

## European Court of Human Rights judgments on the right to freedom of expression

### Bulletin LXI: USE OF HIDDEN RECORDING DEVICES FOR JOURNALISTIC PURPOSES

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Hidden cameras or other recording devices can be an important tool for journalists, particularly in investigative journalism. While their use does infringe the privacy of the person being filmed, some investigative reports justify the use of hidden recording devices, typically those stories of real public interest where the journalist exposes wrong-doing or needs to gain access to a clandestine world.

The following paragraphs highlight the main European Court of Human Rights' decisions and summarise case law in other European countries.

#### 1. European Court of Human Rights decisions

- *Haldimann and others v. Switzerland*, application no. 21830/09, 24 February 2015 (use of hidden cameras legitimate tool in consumer journalism)

This concerned the conviction of four journalists for broadcasting an interview with an insurance broker that had been filmed with a hidden camera. The interview was part of a television documentary that reported on misleading advice provided by life insurance brokers, an issue of public debate in Switzerland at the time. The broker filed a police complaint for violation of privacy – a criminal offence under Swiss law. Although the journalists were acquitted at first instance and an injunction to prevent the broadcast failed, they were convicted on appeal and sentenced to a fine on the grounds that the use of a hidden camera had not been strictly “necessary” for the programme. The journalists appealed to the Swiss Federal Court, and from there to the European Court of Human Rights.

The Court first affirmed its “general principles” on freedom of expression and invasion of privacy, emphasising the importance of the right to freedom of expression as well as the duty on journalists to behave ethically. In cases concerning the invasion of privacy of public figures, six criteria in particular are relevant: (1) the extent to which the story contributed to a debate of general interest; (2) the reputation of the person concerned and the purpose of the report; (3) the past behaviour of the individual reported on; (4) the method by which the information was obtained; (5) the report’s content, form and impact; and (6) the severity of the sanction imposed.

Applying these criteria to the case, the Court found that while the insurance broker was not a public figure, the journalists had clearly sought to report on an issue of general interest: the mis-selling of insurance schemes. Their aim had not been to attack the broker individually but rather to use him as an example to illustrate the wider issue. The impact of the story on the reputation of the dealer was therefore limited and the Court took this into account in its assessment of the case. At the same time, the Court held that the broker did have a reasonable expectation of privacy. He was not a public figure and he had not consented to being filmed. This was counterbalanced, however, by the fact that he was not the sole focus of the report, which instead focused on the mis-selling of insurance schemes generally, and that he had not been interviewed in his own offices. This meant that while the filming had constituted an 'interference' with his privacy, this interference was at the lower end of the scale.

The Court went on to consider the crucial element of the case from a jurisprudential perspective – the method by which the information had been obtained. It first reaffirmed that while journalists have considerable leeway in their reporting on issues of public interest, they must do so in good faith, on an accurate factual basis and they have to strive to provide "reliable and precise" information in accordance with the ethics of journalism. The Court then considered the way in which the report had been broadcast. It took into account that the broker's face had been pixelated and his voice disguised, that he had not been interviewed in his own offices and that his suit was nondescript. This meant that the level of interference with the broker's privacy was minimal and did not outweigh the public interest in the story. Finally, the Court took into account the severity of the sanction. While in financial terms the penalty was light, the Court held that the use of the criminal law had been disproportionate. For all these reasons, the Court found that the conviction violated the right to freedom of expression.

- *Radio Twist v. Slovakia*, application no. 62202/00, judgment of 19 December 2006 (journalists allowed to broadcast taped telephone conversation between minister and a senior civil servant)

This concerned the broadcast the recording of a telephone conversation involving the deputy Prime Minister and a senior civil servant at the Ministry of Justice. The domestic courts held that even public figures had the right to have their privacy protected by law and found that the recorded and broadcast telephone conversation was private in nature and, therefore, should not have been broadcast.

The European Court of Human Rights disagreed. It noted that the telephone conversation in question was between two high-ranking government officials and concerned a matter of public interest – the management and privatisation of State-owned enterprises. The Court further observed that the domestic courts had attached decisive importance to the fact that the recording had been obtained by unlawful means, even though it had not been made by the journalists themselves. The Court held that the mere fact that a recording had been made illegally and then passed on to

journalists should not deprive the journalists who broadcast it from the protection of the right to freedom of expression. It therefore found a violation of the right to freedom of expression.

## **2. Decisions by national European courts**

For member States of the European Union, in addition to the two European Court of Human Rights decisions summarised above, EU Council Directive 95/46/EC (“the Data Protection Directive”) is important. This regulates the gathering and processing of personal data, which includes the gathering of information by journalists. While films and recordings of individuals taken undercover constitute “personal data” under the Directive, it also provides an exemption for the gathering of data by journalists, in Article 9. In the case of *Tietosuojavaltuutettu* (Case C-73/07, 18 December 2008), the European Court of Justice confirmed that the journalistic exemption applies if the sole object of the document is the disclosure to the public of information, opinions or ideas.

Across Europe, national courts have taken different positions on this issue. The following paragraphs summarise various laws, journalists’ codes and court decisions. In most countries, the law allows for the use of hidden cameras when there is a genuine public interest involved.

### France

In France, the Regional Court of Paris has considered a case involving an interview with a spokesperson for a pharmaceutical company, part of which had been filmed with a hidden camera.<sup>1</sup> The Court held that, in this case, the need to inform the public was more important than the person’s right to have control over the use made of his image. In the three disputed sequences filmed with a hidden camera the Court found that there was no disproportionate invasion of privacy. The images had been filmed and broadcast under conditions that were very similar to those under which he had agreed to be formally interviewed a few minutes earlier, and the topics discussed were the same as those to which he had just given his authorisation. However, the spokesperson’s attitude was very different from when he had been ‘formally’ interviewed. For example, although he had replied on-camera that he did not know whether the company was about to open in the Czech Republic, he gave a different answer when he thought he was off-camera; similarly, after a long explanation on-camera on the traceability of the origin of the medicines distributed by his company, he then said that medicines produced in other countries were also guaranteed by the manufacturers and that the system for checking pharmacies was ineffective. Therefore, the Court found that the need to inform the public took precedence over any image rights or privacy rights.

### Germany

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<sup>1</sup> 17th civil chamber, 7 September 2009 - R. Berghausen vs. France Télévisions S.A. et al.

In Germany, broadcasting footage obtained via hidden camera is a criminal offence but there is a defence if it is justified in the public interest.<sup>2</sup> Court cases consistently show that investigative journalists are allowed to use hidden cameras if necessary. For example, in 2012, two Dutch journalists were acquitted when they broadcast an interview with a German WW2-era soldier who had been sentenced to life imprisonment in 2010, following unsuccessful prosecutions in earlier decades. The journalists had tracked him down to an old peoples' home and interviewed him. The Court found that he was a "person of contemporary history" and the secret recordings were therefore "historical documents", which meant that he had to tolerate this reporting. The Court also recognised that the journalists had been unaware that their conduct was a criminal offence in Germany.<sup>3</sup>

In another case, in 2005, the Munich Court of Appeal dismissed a complaint by a management consultancy company against a journalist who had made hidden recordings for a programme on surreptitious advertising in television. The video showed a female employee of the plaintiff in a sales meeting with syndicate representatives, offering to place certain themes or products in the series in return for payment. The Court agreed with the journalists' assessment that the allegation of surreptitious advertising could only be substantiated by means of an undercover investigation. It therefore rejected the claim for an injunction. In situations where there was no other way of verifying a suspicion, the right to freedom of expression and newsgathering therefore included the use of hidden recordings. Since public service broadcasting was financed by means of the licence fee, it was particularly important for the public interest that abuses connected with illegal surreptitious advertising should be brought to light.<sup>4</sup>

In 2013, the Stuttgart District Court ruled that journalists could broadcast hidden camera footage to expose poor working conditions at a Daimler factory; the public's right to information took precedence over the rights of Daimler.<sup>5</sup>

## Netherlands

In the Netherlands, the use of hidden recordings is allowed when there is a public interest in doing so. Cases concerning the use of hidden recordings are decided by courts from time to time and show how this principle is applied in practice. For example, in 2013, the Amsterdam District Court held that a TV programme which used hidden camera interviews to illustrate the dangers to women of finding sperm donors over the internet was justified in the public interest. The journalist had filmed a segment featuring a donor who suffered from Asperger syndrome, which is a hereditary health condition, but who had failed to disclose this to prospective mothers. The Court held that while the recording violated the plaintiff's privacy, his identity had been disguised and the issue concerned was clearly one of public interest.<sup>6</sup> In another case,

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<sup>2</sup> Articles 123 and 301, Criminal Code.

<sup>3</sup> As reported at <http://merlin.obs.coe.int/iris/2012/3/article17.en.html>

<sup>4</sup> Ruling of 20 January 2005 - case no.: 6 U 3236/04

<sup>5</sup> Stuttgart District Court, 9 October 2014, as reported at <http://merlin.obs.coe.int/iris/2015/1/article12.en.html>

<sup>6</sup> District Court in Amsterdam, 4 December 2013, C/13/531572, as reported at <http://merlin.obs.coe.int/iris/2014/2/article28.en.html>

the Amsterdam District Court held that using hidden camera footage of a ‘stalker’, disguised so his identity was unknown, was justified in a programme on the dangers to society of men stalking women.<sup>7</sup>

By contrast, in another case in which hidden cameras were used to expose bullying in a secondary school, the Court ruled that in schools and with regard to children, there is an enhanced need for privacy and that the broadcaster had not done enough to safeguard the children’s privacy. In addition, the broadcaster had publicly shown the footage to the children as part of the programme. This meant that the use of hidden recordings had not been justified.<sup>8</sup>

## Belgium

In Belgium, the issue is covered under rules on journalistic ethics. The Press Council has adopted a specific “*Ethical Directive on Undercover Journalism*”. Under this Directive, Undercover Techniques should be used in accordance with four criteria:

- (1) the information obtained should be of significant societal importance;
- (2) it should not be possible to obtain the information via conventional journalistic methods;
- (3) the risks related to this method should be in proportion to the results pursued; and
- (4) the decision to use the undercover method and the realisation of the report should only occur after deliberation with and under the responsibility of the editors in chief.<sup>9</sup>

Decisions by the Council for Journalism Ethics illustrate how this rule operates in practice. For example, in one case, in 2011, the Council found that the use of hidden cameras to expose the illegal trade of antiques from Afghanistan, and how the proceeds of this funded the Taliban, was in line with journalistic ethics. The Flemish public broadcaster had recorded an interview with a collector in his private home. His face had been blurred, but his voice had not been changed; but the Council considered that the illegal export of antiques from Afghanistan and the fact that terrorist organisations are financed through this trade is undeniably a matter of great societal importance. Furthermore, it held that filming the collector at his home, with his collection of antiques, was justified. However, the Council did find that the collector’s voice should have been disguised; there was no journalistic need to leave it unchanged. This therefore violated journalistic ethics.<sup>10</sup>

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<sup>7</sup> District Court Amsterdam, 17 April 2015, IEF 14915, S v. SBS, as reported at

<http://merlin.obs.coe.int/iris/2015/6/article28.en.html>

<sup>8</sup> Preliminary Court Midden-Nederland, 16 May 2014, ECLI:NL:RBMNE:2014:1940, Project P, as reported at

<http://merlin.obs.coe.int/iris/2014/6/article27.en.html>

<sup>9</sup> Vereniging van de Raad voor de Journalistiek, *Code of Ethics* (2010), <http://www.rvdj.be/journalistieke-code>.

See also recent decisions of the Flemish Press Council on this issue: Flemish Council for Journalism Ethics, Backx and others v NV VRT, 10 September 2009 (reported at <http://merlin.obs.coe.int/iris/2009/10/article5.en.html>) and Flemish Council for Journalism Ethics, Thierry V. v. NV VRT, 13 January 2011 (reported at <http://merlin.obs.coe.int/iris/2011/3/article8.en.html>).

<sup>10</sup> Flemish Council for Journalism Ethics, Thierry V. v. NV VRT, 13 January 2011, as reported at <http://merlin.obs.coe.int/iris/2011/4/article11.en.html>

In another case, the Council found that there was no public interest in the use of hidden cameras in a TV programme which followed a number of couples who attempted to start restaurant businesses. The programme had been made solely for entertainment purposes and had been described by the journalists as a “stunt” and a “joke in order to lead as many people as possible to the website”.<sup>11</sup>

### United Kingdom

In the UK, the BBC’s Editorial Guidelines contain a lengthy section setting out the BBC’s rules and procedures on the making and subsequent use of ‘secret recordings’. The BBC Guidelines provide that:

*“Normally, the BBC will use secret recording only ... as an investigative tool where:*

- there is clear existing prima facie evidence of behaviour, or intention to carry out behaviour, that it is in the public interest to reveal, and*
- the recording is necessary to prove the behaviour, and*
- there is no viable, alternative means of gathering the evidence that proves the behaviour.”*

Additionally, the BBC Rules state that secret recordings may be made “*to obtain material outside the UK where a country's laws make the normal and responsible gathering of material extraordinarily difficult or impossible*” or “*as a method of consumer, scientific or social research in the public interest, where no other methods could naturally capture the attitudes or behaviour in question*”.<sup>12</sup>

As regards subsequent broadcast, the BBC Guidelines state that “*[t]he results of the research should be edited to provide a fair and accurate representation of the research. Consent should normally be obtained retrospectively from individuals or organisations to be included in our content, or their identities should be appropriately obscured. Any proposal in these circumstances to identify individuals or organisations without their consent should be referred to Editorial Policy.*”<sup>13</sup>

In a small number of countries, the use of hidden cameras is not allowed under any circumstances. Following the European Court of Human Rights decision in the case of *Haldimann v. Switzerland*, summarised above, it is questionable whether this is still in line with European standards.

In Spain, the Supreme Court has taken a very strict approach has been adopted towards at least the *use* of undercover filming materials, with the broadcast of such materials being taken as a *per se* interference with privacy rights (Decision of 18 December 2008). On 30 January 2012, the Spanish Constitutional Court confirmed that the use of hidden

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<sup>11</sup> Flemish Council for Journalism Ethics, *VMMa NV v. Clint.be*, 10 February 2011, as reported at <http://merlin.obs.coe.int/iris/2011/3/article8.en.html>

<sup>12</sup> BBC Editorial Guidelines, Section 7: Privacy / Secret Recording, <http://www.bbc.co.uk/editorialguidelines/guidelines/privacy/secret-recording>

<sup>13</sup> *Ibid.*, section 7.4.16.

cameras in journalism was unconstitutional, regardless of the public relevance of the investigation's purpose.<sup>14</sup>

Bulgaria operates an apparently absolute approach pursuant to Article 32(2) of its Constitution which prevents anyone being followed, photographed or filmed or recorded except where such actions are permitted by law. There is also a dedicated offence under Article 339a of the Penal Code criminalising the selling without a permit of a special technical device, a term that includes hidden cameras. In 2005, a journalist, George Buhnici, was convicted and fined pursuant to these provisions for using a camera hidden in sunglasses to film corrupt practices at state run duty free shops and in customs.

*Prepared by Peter Noorlander, Director of Media Legal Defence Initiative, London in cooperation with HRA*



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<sup>14</sup> Spanish Constitutional Court Decision 12/2012 of 30 January 2012, Official Journal no. 47, 24 February 2012, reported at <http://merlin.obs.coe.int/iris/2012/4/article21.en.html>