



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF HURBAIN v. BELGIUM

(Application no. 57292/16)

JUDGMENT

Art 10 • Freedom of expression • Newspaper publisher ordered to anonymise the online archive of an article printed twenty years earlier, to protect the right to be forgotten of a person who had caused a fatal accident • Balancing of the interests at stake in conformity with the Court's case-law • Identity of private person who was not known to the public did not enhance the public interest of the impugned article, which, by being kept online, was liable to create a "virtual criminal record" • Damage caused to the individual named in view, among other factors, of the length of time since publication of the original article • Integrity of original version of the archived article preserved • Relevant and sufficient reasons • Proportionate measure • Obligation for media to check their archives and weigh up the rights at stake only in the event of an express request to that effect

STRASBOURG

22 June 2021

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
04/07/2023**

This judgment may be subject to editorial revision.

In the case of Hurbain v. Belgium,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Georgios A. Serghides, *President*,

Paul Lemmens,

Georges Ravarani,

María Elósegui,

Darian Pavli,

Anja Seibert-Fohr,

Peeter Roosma, *judges*,

and Milan Blaško, *Section Registrar*,

Having regard to:

the application (no. 57292/16) against the Kingdom of Belgium lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Belgian national, Mr Patrick Hurbain (“the applicant”), on 26 September 2016;

the decision to give notice to the Belgian Government (“the Government”) of the application;

the parties’ observations;

the comments submitted by G., who was granted leave to intervene as a third party by the President of the Section;

Having deliberated in private on 23 March and 18 May 2021,

Delivers the following judgment, which was adopted on the last-mentioned date:

INTRODUCTION

1. The application concerns a civil judgment against the applicant, the publisher of the Belgian daily newspaper *Le Soir*, ordering him to anonymise, on the basis of the right to be forgotten, the electronic archived version of an article which mentioned the full name of G., the driver responsible for a fatal road accident in 1994. The applicant relies on Article 10 of the Convention.

THE FACTS

2. The applicant was born in 1959 and lives in Genappe. He was represented by Mr A. Berenboom, lawyer.

3. The Belgian Government (“the Government”) were represented by their Agent, Ms I. Niedlispacher, of the Federal Justice Department.

I. BACKGROUND TO THE CASE

4. The applicant is the publisher of the newspaper *Le Soir*, one of Belgium's leading French-language newspapers.

5. In a 1994 print edition of the newspaper an article reported, among other items, on a car accident caused by G. that had led to the death of two people and injured three others. The article mentioned G.'s full name. G. was convicted in connection with the incident in 2000. He served his sentence and was formally rehabilitated in 2006.

6. Since 13 June 2008 the newspaper's website has provided an electronic version of its archives dating back to 1989, including the above-mentioned article. When the archives were published online, and throughout the proceedings before the domestic courts, the articles were freely accessible on the website.

7. On 15 June, 7 July and 19 August 2010, G. wrote to the legal department of the public limited company Rossel et Compagnie, which owned *Le Soir*, requesting that the article be removed from the newspaper's electronic archives or at least rendered anonymous. In support of his request G. referred to the fact that he was a doctor and that the article appeared on the list of search results when his name was typed into several search engines.

8. On 24 January 2011 the legal department of Rossel et Compagnie refused to remove the impugned article from the archives, but stated that it had given notice to the administrator of the search engine Google to delist the article. A reminder was sent to the administrator of Google on 23 February 2011. Before the domestic courts, the applicant stated that these steps had produced no response. The Court has not been informed of any subsequent follow-up action.

9. On 30 March 2012 G. brought the case before the Council for Journalistic Ethics (*Conseil de déontologie journalistique* – "the CDJ"), the self-regulatory body of the French and German-speaking media in Belgium.

10. On 18 April 2012 the CDJ declared the request inadmissible on the grounds that the dispute did not concern a matter of journalistic ethics. It pointed to the solutions that had been adopted by Belgian newspaper publishers with regard to electronic press archives, namely the right to rectification (in cases where the information was inaccurate) and the right of electronic communication (in cases where the information was incomplete).

II. DOMESTIC COURT PROCEEDINGS

11. In a summons served on 24 May 2012 G. instituted proceedings against the applicant in the Neufchâteau Court of First Instance, seeking to have the online press archive in question anonymised on the basis of Article 1382 of the Civil Code. In the alternative, should the applicant

actually provide irrefutable technical evidence of the impossibility of making the information anonymous, G. sought an order requiring him to add a “no-index” tag to the online version of the article to prevent it from appearing on the list of results when his name was typed into the search engine of the newspaper’s website. In G.’s view, by keeping the article online without anonymising it or adding a no-index tag, despite receiving a reasonable and substantiated request to that effect, the applicant had committed a fault and had infringed G.’s right to be forgotten.

12. In a judgment of 25 January 2013 the Court of First Instance allowed most of G.’s claims. Noting that the applicant had not adduced any evidence of the impossibility of anonymising the article, the court ordered him to replace G.’s first name and surname by the letter X in the digital version of the article featured on the newspaper’s website and on any other database for which he was responsible. The applicant was ordered to pay one euro to G. in respect of non-pecuniary damage and to pay G.’s costs. The court rejected the requests for an anonymised version of the judgment to be sent to the parties and to possible third parties and for the judgment to be declared immediately enforceable.

13. In a judgment of 25 September 2014 the Liège Court of Appeal upheld the lower court’s judgment in its entirety. The Court of Appeal began by pointing out that each of the parties had fundamental rights that were not absolute and were of equal ranking.

14. As to the criterion of lawfulness required in order to derogate from the principle of freedom of expression, the Court of Appeal noted that the right to be forgotten was considered an integral part of the right to respect for private life as enshrined in Article 8 of the Convention, Article 17 of the International Covenant on Civil and Political Rights and Article 22 of the Constitution. That was sufficient to satisfy the lawfulness test in order to derogate from the principle of freedom of expression. The Court dismissed the applicant’s argument that Article 1382 of the Civil Code did not provide a clear and foreseeable legal basis. The provision in question constituted the ordinary rules on liability and was applicable to news organisations, which could not be unaware that they might be held liable if the exercise of press freedom caused damage resulting from an infringement of the rights of others. As the Court of First Instance had observed, Articles 1382 et seq. of the Civil Code, as interpreted by the Belgian legal literature and case-law, constituted legislation that was sufficiently accessible, clear, precise and foreseeable for the purposes of Article 10 § 2 of the Convention.

15. The Court of Appeal added that, alongside the traditional aspect of the right to be forgotten linked to the fresh disclosure by the press of a person’s previous convictions, there existed a second aspect linked to the erasure of the digital data, and in particular the data available on the Internet. The dispute, which concerned the digitisation of journalistic archives, related to the latter aspect, namely the right to be forgotten online.

What was sought, therefore, was the removal of information available on the Internet. This right to be forgotten online had recently been established by the Court of Justice of the European Union (“the CJEU”) in its judgment in *Google Spain and Google* (C-131/12, 13 May 2014; see paragraphs 41-45 below). The CJEU had held that the requirement regarding fresh disclosure of the information could be inferred from the effect of the search tool, which gave prominence to information that would not otherwise be visible online. It was true that the CJEU judgment concerned a dispute between a private individual and the operator of a search engine. Nevertheless, the principles established by that judgment could be transposed to the case at hand in so far as the publisher had also enabled the article in question to be given prominence via the search engine of the newspaper’s website, which was accessible free of charge. The effect had also been multiplied significantly by the development of the operating software used by Google-type search engines. The indexing of the article on search engines was only possible because it was present in the database of *Le Soir* in non-anonymised form and without any no-index tag.

16. The right to be forgotten online was not unlimited and had to be regulated in so far as it was liable to come into conflict with the freedom of expression of the press. In order to assess whether a balance had been struck between the fundamental rights enshrined, *inter alia*, in Articles 8 and 10 of the Convention, it was necessary to have regard to the criteria defined in the Court’s case-law (*Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, ECHR 2012) and the case-law of the CJEU (*Google Spain and Google*, cited above). Thus, in order for a right to be forgotten to be recognised, the facts had to have been disclosed lawfully in the first place and had to be of a judicial nature; there could be no current interest in their disclosure; the facts could not be of historical interest; a certain time had to have elapsed between the two disclosures; and the person concerned could not be a public figure, had to have an interest in being reintegrated into society, and had to have discharged his or her debt. The Court of Appeal’s task in the case before it was to ascertain whether, in the light of these criteria, the restriction on press freedom stemming from G.’s request pursued a legitimate aim and satisfied the proportionality test, in conformity with Article 10 § 2 of the Convention.

17. In the instant case the Court of Appeal found that it was not disputed that the original disclosure of the information in question had been lawful and that the facts reported on had been of a judicial nature. The fresh disclosure of the facts had no value in terms of newsworthiness. G. did not hold any public office: the mere fact that he was a doctor in no way justified his continued identification in the online article some twenty years after the events. The court considered this to be illegitimate and disproportionate, since it did not add anything to the value of the article and was liable to cause indefinite and serious harm to G.’s reputation by giving him a “virtual

criminal record”, despite the fact that he had not only served his sentence after a final conviction for the offence but had also been rehabilitated. Twenty years after the events, the identity of a person who was not a public figure did not enhance the public interest of the article, which merely contributed at a statistical level to a public debate on road safety.

18. In the Court of Appeal’s view, removing G.’s first name and surname did not render the information devoid of interest since it would have no impact on the actual substance of the information conveyed, which concerned a tragic road traffic accident caused in particular by the harmful effects of alcohol. The applicant’s arguments concerning the duty of remembrance and the need to preserve a full and faithful record in the archives were irrelevant. G. had not requested that the impugned article be removed from the archives, but simply that the electronic version be rendered anonymous; the paper archives remained intact and the applicant was still able to ensure the integrity of the original digital version.

19. The events reported on in the article were clearly not of historical significance, as the article related to a banal – albeit tragic – news story which was not alleged, still less demonstrated, to have been a source of particular public concern.

20. Lastly, a significant length of time (sixteen years) had elapsed between the initial publication of the article and the first request for anonymisation; some twenty years had passed by the time of delivery of the judgment.

21. It followed from all these considerations that G. satisfied the criteria for claiming a right to be forgotten, and that keeping the article in question online without rendering it anonymous was liable to cause him disproportionate harm when weighed against the benefits of strict observance of the applicant’s right to freedom of expression. The criteria of lawfulness, legitimacy and proportionality arising out of Article 10 § 2 of the Convention were satisfied in the Court of Appeal’s view.

22. The request for anonymisation had been apt to ensure a proper balance between the interests at stake. That balance would not be achieved by the establishment of a right to digital rectification or communication as proposed by the applicant. Such procedures would not be appropriate as they would allow the stigmatising effect of the serious offences committed by G., and of the sentence he had already served, to persist indefinitely and would render the rehabilitation order given in his favour meaningless. Hence, the most effective means of protecting G.’s privacy without interfering to a disproportionate extent with the applicant’s freedom of expression was to anonymise the article on the website of *Le Soir* by replacing G.’s first name and surname with the letter X.

23. In the Court of Appeal’s view, by refusing to accede to the request to anonymise the article, the applicant had not acted in the way that any prudent and diligent publisher would act in the same circumstances. That

refusal constituted a fault. A simple search using G.'s first name and surname in the search engine on *Le Soir*'s website or on Google immediately brought up the article. That was undoubtedly a source of damage to G., at least of a non-pecuniary nature. Such a situation made knowledge of his previous conviction easily accessible to a wide audience and was thus liable to stigmatise him, seriously damage his reputation and prevent him from reintegrating into society normally. A causal link between the fault and the damage sustained had also been established.

24. Acceding to G.'s request did not confer on each and every individual a subjective right to rewrite history, nor did it make it possible to "falsify history" or impose an "excessive burden of responsibility" on the applicant. The Court of Appeal was called upon to determine a specific dispute between two parties in the context of a one-off civil action for damages based on Article 1382 of the Civil Code while seeking to ensure that a balance was struck between two fundamental rights claimed by the parties.

25. The applicant further argued before the Court of Appeal that the way in which the database of *Le Soir* worked meant that it was not possible to alter archived articles and thus to replace G.'s name with the letter X. The Court of Appeal noted that, in support of his claims, the applicant had submitted a report drawn up by the newspaper's technical department. However, the court considered that the report in question, which had been prepared after the applicant had been given notice to appear, by technicians who were in a relationship of dependency with the applicant, did not provide any guarantees of impartiality and had no probative value. Moreover, the report did not state that it was actually impossible to implement the measure requested, but simply referred to the risks and costs. The only reference to impossibility concerned the "physical impossibility of withdrawing the newspapers that [had] been sold, the collections that [had] been distributed, and the numerous copies of the content available in physical and digital format in the public domain", something that had not been requested.

26. The applicant appealed on points of law. In one of his grounds of appeal he alleged a violation of Article 10 of the Convention. In particular, he argued in the first limb of the ground of appeal that the fault he had allegedly committed consisted in disregarding a subjective right, namely the right to be forgotten, although that right was not enshrined either in clear, precise and accessible domestic legislation or in a higher-ranking international rule, but was derived solely from the legal literature and case-law. Hence, in the applicant's view, the Court of Appeal judgment had breached the requirement that the interference be lawful. In the second limb of the ground of appeal the applicant contended that the order for him to alter in the online archives the content of an article that had been published in the past and was available in the paper archives amounted to unjustified

interference with his freedom of expression, in breach of Article 10 of the Convention.

27. In a judgment of 29 April 2016 the Court of Cassation dismissed the appeal on points of law. It found that the first limb of the ground of appeal, arguing that the Court of Appeal had based the right to be forgotten online on the legal literature and case-law, failed on factual grounds. The Court of Cassation held as follows:

“... It follows [from] the reasoning [of the Court of Appeal judgment], firstly, that the judgment under challenge regards the right to be forgotten online as an ‘intrinsic component of the right to respect for private life’ (and indeed states so), and views such interference with the right to freedom of expression as may be justified in order to protect that right as being based not on the legal literature and case-law – which the judgment does not recognise as having general regulatory scope – but on Article 8 of the [Convention], Article 17 of the International Covenant on Civil and Political Rights and Article 22 of the Constitution; and, secondly, that it refers to the judgment of the Court of Justice of the European Union only to lend support to its view on the scope of that right to be forgotten.”

28. As to the second limb, the Court of Cassation held that the right to respect for private life, which encompassed the right to be forgotten, might justify interference with the right to freedom of expression. The digital archiving of an old press article which, at the time it was printed, had lawfully reported on past events that were now covered by the right to be forgotten was not exempt from possible interference with the right to freedom of expression in order to protect the right to be forgotten. Such interference might consist in altering the archived text so as to prevent or make good a breach of the right to be forgotten. The Court of Appeal had ruled lawfully that the online archiving of the article in question had amounted to a fresh disclosure of G.’s previous conviction that was liable to infringe his right to be forgotten. The Court of Appeal had subsequently weighed up the rights of the parties and had provided legal justification for its ruling that the applicant, by refusing to accede to the request for the article to be anonymised, had committed a fault. It had therefore lawfully ordered him to replace G.’s first name and surname with the letter X on the website of *Le Soir*. Accordingly, the second limb of the ground of appeal had to be dismissed.

29. It appears that the article in question is still available on the newspaper’s website, but is accessible only to subscribers. It is accompanied by a notice referring to the relevant judicial decision.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. Protection of the fundamental rights at stake and the right to be forgotten

30. The Belgian Constitution guarantees freedom to manifest one's opinions on all matters (Article 19) and freedom of the press (Article 25), as well as the right to respect for private and family life (Article 22).

31. Prior to the events giving rise to the present case, the right to be forgotten had been recognised by the lower courts as an integral part of the right to respect for private life (see, for instance, Brussels Court of Appeal (ref.), 21 December 1995, J.T., 1996, p. 47; Brussels Court of First Instance, 30 June 1997, J.T. 1997, p. 710; Namur Court of First Instance, 17 November 1997, J.T., 1998, p. 187; Namur Court of First Instance, 27 September 1999, *Auteurs & Média*, 2000, p. 471; and Brussels Court of First Instance, 20 September 2001, *Auteurs & Média*, 2002, p. 77). This right was also recognised subsequently by the Court of Cassation (Cass., 29 April 2016, C.15.0052.F, in the applicant's case, and Cass., 8 November 2018, C.16.0457.F).

B. Civil Code

32. Under Article 1382 of the Civil Code, "any act committed by a person that causes damage to another shall render the person through whose fault the damage was caused liable to make reparation for it".

33. This provision may be used as the basis for civil actions for alleged abuse of press freedom (Cass., 4 December 1952, Pas. 1953, I, p. 215; see *De Haes and Gijssels v. Belgium*, 24 February 1997, § 26, *Reports of Judgments and Decisions* 1997-I).

C. Act of 8 December 1992 on the protection of private life with regard to the processing of personal data

34. Under section 8(1) of the Act of 8 December 1992 on the protection of private life with regard to the processing of personal data ("the Protection of Private Life Act"), which was in force at the material time, the processing of personal data concerning cases coming before the ordinary and administrative courts, suspected offences, prosecutions or convictions in connection with offences, and administrative sanctions or preventive measures, was prohibited. Nevertheless, section 3(3)(a) of the Act provided that section 8 did not apply to the processing of personal data solely for journalistic purposes where it concerned data that had been manifestly made

public by the person concerned, or to data that were closely connected to the public profile of the person concerned or the public nature of the events in which he or she had been involved.

35. Under section 14 of the same Act, the president of the Court of First Instance, as the judge responsible for hearing urgent applications, had jurisdiction to examine any request to rectify, remove or prohibit the use of any personal data that were inaccurate or which, regard being had to the purpose of the processing, were incomplete or irrelevant; the recording, communication or retention of which was prohibited; the processing of which the person concerned had objected to; or which had been retained beyond the authorised period.

36. Hearing an application based on this Act, the president of the Brussels Court of First Instance refused to order the anonymisation of an article published in the online press archives of several media companies (Brussels Civ. (pres.), 9 October 2012, *Auteurs & Média*, 2013, p. 267). The applicant had based his action on the right to object and the right to rectification granted to the persons concerned under the Act. The president found that the online publication of journalistic archives could be said to meet the definition of processing solely for journalistic purposes, which was covered by a derogation under the Act relating in particular to the two rights in issue and which, in the president's view, was not limited in time, as journalism was not merely a matter of "informing the public on current affairs". Accordingly, the president refused the application. That order was upheld on appeal (Brussels, 21 March 2013, no. 2012/AR/2791, unreported).

37. The Act of 8 December 1992 was repealed by the Act of 30 July 2018 on the protection of individuals with regard to the processing of personal data. Section 24(2) exempts the processing of personal data carried out solely for journalistic purposes from the application of a number of Articles of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (see paragraph 48 below). Article 17 of the Regulation is not among the provisions concerned.

D. Rehabilitation of convicted persons

38. Articles 621 to 634 of the Code of Criminal Procedure make provision for persons who have been convicted to apply for rehabilitation, subject to a number of conditions. Rehabilitation orders are made by the Court of Appeal.

39. The rehabilitation of a convicted person does not mean that the facts established by the courts and forming the basis for the person's conviction are ignored as though they had never existed. The conviction still stands and the rehabilitation order does not prevent third parties – including the media – from referring to it (Cass., 23 April 1997, Pas. 1997, I, no. 199).

II. COUNCIL OF EUROPE INSTRUMENTS

40. The relevant provisions of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Recommendation No. R (2000) 13 of the Committee of Ministers to member states on a European policy on access to archives, Recommendation Rec (2003) 13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings, and Recommendation CM/Rec(2012)3 of the Committee of Ministers to member States on the protection of human rights with regard to search engines are set out in the judgment in *M.L. and W.W. v. Germany* (nos. 60798/10 and 65599/10, §§ 52-56, 28 June 2018).

III. EUROPEAN UNION LAW

41. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data was aimed at protecting the fundamental rights and freedoms of individuals, and in particular the right to privacy, with regard to the processing of personal data, while removing obstacles to the free movement of such data. Under Article 9 of the Directive, the member States could provide for exemptions or derogations from the provisions of a number of Chapters for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression “only if they [were] necessary to reconcile the right to privacy with the rules governing freedom of expression”.

42. In its judgment of 13 May 2014 (Case C-131/12, EU:C:2014:317; *Google Spain SL and Google Inc.* – hereafter “*Google Spain*”), the Court of Justice of the European Union (“the CJEU”) was called upon to define the extent of the rights and obligations arising out of Directive 95/46/EC with regard to Internet search engines. The case originated in a complaint lodged by a Spanish national with the Spanish Data Protection Agency against a Spanish daily newspaper and Google. The applicant had complained that, when an Internet user entered his name in Google’s search engine, the list of results displayed links to two pages of the newspaper mentioning his name in connection with an auction following attachment proceedings. He had requested the newspaper either to remove or alter those pages so that the personal data relating to him no longer appeared or to use certain tools made available by search engines in order to protect his data. He had also requested Google to remove or conceal the personal data relating to him so that they ceased to be included in the search results and in the links to the newspaper. While the Spanish agency had rejected the complaint against the newspaper, it had upheld the complaint against Google, which brought an

action before the Spanish courts. It was in the context of this judicial dispute that the case was referred to the CJEU for a preliminary ruling.

43. The CJEU held that the operations carried out by operators of search engines should be classified as “data processing”, of which they were the “controllers” (Article 2 (b) and (d)), regardless of the fact that these data had already been published on the Internet and had not been altered by the search engine. It stated that, in so far as the activity of a search engine could be distinguished from and was additional to that carried out by publishers of websites and also affected the fundamental rights of the person concerned, the operator of the search engine had to ensure in particular that the guarantees laid down by the directive could have full effect. Moreover, given the ease with which information published on a website could be replicated on other sites, effective and complete protection of data users, and particularly of their right to privacy, could not be achieved if they had to obtain first or in parallel the erasure of the information relating to them from the publishers of websites. The CJEU concluded that the operator of a search engine was obliged to remove links to web pages that were published by third parties and contained information relating to a person from the list of results displayed following a search made on the basis of that person’s name, including in cases where the name or information had not been erased beforehand or simultaneously from those web pages and even, as applicable, when its publication on those pages was in itself lawful.

44. The CJEU added that even initially lawful processing of accurate data could, in the course of time, become incompatible with the directive where those data were no longer necessary in the light of the purposes for which they had been collected or processed. That was so in particular where they appeared to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that had elapsed. The CJEU concluded that if, under Articles 7 and 8 of the European Union’s Charter of Fundamental Rights guaranteeing, respectively, the right to respect for private life and the right to the protection of personal data, the persons concerned had a right to ensure that the information in question relating to them personally should no longer be linked to their name by a list of results, and they were thus entitled to request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, those rights overrode, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information through a search relating to the names of the persons concerned. However, according to the CJEU, that would not be the case if it appeared, for particular reasons such as the role played by the persons concerned in public life, that the interference with their fundamental rights was justified by the preponderant interest of the general public in having, on

account of its inclusion in the list of results, access to the information in question.

45. Regarding the difference in treatment between the publisher of a web page and the operator of a search engine, the CJEU found as follows:

“85. Furthermore, the processing by the publisher of a web page consisting in the publication of information relating to an individual may, in some circumstances, be carried out ‘solely for journalistic purposes’ and thus benefit, by virtue of Article 9 of Directive 95/46, from derogations from the requirements laid down by the directive, whereas that does not appear to be so in the case of the processing carried out by the operator of a search engine. It cannot therefore be ruled out that in certain circumstances the data subject is capable of exercising the rights referred to in Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 against that operator but not against the publisher of the web page.

86. Finally, it must be stated that not only does the ground, under Article 7 of Directive 95/46, justifying the publication of a piece of personal data on a website not necessarily coincide with that which is applicable to the activity of search engines, but also, even where that is the case, the outcome of the weighing of the interests at issue to be carried out under Article 7(f) and subparagraph (a) of the first paragraph of Article 14 of the directive may differ according to whether the processing carried out by the operator of a search engine or that carried out by the publisher of the web page is at issue, given that, first, the legitimate interests justifying the processing may be different and, second, the consequences of the processing for the data subject, and in particular for his private life, are not necessarily the same.

87. Indeed, since the inclusion in the list of results, displayed following a search made on the basis of a person’s name, of a web page and of the information contained on it relating to that person makes access to that information appreciably easier for any internet user making a search in respect of the person concerned and may play a decisive role in the dissemination of that information, it is liable to constitute a more significant interference with the data subject’s fundamental right to privacy than the publication on the web page.”

46. In the Guidelines on the implementation of the Court of Justice of the European Union judgment in the case of “*Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*” (C-131/12), adopted on 26 November 2014, the “Article 29” Data Protection Working Party stated as follows:

“18. Search engines included in web pages do not produce the same effects as ‘external’ search engines. On the one hand, they only recover the information contained on specific web pages. On the other, and even if a user looks for the same person in a number of web pages, internal search engines will not establish a complete profile of the affected individual and the results will not have a serious impact on him. Therefore, as a rule the right to de-listing should not apply to search engines with a restricted field of action, particularly in the case of search tools of websites of newspapers.

...

21. From the material point of view, and as it’s been already mentioned, the ruling expressly states that the right only affects the results obtained on searches made by the name of the individual and never suggests that the complete deletion of the page from

the indexes of the search engine is needed. The page should still be accessible using any other terms of search. It is worth mentioning that the ruling uses the term ‘name’, without further specification ...”

47. The second part of the guidelines concerns common criteria which the data protection authorities are invited to apply in handling complaints following refusals of delisting by search engines. The relevant parts of the eighth and thirteenth criteria read as follows:

“8. Is the data processing causing prejudice to the data subject? Does the data have a disproportionately negative privacy impact on the data subject?

...

The data might have a disproportionately negative impact on the data subject where a search result relates to a trivial or foolish misdemeanour which is no longer – or may never have been – the subject of public debate and where there is no wider public interest in the availability of the information.

...

13. Does the data relate to a criminal offence?

EU Member States may have different approaches as to the public availability of information about offenders and their offences. Specific legal provisions may exist which have an impact on the availability of such information over time. [Data Protection Authorities] will handle such cases in accordance with the relevant national principles and approaches. As a rule, [Data Protection Authorities] are more likely to consider the de-listing of search results relating to relatively minor offences that happened a long time ago, whilst being less likely to consider the de-listing of results relating to more serious ones that happened more recently. However, these issues call for careful consideration and will be handled on a case-by-case basis.”

48. After the Court of Appeal had given its judgment in the present case, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (“the GDPR”) repealed Directive 95/46/EC of 24 October 1995. Article 17 of the GDPR provides as follows:

Article 17

Right to erasure (“right to be forgotten”)

“1. The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:

(a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;

...

2. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including

technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.

3. Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:

(a) for exercising the right of freedom of expression and information;

...

(d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing;

...”

49. After the delivery of the judgment in *M.L. and W.W. v. Germany* (cited above), the CJEU delivered two judgments on 24 September 2019 relating to requests for a preliminary ruling concerning the obligation for operators of search engines to grant requests for delisting (“de-referencing”). The cases concerned are *GC and Others v Commission nationale de l’informatique et des libertés (CNIL)* (C-136/17, EU:C:2019:773), and *Google LLC, successor in law to Google Inc. v Commission nationale de l’informatique et des libertés (CNIL)* (C-507/17, EU:C:2019:772).

50. In the first judgment (C-136/17), the CJEU reiterated that the operators of search engines could be required to grant requests for de-referencing. Nevertheless, when they received a request to that effect, they had to weigh up the right to privacy and the right to protection of personal data of the person making the request for de-referencing against the freedom of information of Internet users potentially interested in accessing the information in question. The CJEU referred to the judgment in *M.L. and W.W. v. Germany* (cited above), inferring from it that it was for the operator of a search engine to “assess, in the context of a request for de-referencing relating to links to web pages on which information is published relating to criminal proceedings brought against the data subject, ... whether, in the light of all the circumstances of the case, such as, in particular, the nature and seriousness of the offence in question, the progress and the outcome of the proceedings, the time elapsed, the part played by the data subject in public life and his past conduct, the public’s interest at the time of the request, the content and form of the publication and the consequences of publication for the data subject, he or she has a right to the information in question no longer, in the present state of things, being linked with his or her name by a list of results displayed following a search carried out on the basis of that name” (§ 77).

51. In the second judgment (C-507/17), the CJEU specified that European Union law did not require the operator of a search engine to carry out de-referencing on all versions of its search engine. Nevertheless, it was

required to do so on the versions of the search engine corresponding to all the member States and to put in place measures to discourage Internet users conducting a search from one of the member States from gaining access to the links in question found on non-EU versions of the search engine. Furthermore, EU law did not prevent a supervisory or judicial authority of a member State from weighing up the fundamental rights at stake in the light of national standards of protection of fundamental rights and, after weighing those rights against each other, from ordering the operator of such a search engine, where appropriate, to carry out de-referencing concerning all versions of the search engine.

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

52. The applicant alleged that the order for him to anonymise the archived version of the impugned article on the website of the newspaper *Le Soir* constituted a violation of freedom of expression, freedom of the press and freedom to impart information. He relied on Article 10 of the Convention, the relevant parts of which provide:

“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 public authority and regardless of frontiers ...

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 maintaining the authority and impartiality of the judiciary.”

A. Admissibility

53. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

(a) **The applicant**

(i) *Lawfulness of the interference*

54. The applicant submitted that the judgment against him had not been based on a clear and foreseeable law enabling him to foresee the legal

consequences of his actions. Article 1382 of the Civil Code did not provide any clarification as to the type of restrictions allowed, their purpose, duration and scope or the possibility of reviewing them. The right to be forgotten as established in a handful of decisions of the Belgian courts applied only to newly published material and not to the digital reproduction of an original article that had been archived in unaltered form.

55. The Court of Appeal had drawn an analogy with the CJEU judgment in the case of *Google Spain*, transposing the principles established in that judgment regarding a search engine to a newspaper publisher. It had equated newspaper publishers with search engines without taking into account the fact that they were not subject to the same obligations, as newspaper publishers were granted exemptions “for journalistic purposes” within the meaning of Article 9 of Directive 95/46/CE, or the fact that the CJEU had expressly distinguished between these two types of activities.

56. Furthermore, the Belgian courts had previously held that the Protection of Private Life Act of 8 December 1992 did not impose a time-limit on the press beyond which any information had to be disseminated in anonymous form by the person responsible for the processing or by a third party (see paragraph 36 above). That Act also expressly permitted journalists to process judicial data. In the applicant’s view, something that was permitted under a specific law could not be prohibited by the ordinary rules on liability.

57. The applicant added that the few decisions that had sanctioned the right to be forgotten on the basis of Article 1382 of the Civil Code set out criteria that had been the subject of novel, and therefore unforeseeable, interpretations. Finding, as the Court of Appeal had done in the instant case, that the proceedings were not designed to “punish the disclosure of past events, but to obtain the removal of information available online”, amounted to a substantial change in the criteria for applying the right to be forgotten hitherto recognised by the case-law. In the applicant’s view, the extensive interpretation of those criteria by the Court of Appeal conferred an absolute and automatic character on the right to be forgotten which meant that with the passage of time it was possible to obtain the anonymisation of any electronic archive, and hence of all newspaper judicial archives. This would result in a gradual erosion of the integrity of the journalistic archives, if it was possible for anyone to have the information made anonymous. There was even a risk that the activity of archiving itself would disappear. Anonymisation therefore needed to be part of a particularly tight framework ensuring effective judicial review to prevent possible abuse.

58. Lastly, the applicant emphasised that the GDPR, which incorporated the interpretation of the right to be forgotten given by the CJEU in its *Google Spain* judgment, specifically provided for an exemption for the processing of data “for archiving purposes in the public interest” (Article 17(3)(d); see paragraph 48 above).

(ii) Necessity of the interference

59. In the applicant's view, the judgment against him had not been strictly necessary in a democratic society. The source of G.'s grievance was the fact that the article was indexed by search engines, rather than the article as such. It was search engines that brought the archives to light. A decision should therefore have been taken to de-index the article rather than anonymising it, as this was less restrictive of freedom of expression.

60. There were significant issues at stake in the present case, as requests for anonymisation posed a serious threat to digital archiving. Recognising a right to be forgotten with regard to journalistic archives entailed a risk that this right would become a right to have information deleted or rewritten and hence a risk of undermining freedom to convey information and the very concept of archives, which presupposed the existence of documents in their original unaltered form. The order for the applicant to anonymise the archive in question would have a chilling effect on freedom of expression and freedom of the press and would ultimately prompt him to cease electronic archiving.

61. Furthermore, the Belgian courts had not weighed up the competing interests at stake in accordance with the criteria established in the Court's case-law. In particular, the assessment as to whether G. was known to the public had been incompatible with the Court's case-law, according to which individuals could not complain of a loss of reputation which was a foreseeable consequence of their own actions, such as the commission of a criminal offence.

62. As to the severity of the measure imposed, the applicant submitted that other measures had existed that were less restrictive of freedom of expression, such as making an addition to the news item published at the time, referring to the order rehabilitating G., or the delisting of the article by search engines such as Google. With regard to the last of these, the applicant alleged that it had been up to G. to submit a request for delisting to the operators of the search engines. Nevertheless, in an effort to assist the applicant, the newspaper's legal department had itself requested Google to delist the article in question but had received no response.

63. The applicant inferred from this that the reasons given by the Court of Appeal and upheld by the Court of Cassation were insufficient to demonstrate that the interference had been "necessary in a democratic society". The Court of Cassation had merely found that the Court of Appeal judgment had been legally justified, without replying to the arguments raised by the applicant.

64. The applicant added that the right to be forgotten could not be transformed into a right for each individual to rewrite his or her personal history. Criminal convictions that had been the subject of public proceedings reported on by the press fell into the category of information

that could legitimately be retained by the media. The information could be delisted if the relevant criteria were satisfied, but it could not be censored.

(b) The Government

(i) Lawfulness of the interference

65. The Government observed that the foreseeability of the law should not translate into excessive rigidity. In the present case the judgment against the applicant was based on the provisions of the Convention and the Constitution guaranteeing the right to protection of private life – of which the right to be forgotten formed a part – and on Article 1382 of the Civil Code, which together constituted a sufficiently foreseeable legal basis. Hence, the interference with freedom of expression did not stem either from the Belgian legal literature or case-law or from the CJEU’s *Google Spain* judgment.

66. It was acknowledged in the Belgian ordinary rules on liability that a violation of the right to respect for private life, of which the right to be forgotten was a part, constituted a fault resulting from a breach of a written rule of conduct. Hence, the applicant could not have been unaware that he might be held liable. Article 1382 of the Civil Code was sufficiently accessible, clear, precise and foreseeable. Taken together with Article 8 of the Convention, it formed a sufficiently foreseeable basis justifying interference with freedom of expression.

67. The fact that other courts, whether in Belgium or elsewhere, had reached a different conclusion was irrelevant in so far as those courts had applied the same reasoning, which had resulted in different outcomes depending on the specific circumstances of the cases before them. In any event, any exemptions allowed for journalists were not absolute and had to be weighed up in the light of the criteria established by the Court.

(ii) Necessity of the interference

68. The Government pointed out that neither the public’s right to be informed about past events nor the right to create online archives was an absolute right. In their view, the initial interference with G.’s exercise of his right to respect for his private life stemmed from the decision of the publisher of *Le Soir* to publish the information in question and to keep it online, albeit without drawing the public’s attention to it. The domestic courts had examined all the legal and technical arguments advanced by the parties and had imposed a proportionate measure on the applicant, taking into account the range of different measures proposed by him. In particular, they had deemed it insufficient to add a comment to the online article. The Court of Appeal had opted for the anonymisation of the article after weighing up the interests at stake. The Government stressed that the integrity of the archives as such was not impaired by the judgment given

against the applicant, but merely the public's access to the online version of the article. The paper archives remained intact and people like researchers could still request access to the non-anonymised digital version of the article.

69. The case was to be distinguished from that of *M.L. and W.W. v. Germany* (nos. 60798/10 and 65599/10, 28 June 2018) in view of the particular circumstances of the case, and especially the fact that G. was not well known, the fact that he had had no contact with the media and the minimal interest of the events reported on in the article. The information had become damaging precisely because of the passage of time, and the article had been published online more than fifteen years after publication of the print version. The present case was therefore also to be distinguished in terms of the facts from the judgment in *Węgrzynowski and Smolczewski v. Poland* (no. 33846/07, 16 July 2013).

70. In conclusion, the Government observed that the Belgian courts had determined a specific dispute between two parties in the context of a civil action for damages while seeking to ensure that a balance was struck between two competing fundamental rights claimed by the parties. They had taken their decisions after examining the criteria established by the Court and striking a reasonable balance between the interests at stake. There were therefore no sufficiently strong reasons for the Court to substitute its assessment for that of the domestic courts.

2. *Submissions of the third-party intervener*

71. The third-party intervener, G., was the person who had requested anonymisation of his name in the article in issue. In his view, the applicant had displayed excessive zeal in objecting to the request. As to the facts, he pointed out in particular that although he had himself, in the proceedings before the Court of First Instance, proposed the use of a no-index tag as an alternative to anonymisation, it was the applicant who had subsequently rejected that solution.

72. In G.'s view, Article 1382 of the Civil Code, taken in conjunction with the right to be forgotten as recognised by the case-law and legal literature as an integral part of the right to respect for private life, constituted a sufficiently foreseeable legal basis satisfying the requirements of Article 10 § 2 of the Convention.

73. As to the necessity of the interference, he stressed the fact that the article belonged to the past, which meant that it attracted a lesser degree of protection; the significant repercussions of re-publication of the article on the Internet as a result of the publication of the archives online; and the complete lack of any public interest in the inclusion of his full name in the article. Furthermore, it was not a question of requiring the media to remove all personal data from their archives as a blanket measure, or to remove the

data of anyone who so requested, but of requiring them to assess the fundamental rights at stake in context.

3. *The Court's assessment*

74. It is not disputed that the civil judgment against the applicant ordering him to anonymise the impugned article amounted to “interference” with his rights under Article 10 of the Convention.

75. An interference with the right to convey information or ideas will infringe the Convention if it does not meet the requirements of paragraph 2 of Article 10. It should therefore be determined whether the interference was “prescribed by law”, whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was “necessary in a democratic society” in order to achieve the relevant aim or aims.

(a) **Lawfulness of the interference**

76. The applicant alleged that the judgment against him had not been foreseeable.

77. The general principles concerning the requirement of foreseeability of the law under Article 10 of the Convention are summarised in the judgment in *Delfi AS v. Estonia* [GC], no. 64569/09, §§ 120-22, ECHR 2015; see also, more recently, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, §§ 142-45, 27 June 2017; *Magyar Kétfarkú Kutya Párt v. Hungary* [GC], no. 201/17, §§ 93-101, 20 January 2020; and *Selahattin Demirtaş v. Turkey (no. 2)* [GC], no. 14305/17, §§ 249-53, 22 December 2020).

78. The Court must seek to ascertain whether the way in which the domestic courts applied Article 1382 of the Civil Code – which constitutes the ordinary rules on liability – to the applicant’s situation was foreseeable. In so doing it will take account of the domestic legal framework as a whole, that is to say, both the written norms that were applied and the general principles stemming from the legislation and the case-law (see *Delfi AS*, cited above, § 128).

79. The Court observes at the outset that Belgian law recognises a right to be forgotten as an integral part of the right to respect for private life (see paragraph 31 above). As pointed out by the Court of Cassation in the present case, that right flows from Article 8 of the Convention, Article 17 of the International Covenant on Civil and Political Rights, and Article 22 of the Constitution (see paragraph 27 above). The Court of Appeal relied on these provisions in particular in recognising G.’s right to be forgotten (see paragraph 14 above).

80. Interpreting the scope of the right to be forgotten is a matter for the national authorities, notably the courts, which have primary responsibility for interpreting domestic law. Unless the interpretation is arbitrary or

manifestly unreasonable, the Court's role is confined to ascertaining whether the effects of the interpretation are compatible with the Convention (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 149, 20 March 2018; *S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 others, § 148, 22 October 2018; and *Molla Sali v. Greece* [GC], no. 20452/14, § 149, 19 December 2018).

81. The question raised by the applicant before the domestic courts was whether G. satisfied the relevant criteria in order to claim the right to be forgotten, in so far as, in the applicant's view, the article in question was not newly published material but an archived version of an old article. In this regard the Court of Cassation upheld the interpretation of the Court of Appeal, which had found that the online publication of the archived version of the article amounted to "fresh disclosure" of G.'s previous conviction (see paragraph 27 above).

82. The Court cannot subscribe to the applicant's view that the Court of Appeal, in referring to the CJEU judgment in *Google Spain*, had equated newspaper publishers with search engines. As explained by the Court of Cassation, the Court of Appeal had referred to the above-mentioned judgment, which concerned a search engine, only for the purpose of determining the scope of the right to be forgotten *per se*.

83. In the Court's view, this interpretation by the national courts of the provisions concerning the protection of private life was neither arbitrary nor manifestly unreasonable.

84. Returning to Article 1382 of the Civil Code, this provision requires a person to make good any damage caused through his or her fault, including the unjustified infringement of a right. This provision serves as the basis for civil actions for alleged abuse of press freedom (see paragraph 33 above).

85. Accordingly, the Court is not persuaded by the applicant's argument that it had not been foreseeable that judgment might be given against him on the basis of the ordinary rules on liability on account of an infringement of the right to be forgotten stemming from the digital reproduction of an old article. It observes in that connection that the fact that a legal provision is applied for the first time in a certain type of case does not suffice to establish a lack of foreseeability (see *Satakunnan Markkinapörssi Oy and Satamedia Oy*, cited above, § 150; *Magyar Kétfarkú Kutya Párt*, cited above, § 97; and *Selahattin Demirtaş*, cited above, § 253).

86. Likewise, the fact that there are examples of cases in which the courts ruled differently is not sufficient to establish a lack of foreseeability, since all the circumstances of the case must be taken into account in matters that involve the balancing of rights. This is especially true since the case-law to which the applicant referred had a different legal basis, namely the Protection of Private Life Act of 8 December 1992 (see paragraph 36 above; see, conversely, *RTBF v. Belgium*, no. 50084/06, §§ 113-14, ECHR 2011).

87. Moreover, the Court notes that in previous cases examined under Article 10 of the Convention, it has accepted a provision constituting the ordinary rules on civil liability as a sufficiently foreseeable legal basis (see, with regard to Article 1382 of the Belgian Civil Code, *De Haes and Gijssels v. Belgium*, 24 February 1997, *Reports of Judgments and Decisions* 1997-I, and *Leempoel & S.A. ED. Ciné Revue v. Belgium*, no. 64772/01, 9 November 2006; for cases concerning other States in which the interference with freedom of expression was also based on the ordinary rules of liability, see, for instance, *Węgrzynowski and Smolczewski*, cited above, § 64, and *M.L. and W.W. v. Germany*, cited above, §§ 48-49).

88. It follows from the foregoing that the judgment given against the applicant had a legal basis that satisfied the foreseeability requirement. The interference was therefore “prescribed by law”.

(b) Legitimate aim

89. The parties agreed that the interference had pursued a legitimate aim within the meaning of Article 10 § 2, namely the protection of the reputation or rights of others, in this case G.’s right to respect for his private life.

(c) Necessity of the interference

90. The Court emphasises that, as in the case of *M.L. and W.W. v. Germany* (cited above, § 99), it is not the lawfulness of the article when it was first published that is in issue, but the fact that it was made available on the Internet and the possibility of accessing the article a long time after the events.

91. The task of the national courts was to balance the various rights at stake: the freedom of expression of the applicant as a publisher, and in particular his right to convey information to the public, on the one hand, and G.’s right to protection of his private life on the other.

92. The Court will first reiterate the principles concerning the balancing of the rights in issue and the criteria to be taken into account in assessing the necessity of an interference with freedom of expression as guaranteed by Article 10 of the Convention, especially where, as in the present case, the issue concerns a digital archive available on the Internet (*i*). It will then apply those criteria to the particular circumstances of the case (*ii*).

(i) The applicable general principles

(α) Balancing of the rights

93. The Court refers to the general principles as set out in numerous judgments concerning the balancing of the rights guaranteed by Articles 8 and 10 of the Convention (see, among other authorities, *Axel Springer AG v. Germany* [GC], no. 39954/08, §§ 78-84, 7 February 2012; *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, §§ 82-93,

ECHR 2015 (extracts); *Bédât v. Switzerland* [GC], no. 56925/08, §§ 48-54, 29 March 2016; and *Satakunnan Markkinapörssi Oy and Satamedia Oy*, cited above, §§ 162-65). As it has held repeatedly, these rights as a matter of principle deserve equal respect (see, among other authorities, *Axel Springer AG*, cited above, § 87; *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 106, CEDH 2012; *Delfi AS*, cited above, §§ 110 and 139; *Couderc and Hachette Filipacchi Associés*, cited above, § 91; and *Bédât*, cited above, § 52).

94. The Court has already had occasion, in examining an initial publication, to lay down the relevant principles which must guide its assessment – and, more importantly, that of the domestic courts – as to whether an instance of interference was necessary. It has thus identified a number of criteria in the context of balancing the right to freedom of expression and the right to respect for private life. The criteria are as follows: (i) contribution to a debate of public interest; (ii) whether the person concerned is known to the public, and the subject of the news report; (iii) the prior conduct of the person concerned; (iv) the way in which the information was obtained and its veracity; (v) the content, form and consequences of the publication; and (vi) the severity of the measure imposed (see *Axel Springer AG*, cited above, §§ 89-95, and *Satakunnan Markkinapörssi Oy and Satamedia Oy*, cited above, § 165, and the references therein; see also the CJEU judgment in *GC and Others v Commission nationale de l’informatique et des libertés (CNIL)*, cited at paragraph 50 above).

95. According to the Court’s case-law, the test of “necessity in a democratic society” requires the Court to determine whether the interference complained of corresponded to a pressing social need, and in particular whether the reasons given by the national authorities to justify it were relevant and sufficient and whether it was proportionate to the legitimate aim pursued (see *The Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, § 62, Series A no. 30, and *Vavříčka and Others v. the Czech Republic* [GC], nos. 47621/13 and 5 others, § 273, 8 April 2021).

96. The Court further reiterates that, under Article 10 of the Convention, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent an interference with the freedom of expression guaranteed under that provision is necessary. However, this margin goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court. In exercising its supervisory function, the Court’s task is not to take the place of the national courts, but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied on (see *Axel Springer AG*, cited above, §§ 85-86).

97. Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see, among other authorities, *Axel Springer AG*, cited above, § 88; *Couderc and Hachette Filipacchi Associés*, cited above, § 92; *Bédard*, cited above, § 54; and *Satakunnan Markkinapörssi Oy and Satamedia Oy*, cited above, § 164).

(β) The specific nature of online publication of digital archives

98. The great majority of cases concerning a conflict between the right to freedom of expression and the right to respect for private life examined by the Court have related to the initial publication of information about private aspects of the lives of individuals or their families (see, among many other authorities, *Hachette Filipacchi Associés (ICI PARIS) v. France*, no. 12268/03, 23 July 2009; *Axel Springer AG*, cited above; *Couderc and Hachette Filipacchi Associés*, cited above; *Satakunnan Markkinapörssi Oy and Satamedia Oy*, cited above; and, more recently, *Falzon v. Malta*, no. 45791/13, 20 March 2018).

99. Unlike those cases, the present case concerns the online publication in 2008, and the continued availability to date, of the archived version of an article originally published in 1994 in the print edition of the newspaper *Le Soir*, in a situation where the lawfulness of the initial publication is not disputed. In response to a request to that effect by G., the domestic courts ordered the applicant to anonymise the digital archive of the impugned article by replacing G.'s full name with the letter X.

100. The Court has previously held that, in addition to its primary function, the press has a secondary but nonetheless valuable role in maintaining archives containing news which has previously been reported and making them available to the public. Internet archives make a substantial contribution to preserving and making available news and information. Digital archives constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free (see *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*, nos. 3002/03 and 23676/03, §§ 27 and 45, ECHR 2009; *Węgrzynowski and Smolczewski*, cited above § 59; *Fuchsmann v. Germany*, no. 71233/13, § 39, 19 October 2017; and *M.L. and W.W. v. Germany*, cited above, § 90).

101. In a case such as the present one, the rights of a person who has been the subject of content available on the Internet must therefore be balanced against the public's right to be informed about past events and contemporary history, in particular through the use of digital press archives (see *M.L. and W.W. v. Germany*, cited above, § 104).

102. In that connection the Court is keenly aware of the risk of a chilling effect on freedom of the press posed by a requirement for a publisher to

anonymise an article whose lawfulness has not been questioned. The obligation to examine at a later stage the lawfulness of keeping a report online following a request from the person concerned, which implies weighing up all the interests at stake, entails a risk that the press might refrain from keeping reports in its online archives or omit individualised elements in reports likely to be the subject of such a request (see *M.L. and W.W. v. Germany*, cited above, § 103).

103. The Court is also mindful of the fact that the alteration of the archived version of an article undermines the integrity of the archives and thus their very essence. The domestic courts must therefore be particularly vigilant whenever they grant a request for anonymisation or alteration of the electronic version of an archived article on the grounds of respect for private life.

104. That being said, the right to keep archives available to the public online is not an absolute right but must be balanced against the other rights at stake. In this context, in the Court's view, the criteria to be taken into account regarding the online publication or continued availability of archived material are, in principle, the same as those applied by the Court in the context of initial publication. Nevertheless, certain criteria may have more or less relevance given the particular circumstances of the case and the passage of time (see, to similar effect, *M.L. and W.W. v. Germany*, cited above, § 96; see also *Satakunnan Markkinapörssi Oy and Satamedia Oy*, cited above, § 166).

(ii) *Application of these principles in the present case*

(α) Contribution to a debate of public interest

105. As to the existence of a debate of public interest not diminished by the passage of time (see *M.L. and W.W. v. Germany*, cited above, § 99), the Court stresses the fact that, by their very nature, archives contribute to a debate of public interest in a different way from an initial publication. Above all, digital archives constitute an important source for education and historical research (see paragraph 100 above) and for placing current events in context. The weight to be given to this criterion in balancing the interests at stake must therefore be tailored to the specific nature of such archives.

106. In the present case, the Court of Appeal correctly observed that the online publication of the article did not have any value in terms of newsworthiness (see paragraph 17 above). It held that, twenty years after the events, the identity of a person who was not a public figure did not enhance the public interest of the impugned article, which merely contributed at a statistical level to a general debate on road safety.

107. The article concerned a series of – admittedly tragic – events whose contribution to a debate of public interest related mainly to the hazards of road traffic and the causes of those hazards. Hence, the Court notes the

Court of Appeal's finding that mentioning G.'s full name was not apt, twenty years after the events, to contribute to a debate of public interest (see, conversely, *M.L. and W.W. v. Germany*, cited above, § 106).

- (β) Whether the person concerned was known to the public, and the subject of the article

108. As to whether the person concerned was known to the public, and the subject of the article, it is true that the Court has previously found, as pointed out by the applicant, that Article 8 of the Convention cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions, such as the commission of a criminal offence (see *Axel Springer AG*, cited above, § 83; *Gillberg v. Sweden* [GC], no. 41723/06, § 67, 3 April 2012; *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* [GC], no. 17224/11, § 76, 27 June 2017; *M.L. and W.W. v. Germany*, cited above, § 88; and *Denisov v. Ukraine* [GC], no. 76639/11, § 98, 25 September 2018).

109. However, this does not mean that a person with a past criminal conviction may never claim the right to be forgotten; were this so, that right would be devoid of substance. The Court considers that after a certain amount of time has passed, persons who have been convicted may have an interest in no longer being confronted with their acts, with a view to their reintegration in society (see *M.L. and W.W. v. Germany*, cited above, § 100, and the references contained therein). As stated by the Court of Appeal, the electronic archiving of an article concerning the commission of an offence must not create a kind of "virtual criminal record" for the person concerned (see paragraph 17 above). This is particularly true where, as in the present case, the person has served his or her sentence and been rehabilitated.

110. Although, after the commission of a criminal offence and while the trial is ongoing, a hitherto unknown person may acquire a degree of notoriety, that notoriety may also decline with the passage of time (see *M.L. and W.W. v. Germany*, cited above, § 106). Indeed, the public's interest as regards criminal proceedings will vary in degree (*ibid.*, § 100). Thus, in some cases, the right to be forgotten may confer on the person concerned the right to revert to being simply an individual unknown to the public. Again, time is a very important factor in this regard.

111. In the present case the Court of Appeal observed that G. did not hold any public office (see paragraph 17 above). He was a private individual unknown to the general public at the time of his request for anonymisation (see, conversely, *M.L. and W.W. v. Germany*, cited above, § 106). The facts for which he had been convicted were not the subject of any media coverage with the exception of the impugned article, either at the time of the events reported on or when the archived version of the article was published on the Internet.

(γ) The conduct of the person concerned with regard to the media

112. The domestic courts did not rule expressly on the issue of G.'s conduct with regard to the media. The Court notes that G. did not at any time contact the media to publicise his situation, either when the article first appeared in 1994 or when it was published online in 2008 (see, conversely, *M.L. and W.W. v. Germany*, cited above, §§ 108-09). It is clear from his letters to *Le Soir* requesting the removal or anonymisation of the article (see paragraph 7 above) that, on the contrary, he made every effort to stay out of the media spotlight.

(δ) How the information was obtained and its veracity

113. The veracity of the facts related in the article was not disputed by G. (see, *mutatis mutandis*, *M.L. and W.W. v. Germany*, cited above, § 111, and, conversely, *Węgrzynowski and Smolczewski*, cited above, § 60). Likewise, G. did not allege that the information had been obtained in breach of journalistic ethics. Moreover, the Court of Appeal found that it was not disputed that the initial disclosure of the information had been lawful (see paragraph 17 above).

(ε) The content, form and consequences of the publication

114. Firstly, as regards the content of the article in question, it dealt with several road-traffic accidents which had occurred within the space of a few days in 1994. The accident caused by G. was one of them (see paragraph 5 above).

115. Secondly, with regard to the form of the publication, an issue on which the domestic courts likewise did not rule expressly, the Court reiterates that Internet sites are an information and communication tool particularly distinct from the printed media, especially as regards the capacity to store and transmit information, and that the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by printed publications (see *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, no. 33014/05, § 63, ECHR 2011 (extracts); *Węgrzynowski and Smolczewski*, cited above, § 58; *Delfi AS*, cited above, § 133; and *M.L. and W.W. v. Germany*, cited above, § 91).

116. The Court has inferred from this that the policies governing reproduction of material from the printed media and the Internet may differ (see *Editorial Board of Pravoye Delo and Shtekel*, cited above, § 63, and *Węgrzynowski and Smolczewski*, cited above, § 58). The same is true as regards paper and digital archives, as the scope of the latter is much greater and the repercussions on the private life of the individuals

who are named are correspondingly more serious, an effect that is further amplified by search engines.

117. As to the extent to which the archived version of the article was disseminated, the Court takes account of the fact that consulting archives requires an active search which involves entering keywords on the web page containing the newspaper's archives. Given its location on the website, the article in issue was not likely to attract the attention of those Internet users who were not seeking information about G. Likewise, the Court does not doubt that maintaining access to the article was not intended to re-disseminate information about G. (see, to similar effect, *M.L. and W.W. v. Germany*, cited above, § 113).

118. The Court nevertheless notes that in the instant case, at the time of G.'s request and throughout the domestic proceedings, access to the archives of the newspaper *Le Soir* was unrestricted and free of charge (compare with *M.L. and W.W. v. Germany*, cited above, § 113, where certain articles were accessible only behind a paywall or for subscribers).

119. The applicant pointed out that in the present case the judgment had not been against the operator of the search engine but against the publisher of a newspaper whose articles were accessible online.

120. Like the CJEU, the Court accepts that the obligations of search engines may differ from those of the entity which originally published the information (see *M.L. and W.W. v. Germany*, cited above, § 97; see also paragraph 45 above). It is also true that it is primarily because of search engines that the information on individuals that is held by the media outlets concerned can easily be found by Internet users (see *M.L. and W.W. v. Germany*, cited above, § 97). However, it cannot be overlooked that the very fact that a newspaper posts an article on its website has an impact on the visibility of the information in question. Thus, the initial interference with G.'s right to respect for his private life resulted from the applicant's decision to publish that information on his website and, especially, to keep it available there, even without the intention of attracting the public's attention (*ibid.*).

121. Thirdly, as to the consequences of publication, the Court of Appeal noted that a simple search using G.'s first name and surname on the search engine of *Le Soir* or on Google immediately brought up the article (see paragraph 17 above). The Court of Appeal held that keeping the impugned article online was therefore liable to cause indefinite and serious harm to G.'s reputation by giving him, as already observed (see paragraph 109 above), a "virtual criminal record", despite the fact that he had not only served his sentence after a final conviction for the offence but had also been formally rehabilitated.

122. In the Court's view, this assessment by the Court of Appeal cannot be regarded as arbitrary or manifestly unreasonable. With the passage of time, individuals should have the opportunity to rebuild their lives without

being confronted with their past mistakes by members of the public (see, *mutatis mutandis*, *Österreichischer Rundfunk v. Austria*, no. 35841/02, § 68, 7 December 2006, and *M.L. and W.W. v. Germany*, cited above, § 100). Name searches have become commonplace in today's society, and more often than not people conduct such searches for reasons wholly unconnected to any prosecution or conviction of the person concerned.

(στ) The severity of the measure imposed on the applicant

123. Lastly, as regards the severity of the measure imposed on the applicant, the Court must seek to ascertain whether the domestic courts took into account the impact of the measure on the applicant and *Le Soir* and whether they examined, within the limits of the case before them, whether other measures less restrictive of freedom of expression could be considered.

124. The Court notes that in the proceedings before the domestic courts the applicant maintained that a balance between the rights at stake could be achieved by means of a right to rectification or communication, that is to say, by adding further information to the impugned article. The Court of Appeal took the view that such a procedure would not be appropriate in the present case as it would allow the stigmatising effect of the offences committed by G., and of the sentence he had already served, to persist indefinitely and would render the rehabilitation order given in his favour meaningless.

125. Before the Court, the applicant subsequently alleged that the Court of Appeal had not made clear why the addition by *Le Soir* of a no-index tag would be insufficient to secure G.'s right to respect for his private life. He also alleged, referring in particular to the CJEU's *Google Spain* judgment, that G. should have asked search engines like Google to delist the impugned article. The Court notes that in the Court of Appeal proceedings the applicant argued that only the search engines were competent to deal with G.'s request and that the latter had erroneously directed his request against the applicant.

126. As to the addition by *Le Soir* of a no-index tag on the article, it does not appear from the documents in the domestic case file to which the Court has access that the applicant argued before the lower courts that the addition of such a tag would suffice to secure G.'s right to respect for private life. In any event, the Court of Appeal noted that at the time of delivery of its judgment the article in question was still available on the website of *Le Soir* without any no-index tag.

127. As to the delisting of the article by search engines, the Court considers that the relevance of such a measure is to be assessed in the context of the case brought before the courts. As G.'s request was directed against the applicant alone, the courts cannot be criticised for simply examining the admissibility and merits of that request. It is true that it was

open to *Le Soir* to take the initiative and itself request the search engines to delist the article in question, in response to the request it had received from G. to ensure respect for his private life. The applicant stated that the newspaper's legal department had in fact contacted Google for that purpose, but had received no reply (see paragraph 8 above). As G. did not request delisting of the article by the search engines in the context of his dispute with the applicant, and the latter did not have it delisted as an alternative to anonymisation, the Court considers it unnecessary to examine in the abstract whether delisting was apt to achieve a fair balance between the interests at stake. Likewise, in so far as the matter was not raised in the proceedings before the domestic courts, it is not the Court's task to consider of its own motion possible alternative methods, less restrictive of the applicant's right to freedom of expression, that might have been used in the present case.

128. The Court of Appeal took the view that the most effective means of protecting G.'s privacy without disproportionately interfering with the applicant's freedom of expression was to anonymise the article posted on *Le Soir*'s website by replacing G.'s first name and surname with the letter X (see paragraph 22 above). In reply to an argument advanced by the applicant, it stressed the fact that he had not been requested to remove the article from the archives but simply to render the electronic version anonymous; the paper archives remained intact and the applicant could still ensure the integrity of the original digital version (see paragraph 18 above). Replying to a further argument by the applicant citing the technical impossibility of altering archived articles, the Court of Appeal considered that the impossibility of doing so had not been established (see paragraph 25 above).

129. With regard to archives, the Court attaches considerable weight to the fact that the nature of the measure imposed in the present case preserved the integrity of the archived article, since it was only a matter of anonymising the online version of the article and the applicant was allowed to keep the original digital and paper archives. As pointed out by the Government, this meant, in particular, that anyone interested in the original version of the article could still request access to it, including in digital form (see paragraph 68 above). It was therefore not the article itself, but merely the ability to access it on the website of *Le Soir*, that was affected by the measure.

130. As to the Court of Appeal's assessment of the technical feasibility for the applicant of anonymising the article on the website of *Le Soir*, the applicant did not adduce any evidence capable of persuading the Court that this assessment was arbitrary or manifestly unreasonable.

131. In view of the foregoing, the Court considers that the national courts were entitled to conclude that the test as to the proportionality of the interference with the right to freedom of expression was satisfied (see paragraph 16 above).

(iii) Conclusion

132. In the light of the considerations outlined above, the Court considers that the domestic courts weighed in the balance G.'s right to respect for his private life and the applicant's right to freedom of expression, in accordance with the criteria established in its case-law. Specifically, the Court of Appeal attached particular weight to the damage sustained by G. on account of the online publication of the article in question, having regard in particular to the passage of time since the publication of the original article and to the fact that the anonymisation of the article on the website of *Le Soir* left the archives themselves intact and constituted the most effective measure amongst those that could have been taken in the present case, without interfering disproportionately with the applicant's freedom of expression. In the Court's view, the reasons given by the domestic courts were relevant and sufficient. It sees no strong reason which would require it to substitute its view for that of the domestic courts and to set aside the balancing exercise carried out by them. It therefore finds that the measure imposed can be regarded as proportionate to the legitimate aim pursued and as striking a fair balance between the competing rights at stake.

133. Accordingly, in the specific circumstances of the present case, there has been no violation of Article 10 of the Convention.

134. The Court wishes to make it clear that its finding cannot be interpreted as entailing an obligation for the media to check their archives on a systematic and permanent basis. Without prejudice to their duty to respect private life at the time of the initial publication of an article, when it comes to archiving the article they are required to carry out a check, and thus weigh the rights at stake, only if they receive an express request to that effect.

FOR THESE REASONS, THE COURT,

1. *Declares*, unanimously, the application admissible;
2. *Holds*, by six votes to one, that there has been no violation of Article 10 of the Convention.

Done in French, and notified in writing on 22 June 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court. {signature_p_2}

Milan Blaško
Registrar

Georgios A. Serghides
President

HURBAIN v. BELGIUM JUDGMENT

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Pavli is annexed to this judgment.

G.A.S.
M.B.

DISSENTING OPINION OF JUDGE PAVLI

1. The current case involves a conflict between the right of the press and the general public to preserve the integrity of press archives versus the right of an individual not to be confronted with a permanent “criminal record” in the online domain, which is one aspect of what has come to be known as “the right to be forgotten”. On the facts, it is a situation whereby one person’s right to online privacy can be quite effectively protected, at the level of search engines, without it being necessary to interfere directly with the relevant archived material – a situation that by definition raises serious questions of necessity in a democratic society. It is a crucial consideration that has been ignored by the domestic rulings, which the majority upholds based on a weak procedural argument and with little attention to the general ramifications of this potentially far-reaching judgment.

2. In my view, by ordering the applicant to anonymise an archived online article containing information about an old crime committed by the plaintiff in the domestic proceedings (Mr G.), the Belgian courts failed to strike a fair balance between the competing interests protected by Article 10 and Article 8 of the Convention respectively. In ratifying the balancing exercise carried out by the national courts, the judgment goes against an emerging but clear European consensus that right-to-be-forgotten claims in the online realm can, and should, be effectively addressed through deindexation of search engine results, while preserving the integrity of the original historical material – unless the privacy claimant can show that, for some exceptional reason, deindexation would not be sufficient or adequate in the specific case. Finally, the methodological approach followed by the majority in applying the *Von Hannover* criteria to the current case is also questionable in my view.

A. The essential role of digital press archives

3. I recall at the outset that the Court has repeatedly emphasised the substantial contribution made by digital press archives to preserving and making available news and information, thereby constituting an important source for education and historical research (see *Węgrzynowski and Smolczewski v. Poland*, no. 33846/07, § 59, 16 July 2013, and *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*, nos. 3002/03 and 23676/03, § 45, ECHR 2009). The maintenance of Internet archives is a critical aspect of the role of the press in a democracy (*ibid.*).

4. The Court has further noted that, even with respect to defamatory material, “it is not the role of judicial authorities to engage in rewriting history by ordering the removal from the public domain of all traces of publications which have in the past been found, by final judicial decisions,

to amount to unjustified attacks on individual reputations” (see *Węgrzynowski and Smolczewski*, cited above, § 65). It follows *a fortiori* that only very compelling reasons can justify direct interference with archived media content whose legality at the time of the original publication has not been questioned.

5. Retrospective cleansing of digital press archives interferes not only with the public’s Article 10 right to be informed about past events and contemporary history, but also with the publisher’s freedom of journalistic expression protected by the same provision. In this context, the Court has recognised that granting such anonymisation requests can have a broader chilling effect on freedom of expression. According to the Court, “[t]he obligation to examine the lawfulness of a report at a later stage, following an anonymisation request from the person concerned, which implies ... weighing up all the interests at stake, would entail a risk that the press might refrain from keeping reports in its online archives or that it would omit individualised elements in reports likely to be the subject of such a request” (see *M.L. and W.W. v. Germany*, nos. 60798/10 and 65599/10, § 104, 28 June 2018). The Court observed in that regard that “the most careful scrutiny under Article 10 is required where measures or sanctions imposed on the press are capable of discouraging the participation of the press in debates on matters of legitimate public concern” (*ibid.*).

6. To fulfil their Article 10 function, digital press archives must be complete and historically accurate. Any tampering with their content could undermine their underlying purpose, which is to maintain a full historical record, keeping in mind also that it is not possible to know beforehand which particular information stored in them will, at some future point, become of renewed public interest. For example, journalists and others have a legitimate interest in building a moral profile of a political candidate by gathering or cross-checking various facts about his or her past. In such a situation, the person’s criminal record may gain new significance, whether or not any prior convictions are considered to be “spent” (see *Jankauskas v. Lithuania (no. 2)*, no. 50446/09, 27 June 2017, where the Court found that spent convictions can legitimately be relied on for the purposes of evaluating a person’s moral stature). In the case of emergent public figures, the watchdog function can be seriously compromised if press archives have in the meantime been unnecessarily sanitised.

7. In view of the above, there is little scope under the Convention for measures that have the effect of permanently interfering with the historical record. I should note at this point that it makes little difference that the historical material has been left untouched in the printed version of the archive, considering that present-day newsgathering, investigative journalism and scholarly research rely to a great degree on online sources. In fact, the Court has stressed that the importance of digital press archives

stems particularly from the fact that they are readily accessible to the public and are generally free (see *M.L. and W.W. v. Germany*, cited above, § 90). While a person’s privacy and right to rehabilitation should be generally protected from the casual curiosity of the online masses, that does not necessarily justify the complete erasure of the historical record.

B. Emerging European consensus on the “right to be forgotten”

8. It is important to consider the case at hand in the context of the emerging European consensus on balancing private and public interests in cases involving press archives. An important reference in this regard is the CJEU’s ruling in *Google Spain*, to which today’s judgment refers extensively (see paragraphs 42-45 of the judgment)¹. At issue in *Google Spain* was an archived online article, fully lawful at the time of publication, containing a person’s name in connection with an auction that followed attachment proceedings. The CJEU established a data protection remedy that consists in delisting web pages containing personal data from name-based search engine results, but ensuring that no information gets deleted or altered in the original source². The CJEU’s reasoning rested in part on the distinction between the legal regime applicable to general search engines and that applicable to primary publishers, with the crucial difference being that only the latter can benefit from journalistic exemptions under European Union data protection principles. The CJEU pointed out that as a result of this difference the data subject will, in certain circumstances, be capable of exercising his data protection rights against the search engine operator, but not against the publisher of the web page (see paragraph 85 of the CJEU judgment). In the same vein, the outcome of the weighing of the competing interests at issue may be different in each of the two scenarios, “given that, first, the *legitimate interests* justifying the processing may be different and, second, the *consequences of the processing for the data subject*, and in particular for his private life, are not necessarily the same” (paragraph 86).

9. Regarding specifically the consequences of data processing for private life, the CJEU found that the inclusion of a web page in name-based search results “is liable to constitute a more significant interference with the data subject’s fundamental right to privacy than the publication on the web page”, given that the inclusion of information in the search results “makes

¹ Case C-131/12, EU:C:2014:317; *Google Spain SL and Google Inc.* It is notable that the Liège Court of Appeal took note of *Google Spain* in its decision in the case at hand and was therefore aware of the newly established remedy (see paragraph 15 of the judgment).

² See “Article 29” Data Protection Working Party, Guidelines on the implementation of the Court of Justice of the European Union judgment in the case of “*Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*” (C-131/12), adopted on 26 November 2014, § 4.

access to that information appreciably easier for any internet user making a search in respect of the person concerned and may play a decisive role in the dissemination of that information” (paragraph 87).

10. In this connection, it is important to bear in mind that general search engines have a *transformational* impact on personal privacy because they allow users to build a “complete profile” of a person’s life, drawing on practically every piece of information available online, in a way that was not possible in the pre-Internet days. This makes general search engines unique in a way that does not apply to digital press archives or even the search engine of one individual website.

11. In continuity with previous EU data protection rules and the *Google Spain* judgment, the upgraded EU General Data Protection Regulation (GDPR) expressly lays down the right to erasure of personal data on grounds enumerated in Article 17(1); this right is, however, subject to limitation to the extent that processing is necessary for exercising the right of freedom of expression and information (Article 17(3)(a)). The GDPR also provides for exemptions and derogations for processing carried out for journalistic purposes if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information (Article 85(2)). Recital 153 of the GDPR makes it clear that this applies “in particular to the processing of personal data ... in news archives and press libraries”.

12. In the years since the *Google Spain* judgment, delisting of name-based search results has become a well-established and functional remedy in Europe in cases concerning right-to-be-forgotten claims relating to press publications³. There is in fact strong comparative evidence pointing towards a reluctance on the part of domestic courts to edit the past by anonymising archives, with remedies at the level of search engines being favoured instead.

13. By way of example, I refer to a recent judgment of the Spanish Constitutional Court in *A & B v. Ediciones El País*, which dealt with facts not dissimilar to those at issue in the current case⁴. The Constitutional Court held that once access to the online article in question had been impeded through its deindexation from general search engines and from the internal search engine of *El País*, it was no longer necessary to alter its content to satisfy the privacy claim, since the dissemination of the article had been reduced both quantitatively and qualitatively by disassociating it from the identity of the persons concerned.

³ See, for instance, the recent judgment of the High Court of England and Wales in *NTI and NT2 v Google and The Information Commissioner* [2018] EWHC 799 (QB); and the judgment of the French Court of Cassation, First Civil Division, 12 May 2016, no. 15-17729.

⁴ Judgment 58/2018, 4 June 2018.

14. Also notable is a judgment of the German Federal Constitutional Court of November 2019 which introduced a nuanced methodology for balancing private and public interests in cases concerning digital press archives, with an emphasis on examining all available technical options before resorting to altering the historical record directly⁵. While leaving the balancing exercise *in casu* to the ordinary courts, the high German court stressed that “[t]he aim is to strike a balance that preserves unrestricted access to the original texts to the greatest extent possible, while also ensuring that where protection is merited in the individual case – especially in relation to name-based searches via search engines – sufficient limitations are put in place” (paragraph 141). In its methodological guidance to the lower courts, the Federal Constitutional Court focused on the actual dissemination and visibility of the original publication on the Internet (see paragraphs 125, 131-32 and 137), an aspect that is also crucial in the present case.

C. The all-terrain Von Hannover criteria

15. Turning now to our own methodology for considering right-to-be-forgotten requests, the majority have resorted to the criteria developed in *Von Hannover v. Germany* (no. 2) ([GC], nos. 40660/08 and 60641/08, ECHR 2012) as the general matrix for resolving conflicts between Article 8 and Article 10 interests. In fairness, the Court has previously followed the same approach, in *M.L. and W.W. v. Germany* (cited above).

16. The deployment of the *Von Hannover* criteria, together with the similar but not identical test adopted in *Axel Springer AG v. Germany* ([GC], no. 39954/08, 7 February 2012), in order to resolve all conflicts ranging from invasion of privacy to defamation disputes and now matters of informational self-determination has generated a measure of criticism from both outside⁶ and inside⁷ the Court. It has been argued, for example, that defamation cases differ in many significant respects from privacy torts, and that at least some of the criteria developed in *Von Hannover* are not equally relevant or transposable to the reputational context. I have some sympathy for this line of argument, considering that it may be somewhat rigid and overambitious to seek to apply a single set of criteria to the very diverse range of conflicts that may arise between Article 8 and 10 interests. This is

⁵ 1 BvR 16/13, 6 November 2019.

⁶ See, among others, H. Tomlinson, “Privacy and Defamation, Strasbourg blurs the boundaries”, 23 January 2014, at Inform.org; and S. E. Gale, “Defamation and the misuse of private information: a comparative analysis” (2018), *Tort Law Review* 26, at 38-54.

⁷ See, although in a more specific context, the joint dissenting opinion of Judges Sajó and Karakas in *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, 27 June 2017.

especially so in view of the growing scope and diversity of claims that the Court has recognised as falling within the remit of Article 8.

17. Be that as it may, the current context raises an even more challenging question: why should the *Von Hannover* criteria be applied by default to a dispute about a publication whose original legality is not in question and whose court-ordered editing is requested in the name of substantially different considerations? For example, the notoriety of the person concerned or the contribution of the material to matters of public interest are much more easily assessable at the moment of the original publication; in contrast, when interference with the archived material is requested many years after the events, it is also necessary to consider the potential utility and relevance of the publication at some future time. This is an inherently uncertain ponderation and therefore the presumption must be in favour of not interfering directly with original archive material. For these reasons, I fear that the *Von Hannover* criteria may have reached the limit of their usefulness in this context. It is worth recalling here that the EU regulatory framework on the right to be forgotten relies on a simpler set of criteria that are more germane to the context of personal data protection⁸ (though certainly not without their own interpretative challenges).

D. Delisting versus editing of the press archive in the present case

18. Turning to the merits of the present case, I do not question that the plaintiff in the domestic proceedings had a legitimate Article 8 interest in not being casually confronted with his spent conviction, with a view to his reintegration in society. It is, however, important to pinpoint where exactly that interest lay. He took the initial steps against *Le Soir* because he realised that the article at issue appeared among the top search results when his name was typed into search engines (see paragraph 7 of the judgment). In his submissions to this Court, Mr G. sought to demonstrate the impact of the archived article on his private life precisely by reference to the fact that the article featured prominently in the search results linked to his name on a major search engine and on the internal search engine of *Le Soir* (see paragraph 8 of the third-party submissions). It is also notable, even though not decisive, that Mr G. was prepared to accept, as an alternative remedy, the delisting of the article from search engine results for queries containing his name, should anonymisation of the article prove technically impossible (see paragraph 11 of the judgment).

19. It is clear from the above that the plaintiff's root concern was with the online search results, not the article itself. With this in mind, his legitimate interest in not being confronted with the article in question in his daily personal and professional life could have been adequately protected by

⁸ See paragraph 11 above.

removing the article from name-based search results on general search engines (according to current statistics, more than 90 percent of Belgian Internet users tend to use one of two major search engines). Such a measure would have prevented the article from becoming easily accessible through curiosity-driven or other random search queries. At the same time, it would have preserved the integrity of the press archives and allowed full access to the unaltered original source to those persons – journalists, researchers or others – who might become specifically interested in the past events covered in the article. While delisting remains a significant interference with the freedom to receive and impart information and ideas, it is still less onerous for the applicant and less detrimental to his Article 10 rights.

20. It cannot be excluded that in certain circumstances a privacy interest may be so strong as to warrant the anonymisation of an archived news article. Where a person makes a compelling case that the harm caused to him or her as a result of an online publication cannot be undone by delisting, other remedies may need to be considered. Put differently, for anonymisation to be compatible with Article 10, a person must show that substantial harm to his or her private life does not result merely from a piece of information being easily discoverable, but rather from the fact that the information continues to exist in the online space at all (for example, when it involves particularly sensitive personal data or especially vulnerable persons). However, no such special circumstances are present in the instant case.

21. How do the majority deal with this conundrum? They find that since the plaintiff had not requested deindexation from the search engine and had in fact chosen to go after the newspaper archive, it was not for the national courts, or for this Court, to consider possible alternatives “in the abstract” (see paragraph 127 of the judgment). In other words, because the plaintiff has demanded that the neighbour’s wall be taken down in order to get rid of some graffiti on it, let the plaintiff have his wish – alternatives and proportionality be damned! I am not persuaded that the Belgian courts seriously considered any (readily available) alternatives to direct interference with the archived material in this case. The majority have therefore upheld domestic decisions that failed to engage in the kind of careful balancing that other national and supranational courts across the continent have sought to develop in this delicate context⁹. While one ought to have sympathy for the predicament of the plaintiff in the domestic proceedings, we cannot ignore the broader consequences of the precedent we are creating.

⁹ I am also unable to follow the majority’s suggestion that *the applicant* entity should have requested deindexation from the search engines, while the rightsholder was not prepared to do so himself. This would be against the principles of data protection and it is not surprising that the search engine failed to act on a third party’s request.

22. In conclusion, today's judgment stands in strong tension with the principles of our own jurisprudence on the integrity of press archives as well as the emerging European consensus on the application of the right to be forgotten. In adopting this judgment the Court may have opened the door, with no good reason in my view, to the facile cleansing of the journalistic record.