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European Court of Human Rights decisions on the right to freedom of expression

Bulletin I: PROTECTION OF JOURNALISTIC SOURCES

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In April and June 2012, the European Court issued judgment in two cases concerning the protection of journalistic materials and sources: in the case of Ressiot and others v. France (28 June 2012) and the case of Martin and others v. France (12 April 2012).

Ressiot and Others v. France

The applicants in this case were journalists employed at the French newspapers *L'Equipe* and *Le Point*. In 2004, *Le Point* published an article reporting on a judicial investigation into allegations of doping among members of a professional cycling team. The article reproduced whole passages from records of transcripts of recorded telephone conversations made in the course of the investigation carried out by the French police. A follow-up article divulged a list of illicit substances found during a search at the home of a former professional cyclist. The French police opened an investigation into how the journalists had obtained these materials. Two months later, *L'Equipe* published a series of articles on the same subject, reproducing excerpts from official records and procedural documents. The cycling team subsequently launched a criminal complaint for breach of confidence. Following preliminary judicial proceedings, the French public prosecutor ordered a search of the offices of the two newspapers to uncover traces of the leaked documents.

In 2005, the investigating judge transferred the file to the public prosecutor to prepare the investigation of the journalists for using information obtained through a breach of the confidentiality of a judicial investigation. Several months later, the judge declared in an interview with another newspaper that the case had not been a priority case, that he had not had enough police officers to assist him and that technical errors had been made. Subsequently, the journalists concerned requested that all the material relating to the search carried out at the newspapers' be declared null and void, together with all the materials relating to the search of the journalists' homes and the list of their telephone calls that had been placed under seal.

Following lengthy proceedings, the French courts eventually held that while the materials had been obtained as a result of a breach of confidence, the journalists themselves had not committed an offence in publishing the materials. Furthermore, the French courts found that while the journalists should not have been placed under surveillance and their phone calls should not have been

intercepted, the search and seizure of their offices had been legitimate. The journalists complained to the European Court of Human Rights.

The European Court held that the protection of journalistic sources was one of the cornerstones of media freedom. Without such protection, sources might be deterred from assisting the press in informing the public. As a result the vital public-watchdog role of the press might be undermined and the ability of the press to provide accurate and reliable information might be adversely affected.

The Court recalled some of its earlier judgments, reiterating the importance of the media's role in the area of criminal justice. The Court also referred to a Recommendation by the Committee of Ministers of the Council of Europe on the provision of information through the media in relation to criminal proceedings. It stressed the importance of media reporting in informing the public on criminal proceedings and ensuring public scrutiny of the functioning of the criminal justice system.

The Court went on to state that interference with the confidentiality of journalistic sources could only be justified by an overriding requirement in the public interest. It noted that the authorities had not taken any action against the journalists until more than a year after the publication of the articles. It noted that the sole aim behind the searches and the interception of the journalists' phone calls had been to identify the source of the information.

The Court pointed out that the right of journalists not to disclose their sources could not be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but was part and parcel of the right to information. The seizure and placing under seal of the lists of the telephone calls of two of the journalists, and the searches carried out at their homes as well as at the offices of the two newspapers had been allowed by the investigation division without any evidence showing the existence of an overriding social need.

The Court concluded that the Government had not shown that a fair balance had been struck between the various interests involved. Even if the reasons given were relevant, the Court considered that they did not suffice to justify the searches and seizures carried out. The means used were not reasonably proportionate to the legitimate aims pursued having regard to the interest of a democratic society in ensuring and maintaining the freedom of the press.

The Court therefore held that the actions taken by the French police violated the right to freedom of expression of the journalists.

Martin and Others v. France

The applicants in this case were journalists at the French newspaper, *Midi Libre*. In 2005, they published an article reporting that the Regional Audit Office of the French region of Languedoc-Roussillon was critical of the management of region. In their article, they published parts of the draft report, even though this was still confidential. A complaint was lodged for breach of professional secrecy and the handling, by the journalists, of confidential material. In order to determine how the journalists had obtained the confidential information, the investigating judge ordered a search of the newspaper's premises. During the search various documents were seized and placed under seal, and copies were made of the computer hard drives of the journalists concerned.

Following investigations, the proceedings against the journalists were discharged. They then lodged a complaint and requested that the search and all the subsequent proceedings be set aside, arguing

that they were in violation of the right to freedom of expression. The French courts disagreed that their rights had been violated, and the journalists lodged a complaint with the European Court of Human Rights.

In its judgment, issued in April 2012, the European Court reiterated that it had already found that searches conducted in journalists' homes or places of work with a view to identifying the sources of breaches of professional secrecy constituted an interference with the right to freedom of expression. In this case, while the interference had been in accordance with domestic law and had pursued a legitimate aim – namely the protection of the rights of others – the question was whether it had been "necessary in a democratic society".

The Court noted that the journalists had published reports on a matter of significant public interest, namely the management of regional finances, and in particular, the management of public funds by elected officials. This was at the heart of the role of journalists in a democratic society: to inform and alert the public, particularly of bad news, as soon as the information came into their possession. The journalists had mentioned on the first page of the newspaper that the information came from "a draft report that might be amended in the light of the response of the people it criticised". The Court considered that the journalists had made a clear presentation of the report in question that displayed their good faith and respect for the ethics of their profession.

The Court noted that extracts of the draft report had been sent to around seventy people criticised in the report, and that the people to whom the report had been sent were not bound by a duty of professional secrecy. Furthermore, according to French law, documents in draft form were not automatically classified.

The Court noted that the French authorities had not attempted any other methods to discover the source of the leaked documents: they had immediately ordered a search of the newspaper's offices. The Court held that the French Government had failed to demonstrate that without the search the authorities would have been unable to seek evidence, first, that there had been a breach of professional secrecy and then that information thus wrongfully obtained had been published.

For these reasons, the Court concluded that the Government had not demonstrated that there was an overriding interest that justified the interference with the journalists' rights, and the interference had therefore not been "necessary in a democratic society". The competing interests in this case - namely the protection of journalists' sources on the one hand, and the prevention and repression of crime on the other - had not been properly balanced.

The Court therefore held that the actions taken by the French authorities violated the right to freedom of expression of the journalists.

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