

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

### Bulletin LXIII: SUMMARY OF EUROPEAN COURT DECISIONS ON THE RIGHT TO FREEDOM OF EXPRESSION: January 2016

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During January 2016, the European Court of Human Rights decided the following noteworthy cases involving the right to freedom of expression and related topics:

- ***Frumkin v. Russia***, application no. 74568/12, 5 January 2016 (failing to ensure peaceful protest and detention of protestors breached the right to freedom of assembly)
- ***Genner v. Austria***, application no. 55495/08, 12 January 2016 (defamation conviction for insulting the memory of a minister the day after her death did not violate right to freedom of expression)
- ***Szabó and Vissy v. Hungary***, application no. 37138/14, 12 January 2016 (legislation providing broad powers of surveillance without adequate safeguards against abuse violated the right of privacy)
- ***Bărbulescu v. Romania***, application no. 61496/08, 12 January 2016 (interception of electronic communications by employer did not violate right to respect for private life)
- ***Görmüş and Others v. Turkey***, application no. 49085/07, 19 January 2016 (search and seizure of documents to reveal identity of whistleblower violated right to freedom of expression)
- ***De Carolis and France Televisions v. France***, application no. 29313/10, 21 January 2016 (defamation conviction for broadcasting allegations of involvement terrorist attack violated right to freedom of expression)

These cases concerned the following issues:

- ***Frumkin v. Russia*, application no. 74568/12, 5 January 2016 (failing to ensure peaceful protest and detention of protestors breached the right to freedom of assembly)**

This concerned a participant in a demonstration against alleged election rigging following the 2011 and 2012 Duma and Presidential elections in Russia. The demonstration was to be held on a river embankment and in a neighbouring park and had been authorised by the city authorities. On the day, however, the protestors found that access to the park had been closed off by police. Following unsuccessful negotiations with the police, the organisers called for a 'sit in'. As the crowd grew larger, unrest ensued and the police made several arrests. The protestors lodged formal complaints of police violence but these were dismissed and instead the several of the protestors were convicted of 'organising mass disorder' and similar offences, resulting in the imposition of prison sentences for some of them of up to four years. The applicant, who had only received a 15 day sentence, appealed to the European Court of Human Rights.

The European Court of Human Rights held that the conviction and imposition of the prison sentence as well as the failure of the police to ensure the peaceful assembly violated the right to freedom of assembly. By excluding the park from the protest, going against what had previously been agreed between the organisers and the authorities, and by failing to communicate with the protestors but instead moving in aggressively to disperse them, police had failed to ensure the peaceful conduct of the protest. They had also failed to prevent disorder and to secure the safety of all the citizens involved. As regards the applicant's arrest and detention for fifteen days, the Court held that this was grossly disproportionate. The Court also held that the trial against the applicant had been unfair, because the Russian courts had based their judgment exclusively on standardised documents submitted by the police and had refused to accept additional evidence.

- ***Genner v. Austria***, application no. 55495/08, 12 January 2016 (defamation conviction for insulting the memory of a minister the day after her death did not violate right to freedom of expression)

This concerned an individual who worked for an NGO that supports asylum seekers. The day after the death of Austria's Minister for Interior Affairs, the individual posted a statement on the NGO's website that read, "The good news for the New Year: L.P., Minister for torture and deportation is dead." The statement said that the Minister had been "a desk criminal just like many others there have been in the atrocious history of this country", that she had been "the compliant instrument of a bureaucracy contaminated with racism" and that "no decent human is shedding tears over her death". The late Minister's widower filed a private prosecution for defamation against Mr Genner and the NGO, and they were convicted. The Austrian court concluded that the accusations, on the day after her death, overstepped the limits of acceptable criticism.

The European Court of Human Rights held that the defamation conviction did not violate the right to freedom of expression. On the one hand, Mr Genner's statement concerned an issue of public interest and could be seen as a contribution to a political debate of public interest – the treatment of asylum seekers under legislation introduced by the minister. Furthermore, the minister was undoubtedly a public figure and so she and her heirs should tolerate greater criticism than an ordinary individual. However, the press release was issued on the day after her unexpected death, giving the words added impact, and the applicant's statement was published within the immediate period of her family's grief and was likely to cause considerable damage to the late Minister's reputation. The Court considered that "[t]o express insult on the day after the death of the insulted person contradicts elementary decency and respect to human beings ... and is an attack on the core of personality rights." The Court emphasised that the statement did not discuss the policies introduced by the minister but was instead highly personal and compared her to a high-ranking Nazi-era official.

- ***Szabó and Vissy v. Hungary***, application no. 37138/14, 12 January 2016 (legislation providing broad powers of surveillance without adequate safeguards against abuse violated the right of privacy)

This was an application by two individuals who worked for an NGO that was frequently critical of the Hungarian government. They complained that under new legislation introduced in 2011, a special police task force was empowered to conduct secret house searches, electronic surveillance and intercept mail. They filed a constitutional complaint which was dismissed, and

the applicants complained to the European Court of Human Rights arguing that the legislation violated their right to privacy.

The European Court of Human Rights held that the legislation violated the right to respect for private life. It held that it was clear that the applicants belonged to a targeted group, since they worked for an NGO that was critical of the government. It was likely that the applicants might have been targeted because of their affiliation with a watchdog NGO, and the Court emphasised that as “staff members of a watchdog organisation, whose activities have previously been found similar, in some ways, to those of journalists ... any fear of being subjected to secret surveillance might have an impact on [their] activities”. The Court ruled that the legislation failed to provide safeguards which were sufficiently precise, effective and comprehensive in as far as the ordering, execution and potential redressing of surveillance measures were concerned. The Court was particularly critical that under the legislation, virtually any person in Hungary could be subjected to secret surveillance, because the legislation failed to describe the categories of persons who, in practice, might have their communications intercepted. The Court also criticized the legislation for failing to limit the duration of surveillance measures, as well as the fact that there was no judicial supervision. As regards accountability, the Court noted that individuals affected by surveillance had no redress whatsoever and the bi-annual reports to parliament were secret. This was not sufficient to provide adequate safeguards against abuse of the powers.

- ***Bărbulescu v. Romania***, application no. 61496/08, 12 January 2016 (interception of electronic communications by employer did not violate right to respect for private life)

This concerned an individual who had been dismissed from his job for unauthorised use of email during work hours. He was a sales engineer and, at his employers' request, had set up a Yahoo Messenger account for the purpose of responding to clients' enquiries. In July 2007, he was notified that the use of his account had been monitored and that it showed he had been using the account for personal purposes. His contract was terminated for breach of the company's internal regulations that prohibited the use of company resources for personal purposes.

The European Court of Human Rights held that this did not violate his right to respect for private life. The Court did not consider it unreasonable for an employer to verify that employees were completing their professional tasks during working hours, and noted that the employer had accessed Mr Bărbulescu's account in the belief that it contained client-related communications. They had not intended to search for private communications, and Mr Bărbulescu had been able to raise his arguments related to the alleged breach of his private life and correspondence before the domestic courts. The domestic courts had used the transcript of his communications only to the extent that it proved that he had used the company's computer for his own private purposes during working hours and the identity of the people with whom he had communicated was not revealed.

- ***Görmüş and Others v. Turkey***, application no. 49085/07, 19 January 2016 (search and seizure of documents to reveal identity of whistleblower violated right to freedom of expression)

This concerned the publisher, editor and journalists working for a weekly magazine which had published an article commenting on a military list that divided the media into categories of

'friendly' and 'non-friendly'. The article was based on confidential documents which had been given to the journalists by a whistleblower. Following a complaint by the Chief of Staff of the armed forces, a Military Court ordered a search of the magazine's offices, demanding electronic and paper copies of the files stored on all private and professional computers, in the archives and on CDs and USB sticks. The journalists handed over the materials but appealed against the search warrant, complaining that this violated the right to protection of journalists' sources. Their appeals were turned down by the Turkish courts, and the journalists appealed to the European Court of Human Rights.

The European Court of Human Rights held that the search and seizure of the documents violated the right to freedom of expression. The Court noted in order to identify the State employees who had handed over the confidential information, the judicial authorities had raided the journalists' workplace unannounced and gained access to all of their systems and documents, transferring data from all the magazine's computers. This was a far more serious act than a mere order to divulge the source's identity and extended far beyond the initial request by the military prosecutor's office, which had been to identify the whistleblower. This could deter potential sources from assisting the press in informing the public on matters of public interest, such as the involvement of the army in politics.

With regard to the protection of whistle-blowers who were State officials, the Court noted that the investigation had been intended to identify those responsible for the leak. The Court acknowledged that while whistleblowers could be required to go through internal administrative procedures in order to draw the wrongdoing they had uncovered to the attention of their superiors, Turkish law did not provide for such a procedure. Therefore, the journalists could not be criticised for having published the contested information. The Court acknowledged that the confidential nature of information concerning the internal organisation and functioning of the armed forces was in principle justified, but that this should not be protected at any cost – and it should not stop legitimate debate about the actions of the armed forces from taking place. Moreover, the Court noted that the reasons for which the contested documents had been classified as confidential were not justified, as the Government had not shown that there had been a detrimental impact as a result of their disclosure.

- ***De Carolis and France Televisions v. France***, application no. 29313/10, 21 January 2016 (defamation conviction for broadcasting allegations of involvement terrorist attack violated right to freedom of expression)

This concerned the defamation conviction of a journalist and a TV company for a documentary in which families of those killed in 9/11 (the attack on the Twin Towers in New York) had alleged that the Saudi Prince Turki Al Faisal had assisted and financed the Taliban and al-Qaeda when he was head of the intelligence service in Saudi Arabia, and that he had been aware of their terrorist intentions. The documentary suggested that he had never been prosecuted because of diplomatic immunity. The French courts had considered that while the journalists had not offered to prove the truth of the allegations, they had invoked the defence of good faith. The French courts found that given the extreme seriousness of the allegations – involvement in terrorism – this was not sufficient; they held that the journalists should have demonstrated far greater prudence and objectivity. The journalist and the broadcaster appealed to the European Court of Human Rights.

The European Court held that the defamation conviction violated the right to freedom of expression. The Court observed that the facts reported concerned a subject of general interest, and that the Prince, as a public figure, should tolerate more criticism than an ordinary person. The Court also considered that the documentary contained statements of fact as well as value judgments, and that the statements which the Prince had sued for were statements of opinion rather than factual allegations. The Court then examined whether the “factual basis” for the value judgments was sufficient. It noted that there had been complaints from the families of the 9/11 victims, and that there had been extensive legal proceedings in the US concerning the Prince’s diplomatic immunity (he had been appointed ambassador in the US) and the possibility of lifting this immunity. The Court also found that the journalist had distanced herself from the victims’ testimony, and that the Prince’s lawyers had been offered to have their say during the documentary. Furthermore, a former US Deputy Secretary of State had been interviewed and testified clearly in favour of the Prince. In all, the Court considered that the journalists had acted responsibly in broadcasting the allegations.

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