



The AIRE Centre
Advice on Individual Rights in Europe



Freedom of Expression and its Relationship with the Right to Respect for Private Life and the Right to a Fair Trial

THE JURISPRUDENCE OF THE
EUROPEAN COURT OF HUMAN RIGHTS

For judges, decision-makers and practitioners

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Introduction

The Fourth Annual Regional Rule of Law Forum - aimed at promoting the implementation of the European Convention on Human Rights, encouraging regional cooperation and assisting the process of EU integration – will be focusing on the very pertinent issue of the right to freedom of expression.

The right to freedom of expression, ‘constitutes one of the essential foundations of a [democratic] society’¹. It is key to the development, dignity and fulfilment of individuals, is a core component of a country that values the rule of law, and is the foundation of an open and inclusive society. The right is also recognised in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

The value of this right is also clear from the broad interpretation of this Article 10 by the European Court of Human Rights. As a result of this, a person’s right to freedom of expression is likely to affect the Convention rights of others and for this reason, Article 10 is not an absolute right. In these instances of an interplay between Convention rights, a balancing exercise needs to take place. This occurs frequently in the context of the Article 6 right to a fair trial, and the Article 8 right to respect for private life.

The fundamental importance of Article 10, but also its interesting and often contentious relationship with other human rights, is why it was the chosen topic for this year’s Forum. We will also be looking at how the right to free speech can be exercised by members of the judiciary and the legal profession.

By providing an analysis of the European Court’s jurisprudence and summaries of relevant case-law, we hope that this publication, along with the other resources we are providing to the participants at the Forum, will assist in furthering the understanding of the relationship between the right to freedom of expression with the right to respect for private life and the right to a fair trial.

It is our desire and objective that all participants at the conclusion of this event, armed with all of the materials and having participated in the lively discussions, will feel better able to navigate the jurisprudence of the European Court, and to overcome the challenges currently facing the implementation of the Convention in the region today.

1 *Handyside v. The United Kingdom*, App. No. 5493/72, judgment of 7 December 1976, paragraph 49.

We wish you all a successful Forum gathering and very much look forward to all our discussions!

Biljana Braithwaite

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The AIRE Centre

Goran Miletic

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Civil Rights Defenders

Tirana, March 2017

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A Guide through the Jurisprudence of the European Court of Human Rights

[I] Article 10: General Overview

(a) Article 10 ECHR

Article 10 of the European Convention on Human Rights ('ECHR' or 'the Convention') provides:

'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 a public authority and regardless of frontiers. This article shall not prevent states from requiring the licensing of broadcasting, television or cinema.

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 the maintaining of the authority and impartiality of the judiciary.'

(b) The Purpose of Article 10

Article 10 serves a range of related purposes. The protection of freedom of expression is considered to promote both social and individual good, and it is a pre-condition of an effective democratic system. The European Court of Human Rights ('the Court') has expressed this in the following terms:

*'Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment.'*²

Article 10 is also said to be inherently linked to the realisation of human rights generally. Without the freedom of expression, human rights violations can be

² *Ahmed and Others v. The United Kingdom*, App. No. 22954/93, judgment of 2 September 1998, paragraph 55.

overlooked and State abuses would go unchecked and there would be a universal lack of accountability. It has been recognised, moreover, as facilitating participation in the exchange of cultural, political and social information.³ Freedom of expression promotes knowledge, understanding and tolerance in culturally diverse societies like those in Europe.

(c) The Scope of Article 10

National authorities should be aware of the wide scope and range of application of the concept of freedom of expression. Article 10 guarantees freedom of expression to ‘everyone’, including both individuals and companies,⁴ even when they are pursuing profit-making activities.⁵ It also protects freedom of expression of a wide variety of information or ideas, for example political expression, commercial expression⁶ and even entertainment.⁷ Another example is artistic expression about which the Court has stated:

*‘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. Hence the obligation on the State not to encroach unduly on their freedom of expression.’*⁸

As might be expected, Article 10 protection is not limited to the expression of true factual statements, (though the truth of the statement will carry a certain weight in the assessment), but covers the expression of opinions such as criticisms and value judgements.⁹ Nor is it limited to content that is favourably received or regarded as inoffensive or as a matter of indifference. It also covers information and ideas that offend, shock or disturb.¹⁰ Such information and ideas are protected on the basis that a democratic society cannot exist without a certain pluralism, tolerance and broadmindedness. The Court has interpreted the scope of freedom of expression widely in order to protect those values.

3 *Müller and Others v. Switzerland*, App. No. 10737/84, judgment of 24 May 1988, paragraph 27.

4 *Ahmet Yildirim v. Turkey*, App. No. 3111/10, judgment of 18 December 2012, paragraph 50.

5 *Casado Coca v. Spain*, App. No. 15450/89, judgment of 24 February 1994, paragraph 35.

6 *Markt Intern Verlag GmbH & Klaus Beermann v. Germany*, App. No. 10572/83, judgment of 20 November 1989, para 26.

7 *Groppera Radio AG and Others v. Switzerland*, App. No. 10890/84, judgment of 28 March 1990, paragraph 55.

8 *Vereinigung Bildender Künstler v. Austria*, App. No. 68354/01, judgment of 25 January 2007, paragraph 26.

9 *Lingens v. Austria*, App. No. 9815/82, judgment of 8 July 1986.

10 *Ahmed and Others v. United Kingdom*, App. No. 22954/93, judgment of 2 September 1998, paragraph 55; however, statements that are purely revisionist may be excluded from the protection of Article 10 by the operation of Article 17 ECHR (see *Chauvy and Others v. France*, App. No. 64915/01, judgment of 29 June 2004, paragraph 69).

Article 10 also provides protection in respect of a very wide range of means of dissemination of information and ideas. It extends both to mainstream media, such as television¹¹ and newspapers,¹² and also to many other means of expression such as dress,¹³ music,¹⁴ or graffiti.¹⁵ It also protects information and ideas posted on internet sites, the contemporary importance of which in the exercise of freedom of expression has been emphasised by the Court in recent years.¹⁶ Any restrictions imposed on the means of dissemination of information or ideas will itself constitute an interference with the right to receive and impart information.¹⁷

Article 10 also provides a right to receive information that others are willing to provide,¹⁸ but in some exceptional cases also the right to receive information that is in the public interest¹⁹ and it protects the freedom to hold opinions. However, because freedom of conscience is protected without limitation by Article 9, the freedom to hold opinions has received limited attention. The jurisprudence of the Court tends to focus on the expression of opinions held.

(d) The Qualified Nature of the Right

The right to freedom of expression under Article 10, along with Articles 8, 9 and 11, is a qualified rather than an absolute right under the Convention. This means that it is subject to a number of exceptions, which are explained further below. The Court has stated that those exceptions must be narrowly interpreted and the necessity for any exceptions must be convincingly established.²⁰

Judges in domestic courts need to be aware of the Court's approach to Article 10 cases. The Court tends to approach Article 10 by reference to the following five issues.

1. Do the facts disclose the type of expression covered by Article 10?²¹

11 *Autronic AG v. Switzerland*, App. No. 12726/87, judgment of 22 May 1990, paragraph 47.

12 *Goodwin v. The United Kingdom*, App. No. 17488/90, Grand Chamber judgment of 27 March 1996, paragraph 28.

13 *Stevens v. The United Kingdom*, App. No. 11674/85, Commission Decision of 3 March 1986.

14 *H and K v. The United Kingdom*, App. No. 10317/83, Commission Decision of 6 October 1983.

15 *N v. Switzerland*, App. No. 9870/82, Commission Decision of 13 October 1983.

16 *Ahmet Yildirim v. Turkey*, App. No. 3111/10, judgment of 18 December 2012, paragraph 48.

17 *Ahmet Yildirim v. Turkey*, App. No. 3111/10, judgment of 18 December 2012, paragraph 50; *Youth Initiative for Human Rights v. Serbia*, App. No. 48135/06, judgment of 25 June 2013.

18 *E.g. Khurshid Mustafa and Tarzibachi v. Sweden*, App. No. 23883/06, judgment of 6 December 2008, paragraph 32.

19 *Youth Initiative for Human Rights v. Serbia*, App. No. 48135/06, judgment of 25 June 2013.

20 *Ahmed and Others v. The United Kingdom*, App. No. 22954/93, judgment of 2 September 1998, paragraph 55.

21 See below in relation to hate speech.

2. Has there been, or is there proposed, any interference with the right? This can include prior restraint (e.g. censorship), on-going interferences and sanctions after the expression was manifested.
3. Is the interference ‘prescribed by law’?
4. Does the interference pursue a legitimate aim?
5. Is the inference ‘necessary in a democratic society’?

If the answer to the first two questions is ‘yes’, it means that there has been an interference with a person’s freedom of expression within the scope of Article 10. The Court has shifted the evidential burden to the State in that it must show that the interference was justified in accordance with Article 10(2). The final three questions, relate to whether that interference is justified. If the answer to any of those three questions is ‘no’, it would result in a finding of a violation of Article 10. If, on the other hand, the answer to all three questions is ‘yes’, it means that the interference will be justified and Article 10 is not breached. The three conditions for the justification for an interference with free expression are explained briefly below.

(i) *‘Prescribed by law’*

An interference with freedom of expression cannot be justifiable under Article 10 unless the it is ‘prescribed by law’. This means that any interference with Article 10 rights must have a basis in domestic law. The Court has observed that the word ‘law’ covers not only statute, but also unwritten law and would therefore encompass both common law and legislation. So, for example, an interference with the right to free expression which results from the proper application of the domestic law of defamation would *prima facie* have such a basis. If an interference has no basis in national law, it will automatically constitute a violation of Article 10.²²

The phrase ‘prescribed by law’ also entails two more things. Firstly, the law must be adequately accessible i.e. the citizen must be able to have an indication of the legal rules applicable to a given case.²³ Furthermore, the law must be formulated in such a way that the citizen can regulate their conduct accordingly i.e. foresee, to a reasonable degree, the consequences that a given action may entail.²⁴

This is often referred to as the ‘quality of law’ requirement.²⁵ An interference with

22 E.g. *Gsell v. Switzerland*, App. No. 12675/05, judgment of 8 October 2009.

23 *The Sunday Times v. The United Kingdom*, App. No. 6538/74, judgment of 26 April 1979.

24 *Malone v. The United Kingdom*, App. No. 8691/79, judgment of 2 August 1984.

25 *Karademirci and Others v. Turkey*, App. Nos. 37096/97 and 37101/97, judgment of 25 January 2005, paragraph 33.

a person's freedom of expression made under a law that lacks sufficient accessibility or precision will not be 'in accordance with the law' and therefore not justifiable under Article 10. Thus, that domestic law is coherent and accessible is fundamental to the State remaining in compliance with the Convention.

(ii) *Legitimate aims listed in Article 10(2)*

An interference with rights in Article 10(1) must pursue a legitimate aim,²⁶ exhaustively enumerated in Article 10(2), in order to be justified. The following are the legitimate aims listed in Article 10(2):

- The interests of national security, territorial integrity or public safety;
- The prevention of disorder or crime;
- The protection of health or morals;
- The protection of the reputation or rights of others;
- The prevention of the disclosure of information received in confidence;
- The maintenance of the authority and impartiality of the judiciary.

(iii) *'Necessary in a democratic society' (proportionate to the aim pursued)*

Finally, in order to be justifiable, any interference with freedom of expression must be 'necessary in a democratic society'. This is very often the main issue in freedom of expression cases.

In order to be 'necessary in a democratic society', an interference with Article 10 rights must address a 'pressing social need' and it must be proportionate to the legitimate aim pursued. This means that any restriction on a person's freedom of expression should reflect a fair balance between the competing individual and general interests at stake. In other words, the national authorities must use the method that is the least restrictive of the right to freedom of expression.

There are a number of factors the Court may consider in determining whether an interference is proportionate. Different considerations will apply depending on which of the legitimate aims set out in Article 10(2) is applicable. For example, the Court will grant a wider (but not unlimited) margin of appreciation for interferences which have the legitimate aim of protecting public morals.²⁷ The application of Article 10 in the context of free expression cases involving journalism and media issues are considered in more detail below.

²⁶ It should be noted that the legitimate aims that justify interferences in the context of the other qualified rights vary slightly to those of Article 10.

²⁷ *Otto-Preminger-Institut v. Austria*, App. No. 13470/87, judgment of 20 September 1994, paragraph 50.

As a general matter, Contracting States have leeway in determining whether an interference with a person's freedom of expression is necessary in a democratic society. This is usually referred to as the margin of appreciation. Domestic authorities have always been recognised by the Convention organs as generally being in the best position to reach a decision, interpret domestic law or assess the facts in a particular case. Thus, the Court has stated that it should not rush to substitute its view for that of the domestic authorities. This deference is linked to the Convention principle of subsidiarity whereby the Court sees itself as primarily a supervisory body that is a subsidiary to the national systems safeguarding human rights. This deference, or margin of appreciation, plays an important role in cases where there is a prima facie interference with a right, and arguments either way as to whether the interference is necessary, and thus, it is very relevant to Article 10 cases.

The extent of this margin of appreciation varies according to the type of expression interfered with. For example, a State's margin of appreciation is generally narrower in respect of political speech than in respect of commercial or artistic speech.²⁸ National authorities should also be aware that the margin of appreciation goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.²⁹

Another implication of the margin of appreciation and subsidiarity is the impact it has on the role of domestic judges. The Court and the Convention calls for deference to be shown to the assessment of national authorities into the proportionality of the interference by the State into the right. If it can be demonstrated to the Court that this assessment was undertaken in a Convention compliant manner, the Court will be reluctant to find a violation of the Convention merely because it believes it would have reached a different conclusion. This, therefore, puts the responsibility of Convention compliance in the hands of national authorities, but in particular, domestic judges.

(e) State Responsibility under Article 10 and in the Convention generally

The Court has held that, although the essential purpose of many of the Convention provisions is to protect the individual against arbitrary interference by public authorities, many of the rights protected by the Convention may also result in positive obligations being incumbent on the State.³⁰ This idea derives from Article

28 *VgT Verein Gegen Tierfabriken v. Switzerland*, App. No. 24699/94, judgment of 28 June 2001, paragraphs 69-71.

29 *Ahmed and Others v. The United Kingdom*, App. No. 22954/93, judgment of 2 September 1998, paragraph 55.

30 *Ozgur Gundem v. Turkey*, App. No. 23144/93, judgment of 16 March 2000, paragraph 42.

1 of the Convention that states that '[t]he High Contracting Parties shall *secure* to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.' Thus, genuine, effective exercise of certain freedoms will require *both* that States refrain from any action that disproportionately interferes with the Convention rights, but also that they adopt positive measures of protection, even in the sphere of relations between individuals.³¹ This is true for Article 10, Article 8 and Article 2 of the Convention, amongst others.

In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual.³² This is a similar test to that of the negative obligations incumbent on States. The Court will also take into consideration the differing situations in Contracting States. Moreover, obligations under these articles, the Court has made clear, will not be interpreted in such a way as to impose an impossible or disproportionate burden on authorities.³³

Article 10, the Court has stated, given its key role in the functioning of a democracy, will require more than the State not intervening, but may require positive measures of protection. For example, failure to protect against attacks on a newspaper resulted in a violation of Article 10,³⁴ the obligation on States to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear³⁵ and the Court has arguably conceded that a positive obligation arises to protect the right to freedom of expression by ensuring a reasonable opportunity to exercise a right of reply.³⁶

In consideration of the focus of this guide on the interplay between Article 10 with Article 6 and Article 8, it is important to note that the nature of a State's positive obligations under Article 10 may vary when the Court is required to balance the right to freedom of expression with other Convention rights.³⁷ This interaction will be examined in further detail in the relevant sections below.

31 *Palomo Sánchez and Others v. Spain*, App. Nos. 28955/06, 28957/06, 28959/06 and 28964/06, Grand Chamber judgment of 12 September 2011, paragraph 58-59.

32 *Ozgur Gundem v. Turkey*, App. No. 23144/93, judgment of 16 March 2000, paragraph 43.

33 *Rees v. The United Kingdom*, App. No. 9532/81, judgment of 17 October 1986, paragraph 37.

34 *Ozgur Gundem v. Turkey*, App. No. 23144/93, judgment of 16 March 2000.

35 *Dink v. Turkey*, App. Nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09, judgment of 14 September 2010.

36 *Melnychuk v. Ukraine* (dec.), no. 28743/03, ECHR 2005-IX.

37 *Appleby and Others v. The United Kingdom*, App. No. 44306/98, judgment of 6 May 2003, paragraphs 42-43 and 47-49.

(f) Unprotected Speech: Hate Speech

It is important to note that, because of the demands of pluralism, tolerance and broadmindedness, the scope of protection afforded by Article 10 covers information or ideas which may shock or offend some people.³⁸ Speech which is offensive is to be distinguished from hate speech. The Committee of Ministers of the Council of Europe has described ‘hate speech’ as ‘forms of expression which spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism or other forms of hatred based on intolerance.’³⁹ The right to freedom of expression cannot be relied on to justify ‘hate speech.’ Speech which is directed against the Convention’s values will not be protected by Article 10. The Court has stated:

*‘Tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle, it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance.’*⁴⁰

In determining whether a statement can be protected by Article 10, it is necessary to distinguish between speech that is shocking but not gratuitously abusive or insulting (which will in some cases be protected)⁴¹ and speech which is directed at violating the rights and freedoms of others (which is unprotected)⁴². Thus, in some cases the Court has held that hate speech falls wholly outside the protection of Article 10. In other cases it has considered that the expression was within the scope of the Article but that interferences were justified.⁴³

The Court has excluded hate speech from protection by means of two approaches provided for in the Convention:

- a) By holding that, because of its nature, the speech falls wholly outside the scope of the protection of Article 10 and that the complaints are therefore inadmissible *ratione materiae*. By applying Article 17 (prohibition of abuse of rights), the Court finds that the applicant cannot benefit from

³⁸ *Handyside v. United Kingdom*, App. No. 5493/72, judgment of 7 December 1976, paragraph 49.

³⁹ Recommendation No. R 97 (20) of the Committee of Ministers of the Council of Europe to Member States on Member States accessible at: [http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec\(97\)20_en.pdf](http://www.coe.int/t/dghl/standardsetting/hrpolicy/other_committees/dh-lgbt_docs/CM_Rec(97)20_en.pdf)

⁴⁰ *Erbakan v. Turkey*, App. No. 59405/00, judgment of 6 July 2006, paragraph 56.

⁴¹ E.g. *Lehideux and Isorni v. France*, App. No. 24662/94, judgment of 23 September 1998.

⁴² E.g. *Vona v. Hungary*, App. No. 35943/10, judgment of 9 July 2013.

⁴³ *Sürek v. Turkey (No. 1)*, App. No. 26682/95, Grand Chamber judgment of 8 July 1999.

the protection afforded by Article 10. This is aimed at preventing persons from inferring any right to engage in activities or perform acts aimed at the destruction of any rights and freedoms set forth in the Convention. In such cases the Court does not then have to examine whether the interferences were in accordance with the law or justifiable.

- b) By applying the limitations provided for in the second paragraph of Article 10 of the Convention – this approach is adopted where the speech in question (although it can be considered hate speech) is not capable of destroying the fundamental values of the Convention.

The Court has found that Article 10 does not protect *inter alia*:

- Holocaust-denial⁴⁴;
- Accusing homosexuals of having a morally destructive effect on society, and being responsible for the development of HIV and AIDS⁴⁵;
- Public defence of war crimes⁴⁶; and
- Speeches associating all Muslims with the 9/11 attacks.⁴⁷

Such expression runs counter to the fundamental values of the Convention, namely justice, social peace and non-discrimination. In fact, criminal sanctions may even be permitted or required in this context.⁴⁸

[II] Freedom of Expression and the Media

This Section will examine the specific, and highly pertinent issue of the freedom of press under Article 10 of the Convention and how protection of the media can impact upon the rights and freedoms of others.

(a) Protection Afforded to the Media under Article 10

The Court has stressed that Article 10 not only safeguards the content of information, but also the means of dissemination.⁴⁹ Although Article 10 does not

44 *Garaudy v. France*, App. No. 65831/01, decision of 24 June 2003.

45 *Vejdeland and Others v. Sweden*, App. No. 1813/07, judgment of 9 February 2012.

46 *Lehideux and Isorni v. France*, App. No. 24662/94, judgment of 23 September 1998, paragraph 53; *Leroy v. France*, App. No. 36109/03, judgment of 2 October 2008.

47 *Norwood v. The United Kingdom*, App. No. 23131/03, DA 16 November 2004.

48 *Garaudy v. France*, App. No. 65831/01, DA 24 June 2003.

49 *Autronic AG v. Switzerland*, App. No. 12726/87, judgment of 22 May 1990, paragraph 47; *Öztürk v. Turkey*, App.

explicitly mention freedom of the press, the Court has developed extensive case law, providing a body of principles and rules granting the press a special status in the enjoyment of the freedoms contained in Article 10. The Court has emphasised the role of the press as political watchdog, by stating that:

‘[i]t is... incumbent on [the press] to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them.’⁵⁰

Freedom of the press is seen to afford one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders, and therefore it is at the core of the concept of a democratic society. In this respect, the press is active in exposing actions of the government to public scrutiny.⁵¹ The press also has an important role outside of the political process, in encouraging debate on issues of general public interest.⁵²

The press enjoys a broad scope of protection under Article 10. The protection extends to research and inquiries carried out by journalists⁵³ in preparation for publication, as well as the protection of journalistic sources⁵⁴. The scope of the freedom of expression of the press must be construed broadly due to its role as a ‘public watchdog’. Thus, a degree of exaggeration or even provocation⁵⁵ can be permitted for journalistic freedom. Measures imposed by public authorities (including national courts) that are capable of discouraging the participation of the press in debates over matters of legitimate public concern are likely to attract especially close scrutiny.⁵⁶

(b) Duties and Responsibilities of the Press

Although Article 10 provides strong protection for the press, the right to freedom of expression is not absolute and the duties and responsibilities that it carries with it do apply to the press. The Court has put it this way: ‘By reason of the “duties

No. 22479/93, Grand Chamber judgment of 28 September 1999, paragraph 49.

50 *Lingens v. Austria*, App. No. 9815/82, judgment of 8 July 1986, paragraph 42.

51 *Martin and Others v. France*, App. No. 30002/08, judgment of 12 April 2012, paragraph 80.

52 *Cumpana and Mazare v. Romania*, App. No. 33348/96, judgment of 17 December 2004, paragraph 96.

53 *The Sunday Times v. The United Kingdom (No. 2)*, App. No. 13166/87, judgment of 26 November 1991.

54 *Goodwin v. The United Kingdom*, App. No. 17488/90, Grand Chamber judgment of 27 March 2006.

55 *Bladet Tromsø and Stensaas v. Norway*, App. No. 21980/93, Grand Chamber judgment of 20 May 1999, paragraph 59.

56 *Ibid.*, paragraph 64.

and responsibilities” inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on 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.⁵⁷

For journalists, this means that the precise scope of those duties and responsibilities depends on the situation of the person exercising the right and the technical means he or she uses.⁵⁸ They are likely to be heavier where the reputation of a named individual is attacked or a person’s rights are infringed.⁵⁹ It also means that journalists should meet certain ethical standards in their work. Both domestic authorities and journalists should take into account the Council of Europe Parliamentary Assembly’s *Recommendation 1215* (1993) and its *Resolution 1003* (1993) on the ethics of journalism.

(c) Relevant Factors in Balancing Competing Rights

As was previously mentioned, Article 10 is not an absolute right; it is a qualified right. This means that an interference with freedom of expression is not necessarily a violation of Article 10 – it can be justified. Furthermore, media disclosures within the scope of Article 10 may impact on the private life of a person within the scope of Article 8 of the Convention.⁶⁰ Accordingly, there are a number of factors that must be weighed up by national authorities in balancing the potentially conflicting or competing rights and interests in respect of contentious media disclosures.

A range of factors may be relevant in balancing the rights and interests at issue in media cases. These include⁶¹:

- Whether the information contributes to a debate of public interest;
- Whether the person concerned is a public or private figure;
- The prior conduct of the person concerned;

57 Ibid, para 65; *Bladet Tromsø and Stensaas v. Norway*, App. No. 21980/93, judgment of 20 May 1999, paragraph 65.

58 *Handyside v. The United Kingdom*, App. No. 5493/72), judgment of 7 December 1976, paragraph 49.

59 *Lindon, Otchakovsky-Laurens and July v. France*, App. No. 21279/02, Grand Chamber judgment of 22 October 2007.

60 Article 8 of the Convention, and how it interacts with the right to freedom of expression, will be examined in greater detail in Section III of this guide.

61 *Von Hannover v. Germany (No. 2)*, App. Nos. 40660/08 and 60641/08, judgment of 7 February 2012, paragraphs 109-113.

- The content, form and consequences of the publication; and
- The circumstances in which any photographs were taken.

These factors are examined in turn below.

(i) *Contribution to a debate of public interest*

The first aspect to consider is whether and to what extent the photo or article contributes to a debate of public interest.⁶² What is interesting to the public is not always a discussion which is in the public interest. Whether something constitutes a subject of public interest will depend on the circumstances of the case. Matters related to political issues will normally be in the general public interest and therefore very few restrictions are permitted.⁶³

The Court has found the following issues not to be in the public interest:

- Rumoured marital difficulties of a political leader⁶⁴;
- Financial affairs of a famous singer⁶⁵;
- Photos of a public figure's private life aimed at satisfying public curiosity⁶⁶.

The general rule is that where the communication in question contributes to a debate of public interest, it will be difficult to justify any interference with that communication.

(ii) *A public or private figure?*

Different levels of protection apply to individuals depending on whether they are public or private figures. The limits of acceptable criticism are wider where a public figure is involved, and they are especially wide where the target is a politician. The Court has held that public figures, including judges,⁶⁷ and politicians inevitably and knowingly lay themselves open to close public scrutiny. As such, they must display a greater degree of tolerance.⁶⁸ This is especially so for politicians

62 *Von Hannover v. Germany (No. 2)*, App. Nos. 40660/08 and 60641/08, judgment of 7 February 2012, paragraph 109.

63 *Kuliš v. Poland*, App. No. 15601/02, judgment of 18 March 2008, paragraphs 37-38.

64 *Standard Verlags GmbH v. Austria (No. 2)*, App. No. 21277/05, judgment of 4 June 2009.

65 *Hachette Filipacchi Associes (ICI Paris) v. France*, App. No. 12268/03, judgment of 23 July 2009.

66 *Von Hannover v. Germany*, App. No. 59320/00, judgment of 24 June 2004, paragraph 64.

67 This particular aspect of the freedom of speech will be examined in more detail in Section V below.

68 E.g. *Angelov v. Bulgaria*, App. No. 45963/99 decision of 14 December 2004; *Lombardo and Others v. Malta*, App. No. 7333/06, judgment of 24 April 2007, paragraph 54; *Kuliš v. Poland*, App. No. 15601/02, judgment of 18 March 2008.

during election campaigns. During such times opinions and information of all kinds should be permitted to circulate freely.⁶⁹

However, even persons with a public profile may legitimately expect some degree of privacy.⁷⁰ The Court makes a distinction between reporting on aspects of public figures' *private life* and reporting about them in *public capacity*.⁷¹ Greater protection is afforded to the former than the latter. Nevertheless, the right of the public to be informed can even extend, in certain special circumstances, to aspects of the private life of public figures, particularly where politicians are concerned.⁷²

The Court has also recognised that persons may withdraw from public life. It is likely to be more difficult to show that disclosures about the private life of persons who have withdrawn from political or civic life serve the public interest.⁷³

(iii) *The content, form and consequences of the publication*

A further relevant factor is the way in which the photo or report is published, and the manner in which the person is represented in the photo or report.⁷⁴ The Court will also consider the extent to which the report and photo have been disseminated, looking at whether the newspaper is national or local, and has a large or limited circulation.⁷⁵

(iv) *Circumstances in which any photographs were taken*

Additionally, the Court has held that the context and circumstances in which the photos were taken are relevant.⁷⁶ It is necessary to consider whether the taking of the photographs and subsequent publication was done with the consent of the person photographed, or whether this was done without their knowledge or by illicit means. The seriousness of the intrusion and consequences of publication for the person concerned should be taken into account.

69 *Lepojić v. Serbia*, App. No. 13909/05, judgment of 6 November 2007.

70 *Von Hannover v. Germany*, App. No. 59320/00, judgment of 24 June 2004.

71 *Dalban v. Romania*, App. No. 28114/95, Grand Chamber judgment of 28 September 1999, paragraph 50.

72 *Von Hannover v. Germany*, App. No. 59320/00, judgment of 24 June 2004, paragraph 64.

73 *Tammer v. Estonia*, App. No. 41205/98, judgment of 6 February 2001, paragraph 68.

74 *Jokitaipale and Others v. Finland*, App. No. 43349/05, judgment of 6 April 2010.

75 *Karhuvaara and Iltalehti v. Finland*, App. No. 53678/00, judgment of 16 November 2004, paragraph 47.

76 *Von Hannover v. Germany (No. 2)*, App Nos. 40660/08 and 60641/08, judgment of 7 February 2012, paragraph

(d) Two Sample Cases

Although the balancing of rights will be examined in more detail below in the specific contexts of Article 6 and Article 8 of the Convention, it may be helpful to illustrate here the way the factors applied by the Court when balancing competing rights and to draw out particular consideration by reference to two important ECtHR cases in this area:

1. *Hachette Filipacchi Associés v. France* – a case brought by a publishing company complaining about an interference with its right to freedom of expression; and
2. *Von Hannover v. Germany* – a case brought by an individual complaining about press coverage of her.

These two cases are considered in turn below.

Hachette Filipacchi Associés v. France⁷⁷

The French weekly magazine, Paris-Match, published an article concerning the murder of the Prefect Claude Erignac in Ajaccio, Corsica, on 6 February 1998. The article was illustrated by a photograph of the scene, taken moments after the murder, showing the prefect's body lying on the ground.

In the domestic civil proceedings, the French courts ordered Paris-Match to publish a statement that the photograph was published without the consent of Claude Erignac's family and that the family considered its publication as an intrusion into the intimacy of their private life.

The applicant publishing company complained to the Court that the obligation to publish the statement was a violation of its right of freedom of expression. The Court held that it amounted to an interference with the applicant's freedom of expression. It went on to consider whether the interference was justified:

- Firstly, it held that the obligation was imposed on the basis of case-law that met the conditions of accessibility and foreseeability required to determine that this form of interference was 'prescribed by law'.
- Secondly, it held that the interference had pursued one of the legitimate aims set out in Article 10(2), namely 'the protection of the rights and freedoms of others'.

⁷⁷ *Hachette Filipacchi Associés v. France*, App. No. 71111/01, judgment of 14 June 2007.

- Accordingly, the third and critical issue was whether the measure was ‘necessary in a democratic society’.

In assessing that third question the Court considered a number of factors including:

- The ‘duties and responsibilities’ inherent in the exercise of freedom of expression and the potentially deterrent effect of the penalty imposed on the way in which the magazine exercises its freedom of expression.
- The grief felt by the victim’s family, their express objection to publication and the violent and traumatic circumstances of the death.
- The wording of the statement that the French courts required Paris-Match to publish and the respect of the domestic courts for the magazine’s editorial freedom.

Having taken those factors into account, the Court determined that the domestic courts had imposed the least restrictive sanction available under the French Civil Code to the applicant company’s rights. Accordingly, the Court held that the domestic courts’ interference with the applicant’s freedom of expression was justified and that accordingly there was no violation of Article 10.

Von Hannover v. Germany⁷⁸

This case concerned the publication in German magazines of a number of photographs of Caroline von Hannover, the eldest daughter of Prince Rainier III of Monaco. Following litigation in the German domestic courts in respect of the publications, she complained to the Court about the lack of adequate State protection of her private life and her image.

The Court approached the issues by holding that the protection of her private life had to be balanced against the freedom of expression guaranteed by Article 10. On the one hand it pointed out that the right to freedom of expression does extend to the publication of photos. On the other hand, it stated that this is an area in which the protection of the rights and reputation of others takes on particular importance.

In undertaking this balancing exercise between the applicable Article 8 and Article 10 rights, the Court made a number of important points:

- The decisive factor in balancing Article 8 and Article 10 rights is the contribution made by the photos or articles in the press to a debate of

⁷⁸ *Von Hannover v. Germany*, App. No. 59320/00, judgment of 24 June 2004.

public interest. The applicant did represent the ruling family of Monaco at certain cultural or charitable events, but she did not exercise any official functions. The photos related solely to the applicant's private life and did not contribute to a public debate. The Court said that called for a narrower interpretation of Article 10.

- In this case, the photos contained very personal or even intimate information about the applicant. The Court made the point that 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.
- The Court also considered the importance of the context in which these photos were taken. They were taken without the applicant's knowledge or consent and held that the harassment endured by many public figures in their daily lives cannot be fully disregarded.
- The Court considered that the public does not have a legitimate interest in knowing where the applicant is and how she behaves generally in her private life even if she appears in places that cannot always be described as secluded and despite the fact that she is well known to the public.

The Court went on to state that Article 8 protection of private life extends beyond the private family circle and also includes a social dimension. Even persons known to the general public, must be able to enjoy a 'legitimate expectation' of protection of and respect for their private life, especially in light of new communication technologies. The Court unanimously held that the applicant's right to a private life had been violated by the failure of the authorities to protect her from press intrusions. This can be contrasted with the decision of the Court in *Von Hannover (No. 2)*,⁷⁹ in which it found no violation in respect of similar facts because the domestic courts had carefully balanced the competing interests, taking into account the Court's case law.

(e) Nature of the Sanction

Some restrictions or sanctions imposed on the exercise of free expression by the media are likely to be particularly difficult to justify because of the severity of the impact they may have on the exercise of the right. These include:

- Criminal sanctions.⁸⁰
- Prior restraints on publication.

⁷⁹ *Von Hannover v. Germany (No. 2)*, App. Nos. 40660/08 and 60641/08, judgment of 7 February 2012.

⁸⁰ *Karademirci and Others v. Turkey*, App. Nos. 37096/97 and 37101/97, judgment of 25 January 2005, paragraph 42-43.

Criminal sanctions for publications, whilst not forbidden under the Convention, should only be applied in ‘very exceptional circumstances’. The Court has pointed out that

‘recourse to criminal prosecution against journalists for purported insults raising issues of public debate ... should be considered proportionate only in very exceptional circumstances involving a most serious attack on an individual’s rights To hold otherwise would deter journalists from contributing to the public discussion of issues affecting the life of the community and, more generally, hamper the press in carrying out its important role of a “public watchdog”.’⁸¹

Prior restraints on publications are not absolutely forbidden by Article 10, but the Court has stated that:

‘the dangers inherent in prior restraint are such that they call for the most careful scrutiny by the Court. This is especially so 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. This danger extends to the censorship of publications other than periodicals that deal with a topical issue.’⁸²

[III] Article 10 and Article 8: Balancing the Right to a Private Life with the Freedom of Expression

One of the most obvious places where the question of balancing the right to freedom of expression with other rights arises when the exercise by one person of their right to freedom of expression, affects another person’s right to private life as guaranteed by Article 8 of the Convention. This interaction was touched upon in the context of the freedom of the press above, but it will be examined in this section in more detail.

(a) Article 8 ECHR

Article 8 protects the right to respect for private and family life, home and correspondence. It provides:

‘1. Everyone has the right to respect for his private and family life, his home and his correspondence.’

⁸¹ *Bodrožić and Vujin v. Serbia*, App. No. 38435/05, judgment of 23 June 2009, paragraph 39.

⁸² *Alinak v. Turkey*, App. No. 40287/98, judgment of 29 March 2005, paragraph 37.

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.*

(b) The Purpose of Article 8

Article 8 requires States to respect four rights, which are undefined in the Convention text. Over the years, the Court has taken a very broad approach to defining the scope of the protection provided by this provision. Article 8 is sometimes seen as a ‘residual’ provision for issues not covered by other provisions of the Convention. The Court has used the ‘living instrument’ approach to facilitate the interpretation of Article 8 in line with social developments. Article 8 protects ‘the respect for’ each interest. Thus, not only do States have a negative obligation not to interfere with these rights but there is also an inherent positive obligation on States to protect these interests from interferences by non-State actors.

Article 8 encompasses four protected areas:

- Private life
- Family life
- Home
- Correspondence

Each of these is an autonomous concept under the Convention. In the context of considering freedom of expression it is particularly important to consider the scope of protection afforded to private life. Accordingly, it is the right to respect for private life that is the focus of the examination.

(c) The Scope of ‘private life’

From the beginning, the Court has taken a very broad approach to the notion of private life, rather than a more restrictive approach, which would limit the scope to the traditional concept of privacy. The concept of ‘private life’ is more akin to the concept of personal autonomy. As a result, the scope of private life is as open-ended as is consistent with legal certainty. In the *Belgian Linguistics case*,⁸³ the Court held that private life included the right to live one’s life without arbitrary

⁸³ *Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium” v. Belgium*, App. Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, judgment of 23 July 1968, paragraph 6.

interference. The Court went further to say that '[r]espect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings'.⁸⁴ However, the Court clarified that

'[a] broad construction of Article 8 does not mean, however, that it protects every activity a person might seek to engage in with other human beings in order to establish and develop such relationships. It will not, for example, protect interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the action or inaction of a State and a person's private life'.⁸⁵

The Court has also held that data protection is covered by Article 8. The storage of data by a public authority of information relating to a person's private life amounts to an interference with Article 8, regardless of whether the information is used.⁸⁶

The notion of respect for private life also extends to physical and moral integrity, that is physical and psychological well-being.⁸⁷ It is also well established in the Court's case-law that the right to protection of reputation and honour is included in Article 8 of the Convention as part of the right to respect for private life.⁸⁸

(d) The Qualified Nature of the Right

The essential object of Article 8 is to protect individuals against arbitrary interferences by the State with any of the four protected areas. The Court in its jurisprudence has developed the following five-point test, similar to the one which it applies under Article 10. It uses this test to determine whether there has been a violation of this negative obligation arising under Article 8.

First, the aggrieved individual has to show that:

1. His/her rights under Article 8 have been engaged – does the case fall within the scope of one of the protected rights in Article 8? If not, Art 8 does not apply.
2. The State has interfered with those rights – are the State's actions sufficient to amount to an interference with a person's private life or one of the other protected areas?

⁸⁴ *Niemietz v. Germany*, App. No. 13710/88, judgment of 16 December 1992, paragraph 29.

⁸⁵ *Friend and Others v. The United Kingdom*, App. Nos. 16072/06, 27809/08, DA 24 November 2009.

⁸⁶ *Leander v. Sweden*, App. No. 9248/81, judgment of 26 March 1987; *Kopp v. Switzerland*, App. No. 23224/94, judgment of 25 March 1998; *Amann v. Switzerland*, App. No. 27798/95, judgment of 16 February 2000.

⁸⁷ *X and Y v. The Netherlands*, App. No. 8978/80, judgment of 6 March 1985.

⁸⁸ *A v. Norway*, App. No. 28070/06, judgment of 9 April 2009, paragraph 64.

If there has been such an interference, it can never be justifiable unless the State can show that:

1. The interference was in accordance with the law. As with Article 10 discussed above the law in question must be sufficiently certain in its formulation and foreseeable in its consequences. It must also be publicly accessible;
2. The interference pursued one or more of the legitimate aims set out in Article 8(2);
3. The interference was necessary in a democratic society. This means that the interference must meet a pressing social need and it must be *proportionate to the legitimate aim(s) pursued*.

The legitimate aims in question are those set out in the second paragraph of Article 8, namely:

- National security, public safety or the economic well-being of the country.
- The prevention of disorder or crime.
- The protection of health or morals.
- The protection of the rights and freedoms of others.

(e) Interplay with Article 10

One of the areas in which a State's positive obligations under Article 8 are engaged is the proper control by public authorities of the exercise by individuals of the right to freedom of expression, bearing in mind the explicit provision in Article 10(2) that the freedom of expression carries with it certain duties and responsibilities. So, for example, the absence of a remedy in relation to the publication of information relating to private affairs may constitute a lack of respect for private life.⁸⁹

Judges in domestic courts should note that a careful balancing of Article 8 and Article 10 rights may be required with a view to respecting both rights, neither one of which automatically takes precedence over the other.⁹⁰ The Parliamentary Assembly of the Council of Europe has stated that: '[t]he Assembly reaffirms the importance of everyone's right to privacy, and of the right to freedom of expression, as fundamental to a democratic society. These rights are neither absolute

⁸⁹ *Schüssel v. Austria*, App. No. 40409/98, judgment of 21 February 2002.

⁹⁰ *Von Hannover v. Germany*, App. No. 59320/00, judgment of 24 June 2004, paragraph 58.

The Court has formulated several principles that are applicable when a balance between Article 10 and Article 8 is sought. Firstly, in order for Article 8 to apply, 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’.⁹² The Court also consistently recalls the general principles regarding the freedom of expression, namely, that freedom of expression constitutes one of the essential foundations of a democratic society, that it is applicable 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, and that any exceptions to freedom of expression must be construed strictly and the need for any restrictions must be established convincingly.

[IV] Article 10 and Article 6: The Interplay between the Freedom of Expression and Fair Trial Rights under the Convention

Another important interplay issue is the relationship between the right to freedom of expression and the Article 6 fair trial rights. When media freedom and other free expression issues arise in a justice system context, additional factors need to be considered. In particular, judges should consider how the right to a fair trial relates to the right to freedom of expression. In order to do this, they will need to understand the implications of Article 6 of the Convention, which protects the right to a fair trial.

(a) Article 6 ECHR

Article 6 of the Convention provides:

‘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 private life of the parties so require, or to the extent strictly

91 Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe, paragraph 10.

92 *Delfi AS v. Estonia*, App. No.64569/09, Grand Chamber judgment of 16 June 2015, paragraph 137

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.'*

(b) Balancing the Two Rights

Article 6 provides among other things that court hearings should be held in public, subject only to limited exceptions. This protection of the publicity of hearings and the protection of media freedom of expression in Article 10 are related, and together they play an important role in ensuring that the justice system is open to scrutiny. Media coverage of the justice system in action also provides the public with insights that may help to generate confidence in it. In many cases, therefore, the protection of freedom of expression will help to ensure that fair trial rights are also protected. The two rights are in many ways mutually supportive and can co-exist harmoniously.

However, there are also cases where the protection of interests under both Article 6 and Article 10 is not quite so straightforward. In these cases, the Court is asked to determine whether the domestic authorities struck the right balance between the two sets of rights.

Such cases can come before the Court in a number of different ways, for example:

- Complaints by journalists or others that their right to freedom of

expression has been violated in respect of a matter that does or may relate to a trial⁹³;

- Article 6 complaints that the exercise of free expression by another person has interfered with the fairness of a trial or the right of a person to be presumed innocent until proven guilty.

The importance of the balancing exercise judges may need to carry out in Article 10 cases emerges clearly in the case of *Worm v. Austria*⁹⁴ in which the Court directly addressed the relationship between Article 6 and Article 10. In the *Worm* case, the Court had to consider conflicting rights in respect of the publication of an article during a criminal trial. The article caused a high risk of prejudice to that trial. The applicant was a journalist who had for several years reported on Mr Androsch, a former Vice-Chancellor and Minister of Finance, who had been involved in various criminal proceedings, including proceedings in which he was convicted of tax evasion. Between the hearings and the conviction in respect of the tax evasion charges the applicant published an article. He was subsequently tried and convicted in respect of that article for having had a prohibited influence on criminal proceedings.

The crucial factor in determining the case before the Court was once again whether the interference with the applicant's Article 10 rights was necessary in a democratic society. Here, the legitimate aim in question was the 'maintenance of the authority and impartiality of the judiciary'.⁹⁵ Although the need to maintain the authority and impartiality of the judiciary is a legitimate aim that may justify an interference with a person's freedom of expression, the Court stated that it does not entitle States to restrict all forms of public discussion on matters pending before the courts. It emphasised that reporting within the bounds imposed in the interests of the proper administration of justice is consonant with Article 6. The Court thus confirmed the importance of the protection of freedom of expression in the context of trial reporting.

Nevertheless, the Court also pointed to the importance of the protection of fair trial rights, stating that the guarantees of fair trial set out in Article 6 should be considered by journalists when reporting on trials within the scope of the Article. The Court reasoned that 'the limits of permissible comment may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the

93 This aspect of the interplay between Article 6 and Article 10 will be examined in the next section in the context of specific issue of the relationship between the legal profession and Article 10.

94 *Worm v. Austria*, App. No. 22714/93, judgment of 29 August 1997.

95 This Article 10(2) justification will be examined in more detail below in Section V(a).

public in the role of the courts in the administration of criminal justice.⁹⁶ In other words, although it is vitally important that media freedoms in a justice system context are properly protected, such freedoms do not come without responsibility or limits. Part of the task of the domestic courts, under the supervision of the ECtHR, is to balance any competing interests and to work out what limits, if any, are appropriate.

These types of balancing cases will now be considered.

(c) Article 10 Complaints Relating to Trials

A journalist may complain to the Court that a measure taken in respect of him or her in the course of reporting on a trial or investigation has violated Article 10. For example, an injunction may be issued against a journalist preventing publication of an article or a journalist may be convicted for defamation in respect of a published article. Such a case is very likely to give rise to an interference with the journalist's freedom of expression.

However, it is important to remember that Article 10 is a qualified right. The legitimate aims listed in Article 10(2) that may be used to justify an interference with a person's freedom of expression include:

- the protection of the 'rights of others'; and
- 'maintaining the authority and impartiality of the judiciary'.⁹⁷

In respect of the first of these two legitimate aims, it is important to note that the 'rights of others' could include the rights of others to receive a fair trial. The protection of the rights of others to receive a fair trial could therefore justify an interference with the right to freedom of expression if the interference in question is both 'prescribed by law' and 'necessary in a democratic society'.

This exception to the right to freedom of expression to protect the rights of others to a fair trial was invoked before the Court in the case of *News Verlags GmbH & Co.KG v. Austria*.⁹⁸ The applicant was the publisher of a magazine which had published reports concerning a series of letter bombs that had been sent to public figures in Austria, some of which had caused serious injury. The reports implicated a particular individual who was arrested and charged over the attacks and it linked

⁹⁶ *Worm v. Austria*, App. No. 22714/93, judgment of 29 August 1997, paragraph 50.

⁹⁷ This justification will be examined in more detail in Section V(a) below.

⁹⁸ *News Verlags GmbH & Co.KG v. Austria*, App. No. 31457/96, judgment of 11 January 2000. This justification will be examined in detail in the section below on the freedom of speech and the legal profession.

him politically with the extreme right. In response to the reports, the individual in question sought and was granted an injunction to prevent the applicant from publishing his photograph in the context of the criminal proceedings against him.

The applicant company subsequently made a complaint about the injunction imposed on it to the ECtHR under Article 10 and the case came before the Court. The Court considered that the injunctions against the applicant did constitute an interference with its freedom of expression, even though they did not prevent reporting on the case but only the publication of photographs. The Court stated that Article 10 protects not only the substance of ideas and information but also the form in which they are conveyed, so the limitations on the form of presentation of reports in this case (i.e. the ban on publishing photographs) had interfered with the applicant's freedom of expression. The Court was satisfied that the interference was imposed in accordance with a sufficiently precise law and that the interference pursued one or more legitimate aims. The key issue was therefore whether the interference was necessary in a democratic society.

The Court emphasised the importance of looking at the impugned decisions not in isolation but in light of the case as a whole. It noted that the interference arose in the context of a news item of major public concern and related to a public figure. It also noted the essential function of the press in a democratic society which extends to reporting and commentary on court proceedings. However, these considerations had to be balanced against any risk of prejudice to the fairness of a trial and the rights of a person to be presumed innocent until proven guilty. In light of the fact that other media were able to publish pictures and that it had only been the combination of words and images (and not the images alone) that had interfered with the individual's rights in this case, the Court held that the injunction against publication of all images went further than necessary in order to protect the legitimate aim of protecting those rights. The interference was held not to be proportionate and therefore not necessary in a democratic society. Accordingly, Article 10 had been violated.⁹⁹

The News Verlags case described above illustrates how important the test of whether an interference is necessary in a democratic society is in adjudicating Article 10 complaints of this type. The test requires the Court to determine whether the interference complained of corresponds to a 'pressing social need', whether it is proportionate to the legitimate aim pursued, and whether the reasons given by

⁹⁹ Similarly, in *The Sunday Times v. The United Kingdom (No. 1)*, App. No. 6538/74, judgment of 26 April 1979, an Article 10 violation was held to have occurred in respect of an injunction relating to an article about the drug Thalidomide. The UK's House of Lords had imposed the injunction after concluding that the article dealt with an issue corporate negligence in a way that prejudiced pending (albeit dormant) civil litigation.

the national authorities to justify it are relevant and sufficient.¹⁰⁰ The Contracting States will be given some margin of appreciation in applying the test, but that margin is not unlimited and remains subject to the supervision of the Court.

If, on the one hand, *the News Verlags* case is an example of a disproportionate interference, the *BBC v. UK*¹⁰¹ case, on the other hand, is an example of an interference with freedom of expression that was held to be proportionate. The case concerned an order preventing broadcast of a television programme about an alleged assault on six prisoners by three prison officers until after the trial by jury of the prison officers. The Commission¹⁰² found that the domestic court that had imposed the order had carried out a balancing act that included consideration of the more than minimal risk of prejudice to the prison officers at their trial. Noting that the order postponed rather than prohibited broadcast and that the domestic court had given relevant and sufficient reasons for imposing it, the Commission found that the order had not violated Article 10.

These cases illustrate the fact that domestic courts will need to carry out careful and reasoned balancing exercises when faced with similar cases. They will need to consider the extent to which an interference with free expression may be necessary to protect the rights of others and take care not to impose injunctions or other measures which are disproportionate and go further than necessary in that regard. Furthermore, relevant and sufficient reasons should be given by judges for the imposition of such measures.

(d) Article 6 Complaints Relating to the Freedom of Expression

The Court has recognised that the justice system cannot operate in a vacuum and that it would not be appropriate to exclude all prior or contemporaneous discussion of the subject matter of trials in the press or amongst the public at large. Nevertheless, as has been noted above, some limits should be imposed in the interests of the proper administration of justice.¹⁰³ Accordingly, if proper limits are not put in place complaints may arise under Article 6 that the exercise of free expression by another person has interfered with the fairness of a trial.

One way in which such a complaint of Article 6 interference may arise is through prejudicial media publicity that influences public opinion and consequently those

100 *The Sunday Times v. The United Kingdom (No. 1)*, App. No. 6538/74, judgment of 26 April 1979, paragraph 62.

101 *BBC v. The United Kingdom*, App. No. 25798/94, Commission Decision 18 January 1996.

102 The European Commission of Human Rights (Commission) was part of the old Strasbourg system. Applications would be made to Commission, who would take some cases to the Court.

103 *Papon v. France*, App. No. 54210/00, DA 15 November 2001.

who are to decide a case and thereby potentially interferes with a person's right to a fair hearing or the right to an independent and impartial tribunal. A key difference between a complaint like this under Article 6 and a complaint under Article 10 is that on its face Article 6 has very limited qualifications. This means that there is in most cases no balancing exercise or proportionality test to be applied in respect of Article 6 complaints after an interference with those rights has been identified.

However, perhaps in light of the unqualified nature of these Article 6 rights and their relationship with Article 10, the Court has adopted a fairly restrictive concept of what amounts to an interference with them in respect of cases about potentially prejudicial publicity connected to a trial. While the Court accepts that, in certain cases, such publicity can adversely affect the fairness of the trial and involve the State's responsibility, it has required that publicity to amount to a 'virulent press campaign' aimed at hampering the fairness of the trial in order to amount to an interference with Article 6 rights.¹⁰⁴ This approach is likely to make it relatively difficult to show that media publicity has interfered with the impartiality of a tribunal, and it is likely to be harder still to do that where the tribunal in question consists of professional judges as opposed to juries or lay assessors.¹⁰⁵

Another way in which an Article 6 complaint may arise in a media or free expression context is through statements that impinge on the right of a person to be presumed innocent until proven guilty. Again, an interference with this right can lead to a violation without the need to consider possible justifications for the interference because of the unqualified nature of the right. The result is that State authorities, including judges, should be very careful not to follow the example that some of the highest ranking officers in the French police set in the case of *Ribemont v. France*.¹⁰⁶ The French police in that case referred to the applicant in question, who had not even been charged at that point, without any qualification or reservation, as one of the instigators of a murder. The Court found that the statements made about the applicant amounted to a declaration of his guilt which encouraged the public to believe him guilty and prejudiced the assessment of the facts by the competent judicial authority. There had been a breach of the applicant's right to be presumed innocent until proven guilty. As this was a breach of an unqualified right under Article 6(2), without any need to consider or balance that breach against the rights of free expression of the police officers, Article 6(2) was held to have been violated.

104 *Anguelov v. Bulgaria*, App. No. 45963/99, DA 14 December 2004.

105 *Craxi v. Italy*, App. No. 34896/97, judgment of 5 December 2002.

106 *Alenet de Ribemont v. France*, App. No. 15175/89, judgment of 10 February 1995; see also *Ergashev v. Russia*, App. No. 12106/09, judgment of 20 December 2011.

In light of this jurisprudence, national judges should be aware that a positive State obligation may arise under the Convention to check virulent press campaigns that may interfere with Article 6 fair trial rights. In addition, they should take care to protect the principle of presumption of innocence, not least by ensuring their own statements do not amount to a declaration of guilt of a person before that person has been convicted.

[V] The Freedom of Expression and the Legal Profession

This section will consider Article 10 in the specific context of the legal profession. Many of the principles and ideas that have been covered thus far in the guide are applicable here. In particular, this Section is connected to the Article 6/Article 10 relationship, though any criticism of members of the legal profession would also engage their Article 8 right. Despite this overlap, as with the media, due to the integral role the judiciary and lawyers play in a democratic society, it was thought that a separate section was appropriate.

(a) Limits of Acceptable Criticism of the Judiciary: ‘Maintenance of the authority and impartiality of the judiciary’

It is a widely accepted fact that the rule of law is a central tenet of any democracy and depends upon the effective application of the law by the courts. The rule of law also requires that the judiciary have the confidence of the people they serve.

To this end, States have an interest in ensuring that the sanctity of judicial processes is protected, which will encompass limiting the nature and extent of criticism of active proceedings. The importance of this is recognised by Article 10(2) which includes the ‘maintenance of the authority and impartiality of the judiciary’ as one of the legitimate aims that can justify an interference with the rights protected in Article 10(1).

The Court has stated that the term ‘judiciary’ comprises the judicial branch of government, as well as the judges in their official capacity. ‘Authority of the judiciary’, for its part, includes ‘the notion that the courts are, and are accepted by the public as being, the proper forum for the ascertainment of legal rights and obligations and the settlement of disputes’ related to those rights and obligations.¹⁰⁷ In these cases, the Court will look more closely at the context in which

¹⁰⁷ *The Sunday Times v. The United Kingdom* (No.1), App. No. 6538/74, judgment of 26 April 1979, paragraph 55.

the words were spoken or written, particularly the intention served by the words expressed.¹⁰⁸

The Court has found that the purpose served by the judiciary may result in it being necessary to protect it against destructive attacks that are essentially unfounded, especially given that judges are subject to a duty that precludes them from replying to criticism.¹⁰⁹ For example, with regard to allegations of bias, the Court has held that they need a very solid factual basis.¹¹⁰ However, as always, it is about striking the appropriate balance, and public institutions cannot be immune from criticism and scrutiny. Thus, the Court draws a clear distinction between insult and criticism.¹¹¹ In the case of insults, the Court has held that appropriate punishment would not violate Article 10.

When it was shown that the allegations made had an undisputed factual basis, the Court found a violation.¹¹² Equally, comments that were not grave or insulting, but which demonstrated a certain lack of regard for the Constitutional Court, should not have resulted in a sanction being imposed.¹¹³ The Court has also given weight to the fact that the impugned statements made in reference to a particular judgment were in an academic publication and were written in the context of intense public debate on the issues covered in the proceedings.¹¹⁴ Moreover, where an article could have prejudiced the outcome of a trial by stating an opinion of guilt, the interests in maintaining the authority and impartiality of the judiciary meant that the imposition of a fine did not constitute a violation of Article 10.¹¹⁵ This again speaks to the interplay between Article 10 and Article 6.

Finally, it is possible to take from Court's approach in *Morice v. France* (where a violation was found) that the Court will require that an interference justified by the need to maintain 'the authority and impartiality of the judiciary' will *in fact* serve that purpose.¹¹⁶

108 *Thorgeir Thorgeirson v. Iceland*, App. No. 13778/88, judgment of 25 June 1992.

109 *Prager and Oberschlick v. Austria*, App. No. 15974/90, judgment of 26 April 1995.

110 *Falter Zeitschriften GmbH v. Austria*, App. No. 3084/07, judgment of 18 September 2012.

111 *Skalka v. Poland*, App. No. 43425/98, judgment of 27 May 2003.

112 *De Haes and Gijssels v. Belgium*, App. No. 19983/92, judgment of 24 February 1997.

113 *Amihalachioaie v. Moldova*, App. No. 60115/00, judgment of 20 April 2004.

114 *Mustafa Erdogan and Others v. Turkey*, App. Nos. 346/04 & 39779/04, judgment of 27 May 2014.

115 *Worm v. Austria*, App. No. 22714/93, judgment of 29 August 1997.

116 *Morice v. France*, App. No. 29369/10, Grand Chamber judgment of 23 April 2015, paragraph 170.

(b) Freedom of Expression of the Judiciary and Lawyers

With regard to the freedom of expression of senior members of the judiciary, they may be expected to show restraint in circumstances where the authority and impartiality of the judiciary could be called into question. However, any interference with the freedom of expression of a judge of this position calls for close scrutiny.

The Court has found that in order to prevent a ‘chilling effect’ on judges wishing to participate in the public debate on the effectiveness of the judicial institutions, they must be permitted to speak freely (and even with a certain degree of exaggeration) about matters of great public importance.¹¹⁷ The Court has reasoned that even if the expression of certain views by a judge played a *certain* part in his or her removal from office, if this was not the exclusive or *preponderant* reason for the removal, Article 10 may not be violated. For example, the judge’s ability to properly exercise judicial duties is a legitimate reason to remove a judge.¹¹⁸

As regards the freedom of expression of lawyers, the Court has held that because they play a central role in the administration of justice, they should enjoy heightened protection. This protection is afforded to them when they are acting in the context of defending an accused in a criminal trial.¹¹⁹ Thus, while it is permissible to restrict the expression of criticism of the courts in certain circumstances in order to protect their independence, criticism voiced in court made by one legal representative of the other, should not normally be regarded as grounds for restricting freedom of expression. Thus, the Court has noted that only in exceptional circumstances should a defence counsel, acting in court and during the conduct of the defence of her client, be subject to a restriction of her freedom of expression.¹²⁰ The Court has adopted this approach in order to prevent a ‘chilling effect’ on the performance by lawyers of their duties as defence counsel.¹²¹ For example, the Court found that even a simple admonition by a disciplinary council on defence counsel for alleging that his client had been put under pressure by an investigating officer was found to have an unjustified ‘chilling effect’.¹²²

However, in certain circumstances, for example where pursuing legitimate aims, disciplinary sanctions imposed on lawyers by professional bodies may be

117 *Kudeshkina v. Russia*, App. No. 29492/05, judgment of 26 February 2009.

118 *Harabin v. Slovakia*, App. No. 58688/11, judgment of 20 November 2012.

119 *Morice v. France*, App. No. 29369/10, Grand Chamber judgment of 23 April 2015.

120 *Nikula v. Finland*, App. No. 31611/96, judgment of 21 March 2002.

121 *Kyprianou v. Cyprus*, App. No. 73797/01, Grand Chamber judgment of 15 December 2005.

122 *Steur v. Netherlands*, App. No. 39657/98, judgment of 28 October 2003.

acceptable.¹²³ For example, the Court found that no violation of Article 10 had taken place where a lawyer was convicted and fined for defamation when she issued a press statement accusing the police of serious misconduct and brutality. The Court found that her claims lacked factual basis and were not made with the goal of vindicating her clients rights.¹²⁴

Equally, using the media as a means to resolve issues in a trial is not likely to be afforded the protection of Article 10 by the Court. For example, leaking evidence to the press where it had been excluded from the case file has been held to justify the imposition of a fine on a lawyer.¹²⁵ However, where an expert report was already available to the public, the Court found that the domestic authorities had failed to strike the right balance given there was no evidence that the lawyer's statement to press had any adverse impact on the proceedings.¹²⁶

[VI] Conclusion: The Freedom of Expression in Europe – Why is it topical?

This guide has examined, both independently and as they relate to each other, the right to freedom of expression, the right to respect for private life and the right to a fair trial. The right to freedom of expression and the right to private life are both qualified rights under the Convention. This requires that judges considering their application need to consider not only whether there has been an interference with one or both of them, but also whether any such interference is justifiable. Furthermore, this guide considered aspects of the relationship between the right to freedom of expression.

The spheres of application of these three rights overlap. Notably, they will often apply to protect competing interests in cases involving media and press freedoms. This is an area in which national authorities, including domestic courts, are required by the Convention to carry out a careful balancing exercise. The balancing exercise should examine and respect the potentially conflicting interests at issue in light of the requirements of the Convention and the protections it extends to the press, to the justice system and to those who are subject to media attention.

This guide also examined the specific issue of the right of the legal profession, including lawyers and judges, to freedom of expression, and the application of the

123 *Schopfer v. Switzerland*, App. No. 25405/94, judgment of 20 May 1998.

124 *Coutant v. France*, App. No. 17155/03, decision of 24 January 2008.

125 *Furuholmen v. Norway*, App. No. 53349/06, decision of 18 March 2010.

126 *Mor v. France*, App. No. 28198/09, judgment of 15 December 2011.

justification in Article 10(2) of ‘maintaining the authority and impartiality of the judiciary’. This too requires national authorities to balance competing interests.

Understanding the Court’s approach to Article 10 is imperative, especially given that recent events have raised questions with regard to the implementation of freedom of expression in democratic societies. For example, the murder of *Charlie Hebdo* journalists in Paris on 7 January 2015 raised several issues in the context of the right to freedom of expression. These include the protection and safety of journalists, the scope of unprotected hate speech and also issues with regard to the limits of acceptable speech in contemporary European societies in which the enjoyment of one’s freedom impacts the freedom of others due to the ever-increasing diversity of cultures which coexist. Today, there is also the issue of the use of social media and the internet in the context of employment. Can an employer react to the ‘improper’ use of the internet of an employee?

European States, including the countries of the Western Balkans, are under an obligation to prevent violations of Article 10, and moreover, to respond to threats when they occur to prevent impunity and to comply with the positive obligations incumbent on them. Complying with Article 10, as was shown in this guide, will frequently require domestic authorities to balance this freedom with other Convention rights. It is for this reason that an understanding of this balancing exercise is essential, and it was to this end that this guide was prepared.

Moreover, it is clear from the above analysis that whilst all domestic authorities have a role to play in the application of the Convention to citizens, domestic judges are in a unique position in that they are the last forum for the proportionality assessment, before the ECtHR is asked to adjudicate on the alleged unjustified interference. It is, therefore, imperative that judges understand the nature of the proportionality assessment, because if it can be demonstrated that they conducted this evaluation in a Convention compliant manner, it is unlikely that the State will be found to be in violation of the Convention.

As has been reiterated throughout this guide, protection of the freedom of expression is a core component of a democratic society, making prompt, effective, impartial and thorough investigations into all alleged breaches paramount. Thus, judges, by default, play a central role, and they bear responsibility for the protection of democratic values when deciding freedom of expression cases.

European Court of Human Rights: Selected Case Summaries

Freedom of Expression and the Internet

Finding of liability against an Internet portal for third-party comments was a justified and proportionate restriction of freedom of expression

GRAND CHAMBER JUDGMENT IN THE CASE OF DELFI AS v. ESTONIA
(Application no. 64569/09)
16 June 2015

1. Principal facts

The applicant, Delfi AS, is a public limited company registered in Estonia. It owns one of the largest Internet news sites in the country.

In January 2006, Delfi published an article on its webpage discussing a ferry company's decision to change the route its ferries took to certain islands. The change resulted in the postponement of the opening of ice roads – a cheaper and faster connection to the islands compared to the ferry services – where ferries had broken the ice. Below the article, readers were able to access the comments of other users of the site. Many readers had written highly offensive or threatening posts about the ferry operator and its owner. At the request of the lawyers of the owner of the ferry company, Delfi removed the offensive comments about six weeks after their publication in March 2006.

The owner of the ferry company sued Delfi in April 2006, and successfully obtained a judgment against it in June 2008. The Estonian court found that the comments were defamatory, and that Delfi was responsible for them. The owner of the ferry company was awarded 5,000 kroons in damages (around €320).

An appeal by Delfi was dismissed by Estonia's Supreme Court in June 2009. The Supreme Court rejected the portal's argument that, under EU Directive 2000/31/EC on Electronic Commerce, its role as an information society service provider or storage host was merely technical, passive and neutral, finding that the portal exercised control over the publication of comments.

2. Decision of the Court

The applicant company complained that holding it liable for the comments posted

by the readers of its Internet news portal infringed its freedom of expression as provided in Article 10. The Government contested that argument. On 10 October 2013 the Chamber of the European Court of Human Rights found that there had been no violation of the Convention. On the applicant company's request, the case was referred to the Grand Chamber under Article 43.

Article 10

It was not in dispute that the national courts' decisions had constituted an interference with Delfi's right to freedom of expression and that the restriction had pursued the legitimate aim of protecting the reputation and rights of others.

The parties' opinions differed, however, as to whether the interference was "prescribed by law". The Grand Chamber found that it was for national courts to resolve issues of interpretation and application of domestic law. The Court therefore did not address the issue under EU law, limiting itself to the question of whether the Supreme Court's application of the domestic law to Delfi's situation had been foreseeable. As a professional publisher running an Internet news portal for an economic purpose, Delfi should have been familiar with the relevant legislation and case law, and could also have sought legal advice. Moreover, public concern had already been expressed before the publication of the comments in question, and in September 2005 the Minister of Justice had noted that victims of insults could bring a suit against Delfi and claim damages. Thus, the Grand Chamber considered that Delfi had been in a position to assess the risks and consequences related to its activities. The interference with Delfi's freedom of expression was therefore foreseeable and "prescribed by law".

At issue was whether Delfi's liability for comments posted by third parties breached its freedom to impart information as guaranteed by Article 10. The Grand Chamber assessed whether the finding of liability was based on relevant and sufficient grounds by reference to four key aspects: the context of the comments; the liability of the actual authors of the comments as an alternative to Delfi being held liable; the steps taken by Delfi to prevent or remove the defamatory comments; and the consequences of the proceedings before the national courts for Delfi.

Firstly, with regard to the context, the extreme nature of the comments and the fact that Delfi was a professionally managed Internet news portal, which sought to attract a large number of comments, was relevant. Moreover, Delfi had an economic interest in the posting of the comments. The Grand Chamber determined that, although Delfi was not the author, it had control over the comment environment.

Secondly, Delfi had not ensured a realistic prospect of the authors of the comments being held liable. Delfi allowed readers to make comments without registering their names, and the measures to establish the identity of the authors were uncertain.

Thirdly, the steps taken by Delfi to prevent or remove without delay the defamatory comments once published had been insufficient. Delfi's disclaimer (stating that authors of comments were liable for their content, and that threatening or insulting comments were not allowed) had failed to prevent manifest expressions of hatred and blatant threats. Delfi's automatic word-based filter and notice-and-take-down system had failed to filter out these expressions. The Grand Chamber considered that it was not disproportionate for Delfi to have been obliged to remove from its website, without delay, clearly unlawful comments, even without notice from the alleged victims or from third parties whose ability to monitor the Internet was obviously more limited than that of a large commercial Internet news portal.

Finally, the Grand Chamber considered that the consequences of Delfi being held liable were small. The €320 fine was not excessive and the portal's popularity with those posting comments had not been affected. Furthermore, the tangible result for Internet operators in post-Delfi cases has been that they have taken down offending comments but have not been ordered to pay compensation.

The Grand Chamber hereby found that the Estonian courts' finding of liability against Delfi had been a justified and proportionate restriction on the portal's freedom of expression. Accordingly, there had been no violation of Article 10.

JUDGMENT IN THE CASE OF AHMET YILDIRIM v. TURKEY

(Application no. 3111/10)

18 December 2012

1. Principal Facts

The applicant, Ahmet Yildirim, is a Turkish national who was born in 1983 and lives in Istanbul, Turkey.

The applicant owns and runs a website on which he publishes his academic work and his views on various topics. The website was created using the Google Sites website create and hosting service.

On 23 June 2009, the Denizli Criminal Court of first Instance ordered the blocking of a separate website (the “offending website”) in the context of criminal proceedings against the site’s owner, who was accused of insulting the memory of Atatürk. The order was transmitted to the Telecommunications and Information Technology Directorate (the “TIB”) for execution. However, as a result of difficulties with implementing this order, the Court of First instance on 24 June 2009, at the request of the TIB, varied the decision of 23 June and ordered the blocking of all access to Google Sites. According to the TIB, this was the only means by which access to the offending website could be blocked.

The decision of the 24th June resulted in the applicant being unable to access his own website. On 1 July 2009, he applied to have the blocking order set aside in respect of his website because he had no connection with the offending website.

On 13 July 2009, the Denizli Criminal Court dismissed the applicant’s case, stating that it was the only means of blocking access to the offending website. On 25 April 2012, the applicant was still unable to access his own website, despite the fact that the criminal proceedings against the owner of the offending website had been discontinued on 25 March 2011 because of the impossibility of determining the identity and address of the accused, who lived abroad.

2. Decision of the Court

The applicant complained that because he was unable to access his own Internet site because of a measure ordered in the context of criminal proceedings unconnected to him, his freedom of expression under Article 10 had been violated. In

particular, he argued that the measure infringed upon his right to freedom to receive and impart information and ideas.

Article 10

The Court noted that Google Sites was a service designed to facilitate the creation and sharing of websites within a group, and therefore constituted a means of exercising freedom of expression. This was supported by the fact that both the content of information and its means of dissemination is protected by Article 10. The Court stated that any interference with the means of dissemination will necessarily engage the right to receive and impart information.

According to the Court, the “crux” of the case concerned the effect of the preventative measure adopted in the context of the criminal proceedings against the owner of the offending website. It was noted that the decision of 24 June 2009 resulted in the applicant being unable to access his own website without Google Sites or the applicant’s website being the subject of proceedings. This, therefore, constituted a prior restraint on publication.

The Court accepted that this was not a blanket ban but rather a restriction on Internet access. However, the limited effect of the restriction did not lessen its significance, particularly as the Internet had become one of the principal means of exercising the right to freedom of expression and information. This led to the Court concluding that the measure in question amounted to “interference by public authority” with the applicant’s right to freedom of expression, of which the freedom to receive and impart information and ideas is an integral part. This interference will result in a breach of Article 10 unless it is “prescribed by law”, pursues one or more of the legitimate aims referred to in Article 10(2) and is “necessary in a democratic society” to achieve those aims.

“Prescribed by law” requires that the measure have some basis in domestic law, and that it be accessible to the person concerned, which includes their ability to foresee its consequences, and also the measure’s compliance with the rule of law. The measure concerned was provided for by section 8(1) of Law no. 5651. A rule will be foreseeable if it is formulated with sufficient precision and clarity, preventing arbitrary interferences by public authorities and allowing individuals to regulate their conduct accordingly. In particular, for prior restraints, the Court noted that the legal framework needed to ensure tight control over the scope of the bans and effective judicial review to prevent any abuse of power.

The Court noted that neither the applicant’s website, nor Google Sites, *per se* fell within the scope of Section 8(1) of Law no. 5651, since the legality of their content,

was not in issue in the present case, as is required by the provision. Nor does the law authorise the blocking of an entire Internet domain such as Google Sites. The Court also observed that the law had conferred extensive powers on an administrative body, the TİB, in the implementation of a blocking order originally issued in relation to a specified site and that it was not difficult for it to expand the scope of the order. Moreover, when the Denizli Criminal Court had decided to block all access to Google Sites, it had not examined whether a less far-reaching measure could have been taken to block access specifically to the site in question. The court also did not weigh up the various interests at stake because the law did not require it to do so. The Court found that the Convention requires domestic courts to take into account the fact that, by rendering large quantities of information inaccessible, the rights of internet users would be substantially restricted.

The Court thus concluded that the interference resulting from the application of section 8 of Law no. 5616 did not satisfy the foreseeability requirement under the Convention and did not afford the applicant the degree of protection to which he was entitled by the rules of law in a democratic society. The Court further concluded that the measure produced arbitrary effects and could not be said to have been aimed solely at blocking access to the offending website, since it consisted in the wholesale blocking of all the sites hosted by Google Sites. Accordingly, the Court found a violation of Article 10 of the Convention.

Article 41

The Court held that Turkey was to pay the applicant €7,500 in respect of non-pecuniary damage and €1,000 in respect of costs and expenses.

Hate Speech

Criminal conviction for distributing leaflets offensive to homosexuals was not contrary to freedom of expression

JUDGMENT IN THE CASE OF VEJDELAND AND OTHERS v. SWEDEN
(Application no. 1813/07)
9 February 2012

1. Principal facts

The applicants, Tor Fredrik Vejdeland, Mattias Harlin, Björn Täng and Niklas Lundström, are Swedish nationals, born in 1978, 1981, 1987 and 1986 respectively. All applicants live Sweden.

In December 2004, as part of their activities for the National Youth, the applicants left approximately 100 leaflets on secondary school pupils' lockers. The leaflets alleged that homosexuality was a "deviant sexual proclivity", had "a morally destructive effect on the substance of society" and was responsible for the development of HIV and AIDS.

The applicants claimed that in distributing the leaflets, they had not intended to express contempt for homosexuals as a group. Instead, the applicants stated that their intention had been to stir debate about the lack of objectivity in Swedish education. On 6 July 2006 however, the Supreme Court convicted the applicants of agitation against a national or ethnic group. The majority of the court found that the pupils had not been able to refuse the leaflets and that the purpose of supplying pupils with arguments for a debate could have been achieved without recourse to offensive statements.

2. Decision of the Court

The applicants alleged that the Supreme Court convicting them of agitation against a national or ethnic group had constituted a violation of their freedom of expression under Article 10 of the Convention. They further submitted that they had been punished without law in violation of Article 7.

Article 10

The applicants were convicted of agitation against a national or ethnic group in accordance with the Swedish Penal Code. The Court therefore considered that the interference with their freedom of expression had been sufficiently clear and

foreseeable and thus “prescribed by law” within the meaning of the Convention. The interference had served a legitimate aim, namely “the protection of the reputation and rights of others” (Article 10 § 2).

The Court agreed with the Supreme Court that, even if the applicants’ objective to start a debate about the lack of objectivity of education in Swedish schools had been an acceptable aim, regard had to be paid to the wording of the leaflets. According to the leaflets, homosexuality was a “deviant sexual proclivity”, had “a morally destructive effect” on society and was responsible for the development of HIV and AIDS. The leaflets further alleged that the “homosexual lobby” tried to play down paedophilia. These statements had constituted serious and prejudicial allegations, even if they had not been a direct call to hateful acts. The Court stressed that discrimination based on sexual orientation was as serious as discrimination based on “race, origin or colour”.

While acknowledging the applicants’ right to express their ideas, the Supreme Court had found that the leaflets’ statements had been unnecessarily offensive. It had further emphasised that the applicants had imposed the leaflets on the pupils by leaving them on or in their lockers. The Court noted that the pupils had been at an impressionable and sensitive age and that the distribution of the leaflets had taken place at a school which none of the applicants attended and to which they did not have free access.

Three of the applicants 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 did not find these penalties excessive in the circumstances as the crime of which they had been convicted had carried a penalty of up to two years’ imprisonment.

The Court therefore considered that the interference with the applicants’ exercise of their right to freedom of expression had reasonably been regarded by the Swedish authorities as necessary in a democratic society for the protection of the reputation and rights of others. The Court concluded that there had been no violation of Article 10.

Article 7

Having regard to the finding under Article 10, that the measure complained of were “prescribed by law”, the Court declared the applicants’ complaint under Article 7 inadmissible as being manifestly ill-founded.

JUDGMENT IN THE CASE OF FATULLAYEV v. AZERBAIJAN
(Application no. 40984/07)
22 April 2010

1. Principal facts

The applicant, Mr Fatullayev, was born in 1976 and lives in Baku. He was the founder and chief editor of two newspapers that were widely known for often publishing articles harshly criticising the Government and various public officials. He is currently serving a prison sentence.

The first set of criminal proceedings related to an article published in April 2005. The statements made in the article differed from the commonly accepted version of the events 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 survivors and two former soldiers involved in the battle brought a criminal complaint against Mr Fatullayev for defamation and for falsely accusing Azerbaijani soldiers of having committed an especially grave crime. The courts upheld the claims against the applicant, convicted him of defamation and sentenced him to two years and six months' imprisonment. In addition, in civil proceedings brought against the applicant before the 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, and another EUR 8,500 on behalf of his newspaper, in respect of non-pecuniary damage.

The second set of criminal proceedings related to an article published in March 2007. In it the applicant expressed the view that, in order for the President to remain in power in Azerbaijan, the Azerbaijani Government had sought the support of the United States (US) in exchange for Azerbaijan's support for the US "aggression" against Iran. He argued that Azerbaijan may become a victim of Iranian retaliation as a result, and speculated on possible Azerbaijan's targets. The criminal proceedings against the applicant in connection with this article were brought by the Ministry of National Security in May 2007. Before the applicant was formally charged with the offence of threat of terrorism, however, the Prosecutor General made a statement to the press, noting that Mr Fatullayev's article constituted a threat of terrorism. The applicant was found guilty as charged and convicted of threat of terrorism in October 2007. The total sentence imposed on him was eight years and six months' imprisonment.

2. Decision of the Court

The applicant complained under Articles 6 and 10 of the Convention that each of his criminal convictions for the statements he had made in the newspaper articles had amounted to an unjustified interference with his right to freedom of expression and that, in this connection, his right to a fair trial had also been infringed in the relevant criminal proceedings.

Article 10

First criminal conviction

With respect to the first criminal conviction, the Court acknowledged the very sensitive nature of the issues discussed in the applicant'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 the applicant may have been considered shocking or disturbing by the public. However, the Court recalled that freedom of information applied not only to information or ideas that were favourably received, but also to those that offended, shocked or disturbed. It was 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 have been able to take place freely.

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 had been entitled to receive information about what was happening in the territories over which their country had lost control in the aftermath of the war. 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.

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 Mr Fatullayev. There had accordingly been a violation of Article 10 of the Convention in respect of the applicant's first criminal conviction.

Second criminal conviction

The second article had focused on Azerbaijan's specific role in the dynamics of

international politics relating to US-Iranian relations. The applicant had criticised the Azerbaijani Government's foreign and domestic political moves. 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. Neither had Mr 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.

The Court considered that Mr 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. There had accordingly been a violation of Article 10 in respect of Mr Fatullayev's second criminal conviction.

Article 6 § 1

The Court noted that the judge who had heard the criminal case had been the same judge who had previously examined the civil action against the applicant. Both sets of proceedings, the civil and the criminal one, had concerned exactly the same allegedly defamatory statements made by Mr Fatullayev. Having decided the civil case, the judge had already reached the conclusion that the applicant's statements had constituted false information tarnishing the dignity of Khojaly survivors. Accordingly, the Court considered that the applicant's fear of the judge's lack of impartiality could be considered as objectively justified. There had accordingly been a violation of Article 6 § 1 in this respect.

Article 6 § 2

It had been the Court's consistent approach to find that the presumption of innocence was violated if a statement by a public official concerning a person charged with a criminal offence reflected an opinion that he was guilty before he had been proved guilty according to law. The Prosecutor General's statement had unequivocally declared that the applicant's article indeed contained a threat of terrorism. Those specific remarks, made without any qualification or reservation, had amounted to a declaration that the applicant had committed the criminal offence of threat of terrorism and had thus prejudged the assessment of the facts by the courts. That in turn had encouraged the public to believe the applicant guilty before he had been proved guilty according to law. There had accordingly been a violation of Article 6 § 2.

Article 46

The Court noted that the applicant was currently serving the sentence for the

press offences in respect of which it had found Azerbaijan in violation of the Convention. Having considered unacceptable that the applicant still remained imprisoned and the urgent need to put an end to the violations of Article 10, the Court held that Azerbaijan had to release the applicant immediately.

Article 41

The Court held that Azerbaijan is to pay Mr Fatullayev EUR 25,000 in respect of non-pecuniary damage and EUR 2,822 in respect of costs and expenses.

**GRAND CHAMBER JUDGMENT IN THE CASE OF PERİNÇEK
v. SWITZERLAND**
(Application no. 27510/08)
15 October 2015

1. Principal Facts

The applicant, Doğu Perinçek, is a Turkish national who was born in 1942 and lived in Ankara, Turkey.

As a doctor of laws and the Chairman of the Turkish Workers' Party, he participated in various conferences in Switzerland in 2005, during which he publicly denied that the Ottoman Empire had perpetrated the crime of genocide against the Armenian people in 1915 and the following years. He described the idea of an Armenian genocide as an "international lie". The association "Switzerland- Armenia" filed a criminal complaint against him on 15 July 2005.

On 9 March 2007 the Lausanne Police Court found Mr Perinçek guilty of racial discrimination within the meaning of the Article 261bis, paragraph 4 of the Swiss Criminal Code, finding that his motives were of a racist tendency and did not contribute to the historical debate. He was ordered to pay 90 day-fines of 100 Swiss francs each (approximately €93), suspended for two years, a fine of 3,000 Swiss francs (approximately €2,794), which could be replaced by 30 days' imprisonment, and 1,000 Swiss francs (approximately €931) in compensation to the Switzerland-Armenian Association for non-pecuniary damage.

Mr Perinçek lodged an appeal that was dismissed by the Criminal Cassation Division of the Vaud Cantonal Court. In that court's view, the Armenian genocide, like the Jewish genocide, was a proven historical fact. The courts did not therefore need to refer to the work of historians in order to accept its existence. The Federal Court dismissed a further appeal by Mr Perinçek in a judgment of 12 December 2007.

2. Decision of the Court

On 12 November 2013 a Chamber of the Court held that there had been a violation of Article 10 of the Convention. On 2 June 2014 a panel of the Grand Chamber accepted the Government's request for referral of the case.

The applicant, relying on the Article 10 right to freedom of expression, complained

that the Swiss courts breached his freedom of expression. He argued that Article 261bis, paragraph 4, of the Swiss Criminal Code is not sufficiently foreseeable in its effect, that his conviction was not justified by the pursuit of a legitimate aim and that the alleged breach of his freedom of expression was not “necessary in a democratic society”.

Article 10

The Court stated that it was not its duty to determine whether the criminalisation of the denial of genocide is justified, or indeed even to determine whether a genocide had taken place. The Court stated that its role was solely to examine whether the application of Article 261 *bis* § 4 of the Swiss Criminal Code in the case of the applicant was “necessary in a democratic society”. To this end, the Court observed that it was accepted by both parties that Mr Perinçek’s conviction and punishment had constituted an interference with the exercise of his right to freedom of expression under Article 10. However, to be a justified interference under the Convention, the interference must also be “prescribed by law”, be in pursuit of a legitimate aim under Article 10(2) and must be “necessary in a democratic society”.

The Grand Chamber stated that the interference with Mr Perinçek’s right to freedom of expression had been prescribed by law within the meaning of Article 10(2). The Court found in particular that – despite his submissions to the contrary – the applicant could reasonably have foreseen that his statements might result in criminal liability under Swiss law.

As regards the question of whether the interference had pursued a legitimate aim, the Grand Chamber found that the interference could not be regarded as being justified by a desire to prevent disorder. However, the interference could be regarded as having been intended “for the protection of the ... rights of others” within the meaning of Article 10(2). It noted that many of the descendants of the victims of the events of 1915 and the following years, constructed their identity around the perception that their community had been the victim of genocide. The Court thus accepted that the interference with Mr Perinçek’s rights had been intended to protect that identity and thus the dignity of present-day Armenians.

Concerning the question whether the interference had been “necessary in a democratic society” within the meaning of Article 10(2), the Court stated that it had to review whether or not the application of Article 261 *bis* § 4 of the Swiss Criminal Code in Mr Perinçek’s case had been in conformity with Article 10. The Court observed that in the light of its case-law, the dignity of Armenians was protected under Article 8 of the Convention. The Court was thus faced with the need to

strike a balance between two Convention rights, taking into account the specific circumstances of the case and the proportionality between the means used and the aim sought to be achieved.

The Court examined the nature of the applicant's statements. It noted that he had not expressed contempt or hatred for the victims of the events of 1915 and the following years. He had not called the Armenians liars, used abusive terms with respect to them, or attempted to stereotype them. His strongly worded allegations had been directed against the "imperialists" and their allegedly insidious designs with respect to the Ottoman Empire and Turkey. The Court distinguished the facts of this case to its previous case law on the Holocaust, and stated that this context did not require an automatic presumption that Mr Perinçek's statements relating to the 1915 events promoted a racist and antidemocratic agenda. Indeed, the Court found that, read in their entirety, the statements could not be seen as a call for hatred, violence or intolerance. The Court also decided that his statements were entitled to heightened protection under Article 10 as the context in which they were made (at public events to like-minded people) showed that he spoke as a politician, and not as a historical or legal scholar and about a matter of public concern.

It was also observed by the Court that, unlike the cases it had dealt with concerning the Holocaust, it had not been argued that there was a direct link between Switzerland and the events that took place in the Ottoman Empire in 1915 and the following years. Moreover, there was no evidence that at the time when Mr Perinçek had made his statements the atmosphere in Switzerland had been tense and could have resulted in serious friction between Turks and Armenians there.

Therefore, the Court concluded that while it was aware of the importance attributed by the Armenian community to the question whether the tragic events of 1915 and the following years were to be regarded as genocide, it could not accept that Mr Perinçek's statements had been so wounding to the dignity of the Armenians as to require criminal law measures in Switzerland. It also noted that his statements did not imply that the Armenians deserved to be subjected to the atrocities and that a significant amount of time has passed since the events, meaning that they could not be seen as having the significantly unsettling effect sought to be attributed to them. The Court also reaffirmed that a criminal conviction was one of the most serious forms of interference with the right to freedom of expression.

The Court concluded, therefore, that it had not been necessary, "in a democratic society", to subject Mr Perinçek to a criminal penalty in order to protect the rights of the Armenian community. There had accordingly been a breach of Article 10 of the Convention.

Article 41

The Court held that the finding of a violation of Article 10 constituted in itself sufficient just satisfaction for any non-pecuniary damage suffered by Mr Perinçek. The Court further dismissed, unanimously, the remainder of his claim for just satisfaction.

No violation of Article 10 where the need to protect the rights of the immigrant community justified the interference with the political party's right to freedom of expression

JUDGMENT IN THE CASE OF FERET v. BELGIUM

(Application no. 15615/07)

16 July 2009

1. Principal facts

The applicant, Mr Daniel Féret, is a Belgian national who was born in 1944 and lives in Brussels. As chairman of the political party “Front National-Nationaal Front” he is the editor in chief of the party’s publications and owner of its website. He was a member of the Belgian House of Representatives at the relevant time.

Between July 1999 and October 2001 the distribution of leaflets and posters by his party, in connection with the election campaigns of the Front National, led to complaints by individuals and associations for incitation of hatred, discrimination and violence, filed under a law of 30 July 1981 which penalised certain acts inspired by racism or xenophobia.

On 19 February 2002 Mr Féret was interviewed by the police in connection with those complaints.

The applicant’s parliamentary immunity was waived on the request of the Principal Public Prosecutor at the Brussels Court of Appeal. In November 2002 criminal proceedings were brought against him as author and editor-in-chief of the offending leaflets and owner of the website.

On 4 June 2003, in order to be able to rule on the merits, the Brussels Criminal Court re-opened the proceedings. An appeal by Mr Féret concerning the jurisdiction of that first-instance court was declared inadmissible in June 2003 and in March 2004 the Court of Cassation dismissed his appeal on points of law against the Court of Appeal’s decision.

On 13 June 2004 the applicant was elected to the Bruxelles-Capitale Regional Council and to the Parliament of the French Community, both positions affording him new parliamentary immunity.

The public prosecutor reactivated the proceedings on 23 June 2004. On 20 February 2006 the Brussels Court of Appeal held a complete trial and on 18 April 2006 sentenced Mr Féret to 250 hours of community service related to the integration

of immigrants, together with a 10-month suspended prison sentence. It declared him ineligible for ten years. Lastly, it ordered him to pay one euro to each of the civil parties.

The court 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 incitation of discrimination, segregation or hatred, and even violence, for reasons of race, colour or national or ethnic origin.

An appeal on points of law by Mr Féret was dismissed on 4 October 2006.

2. Decision of the Court

Relying on Article 10, the applicant alleged that his conviction for the content of his political party's leaflets represented an excessive restriction on his right to freedom of expression.

Article 10

The interference with Mr Féret's right to freedom of expression had been provided for by law (law of 30 July 1981 on racism and xenophobia) and had the legitimate aims of preventing disorder and of protecting the rights of others.

The Court observed that the leaflets presented the communities in question 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.

While freedom of expression was important for everybody, it was especially so for an elected representative of the people: he or she represented the electorate and defended their interests. However, the Court 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 in an electoral context, in which arguments naturally became 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 Court noted that the authorities had preferred a 10-year period of ineligibility rather than a penal option, 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.

JUDGMENT IN THE CASE OF BODROŽIĆ v. SERBIA

(Application no. 32550/05)

23 June 2009

1. Principal facts

The applicant, Zeljko Bodrozic, was born in 1970 and lives in Kikinda, Serbia. The applicant is a journalist and member of a political party. At the time of the impugned events, he was also the editor of the local weekly newspaper, *Kikindske*.

On 3 October 2003 the applicant published an article about a certain historian, J.P., entitled ‘The Floor is Given to the Fascist’ where he called him and idiot and a fascist. J.P. instituted private criminal proceedings for insult against the applicant. At the hearing held on 17 November 2003, the applicant stated that “he did not wish to settle the matter with the private prosecutor [J.P.] because he was a member of the fascist movement in Serbia”. On account of this statement, on 5 January 2004 J.P. instituted new private criminal proceedings for defamation against the applicant.

The court found the applicant guilty of insult for the published article and of defamation for the statement given at the court hearing of 17 November 2003. The court fined him approximately EUR 162, and ordered him to pay J.P. additional EUR 225 in respect of the costs of the proceedings. The applicant appealed but the judgment was upheld in the second instance.

2. Decision of the Court

The applicant complained that his criminal conviction had violated his right to freedom of expression as provided in Article 10 of the Convention, and that he had not been afforded enough time to prepare his defence in the criminal proceedings contrary to Article 6 § 3, but the Court rejected the latter complaint as manifestly ill-founded.

Admissibility

The Government argued that applicant could have brought a civil action for damages if he deemed that one of his personality rights had been violated.

However, the Court considered that Government were unable to cite any domestic

jurisprudence where a claim based on the relevant provisions of the Obligations Act had been used successfully in a case such as the applicant's. In the Court's view, it appeared in any event contradictory to the social purpose of criminal sanctions that a convicted person may institute civil proceedings against the State with a view to overturning a final criminal conviction and obtaining damages suffered as a consequence thereof. The Court therefore declared the application admissible.

Article 10

It was not disputed that the applicant's conviction for defamation and insult amounted to an "interference" with his right to freedom of expression, that it was "prescribed by law" under the Criminal Code as worded at the material time, and it pursued the legitimate aim of the protection of the rights of others. What remained to be established is whether the interference was "necessary in a democratic society".

As the Court has often observed, freedom of expression enshrined in Article 10 constitutes one of the essential foundations of a democratic society. Subject to paragraph 2, it is applicable not only to "information" or "ideas" which are favourably received or regarded as inoffensive, but also to those which offend, shock or disturb.

The Court emphasised the essential function fulfilled by the press in a democratic society. Although the press must not overstep certain bounds, particularly in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. In cases concerning the press, the State's margin of appreciation is circumscribed by the interest of a democratic society in ensuring and maintaining a free press.

The applicant's statements must be seen in context. The applicant had reacted to certain controversial statements made by J.P. on public television concerning the existence and the history of national minorities in Vojvodina, a multi-ethnic region, 35% of whose population was non-Serbian, according to the 2002 census. This large minority was made up mostly of Hungarians, but also of Slovaks, Croats and others. In that interview, J.P. stated, *inter alia*, that "all Hungarians in Vojvodina were colonists" and that "there were no Croats in that region". Even though J.P. in no way relied on fascism as defined by the Serbian courts, it is understandable why the applicant, who himself had different political views, might have interpreted J.P.'s statements as implying a certain degree of intolerance towards national minorities. The fact that he considered it his duty as a journalist

to react to such statements publicly is also understandable. Further, the Court considers that calling someone a fascist, a Nazi or a communist cannot in itself be identified with a factual statement of that person's party affiliation.

In view of the above, the Court found that the expressions used by the applicant cannot but be interpreted as value judgments, the veracity of which is not susceptible of proof. Such value judgments may be excessive in the absence of any factual basis but, in the light of the aforementioned elements, that did not appear to have been the case in the present application.

Lastly, the Court reiterated that when assessing the proportionality of the interference, the nature and severity of the penalties imposed are also factors to be taken into account. In the instant case, not only was the applicant subject to a criminal conviction, but the fine imposed on him could, in case of default, be replaced by 75 days' imprisonment.

The Court concluded that the criminal proceedings in the particular circumstances of the instant case resulted in a breach of the applicant's right to freedom of expression guaranteed by Article 10.

Article 41

The Court awarded the applicant €500 in respect of non-pecuniary damage.

Article 10 and Article 8's Right to Respect for Private Life

The ban on the publication of individuals' taxation data did not violate the right to freedom of expression

JUDGMENT IN THE CASE OF SATAKUNNAN MARKKINAPÖRSSI OY AND SATAMEDIA OY v. FINLAND¹²⁷

(Application no. 931/13)

21 July 2015

1. Principal facts

The applicants, Satakunnan Markkinapörssi Oy and Satamedia Oy, are two Finnish companies, publishers of the magazine “Veropörssi”, which reported information on taxation, especially taxable income and assets of individuals. In 2003, Satamedia Oy began providing an SMS service allowing people to retrieve taxation information from a database. The database had been created using the information which had already been published in the magazine.

In February 2004 the Data Protection Ombudsman requested that the Data Protection Board prevent the applicants from processing and publishing such information about individuals on the grounds that it was contrary to the Finnish Personal Data Act. The Data Protection Board dismissed the request since the “journalistic derogation” provided for in the Personal Data Act applied in this case.

This decision was upheld by the Helsinki Administrative Court. The Data Protection Ombudsman appealed to the Supreme Administrative Court, and after a preliminary ruling by the Court of Justice of the European Union¹²⁸, the Supreme Administrative Court quashed the previous decisions and referred the case back to the Data Protection Board. It held that the publication of the whole database could not be considered as journalistic activity but as processing of personal data, which the applicant companies had no right to do. It considered the balance between the companies' right to freedom of expression and the individual's right to privacy and found that the publication of such information was not in the public interest. The SMS service was discontinued and the magazine published a further issue with reduced taxation data in autumn 2009 and has not been published since.

¹²⁷ This case has been referred to the Grand Chamber and a judgment is awaited.

¹²⁸ Case C-73/07 *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy* [GC], 16 December 2008

The Data Protection Board forbade the applicants to process taxation data, and this decision was upheld on appeal.

2. Decision of the Court

Article 10

The applicants complained that the ban on processing taxation data amounted to censorship and violated Article 10 of the Convention. The Court found that there had been an interference with the applicants' right to impart information as guaranteed by Article 10(1). The interference had been prescribed by law since it was based on the provisions of the Personal Data Act and it pursued the legitimate aim of protecting the reputation and the rights of others.

The Court examined whether the interference had been necessary in a democratic society. It identified a number of relevant criteria when balancing freedom of expression and the right to respect for private life: the contribution to a debate of general interest; how well-known is the person concerned and what is the subject of the report; prior conduct of the person concerned; method of obtaining the information and its veracity/circumstances in which the photographs were taken; content, form and consequences of the publication; and the severity of the sanction imposed.

In order to determine whether the restriction had been necessary, the Court considered whether the balancing exercise between freedom of expression and the right to respect for private life carried out by the national authorities had been in conformity with the Court's criteria. The Court found that imparting taxation data was part of the public's right to receive information and it was justified from a journalistic point of view. Furthermore, the accuracy of the information had not been disputed by the Finnish authorities. However, the Court found that the Supreme Administrative Court had carried out a thorough balancing of the two rights at stake and had attached weight to both the freedom of expression of the applicant companies and right to respect of private life of the tax-payers whose data had been published. After careful consideration, the Supreme Administrative Court found that it was necessary to limit the applicants' freedom of expression. The Court found this reasoning acceptable.

In addition, nothing prevented the applicants from publishing information to a lesser extent than they had done in 2002. The reasons relied on by the domestic courts were sufficient to show that the interference had been necessary in a democratic society and that consequently, there had not been a violation of Article 10.

Article 6(1)

The applicants complained that the length of administrative proceedings, which lasted more than eight years, violated Article 6(1).

When considering the length of time at issue, the Court deduced the time during which the case for preliminary reference was pending before the CJEU, bringing the impugned proceedings down to six years and six months. However, the excessive length of the proceedings had not been convincingly justified by the Government, and hence there had been a violation of Article 6(1).

Article 14

This part of the application was declared inadmissible as manifestly ill-founded.

Article 41

The Court did not award the applicants pecuniary or non-pecuniary damages but did award €9,500 in respect of costs and expenses.

Media coverage of celebrities' private lives: protected by the right to freedom of expression under Article 10 if in the general interest and if in reasonable balance with the right to respect for private life

GRAND CHAMBER JUDGMENTS IN THE CASES OF AXEL SPRINGER v. GERMANY AND VON HANNOVER (no. 2) v. GERMANY

(Applications nos. 39954/08, 40660/08 and 60641/08)

7 February 2012

1. Principal facts

Axel Springer AG

The applicant company, Axel Springer AG (“Springer”), is registered in Germany. It is the publisher of the Bild, a national daily newspaper with a large circulation.

In September 2004, the Bild published a front-page article about X, a well-known television actor, being arrested at the Munich beer festival for possessing cocaine. The article also mentioned that X, who had played the role of a police superintendent in a popular TV series since 1998, had previously been given a suspended prison sentence for possession of drugs in July 2000. The newspaper published a second article in July 2005. This reported X being convicted and fined for illegal possession of drugs after making a full confession.

When the first article appeared, X brought injunction proceedings against Springer at Hamburg Regional Court. The Court granted X’s request and prohibited any further publication of the article and photos. In another set of proceedings concerning a second article about X’s conviction, Hamburg Regional Court also granted an injunction. The judgments were upheld by Hamburg Court of Appeal and the Federal Court of Justice. On both occasions, the court held that X’s right to protection prevailed over the public interest.

Von Hannover (no. 2)

The applicants were Princess Caroline von Hannover, daughter of the late Prince Rainier III of Monaco, and her husband Prince Ernst August von Hannover.

Since the early 1990s Princess Caroline has attempted to prevent the publication of photos of her private life in the press. Two series of photos, published in 1993 and 1997 in German magazines had been the subject of three sets of proceedings before the German courts. These proceedings were eventually heard by the European Court of Human Rights, see *Caroline von Hannover v. Germany* (no.

59320/00). In this case, the Court held that the publication of the photographs infringed Princess Caroline's right to respect for her private life under Article 8.

Relying on *Caroline von Hannover v. Germany*, Princess Caroline and Prince Ernst August brought several sets of proceedings before the German civil courts seeking an injunction against the publication of further photos. The Federal Court of Justice granted Princess Caroline's claim as regards the publication of two of the photos, stating that they did not contribute to a debate of general interest. The Federal Court of Justice however, dismissed her claim as concerned another photo showing the couple walking during a skiing holiday in St. Moritz; this photo was accompanied by an article reporting on the poor health of Prince Rainier of Monaco. In reaching their decision, the Federal Court held that the reigning Prince's poor health was a subject of general interest and that the press had been entitled to report on the manner in which his children reconciled their obligations of family solidarity with the legitimate needs of their private life.

The Federal Constitutional Court later dismissed a constitutional complaint made by Princess Caroline, rejecting in particular the allegation that the German courts had disregarded or taken insufficient account of *Caroline von Hannover v. Germany*.

2. Decision of the Court

Axel Springer AG complained that the injunction prohibiting any further publication of the articles violated their rights under Article 10.

Princess Caroline von Hannover and Prince Ernst August von Hannover complained that the German Courts' refusal to prohibit any further publication of the disputed photos violated their Article 8 rights. In particular, it was alleged that the German courts had not taken sufficient account of *Caroline von Hannover v. Germany*.

The Chamber to which the applications had been allocated joined the applications and relinquished jurisdiction in favour of the Grand Chamber.

Axel Springer AG

It was undisputed that the German courts' decisions constituted an interference with Springer's rights under Article 10. It was further common ground that the interference was prescribed by German law and that it had pursued a legitimate aim, namely the protection of the reputation of others.

As regards the question whether the interference had been necessary in a

democratic society, the Court noted that the articles in question, about the arrest and conviction of the actor concerned public judicial facts, of which the public had an interest in being informed. It was in principle for the national courts to assess how well known a person was, especially where that person, as the actor concerned, was mainly known at national level. The Court noted that the German Court of Appeal had also found that having played the role of a police superintendent over a long period of time, the actor was well known and very popular. The Court considered therefore that X was sufficiently well known to qualify as a public figure. This reinforced the public's interest in being informed of his arrest and the subsequent proceedings against him.

While the Court could broadly agree with the German courts' assessment that Springer's interest in publishing the articles was solely due precisely to the fact that it was a well-known actor who had committed an offence – which would not have been reported on if committed by a person unknown to the public – it underlined that the actor had been arrested in public at the Munich beer festival. The actor's expectation that his private life would be effectively protected had furthermore been reduced by the fact that he had previously revealed details about his private life in a number of interviews.

According to a statement by one of the journalists involved, the truth of which had not been contested by the German Government, the information published in the Bild in September 2004 about the actor's arrest had been obtained from the police and the Munich public prosecutor's office. It therefore had a sufficient factual basis, and the truth of the information related in both articles was not in dispute between the parties. Nothing suggested that Springer had not undertaken a balancing exercise between its interest in publishing the information and the actor's right to respect for his private life. Given that Springer had obtained confirmation of the information conveyed by the prosecuting authorities, it did not have sufficiently strong grounds for believing that it should preserve the actor's anonymity. It could therefore not be said to have acted in bad faith.

The Court also noted that the articles had not revealed details about the actor's private life, but had mainly concerned the circumstances of his arrest and the outcome of the criminal proceedings against him. They contained no disparaging expression or unsubstantiated allegation, and the Government had not shown that the publication of the articles had resulted in serious consequences for the actor. While the sanctions imposed on Springer had been lenient, they were capable of having a chilling effect on the company. The Court concluded therefore that the restrictions imposed on the company had not been reasonably proportionate to the legitimate aim of protecting the actor's private life. There had accordingly been a violation of Article 10.

The Court observed that following its 2004 judgment in *Caroline von Hannover v. Germany*, the German Federal Court of Justice had made changes to its earlier case law. In particular, the German Federal Court of Justice had stated that it was significant whether a report in the media contributed to a factual debate and whether its contents went beyond a mere desire to satisfy public curiosity. The Federal Court of Justice had noted that the greater the information value for the public the more the interest of a person in being protected against its publication had to yield, and vice versa, and that the reader's interest in being entertained generally carried less weight than the interest in protecting the private sphere.

The fact that the German Federal Court of Justice had assessed the information value of the photo in question in the light of the article that was published together with it could not be criticised under the Convention. The Court could accept that the photo, in the context of the article, did at least to some degree, contribute to a debate of general interest. The German courts' characterisation of Prince Rainier's illness as an event of contemporary society could not be considered unreasonable. The Court further noted that irrespective of the question to what extent Caroline von Hannover assumed official functions on behalf of the Principality of Monaco, it could not be claimed that the applicants, who were undeniably very well known, were ordinary private individuals. They had to be regarded as public figures therefore.

The German courts had concluded that the applicants had not provided any evidence that the photos had been taken in a climate of general harassment, as they had alleged, or that they had been taken secretly.

In conclusion, therefore, the Court found that German courts had carefully balanced the right of the publishing company's freedom of expression against the right of the applicants to respect for their private life. In doing so, they had implicitly taken into account the Court's case law, including *Caroline von Hannover v. Germany*. There had accordingly been no violation of Article 8.

Article 41

The Court held that Germany was to pay Axel Springer AG EUR 17,734.28 in respect of pecuniary damage and EUR 32,522.80 in respect of costs and expenses.

Violation of the Convention where Prince Albert of Monaco's right to respect for his private life under Article 8 could not justify the interference with the freedom of expression of the press under Article 10

**GRAND CHAMBER JUDGMENT IN THE CASE OF COUDERC AND
HACHETTE FILIPACCHI ASSOCIÉS v. FRANCE**

(Application no. 40454/07)

10 November 2015

1. Principal Facts

The applicants are Anne-Marie Couderc, a French national who was born in 1950, and who is the publication director of *Paris Match*, and the company Hachette Filipacchi Associés, which publishes the weekly magazine *Paris Match*.

On 3 May 2005, the British newspaper the *Daily Mail* published an article in which an individual named Ms Coste claimed that her son's father was Albert Grimaldi, reigning prince of Monaco. The British newspaper mentioned a forthcoming publication in *Paris Match* resulting in Prince Albert serving notice on the applicants to refrain from publishing the article. In spite of this, however, on 5 May 2005, *Paris Match* published the article, which consisted of an interview with Ms Coste, who claimed that Prince Albert was the father of her child. The article was accompanied by photographs showing Prince Albert with the child in his arms.

On 19 May 2005, claiming that the article infringed his rights to private life and to protection of his own image, Prince Albert brought proceedings against the applicants, seeking damages from the publishing company and an order that it publish the court's ruling on the front cover of the magazine.

On 29 June 2005 the Nanterre *Tribunal de Grande Instance* ordered the company Hachette Filipacchi Associés to pay Prince Albert €50,000 in non-pecuniary damages, and also ordered that details of the judgment be printed on *Paris Match's* entire front cover, under the headline "Court order against Paris Match at the request of Prince Albert II of Monaco". The court considered that the entire article fell within the most intimate sphere of Prince Albert's love and family life and that it did not concern any debate of general interest. The applicants lodged an appeal.

In a press release of 6 July 2005 Prince Albert publicly acknowledged that he was the child's father. On 24 November 2005 the court of appeal upheld the order to pay €50,000 in damages and amended the conditions of publication of the court

ruling, which was not to appear under a headline and was to take up only one third of the front cover.

2. Decision of the Court

Relying on Article 10, the applicants complained that the judgment against them had amounted to unjustified interference with the exercise of their right to freedom of information. On 12 June 2014 a Chamber of the European Court of Human Rights found that there had been a violation of Article 10 of the Convention. On 13 October 2014 a panel of the Grand Chamber accepted the Government's request for referral of the case.

Article 10

The Court noted that it was not disputed that the impugned judgment constituted an interference with the applicants' exercise of their freedom of expression. Nor was it contested that the interference was prescribed by law. Furthermore, the Court observed that it was accepted that it pursued the legitimate aim of protection of the rights of others within the meaning of Article 10(2) of the Convention. However, in order for an interference to be in compliance with the Convention, it must also be "necessary in a democratic society".

Whether the interference in this case was "necessary", the Court noted, required it to examine whether the domestic courts struck the right balance between two competing rights, namely, the right to respect for private life of the Prince and the right to freedom of expression of the applicants. The Court noted that the protection afforded by the concept of "private life" in Article 8 of the Convention is primarily intended to ensure the development, without outside interference, of the personality of each individual. With regard to Article 10, the Court reiterated that its protection encompasses information and ideas that offend, shock or disturb and that when information concerns matters of public interest, the press have a duty to impart this information and the public have a right to receive it. The Court noted that the protection afforded by Article 10 may cede to the requirements of Article 8 where the information is of private and intimate nature and there is no public interest in its dissemination.

The Court then, using previous case law, listed the criteria to be examined when balancing the competing rights. The relevant criteria 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 photographs were taken. Where it examines an application lodged

under Article 10, the Court stated that it will also examine the way in which the information was obtained and its veracity, and the gravity of the penalty imposed on the journalists or publishers.

The Court accepted that there was no doubt that the publication, taken as a whole and in context, and analysed in the light of the Court's case-law precedents, concerned a matter of public interest. At the relevant time this child's birth was not without possible dynastic and financial implications and thus the contested information was of political importance, as it could arouse the interest of the public with regard to the rules of succession in force in the Principality.

The Court also pointed out that given that the Prince was a public figure, the protection he is entitled to under Article 8 could be impacted. The fact of exercising a public function necessarily exposes an individual to the close scrutiny of the public, including the media. The Court observed that the disputed publication concerned the Prince's private life. However, the essential element of the information contained in the article – the child's existence – went beyond the private sphere, given the hereditary nature of the Prince's functions as the Monegasque Head of State. Moreover, the veracity of Ms Coste's statements with regard to the Prince's paternity has not been contested by Prince Albert, who himself publicly acknowledged it shortly after the article in question had been published. Finally, the Court stated that the photographs were handed over to *Paris Match* by Ms Coste voluntarily and without charge, they were not taken without the Prince's permission and they did not show him in an unfavourable light.

In the light of these considerations, the Court considered that the arguments advanced by the Government with regard to the protection of Prince Albert's private life and of his right to his own image could not be regarded as sufficient to justify the interference in question. The domestic courts had not given due consideration to the principles and criteria for balancing the right to respect for private life and the right to freedom of expression. In this respect, the Court observed that the domestic courts had failed to assess the impugned interview in such a way so as to differentiate and weigh up what aspects fell within the core area of the Prince's private life and what could be of legitimate interest to the public. The domestic courts denied that there was any "topical" value to the news about the existence of the Prince's son and thus concluded that the article did not form part of "any debate on a matter of public interest which would have justified its being reported...on the grounds of legitimate imparting of information to the public". The Court concluded, therefore, that the domestic courts failed to strike a reasonable balance of proportionality between the measures restricting the applicant's right to freedom of expression and the legitimate aim pursued.

The Court concluded that there had been a violation of Article 10.

Article 41

The Court, due to the failure of the applicants to submit the particulars of their claims in respect of the damage sustained by them, rejected their claim for compensation. The Court did, however, award the applicants jointly €15,000 for costs and expenses.

Negative Media Coverage of Trials, the Presumption of Innocence and Interferences by Authorities with Media's Freedom to Report Trials

The conviction of a journalist for disclosing confidential information regarding a criminal investigation did not breach Article 10

GRAND CHAMBER JUDGMENT IN THE CASE OF
BÉDAT v. SWITZERLAND
(Application No. 56925/08)
29 March 2016

1. Principal facts

The applicant, Mr Arnaud Bédât, is a Swiss journalist who published an article on 15 October 2003 in the weekly magazine, *L'Illustré*, entitled 'Tragedy on the Lausanne Bridge – the reckless driver's version – Questioning of the mad driver'. It concerned the criminal proceedings against M.B. who, on 8 July 2003, had driven his car into pedestrians, killing three and injuring eight, before throwing himself off the Lausanne Bridge. M.B. survived and was remanded in custody. His trial commenced two years later. The article contained sensitive information, such as questions asked by the police officers and the investigating judge; M.B.'s answers to such questions; the charge against M.B. and; photographs of letters sent by M.B. to the investigating judge. It also asserted that M.B. "appear[ed] to show no remorse" and stated that he was "doing everything in his power to make himself impossible to defend".

The applicant had obtained the information legally and in good faith - a party claiming damages from M.B. had lost a photocopy of M.B.'s case file in a shopping centre. This was found by an unnamed person who had then delivered it to the office of *L'Illustré*. Criminal proceedings were brought by the public prosecutor for the publishing of secret documents and the applicant was convicted of violating the Swiss Criminal Code and fined accordingly.

2. Decision of the Court

Mr Bédât claimed that his criminal conviction breached his right to freedom of expression under Article 10 of the Convention. In its Chamber judgment of 1 July 2014, the Court found by a majority that there had been a violation of Article 10.

A request by the Swiss Government to have the case referred to the Grand Chamber under Article 43 was granted by the panel of the Grand Chamber.

Article 10

The Grand Chamber found there to be agreement between the parties that the applicant's conviction constituted an interference of his right to freedom of expression under Article 10 and that such an interference was prescribed by law. The Grand Chamber also confirmed the Chamber's conclusion that the impugned measure had pursued the legitimate aims of preventing the disclosure of confidential information, upholding the judiciary's authority and impartiality and safeguarding a citizen's reputation and rights.

The Court then turned to examine whether the interference was 'necessary'. It confirmed that a high level of protection, and a particularly narrow margin of appreciation, exists for political speech and matters of public interest. It highlighted that the press plays an indispensable role in democratic society, but also that the protection afforded by Article 10 is dependent on journalists acting in good faith in imparting accurate and reliable information in line with the principles of responsible journalism. A relevant consideration when determining whether a journalist has acted responsibly is whether or not they have breached the law.

The press have the task of discussing the subject matter of trials and the public has the right to receive such information. However, the right to a fair hearing in a criminal trial under Article 6 also secures the right to an impartial tribunal and the right to the presumption of innocence. This must be at the forefront of a journalist's mind when commenting on on-going criminal proceedings. The Court observed that Convention rights enjoy equal protection and thus Article 6 and 10 must be balanced, just as Article 8 and 10 have been in the Court's jurisprudence. In order to assist in doing this, the Court specified six criteria to consider.

Firstly, the Court should consider how the applicant came into possession of the information at issue. In this regard, the Court noted that although the applicant obtained the information legally, Mr Bédard could not have been unaware that the information was confidential.

Secondly the Court should examine the content of the impugned article. It is not for judicial bodies to dictate what reporting techniques journalists should use, and journalistic freedom includes a degree of exaggeration, or even provocation. The Swiss Federal Court had conducted a comprehensive assessment of the article, and considered that it was extremely negative towards M.B., adopted an

“almost mocking tone”, was written in a sensationalist tone and commented on matters before the judicial authorities such as the reliability of M.B.’s statements.

Thirdly, the Court should analyse the impugned article’s contribution to a public-interest debate. Here, the Court noted that, although the subject of the article had caused an emotional reaction from the general public, the question was whether the article’s content and, specially, the secret information could contribute to the public debate on the issue. In this regard, the Court agreed with the Swiss Federal Court in holding that the article did not contribute to the public debate on the pending criminal proceedings.

Fourthly, the Court should assess the influence of the impugned article on the criminal proceedings. Although Articles 6 and 10 must be respected equally, the secrecy of a judicial investigation must be granted special protection due to the seriousness of criminal proceedings. Such secrecy is necessary to minimise risks of collusion and evidence tampering, but also to ensure the presumption of innocence and to protect the impartiality of the judiciary. In this regard, the article had an inherent risk of influencing the court proceedings.

Fifthly, the Court should investigate whether the accused’s private life has been infringed. Article 8 of the Convention protects the right to protection of reputation and also personal information that individuals can legitimately expect not to be published without their consent. States have a positive obligation to protect individuals’ rights under Article 8 and, accordingly, the Swiss prosecuting authorities were correct in bringing criminal proceedings against the applicant. Moreover, the information divulged in the article was highly personal in nature and M.B. was not a public figure. He thus deserved the highest level of protection under Article 8. The Grand Chamber therefore disagreed with the Chamber which had found that the protection of M.B.’s private life could have been upheld by M.B. having recourse to civil-law remedies instead of the applicant receiving a criminal conviction. The existence of such civil-law remedies did not release the State from its positive obligation. M.B. was in prison, in a situation of vulnerability and probably suffering from mental illness. The Swiss authorities could not therefore wait for M.B. to begin civil proceedings, it had to fulfil its positive obligation to protect M.B.’s right to a private life.

Finally, the Court must evaluate the proportionality of the penalty imposed. When doing this, the nature and severity of the penalty must be taken into account. Such penalties cannot represent a form of censorship aimed at suppressing criticism and deterring journalists from contributing to discussion on matters of public interest. Nevertheless, the Court found that the disclosure of information covered by the secrecy of judicial investigations was publishable in all thirty

Contracting States studied by the Court. Mr Bédât was initially given a suspended sentence of one month's imprisonment, however, this was subsequently amended to a fine of CHF 4,000. This figure was set with regard to the applicant's previous record and was advanced by his employer. The Court therefore found that recourse to criminal proceedings and the penalty imposed did not amount to a disproportionate interference of the applicant's Article 10 rights. It held that such a penalty could not be said to have a deterrent effect on the freedom of expression of Mr Bédât or other journalists who wrote about pending criminal proceedings.

Therefore, in light of the foregoing and having regard to the margin of appreciation available to the State, the Court held that there had been no violation of Article 10 of the Convention.

JUDGMENT IN THE CASE OF KHUZHIN AND OTHERS v. RUSSIA

(Application no. 13470/02)

23 October 2008

1. Principal facts

The applicants are three brothers who are Russian nationals: Amir Khuzhin who was born in 1975; his twin brother, Damir Khuzhin, now deceased; and, Marat Khuzhin who was born in 1970. The surviving brothers live in Russia.

The three brothers were arrested in April 1999 and subsequently charged with kidnapping and torture. They were accused of having abducted a vagrant, who they had forced into physical labour in exchange for extremely low pay and whom they had beaten and tortured with electric wires when he had attempted to escape. A few days before their trial in July 1999, a national television channel broadcast a talk show during which three prosecution officials discussed in detail the brothers' case. One of the officials in particular referred to them as hardened criminals and that the "crime" they had committed was characteristic of their "cruelty and meaningless brutality". A local newspaper also subsequently published an article about the affair. The brothers lodged several complaints about the press coverage of the proceedings against them, without success. All three brothers also brought a civil defamation action against the author of the article in the newspaper. That claim was dismissed without the applicants' or their representative's presence during the hearings as Russian domestic law did not provide for convicted persons to be brought from correctional colonies to the place where their civil claim was being heard and as, in protest against that practice, the applicants' representative refused to participate.

Ultimately the brothers were found guilty as charged in March 2001. Marat Khuzhin was sentenced to five years and one month's imprisonment and his twin brothers to seven years in a high-security colony.

2. Decision of the Court

The case concerned, in particular, the applicants' complaints: that the statements made by the prosecution authorities during the talk show were prejudicial for their trial; about Amir Khuzhin's photograph being broadcast on television; about the fact that they were not allowed to take part in the civil proceedings to which they were parties; and, the impounding of Marat Khuzhin's van upon his arrival

for questioning. They relied on Article 6 § 1 (right to a fair trial), Article 6 § 2 (presumption of innocence), Article 8 (right to respect for private and family life and correspondence) and Article 1 of Protocol No. 1 (protection of property). Further relying on Article 3 (prohibition of inhuman or degrading treatment), the applicants also complained about their conditions of transport and detention, notably the exposure to cold weather without adequate clothing. The applicants also alleged a breach of their presumption of innocence due to the fact that the prosecution authorities had closely cooperated with the mass media during the trial.

Article 3

The Court examined the facts and concluded that the domestic authorities had not failed in their duty to provide protection against the inclement weather. It declared the applicants' complaint under Article 3 inadmissible.

Article 6

The Court noted that the three prosecution officials had stated as an established fact that the applicants had committed a crime; they had not even mentioned that the applicants had denied their involvement. Those statements had therefore amounted to a declaration of the applicants' guilt and had prejudged the assessment of the facts of the case by the competent judicial authority, thereby encouraging the public to believe the applicants were guilty before it had been proven according to law. The Court therefore held that the applicants' presumption of innocence had been breached, in violation of Article 6 § 2.

The Court also found that the domestic courts' refusal to grant the applicants leave to appear at the hearings concerning their civil claim had been prejudicial, no legal possibilities having been considered to ensure their effective participation. Nor had the proceedings been adjourned to give them the possibility of designating further representation. In those circumstances, the Court held that the applicants had been deprived of the opportunity to present their civil case effectively before the courts, in violation of Article 6 § 1.

Article 8

The Court noted that the police had taken a passport photograph of Amir Khuzhin from the criminal case file and, without his consent, had given it to a journalist. Showing his photograph had not been necessary to determine his whereabouts as he was not a fugitive from justice; nor had it been necessary to reinforce the public character of the judicial proceedings because at the time when the television show had been aired the trial had not yet begun. The Court did not

therefore see any legitimate aim for the interference with Amir Khuzhin's right to respect for his private life and, bearing in mind that the Government had not put forward any justification for that interference, it held that there had been a violation of Article 8.

Article 1 of Protocol No.1

With respect to the impounding of the van, the Court observed that the charges of torture or kidnapping against Marat Khuzhin had not carried a confiscation measure as a penal sanction. Nor had any civil claim been brought in criminal proceedings. It followed that neither of the two grounds necessary under domestic law for making a confiscation order had been applicable in respect of Marat Khuzhin's vehicle. The Court therefore held that there had been a violation of Article 1 of Protocol No. 1 on account of the unlawful impounding of Marat Khuzhin's vehicle.

Article 41

The applicants' claim for just satisfaction was rejected.

JUDGMENT IN THE CASE OF TOURANCHEAU AND JULY v. FRANCE

(Application no. 53886/00)

24 November 2005

1. Principal facts

The applicants, Patricia Tourancheau and Serge July, are French nationals, aged 46 and 62, who live in Paris.

On 28 October 1996 the national daily newspaper *Libération*, of which Mr July is editor, published an article by Ms Tourancheau about the murder of a young girl stabbed to death in May 1996. The criminal investigation was still pending at the time and the two suspects, a young man, B. (then aged 19) and his girlfriend, A. (then aged 17), had been placed under investigation. Each accused the other of the crime, but the young man had been released while his girlfriend was in pretrial detention.

The article described the circumstances of the murder and the relationship between the two suspects before it had taken place. In particular, it reproduced extracts from statements made by A. to the police and the investigating judge, and comments from B. contained in the case file or noted down during the interview he had given to Ms Tourancheau.

On the basis of section 38 of the Freedom of the Press Act of 29 July 1881, criminal proceedings were brought against the applicants for publishing documents in the case file ahead of the proceedings in open court. The applicants did not dispute the fact that, with a few exceptions, the quotations and transcripts were identical to those in the case file. However, Ms Tourancheau maintained that she had never seen the case file and had copied the extracts taken from the hearings and the court papers from notes made by B. based on the file.

The applicants were found guilty as charged at first instance and were each ordered to pay a fine of 10,000 French francs (approximately EUR 1,524.49). Their conviction was upheld on appeal, although payment of the fine was suspended. In a judgment of June 1999 the Court of Cassation dismissed an appeal by the applicants.

In the meantime, on 10 June 1998, 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.

2. Decision of the Court

Relying on Article 10, the applicants contended that their criminal conviction had infringed their right to freedom of expression.

Article 10

The Court noted that the applicants' conviction amounted to an interference with their right to freedom of expression.

The applicants had been convicted on the basis of the Freedom of the Press Act of 29 July 1881 which, having been published, could be considered to be accessible. The Court noted that section 38 of the 1881 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 documents relating to proceedings concerning serious crimes or other major offences until the day of the hearing. Furthermore, it had been established by caselaw that the prohibition extended to extracts from such documents.

In those circumstances the applicants, who were professional journalists, should have been familiar with the applicable legislation and caselaw, and could have sought advice from specialist lawyers. Consequently, the interference in question could be regarded as being "prescribed by law".

The Court considered that the aims of the interference had been to protect "the reputation and rights of others" and to maintain "the authority and impartiality of the judiciary".

It remained for the Court to determine whether the interference complained of had been "necessary in a democratic society". In that connection it noted that, while the pending investigation had not made any findings as to the guilt of A. or B., the article had backed the version of events given by B., who had been interviewed by the applicant, to the detriment of the version supplied by A., a minor being held in custody.

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(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. and for their right to be presumed innocent, and also for the authority and impartiality of the judiciary, owing to the possible impact of the article on the members of a lay jury. The Court took

the view that the applicants' interest in imparting information concerning the progress of criminal proceedings and the guilt of the suspects while the judicial investigation was still ongoing, and the interest of the public in receiving such information, were not sufficient to prevail over the considerations referred to by the courts. The 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.

No violation of the presumption of innocence under Article 6 where it could not be shown that the judges had been influenced by statements in the media

JUDGMENT IN THE CASE OF CRAXI v. ITALY (no. 2)

(Application no. 34896/97)

5 December 2002

1. Principal facts

Benedetto Craxi was an Italian national born in 1934. Better known by the name of Bettino Craxi, he was Secretary of the Italian Socialist Party and Prime Minister of Italy. He died in Tunisia in January 2000. His widow and two children indicated that they wished to pursue the proceedings.

Criminal proceedings were instituted against the applicant after serious irregularities were discovered in the negotiations relating to an agreement between the Eni and Montedison groups to form the Enimont company. In 1992 the applicant and numerous others were charged with false accounting, illegal funding of political parties, corruption, extortion and handling offences, all of which had been committed in particular at the time of the sale of Montedison's shareholding to Enimont. In all, 26 notices of intention to commence criminal proceedings were issued against him. The criminal proceedings against the applicant and other political, economic and establishment figures were reported in the press.

The applicant was committed for trial in the Milan District Court in six sets of proceedings. The applicant was convicted in all but one case and given prison sentences of up to eight and a half years.

In one of the six cases, the Eni-Sai case, the applicant was prosecuted for corruption. He was accused of having influenced and facilitated a planned joint venture between three companies belonging to the insurance sector. It was alleged that he and some of his co-defendants had illegally paid high amounts to public officials and the directors of the above-mentioned companies.

According to his lawyers, the applicant did not attend the first hearing in this case on grounds of ill-health and danger to his personal safety. He did not attend any of the other 55 hearings between April and December 1994 because he moved to Tunisia on 16 May 1994. During the trial a number of his co-defendants stated that they wished to remain silent, so their statements were appended to the case file. Other defendants in connected proceedings were questioned at the trial and a transcript of the questioning was also appended to the case file.

In a judgment of 6 December 1994 the applicant was sentenced *in absentia* to five and a half years' imprisonment. He appealed unsuccessfully against that judgment, challenging in particular the use of transcripts of statements by witness whom he had been unable to cross-examine. The Court of Cassation also dismissed an appeal by the applicant in a judgment of 12 November 1996, holding that his conviction had not been based exclusively on those statements since they had been corroborated by witness evidence.

2. Decision of the Court

Relying on Article 6, the applicant complained of the unfairness of the criminal proceedings against him. He submitted that he had not had adequate time and facilities for the preparation of his defence and that he had been unable to cross-examine the prosecution witnesses or have them cross-examined. He further alleged that the press campaign conducted against him had influenced the judges determining the charges against him.

Article 6 (1) and 6 (3)(b)

The Court pointed out that the present application had been declared admissible solely as regards the alleged unfairness of the proceedings in the Eni-Sai case.

The Court noted that from 18 October 1994 until the adoption of a judgment on the merits on 6 December 1994, hearings had been scheduled according to a timetable that had been agreed to by the applicant's lawyers. The applicant could therefore not complain about proceedings that had been arranged with the consent of his counsel. As regards the period before 18 October 1994, the Court noted that thirty-eight hearings had been held in the Eni-Sai case, at the same or almost the same time as numerous hearings in other cases in which the applicant had been prosecuted.

The Court noted that the applicant, who had not attended the first hearing, had of his own accord left Italy and moved to Tunisia, and had freely chosen not to appear in court. The applicant's defence had consequently been conducted by lawyers, who had had to take part in a large number of hearings within a short space of time. However, it did not appear from the evidence before the Court that their presentation of his case had been deficient or ineffective. Furthermore, the applicant's lawyers had not provided the Court with any relevant explanation as to why they had not, until 9 November 1994, drawn the national authorities' attention to the problems they were encountering in preparing his defence. The Court accordingly held that there had been no violation of Article 6 under that head.

Article 6 (1) and 6(3)(d)

The Court noted that the Code of Criminal Procedure had provided for the possibility, in determining the merits of a charge, of using statements made before the trial by co-defendants who had subsequently exercised their right to remain silent, or by persons who had died before having the opportunity to give evidence in court. However, that fact did not deprive an accused of the right to have any material evidence against him examined in adversarial proceedings. In the present case, the Court observed that it appeared from the Court of Cassation's judgment of 12 November 1996 that the applicant had been convicted solely on the basis of statements made before the trial by other defendants who had chosen not to give evidence in court and by a person who had subsequently died. The applicant and his lawyers had not had the opportunity to cross-examine those witnesses and had consequently not been able to challenge the statements which had formed the legal basis for the applicant's conviction.

In that connection, the Court noted that the applicant's lawyers had not raised any objections in the Milan District Court contesting the lawfulness or advisability of appending the statements in issue to the case file. However, as the statements had been appended to the file in accordance with the relevant domestic legislation in force at the material time, the Court considered that any objection by the applicant would have had little prospect of success and that the failure to raise such an objection could not be construed as a tacit waiver of his right to have prosecution witnesses cross-examined, especially as he had subsequently raised the matter in the Court of Appeal and the Court of Cassation. The Court accordingly held that there had been a violation of Article 6 §§ 1 and 3 (d) under that head.

Article 6

The Court observed that the interest of the media and the public in the Eni-Sai case had stemmed from the eminent position occupied by the applicant, the political context in which the alleged offences had taken place, and their nature and gravity. In the Court's view, it was inevitable in a democratic society that the press should sometimes make harsh comments on a sensitive case such as the present one, which called into question the morality of high-ranking public officials and the relations between the political and business worlds. The Court further noted that the courts that had dealt with the applicant's case had been composed exclusively of professional judges and that the applicant had been convicted following adversarial proceedings. Admittedly, the Court had found a breach of the requirements of a fair hearing in the case, but that had resulted from the judges' application of legislative provisions that were general in scope and were applicable to everyone. There was nothing in the present case to suggest that the judges had

been influenced by the statements made in the press. The Court accordingly held that there had been no violation of Article 6 under that head.

Article 41

The finding of a violation constituted in itself sufficient just satisfaction.

The absolute and general ban on the applicant's magazine publication concerning the joinder of civil parties, constituted a violation of Article 10

JUDGMENT IN THE CASE OF DU ROY AND MALAURIE v. FRANCE

(Application no. 34000/96)

3 October 2000

1. Principal facts

The applicants, Albert Du Roy and Guillaume Malaurie, are French nationals.

The first applicant was the editor of and the second applicant a journalist on *L'Évènement du Jeudi*, a weekly magazine. In its edition of 11 to 17 February 1993, the magazine published an article credited to the second applicant, which was critical of Michel Gagneux, the former head of Sonacotra (National Company for the Construction of Workers' Accommodation) and of his relations with new management of Sonacotra, since the company had lodged a criminal complaint with a request that it be made a civil party to the proceedings against Mr Gagneux for misappropriation of company assets.

Mr Gagneux lodged a complaint against the applicants for publishing information concerning the joinder of civil parties, an offence under section 2 of the law of 2 July 1931. The Paris Criminal Court found the applicants guilty and ordered each of them to pay a fine of FRF 3,000. They were also required to pay damages in respect of Mr Gagneux's civil claim and to publish the judgment.

The criminal court held that the ban laid down by section 2 of the law of 2 July 1931 was general and absolute. It sufficed that the information concerned a complaint with the joinder of a civil party. The criminal court also pointed out that the ban was intended to guarantee the presumption of innocence and to prevent any external influence on the course of justice. The applicants appealed against their conviction, but the Paris Court of Appeal upheld their conviction and the amount of the fine, but reduced the damages payable to Mr Gagneux, the civil party, to one franc.

The applicants appealed to the Court of Cassation, but the appeal was dismissed.

2. Decision of the Court

The applicants complained of an infringement of their right to freedom of expression as guaranteed by Article 10 of the European Convention on Human Rights.

Article 10

The Court noted that journalists who report on pending criminal proceedings were required not to overstep the limits laid down in the interests of the proper administration of justice and also to respect the accused right to be presumed innocent. However, it observed that the interference in issue took the form of an absolute and general ban on the publication of any form of information.

The Court considered that while, as in the instant case, the domestic courts considered the ban justified in order to protect the reputation of others and to guarantee the authority of the judiciary, that justification did not appear to be sufficient since it concerned only criminal proceedings instituted following a complaint with an application by the complainant to be made a civil party to the proceedings and did not include prosecutions brought by the public prosecutor's office or by ordinary complaint. Such a difference in treatment of the right to information did not appear to be founded on any objective basis and completely hindered the right of the press to inform the public on matters which, though concerning criminal proceedings with the joinder of a civil party could nevertheless be in the public interest.

In conclusion, the journalists' conviction did not represent means that were reasonably proportionate to the legitimate aims pursued in view of the interest which a democratic society has in ensuring and maintaining press freedom. There had therefore been a violation of Article 10 of the Convention.

Article 41 of the Convention

The Court considered that the finding of a violation contained in the judgment itself constituted sufficient just satisfaction. It awarded the applicants FRF 50,000 for costs and expenses.

Violation of Article 10 where the absolute prohibition of the publication of the applicant's picture was disproportionate to the legitimate aims pursued

JUDGMENT IN THE CASE OF NEWS VERLAGS GmbH & Co. KG

v. AUSTRIA

(Application no. 31457/96)

11 January 2000

1. Principal facts

The applicant is News Verlags GmbH & CoKG, a company based in Tulln, Austria, which is the owner and publisher of the magazine News.

In December 1993 the applicant company published articles in its magazine News about a series of letter bombs sent to politicians and other persons in the public eye in Austria which had severely injured several victims. The articles, which also covered the Austrian neo-Nazi scene, included pictures of the suspect, B., accompanied by comments which either directly or indirectly named him as the “perpetrator” of the offences at issue.

Upon B’s action, the Vienna Court of Appeal, by judgment of 22 September 1994 in preliminary injunction proceedings and by judgment of 30 August 1995 in the subsequent main proceedings, issued injunctions based on section 78 of the Copyright Act which prohibited the applicant company from publishing photographs of B. in the context of the criminal proceedings against him, irrespective of the accompanying text. Its judgments were upheld by the Supreme Court.

2. Decision of the Court

The applicant company complained that its right to freedom of expression guaranteed under Article 10 of the European Convention on Human Rights and the prohibition of discrimination guaranteed under Article 14 of the Convention taken in conjunction with Article 10 had been violated.

Article 10

The Court considered that the prohibition of the publication of B’s picture in the context of reports on the criminal proceedings against him constituted an interference with the applicant company’s right to freedom of expression guaranteed under Article 10(1) of the Convention. The Court was satisfied that the interference was “prescribed by law” namely by section 78 of the Austrian Copyright Act and pursued legitimate aims under Article 10 § 2 of the Convention namely

“the protection of the reputation or rights of others” as well as “maintaining the authority and impartiality of the judiciary”.

As regards the question of whether the interference was “necessary in a democratic society” the Court had regard to the context in which the articles giving rise to the injunction proceedings were written, namely a spectacular series of letter bombs. It noted that B. was a right-wing extremist who had entered the public scene well before the letter-bomb series and that the offences he was suspected of, namely offences under the National Socialism Prohibition Act and aiding and abetting assault through letter-bombs, were offences with a political background directed against the foundations of a democratic society. In these circumstances the publication of photographs of B., which moreover did not disclose any details of his private life, did not encroach upon B.’s right to privacy.

The Court further noted that the Vienna Court of Appeal stated in the reasons for its decision of 22 September 1994 and its subsequent judgment of 30 August 1995 that it was not the publication of B.’s picture in itself but its combination with comments which were insulting and contrary to the presumption of innocence that violated B.’s legitimate interests within the meaning of section 78 of the Copyright Act. Nevertheless, the Vienna Court of Appeal prohibited the applicant company from publishing B.’s picture in connection with reports on the criminal proceedings against him, irrespective of the accompanying text.

The Court acknowledged that there may be good reasons for prohibiting the publication of a suspect’s picture in itself, depending on the nature of the offence at issue and the particular circumstances of the case. However, the Court noted that no such reasons were adduced by the Vienna Court of Appeal. Nor did the Vienna Court of Appeal carry out a weighing of B.’s interest in the protection of his picture against the public interest in its publication which, according to Austrian law, is required under section 78 of the Copyright Act.

Finally, the Court considered that the contested injunctions restricted the applicant company’s choice as to the presentation of its reports, while it was undisputed that other media remained free to publish B.’s picture throughout the criminal proceedings against him.

Having also regard to the domestic courts’ finding that it was not the pictures used by the applicant company but only their combination with the text that interfered with B.’s rights, the Court finds that the absolute prohibition of the publication of B.’s picture was disproportionate to the legitimate aims pursued.

Accordingly, it found a breach of Article 10 of the Convention.

Article 14 of the Convention taken in conjunction with Article 10

The Court did not consider it necessary to examine whether Article 14 of the Convention taken in conjunction with Article 10 was also violated.

Article 41

The Court awarded the applicant company 276,105 Austrian schillings for costs and expenses. It held that its judgment constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained and dismissed the remainder of the applicant company's claims for just satisfaction.

No violation of the right to freedom of expression under Article 10 where an author was convicted of publishing an article that risked influencing criminal proceedings against a public figure

JUDGMENT IN THE CASE OF WORM v. AUSTRIA

(Application no. 22714/93)

29 August 1997

1. Principal Facts

The applicant, Mr Alfred Worm, born in 1945, was a journalist. He lived in Vienna, Austria.

The applicant worked for *Profil*, an Austrian periodical dealing mostly with politics. For several years, he had been investigating and reporting on the case of Mr Hannes Androsch, a former Vice-Chancellor and Minister of Finance, who was involved in criminal proceedings relating to tax evasion and making false statements as a witness in other proceedings.

On 1 July 1991, *Profil* published an article written by the applicant, relating to hearings held in the context of the above tax evasion proceedings that were held on 25 and 26 May 1991. This article analysed the conduct of the presiding judge, the public prosecutor, defence counsel and in particular, the accused, Mr Androsch. It appeared from the article that the applicant assumed that the investigations carried out by the tax authorities were correct and he also subjected the statements made by the accused at trial to a critical psychological analysis.

Thereafter, the applicant was charged under the Media Act for having exercised prohibited influence on criminal proceedings but was later acquitted by the Vienna Regional Criminal Court on 12 May 1992. It was found that the article was not capable of influencing the outcome of the proceedings against Mr Androsch and that it was not the applicant's intention to do so.

On appeal to the Vienna Court of Appeal, however, the applicant was convicted of having exercised prohibited influence on criminal proceedings. The court found that the applicant had commented unfavourably on the answers given by Mr Androsch at the trial and that it was possible that the lay judges would read the article. It also stated that the applicant's long-standing involvement in the proceedings reinforced the impression gained from the wording of the article that he had written it with the intention of influencing the outcome of the proceedings. The court also added that it felt that "the accused wished to usurp the position of the judges dealing with the case", that he was convinced that Mr Androsch had

committed tax evasion and that in the article he had predicted the outcome of the proceedings, namely the conviction of the Mr Androsch. Consequently, a forty day-fine of ATS 1,200/day (€87), or twenty days' imprisonment in default of payment was imposed on the applicant.

2. Decision of the Court

The applicant alleged that his conviction, and the fine imposed upon him for having published an article commenting on Mr Androsch's trial, constituted a violation of his freedom of expression under Article 10 of the Convention.

Article 10

The Court noted that it was uncontested that the conviction constituted an interference with the applicant's right to freedom of expression as guaranteed by Article 10(1) of the Convention. The Court then moved to examine whether the interference was justified under Article 10(2) of the Convention. For an interference with Article 10 of the Convention to be permissible, it must be "prescribed by law", in pursuit of a legitimate aim, and necessary in a democratic society, as required by the second paragraph of that provision.

It was accepted by both parties that section 23 of the Media Act provided for convictions for "prohibited influence on criminal proceedings". The Court stated that the national law must be formulated with sufficient precision to enable persons concerned to foresee the consequences of their actions and that it was for domestic courts to interpret and apply legislation. The Court concluded that the Vienna Court of Appeal's application of section 23 did not go beyond what was reasonably foreseeable in the circumstances and therefore that the impugned conviction was "prescribed by law".

With regard to whether the interference pursued a legitimate aim, the Court noted that it was not in dispute that the applicant's conviction was aimed at "maintaining the authority and impartiality of the judiciary"; a legitimate aim under the Convention. The Court then linked this principle to Article 6 of the Convention which reflects the fundamental principle of the rule of law. "Authority of the judiciary" according to the Court includes that the public have respect for, and confidence in, the courts' capacity to fulfil its function of being the proper forum for the settlement of legal disputes and for the determination of a person's guilt or innocence. "Impartiality", on the other hand, refers to the lack of prejudice and bias of the judiciary.

With the above in mind, the Court concluded that the reasons given by the Appeal

court, which included the fact that the lay judges were following the reports written on the case and that the applicant had known expertise in the area, meant that the conviction was aimed at “maintaining the authority and impartiality of the judiciary”.

Finally, with regard to whether the interference was “necessary in a democratic society”, the Court reiterated that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance. In protection of this freedom, the Court stated that its role was to determine whether the reasons adduced by the national authorities to justify the interference were “relevant and sufficient”. The Court noted that because the Vienna Court of Appeal was concerned that the article was capable of influencing the outcome of the proceedings, the measure was “relevant”.

As to whether the reasons were “sufficient” to justify the interference, the Court stated that courts cannot operate in a vacuum; there is room for the discussion of subject matter of criminal trials in specialised journals, in general press or amongst the public. This contributes to the requirement that hearings be public under Article 6 of the Convention, and this is particularly true when the person concerned is a public figure. Accordingly, the limits of acceptable comment are wider as regards public figures.

However, the Court did note that public figures are also entitled to enjoyment of the guarantees of fair trial set out in Article 6, including the right to an impartial tribunal. Thus, the limits of permissible comment must not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial, or to undermine the confidence of the public in the role of the courts in the administration of criminal justice.

The Court then examined the reasoning of the Court of Appeal’s judgment with regard to the likelihood of the article influencing the outcome of the trial. It noted that the conviction was not directed against the applicant’s right to inform in an objective manner. Rather, the article was an unfavourable assessment of Mr Androsch and his answers and it was written to lead the reader to conclude that he was guilty of the charges against him. The Court also focused on the fact that it was possible that the lay judges would read the article and that the applicant’s knowledge in the area tended towards the impression that he had intended to influence the outcome of the proceedings. Finally, with regard to the Appellate Court’s claim that “it can be inferred from the article that [the applicant] wished to usurp the position of the judges dealing with the case”, the Court noted that it did not need to be proved that there was actual influence on the particular

proceedings for the interference on the grounds of protecting the authority of the judiciary to be justified.

The Court, thus, concluded that the reasons adduced by the Vienna Court of Appeal to justify the interference with the applicant's right to freedom of expression resulting from his conviction were also "sufficient" for the purposes of Article 10(2). Moreover, the Court confirmed that the fine and the fact that the publishing firm was ordered to be jointly and severally liable for payment of it, was proportionate to the aim pursued.

The Court, therefore, held that there had been no violation of Article 10 of the Convention.

Freedom of Expression and the Legal Profession

Premature termination, with no review, of the President of the Supreme Court's term as a result of expression of his professional views on legislative reform in violation of Articles 6 and 10

GRAND CHAMBER JUDGMENT IN THE CASE OF BAKA v. HUNGARY

(Application No. 20261/12)

23 June 2016

1. Principal Facts

The applicant, Mr András Baka, is a Hungarian national who was born in 1952 and lives in Budapest. From 1991 to 2008, Mr Baka served as a judge on the European Court of Human Rights. He then spent more than one year as a member of the Budapest Court of Appeal.

On 22 June 2009, the Hungarian Parliament elected Mr Baka as president of the Supreme Court for a six-year term, until 22 June 2015. This role involved managerial tasks and presiding over deliberations resulting in uniformity resolutions. Mr Baka was also head of the National Council of Justice, which imposed a statutory obligation on him to express his opinion on parliamentary bills that affected the judiciary, after gathering and summarising opinions of different courts.

In April 2010, Parliament began a program of comprehensive constitutional and legislative reforms. Throughout this reform period, Mr Baka publicly expressed his professional opinions on bills affecting the judiciary.

E.g., on 24 March 2011, before Parliament, Mr Baka expressed his opinions on the new name of the Supreme Court (Kúria), the new powers attributed to it in ensuring consistency in the case-law, the management of the judiciary, and the functioning of the National Council of Justice, as well as the introduction of a constitutional appeal against judicial decisions.

In April 2011, Mr Baka, along with other court presidents, issued an open letter criticising the proposal to reduce the mandatory retirement age of judges from 70 years to 62. Further, in June 2011, Mr Baka challenged a judicial reform act before the Constitutional Court.

Further, in a speech, delivered in November 2011, Mr Baka expressed to

Parliament his disapproval of the Organisation and Administration of the Courts Bill and the Legal Status and Remuneration of Judges Bill. Mr Baka said the draft legislation did not address the structural problems of the judiciary, but left them to “the discretion of the executive of an external administration (the President of the proposed National Judicial Office, which would replace the National Council of Justice in managing the courts), who [would be] assigned excessive and, in Europe, unprecedented powers, with no adequate accountability.”

The Hungarian Parliament passed the Fundamental Law, which established that the Supreme Court would be renamed the Kúria, on 25 April 2011. Following this, multiple politicians stated that the legislation would not result in a new president of the Supreme Court. However, on 9 November 2011 the Organisation and Administration of the Courts Bill was amended, requiring the new president of the Kúria to have served at least five years as a judge in Hungary. Serving on an international court did not count toward this requirement. In the period between 19 and 23 November 2011, members of Parliament submitted several amendments proposing that Mr Baka’s mandate as President of the Supreme Court be terminated, as he did not have the newly requisite experience. In December 2011 Parliament elected two candidates, namely Péter Darák and Tünde Handó, as President of the new Kúria and President of the National Judicial Office respectively. Mr Baka remained in office as president of a civil-law bench of the Kúria.

2. Decision of the Court

On 27 May 2014 a Chamber of the Court held, unanimously, that there had been violations of Articles 6 and 10 of the Convention. On 15 December 2014 a panel of the Grand Chamber accepted the Government’s request for referral of the case under Article 43.

The applicant alleged that he was denied access to a tribunal to defend his rights in relation to his premature dismissal, in violation of Article 6, and that his mandate was terminated as a result of expressing his professional opinions on legislative reform in breach of Article 10. He further complained that he had no effective remedy under Article 13, and that he had been discriminated against in violation of Article 14.

Article 6

For Article 6 to apply, there must be a “genuine and serious” dispute over a “right” recognised under domestic law. The Court found that the 1949 Constitution affirmed that judges could only be removed on specific grounds in accordance with procedures specified by law and that judges were independent. The new

legislation could not remove, retrospectively, the arguability of Mr Baka's right to fulfill his term under the applicable rules in force at the time of his election. Based on this, the Court held there was a dispute over a right between Mr Baka and the Hungarian Government.

Some civil servants, however, are excluded from Article 6 protection of dismissals. The Court applied the test from *Vilho Eskelinen v. Finland*¹²⁹ to see if Mr Baka would fall into this category. For him to be excluded, first, the State, in its national law, must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest. In analysing the first criterion, the Court found the applicant could contest removal before the Service Tribunal. But in this particular case, the applicant's access to a court was impeded by the fact that the premature termination of his mandate as President of the Supreme Court was included in the transitional provisions of the Organisation and Administration of the Courts Act. This precluded him from contesting that measure before the Service Tribunal, which he would have been able to do in the event of a dismissal on the basis of the existing legal framework. Therefore, Mr Baka was not excluded from Article 6 protection.

Mr Baka's premature removal from office was not reviewed, nor open to review. This lack of judicial review was also the result of legislation whose compatibility with the requirements of the rule of law is doubtful. As a result, the Court held that a violation of Article 6 had occurred.

Article 10

The Court first had to determine whether the measure complained of amounted to an interference with the exercise of the applicant's freedom of expression in the form of a "formality, condition, restriction or penalty" or whether it merely affected the exercise of the right to hold a public post in the administration of justice, which is not a recognised right. In this case, the Court considered the timeline of Mr Baka's remarks and the amendments proposed to the Fundamental Law. The interviews given by the two members of the parliamentary majority and the Government's assurances to the Venice Commission that Mr Baka would not be removed from his post all pre-dated his speech in Parliament on 3 November 2011, after which the proposals to terminate his mandate and to abolish his post-term allowances had been submitted.

In the Court's view, having regard to the sequence of events in their entirety, there is *prima facie* evidence of a causal link between the applicant's exercise of his

¹²⁹ *Vilho Eskelinen v. Finland*, Grand Chamber judgment of 19 April 2007.

freedom of expression and the termination of his mandate. Therefore, there was an interference with Mr Baka's freedom of expression. The Court held that once there is *prima facie* evidence in favour of the applicant's version of the events and the existence of a causal link, the burden of proof shifts to the Government to justify it.

The Government claimed the new legislation and Mr Baka's removal were efforts to maintain the authority and impartiality of the judiciary. However, the Court held that a State cannot legitimately invoke the independence of the judiciary in order to justify premature termination of the mandate of a court president for reasons that had not been established by law and did not relate to any grounds of professional incompetence or misconduct. The Government's actions were not compatible with their stated aim.

The Government's actions were also not necessary in a democratic society because they had a "chilling effect" on other judges who became reluctant to participate in public debates on issues related to the administration of justice and the judiciary. Mr Baka merely spoke out within the professional responsibility of his post and was punished for it. Therefore, the Court held that a violation of Article 10 had occurred.

Article 13

The Court found that there was no need to examine the application separately under Article 13 of the Convention in conjunction with Article 10.

Article 14

The Court found that there was no need to examine the application separately under Article 14 of the Convention in conjunction with Articles 6 and 10.

Article 41

The Court held that Hungary must pay the applicant €70,000 in respect of pecuniary and non-pecuniary damage and €30,000 in respect of costs and expenses.

JUDGMENT IN THE CASE OF RADOBUJAC v. CROATIA

(Application no. 51000/11)

28 June 2016

1. Principal Facts

The applicant, Mr Radobuljac, was born in 1963 and lives in Zagreb, Croatia.

In his capacity as a lawyer, the applicant represented the plaintiff in civil proceedings before Vukovar Municipal Court. A hearing was scheduled by the court for 17 December 2009. The applicant, however, did not attend this hearing due to a vehicle malfunction although he did attempt to make contact with the court and the defendant's representative to inform them. At this hearing, the court made a decision to suspend the proceedings in accordance with section 216(1) of the Civil Procedure Act. On 31 December 2009, the applicant, on behalf of the plaintiff, appealed the suspension decision.

In this appeal, the applicant explained the reason for his absence and also stated that despite the defendant's representative requesting otherwise, the court had decided to adjourn the hearing and suspend the proceedings. The applicant also passed a remark on the competence of the judge and his handling of the case. He stated that "the conduct from the judge is absolutely unacceptable.

In behaving in this way, he seeks to give the impression that he is proceeding with the case, whereas, essentially, hearings are being held which are devoid of substance." It was partly on the basis of this remark that Judge M.R., the judge responsible for the suspension decision, fined the applicant 1,500 kunas (HRK) (approximately €205), by a decision of 13 January 2010. That decision stated that the applicant's remark was "offensive to the court and the judge" and thus "constitutes unacceptable communication between the court and the advocate representing one of the parties."

The applicant appealed against this decision, stating that the remark had not been offensive or insulting. He claimed that it was intended to highlight the first-instance court's inefficiency in conducting the proceedings. In July 2010, this appeal was dismissed by the Vukovar County Court. The applicant then lodged a constitutional complaint, which was subsequently deemed inadmissible by a decision of the Constitution Court in January 2011.

2. Decision of the Court

The applicant complained before the European Court of Human Rights that the decision of the Vukovar Municipal Court to fine him for contempt of court had violated his freedom of expression, a right guaranteed by Article 10 of the European Convention of Human Rights.

Article 10

In its examination of Article 10, the Court reiterated that this provision applies to both “information” and “ideas” that are favourably received or regarded as in-offensive, but also to those that offend, shock or disturb. Furthermore, freedom of expression is applicable to lawyers, and protects not only the substance of the information, but also the form in which it is conveyed. The Court, therefore, concluded that the fining for contempt amounted to an interference with the applicant’s freedom of expression.

In order for an interference to be justifiable, it must be prescribed by law, pursue a legitimate aim and be necessary in a democratic society. The Court found that the first and second criteria were satisfied because the interference was prescribed by section 110(1) of the Civil Procedure Act and it pursued the legitimate aim of maintaining the authority of the judiciary within the meaning of Article 10(2) of the Convention. Thus, the question remaining for the Court was whether or not the interference was “necessary in a democratic society”. This required a determination of whether or not the interference complained of was proportionate to the “pressing social need” sought to be protected.

The Court conducted an analysis of the role lawyers play in the administration of justice and in ensuring that courts enjoy public confidence. It noted that for members of the public to have confidence in the administration of justice, they must have confidence in the ability of the legal profession to provide effective representation. Thus, the freedom of expression of lawyers is related to the independence of the legal profession and has a significant impact on the ability of lawyers to zealously defend their clients’ interests. Lawyers can thus be called upon to object to or complain about the conduct of the court in the defence of their client, within certain limits. The Court highlighted here that a distinction must be made between a criticism and an insult.

The Court then moved to examine the context, purpose and nature of the applicant’s remarks, in order to assess the proportionality of the interference with the applicant’s right to freedom of expression. The Court noted that the remark was made by the applicant in the context of judicial proceedings, in which he was

acting in his capacity as an advocate, and made in a forum where his client's rights were to be defended i.e. an appeal against a ruling that was unfavourable to his client. The remarks were thus confined to the courtroom, and did not constitute an open and overall attack of the authority of the judiciary. The Court, therefore, concluded that the domestic courts failed to situate the applicant's remarks within the context and form in which they were expressed.

Moving then to the purpose of the applicant's remarks, the Court noted that it was difficult to accept the government's contention that the sole purpose of the remarks was to publicly discredit the judge. The Court said that the likelihood of success of the appeal against the suspension decision could not be interpreted as a sign of the applicant's intent to insult the judge in question. The Court also dismissed the government's claim that the remarks had not been pertinent or necessary. With regard to the nature of the applicant's remarks, the Court did not find that they were insulting. Conversely, the comments were aimed at the manner in which the judge was conducting the specific proceedings, rather than criticising his general qualities.

The Court also reiterated that the fairness of the proceedings and the procedural guarantees afforded, are factors to be taken into account when assessing the proportionality of an interference. With this in mind, the Court found the fact that the decision to fine the applicant was made by the same judge who felt insulted by the remarks, particularly pertinent.

On the basis of this analysis, the Court concluded that the domestic courts failed to strike the right balance between the need to protect the authority of the judiciary and the need to protect the applicant's freedom of expression. The interference, therefore, could not be considered to be "necessary in a democratic society" and thus constituted a violation of Article 10 of the Convention.

Article 41

The Court held that Croatia had to pay Mr Radobuljac €205 in respect of pecuniary damage and €13 for postal and other administrative expenses arising from the case. With regard to non-pecuniary damage, the Court considered that the finding of a violation constituted in itself sufficient just satisfaction.

Violation of the right to freedom of expression of a lawyer whose imprisonment could have a “chilling effect” on the performance by lawyers of their duties as counsel

**GRAND CHAMBER JUDGMENT IN THE CASE OF
KYPRIANOU v. CYPRUS
(Application no. 73797/01)
15 December 2005**

1. Principal facts

The case concerns an application brought by a Cypriot national, Michalakis Kyprianou, who was born in 1937 and lives in Cyprus. He is a lawyer.

On 14 February 2001 Mr Kyprianou was involved in a murder trial, defending an accused before the Court of Assize in Limassol. During the trial, he objected to having been interrupted during his cross-examination of a prosecution witness, sought leave to withdraw and, when leave was not granted, he alleged that members of the court were talking to each other and sending each other notes (“rav-asakia” - which can mean, among other things, short and secret letters/notes, or love letters, or messages with unpleasant contents).

The judges said they had been “deeply insulted” “as persons” by the applicant. They added that they could not “conceive of another occasion of such a manifest and unacceptable contempt of court by any person, let alone an advocate” and that “if the court’s reaction is not immediate and drastic, we feel that justice will have suffered a disastrous blow”. They gave the applicant the choice, either to maintain what he had said and to give reasons why a sentence should not be imposed on him or to retract. The applicant did neither.

The court then found Mr Kyprianou to be in contempt of court and sentenced him to five days’ imprisonment, enforced immediately, which they deemed to be the “only adequate response”.

The applicant served the prison sentence immediately, although he was in fact released early, in accordance with the relevant legislation. His appeal was dismissed by the Supreme Court on 2 April 2001.

2. Decision of the Court

In its Chamber judgment of 27 January 2004 the Court held that there had been a violation of Article 6(1), (2) and (3) (a) and that it was not necessary to examine

the applicant's complaint under Article 10. The Court awarded the applicant EUR 15,000 for non-pecuniary damage and EUR 10,000 for costs and expenses.

On 19 April 2004 the Cypriot Government requested that the case be referred to the Grand Chamber and the panel of the Grand Chamber accepted the request on 14 June 2004.

Third-party comments were received from the Governments of the United Kingdom, Ireland and Malta.

The applicant complained under Article 6 that he was not tried by an independent and impartial tribunal, as the same court which claimed that he was in contempt had also tried and punished him.

Article 6 (1)

The European Court of Human Rights first considered the applicant's complaint that, in the particular circumstances of his case, the fact that the same judges of the court in respect of which he allegedly committed contempt tried, convicted and sentenced him, raised objectively justified doubts as to the impartiality of that court.

The Court observed that the complaint was directed at a functional defect in the relevant proceedings. In that connection, the Court took note of the increasing trend in a number of common law jurisdictions acknowledging the need to use a summary procedure in respect of contempt of court sparingly, after a period of careful reflection and with appropriate safeguards. However, the Court did not regard it as necessary or desirable to review generally the law on contempt and the practice of summary proceedings in Cyprus and other common law systems. Its task was to determine whether the use of summary proceedings in relation to Mr Kyprianou gave rise to a violation of Article 6 § 1.

The applicant's case related to contempt in the face of the court, aimed at the judges personally. They had been the direct object of the applicant's criticisms as to the manner in which they had been conducting the proceedings. The same judges then took the decision to prosecute, tried the issues arising from the applicant's conduct, determined his guilt and imposed the sanction (a term of imprisonment). In such a situation the confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt objectively justified fears as to the conformity of the proceedings with the time-honoured principle that no one should be a judge in his or her own cause and, consequently, as to the impartiality of the bench. The Court therefore found that, on the facts of the case and

considering the functional defect which it had identified, the impartiality of the Assize Court was capable of appearing open to doubt.

The Court then considered the applicant's allegation that the judges concerned acted with personal bias, a complaint directed at the judges' personal conduct.

The Court observed that the judges in their decision sentencing the applicant acknowledged that they had been "deeply insulted" "as persons" by the applicant. In addition, the emphatic language used by the judges throughout their decision conveyed a sense of indignation and shock, which ran counter to the detached approach expected of judicial pronouncements. The judges then proceeded to impose a sentence of five days' imprisonment, enforced immediately, which they deemed to be the "only adequate response" to what had happened.

Against that background and having regard in particular to the different elements of the judges' personal conduct taken together, the Court found that the misgivings of Mr Kyprianou about the impartiality of Limassol Assize Court were also justified in this respect. Finally, the Court found that the Supreme Court did not remedy the defect in question.

The Court concluded that Limassol Assize Court was not impartial within the meaning of Article 6 § 1.

Article 10

The Court considered that, in the circumstances of the applicant's case, a separate examination of his complaint under Article 10 was called for.

The applicant's conduct could be regarded as showing certain disrespect for the judges of the Assize Court. Nonetheless, albeit discourteous, his comments were aimed at and limited to the manner in which the judges were trying the case, in particular concerning the cross-examination of a witness he was carrying out in the course of defending his client against a charge of murder.

Accordingly, the Court considered that a penalty of five days' imprisonment was disproportionately severe on the applicant and was capable of having a "chilling effect" on the performance by lawyers of their duties as defence counsel. The Court's finding of procedural unfairness in the summary proceedings for contempt served to compound that lack of proportionality.

That being so, the Court considered that the Assize Court failed to strike the right balance between the need to protect the authority of the judiciary and the need to

protect the applicant's right to freedom of expression. The fact that the applicant only served part of the prison sentence did not alter that conclusion.

The Court accordingly held that Article 10 had been breached, given the disproportionate sentence imposed on the applicant.

Article 41

The Court awarded the applicant EUR 15,000 for non-pecuniary damage and EUR 35,000 for costs and expenses.

Right to a fair trial violated due to, inter alia, insufficient legislative and financial guarantees against outside pressure on the domestic judge

JUDGMENT IN THE CASE OF SALOV v. UKRAINE

(Application no. 65518/01)

6 September 2005

1. Principal facts

The applicant, Sergey Petrovich Salov, is a Ukrainian national who was born in 1958 and lives in Ukraine. He is a lawyer and, at the time of the events in question, was the legal representative of Olexander Moroz, a candidate for the presidency of Ukraine in the 1999 elections.

On 30 and 31 October Mr Salov allegedly distributed a number of copies of a forged special edition of the Parliament newspaper, which included a statement attributed to the Speaker of the Parliament, claiming that presidential candidate and incumbent President Leonid Kuchma was dead. On 1 November 1999 Mr Salov was arrested and placed in detention for having disseminated false information about Mr Kuchma.

On 10 November 1999 he lodged a petition seeking his release from detention with District Court, which was dismissed on 17 November 1999. On 7 March 2000 the District Court ordered an additional investigation to be undertaken into the circumstances of the case, having found no evidence to convict the applicant of the offences with which he was charged.

However, on 5 April 2000 the Presidium of the Regional Court allowed a protest lodged by the prosecution against the ruling of 7 March 2000 and remitted the case for further judicial consideration.

The applicant was released from detention on 16 June 2000.

On 6 July 2000 he was given a five-year suspended prison sentence for interfering with the citizens' right to vote for the purpose of influencing election results by means of fraudulent behaviour. As a result, he also lost his licence to practice law for three years and five months.

2. Decision of the Court

The applicant complained that he was not brought promptly before a judge or other judicial authority to have his arrest reviewed. He also alleged that he did not have a fair trial, in particular, because the Presidium of the Regional Court

quashed the ruling of 7 March 2000. He further expressed doubts about the impartiality of the trial judge, claiming that Ukrainian domestic legislation and the system for financing the courts did not prevent outside pressure on judges. He also maintained that he had not known whether or not the information about the death of the candidate Mr Kuchma was genuine and that he had been trying to verify it. He relied on Article 5 § 3 (right to liberty and security), Article 6 § 1 (right to a fair trial) and Article 10 (freedom of expression) of the Convention.

Article 5(3)

The Court noted that the applicant was apprehended by the police on 1 November 1999 but that his detention was not reviewed by a court until 17 November 1999, 16 days after his arrest. Even if the Court were to accept the Ukrainian Government's argument that the applicant had contributed to the delay by not applying for release until 10 November, his detention for even seven days without any judicial control fell outside the strict constraints of time laid down by the Convention. The Court therefore held that there had been a violation of Article 5 § 3.

Article 6(1)

The Court found that the applicant's doubts as to the impartiality of the judge of the District Court might be said to have been objectively justified, taking into account the insufficient legislative and financial guarantees against outside pressure on the judge hearing the case and, in particular, the lack of such guarantees in respect of possible pressure from the President of the Regional Court, the binding nature of the instructions given by the Presidium of the Regional Court and the wording of the relevant intermediary judicial decisions in the case.

In addition, the principle of equality of arms dictated that the public prosecutor's *protest* lodged with the Presidium of the Regional Court should have been communicated to the applicant and/or his advocate, who should have had a reasonable opportunity to comment on it before it was considered by the Presidium. Furthermore, the applicant should have been provided with a copy of the resolution of the Presidium of the Regional Court so as to give him the opportunity to prepare his defence in advance of the trial. As that did not happen and neither the applicant nor his lawyers were present when the *protest* was considered by the Presidium, the applicant found himself at a substantial disadvantage vis-à-vis his opponent, the State prosecution service.

The Court further found that the domestic courts gave no reasoned answer as to why the district court had originally found no evidence to convict the applicant of the offences with which he was charged and yet, on 6 July 2000, found him guilty

of interfering with voters' rights. The lack of a reasoned decision also hindered the applicant from raising those issues at the appeal stage.

Lastly, the resolution by the Presidium of the Regional Court to consider the prosecution's late request to review the resolution of 7 March 2000 and to set it aside a month after it had been adopted could be described as arbitrary, and as capable of undermining the fairness of the proceedings.

The Court therefore considered that the criminal proceedings in their entirety were unfair and held that there had been a violation of Article 6 § 1.

Article 10

The Court was of the view that the impugned article, disseminated in a copy of a forged newspaper, concerned issues of public interest and concern, the elections in general and the question of support for a particular candidate.

The Court noted that the applicant emphasised that he had not known whether the information was true or false while he was discussing it with others. He alleged that he was trying to verify it. Moreover, the impact of the information contained in the newspaper was minor as he only had eight copies of the forged newspaper and spoke to a limited number of people about it, a fact that should have been taken into account by the domestic courts. The guarantees of free expression and free discussion of information enshrined in Article 10, bearing in mind the particular context of the presidential elections, should have also been taken into account by the domestic courts in considering the applicant's case.

The Court reiterated that, when assessing the proportionality of an interference, the nature and severity of the penalties imposed were also factors to be taken into account. In the applicant's case, his sentence and the resulting annulment by the Bar Association of his licence to practice law constituted a very severe penalty.

The Court found that the interference complained of was not necessary in a democratic society. Furthermore, the decision to convict the applicant for discussing information disseminated in the forged copy of a newspaper about the death of President Kuchma was manifestly disproportionate to the legitimate aim pursued. Accordingly, the Court held that there had been a violation of Article 10.

Article 41

The Court awarded the applicant €227.55 for pecuniary and €10,000 for non-pecuniary damage.

JUDGMENT IN THE CASE OF AMIHALACHIOAIE v. MOLDOVA

(Application no. 60115/00)

20 April 2004

1. Principal facts

The applicant, Gheorghe Amihalachioaie, is a Moldovan national who was born in 1949 and lives in Chişinău. He is a lawyer and President of the Union of Lawyers of Moldova.

In a case referred to it by a group of deputies and the Ombudsman of Moldova, the Constitutional Court gave a decision on 15 February 2000 declaring unconstitutional the statutory provisions requiring lawyers to be members of the Union of Lawyers of Moldova.

The applicant criticised the decision in an interview with a journalist, which was published in the “Economic Analysis” journal. In a final decision of 6 March 2000 the Constitutional Court imposed an administrative fine of the equivalent of 36 euros on the applicant for being disrespectful towards it. It penalised him for stating that, as a result of the decision, “complete chaos would reign in the legal profession” and that the question therefore arose as to whether the Constitutional Court was constitutional. The court also penalised him for asserting that its judges “probably did not consider the European Court of Human Rights to be an authority”.

2. Decision of the Court

The applicant complained, under Article 10, that the penalty imposed on him amounted to unjustified interference with his right to freedom of expression.

Article 10

The Court noted that the applicant’s conviction amounted to interference with his freedom of expression and that this interference was prescribed by Article 82(e) of the Code of Constitutional Procedure. The interference in question had pursued a legitimate aim, which was to maintain the authority and impartiality of the judiciary.

With regard to whether the interference in question was “necessary in a democratic

society”, the Court noted that the applicant’s statements had concerned a matter of general interest which was the subject of a fierce controversy among lawyers, that had been unleashed by a decision of the Constitutional Court on the status of the profession and which had put an end to the organisation of lawyers into a single structure, the Union of Lawyers of Moldova, of which the applicant was the president.

In that context, even if Mr Amihalachioaie’s statements did conceivably denote a certain lack of consideration towards the Constitutional Court, they could not be regarded as serious or insulting towards the judges of that court. Furthermore, since the applicant had subsequently denied part of the statements attributed to him by the press the Court considered that he could not be held responsible for everything that had been published in the interview. With regard to the fine imposed on him, although the amount had not been substantial, it had nonetheless shown an intention to punish the applicant severely since the Constitutional Court had applied a fine approaching the statutory maximum penalty.

In those circumstances the Court considered that there had not been a “pressing social need” to restrict the applicant’s right to freedom of expression and that the domestic authorities had not provided “relevant and sufficient” grounds justifying the interference. Since the applicant had not exceeded the limits of criticism permissible under Article 10 of the Convention, the interference complained of could not be regarded as “necessary in a democratic society”.

Article 41

The Court found that the finding of a violation constituted just satisfaction for any non-pecuniary damage sustained by the applicant.

JUDGMENT IN THE CASE OF STEUR v. THE NETHERLANDS

(Application no. 39657/98)

28 October 2003

1. Principal facts

The applicant, Peter Steur, a lawyer, is a Dutch national, who was born in 1951 and lives in Oegstgeest.

He acted for a client who was accused of obtaining social security benefits by fraud. Civil and criminal proceedings were instituted against Mr Steur's client after he had made statements to Mr W., a social-security investigating officer, at an interview conducted without the presence of an interpreter or lawyer.

In the civil proceedings, Mr Steur alleged that Mr W. must have obtained the statements by subjecting his client to unacceptable pressure. Mr W. considered that those statements tarnished his professional honour and reputation and filed a complaint with the dean of the local bar association, who forwarded it to the disciplinary council.

In a decision of 1 July 1996, the disciplinary council partly upheld Mr W.'s complaint, finding that Mr Steur's allegations were uncorroborated and that he had transgressed the limits of acceptable behaviour and failed to observe the standards expected from a lawyer. Mr Steur lodged an appeal against that decision, but it was dismissed. The Disciplinary Appeals Tribunal, noting that the applicant did not have any evidence in support of his allegations at the time they were made (having only received confirmation from his client subsequently), held that a lawyer was not permitted to make such allegations without any factual basis.

2. Decision of the Court

The applicant complained, under Article 10 of the Convention, that the decision of the Disciplinary Appeals Tribunal meant that lawyers were not permitted at a hearing to argue on the basis of facts which were not within their knowledge that unacceptable pressure had been exercised on their client.

Article 10

The Court noted that while no penalty had been imposed on the applicant, he had

nonetheless been found guilty of violating the applicable professional standards. That could have had a discouraging effect on him, in the sense that he might have felt restricted in his choice of arguments when defending clients in future cases. It was therefore reasonable to consider that the applicant's freedom of expression had been impeded by a "formality" or "restriction".

It was common ground that the interference was prescribed by law and pursued a legitimate aim, namely the protection of the reputation or rights of others. The Court noted that the applicant's comments were liable to discredit Mr W. In that connection, it reiterated that the limits of acceptable criticism might in some circumstances be wider with regard to civil servants exercising their official duties than in relation to private individuals. However, civil servants were not deprived of all protection. In the case before the Court, the applicant's criticism was limited to Mr W. in his capacity as an investigating officer in a specific case. It had been confined to the courtroom and did not amount to a personal insult. It was based on the fact that the applicant's client had not fully understood his incriminating statement, given the absence of an interpreter at the interview.

The Court noted that the disciplinary authorities had not attempted to establish whether the applicant's allegations were true or had been made in good faith. While it was true that no penalty had been imposed on the applicant, the threat of an *ex post facto* review of his criticism with respect to the manner in which evidence had been taken from his client was difficult to reconcile with his duty as an advocate to protect the interests of his clients and might adversely affect the way he performed his professional duties. In the circumstances, the Court found that the restrictions on the applicant's freedom of expression did not meet a pressing social need and were contrary to Article 10.

Violation of Article 10 as it was only in exceptional cases that restrictions on a defence counsel's freedom of expression could be accepted as "necessary in a democratic society"

JUDGMENT IN THE CASE OF NIKULA v. FINLAND

(Application no. 31611/96)

21 March 2002

1. Principal facts

Anne Nikula, a Finnish national born in 1962, is a lawyer living in Helsinki. In 1992-3 she acted as defence counsel in two sets of criminal proceedings before City Court concerning the winding-up of companies, in which her client was charged with aiding and abetting in fraud and abusing a position of trust.

A former co-suspect was summoned by the public prosecutor T. to testify. The applicant objected and prepared a memorandum in which she denounced the tactics of the prosecutor T. as constituting "role manipulation and unlawful presentation of evidence", and "breach of his official duties". Her objection was rejected by the City Court, which dealt with the case at first instance, and her client was eventually convicted.

The prosecutor T. subsequently reported the applicant's statements to the Prosecuting Counsel of the Court of Appeal for consideration of possible defamation charges. The Acting Prosecuting Counsel considered that the applicant had been guilty of defamation but decided not to indict her, since the offence had been of a minor character.

Using his independent right of private prosecution, the prosecutor T. nevertheless brought criminal proceedings against the applicant in the Court of Appeal. On 22 August 1994 she was convicted of defamation "without better knowledge", i.e. merely expressing one's opinion about someone's behaviour and not imputing an offence whilst knowing that it has not been committed. A fine was imposed and she was ordered to pay damages to the prosecutor and costs to the State. Both the applicant and the prosecutor appealed to the Supreme Court, which upheld the Court of Appeal's reasons but waived the fine, considering that the offence was minor; the obligation to pay damages and costs was, however, confirmed.

2. Decision of the Court

The applicant complained under Article 10.

The Court reiterated that the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar. Moreover, the courts – the guarantors of justice, whose role is fundamental in a State based on the rule of law – must enjoy public confidence. Regard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein.

The Court further recalled that Article 10 protects not only the substance of the ideas and information expressed but also the form in which they are conveyed. While lawyers too are certainly entitled to comment in public on the administration of justice, their criticism must not overstep certain bounds. In that connection, account must be taken of the need to strike the right balance 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 national authorities have a certain margin of appreciation in assessing the necessity of an interference, but this margin is subject to European supervision as regards both the relevant rules and the decisions applying them.

The Court observed that the limits of acceptable criticism might in some circumstances be wider with regard to civil servants exercising their powers than in relation to private individuals. It could not be said, however, that civil servants knowingly laid themselves open to close scrutiny of their every word and deed to the same extent as politicians and that they should therefore be treated on an equal footing with the latter when it came to criticism of their actions. On the contrary, it might prove necessary to protect civil servants from offensive and abusive verbal attacks when on duty.

The present applicant was convicted for having criticised a prosecutor for decisions taken in his capacity as a party to criminal proceedings in which the applicant was defending one of the accused. It was true that the applicant accused prosecutor T. of unlawful conduct, but this criticism was directed at the prosecution strategy purportedly chosen by T., that is to say, the two specific decisions which he had taken prior to the trial and which, in the applicant's view, constituted "role manipulation ... breaching his official duties". Although some of the terms were inappropriate, her criticism was strictly limited to T.'s performance as prosecutor in the case against the applicant's client, as distinct from criticism focusing on T.'s general professional or other qualities. In that procedural context

T. had to tolerate very considerable criticism by the applicant in her capacity as defence counsel. The Court noted, moreover, that the applicant's submissions were confined to the court room, as opposed to criticism against a judge or a prosecutor voiced in, for instance, the media. Nor could the Court find that the applicant's criticism of the prosecutor, being of a procedural character, amounted to personal insult.

The Court further reiterated that, even if the applicant was not a member of the Bar and therefore not subject to its disciplinary proceedings, she was nonetheless subject to supervision and direction by the trial court. There was no indication that prosecutor T. requested the presiding judge to react to the applicant's criticism in any other way than by deciding on the procedural objection of the defence as to hearing the prosecution witness in question. The City Court indeed limited itself to dismissing that objection. Still, the presiding judge could have interrupted the applicant's pleadings and rebuked her even in the absence of a request to that end from the prosecutor. The City Court could even have revoked her appointment as counsel under the legal-aid scheme or excluded her as counsel in the trial. In this context the Court stressed that the role of the courts and the presiding judge was to direct proceedings in a manner such as to ensure the proper conduct of the parties and above all the fairness of the trial – rather than leaving examination of the appropriateness of a party's statements in the court room to subsequent proceedings.

Following the private prosecution initiated by prosecutor T., the applicant was convicted merely of negligent defamation. The Supreme Court waived her sentence, considering the offence to have been minor in nature. Even if the fine imposed on her was therefore lifted, her obligation to pay damages and costs remained. Even so, the threat of an *ex post facto* review of counsel's criticism of another party to criminal proceedings – which the public prosecutor doubtless must be considered to be – is difficult to reconcile with defence counsel's duty to defend their clients' interests zealously. It followed that it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument without being influenced by the potential "chilling effect" of even a relatively light criminal sanction or an obligation to pay compensation for harm suffered or costs incurred.

It was therefore only in exceptional cases that restriction – even by way of a lenient criminal sanction – of defence counsel's freedom of expression can be accepted as necessary in a democratic society. Both the Acting Prosecuting Counsel's decision not to bring charges against the applicant and the minority opinion of the Supreme Court suggest that the national authorities were also far from unanimous as to the existence of sufficient reasons for the interference now in question. In

the Court's view such reasons had not been shown to exist and the restriction on Ms Nikula's freedom of expression therefore failed to answer any "pressing social need". The Court therefore concluded that Article 10 had been violated in that the Supreme Court's judgment upholding the applicant's conviction and ordering her to pay damages and costs was not proportionate to the legitimate aim sought to be achieved.

Article 41

The Court awarded the applicant (by five votes to two) 5,042 euros (EUR) for non-pecuniary damage and, unanimously, EUR 1,900 for pecuniary damage and EUR 6,500 for costs and expenses.

GRAND CHAMBER JUDGMENT IN THE CASE OF MORICE v. FRANCE

(Application no. 29369/10)

23 April 2015

1. Principal facts

The applicant, Mr Olivier Morice, was a French lawyer and member of the Paris Bar. He represented Ms Elisabeth Borrel, a judge and the widow of the French judge Bernard Borrel, whose dead body was found, on 19 October 1995, 80 kilometres from the city of Djibouti.

In 1997 the French judicial investigation into Mr Borrel's death as a premeditated murder was assigned to the investigating Judges Ms M. and Mr L.L. On 21 June 2000, on an appeal lodged by Mr Morice and his colleague, the Indictments Division of the Paris Court of Appeal set aside a decision of the two judges in which they refused to organise an on-site reconstruction in the presence of the civil parties, removing those judges from the case and transferring it to a new investigating judge, Judge P.

The new investigating judge presented a report on 1 August 2000 with the following observations regarding the Mr Borrel's case: a video-recording made in Djibouti in March 2000 during an on-site visit by the former investigating judges and experts was not in the judicial investigation file forwarded to him and was not registered as an exhibit; at his request, the cassette had subsequently been given to him by Judge M., in an envelope showing no sign of having been placed under seal and bearing that judge's name as addressee, together with a handwritten card to her from the public prosecutor of Djibouti as sender; the card, written in an informal language and revealing a surprising and regrettable complicit intimacy between Judge M. and the public prosecutor of Djibouti, cast aspersions on Ms Borrel and her lawyers, accusing them of "orchestrating their manipulation".

On 6 September 2000 the applicant and his colleague wrote to the French Minister of Justice to complain about the facts noted by Judge P. in his report, referring to the conduct of Judges M. and L.L. as being "completely at odds with the principles of impartiality and fairness". They requested an investigation to be carried out by the General Inspectorate of Judicial Services into the numerous shortcomings brought to light in the course of the judicial investigation. The following day, extracts from that letter were included, together with statements made by the applicant to the journalist and the handwritten note, in an article in the newspaper *Le*

Monde. The article also referred to the disciplinary proceedings against Judge M. pending before the National Legal Service Commission in the Scientology case for which she was responsible, in particular for the disappearance of documents from the case file. Mr Morice, who represented the civil parties in that case as well, had obtained Judge M.'s removal from the investigation and, in 2000, a judgment against the State for gross negligence on the part of the courts service on account of the disappearance of the Scientology file from Judge M.'s office.

In October 2000 Judges M. and L.L. filed a criminal complaint against the publication director of *Le Monde*, the journalist who had written the article and Mr Morice, accusing them of the offence of public defamation of a civil servant. Mr Morice was ultimately found guilty of complicity in that offence by the Rouen Court of Appeal in 2008.

Mr Morice appealed the Rouen Court of Appeal's decision. On 10 November 2009 the Court of Cassation dismissed the appeal on points of law, finding in particular that the admissible limits of freedom of expression in criticising the action of the judges had been overstepped. The composition of the Court of Cassation's bench was different from that previously announced to the parties: the presence of Judge J.M. gave rise to a complaint by the applicant as that judge had at the General Meeting of judges of the Paris *tribunal de grande instance* in July 2000, expressed his support for Judge M. in the context of the disciplinary proceedings for her handling of the Scientology case.

2. Decision of the Court

The application was lodged with the European Court of Human Rights on 7 May 2010. On 11 June 2013 the Fifth Section found that there had been no violation of Article 6(1) and no violation of Article 10 of the Convention. On Mr Morice's request, the case was referred to the Grand Chamber under Article 43.

The applicant alleged that there had been a breach of the principle of impartiality under Article 6(1) (Right to a fair trial) of the Convention in proceedings before the Court of Cassation and that his freedom of expression enshrined in Article 10 (Freedom of expression) of the Convention had been breached on account of his conviction for complicity in defamation.

Article 6(1)

According to the Court's settled case-law, the existence of impartiality must be determined according to a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any

personal prejudice or bias in a given case; and also according to an objective test, by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality.

The Court began by finding that Mr Morice had acknowledged that it was not established that Judge J.M. had displayed any personal bias against him. He had argued nevertheless that his very presence on the bench had created a situation which justified the fear of a lack of impartiality, having him expressed his support to Judge M. nine years earlier in the Scientology case. The Court thus examined the case from the perspective of the objective impartiality test, addressing the question whether the applicant's doubts could be regarded as objectively justified in the circumstances of the present case.

First, the language used in 2000 by Judge J.M. in support of Judge M., whose complaint had led to the criminal proceedings against Mr Morice, had been capable of raising doubts in the defendant's mind as to the impartiality of the panel hearing his case. According to the Court, the very singular context of the case, which concerned a lawyer and a judge who had both been involved at the judicial investigation stage of two particularly high profile cases, could not be overlooked. In doing so, after pointing out that the applicant had been convicted on the basis of a complaint raised by Judge M., the Court observed that the Court of Appeal's judgment had itself expressly established a connection between Mr Morice's remarks in the Borrel case and the developments in the Scientology case, concluding that this suggested the existence of personal animosity on the part of Mr Morice towards Judge M. It was precisely that Court of Appeal's judgment that Mr Morice had appealed against on points of law and that had been examined by the bench of the Court of Cassation on which Judge J.M. was sitting.

In addition, as Mr Morice had not been informed that Judge J.M. would be sitting on the bench, and had had no reason to believe that he would do so, he had thus had no opportunity to challenge J.M.'s presence or to make any submissions on the connected arising issue of impartiality.

The Court held that Mr Morice's fears could have been considered objectively justified and that there has been a violation of Article 6(1) consequently.

Article 10

It was not in dispute between the parties that Mr Morice's conviction had constituted an interference with the exercise of his right to freedom of expression, as prescribed by the Freedom of the Press Act 1881, and that the aim of this

interference was the protection of the reputation or rights of others. Therefore, the Court acknowledged this and proceeded to examine whether the interference was “necessary in a democratic society”, whether it was proportionate to the legitimate aim pursued, and whether the grounds given by domestic courts were relevant and sufficient.

Mr Morice had relied on the lawyers’ right to defend their clients through making statements to the press. According to the Court, with regard to the status and freedom of expression of lawyers, a distinction had to be drawn depending on whether the lawyer’s remarks were made inside or outside the courtroom. As lawyers could not be equated to journalists, being their respective positions and roles in judicial proceedings intrinsically different, remarks made in the courtroom warranted a high degree of tolerance to criticism. As to remarks made outside the courtroom, lawyers had to avoid those amounting to a gratuitous personal attack without a direct connection to the facts of the case. That being said, in the present case the Court failed to see how Mr Morice’s statements could have directly contributed to his task of defending his client, since the judicial investigation had by that time been entrusted to another judge who was not subject to criticism.

The applicant had further relied on his right to inform the public about the shortcomings of ongoing proceedings in order to contribute to the debate on matters of public interest. The Court took the view that his remarks, which concerned the functioning of the judiciary and its handling of the Borrel case, fell within the context of a debate on such matters, as the public had a legitimate interest in being informed about criminal proceedings. In that context, the authorities were entrusted with a particularly narrow margin of appreciation when it came to restricting lawyers’ freedom of expression.

As to the nature of the applicant’s impugned remarks on the professional and moral integrity of Judges M. and L.L., the Court took the view that they were value judgments, not pure statements of fact, and as such were not susceptible of proof, but nevertheless had to have a sufficient factual basis. The Court found in the present case that such a basis existed and that was sufficient. It had first established that an important item of evidence - the video recording made in Djibouti - had not been forwarded with the case file to the new investigating judge, who had produced a report to register this fact. In addition, Judge P. had made a number of factual observations, concerning in particular the absence of exhibits under seal and the presence of a handwritten card showing a certain friendliness on the part of the public prosecutor of Djibouti towards Judge M. and accusing the civil parties’ lawyers of “orchestrating their manipulation”. Lastly, Mr Morice had acted in his capacity as lawyer in two high-profile cases in which Judge M. was an investigating judge, and in both of them, shortcomings in the proceedings

had been identified, leading to the withdrawal of the cases from Judge M. at Mr Morice's request. As to Mr Morice's remarks, they were considered to have a sufficiently close connection with the facts of the case and could not have been regarded neither as misleading nor gratuitous.

The Court reiterated that, in the context of Article 10, it had to take into account the circumstances and the overall background against which the statements in question were made. In the present case, the background could be explained not only by the conduct of the investigating judges and by Mr Morice's relations with one of them, but also by the very specific history of the case, its inter-State dimension and the substantial media coverage. Although this specific context was of considerable importance, the Court of Appeal had attributed an extensive scope to some of the language used by Mr Morice, which the Court did not share as the use of the term "connivance" could not have constituted in itself a serious attack on the honour and reputation of the persons involved.

According to the Court, Mr Morice's remarks could not be reduced to the mere expression of personal animosity on his part towards Judge M., neither as they fell within a broader context, also involving another lawyer and another judge. In addition, while Mr Morice's remarks did have a negative connotation, they concerned alleged shortcomings in a judicial investigation – a matter to which a lawyer should be able to draw the public's attention.

As to maintaining the authority of judiciary, the Court recognised that Mr Morice's remarks were not capable of undermining the proper conduct of the judicial proceedings. Although the judges were bound by duty of discretion, while it might be necessary to protect them from gravely damaging and unfounded attacks, this could not have the effect of prohibiting individuals from expressing their views on matters of public interest related to the functioning of the justice system, through value judgments with a sufficient factual basis. Further, for the same reasons, it could not be considered that the applicant's conviction could serve to maintain the authority of the judiciary. The Court nevertheless underlined the need to maintain the authority of the judiciary and to ensure relations between the different protagonists of the justice system based on mutual consideration and respect.

With regard to the Government's argument as to the possibility of using the available legal remedies in front of competent courts and not the media to conduct the defence of his client, the Court noted that the applicant's initial intention was to resolve the matter using the available remedies. He made a referral to the Indictments Division of the Paris Court of Appeal, however, only after that remedy had been used, the Indictments Division was no longer in a position to examine such

complaints, because it had already withdrawn the case from Judges M. and L.L. Moreover, the request for an investigation made to the Ministry of Justice could not be qualified as a judicial remedy, but as a mere request for an administrative investigation subject to its discretionary decision. The Court further noted that no disciplinary proceedings had been brought against Mr Morice on account of his statement in the press.

As to the sanctions imposed, the Court reiterated that in assessing the proportionality of an interference, the nature and severity of the penalties imposed are also factors to be taken into account. It was noted that Mr Morice's punishment had not been confined to a criminal conviction: the sanction imposed was not the "lightest possible", but was of some significance, being his status as a lawyer relied upon to justify its greater severity.

In view of the foregoing, the Court found that the judgment against Mr Morice for complicity in defamation constituted a disproportionate interference with his right to freedom of expression, unnecessary in a democratic society, and held that there has been a violation of Article 10.

Article 41

The Court held that France had to pay the applicant €15,000 in respect of non-pecuniary damage, €4,270 in respect of pecuniary damage, and €14,400 for costs and expenses arising from the case.

JUDGMENT IN THE CASE OF FUCHS v. GERMANY

(Application nos. 29222/11 & 64345/11)

27 January 2015

1. Principal Facts

The applicant, Ulrich Fuchs, was a German national who was born in 1958 and lived in Miesbach. He was a practicing lawyer.

The applicant owned rooms in Munich, which he let to the H. association, which in turn sublet the rooms to a support group for men struggling with paedophile tendencies. On 11 December 2003 the rooms were searched by the police. The following day, the applicant went to the local police station where he was briefly shown a search warrant, issued by a court, addressing a group called “AG Pädö”. Since the applicant could not show power of attorney of a group with that name, he was refused a copy of the search warrant. On 15 December 2003 the applicant, representing the H. association, lodged a criminal complaint with the public prosecutor alleging that there had been no warrant addressing his client, and thus that it was likely that it was not executed by the police.

The public prosecution instituted criminal investigations against unknown persons, which were discontinued on 10 March 2004 after police had provided the information that the incident had not been a burglary, but a search carried out by police on the basis of a search warrant

Subsequently, while representing a client accused of having downloaded child pornography on his computer, Mr Fuchs alleged in writing before the trial court, in October 2004, that a private expert engaged by the prosecution to decrypt the data files – who had been sworn-in before taking up duties with the legal authorities – might have manipulated the files in order to obtain the result sought by the prosecution. In particular, Mr Fuchs stated that the company for which the expert worked had a personal interest in successful results, no matter whether the findings are correct.

The expert lodged a criminal complaint against Mr Fuchs, who was ultimately convicted of misleading the authorities about the commission of an offence, and of defamation, and sentenced to a fine by a judgment eventually upheld on appeal in September 2007. In subsequent proceedings before a disciplinary court for lawyers, Mr Fuchs received a reprimand and a fine for having breached his duty

to exercise his profession in a conscientious manner and to be worthy of the trust owed to his professional status. That decision was eventually upheld on appeal in February 2011.

2. Decision of the Court

The applicant complained that the criminal and disciplinary sanctions imposed on him had violated his right to freedom of expression under Article 10 of the Convention and that the proceedings leading to those sanctions had violated his rights under Article 6 of the Convention.

Article 10

The Court accepted that the applicant's conviction interfered with his right to freedom of expression. For an interference to be justified, it must be "prescribed by law", in pursuit of a legitimate aim enumerated in Article 10(2) of the Convention, and "necessary in a democratic society".

The Court accepted that it was "prescribed by law" because the convictions were based on provisions of the criminal Code and the Federal Code for the Legal Profession. Moreover, the Court recognised that the applicant's conviction for misleading the authorities served the aim of protecting the public prosecution's function in preventing disorder or crime and that the conviction for defamation pursued the legitimate aim of protecting the reputation and rights of the sworn-in expert.

With regard to whether the measures were "necessary in a democratic society", the Court stated that the test was whether the interference corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons adduced by the national authorities to justify it were relevant and sufficient. In this context, the Court recognised that the applicant in this case was a professional lawyer and that the actions leading to his convictions related to this professional activity. The Court referred to its previous case law case to highlight the specific principles applicable to the legal profession. The special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the court. Moreover, the courts, the guarantors of justice, must enjoy public confidence. Regard being had to this integral role of lawyers, it is legitimate to expect them to contribute to the proper administration of justice, and thereby enabling the protection of public confidence in the courts.

Applying the above principles to the facts of this case, the Court observed that the

domestic courts based the applicant's criminal and disciplinary convictions for misleading the authorities on the fact that the applicant had knowingly submitted incomplete and thus misleading information on the search of office space, thus causing public prosecution to instigate futile investigations. Sanctioning this, the Court noted, is permissible under the Convention in order to safeguard public prosecution's function in preventing disorder or crime.

With regard to the applicant's conviction of defamation, the Court noted that the domestic courts considered that the applicant's submissions as a defence counsel contained the allegations that the expert H. had created new data in order to obtain the result desired by public prosecution and that he had a personal interest in falsifying evidence. The Court observed that the offensive statement did not contain any objective criticism of the expert's work in the particular case, but was aimed at globally depreciating his actions and at generally declaring his expert findings unusable and thus was not capable of being justified by the legitimate pursuit of his client's interests. The Court also observed that sworn-in experts must be able to perform their duties in conditions free of undue perturbation if they are to be successful in performing their tasks and thus should be protected accordingly.

Finally, the Court considered that the fines imposed on the applicant were not disproportionate to the aim pursued and thus that there had been no violation of Article 10 of the Convention as the interferences were justifiable under the Convention. The Court, subsequently, rejected the complaint in accordance with Article 35(3)(a) and (4) of the Convention.

Article 6

The applicant complained about the disciplinary courts' refusal to have recourse to the case-file of the criminal proceedings against his client K., alleging that this would have disclosed the fact that the search warrant had been incomplete and unlawful and that the opinion submitted by the expert H. had indeed been incorrect. Furthermore, the domestic courts had failed to take into account the applicant's submission that the facts reported in his criminal information had been correct, thus violating his right to be heard. With regard to his conviction for defamation, the applicant complained that the courts had failed to take into account that his criticism of the expert opinion had been well-founded.

The Court declared these complaints inadmissible under Article 6 as being manifestly ill-founded. It found that there was no indication that the various arguments had not been duly examined by the German courts and that the proceedings had not been conducted fairly.

Violation of the right to freedom of expression in Article 10 where damages for defamation were imposed on a law professor for writing an article criticising a decision of the Constitutional Court

JUDGMENT IN THE CASE OF MUSTAFA ERDOĞAN AND OTHERS

v. TURKEY

(Application nos. 346/04 & 39779/04)

27 May 2014

1. Principal Facts

The applicants were Mustafa Erdoğan, a Turkish national born in 1956, Mr Haluk Kürşad Kopuzlu, a Turkish national born in 1975, and Liberte A. Ş., a joint-stock Turkish company and publisher of 'Liberal Thinking', a quarterly law journal.

In 2001, Mr Erdoğan, a constitutional law professor, published an article in the quarterly law journal, edited by Mr Kopuzlu, criticising the judges of the Constitutional Court for their decision to dissolve a political party named *Fazilet*, which was allegedly operating contrary to the principles of secularism. The article questioned whether, as a matter of law, the conditions for dissolving the political party were met, and it further implied that the judges were incompetent and potentially lacking in impartiality.

Three judges concerned brought separate proceedings against the applicants, claiming that the article was a serious personal attack on their honour and integrity. The applicants maintained that the article was based on fact and that it did not exceed the limits of acceptable criticism of judges. The decisions of the national courts were passed during 2002 to 2004, and held that the expressions used in the article suggesting a lack of independence and competence on the part of the judges of the Constitutional Court constituted defamation. The applicants were ordered to pay damages to each respective judge.

2. Decision of the Court

The applicants, relying on Article 10 of the Convention, complained that the decisions of the national courts, ordering them to pay damages for defamation to the judges of the Constitutional Court, violated their right to freedom of expression.

Article 10

The Court found that the national courts' decisions complained of by the applicants had amounted to an interference with their right to freedom of expression.

In order for this to be permissible under the Convention, this interference must be prescribed by law, in pursuit of a legitimate aim, and necessary in a democratic society. The Court found that the measure was indeed prescribed by Turkish law. Therefore, the issue turned on whether that interference had been justified as “necessary in a democratic society” for the protection of the reputation and rights of others (the legitimate goal pursued within the meaning of Article 10(2)).

In considering whether the interference was justified as “necessary in a democratic society”, the Court reaffirmed that the Article 10 protections cover “information” or “ideas” that offend, shock or disturb. The test of “necessary in a democratic society”, the Court stated, requires it to determine whether the interference complained of corresponds to a “pressing social need”. In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were “relevant and sufficient” and whether the measure taken was “proportionate to the legitimate aims pursued”.

The Court stated that issues concerning the functioning of the justice system constitute questions of public interest, the debate on which enjoys the protection of Article 10. It also pointed out that its previous case law has underlined the importance of academic freedom and of academic works. It was 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. This freedom, the Court continued, covers the freedom of academics to freely express their views and opinions, even if controversial.

The Court then observed that the subject matter of the article concerned an important and topical issue in a democratic society which the public had a legitimate interest in being informed of and therefore that the article in question contributed to a debate of general interest i.e. the functioning of the justice system, an institution that is essential for any democratic society. Thus, when it comes to the criticism of their actions, members of the judiciary acting in an official capacity, as in the present case, may be subject to wider limits of acceptable criticism than ordinary citizens, like politicians only to a slightly lesser extent. This must, however, be balanced with the fact that the judiciary plays a special role in society as guarantor of justice and thus it must enjoy public confidence. It may therefore prove necessary, the Court stated to protect that confidence against destructive attacks which are essentially unfounded.

In weighing up these two interests (the applicants’ right to convey Mr Erdoğan’s opinion on a topic of general interest with the judges’ right to be protected against insult), the Court observed that a clear distinction needed to be made between criticism and insult because if the sole intent of any form of expression is to insult

a court, or members of that court, an appropriate sanction would not, in principle, constitute a violation of Article 10 of the Convention. The impugned article, according to the Court, was harsh and offensive, but the opinions were mostly value judgments based on the manner in which the Constitutional Court ruled on certain issues and on the public debate already surrounding the proceedings and thus could be said to have had a sufficient factual basis. The Court also noted that the domestic courts failed to distinguish these value judgments from statements of fact contained in the article. Nor did the domestic courts examine whether the “duties and responsibilities” incumbent on the applicants within the meaning of Article 10(2) of the Convention were observed, nor did they assess whether the article was published in good faith.

The Court concluded that that the impugned strong and harsh remarks contained in the article, set out in general terms, with respect to the judges of the Constitutional Court, cannot be construed as a gratuitous personal attack against the claimants, given the content of the article as a whole and the context in which it was expressed (a quasi-academic quarterly as opposed to a popular newspaper). Thus, the Court considered that the interference with the applicants’ freedom of expression was not based on sufficient reasons to show that the interference complained of was necessary in a democratic society for the protection of the reputation and rights of others. The Court held, therefore, that there had been a violation of Article 10 of the Convention.

Article 41

The Court held that Turkey was to pay the applicant, Mr Erdoğan, a sum in euros in respect of pecuniary damage equivalent to the damages paid by him in respect of the damages claims lodged by the three judges Ms F.K., Mr Y.A. and Mr B.M., and €7,500 in respect of non-pecuniary damage. No claim for just satisfaction was made by Mr Kopuzlu or the applicant publisher and therefore no award was made to either of them.

No breach of Article 10 where the President of the Supreme Court was removed as this decision was based on his ability to properly exercise his role, and not the expression of his views

JUDGMENT IN THE CASE OF HARABIN v. SLOVAKIA

(Application no. 58688/11)

20 November 2012

1. Principal facts

The applicant, Mr Štefan Harabin, a Slovakian national, was a Supreme Court judge. He had been the President of the Supreme Court since June 2009 (after having previously held this office between 1998 and 2003) and he was the Minister of Justice of the Slovak Republic between July 2006 and June 2009.

In July and August 2010, Mr Harabin, in his capacity as its President, prevented a group of auditors instructed by the Minister of Finance from carrying out an audit at the Supreme Court, the aim of which was to examine the use of public funds, the efficiency of financial management and the elimination of shortcomings identified in a previous audit. The applicant then informed the Minister of Finance that the Ministry lacked the legal basis and power to carry out the audit and that it was the Supreme Audit Office which had the authority to do so in respect of the principle of independence of the judiciary.

In November 2010, upon the submission by the Minister of Finance, the Minister of Justice initiated disciplinary proceedings before the Constitutional Court against Mr Harabin for having prevented the audit. During the proceedings, the Minister of Justice challenged three constitutional judges for bias, on the ground that they had had a personal relationship with Mr Harabin for several years and that they had been nominated to posts by the same political party. Also Mr Harabin challenged four different constitutional judges for bias. He argued that two of them had made negative statements about him in the media on two different occasions, that a third judge was a member of the same chamber as those two judges, and that a fourth one had been convicted of a tax offence and had been criticised for ignoring an invitation by the Constitutional Court to reconsider his position as a judge. In reply to these objections, neither of the judges considered themselves biased and, in May 2011, the Constitutional Court decided not to exclude any of the seven judges from dealing with the case. The Constitutional Court noted that the determination of the disciplinary offence allegedly committed by Mr Harabin fell within the exclusive jurisdiction of its plenary session, and considered that excessive formalism posed the risk of rendering the proceedings ineffective.

On 29 June 2011, Mr Harabin was found guilty and sentenced to a disciplinary sanction which consisted of a 70% reduction of his annual salary.

2. Decision of the Court

The application was lodged with the European Court of Human Rights on 20 September 2011.

Relying on Article 6 (right to a fair trial), Mr Harabin complained that the proceedings before the Constitutional Court had been unfair, alleging that a number of the judges who decided on the case had been biased. He also made a number of other complaints including that the Constitutional Court had erroneously interpreted the relevant provisions as to what the elements of a serious disciplinary offence were. He further complained that he had been sanctioned for his legal opinions; that his right to peaceful enjoyment of his possessions had been impaired; that he had been discriminated against in the enjoyment of his rights under the previous Articles; and that he had had no effective remedies at his disposal to challenge the Constitutional Court's decision, in breach of Articles 10 (freedom of expression), 1 of Protocol 1 (protection of property), 13 (right to an effective remedy) and 14 (prohibition of discrimination) of the Convention.

Article 6

After having underlined that its task in the present case was exclusively to determine whether the applicant's rights under the Convention had been complied with in the proceedings before the Constitutional Court in which he was sanctioned for a disciplinary offence, the Court proceeded to address the complaint about the alleged lack of impartiality of the constitutional judges.

The Court stressed that it was particularly relevant that the guarantees of the right to a fair trial under Article 6 were complied with in proceedings initiated by a Government against a judge in his capacity as President of the Supreme Court, given that the confidence of the public in the functioning of the judiciary at the highest national level was at stake. Under Slovak law, disciplinary proceedings against the President of the Supreme Court could only be decided by a majority of the Constitutional Court's plenary. The Constitutional Court, faced with a situation where seven of its thirteen judges were challenged by the parties for bias, had had to balance between the need to respond to the requests for exclusion of those judges and the need to maintain its capacity to determine the case. The Court considered that, in doing so, the Constitutional Court had failed to take appropriate stand from the point of view of the guarantees of Article 6. Firstly, two of the judges challenged by Mr Harabin and two of the judges challenged by the

Minister had been excluded in earlier set of proceedings before the Constitutional Court involving Mr Harabin. Given that doubts were therefore likely to arise as to their impartiality; the Constitutional Court should have clearly adduced convincing arguments as to why the challenges could not be accepted in the disciplinary proceedings. Secondly, the Constitutional Court had not taken a stand as to whether any of the other reasons evoked by the parties would have justified the respective judges' exclusion.

Only after answering the parties' arguments and establishing whether or not the challenges to the judges were justified, the question as to whether there was any proclaimed need or justification for not excluding any of the judges could have arisen. The reasons invoked by the Constitutional Court, namely the need to maintain its capacity to determine the case, could therefore not justify the participation of the judges in respect of whose alleged lack of impartiality the Constitutional Court had failed to convincingly dissipate doubts. Mr Harabin's right to a hearing by an impartial tribunal had therefore been infringed.

Having regard to that conclusion, and considering that it had only limited powers to deal with errors of fact or law allegedly committed by national courts, the court did not find it necessary to examine separately Mr Harabin's other complaints relating to the alleged unfairness of the disciplinary proceedings against him.

Further, Mr Harabin's other additional complaints were declared inadmissible, as they were either manifestly ill-founded or he had failed to exhaust the domestic remedies in their respect.

Article 10

Mr Harabin was sanctioned at the behest of the Minister of Justice and after the Constitutional Court had concluded that he had failed to comply with his obligations relating to court administration as laid down in the relevant domestic legislation. It was the applicant's professional behaviour in the context of administration of justice and in respect of a different State authority which represented the essential aspect of the case and which determined the application of the disputed sanction. It therefore did not amount to an interference with the exercise of the applicant's right to freedom of expression as guaranteed by Article 10.

Article 1 Protocol 1

According to Mr Harabin, the sanction imposed to him and consisting in a 70% reduction of his annual salary, was disproportionate and contrary to his right to peaceful enjoyment of his possessions. Although the sanction amounted to an

interference with the abovementioned right, the interference was provided for by law (i.e. by the Constitution and the Judges and Assessors Act 2000) and pursued a legitimate aim in the public interest (i.e. to ensure monitoring of appropriate use of public funds and compliance by the applicant with his statutory obligations as President of the Supreme Court). The Court therefore concluded that the sanction did not act contrary to the requirement under Article 1 of Protocol 1 and rejected this part of the application as manifestly ill-founded.

Article 14

In examining the alleged violation of the applicant's right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention or its Protocols (in the present case, namely the right of a fair trial, freedom of expression and protection of property), the Court found that the applicant had not been treated differently in respect of other individuals in his same situation. It followed that this part of the application was rejected by the Court.

Article 13

The Court reiterated that where the applicant alleges a violation of a right conferred by the Convention by the final judicial authority of the domestic legal system, the application of Article 13 is implicitly restricted. Therefore, the Court rejected this applicant's complaint.

Article 41

The Court held that Slovakia had to pay Mr Harabin €3,000 in respect of non-pecuniary damage, and €500 for costs and expenses arising from the case.

JUDGMENT IN THE CASE OF HRICO v. SLOVAKIA

(Application no. 49418/99)

20 July 2004

1. Principal Facts

The applicant, Andrej Hrico, was a Slovakian national who was born in 1949 and lived in Košice, Slovakia. He was the publisher and editor-in-chief of the weekly *Domino efekt*.

In 1994 and 1995 the weekly published three articles concerning an action in defamation that had been brought in the Slovakian courts by Mr Dušan Slobodník, a Minister who later became a Member of Parliament, against Mr Ľubomír Feldek, a writer who had published a statement alleging, among other things, that Mr Slobodník had a fascist past.

One article, entitled “Slovakia is governed by an absolute legal chaos”, consisted of an interview with the former president of the Constitutional Court, who was also Mr Feldek’s lawyer in the defamation proceedings. He expressed the view that Judge Š., who had presided over the chamber of the Supreme Court that had heard Mr Slobodník’s appeal, had reached his decision in the case well before judgment was delivered. Another article was critical of the judgment “produced by Judge Š.”, which it described as a “legal farce” and went on to examine the prospects of an appeal to European Court of Human Rights succeeding.

In September 1995, Judge Š. brought an action against the applicant arguing that the articles had damaged his reputation in his civil and professional life and undermined his authority as a Supreme Court judge.

On 11 March 1999, the Košice Regional Court held that the terms used clearly showed that the purpose of the statements had been to offend, humiliate and discredit the person criticised and that Judge Š. was accordingly entitled to compensation for his loss. It ordered the applicant to pay 50,000 Slovakian korunas (approximately €1,125) for non-pecuniary damage.

2. Decision of the Court

The applicant alleged that the fine imposed upon him constituted a violation of his right to freedom of expression protected under Article 10 of the Convention.

The Court reiterated the fundamental principle that any interference with a person's freedom of expression must be "prescribed by law", must be in pursuit of a legitimate aim enumerated under Article 10(2) of the Convention and must be "necessary in a democratic society". The Court reaffirmed the margin of appreciation of Contracting States when it comes to assessing whether the interference was "necessary", but it stated that it was the Court's role to determine whether the interference at issue was proportionate to the legitimate aim pursued and whether the reasons adduced by the national authorities to justify the interference were "relevant and sufficient".

In applying the above, the Court found that it was not disputed that the interference, in the form of the fine, was "prescribed by law" as it was provided for in Article 11 of the Civil Code, nor was it disputed that the interference pursued the legitimate aim of maintaining the authority of the judiciary and of protection of the reputation and rights of the judge concerned. However, what was at issue was whether the interference was "necessary in a democratic society".

The Court noted that underlying both the interview and the impugned article was the undisputed fact that judge Š. was a candidate for election on the list of the Christian-Social Union, a party which had a clear and widely-known stance on the position taken by the Slovakian authorities during the period between 1939 and 1945. The view which was expressed or implicit in both the interview and the article was that a judge who had made public his intention to become involved in politics and to support the party in question should have withdrawn from defamation proceedings which directly concerned the alleged activities and fascist past of the plaintiff, a former Government minister, during World War II. The Court also accepted that the language used in the impugned article, in particular the description of the judgment as "a legal farce", was strong. The article further indicated that judge Š. had been responsible for the judgment whereas it had been adopted by a panel of three judges.

The above notwithstanding, the Court reaffirmed the importance of the press in a democratic society and its duty to impart information and ideas. Journalistic freedom, it stated, covers possible recourse to a degree of exaggeration, and even provocation. Furthermore, the Court recalled that the limits of what is acceptable criticism is wider in respect of a judge who enters political life, than for a private person. Matters of public interest, including questions concerning the functioning of the judiciary, are of particular interest to the wider public; who themselves have a right to receive this information. However, this is not to say, the Court reiterated, that the courts should not be protected against unfounded attacks.

The Court concluded that it could not be said that the purpose of the statements in question was to offend, to humiliate and to discredit the criticised person. The judicial proceedings in which the criticised judge had been involved in and which were commented on in the impugned articles related to an issue of general concern on which a political debate existed. The Court, thus, found that the reasons adduced by the public authorities to justify the interference could not be regarded as “sufficient”.

Consequently, there had been a violation of Article 10 of the Convention.

Article 41

The Court awarded the applicant €1,250 in respect of pecuniary damage and €1,000 in respect of non-pecuniary damages. The Court awarded €780 in respect of costs and expenses.

No violation of Article 10 where the interests in protecting the reputation of lay judges outweighed the interest in protecting the right to freedom of expression of the applicant

JUDGMENT IN THE CASE OF BARFOD v. DENMARK

(Application no. 11508/85)

22 February 1989

1. Principal Facts

The applicant was a Danish citizen, born in 1919. By profession, he was a precious-stone cutter and resided in Narssaq, Greenland.

In 1979, when the Greenland Local Government decided to introduce taxation of Danish nationals working on American bases in Greenland, a number of the persons affected challenged that decision before the High Court of Greenland. They argued that the decision was illegal on the grounds that they did not have the right to vote in local elections in Greenland and they did not receive any benefits from the Greenland authorities. The case was heard in the High Court composed of one professional judge and two lay judges; the latter were both employed by the Local Government. In its judgment of 28 January 1981, the High Court unanimously found for the Local Government; this judgment was subsequently upheld by the High Court for Eastern Denmark on 8 September 1983.

After learning about the judgment, the applicant wrote an article published in a magazine called "Grønland Dansk" in August 1982. In the article he expressed his opinion that the two lay judges were disqualified under Article 62 of the Danish Constitution. According to Article 62, the administration of justice shall remain separated from the Executive and the rules in this respect shall be laid down by law. He also questioned their ability and power to decide impartially in a case brought against their employer. The professional High Court judge considered that these remarks on the two lay judges were of a kind which might damage their reputation in the eyes of the public and hence generally impair confidence in the legal system. As head of the Greenland judiciary, he consequently applied to the Greenland Chief of Police, asking for a criminal investigation to be instituted.

The applicant was subsequently charged with defamation and a fine of 2,000 Danish Crowns (€269) was imposed on him.

2. Decision of the Court

The applicant submitted that his conviction for defamation constituted a violation

Article 10

In considering the applicant's claim, it was noted by the Court that it was not disputed that the applicant's conviction for defamation, and the fine imposed, amounted to an interference by a public authority with his right to freedom of expression. It was also accepted by the Court that the interference was prescribed by law and that it pursued the legitimate aim, enumerated in Article 10(2) of the Convention, of the protection of the reputation of others, and, indirectly, the maintenance of the authority of the judiciary. Therefore, the sole issue was whether the interference was "necessary in a democratic society" for achieving the above-mentioned aims, and whether it was proportionate to the aim pursued.

The Court observed that proportionality for the purposes of this case required that the pursuit of the aim of protecting the reputation of others and the maintenance of the authority of the judiciary, must be weighed against the value of open discussion of topics of public concern. Imperative to this balancing exercise, the Court noted, was the great importance of not discouraging members of the public, for fear of criminal or other sanctions, from voicing their opinions on issues of public concern.

With regard to the impugned article, the Court noted that it had two elements: firstly, a criticism of the composition of the High Court in the 1981 tax case and, secondly, the statement that the two lay judges "did their duty" i.e. questioning whether they were independent and impartial. The Court observed that it was the questioning of the impartiality and independence of the two lay judges that led to the conviction for defamation. The basis of the Greenland High Court's judgment was its finding, that "the words of the article to the effect that the two ... lay judges did their duty - namely their duty as employees of the Local Government to rule in its favour - represent a serious accusation which is likely to lower them in public esteem".

Having regard to this, and the fact that no proof had been adduced to support his claim, the Court was satisfied that the interference with his freedom of expression did not aim at restricting his right under the Convention to criticise publicly the composition of the High Court in the 1981 tax case. Conversely, his right to voice his opinion on this issue was expressly recognised by the High Court in its judgment of 3 July 1984, which the Court observed, could not be considered to have been limited by the conviction. The Court also noted that it would have been possible to question the composition of the High Court without attacking the two lay judges personally. The High Court's finding that there was no proof

of the accusations against the lay judges remains unchallenged and therefore the Court concluded that the applicant must accordingly be considered to have based his accusations on the mere fact that the lay judges were employed by the Local Government, the defendant in the 1981 tax case. The Court did concede that although this fact may give rise to a difference of opinion as to whether the court was properly composed, it was certainly not proof of actual bias.

The State's legitimate interest, therefore, in protecting the reputation of the two lay judges was accordingly not in conflict with the applicant's interest in being able to participate in free public debate on the question of the structural impartiality of the High Court. The impugned statement was not a criticism of the reasoning in the judgment of 28 January 1981, but rather it was a defamatory accusation against the lay judges personally, which was likely to lower them in public esteem and was put forward without any supporting evidence. This, the Court stated, precluded the political context in which the tax case was fought being relevant for the question of proportionality.

Thus, the Court concluded that there had been no breach of Article 10 of the Convention.

No violation of the right to freedom of expression in Article 10 where the interest in protecting the reputation of a judge and maintaining the authority of the judiciary outweighed that of a journalist

JUDGMENT IN THE CASE OF PRAGER AND OBERSCHLICK v. AUSTRIA

(Application no. 15974/90)

26 April 1995

1. Principal Facts

The applicants, Mr Prager and Mr Oberschlick were journalists who lived in Vienna, Austria. Mr Oberschlick was the publisher of the periodical Forum.

On 15 March 1987, the Forum published an article by Mr Prager entitled “Danger! Harsh judges!”, containing criticisms of the judges sitting in the Austrian criminal courts. He gave as sources for his article, in addition to his own experience of attending a number of trials, statements of lawyers and legal correspondents and surveys carried out by university researchers. In the article he described in detail the attitude of nine members of the Vienna Regional Criminal Court, including that of Judge J.

Mr Prager stated in this article that the Viennese judges “treat each accused at the outset as if he had already been convicted”, and that some judges were “capable of anything”. He also attributed to Judge J. an “arrogant” and “bullying” attitude in the performance of his duties. By implication, therefore, the applicant accused the persons concerned of having, as judges, broken the law or, at the very least, of having breached their professional obligations.

On 23 April 1987, Judge J. brought an action against Mr Prager for defamation and sought damages from the publisher and an order imposing a fine on the latter jointly and severally with the author and requiring them to pay the legal costs. On 11 October 1988, the Regional Court sentenced Mr Prager to 120 day fines at the rate of 30 schillings (ATS) (€2.20) per day and to sixty days’ imprisonment in the event of non-payment. Mr Oberschlick was ordered to pay Judge J. damages of ATS 30,000 (€2,180) and was declared jointly and severally liable with the first applicant in respect of the fine and the legal costs. The court also ordered the confiscation of the remaining stocks of the relevant issue of Forum and the publication of extracts from its judgment. This judgment was upheld by the Vienna Court of Appeal on 26 June 1989, but it reduced the damages to ATS 20,000 (€1,453).

2. Decision of the Court

The applicants alleged that the conviction and the other measures imposed were

a violation of their right to freedom of expression as guaranteed under Article 10 of the Convention.

Article 10

The Court noted that it was not in dispute that Mr Prager's conviction for defamation and the other measures of which the applicants complained of amounted to an "interference" with their exercise of their freedom of expression. This "interference", however, must be "prescribed by law", in pursuit of a legitimate aim set out in Article 10(2) of the Convention, and "necessary in a democratic society".

The Court accepted the interference was indeed prescribed by law (Article 111 of the Criminal Code and section 29 of the Media Act) and that it pursued the legitimate aims of the protection of the reputation of others (here Judge J.) and to maintain the authority of the judiciary, both legitimate aims for the purposes of Article 10(2) of the Convention.

On whether the interference was "necessary in a democratic society", the Court reiterated that the press plays a core role in a State governed by the rule of law. It is its duty to impart information and ideas on political questions and on other matters of public interest. The Court observed that this encompasses questions concerning the functioning of the system of justice, an institution that is essential for a democratic society. However, the Court reiterated that regard must be had to the special role of the judiciary in society. As the guarantor of justice, it must enjoy public confidence if it is to be successful in carrying out its duties. It may therefore be necessary to protect such confidence against destructive attacks that are essentially unfounded.

The accusations in the impugned article, according to the Court, were so serious that they damaged the reputation of the Viennese judges, including Judge J, but they also undermined public confidence in the integrity of the judiciary as a whole. The Court also observed that the domestic decisions against the applicants were not directed against the applicant's use, as such, of his freedom of expression in relation to the system of justice, or even the fact that he had criticised certain judges whom he had identified by name, they were directed at the excessive breadth of the accusations, which, in the absence of sufficient factual basis, appeared unnecessarily prejudicial. The Court, moreover, stated that Mr Prager could not invoke his good faith or compliance with the ethics of journalism as the research that he had undertaken was not adequate to substantiate the allegations.

The Court found that despite the fact that Article 10 applies to "information" and "ideas" that shock or disturb, and that journalistic freedom covers recourse to a

degree of exaggeration, the impugned interference was not disproportionate to the legitimate aim pursued. Thus, the Court concluded that the measure could be said to be “necessary in a democratic society” and, therefore, that Article 10 had not been violated.

Violation of Article 10 where the interference with the right to freedom of expression of journalists was not necessary given the seriousness of their allegations

JUDGMENT IN THE CASE OF DE HAES AND GIJSELS

v. BELGIUM

(Application no. 19983/92)

24 February 1997

1. Principal Facts

The applicants, Mr Leo De Haes and Mr Hugo Gijssels, lived in Antwerp, Belgium, and worked as an editor and journalist, respectively, for the weekly magazine "Humo".

On 26 June, 17 July, 18 September and 6 and 27 November 1986, the applicants published five articles in which they criticised judges of the Antwerp Court of Appeal at length and in harsh terms for having, in a divorce suit, awarded custody of the children to the father, Mr X, a Belgian notary. This was despite the fact that in 1984 the notary's wife and parents-in-law had lodged a criminal complaint accusing him of incest and of abusing the children.

On 17 February 1987, three judges and an advocate-general of the Antwerp Court of Appeal, Mrs [YA], Mr [YB], Mr [YC] and Mr [YD], instituted proceedings against Mr De Haes and Mr Gijssels and against Humo's editor, publisher, statutory representative, printer and distributor in the Brussels tribunal de première instance (court of first instance). They sought compensation for the damage caused by the statements made in the articles, alleging they were extremely defamatory.

On 29 September 1988, the court of first instance ordered Mr De Haes and Mr Gijssels to pay each plaintiff one franc in respect of nominal non-pecuniary damage and to publish the whole of its judgment in Humo; it also gave the plaintiffs leave to have the judgment published at the applicants' expense in six daily newspapers. Lastly, it declared the action inadmissible in so far as it was directed against the other defendants. This decision was confirmed by the Brussels Court of Appeal on 5 February 1990, and an appeal to the Cour de Cassation was subsequently dismissed on 13 September 1991.

2. Decision of the Court

The applicants alleged that the judgment of the Brussels tribunal de première instance and the Court of Appeal against them had resulted in a breach of their right to freedom of expression under Article 10 of the Convention.

The Court observed that it was not disputed that the judgment against the applicants amounted to an “interference” with the exercise of their freedom of expression. It was also accepted that it was “prescribed by law” and had pursued at least one legitimate aim referred to in Article 10(2) of the Convention i.e. the protection of the reputation or rights of others. However, in order to be justifiable as a legitimate interference for the purposes of the Convention, it must be “necessary in a democratic society” for achieving the aim.

In that context, the Court reiterated that the press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart - in a manner consistent with its obligations and responsibilities - information and ideas on all matters of public interest, including those relating to the functioning of the judiciary. The courts, for their part, as the guarantors of justice, whose role is fundamental in a State based on the rule of law - must enjoy public confidence. They must accordingly be protected from destructive attacks that are unfounded.

The Court then observed that the articles contained an extensive amount of detailed information about the circumstances in which the decisions on the custody of Mr X’s children were taken. That information was based on thorough research into the allegations against Mr X, and on the opinions of several experts who were said to have advised the applicants to disclose them in the interests of the children. Therefore, the Court stated, the applicants could not be accused of having failed in their professional obligation.

The Court reiterated that it is incumbent on the press to impart information and ideas of public interest. Not only does the press have the duty of imparting such “information” and “ideas”: the public also has a right to receive them. In this case, the Court said, the articles were particularly important given that the allegations concerned both the fate of young children and the functioning of the system of justice in Antwerp.

The Court also reiterated that it is imperative that a distinction be made between facts and value judgments because the existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. Furthermore, freedom of expression is also applicable to “information” or “ideas” that shock or disturb, and journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.

The Court observed, in summation, that the accusations in question amounted

to an opinion, whose truth, by definition, is not susceptible of proof. Such an opinion may, however, be excessive, in particular in the absence of any factual basis, but it was not so in this instance. The Court then differentiated the present case from *Prager and Oberschlick v. Austria*.¹³⁰ The Court stated that though the comments were extremely critical, they were proportionate to the gravity of the content covered by the articles. Moreover, the Court stated that Article 10 protects both the substance of the ideas and information, and also the form in which they are conveyed.

Thus, the Court held that, regard being had to the seriousness of the circumstances of the case and of the issues at stake, the necessity of the interference with the exercise of the applicants' freedom of expression has not been shown, except as regards the allusion to the past history of the father of one of the judges in question. The Court found that a penalty was justifiable on account of that allusion because it is unacceptable that someone should be exposed to criticism because of matters concerning a member of his family. However, this was not enough to change the outcome of the case. The Court, therefore, held that there had been a breach of Article 10.

Article 6

The applicants also complained of a violation of Article 6. They argued that the domestic courts had refused to admit in evidence the documents referred to in the impugned articles or hear their witnesses, resulting, they said, in an inequality of arms between the applicants and the judges and the Advocate-General. Further, in arguing against Mr De Haes and Mr Gijssels on the basis of their article of 14 October 1988, the Brussels Court of Appeal had ruled on matters not before it as the judges criticised in that article were not parties to the case before the Court of Appeal. They also argued that the derogatory terms used in the Brussels Court of Appeal's judgment showed that there had been a lack of subjective impartiality.

The Court held that the outright rejection of the applicant's application to the Brussels tribunal de première instance and Court of Appeal to study the opinion of the three professors whose examinations had prompted the applicants to write their articles put the journalists at a substantial disadvantage vis-à-vis the plaintiffs. There was therefore a breach of the principle of the equality of arms.

The Court thus concluded that this finding alone constituted a breach of Article 6 and thus found it unnecessary to examine the other complaints raised by the applicants under that provision.

¹³⁰ This case is also summarised in this publication.

The Court awarded the applicants 113,101 Belgian francs (€2,804) in respect of pecuniary damage and 851,697 Belgian francs (€21,113) in respect of costs and expenses.

No violation of Article 10 where the conviction for defamation of a lawyer was necessary in order to protect the reputation of others and the authority of the judiciary

JUDGMENT IN THE CASE OF PERUZZI v. ITALY

(Application no. 39294/09)

30 June 2015

1. Principal Facts

The applicant, Piero Antonio Peruzzi, was born in 1946 and lived in Sant'Angelo In Campo, Italy. He was a lawyer at the time of the events.

In September 2001, Mr Peruzzi wrote to the Supreme Council of the Judiciary complaining of the conduct of Judge X of the Lucca District Court. He subsequently sent a "circular letter" to several judges of the same court reproducing the content of the first letter, but without referring to Judge X by name. The first part of the circular letter gave details of the decisions adopted by the judge in question in the context of a set of inheritance proceedings, while the second part dealt with what Mr Peruzzi deemed to be unacceptable conduct on the part of judges, including "wilfully committing errors with malice or gross negligence or through lack of commitment".

Judge X lodged a complaint against Mr Peruzzi for defamation. Mr Peruzzi was further accused of insult, since Judge X had also received a copy of the circular letter. In a judgment of 3 February 2005 the Genoa District Court sentenced Mr Peruzzi to four months' imprisonment for defamation and insult. It considered that Mr Peruzzi had overstepped the limits of his right to criticise by alleging that Judge X had committed errors "wilfully"; this constituted a serious affront to the honour of the judge in question.

Mr Peruzzi appealed and in a judgment of 12 March 2007 the Genoa Court of Appeal stated that, in the absence of a complaint, no prosecution could be brought for the offence of insult. The custodial sentence imposed on the applicant at first instance was replaced by a fine of €400. The applicant was also ordered to pay €15,000 to Judge X for non-pecuniary damage. In November 2008 the Court of Cassation dismissed an appeal on points of law lodged by Mr Peruzzi.

2. Decision of the Court

The applicant complained, relying on Article 10, that his conviction for defamation violated his right to freedom of expression.

The parties were not in dispute as to the existence of an interference with the Article 10 right of the applicant. However, an interference, in order to comply with the Convention, must be “prescribed by law”, must be in pursuit of a legitimate aim, and must be “necessary in a democratic society”. The Court noted that it was also not in contention that the interference was prescribed by law. It was further accepted that the interference was aimed at the “protection of the reputation and rights of others” and the maintenance of the “authority and impartiality of the judiciary”.

In its determination as to whether the interference could be considered to have been “necessary in a democratic society”, the Court noted that it could not accept the applicant’s argument that the criticisms contained in the circular letter had not been directed against Judge X, but rather against the Italian judicial system in general. The Court therefore stated that it had to ascertain whether the complaints concerning Judge X were within the limits of permissible criticism in a democratic society. The Court also stated that it had to examine whether the reasons given for the interference were “relevant and sufficient”, and whether the impugned conviction was “proportionate” to the aim pursued

According to the Court, the first criticism of the judge made by Mr Peruzzi, namely that he had adopted unjust and arbitrary decisions, did not amount to excessive criticism since the remarks constituted value judgments – the truth of which, according to the Court’s case-law, was not susceptible of proof – that had some factual basis, given that the applicant had represented one of the parties to the inheritance proceedings in question.

However, the Court observed that the second criticism, to the effect that the judge was “biased” and had committed errors “wilfully ... with malice or gross negligence or through lack of commitment”, implied that Judge X had disregarded his ethical obligations as a judge or had even committed a criminal offence. Mr Peruzzi had not produced any evidence demonstrating an element of malice in the decisions of which he complained. Furthermore, he had circulated the letter without awaiting the outcome of the case he had brought against Judge X before the Supreme Council of the Judiciary.

The Court took note of the fact that the applicant was a lawyer and that the facts of the case concerned acts undertaken in his capacity as a lawyer. It reaffirmed from its previous case law that lawyers have the right to speak about the functioning of the judiciary but that there are limits to what can be said. However, it also noted that Judge X was a sitting judge and that the limits of what is acceptable criticism

could be considered to be broader in the case of a judge than that of an ordinary citizen. The Court also noted that Mr Peruzzi's criticisms had not been made at the hearing or in the course of the inheritance proceedings, and that the letter had been sent to Judge X and numerous judges of the Lucca District Court in a context unrelated to any step in the proceedings; this had been bound to undermine Judge X's reputation and professional image. This fact distinguished this case from *Nikula v. Finland*.¹³¹ Lastly, the Court noted that the custodial sentence originally imposed on Mr Peruzzi had been replaced on appeal by a small fine of €400. Similarly, the amount of compensation awarded to Judge X (€15,000) could not be regarded as excessive

The Court, thus, concluded that Mr Peruzzi's conviction for the defamatory remarks made in his circular letter, and the penalty imposed on him, had not been disproportionate to the legitimate aims pursued and that the reasons given by the Italian courts had been "relevant and sufficient" to justify the measures. The interference with Mr Peruzzi's right to freedom of expression could reasonably be considered "necessary in a democratic society" in order to protect the reputation of others and maintain the authority and impartiality of the judiciary within the meaning of Article 10(2). Accordingly, there had been no violation of that provisi

¹³¹ This case is also included in the case summaries to this handbook.

Serbian Intelligence Agency must give access to information it obtained via electronic surveillance in order to protect the right to freedom of expression of an NGO

**JUDGMENT IN THE CASE OF YOUTH INITIATIVE
FOR HUMAN RIGHTS v. SERBIA**
(Application no. 48135/06)
25 June 2013

1. Principal facts

The applicant is a non-governmental organisation set up in 2003 and based in Belgrade. It monitors the implementation of transitional laws with a view to ensuring respect for human rights, democracy and the rule of law.

On 31 October 2005 the applicant requested the intelligence agency of Serbia to inform it how many people had been subjected to electronic surveillance by that agency in 2005. On 4 November 2005 the agency refused the request, relying thereby on section 9(5) of the Freedom of Information Act 2004.

The applicant complained to the Information Commissioner, a domestic body set up under the Freedom of Information Act 2004 to ensure the observance of that Act, on 17 November 2005.

On 22 December 2005 the Commissioner found that the intelligence agency had breached the law and ordered that the information requested be made available to the applicant within three days. The agency appealed, but on 19 April 2006 the Supreme Court of Serbia held that it lacked standing and dismissed its appeal.

On 23 September 2008 the intelligence agency notified the applicant that it did not hold the information requested.

2. Decision of the Court

The applicant complained, under Article 10 of the Convention, that the intelligence agency of Serbia had denied it access to certain information concerning electronic surveillance, despite a final and binding decision of the Information Commissioner in its favour.

Article 10

The Court noted that the refusal to provide the requested information to the applicant who 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, constituted an interference with the right to freedom of expression.

While the exercise of freedom of expression may be subject to restrictions, such restrictions need to be in accordance with the law. The Court found however that the restrictions imposed by the intelligence agency in the present case did not meet that criterion. The domestic body set up precisely to ensure the observance of the Freedom of Information Act 2004 examined the case and decided that the information sought had to be provided to the applicant. It was true that the intelligence agency eventually responded that it did not hold that information, but that response was 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 concluded 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.

Article 6

Having regard to the findings above, the Court considered that it was not necessary to examine the same complaint under Article 6.

Article 46

It was not in principle for the Court to determine what remedial measures might be appropriate following a judgment. However, the violation found in this case, by its very nature, did not leave any real choice as to the measures required to remedy it. Therefore, the most natural way to implement its judgment in this case would be to ensure that the agency provided the applicant NGO with the information it had requested, namely, how many people had been subjected to electronic surveillance in 2005.

Article 41

The Court considered that the finding of a violation and the order made under Article 46 constituted sufficient just satisfaction for any non-pecuniary damage which the applicant might have suffered.

JUDGMENT IN THE CASE OF KOPRIVICA v. MONTENEGRO

(Application no. 41158/09)

22 November 2011

2. Principal facts

The applicant, Veseljko Koprivica, is a Montenegrin national who was born in 1948 and lives in Podgorica. He was the editor-in-chief of an opposition Montenegrin weekly magazine called “Liberal”.

On 24 September 1994, the “Liberal” published an article entitled “16”, which appeared to have been written by its special correspondent at the Hague. The article reported that many journalists, 16 of whom came from Montenegro, were going to be tried for incitement to war by the International Criminal Tribunal for the former Yugoslavia (ICTY). Two ICTY officials were identified as those who had prepared the case-file and a list of the 16 Montenegrin journalists allegedly concerned was enclosed.

In October 1994, one of the 16, himself an editor of a major State-owned media outlet, brought domestic civil proceedings against the applicant, alleging that the article had damaged his reputation and asked for compensation.

In May 2002, the ICTY informed the first instance court in Podgorica that it had no information whatsoever concerning the journalist who started the proceedings about Mr Koprivica’s article. Mr Koprivica maintained in court that he had relied on the information provided by the magazine’s special correspondent at the Hague. Commenting on the ICTY’s statement, however, he said that he was not interested in the content of the ICTY letter or whether the journalist in question was on that list, as he had personally seen that journalist’s work in the past.

In May 2004, the first instance court found partly in favour of the journalist. It ordered Mr Koprivica, together with the founder of “Liberal”, to pay jointly EUR 5,000 to compensate the journalist. The court concluded that the published assertion had been untrue and that Mr Koprivica had not been interested in establishing its truthfulness. In November 2009, the court specified that Mr Koprivica should pay the damages in regular transfers, each of those amounting to half his pension. By 14 October 2011, the remaining sum owed by Mr Koprivica was EUR 853.

2. Decision of the Court

Relying on Article 10, Mr Koprivica complained that his right to freedom of expression had been breached as a result of ordering him to pay damages for publishing the 1994 article.

Article 10

Admissibility

The Court found that, contrary to the assertion of the Montenegrin Government, Mr Koprivica was not obliged to seek redress before the Constitutional Court of Montenegro. Although the possibility of a constitutional appeal had been introduced in October 2007, the appeals which had been lodged before that court had been systematically rejected or dismissed. In particular, by 31 July 2009, the date on which Mr Koprivica lodged his complaint with the Court, no constitutional appeal had ever been upheld. Neither had any decision adopted been made available to the public. Consequently, Mr Koprivica's complaint was admissible as he had exhausted all available effective domestic remedies.

Merits

The Court noted that the final civil court judgment had undoubtedly interfered with Mr Koprivica's right to freedom of expression. The interference had been in accordance with the law and had pursued the legitimate aim of protecting the reputation of others, as required by Article 10.

The Court then examined whether the domestic courts' findings had been "necessary in a democratic society". It noted that the magazine article in question had clearly alleged a fact and, therefore, proof for it could be demanded. The information published amounted to a serious accusation against the journalist, which was magnified by the sensitivity of the issue in the Balkans at the time. Consequently, the editor-in-chief should have been particularly diligent about verifying the information before publication.

Mr Koprivica had maintained that he could not verify the information given that no internet connection or official contacts between the Federal Republic of Yugoslavia and the ICTY existed at the time. The Court considered that those reasons could not justify him not even trying to use other means to reach the ICTY and double-check the veracity of the information he ultimately published. Indeed, the Court recognised that news was a perishable commodity and to delay its publication risked stripping it of its value and interest. However, the article in

question had been published in a weekly magazine, not in a daily newspaper, thus Mr Koprivica had longer to verify his information. Additionally, he had openly stated that he was not concerned with verifying the truth or the reliability of the information before publication.

The Court found that Mr Koprivica had failed to do what he could to verify the information which his publication presented as a fact. At the same time, the Montenegrin courts had refused to hear relevant witnesses proposed by Mr Koprivica, particularly the magazine's special correspondent who had actually written the article.

In any event, the Court concluded that it did not need to take a firm stance on those points given that the damages Mr Koprivica was ordered to pay were disproportionate, particularly when compared to his pension. While the Montenegrin Government had argued that his pension had not been his only income, they had not submitted evidence to support their claim. Additionally, even when compared to the highest incomes in Montenegro, the damages and costs which Mr Koprivica had been obliged to pay had still been excessive.

Accordingly, there had been a violation of Article 10.

Article 41

The Court held that the question of the application of Article 41 of the Convention was not ready for decision and reserved the whole question accordingly.

Wrongful conviction for defamation of a director of water supply based on statements by him about the quality of the water in a particular area

JUDGMENT IN THE CASE OF ŠABANOVIĆ v. MONTENEGRO

(Application no. 5995/06)

31 May 2011

1. Principal facts

The applicant, Zoran Šabanović, is a Montenegrin national who lives in Herceg Novi.

On 6 February 2003 a Montenegrin daily newspaper published an article alleging that the water in the Herceg Novi area was “full of bacteria”, based on a report which had been drawn up at the request of the Chief State Water Inspector. Mr Šabanović, director of a public water supply company and a member of the opposition political party at the time, immediately held a press conference at which he denied the allegations, maintaining that all tap water was filtered and safe for public consumption. He further stated in particular that the water inspector was favouritising two private water companies in their bid to develop additional water sources and that he was under orders from the Democratic Party of Socialists, the major partner in the ruling coalition Government at the time.

As a result, the water inspector brought defamation proceedings against Mr Šabanović and on 4 September 2003 he was found guilty of making statements which were untrue and harmful to the inspector’s honour and reputation. He was sentenced to a three month suspended prison sentence. The domestic courts refused Mr Šabanović’s request to read the newspaper article in which the allegations of contaminated drinking water were made as they considered that it was not relevant and that such a step would only delay the proceedings. That decision was upheld on appeal in November 2005.

2. Decision of the Court

Relying on Article 10, Mr Šabanović complained about his conviction for defamation on account of the statements he had made at the press conference in February 2003.

Article 10

Given that the criminal proceedings against Mr Šabanović had been conducted entirely by the Montenegrin courts, the Court decided to reject the part of his complaint in respect of Serbia.

The interference with Mr Šabanović's freedom of expression, based on the Criminal Code of the Republic of Montenegro, had been "prescribed by law" and pursued "the legitimate aim" of protecting the reputation of others.

However, it was quite understandable that Mr Šabanović, as director of a public water supply company, had felt that it was his duty to respond to allegations in the press that drinking water in the Herceg Novi area was contaminated, in order to inform the public that their drinking water was filtered and safe to use. His remarks were a robust clarification of a matter of great public interest and were not a gratuitous attack on the water inspector's private life but criticism of him in his official capacity. Indeed, the courts had taken a rather restrictive approach to the matter, having failed to situate his comments in the broader context of the general debate in the press about the quality of drinking water in the area.

The Court held that there was little scope for such restrictions on debates of public interest and therefore found that the interference with Mr Šabanović's freedom of expression had not been necessary in a democratic society, in violation of Article 10. The Court further noted with concern that Mr Šabanović had been given a prison sentence for defamation, a sanction which, even if not actually imposed, the Council of Europe has called upon its members States to abolish without delay.

Article 41

The Court dismissed Mr Šabanović's claim for just satisfaction under Article 41 as it had been submitted after the deadline.

JUDGMENT IN THE CASE OF LEPOJIĆ v. SERBIA*(Application no. 13909/05)***6 November 2007****1. Principal facts**

The applicant, Zoran Lepojić, is a Serbian national who was born in 1975 and lives in Babušnica, Serbia. He was president of a local branch of the Demo-Christian Party in Serbia.

The case concerned the applicant's conviction for criminal defamation in relation to his article about the Mayor of Babušnica, written in the run-up to the 2002 elections.

In August of 2002, the applicant's article, entitled "A Despotic Mayor", appeared in the newsletter "Narodne lužnicke novine". In his article, Mr Lepojić firstly argued that Mr P.J. could no longer be the mayor of the Municipality of Babušnica because he had been expelled from his political party and was therefore not legally allowed to remain in post. That opinion was based on information provided by the Ministry of Justice and Local Self-Government. Secondly, based on information provided by the Ministry of Internal Affairs and the Public Prosecutor of the Republic of Serbia, Mr Lepojić accused the mayor of committing "legal infractions amounting to crimes", stating that criminal complaints had been filed against him and that he had abused his authority as the Director of the State-owned company, Lisca. Lastly, the applicant criticised what he called the mayor's "nearly insane" (*sumanuto*) spending of municipality money on sponsorships and gala lunches.

In response to the publication of the article, the mayor filed a private criminal action against the applicant who, on 11 June 2003, was found guilty of criminal defamation on the basis of his reference to "nearly insane" spending of municipality money on sponsorships and gala lunches. He was given a suspended fine of 15,000 dinars and required to pay 11,000 dinars for costs, which was at that time equivalent to approximately EUR 400. The court reasoned that the applicant had failed to prove either the truth of the statement in question or that he had had reasonable grounds to believe that it was true. The term "nearly insane" also implied that the mayor had a mental illness. The judgment was upheld on appeal.

On 8 February 2005 the mayor filed a separate civil complaint for damages, alleging that he had suffered mental anguish as a result of the publication of

the article. On 18 March 2005 the applicant was ordered to pay 120,000 dinars in compensation plus interest and costs of 39,000 dinars, which was then equivalent to approximately EUR 1,970. The court concerned reasoned that the honour of the mayor was more important than that of an ordinary individual. On appeal the award for costs was reduced to 24,200 dinars, then equivalent to approximately EUR 295.

2. Decision of the Court

Mr Lepojić complained about the criminal conviction and civil judgment against him, relying on Article 10 and Article 6 § 1.

Article 10

The Court noted that the final criminal and civil judgments at issue undoubtedly constituted an interference with the applicant's right to freedom of expression which were "prescribed by law" and adopted in pursuit of a legitimate aim, namely "for the protection of the reputation" of another.

Concerning whether the criminal conviction and the compensation awarded were proportionate to the legitimate aim pursued, the Court noted that the applicant had clearly written the article in question in the run-up to an election and in his capacity as a politician. The target of the applicant's criticism was the mayor, himself a public figure, and the word "nearly insane" was obviously not used to describe the mayor's mental state but rather to explain the manner in which he had allegedly been spending local taxpayers' money. Although the applicant was unable to prove before the domestic courts that his other claims were true, even assuming that they were all statements of fact and, as such, susceptible of proof, he clearly had some reason to believe that the mayor might have been involved in criminal activity and, also, that his tenure was unlawful. In any event, although the applicant's article contained some strong language, it was not a gratuitous personal attack and focused on issues of public interest rather than the mayor's private life. The reasoning of the criminal and civil courts, in ruling against the applicant, was not "sufficient", given the amount of compensation and costs awarded (equivalent to approximately eight average monthly salaries in Serbia at the relevant time) as well as the suspended fine which could, under certain circumstances, have been converted into a prison term.

Bearing in mind the seriousness of the criminal sanctions involved, as well as the domestic courts' dubious reasoning that the mayor's honour was more important than that of an ordinary citizen, the Court concluded that there had been a violation of Article 10.

Article 6(1)

The Court considered that it was unnecessary to examine separately the applicant's complaint that he had not had a fair trial.

Article 41

The Court awarded Mr Lepojić €3,000 in respect of non-pecuniary damage and EUR 250 for costs and expenses.

**GRAND CHAMBER JUDGMENT IN THE CASE OF PENTIKÄINEN
v. FINLAND**
(Application no. 11882/10)
20 October 2015

1. Principal facts

The applicant, Mr Pentikäinen, was born in 1980 and lives in Helsinki. He is a photographer and journalist employed by the weekly magazine *Suomen Kuvalehti*.

On 9 September 2006, the applicant was sent by his employer to take photos of a protest against the Asia-Europe meeting (ASEM) in Helsinki. Following the escalation of violence, the police eventually cordoned off the demonstration area and ordered the crowd to disperse. After a call with his employer, the applicant decided it was necessary for him to remain inside the cordon, along with a small number of demonstrators. Together with them he was apprehended. He remained in police detention from around 9.30pm until his release the next day at 3pm.

The applicant was convicted by the Helsinki District Court for contumacy towards the police in December 2007. Both the Court of Appeal and the Supreme Court upheld the judgment in 2009. No penalty was imposed as the offence was “excusable”, owing to the conflicting expectations of the applicant expressed by the police and his employer.

2. Decision of the Court

In its Chamber judgment of 4 February 2014, the Court found by a majority that the domestic courts had struck a fair balance between the competing interests at stake and, accordingly, there had been no violation of Article 10. A request by the applicant to have the case referred to the Grand Chamber under Article 43 was granted by the panel of the Grand Chamber.

The applicant complained that his rights under Article 10 had been violated by his apprehension, detention and conviction, which constituted a “chilling effect” on his rights and work.

Article 10

The Court accepted that there had been an interference with the applicant’s right

to freedom of expression. The interference had a basis in Finnish law and pursued legitimate aims, namely the protection of public safety and the prevention of disorder and crime.

In assessing whether the applicant's treatment was "necessary in a democratic society", the Court noted that the Finnish police, particularly with their previous experience of riots which had taken place the same year, had good reason to expect that the protest might turn violent. Police orders for the crowd to disperse had therefore been based on a reasonable assessment of the facts. Furthermore, the applicant had not as such been prevented from reporting on the event. He had been able to take photographs during the entire demonstration until the moment he was apprehended.

The applicant was apprehended in the cordoned-off area where he had stayed with the remaining demonstrators. The Court noted, from available video recordings, that the applicant had not been wearing any distinctive signs that would have identified him as a journalist, nor had his press badge been visible. The applicant had thus failed to make it sufficiently clear that he was a journalist prior to his apprehension.

The Helsinki District Court found that the applicant had been aware of the police orders to leave the scene, but decided to ignore them. This was confirmed, *inter alia*, by the fact that the applicant called his employer to discuss whether he should leave the area. By not obeying orders given by the police, the applicant knowingly took the risk of being apprehended. The Court also found it relevant that all other journalists had at this stage left the scene. Nothing suggested that the applicant, had he obeyed the order, could not have continued to exercise his professional assignment in the vicinity of the cordoned-off area.

Regarding his detention, the Court observed that the applicant had been one of the first of those apprehended to be interrogated and released due to his status as a journalist. Though withheld for the duration of his apprehension, the applicant's camera and photographic material were returned to him in their entirety and unaltered.

Regarding his conviction, the Court noted the lack of penalty imposed on the applicant. The Court emphasised that the conduct for which he was convicted was not his journalistic activity, but the refusal to leave the area following a police order. Moreover, any interference with the exercise of his journalistic freedom had been of limited extent, given the opportunities made available to him to cover the event adequately.

The prosecution had been directed against altogether 86 defendants. The Court reiterated that journalists cannot be exempted from their duty to obey the ordinary criminal law solely on the basis that Article 10 affords them protection. The Court accepted that journalists sometimes face a conflict between the general duty to abide by ordinary criminal law and their professional duty to obtain and disseminate information. However, it emphasised that the concept of responsible journalism requires that whenever a journalist makes the choice to disobey ordinary criminal law, he or she must be aware of the risk of being subject to legal sanctions. Bearing in mind in particular the lack of adverse material consequences to the applicant, the Court considered his conviction feasibly proportionate to the legitimate aims pursued.

The Court concluded that the domestic authorities had based their decisions on relevant and sufficient reasons and struck a fair balance between the competing interests at stake. The applicant had not been prevented from carrying out his work as a journalist either during or after the demonstration. There had accordingly been no violation of Article 10.

**JUDGMENT IN THE CASE OF SELMANI AND OTHERS
v. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA¹³²**

(Application no. 67259/14)

9 February 2017

1. Principal Facts

The applicants, Naser Selmani, Toni Angelovski, Biljana Dameska, Frosina Fakova, Snežana Lupevska, and Nataša Stojanovska, were six Macedonian nationals who lived in Skopje and worked as accredited journalists.

On 24 December 2012 the applicants were reporting from the Parliament gallery, the designated area for journalists authorised to report on the work of Parliament. They were following the debate about approval of the State budget for 2013, which had been a source of tension between the opposition and ruling party MPs and had attracted considerable public and media attention.

During the proceedings, opposition MPs approached the President of the Parliament and started to create a disturbance by slapping his table. Subsequently, security officers forcibly ejected the opposition MPs and removed the journalists from the gallery. Some journalists complied, but the applicants, believing that the public had a right to be informed, refused to comply. This resulted in them being forcibly removed. At the same time two opposing groups of people were protesting in front of the Parliament building.

The applicants subsequently lodged a constitutional complaint alleging that their right to freedom of expression under Article 10 of the Convention had been breached as they were prevented from reporting on a topic of public interest. They also urged the Constitutional Court to hold a public hearing on their case.

In April 2014, a hearing was held in the absence of the parties where the Constitutional Court dismissed the applicants' complaints. It found that the removal from the gallery had been necessary for security reasons, and it was not directed at restricting their freedom of expression.

¹³² This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention.

2. Decision of the Court

The applicants, relying on Article 10 and Article 6 of the Convention, complained about their removal from the Parliament gallery and about the lack of an oral hearing in the ensuing proceedings in the Constitutional Court.

Article 6

The applicants complained that the failure of the Constitutional Court to provide them with an oral hearing constituted a violation of Article 6 of the Convention.

The Court first reaffirmed that in proceedings before a court of first and only instance, as was the case here, the right to a “public hearing” entails an entitlement to an “oral hearing” under Article 6(1) of the Convention, unless there are exceptional circumstances.

The Court then observed that the issue at hand - whether the applicants’ forcible removal from the Parliament gallery had violated their right to freedom of expression – involved more than mere issues of law, as argued by the Government. Conversely, the issue of the necessity and the proportionality of the impugned measure relied on issues of fact which the Constitutional Court was required to ascertain. These contested facts included whether the reasons for the applicants’ removal had been explained to them; the level of force used by the security officers; whether a security officer had been injured during the incident; the security risk that had allegedly required their removal; and whether the applicants had been able to follow the events in the parliamentary chamber after their removal. This, the Court said, resulted in the applicants being entitled to an oral hearing, a consideration that outweighed the Government’s arguments relating to efficiency. Moreover, the Court noted, the Constitutional Court did not give any reasons as to why it considered that no hearing was necessary.

The Court concluded that there were no exceptional circumstances that could justify dispensing with an oral hearing, and accordingly, it found that there had been a breach of Article 6(1) of the Convention.

Article 10

It was not contested between the parties that the applicants’ removal from the Parliament gallery from where they were reporting on the parliamentary proceedings and the subsequent incidents in the chamber amounted to an “interference” with their right to freedom of expression under Article 10(1) of the Convention.

Moving then to whether or not the measure was “prescribed by law”, the Court reaffirmed that this requires that the measure have a legal basis in domestic law, and that it be foreseeable as to its effects on the person concerned. Here, the Court observed, the measure was based on section 43 of the Parliament Act and Articles 91-94 of the parliamentary Rules of Procedure. In the opinion of the Court, that security officers would remove journalists from the gallery, was not an unreasonable, arbitrary or unforeseeable application of these provisions. Thus, the Court found that the measure was “prescribed by law”.

The Court then accepted that the interference pursued the legitimate aims of ensuring public safety and the prevention of disorder and thus moved to examine whether it was “necessary in a democratic society”. The Court reiterated the crucial role of the media as public watch-dog in a democratic society, and particularly in situations such as in the applicants’ case where the authorities had had to handle disorderly behaviour of MPs during a Parliamentary session. The media, within certain limits, has a duty to impart information and ideas on all matters of public interest, for example, disorder in the parliamentary chamber. Furthermore, the public has a right to receive this information. As a result of this, any attempt to prevent journalists from fulfilling this role must be subject to strict scrutiny.

The Court recognised that the domestic authorities were tasked with balancing two sets of interests, both of which were public in nature, namely the interests of the security service in maintaining order in Parliament and ensuring public safety, and the interests of the public in receiving information on an issue of general interest. In assessing if an appropriate balance was struck between these competing interests, the Court examined whether the impugned interference, seen as a whole, was supported by relevant and sufficient reasons and was proportionate to the legitimate aims pursued.

In this respect, the Court noted with regard to the protests outside the Parliament building, the Constitutional Court did not go any further than to state that “several people were injured” in them. The Constitutional Court did not follow up on the factual basis behind the reports on these protests and to what extent, if any, they would threaten the safety of those inside the building, including the applicants. With regard to the events within the parliamentary chamber, it was not contested that the applicants did not pose a threat to public safety. The Court observed that the Constitutional Court made no finding of fact as to the allegation that a security officer had been injured in the altercation with one of the applicants. The Court also considered it noteworthy that the applicants’ removal from the gallery was not a consequence of their refusal to comply with the orders of the parliamentary security service or their resistance, but was a result of the risk assessment made by that same service that the applicants’ further presence in

the gallery posed a threat to their lives and physical integrity. However, the Court found no indication that the disorderly behaviour of the MPs in the chamber would have put the applicants' lives and physical integrity in danger. Lastly, the Court noted that their removal prevented them from obtaining first-hand and direct knowledge based on their personal experience of the events unfolding in the chamber.

The Court concluded, therefore, that the Government failed to establish that the applicant's removal from the gallery was "necessary in a democratic society" and met the requirement of "pressing social need". Accordingly, the Court found a violation of Article 10 of the Convention.

Article 41

The Court held that the State was to pay the applicants €5,000 euros each in respect of non-pecuniary damage. With regard to costs and expenses, the Court noted that the applicants had failed to substantiate whether the costs for representation were incurred in the domestic proceedings or in the proceedings before the Court and thus made no award.



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