of Human Rights: Terentyev v. Russia

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In one of its first judgments in 2017 related to the right to freedom of expression, the European Court of Human Rights (ECtHR) found a violation of a blogger's right under Article 10 of the European Convention on Human Rights (ECHR). The blogger, Mr Terentyev, a musician and jazz critic, had been convicted in Russia for defamation after he had published an article on his personal website about a local jazz festival which was scathingly critical of the festival and its president, Mr Y. Mr Terentyev used various corruptions of the festival president's surname to mock his professional competence. The jazz festival was described as being "a shoddy piece of work" and Mr Y.'s performance "crappy". Mr Y. sued the blogger for defamation, arguing that the article had been insulting and harmful to his reputation. The Syktyvkar Town Court found the applicant liable in defamation, stating that "[u]sing a distorted form of the plaintiff's patronymic and last name ... breaches the plaintiff's right to his own name and to his good name, which is unacceptable under the law". The Town Court also considered that the defamatory extracts undermined the honour and dignity of the plaintiff, while Mr Terentyev did not submit any evidence to the court showing that the impugned statements were true. The Town Court awarded Mr Y. 5,000 Russian roubles (about EUR 80) in damages and ordered Mr Terentyev to publish a retraction on his website. The Supreme Court of the Komi Republic dismissed his appeal. It endorsed the findings of the lower court in a summary judgment, holding that Article 10 of the Convention had not been breached because "the defendant published statements on the Internet which undermined the honour and dignity of the plaintiff as a person, pedagogue and musician and which contained negative information about him".

Mr Terentyev lodged a complaint with the ECtHR, arguing that his conviction for defamation amounted to a violation of his right to freedom of expression under Article 10 of the Convention. As this "interference" with Mr Terentyev's right to freedom of expression was "prescribed by law" under Article 152 of the Russian Civil Code and pursued the legitimate aim of the protection of the rights of others - namely the reputation of Mr Y. - what remained to be established was whether the interference was "necessary in a democratic society". The European Court refers to its standard approach, according to which it may be required to ascertain whether the domestic authorities have struck a fair balance when protecting two values guaranteed by the Convention - namely freedom of expression, as protected by Article 10, and the right to respect for private life enshrined in Article 8 of the ECHR, including the right to reputation. In a balancing exercise between those two rights the European Court leaves a certain margin of appreciation to the national authorities of the defending state, while the Court would require strong reasons for substituting its view for that of the domestic courts. However the domestic courts are required to carefully examine the context of the dispute, the nature of the impugned remarks and the criteria laid down in the Court's case-law, as elaborated in the 2012 Grand Chamber judgment in [Axel Springer AG v. Germany](#) (see IRIS 2012-3/1). In the present case, the ECtHR observes that the judgments of the domestic courts offer no insight into the context of the dispute: they did not discuss whether the article had contributed to a debate on a matter of public interest or whether it had been a form of artistic criticism, and did not explain why Mr Y.'s reputation had to be afforded greater protection on account of his being "a person, pedagogue and musician". The judgments at the domestic level were also remarkably laconic and contained nothing that

would help the European Court to grasp the rationale behind the interference. The domestic courts made no genuine attempt to distinguish between statements of fact and value judgments; rather, they reprinted the impugned extracts of the article in their entirety, without subjecting them to meaningful scrutiny. Faced with this failure to give relevant and sufficient reasons to justify the interference, the ECtHR finds that the domestic courts cannot be said to have “applied standards which were in conformity with the principles embodied in Article 10” or to have “based themselves on an acceptable assessment of the relevant facts”. Therefore the European Court concludes unanimously that there has been a violation of Article 10 of the ECHR. The Russian state is ordered to pay Mr Terentyev EUR 144 in respect of pecuniary damage and EUR 2,500 in respect of non-pecuniary damage.

- [Terentyev v. Russia](#), no. 25147/09, 26 January 2017.

IRIS 2017-3/1

European Court of Human Rights: Selmani and Others v. the former Yugoslav Republic of Macedonia

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On 9 February 2017, the European Court of Human Rights (ECtHR) delivered an important judgment, condemning the forcible removal of journalists from the national parliament gallery where they were reporting on a parliamentary debate in the former Yugoslav Republic of Macedonia. During the debate a group of opposition members of parliament (MPs) had started creating a disturbance in the parliamentary chamber, and had been ejected by security officers. The applicants, all accredited journalists, had refused to leave the gallery but were finally forcibly removed by security officers. The journalists brought proceedings before the Constitutional Court to complain about the incident, and contested the fact that there was no oral hearing in order to challenge the facts as disputed between them and the government. They submitted that the parliamentary debate, and the related events regarding the approval of the State budget, had been of particular public interest, and that the intervention of the parliament security officers had been neither “lawful” nor “necessary in a democratic society”. The Constitutional Court dismissed the journalists’ complaint, emphasising that in the circumstances of the case at issue, the Parliament security service was entitled to move the journalists to a safer place, where they would not be in danger. Such an assessment should not be viewed as conflicting with the journalists’ right to attend parliamentary proceedings and report on events they witnessed. In fact, the journalists published their reports in the evening editions of their newspapers, which implies that there was no violation of their freedom of expression.

The journalists lodged an application with the ECtHR, complaining about their forcible removal from the parliament gallery from where they had been reporting. In its judgment, the ECtHR agreed with the government that the removal of the journalists was “prescribed by law” and pursued the “legitimate aim” of ensuring public safety and the prevention of disorder. The ECtHR however was of the opinion that the government had failed to establish that the removal of the journalists was “necessary in a democratic society”. In particular, there was no indication that there had been any danger from the protests which had taken place outside the parliament building on the day of the incident, either from the journalists themselves (who had neither contributed to nor participated in the disturbance in the chamber), or from the MPs who had been at the origin of the disorder. Nor was the ECtHR convinced that the journalists had effectively been able to view the ongoing removal of the MPs, a matter which had been of legitimate public concern. In its reasoning the ECtHR referred to the crucial role of the media in providing information on the authorities’ handling of public demonstrations and the containment of disorder, such as in the present case. It reiterated that the “watchdog” role of the media assumes particular importance in such contexts, since their presence is a guarantee that the authorities can be held to account for their conduct vis-à-vis the demonstrators and the public at large when it comes to the policing of large gatherings, including the methods used to control or disperse protesters or to preserve public order. Any attempt to remove journalists from the scene of demonstrations must therefore be subject to strict scrutiny, especially “when journalists exercise their right to impart information to the public about the behaviour of elected representatives in Parliament and about the manner in which authorities handle disorder that occurs during Parliamentary sessions”. According to the ECtHR, it was not presented with any evidence that the

disturbance in the chamber had been violent or that anyone, in the chamber or elsewhere, had sustained an injury as a result of that disturbance. The journalists' removal, on the other hand, entailed immediate adverse effects that instantaneously prevented them from obtaining first-hand and direct knowledge based on their personal experience of the events unfolding in the chamber. The Court found that these are important elements in the exercise of the applicants' journalistic functions, of which the public should not have been deprived in the circumstances of the present case. Against this background, the ECtHR considered that the government failed to establish convincingly that the journalists' removal from the gallery was necessary in a democratic society, and came to the conclusion that there has been a violation of Article 10 of the European Convention on Human Rights (ECHR). It also found a breach of Article 6 of the ECHR, as the journalists were refused an oral hearing before the Constitutional Court, without being provided any reasons for this refusal.

- [*Selmani and Others v. the former Yugoslav Republic of Macedonia*](#), no. 67259/14, 9 February 2017.

IRIS 2017-4/2

European Court of Human Rights: Rubio Dosamantes v. Spain

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The European Court of Human Rights (ECtHR) has, once again, clarified that media freedom and entertainment news must respect the right of privacy of individuals, including when commenting on the private life of media celebrities. The case of *Rubio Dosamantes v. Spain* deals with an application by the Mexican pop singer whose artist name is Paulina Rubio, complaining that her reputation and private life had been harmed by remarks in various Spanish TV programmes. The ECtHR held that the dismissal of Dosamantes' claims by the Spanish courts was a breach of Article 8 of the European Convention on Human Rights (ECHR). The fact that the singer was well known to the public and that rumours about her private life and sexuality had been widely circulated, including on the Internet, did not justify the broadcast of interviews about her relationships and sexuality, merely repeating such rumours. The ECtHR found that Ms. Rubio's fame as a singer did not mean that her activities or conduct in her private life should be regarded as necessarily falling within the public interest.

In 2005 Ms. Rubio's former manager gave interviews on three television programmes concerning various aspects of the singer's private life. Ms. Rubio brought a civil action, seeking protection of her right to honour and to privacy, against her former manager and various television presenters and staff members, television production companies, and television stations. The first-instance court, and later the court of appeal, dismissed Ms. Rubio's claims. They found that the comments concerning the drug use of Ms. Rubio's boyfriend, R.B., had related solely to the state of their relationship and had not alleged that Ms. Rubio had incited him directly to take drugs. As to the references to Ms. Rubio's sexual orientation, the Spanish courts considered that they had not impugned her honour, as homosexuality should no longer be considered dishonourable. Furthermore Ms. Rubio herself had tacitly consented to the debate on the subject. Lastly, the Spanish courts found that the remarks concerning Ms. Rubio's alleged ill-treatment of R.B. were likewise not damaging to her reputation. Further appeals were declared inadmissible by the Supreme Court, and finally also by the Constitutional Court.

In her complaint lodged with the ECtHR, Ms. Rubio alleged that the remarks made about her during the disputed TV programmes had impugned her honour and breached her right to respect for her private life, as protected by Article 8 of the Convention. As in former cases dealt with by the ECtHR (see [IRIS 2012-3/1](#) and [IRIS 2016-1/3](#)), the question was whether a fair balance had been struck by the national courts between the right to respect for private life, including her right to reputation, and the right of the opposing party to freedom of expression. The ECtHR refers to the relevant criteria applied in other cases in this balancing, and focuses on (1) the contribution to a debate of public interest and the degree of notoriety of Ms. Rubio; (2) the prior conduct of Ms. Rubio; and (3) the content, form, and consequences of the comments uttered in the TV programmes at issue.

The ECtHR observed that the domestic courts had based their decisions merely on the fact that Ms. Rubio was famous, while emphasising that a public figure well known as a singer also has a right of privacy with regard to activities or conduct in his or her private life. According to the ECtHR, the TV programmes in question, based as they were on strictly private aspects of Ms. Rubio's life, did not have any public interest that could legitimise the disclosure of the

information, in spite of her fame, as the public had no legitimate interest in knowing certain intimate details about her private life. Even assuming that there had been a public interest, in parallel to the commercial interest of the television channels in broadcasting the programmes, the ECtHR found that those interests were outweighed by a person's individual right to the effective protection of his or her privacy. Next the ECtHR found that the fact that Ms. Rubio had earlier benefitted from extensive media attention did not authorise the TV channels to broadcast unchecked and unlimited comments about her private life. It reiterated that certain events of private and family life were given particularly careful protection under Article 8 of the Convention, and that therefore journalists and media had to show prudence and precaution when discussing them. The Spanish courts had therefore had a duty to assess the TV programmes in question, in order to distinguish between, and to weigh in the balance, those matters which were intimately part of Ms. Rubio's private life and those which might have had a legitimate public interest. The ECtHR however observed that the national courts had not carefully weighed those rights and interests in the balance, but had merely taken the view that the comments in question had not impugned Ms. Rubio's honour. They had not examined the criteria to be taken into account in order to make a fair assessment of the balance between the right to respect for freedom of expression and the right to respect for a person's private life. Having regard to the margin of appreciation afforded to the domestic authorities when it came to weighing up the various interests, the ECtHR found unanimously that they had failed in their positive obligations to ensure the protection of Ms. Rubio's privacy. There had therefore been a violation of Article 8 (see also [IRIS 2016-6/1](#)).

- [Rubio Dosamantes v. Spain](#), no. 20996/10, 21 February 2017.

IRIS 2017-4/1

European Court of Human Rights: Orlovskaya Iskra v. Russia

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In *Orlovskaya Iskra v. Russia* the European Court of Human Rights (ECtHR) has further developed its case law regarding freedom of expression and press freedom during election periods. The case concerns the application of a specific provision in Russian electoral law restricting the freedom of media reporting at election time. The Court's judgment deals with the applicant's conviction for an administrative offence for publishing critical articles about a politician during the 2007 parliamentary election campaign in Russia.

The applicant is a non-governmental organisation that publishes *Orlovskaya Iskra*, a newspaper in the Orel Region, a region south-west of Moscow. The Communist Party of the Russian Federation and the People's Patriotic Union of Russia were listed as the *Orlovskaya Iskra*'s founders. This information was specified on the front page of the newspaper. During the 2007 parliamentary election campaign the newspaper published two articles criticising the then governor of the Orel Region, who stood as first candidate on the regional list of the United Russia political party. The Communist Party was one of the main opposition parties at those elections. The articles contained accusations of corrupt and controversial practices and focused on the fact that the governor had closed down a publicly-owned newspaper. The Working Group on Informational Disputes of the regional Electoral Committee examined both articles and concluded that the articles contained elements of electoral campaigning, because they were critically focused on one candidate. It found that the articles had not been paid for by the official campaign fund of any political party participating in the election campaign, as was required by the Russian Electoral Rights Act. For that reason *Orlovskaya Iskra* was found guilty of an administrative offence and fined. It complained under Article 10 of the European Convention of Human Rights (ECHR) about the classification of the material it published as "election campaigning" and the fine imposed for failure to indicate who had commissioned the publication of this material. Joint submissions as third-party interventions in support of *Orlovskaya Iskra* were produced by the Media Legal Defence Initiative and the Mass Media Defence Centre.

The ECtHR accepted that the applicable provisions of the Russian Electoral Rights Act were aimed at transparency of elections, including campaign finances, as well as at enforcing the voters' right to impartial, truthful and balanced information via mass media outlets. The Court found however that the application of the Electoral Rights Act impinged upon *Orlovskaya Iskra*'s freedom to impart information and ideas during the election period, and that the interference with its freedom of expression was not shown to achieve, in a proportionate manner, the aim of running fair elections.

The ECtHR reiterated that free elections, as guaranteed by Article 3 of Protocol No. 1 to the ECHR, and freedom of expression, together form the bedrock of any democratic system. The two rights are inter-related and operate to reinforce each other, freedom of expression being one of the "conditions" necessary to ensure free elections. For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely. According to the ECtHR in the case at issue there was little scope for restrictions, especially on account of the strong interest of a democratic society in the press exercising its vital role as a public watchdog. The content of the publications was part of the normal journalistic coverage

of a political debate in the print media. The ECtHR stated that it saw no reason to consider that any candidates or political parties were at the origin of the impugned articles and it considered that the publication of the articles constituted a fully-fledged exercise of Orlovskaya Iskra's freedom of expression, namely the choice to publish the articles, thus imparting information to the readers and potential voters. According to the ECtHR it has not been convincingly demonstrated, and there was certainly no sufficient basis for upholding the Government's argument, that the print media should be subjected to rigorous requirements of impartiality, neutrality and equality of treatment during an election period. The ECtHR recognised however that in certain circumstances the rights under Article 10 ECHR and Article 3 of Protocol No. 1 may conflict and it may be considered necessary, in the period preceding or during an election, to place certain restrictions on freedom of expression, of a type which would not usually be acceptable, in order to secure the "free expression of the opinion of the people in the choice of the legislature". It also considers that unfavourable publications before Election Day can indeed damage one's reputation. However the focus of the domestic legislation was not on the falsity or truth of the content or its defamatory nature. In the opinion of the ECtHR the "public watchdog" role of the press, also at election time, is not limited to using the press as a medium of communication, for instance by way of political advertising, but also encompasses an independent exercise of freedom of the press by mass media outlets such as newspapers on the basis of free editorial choice aimed at imparting information and ideas on subjects of public interest. In particular, discussion of the candidates and their programmes contributes to the public's right to receive information and strengthens voters' ability to make informed choices between candidates for office. In addition, the ECtHR stated that any damage caused to reputation could be addressed, possibly before Election Day, by way of other appropriate procedures.

The ECtHR concluded that, in view of the regulatory framework, Orlovskaya Iskra was restricted in its freedom to impart information and ideas. By subjecting the expression of comments to the regulation of "campaigning" and by prosecuting the applicant with reference to this regulation, there was an interference with Orlovskaya Iskra's editorial choice to publish a text taking a critical stance and to impart information and ideas on matters of public interest. The Court affirmed that no sufficiently compelling reasons had been shown to justify the prosecution and conviction of Orlovskaya Iskra for its publications at election time. Therefore the ECtHR concluded that there had been a violation of Article 10 ECHR.

- [Orlovskaya Iskra v. Russia](#), no. 42911/08, 21 February 2017.

IRIS 2017-6/2

European Court of Human Rights: Rolf Anders Daniel Pihl v. Sweden

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The decision in *Rolf Anders Daniel Pihl v. Sweden* deals with a complaint about an alleged breach of the applicant's right to privacy and reputation under Article 8 of the European Convention on Human Rights (ECHR), because the Swedish authorities had refused to hold the operator of a website liable for a defamatory blog post and an anonymous online comment. Again, the European Court of Human Rights (ECtHR) applies a crucial distinction between illegal hate speech and defamation, limiting the liability of the operator of the blog when it (only) concerns defamation, and not incitement to violence. The blog post at issue had wrongfully accused Mr. Pihl of being involved in a Nazi political party. The day after publication of the post, an anonymous person posted a comment calling Pihl "a real hash-junkie". The blog, which was run by a small non-profit association, allowed comments to be posted without being checked before publication. The commentators were considered responsible for their own statements, and therefore they were requested to "display good manners and obey the law". Nine days later Pihl posted a comment on the blog in reply to the blog post and comment about him, stating that both allegations were false and requesting their immediate removal. The following day the blog post and the comment were removed and a new post was added on the blog by the association - stating that the earlier post had been wrong and based on inaccurate information - and it apologised for the mistake. However, Pihl sued the association and claimed symbolic damages of SEK 1, approximately EUR 0.10. He submitted that the post and the comment constituted defamation, and that the association was responsible for the fact that the blog and the comment had remained on the website for nine days. The Swedish courts however rejected Pihl's claim. They agreed that the comment constituted defamation, but found no legal grounds on which to hold the association responsible for failing to remove the blog post and comment sooner than it had done. Pihl complained before the ECtHR that his right to privacy and reputation under Article 8 ECHR had been breached.

First the Court considered that the comment, although offensive, certainly did not amount to hate speech or incitement to violence, and accepted the national courts' finding that the comments at issue constituted defamation and, consequently, fell within the scope of Article 8. Next, the Court referred to its case law in [Delfi AS v. Estonia](#) (see IRIS 2015-7/1) and [Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary](#) (see IRIS 2016-3/2), and summarised the aspects that are relevant for the concrete assessment of the interference in question: "the context of the comments, the measures applied by the company in order to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the intermediary's liability, and the consequences of the domestic proceedings for the company". As regards the context of the comment, the Court noted that the underlying blog post accused Pihl, incorrectly, of being involved in a Nazi political party, but also that the post and the subsequent comment were promptly removed and an apology published when Pihl notified the association of the inaccurate allegations about him. The Court attached particular importance to the fact that the association is a small non-profit association, and observed that it was also unlikely that the blog post and the comment at issue would be widely read. It considered that "expecting the association to assume that some unfiltered comments might be in breach of the law would amount to requiring excessive and impractical forethought capable of

undermining the right to impart information via internet”. As regards the measures taken by the association to prevent or remove defamatory comments, the Court noted that it was clearly stated on the blog that the association did not check such comments before they were published and that commentators were responsible for their own statements. The Court also referred to its earlier case law in which it held that “liability for third-party comments may have negative consequences on the comment-related environment of an internet portal and thus a chilling effect on freedom of expression via internet. This effect could be particularly detrimental for a non-commercial website”. Turning to the liability of the originator of the comment, the Court observed that Pihl obtained the IP-address of the computer used to submit the comment, but that there were no indications that he took any further measures to try to obtain the identity of the author of the comment. Lastly the Court noted that Pihl’s case was considered on its merits by two judicial instances at the domestic level before the Supreme Court refused leave to appeal. The Court further observed that the scope of responsibility of those running blogs is regulated by domestic law and that, had the comment been of a different and more severe nature, the association could have been found responsible for not removing it sooner, e.g. if it had concerned child pornography or incitement to rebellion or violence. In its overall conclusion the ECtHR again emphasised the fact that the comment, although offensive, did not amount to hate speech or incitement to violence and was posted on a small blog run by a non-profit association, which removed it the day after the applicant’s request and nine days after it had been posted. In view of this, the Court finds that the domestic courts acted within their margin of appreciation and struck a fair balance between Pihl’s rights under Article 8 and the association’s opposing right to freedom of expression under Article 10 ECHR. Therefore the Court found the application to be manifestly ill-founded.

- [Rolf Anders Daniel PIHL v. Sweden](#) (dec.), no. 74742/14, 7 February 2017.

IRIS 2017-5/3

European Court of Human Rights: Ólafsson v. Iceland

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According to the European Court of Human Rights (ECtHR), Iceland has breached the right to freedom of expression of the editor of a web-based media site, by holding him liable for defamation. The applicant in this case is Mr. Ólafsson, editor of the web-based media site Pressan. He published articles alleging that a political candidate ('A.') had sexually abused children. The allegations were based on statements made by relatives of 'A.' who had declared that he had sexually abused them when they were children. These allegations were also forwarded to the police and the child protection services, but for an unknown reason, the police had not instigated an investigation.

The Supreme Court of Iceland held Mr. Ólafsson liable for defamation, because statements in the articles had indeed insinuated that 'A.' was guilty of having abused children. Whilst the Supreme Court accepted that candidates for public service had to endure a certain amount of public scrutiny, it held that this could not justify the accusations of criminality against 'A.' in the media, particularly because A. had not been found guilty of the alleged conduct and had not been under criminal or other investigation for it. The Supreme Court also held that Mr. Ólafsson, as an editor, had a supervisory obligation which entailed that he should conduct his editorial duties in such a way that the published material would not harm anyone by being defamatory. Mr. Ólafsson was ordered to pay, under the Tort Act, EUR 1,600 for non-pecuniary damages, and compensation for 'A.'s legal costs of EUR 6,500. Under Article 241 of the Penal Code the statements at issue published on Pressan were declared null and void.

Mr. Ólafsson complained to the ECtHR of a violation of his right to freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights (ECHR). The ECtHR found that it has been adequately established that Mr. Ólafsson's liability was prescribed by domestic law within the meaning of Article 10 § 2 of the ECHR, and that the interference complained of pursued the legitimate aim of the protection of the reputation or rights of others. The ECtHR however found the arguments for the interference with Mr. Ólafsson's right to freedom of expression as an editor insufficiently convincing. In doing so the ECtHR referred to the standards and principles that the ECtHR has developed when considering disputes requiring an examination of the fair balancing of the right to respect for private life under Article 8 and the right to freedom of expression. The ECtHR recalled that in order for Article 8 to come into play, an attack on a person's reputation must attain a certain level of seriousness and its manner must cause prejudice to personal enjoyment of the right to respect for private life. The criteria which are relevant when balancing the right to freedom of expression against the right to respect for private life are: (1) the extent to which the impugned statement contributes to a debate of general interest; (2) how well known the person concerned is and what the subject of the report is; (3) his or her prior conduct; (4) the method of obtaining the information and its veracity; (5) the content, form, and consequences of the publication and (6) the severity of the sanction imposed.

The ECtHR confirmed that the general public had a legitimate interest in being informed about 'A.'s running for general election and of such serious matters as child abuse. It also considers that, by running for office in general elections, 'A.' must be considered to have inevitably and knowingly entered the public domain and laid himself open to closer scrutiny of his acts. The

limits of acceptable criticism are accordingly wider than in a case of a private individual. Next the ECtHR referred to the obligation for journalists to rely on a sufficiently accurate and reliable factual basis which can be considered proportionate to the nature and degree of their allegations, such that the more serious the allegations, the more solid the factual basis has to be. The ECtHR accepted that the journalist tried to establish the credibility and the truth of the allegations by interviewing several relevant persons, and that the impugned articles offered 'A.' an opportunity to comment on the allegations. The Court reiterated that a general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult, or provoke others, or damage their reputation, is not reconcilable with the press's role of providing information on current events, opinions, and ideas and that "punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so". The ECtHR was of the opinion that Mr. Ólafsson acted in good faith and made sure that the article was written in compliance with ordinary journalistic obligations to verify a factual allegation.

Although the ECtHR agreed that the allegations were of such nature and gravity as to be capable of causing harm to 'A.'s honour and reputation, it emphasised that the disputed statements did not originate from Mr. Ólafsson himself nor from the journalist who wrote the articles, but from the alleged victims. Insofar as Mr. Ólafsson's conviction may have been in the legitimate interest of protecting 'A.' from the impugned defamatory allegations made by the alleged victims, that interest was, in the Court's view, largely preserved by the possibility available to him under Icelandic law to bring defamation proceedings against the persons who made the claims. The ECtHR regarded it as significant that 'A.' opted to institute proceedings against Mr. Ólafsson only. 'A.' had indeed chosen not to sue the persons making the claims, and that might have prevented Mr. Ólafsson from establishing that he had acted in good faith and had ascertained the truth of the allegations. With regard the proportionate character of the order by the Iceland Supreme Court to pay compensation and costs, the ECtHR considered that what matters is the very fact of judgment being made against the person concerned, even where such a ruling is solely civil in nature. It emphasised that any undue restriction on freedom of expression effectively entails a risk of obstructing or paralysing future media coverage of similar questions.

The ECtHR concluded that the Supreme Court had failed to strike a reasonable balance between the measures restricting Mr. Ólafsson's freedom of expression, and the legitimate aim of protecting the reputation of others. The ECtHR held, unanimously, that there had been a breach of Mr. Ólafsson's freedom of expression and that the Icelandic judicial authorities had violated Article 10 ECHR.

- [Ólafsson v. Iceland](#), no. 58493/13, 16 March 2017.

IRIS 2017-6/1

European Court of Human Rights: *Milisavljević v. Serbia*

Dirk Voorhoof

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The European Court of Human Rights (ECtHR) has recently found that the Republic of Serbia has acted in breach of the right to freedom of expression by convicting a journalist for insult of a well-known human rights activist. The ECtHR emphasises that criminal prosecution for insult of public figures is likely to deter journalists from contributing to the public discussion of issues affecting the life of the community. More than 10 years after the journalist lodged an application with the Court, the ECtHR came unanimously to the conclusion that the Serbian authorities' reaction to the journalist's article was disproportionate to the legitimate aim of protecting the reputation of others, and was therefore not necessary in a democratic society, within the meaning of Article 10 (2) of the European Convention on Human Rights (ECHR).

The applicant is Ljiljana Milisavljević, who was a journalist employed at Politika, a major Serbian daily newspaper. In September 2003, Milisavljević wrote an article in Politika about Nataša Kandić, a Serbian human rights activist primarily known for her activities in investigating crimes committed during the armed conflicts in the former Yugoslavia. Kandić also advocated for full cooperation of the Yugoslav, and later Serbian authorities with the International Criminal Tribunal for the former Yugoslavia (ICTY), a highly controversial issue at that time in Serbia. A few weeks after the publication of the article Kandić started a private prosecution against Milisavljević. She claimed that the article had been written with the intent of belittling her in the eyes of the public, to present her as a traitor to Serbian interests and as a "paid servant of foreign interests and a prostitute who sells herself for money".

The First Municipal Court in Belgrade found that Milisavljević had indeed insulted Kandić by writing that "she has been called a witch and a prostitute". The court established that although the impugned phrase had been previously published in another article by another author in a different magazine, Milisavljević had not put it in quotation marks which meant that she agreed with it, thus expressing her opinion, with the intention of insulting Kandić. In view of no aggravating circumstances and a number of mitigating ones, no prison sentence or fines were imposed: the court only gave Milisavljević a judicial warning. This judgment was confirmed by the court of appeal, while in separate proceedings Milisavljević was ordered to pay Kandić approximately EUR 386 in respect of costs and expenses.

In 2006, Milisavljević lodged a complaint with the ECtHR, arguing that her right to freedom of expression as a journalist had been violated by the conviction for criminal insult. She also submitted that she had been later discharged from Politika and that her conviction appeared to have been the cause thereof, while her conviction also represented a threat and warning to all Serbian journalists. In determining whether the interference with the journalist's freedom of expression was necessary in a democratic society in the terms of Article 10 (2) ECHR, the Court applied the relevant considerations of (a) whether the article contributed to a debate of general interest; (b) how well known the person concerned was and what the subject was of the report; (c) the conduct of the person concerned prior to publication of the article; (d) the method of obtaining the information and its veracity; (e) the content, form, and consequences of the publication; and (f) the severity of the sanction imposed. When examining the necessity of an interference in a democratic society in the interests of the "protection of the reputation or rights

of others”, the ECtHR has to verify whether the domestic authorities struck a fair balance between the competing rights and values.

While there was no doubt that the article was published in the context of a debate on matters of public interest, the ECtHR further observed that the applicant is a journalist and in that capacity her task was to write an article about Kandić, a well-known human rights activist and undeniably a public figure. The crucial question was to determine what the impact was of the allegation that Kandić had been called “a witch and a prostitute”. The ECtHR considered that the impugned words are offensive, but that it is clear from the formulation of the sentence that this is how Kandić was perceived by others, not by Milisavljević herself. It reiterated that a general requirement for journalists systematically and formally to distance themselves from the content of a quotation that might insult or provoke others or damage their reputation is not reconcilable with the press’s role of providing information on current events, opinions, and ideas.

According to the ECtHR, the domestic courts also failed to make any balancing exercise whatsoever between Kandić’s reputation and Milisavljević’s freedom of expression, also referring to the latter’s “duty, as a journalist, to impart information of general interest”. The Serbian courts made no reference to the overall context of the text and the circumstances under which it was written, as their findings were rather limited to the fact that the impugned words were not put in quotation marks. In the ECtHR’s view this amounted to a “terse and undeveloped reasoning” at the domestic level, which is in itself problematic “as it rendered any defence raised by the applicant devoid of any practical effect”. The ECtHR found that the impugned article offered both positive and negative views about Kandić, and it considered that the impugned words could not be understood as a gratuitous personal attack on, or insult to, Kandić. The article did not refer to her private or family life, but showed how she was perceived professionally, as a human rights activist and a public figure. That being so, the ECtHR considered that she inevitably and knowingly exposed herself to public scrutiny, and should therefore have displayed a greater degree of tolerance than an ordinary private individual.

With regard the proportionality of the interference, the ECtHR disagreed with the Serbian Government’s argument that the journalist’s sentence was lenient: what matters was not that Milisavljević was “only” issued a judicial warning, but that she was convicted for an insult at all. The ECtHR emphasised that “irrespective of the severity of the penalty which is liable to be imposed, a recourse to the criminal prosecution of journalists for purported insults, with the attendant risk of a criminal conviction and a criminal penalty, for criticising a public figure in a manner which can be regarded as personally insulting, is likely to deter journalists from contributing to the public discussion of issues affecting the life of the community”. On the basis of all these considerations, the ECtHR concluded that there has been a violation of Article 10 ECHR.

- [Milisavljević v. Serbia](#), no. 50123/06, 4 April 2017.

IRIS 2017-7/2

European Court of Human Rights: Huseynova v. Azerbaijan

Dirk Voorhoof

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The European Court of Human Rights (ECtHR) recently dealt with a case that illustrates the dramatic situation of violence against journalists in some countries and the often remaining impunity for crimes against journalists (see [IRIS 2017-3/3](#) and [IRIS 2016-5/3](#)). It also shows the difficulties the victims or their families can be confronted with in invoking the European Convention on Human Rights (ECHR).

Elmar Huseynov was a prominent independent journalist in Azerbaijan and the editor-in-chief of the weekly magazine Monitor. Various civil and criminal proceedings had been brought against him for the publication of critical articles about the President of Azerbaijan and members of his family, and about members of the parliament, government and other state officials. Moreover, copies of the magazine had been confiscated on several occasions and the domestic authorities sometimes prevented its publication. After having received threats because of his critical articles, and in particular shortly after having been told by a public official to stop writing about the President and his family, on 2 March 2005, Mr Huseynov was shot dead in his apartment building as he returned home from work. Huseynov's murder received widespread local and international media coverage and was unanimously condemned by various politicians, international organisations, and local and international NGOs. Criminal investigations were instituted immediately after the murder and numerous investigative actions were taken, but 12 years later the criminal proceedings were still ongoing and the perpetrators of the crime had not yet been prosecuted. Before the ECtHR, Ms Rushaniya Saidovna Huseynova alleged that her husband had been murdered by Azerbaijani State agents and that the authorities had failed to conduct an effective investigation, and hence breached Article 2 (the right to life) of the European Convention on Human Rights (ECHR). She further alleged that the killing of her husband had constituted a breach of the right to freedom of expression (Article 10 ECHR), as he had been targeted on account of his journalistic activity.

With regard to the merits of the complaint and the alleged violation of Article 2 ECHR, the ECtHR observes that Ms Huseynova made allegations about the involvement of state agents or the state in general in the murder of her husband, because of his journalistic activity. The ECtHR however considered that there was no evidence for these allegations. The Court next referred to the duty of the state not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. This involves a primary duty for the state to secure the right to life by putting in place effective criminal law provisions to deter the commission of offences against the person, backed up by law enforcement machinery for the prevention, suppression, and punishment of breaches of such provisions. It also extends, in appropriate circumstances, to a positive obligation on the authorities to take preventive operational measures to protect an individual or individuals whose lives are at risk. However, for a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of a particular individual or individuals from the criminal acts of a third party, and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. The ECtHR points out that Mr Huseynov had never applied to the domestic

authorities for protection or informed them of any danger or threat to his life and it further observes that the law enforcement authorities had not been aware of any danger to his life, nor had they held any information which might give rise to such a possibility. The ECtHR concluded that it had no evidence indicating that the domestic authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of Mr Huseynov and failed to protect his right to life. Accordingly, there has been no violation of the substantive limb of Article 2 ECHR.

As to the procedural limb of Article 2 ECHR, with regard the alleged failure to carry out an effective investigation, the ECtHR did find a violation. The ECtHR referred to a number of shortcomings in the criminal investigation carried out by the domestic authorities. The ECtHR is of the opinion that the Azerbaijani authorities did not effectively examine the possibility of prosecuting the alleged perpetrators of the murder in Georgia by transferring the criminal case there, after the investigation had identified two suspects who were on the territory of the State of Georgia, which refused to extradite them. The ECtHR also noted that even though Ms Huseynova was granted victim status in the investigation, she has been constantly denied access to the case file during the investigation, and she only obtained copies of some documents from the case file for the first time when the Government submitted its observations to the ECtHR. That situation deprived her of the opportunity to safeguard her legitimate interests and prevented any scrutiny of the investigation by the public. The ECtHR furthermore considered that the criminal investigation was not carried out promptly, taking into account its overall length of over 12 years. Finally, it was apparent that the murder of Mr Huseynov could have a “chilling effect” on the work of other journalists in Azerbaijan. According to the ECtHR it does not appear that adequate steps were taken during the investigation to inquire sufficiently into the motives behind the killing of Mr Huseynov and to investigate the possibility that the attack could have been linked to his work as a journalist. On the basis of these findings the ECtHR concludes that the domestic authorities failed to carry out an adequate and effective investigation into the circumstances surrounding the killing of Ms Huseynova’s husband. It accordingly held that there had been a violation of the procedural limb of Article 2 ECHR.

With regard to the complaint under Article 10, the ECtHR noted that the allegations arise out of the same facts as those already examined under Article 2. Having regard to its finding of a violation of Article 2 under its procedural limb because of the ineffectiveness of the investigation into the killing of Ms Huseynova’s husband, the ECtHR considers that it is not necessary to examine the complaint under Article 10 ECtHR separately.

- [Huseynova v. Azerbaijan](#), no. 10653/10, 13 April 2017.

IRIS 2017-7/1

European Court of Human Rights: Herbert Haupt v. Austria

Dirk Voorhoof

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In a case against Austria, the European Court of Human Rights (“ECtHR”) decided that a satirical report aired during a comedy show on television that allegedly tarnished the reputation of a high-ranking and controversial politician had not violated the politician’s right to private life, as guaranteed by Article 8 of the European Convention on Human Rights (ECHR). The ECtHR is of the opinion that the Austrian courts struck a fair balance between the competing interests in the case, in finding that the broadcaster’s right to freedom of expression under Article 10 ECHR had outweighed the politician’s right to private life under Article 8 ECHR.

The applicant in this case is Mr Herbert Haupt, who was the Chairperson of the Austrian Freedom Party (Freiheitliche Partei Österreichs, or FPÖ) from 2002 to 2004; in 2003 he was Vice-Chancellor of the Federal Government. In September 2013 a comedy show was aired on the television channel ATV+ called “The Worst of the Week” (Das Letzte der Woche). One of the reports concerned the fact that Mr Haupt, then the Vice-Chancellor of Austria, had become “godfather” to a baby hippopotamus at Vienna Zoo, as part of a fundraising incentive designed to encourage people to become sponsors of the zoo. The report contained blatant mockery and satirical comments, mentioning, inter alia, that there were many similarities between Mr Haupt, as the leader of the FPÖ, and his godchild, the baby hippopotamus, as both were usually surrounded by a lot of brown rats. Mr Haupt lodged a claim for compensation for non-pecuniary damage under section 6 of the Media Act (Mediengesetz), in conjunction with Article 115 of the Criminal Code (Strafgesetzbuch), against ATV Privat TV GmbH & Co KG (hereinafter “ATV”), the owner of ATV+, alleging that he had been insulted by the expression “brown rats”. In a first set of proceedings the Austrian courts ruled in favour of Mr Haupt, ordering ATV to pay him compensation of EUR 2,000, as the statement about the brown rats had amounted to defamation under Article 111 of the Criminal Code. After the Supreme Court annulled the Vienna Regional Court’s and the Vienna Court of Appeal’s judgments, it allowed the extraordinary reopening of the proceedings against ATV. In the reopened proceedings the Austrian courts dismissed Mr Haupt’s claim for compensation and also ordered him to bear the costs in respect of the proceedings incurred by the opposing party. As regards the alleged defamatory statement and its examination of evidence, the Regional Court listed a number of extreme right-wing or neo-Nazi statements made by high-ranking politicians belonging to the Freedom Party, while it found that Mr Haupt had not publicly dissociated himself from these statements. The impugned remark made during the broadcast about brown rats did not concern Mr Haupt’s private and personal sphere but rather his professional, public position as a politician. The Court of Appeal confirmed the findings by the Regional Court, including the observation that the statement about the brown rats had constituted political criticism of the attitude and statements of FPÖ politicians. Before the ECtHR Mr Haupt complained that there had been a violation of Article 8 of the ECHR because the Austrian courts had failed to strike a fair balance between freedom of expression and his interest in protecting his reputation. His interest in the protection of his reputation should have outweighed ATV’s interest in disseminating on its television channel a statement which was of a lurid and degrading nature.

Firstly, the ECtHR reiterates that according to its case-law the right to reputation is an independent right guaranteed by Article 8 of the ECHR, as part of the right to respect for private life, which the State has a positive obligation to protect. In order for Article 8 to come into play,

however, an attack on a person's reputation must attain a certain level of seriousness and be carried out in a manner causing prejudice to personal enjoyment of the right to respect for private life. The ECtHR refers to its earlier case law in which it identified the relevant principles which must guide its assessment within the context of balancing Article 8 and 10 as competing rights. The relevant criteria thus defined are: contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, the content, form and consequences of the publication, and, where appropriate, the circumstances in which the statement was made. The ECtHR also considers that, notwithstanding the fact that the Mr Haupt claims a violation of Article 8 ECHR, it is the task of the ECtHR to determine whether the principles inherent in Article 10 ECHR were properly applied by the Austrian courts when examining Mr Haupt's actions. Next the ECtHR emphasises that the most careful scrutiny under Article 10 ECHR is required where measures or sanctions imposed on the press are capable of discouraging the participation of the press in debates on matters of legitimate public concern. Furthermore, the limits of acceptable criticism are drawn more widely as regards a politician than they are as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance. The ECtHR reiterates that satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's or social commentator's right to such expression must be examined with particular care.

The ECtHR considers important, inter alia, the fact that Mr Haupt was a well-known politician and that he thus has to display a greater degree of tolerance in the face of such provocation in a satirical television programme. Furthermore, the ECtHR finds that the report dealt with an issue of legitimate public concern - namely, statements made by high-ranking members of the FPÖ which were criticised in the media as expressing extremist right-wing positions and the question of whether Mr Haupt (in his position as Chairperson of that party) had distanced himself sufficiently from such statements. The ECtHR is also satisfied that there was a sufficient factual basis for the reference to the brown rats around the FPÖ, having regard to the detailed findings reached by the Regional Court in which it quoted various problematic statements made by politicians of the FPÖ. For these reasons, the ECtHR is satisfied that the judgment of the Vienna Regional Court, as upheld by the Vienna Court of Appeal, struck a fair balance between the competing interests in the present case. Consequently, the ECtHR concludes unanimously that there is no appearance of a violation of Article 8 ECHR. Therefore the complaint by Mr Haupt is rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 ECHR, and consequently Mr Haupt's application is declared inadmissible.

- [Herbert Haupt v. Austria](#) (dec.), no. 55537/10, 2 May 2017.

IRIS 2017-9/2

European Court of Human Rights: Fouad Belkacem v. Belgium

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In a case concerning religious extremism on the Internet, the European Court of Human Rights (“ECtHR”) confirmed that defending “Sharia law” while calling for violence to establish it could be regarded as “hate speech”. The Court held that, in accordance with Article 17 (prohibition of abuse of rights) of the European Convention on Human Rights (“ECHR”), the discourse at issue did not fall under the protection of Article 10 of the ECHR, which guarantees the right to freedom of expression.

The case concerns the conviction of Mr Belkacem, the leader and spokesperson of the organisation “Sharia4Belgium” (which was dissolved in 2012) for incitement to discrimination, hatred and violence on account of remarks he made in YouTube videos concerning non-Muslim groups and Sharia law. Mr Belkacem was prosecuted for various offences under Belgium’s Anti-Discrimination Law of 10 May 2007 and for online harassment with discriminatory intent. In the videos in question Mr Belkacem called on viewers, among other things, to overpower non-Muslims, “teach them a lesson” and to fight them. He also advocated jihad and Sharia law. In 2013 the Antwerp Court of Appeal sentenced Mr Belkacem to a suspended term of one year and six months’ imprisonment and to a fine of EUR 550. The Antwerp court specified that the offence of public incitement to discrimination, violence and hatred was undoubtedly intentional, explicit, firm and repeated. The Court of Cassation dismissed an appeal lodged by Mr Belkacem. It found that Mr Belkacem had not simply expressed his views, but had unquestionably incited others to engage in discrimination on the basis of faith and discrimination, segregation, hatred or violence towards non-Muslims, and had done so knowingly and therefore intentionally.

Relying on Article 10 ECHR, Mr Belkacem argued before the ECtHR that he had never intended to incite others to hatred, violence or discrimination but had simply sought to propagate his ideas and opinions. He maintained that his remarks had merely been a manifestation of his freedom of expression and religion and had not constituted a threat to public order.

The ECtHR reiterates that, while its case-law enshrines the overriding and essential nature of freedom of expression in a democratic society, it also lays down its limits by excluding certain statements from the protection of Article 10. The ECtHR notes that Mr Belkacem published a series of videos on the YouTube platform in which he called on viewers to overpower non-Muslims, teach them a lesson and fight them. The ECtHR is in no doubt as to the markedly hateful nature of Mr Belkacem’s views, and agrees with the domestic courts’ finding that Mr Belkacem, through his recordings and video messages on the Internet, had sought to stir up hatred, discrimination and violence towards all non-Muslims. In the Court’s view, such a general and vehement attack is incompatible with the values of tolerance, social peace and non-discrimination underlying the Convention. With particular reference to Mr Belkacem’s remarks concerning Sharia law, the Court reiterates that it has ruled that the fact of defending Sharia law while calling for violence to establish it could be regarded as “hate speech”, and that each Contracting State was entitled to oppose political movements based on religious fundamentalism. The ECtHR also observes that the Belgian legislation, as applied in the present case, appeared to be in conformity with the relevant provisions and recommendations of the Council of Europe and the European Union aimed at combating incitement to hatred, discrimination and violence. Lastly, the ECtHR considers that Mr Belkacem had attempted to deflect Article 10 of the Convention from its real purpose by using his right to freedom of

expression for ends which were manifestly contrary to the spirit of the Convention. Although reiterating that the abuse clause of Article 17 is only applicable on an exceptional basis and in extreme cases, the ECtHR finds it applicable in the case at issue. Accordingly, it holds that, in accordance with Article 17 of the ECHR, Mr Belkacem could not claim the protection of Article 10 of the ECHR. The ECtHR decides that the application is therefore incompatible *ratione materiae* with the provisions of the ECHR (Article 35 §§ 3(a) and 4) and is inadmissible.

- [Fouad Belkacem v. Belgium](#) (dec.), no. 34367/14, 20 July 2017.

IRIS 2017-9/1

European Court of Human Rights: Ghiulfer Predescu v. Romania

Dirk Voorhoof

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The European Court of Human Rights (ECtHR), in a case against Romania, has confirmed the strong protection of the right to freedom of expression to be guaranteed to statements by journalists made within the context of a lively debate in a television show on a matter of public interest.

Ms Predescu, an investigative journalist, complained of a violation of her right to freedom of expression. She appeared on a television show on a national television channel together with the Mayor of Constanța, R.M., to discuss certain violent incidents that had taken place in Mamaia, a seaside resort on the outskirts of Constanța. During the broadcast, Ms Predescu had made allegations that the Mayor was personally connected to a vendetta between violent rival clans operating in the area. The Mayor had lodged a civil complaint against her for defamation, essentially arguing that Ms Predescu's allegations about specific facts had not been previously verified, nor ever proved to be true. He had further argued that by associating his name and image with that of criminal groups or clans, the journalist had seriously harmed his reputation as a public person and a locally elected official. After the case went to appeal, the Mayor's claim was ultimately successful and Ms Predescu was ordered to pay RON 50,000 (approximately EUR 10,000) in damages, plus costs, and to publish at her own expense the judgment against her in two newspapers.

The question before the ECtHR was whether the domestic authorities had struck a fair balance between the protection of freedom of expression, as enshrined in Article 10, and the protection of the reputation of those against whom allegations are made, a right which, as an aspect of private life, is protected by Article 8 of the European Convention on Human Rights (ECHR).

Firstly, the ECtHR reiterated that there is little scope under Article 10 § 2 of the ECHR for restrictions on political speech or on debate on matters of public interest, and that the limits of acceptable criticism are therefore wider with regard to a civil servant or a politician acting in his public capacity than in relation to a private individual. Journalistic freedom also covers possible recourse to a degree of exaggeration or even provocation, while the safeguard afforded by Article 10 of the ECHR to journalists in relation to the reporting of issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information, in accordance with the ethics of journalism.

Focusing on the concrete elements of the case, the ECtHR observed that the impugned television show had been an attempt to debate publicly the question of the possible implication of R.M. - the Mayor of the city of Constanța and a local businessman - in violent incidents in which a large group of armed persons had wrecked several hotels in Mamaia, including a hotel belonging to a company in which R.M. was a shareholder. It stressed that the role of the press certainly entails a duty to alert the public when it has learned of presumed misappropriation on the part of local elected representatives and public officials. The ECtHR also noted that the format of the television show was designed to encourage an exchange of views or even an argument, in such a way that the opinions expressed would counterbalance each other and the debate hold the viewers' attention. The show had been broadcast live on television, so Ms Predescu had had only a limited possibility to reformulate, refine or retract any statements before they were made public. Furthermore, the statements expressed by Ms Predescu had had a sufficient factual basis,

as they had been based on information which was already known to the general public - namely articles and journalistic investigative material that had been previously published about R.M.

In contrast with the judgment by the domestic appeal court that found Ms Predescu liable for defamation, the ECtHR was of the opinion that there was nothing in the case to suggest that the journalist's allegations had been made otherwise than in good faith and in pursuit of the legitimate aim of debating a matter of public interest. Finally the ECtHR noted that the amount that Ms Predescu had been ordered to pay had been extremely high and was capable of having a "chilling", dissuasive effect on her freedom of expression. The sanction imposed on the journalist had also lacked appropriate justification and the standards applied by the domestic courts had failed to ensure a fair balance between the relevant rights and related interests. Accordingly, the interference complained of was not "necessary in a democratic society" within the meaning of Article 10 § 2 of the ECHR; therefore the ECtHR found that there has been a violation of Article 10 ECHR.

- [Ghiulfer Predescu v. Romania](#), no. 29751/09, 27 June 2017.

IRIS 2017-8/2

European Court of Human Rights: Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland

Dirk Voorhoof

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Following the [Chamber judgment](#) of the European Court of Human Rights (ECtHR) two years ago (see IRIS 2015-8/1), the Grand Chamber has also come to the conclusion that the right to freedom of expression and information was not violated in Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland. By fifteen votes to two the Grand Chamber found that a prohibition issued by the Finnish Data Protection Board that had prevented two media companies from publishing personal taxation data in the manner and to the extent that they had published these data before was to be considered as a legal, legitimate and necessary interference with the applicants' right to freedom of expression and information. The ECtHR approved the approach of the Finnish authorities, who had rejected the applicants' reliance on the exception provided in respect of journalistic activities by the law which protects personal data.

The ECtHR observed that at the heart of the present case lay the question of whether a correct balance had been struck between the right to freedom of expression and press freedom under Article 10 of the ECHR, on the one hand, and the right to privacy under Article 8 of the ECHR, on the other hand (both rights must be accorded equal respect). In addition, the ECtHR referred to a set of principles that are (i) related to press freedom, including "the gathering of information (as) an essential preparatory step in journalism and an inherent, protected part of press freedom" and (ii) related to privacy protection, emphasising that "the fact that information is already in the public domain will not necessarily remove the protection of Article 8 of the Convention". The ECtHR was of the opinion that the interference at issue was one that was prescribed by law and that had pursued the legitimate aim of protecting the reputation or rights of others. The question however remains whether the interference at issue was necessary in a democratic society. The relevant criteria in such a case are: a contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, the content, form and consequences of the publication, the way in which the information was obtained (and its veracity), and the gravity of the penalty imposed on the journalists or publishers.

The ECtHR pointed out that the derogation of journalistic purposes (which is indeed provided by the Finnish Personal Data Act) "is intended to allow journalists to access, collect and process data in order to ensure that they are able to perform their journalistic activities, themselves recognised as essential in a democratic society", while the right of access to public documents does not by itself justify the dissemination en masse of such "raw data in unaltered form without any analytical input". The ECtHR was not persuaded that the publication of taxation data in the manner and to the extent undertaken by the applicant companies contributed to a debate of public interest, or that its principal purpose was to do so. Rather, considered that the dissemination of the data at issue might have enabled curious members of the public to categorise named individuals, who are not public figures, and that this could be regarded "as a manifestation of the public's thirst for information about the private life of others and, as such, a form of sensationalism, even voyeurism". Because the impugned publication cannot be regarded as contributing to a debate of public interest, nor as a form of political speech, it cannot enjoy the traditionally privileged position of such speech, which calls for strict scrutiny by the ECtHR of interferences with press freedom, and allows little scope for restrictions under Article 10 § 2 of the ECHR. The vast majority of the Grand Chamber agreed with the findings at the domestic

level “that the publication of the taxation data in the manner and to the extent described did not contribute to a debate of public interest and that the applicants could not in substance claim that it had been done solely for a journalistic purpose, within the meaning of domestic and EU law”. This led the ECtHR to the conclusion that the Finnish authorities had acted within their “margin of appreciation” in striking a fair balance between the competing interests at stake. Therefore, the ECtHR found that there had been no violation of Article 10 ECHR.

The Grand Chamber on the other hand confirmed the finding of a violation of Article 6 § 1 of the ECHR (right to a fair trial), as the length of the proceedings at the domestic level (six years and six months) had been excessive and had failed to meet the “reasonable time” requirement, even taking into account the complexity of the case.

- [Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland](#) [GC], no. 931/13, ECHR 2017.

IRIS 2017-8/1

European Court of Human Rights: Halldórsson v. Iceland

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In a case against Iceland, the European Court of Human Rights (ECtHR) stated that a journalist responsible for a TV news item causing prejudice to an identifiable public person must give relevant evidence that he or she has been acting in good faith as pertains to the accuracy of the allegations in the news item. The ECtHR also made clear that a journalist cannot shield behind his right to protect his sources where he cannot produce evidence of serious accusations uttered in a news item, tarnishing a person's reputation as protected under Article 8 of the European Convention on Human Rights.

The applicant is a journalist working for the newsroom of the Icelandic National Broadcasting Service (RUV). RUV broadcasted a series of news reports about a loan transaction of about EUR 20 million between an Icelandic company and a shelf company in Panama. It was reported that three Icelandic businessmen (A, B and C) had planned the Panama deal in advance in order to send the money to Panama and then back into their own company again. Pictures of A, B and C were shown on the screen with the text "under investigation", accompanied by the message that the authorities were investigating the case and the role of A, B and C. In another news item, pictures of A, B and C were shown above a world map, with a pile of money being visually transferred to the pictures of the men, mentioning that the money went back in "the pockets of the threesome". An article summarising the content of the broadcasted news items was also published on RUV's website. After the news broadcast, A issued a press release denying any link with the alleged suspect transaction. The online news article was promptly updated to include the press release.

A few weeks later, A lodged defamation proceedings against Svavar Halldórsson, the RUV journalist who produced the news items. He requested that the reference to his name and the word "threesome" in the news report and on the website be declared null and void. The Supreme Court, overturning the judgment by the District Court which found for the journalist, ordered Halldórsson to pay approximately EUR 2,600 to A in compensation for non-pecuniary damage, and about EUR 8,800 for A's legal costs before the domestic courts. The mentioning of A's name and the word "threesome" were declared null and void. Before the ECtHR, Halldórsson maintained that the statements in the news items had not affected A's reputation to a sufficient degree, and that therefore A could not invoke the protection of Article 8 ECHR. He also argued that the statements were not defamatory and that there was nothing presented in the news item to the effect that A had been guilty of a financial crime or other actions punishable by law.

In evaluating whether the interference with Halldórsson's freedom of expression was justified as being necessary in a democratic society, the ECtHR first clarifies that a person's reputation, even if that person is being criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore falls within the scope of his or her "private life". The attack on personal honour and reputation must however attain a certain level of gravity and in a manner causing prejudice to the personal enjoyment of the right to respect for private life in order for Article 8 ECHR to come into play. In line with the findings by the domestic courts, the ECtHR confirms that the news items indeed contained a serious accusation of a factual nature concerning unlawful and criminal acts; therefore the ECtHR is of the opinion that the dispute requires an examination of the fair balance to be struck between the right to respect for private life and the right to freedom of expression. The ECtHR refers to the criteria which are relevant

when balancing these rights, such as the contribution to a debate of general interest; how well known the person concerned is and what the subject of the report is; his or her prior conduct; the method of obtaining the information and its veracity; the content, form and consequences of the publication; and the severity of the sanction imposed.

The ECtHR agrees that A was to be considered a public person and that the subject matter of the disputed news items was an issue of public interest; however, it confirms the findings by the Icelandic Supreme Court that Halldórsson had not been acting in good faith, as he had not presented any documents supporting the legitimacy of the statements, for which he had to bear the burden. Halldórsson had also omitted to seek information from A while preparing the news item. The ECtHR reiterates that the safeguard afforded by Article 10 ECHR to journalists in relation to reporting on issues of general interest is subject to the condition that they are acting in good faith and on an accurate factual basis and that they provide “reliable and precise” information in accordance with the ethics of journalism. It finds that there were no special grounds to dispense the journalist from his ordinary obligation to verify factual statements that are defamatory of private individuals, and it observed that there was no confirmation that A had been charged, indicted, or was on trial or had been convicted of a crime.

Next, the ECtHR dismisses Halldórsson’s arguments referring to the right to protect his sources and to keep his sources and the documentation behind the news items confidential. The ECtHR confirms that the protection of journalistic sources is one of the basic conditions for press freedom, without which sources may be deterred from assisting the press in informing the public on matters of public concern. In the present case, however, the journalist was at no stage required to disclose the identity of his sources. The ECtHR clarifies that “a mere reference to protection of sources cannot exempt a journalist from the obligation to prove the veracity of or have sufficient factual basis for serious accusations of a factual nature, an obligation that can be met without necessarily having to reveal the sources in question”.

Finally, the ECtHR does not find the financial compensation and payment of the costs of the domestic proceedings excessive or to be of such a kind as to have a “chilling effect” on the exercise of media freedom. The ECtHR also considers the potential impact of the medium an important factor in the consideration of the proportionality of an interference. In this respect, the ECtHR reiterates “that the audio-visual media have a more immediate and powerful effect than the print media”. Because the Icelandic Supreme Court balanced the right of freedom of expression with the right to respect for private life, and took into account the criteria set out in the ECtHR’s case law, it acted within the margin of appreciation afforded to it and struck a reasonable balance between the measures imposed, restricting the right to freedom of expression. Therefore, the ECtHR concludes, unanimously, that there has been no violation of Halldórsson’s right to freedom of expression under Article 10 ECHR.

- [Halldórsson v. Iceland](#), no. 44322/13, 4 July 2017.

IRIS 2017-8/3

European Court of Human Rights: Axel Springer SE and RTL Television GmbH v. Germany

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In a case against Germany, two media companies - Axel Springer SE, a publishing house, and RTL, a broadcasting company - complained about a restriction on publishing pictures of the accused (S.) in a brutal murder case. S. was charged with killing his parents, dismembering their bodies, burning some of the parts, flushing others down the toilet and disposing of the rest by putting them in barrels. S. had already confessed to the police, while a psychiatric expert opinion ordered for the trial had concluded that S. was suffering from a schizoid personality disorder at the time when he had committed the offence. Prior to the start of the court hearings, the presiding judge informed the photojournalists orally that the face of S. would have to be made unidentifiable "in the usual manner" before any images of him were published. Axel Springer and RTL protested against the order, and a week later, a written order was issued confirming that the only media representatives who were permitted to take photographs and make video recordings of S. were those who had previously registered with the court and given an assurance that prior to the publication or forwarding of the material, the face of S. would be disguised by a technical process (for example by pixelization) so that it would only be possible to use the images in such a form. Journalists would be barred from further reporting on the case if they failed to comply with the order. The order stressed the importance of the presumption of innocence, finding that reporting on S. in a way which identified him could have a "pillory effect"; moreover, the wording of the order noted that S. had never been in the public eye and had expressly requested that his identity be concealed. According to the presiding judge, in this case the personality rights of S. clearly outweighed the public interest in being informed of his identity and physical appearance.

After exhausting all national legal channels to have the order suspended, Axel Springer and RTL lodged an application with the European Court of Human Rights (ECtHR), complaining that the judicial order banning the publication of images by which S. could be identified had violated their right to freedom of expression, as provided in Article 10 of the European Convention on Human Rights (ECHR).

The ECtHR starts by referring to its earlier case law, balancing the right to freedom of expression against the right to respect for private life, and to the criteria that have to be taken into account in such cases. It clarifies that the criteria thus defined are not exhaustive and should be transposed and adapted in the light of the specific circumstances of the case, in particular where the presumption of innocence under Article 6 paragraph 2 ECHR comes into play. The Court identifies the following relevant criteria in the context of balancing competing rights: the contribution to a debate of public interest, the degree to which the person affected is known, the influence of the publication of the photographs on the criminal proceedings, the circumstances in which the photographs were taken, the content, form and consequences of the publication, and the severity of the sanction imposed.

The ECtHR acknowledges that the crime at issue was brutal, but had been committed within a family following a private dispute and in a domestic setting. It agrees with the domestic court's assessment that there was only a limited degree of public interest in the case. The judicial order at issue did not restrict the content of reporting but rather concerned the publication of images by which S. could be identified. The ECtHR does not consider that information on S.'s physical appearance could have contributed significantly to the debate on the case, in particular as S. was undoubtedly not a public figure, but an ordinary person who was the subject of criminal

proceedings. The ECtHR dismisses the argument that S. no longer benefitted from the presumption of innocence, as he had confessed to the murder: a confession in itself does not remove the protection of the presumption of innocence, and as S. suffered from a schizoid personality disorder, the criminal court had to review carefully the confession in order to satisfy itself that it was accurate and reliable. The Court also refers to the fact that images of an accused person taken in a court room may show the person in a state of great distress and possibly in a situation of reduced self-control. The ECtHR finds that under the circumstances in question there was a strong need to protect S.'s privacy, given that S. had never sought to contact the media nor make any public comments. Furthermore, the ECtHR refers to the harmful effect which the disclosure of information enabling the identification of suspects, accused or convicted persons or other parties to criminal proceedings may have on these persons, and to the negative implications this might have on the later social rehabilitation of convicted persons. It was also in the interest of safeguarding due process not to increase the psychological pressure on S. - particularly in view of his personality disorder. Finally, the ECtHR notes that the judicial order did not constitute a particularly severe restriction on reporting: the taking of images as such was not prohibited, the order banned merely the publication of images from which S. could be identified, and any other reporting on the proceedings was not restricted. Thus, the presiding judge chose the least restrictive of several possible measures in order to safeguard due process and protect S.'s privacy. Therefore, the ECtHR does not consider that the order had a "chilling effect" on the media companies, contrary to their rights under Article 10 ECHR.

The ECtHR recognises the careful balancing act carried out by the presiding judge, clearly addressing the conflict between opposing interests and carefully weighing the relevant aspects of the case. The ECtHR unanimously concludes that the interference with the media companies' right to freedom of expression was "necessary in a democratic society". Accordingly, there has been no violation of their right to freedom of expression and information, as guaranteed by Article 10 of the ECHR.

- [Axel Springer SE and RTL Television GmbH v. Germany](#), no. 51405/12, 21 September 2017.

IRIS 2017-10/2

European Court of Human Rights: Becker v. Norway

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A recent judgment of the European Court of Human Rights (ECtHR) emphasises once more the importance of the protection of journalistic sources for press freedom. The ECtHR emphasises that a journalist's protection under Article 10 of the European Convention on Human Rights (ECHR) cannot automatically be removed by virtue of a source's own conduct, and that the principle of protecting a source applies even when that source's identity is known.

The case concerns a journalist, Cecilie Langum Becker, working for DN.no, a Norwegian Internet-based newspaper. Ms Becker was ordered to give evidence in a criminal case brought against one of her sources, Mr X, who was accused of market manipulation. Mr X had confirmed to the police that he had been Ms Becker's source for an article she had written about the allegedly difficult situation being faced by the Norwegian Oil Company (DNO). The price of DNO stock decreased by 4.1% on the first trading day after the publication of Ms Becker's article. Mr X was subsequently charged with using Ms Becker to manipulate the financial market. Ms Becker refused to testify against Mr X, and the courts therefore ordered her to testify about her contacts with him, finding that there was no source to protect as he had already come forward. They also considered that her evidence might significantly assist the courts in elucidating the case. Mr X was, however, convicted as charged before the final decision on Ms Becker's duty to give evidence had been made. Relying on Article 125 of the Norwegian Code of Criminal Procedure and Article 10 of the ECHR, Ms Becker argued that she was under no obligation to give evidence and she refused at any stage of the proceedings to answer questions about possible contact between her and Mr X and other sources. On account of her refusal to comply, the High Court ordered Ms Becker to pay a fine of approximately EUR 3,700 for the offence of impeding the good order of court proceedings, failing which she would be liable to ten days' imprisonment. A short time later Ms Becker lodged an application with the ECtHR, alleging that she had been compelled to give evidence that would have enabled one or more journalistic sources to be identified, in violation of her right under Article 10 of the ECHR to receive and impart information. It took the ECtHR more than five years to decide on the case, but finally, with a unanimous vote, the Fifth Section of the ECtHR on 5 October 2017 found that Norway violated Ms Becker's right to protect her sources.

The ECtHR builds on its earlier case law in which it has developed the principles governing the protection of journalistic sources, such as in [Goodwin v. the United Kingdom](#) (see IRIS 1996-4/4) and in [Sanoma Uitgevers B.V. v. the Netherlands](#) (see IRIS 2010-10/2), reiterating that "the Court has always subjected the safeguards for respect of freedom of expression in cases under Article 10 of the Convention to special scrutiny. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society, an interference cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest." The Court reiterated that in [Nagla v. Latvia](#) (see IRIS 2013-8/2) it found that the fact that a source's identity had been known to the investigating authorities prior to a search at the premises of a journalist did not remove the journalist's protection under Article 10 of the ECHR and it emphasises that a journalist's protection under Article 10 cannot automatically be removed by virtue of a source's own conduct. The ECtHR furthermore holds that protection afforded to journalists when it comes to their right to keep their sources confidential is "two-fold, relating not only to the journalist, but also and in particular to the source who volunteers

to assist the press in informing the public about matters of public interest”, while in [Voskuil v. the Netherlands](#) (see IRIS 2008-4/2) the ECtHR found that the potential significance in criminal proceedings of the information sought from a journalist was insufficient under Article 10 of the ECHR as a reason to justify compelling him to disclose his source or sources. It also emphasised that a “chilling effect” will arise wherever journalists are seen to assist in the identification of anonymous sources.

The ECtHR went on to rule that the possible effects of the order were of such a nature that the general principles developed with respect to orders to disclose a source were applicable to the case, and that Ms Becker’s refusal to disclose her source or sources did not at any point in time hinder the investigation of the case or the proceedings against Mr X. On the contrary, there was no indication that Ms Becker’s refusal to give evidence attracted any concerns on the part of the Norwegian courts as regards the case or the evidence against Mr X. It also bore in mind that Ms Becker’s journalistic methods had never been called into question and that she had not been accused of any illegal activity. Having regard to the importance of the protection of journalistic sources for press freedom, the ECtHR finds that the reasons adduced in favour of compelling Ms Becker to testify on her contact with Mr X, though relevant, were insufficient. Accordingly, the ECtHR is not convinced that the impugned order was justified by an “overriding requirement in the public interest” and, hence, necessary in a democratic society. The ECtHR accordingly concludes that there has been a violation of Article 10 ECHR.

- [Becker v. Norway](#), no. 21272/12, ECHR 2017.

IRIS 2017-10/3

European Court of Human Rights: *Tamiz v. the United Kingdom*

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On 12 October 2017, the European Court of Human Rights (ECtHR) issued its decision in *Tamiz v. U*, concerning a politician's claim that his right to protection of reputation had been violated following the UK courts' refusal to find Google liable for allegedly defamatory comments on Google's Blogger platform. The applicant was a Conservative Party candidate in local UK elections, and on 27 April 2011, a blog post was published on the "London Muslim" blog, hosted on blogger.com, which is owned by Google Inc. The blog post concerned the applicant, and included the observation that "this Tory prat with Star Trek Spock ears might have engaged the odd brain cell before making these offensive remarks." A number of anonymous comments were posted under the blog post, including that the applicant "is a known drug dealer" and a "class A prat".

The applicant used the blog's "report abuse" function to indicate that he considered certain comments to be defamatory, and sent a letter of claim to Google in respect of "defamatory" comments. Google confirmed that it would not itself remove the comments, but forwarded the claim to the blog's author, who three days later removed the post and comments. Meanwhile, the applicant also sought to bring a libel claim against Google Inc. (US) in relation to the comments. Ultimately, the Court of Appeal held that the claim should not be allowed to proceed. The Court held that since it could not be said that Google Inc. had known or ought reasonably to have known of the defamatory comments prior to it being notified by the applicant, Google Inc. could not be viewed as a secondary publisher prior to that notification. In relation to the period following notification, the Court held that the claim should not be allowed because it was "highly improbable that any significant number of readers will have accessed the comments after that time and prior to the removal of the entire blog", any damage to the appellant's reputation arising from the continued publication of the comments will have been trivial, and the costs of the exercise would be out of all proportion to what would be achieved.

The applicant then made an application to the European Court of Human Rights (ECtHR), claiming that in refusing him permission to serve a claim on Google Inc., the UK was in breach of its positive obligation under Article 8 of the European Convention on Human Rights (ECHR) to protect his reputation.

The ECtHR stated that the case concerned whether an appropriate balancing exercise was conducted by the national courts between the applicant's right to respect for his private life under Article 8 ECHR and the right to freedom of expression guaranteed by Article 10 of the ECHR and enjoyed by both Google Inc. and its end users. Firstly, the Court reiterated that in considering the gravity of the interference with the applicant's Article 8 rights, an attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to the personal enjoyment of the right to respect for private life. The Court stated that this threshold test is important, and that the reality is that millions of Internet users post comments online every day and many of these users express themselves in ways that might be regarded as offensive or even defamatory. On the facts, the Court was inclined to agree with the national courts that while the majority of comments about which the applicant complains were undoubtedly offensive, for the large part they were little more than "vulgar abuse" of a kind which is common in communication on many Internet portals and which the applicant, as a budding politician, would be expected to tolerate. Furthermore, many of those comments which

made more specific allegations would, in the context in which they were written, likely be understood by readers as conjecture which should not be taken seriously.

Secondly, the Court noted that although the applicant was ultimately prevented from serving proceedings on Google Inc., this was not because such an action was inherently objectionable to the national courts. Rather, having assessed the evidence before them, they concluded that the applicant's claim did not meet the "real and substantial tort" threshold required to serve defamation proceedings. This conclusion was based, to a significant extent, on the courts' finding that Google Inc. could only, on the most generous assessment, be found responsible in law for the content of the comments once a reasonable period had elapsed after it was notified of their potentially defamatory nature. The Court noted that the approach of the national courts is entirely in keeping with the position in international law that information society service providers (ISSPs) should not be held responsible for content emanating from third parties unless they failed to act expeditiously in removing or disabling access to it once they became aware of its illegality. The Court concluded that it was satisfied that the appropriate balancing exercise was conducted by the national courts, and the applicant's Article 8 complaint was therefore rejected as manifestly ill-founded, pursuant to Article 35 § 3 (a) of the Convention.

- [Tamiz v. the United Kingdom](#) (dec.), no. 3877/14, 12 October 2017.

IRIS 2018-1:1/2

European Court of Human Rights: Einarsson v. Iceland

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On 7 November 2017, the European Court of Human Rights (ECtHR) delivered its judgment in *Einarsson v. Iceland*, concerning a public figure's claim that his right to reputation had been violated following an Icelandic Supreme Court decision that a post on the image-sharing platform Instagram was not defamatory. The applicant in the case was a well-known author and media personality in Iceland. On 22 November 2012, X published an altered picture of the applicant on his Instagram account, drawing an upside-down cross on the applicant's forehead, writing "loser" across his face, and with the caption "Fuck you, rapist bastard". The original picture of the applicant had been included in a newspaper interview with the applicant that same day in which the applicant had discussed a rape accusation made against him. A week earlier, the Public Prosecutor had terminated proceedings against the applicant that had been initiated after an 18-year-old woman had reported to the police in November 2011 that the applicant and his girlfriend had raped her.

On 17 December 2012, the applicant initiated defamation proceedings against X before the District Court of Reykjavík and asked for him to be punished, under the applicable provisions of the Penal Code, for altering the picture and for publishing it on Instagram with the caption "Fuck you, rapist bastard". However, the District Court found against the applicant, a decision that was ultimately upheld by the Supreme Court. The Supreme Court found that the applicant was a well-known person who had controversial views - "views which [included] his attitudes towards women and their sexual freedom", and that "there [had] been instances when his criticism had been directed towards named individuals, often women, and in some cases his words could be construed to mean that he was in fact recommending that they should be subjected to sexual violence." In this context, the Court found that the altered picture and comment 'Fuck you, rapist bastard' should be taken , and was a case of invective on the part of X against the applicant as part of a ruthless public debate, which the latter had instigated. It therefore constituted a value judgment regarding the applicant and not a factual statement that he was guilty of committing rape. Thus, X had expressed himself within the limits of freedom of expression, and should be acquitted.

The applicant made an application to the ECtHR, claiming that the Iceland Supreme Court's judgment had constituted a violation of his right to respect for his private life, as provided in Article 8 of the European Convention on Human Rights (ECHR). The ECtHR considered that the question was whether the domestic courts had struck a fair balance between the applicant's right to respect for his private life and X's right to freedom of expression, as protected by Article 10 of the ECHR. In this regard, the ECtHR considered it appropriate to consider the following criteria: how well-known was the person concerned, the subject matter of the statement and the prior conduct of the person concerned; and the contribution to a debate of general interest and the content, form and consequences of the publication (including the method of obtaining the information and its veracity).

Firstly, the ECtHR agreed that the applicant was well-known, and that the limits to acceptable criticism must thus accordingly be wider in the present case than in the case of an individual who was not well-known. Secondly, the Court agreed with the domestic courts that the publication of the picture had constituted a part of a general public debate: The applicant had participated in public discussions about his professional activities and the complaints against him of sexual

violence, and was thus an object of general interest. Thirdly, the ECtHR examined whether the statement “Fuck you, rapist bastard” had constituted a statement of fact or a value judgment. The ECtHR admitted that the classification of a statement as a fact or as a value judgment is a matter which in the first place falls within the margin of appreciation of the national authorities - in particular the domestic courts. However, the Court may consider it necessary to make its own assessment of the impugned statements. In this regard, the Court held that the Supreme Court had not taken sufficient account of the relevant elements so as to be able to justify the conclusion that the statement had constituted a value judgment. In particular, the Supreme Court had failed to take adequate account of the important chronological link between the publication of the statement on 22 November 2012 and the discontinuance of the criminal proceedings against the applicant in respect of alleged rape. Moreover, the Supreme Court had failed to explain sufficiently the factual basis that could have justified deeming the use of the term “rapist” to constitute a value judgment, the Supreme Court “merely” referring to the applicant’s participation in a “ruthless public debate” which he had “instigated”. In conclusion, the Court found that the domestic courts had failed to strike a fair balance between the applicant’s right to respect for private life under Article 8 and X’s right to freedom of expression, and that this had therefore constituted a violation of Article 8.

- [Egill Einarsson v. Iceland](#), no. 24703/15, 7 November 2017.

IRIS 2018-1:1/3

European Court of Human Rights: Fuchsmann v. Germany

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On 19 October 2017, the European Court of Human Rights (ECtHR) delivered its judgment in the case of Fuchsmann v. Germany, which concerned the online version of a New York Times article accessible in Germany. The applicant in the case is an internationally active entrepreneur in the media sector, and holds the position of Vice-President of the World Jewish Congress. In June 2001, the New York Times published an article about an investigation into corruption against

R.L. The article was entitled “[L] Media Company Faces a Federal Inquiry”, and included the statements that the applicant had “ties to Russian organized crime, according to reports by the FBI and European law enforcement agencies”, and a “1994 FBI report on Russian organized crime in the United States described [the applicant] as a gold smuggler and embezzler, whose company in Germany was part of an international organized crime network. He is barred from entering the United States.”

In July 2002, the applicant sought injunctions against certain parts of the article, including the statements above. Ultimately, in 2011, the Düsseldorf Court of Appeal granted the injunction in so far as the article stated that the applicant had been banned from entering the US. As regards the rest of the statements, the Court of Appeal held that there was a great informational interest on the part of the public in reporting that the applicant, as a German businessman internationally active in the media sector, was suspected by the secret service of being involved in gold smuggling, embezzlement and organised crime. This assessment was not changed by the fact that the criminal offences mentioned had occurred more than sixteen years previously. The court furthermore considered that the reporting made it sufficiently clear that only insights from FBI reports and the law-enforcement authorities were being reported. The court concluded that the defendant had complied with the required journalistic duty of care and that the reporting had relied on sources and background information, which the journalist could reasonably consider reliable. The injunctions were thus refused.

The applicant made an application to the ECtHR, claiming that the domestic courts had failed to protect his reputation under Article 8 of the European Convention on Human Rights (ECHR). In this regard, the Court first held that allegations that the applicant was involved in gold smuggling, embezzlement and organised crime were allegations grave enough for Article 8 to come into play. The Court then considered that the case required an examination of whether a fair balance had been struck between the applicant’s right to the protection of his private life under Article 8 and the newspaper’s right to freedom of expression under Article 10. The relevant criteria within the context of balancing these competing rights were: the contribution to a debate of public interest; the degree to which the person affected was well-known; the subject of the news report; the prior conduct of the person concerned; the method of obtaining the information and its veracity; and the content, form and consequences of the publication.

Firstly, the Court agreed that the article had contributed to a debate of public interest and that there had been a public interest in the alleged involvement of the applicant and mentioning him by name. The Court also held that a public interest also existed in the publication of the article in the online archive of the newspaper, and noted “the substantial contribution made by Internet archives to preserving and making available news and information”. Secondly, the Court held that the Court of Appeal’s assessment that there was a certain interest in the applicant as a German

businessman internationally active in the media sector, was in compliance with the ECtHR's case law. Thirdly, the Court reiterated that the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research. The Court observed that the main source for the statements regarding the applicant was an internal FBI report and not an officially published report. The Court agreed that there was a sufficient factual basis for the remaining statements at issue. Fourthly, the Court agreed with the Court of Appeal that the article was free from polemical statements and insinuations, and made it sufficiently clear that only insights from reports by the FBI and other law-enforcement authorities were being reported. Moreover, the Court found that the information disseminated had mainly concerned the applicant's professional life and had not divulged any intimate private details. The ECtHR also noted that the Court of Appeal found that the online article was accessible only as a result of a directed search with an online search engine. Therefore, the Court accepted the conclusion of the domestic courts that the consequences of the article in Germany were limited. In conclusion, the Court considered that the Court of Appeal, in balancing the right to respect for private life with the right to freedom of expression, had taken into account and applied the criteria set out in the Court's case-law. Thus, there had been no violation of Article 8.

- [Fuchsmann v. Germany](#), no. 71233/13, 19 October 2017.

IRIS 2018-2:1/1

European Court of Human Rights: Frisk and Jensen v. Denmark

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On 5 December 2017, the European Court of Human Rights (ECtHR) delivered its judgment in the case of Frisk and Jensen v. Denmark. The applicants in the case were journalists with the public broadcaster Danmarks Radio (DR), and had produced the documentary “When the doctor knows best”, broadcast in September 2008. The documentary concerned the treatment of pleural mesothelioma cancer at Copenhagen University Hospital, where consultant S was in charge of treatment. It focused on two types of chemotherapy medication (Alimta and Vinorelbine) used by the hospital, and followed four patients and relatives, and a narrator spoke as a voice-over. During the programme, the narrator stated that “doctors chose to treat her with a substance that has not been approved [in cases of such a diagnosis], and whose effect on pleural mesothelioma cancer is not substantiated”. While “there is only one treatment which, in comparative studies, has proved to have an effect on pleural mesothelioma cancer”, S “chose not to use that medication on his patients”, and “the question remains: why does S carry out tests with Vinorelbine.” It “turns out that S has received more than DKK 800,000 over the last five and a half years from the company F. This is the company behind the test medication Vinorelbine. The money has been paid into S’s personal research account.”

Following the broadcast, the hospital and consultant S instituted defamation proceedings against DR’s director, and the two applicants (the journalists concerned), claiming that the programme had made accusations of malpractice. In 2010, the Copenhagen City Court found that the applicants and DR’s director had violated Article 267 of the Penal Code, and sentenced them each to fines totalling DKK 10,000 (EUR 1,340), and the applicants jointly liable for costs of DKK 62,250 (EUR 8,355). The High Court of Eastern Denmark upheld the judgment, finding that the programme had given “the impression that malpractice has occurred at Copenhagen University Hospital, in that S deliberately used medication (Vinorelbine) which is not approved for treatment of pleural mesothelioma cancer; the test medication has resulted in patients dying or having their lives shortened; and the clear impression has been given that the reasons for this choice of medication (Vinorelbine) were S’s professional prestige and personal finances”. The applicants were ordered to pay costs to the hospital and S, totalling DKK 90,000 (EUR 12,080). The applicant journalists made an application to the ECtHR, claiming a violation of their right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The main question for the ECtHR was whether a fair balance had been struck between the right to respect for private life and the right to freedom of expression, and reiterated the criteria for this assessment: the contribution to a debate of general interest; how well-known the person concerned is and what the subject of the report is; his or her prior conduct; the method of obtaining the information and its veracity; the content, form and consequences of the publication; and the severity of the sanction imposed.

Firstly, the Court held that the programme had dealt with issues of legitimate public interest, namely that it had involved a discussion about risk to life and health, as regards public hospital treatment. Secondly, the criticism had been directed at S and Copenhagen University Hospital, who were vested with official functions, and there was a need for wider limits for public scrutiny. Thirdly, however, the Court noted that the domestic courts had found that the applicants had made allegations that S and the hospital had administered to certain patients suffering from mesothelioma improper treatment, resulting in their unnecessary death and the shortening of

their lives to promote the professional esteem and personal financial situation of S., and that those accusations rested on a factually incorrect basis. The Court held that it had “no reason to call into question those conclusions”. The Court rejected the applicants’ argument the impact of the programme had had various important consequences, inter alia, a public demand for Alimta therapy and a change in practice at Copenhagen University Hospital. The Court stated that the reason why the public demand for Alimta therapy may have increased and Copenhagen University Hospital changed its standard therapy for operable patients to Cisplatin in combination with Alimta, was that the programme, on an incorrect factual basis, had encouraged patients to mistrust Vinorelbine therapy. Fourthly, in respect of the method of the obtaining of the information and its veracity, the Court noted that the domestic courts did not dispute that the applicants had conducted thorough research, over a period of approximately one year. However, the Court held that it had no reason to call into question the High Court’s conclusion that the applicants had made accusations resting on a factually incorrect basis, of which they must be deemed to have become aware through the research material. Finally, the Court held that it did not find the conviction and sentence to have been excessive or of such a kind as to have a “chilling effect” on media freedom. Furthermore, the decision that the applicants should pay legal costs did not appear unreasonable or disproportionate. In conclusion, the Court held that the reasons relied upon were both relevant and sufficient to show that the interference complained of was “necessary in a democratic society”. Thus, there had been no violation of Article 10 of the Convention.

- [Frisk and Jensen v. Denmark](#), no. 19657/12, 5 December 2017.

IRIS 2018-2:1/2

European Court of Human Rights: MAC TV s.r.o. v. Slovakia

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On 28 November 2017, the European Court of Human Rights (ECtHR) delivered its judgment in *MAC TV s.r.o. v. Slovakia*, which concerned the fining of a broadcaster over a television programme's commentary on the death of the late President of Poland. The case involved MAC TV, which operates two private television channels, and broadcasts the television programme "JOJ PLUS". During an episode of the programme broadcast in April 2010, following the fatal plane crash in which the President of Poland, Lech Kaczynski, had been travelling, a commentary was delivered entitled "Compassion in Accordance with Protocol". The commentary included the statement that "Jews, homosexuals, liberals, feminists and left-oriented intellectuals are bitterly sorry for the death of a man who represented an extreme Polish conservatism, and who was a symbol of a country where people who are not white heterosexual Catholic Poles were born as a punishment. I am sorry, but I do not pity Poles. I envy them."

Following the broadcast, the Broadcasting Council initiated administrative proceedings against MAC TV under section 19(1)(a) of the Broadcasting and Retransmission Act, which stipulates the protection of human dignity. The Broadcast Council found that the broadcaster had breached its obligations under the Broadcasting Act, in that the manner of processing and presenting the content of the commentary had interfered with the dignity of the late Polish President, and imposed a fine of EUR 5,000. In particular, the Broadcasting Council concluded that the manner in which the commentator had presented his opinion - that is to say his lack of regret for the Polish President's death - had contravened the duty to respect his human dignity. Moreover, the degree of sarcasm and irony in the broadcast commentary had been so high that its content and the manner in which the author's opinion had been presented had dishonoured the late President. The Broadcasting Council's decision was ultimately upheld by the Supreme Court. MAC TV then lodged an application with the ECtHR, claiming a violation of its right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The ECtHR first noted that the Broadcasting Council's decision had constituted an interference with the applicant company's right to freedom of expression, had been prescribed by law under the Broadcasting Act, and pursued the legitimate aim of the protection of the reputation or rights of others (the Court held that it was not required to reach a general conclusion on whether or not the interference created by a measure concerning a deceased person's reputation pursued a legitimate aim). Thus, the main question was whether the interference was "necessary in a democratic society".

Firstly, the ECtHR emphasised that under Article 10 ECHR, very strong reasons were required to justify restrictions on political speech. Secondly, the ECtHR noted that the applicant's reaction to the political governance of the late President and his political conservatism gave rise to a matter of public interest, and the late President, as a public figure, was subject to wider limits of acceptable criticism. Thirdly, the ECtHR noted that the domestic authorities had essentially based their conclusions predominantly on the closing remarks in the commentary ("I am sorry, but I do not pity the Poles. I envy them"). However, in this regard, the ECtHR reiterated that one criterion of responsible journalism is that it should recognise the fact that it is the commentary (or article) as a whole that the reporter presents to the public. The ECtHR held that the domestic authorities' assessment was narrow in scope, and had not been conducted within the wider context of the commentary. The Court considered that the impugned commentary, seen within its context, could not be understood to have constituted a gratuitous personal attack on, or insult to Lech

Kaczynski. While it had contained a sarcastic tone that had been unsympathetic to the political ideology of the late President, it had remained within the acceptable degree of stylistic exaggeration used to express the journalist's opinion concerning the political views that the late President had represented. The Court reiterated that journalistic freedom also covered possible recourse to a degree of exaggeration, or even provocation. Thus, the Court considered that nothing in that commentary suggested that the applicant company had overstepped the limits of freedom of expression tolerated under Article 10 ECHR by using a sarcastic tone and ironic language. The Court concluded that the domestic authorities had failed to demonstrate that the interference with the applicant company's Article 10 rights had been necessary, and that there had accordingly been a violation of Article

10. In addition, the ECtHR awarded the applicant company EUR 5,000 in respect of pecuniary damage, EUR 5,850 in respect of non-pecuniary damage, and EUR 6,900 in costs.

- [MAC TV s.r.o. v. Slovakia](#), no. 13466/12, 28 November 2017.

IRIS 2018-2:1/3

European Court of Human Rights: Magyar Kétfarkú Kutya Párt v. Hungary

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On 23 January 2018, the European Court of Human Rights (ECtHR) delivered its judgment in the case of Magyar Kétfarkú Kutya Párt v. Hungary, concerning a mobile application (“app”) which allowed voters to anonymously share photographs of their ballot papers. Notably, the Court held that a fine imposed on a political party for distributing the app had violated the party’s right to freedom of expression. The applicant in the case was the Hungarian political party Magyar Kétfarkú Kutya Párt. Three days before Hungary’s 2016 referendum on the EU’s migrant relocation plan, the applicant made the mobile app available to voters. The app allowed voters to upload and share photographs taken of their ballots, and also enabled voters to give the reasons for how they cast their ballot. The posting and sharing of photographs was anonymous. Following a complaint about the app, the National Election Commission issued a decision, finding that the app had infringed the principles of fairness of elections, voting secrecy, and the proper exercise of rights, and ordered the applicant to refrain from further breaches of section 2(1)(a) and (e) of the Act on Electoral Procedure and Article 2(1) of the Fundamental Law. The Commission also imposed a fine of EUR 2,700. On appeal, the Kúria (the Hungarian Supreme Court) upheld the Commission’s decision regarding the infringement of the principle of the proper exercise of rights. The Kúria held that the purpose of the ballots had been to enable voters to express their opinion on the referendum question, and that taking photographs of ballots and subsequently publishing them had not been in line with this purpose. The Kúria overturned the remainder of the Commission’s decision on the infringement of the secrecy of the electoral process. It found that there was no regulation prohibiting voters from taking photographs of their ballot papers in the voting booths and that their identity could not have been revealed through the mobile app. The Kúria reduced the fine to EUR 330.

The applicant made an application to the ECtHR, claiming a violation of its right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The first question for the Court was whether there had been an interference with the applicant’s right to freedom of expression. The Court noted that the app had been developed by the applicant precisely in order that voters could share, via information and communication technologies, opinions through anonymous photos of invalid ballot papers. The app therefore possessed a communicative value, and constituted expression on a matter of public interest, as protected by Article 10 of the ECHR. What the applicant was reproached for was precisely the provision of the means of transmission for others to impart and receive information within the meaning of Article 10. Thus, there had been an interference with the applicant’s right to freedom of expression.

The main question for the Court was then whether the interference had had a legitimate aim. Notably, the Court rejected both arguments put forward by the Government. Firstly, the Government argued that the measure had been aimed at ensuring the orderly conduct of the voting procedure and ensuring the proper use of ballot papers, and that these aims could fall under “the protection of the rights of others” (Article 10 § 2 of the ECHR). However, the Court held that the Government had not pointed to any other actual rights of “others” that would or could have been adversely affected by the anonymous publication of images of marked or spoiled ballots. The Government had not provided any elements showing that there had been a resultant deficiency in the voting procedure, facilitated by the posting of images of those ballot papers, which should have been addressed through a restriction on the use of the mobile app.

The Government’s second argument focused on the violation of the principle of the proper

exercise of rights, as laid down in section 2(1)(e) of the Act on Electoral Procedure, which, in their estimation, would also entail a violation of the rights of others. However, the Court held that it was not persuaded by this suggestion. The Court stated that while it was true that the domestic authorities had established that the use of the ballot papers for any other purpose than that of casting a vote infringed that provision, the Government had not convincingly established any link between this principle of domestic law and the aims exhaustively listed in paragraph 2 of Article 10. The Court concluded that the foregoing considerations were sufficient to enable the Court to conclude that the sanction imposed on the applicant political party for operating the mobile app did not meet the requirements of Article 10 § 2. There had therefore been a violation of Article 10.

- [Magyar Kétfarkú Kutya Párt v. Hungary](#), no. 201/17, 23 January 2018.

Editor's note: This case was referred to the Grand Chamber, which returned its judgment on [20 January 2020](#) (see [IRIS 2020-3:1](#)).

IRIS 2018-3:1/2

European Court of Human Rights: Faludy-Kovács v. Hungary

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On 23 January 2018, the European Court of Human Rights (ECtHR) delivered its judgment in the case of Faludy-Kovács v. Hungary, concerning media coverage of a non-political public figure who had “actively sought the limelight”, and the extent of her right to reputation.

The applicant in the case was the widow of the well-known Hungarian poet, György Faludy. In 2008, the Helyi Téma newspaper published a front-page article, with a photograph of the applicant and her late husband, with the headline “Trampling on the memory of Faludy. The widow does anything for the limelight”. The article concerned an interview the applicant had given to another newspaper in which she revealed she wanted to have a child who would be a blood relative of both her and her late husband, and explained that she envisaged her own sister and her late husband’s grandson being the parents of that child.

The applicant lodged a civil action against the publisher of Helyi Téma under Article 78 of the (old) Hungarian Civil Code, alleging a violation of her right to reputation. The Budapest Regional Court ordered a public apology and obliged the publisher to pay EUR 2,000 in damages. The court held that the statement that she had trampled on her husband’s memory had infringed her right to reputation and dignity. However, the Budapest Court of Appeal reversed the previous judgment and held that the headline had not been a statement of fact but a value judgment expressed in connection with the applicant’s own “peculiar” statements. The court also found that the headline could not have infringed the applicant’s reputation since her own statements had been irrational and undignified, putting György Faludy’s grandson in an embarrassing situation. The Kúria (the Hungarian Supreme Court) subsequently dismissed an appeal by the applicant, finding that the headline had constituted a value judgment concerning the unusual manner in which the applicant intended to start a family.

The applicant made an application to the ECtHR, claiming a violation of her right to reputation under Article 8 of the European Convention on Human Rights (ECHR). The main question for the Court was whether the domestic courts had struck a fair balance between the journalist’s right to freedom of expression under Article 10 of the ECHR and the applicant’s right to have her reputation respected under Article 8 of the Convention. Firstly, the Court held that the applicant, in her capacity as the widow of György Faludy and a well-known person in contemporary society, was a public figure and that she inevitably and knowingly exposed herself to public scrutiny. Secondly, the Court held that the applicant had actively sought the limelight so, having regard to the degree to which she was known to the public, her “legitimate expectation” that her private life would not attract public attention and would not be commented on was hence reduced. Thirdly, regarding the content, form and consequences of the publication, the Court held that the headline merely related to the applicant’s own statements, as reproduced in the accompanying article, and did not contain unsubstantiated allegations. The fact that the headline had employed an expression which, to all intents and purposes, had been designed to attract the public’s attention cannot in itself raise an issue under the Court’s case-law. The Court considered that the headline introducing the statements of the applicant had to be considered as a matter of editorial choice that had been intended to provoke a reaction.

Fourthly, the information to which the journalist had reacted had been expressed voluntarily by the applicant in the course of an interview, and had not been acquired in circumstances

unfavourable to her. Finally, regarding the contribution of the article to a debate of public interest, the Court noted that the domestic courts had reached their conclusions without going into an analysis of whether the article had concerned an issue of legitimate public interest. However, in the Court's view, in the circumstances of the present case, where the applicant gave an interview about her family plans clearly for the purposes of satisfying the curiosity of a certain readership, the question of whether the accompanying expression in issue covered a subject of public interest is of minor relevance. Thus, the absence of this element in the domestic courts' reasoning did not have an effect on the balancing exercise that they have conducted.

In the light of the foregoing, the Court held that domestic courts had struck a fair balance between the journalist's freedom of expression under Article 10 of the Convention and the applicant's right to have her reputation respected under Article 8. The potential negative consequences that the applicant might have suffered after the publication of the headline were not so serious as to justify a restriction on the right to freedom of expression guaranteed by Article 10. Thus, there had been no violation of Article 8 of the Convention.

- [Faludy-Kovács v. Hungary](#), no. 20487/13, 23 January 2018.

IRIS 2018-3:1/3

European Court of Human Rights: Sekmadienis Ltd. v. Lithuania

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On 30 January 2018, the European Court of Human Rights (ECtHR) delivered its judgment in the case of *Sekmadienis Ltd. v. Lithuania*, concerning freedom of expression and the regulation of commercial advertising deemed offensive. Notably, the Court unanimously found that an advertising company's freedom of expression had been violated by the imposition of a fine under Lithuania's advertising law.

The applicant in the case - a Vilnius-based applicant company ran an advertising campaign in October 2012 introducing a clothing line by the designer R.K., including advertisements on R.K.'s website. The first advertisement showed a young man with long hair, a headband, a halo around his head and several tattoos wearing a pair of jeans, with a caption reading "Jesus, what trousers!" The second advertisement showed a woman wearing a white dress and with a halo around her head, accompanied by the reading "Dear Mary, what a dress!". After receiving over 100 complaints about the advertisements, the Lithuanian State Consumer Rights Protection Authority adopted a decision against the applicant company concerning a violation of Article 4 § 2 (1) of the Law on Advertising, which prohibits advertising that "violates public morals". The Authority held that the use of religious symbols for commercial gain exceeds the limits of tolerance; using the name of God for commercial purpose was not in line with public morals; and the inappropriate depiction of Christ and Mary in the advertisements was likely to offend the feelings of religious people. The applicant company was fined EUR 580. The decision was upheld on appeal.

The applicant company made an application to the ECtHR, claiming that there had been a violation of its right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The main question for the Court was whether the interference with applicant company's freedom of expression had been "necessary in a democratic society".

The Court ultimately found that there had been a violation of Article 10 of the Convention, and held that the domestic authorities had given absolute primacy to protecting the feelings of religious people, without adequately taking into account the applicant company's right to freedom of expression. In reaching this conclusion, the Court firstly accepted that the advertisements had created an unmistakable resemblance between the persons depicted therein and religious figures, and that the advertisements had had a commercial purpose, had made no contribution to public debate. However, the Court considered that the advertisements did not appear to have been gratuitously offensive or profane, and nor had they incited hatred on the grounds of religious belief or attacked a religion in an unwarranted or abusive manner.

Notably, the Court reiterated that freedom of expression also extends to ideas which offend shock or disturb. In a pluralist democratic society those who choose to exercise the freedom to manifest their religion cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. In the Court's view, even though the advertisements had a commercial purpose and cannot be said to constitute "criticism" of religious ideas, the applicable principles are nonetheless similar.

Finally, the Court held that even assuming that the majority of the Lithuanian population would indeed find the advertisements offensive, the Court reiterated that it would be incompatible with

the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this to be so, that minority group's right to, inter alia, freedom of expression would become merely theoretical rather than practical and effective, as required by the Convention. In the light of these considerations, the Court concluded that the domestic authorities had failed to strike a fair balance between, on the one hand, the protection of public morals and the rights of religious people, and, on the other hand, the applicant company's right to freedom of expression. There had therefore been a violation of Article 10 of the Convention.

- [Sėkmadienis Ltd. v. Lithuania](#), no. 69317/14, 30 January 2018.

IRIS 2018-3:1/4

European Court of Human Rights: Alpha Doryforiki Tileorasi Anonymi Etairia v. Greece

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On 22 February 2018, the European Court of Human Rights (ECtHR) delivered its judgment in *Alpha Doryforiki Tileorasi Anonymi Etairia v. Greece* concerning the fining of a broadcaster over hidden camera footage of a politician. The applicant in the case was the owner of a Greek television channel, ALPHA. In January 2002, ALPHA broadcast a television show named “Jungle” (Ζούγκλα) in which three videos filmed with a hidden camera were broadcast. In the first video, A.C., then a member of the Hellenic Parliament and chairman of the parliamentary committee on electronic gambling, was shown entering a gambling arcade and playing on two machines. The second video showed a meeting between A.C. and associates of the television host of “Jungle”, M.T., during which the first video was shown to A.C. The third video showed a meeting between A.C. and M.T. in the latter’s office.

Following a hearing in May 2002, the National Radio and Television Council (NRTC) found that the use of a hidden camera by the broadcaster in the three videos had not been in accordance with the law. The NRTC ordered the applicant company to pay EUR 100,000 for each of the two television shows in which the videos were shown, and to broadcast on three days in a row on its main news show the content of its decision. The applicant company appealed against the decision to the Supreme Administrative Court, and in April 2010, the court dismissed the appeal. The court held that broadcasting a secretly recorded image can only be justified if the legitimate broadcasting of such news is completely impossible or particularly difficult without broadcasting the image that was recorded by hidden means and which constitutes the source of the news. The Court found that the applicant company had not disputed that the images had been recorded by secret means and had not claimed that broadcasting of the news was absolutely impossible or extremely difficult without broadcasting the relevant images. Therefore, the applicant company’s allegation that it had broadcast the impugned images for reasons of journalistic interest and of public interest was dismissed.

The applicant made an application to the ECtHR, claiming a violation of its right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The main question was whether the interference with the applicant’s right to freedom of expression had been necessary in a democratic society. In this regard, the Court examined a number of criteria. Firstly, the Court held that the report contributed to a debate of public interest, including the conduct vis-à-vis electronic gambling of an elected representative who, additionally, was chairman of an inter-party committee on electronic gambling. Secondly, the Court found that A.C. was undeniably a prominent political figure. Thirdly, the Court examined the method of obtaining the information and its veracity - namely the circumstances under which the videos were taken. With regard to the first video, the Court held that the domestic authorities had failed to take into consideration the fact that it had been filmed in a public place - an element which, in the Court’s view, weakens the legitimacy of any expectation of privacy A.C. might have had when he entered the gambling arcade. However, with regard to the second and third videos, the Court considered that it was clear under Greek criminal law that A.C. had been entitled to an expectation of privacy as he had entered private spaces with a view to discussing the recorded incidents and for his conversations not to be recorded without his explicit consent. Lastly, the Court examined the severity of the sanctions, and the Court held that the sanctions imposed were relatively lenient, though not insignificant, and that a number of factors were taken into account

when imposing them, such as the applicant company's past behaviour in relation to similar incidents. The Court also considers that the sanctions imposed cannot be said to have had a deterrent effect on the press reporting on matters of public interest. In conclusion, the Court held that the reasons given by the Greek authorities were "relevant" and "sufficient" to justify the interference in respect of the second and third videos. However, the Court held that in so far as the first video is concerned, the domestic authorities failed to take into account the circumstances under which it was obtained. The Court attached great importance to the fact that it was not recorded in private premises and that the interference with A.C.'s rights under Article 8 was therefore significantly less serious. The Court is thus of the opinion that the domestic authorities should have included in their assessment the fact that A.C., by entering a gambling arcade, could legitimately have expected his conduct to have been closely monitored and even recorded on camera, especially in view of the fact that he was a public figure. Thus, there has been a violation of Article 10 of the ECHR in respect of the first video (the Court also found a violation of Article 6 of the ECHR over the length of the proceedings). The Court awarded the applicant EUR 33,000 in pecuniary damage (finding the applicant had paid only EUR 100,000 of the fine imposed in relation to all three videos), and awarded EUR 7,000 in compensation for non-pecuniary damage.

- [Alpha Doryforiki Tileorasi Anonymi Etairia v. Greece](#), no. 72562/10, 22 February 2018.

IRIS 2018-4:1/1

European Court of Human Rights: Butkevich v. Russia

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In a case about a Ukrainian journalist being arrested during an anti-globalisation protest in Russia, the European Court of Human Rights (ECtHR) has clarified that the gathering of information is an essential preparatory step in journalism, solidly protected as a part of press freedom. The ECtHR recognises that the media fulfil an important task in a democratic society, when providing information on the authorities' handling of public demonstrations and the containment of disorder. Therefore, any attempt to remove journalists from the scene of demonstrations must be subject to "strict scrutiny". The ECtHR found that the arrest, prosecution and conviction of the journalist had violated his right to freedom of expression under Article 10 of the European Convention of Human Rights (ECHR). The ECtHR also stated that in cases relating to public events, there is a close link between the freedoms protected by Articles 10 (freedom of expression) and 11 (freedom of peaceful demonstration) of the ECHR.

The case concerns the arrest and conviction of Maksim Aleksandrovich Butkevich, who was covering as a journalist an anti-globalisation protest in July 2006 in St Petersburg, during a G8 Summit. While observing the demonstration and taking photographs - including when the police started to disperse the gathering and to arrest some of the participants - two police officers approached the journalist and ordered him to cease his "unlawful actions". As Butkevich continued taking pictures, he was ordered to come in the police vehicle and was taken to and detained in a police station. Administrative-offence proceedings were brought against him for disobeying a lawful order of the police. The case was examined in an expedited procedure, and on the same evening as that on which the events had occurred he was heard by a judge and convicted as charged. He was sentenced to three days' detention. Two days later the appeal court reduced this sentence to two days and ordered his release, with immediate effect.

Butkevich lodged a complaint with the ECtHR, alleging that his administrative arrest and delayed release from detention had been unlawful (breach of Article 5 § 1 of the ECHR), that he had not been given a fair trial by an impartial court (breach of Article 6 § 1 of the ECHR), and that his freedom of expression had been interfered with in an unlawful and disproportionate manner by the Russian authorities (Article 10 of the ECHR). Third-party submissions were made by the Ukraine Government and by three NGOs - the Media Legal Defence Initiative (MLDI), Article 19: Global Campaign for Free Expression, and the Mass Media Defence Centre. After finding breaches of Article 5 § 1 and Article 6 § 1 of the ECHR, the ECtHR also came to the conclusion that Butkevich's rights as a journalist under Article 10 of the ECHR were violated by the Russian police and judiciary.

As regards Butkevich's pre-trial deprivation of liberty at the police station, the ECtHR considered that the Russian authorities had not provided any justification for the administrative arrest. Thus, the ECtHR concluded that this aspect of interference with the journalist's right to freedom of expression had not been "prescribed by law" within the meaning of Article 10 of the ECHR.

With regard to Butkevich's prosecution and his being sentenced to administrative detention, the ECtHR accepted the legality of the interference, as it had been aimed at pursuing the legitimate aim of prevention of disorder, but it did not accept that it had been necessary in a democratic society, in accordance with Article 10 § 2 of the ECHR. The ECtHR considered as a pertinent issue the question of whether Butkevich had identified himself as a journalist in a timely and adequate

manner during the demonstration and in the subsequent proceedings, but it left no doubt that Butkevich was to be considered as acting as a journalist during the event at issue. The fact that Butkevich on the day of the event had not been acting on a journalistic assignment from any media outlet did not influence the finding that he had been acting as a journalist, with the intention of collecting information and photographic material relating to a public event and to impart them to the public via means of mass communication. While the ECtHR noted that the legitimate aim of preventing disorder weighed heavily in [Pentikäinen v. Finland](#) (see IRIS 2016-1/2), it was of the opinion that the present case was different in this respect, as there was nothing in the case file confirming that the demonstration had not been peaceful or that it had turned violent. According to the ECtHR the domestic authorities should also have questioned and investigated whether Butkevich's alleged actions had been excusable or had otherwise been mitigated, given his argument that he had been acting as a journalist. As the ECtHR was of the opinion that the domestic decisions did not suggest that there had been any kind of adequate assessment of this aspect of the case, and as the Russian authorities have not produced any relevant and pertinent reasons in order to justify the prosecution and conviction of Butkevich, it came to the conclusion, unanimously, that the journalist's right to gather information had been violated. The ECtHR lastly considered that it was not necessary in the present case to make further findings concerning Butkevich's removal from the venue of the demonstration.

In application of Article 41 of the ECHR, the ECtHR awarded Butkevich EUR 7,000 in respect of non-pecuniary damage, and EUR 2,000 for costs and expenses related to the proceedings before the ECtHR.

- [Butkevich v. Russia](#), no. 5865/07, 13 February 2018.

IRIS 2018-4:1/2

European Court of Human Rights: *Ivashchenko v. Russia*

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On 13 February 2018, the European Court of Human Rights (ECtHR) issued its judgment in *Ivashchenko v. Russia* concerning the inspection and copying of a journalist's laptop and storage devices by customs officials. The applicant in the case was a photojournalist with a photo agency, Photographer.ru. In early August 2009, the applicant travelled to Abkhazia to prepare a report (to be illustrated by photographs) on "the life of this unrecognised republic". On 27 August 2009, the applicant returned to Russia, and on arrival at the Adler customs checkpoint, presented his Russian passport, press card and a customs declaration, stating that he had electronic information devices (a laptop and flash memory cards) in his luggage. The applicant was examined by a customs officer to verify the information contained in the applicant's customs declaration by way of an "inspection procedure". After finding in the directory of the laptop an electronic folder entitled "Extremism (for RR)", which contained a number of photographs, the customs officer decided to copy it and other folders from the laptop for further examination by an expert, who could determine whether they contained any information of an extremist nature. 34 folders (containing some 480 subfolders with over 16,300 electronic files) were copied. The laptop remained with a customs officer for several hours. On 9 September 2009 the applicant was informed that a report had been commissioned from a criminal forensics expert to determine whether the data copied from his laptop contained any prohibited "extremist" content. In December 2009 a report concluded that the data contained no extremist material. According to the applicant, the DVDs with his data were handed back to him in November 2011.

The applicant applied for judicial review, challenging the actions of the customs officials. In January 2010, the Prikubanskiy District Court of Krasnodar dismissed his application, finding that the data from the applicant's laptop had been copied for the purposes of examination, in compliance with Presidential Decree no. 310 on combating fascism and political extremism. On appeal, the Krasnodar Regional Court upheld the judgment, holding that the customs inspection had been authorised and carried out according to official customs procedures and that the data had been copied in line with Russian Presidential Decree no. 310 of 23 March 1995.

The applicant made an application to the ECtHR, claiming a violation of his right to private life under Article 8 of the European Convention on Human Rights (ECHR). Firstly, the Court held that there had been an interference with the applicant's right to private life, noting the search of his laptop (which had lasted several hours, allegedly without any reasonable suspicion of any offence or unlawful conduct), the copying of his personal and professional data (followed by their being forwarded for a specialist assessment), and the retention of his data for some two years. In the Court's view, those actions had gone beyond what could be perceived as procedures that were "routine", relatively non-invasive and for which consent was usually given. The Court then examined whether the interference had been in accordance with the law, and in particular whether Russian law provided protection against arbitrariness and adequate safeguards. Firstly, the Court held that it did not appear that the comprehensive measure used in the present case had to be based on some notion of a reasonable suspicion that someone making a customs declaration has committed an offence - namely one arising from the anti-extremist legislation pertinent to the present case. The apparent lack of any need for reasonable suspicion relating to an offence was exacerbated by the fact that the domestic authorities (ultimately the courts at the judicial review stage) had not attempted to define and apply such notions as "propaganda for

fascism”, “social, racial, ethnic or religious enmity” to any of the ascertained facts. Secondly, the Court held that the domestic authorities, including the courts, had not been required to give, and had not given, relevant and sufficient reasons for justifying the “interference” in the present case. In particular, it had not been considered pertinent by the domestic authorities to ascertain whether the impugned measures had been taken in pursuance of any actual legitimate aim (for instance the ones referred to by the Government). It was merely assumed that the identification of possible “extremist material” was required by the 1995 Presidential decree. It was not considered relevant, at any stage and in any manner, that the applicant was carrying journalistic material. The Court concluded that Russian Government had not convincingly demonstrated that the relevant legislation and practice afforded adequate and effective safeguards against abuse in a situation of applying the sampling procedure in respect of electronic data contained in an electronic device. Thus, they were not “in accordance with the law”, and violated Article 8 ECHR (the Court also concluded that having regard to this finding, it was not necessary to examine the complaint under Article 10 ECHR). The Court awarded the applicant EUR 3,000 in damages, and EUR 1,700 for costs.

- [Ivashchenko v. Russia](#), no. 61064/10, 13 February 2018.

IRIS 2018-4:1/3

European Court of Human Rights: Endy Gęsina-Torres v. Poland

Dirk Voorhoof

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A recent decision by the European Court of Human Rights (ECtHR) confirms that journalists who are found guilty of a criminal offence during newsgathering activities cannot invoke robust protection based on their rights to freedom of expression and information, as guaranteed by Article 10 of the European Convention on Human Rights (ECHR). Following the decisions in the cases of [Diamant Salihu and others v. Sweden](#) (IRIS 2016-8/1), [Brambilla and others v. Italy](#) (IRIS 2016-9/1) and [Boris Erdtmann v. Germany](#) (IRIS 2016-9/1), the Court on this occasion dismissed a complaint lodged by an undercover television journalist who was fined for using forged documents and giving false testimony in court during proceedings concerning his placement in a refuge detention centre on the Polish border.

In 2013 Endy Gęsina-Torres was working as a journalist for Polish public television. Alarmed by the number of reports about the alleged ill treatment of aliens in a detention centre for refugees run by the Border Guard Service near the town of Białystok and about the conditions there, he decided to draw the attention of the public to the issue by making an undercover documentary about conditions in the refugee centre. Arriving at the border near Białystok he was stopped by police officers who wanted to check his identity papers. Gęsina-Torres told the police officers that he had crossed the Polish border illegally after losing his documents. He gave them a fictitious name and was arrested. By a subsequent judicial decision, he was placed in the Border Guard Service's closed centre for aliens in Białystok. Gęsina-Torres stayed at the centre for three weeks, making recordings with a device placed in his watch. When his real identity was discovered, criminal proceedings were instituted against the journalist, and he was found guilty of using forged documents (by virtue of his having signed documents relating to his arrest and detention under a false name) and of giving false testimony (by making false statements about how he had illegally crossed the Polish border prior to his arrest). The Polish court was also of the view that Gęsina-Torres' conduct had jeopardised the administration of justice, as the court that had decided to place him in the detention centre for aliens had been misled about his identity. The fine was set at PLN 2,000, with the court noting that Gęsina-Torres did not have any criminal record; he was furthermore ordered to pay court costs of PLN 300.

Gęsina-Torres alleged before the ECtHR that finding him criminally responsible for the use of forged identity documents and giving false testimony in the context of investigative journalism had amounted to an interference with his right to freedom of expression, in breach of Article 10 ECHR. His arguments were supported by "Article 19", a non-governmental organisation intervening as a third party. According to "Article 19", it had been long recognised that in order to bring important information to the public notice, journalists might have to resort to unconventional forms of information gathering (such as undercover reporting, when undercover reporting was the only way to report on situations that public authorities were trying to cover up).

Although the domestic authorities did not interfere with the content of the programme, the ECtHR finds that Gęsina-Torres' criminal conviction may be regarded as interfering with his rights under Article 10 of the ECHR. The crucial question is whether this interference could be justified as being "necessary in a democratic society" under the terms of Article 10 § 2 of the ECHR.

The ECtHR reiterates that the protection afforded by Article 10 ECHR to journalists "is subject to

the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism”, and that the concept of responsible journalism also embraces “the lawfulness of the conduct of a journalist, including, and of relevance to the instant case, his or her public interaction with the authorities when exercising journalistic functions. The fact that a journalist has breached the law in that connection is a most relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly”. The ECtHR refers to “the vital role played by the media in a democratic society”, but it especially emphasises that “journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that, as journalists, Article 10 affords them a cast-iron defence. In other words, a journalist cannot claim an exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising the right to freedom of expression, the offence in question was committed during the performance of his or her journalistic functions”.

Applying these principles to the facts of the case, the ECtHR noted that the investigation carried out by *Geşina-Torres* had concerned a matter of public interest, given that allegations of harsh treatment in closed detention camps for refugees and of breaches of fundamental rights by staff clearly fell within the ambit of that notion. However, as a journalist, *Geşina-Torres* knew that by using forged documents and a false identity he would be acting in breach of the law. The ECtHR was of the opinion that the breach (namely lying about his identity) was the very foundation of his modus operandi and was not merely an accessory element of his actions in gathering information. The ECtHR furthermore did not find the journalist’s argument that this was the only manner that he could have used to gather information about the situation in the detention centres convincing, as by then this kind of information was already in the public domain. In the ECtHR’s view, this showed that other means of gathering information had proved effective for disclosing and establishing facts concerning allegations of the ill-treatment of foreigners in the detention centres. The ECtHR was of the view that the domestic courts had been meticulous and that they had balanced the journalist’s freedom of expression against another important interest - namely the interest that a democratic society had in preserving the authority of the judiciary. According to the ECtHR, the Polish courts had not overstepped their margin of appreciation and had made use of it in good faith, carefully and reasonably. Finally, the fine imposed on the journalist had certainly not constituted a “harsh sentence”. Therefore, the ECtHR concluded that the domestic authorities, when justifying the interference concerned in the present case, had relied on grounds which had been both relevant and sufficient. The ECtHR found that there was no appearance of a violation of Article 10 ECHR and accordingly, it declared the journalist’s application manifestly ill-founded, and therefore inadmissible.

- [Endy Geşina-Torres v. Poland](#) (dec.), no. 11915/15, 15 March 2018.

IRIS 2018-5:1/1

European Court of Human Rights: Mehmet Hasan Altan v. Turkey and Şahin Alpay v. Turkey

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On 20 March 2018, the European Court of Human Rights (ECtHR) delivered two important judgments in cases brought by two prominent journalists detained in Turkey after the attempted coup d'état of 15 July 2016. In both cases it found a violation of the journalists' right to freedom of expression. The ECtHR clarified that the existence of a "public emergency threatening the life of the nation" cannot serve as a pretext for limiting the freedom of political debate, which is at the very core of the concept of a democratic society. Even in a state of emergency 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." The ECtHR is of the opinion that the pre-trial detention and the criminal prosecution of the journalists will inevitably have a chilling effect on freedom of expression by intimidating civil society and silencing dissenting voices in Turkey.

Mehmet Hasan Altan is an economics professor and a journalist in Turkey. Prior to the attempted military coup of 15 July 2016, he presented a political discussion programme on Can Erzinçan TV, a television channel that was closed down following the adoption of Legislative Decree no. 668, issued on 27 July 2016 in connection with the state of emergency that was declared by the Government on 20 July 2016. Şahin Alpay is a journalist who had been working for the daily newspaper Zaman, which was viewed by the Turkish government as the principal publication medium of the so-called "Gülenist" network. Zaman was also closed down in a move arising from the declaration of the state of emergency in Turkey. In the years leading up to the attempted coup, both Mehmet Hasan Altan and Şahin Alpay had been known for their critical views of the Government's policies. Both journalists had been arrested and held in pre-trial detention since the summer of 2016. They were charged, on the basis of articles written by them and their public statements, with attempting to overthrow the constitutional order, the Turkish Grand National Assembly and the Government by force and violence, and of committing offences on behalf of a terrorist organisation (without actually being members of it). Mehmet Hasan Altan was sentenced on 16 February 2018 by the Istanbul Assize Court to aggravated life imprisonment for attempting to overthrow the constitutional order.

However, the Turkish Constitutional Court in the meantime found that the journalists' initial and continued pre-trial detention could not be regarded as a necessary and proportionate interference in a democratic society and that their pre-trial detention could have a chilling effect on freedom of expression and freedom of the press, in so far as it had not been based on any concrete evidence (see IRIS 2018-3/31). The Istanbul Assize Court has rejected the judgments of the Constitutional Court, and both journalists remained in prison. While the proceedings were still pending, both journalists lodged a complaint with the ECtHR alleging the violation of their rights under Article 5 (right to liberty and security), Article 10 (right to freedom of expression) and Article 18 (limitation on the use of restrictions on rights) of the European Convention of Human Rights (ECHR). The journalists were supported in their claims by the Council of Europe Commissioner for Human Rights, the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and by a range of non-governmental organisations acting jointly, such as "Article 19", the Committee to Protect Journalists, the European Centre for Press and Media Freedom, the European Federation of Journalists, the

International Federation of Journalists, the International Press Institute and Reporters Without Borders.

Apart from finding a breach of Article 5 § 1 of the ECHR (specifically, the arbitrary pre-trial detention of the journalists, given that there had been a lack of reasonable suspicion that they had committed the criminal offences that they were charged with), the ECtHR came to the conclusion that the journalists' right to freedom of expression had been violated by the Turkish authorities. The ECtHR pointed to a general problem in Turkey concerning the interpretation of anti- terrorism legislation by prosecutors and the competent courts, as journalists have often been subjected to severe measures such as detention for addressing matters of public interest. According to the ECtHR, views expressed that do not constitute incitement to violence and do not justify the commission of terrorist acts or cannot be interpreted as likely to encourage violence by instilling deep- seated and irrational hatred towards specified individuals should not be restricted with reference to the aims set out in Article 10 § 2 – namely the protection of territorial integrity or national security or the prevention of disorder or crime.

The ECtHR recognises in particular the difficulties facing Turkey in the aftermath of the attempted military coup, as the coup attempt and other terrorist acts have clearly posed major threats to Turkey's vulnerable democracy. However, the ECtHR considers that one of the principal characteristics of democracy is the possibility it offers of resolving problems through public debate, and that democracy thrives on freedom of expression. In this context, it considers that criticism of governments and the publication of information regarded by a country's leaders as endangering national interests should not attract criminal charges for particularly serious offences such as belonging to or assisting a terrorist organisation, attempting to overthrow the Government or the constitutional order, or disseminating terrorist propaganda. Moreover, even where such serious charges have been brought, pre-trial detention should only be used as an exceptional measure of last resort when all other measures have proved incapable of fully guaranteeing the proper conduct of proceedings: the pre-trial detention of anyone expressing critical views produces a range of adverse effects, both for the detainees themselves and for society as a whole, since the imposition of a measure entailing deprivation of liberty will inevitably have a chilling effect on freedom of expression by intimidating civil society and silencing dissenting voices. Therefore, the ECtHR concluded that there had been a violation of Article 10 ECHR in both cases. Only the ad hoc national judge, Judge Ergül dissented, justifying the interferences with the journalists rights on the basis of the state of emergency after the attempted military coup and the severe danger posed to the democratic constitutional order, public security and respect for human rights, amounting to a threat to the life of the Turkish nation within the meaning of Article 15 ECHR (derogation in times of emergency). He also referred to certain media in Turkey that have played a significant role in legitimising the actions that gave rise to the “despicable attempted military coup by manipulating public opinion”.

- [Mehmet Hasan Altan v. Turkey](#), no. 13237/17, 20 March 2018.
- [Şahin Alpay v. Turkey](#), no. 16538/17, 20 March 2018.

IRIS 2018-5:1/2

European Court of Human Rights: Sinkova v. Ukraine

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On 27 February 2018, the European Court of Human Rights (ECtHR) delivered its judgment in *Sinkova v. Ukraine* concerning a conviction for a performance-art protest at a war memorial, which had been filmed and published online. The performing artist was prosecuted and convicted of the “desecration of the Tomb of the Unknown Soldier”. The ECtHR held, by four votes to three, that the interference by the Ukrainian authorities with the protestor’s right to freedom of expression did not amount to a violation of Article 10 of the European Convention of Human Rights (ECHR).

The case concerns Anna Olegovna Sinkova, acting as a member of the artistic group the Brotherhood of St. Luke. In December 2010, Sinkova and three group members decided to protest “against the wasteful use of natural gas by the State while turning a blind eye to the poor living standards of veterans,” and staged an artistic performance at a war memorial in central Kyiv. The performance involved Sinkova frying eggs over the Eternal Flame at the Tomb of the Unknown Soldier. A member of the group also filmed the performance. Two police officers approached the group and remarked that their behaviour was “inappropriate,” but they undertook no further interference.

Sinkova posted the video of her performance online as an act of protest, with the commentary that “precious natural gas has been burned, pointlessly, at the Memorial of Eternal Glory in Kyiv for fifty-three years now. This luxury costs taxpayers about 300,000 hryvnias per month.” Following the video’s publication, a number of complaints were made to the police. In late March 2011, Sinkova was arrested and charged with the “desecration of the Tomb of the Unknown Soldier,” which is an offence under Article 297 of Ukraine’s Criminal Code. The District Court granted a request for Sinkova’s pre-trial detention, as she was accused of a “serious offence punishable by imprisonment of between three and five years.” Following three months in pre-trial detention, Sinkova was convicted of the offence. The District Court held that Sinkova’s argument that her performance had not been meant to desecrate the tomb “had no impact on the legal classification of her actions” and the “deliberate acts” had shown “disrespect for the burial place of the Unknown Soldier.” The District Court imposed a three-year prison sentence, which was suspended for two years. The conviction was upheld on appeal, with the Kyiv City Court of Appeal rejecting Sinkova’s argument that there had been a violation of her right to freedom of expression, ruling that her conviction was “in accordance with the law and pursued a legitimate aim.” Sinkova subsequently made an application to the ECtHR, claiming that her pre-trial detention had violated her right to liberty under Article 5 ECHR and that her conviction had violated her right to freedom of expression under Article 10 of the ECHR. In respect of Article 5, the ECtHR unanimously found three separate violations concerning her pre-trial detention, including a violation arising from the fact that the courts “had maintained her detention on grounds which cannot be regarded as sufficient,” and finding that her detention in June 2011 “was not covered by any judicial decision.” However, in respect of Article 10, the ECtHR, by four votes to three, found that there had been no violation of Sinkova’s freedom of expression.

The ECtHR judgment noted that the interference with Sinkova’s Article 10 right to freedom of expression had been based on the sufficiently precise criminal code provision on “desecration;” and that the conviction had the legitimate aim of “protecting the morals and the rights of others.”

The main question was whether the conviction had been “necessary in a democratic society.” The ECtHR held that Sinkova had been prosecuted and convicted “only” on account of her frying eggs over the Eternal Flame. The ECtHR pointed out that she had not been charged over the video, nor the content of the “rather sarcastic and provocative text” in the video. Thus, the applicant “was not convicted for expressing the views that she did”; rather, her conviction “was a narrow one in respect of particular conduct in a particular place” and based on a “general prohibition on contempt for the Tomb of the Unknown Soldier, [which formed] part of ordinary criminal law.” Secondly, while the ECtHR stated that the domestic courts “paid little attention to the applicant’s stated motives, given their irrelevance for the legal classification of her actions,” it noted that the courts “did take into account the applicant’s individual circumstances in deciding on her sentence.” Thirdly, the ECtHR rejected Sinkova’s argument that her conduct could not be reasonably interpreted as contemptuous towards those the memorial honoured, with the Court noting that “eternal flames are a long-standing tradition in many cultures and religions most often aimed at commemorating a person or event of national significance.” The ECtHR held that there were many “suitable” opportunities for Sinkova to express her views, or participate in “genuine” protests, without breaking the criminal law, and without “insulting the memory of soldiers who perished and the feelings of veterans.” Lastly, the ECtHR examined the “nature and severity of the penalty,” and noted that “peaceful and non-violent forms of expression in principle should not be made subject to the threat of a custodial sentence.” The ECtHR, however, found Sinkova’s conviction acceptable and proportionate, as she was only “given a suspended sentence and did not serve a single day of it.” The majority thus held there had been no violation of Article 10.

By contrast, the dissenting ECtHR judges found a violation of Article 10, partly in the light of the domestic courts’ failure to address the “purpose of the applicant’s performance” and the courts’ disregard of the performance’s satirical nature. Furthermore, the dissenting judges noted an “inconsistency” in the majority’s position and the Court’s prior case-law that a suspended prison sentence is “likely to have a chilling effect on satirical forms of expression.” Given “the lack of adequate assessment by the national authorities of the applicant’s performance from the standpoint of Article 10 of the Convention,” and the “complete disregard of its satirical nature,” in addition to the “disproportionate nature of the sentence,” the dissenting judges found that Article 10 was violated in the present case.

- [Sinkova v. Ukraine](#), no. 39496/11, 27 February 2018.

IRIS 2018-5:1/3

European Court of Human Rights: GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland

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In a case against Switzerland, the European Court of Human Rights (ECtHR) strongly emphasised the right of a non-governmental organisation (NGO) to use robust language on its website to criticise a politician, and to label his discourse as racist speech. The NGO had posted a blog post during the heated political debate on the referendum on banning the construction of minarets in Switzerland, in which it referred to B.K., the president of a local branch of the Young Swiss People's Party (JSVP). In a public speech, B.K. had said that the Swiss guiding culture ("schweizerische Leitkultur") was based on Christianity and that minarets, as a symbolic sign of another culture, should not be tolerated. It was this speech and this reasoning that the NGO GRA Stiftung gegen Rassismus und Antisemitismus qualified as "verbal racism" on a blog post.

B.K. filed a claim with the District Court for the protection of his personality rights, requesting that the blog post be removed from the NGO's website and that the text be replaced with the court's judgment. After the District Court had dismissed his request, the High Court found the blog post at issue insulting, while considering that B.K.'s speech itself had not been racist. It therefore ordered that the impugned article be removed from the NGO's website and be replaced with the High Court's judgment. This judgment was confirmed by the Federal Supreme Court finding that the speech by B.K. did not deserve to be qualified as "verbal racism" as B.K. had only defended his own beliefs and culture, which did not result in a blanket denigration of the followers of Islam or show fundamental contempt for Muslims. The Federal Supreme Court also explained that although political debate on important issues for society deserved a solid and broad right of freedom of expression, this could not justify the dissemination of untruths nor the publication of value judgments that did not appear to be justified with regard to the underlying facts.

The ECtHR, however, did not agree with the Swiss Courts' findings and came to the conclusion that the interference with the rights of GRA Stiftung gegen Rassismus und Antisemitismus amounted to a violation of the NGO's right to freedom of expression under Article 10 ECHR. While the ECtHR accepted that the interference was prescribed by law, and that the interference pursued the legitimate aim of protecting the reputation and rights of others, it found that the interference with the NGO's rights not necessary in a democratic society. When examining the necessity of an interference in a democratic society in cases where the interests of the "protection of the reputation or rights of others" bring Article 8 ECHR into play, the ECtHR verified whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely freedom of expression protected by Article 10 and the right to respect for private life enshrined in Article 8. The ECtHR repeated that "where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts". The ECtHR had, on earlier occasions, identified a number of criteria which may come into play in the context of balancing the competing rights at issue. The relevant criteria thus defined include: contribution to a debate of public interest; the degree of notoriety of the person affected; the subject of the news report; the prior conduct of the person concerned; and the content, form and consequences of the publication. The ECtHR recalled that it had previously accepted that

when an NGO drew attention to matters of public interest, it was exercising a “public watchdog” role of similar importance to that of the press and may be characterised as a social “watchdog” warranting similar protection under the ECHR as that afforded to the press.

According to the ECtHR, there was no doubt that B.K.’s speech and the NGO’s blog post concerned a very sensitive topic of “intense public debate in Switzerland” at the material time, while B.K. had willingly exposed himself to public scrutiny by stating his political views. Therefore, he had to show a higher degree of tolerance towards potential criticism of his statements by persons or organisations which did not share his views. According to the ECtHR, it could not be said that classifying B.K.’s speech as “verbal racism”, when it supported an initiative which had already been described by various organisations as discriminatory, xenophobic or racist, could be regarded as devoid of any factual basis. Nor could the impugned description be understood as a gratuitous personal attack on, or an insult to B.K. The NGO’s blog post did not refer to his private or family life, but to the manner in which his political speech had been perceived. In view of the foregoing, the impugned categorisation of B.K.’s statement as “verbal racism” on the NGO’s website could hardly be said to have had harmful consequences for his private or professional life. The ECtHR particularly disagreed with the Swiss authorities’ argument that describing someone’s words as “verbal racism” could be associated by the average reader with an accusation of an offence punishable under Swiss criminal law. The ECtHR observed that the NGO had never suggested that B.K.’s statements fell within the scope of the criminal offence of racial discrimination under Article 261bis of the Swiss Criminal Code, and it referred to the NGO’s argument stressing the need to be able to describe an individual’s statement as racist without necessarily implying criminal liability. As for the nature of the interference (the order to remove the impugned article from the NGO’s website, to publish the conclusion of the second-instance court, the payment of CHF 3 335 plus tax in court fees and the reimbursement of B.K.’s legal costs amounting to CHF 3 830), the ECtHR was of the opinion that it may have had a “chilling effect” on the exercise of the NGO’s freedom of expression “as it may have discouraged it from pursuing its statutory aims and criticising political statements and policies in the future”.

In the light of all of the above-mentioned considerations, the ECtHR considered that the arguments advanced by the Swiss Government with regard to the protection of B.K.’s personality rights, although relevant, could not be regarded as sufficient to justify the interference at issue. The domestic courts did not give due consideration to the principles and criteria laid down by the Court’s case law for balancing the right to respect for private life and the right to freedom of expression. Therefore, the ECtHR unanimously found that there had been a violation of Article 10 ECHR. The applicant NGO is to receive EUR 35 000 from the Swiss Government in respect of non-pecuniary damages and to cover the costs and expenses incurred both at domestic level and for the proceedings before the ECtHR.

- [GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland](#), no. 18597/13, 9 January 2018.

IRIS 2018-6:1/1

European Court of Human Rights: Hans Burkhard Nix v. Germany

Dirk Voorhoof

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A recent decision by the European Court of Human Rights (ECtHR) confirms the limits of freedom of expression in Germany in relation to the publication of Nazi- symbols. A German blogger complained under Article 10 of the European Convention of Human Rights (ECHR) about his criminal conviction for the offence of using symbols of unconstitutional organisations; however the ECtHR recently found no violation of his right to freedom of expression.

The applicant, Mr Nix, has a blog in which he writes about certain matters concerning economics, politics and society. One of his blog posts contained a picture of former SS chief Heinrich Himmler in SS uniform with the badge of the Nazi party, a swastika on his front pocket and a swastika armband. The picture, accompanied by a quotation by Himmler, was meant to illustrate the blog post in which Mr Nix accused a public official of acting in a racist and discriminatory manner towards his daughter, who is of German-Nepalese origin, with regard to a registration for a vocational training course. Parts of the post were written in vulgar and offensive language. The Munich prosecution authorities instituted criminal proceedings against Mr Nix, charging him with the offence of using symbols of unconstitutional organisations. After long proceedings, Mr Nix was ordered to pay EUR 10 per day for a period covering 120 days in application of Article 86a of the German Criminal Code that prohibits the publication of symbols of unconstitutional organisations. A constitutional request on the grounds that the Regional Court and the Court of Appeal had not examined his right to freedom of expression as protected by Article 5 of the German Basic Law, and Article 10 ECHR, was dismissed by the Federal Constitutional Court. In his complaint, Mr Nix referred to the case of [Vajnai v. Hungary](#), in which the ECtHR had found that the applicant's criminal conviction for wearing a red star at a demonstration constituted a violation of Article 10 ECHR. The Federal Constitutional Court, however, considered the constitutional complaint inadmissible. Finally, Mr Nix lodged a complaint before the ECtHR, referring to his right to freedom of expression under Article 10 ECHR. He submitted, in essence, that the domestic courts had not taken all the circumstances of the case into account and had thus failed to consider that his blog post had constituted a protest against discrimination against children with a migrant background and against the working methods of the employment office, which he deemed to resemble those employed by the Nazis.

The ECtHR reiterated that Article 10 ECHR applies to the Internet as a means of communication and that the publication of photographs on an Internet site falls under the right to freedom of expression. It considered that Mr Nix's conviction for having displayed a picture of Himmler in SS uniform with a swastika armband in his blog post amounted to an interference with his right to freedom of expression, as guaranteed by Article 10 ECHR; such interference would infringe the ECHR if it did not meet the requirements of Article 10 section 2. It was therefore to be determined whether Mr Nix's conviction was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was "necessary in a democratic society" in order to achieve those aims.

The ECtHR noted that the purpose of Article 86a of the German Criminal Code was to prevent the revival of prohibited organisations and the unconstitutional ideas pursued by them, to maintain political peace, and to ban symbols of unconstitutional organisations in German political life. It therefore considered that the interference in question was in accordance with the law and pursued the legitimate aim of the prevention of disorder. Although there is little scope under

Article 10 section 2 ECHR for restrictions on political expression or on debating questions of public interest, the ECtHR reiterated that it had always been sensitive to the historical context of the High Contracting Party concerned when reviewing whether there existed a pressing social need for interference with rights under the Convention. In the light of their historical role and experience, states which experienced the Nazi horrors may therefore be regarded as having a special moral responsibility to distance themselves from the mass atrocities perpetrated by the Nazis. The ECtHR considered that the legislature's choice to criminally sanction the use of Nazi symbols, to ban the use of such symbols from German political life, to maintain political peace, and to prevent the revival of Nazism, must be seen against this background. It observed that the picture and symbol used in Mr Nix's blog post could not be considered as having any meaning other than that of Nazi ideology, which differentiated this case from the findings on the use of the red star in the [Vajnai v. Hungary](#) and [Fratanoló v. Hungary](#) cases.

The ECtHR accepted that Mr Nix had not intended to spread totalitarian propaganda, to incite violence, or to utter hate speech, that his expression had not resulted in intimidation, and that he may have intended to contribute to a debate of public interest. It noted, however, that the gratuitous use of the picture at issue was exactly what the provision sanctioning the use of symbols of unconstitutional organisations was intended to prevent; it was meant to pre-empt anyone becoming used to certain symbols by banning them from all means of communication. Having regard to the circumstances of the case, the ECtHR saw no reason to depart from the domestic courts' assessment that the applicant did not clearly and obviously reject Nazi ideology in his blog post, and while the criminal conviction of 120 day-fines was not negligible, the ECtHR noted that the sentence had been reduced from a prison sentence to a fine in the course of the proceedings and that Mr Nix had been convicted of a similar offence only a few weeks before he published the blog post at issue.

The ECtHR found, in light of all the circumstances of the case and referring to the historical experience of Germany, that the German authorities had adduced relevant and sufficient reasons and had not overstepped their margin of appreciation when interfering with Mr Nix's right to freedom of expression. The interference was proportionate to the legitimate aim pursued and was thus "necessary in a democratic society". Therefore, the application was considered manifestly ill-founded and was rejected as inadmissible.

- [Hans Burkhard Nix v. Germany](#), Application No. 35285/16, 5 April 2018.

IRIS 2018-6:1/2

European Court of Human Rights: Stern Taulats and Roura Capellera v. Spain

Dirk Voorhoof

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Shortly after the majority judgment in the case of [Sinkova v. Ukraine](#) (see IRIS 2018-5/3), the European Court of Human Rights (ECtHR) has delivered a new judgment in a case of symbolic speech and expressive conduct as part of the right to freedom of expression guaranteed under Article 10 of the European Convention of Human Rights (ECHR). The case concerns the conviction of two Spanish nationals, Enric Stern Taulats and Jaume Roura Capellera, for setting fire to a photograph of the royal couple, turned upside down, at a public demonstration held during the Spanish King's official visit to the Catalan city of Girona in 2007. The ECtHR considered the act at issue as a political statement that did not constitute incitement to hatred or violence: according to the Court, an act of this type should be interpreted as the symbolic expression of dissatisfaction and protest. The ECtHR held that the criminal conviction of the applicants for insult of the Crown was not necessary in a democratic society.

In September 2007, while the King was on an official visit to Girona, the applicants set fire to a large photograph of the royal couple during a public demonstration. As a result, they were sentenced to 15 months' imprisonment for insult to the Crown in application of Article 490 section 3 of the Criminal Code. The penalty was subsequently replaced by a fine of EUR 2 700 each; in the event of failure to pay the fine in whole or in part, the applicants would have to serve a prison term. This judgment was upheld by the Audiencia Nacional, by ten votes to six, and the applicants did indeed pay the fine. However, they lodged an amparo appeal with the Constitutional Court, which concluded, by a majority of seven to four, that the act at issue fell outside the scope of freedom of expression, given that the applicants had been guilty of incitement to hatred and violence against the King and the monarchy. It stated that "burning in public, in the circumstances described, the photograph or image of a person entails incitement to violence against the person and the institution he or she represents, encourages feelings of aggression against the person and expresses a threat".

Relying on Article 10 ECHR, the applicants complained before the ECtHR that the judgment finding them guilty of insult to the Crown amounted to a violation of their right to freedom of expression. On the same grounds, they also complained of a breach of Article 9 ECHR (freedom of thought, conscience and religion) read in conjunction with Article 10 ECHR.

The ECtHR agreed that the applicants' conviction amounted to an interference with their right to freedom of expression, and it considered that the interference was prescribed by law and pursued the legitimate aim of protecting the reputation or rights of others.

As regards its necessity in a democratic society, the Court noted that the act at issue had been part of a political, rather than a personal critique of the monarchist institution in general, and of the Kingdom of Spain as a nation in particular. The impugned "staged event" had been part of a debate on the independence of Catalonia and the monarchistic structure of the state and a critique of the King as a symbol of the Spanish nation. Burning the picture had not constituted a personal attack on the King of Spain geared to insulting and vilifying his person, but a denunciation of what the King represented as the Head and the symbol of the state apparatus and the forces which, according to the applicants, had occupied Catalonia. This kind of expression falls within the sphere of political criticism or dissidence and corresponds to the expression of rejection of the monarchy as an institution. The ECtHR emphasised that the applicants had used

symbolical elements clearly and manifestly linked to their practical political criticism of the Spanish State and its monarchistic form: the effigy of the King of Spain was the symbol of the King as the Head of the state apparatus; using fire and turning the photograph upside down expressed a radical rejection or refusal, and those two elements were used as the manifestation of criticism of a political or other nature; and the size of the photograph appeared to have been intended to ensure the visibility of the act in question, which had taken place in a public square. The applicants' act had therefore been one of the provocative "events" which were increasingly being staged to attract media attention and which merely used a certain permissible degree of provocation to transmit a critical message in the context of freedom of expression.

The ECtHR also found that the applicants' intention had not been to incite anyone to commit acts of violence against the King, even though the "performance" had entailed burning an image of the figurehead of the state. Indeed, an act of this type should be interpreted as the symbolic expression of dissatisfaction and protest. Even though the "staged event" had involved burning an image, it was a means of expressing an opinion in a debate on a public-interest issue, namely the institution of the monarchy. The ECtHR reiterated that freedom of expression extends to "information" and "ideas" that offend, shock or disturb: such are the demands of pluralism, tolerance and broad-mindedness, without which there would be no "democratic society". The ECtHR was not convinced that the impugned act could reasonably be construed as incitement to hatred or violence, neither could it be considered as constituting hate speech, given the irrelevance of Article 17 ECHR (prohibition of abuse of rights) to the present case. Finally, the ECtHR pointed out that the criminal penalty imposed on the applicants - a prison sentence, to be executed in the event of failure to pay the fine - amounted to an interference with freedom of expression which had been neither proportionate to the legitimate aim pursued nor necessary in a democratic society. The ECtHR therefore unanimously found a violation of Article 10 ECHR, while it deemed unnecessary any separate consideration of the complaint under Article 9 concerning the same facts. The applicants are to receive EUR 14 400 from the Spanish Government in respect of pecuniary damage and to cover costs and expenses both at domestic level and for the proceedings before the ECtHR.

- [*Stern Taulats and Roura Capellera v. Spain*](#), nos. 51168/15 and 51186/15, 13 March 2018.

IRIS 2018-6:1/3

European Court of Human Rights: ROJ TV A/S v. Denmark

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The European Court of Human Rights (ECtHR) has rejected the application by the Denmark-based TV company ROJ TV A/S, which was convicted and deprived of its licence because some of its programmes were considered to have promoted the Kurdistan Workers' Party (PKK), which is listed as a terrorist organisation within the EU and in the US, Canada and Australia.

The case concerned the conviction of ROJ TV A/S for terrorism offences, as the Danish courts had found that a series of programmes broadcast by ROJ TV A/S between 2006 and 2010 had promoted the PKK. The Danish courts had found it established that the PKK could be considered a terrorist organisation within the meaning of the Danish Penal Code and that ROJ TV A/S had supported the PKK's terror operations by broadcasting propaganda for the PKK. It was fined and its licence withdrawn. ROJ TV A/S invoked Article 10 of the European Convention of Human Rights (ECHR) by complaining that its conviction and the withdrawal of its licence had interfered with and violated its freedom of expression.

The ECtHR found that the domestic courts had carefully assessed the evidence before them and conducted a balancing exercise, taking ROJ TV's right to freedom of expression into account. It did not find any elements indicating that the Danish courts did not base their findings on an acceptable assessment of the relevant facts. Most importantly, the ECtHR found that the television station could not benefit from the protection afforded by Article 10 ECHR, as it had tried to employ that right for ends which were contrary to the values of the ECHR by inciting violence and supporting terrorist activity. Because such expressions are in violation of Article 17 of the ECHR (prohibition on the abuse of rights), the complaint by ROJ TV A/S did not attract the protection of the right to freedom of expression. Under Article 17 of the ECHR "nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention." The purpose of Article 17 is to make it impossible for persons, groups or organisations to derive from the Convention a right to engage in any activity or perform any act aimed at destroying any of the rights and freedoms set forth in the Convention. The ECtHR reiterated that the decisive point when assessing whether statements, verbal or non-verbal, are removed from the protection of Article 10 by Article 17 of the ECHR is whether the statements in question are directed against the Convention's underlying values - for example, by stirring up hatred or violence - and whether by making the statement, the author attempted to rely on the ECHR to engage in an activity or perform acts aimed at the destruction of the rights and freedoms laid down in it.

The ECtHR reiterated that Article 17 ECHR is only applicable on an exceptional basis and in extreme cases (see [Perinçek v. Switzerland](#), IRIS 2016-1/1). In the present case however, the ECtHR attached significant weight to the fact that the City Court of Copenhagen had found that the one-sided coverage (with repetitive incitement to participate in fighting and actions, incitement to join the organisation in question and its guerrillas, and the portrayal of deceased guerrilla members as heroes) had amounted to propaganda for the PKK, a terrorist organisation, and that it could not be considered to constitute only a declaration of sympathy. In addition, ROJ TV A/S had been financed to a significant extent by the PKK in the years 2006-2010. Furthermore, the High Court of Eastern Denmark had found explicitly that, having regard to the content, presentation and connection of the programmes of ROJ TV, the case concerned the promotion of

the PKK's terror operations. The ECHR referred to the nature of the impugned programmes, which included incitement to violence and support for terrorist activity (elements extensively examined by the national courts). It also considered the fact that the views expressed in the programmes of ROJ TV A/S had been disseminated to a wide audience through television broadcasting and that they related directly to an issue which is paramount in modern European society - the prevention of terrorism and terrorist-related expressions advocating the use of violence. For these reasons ROJ TV A/S could not, under Article 17 of the ECHR, rely on the protection afforded by Article 10 of the ECHR. Therefore, the ECtHR was of the opinion that ROJ TV A/S was attempting to deflect Article 10 of the ECHR from its real purpose by employing this right for ends which were clearly contrary to the values of the ECHR. Consequently, the Court found unanimously that, by reason of Article 17 ECHR, ROJ TV A/S could not benefit from the protection afforded by Article 10 of the ECHR. The ECtHR considered the application incompatible *ratione materiae* with the provisions of the Convention; accordingly, the application by ROJ TV A/S was rejected by the Court. The decision by the ECtHR is final.

- [ROJ TV A/S v. Denmark](#) (dec.), no. 24683/14, 24 May 2018.

IRIS 2018-7:1/2

European Court of Human Rights: Unifaun Theatre Productions Limited and Others v. Malta

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On 15 May 2018, the European Court of Human Rights (ECtHR) delivered a judgment regarding a peculiar application of the Maltese Cinema and Stage Regulations. A theatre group, Unifaun Theatre Productions, had been prevented from producing and performing the play *Stitching*, owing to a ban imposed by the Board for Film and Stage Classification (“the Board”). This interference with the theatre group’s right to freedom of expression was subsequently confirmed by the domestic courts, including the Constitutional Court of Malta. According to the Constitutional Court, the play contained several scenes that affected the morality and decency of the entire production, and it was within the Board’s authority to assess that in line with the Cinema and Stage Regulations. The Constitutional Court referred to phrases which constituted disparaging and insolent remarks in respect of more than one belief, towards women and towards the suffering of the Jews in the Second World War. In the Court’s view, the limits of decency had been breached by the blasphemy (an offence under Maltese law) contained within the play and by the vilification of the dignity of a people, a woman, children, and human beings in general, as well by the extreme glorification of sexual perversion. In upholding the legitimate and justified character of the interference with the theatre group’s freedom of expression, the Constitutional Court, *inter alia*, referred to the case law of the European Court of Human Rights (ECtHR) in [Otto-Preminger-Institut v. Austria](#) (see IRIS 1995-1/1).

The theatre group lodged an application with the ECtHR, arguing that the complete ban on the production of the play *Stitching* was contrary to Article 10 of the European Convention of Human Rights (ECHR) guaranteeing the right to freedom of expression. The application was joined by two directors of Unifaun Theatre Productions, the artistic director of the play and two actors engaged to perform in the above-mentioned production.

Firstly, the ECtHR noted that the Government had not rebutted the applicants’ claim that the Guidelines for Film Classification (on which the ban was based) had only been cited for the first time in the domestic proceedings, and that the Guidelines did not meet the requisite standard of law in so far as they were not accessible to the public. Secondly, in so far as the domestic authorities had relied on the Cinema and Stage Regulations, the ECtHR was of the opinion that the criteria mentioned in the Regulations (such as levels of morality, decency and good general behaviour), left room for unfettered power, since the law did not indicate with sufficient clarity the scope of any discretion conferred on such authorities and the manner of its exercise. Thirdly, the ECtHR found that a total ban was only possible in the case of films; stage productions did not fall under category to which such a ban could apply. Thus, there was no legal basis for the impugned ban.

On the basis of these considerations the ECtHR found that the law relied on by the Maltese Government was not of a sufficient quality and that the interference had been the result of a procedure not prescribed by law. As the interference had not been lawful within the meaning of the ECHR, the ECtHR deemed that it was not necessary to further determine whether the interference had been necessary in a democratic society. The ECtHR unanimously concluded that there had been a violation of Article 10 of the ECHR.

The judgment also contained a specific interpretation with regard to just satisfaction and the awarding of damages to victims of a violation of the ECHR under Article 41 of the ECHR. The

applicants claimed EUR 4 299.20 in respect of pecuniary damage, covering the fees for the classification exercise, the purchase of performance rights, theatre bookings, promotional material and advertisements, and EUR 30 000 in non-pecuniary damage. The Maltese Government submitted that the applicants had been well aware that they would have to obtain the requisite permit to perform the play; thus, the expenses that they had incurred in respect of the play had constituted a self-imposed business risk taken in the knowledge that the play might be banned. The Government also considered that a finding of a violation would constitute sufficient just satisfaction, and that in any event the ECtHR should not award more than EUR 3 500 in non-pecuniary damage.

The ECtHR was of the opinion that despite the lack of clarity in the law as to whether a total ban might be possible, the applicants should have waited for a decision on the specific classification of the play (and thus knowledge of the applicable audience) before venturing into theatre bookings and promotional material and advertisements. It also considered that performance rights are likely to be required before such a procedure is undertaken at a cost, no matter its outcome. Thus, the ECtHR did not discern any causal link between the violation found and the pecuniary damage alleged it therefore rejected this part of the claim.

On the other hand, making its assessment on an equitable basis, the ECtHR awarded the applicants EUR 10 000, jointly, in respect of non-pecuniary damage. In addition, the ECtHR considered it reasonable to also award the applicants the sum of EUR 10 000, jointly, covering the costs for professional legal fees and court expenses.

- [Unifaun Theatre Productions Limited and Others v. Malta](#), no. 37326/13, 15 May 2018.

IRIS 2018-7:1/3

European Court of Human Rights: Stomakhin v. Russia

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On 9 May 2018, the European Court of Human Rights (ECtHR) delivered, unanimously, an important judgment with regard to the conditions regarding interferences by public authorities with extremist speech. The ECtHR found that the Russian authorities had violated Article 10 of the European Convention of Human Rights (ECHR), which guarantees the right to freedom of (political) expression. With its judgment, the ECtHR urged governments to be cautious when considering what constitutes hate speech and what constitutes criticism of the authorities.

The case concerned Boris Vladimirovich Stomakhin's conviction for newsletter articles he had written on the armed conflict in Chechnya. Acting both as a journalist working for a magazine, but mostly as an activist (being the founder, owner, publisher and editor-in-chief of a monthly newsletter, Radikalnaya Politika ("Radical Politics"), Stomakhin published in 2003 a series of articles touching, to a great extent, on events in the Chechen Republic. The articles sharply criticised the Russian Government and the actions by the army there, and expressed support for the Chechen rebel separatist movement. According to the domestic courts, Stomakhin had justified extremist activities and had incited racial, national, and social hatred. He had justified and glorified acts of terrorism by Chechens, called for violence against the Russian people and declared that the Orthodox faith was an inferior one. Stomakhin argued that he had simply expressed his opinion on political events in Russia (in particular the conflict in Chechnya) and he denied supporting extremism. Stomakhin was found guilty of "having publicly appealed to extremist activities through the mass media" (Article 280 § 2 of the Russian Criminal Code) and of having committed "actions aimed at inciting hatred and enmity, as well as at humiliating the dignity of an individual or group of individuals on the grounds of ethnicity, origin, attitude towards religion and membership of a social group, through the mass media" (Article 282 § 1). The domestic courts also concluded that the impugned texts had had a clear extremist leaning and had incited actions prohibited by the Federal Law on Suppression of Extremist Activities. Stomakhin was sentenced to five years in prison and given a three-year ban on practising journalism. He served the sentence in full and was released in March 2011.

In 2007, while in prison, Stomakhin lodged an application with the ECtHR, complaining mainly about a violation of his right to freedom of expression. In its judgment, more than ten years later, the ECtHR reiterated that there is little scope under Article 10 § 2 ECHR for restrictions on political speech or on debate on questions of public interest and that "the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the Government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries". The ECtHR also reiterated that it may be considered necessary in democratic societies to sanction or even prevent all forms of expression that spread, incite, promote or justify violence, hatred or intolerance, provided that the restrictions or penalties imposed are proportionate to the legitimate aim pursued. Turning to the wording of the texts in question, the ECtHR considered that the impugned statements could be divided into three groups, and it examined each group separately. The first group of statements had justified terrorism, vilified Russian servicemen to the extent that they

might have become targets for actual attack, and had praised Chechen leaders within the context of approving of violence. Those statements had therefore gone beyond the limits of acceptable criticism and the ECtHR found that the Russian courts' treatment of them had been proportionate. The ECtHR also found that some of Stomakhin's criticisms of Orthodox believers and ethnic Russians had incited hatred and enmity and that the Russian courts' considerations had been "relevant and sufficient" to justify a conviction.

However, the domestic courts had been too harsh in other aspects. In particular, some statements about the war had not gone beyond acceptable limits of criticism, which are wide when it comes to governments. The domestic courts had also taken other comments on Russian servicemen out of context, or had failed even to refer to any particular texts which, according to them, had had discriminatory or humiliating connotations with regard to the national dignity of people practising the Orthodox religion. The ECtHR emphasised that it is an integral part of freedom of expression to seek historical truth, and that a debate on the causes of acts of particular gravity which may amount to war crimes or crimes against humanity should be able to take place freely. Moreover, it is in the nature of political speech to be controversial and often virulent, and the fact that statements contain hard-hitting criticism of official policy and communicate a one-sided view of the origin of and responsibility for the situation addressed by them is insufficient, in itself, to justify an interference with freedom of expression. Although some of Stomakhin's statements had been admittedly quite virulent in their language and had contained strongly worded statements, the ECtHR discerned no elements in them other than a criticism of the Russian Government and its actions during the armed conflict in the Chechen Republic and held that however acerbic they might have appeared, those statements had not gone beyond the acceptable limits, given the fact that those limits are particularly wide with regard to the Government. Other statements had been published during an electoral campaign, a period "where it was particularly important that opinions and information of all kinds were permitted to circulate freely".

The ECtHR also stressed that it is vitally important that the domestic authorities adopt a cautious approach in determining the scope of "hate speech" crimes and strictly construe the relevant legal provisions in order to avoid excessive interference under the guise of action taken against "hate speech", where such charges are brought for the purpose of merely criticising the Government, state institutions, and their policies and practices.

Lastly, the ECtHR found that the Russian courts' reasons for the penalty imposed on Stomakhin had been limited to his personality and the social danger he had presented. The ECtHR referred to the fact that Stomakhin had been sentenced to five years' imprisonment and banned from practising journalism for three years, and that he had served this sentence in full. It left open the question of whether a ban on the exercise of journalistic activities, as such, was compatible with Article 10 of the ECHR. But the punishment to five years imprisonment it considered not proportionate. The ECtHR observed that Stomakhin had had no criminal record and thus had never been convicted of any similar offence. It also found that the circulation of the newsletter at issue was insignificant, and that it could not be said that the incriminated statements had been disseminated in a form that had been impossible to ignore. On the contrary, in the present case the potential impact of the impugned statements had been very limited. Therefore, the ECtHR found the punishment of five years imprisonment "an extremely harsh measure". Particularly bearing in mind the Russian authorities' failure to demonstrate convincingly "the pressing social need" to interfere with Stomakhin's freedom of expression in respect of a number of the impugned statements, as well as the severity of the penalty imposed on him, the ECtHR found that the interference in question had not been "necessary in a democratic society", and hence

that there had been a violation of Article 10 of the ECHR.

- [Stomakhin v. Russia](#), no. 52273/07, 9 May 2018.

IRIS 2018-7:1/4

European Court of Human Rights: M.L. and W.W. v. Germany

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Since the judgment by the Court of Justice of the European Union (CJEU) in the case of [Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos](#) (see IRIS 2014-6/3), and the explicit recognition in Article 17 of the General Data Protection Regulation (2016/679) of the right to erasure (“the right to be forgotten” - see [IRIS 2018-6/7](#)), the European Court of Human Rights (ECtHR) has introduced and applied important principles with regard to the “right to be forgotten” with respect to both Article 8 (the right to respect for private life) and Article 10 (the right to freedom of expression) of the European Convention on Human Rights (ECHR). In its judgment of 28 June 2018, the ECtHR dismissed a “right to be forgotten” application under Article 8 in respect of online information published on German media portals concerning the conviction for murder of two persons, M.L. and W.W.

The case concerned the refusal by the German Federal Court of Justice to issue an injunction prohibiting three different media organisations from continuing to allow Internet users access to documentation about a murder case, which listed the full names of the convicted murderers. In 1993 M.L. and W.W. were convicted of murdering a popular actor and sentenced to life imprisonment. When they were released on probation in 2007 and 2008, M.L. and W.W. brought proceedings against the radio station Deutschlandradio, the weekly magazine Der Spiegel, and the daily newspaper Mannheimer Morgen, requesting the anonymisation of the personal data in the documentation on them which had appeared on those media organisations’ respective Internet sites. In first-instance and appeal judgments the courts granted W.L.’s and W.W.’s requests, considering in particular that their interest in no longer being confronted with their past actions so long after their convictions prevailed over the public interest in being informed. However, the Federal Court of Justice overturned those decisions on the grounds that insufficient account had been taken of the media’s right to freedom of expression and, with regard to the mission of the media, the public’s interest in being informed.

Relying on Article 8 of the ECHR, M.L. and W.W. lodged an application with the ECtHR, complaining of a violation of their right to privacy constituted by the refusal of the German Federal Court of Justice to issue an injunction prohibiting the defendant media from keeping on their respective Internet portals personal data concerning M.L.’s and W.W.’s criminal trial and conviction for murder. The ECtHR considered that although it was primarily on account of search engines that the information about the murder case could easily be obtained by Internet users, the interference complained of by M.L. and W.W. resulted from the decision by the media organisations themselves to publish and conserve this material on their respective websites; the search engines hence merely amplified the scope of the interference. It also observed that M.L. and W.W. were not asking for the removal of the reports in question, but only that they be anonymised, and that rendering material anonymous was a less restrictive measure in terms of press freedom than the removal of an entire article. On the other hand the substantial contribution made by Internet archives to preserving and making available news and information was to be taken into account, as archives constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free. The ECtHR confirmed that the media have the task of participating in the creation of democratic opinion, by making available to the public old news items that they have preserved in their archives.

The ECtHR next examined the relevant criteria applied in other cases when balancing Article 8 and Article 10 rights, focusing on (1) the contribution to a debate of public interest, (2) the degree of notoriety of M.L. and W.W., (3) their prior conduct in relation to the media, and (4) the content, form and consequences of online reports (containing M.L. and W.W.'s names and photographs) at issue.

The ECtHR reiterated that the approach to covering any subject is a matter of journalistic freedom, leaving it to journalists to decide what details ought to be published, provided that these decisions corresponded to the profession's ethical norms. The inclusion in a report of individualised information, such as the full name of the person in question, is an important aspect of the press's work, especially when reporting on criminal proceedings which have attracted considerable attention and contributed to a debate of public interest that remains undiminished with the passage of time. As to how well known M.L. and W.W. were, the ECtHR observed that they were not simply private individuals who were unknown to the public at the time their request for anonymity was made. The reports in question concerned either the conduct of their criminal trial, or one of their requests for the reopening of that trial, and thus constituted information capable of contributing to a debate in a democratic society. The ECtHR also noted that at an earlier stage, some years before their release on probation, M.L. and W.W. had themselves contacted the press, transmitting a number of documents while inviting journalists to keep the public informed about their requests to reopen the case. According to the ECtHR, this attitude put a different perspective on their hope of obtaining anonymity in the media reports, or on the right to be forgotten online. With regard to the content and form of the contested documentation, the ECtHR considered that the texts at issue described a judicial decision in an objective and non-denigrating manner, the original truthfulness or lawfulness of which had never been challenged. It found that the dissemination of the contested publications had been limited in scope, especially as some of the material was subject to restrictions such as paid access or a subscription. The ECtHR also referred to the fact that M.L. and W.W. did not provide information about any attempts made by them to contact search engine operators with a view to making it harder to trace information about them.

In conclusion, having regard to the margin of appreciation left to the national authorities when weighing up divergent interests, the importance of maintaining the accessibility of press reports that have been recognised as lawful, and M.L.'s and W.W.'s conduct vis-à-vis the press, the ECtHR, unanimously, considered that there were no substantial grounds for it to substitute its view for that of the German Federal Court of Justice. Hence the ECtHR concluded that there had been no violation of Article 8 of the ECHR.

- [M.L. and W.W. v. Germany](#), nos. 60798/10 and 65599/10, 28 June 2018.

IRIS 2018-8:1/1

European Court of Human Rights: Mariya Alekhina and Others v. Russia

Dirk Voorhoof

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After the international condemnation of the Russian authorities' targeting of the punk band Pussy Riot, the European Court of Human Rights (ECtHR) has found various violations of the band members' rights under the European Convention on Human Rights (ECHR). The ECtHR found violations under Article 3 (prohibition of inhuman or degrading treatment), Article 5 § 3 (the right to liberty and security) and 6 §§ 1 and 3 (c) of the ECHR (the right to a fair trial), in relation to the conditions of their transportation and detention in the courthouse, their pre-trial detention, their treatment during the court hearings and restrictions on the legal assistance afforded to them. Most importantly the ECtHR found that the criminal prosecution of and prison sentence imposed on the Pussy Riot members constituted a breach of their freedom of expression under Article 10 of the ECHR. The ECtHR also found a violation of Article 10 for having declared extremist and banned video material of the Pussy Riot available on the Internet.

The three applicants are members of the feminist punk band, Pussy Riot: Ms Mariya Vladimirovna Alekhina, Ms Nadezhda Andreyevna Tolokonnikova and Ms Yekaterina Stanislavovna Samutsevich. The group carried out a series of impromptu performances of their songs in various public areas in Moscow. According to Pussy Riot, their actions and performances were a response to the ongoing political process in Russia, and their songs contained "clear and strongly worded political messages critical of the government and expressing support for feminism, the rights of minorities and ongoing political protests".

The Pussy Riot members complained to the ECtHR about their conviction and imprisonment for attempting to perform one of their protest songs in a Moscow cathedral in 2012. The performance was meant to express disapproval of the political situation in Russia at the time and of Patriarch Kirill, the leader of the Russian Orthodox Church, who had strongly criticised the large-scale street protests across the country against the recently held elections. No service was taking place, but some people were inside the cathedral, including journalists invited by the band for the purposes of publicity. The performance only lasted slightly over a minute because cathedral guards quickly forced the band out. The band uploaded the video footage of their attempted performance to their website and to YouTube. The three Pussy Riot members were arrested shortly after the performance for "hooliganism motivated by religious hatred" and were held in custody and pre-trial detention for just over five months before being convicted as charged. The trial court found that the Pussy Riot action had been offensive and insulting. The court rejected the applicants' arguments that their performance had been politically and not religiously motivated, and they were sentenced to one year and eleven months imprisonment. All appeals against this decision were dismissed. The domestic courts also ruled that the performance had been offensive and banned access to the "extremist" video recordings Pussy Riot had subsequently uploaded onto the Internet.

With regard to the punk band's right to freedom of expression the ECtHR reiterated that this right includes freedom of artistic expression, which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds; the ECtHR considered that such an exchange of ideas by those who create and perform art was essential for a democratic society. The ECtHR also emphasised that opinions or artistic works, apart from being capable of being expressed through the media, can also be expressed through conduct.

In its assessment of the necessity in a democratic society of the interferences at issue, the ECtHR emphasised that Pussy Riot's actions had contributed to the debate about the political situation in Russia and the exercise of parliamentary and presidential powers. The ECtHR reiterated that there is little scope under Article 10 § 2 of the ECHR for restrictions on political speech or debates on questions of public interest, and that very strong reasons are required to justify such restrictions. On the other hand, the ECtHR noted that Article 10 of the ECHR does not bestow any freedom of forum for the exercise of that right and does not create an automatic right of entry to private or publicly owned property. As the Pussy Riot performance had taken place in a cathedral, it could be considered to have violated the accepted rules of conduct in a place of religious worship; this conduct could have justified the imposition of certain sanctions in order to protect the rights of others. However, the applicants were charged with a criminal offence and sentenced to one year and eleven months in prison. The ECtHR noted that the applicants' actions did not disrupt any religious services, and nor did they cause any injury to people inside the cathedral or any damage to church property. It also observed that it was unable to discern any element in the domestic courts' analysis which would allow the applicants' conduct to be deemed to constitute incitement to (religious) hatred. The ECtHR found that the Pussy Riot performance neither contained elements of violence, nor stirred up or justified violence, hatred or intolerance of believers, and it reiterated that, in principle, peaceful and non-violent forms of expression should not be made subject to the threat of the imposition of a custodial sentence. The ECtHR reiterated that interference with freedom of expression in the form of criminal sanctions could have a "chilling effect" on the exercise of that freedom. The ECtHR concluded that the domestic courts had failed to adduce "relevant and sufficient" reasons to justify the criminal conviction and prison sentence imposed on the applicants and that the sanctions were not proportionate to the legitimate aim pursued.

With regard to the finding that the Pussy Riot video materials available on the Internet were "extremist" and to the placing of a ban on access to that material, the ECtHR found that the domestic courts had made no attempt to conduct its own analysis of the video materials in question; rather, it had relied solely on a report by linguistic experts, without specifying which particular elements of the videos were problematic under the Suppression of Extremism Act. The ECtHR was also of the view that a domestic court could never be in a position to provide "relevant and sufficient" reasons to justify interference with the rights guaranteed by Article 10 of the ECHR without some form of judicial review based on an assessment of the arguments advanced by the public authority against those of the interested party.

However, the domestic law had not allowed Pussy Riot to participate in the proceedings that led to the finding that their activities and material had been "extremist"; they had thus been deprived of any possibility to contest the allegations made by the public authority. There is no doubt that this kind of state action curtailing the right to freedom of expression is incompatible with Article 10 of the ECHR. The ECtHR thus came to the conclusion that declaring Pussy Riot's online video materials "extremist" and placing a ban on access to them had not met a "pressing social need" and had accordingly been disproportionate to the legitimate aim invoked. The interference had thus not been "necessary in a democratic society" and had therefore violated Article 10 of the ECHR.

- [Mariya Alekhina and Others v. Russia](#), no. 38004/12, 17 July 2018.

IRIS 2018-8:1/2

European Court of Human Rights: Centrum för Rättvisa v. Sweden

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According to the European Court of Human Rights (ECtHR), the Swedish law permitting the bulk interception of electronic signals in Sweden for foreign intelligence purposes does not violate the right to privacy and correspondence under Article 8 of the European Convention on Human Rights (ECHR). The ECtHR reached this conclusion after a Swedish human rights not-for-profit organisation, Centrum för Rättvisa (“the Centrum”), lodged a complaint with the Strasbourg Court, alleging that Swedish legislation and practice in the field of signals intelligence violated and continued to violate its privacy rights under Article 8 of the ECHR.

“Signals intelligence” can be defined as the interception, processing, analysis and reporting of intelligence derived from electronic signals. These signals may be converted to text, images and sound. In Sweden, signals intelligence is conducted by the National Defence Radio Establishment (Försvarets radioanstalt - “the FRA”) and regulated by the Signals Intelligence Act. Owing to the nature of its function as a non-governmental organisation scrutinising the activities of state actors, the Centrum argued that there is a risk that those of its communication activities carried out by means of mobile telephones and mobile broadband had been or could be intercepted and examined by way of signals intelligence. The Centrum has not brought any domestic proceedings, contending that there was or is no effective remedy for its Convention complaints.

The ECtHR considered that the contested legislation regulating signals intelligence establishes a system of secret surveillance that potentially affects all users of, for example, mobile telephone services and the Internet, without their being notified of such surveillance. And, because no domestic legal remedies provide detailed grounds in response to a complainant who suspects that his or her communications have been intercepted.

In these circumstances, the ECtHR accepted that an examination of the Swedish legislation in abstracto is justified. It emphasised that, especially where a power vested in the executive is exercised in secret, the risk of arbitrariness is evident; therefore it is essential to have clear, detailed rules on the interception of telephone and Internet communications, especially as the relevant technology available is continually becoming more sophisticated. In view of the risk that a system of secret surveillance set up to protect national security may undermine, or even destroy, democracy under the cloak of defending it, the ECtHR must be satisfied that there are adequate and effective guarantees against abuse. Any assessment of this question must depend on all the circumstances of the case, such as the nature, scope and duration of possible measures, the grounds required for ordering them, the authorities competent to authorise, carry out and supervise them, and the kind of remedy provided by the national law.

As the ECtHR considered that it is clear that the Swedish law permitting signals intelligence pursues legitimate aims in the interest of national security, it remained to be ascertained whether the law is accessible and contains adequate and effective safeguards and guarantees to be considered “foreseeable” and “necessary in a democratic society”.

The ECtHR found that the Swedish law indicates the scope for mandating and performing signals intelligence conferred on the competent authorities and the manner of the exercise thereof sufficient clarity, and it was satisfied that there are safeguards in place which adequately regulate the duration, renewal and cancellation of interception measures. Most importantly, permission

to undertake interception measures have to be authorised by court order, and only after a detailed examination; it was only permitted in respect of communications crossing the Swedish border and not within Sweden itself; such measures could only last for a maximum of six months; and any renewal required a court review. The ECtHR found that the provisions and procedures regulating the system of prior court authorisation, on the whole, provide important guarantees against abuse. Examining the legislation on storing, accessing, examining, using and destroying intercepted data, the ECtHR was also satisfied that it provides adequate safeguards against the abusive treatment of personal data and thus serves to protect individuals' personal integrity. Although a certain lack of specification in the provisions regulating the communication of personal data to other states and international organisations gives some cause for concern with respect to the possible abuse of the rights of individuals, on the whole, the ECtHR considered that the supervisory elements in place sufficiently counterbalance these regulatory shortcomings. Lastly, the ECtHR agreed with the Swedish Government that the lack of notification of surveillance measures is compensated for by the fact that there are a number of complaint mechanisms available - in particular those that could be exercised via the Data Protection Authority, the Parliamentary Ombudsmen and the Chancellor of Justice. However, the ECtHR observed that the Swedish remedies available in relation to complaints relating to secret surveillance do not include recourse to a court, nor do they offer other effective remedies.

Furthermore, individuals are not informed of whether their communications have actually been intercepted, and neither are they generally given reasoned decisions. However, it ruled that the total number of available remedies, although not providing a full and public response to the objections raised by the Centrum, must be considered sufficient in the present context, which concerns an abstract challenge to the signals intelligence regime itself and does not concern a complaint against a particular intelligence measure. In reaching this conclusion, the Court attaches importance to the earlier stages of supervision of the signals intelligence regime, including the detailed judicial examination by the Foreign Intelligence Court of the FRA's requests for permits to conduct signals intelligence and the extensive and partly public supervision by several bodies (in particular the Foreign Intelligence Inspectorate).

Although the ECtHR stressed that it is mindful of the potentially harmful effects that the operation of a signals intelligence scheme may have on the protection of privacy, it acknowledged the importance for national security operations of a system such as the Swedish one, having regard to the present-day threats being posed by global terrorism and serious cross-border crime, as well as the increased sophistication of communications technology. The ECtHR was of the opinion that the Swedish system on signals intelligence reveals no significant shortcomings in its structure and operation and that it provides adequate and sufficient guarantees against arbitrariness and the risk of abuse. It therefore ruled that there had been no violation of Article 8 of the ECHR.

- [Centrum för rättvisa v. Sweden](#), no. 35252/08, 19 June 2018.

Editor's note: This case was referred to the Grand Chamber on 4 February 2019.

IRIS 2018-8:1/3

European Court of Human Rights: *Gîrleanu v. Romania*

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On 26 June 2018, the European Court of Human Rights (ECtHR) delivered an interesting judgment in support of investigative journalism, criticising the Romanian authorities' negligence in allowing leaks of secret, sensitive military information. The ECtHR found that the criminal prosecution of a journalist and the measures taken against him for disclosing classified information that gave evidence of the leaks, violated the journalist's right to freedom of expression as guaranteed under Article 10 of the European Convention on Human Rights (ECHR).

The applicant is Marian Gîrleanu, a local correspondent for the national daily newspaper *România liberă*. His articles covered various fields, including investigations into the activities of the armed forces and the police. In a television show, examples of leaks of secret, sensitive military information were criticised, and it was suggested that such information could also have reached terrorists. During the show, it was mentioned that some daily newspapers had received classified secret information about military operations, but had decided not to publish it, fearing possible damage to national security. A few days later, the newspapers *România liberă* and *Ziua* published articles drawing attention to the fact that confidential information which could have threatened national security had been leaked from a military unit in Afghanistan under the authority of the Romanian Ministry of Defence. Shortly afterwards, criminal proceedings were instituted against Gîrleanu and four other people, including another journalist and a former member of the army, for disclosing classified information on national security under Article 169 of the Criminal Code, and for the gathering and sharing of secret or confidential information under Article 19(1) of Law No. 51/1991 on national security. Gîrleanu's house was searched by the police, the hard drive of his computer was seized and he was taken into police custody. The next day, his pre-trial detention was authorised by a judge for a period of ten days, but after two days, he was released. Finally, he was convicted of having committed the crime proscribed by Article 19(1) of Law No. 51/1991 and ordered to pay an administrative fine of EUR 240 and the court fees. The hard drive that was seized remained confiscated. Gîrleanu complained to the ECtHR that he had been arrested, investigated and fined for gathering and sharing secret information, and that this interference with his right as a journalist to gather and disclose confidential information on national security had infringed his rights under Article 10 ECHR. Although the fine he had been ordered to pay might appear to be low, he argued that the detention and criminal proceedings had damaged his reputation as a journalist and led to him losing his permanent employment, and later to his dismissal from his job with the newspaper. The journalist received support before the ECtHR from the Guardian News and Media, Open Society Justice Initiative and the International Commission of Jurists as third-party interveners.

The ECtHR reiterated that the press exercises the vital role of "public watchdog" in imparting information on matters of public concern, while the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom. The ECtHR also referred to the concept of responsible journalism as a professional activity which enjoys the protection of Article 10 ECHR. That concept also embraces the lawfulness of the conduct of a journalist, and the fact that a journalist has breached the law is a relevant, albeit not decisive consideration when determining whether he or she has acted responsibly. While the interferences with Gîrleanu's right to freedom of expression were prescribed by law and could be considered to protect national security, the ECtHR did not agree with the Romanian government's view that

the interferences at issue were necessary in a democratic society. In its assessment of this crucial aspect, the ECtHR applied the criteria of [Stoll v. Switzerland](#) (IRIS 2008/3-2) and it analysed the interests at stake, the conduct of the journalist, the review of the measure by the domestic courts and whether the penalty imposed was proportionate. In the Court's view, the documents in Gîrleanu's possession, as well as the fact that they had been leaked from the Romanian army, were likely to raise questions of public interest. He had not obtained the information in question by unlawful means and the investigation had failed to prove that Gîrleanu had actively sought to obtain such information. The ECtHR also noted that the information in question had already been seen by other people before Gîrleanu obtained the documents, and that it was the state's responsibility to organise its intelligence and military services and to train its personnel in such a way as to ensure that no confidential information is disclosed. The ECtHR noted that Gîrleanu was a journalist claiming to have made the disclosure in the context of a journalistic investigation, not a member of the army who collected and transmitted secret military information to others. The ECtHR was of the opinion that the domestic courts had not addressed the prosecutor's finding that the disclosure of the information under dispute was not likely to endanger national security and had failed to actually verify whether the information at issue could indeed have posed a threat to military structures. Moreover, although Gîrleanu invoked the guarantees provided by Article 10 ECHR, the domestic courts did not appear to have weighed the interests in maintaining the confidentiality of the documents in question over the interests of a journalistic investigation and the public's interest in being informed of the information leak and maybe even of the actual contents of the documents. Although the amount of the fine appears to be relatively low, the domestic courts held as established that Gîrleanu had intentionally committed a criminal offence against national security. In this perspective, the ECtHR reiterated that the fact that a person had been convicted may, in some cases, be more important than the minor nature of the penalty imposed. Furthermore, the sanctions against Gîrleanu had been imposed before publication of the secret information in question, which meant that the measures taken had the purpose of preventing him from publishing and sharing the secret documents he had in his possession. Finally, the ECtHR was of the opinion that after the de-classification of the documents in question and the prosecutor's finding that they were outdated and not likely to endanger national security, the decision on whether to impose any sanctions against the applicant should have been more thoroughly weighed. Therefore, the ECtHR considered that the measures taken against Gîrleanu were not reasonably proportionate to the legitimate aim pursued, in view of the interests of a democratic society in ensuring and maintaining freedom of the press. Accordingly, the ECtHR concluded that there had been a violation of Article 10 ECHR.

- [Gîrleanu v. Romania](#), no. 50376/09, 26 June 2018.

IRIS 2018-9:1/1

European Court of Human Rights: Egill Einarsson v. Iceland (No. 2)

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In Iceland, a person (hereafter, X) posted a critical and defamatory comment on a Facebook page, commenting on a recent interview given by Egill Einarsson, against whom complaints had been formulated concerning the rape of women. At the material time, Einarsson was a well-known personality in Iceland who, for years, had published articles, blogs and books and had appeared in films, on television and other media, under pseudonyms. Upon completion of the police investigation, the public prosecutor dismissed all cases against Einarsson because the evidence which had been gathered had not been sufficient or likely to lead to a conviction. The interview, with a photo of Einarsson on the cover of the magazine, initiated many reactions and a Facebook page was set up to encourage the editor of the magazine to remove Einarsson's picture from its front page. Extensive dialogue took place on the site that day, and X posted the comment: "This is also not an attack on a man for saying something wrong, but for raping a teenage girl ... It is permissible to criticise the fact that rapists appear on the cover of publications which are distributed all over town ...". A district court found X's comment on Facebook defamatory and declared the statements null and void. However, it dismissed Einarsson's claim for the imposition of a criminal punishment on X under the Penal Code, and it rejected the claim to have X carry the cost of publishing the main content and reasoning of the judgment in a newspaper. Furthermore, the district court did not award Einarsson non-pecuniary damage and concluded, finally, that each party should bear its own legal costs. These findings were confirmed by the Supreme Court of Iceland.

Einarsson complained to the European Court of Human Rights (ECtHR) about a violation of his right to respect for his private life and reputation, as provided in Article 8 of the European Convention on Human Rights (ECHR). The starting point for this was indeed that the right to protection of one's honour and reputation is encompassed by Article 8 ECHR of the Convention as part of the right to respect for private life, even if the person is criticised in a public debate. In order for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to the personal enjoyment of the right to respect for private life. The ECtHR pointed out that the choice of the means to secure compliance with Article 8 in the sphere of inter-individual relationships is, in principle, a matter that falls within the contracting states' margin of appreciation, and that the nature of the state's obligation to potentially restrict to some extent the rights secured under Article 10 for another person depends on the particular aspect of private life that is at issue. The Court reiterated that where the balancing exercise between the rights under Article 8 and 10 ECHR had been undertaken by the national authorities in conformity with the criteria laid down in the Court's case law, the ECtHR would require strong reasons to substitute its view for that of the domestic courts. It also recalled that the member States of the Council of Europe may regulate questions of compensation for non-pecuniary damage differently. The ECtHR also recalled that domestic courts have a margin of appreciation in assessing how to remedy a finding at national level that a violation of the right to private life had occurred.

With regard to the concrete circumstances of the case, the ECtHR referred to the fact that the district court, confirmed by the Supreme Court, had taken into account Einarsson's previous behaviour; the public reputation he had made for himself; the material produced by him and its substance, which was often ambiguous and provocative and could be interpreted as an

incitement to sexual violence; the dissemination of the comment: on a Facebook page amongst hundreds or thousands of other comments; and the fact that the statements were removed by X as soon as Einarsson had so requested. The Icelandic courts found that Einarsson had received “full judicial satisfaction” by the comments being declared null and void. The ECtHR found that it could not be held that the protection afforded to Einarsson by the Icelandic courts - finding that he had been defamed and declaring the statements null and void - was not effective or sufficient with regard to the state’s positive obligations or that the decision not to grant him compensation deprived Einarsson of his right to reputation and, thereby, emptied the right under Article 8 ECHR of its effective content. The ECtHR further noted that although the domestic courts had accepted to declare the impugned statements null and void, they had not accepted all of Einarsson’s claims. Against this background, it could not be said that the domestic courts had handled the issue of legal costs in a manner that appeared unreasonable or disproportionate. These elements were sufficient for the ECtHR to conclude that the national authorities had not failed in their positive obligations and had afforded Einarsson sufficient protection. Accordingly, there had been no violation of Article 8 ECHR.

- [Egill Einarsson v. Iceland \(no. 2\)](#), no. 31221/15, 17 July 2018.

IRIS 2018-9:1/2

European Court of Human Rights: Savva Terentyev v. Russia

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In its judgment in *Savva Terentyev v. Russia*, the European Court of Human Rights (ECtHR) recognised a very high level of protection of freedom of speech concerning insulting comments about police officers published on a weblog. The ECtHR confirmed that some of the wording in the blog post was offensive, insulting and virulent, but it found that the (emotional) comments, as a whole, could not be seen as inciting to hatred or violence against police officers. The applicant in this case, Savva Terentyev, a resident of the Komi Republic of Russia, had a blog hosted by livejournal.com, a popular blog platform. Police action on the premises of a local newspaper during a pre-election period had resulted in sharp criticism on social media and websites. Savva Terentyev also posted a comment on his website entitled “I hate the cops, for fuck’s sake”. In his blog post, he compared police officers to pigs, and he went on to say that “only lowbrows and hoodlums - the dumbest and least educated representatives of the animal world” become police officers in Russia. He also suggested that it would be great “if in the centre of every Russian city, in the main square ... there was an oven, like at Auschwitz, in which ceremonially (..) infidel cops would be burnt. The people would be burning them. This would be the first step to cleansing society of this cop-hoodlum filth.” Soon afterwards, criminal proceedings were brought against Terentyev under Article 282, section 1 of the Russian Criminal Code. Terentyev was found guilty of “having publicly committed actions aimed at inciting hatred and enmity and humiliating the dignity of a group of persons on the grounds of their membership of a social group”. The town court found that he had “negatively [influenced] public opinion with the aim of inciting social hatred and enmity, escalating social conflict and controversy in society and awakening base instincts in people” and “[set] the community against police officers in calling for [their] physical extermination by ordinary people”. It considered that the crime committed by Terentyev was “particularly blatant and dangerous for national security [as] it [ran] against the fundamentals of the constitutional system and State security”. Terentyev was given a suspended sentence of one year’s imprisonment. He complained to the ECtHR that this criminal conviction had violated his right to freedom of expression, as provided in Article 10 ECHR. The ECtHR assumed that the interference with Terentyev’s right to freedom of expression was “prescribed by law” and aimed to protect the rights of others, namely Russian police personnel. With regard to the assessment of the question of necessity in a democratic society, the ECtHR first recalled that “there is little scope under Article 10 § 2 ECHR for restrictions on political speech or on debate on questions of public interest. It is the Court’s consistent approach to require very strong reasons for justifying restrictions on such debate, for broad restrictions imposed in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned”. The ECtHR accepted that it may be necessary in democratic societies to sanction or even prevent forms of expression which spread, incite, promote or justify violence or hatred based on intolerance, provided that any “formalities”, “conditions”, “restrictions” or “penalties” imposed are proportionate to the legitimate aim pursued. Next, the ECtHR examined the nature and wording of the impugned statements, the context in which they were published, their potential to lead to harmful consequences, and the reasons adduced by the Russian courts to justify the interference in question.

The ECtHR reiterated that offensive language may fall outside the protection of freedom of expression if it amounts to wanton denigration; but the use of vulgar phrases in itself is not decisive in the assessment of an offensive expression as it may well serve merely stylistic

purposes: style constitutes part of the communication as the form of expression and is as such protected together with the substance of the ideas and information expressed. The ECtHR stressed that not every remark which may be perceived as offensive or insulting by particular individuals or their groups justifies a criminal conviction in the form of imprisonment. It is only through careful examination of the context in which the insulting or aggressive words appear that one can draw a meaningful distinction between shocking and offensive language which is protected by Article 10 ECHR and that which forfeits its right to tolerance in a democratic society. The key issue in the present case was whether Terentyev's statements, when read as a whole and in their context, could be seen as promoting violence, hatred or intolerance. It was also emphasised that the statements had raised the issue of the alleged involvement of the police in silencing and oppressing political opposition during the period of an electoral campaign and therefore touched upon a matter of general and public concern, a sphere in which restrictions of freedom of expression are to be strictly construed. With regard to the content of the statements, the ECtHR noted that the passage about "[ceremonial]" incineration of "infidel cops" in "Auschwitz-[like]" ovens was particularly aggressive and hostile in tone. However, contrary to the domestic courts' construal, it was not convinced that that passage could actually be interpreted as a call for "[the police officers'] physical extermination by ordinary people". Rather, it was used as a provocative metaphor, which frantically affirmed Terentyev's wish to see the police "cleansed" of corrupt and abusive officers ("infidel cops). It is furthermore of relevance that the remarks in Terentyev's blog did not personally attack any identifiable police officers, but rather concerned the police as a public institution. A certain degree of immoderation may be acceptable, particularly where it involves a reaction to what is perceived as the unjustified or unlawful conduct of civil servants. In the Court's view, as a member of the state's security forces, the police should display a particularly high degree of tolerance to offensive speech, unless such inflammatory speech is likely to provoke imminent unlawful actions in respect of its personnel and expose them to a real risk of physical violence. The ECtHR was not convinced that Terentyev's comment was likely to encourage violence capable of putting the Russian police officers at risk. Furthermore, his blog had only a minor impact, as it drew seemingly very little public attention, and the comments had remained online for only one month, as Terentyev removed them from the Internet after he found out the reasons for a criminal case being brought against him. Finally, the Court reiterated that a criminal conviction is a serious sanction; moreover, the imposition of a prison sentence for an offence in the area of a debate on an issue of legitimate public interest is compatible with freedom of expression as guaranteed by Article 10 ECHR only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence. The ECtHR was not convinced that Terentyev's comment had the potential to provoke any violence with regard to the Russian police officers, thus posing a clear and imminent danger which required his criminal prosecution and conviction. The ECtHR stressed "that it is vitally important that criminal law provisions directed against expressions that stir up, promote or justify violence, hatred or intolerance clearly and precisely define the scope of relevant offences, and that those provisions be strictly construed in order to avoid a situation where the State's discretion to prosecute for such offences becomes too broad and potentially subject to abuse through selective enforcement". On the basis of these considerations, the ECtHR came to the conclusion that Terentyev's criminal conviction did not meet a "pressing social need" and was disproportionate to the legitimate aim invoked. The interference was thus not "necessary in a democratic society" and accordingly violated Article 10 ECHR.

- [Savva Terentyev v. Russia](#), no. 10692/09, 28 August 2018.

IRIS 2018-9:1/3

European Court of Human Rights: Big Brother Watch and Others v. the United Kingdom

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Human Rights Centre, Ghent University and Legal Human Academy

A short time after the judgment in *Centrum för Rättvisa v. Sweden* (see IRIS 2018- 8/3), the European Court of Human Rights (ECtHR) has delivered a new judgment on the bulk interception of communications and intelligence sharing. This time, the ECtHR has found several violations of the European Convention on Human Rights (ECHR) in the United Kingdom's regime for bulk interception of communications, including a violation of the right of journalists to protect their sources. It is important, however, to underscore that the UK has updated its surveillance rules under new legislation, the Investigatory Powers Act 2016 (IPA 2016), which has not yet fully come into force. The ECtHR did not examine the new legislation in its judgment of 13 September 2018.

The judgment in the case of *Big Brother Watch and Others v. the United Kingdom* deals with a complex set of statutory laws, codes of conduct, procedures and monitoring instruments on the bulk interception of communications, intelligence sharing and requesting data from communications service providers. The judgment counts 204 pages, including separate opinions, though with a very helpful structure produced by the ECtHR itself, accompanied by an instructive press release and even an explanatory Q&A-document as "a tool for the press".

The applications with the Strasbourg Court were lodged by organisations and individuals who actively campaign on issues of civil liberties; by a newsgathering organisation; and by a journalist complaining about the scope and magnitude of the electronic surveillance programmes operated by the UK Government. The applications were lodged after Edward Snowden, a former US National Security Agency (NSA) contractor, revealed the existence of surveillance and intelligence-sharing programmes operated by the intelligence services of the United States and the UK. The applicants believed that the nature of their activities meant that their electronic communications and/or communications data were likely to have been intercepted or obtained by the UK intelligence services.

The ECtHR expressly recognised the severity of the threats currently facing many contracting states, including the scourge of global terrorism and other serious crime, such as drug trafficking, human trafficking, the sexual exploitation of children and cybercrime. It also recognised that advancements in technology have made it easier for terrorists and criminals to evade detection on the Internet. It therefore held that states should enjoy broad discretion in choosing how best to protect national security. Consequently, a state may operate a bulk interception regime if it considers it necessary in the interests of national security. However, the ECtHR does not ignore the fact that surveillance regimes have the potential to be abused, with serious consequences for individual privacy. In order to minimise this risk, the ECtHR reiterated that six minimum safeguards must exist. These safeguards are that the national law must clearly indicate: the nature of offences which may give rise to an interception order; a definition of the categories of people liable to have their communications intercepted; a limit on the duration of interception; the procedure to be followed for examining, using and storing the data obtained; the precautions to be taken when communicating the data to other parties; and the circumstances in which intercepted data may or must be erased or destroyed.

With regard to the bulk interception of communications, the ECtHR came to the conclusion that the UK intelligence services take their Convention obligations seriously and do not abuse their

powers; however, it considered that there was inadequate independent oversight of the selection and search processes involved in the operation, in particular when it came to selecting the Internet bearers for interception and choosing the selectors and search criteria used to filter and select intercepted communications for examination. Furthermore, there were no real safeguards applicable to the selection of related communications data for examination, even though this data could reveal a great deal about a person's habits and contacts. The ECtHR also referred to a wide range of possibilities for public bodies to request access to communications data from communications companies in various ill-defined circumstances. According to the ECtHR, the legal regime in the UK allowing access to data held by communications service providers was not limited to the purpose of combatting "serious crime", and there were no sufficient guarantees to prior review by a court or independent administrative body. Therefore, the ECtHR came to the conclusion that Article 8 of the ECHR was being breached.

On the issue of requesting intelligence from foreign intelligence agencies, the ECtHR found that the regulatory provisions in the UK were formulated with sufficient clarity in the domestic law and in the relevant code of practice. As there was no evidence of any significant shortcomings in the application and operation of the regime, or evidence of any abuse, the ECtHR found no violation of Article 8 of the ECHR on this matter.

The specific complaint with regard to Article 10 of the ECHR by the Bureau of Investigative Journalism and the journalist Alice Ross, supported by third party interventions submitted by the National Union of Journalists, the International Federation of Journalists, the Media Lawyers' Association and the Helsinki Foundation for Human Rights, led to the finding that the bulk surveillance regimes in the UK did not provide sufficient protection for journalistic sources or confidential journalistic material. The ECtHR reiterated that the protection of journalistic sources is one of the cornerstones of freedom of the press, and that interference cannot be compatible with Article 10 of the ECHR unless it is justified by an overriding requirement in the public interest. Carrying out searches at a journalist's home and workplace with a view to uncovering his or her sources, even if unproductive, constitutes a more drastic measure than an order to divulge the source's identity, since investigators who raid a journalist's workplace have access to all the documentation held by the journalist. Therefore special consideration is to be given to the interception of communications that involve confidential journalistic material and confidential personal information. The ECtHR expressed particular concern about the absence of any published safeguards in the UK relating both to the circumstances in which confidential journalistic material could be selected intentionally for examination, and to the protection of confidentiality where it had been selected, either intentionally or otherwise, for examination. In view of the potential chilling effect that any perceived interference with the confidentiality of their communications and, in particular, their sources might have on the freedom of the press and, in the absence of any published arrangements limiting the intelligence services' ability to search and examine such material other than where "it was justified by an overriding requirement in the public interest", the ECtHR found the bulk interception regime in violation of Article 10 of the ECHR. With regard to the requests for data from communications service providers, yet again, the ECtHR did not find sufficient guarantees to protect journalists' sources: the relevant safeguards do not apply in every case where there is a request for a journalist's communications data, or where collateral intrusion is likely. In addition, there are no special provisions restricting access for the purpose of combatting "serious crime". As a consequence, the ECtHR also found a violation of journalists' rights under Article 10 of the ECHR in respect of the regime for data requests from communication service providers.

- [Big Brother Watch and Others v. the United Kingdom](#), nos. 58170/13 and 2 others, 13

September 2018.

Editor's note: This case was referred to the Grand Chamber on 4 February 2019.

IRIS 2018-10:1/1

European Court of Human Rights: *Annen (No. 2 and 5) v. Germany*

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Yet again, the European Court of Human Rights (ECtHR) has been requested to balance the right to reputation and the right to freedom of expression with regard to Internet content. The cases of *Annen v. Germany* are about a series of interferences with the right to freedom of expression of Klaus Günter Annen, a campaigner against abortion who also operates an anti-abortion website. While the other cases deal with distributing leaflets and campaigning in the immediate vicinity of medical practices and clinics where abortions are performed, two of the cases concern injunctions against Annen, as well as a judicial order to pay damages for the violation of the personality rights of doctors performing abortions who had been accused by Annen of “aggravated murder”. Annen’s website had also associated one of the medical doctors with the Third Reich, equating abortions with the crimes of the Third Reich and stigmatising the doctor as a murderer.

Annen lodged a complaint with the ECtHR, arguing that the injunctions and the order to pay damages had violated his freedom of expression as provided in Article 10 of the European Convention on Human Rights (ECHR). At the outset, the ECtHR considered that it was not in dispute that the injunction and the order to pay damages interfered with Annen’s right to freedom of expression, that the interferences were prescribed by German law (Articles 823 and 1004 of the Civil Code), and that they pursued the legitimate aim of protecting the rights of others. Therefore, it remained to be determined whether the interferences by the German judicial authorities were ‘necessary in a democratic society’. The ECtHR reiterated that when examining whether there is a need for an interference with freedom of expression in a democratic society in the interests of the “protection of the reputation or rights of others”, it may be required to ascertain whether the domestic authorities have struck a fair balance when protecting two values guaranteed by the ECHR which may come into conflict with one another in certain cases, namely on the one hand freedom of expression protected by Article 10, and on the other the right to respect for private life and the right to reputation enshrined in Article 8.

The ECtHR referred to the wording on Annen’s website and agreed with the findings by the domestic courts that the website contained the general statement that abortions, as performed by the named doctors, were acts of aggravated murder. According to the ECtHR, these accusations had no factual basis, as Article 218A of the Criminal Code exempts doctors from criminal liability and there is no domestic case law or other evidence in domestic law supporting Annen’s claim. The ECtHR also noted that these accusations were not only very serious, something reflected in the fact that a conviction for aggravated murder would carry a life sentence, but that they might also incite to hatred and aggression. The ECtHR, in *Annen No. 5*, further observed that the domestic courts additionally justified the injunction and the order to pay damages by Annen’s comparison of abortion with the Holocaust and the atrocities under the Nazi regime. It agreed with the findings of the domestic courts that Annen had equated the medical activities of the named doctor to the utterly unjustifiable atrocities inflicted on Jews under the Nazi regime. It reiterated that the impact an expression of opinion has on another person’s personality rights cannot be detached from the historical and social context in which the statement was made and that references to the Holocaust must be seen in the specific context of German history.

Lastly, the ECtHR observed that Annen had not been criminally prosecuted or convicted for slander and that he had not been prevented from campaigning against abortions in general.

Indeed, Annen had only been prohibited from describing abortions, as performed by the named doctors, as aggravated murder, and therefore from implying that they were committing that criminal offence. As far as damages were concerned, the ECtHR observed that the domestic courts had elaborated in detail why the violations of the doctor's personality rights had been particularly serious and why they had considered damages appropriate. On these grounds, the ECtHR concluded that the injunction and the order to pay damages were not disproportionate to the legitimate aim pursued, and that the reasons given by the domestic courts were relevant and sufficient. The interference with Annen's right to freedom of expression could therefore reasonably be regarded as necessary in a democratic society for the protection of the reputation and rights of the named doctors. Accordingly, in both judgments, the ECtHR found no violation of Article 10 of the ECHR.

- [Annen v. Germany \(no. 2\)](#), no. 3682/10, 20 September 2018.
- [Annen v. Germany \(no. 5\)](#), no. 70693/11, 20 September 2018.

IRIS 2018-10:1/2

European Court of Human Rights: *E.S. v. Austria*

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Over the last 25 years the European Court of Human Rights (ECtHR) has been regularly asked to decide whether specific interferences with certain forms of religion, or specifically worded insults directed at a religion or the spreading of religious enmity were protected under the right to freedom of expression established by Article 10 of the European Convention on Human Rights (ECHR) (see, inter alia, [Otto-Preminger Institut v. Austria](#), IRIS 1995-1/1; [Wingrove v. the United Kingdom](#), IRIS 1997-1/8; [I.A. v. Turkey](#), IRIS 2005-10/3; [Giniewski v. France](#), IRIS 2006-4/1; [Tatlav v. Turkey](#), IRIS 2006-7/2; [Klein v. Slovakia](#), IRIS 2007-1/1; [Fouad Belkacem v. Belgium](#), IRIS 2017-9/1; and [Mariya Alekhina and Others v. Russia](#) (Pussy Riot), IRIS 2018-8/2). In line with its earlier case law the ECtHR recently reiterated that expressions that seek to spread, incite or justify hatred on the basis of intolerance (including religious intolerance) do not enjoy the protection afforded by Article 10 of the ECHR. The ECtHR confirms that people with a religious conviction - irrespective of whether they belong to a religious majority or a minority - cannot expect to be exempt from criticism and must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, expressions that go beyond the limits of a critical denial of other people's religious beliefs and are likely to incite religious intolerance - for example in the event of an improper or even abusive attack on an object of religious veneration - may be legitimately considered as incompatible with respect for the freedom of thought, conscience and religion, as protected by Article 9 ECHR. In such situations the state can take proportionate restrictive measures. According to the ECtHR, there is a general requirement to ensure the peaceful enjoyment of the rights guaranteed under Article 9 of the ECHR by the holders of such beliefs - including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane.

In the case of *E.S. v. Austria* the ECtHR decided on whether a criminal conviction was necessary in respect of someone found guilty of disparaging religious doctrines in application of Article 188 of the Austrian Criminal Code. The applicant, E.S., held seminars entitled "Basic Information on Islam" at the right-wing Freedom Party Education Institute. At one such seminar, referring to the marriage that Muhammad concluded with Aisha, a six-year old, and consummated when she was aged nine, she stated, inter alia, that "Muhammad liked to do it with children". And she added: "What do you call that? Give me an example? What do we call it, if it is not paedophilia?" An undercover journalist who attended the seminar recorded these statements and requested that a preliminary investigation be opened against E.S. The Vienna Public Prosecutor brought charges against E.S., which eventually led to her criminal conviction for disparagement of religious precepts, pursuant to Article 188 of the Criminal Code. She was sentenced to pay a fine of EUR 480, or to serve 60 days' imprisonment in the event that she failed to pay the fine.

E.S. complained to the ECtHR that this conviction had violated her right to freedom of expression under Article 10 of the ECHR. She stressed that by stating that Muhammad had had sexual intercourse with a nine-year-old, she had cited a historically proven fact and questioned whether this could be regarded as paedophilia. Furthermore, through the impugned statements, she had expressed criticism concerning Islam, within the framework of an objective and lively discussion, which the domestic courts had failed to take into account. In essence,

E.S. argued that the impugned statements had formed part of a criticism of a religion, contributing to a public debate, without the aim of defaming the Prophet of Islam.

The ECtHR, however, was of the opinion that the Austrian courts had extensively explained why they considered that the statements uttered by E.S. had been capable of arousing justified indignation, as they had not been made in an objective manner aimed at contributing to a debate of public interest, but in a manner that could only be understood as being intended to demonstrate that Muhammad was not a worthy subject of worship. The domestic courts found that

(i) E.S. had subjectively labeled Muhammad as someone whose general sexual preference was that of paedophilia, and (ii) she had failed to neutrally inform her audience of the relevant historical background - consequently there could have been no serious debate on the issue. The ECtHR also referred to its findings in other cases where the impugned statements had not only offended or shocked, or had expressed a “provocative” opinion, but had amounted to an abusive attack on a religious group. In such cases a criminal conviction was considered necessary in order to protect the freedom of religion of others. Indeed, owing to their positive obligations under Article 9 of the ECHR, member states’ authorities are to enable the peaceful co-existence of religious and non-religious groups and individuals under their jurisdiction by ensuring an atmosphere of mutual tolerance. The ECtHR agrees with the Austrian courts’ approach - that is to say, that presenting objects of religious worship in a provocative way capable of hurting the feelings of the followers of that religion could be conceived as a malicious violation of the spirit of tolerance, which is one of the bases of a democratic society. Furthermore, the fine imposed was at the lower end of the statutory range of punishments, and could therefore not be considered as constituting a disproportionately severe sanction. In conclusion, the ECtHR found that the Austrian courts had comprehensively assessed the wider context of E.S.’s statements, and carefully balanced her right to freedom of expression with the rights of others to have their religious feelings protected and the need to have religious peace preserved in Austrian society. By considering the impugned statements as going beyond the permissible limits and containing elements of incitement to religious intolerance, the Austrian courts put forward relevant and sufficient justification for the interference with E.S.’s rights under Article 10 ECHR. Hence the interference corresponded to a pressing social need and was proportionate to the legitimate aim pursued, and the domestic courts did not overstep their wide margin of appreciation when convicting E.S. of disparaging religious doctrines. Accordingly, the ECtHR finds that there has been no violation of Article 10 of the ECHR.

- [E.S. v. Austria](#), no. 38450/12, 25 October 2018.

IRIS 2019-1:1/1

European Court of Human Rights: Annen (No. 6) v. Germany

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In a new judgment with regard to Internet content, the European Court of Human Rights (ECtHR) found that a criminal conviction for insult was a justified interference with the right to freedom of expression as guaranteed under Article 10 of the European Convention on Human Rights (ECHR). The case of *Annen (No. 6) v. Germany* concerns a conviction for posting a press release on the Internet and distributing leaflets with insulting statements about a German professor at the University of Bonn, professor B., who was conducting embryonic stem cell research. Annen is a campaigner against abortion and operates an anti-abortion website. In line with the criticism of a catholic Bishop, Annen referred to the similarity between the team of scientists around professor B. carrying out stem cell research and the Nazis who had performed experiments on humans. The text mentioned that professor B. 'uses embryos - people - that were murdered in Israel and then sold to Germany for significant sums of money for research purposes at the University of Bonn. During Nazi times, German scientists performed research experiments on Jews and then murdered them'. Annen's press release also expressed the opinion that the professors of Bonn University 'appear to have forgotten that these experiments were performed in Nazi times by willing doctors and scientists. These doctors and scientists, who were clearly in bondage to the rogue State and subservient to it, also carried out their research solely 'for the good of the people'. The research performed during the Nazi regime took place at a later stage of human life. The present-day research takes place at an earlier stage of human life.'

Annen was convicted of insult and sentenced to a penalty of thirty daily fines of EUR 15 each. This sentence was imposed by a district court and later confirmed by the regional court. The German courts acknowledged Annen's right to freedom of expression and to impart to others his beliefs that the fusion of an egg and a sperm represented the beginning of human life and that research using imported stem cells from terminated embryos involved the destruction of human life. They also acknowledged that his statements contributed to a debate of public interest. The courts however found that referring to professor B. by name and to the criminal and dehumanising medical experiments under the Nazi-regime had been equivalent to linking his professional conduct to the atrocities committed by the Nazis, which represented a serious infringement of his personality. After exhausting all national remedies in Germany, Annen complained to the ECtHR that his criminal conviction for insult had violated his right to freedom of expression as provided in Article 10 ECHR.

At the outset, the ECtHR observed that the criminal conviction interfered with Annen's right to freedom of expression, that it was prescribed by law - namely Article 185 of the Criminal Code - and that it pursued the legitimate aim of protecting the reputation or rights of others. It therefore remained to be determined whether the interferences were 'necessary in a democratic society'. It further reiterated that the right to protection of reputation is guaranteed by Article 8 ECHR as part of the right to respect for private life, and that in order for Article 8 ECHR to come into play, an attack on a person's reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life. The ECtHR also repeated that it had to ascertain whether the domestic authorities had struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely on the one hand freedom of expression protected by Article 10 ECHR, and on the other the right to respect for private life enshrined in Article 8 ECHR. It also

emphasised that a clear distinction had to be made between criticism and insult: 'If the sole intent of a particular form of expression is to insult a person, an appropriate sanction would not, in principle, constitute a violation of Article 10 ECHR'. The ECtHR referred in particular to some statements in Annen's press release expressing a comparison between modern-day stem cell research and experiments carried out on humans during the Nazi regime, with a reference to Auschwitz. Given these statements, the ECtHR saw no reason to call into question the domestic courts' conclusion that Annen did indeed directly link the work of the scientists - and in particular of professor B. - to the atrocities committed during Nazi times. Even if, as in the instant case, regarded as value judgment, such serious and particularly offensive comparisons demand a particularly solid factual basis. While the ECtHR accepted that the moral responsibility of scientists was the issue discussed, this alone did not provide a solid factual basis for personally targeting professor B.'s scientific work. The ECtHR found the comparison with the Nazi atrocities not only shocking and disturbing, but also transgressing the limits of any acceptable criticism. It found that even though the intention behind Annen's press release was not mainly to defame the scientists, by naming professor B. it still had a stigmatising and defaming effect. Furthermore, in the German historical context, the attack on professor B.'s reputation was serious. Notwithstanding the fact that Annen's statements sought to contribute to a public debate and that professor B. had entered the public stage to a certain degree, the ECtHR concluded that the German courts had provided relevant and sufficient reasons for the criminal conviction of Annen. It found that the decisions by the domestic courts were based on a reasonable assessment of the statements in question, the rights of professor B. and of the circumstances of the present case. Lastly, the ECtHR observed that the sanction was criminal in nature, which is - in view of the existence of other means of intervention and rebuttal, particularly through civil remedies - one of the most serious forms of interference with the right to freedom of expression. The ECtHR recalled that criminal sanctions for insult or defamation must not be such as to dissuade the press or others who engage in public debate from taking part in the discussion of matters of legitimate public concern. The ECtHR noted however that Annen was sentenced (only) to a penalty of 30 daily fines of EUR 15 each and thereby to a sentence at the lower end of the possible criminal sanctions for insult. The ECtHR found this penalty moderate, having regard to the seriousness of the violations of professor B.'s personality rights and the nature of the personalised attacks, when seen in the historical context. Therefore, there had been no violation of Article 10 ECHR.

- [Annen v. Germany \(no. 6\)](#), no. 3779/11, 18 October 2018.

IRIS 2019-1:1/2

European Court of Human Rights: Magyar Jeti Zrt v. Hungary

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On 4 December 2018 the European Court of Human Rights (ECtHR) issued, unanimously, another landmark judgment on freedom of expression in the digital world (see also [Ed.: [Delfi](#)] IRIS 2015-7/1, [Ed.: [Cengiz & others](#)] IRIS 2016-2/1, [Ed.: [MTE & Index](#)] IRIS 2016-3/2, [Ed.: [M.L. & W.W.](#)] IRIS 2018-8/1 IRIS 2018-10/1). In the case of Magyar Jeti Zrt v. Hungary the ECtHR made clear that automatically holding media companies liable for defamatory content hyperlinked in their reports violates the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). In its judgment the ECtHR emphasised that the very purpose of hyperlinks was to allow Internet users to navigate to and from online material and to contribute to the smooth operation of the Internet by rendering different pieces of information accessible by linking them to each other. Accordingly, the ECtHR cannot accept the strict or objective liability of media platforms that embed, in their editorial content, a hyperlink to defamatory or other illegal content. The ECtHR found that such an objective liability “may have foreseeable negative consequences on the flow of information on the Internet, impelling article authors and publishers to refrain altogether from hyperlinking to material over whose changeable content they have no control. This may have, directly or indirectly, a chilling effect on freedom of expression on the Internet”. The ECtHR did, however, not exclude the possibility that, “in certain particular constellations of elements”, the posting of a hyperlink could potentially engage the question of liability - for instance, where a journalist does not act in good faith and in accordance with the ethics of journalism and with the diligence expected in responsible journalism.

In September 2013 the Hungarian media platform 444.hu, which is operated by the company Magyar Jeti Zrt, published an article about an incident in which a group of apparently drunk football supporters had made racist remarks in front of an elementary school in Konyár, whose pupils are predominately of Roma origin. In an interview later that day, the head of a local Roma organisation asserted that the football supporters were associate with Jobbik, a right-wing political party in Hungary which has been criticised in the past for its anti-Roma and anti- Semitic stance. The interview was uploaded to YouTube.com by another media outlet. The article on 444.hu included a hyperlink to that interview on YouTube. Jobbik brought proceedings against eight defendants, including the Roma community leader, Magyar Jeti Zrt and other media outlets who had provided links to the impugned video. Jobbik argued that by using the term “Jobbik” to describe the football supporters and by publishing a hyperlink to the YouTube video, the defendants had infringed its right to reputation. The Hungarian courts upheld the plaintiff’s claim, finding that the statements in the video had indeed falsely conveyed the impression that Jobbik had been involved in the incident in Konyár. Magyar Jeti Zrt was considered “objectively liable” for disseminating defamatory statements, having infringed the political party’s right to reputation, and was ordered by the court to publish excerpts of the judgment on the 444.hu website and to remove the hyperlink to the YouTube video from the online article. This finding was finally confirmed by a judgment issued by the Hungarian Constitutional Court on 19 December 2017.

Magyar Jeti Zrt complained under Article 10 ECHR that the Hungarian courts had unduly restricted its freedom of expression by finding it liable for the posting of a hyperlink leading to defamatory content. The application lodged with the ECtHR was supported by an impressive group of third-party interveners, including the European Publishers’ Council, the Newspaper Association of

America, Index on Censorship, Article 19 and European Digital Rights. After referring to the general principles related to interferences with the right freedom of expression that are upheld by the Court's case law, the ECtHR scrutinised the question of whether or not the interference at issue had been necessary in a democratic society. The ECtHR explicitly referred to the importance of online freedom of expression and to the important role of the Internet in enhancing the public's access to news and in facilitating the dissemination of information in general, without neglecting "the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life", which includes the right to reputation. The ECtHR is of the opinion that hyperlinks, as a technique of reporting, are essentially different from traditional acts of publication. Indeed, hyperlinks merely direct users to content available elsewhere on the Internet: they do not present the linked statements to the audience or communicate its content, but only serve to call readers' attention to the existence of material on another website. Another distinguishing feature of hyperlinks, compared to acts involving the dissemination of information, is that a person referring to information through a hyperlink does not exercise control over the content of the website to which a hyperlink enables access, and which might be changed after the creation of the link. Additionally, the content behind the hyperlink has already been made available by the initial publisher on the website to which it leads, providing unrestricted access to the public. Given the particularities of hyperlinks, the ECtHR cannot agree with the approach of the Hungarian courts, which consists of equating the mere posting of a hyperlink with the dissemination of the defamatory information, thus automatically giving rise to liability in respect of the content itself. The ECtHR considers that the issue of whether the posting of a hyperlink may give rise to such liability requires an individual assessment in each case, regard being had to a number of elements.

The ECtHR identified the following questions as relevant to an analysis of the liability of the publisher of a hyperlink: (i) Did the journalist endorse the impugned content? (ii) Did the journalist republish the impugned content (without endorsing it)? (iii) Did the journalist merely put a hyperlink to the impugned content (without endorsing or repeating it)? (iv) Did the journalist know (or could he or she have reasonably known) that the impugned content was defamatory or otherwise unlawful? (v) Did the journalist act in good faith, respect the ethics of journalism and undertake the due diligence expected in the practice of responsible journalism?

After assessing these aspects, the ECtHR considers that 444.hu has embedded a hyperlink without repeating or endorsing the content of the interview on YouTube. 444.hu could reasonably assume that the contents, to which it provided access, although perhaps controversial, would remain within the realm of permissible criticism of political parties and, as such, would not be unlawful. Although the statements in the interview on YouTube were ultimately found to be defamatory, the ECtHR is satisfied that such utterances could not be seen as clearly unlawful from the outset. Finally the ECtHR criticised the relevant Hungarian law, as interpreted by the competent domestic courts, excluding any meaningful assessment of the Magyar Jet Zrt's freedom of expression rights under Article 10 ECHR, precisely in a situation where restrictions would have required the utmost scrutiny, given the debate on a matter of general interest. Indeed, the Hungarian courts held that the hyperlinking amounted to dissemination of information and allocated objective liability - a course of action that effectively precluded any balancing between the competing rights, that is to say, the right to reputation of the political party and the right to freedom of expression of Magyar Jeti Zrt. According to the ECtHR such objective liability for hyperlinks could have, directly or indirectly, a chilling effect on freedom of expression on the Internet. For these reasons, the ECtHR found that the Hungarian courts' imposition of objective

liability on Magyar Jeti Zrt had not been based on relevant and sufficient grounds. Therefore, the measure had constituted a disproportionate restriction on its right to freedom of expression, thus violating Article 10 of the ECHR.

- [Magyar Jeti Zrt v. Hungary](#), no. 11257/16, 4 December 2018.

IRIS 2019-2:1/1

European Court of Human Rights: Khadija Ismayilova v. Azerbaijan

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A recent judgment delivered by the European Court of Human Rights (ECtHR) reveals how powerful persons and their entourage sometimes use clearly illegal and immoral techniques to intimidate investigative journalists in order to make them stop critically reporting on their actions, policy or corruptive activities. The judgment in the case of Khadija Ismayilova v. Azerbaijan once more illustrates the practice of harassment and intimidation, and the blatant lack of respect for the rights of journalists to critically report on the government or the president in Azerbaijan (see [Ed.: [Fatullayev](#)] IRIS 2010-8/2, [Ed.: [Uzeyir Jafarov](#)] IRIS 2015-3/1 and [Ed.: [Huseynova](#)] IRIS 2017-7/1). The case mainly concerns a smear campaign against a well-known journalist who is reporting on corruption and human rights violations in her country. Khadija Rovshan qizi Ismayilova worked as a staff reporter and director at the Azerbaijani service of Radio Free Europe/Radio Liberty Azadliq Radio, whose broadcasts were often critical of the government. In addition, she trained journalists in investigation techniques and cross-border reporting, and she has received a number of international awards for her journalistic activity. After publishing a series of articles on government corruption involving the president of Azerbaijan and his family, she began receiving threats and was subject to acts of intimidation and gross violations of her privacy, all designed to prevent her from pursuing her journalistic work. In particular, she was sent a letter threatening her with public humiliation if she did not stop her investigative reporting. When she refused, a video recorded with a hidden camera featuring scenes of a sexual nature involving her and her then boyfriend was posted on the Internet. Around the same time, newspapers ran stories accusing her of anti-government bias, immoral behaviour and being involved in “sex scandals”. A short time later, Ismayilova discovered several hidden cameras in her flat. She reported the threats and the intrusion into her privacy to the authorities, complaining that she felt intimidated in connection with her journalistic activity, and asking the prosecution authorities to ensure her safety, to investigate the matter, and to hold those responsible for the threat and the video accountable. About a month later, Ismayilova published a press release in which she criticised the authorities for failing to conduct an adequate investigation, and she lodged a complaint against the officials of the Baku City Prosecutor’s Office. Instead of effectively investigating the threats and the gross violation of her privacy, the authorities published a status report, referring to a number of investigative steps which had been taken. The report also criticised Ismayilova for spreading false information and it disclosed more private information not only about her, but also about some of her friends and family. Having received no effective redress from the Azerbaijani authorities, and after exhausting all relevant national judicial remedies, in September 2013, Ismayilova petitioned the ECtHR.

The ECtHR was in no doubt that the covert filming of highly intimate aspects of Ismayilova’s life in her own home clearly concerned a matter of “private life”, a concept that covers the physical and moral integrity of a person, as well as his or her sexual life. But the ECtHR found no sufficient evidence “beyond reasonable doubt” that the state itself was responsible for the very serious invasion of Ismayilova’s privacy. Her arguments were based on circumstantial evidence or on assertions requiring corroboration and further investigation. According to the ECtHR, the question of whether state agents had abused their official power remains an open one, although it emphasised its concerns as regards the answer to that question, referring to Ismayilova’s credible allegations and the contextual information provided by reports from various international and regional human rights organisations, including the Council of Europe, the OSCE and the United

Nations, who had repeatedly called upon the Azerbaijani authorities to improve respect for the rights of journalists who report on human rights violations or critically report on the government.

The ECtHR specifically focused on the authorities' positive obligation under Article 8 of the European Convention of Human Rights (ECHR) to secure respect for private life, and it found that there had been significant flaws and delays in the manner in which the authorities had investigated the case. By failing to conduct an effective criminal investigation, the Azerbaijani authorities had not fulfilled their duty to adequately protect Ismayilova against such a serious, flagrant and extraordinarily intense invasion of her private life. The ECtHR also found that Article 8 ECHR had been violated through the public disclosure of confidential and personal information in the status report published by the authorities. By not effectively investigating the flagrant invasion of her privacy and by acting carelessly in further compounding the already existing breach of Ismayilova's privacy, the Azerbaijani authorities had clearly interfered with her right to private life in an unjustified manner.

In connection with the incidents involving the threatening letter, the unauthorised installation of wires and hidden cameras in her flat, the dissemination of the covertly filmed videos on the Internet, the publication of newspaper articles about her in pro-government newspapers, the ineffectiveness of the investigation and the lack of remedies against the inaction of the prosecuting authorities, as well as the publication of the status report by the investigating authorities, Ismayilova also complained that the Azerbaijani State authorities had breached their obligations under Article 10 ECHR, which guaranteed the right to freedom of expression. The ECtHR reiterated that it had repeatedly stressed that interference with freedom of expression may have a "chilling effect" on the exercise of that freedom and even more so in cases of serious crimes committed against journalists, making it of utmost importance for the authorities to check a possible connection between the crime and the journalist's professional activity. Therefore, the ECtHR examined the entirety of Ismayilova's complaint from the standpoint of the positive obligations of the Azerbaijani State under Article 10 ECHR. Referring to its findings under Article 8 ECHR and emphasising that the acts of a criminal nature committed against Ismayilova were apparently linked to her journalistic activity, the ECtHR was of the opinion that the authorities had failed to comply with their positive obligation to protect her in the exercise of her freedom of expression. The ECtHR referred to the significant flaws and delays in the criminal investigation, the articles published in the newspapers, and the unjustified public disclosure in the status report on the criminal investigation. In the context of many other reported violations of journalists' rights in Azerbaijan, the ECtHR unanimously came to the conclusion that the authorities had acted "contrary to the spirit of an environment protective of journalism", and that, accordingly, there had been a violation of Article 10 ECHR. The Azerbaijani Government was ordered to pay the journalist EUR 15 000 in respect of non-pecuniary damage and EUR 1 750 for the costs and expenses of the proceedings before the ECtHR.

- [Khadija Ismayilova v. Azerbaijan](#), nos. 65286/13 and 57270/14, 10 January 2019.

IRIS 2019-3:1/1

European Court of Human Rights: *Catt v. the United Kingdom*

Dirk Voorhoof

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The European Court of Human Rights (ECtHR) has delivered a judgment on the compatibility of the right to privacy under Article 8 of the European Convention on Human Rights (ECHR) with the collection, retention and further use of personal data for purposes of police intelligence, while two earlier cases reported in IRIS on the bulk interception of personal communications for intelligence purposes and the right to privacy are pending before the Grand Chamber of the European Court of Human Rights (ECtHR) ([Centrum för Rättvisa v. Sweden](#), IRIS 2018-8/3, and [Big Brother Watch and Others v. the United Kingdom](#), IRIS 2018- 10/1).

The applicant in *Catt v. the United Kingdom* has been active in the peace movement for many years and has regularly attended public demonstrations. He participated in demonstrations and meetings organised by labour unions, in a pro- Gaza protest and in several (violent) demonstrations against a United States- owned company which produces weapons in the United Kingdom. Mr Catt was arrested twice at such demonstrations for obstructing the public highway, but he has never been convicted of any offence. In 2010, he made a subject access request to the police under the Data Protection Act for information relating to him. Sixty-six entries from nominal records for other individuals and information reports concerning incidents at demonstrations which incidentally mentioned him were disclosed to him. Those records were held in a police database known as the “Extremism database”. Mr Catt requested the Association of Chief Police Officers (“ACPO”) to delete all entries from nominal records and information reports which mentioned him. As his request was dismissed, he issued proceedings against the ACPO for judicial review, contending that the retention of his data was not “necessary” within the meaning of Article 8, section 2 ECHR. The Supreme Court finally upheld the refusal to delete the data, identifying three reasons for the need to retain the data at issue: (1) to enable the police to make a more informed assessment of the risks and threats to public order; (2) to investigate criminal offences where there have been any, and to identify potential witnesses and victims; (3) to study the leadership, organisation, tactics and methods of protest groups which have been persistently associated with violence. The majority of the Supreme Court was of the view that sufficient safeguards existed to ensure that personal information was not retained for longer than required for the purpose of maintaining public order and preventing or detecting crime. It observed that political protest is a basic right recognised by the common law and protected by Articles 10 and 11 ECHR, but that the collection and retention of the data concerning Mr Catt was justified and proportionate, as the material was not usable or disclosable for any purpose other than police purposes, except as a result of an access request by the subject under the Data Protection Act, and it was not used for political purposes or for any kind of victimisation of dissidents. The Supreme Court also underlined a basic principle about intelligence gathering: that it is necessarily acquired indiscriminately in the first instance and that its value can only be judged in hindsight, as subsequent analysis for particular purposes discloses a relevant pattern.

Mr Catt lodged an application with the ECtHR, complaining that the retention of his data by the police was in violation of his right to privacy as protected by Article 8 ECHR. The ECtHR expressed its concern that the collection of data by the police relating to persons involved in “domestic extremism” did not have a clearer and more coherent legal base. It observed that in light of the general nature of police powers and the variety of definitions for the term “domestic extremism”, there was significant ambiguity over the criteria being used by the police to govern the collection

of the data in question. After this consideration, the ECtHR focused on the question of whether the collection, retention and use of Mr Catt's personal data was necessary in a democratic society. The government argued that due to the extensive amount of judicial scrutiny at domestic level, the question of whether it was necessary to collect and retain Mr Catt's data fell within the state's margin of appreciation and it was therefore not for the ECtHR to decide. However, the ECtHR was of the opinion that in this case there were "compelling reasons" to substitute its own assessment of the merits of the case for that of the competent national authorities. In the first place, the ECtHR considered it significant that personal data revealing a political opinion fell within the special categories of sensitive data attracting a heightened level of protection. The ECtHR also reiterated the importance of examining compliance with the principles of Article 8 ECHR where the powers vested in the state are obscure, creating a risk of arbitrariness, especially where the technology available is continually becoming more sophisticated. As to whether there was a pressing need to collect the personal data concerning Mr Catt, the ECtHR accepted that there was: it agreed with the UK Supreme Court that the nature of intelligence gathering was such that the police first needed to collect the data before evaluating its value. Although Mr Catt himself was not suspected of being directly involved in any criminal activities, it was justifiable for the police to collect his personal data, as he had participated repeatedly and publicly aligned himself with the activities of a violent protest group. As to whether there was a pressing need to retain Mr Catt's data, the ECtHR considered that there was not. It referred to the absence of effective safeguards relating to personal data revealing political opinions. The ECtHR emphasised that "engaging in peaceful protest has specific protection under Article 11 of the Convention, which also contains special protection for trade unions, whose events the applicant attended". In this connection, it noted that the definition of "domestic extremism" referred to the collection of data on groups and individuals who act "outside the democratic process". Therefore, the police did not appear to have respected their own definition (fluid as it may have been) in retaining data on Mr Catt's association with peaceful, political events, while such events are "a vital part of the democratic process". Referring to the danger of an ambiguous approach to the scope of data collection in the present case, the ECtHR considered that the decisions to retain Mr Catt's personal data did not take into account the heightened level of protection it attracted as data revealing a political opinion, and that under the circumstances, its retention must have had a "chilling effect". Furthermore, the retention of Mr Catt's data, in particular the data concerning peaceful protest, has neither been shown to be absolutely necessary, nor for the purposes of a particular inquiry. Finally, the ECtHR was not convinced that the deletion of the data would be as burdensome as the government had contended. According to the ECtHR, it would be entirely contrary to the need to protect private life under Article 8 if the authorities could create a database in such a manner that the data in it could not be easily reviewed or edited, and then use this development as a justification to refuse to remove information from that database. On the basis of the foregoing considerations, the ECtHR unanimously concluded that there had been a violation of Article 8 ECHR.

- [Catt v. the United Kingdom](#), no. 43514/15, 24 January 2019.

IRIS 2019-4:1/1

European Court of Human Rights: *Høiness v. Norway*

Dirk Voorhoof Human Rights Centre, Ghent University and Legal Human Academy

The European Court of Human Rights (ECtHR) has delivered a new judgment with regard to the liability of an Internet portal for offensive content allegedly tarnishing one's reputation (see also [Delfi v. Estonia](#) (Grand Chamber), IRIS 2015- 7/1; [Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary](#), Iris 2016-3/2 and [Pihl v. Sweden](#), Iris 2017-5/3). The ECtHR agreed with the findings by the Norwegian courts that although some anonymous comments were inappropriate and tasteless, the expeditious removal of the offensive comments upon actual knowledge by the media company and the editor exempted the Internet portal from liability. Therefore, the dismissal by the Norwegian courts of the applicant's complaint against the Internet portal for alleged violation of her right to privacy and reputation was not in breach of Article 8 of the European Convention on Human Rights (ECHR).

The applicant in this case, Ms Mona Høiness, is a well-known lawyer in Norway who was formerly a talk show host and active participant in public debate. The Internet portal Hegnar Online published articles concerning her role and relationship with a wealthy, elderly widow from whom she had inherited. The inheritance case was covered extensively by some media, and the Hegnar Online website featured a forum - at a separate web address, but to which access was given via the online newspaper - where readers could start debates and submit comments. There was no editorial content in the forum: all content was user- generated, and it was possible for users to comment anonymously, without the requirement to register. After a few readers had posted some vulgar and sleazy comments about Ms Høiness, she initiated civil proceedings against the Hegnar Media AS company and Mr H., an editor working for Hegnar Online. Ms Høiness complained that her honour had been infringed, particularly because of sexual harassment in three comments on the Hegnar Online's forum. The defendants argued that they had not been aware of the comments and that the offensive comments had been removed as soon as they had become aware of them. It was recognised by the Norwegian High Court that each of the three comments were 'inappropriate, unserious and tasteless', but that was, in itself, not sufficient. Ms Høiness' claim for compensation could only succeed if 'sufficient culpability' could be demonstrated by Hegnar Online and Mr H. for not having done enough to discover and thereafter remove the impugned comments. As two comments had been rapidly removed after the notification by Ms Høiness, and one comment had been deleted on the portal staff's own motion, there was no reason to consider Hegnar Online liable in this case. Furthermore, the Norwegian courts awarded the defendants for their litigation costs, to be paid by Ms Høiness for a total of approximately EUR 45 000.

Before the ECtHR, Ms Høiness complained that the Norwegian authorities, by not sufficiently protecting her right to respect for her private life and requiring her to pay the defendants' litigation costs, had acted contrary to Article 8 of the European Convention on Human Rights (ECHR). The ECtHR observed that what was at issue in the present case was not an act by the state, but the alleged inadequacy of the protection afforded by the domestic courts to Ms Høiness' private life. While the essential object of Article 8 ECHR was to protect the individual against arbitrary interference by public authorities, it did not merely compel the state to abstain from such interference: in addition to this negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may also involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. The ECtHR reiterated that in order for Article 8 ECHR to come into play, however, the attack on personal honour and reputation must attain a certain level of seriousness and must have been carried out in a manner causing prejudice to personal

enjoyment of the right to respect for private life, while the rights guaranteed under Articles 8 and 10 ECHR deserved equal respect. Thus, the question was whether the state had struck a fair balance between Ms Høiness' right to respect for her private life under Article

8 ECHR and the online news agency and forum host's right to freedom of expression guaranteed by Article 10 ECHR. In this regard, the ECtHR first and foremost emphasised that the impugned comments had not amounted to hate speech or incitement to violence. In balancing the conflicting rights at issue, the ECtHR referred to the specific aspects of freedom of expression as being relevant for the concrete assessment of the interference in question: the context of the comments, the measures applied by the company in order to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the intermediary's liability, and the consequences of the domestic proceedings for the company.

The ECtHR agreed that Ms Høiness would have faced considerable obstacles in attempting to pursue claims against the individuals behind the anonymous comments, while it also took account of the fact that Hegnar Online was a large, commercially run news portal and that the debate forums were popular. It did not appear, however, that the debate forum was particularly integrated in the presentation of news and thus could be taken to be a continuation of the editorial articles. Most importantly, the ECtHR referred to the measures adopted by Hegnar Online: it had an established system of moderators who monitored content, and readers could click on 'warning' buttons in order to notify their reaction to comments. In the present case, the news portal company and its editor had acted appropriately by rapidly removing the offensive comments upon notification. The ECtHR saw no reason to substitute a different view for that of the domestic courts, and it found that the Norwegian courts had acted within their margin of appreciation when seeking to establish a balance between Ms Høiness' rights under Article 8 ECHR and the news portal and host of the debate forum's opposing right to freedom of expression under Article 10 ECHR.

The ECtHR finally noted that a considerable amount of litigation costs had been imposed on Ms Høiness, but it agreed with the Norwegian courts that there had been no reason to deviate from the starting point which had established that the winning party be awarded compensation for their fees and expenses. Taking account of the nature of the claim lodged before the national courts, the subject matter and the 'welfare and relative strength' of the applicant, the ECtHR did not consider that it could call into question the domestic courts' assessment as to the imposition of costs. Unanimously, the ECtHR held that there had been no violation of Article 8 ECHR.

- [Høiness v. Norway](#), no. 43624/14, 19 March 2019.

IRIS 2019-5:1/2

European Court of Human Rights: Richard Williamson v. Germany

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The European Court of Human Rights (ECtHR) delivered a decision in a case of Holocaust denial expressed in an interview broadcast on Swedish television, published on YouTube and reported in German media. The ECtHR found that the statements in the interview at issue were not protected by the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The applicant is Mr Richard Williamson, a British national and former member of the Society of Saint Pius X, opposing the ecclesiastical reforms of the Second Vatican Council. He was excommunicated under the Code of Canon Law, but in 2009 the Congregation for Bishops decided to lift the excommunication, a decision that attracted significant media coverage. In an interview with the Swedish television channel SVT-1 - recorded in Germany -, Williamson made some statements about the Holocaust, denying the existence of gas chambers and stating that about two to three hundred thousand Jews perished in Nazi concentration camps. He also said that the Germans had a guilt complex about the gas chambers and the killing of six million Jews. The broadcast with the interview was soon also available on the video website of SVT-1 and on the video-sharing Internet site YouTube. The German weekly magazine Der Spiegel published an article in which Williamson's statements about the gas chambers during the Nazi regime were quoted verbatim. Subsequently, a variety of major German newspapers, television, and radio stations reported on Williamson's statements.

Williamson applied for a preliminary injunction from the German civil courts, for an order for the removal of the recording of the interview from the Internet, but this request was rejected by the Nuremberg-Fürth Regional Court, mainly finding that the dissemination of his statements, including via the Internet, had been covered by Williamson's general consent to the interview. In 2012 the Regensburg District Court, at the public prosecutor's request, issued a penal order against Williamson, finding him guilty of incitement to hatred under Article 130 § 3 of the Criminal Code. This conviction was upheld by the Regensburg Regional Court in 2013, confirming that Williamson's statements in the interview had been capable of disturbing the public peace in Germany and constituted a criminal act. Williamson was sentenced to 90 day-fines of EUR 20 each. After the Nuremberg Court of Appeal rejected his appeal and the Federal Constitutional Court in 2017 declined his constitutional complaint, Williamson lodged an application before the ECtHR, complaining under Article 10 ECHR that his criminal conviction of incitement to hatred had breached his right to freedom of expression. In particular, he argued that German law was not applicable to the statement at issue as the offence had not been committed in Germany: criminal liability for the offence of incitement to hatred could only be triggered once his statement became "public"; that is, once it had been broadcast in Sweden - where that statement was not subject to criminal liability - and when it was uploaded on the Internet. Williamson also argued that he had never intended that his statement be broadcast in Germany and that he had tried everything in his power to prevent its broadcast there.

The ECtHR observes that Williamson in essence argues that the German courts wrongfully applied domestic law and that the exercise of his right to freedom of expression, which had been lawful in one member State, had been restricted by another member State where it was not lawful. The ECtHR however is of the opinion that Williamson agreed to provide the interview in Germany, while knowing that the statements he made were subject to criminal liability in Germany, and that he did not make a statement during the interview to insist that it not be broadcast in

Germany. All he had done was to tell the interviewer to “be careful” as the statements were subject to criminal liability in Germany. The ECtHR accepts the findings by the German courts that the offence was committed in Germany, because the key feature of the offence, the interview, was carried out there and that his statements had been made “publicly” also with respect to Germany. The ECtHR is also satisfied that Williamson’s conviction was prescribed by law, and that it pursued the legitimate aim of preventing a disturbance of the public peace in Germany and thus the prevention of disorder and crime.

On the question of whether the interference with Williamson’s right to freedom of expression was necessary in a democratic society, the ECtHR refers to its Grand Chamber judgment in the case of [Perinçek v. Switzerland](#) (see IRIS 2016-1/1). In this decision, it confirms the findings by the German courts that Williamson explicitly denied the existence of gas chambers and the killing of Jews in those gas chambers under the Nazi regime and explicitly stated that not more than two or three hundred thousand Jews had perished in Nazi concentration camps. Williamson thus had downplayed acts of genocide. The ECtHR concludes that Williamson sought to use his right to freedom of expression with the aim of promoting ideas contrary to the text and spirit of the Convention and this circumstance weighs heavily in the assessment of the necessity of the interference. Referring to the findings by the German courts that Williamson had acted with intent, and with the awareness that his statements were subject to criminal liability in Germany, the ECtHR sees no reason to depart from that assessment and reiterates that it has always been sensitive to the national historical context when reviewing whether there exists a pressing social need for interference with rights under the ECHR. It reiterates that, in the light of their historical role and experience, States which have experienced the Nazi horrors may be regarded as having a special moral responsibility to distance themselves from the mass atrocities perpetrated by the Nazis.

The ECtHR finally observes that the sentence of 90 day-fines of EUR 20 each was very lenient and that the domestic authorities have justified the interference with Williamson’s right to freedom of expression with relevant and sufficient reasons, not overstepping their margin of appreciation. As the interference at issue was proportionate to the legitimate aim pursued and was “necessary in a democratic society”, Williamson’s complaint is declared manifestly ill-founded and therefore inadmissible in accordance with Article 35 § 4 ECHR.

- [Richard Williamson v. Germany](#) (dec.), no. 64496/17, 31 January 2019.

IRIS 2019-6:1/1

European Court of Human Rights: Rebechenko v. Russia

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The European Court of Human Rights (ECtHR) delivered an interesting judgment on the freedom of expression of a blogger (see also [Egill Einarsson v. Iceland \(No. 2\)](#), IRIS 2018-9/2 and [Savva Terentyev v. Russia](#), IRIS 2018-9/3). The ECtHR values the statements of the blogger as those of a “public watchdog” and finds that his conviction for defamation violated Article 10 of the European Convention on Human Rights (ECHR).

In 2015 Mr Maksim Sergeyeovich Rebechenko published on YouTube a video with the title “Kolkhoz TV on Ukrainian crisis”. In the video he made a series of critical comments about a speech by Ms F, the head of the Ust-Labinsky District and of the non-governmental organisation Human Rights Defender. In that speech on television Ms F had commented on the situation in the eastern region of Ukraine and relations between Russia and Ukraine. On the basis of Article 152 of the Russian Civil Code Ms F brought an action against Rebechenko, stating that he had offended her and had harmed her reputation. The Russian courts found that Rebechenko in an abusive and obscene language had disseminated untrue statements about Ms F which damaged her honour, dignity and reputation. The courts found that Ms F has sustained damage of a non-pecuniary nature due to emotional distress caused by the defamatory and discrediting statements and allusions to her unethical conduct. In accordance with the principle of reasonableness, taking into account the seriousness of the wrongful acts, the nature of the offence, and the contents of the publication, the degree of suffering involved, and that the information concerned a public activist and was available for the general public, Ms F was awarded 50,000 roubles (about 714 EUR) for non-pecuniary damages. Rebechenko was also ordered to delete the video from the Internet and to publish a retraction. After exhaustion of all national remedies, Rebechenko lodged an application before the ECtHR, complaining about a violation of his right to impart information under Article 10 ECHR.

The ECtHR first reiterates that freedom of expression has paramount importance as an essential foundation of a democratic society and a basic condition for its progress and the development of every person. It also confirms that this right applies not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock, or disturb the State or any sector of the population. The ECtHR refers to its practice recognising the essential role played by the press in a democratic society, while it has previously established that the press, as well as NGOs, exercise watchdog functions, and that the function of bloggers and popular users of social media may be also assimilated to that of “public watchdogs” as far as the protection afforded by Article 10 is concerned. As it was not disputed that the interference Rebechenko complained of was prescribed by law and pursued a legitimate aim to protect the reputation or rights of others, the ECtHR examines whether the interference was necessary in a democratic society, and specifically whether it was proportionate to the aim pursued. In this regard the ECtHR recalls that whether an interference is necessary in a democratic society will depend on who spoke, about whom, on what subject of debate, whether the expressions used were facts or value judgments, and on procedural guarantees in the domestic courts, including reasoning of decisions and the nature and seriousness of penalties. The ECtHR emphasises that in the present case, the applicant was a blogger who uploaded his video to a YouTube channel with more than 2,000 subscribers, while more than 80,000 visitors viewed the video. In such circumstances the interference must be examined on the basis of the

same principles applied when assessing the role of a free press in ensuring the proper functioning of a democratic society. The ECtHR observes that Ms F had a profile similar to that of professional politicians, who should be prepared to tolerate a more demanding public scrutiny, while the issues raised in the video were undeniably part of a political debate on a matter of general and public concern: relations between Russia and Ukraine, Russia's position in the international arena, and the impact of its foreign policy. The ECtHR reiterates in this connection that its approach has been consistently to require very strong reasons for justifying restrictions on political speech. Furthermore, Rebechenko has acted in good faith and in pursuit of the legitimate aim of protecting the democratic development of, and contributing to free political debate, while his statements were value judgments, the truth of which cannot be proven. Moreover, as far as the reasoning of the domestic decisions is concerned, the ECtHR notes that the Russian courts failed to analyse the contents of the video; they did not even use any extracts from the video to support their position on the case and did not perform a balancing exercise between the need to protect Ms F's reputation and Rebechenko's right to impart information on issues of general interest. As to the sanctions imposed, the order to delete the video, publish a retraction, and pay about EUR 714 in non-pecuniary damages, the ECtHR notes that these sanctions could discourage the participation of the press in debates on matters of legitimate public concern. The ECtHR concludes that the domestic courts failed to strike a fair balance between the relevant interests and to establish a "pressing social need" for putting the protection of Ms F's reputation above Rebechenko's right to freedom of expression. Therefore, the Court considers that the domestic courts overstepped the narrow margin of appreciation afforded to them in matters of debate of public interest and that the interference was not necessary in a democratic society. Accordingly there has been a violation of Article 10 ECHR. Russia is ordered to pay Rebechenko EUR 714 in respect of pecuniary damage; EUR 500 in respect of non-pecuniary damages; and EUR 71 in respect of costs and expenses.

- [Rebechenko v. Russia](#), no. 10257/17, 16 April 2019.

IRIS 2019-6:1/2

European Court of Human Rights: *Kablis v. Russia*

Dirk Voorhoof

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On 30 April 2019, the European Court of Human Rights (ECtHR) found that the blocking by Russian authorities of an activist's social networking account and entries on his blog had breached his right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The applicant, Grigoriy Kablis, had called for participation in a 'people's assembly' at a square in Syktyvkar, the capital of the Komi Republic, after the local authorities had already refused Kablis' request to organise a public event at that venue, and had proposed another specially designated location for holding public events. The ECtHR also found that Kablis' right to freedom of peaceful assembly as guaranteed by Article 11 ECHR has been violated, as well as his right to an effective remedy under Article 13 ECHR. The most important part of the judgment concentrates on the blocking measures as a form of prior restraint on Kablis' right to freedom of expression. The Court's judgment is a clear warning against too vague and overbroad legislation leaving too much power to the Public Prosecutor's office or other authorities to block social networking accounts or to remove alleged illegal material from the Internet without sufficient guarantees on effective and prompt judicial review.

In 2015, the Governor of the Komi Republic and several high-ranking officials were arrested and criminal proceedings were opened on suspicion of their membership of a criminal gang and of them having committed fraud. After a refusal by the local authorities to organise a 'picket' to discuss the arrest of the Komi Republic Government, Kablis posted a message on his blog calling for participation in the unauthorised public event. He also published a post with similar content on VKontakte, a popular online social networking service. The next day, Kablis' VKontakte account was blocked following an order by the Federal Service for Supervision of Communications, Information Technology and Mass Media and a deputy Prosecutor General of the Russian Federation, because Kablis had been campaigning for participation in an unlawful public event in breach of the Public Events Act, justifying the blocking of the account pursuant to section 15.3(1) of the Information Act. Kablis was also informed by the administrator of the Internet site that hosted his blog that access to the blog entries campaigning for the announced picket had been restricted on the order of the Prosecutor General's office. Kablis challenged the decisions of the Prosecutor General's office, but his complaint was dismissed at all domestic levels.

Kablis lodged an application before the ECtHR, complaining that the blocking of his social networking account and entries on his blog calling for participation in an unauthorised public event had breached his right to freedom of expression. The ECtHR first of all disagrees with the Russian authorities' argument that there was no restriction of Kablis' right to freedom of expression, as his account could have been unblocked if he had deleted the unlawful content and he could also have created a new social networking account and written new Internet blogs. The ECtHR leaves no doubt that the blocking of Kablis' social networking account and of the entries on his blog amounted to 'interference by a public authority' with Kablis' right to freedom of expression. Next, the ECtHR focuses on the fact that the blocking order has been taken before a judicial decision was issued on the illegality of the published content, and that therefore the interference with Kablis' right to freedom of expression amounted to a prior restraint. Although Article 10 ECHR does not prohibit prior restraints on publication as such, the dangers inherent in prior restraints call for the most careful scrutiny on the part of the ECtHR and are justified only

in exceptional circumstances. This approach of ‘careful scrutiny’ is especially applicable as far as the press is concerned, ‘for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest’. The ECtHR clarifies that this danger ‘also applies to publications other than periodicals that deal with a topical issue’ and it reiterates that ‘in cases of prior restraint, a legal framework is required, ensuring both tight control over the scope of bans and effective judicial review to prevent any abuse of power’. The Court is of the opinion that the blocking order was based on a ‘too broad and vague’ provision in law, while the law does not require the Prosecutor General’s office to examine whether the wholesale blocking of the entire website or webpage, rather than of a specific information item published on it, was necessary, having regard to the criteria established and applied by the ECtHR under Article 10 ECHR. The Court, referring to its judgments in [Ahmet Yıldırım v. Turkey](#) (IRIS 2013/2-1) and [Cengiz and Others v. Turkey](#) (IRIS 2016/2-1) emphasises that ‘Article 10 requires the authorities to take into consideration, among other aspects, the fact that such a measure, by rendering large quantities of information inaccessible, is bound to substantially restrict the rights of Internet users and to have a significant collateral effect on the material that has not been found to be illegal’. The ECtHR recognises that the exercise of the Prosecutor General’s powers to block Internet posts is subject to judicial review, but that it is ‘likely to be difficult, if not impossible’, to challenge effectively the blocking measure on judicial review and it concludes that the blocking procedure provided for by section 15.3 of the Information Act ‘lacks the necessary guarantees against abuse required by the Court’s case law for prior restraint measures, in particular tight control over the scope of bans and effective judicial review to prevent any abuse of power’.

Finally, the ECtHR observes that the fact that Kabilis breached a statutory prohibition by calling for participation in a public event held in breach of the established procedure is not sufficient in itself to justify an interference with his freedom of expression. It takes into account a number of considerations, including that (a) the aim of the public event was to express an opinion on a topical issue of public interest, namely the recent arrest of the regional government officials; (b) approval of the public event had been refused on formal grounds, rather than on the grounds that the event in question presented a risk of public disorder or public safety; (c) the impugned Internet posts did not contain any calls to commit violent, disorderly or otherwise unlawful acts; (d) in view of the event’s location, small size and peaceful character, there is no reason to believe that it would have been necessary for the authorities to intervene to guarantee its smooth conduct; and (e) as Kabilis explicitly stated on his blog that the public event had not been duly approved, he did not try to mislead prospective participants by making them believe that they were going to participate in a lawful event. According to the ECtHR, it follows that the breach of the procedure for the conduct of public events in the present case was minor and did not create any real risk of public disorder or crime. On these grounds, the Court is not convinced that there was ‘a pressing social need’ to apply prior restraint measures and to block access to the impugned Internet posts calling for participation in that event and thereby expressing an opinion on an important matter of public interest. The ECtHR concludes unanimously that Russian law lacks the necessary guarantees against abuse required by the Court’s case law for prior restraint measures, and that the standards applied by the domestic courts were not in conformity with the principles embodied in Article 10 ECHR. As the Russian courts did not provide ‘relevant and sufficient’ reasons for the interference with Kabilis’ right to freedom of expression, the ECtHR finds that there has been a violation of Article 10 ECHR.

- [Kabilis v. Russia](#), nos. 48310/16 and 59663/17, 30 April 2019.

IRIS 2019-7:1/1

European Court of Human Rights: *Brzeziński v. Poland*

Dirk Voorhoof

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In its committee judgment in the case of *Brzeziński v. Poland*, the European Court of Human Rights (ECtHR) unanimously held that there has been a violation of Article 10 of the European Convention on Human Rights (ECHR) with regard to the applicant's right to freedom of expression as a politician at election time. The case concerns in particular a provision in Poland's election law which allows a court, within 24 hours, to consider whether 'untrue information' has been published, and to issue an order prohibiting its further distribution.

In October 2006, during a political campaign for election to municipal and district councils and regional assemblies, Mr Zenon Brzeziński was standing for the post of municipal councillor. In a brochure in which the public was called to vote for the members of his electoral group, Brzeziński criticised the way in which the municipality was run. These criticisms mainly concerned the mayor and the members of the municipal council. Brzeziński implied that the members of the local council had concluded a form of agreement, with the sole aim of taking advantage of the posts that they held. The mayor and a local politician who were targeted in the brochure sued Brzeziński, applying for an injunction to prevent the dissemination of the brochure and obliging its author to rectify the incorrect information and offer a public apology. On the morning of 27 October 2006, Mr Brzeziński was summoned by telephone to a hearing scheduled for 1.30 p.m. on the same date at the Częstochowa Regional Court. Brzeziński did not attend the hearing. By a decision of the same date, the court barred Brzeziński from continuing to distribute his brochure and ordered him to apologise and to correct the inexact information contained therein. It also ordered him to pay 5000 Polish zlotys (PLN) to a charitable organisation and PLN 360 to the complainants for costs incurred. The court noted that Brzeziński had implied that fraud had been committed in the allocation of public grants, although, in the findings of the court, these facts had not been established. It found that the allegations in the brochure were 'untrue', 'malicious' and 'exceeded the permissible forms of electoral propaganda'. The regional court's judgment was later upheld by the court of appeal.

Brzeziński lodged an application before the ECtHR in 2007, claiming a violation of his right to freedom of expression. Twelve years later, in its judgment of 25 July 2019, the ECtHR holds that there has been a violation of Brzeziński's freedom of expression. The ECtHR considers that the election law provision was 'prescribed by law' pursued the legitimate aim of the 'protection of the reputation or rights of others', while the main question was whether the interference with the right to freedom of expression had been 'necessary in a democratic society'. First, the Court reiterates that under Article 10 ECHR there is little room for restrictions on political and public interest expression, which makes the domestic authorities' margin of appreciation for restricting such expression very limited. The ECtHR does not consider the summary proceedings problematic as it finds Brzeziński had been lawfully summoned to the first-instance hearing, and that his absence from the first-instance hearing and the resultant impossibility of presenting his arguments to the domestic court were not imputable to the national authorities alone. It notes that Brzeziński was expressing himself as a candidate for the post of municipal councillor and as a representative of an electoral group which was distinct from that of the outgoing mayor. However, it did not appear from the reasoning of the domestic courts that they had examined whether the impugned remarks had a credible factual basis, or whether Brzeziński had acted with requisite diligence. The contested remarks had been immediately classified as lies and regarded

as damaging the good reputation and standing of the complainants as candidates in the local elections. The ECtHR disagrees with the domestic courts' finding that Brzeziński was required in the present case to prove the truth of his statements, and it holds that the language used in the brochure had remained within the limits of admissible exaggeration or provocation, having regard to the ordinary tone and register of the political debate at local level. The ECtHR finds that no fair balance has been struck between the need to protect Brzeziński's rights to freedom of expression and the need to protect the complainants' rights and reputation, and that the reasons provided by the domestic courts to justify Brzeziński's conviction cannot be considered relevant and sufficient, and did not correspond to any pressing need. Furthermore, in addition to the ban on continuing to publish the brochure, Brzeziński had been ordered to apologise and to rectify the comments that were held to be inexact by having a statement published on the front page of two local newspapers. He had also been ordered to pay a sum of money to a charitable organisation. The ECtHR is of the opinion that the cumulative application of these sanctions would likely have an inhibiting effect on individuals engaged in local political debate and it concludes that there had been a disproportionate interference with Brzeziński's right to freedom of expression, in violation of Article 10 ECHR. The ECtHR held that Poland was to pay the applicant EUR 9 700 in respect of non-pecuniary damage and EUR 100 in respect of costs and expenses.

- [Brzeziński v. Poland](#), no. 47542/07, 25 July 2019.

IRIS 2019-8:1/1

European Court of Human Rights: *Pryanishnikov v. Russia*

Dirk Voorhoof

Human Rights Centre, Ghent University and Legal Human Academy

The European Court of Human Rights (ECtHR) has delivered a judgment concerning the refusal to grant a film reproduction licence to a Russian film producer on the ground that he was suspected of producing and distributing pornographic films. The ECtHR found that the refusal was a too far-reaching and non-justified restriction on the film producer's freedom of expression, violating Article 10 of the European Convention on Human Rights (ECHR).

The applicant in *Pryanishnikov v. Russia* is a film producer who owns the copyright to over 1 500 erotic films. The films were approved for public distribution by the Ministry of Culture for audiences over eighteen years of age, and Pryanishnikov held valid distribution certificates in respect of them. However, the Ministry of the Press, Broadcasting and Mass Media refused Pryanishnikov's application for a licence for the reproduction of his films because he was involved in investigative measures concerning the illegal production, advertising and distribution of erotic and pornographic material and films, an offence under Article 242 of the Criminal Code. Pryanishnikov challenged the refusal before the Commercial Court of Moscow, which upheld the refusal, as did the Commercial Appeal Court and the Federal Commercial Court of the Moscow Circuit. The charges of producing and distributing pornography were subsequently dropped.

Before the ECtHR, Pryanishnikov alleged that the refusal to grant him a film reproduction licence had violated his freedom of expression. In essence, he argued that the domestic decisions refusing to grant him a film reproduction licence had not contained any proof that he had ever distributed pornography. The Russian Government argued that the interference was prescribed by law and pursued the legitimate aims of protecting morals and the rights of others, in particular protecting children from access to pornographic material.

First, the ECtHR referred to the general principles concerning freedom of expression, also reiterating that freedom of expression includes freedom of artistic expression – notably within freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds. It also recalled the principle that those 'who create, perform, distribute or exhibit works of art contribute to the exchange of ideas and opinions which is essential for a democratic society'. However, artists and those who promote their work are certainly not immune to the possibility of limitations, as provided for in Article 10, section 2 ECHR. Furthermore, under the third sentence of Article 10, section 1, states are permitted to regulate, by means of a licensing system, the way in which broadcasting, television or cinema enterprises are organised in their territories, particularly in respect of their technical aspects. The granting of a licence may also be made conditional on such matters as the nature and objectives of a broadcasting, television or cinema enterprise; its potential audience at national, regional or local level; the rights and needs of a specific audience; and the obligations deriving from international legal instruments. As regards the protection of morals as a legitimate aim to interfere with the right to (artistic) freedom of expression, the ECtHR observed that it is not possible to find a uniform European conception of morals. The view taken on the requirements of morals varies from time to time and from place to place. By reason of their direct and continuous contact with the vital forces of their countries, state authorities are, in principle, in a better position than the international judge to give an opinion on the exact content of these requirements, as well as on the necessity of a restriction or penalty intended to protect morals.

Next, the ECtHR observed that under the domestic law in force at the material time, a film producer needed a film reproduction licence to be able to make copies of his films for the purpose of selling, broadcasting, or distributing them to cinemas, video libraries or video rental facilities. Without such a licence, the applicant was therefore *de facto* unable to distribute them; hence, the refusal amounted to an interference with Pryanishnikov's right to freedom of expression. As this licencing duty was prescribed by law and pursued the legitimate aims of protecting morals and the rights of others, in particular children, it remained to be determined whether the interference was 'necessary in a democratic society'.

The ECtHR found that the domestic judgments – in so far as they relied on a suspicion regarding the involvement in producing and distributing pornography – were based on assumptions rather than on reasoned findings of fact. Therefore, the domestic courts did not provide relevant and sufficient reasons for the finding that Pryanishnikov produced or distributed pornography; and although, in their judgments, the domestic courts briefly referred to the need to protect minors from pornographic material, the ECtHR found no evidence that Pryanishnikov was ever suspected of distributing pornography to children. Next, it observed that the ban on distributing pornography in Russia was not limited to minors, and extended to any audience. The ECtHR referred to its judgment in [Kaos GL v. Turkey](#) (IRIS 2017-2/1) in which it found that even a temporary ban on distributing a piece of pornographic material to any audience was not justified. In that judgment, the ECtHR held that the domestic authorities could have applied a less restrictive measure, for example, a ban on selling the material in question to persons under eighteen years of age; an obligation to sell it with a special cover displaying a warning addressed to persons under eighteen years of age; or an obligation to sell it via a subscription only. Finally, the ECtHR observed that the refusal to grant a film reproduction licence made it impossible for the applicant to distribute any films, including the more than 1 500 films for which the competent authorities had issued distribution certificates after verifying that they were not pornographic, or indeed any other audiovisual products or audio recordings on any types of medium, while there was no evidence in the text of the domestic judgments that the domestic courts weighed the impact which the refusal of a film reproduction licence would have on the film producer's ability to distribute the films for which he had distribution certificates or on his freedom of expression in general. The domestic courts therefore failed to recognise that the present case involved a conflict between the right to freedom of expression and the need to protect public morals and the rights of others, and failed to perform a balancing exercise between them. On this ground, the ECtHR unanimously came to the conclusion that such a far-reaching restriction on Pryanishnikov's freedom of expression, which deprived him of the opportunity to distribute any audiovisual products or audio recordings to any audiences, could not be considered justified. There was, therefore, no reasonable relationship of proportionality between the means employed and the aim sought to be achieved, and accordingly there has been a violation of Article 10 ECHR.

- [Pryanishnikov v. Russia](#), no. 25047/05, 10 September 2019.

IRIS 2019-9:1/1

European Court of Human Rights: Szurovecz v. Hungary

Dirk Voorhoof

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In the case *Szurovecz v. Hungary*, the European Court of Human Rights (ECtHR) has held that a refusal to grant a journalist access to a reception centre for asylum seekers in Hungary violated his right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The ECtHR emphasised that newsgathering, including first-hand observation by a journalist reporting on a matter of significant public interest, was an essential part of journalistic research and press freedom.

In 2015, the Hungarian journalist Illes Szurovecz, working for the Internet newsportal abcug.hu, requested access to the Debrecen Reception Centre, a major housing centre for asylum seekers entering Hungary. Szurovecz sought permission to visit the centre in order to interview asylum seekers and take photographs after serious concerns had been raised about their treatment. Indeed, the Commissioner for Fundamental Rights had issued a report condemning the living conditions in the centre, which amounted to inhuman and degrading treatment. Furthermore, the reception centre was constantly presented in the state-owned media as part of the government's anti-immigration campaign. The Office of Immigration and Nationality (OIN), however, rejected Szurovecz's request, noting that there was constant media interest in asylum seekers and that regular visits to the reception centre would infringe their private lives. Moreover, many people accommodated in the reception centre had fled from some form of persecution, and information about them appearing in the press could endanger both their own security and that of their families. Szurovecz appealed, but his action was declared inadmissible, as the OIN's decision was not subject to judicial review.

Before the Strasbourg Court, Szurovecz complained that the Hungarian authorities had violated his right to impart information under Article 10 ECHR by refusing his request to enter the premises of the Debrecen Reception Centre with a view to writing a report on the living conditions of asylum seekers. A coalition of international organisations, including the Media Legal Defence Initiative, Index on Censorship and the European Centre for Press and Media Freedom, supported Szurovecz's complaint. The third-party intervention emphasised that newsgathering, including physical access to the places where important events are developing, is an essential component of investigative journalism (see also [Butkevich v. Russia](#), IRIS 2018-4/2 and compare with [Endy Gésina-Torres v. Poland](#), IRIS 2018-5/1).

The Hungarian Government argued that the complaint was based on a claim to a right of access to information which did not fall within the scope of Article 10 ECHR. Furthermore, the government submitted that should the ECtHR find that Article 10 was applicable, access to the reception centre had not been necessary for Szurovecz to express his opinion on an issue of public interest, since he had had access to information provided by international organisations and NGOs, as well as other alternative sources. Furthermore, he could have interviewed refugees outside the premises of the reception centre and he could have obtained photographs taken by others. Finally, the government argued that the interference with the right to receive information under Article 10 was justified by referring to the asylum seekers' right to respect for private life under Article 8, as well as their right to life, physical integrity and personal liberty (Articles 2, 3 and 5 ECHR).

The ECtHR disagreed with the Hungarian Government on all points. First, it referred to its earlier

case law according to which the gathering of information is an essential preparatory step in journalism and an inherent and protected part of press freedom. The Court reiterated that ‘obstacles created in order to hinder access to information which is of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as “public watchdogs”, and their ability to provide accurate and reliable information may be adversely affected’. The Court found that the Hungarian authorities had prevented Szurovecz from gathering information first hand and from verifying the information about the conditions of detention provided by other sources. This constituted an interference with the exercise of his right to freedom of expression in that it hindered a preparatory step prior to publication, that is to say, journalistic research (see [Dammann v. Switzerland](#), IRIS 2006-6/3, [Társaság a Szabadságjogokért v. Hungary](#), IRIS 2009/7-1 and [Schweizerische Radio- und Fernseh gesellschaft SRG v. Switzerland](#), IRIS 2012-8/3). The ECtHR accepted that the interference at issue was prescribed by law and pursued the legitimate aim of protecting the private lives of asylum seekers and camp residents. However, in view of the importance of the media in a democratic society and of reporting on matters of considerable public interest, the ECtHR considered that the rather summary reasoning put forward by the OIN and the absence in its decision of any real balancing of the interests at issue, failed to demonstrate convincingly that the refusal of permission to enter and conduct research in the reception centre was necessary in a democratic society. Above all, the fact that the refusal was absolute rendered it disproportionate to the aims pursued and did not meet a “pressing social need”.

The ECtHR considered that the matter of how residents were accommodated in state-run reception centres, whether the state fulfilled its international obligations towards asylum seekers and whether this vulnerable group had the ability to fully enjoy their human rights, was ‘undisputedly newsworthy and of great public significance’. It emphasised that ‘the public interest in reporting from certain locations is especially relevant where the authorities’ handling of vulnerable groups is at stake’. The watchdog role of the media assumes particular importance in such contexts, since their presence is a guarantee that the authorities can be held to account for their conduct (see [Pentikäinen v. Finland](#), IRIS 2016-1/2). The ECtHR found that the conclusion of the OIN in refusing access to the reception centre was reached without any sensible consideration of Szurovecz’s interest as a journalist in conducting his research or of the interest of the public in receiving information on a matter of public interest.

Although the ECtHR ultimately agreed that the reasons adduced by the OIN, relying on the safety and private lives of refugees and asylum seekers, were undoubtedly “relevant”, it did not find them “sufficient” in the light of the necessity test under Article 10, section 2 ECHR. The ECtHR referred to the fact that Szurovecz explained that he would only take photos of individuals who had given their prior consent and, if needed, also obtain written authorisation from them, while the OIN has not taken any notice of this argument. Furthermore, neither the OIN nor the government have indicated in what respect the safety of asylum seekers would have been jeopardised in practice by the proposed research, especially if it had taken place only with the consent of the individuals involved. The Court was also of the opinion that the existence of other alternatives to direct newsgathering within the reception centre did not extinguish Szurovecz’s interest in having face-to-face discussions on and gaining first-hand impressions of living conditions there. Hence, the availability of other forms and tools of research were not sufficient reasons to justify the interference complained of or to remedy the prejudice caused by the refusal to grant authorisation to enter the reception centre. Finally, there was no legal possibility or judicial review open to Szurovecz to allow him to argue for the need to gain access to the

reception centre in order to exercise his right to impart information. The Court unanimously concluded that Article 10 ECHR has been violated.

- [Szurovecz v. Hungary](#), no. 15428/16, 8 October 2019.

IRIS 2019-10:1/2

Appendices

Appendix I: List and summaries of cases reported on in *IRIS*, but not included in the main selection (cases that were struck off the list/in which friendly settlements were reached).

Appendix II: Overview of cases in alphabetical order.

Appendix III: Overview of cases by country.

Appendix IV: ECHR – full text (as amended by protocols)

Appendix I: List and summaries of cases reported on in *IRIS*, but not included in the main selection (cases that were struck off the list/in which friendly settlements were reached).

	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
1	Telesystem Tirol v. Austria	19281/91	09/06 /1997	FS	Public policy, prohibition of commercial broadcasting	Full text	377
2	Altan v. Turkey	32985/96	14/05 /2002	FS	Friendly settlement, positive obligations, political expression, incitement to hatred or hostility	Full text	378
3	Ali Erol v. Turkey	35076/97	20/06 /2002	FS	Friendly settlement, propaganda, terrorism, hate speech, incitement to hatred or hostility based on race or religion	Full text	379
4	Özler v. Turkey	25753/94	11/07 /2002	FS	Friendly settlement, propaganda, terrorism, hate speech, incitement to hatred or hostility based on race or religion	Full text	379
5	Sürek v. Turkey (No. 5)	26976/95, 28305/95 and 28307/95	16/07 /2002	FS	Friendly settlement, propaganda, terrorism, hate speech, incitement to hatred or hostility based on race or religion	Full text	379
6	Freiheitliche Landesgruppe Burgerland v. Austria	34320/96	18/07 /2002	FS	Friendly settlement, insulting caricature, satire, artistic expression	Full text	379
7	Mehmet Bayrak v. Turkey	27307/95	03/09 /2002	FS	Positive obligation, separatist propaganda, terrorism	Full text	381
8	Zarakolu v. Turkey (Nos. 1- 3)	37059/97, 37061/97 and 37062/97	02/10 /2003	FS	Political expression, separatist propaganda, terrorism	Full text	382

European Court of Human Rights: Case of Telesystem Tirol Kabeltelevision Struck Out of the List

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Telesystem Tirol Kabeltelevision applied to the European Commission of Human Rights in 1991, relying on Article 10 of the European Convention for the protection of human rights and fundamental freedoms. As a local cable TV network (Gemeinschaftsantennenanlage - in the USA referred to as cable TV system), it complained that, pursuant to Austrian law, it had been refused permission to distribute its own TV programmes ("active broadcasting") and was only authorised to receive already existing broadcast programmes and retransmit them to the subscribers of the local network ("passive broadcasting").

The refusal to grant the right to distribute its own programmes was based on the general broadcasting monopoly in favour of the Austrian Broadcasting Corporation. The Commission, in its report of 18 October 1995, considered that arguments similar to those in the case of [Informationsverein Lentia vs. Austria](#) (ECourtHR, 24 November 1993, vol. 276), led to the conclusion that the restriction on the freedom to impart information by prohibiting private broadcasting, as this was based on the Austrian Broadcasting monopoly, was not necessary in a democratic society and hence was in breach of Article 10, par. 2 of the Convention. The Telesystem Tirol Kabeltelevision case then was referred to the European Court of Human Rights.

In the meantime however, the Austrian Constitutional Court in two judgments (Constitutional Court, 27 September 1995 (see IRIS 1996-6: 8) and 8 October 1996 (see IRIS 1997-2: 5) declared that the prohibition of "active broadcasting" by local TV networks and the prohibition of commercial advertising by private broadcasters is in breach of Article 10 of the European Convention, under reference also to the European Court's judgment of 24 November 1993 in the case of Informationsverein Lentia . The European Court now in its judgement of 9 June 1997 took formal note of a friendly settlement of the matter between the Austrian government and the applicant. The Court follows the request by the applicant to strike the case out of the list, since active broadcasting and the dissemination of commercial advertising by local TV networks are now legally permissible in Austria. The Court is of the opinion that there is no reason of public policy to continue the litigation. The Austrian broadcasting law finally seems to be in accordance now with Article 10 of the European Convention on Human Rights, in as far as the Monopoly of the Public Broadcasting Organisation Case come to an end.

- [Telesystem Tirol Kabeltelevision v. Austria](#) (friendly settlement), 9 June 1997, *Reports of Judgments and Decisions* 1997-III.

IRIS 1997-7/5

European Court of Human Rights: Friendly Settlement in Altan v. Turkey

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Since 1998, the European Court of Human Rights has come to the conclusion that there has been a violation of freedom of (political) expression in Turkey in more than 15 cases. All of these cases concerned the criminal convictions of journalists, editors, publishers, writers, lawyers, politicians or human rights activists for infringement of Articles 159 or 312 of the Criminal Code or of Articles 6-8 of the Prevention of Terrorism Act, nr. 3712. In all of these cases, the applicants were convicted in Turkey for inciting the people to hatred and hostility based on distinctions of race or religion, or for undermining territorial integrity and the unity of the nation. The Strasbourg Court, however, considered these convictions to be violations of Article 10 of the European Convention, as they failed to give due recognition to the importance of freedom of critical and political speech in a democratic society (see IRIS 1999-8: 4, IRIS 2000-4: 2, IRIS 2000-7: 2, IRIS 2000-8: 2, IRIS 2000-10: 3 and IRIS 2002-3: 2). On several occasions, the Committee of Ministers has requested the Turkish authorities to bring their legislation and jurisprudence into conformity with the case-law of the European Court of Human Rights.

In a judgment of 14 May 2002, the Court has now enacted a friendly settlement between a Turkish applicant and the Turkish Government in a case in which freedom of political expression was also at stake. Ahmet Hüsrev Altan, who is a writer and journalist for the national daily, Milliyet, was given a suspended sentence of one year and eight months' imprisonment and a fine of TRL 500,000 by the National Security Court in 1995, for incitement to hatred and hostility on the basis of a distinction based on membership of a race or a religion. Relying on Article 10, he complained in Strasbourg of an infringement of his right to freedom of expression. The Turkish authorities have now recognised that steps have to be taken at the domestic level in order to guarantee freedom of expression according to Article 10 of the Convention. Before the Court, the Turkish Government made the following statement: "The Court's rulings against Turkey in cases involving prosecutions under Article 312 of the Penal Code or under the provisions of the Prevention of Terrorism Act clearly show that Turkish law and practice urgently need to be brought into line with the Convention's requirements under Article 10 of the Convention. This is also reflected in the interference underlying the facts of the present case. The Government undertake to this end to implement all necessary reform of domestic law and practice in this area, as already outlined in the National Programme of 24 March 2001."

Referring to this commitment, the Court has decided to strike out the case following the friendly settlement in which the applicant is to be paid EUR 4,573.47 for any pecuniary damages and for costs and expenses incurred.

- [Altan v. Turkey](#) (friendly settlement), no. 32985/96, ECHR 2002-III.

IRIS 2002-7/2

European Court of Human Rights: Four Friendly Settlements in Cases on Freedom of Expression (Turkey and Austria)

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After the finding by the European Court of Human Rights of several violations of freedom of expression in Turkey, it seems that the Turkish Government has now become aware of the fact that some restrictions and penalties can manifestly no longer be tolerated from the perspective of Article 10 of the Convention. Shortly after the adoption of a friendly settlement in the case of [Altan v. Turkey](#) on 14 May 2002 (see IRIS 2002-7: 2-3), the Court again took note of the agreements reached between the parties in three different cases against Turkey.

In each of these cases, the Turkish Government promised that steps would be taken in order to guarantee the right to freedom of expression and information, including the offer to pay an amount of damages to the applicants. Before the Court, the Turkish Government made the following statement: "The Court's rulings against Turkey in cases involving prosecutions under Article 312 of the Criminal Code and under Article 8 para. 1 of the Prevention of Terrorism Act show that Turkish law and practice urgently need to be brought into line with the Convention's requirements under Article 10 of the Convention. This is also reflected in the interference underlying the facts of the present case. The Government undertake to this end to implement all necessary reform of domestic law and practice in this area, as already outlined in the National Programme of 24 March 2001. The Government refer also to the individual measures set out in Interim Resolution adopted by the Committee of Ministers of the Council of Europe on 23 July 2001 (ResDH (2001) 106), which they will apply to the circumstances of cases such as the instant one". While this statement was made in the Özler case, the essence of the statements delivered by the Turkish Government in the other cases was the same.

All applicants had been found guilty some years ago of dissemination of propaganda against the indivisibility of the State (Prevention of Terrorism Act) or incitement to hatred and hostility arising from a distinction based on race or religion (Article 312 of the Criminal Code). Ali Erol (a journalist), Sürek (a lawyer and publisher) and Özler (a human rights activist) had criticised the policy of the Turkish authorities on the Kurdish Question in newspapers or in public speeches. Each of them had initiated an application against Turkey, complaining, inter alia, of a violation of Article 10 of the Convention.

Referring to the commitments undertaken by the Turkish Government in each case and recognising that the friendly settlements are based on respect for human rights as defined by the European Convention, the Court has accordingly struck these cases out of the list.

Another friendly settlement was reached in the case of *Freiheitliche Landesgruppe Burgenland v. Austria* on 18 July 2002. In this case, the applicant (a periodical) had been convicted because of an insulting caricature under Section 115 of the Austrian Criminal Code. In order to reach a friendly settlement before the Court, the Austrian Government has promised to pay the applicant a sum of money as compensation in respect of any possible claims relating to the present application, including an amount for costs and expenses incurred both in the domestic proceedings and in the

Convention proceedings. The applicant waives any further claims against Austria relating to the application concerned. Referring to the agreement reached between the parties and satisfied that the settlement is based on respect for human rights as defined by the Convention, the Court struck the case out of the list.

- [Ali Erol v. Turkey](#) (friendly settlement), no. 35076/97, 20 June 2002.
- [Özler v. Turkey](#) (friendly settlement), no. 25753/94, 11 July 2002.
- [Sürek v. Turkey \(no. 5\)](#) (friendly settlement), nos. 26976/95, 28305/95 and 28307/95, 16 July 2002.
- [Freiheitliche Landesgruppe Burgenland v. Austria](#), no. 34320/96, 18 July 2002.

IRIS 2002-9/4

European Court of Human Rights: Another Friendly Settlement in Freedom of Expression Case (Turkey)

Dirk Voorhoof

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Once again, the Turkish Government has recognised that an interference by the Turkish authorities with freedom of political expression could not be legitimised from the perspective of Article 10 of the European Convention on Human Rights. After reaching a friendly settlement in the cases of [Altan v. Turkey](#) on 14 May 2002 (see IRIS 2002-7: 2); [Ali Erol v. Turkey](#) on 20 June 2002; [Özler v. Turkey](#) on 11 July 2002 and [Süreç \(no. 5\) v. Turkey](#) on 16 July 2002 (see IRIS 2002-9: 3), the Court again took note of an agreement that has been reached between the Turkish Government and a Turkish citizen who had applied to the European Court of Human Rights because of an alleged breach of Article 10 of the Convention.

The applicant, Mehmet Bayrak, had been convicted in 1994 and 1995 by the Ankara National Security Court of disseminating separatist propaganda on account of three books with Kurdish themes written or published by him. After the seizure of the books, Bayrak was sentenced to a total of two years' imprisonment and fined a total of TRL 250 million. The content of the books was considered a crime under Article 8 of the Prevention of Terrorism Act.

The case has been struck out of the Court's list following a friendly settlement, after the Turkish Government promised that steps would be taken to guarantee freedom of expression and information, including the offer to pay an amount of damages to the applicant. The Turkish Government made the following statement: "The judgments against Turkey given by the Court in cases concerning prosecutions under Article 312 of the Criminal Code or the provisions of the Prevention of Terrorism Act clearly show that Turkish law and practice must as a matter of urgency be brought into conformity with the requirements of Article 10 of the Convention. That is further evidenced by the interference complained of in the instant case. The Government accordingly undertakes to make all the necessary changes to domestic law and practice in this field, as set out in the National Programme of 24 March 2001. The Government further refers to the individual measures mentioned in the Interim Resolution adopted by the Committee of Ministers of the Council of Europe on 23 July 2001 (ResDH(2001)106), which it will implement in circumstances such as those of the instant case."

- [Mehmet Bayrak v. Turkey](#) (friendly settlement), no. 27307/95, 3 September 2002.

IRIS 2002-10/2

European Court of Human Rights: Friendly Settlements in Freedom of Expression Cases (Turkey)

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In three cases involving Turkey concerning freedom of expression, an agreement was reached between the applicant's widower, Mr. Zarakolu, and the Turkish Government. All three cases concern the seizures of several books because of separatist propaganda. The Court, in its judgments of 2 October 2003, took notice of the friendly settlements, referring to the declaration from the Turkish Government in which it is recognised that the (former) Court's rulings against Turkey in cases involving prosecutions under the provisions of the Prevention of Terrorism Act relating to freedom of expression, and also the facts underlying the present cases, "show that Turkish law and practice urgently need to be brought into line with the Convention's requirements under Article 10 of the Convention". In all three cases the Court took note of the agreement reached between the parties. The Court expresses its satisfaction that the settlement is based on respect for human rights as defined in the Convention and its Protocols. It is ordered that the cases be struck out of the list.

It is to be emphasised that recent modifications in Turkish law, as part of the 6 and 7 reform packages of July and August 2003 (see IRIS 2003-9: 15), are significant steps forward with a view to ensuring compliance with Article 10 of the European Convention on Human Rights. The abrogation of Article 8 of the Prevention of Terrorism Act and the amendments to Articles 159 and 312 of the Criminal Code are of particular relevance in this context. Also, a comprehensive reform of the Turkish Press Law is announced and will be discussed in Parliament in December 2003.

- [Zarakolu v. Turkey \(nos. 1-3\)](#) (friendly settlement), nos. 37059/97, 37061/97 and 37062/97, 2 October 2003.

IRIS 2004-1/5

Appendix II: Overview of cases in alphabetical order.

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
151	A. v. Norway	28070/06	09/04 /2009	V 8	Crime reporting, defamation, presumption of innocence, privacy, margin of appreciation, moral and psychological integrity, protection of minors	Full text	211
89	A. v. the United Kingdom	35373/97	17/12 /2002	NV 6, 8, 13, 14	Political expression, right of access, defamation, discrimination, privacy	Full text	120
100	Abdullah Aydin v. Turkey	42435/98	09/03 /2004	V	Political expression, incitement to hatred or hostility, social, ethnic and regional differences	Full text	135
19	Ahmed & others v. the United Kingdom	22954/93	02/09 /1998	NV	Impart information, political expression, margin of appreciation	Full text	65
201	Ahmet Yildirim v. Turkey	3111/10	18/12 /2012	V	Internet, defamation, blocking of Google Sites, disproportionate measure, prescribed by law	Full text	291
170	Akdas v. Turkey	41056/04	16/02 /2010	V	Artistic expression, obscene or immoral information, fiction, exaggeration, humorous, duties and responsibilities, protection of morals	Full text	238
58	Akkoç v. Turkey	22947/93 and 22948/93	10/10 /2000	NV	Interview, disciplinary sanction, separatist propaganda, incitement to violence, armed resistance or an uprising	Full text	89
173	Aksu v. Turkey	4149/04 and 41029/04	27/07 /2010	NV 14, 8, >GC	Positive obligations, vulnerable groups, margin of appreciation, racial discrimination, racism, cultural diversity, privacy	Full text	244

No.	Case Summaries	Appn. No.	Date	Out-come	Keywords	HUDOC	Page
190	Aksu v. Turkey [Grand Chamber]	4149/04 and 41029/04	15/03 /2012	NV 8	Positive obligations, vulnerable groups, margin of appreciation, racial discrimination, racism, cultural diversity, privacy	Full text	272
162	Alfantakis v. Greece	49330/0	11/02 /2010	V	Television interview, defamation, insult, reputation, live broadcasting, facts or value judgments	Full text	232
282	Alpha Doryforiki Tileorasi Anonymi Etairia v. Greece	72562/10	22/02 /2018	V 10 NV 10 V 6	Broadcast, secretly filmed, public figure, public place, private premises, fair balance	Full text	446
50	Andreas Wabl v. Austria	24773/94	21/03 /2000	NV	Political expression, defamation, Nazism, offensive information	Full text	81
172	Andreescu v. Romania	19452/02	08/06 /2010	V 10, 6	Access, defamation, insult, reputation, facts or value judgments, public debate, good faith	Full text	242
206	Animal Defenders International v. the United Kingdom [Grand Chamber]	48876/08	22/04 /2013	NV	Public debate, ban on political advertising, NGO, powerful financial groups, access, influential media, alternative media, margin of appreciation	Full text	301
302	Annen (No. 2) v. Germany	3682/10	20/09 /2018	NV	Anti-abortion website, “aggravated murder”, equation of abortion with Holocaust, civil injunction, protection of reputation, fair balance, fact or value judgment, distinction criticism and insult	Full text	486
303	Annen (No. 5) v. Germany	70693/11	20/09 /2018	NV	Anti-abortion website, link to list of doctors, “aggravated murder”, equation of abortion with Holocaust, civil injunction, protection of reputation, fair balance, factual basis, incitement to hatred and aggression	Full text	486

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
305	Annen (No. 6) v. Germany	3779/11	18/10 /2018	NV	Anti-abortion campaigner, criminal conviction, online press release, stem cell research, personality rights, value judgements, public debate, margin of appreciation	Full text	490
248	Arlewin v. Sweden	22302/10	01/03 /2016	V 6	Defamation proceedings, transfrontier television programme service, jurisdiction, EU law, right of access to court	Full text	378
27	Arslan v. Turkey	23462/94	08/07 /1999	V	Offensive information, political expression, (separatist) propaganda, limits of acceptable criticism, right to receive information, duties and responsibilities, hate speech or promotion of violence, pluralism	Full text	73
202	Ashby Donald & Others v. France	36769/08	10/01 /2013	NV	Intellectual property, unauthorised reproduction of fashion photos, Internet, margin of appreciation, news reporting exception, commercial speech	Full text	293
185	Avram & others v. Moldova	41588/05	05/07 /2011	V 8	Privacy, positive obligation, undercover video, journalism	Full text	264
187	Axel Springer AG v. Germany	39954/08	07/02 /2012	V	Privacy, reputation, receive information, public interest, conflicting human rights	Full text	260
226	Axel Springer AG v. Germany (No. 2)	48311/10	10/07 /2014	V	Protection of reputation, private life, value judgment, former Chancellor, public figure, degree of tolerance, public watchdog	Full text	335
272	Axel Springer SE and RTL Television GmbH v. Germany	51405/12	21/09 /2017	NV	Restriction on publishing pictures of accused, court reporting, non-public figure, presumption of innocence	Full text	426

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
118	Aydin Tatlav v. Turkey	50692/99	02/02 /2006	V	Critical media reporting, political expression, positive obligations, religion	Full text	161
84	Ayse Öztürk v. Turkey	24914/94	15/10 /2002	V	Political expression, terrorism, incitement to violence, public debate, positive obligation	Full text	115
62	B. & P. v. the United Kingdom	36337/97 and 35974/97	24/04 /2001	NV	Privacy, protection of vulnerable persons, necessity	Full text	92
70	Bankovic & others v. Belgium & others	52207/99	12/12 /2001	I	NATO-bombing of TV station, inadmissible, jurisdiction, treaty obligations of State Parties	Full text	102
29	Başkaya & Okçuoğlu v. Turkey	23536/94 and 24408/94	08/07 /1999	V	Offensive information, political expression, (separatist) propaganda, limits of acceptable criticism, right to receive information, duties and responsibilities, hate speech or promotion of violence, pluralism	Full text	73
221	Bayar (nos. 1-8) v. Turkey	39690/06, 40559/06, 48815/06, 2512/07, 55197/07, 55199/07, 55201/07 and 55202/07	25/03 /2014	V 10, 6	Criminal conviction, publication of declarations by illegal armed organisation, right to fair trial, fight against terrorism, no encouragement of violence, no hate speech	Full text	327
273	Becker v. Norway	21272/12	05/10 /2017	V	Journalist ordered to give evidence, protection of journalistic sources, bad faith of source, chilling effect	Full text	428

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
251	Bédat v. Switzerland [Grand Chamber]	56925/08	29/03 /2016	NV 10	Criminal conviction, secrecy of criminal investigation, responsible journalism, accused's private life	Full text	384
212	Belpietro v. Italy	43612/10	24/09 /2013	V	Freedom of parliamentary speech, parliamentary immunity, defamation, public officials, conviction, editorial control, chilling effect	Full text	309
51	Bergens Tidende v. Norway	26132/95	02/05 /2000	V	Defamation, publication of photos, reputation, rights of others, good faith, public watchdog	Full text	82
301	Big Brother Watch and Others v. the United Kingdom	58170/13, 62322/14 and 24960/15	13/09 /2018	V 10, 12, >GC	Mass surveillance, bulk interception, protection of journalistic sources, confidential personal information, independent oversight, no limitation, chilling effect	Full text	483
25	Bladet Tromsø & Stensaas v. Norway	21980/93	20/05 /1999	V	Secret information, presumption of innocence, critical reporting, defamation, honour and reputation, good faith, public watchdog	Full text	71
231	Bohlen v. Germany	53495/09	19/02 /2015	NV 8	Cigarette advertisements, reputation, privacy, debate of general interest, humour, satire, fair balance	Full text	345
255	Boris Erdtmann v. Germany (dec.)	56328/10	05/01 /2016	I	Criminal conviction, journalistic research, effectiveness of airport security checks, responsible journalism, disproportionate action of journalist	Full text	393
16	Bowman v. the United Kingdom	24839/94	19/02 /1998	V	Political expression, monopoly position of the media, critical reporting	Full text	62
254	Brambilla and Others v. Italy	22567/09	23/06 /2016	NV	Criminal conviction, illegal interception of police communications, responsible	Full text	392

No.	Case Summaries	Appn. No.	Date	Out-come	Keywords	HUDOC	Page
					journalism, duty to obey ordinary criminal law		
222	Broza v. Germany	5709/09	17/04 /2014	V	Freedom of political expression, pre-election, neo-Nazi organisation, private individual, public discussion, mayoral election, acceptable criticism, honour and social reputation, sufficient factual basis	Full text	328
313	Brzeziński v. Poland	47542/07	25/07 /2019	V	Elections, dissemination of false information, credible factual basis, admissible exaggeration or provocation, election law, chilling effect, political debate, apology and rectification, disproportionate interference	Full text	507
283	Butkevich v. Russia	5865/07	13/02 /2018	V 5, 6, 10	Journalist, photographer, anti-globalisation protest, news-gathering, strict scrutiny, threat to public order, proportionality of measures	Full text	448
308	Catt v. the United Kingdom	43514/15	24/01 /2019	V 8	Collection, retention and further use of personal data, activist, “domestic extremism”, privacy, disproportionate and unnecessary, sensitive nature of the data, ambiguous nature of legal framework, lack of appropriate safeguards, chilling effect	Full text	497
243	Cengiz and Others v. Turkey	48226/10 and 14027/11	01/12 /2015	V	YouTube, blanket blocking order, insulting to the memory of Atatürk, citizen journalism, not prescribed by law	Full text	368
194	Centro Europa 7 S.r.l. and Di Stefano v. Italy	38433/09	07/06 /2012	V 10, AP-1(1)	Dominant position over the audiovisual media, allocation of frequencies, media pluralism, right to receive information	Full text	278

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
297	Centrum för Rättvisa v. Sweden	35252/08	19/06 /2018	NV 8, >GC	Confidentiality of online communication, privacy, surveillance, bulk interception, adequate and sufficient safeguards, margin of appreciation	Full text	475
32	Ceylan v. Turkey	23556/94	08/07 /1999	V	Offensive information, political expression, (separatist) propaganda, limits of acceptable criticism, right to receive information, duties and responsibilities, hate speech or promotion of violence, pluralism	Full text	73
130	Colaço Mestre & SIC v. Portugal	11182/03 and 11319/03	26/04 /2007	V	Interview, public interest, defamation, journalistic ethics	Full text	180
79	Colombani & others v. France	51279/99	25/06 /2002	V	Responsible journalism, good name and reputation, public watchdog, public function of press	Full text	110
53	Constantinescu v. Romania	28871/95	27/06 /2000	NV	Criminal defamation, criticism, public debate, interview, rights of others, reputation	Full text	83
92	Cordova v. Italy (Nos. 1 & 2)	40877/98 and 45649/99	30/01 /2003	V 6	Defamation, insult, duties and responsibilities, public interest, reputation	Full text: No. 1 No. 2	126
242	Couderc and Hachette Filipacchi Associés v. France [Grand Chamber]	40454/07	10/11 /2015	V	Private life, freedom of expression, fair balance, debate of public interest, disclosure of the Prince's fatherhood	Full text	365
106	Cumpăna & Mazare v. Romania [Grand Chamber]	33348/96	17/12 /2004	V	Defamation, insult, limits of acceptable criticism, factual basis or value judgments, reputation, privacy, chilling effect, public watchdog	Full text	141

No.	Case Summaries	Appn. No.	Date	Out-come	Keywords	HUDOC	Page
63	Cyprus v. Turkey	25781/94	10/05 /2001	V	Conflict between State Parties, censorship of school-books, restricted distribution and importation media	Full text	93
40	Dalban v. Romania	28114/95	28/09 /1999	V	Political expression, exaggeration, criminal libel, duty of care for journalists, public function, privacy, public watchdog	Full text	75
117	Dammann v. Switzerland	77551/01	25/04 /2006	V	Confidential information, public discussion, vital role of press, public watchdog, newsgathering	Full text	160
246	De Carolis and France Télévisions v. France	29313/10	21/01 /2016	V	Defamation proceedings, protection of reputation, Saudi prince, investigative journalism, sufficient factual basis	Full text	374
75	De Diego Nafría v. Spain	46833/99	14/03 /2002	NV	Defamation, criticism, limits of acceptable criticism, public interest, employment relation	Full text	106
9	De Haes & Gijssels v. Belgium	19983/92	24/02 /1997	V	Defamation, criticism, duties and responsibilities, mode of expression, exaggeration, provocation, authority and impartiality of the judiciary, protection of journalistic sources, alternative evidence	Full text	57
214	Delfi AS v. Estonia	64569/09	10/10 /2013	NV, >GC	Internet news portal, grossly insulting remarks, readers' comments, ISP liability (exemption), filter, notice-and-takedown, editorial control, economic interest	Full text	313
237	Delfi AS v. Estonia [Grand Chamber]	64569/09	16/06 /2015	NV	Internet news portal, users' comments, offensive content, media publisher, duties and responsibilities, liability, notice-and-takedown, E-commerce Directive, Internet service providers, economic interest	Full text	353

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
86	Demuth v. Switzerland	38743/97	05/11 /2002	NV	Allocation of broadcasting licence, media pluralism, margin of appreciation	Full text	117
252	Diamant Salihu and others v. Sweden (dec.)	33628/15	10/05 /2016	I	Criminal conviction, purchasing illegal firearms, newsgathering, duty to obey ordinary criminal law	Full text	387
73	Dichand & others v. Austria	29271/95	26/02 /2002	V	Political expression, criticism, offensive information, public interest, value judgments	Full text	104
88	Dicle on behalf of DEP (Democratic Party) v. Turkey	25141/94	10/12 /2002	V	Political expression, criticism, positive obligation	Full text	119
57	Du Roy & M Laurie v. France	34000/96	03/10 /2000	V	Public interest, secrecy during investigation and enquiry procedures, presumption of innocence	Full text	88
131	Dupuis & others v. France	1914/02	07/06 /2007	V	Confidential but well-known information, public interest, public watchdog, chilling effect, newsgathering	Full text	181
71	E.K. v. Turkey	28496/95	07/02 /2002	V	Book, political expression, vital role of press, receive information	Full text	103
304	E.S. v. Austria	38450/12	25/10 /2018	NV	Criminal conviction, disparagement of religious doctrines, Prophet Muhammad, paedophilia, margin of appreciation, co-existence of different religions, positive obligations, tolerance	Full text	488
104	Editions Plon v. France	56148/00	18/05 /2004	V	Privacy, public interest, medical confidentiality, journalistic ethics, rights of others	Full text	139
299	Egill Einarsson v. Iceland (No. 2)	31221/15	17/07 /2018	NV 8	Public figure, critical and defamatory comment, Facebook page, protection of honour and reputation, private life, certain	Full text	479

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
					level of seriousness, rape, previous behaviour, full judicial satisfaction, margin of appreciation		
275	Einarsson v. Iceland	24703/15	07/11 /2017	V 8	Value judgment, media personality, right to reputation, Instagram, fair balance, consequences of impugned publication	Full text	432
65	Ekin Association v. France	39288/98	17/07 /2001	V	Insult of foreigners, discrimination based on foreign origin	Full text	96
285	Endy Gęsina-Torres v. Poland (dec.)	11915/15	15/03 /2018 w	I	Undercover television journalist, false identity, criminal conviction, news-gathering activities, good faith, responsible journalism, necessary in democratic society, public interest, not accessory element of gathering information	Full text	452
204	Eon v. France	26118/10	14/03 /2013	V	Insult of President, discussion of matters of public interest, private life or honour, satire, chilling effect	Full text	297
119	Erbakan v. Turkey	59405/00	06/07 /2006	V	Political debate, political expression, hate speech, intolerance, incitement to hatred or hostility, religion	Full text	162
31	Erdogdu and Ince v. Turkey	25067/94 and 25068/94	08/07 /1999	V	Offensive information, political expression, (separatist) propaganda, limits of acceptable criticism, right to receive information, duties and responsibilities, hate speech or promotion of violence, pluralism	Full text	73
52	Erdogdu v. Turkey	25723/94	15/06 /2000	V	Propaganda against the territorial integrity of the State, terrorism, access, receive	Full text	83

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
					information, prevention of disorder or crime		
236	Erla Hlynsdóttir v. Iceland (no. 3)	54145/10	02/06 /2015	V	Reporting on criminal proceedings, public debate, responsible journalism, good faith, diligence	Full text	351
96	Ernst & others v. Belgium	33400/96	15/07 /2003	V 10, 8	Protection of sources, journalism, overriding public interest	Full text	131
232	Ernst August von Hannover v. Germany	53649/09	19/02 /2015	NV 8	Cigarette advertisements, reputation, privacy, debate of general interest, humour, satire, fair balance	Full text	345
150	Faccio v. Italy	33/04	31/03 /2009	I	Disproportionate measure, right to receive information, privacy, licence fee.	Full text	210
280	Faludy-Kovács v. Hungary	20487/13	23/01 /2018	NV	Reputation, newspaper headline, fair balance, negative consequences	Full text	442
171	Fatullayev v. Azerbaijan	40984/07	22/04 /2010	V	Sensitive and offensive information, defamation, terrorism, historical truth, public watchdog, disproportionate sanction, order of immediate release from prison	Full text	239
66	Feldek v. Slovakia	29032/95	12/07 /2001	V	Facts or value judgments, political speech, public interest, common knowledge, limits of acceptable criticism	Full text	97
154	Féret v. Belgium	15615/07	16/07 /2009	NV	Hate speech, insult of foreigners, political expression, election campaign, public debate	Full text	217
135	Filatenko v. Russia	73219/01	06/12 /2007	V	Defamation, public interest, reputation, good faith, journalistic ethics	Full text	187
160	Financial Times & others v. the United Kingdom	821/03	15/12 /2009	V	Protection of journalistic sources, a source acting in bad faith, public interest	Full text	228

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
163	Flinkkilä & others v. Finland	25576/04	06/04 /2010	V	Journalism, well-known public figures, privacy, public interest	Full text	233
144	Flux (No. 6) v. Moldova	22824/04	29/07 /2008	NV	Criticism, sensationalism, defamation, journalistic ethics, unprofessional behaviour, chilling effect, lack of factual basis for allegations	Full text	199
268	Fouad Belkacem v. Belgium (dec.)	34367/14	27/06 /2017	NV	Criminal proceedings, incitement to discrimination, hatred and violence, public figure, YouTube videos, Article 17	Full text	418
193	Frasilă and Ciocirlan v. Romania	25329/03	10/05 /2012	V	Positive obligations, access, rights of others, public debate, public watchdog, pluralism	Full text	277
203	Frederik Neij & Peter Sunde Kolmisoppi (The Pirate Bay) v. Sweden (dec.)	40397/12	19/02 /2013	I	Copyright, The Pirate Bay, Internet file-sharing service, illegal use of copyright-protected music, conviction, margin of appreciation	Full text	295
23	Fressoz & Roire v. France	29183/95	21/01 /1999	V	Confidential information, public interest, well-known information, privacy, journalistic ethics, tax reports, journalists committing offence and public interest	Full text	68
277	Frisk and Jensen v. Denmark	19657/12	05/12 /2017	NV	Incorrect factual basis, journalist, fair balance	Full text	436
276	Fuchsmann v. Germany	71233/13	19/10 /2017	NV 8	Fair balance, allegations sufficiently serious, public figure, good faith	Full text	434
48	Fuentes Bobo v. Spain	39293/98	29/02 /2000	V	Offensive information, criticism, horizontal effect of human rights, positive obligations, reputation, rights of others, employment relations, dismissal	Full text	80

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
76	Gaweda v. Poland	26229/95	14/03 /2002	V	Lack of clarity, accessible and foreseeable, printed media	Full text	107
34	Gerger v. Turkey	24919/94	08/07 /1999	V	Offensive information, political expression, (separatist) propaganda, limits of acceptable criticism, right to receive information, duties and responsibilities, hate speech or promotion of violence, pluralism	Full text	73
269	Ghiulfer Predescu v. Romania	29751/09	27/06 /2017	V	Defamation, live television show, mayor, criminal groups, limits of acceptable criticism, public interest, sufficient factual basis, good faith, chilling effect	Full text	420
175	Gillberg v. Sweden	41723/06	02/11 /2010	NV 10, 8, >GC	Access to information, public or official documents, confidential information, privacy, scientific research, open government, academic freedom	Full text	248
192	Gillberg v. Sweden [Grand Chamber]	41723/06	03/04 /2012	NV	Access to information, public or official documents, confidential information, privacy, scientific research, open government, academic freedom	Full text	276
114	Giniewski v. France	64016/00	31/01 /2006	V	Religion, defamation, religious insult, offensive information, hate speech	Full text	155
298	Gîrleanu v. Romania	50376/09	26/06 /2018	V	Investigative journalism, classified information, criminal conviction, public interest, disproportionate to aim pursued	Full text	477
134	Glas Nadezhda EOOD & Elenkov v. Bulgaria	14134/02	11/10 /2007	V 10, 13	Allocation of radio licence, religion, lack of motivation of the judgment, transparency, licensing procedure	Full text	185

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
7	Goodwin v. the United Kingdom	17488/90	27/03 /1996	V	Protection of sources, public interest, responsible journalism, chilling effect, whistle-blowing	Full text	53
244	Görmüş and Others v. Turkey	49085/07	19/01 /2016	V	Protection of journalistic sources, disclosure of confidential military information, whistle-blowers, seizure of computer data	Full text	370
289	GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland	18597/13	09/01 /2018	V	NGO, website quoting politician's speech, accusation of verbal racism, public debate, factual basis, chilling effect, fair balance	Full text	458
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54	Sener v. Turkey	26680/95	18/07 /2000	V	Vital role of press, positive obligations, political expression, public interest, receive information	Full text	85
182	Sigma Radio Television Ltd. V. Cyprus	32181/04 and 35122/05	21/07 /2011	NV 10, 14	Rights of others, decisions by independent media regulators, budget neutrality, margin of appreciation, discrimination	Full text	258
288	Sinkova v. Ukraine	39496/11	27/02 /2018	V 5, NV 10	Performance-art protest at war memorial, film published online, criminal conviction, necessary in democratic society, more suitable ways to express views, insulting memory of killed soldiers and feelings of veterans, severe penalty upheld	Full text	456
183	Sipoş v. Romania	26125/04	03/05 /2011	V 8	Journalism, defamation, insult, privacy, horizontal effect of human rights, positive obligations, chilling effect of criminal sanctions	Full text	260
166	Soila v. Finland	6806/06	06/04 /2010	V	Journalism, well-known public figures, privacy, public interest	Full text	233
249	Sousa Goucha v. Portugal	70434/12	22/03 /2016	NV 8, 14 + 8	Defamation proceedings, right to protection of reputation, sexual orientation joke, television host, public figure, fair balance	Full text	380

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
83	Stambuk v. Germany	37928/97	17/10 /2002	V	Medical advertising, rights of others, protect health, commercial speech, public interest	Full text	113
186	Standard News Verlags GmbH v. Austria (No. 3)	34702/07	10/01 /2012	V	Responsible journalism, good name and reputation, public interest, public figure, defamation, libel	Full text	266
107	Steel & Morris v. the United Kingdom	68416/01	15/02 /2005	V 10, 6	Defamation, libel, potential chilling effect, reputation, public debate	Full text	143
22	Steel & others v. the United Kingdom	24838/94	23/09 /1998	V	Necessity, public order, rule of law, authority of the judiciary, breach of peace, preventing disorder, rights of others	Full text	67
291	Stern Taulats and Roura Capellera v. Spain	51168/15 and 51186/15	13/03 /2018	V	Burning photo of Spanish royal couple, criminal conviction, political expression, symbolic speech, permissible degree of provocation, not hate speech or incitement to hatred or violence	Full text	462
116	Stoll v. Switzerland	69698/01	25/04 /2006	V, >GC	Confidential information, criticism, public watchdog, exaggeration, provocation, public debate, journalistic ethics	Full text	158
136	Stoll v. Switzerland [Grand Chamber]	69698/01	10/12 /2007	NV	Confidential information, criticism, public watchdog, exaggeration, provocation, public debate, journalistic ethics	Full text	188
294	Stomakhin v. Russia	52273/07	09/05 /2018	V	Criminal proceedings, journalist, public interest, acceptable limits of criticism, dominant position of government, pressing social need, limited distribution	Full text	468
35	Sürek & Özdemir v. Turkey	23927/94 and 24277/94	08/07 /1999	V	Offensive information, political expression, (separatist) propaganda, limits of acceptable criticism, right to receive information, duties and responsibilities,	Full text	73

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
					hate speech or promotion of violence, pluralism		
36	Sürek v. Turkey (No. 1)	26682/95	08/07 /1999	NV	<i>Idem.</i>	Full text	73
37	Sürek v. Turkey (No. 2)	24122/94	08/07 /1999	V	<i>Idem.</i>	Full text	73
38	Sürek v. Turkey (No. 3)	24735/94	08/07 /1999	NV	<i>Idem.</i>	Full text	73
39	Sürek v. Turkey (No. 4)	24762/94	08/07 /1999	V	<i>Idem.</i>	Full text	73
198	Szima v. Hungary	29723/11	09/10 /2012	NV	Internet, criticism, labour union, disciplinary sanction	Full text	285
315	Szurovecz v. Hungary	15428/16	08/10 /2019	V	Journalistic access, centre for asylum seekers, press freedom, investigative journalism, first-hand observation, newsgathering, significant public interest	Full text	511
45	T. v. the United Kingdom	24724/94	16/12 /1999	V 6	Fair trial, public interest	Full text	78
274	Tamiz v. the United Kingdom (dec.)	3877/14	19/09 /2017	I	Anonymous defamatory comments, blog, personal honour and reputation, real and substantial tort, liability of information society service providers for illegal content.	Full text	430
60	Tammer v. Estonia	41205/98	06/02 /2001	NV	Privacy, private information, politician, public interest, defamation	Full text	90
224	Taranenko v. Russia	19554/05	15/05 /2014	V 10, 11	Freedom of assembly and association, leaflets, occupation of administrative premises, conviction, prison sentence, pre-trial detention, chilling effect	Full text	332

No.	Case Summaries	Appn. No.	Date	Out-come	Keywords	HUDOC	Page
152	TASZ v. Hungary	37374/05	14/04 /2009	V	Access to information, public or official documents, open government, indirect censorship, personal information of a politician, social watchdog	Full text	213
55	Tele 1 Privatfernsehgesellschaft MBH v. Austria	32240/96	21/09 /2000	V & NV	Allocation of broadcasting licence, impart information, monopoly position of the media	Full text	86
199	Telegraaf Media Nederland Landelijke Media B.V. & Others v. the Netherlands	39315/06	22/11 /2012	V	Protection of journalistic sources, intelligence and security services, surveillance, coercive measures, ex ante review	Full text	287
259	Terentyev v. Russia	25147/09	26/01 /2017	V	Defamation proceedings, blogger, artistic criticism, statements of fact and value judgments	Full text	400
68	Thoma v. Luxembourg	38432/97	29/03 /2001	V	Responsible journalism, good name and reputation, quoting other media sources, public watchdog, public function of press	Full text	100
219	Tierbefreier E.V. v. Germany	45192/09	16/01 /2014	NV 10, 14	Association, animal rights, film, website, injunction, personality rights of company, debate on matters of public interest, unfair means	Full text	323
140	Tillack v. Belgium	20477/05	27/11 /2007	V	Protection of sources, searches of homes and workplaces, public watchdog	Full text	192
149	Times Newspapers Ltd. (Nos. 1 & 2) v. the United Kingdom	3002/03 and 23676/03	10/03 /2009	NV	Internet, internet publication rule, defamation, libel, education, historical research, responsible journalism, news archives	Full text	208
6	Tolstoy Miloslavsky v. the United Kingdom	18139/91	13/07 /1995	V	Defamation, libel, crime reporting, disproportionate damages	Full text	52

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
129	Tønsberg Blad AS & Marit Haukom v. Norway	510/04	01/03 /2007	V	Criticism, defamation, reputation, right to receive information, public interest, good faith, journalistic ethics, duty to verify factual allegations	Full text	178
112	Tourancheau & July v. France	53886/00	24/11 /2005	NV	Crime reporting, necessity, reputation, rights of others, presumption of innocence	Full text	151
167	Tuomela & others v. Finland	25711/04	06/04 /2010	V	Journalism, well-known public figures, privacy, public interest	Full text	233
189	Tusalp v. Turkey	32131/08 and 41617/08	21/02 /2012	V	Defamation, journalistic freedom of expression, value judgments, Prime Minister's personality rights, margin of appreciation	Full text	270
147	TV Vest SA Rogaland Pensjonistparti v. Norway	21132/05	11/12 /2008	V	Television, political advertising, positive obligation, margin of appreciation, pluralism	Full text	204
72	Unabhängige Initiative Informationsvielfalt v. Austria	28525/95	26/02 /2002	V	Political expression, political debate, public interest, value judgment	Full text	104
293	Unifaun Theatre Productions Limited and Others v. Malta	37326/13	15/05 /2018	V	Theatrical production, blasphemous play, ban, not prescribed by law	Full text	466
229	Urechean and Pavlicenco v. Moldova	27756/05 and 41219/07	02/12 /2014	V 6	Defamation proceedings, President, blanket immunity, right of access to courts	Full text	341
159	Ürper & others v. Turkey	14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07,	20/10 /2009	V	Terrorism, suspension of publication and distribution of newspaper, public watchdog	Full text	227

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
		50371/07, 50372/07 and 54637/07					
230	Uzeyir Jafarov v. Azerbaijan	54204/08	29/01 /2015	V 3	Violent attack, journalist, favourable environment, participation in public debate, effective investigation, prohibition of torture, inhuman or degrading treatment	Full text	343
46	V. v. the United Kingdom	24888/94	16/12 /1999	V 6	Fair trial, public interest	Full text	78
191	Vejdeland & others v. Sweden	1813/07	09/02 /2012	NV	Hate speech, homophobia, insult homosexuals, pamphlets, school	Full text	274
3	Vereiniging Weekblad Bluf! v. the Netherlands	16616/90	09/02 /1995	V	National security, sensitive information, State secrets, impart information	Full text	49
4	Vereinigung Demokratischer Soldaten Österreichs & Gubi v. Austria	15153/89	19/12 /1994	V	Political expression, critical reporting, criticism, rights of others, reputation	Full text	50
157	VgT Vereinigung gegen Tierfabriken v. Switzerland (No. 2) [Grand Chamber]	32772/02	30/06 /2009	V	Television, political advertising, horizontal effect of human rights, positive obligations	Full text	223
64	VgT Vereinigung Tegen Tierfabriken v. Switzerland	24699/94	28/06 /2001	V	Television, political advertising, horizontal effect of human rights, positive obligations	Full text	94
102	Von Hannover v. Germany	59320/00	24/06 /2004	V 8	Privacy in public areas, continual harassment, public interest, conflicting human rights	Full text	137

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
188	Von Hannover v. Germany (No. 2)	40660/08 and 60614/08	07/02 /2012	NV 8	Privacy in public areas, public interest, entertainment press, conflicting human rights	Full text	268
211	Von Hannover v. Germany (No. 3)	8772/10	19/09 /2013	NV 8	Photograph, injunction prohibiting further publication, debate of general interest, public figure, privacy, freedom of the press, positive obligations	Full text	308
139	Voskuil v. The Netherlands	64752/01	22/11 /2007	V	Confidential information, protection of sources, integrity of the police and judicial authorities, right to remain silent, public watchdog	Full text	192
210	Węgrzynowski and Smolczewski v. Poland	33846/07	16/07 /2013	NV 10, 8	Personality rights, online news media, digital archives, public watchdog, privacy, libel, rectification	Full text	306
122	White v. Sweden	42435/02	19/09 /2006	NV 8	Privacy, good name and reputation, defamation, exaggeration, provocation, journalistic ethics, positive obligation, public interest, conflicting human rights	Full text	168
42	Wille v. Liechtenstein	28396/95	28/10 /1999	V	Political expression, insult, critical reporting, public debate, margin of appreciation	Full text	77
80	Wilson & NUJ v. the United Kingdom	30668/96, 30671/96 and 30678/96	02/07 /2002	V 11	Journalism, freedom of assembly and association, necessity	Full text	111
8	Wingrove v. the United Kingdom	17419/90	25/11 /1996	NV	Blasphemous film, artistic expression, rights of others, general verification system for videos, political speech, public interest, margin of appreciation, morals or religion	Full text	55

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
111	Wirtschafts-Trend Zeitschriften-Verlags GmbH v. Austria	58547/00	27/10 /2005	V	Limits of acceptable criticism, political expression, defamation, high degree of tolerance, public interest	Full text	149
155	Wojtas-Kaletka v. Poland	20436/02	16/07 /2009	V	Public interest, pluralism, facts or value judgments, duties and responsibilities, good faith, employment relation	Full text	219
11	Worm v. Austria	22714/93	29/08 /1997	NV	Authority and impartiality of the judiciary, journalism, prejudice, crime reporting, fair trial	Full text	59
81	Yagmuredereli v. Turkey	29590/96	04/06 /2002	V	Political expression, criticism, terrorism, separatist propaganda, violence, national security	Full text	112
87	Yalçın Küçük v. Turkey	28493/95	05/12 /2002	V	Political expression, separatist propaganda, receive information, positive obligation	Full text	119
142	Yalçın Küçük v. Turkey (No. 3)	71353/01	22/04 /2008	V	Incitement to hatred or hostility, separatism, necessity	Full text	196
178	Yleisradio Oy & others v. Finland	30881/09	08/02 /2011	NV	Defamation, confidential and sensitive information, privacy, private persons,	Full text	253
208	Youth Initiative for Human Rights v. Serbia	48135/06	25/06 /2013	V	Access to documents held by public authorities, NGO, electronic surveillance measures, freedom of information legislation, public debate, public interest, public watchdog	Full text	304
13	Zana v. Turkey	18954/91	25/11 /1997	NV	Political expression, incitement to violence, terrorism	Full text	61

Appendix III: Overview of cases by country.

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
Armenia							
143	Meltex Ltd. & Mesrop Movsesyan v. Armenia	32283/04	17/06 /2008	V	Non-discriminatory allocation of frequencies or broadcasting licences, licencing procedure	Full text	197
207	Meltex Ltd. v. Armenia (dec.)	45199/09	21/05 /2013	I	Broadcasting licence, licensing body, arbitrary interference, procedural safeguards, domestic enforcement of Court's judgment, fresh violation of freedom of expression	Full text	303
Austria							
50	Andreas Wabl v. Austria	24773/94	21/03 /2000	NV	Political expression, defamation, Nazism, offensive information	Full text	81
73	Dichand & others v. Austria	29271/95	26/02 /2002	V	Political expression, criticism, offensive information, public interest, value judgments	Full text	104
304	E.S. v. Austria	38450/12	25/10 /2018	NV	Criminal conviction, disparagement of religious doctrines, Prophet Muhammad, paedophilia, margin of appreciation, co-existence of different religions, positive obligations, tolerance	Full text	488
267	Herbert Haupt v. Austria (dec.)	55537/10	02/05 / 2017	NV 8	Private life, positive obligations, defamation, television comedy show, politician, artistic expression	Full text	416
61	Jerusalem v. Austria	26958/95	27/02 /2001	V	Political expression, public debate, facts or value judgments	Full text	91
74	Krone Verlag GmbH & Co. KG v. Austria	34315/96	26/02 /2002	V	Political expression, publication of photos, vital role of press, public interest, privacy	Full text	104

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
128	Nikowitz & Verlagsgruppe News GmbH v. Austria	5266/03	22/02 /2007	V	Defamation, value judgments, well-known information, humorous commentary, acceptable satire, public interest	Full text	175
47	News Verlags GmbH v. Austria	31457/96	11/01 /2000	V	Defamation, reputation, rights of others, public concern, publication of photos, presumption of innocence	Full text	79
10	Oberschlick (No. 2) v. Austria	20834/92	01/07 /1997	V	Political expression, defamation, insult, offensive information, limits of acceptable criticism	Full text	58
216	Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria	39534/07	28/11 /2013	V	NGO, gathering of information in public interest, public debate, right of access to information, positive State obligations, information monopoly, social watchdog	Full text	317
103	Österreichischer Rundfunk v. Austria (dec.)	57597/00	25/05 /2004	I	Public broadcasting organisation, publication of photos without consent, private interest, neo-Nazism	Full text	138
127	Österreichischer Rundfunk v. Austria	35841/02	07/12 /2006	V	Public broadcasting organisation, publication of photos without consent, private interest, neo-Nazism	Full text	176
1	Otto-Preminger-Institut v. Austria	13470/87	20/09 /1994	NV	Cinema, blasphemous film, religion, artistic expression, margin of appreciation, art house cinema	Full text	47
5	Prager & Oberschlick v. Austria	15974/90	26/04 /1995	NV	Critical reporting , offensive information, defamation, criticism, rights of others, reputation	Full text	43

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
12	Radio ABC v. Austria	19736/92	20/10 /1997	V	Private broadcasting, monopoly position of the media, positive obligations	Full text	460
186	Standard News Verlags GmbH v. Austria (No. 3)	34702/07	10/01 /2012	V	Responsible journalism, good name and reputation, public interest, public figure, defamation, libel	Full text	266
55	Tele 1 Privatfernsehgesellschaft MBH v. Austria	32240/96	21/09 /2000	V & NV	Allocation of broadcasting licence, impart information, monopoly position of the media	Full text	86
72	Unabhängige Initiative Informationsvielfalt v. Austria	28525/95	26/02 /2002	V	Political expression, political debate, public interest, value judgment	Full text	104
4	Vereinigung Demokratischer Soldaten Österreichs & Gubi v. Austria	15153/89	19/12 /1994	V	Political expression, critical reporting, criticism, rights of others, reputation	Full text	50
111	Wirtschafts-Trend Zeitschriften-Verlags GmbH v. Austria	58547/00	27/10 /2005	V	Limits of acceptable criticism, political expression, defamation, high degree of tolerance, public interest	Full text	149
11	Worm v. Austria	22714/93	29/08 /1997	NV	Authority and impartiality of the judiciary, journalism, prejudice, crime reporting , fair trial	Full text	59
Azerbaijan							
171	Fatullayev v. Azerbaijan	40984/07	22/04 /2010	V	Sensitive and offensive information, defamation, terrorism, historical truth, public watchdog, disproportionate sanction, order of immediate release from prison	Full text	239
266	Huseynova v. Azerbaijan	10653/10	13/04 /2017	V 2	Journalist murdered, right to life, positive obligations, failure to carry out an effective investigation, chilling effect	Full text	414

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
307	Khadija Ismayilova v. Azerbaijan	65286/13 and 57270/14	10/01 /2019	V 8, 10	Intimidation of journalist, hidden cameras in flat, intimate videos online, smear campaign, ineffective and flawed investigation, publication of status report of investigation, positive obligation, private life, chilling effect, environment protective of journalism	Full text	495
230	Uzeyir Jafarov v. Azerbaijan	54204/08	29/01 /2015	V 3	Violent attack, journalist, favourable environment, participation in public debate, effective investigation, prohibition of torture, inhuman or degrading treatment	Full text	343
Belgium							
70	Bankovic & others v. Belgium & others	52207/99	12/12 /2001	I	NATO-bombing of TV station, inadmissible, jurisdiction, treaty obligations of State Parties	Full text	102
9	De Haes & Gijssels v. Belgium	19983/92	24/02 /1997	V	Defamation, criticism, duties and responsibilities, mode of expression, exaggeration, provocation, authority and impartiality of the judiciary, protection of journalistic sources, alternative evidence	Full text	57
96	Ernst & others v. Belgium	33400/96	15/07 /2003	V 10, 8	Protection of sources, journalism, overriding public interest	Full text	131
154	Féret v. Belgium	15615/07	16/07 /2009	NV	Hate speech, insult of foreigners, political expression, election campaign, public debate	Full text	217
268	Fouad Belkacem v. Belgium (dec.)	34367/14	27/06 /2017	NV	Criminal proceedings, incitement to discrimination, hatred and violence, public figure, YouTube videos, Article 17	Full text	418

No.	Case Summaries	Appn. No.	Date	Out-come	Keywords	HUDOC	Page
124	Leempoel & S.A. Ed. Cine Revue v. Belgium	64772/01	09/11/2006	NV	Censorship, privacy, strictly confidential correspondence, public interest	Full text	1670
180	RTBF v. Belgium	50084/06	29/03/2011	V	Broadcasting, patients' rights, impart information, prior restraint, censorship, foreseeability of law	Full text	255
140	Tillack v. Belgium	20477/05	27/11/2007	V	Protection of sources, searches of homes and workplaces, public watchdog	Full text	192
Bulgaria							
134	Glas Nadezhda EOOD & Elenkov v. Bulgaria	14134/02	11/10/2007	V 10, 13	Allocation of radio licence, religion, lack of motivation of the judgment, transparency, licensing procedure	Full text	185
200	Nenkova-Lalova v. Bulgaria	35745/05	11/12/2012	NV	Dismissal of journalist, disciplinary sanction	Full text	289
227	Prezhdarovi v. Bulgaria	8429/05	30/10/2014	V 8	Private life, confiscation of computers, illegal software, illegal distribution and reproduction, search-and-seizure, arbitrary interference, sufficient guarantees	Full text	337
Cyprus							
182	Sigma Radio Television Ltd. V. Cyprus	32181/04 and 35122/05	21/07/2011	NV 10, 14	Rights of others, decisions by independent media regulators, budget neutrality, margin of appreciation, discrimination	Full text	258
Czech Republic							
120	Matky v. Czech Republic	19101/03	10/07/2006	I	Receive information, access to public or administrative documents, positive obligations, rights of others, national security, public health, public interest	Full text	164
Denmark							
277	Frisk and Jensen v. Denmark	19657/12	05/12/2017	NV	Incorrect factual basis, journalist, fair balance	Full text	436

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
2	Jersild v. Denmark	15890/89	23/09 /1994	V	News reporting, interviews, anti-racism, public watchdog, public function of press	Full text	48
113	Nordisk Film & TV A/S v. Denmark	40485/02	08/12 /2005	NV	Protection of sources, vulnerable persons, positive obligations, major crime	Full text	153
94	Pedersen & Baadsgaard v. Denmark	49017/99	19/06 /2003	NV 10, 6, >GC	Responsible journalism, good name and reputation, public interest, defamation, libel, facts or value judgments	Full text	129
105	Pedersen & Baadsgaard v. Denmark [Grand Chamber]	49017/99	17/12 /2004	NV	Responsible journalism, good name and reputation, public interest, defamation, libel, facts or value judgments	Full text	141
292	ROJ TV A/S v. Denmark (dec.)	24683/14	24/05 /2018 w	I	Conviction of television broadcaster, terrorist offences, duties and responsibilities, violence and support for terrorist activity, wide audience, Article 17	Full text	464
Estonia							
214	Delfi AS v. Estonia	64569/09	10/10 /2013	NV, >GC	Internet news portal, grossly insulting remarks, readers' comments, ISP liability (exemption), filter, notice-and-takedown, editorial control, economic interest	Full text	313
237	Delfi AS v. Estonia [Grand Chamber]	64569/09	16/06 /2015	NV	Internet news portal, users' comments, offensive content, media publisher, duties and responsibilities, liability, notice-and-takedown, E-commerce Directive, Internet service providers, economic interest	Full text	353
245	Kalda v. Estonia	17429/10	19/01 /2016	V	Prisoner, access to Internet, right to receive information, role of Internet, security and economic considerations	Full text	372
60	Tammer v. Estonia	41205/98	06/02 /2001	NV	Privacy, private information, politician, public interest, defamation	Full text	90
Finland							

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
163	Flinkkilä & others v. Finland	25576/04	06/04 /2010	V	Journalism, well-known public figures, privacy, public interest	Full text	233
165	Iltalehti & Karhuvaara v. Finland	6372/06	06/04 /2010	V	Journalism, well-known public figures, privacy, public interest	Full text	233
164	Jokitaipale & others v. Finland	43349/05	06/04 /2010	V	Journalism, well-known public figures, privacy, public interest	Full text	233
184	Karttunen v. Finland	1685/10	10/05 /2011	I	Internet, possession and reproduction of child pornography, illegal content, artistic expression	Full text	262
77	Nikula v. Finland	31611/96	21/03 /2002	V	Defamation, criticism, fair trial, potential chilling effect of criminal sanctions, lawyer	Full text	108
239	Niskasaari and Otavamedia Oy v. Finland	32297/10	23/07 /2015	V	Defamation proceedings, journalist's reputation, scrutiny of journalists, comment and criticism	Full text	359
220	Pentikäinen v. Finland	11882/10	04/02 /2014	NV, >GC	Press photographer, demonstration, police order, conviction, no confiscation of equipment or photos, public interest, fair balance	Full text	325
241	Pentikäinen v. Finland [Grand Chamber]	11882/10	20/10 /2015	NV	Press photographer, demonstration, police order, conviction, no confiscation of equipment or photos, public interest, fair balance	Full text	363
215	Ristamäki and Korvola v. Finland	66456/09	29/10 /2013	V	Defamation, conviction, protection of reputation, public interest, tax inspection	Full text	315
223	Salumäki v. Finland	23605/09	29/04 /2014	NV	Newspaper article, insinuation, criminal conviction, private life, reputation, fair balance, public interest, presumption of innocence, margin of appreciation	Full text	330

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
238	Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland	931/13	21/07 /2015	NV 10, 14; V 6	Privacy, personal data, taxation data, public interest, data journalism, magazine and SMS-service, extent of publication, processing of personal data, journalistic activities, margin of appreciation, fair balance, length of proceedings	Full text	356
270	Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland [Grand Chamber]	931/13	27/06 /2017	NV 10 V 6	Privacy, personal data, taxation data, public interest, data journalism, magazine and SMS-service, extent of publication, processing of personal data, journalistic activities, margin of appreciation, fair balance, length of proceedings	Full text	422
166	Soila v. Finland	6806/06	06/04 /2010	V	Journalism, well-known public figures, privacy, public interest	Full text	233
167	Tuomela & others v. Finland	25711/04	06/04 /2010	V	Journalism, well-known public figures, privacy, public interest	Full text	233
178	Yleisradio Oy & others v. Finland	30881/09	08/02 /2011	NV	Defamation, confidential and sensitive information, privacy, private persons,	Full text	253
France							
202	Ashby Donald & Others v. France	36769/08	10/01 /2013	NV	Intellectual property, unauthorised reproduction of fashion photos, Internet, margin of appreciation, news reporting exception, commercial speech	Full text	293
79	Colombani & others v. France	51279/99	25/06 /2002	V	Responsible journalism, good name and reputation, public watchdog, public function of press	Full text	110
242	Couderc and Hachette Filipacchi Associés v. France [Grand Chamber]	40454/07	10/11 /2015	V	Private life, freedom of expression, fair balance, debate of public interest, disclosure of the Prince's fatherhood	Full text	365

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
246	De Carolis and France Télévisions v. France	29313/10	21/01 /2016	V	Defamation proceedings, protection of reputation, Saudi prince, investigative journalism, sufficient factual basis	Full text	374
131	Dupuis & others v. France	1914/02	07/06 /2007	V	Confidential but well-known information, public interest, public watchdog, chilling effect, newsgathering	Full text	181
57	Du Roy & Maurie	34000/96	03/10 /2000	V	Public interest, secrecy during investigation and enquiry procedures, presumption of innocence	Full text	88
104	Editions Plon v. France	56148/00	18/05 /2004	V	Privacy, public interest, medical confidentiality, journalistic ethics, rights of others	Full text	139
65	Ekin Association v. France	39288/98	17/07 /2001	V	Insult of foreigners, discrimination based on foreign origin	Full text	96
204	Eon v. France	26118/10	14/03 /2013	V	Insult of President, discussion of matters of public interest, private life or honour, satire, chilling effect	Full text	297
23	Fressoz & Roire v. France	29183/95	21/01 /1999	V	Confidential information, public interest, well-known information, privacy, journalistic ethics, tax reports, journalists committing offence and public interest	Full text	69
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126	Mamère v. France	12697/03	07/11 /2006	V	Responsible journalism, good name and reputation, defamation, libel, public interest, political expression, exaggeration, provocation	Full text	174
235	Morice v. France [Grand Chamber]	29369/10	23/04 /2015	V	Defamation, investigative judges, lawyers, sufficient factual basis, public interest, value judgments, judicial proceedings, authority of judiciary, chilling effect	Full text	349
101	Radio France v. France	53984/00	30/03 /2004	NV	Privacy, good name and reputation, responsible journalism, exaggeration, provocation	Full text	136
168	Renaud v. France	13290/07	25/02 /2010	V	Internet, political speech, criticism, emotional political debate, tolerance, facts or value judgments, chilling effect	Full text	235
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Germany							
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272	Axel Springer SE and RTL Television GmbH v. Germany	51405/12	21/09 /2017	NV	Restriction on publishing pictures of accused, court reporting, non-public figure, presumption of innocence	Full text	426
231	Bohlen v. Germany	53495/09	19/02 /2015	NV 8	Cigarette advertisements, reputation, privacy, debate of general interest, humour, satire, fair balance	Full text	345
255	Boris Erdtmann v. Germany (dec.)	56328/10	05/01 /2016	I	Criminal conviction, journalistic research, effectiveness of airport security checks, responsible journalism, disproportionate action of journalist	Full text	393
222	Brosa v. Germany	5709/09	17/04 /2014	V	Freedom of political expression, pre-election, neo-Nazi organisation, private	Full text	328

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					individual, public discussion, mayoral election, acceptable criticism, honour and social reputation, sufficient factual basis		
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276	Fuchsmann v. Germany	71233/13	19/10 /2017	NV 8	Fair balance, allegations sufficiently serious, public figure, good faith	Full text	434
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295	M.L. and W.W. v. Germany	60789/10 and 65599/10	28/06 /2018	NV 8	Criminal proceedings, anonymization of media reports, "right to be forgotten", criminal records, privacy, ongoing public interest	Full text	471
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83	Stambuk v. Germany	37928/97	17/10 /2002	V	Medical advertising, rights of others, protect health, commercial speech, public interest	Full text	113
219	Tierbefreier E.V. v. Germany	45192/09	16/01 /2014	NV 10, 14	Association, animal rights, film, website, injunction, personality rights of company, debate on matters of public interest, unfair means	Full text	323
102	Von Hannover v. Germany	59320/00	24/06 /2004	V8	Privacy in public areas, continual harassment, public interest, conflicting human rights	Full text	137

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Greece							
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Hungary							
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257	Magyar Helsinki Bizottság v. Hungary [Grand Chamber]	18030/11	08/11 /2016	V	Access to information, public or official documents, non-governmental organisation, public watchdog	Full text	396
306	Magyar Jeti Zrt. v. Hungary	11257/16	04/12 /2018	V	Freedom of expression online, objective liability, media platform, hyperlink, defamatory content, chilling effect	Full text	492

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247	Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary	22947/13	02/02 /2016	V	Internet news portal, readers' comments, ISP liability, commercial reputation, matters of public interest, notice-and-take-down-system	Full text	375
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26	Rekvényi v. Hungary	25390/94	20/05 /1999	NV	Politically neutral police force, national security, prevention of disorder	Full text	72
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Iceland							
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					level of seriousness, rape, previous behaviour, full judicial satisfaction, margin of appreciation		
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Ireland							
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Italy							
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194	Centro Europa 7 S.r.l. and Di Stefano v. Italy	38433/09	07/06 /2012	V 10; AP- 1(1)	Dominant position over the audiovisual media, allocation of frequencies, media pluralism, right to receive information	Full text	278

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67	Perna v. Italy	48898/99	25/07 /2001	V, >GC	Responsible journalism, good name and reputation, public interest	Full text	98
93	Perna v. Italy [Grand Chamber]	48898/99	06/05 /2003	NV	Responsible journalism, good name and reputation, defamation	Full text	127
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Latvia							
209	Nagla v. Latvia	73469/10	16/07 /2013	V	Protection of journalistic sources, search and seizure, chilling effect, safeguards against abuse, pressing social need	Full text	305
Liechtenstein							
42	Wille v. Liechtenstein	28396/95	28/10 /1999	V	Political expression, insult, critical reporting, public debate, margin of appreciation	Full text	77
Lithuania							
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Luxembourg							
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Malta							
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Moldova							
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141	Guja v. Moldova	14277/04	12/02 /2008	V	Whistleblowing, public interest, journalistic ethics, duties and responsibilities, good faith, chilling effect, employment relation	Full text	194
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The Netherlands							

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3	Vereiniging Weekblad Bluf! v. the Netherlands	16616/90	09/02 /1995	V	National security, sensitive information, State secrets, impart information	Full text	49
139	Voskuil v. The Netherlands	64752/01	22/11 /2007	V	Confidential information, protection of sources, integrity of the police and judicial authorities, right to remain silent, public watchdog	Full text	192
Norway							
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					and reputation, level of seriousness, fair balance, established system of moderation		
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147	TV Vest SA Rogaland Pensjonistparti v. Norway	21132/05	11/12 /2008	V	Television, political advertising, positive obligation, margin of appreciation, pluralism	Full text	204
Poland							
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Portugal							
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Romania							

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40	Dalban v. Romania	28114/95	28/09 /1999	V	Political expression, exaggeration, criminal libel, duty of care for journalists, public function, privacy, public watchdog	Full text	75
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314	Pryanishnikov v. Russia	25047/05	10/09 /2019	V	Film producer, refusal of film reproduction licence, distribution of films, artistic expression, protection of children, pornography, protection of morals, based on assumptions, proportionality	Full text	509
311	Rebechenko v. Russia	10257/17	16/04 /2019	V	Blogger, YouTube video, reputation, political debate, good faith, value judgement, failure to analyse contents of video, discourage participation of the press, fair balance, pressing social need	Full text	503
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Serbia							
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Slovakia							
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Sweden							
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297	Centrum för Rättvisa v. Sweden	35252/08	19/06 /2018	NV 8, >GC	Confidentiality of online communication, privacy, surveillance, bulk interception, adequate and sufficient safeguards, margin of appreciation	Full text	475
252	Diamant Salihu and others v. Sweden (dec.)	33628/15	10/05 /2016	I	Criminal conviction, purchasing illegal firearms, newsgathering, duty to obey ordinary criminal law	Full text	387
203	Frederik Neij & Peter Sunde Kolmisoppi (The	40397/12	19/02 /2013	I	Copyright, The Pirate Bay, Internet file-sharing service, illegal use of copyright-	Full text	295

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	Pirate Bay v. Sweden (dec.)				protected music, conviction, margin of appreciation		
175	Gillberg v. Sweden	41723/06	02/11 /2010, >GC	NV 10, 8	Access to information, public or official documents, confidential information, privacy, scientific research, open government, academic freedom	Full text	248
192	Gillberg v. Sweden [Grand Chamber]	41723/06	03/04 /2012	NV	Access to information, public or official documents, confidential information, privacy, scientific research, open government, academic freedom	Full text	276
148	Khurshid Mustafa & Tarzibachi v. Sweden	23883/06	16/12 /2008	V	Language of television, freedom to receive information, positive obligation, horizontal effect, disproportionality of the interference	Full text	206
263	Rolf Anders Daniel Pihl v. Sweden (dec.)	74742/14	09/03 /2017	NV 8	Private life, positive obligations, website liability, anonymous online comment, chilling effect	Full text	408
191	Vejdeland & others v. Sweden	1813/07	09/02 /2012	NV	Hate speech, homophobia, insult homosexuals, pamphlets, school	Full text	274
122	White v. Sweden	42435/02	19/09 /2006	NV 8	Privacy, good name and reputation, defamation, exaggeration, provocation, journalistic ethics, positive obligation, public interest, conflicting human rights	Full text	168
Switzerland							
251	Bédat v. Switzerland [Grand Chamber]	56925/08	29/03 /2016	NV 10	Criminal conviction, secrecy of criminal investigation, responsible journalism, accused's private life	Full text	384
117	Dammann v. Switzerland	77551/01	25/04 /2006	V	Confidential information, public discussion, vital role of press, public watchdog, newsgathering	Full text	160

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86	Demuth v. Switzerland	38743/97	05/11 /2002	NV	Allocation of broadcasting licence, media pluralism, margin of appreciation	Full text	117
289	GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland	18597/13	09/01 /2018	V	NGO, website quoting politician's speech, accusation of verbal racism, public debate, factual basis, chilling effect, fair balance	Full text	458
234	Haldimann and Others v. Switzerland	21830/09	24/02 /2015	V	Hidden cameras, private life, public interest, personal reputation, ethics of journalism, good faith, accurate factual basis	Full text	347
20	Hertel v. Switzerland	25181/94	25/08 /1998	V	Research paper, rights of others, necessity, commercial speech, academic freedom	Full text	66
121	Monnat v. Switzerland	73604/01	21/09 /2006	V	Broadcasting, critical reporting, public interest, positive obligations, anti-Semitism, politically engaged journalism, journalistic ethics, public watchdog	Full text	166
195	Mouvement raëlien suisse v. Switzerland	16354/06	13/07 /2012	NV	Internet, illegal content, poster campaign, aliens, proselytising speech, the protection of morals, health, rights of others and prevention of crime	Full text	280
217	Perinçek v. Switzerland	27510/08	17/12 /2013	V, >GC	Genocide denial, Armenia, criminal conviction, racial discrimination, historical debate, public interest, negation of crimes against humanity	Full text	319
240	Perinçek v. Switzerland [Grand Chamber]	27510/08	15/10 /2015	V	Genocide denial, Armenia, criminal conviction, racial discrimination, historical debate, public interest, negation of crimes against humanity	Full text	361

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17	Schöpfer v. Switzerland	25405/94	20/05 /1998	NV	Limits of acceptable criticism, receive information, critical reporting , public interest	Full text	63
196	Schweizerische Radio- und Fernseh gesellschaft SRG v. Switzerland	34124/06	21/06 /2012	V	Television interview, political and economic expression, rights of others, public interest, privacy, security, margin of appreciation, public interest	Full text	282
116	Stoll v. Switzerland	69698/01	25/04 /2006	V, >GC	Confidential information, criticism, public watchdog, exaggeration, provocation, public debate, journalistic ethics	Full text	158
136	Stoll v. Switzerland [Grand Chamber]	69698/01	10/12 /2007	NV	Confidential information, criticism, public watchdog, exaggeration, provocation, public debate, journalistic ethics	Full text	188
64	VgT Vereinigung Tegen Tierfabriken v. Switzerland	24699/94	28/06 /2001	V	Television, political advertising, horizontal effect of human rights, positive obligations	Full text	94
157	VgT Vereinigung gegen Tierfabriken v. Switzerland (No. 2) [Grand Chamber]	32772/02	30/06 /2009	V	Television, political advertising, horizontal effect of human rights, positive obligations	Full text	223
"The former Yugoslav Republic of Macedonia"							
260	Selmani & Others v. the former Yugoslav Republic of Macedonia	67259/14	09/02 /2017	V	Forcible removal, journalists, press gallery, national parliament, protests, legitimate public concern, behaviour of elected representatives, necessary in democratic society	Full text	402
Turkey							
100	Abdullah Aydin v. Turkey	42435/98	09/03 /2004	V	Political expression, incitement to hatred or hostility, social, ethnic and regional differences	Full text	135

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201	Ahmet Yildirim v. Turkey	3111/10	18/12 /2012	V	Internet, defamation, blocking of Google Sites, disproportionate measure, prescribed by law	Full text	291
170	Akdas v. Turkey	41056/04	16/02 /2010	V	Artistic expression, obscene or immoral information, fiction, exaggeration, humorous, duties and responsibilities, protection of morals	Full text	238
58	Akkoç v. Turkey	22947/93 and 22948/93	10/10 /2000	NV	Interview, disciplinary sanction, separatist propaganda, incitement to violence, armed resistance or an uprising	Full text	94
173	Aksu v. Turkey	4149/04 and 41029/04	27/07 /2010, >GC	NV 14, 8	Positive obligations, vulnerable groups, margin of appreciation, racial discrimination, racism, cultural diversity, privacy	Full text	244
190	Aksu v. Turkey [Grand Chamber]	4149/04 and 41029/04	15/03 /2012	NV 8	Positive obligations, vulnerable groups, margin of appreciation, racial discrimination, racism, cultural diversity, privacy	Full text	272
27	Arslan v. Turkey	23462/94	08/07 /1999	V	Offensive information, political expression, (separatist) propaganda, limits of acceptable criticism, right to receive information, duties and responsibilities, hate speech or promotion of violence, pluralism	Full text	73
118	Aydin Tatlav v. Turkey	50692/99	02/02 /2006	V	Critical media reporting, political expression, positive obligations, religion	Full text	161
84	Ayse Öztürk v. Turkey	24914/94	15/10 /2002	V	Political expression, terrorism, incitement to violence, public debate, positive obligation	Full text	115

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29	Başkaya & Okçuoğlu v. Turkey	23536/94 and 24408/94	08/07 /1999	V	Offensive information, political expression, (separatist) propaganda, limits of acceptable criticism, right to receive information, duties and responsibilities, hate speech or promotion of violence, pluralism	Full text	73
221	Bayar (nos. 1-8) v. Turkey	39690/06, 40559/06, 48815/06, 2512/07, 55197/07, 55199/07, 55201/07 and 55202/07	25/03 /2014	V 10, 6	Criminal conviction, publication of declarations by illegal armed organisation, right to fair trial, fight against terrorism, no encouragement of violence, no hate speech	Full text	327
243	Cengiz and Others v. Turkey	48226/10 and 14027/11	01/12 /2015	V	YouTube, blanket blocking order, insulting to the memory of Atatürk, citizen journalism, not prescribed by law	Full text	368
32	Ceylan v. Turkey	23556/94	08/07 /1999	V	Offensive information, political expression, (separatist) propaganda, limits of acceptable criticism, right to receive information, duties and responsibilities, hate speech or promotion of violence, pluralism	Full text	73
63	Cyprus v. Turkey	25781/94	10/05 /2001	V	Conflict between State Parties, censorship of school-books, restricted distribution and importation media	Full text	93
88	Dicle on behalf of DEP (Democratic Party) v. Turkey	25141/94	10/12 /2002	V	Political expression, criticism, positive obligation	Full text	119

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71	E.K. v. Turkey	28496/95	07/02 /2002	V	Book, political expression, vital role of press, receive information	Full text	103
119	Erbakan v. Turkey	59405/00	06/07 /2006	V	Political debate, political expression, hate speech, intolerance, incitement to hatred or hostility, religion	Full text	162
31	Erdoğan and İnce v. Turkey	25067/94 and 25068/94	08/07 /1999	V	Offensive information, political expression, (separatist) propaganda, limits of acceptable criticism, right to receive information, duties and responsibilities, hate speech or promotion of violence, pluralism	Full text	73
52	Erdogdu v. Turkey	25723/94	15/06 /2000	V	Propaganda against the territorial integrity of the State, terrorism, access, receive information, prevention of disorder or crime	Full text	83
34	Gerger v. Turkey	24919/94	08/07 /1999	V	Offensive information, political expression, (separatist) propaganda, limits of acceptable criticism, right to receive information, duties and responsibilities, hate speech or promotion of violence, pluralism	Full text	73
244	Görmüş and Others v. Turkey	49085/07	19/01 /2016	V	Protection of journalistic sources, disclosure of confidential military information, whistle-blowers, seizure of computer data	Full text	370
99	Gündüz v. Turkey	35071/97	04/12 /2003	V	Critical media reporting, political expression, religious intolerance, positive obligations, shocking or offensive information, live studio debate, hatred or hostility, pluralism	Full text	134

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110	IA v. Turkey	42571/98	13/09 /2005	NV	Religious insult, rights of others, provocative opinions, abusive and offensive information	Full text	148
59	Ibrahim Aksoy v. Turkey	28635/95, 30171/96 and 34535/97	10/10 /2000	V	Political expression, separatist propaganda, incitement to violence	Full text	89
18	Incal v. Turkey		09/06 /1998	V	Political expression, separatist propaganda, limits of acceptable criticism, public interest, hate speech	Full text	64
258	Kaos GL v. Turkey	4982/07	22/11 /2016	V	Seizure of magazine, protection of minors, protection of public morals, LGBT, sexually explicit expression	Full text	398
85	Karakoç & others v. Turkey	27692/95, 28138/95 and 28498/95	15/10 /2002	V	Political expression, public watchdog, separatist propaganda, positive obligation	Full text	115
30	Karataş v. Turkey	23168/94	08/07 /1999	V	Offensive information, political expression, (separatist) propaganda, limits of acceptable criticism, right to receive information, duties and responsibilities, hate speech or promotion of violence, pluralism	Full text	73
97	Karkin v. Turkey	43928/98	23/09 /2003	V	Political expression, hate speech, discrimination, racism	Full text	132
98	Kizilyaprak v. Turkey	27528/95	02/10 /2003	V	Receive information, separatist propaganda, hate speech based on ethnic ad regional differences	Full text	133
286	Mehmet Hasan Altan v. Turkey	13237/17	20/03 /2018	V 5, 10	Academic and journalist, critical views, military coup, Article 15 - derogation in	Full text	454

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
					time of emergency, Article 5 - right to liberty and security, pre-trial and continued detention, disproportionate, necessary, pressing social need, concrete evidence, chilling effect, intimidation of civil society, silencing of dissenting voices		
137	Nur Radyo v. Turkey	6587/03	27/11 /2007	V	Broadcasting licence, religion, shocking or offensive information, hate speech	Full text	190
176	Nur Radyo Ve Televizyon Yayıncılığı A.Ş. v. Turkey (No. 2)	42284/05	12/10 /2010	V	Broadcasting licence, religion, rule of law, positive obligations,	Full text	251
33	Okçuoğlu v. Turkey	24246/94	08/07 /1999	V	Offensive information, political expression, (separatist) propaganda, limits of acceptable criticism, right to receive information, duties and responsibilities, hate speech or promotion of violence, pluralism	Full text	73
49	Özgür Gündem v. Turkey	23144/93	16/03 /2000	V	Critical media reporting, separatist propaganda, racism, political expression, positive obligations , horizontal effect of human rights	Full text	680
115	Özgür Radyo v. Turkey	64178/00, 64179/00, 64181/00, 64183/00, 64184/00	30/03 /2006	V	Suspension of broadcasting licences, political expression, positive obligations, hate speech, political expression, public order	Full text	156
138	Özgür Radyo v. Turkey	11369/03	04/12 /2007	V	Suspension of broadcasting licences, political expression, positive obligations, hate speech, political expression, public order	Full text	190

No.	Case Summaries	Appn. No.	Date	Out- come	Keywords	HUDOC	Page
41	Öztürk v. Turkey	22479/93	28/09 /1999	V	Political expression, incitement to crime, hatred or hostility, public interest, prevention of disorder or crime	Full text	75
28	Polat v. Turkey	23500/94	08/07 /1999	V	Offensive information, political expression, (separatist) propaganda, limits of acceptable criticism, right to receive information, duties and responsibilities, hate speech or promotion of violence, pluralism	Full text	73
287	Şahin Alpay v. Turkey	16538/17	20/03 /2018	V 5, 10	Journalist, critical views, arrest and pre-trial detention, military coup, public emergency threatening the life of the nation, danger democratic constitutional order, chilling effect, intimidation of civil society, silencing of dissenting voices	Full text	454
82	Seher Karatas v. Turkey	33179/96	09/07 /2002	V	Political expression, criticism, terrorism, incitement to hatred or hostility, national security	Full text	112
54	Sener v. Turkey	26680/95	18/07 /2000	V	Vital role of press, positive obligations, political expression, public interest, receive information	Full text	85
35	Sürek & Özdemir v. Turkey	23927/94 and 24277/94	08/07 /1999	V	Offensive information, political expression, (separatist) propaganda, limits of acceptable criticism, right to receive information, duties and responsibilities, hate speech or promotion of violence, pluralism	Full text	73
36	Sürek v. Turkey (No. 1)	26682/95	08/07 /1999	NV	<i>Idem.</i>	Full text	73

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37	Sürek v. Turkey (No. 2)	24122/94	08/07 /1999	V	<i>Idem.</i>	Full text	73
38	Sürek v. Turkey (No. 3)	24735/94	08/07 /1999	NV	<i>Idem.</i>	Full text	73
39	Sürek v. Turkey (No. 4)	24762/94	08/07 /1999	V	<i>Idem.</i>	Full text	73
189	Tusalp v. Turkey	32131/08 and 41617/08	21/02 /2012	V	Defamation, journalistic freedom of expression, value judgments, Prime Minister's personality rights, margin of appreciation	Full text	270
159	Ürper & others v. Turkey	14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07	20/10 /2009	V	Terrorism, suspension of publication and distribution of newspaper, public watchdog	Full text	227
81	Yagmuredereli v. Turkey	29590/96	04/06 /2002	V	Political expression, criticism, terrorism, separatist propaganda, violence, national security	Full text	112
87	Yalçın Küçük v. Turkey	28493/95	05/12 /2002	V	Political expression, separatist propaganda, receive information, positive obligation	Full text	119
142	Yalçın Küçük v. Turkey (No. 3)	71353/01	22/04 /2008	V	Incitement to hatred or hostility, separatism, necessity	Full text	196
13	Zana v. Turkey	18954/91	25/11 /1997	NV	Political expression, incitement to violence, terrorism	Full text	61

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Ukraine							
253	Instytut Ekonomichnykh Reform, TOV v. Ukraine	61561/08	02/06 /2016	V	Defamation proceedings, public figure, political speech, satire, value judgments, sufficient factual basis	Full text	389
288	Sinkova v. Ukraine	39496/11	27/02 /2018	V 5, NV 10	Performance-art protest at war memorial, film published online, criminal conviction, necessary in democratic society, more suitable ways to express views, insulting memory of killed soldiers and feelings of veterans, severe penalty upheld	Full text	456
The United Kingdom							
89	A. v. the United Kingdom	35373/97	17/12 /2002	NV 6, 8, 13, 14	Political expression, right of access, defamation, discrimination, privacy	Full text	122
19	Ahmed & others v. the United Kingdom	22954/93	02/09 /1998	NV	Impart information, political expression, margin of appreciation	Full text	65
206	Animal Defenders International v. the United Kingdom [Grand Chamber]	48876/08	22/04 /2013	NV	Public debate, ban on political advertising, NGO, powerful financial groups, access, influential media, alternative media, margin of appreciation	Full text	301
62	B. & P. v. the United Kingdom	36337/97 and 35974/97	24/04 /2001	NV	Privacy, protection of vulnerable persons, necessity	Full text	92
301	Big Brother Watch and Others v. the United Kingdom	58170/13, 62322/14 and 24960/15	13/09 /2018	V 10, 12, >GC	Mass surveillance, bulk interception, protection of journalistic sources, confidential personal information, independent oversight, no limitation, chilling effect	Full text	483
16	Bowman v. the United Kingdom	24839/94	19/02 /1998	V	Political expression, monopoly position of the media, critical reporting	Full text	62

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308	Catt v. the United Kingdom	43514/15	24/01/2019	V 8	Collection, retention and further use of personal data, activist, “domestic extremism”, privacy, disproportionate and unnecessary, sensitive nature of the data, ambiguous nature of legal framework, lack of appropriate safeguards, chilling effect	Full text	497
160	Financial Times & others v. the United Kingdom	821/03	15/12/2009	V	Protection of journalistic sources, a source acting in bad faith, public interest	Full text	228
7	Goodwin v. the United Kingdom	17488/90	27/03/1996	V	Protection of sources, public interest, responsible journalism, chilling effect, whistle-blowing	Full text	53
44	Hashman & Harrup v. the United Kingdom	25594/94	25/11/1999	V	Unlawful action, concept of behaviour contra bonos mores, foreseeability	Full text	77
256	Jon Gaunt v. the United Kingdom (dec.)	26448/12	06/09/2016	NV	Broadcasting regulation, broadcasting regulator, manifestly insulting language, public figure	Full text	394
78	McVicar v. the United Kingdom	46311/99	02/05/2002	NV	Defamation, public interest, well-known sports figures, factual evidence	Full text	109
177	MGN Ltd. v. United Kingdom	39401/04	18/01/2011	V	Public interest, privacy, chilling effect, disproportionality of interference	Full text	252
181	Mosley v. the United Kingdom	48009/08	10/05/2011	NV 8	Privacy, positive obligation, prenotification, public interest, , margin of appreciation, chilling effect	Full text	256
91	Peck v. the United Kingdom	44647/98	28/01/2003	V 8	Privacy in public areas, reasonable expectation of privacy, CCTV, media reporting	Full text	124
107	Steel & Morris v. the United Kingdom	68416/01	15/02/2005	V 10, 6	Defamation, libel, potential chilling effect, reputation, public debate	Full text	143

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22	Steel & others v. the United Kingdom	24838/94	23/09 /1998	V	Necessity, public order, rule of law, authority of the judiciary, breach of peace, preventing disorder, rights of others	Full text	67
45	T. v. the United Kingdom	24724/94	16/12 /1999	V 6	Fair trial, public interest	Full text	78
274	Tamiz v. the United Kingdom (dec.)	3877/14	19/09 /2017	I	Anonymous defamatory comments, blog, personal honour and reputation, real and substantial tort, liability of information society service providers for illegal content.	Full text	430
149	Times Newspapers Ltd. (Nos. 1 & 2) v. the United Kingdom	3002/03 and 23676/03	10/03 /2009	NV	Internet, internet publication rule, defamation, libel, education, historical research, responsible journalism, news archives	Full text	208
6	Tolstoy Miloslavsky v. the United Kingdom	18139/91	13/07 /1995	V	Defamation, libel, crime reporting, disproportionate damages	Full text	52
46	V. v. the United Kingdom		16/12 /1999	V 6	Fair trial, public interest	Full text	78
80	Wilson & NUJ v. the United Kingdom	30668/96, 30671/96 and 30678/96	02/07 /2002	V 11	Journalism, freedom of assembly and association, necessity	Full text	111
8	Wingrove v. the United Kingdom	17419/90	25/11 /1996	NV	Blasphemous film, artistic expression, rights of others, general verification system for videos, political speech, public interest, margin of appreciation, morals or religion	Full text	55

Appendix IV



European Treaty Series - No. 5

Convention for the Protection
of Human Rights
and Fundamental Freedoms,
as amended by Protocols No. 11 and 14

Rome, 4.XI.1950

Text amended by the provisions of Protocol No. 14 (CETS No. 194) as from the date of its entry into force on 1 June 2010.

The text of the Convention had been previously amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols were replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force

on 1 October 1994, was repealed and Protocol No. 10 (ETS no. 146) had lost its purpose.

The governments signatory hereto, being members of the Council of Europe,

Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948;

Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;

Considering that the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realisation of human rights and fundamental freedoms;

Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights upon which they depend;

Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration,

Have agreed as follows:

Article 1 – Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

Section I – Rights and freedoms

Article 2 – Right to life

- 1 Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
- 2 Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
 - a in defence of any person from unlawful violence;
 - b in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - c in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3 – Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 4 – Prohibition of slavery and forced labour

- 1 No one shall be held in slavery or servitude.
- 2 No one shall be required to perform forced or compulsory labour.
- 3 For the purpose of this article the term “forced or compulsory labour” shall not include:
 - a any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
 - b any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;
 - c any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
 - d any work or service which forms part of normal civic obligations.

Article 5 – Right to liberty and security

- 1 Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - a the lawful detention of a person after conviction by a competent court;
 - b the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - c the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - d the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the

- competent legal authority;
- e the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - f the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
- 2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
 - 3 Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
 - 4 Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
 - 5 Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6 – Right to a fair trial

- 1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
- 2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
- 3 Everyone charged with a criminal offence has the following minimum rights:
 - a to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b to have adequate time and facilities for the preparation of his defence;

- c to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- d to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- e to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7 – No punishment without law

- 1 No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
- 2 This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

Article 8 – Right to respect for private and family life

- 1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 9 – Freedom of thought, conscience and religion

- 1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
- 2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 10 – Freedom of expression

- 1 Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
- 2 The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 11 – Freedom of assembly and association

- 1 Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
- 2 No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

Article 12 – Right to marry

Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

Article 13 – Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Article 14 – Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 15 – Derogation in time of emergency

- 1 In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
- 2 No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.
- 3 Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

Article 16 – Restrictions on political activity of aliens

Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

Article 17 – Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

Article 18 – Limitation on use of restrictions on rights

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

Section II – European Court of Human Rights

Article 19 – Establishment of the Court

To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights, hereinafter referred to as "the Court". It shall function on a permanent basis.

Article 20 – Number of judges

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

Article 21 – Criteria for office

- 1 The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
- 2 The judges shall sit on the Court in their individual capacity.
- 3 During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

Article 22 – Election of judges²

The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.

Article 23 – Terms of office and dismissal³

- 1 The judges shall be elected for a period of nine years. They may not be re-elected.
- 2 The terms of office of judges shall expire when they reach the age of 70.
- 3 The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.
- 4 No judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions.

Article 24 – Registry and rapporteurs²

- 1 The Court shall have a registry, the functions and organisation of which shall be laid down in the rules of the Court.
- 2 When sitting in a single-judge formation, the Court shall be assisted by rapporteurs who shall function under the authority of the President of the Court. They shall form part of the Court's registry.

Article 25 – Plenary Court⁴

² Text amended according to the provisions of Protocol No. 14 (CETS No. 194).

³ Article renumbered, heading and text amended according to the provisions of Protocol No. 14 (CETS No. 194).

⁴ Article renumbered, heading and text amended according to the provisions of Protocol No. 14 (CETS No. 194).

The plenary Court shall

- a elect its President and one or two Vice-Presidents for a period of three years; they may be re-elected;
- b set up Chambers, constituted for a fixed period of time;
- c elect the Presidents of the Chambers of the Court; they may be re-elected;
- d adopt the rules of the Court;
- e elect the Registrar and one or more Deputy Registrars;
- f make any request under Article 26, paragraph 2.

Article 26 – Single-judge formation, committees, Chambers and Grand Chamber ¹

- 1 To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.
- 2 At the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers.
- 3 When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.
- 4 There shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.
- 5 The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the High Contracting Party concerned.

Article 27 – Competence of single judges ⁵

- 1 A single judge may declare inadmissible or strike out of the Court's list of cases an application submitted under Article 34, where such a decision can be taken without further examination.

⁵ New article according to the provisions of Protocol No. 14 (CETS No. 194).

- 2 The decision shall be final.
- 3 If the single judge does not declare an application inadmissible or strike it out, that judge shall forward it to a committee or to a Chamber for further examination.

Article 28 – Competence of committees⁶

- 1 In respect of an application submitted under Article 34, a committee may, by a unanimous vote,
 - a declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; or
 - b declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court.
- 2 Decisions and judgments under paragraph 1 shall be final.
- 3 If the judge elected in respect of the High Contracting Party concerned is not a member of the committee, the committee may at any stage of the proceedings invite that judge to take the place of one of the members of the committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 1.b.

Article 29 – Decisions by Chambers on admissibility and merits⁷

- 1 If no decision is taken under Article 27 or 28, or no judgment rendered under Article 28, a Chamber shall decide on the admissibility and merits of individual applications submitted under Article 34. The decision on admissibility may be taken separately.
- 2 A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.

Article 30 – Relinquishment of jurisdiction to the Grand Chamber

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the protocols thereto, or where the resolution of a question before the Chamber might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber,

⁶ Heading and text amended according to the provisions of Protocol No. 14 (CETS No. 194).

⁷ Text amended according to the provisions of Protocol No. 14 (CETS No. 194).

unless one of the parties to the case objects.

Article 31 – Powers of the Grand Chamber⁸

The Grand Chamber shall

- a determine applications submitted either under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43;
- b decide on issues referred to the Court by the Committee of Ministers in accordance with Article 46, paragraph 4; and
- c consider requests for advisory opinions submitted under Article 47.

Article 32 – Jurisdiction of the Court¹

- 1 The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.
- 2 In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

Article 33 – Inter-State cases

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.

Article 34 – Individual applications

The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

Article 35 – Admissibility criteria¹

- 1 The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.
- 2 The Court shall not deal with any application submitted under Article 34 that

⁸ Text amended according to the provisions of Protocol No. 14 (CETS No. 194).

- a is anonymous; or
 - b is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.
- 3 The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that :
- a the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or
 - b the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.
- 4 The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

Article 36 – Third party intervention⁹

- 1 In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.
- 2 The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.
- 3 In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.

Article 37 – Striking out applications

- 1 The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that
 - a the applicant does not intend to pursue his application; or

⁹ Text amended according to the provisions of Protocol No. 14 (CETS No. 194).

- b the matter has been resolved; or
- c for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.

- 2 The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

Article 38 – Examination of the case¹⁰

The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.

Article 39 – Friendly settlements¹¹

- 1 At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto.
- 2 Proceedings conducted under paragraph 1 shall be confidential.
- 3 If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.
- 4 This decision shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision.

Article 40 – Public hearings and access to documents

- 1 Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.
- 2 Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

Article 41 – Just satisfaction

¹⁰ Heading and text amended according to the provisions of Protocol No. 14 (CETS No. 194).

¹¹ Heading and text amended according to the provisions of Protocol No. 14 (CETS No. 194).

If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

Article 42 – Judgments of Chambers

Judgments of Chambers shall become final in accordance with the provisions of Article 44, paragraph 2.

Article 43 – Referral to the Grand Chamber

- 1 Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.
- 2 A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.
- 3 If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

Article 44 – Final judgments

- 1 The judgment of the Grand Chamber shall be final.
- 2 The judgment of a Chamber shall become final
 - a when the parties declare that they will not request that the case be referred to the Grand Chamber; or
 - b three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or
 - c when the panel of the Grand Chamber rejects the request to refer under Article 43.
- 3 The final judgment shall be published.

Article 45 – Reasons for judgments and decisions

- 1 Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.
- 2 If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 46 – Binding force and execution of judgments¹²

- 1 The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
- 2 The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.
- 3 If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee.
- 4 If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.
- 5 If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case.

Article 47 – Advisory opinions

- 1 The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the protocols thereto.
- 2 Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.
- 3 Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the Committee.

Article 48 – Advisory jurisdiction of the Court

The Court shall decide whether a request for an advisory opinion submitted by the

¹² Text amended according to the provisions of Protocol No. 14 (CETS No. 194).

Committee of Ministers is within its competence as defined in Article 47.

Article 49 – Reasons for advisory opinions

- 1 Reasons shall be given for advisory opinions of the Court.
- 2 If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.
- 3 Advisory opinions of the Court shall be communicated to the Committee of Ministers.

Article 50 – Expenditure on the Court

The expenditure on the Court shall be borne by the Council of Europe.

Article 51 – Privileges and immunities of judges

The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

Section III – Miscellaneous provisions

Article 52 – Inquiries by the Secretary General

On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.

Article 53 – Safeguard for existing human rights

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

Article 54 – Powers of the Committee of Ministers

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

Article 55 – Exclusion of other means of dispute settlement

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than

those provided for in this Convention.

Article 56 – Territorial application

- 1 Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.
- 2 The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.
- 3 The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.
- 4 Any State which has made a declaration in accordance with paragraph 1 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.

Article 57 – Reservations

- 1 Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.
- 2 Any reservation made under this article shall contain a brief statement of the law concerned.

Article 58 – Denunciation

- 1 A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months' notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.
- 2 Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.
- 3 Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.

- 4 The Convention may be denounced in accordance with the provisions of the preceding paragraphs in respect of any territory to which it has been declared to extend under the terms of Article 56.

Article 59 – Signature and ratification¹³

- 1 This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.
- 2 The European Union may accede to this Convention.
- 3 The present Convention shall come into force after the deposit of ten instruments of ratification.
- 4 As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.
- 5 The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

Done at Rome this 4th day of November 1950, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatories.

¹³ Text amended according to the provisions of Protocol No. 14 (CETS No. 194).

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