Case Law from the European Court of Human Rights in 2016

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Introduction

This article provides an overview of some of the most significant recent freedom of expression rulings from the European Court of Human Rights.[i] As in previous years a major part of the judgments concern defamation. A landmark ruling on access to information was issued in 2016[ii] and in the field of right to protest there have been quite a few noteworthy cases. The Court has also developed its case law concerning liability for comments posted on the internet.[iii] The article has been divided into thematic sections to give a better overview.

Surveillance

In the field of surveillance, the case of Szabó and Vissy v. Hungary is interesting.[iv] The issue at stake was whether a surveillance section of the Hungarian Police Act relating to an anti-terrorism task force (TEK) violated Article 8 of the Convention because it was not sufficiently detailed and precise and did not provide sufficient guarantees against abuse and arbitrariness. It empowered the TEK to search and keep homes under secret surveillance, to check post and parcels, to monitor electronic communications and computer data transmissions and to make recordings of any data acquired through these methods in situations concerning the prevention, tracking and repelling of terrorist acts in Hungary, or the gathering of intelligence necessary for rescuing Hungarian citizens in distress abroad. The Court noted that “domestic law must not only be accessible and foreseeable in its application, it must also ensure that secret surveillance measures are applied only when “necessary in a democratic society”, in particular by providing for adequate and effective safeguards and guarantees against abuse”. [v] Furthermore, domestic law “must be sufficiently clear to give citizens an adequate indication as to the circumstances in which and the conditions on which public authorities are empowered to resort to any such measures”. [vi] The Court emphasized that the potential of cutting-edge surveillance technologies to invade citizens’ privacy made it essential to interpret the requirement “necessary in a democratic society” as requiring “strict necessity”. This was to be understood in the way that a measure of secret surveillance would be in compliance with the Convention only if “strictly necessary, as a general consideration, for the safeguarding the democratic institutions and, moreover, if it is strictly necessary, as a particular consideration, for the obtaining of vital intelligence in an individual operation”. [vii] The Court underlined that both the European Court of Justice and the UN Special Rapporteur require secret surveillance measures to answer to strict necessity. In the present case it was unclear whether surveillance would only be used in cases of
necessity and the government had failed to illustrate the practical effectiveness of the supervision arrangements with appropriate examples. Furthermore, the Court noted that it was unclear how many times surveillance permission could be renewed. The Court thus found that the strict necessity requirement had not been met and there had thus been a violation of Article 8 of the Convention. The Court in this judgment took important stand by emphasizing that strict necessity is required to justify interference with the right to private life in cases of surveillance.

Another judgment issued in early 2016 concerned employers' surveillance of their employees' email correspondence. In the case of *Barbulescu v. Romania*, the employer of Mr. Barbulescu had, through surveillance of his Yahoo messenger account (opened for the purpose of responding to clients' enquiries), come to learn that he had used it for private correspondence with his brother and fiancée relating to personal matters such as his health and sex life. Mr. Barbulescu was subsequently dismissed. The Court found it reasonable for an employer to seek to verify that employees were in fact conducting professional tasks during working hours. Furthermore the Court noted that Mr. Barbulescu’s account was accessed in good faith and that the domestic courts had only used the transcripts to the extent it was necessary to the allegations. The Court therefore found that the domestic courts had struck a fair balance between the competing interests. The Court found no violation of Article 8, however, the judgment is not final, as the case had been referred to the Grand Chamber.

### Criminal and civil defamation

As in previous years, the Court dealt with a large number of cases concerning defamation in 2016. An interesting defamation case is *Genner v. Austria* which dealt with issues of insult to a public person and value judgments. Mr. Genner, who worked for an association supporting asylum seekers and refugees, had published a statement on the association’s website about the Minister for Interior Affairs, who had unexpectedly died on the previous day. The statement read as follows: “The good news for the New Year: L.P., Minister for torture and deportation is dead.” Mr. Genner had, apart from referring to several individual stories of asylum seekers, stated 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’. Her widower filed a private prosecution for defamation against Mr. Genner and the association. The Austrian Supreme Court found that the applicant’s statements were excessive value judgments without factual basis and should thus not be protected. According to the European Court of Human Rights “to 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 found that, “even if regarded as value judgements, such serious and particularly offensive comparisons immediately after the death of the politician in question would demand a particularly solid factual basis”. In this respect the Court considered that Mr. Genner had not made any distinction between the politician herself and the politics she stood for, from his point of view. The applicant argued that a factual basis for his was apparent in a TV interview she gave after the conviction of four police officers who had been found guilty of the torture of a person being detained pending expulsion. However, the Court did not find it proven that the politician had ordered or at least tolerated the torture. The Court found that the reasons given by the national courts were relevant and sufficient, and that the fine of EUR 1,200 was proportionate. Accordingly, there had been no violation of Article 10. The judgment shows that even if there is a very broad right to freedom of expression in connection with speech about politicians, there are limits to how far one can go in a personal attack. It is interesting that the Court includes the need for “elementary decency” in its argumentation and particularly points to the fact that the politician had just died. The outcome may well have looked different had the politician been alive. This indicates
that the Court is, in fact, also seeking to protect the family left behind.

A number of defamation cases from 2016 concern issues where the Court’s case law is clear and well-established. In *Rodriguez Ravelo v. Spain*, the Court found the conviction of a Spanish lawyer for insulting a judge disproportionate.[xii] In *Koniuszewski v. Poland* the Court found it a violation of Article 10 that a journalist had been convicted for defamation after writing a series of articles about the widespread practice in Poland of the sale of adulterated motor fuel. The journalist had written about a matter of public interest. Furthermore the information was already in the public domain, when the article was published.[xiii]

The judgment *Cidad v. Switzerland* concerned a professor who had sued the organization Cidad for describing him as an anti-Semite. Cidad based on his views on the state of Israel.[xiv] Cidad was subsequently convicted for defamation as the Swiss Courts found it particularly grave to describe a person as an anti-Semite in a case where no such behavior had been proven. The European Court found no violation of Article 10 as the sanction was minor (the organization had been ordered to take down the defamatory articles, publish the key parts of the judgment and pay the legal costs relating to the case). In *De Carolis and France Télévisions v. France*, the conviction of a television company for defamation after broadcasting a report implicating a Saudi Prince in the attacks of 11 September 2001 amounted to a violation of Article 10.[xv]

The case *Sousa Goucha v. Portugal* concerned a refusal to prosecute in response to a joke made during a Portuguese television comedy show where a homosexual celebrity was referred to as “female”. The Court took note that “in their decisions, the domestic courts considered that the television show and its host did not have any intention to attack the applicant’s sexual orientation.”[xvi] The Court further noted that the reason for refusing to prosecute seemed rather to have been the weight given to freedom of expression in the circumstances of the case and the lack of intention to attack the applicant’s honor.[xvii] Accordingly, there was no violation of Article 14 taken together with Article 8 of the Convention. In *Ärztekammer Für Wien and Dorner v. Austria* the Court found it permissible under Article 10 of the Convention that the president of the Vienna Chamber of Medical Doctors had been convicted for defamatory statements against a private company that planned to provide radiology services. The Court found that branding the company a “locust” required a sufficient factual basis. There was thus no reason to clarify whether the statement was one of fact or a value judgment.[xviii] The applicant had implied that the private company placed economic interests above those of its patients which was a particularly serious allegation affecting its reputation. Since there was no factual basis for the allegation, there had been no violation of Article 10.

A very interesting judgment where the issue of defamation allegations was connected to the protection of children against abuse was issued in the case of *M.P. v. Finland*. A Finnish father sued the mother of his child for defamation after she alleged that he had sexually abused the child. The Finish courts found that there was no factual basis for the allegations and the mother was convicted and ordered to pay a moderate fine, as well as non-pecuniary compensation and costs and expenses to the father. The European Court noted that two countervailing interests should be considered, each of which are of high social importance, namely the need to safeguard children from abuse by their own parents, and the need to protect parents from unwarranted interference with their right to respect for their private and family life or the risk of unjustified arrest and prosecution.[xx] The Court further noted that “the seriousness of child abuse as a social problem requires that persons who act in good faith in what they believe are the best interests of the child, should not be influenced by the fear of being prosecuted or sued when deciding whether and when their doubts should be communicated to health care professionals or social services …The duty toward the child in making these decisions should not be hampered by a risk of exposure to claims by a distressed parent if the suspicion of abuse proves unfounded.”[xxi] However, acts motivated by a personal grievance or antagonism or an expectation of personal advantage should be discouraged, including in the context of disputes relating to the custody or visiting rights concerning a child.[xxii] The Court welcomed the
recent removal of the possibility of imposing imprisonment for defamation in Finland. However, it also noted that the criminal charges against the applicant and convicting her for defamation could not be justified by a “pressing social need”, especially when taking into consideration the interest of protecting children and in this regard the risk of a chilling effect. Hence, there had been a violation of Article 10. The in this case Court took a very important stand when underlining that even though false accusations should be discouraged the need to protect children prevails of the individual’s right to privacy and to avoid damage of reputation.

A couple of judgments concerned complaints about authorities. The Court found violations of Article 10 in two separate cases from Bulgaria concerning complaints about judges. In another Bulgarian case, Marinova and others v. Bulgaria, the Court found a violation of Article 10 after the applicants in three separate cases had been convicted for defamation following their complaints about authorities (a teacher and several police officers). The Court noted that “private citizens must in principle be able to make complaints against public officials to their hierarchical superiors without the risk of criminal sanctions, even where such complaints amount to allegations of a criminal offence and even if their allegations prove on examination to be groundless.”

In a defamation ruling from the United Kingdom, Gaunt v. the United Kingdom, a journalist had called an interviewee politician a Nazi, an ignorant pig and a fascist, among other insults, and was subsequently dismissed. The ECHR found the application manifestly ill-founded as the national courts had properly balanced the rights at stake. Two judgments during 2016 concerned satirical publications. In the first judgment, Instytut Ekonomichnykh Reform, TOV v. Ukraine, an editorial company in Ukraine had published a piece about a politician and was subsequently convicted for defamation. The Court noted that the statements were neither particularly serious in tone nor particularly damaging in substance. The national courts had failed to recognize sufficiently that the case involved a conflict between freedom of expression and the protection of a person’s reputation and conduct a sufficiently careful balancing exercise between them. The Court thus found a violation of Article 10. The other judgment, Grebneva and Alisimchik v. Russia, concerned the conviction of journalists for a satirical publication found to be insulting to regional prosecutor. The Court found that the domestic courts had “failed to take any account of the social and political context in which it was made, and to examine whether it involved a matter of general interest” and “did not take into account the satirical nature of the publication and the irony underlying it” while also failing “to balance the regional prosecutor’s right to his reputation against the applicant’s freedom of expression and their duty, as journalists, to impart information of general interest”. There had therefore been a violation of Article 10. It is worth noting the Court in line with its previous case law takes a strong stand for the right to satirical publications.

Access to information

The Grand Chamber in 2016 issued a landmark judgment on access to information in the case of Magyar Helsinki v. Hungary. The case concerned the request of the Hungarian Helsinki Committee, Magyar Helsinki Bizottság, for access to government-held information about ex officio defense counsels. The Court has in its case law stressed the relevance of access to information to an effective protection of the rights enshrined in Article 10 of the Convention. However, whereas there is right under Article 8 to access personal information, there is no general right under Article 10 to access government-held information. The Court found that four criteria determine whether access to government information should be granted. These are 1) the purpose of the information request; 2) the nature of the information sought; 3) the role of the applicant; 4) whether the information is ready and available. Concerning the first point, the Court emphasized the purpose of gathering information should be to share it with others. The second point refers to the fact that the information
must meet a public interest test. With regard to the third point, the Court noted that access to information should be given to “public watchdogs” and in this regard noted that this could be not only journalists and NGOs but also academic researchers, authors of publications on issues of general interest, bloggers, popular users of social media. On the fourth point the Court noted that whether the information requested is ready and available ought to constitute an important criterion in the overall assessment of whether access should be given. In the present case, the applicant NGO wished to exercise the right to impart information on a matter of public interest and the Court found that the four criteria had been met wherefore it stated that there had been a violation of Article 10. Though the Court has not fully acknowledged the right to access to information to the same extent as other international bodies the judgment is a positive move in the right direction.

In another case concerning access to information, Kalda v. Estonia, the Court found that a prisoner, who wished to access the official gazette and jurisprudence, had the right to access legal information on the internet. The Court noted that though “Article 10 cannot be interpreted as imposing a general obligation to provide access to the Internet, or to specific Internet sites” in the present case “since access to certain sites containing legal information is granted under Estonian law, the restriction of access to other sites that also contain legal information constitutes an interference with the right to receive information.” There had thus been a violation of Article 10.

Protest

Several protest cases from 2016 concern the problems protesters face in Azerbaijan. In Ahad Mammadli v. Azerbaijan and Ibrahimov and others v. Azerbaijan the Court found that the arrest of peaceful protesters was a violation of Article 11. Similarly in Hajibeyli and others v. Azerbaijan arrests followed by detention in relation to protests was a violation of Article 5(1) of the Convention. In the case of Huseynli and Others v. Azerbaijan, the applicants were arrested prior to a demonstration for disobeying a lawful order of a police officer and or minor hooliganism. All three applicants were members of opposition parties or groups. The applicants claimed that the institution of administrative proceedings and related detention had been an arbitrary practice in Azerbaijan, aimed at preventing or discouraging opposition activists from participating in political rallies. The Court agreed and found violations of Article 11, Article 5 and Article 6. In the Hungarian case Karácsony and Others v. Hungary the Court found it a violation of Article 10 that members of parliament (the opposition) had no proper way of challenging a fine for showing billboards and used a megaphone during parliamentary votes. The Court found that the interference with their right to freedom of expression was not proportionate to the legitimate aims pursued because it was not accompanied by adequate procedural safeguards. In this regard the Court noted that though in principle, the rules concerning the internal functioning of national parliaments, as an aspect of parliamentary autonomy, fall within the margin of appreciation of the Contracting States, the rules concerning the internal operation of Parliament should not serve as a basis for the majority abusing its dominant position vis-à-vis the opposition. In the case Savda v. Turkey (No. 2) the Court found a violation of Article 10 after a protester had been arrested for promoting abstention from military service. He and four persons had protested in front of the Israeli embassy when he read a declaration in solidarity with people abstaining from military service. In Belge v. Turkey a Turkish opposition politician had been convicted for incitement to violence. The politician had held a speech at a gathering calling for peace and better prison conditions for Abdullah Öcalan, the leader of the PKK (the Workers’ Party of Kurdistan). He had concluded his speech by stating “You can disperse now in silence”. The Court found that the reasons adduced by the national courts were not “relevant and sufficient” for the purposes of Article 10.

Russia was also found to have violated Article 11 in several rulings from 2016. In the case of
Yaroslav Belousov v. Russia, the Court found that a two years and three months prison sentence for participating in a lawful demonstration and throwing a small object towards the police was a violation of Article 11. Novikova and Others v. Russia concerned the termination of demonstrations followed by the arrest and prosecution of the applicants for their involvement. Kasparov v. Russia, the authorities had detained Garry Kasparov at the Sheremetyevo Airport in Moscow in May prior to an opposition political demonstration, preventing him from attending. The Court found his detention a violation of Article 5 and Article 11.

Information obtained illegally and publication of confidential material

Three times in 2016 the Court found no infringement of the right to freedom of expression for journalists involved in illegal activities in connection with newsgathering.

In the first case, Salihu and Others v. Sweden, Three Swedish journalists wanted to show how easily illegal weapons can be obtained in Sweden, after a number of shooting episodes had taken place in the town of Malmö. The journalists purchased a firearm on the black market, which they then surrendered to the police before. The following day they published an article in the press. The journalists were subsequently convicted of illegally possessing a firearm and sentenced to pay fines. The Court found that the issue was indeed a matter of public interest. However, there was no interference with the publication as such. The journalists must have known that they acted in breach of criminal law. Furthermore, the Court found that the problems with illegal weapons could have been demonstrated in a different way than by breaking the law. Finally, the domestic courts had balanced the competing interests at stake. The Court therefore declared the case inadmissible. In Boris Erdtmann v. Germany a journalist was convicted for carrying a weapon onboard of an airplane. Finally, in the case concerning Brambilla and Others v. Italy the Court found that the conviction of journalists for intercepting police radio was not a violation of Article 10. In all three cases the sanctions imposed on the journalists were rather small and would probably have been more severe without the journalistic context. The cases show that the Court has taken a clear stand on journalists violating the law when the sanctions imposed are lenient. It is curious, however, that the Court decided to declare Salihu and Others v. Sweden and Erdtmann v. Germany were held inadmissible, while Brambilla and Others v. Italy was declared admissible.

An interesting Grand Chamber judgment from 2016 is Bédat v. Switzerland concerning the conviction of a journalist for the publication of materials covered by the secrecy of a pending investigation. The Grand Chamber overturned the ruling of the Chamber when finding that Article 10 had not been violated. The Grand Chamber balanced the applicant’s right to inform the public and the public’s right to receive information with the public and private interests protected by the prohibition on disclosing information covered by investigative secrecy. As a journalist the applicant could not have been unaware of the confidentiality of the material. The article painted a very negative picture of the accused. Furthermore, the Court found that the applicant had “failed to demonstrate how the fact of publishing records of interviews, statements by the accused’s wife and doctor and letters sent by the accused to the investigating judge concerning banal aspects of his everyday life in detention could have contributed to any public debate on the ongoing investigation”. The Court then considered the risk of the article influencing the criminal proceedings and the infringement on the private life of the accused and finally concluded that the fine imposed on the applicant had been proportionate. Another case concerning publication of confidential information is Görmü? and Others v. Turkey. Here the publisher where the applicants worked had published an article based on documents classified as “confidential” by the general staff of the armed forces. The article described how journalists assumed to be “hostile” to the armed forces were systematically excluded from certain invitations and activities. The military court subsequently ordered an extensive search and
seizure operation in order to identify the journalistic source. The Court found that the search on the magazine’s premises and the gathering of all information of computers and storage was clearly disproportionate and likely to both have a negative effect on the applicants’ relationships with all their sources and have a grave chilling effect on other journalists and whistleblowers. There had thus been a violation of Article 10.

Freedom of expression and liability on the internet

The last but certainly not the least interesting judgment selected for this yearly review is *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary.*[iv] The two applicants were the self-regulatory body of the Hungarian Internet content providers and the owner of one of the major Internet news portals in Hungary. The applicants allowed users to comment on the publications appearing on their portals. Comments could be uploaded following registration and were not previously edited or moderated by the applicants. Readers were advised that the comments did not reflect the portals’ own opinion and that the authors of comments were responsible for their contents. Furthermore, the applicants had made it possible for readers to notify the service provider of any comment of concern and request its deletion.[v] In February 2010 the two applicants published and republished an article critical of a major real-estate website. Both publications generated comments that criticized the real-estate website and some comments used vulgar phrases. One user comment stated that: “People like this should go and shit a hedgehog and spend all their money on their mothers’ tombs until they drop dead.”[vi] Subsequently the company managing the real-estate website sued both applicants for injuries to its business reputation. The Hungarian Supreme Court found that “the applicants, by enabling readers to make comments on their websites, had assumed objective liability for any injurious or unlawful comments made by those readers.”[vii] The Supreme Court did not accept the applicants’ argument that they were only intermediary providers which allowed them to escape any liability for the contents of comments, other than removing them if injurious to a third party. The European Court stated that the present case differed from the Court’s ruling in *Delfi AS v. Estonia* since although the comments were offensive and vulgar they: “did not constitute clearly unlawful speech; and they certainly did not amount to hate speech or incitement to violence”. The Court found that holding the applicant liable would be difficult to reconcile with the existing case-law according to which punishment of a journalist for assisting in the dissemination should not be envisaged unless there are particularly strong reasons for doing so. The Court noted that applicants had immediately removed the comments from their websites upon notification of the initiation of civil proceedings. Furthermore, the applicants took general measures to prevent or remove defamatory comments on their portals and anybody could request the removal of unlawful comments. Whereas the domestic courts held that, the applicants should have foreseen the possibility of unfiltered comments being in breach of the law, the Court stated that this approach “amounts to requiring excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet”. According to the Court, liability could be imposed on Internet news portals that fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties. However, the present case “did not involve such utterances”. There had thus been a violation of Article 10. This ruling is very important for the rights of intermediaries. Especially since in the present case the applicants had both taken general measures concerning defamatory comments and immediately removed the comments upon notification of the proceedings. Had the Court found no violation it would have been practically impossible for intermediaries in the future to filter and censor all comments in advance in order to avoid liability.

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[v] Ibid., para. 59.

[vi] Ibid., para. 62.

[vii] Ibid., para. 73.


[x] Ibid., para. 45.

[xi] Ibid., para. 46.


[xvi] Sousa Goucha v. Portugal, Application No. 70434/12, 22 March 2016, para. 64.

[xvii] Ibid., para. 65.


[xx] Ibid., para. 52.

[xxi] Ibid., para. 55.

[xxii] Ibid.

[xxiii] Ibid., para. 56.


[xxvi] Ibid., para. 90.

[xxviii] Instytut Ekonomicznych Reform, TOV v. Ukraine, Application No. 61561/08, 2 June 2016, para. 58.

[xxix] Ibid., para. 64.


[xxxi] Ibid., para. 64.


[xxxv] Ibid. para. 168.


[xxxviii] Ibid., para. 45.


Ibid., para. 93.


Ibid., para. 143.

Ibid., para. 147.

Savda v. Turkey, Application No. 2458/1, 15 November 2016.

Belge v. Turkey, Application No. 50171/09, 6 December 2016, para. 14. See also Bilen et Coruk v. Turkey, Application No. 14895/05, 8 March 2016 (conviction of two individuals after distribution of leaflets concerning the situation of Kurds in Turkey was a violation of Article 10).

Ibid., para. 36.

Yaroslav Belousov v. Russia, Applications Nos. 2653/13 and 60980/14, 4 October 2016.

Novikova and Others v. Russia, Applications Nos. 25501/07, 57569/11, 80153/12 and 35015/13, 26 April 2016.


[lvi] On 1 July 2014, a Chamber of the Court found a violation of Article 10 (by four votes to three) because the fining of the applicant (4,000 Swiss Francs) did not meet a “pressing social need”.


[lviii] Ibid., para. 81.

[Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, Application No. 22947/13, 2 February 2016.]

[lii] Ibid., para. 6-8.

[liii] Ibid., para. 14.

[lxiv] Ibid., para. 22.


[lxvii] Ibid., para. 79.
[lxxvii] Ibid., para. 80.

[lxxviii] Ibid., para. 82.

[lxxix] Ibid., para. 91.

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