

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

GRAND CHAMBER

CASE OF BÉDAT v. SWITZERLAND

(Application no. 56925/08)

JUDGMENT

STRASBOURG

29 March 2016

This judgment is final.



In the case of Bédat v. Switzerland,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Mirjana Lazarova Trajkovska, *President*,
Dean Spielmann,
Josep Casadevall,
Luis López Guerra,
Mark Villiger,
Elisabeth Steiner,
Khanlar Hajiyev,
Päivi Hirvelä,
Kristina Pardalos,
Ganna Yudkivska,
Vincent A. De Gaetano,
Julia Laffranque,
Helen Keller,
Paul Mahoney,
Aleš Pejchal,
Krzysztof Wojtyczek,
Egidijus Kūris, *judges*,
and Lawrence Early, *Jurisconsult*,

Having deliberated in private on 13 May 2015 and 20 January 2016,

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

PROCEDURE

1. The case originated in an application (no. 56925/08) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swiss national, Mr Arnaud Bédat ("the applicant"), on 7 November 2008. Having originally been designated by the initials A.B., the applicant subsequently agreed to the disclosure of his name.

2. The applicant was represented by Mr C. Poncet and Mr D. Hoffmann, lawyers practising in Geneva. The Swiss Government ("the Government") were represented by their Agent, Mr F. Schürmann, of the Federal Office of Justice.

3. The applicant alleged that the fine imposed on him in criminal proceedings for having published information covered by the secrecy of criminal investigations had violated his right to freedom of expression as secured by Article 10 of the Convention.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). On 1 July 2014 a Chamber of that Section, composed of Guido Raimondi, Işıl Karakaş, András Sajó, Nebojša Vučinić, Helen Keller, Paul Lemmens and Robert Spano, judges, and Abel Campos, Deputy Section Registrar, delivered its judgment (see *A.B. v. Switzerland*, no. 56925/08, 1 July 2014), in which it declared the application admissible and held, by four votes to three, that there had been a violation of Article 10 of the Convention. The joint dissenting opinion of Judges Karakaş, Keller and Lemmens was annexed to the judgment.

On 29 September 2014 the Government requested that the case be referred to the Grand Chamber under Article 43 of the Convention. On 17 November 2014 a panel of the Grand Chamber accepted that request.

5. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

6. The applicant and the Government each filed further observations (Rule 59 § 1).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 13 May 2015 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr F. SCHÜRMANN, Head of the International Human Rights Protection Unit, Federal Office of Justice, *Agent*,
Ms D. STEIGER LEUBA,
Mr F. GALLI,
Mr P. ROHNER, *Advisers*;

(b) *for the applicant*
Mr C. PONCET,
Mr D. HOFFMANN, *Counsel*.

The Court heard addresses by Mr Poncet, Mr Schürmann and Mr Hoffmann and replies by Mr Poncet and Mr Schürmann to questions put by judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant is a journalist by profession. On 15 October 2003 he published an article in the weekly magazine *L'Illustré* entitled "*Drame du*

Grand-Pont à Lausanne – la version du chauffard – l'interrogatoire du conducteur fou" ("Tragedy on the Lausanne Bridge – the reckless driver's version – Questioning of the mad driver"). The article in question concerned a set of criminal proceedings against M.B., a motorist who had been remanded in custody after an incident on 8 July 2003 in which he had rammed his car into pedestrians, before throwing himself off the Lausanne Bridge (Grand-Pont). The incident, in which three people had died and eight others had been injured, had caused much emotion and controversy in Switzerland. The article began as follows.

> "Surname: B. First name: M. Born on 1 January 1966 in Tamanrasset (Algeria), son of B.B. and F.I., resident in Lausanne, holder of a category C licence, spouse of M.B. Profession: nursing assistant ... It is 8.15 p.m. on Tuesday 8 July 2003, in the austere premises of the Lausanne criminal investigation department. Six hours after his tragic headlong race along the Lausanne Bridge, resulting in three deaths and eight casualties, this reckless driver is alone for the first time, facing three investigators. Will he own up? In fact he doesn't actually seem to realise what is happening, as if oblivious to the events and all the hubbub around him. The man who upset the whole of Lausanne this fine summer day is not very talkative. This Algerian citizen is withdrawn, introverted, inscrutable, indeed completely impenetrable. And yet the questions are flying from all sides. What were the reasons for this 'accident', one of the policemen rather clumsily writes, as if he had already formed his opinion. Four words in reply: 'I do not know'."

9. The article continued with a summary of the questions put by the police officers and the investigating judge and M.B.'s replies. It also mentioned that M.B. had been "charged with premeditated murder [*assassinat*] and, in the alternative, with murder [*meurtre*], grievous bodily harm, endangering life and serious traffic offences", and that he "appear[ed] to show no remorse". The article was accompanied by several photographs of letters which M.B. had sent to the investigating judge. It ended with the following paragraph.

> "From his prison cell, M.B. now spends his time sending letters to the investigating judge ...: on being taken into custody he asked for his watch to be returned and requested a cup for his coffee, some dried fruit and chocolate. On 11 July, three days after the events, he even asked to be temporarily released for 'a few days'. 'I would like to phone my big brother in Algeria', he subsequently begged. He finally announced on 11 August that he had come to a 'final decision': he dismissed his lawyer, Mr M.B., on grounds of 'lack of trust'. Two days later, another letter: could the judge send him 'the directory of the Bar Association of the Canton of Vaud' to help him find a different defence lawyer? However, with all the recurrent lies and omissions, the mixture of naivety and arrogance, amnesia and sheer madness characterising all these statements, surely M.B. is doing everything in his power to make himself impossible to defend?"

10. The article also included a brief summary entitled "He lost his marbles..." ("*Il a perdu la boule...*"), and statements from M.B.'s wife and from his doctor.

11. It appears from the file that the applicant's article was not the only piece to have been published on the Lausanne Bridge tragedy. The authorities responsible for the criminal investigation had themselves decided to inform the press of certain aspects of the investigation, which had led to the publication of an article in the *Tribune de Genève* on 14 August 2003.

12. M.B. did not lodge a complaint against the applicant. However, criminal proceedings were brought against the applicant on the initiative of the public prosecutor for having published secret documents. It emerged from the investigation that one of the parties claiming damages in the proceedings against M.B. had photocopied the case file and lost one of the copies in a shopping centre. An unknown person had then brought the copy to the offices of the magazine which had published the impugned article.

13. By an order of 23 June 2004, the investigating judge sentenced the applicant to one month's imprisonment, suspended for one year.

14. Following an application by the applicant to have the decision set aside, the Lausanne Police Court, by a judgment of 22 September 2005, replaced the prison sentence with a fine of 4,000 Swiss francs (CHF) (approximately 2,667 euros). At the hearing on 13 May 2015, in reply to a question from the Court, the applicant's representative stated that the sum of CHF 4,000 had been advanced by his client's employer and that his client was intending to refund it after the proceedings before the Court. He also confirmed that the amount set by the criminal court had taken account of the applicant's previous record.

15. The applicant lodged an appeal on points of law. His appeal was dismissed on 30 January 2006 by the Criminal Court of Cassation of the Canton of Vaud.

16. The applicant lodged a public-law appeal and an appeal on grounds of nullity with the Federal Court, which on 29 April 2008 dismissed the appeals. Its decision was served on the applicant on 9 May 2008. The relevant passages from the decision follow.

> "7. In short, the appellant submits that his conviction for a breach of Article 293 of the Criminal Code is contrary to federal law. He does not challenge the fact that the information which he published falls within the ambit of Article 293 of the Criminal Code. He does, on the other hand, submit, under an interpretation of Articles 293 and 32 of the Criminal Code in the light of the principles inferred from Article 10 ECHR by the European Court of Human Rights, that having received that information in good faith without obtaining it unlawfully, he had the duty as a professional journalist, under Article 32 of the Criminal Code, to publish it owing to what he sees as the obvious interest of the so-called 'Lausanne Bridge' case to the general public in French-speaking Switzerland.
>
> 7.1. In accordance with Article 293 of the Criminal Code (Publication of secret official deliberations), anyone who, without being entitled to do so, makes public all or part of the documents, investigations or deliberations of an authority which are secret by law or by virtue of a decision taken by that authority, acting within its powers, will be punished by a fine (paragraph 1). Complicity in such acts is also

punishable (see paragraph 2). The court may decide not to impose any penalties if the secret thus made public is of minor importance (see paragraph 3).

According to case-law, this provision proceeds from a formal conception of secrecy. It is sufficient that the documents, deliberations or investigations in question have been declared secret by law or by virtue of a decision taken by the authority, or in other words that there has been an intention to keep them from becoming public, regardless of the type of classification selected (for example, top secret or confidential). On the other hand, strict secrecy presupposes that the holder of the specific information wishes to keep it secret, that there is a legitimate interest at stake, and that the information is known or accessible only to a select group of persons (see ATF [Judgments of the Swiss Federal Court] 126 IV 236, point 2a, p. 242, and 2c/aa, p. 244). This state of affairs was not altered by the entry into force of paragraph 3 of this Article on 1 April 1998 (RO [*Recueil officiel* – Official Collection of Federal Statutes] 1998 852 856; FF [*Feuille fédérale*] 1996 IV 533). That rule concerns not secrets in the substantive sense but rather instances of futile, petty or excessive concealment (see ATF 126 IV 236, point 2c/bb, p. 246). In order to exclude the application of paragraph 3, the court must therefore first of all examine the reasons for classifying the information as secret. It must, however, do so with restraint, without interfering with the discretionary power wielded by the authority which declared the information secret. It is sufficient that this declaration should nonetheless appear tenable *vis-à-vis* the content of the documents, investigations or deliberations in issue. Moreover, the journalists' viewpoint on the interest in publishing the information is irrelevant (see ATF 126 IV 236, point 2d, p. 246). In its *Stoll v. Switzerland* judgment of 10 December 2007, the European Court of Human Rights confirmed that this formal conception of secrecy was not contrary to Article 10 ECHR inasmuch as it did not prevent the Federal Court from determining whether the interference in issue was compatible with Article 10 ECHR, by assessing, in the context of its examination of Article 293, paragraph 3, of the Criminal Code, the justification for classifying a given piece of information as secret, on the one hand, and weighing up the interests at stake, on the other (see *Stoll v. Switzerland* [GC], no. 69698/01, §§ 138-39, ECHR 2007-V).

7.2. In the present case the offence with which the appellant is charged concerned the publication of records of interviews and correspondence contained in the case file of a live criminal investigation.

In pursuance of Article 184 of the Code of Criminal Procedure of the Canton of Vaud (CPP/VD), all investigations must remain secret until their final conclusion (see paragraph 1). The secrecy requirement relates to all the evidence uncovered by the investigation itself as well as all non-public decisions and investigative measures (see paragraph 2). The law also specifies that the following are bound by secrecy *vis-à-vis* anyone who does not have access to the case file: the judges and judicial staff (save in cases where disclosure would facilitate the investigation or is justified on public-order, administrative or judicial grounds; see Article 185 CPP/VD), and also the parties, their friends and relatives, their lawyers, the latter's associates, consultants and staff, and any experts and witnesses. However, disclosure to friends or relatives by the parties or their lawyer is not punishable (see Article 185a CPP/VD). Lastly, the law provides for a range of exceptions. As an exception to Article 185, the cantonal investigating judge and, with the latter's agreement, the judge responsible for the preliminary inquiry or senior police officers specially appointed by the cantonal government [*Conseil d'État*] (see Article 168, paragraph 3) may inform the press, radio or television about a pending investigation if so required by the public interest or considerations of fairness, particularly where public cooperation is required to shed light on an offence, in cases which are particularly serious or are already known to the

general public, or where erroneous information must be corrected or the general public reassured (see Article 185b, paragraph 1, CPP/VD).

The present case therefore concerns secrecy imposed by the law rather than by an official decision.

7.3. As a general rule, the reason for the confidentiality of judicial investigations, which applies to most sets of cantonal criminal proceedings, is the need to protect the interests of the criminal proceedings by anticipating risks of collusion and the danger of evidence being tampered with or destroyed. Nevertheless, the interests of the accused must not be disregarded either, particularly *vis-à-vis* the presumption of innocence and, more broadly, the accused's personal relations and interests (see Hauser, Schweri and Hartmann, *Schweizerisches Strafprozessrecht*, 6th ed., 2005, § 52, no. 6, p. 235; Gérard Piquerez, op. cit., § 134, no. 1066, p. 678; Gérard Piquerez, *Procédure pénale suisse: manuel*, 2nd ed., 2007, no. 849, pp. 559 et seq.), as well as the need to protect the opinion-forming process and the decision-making process within a State authority, as protected, precisely, by Article 293 of the Criminal Code (see ATF 126 IV 236, point 2c/aa, p. 245). The European Court of Human Rights has already had occasion to deem such a purpose legitimate in itself. The aim is to maintain the authority and impartiality of the judiciary in accordance with the wording of Article 10 § 2 ECHR, which also mentions the protection of the reputation or rights of others (see *Weber v. Switzerland*, 22 May 1990, § 45, Series A no. 177, and *Dupuis and Others v. France*, no. 1914/02, § 32, 7 June 2007).

Furthermore, in so far as the impugned publication concerned excerpts from records of interviews of the accused and reproduced certain letters sent by the latter to the investigating judge, this evidence can validly be classified secret, by prohibiting public access to it, as provided by the legislation of the Canton of Vaud. This is the inescapable conclusion as regards the records of interviews of the accused, as it would be inadmissible to allow such documents to be analysed in the public sphere, before the conclusion of the investigation, before the trial and out of context, in a manner liable to influence the decisions taken by the investigating judge and the trial court. It is also the only possible conclusion as regards the letters sent by the accused to the investigating judge, which focused on practical problems and criticisms of his lawyer (see Police Court judgment, point 4, p. 7). We might point out here that it appears from the impugned publication – which the cantonal authorities did not reproduce in full in their decisions, although they did refer to it and its content is not disputed – that the aforementioned practical problems concerned requests for temporary release and for access to personal effects (letters of 11 July 2003), for a change of cell (letter of 7 August 2003) and for authorisation to use the telephone (letter of 6 August 2003). Regardless of the guarantee of the presumption of innocence and the inferences concerning the detainee's character which might be drawn during the criminal proceedings from such correspondence, the detainee, whose liberty is considerably restricted, even in respect of everyday acts relating to his private life, or indeed intimate sphere, can expect the authority restricting his liberty to protect him from public exposure of the practical details of his life as a remand prisoner and as a person facing charges (see Article 13 of the Constitution).

It follows that in the instant case the information published by the appellant, in so far as it concerned the content of the records of his interviews and his correspondence with the investigating judge, cannot be described as a secret of minor importance for the purposes of Article 293, paragraph 3, of the Criminal Code. That being so, the impugned publication constituted the factual elements of the offence provided for in Article 293, paragraph 1, of the Criminal Code.

7.4. Moreover, the information in question may be described as being secret in substantive terms because it was only accessible to a restricted number of persons (the investigating judge and the parties to the proceedings). Furthermore, the investigating authority was desirous to keep them secret, with not only a legitimate interest in doing so but an obligation under the Cantonal Code of Criminal Procedure, the justification for which was mentioned above (see point 7.3 above).

7.5. Therefore, the only remaining point at issue is the existence of justification.

8. In short, the appellant submits that he had the professional duty (under former Article 32 of the Criminal Code) as a journalist to publish the information in question because of what he describes as the obvious interest in the 'Lausanne Bridge' case for the population of French-speaking Switzerland. He considers that in the light of European case-law, the basic assumption should be that publication is justified in principle unless there is a pressing social need to maintain secrecy. From the standpoint of good faith, he submits that Article 32 should apply to journalists who are not responsible for the indiscretion committed by a third party and who receive information without committing any offence themselves other than the breach of secrecy stemming from the publication. Lastly, he contends that the mode of publication is not a relevant criterion.

8.1. As regards the former point, the cantonal court found that while the accident of 8 July 2003, the circumstances of which were undoubtedly unusual, had triggered a great deal of public emotion, it had nevertheless, in legal terms, been simply a road accident with fatal consequences, and did not in itself entail any obvious public interest. It was not a case of collective trauma on the part of the Lausanne population, which would have justified reassuring the citizens and keeping them informed of the progress of the investigation (see judgment appealed against, point 2, p. 9).

It is true that the 'Lausanne Bridge case' attracted extensive media coverage (see Police Court judgment, point 4, p. 8, to which the cantonal judgment refers (judgment appealed against, point B, p. 2)). However, this circumstance alone, alongside the unusual nature of the accident, is insufficient to substantiate a major public interest in publishing the confidential information in question. Unless it can be justified *per se*, the interest aroused among the public by media coverage of events cannot constitute a public interest in the disclosure of classified information, because that would mean that it would be sufficient to spark the public's interest in a certain event in order to justify the subsequent publication of confidential information likely to maintain that interest. Furthermore, such a public interest is manifestly lacking as regards the letters that were published. As we have seen above (see point 7.3 above), these letters virtually exclusively concerned criticisms levelled by the accused against his lawyer and such practical problems as requests for temporary release, for access to personal effects, to change cells and to use the telephone. This type of information provides no relevant insights into the accident or the circumstances surrounding it. It relates to the private life, or indeed intimate sphere, of the person in custody, and it is difficult to see any interest which its publication could satisfy other than a certain kind of voyeurism. The same applies to the appellant's requests to the investigating judge in relation to his choice of defence lawyer. Nor is it clear, as regards the records of his interviews, what political question or matter of public interest would have arisen or been worth debating in the public sphere, and the cantonal authorities explicitly ruled out the existence of any collective trauma which might have justified reassuring or informing the population. This finding of fact, which the appellant has not disputed in his public-law appeal, is binding on this court (see section 277 *bis* of the Federal Criminal Procedure Act). That being the case, the appellant fails to demonstrate the 'obvious' interest to the general public of the information published, and the cantonal

court cannot be criticised for having concluded that at the very most, such an interest involved satisfying an unhealthy curiosity.

8.2. The other two factors relied upon by the appellant concern his behaviour (good faith in access to information and mode of publication).

8.2.1. It should first of all be noted that Article 293 of the Criminal Code punishes only the disclosure of information, irrespective of how the perpetrator obtained it. Moreover, even under Article 10 ECHR, the European Court does not attach decisive importance to this fact when considering whether applicants have fulfilled their duties and responsibilities. The determining fact is rather that they could not claim in good faith to be unaware that disclosure of the information was punishable by law (see *Stoll*, cited above, § 144, and *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I). This point is well-established in the present case (see section B above).

8.2.2. On the other hand, the mode of publication can play a more important role in the context of safeguarding freedom of expression. While the European Court of Human Rights reiterates that neither it, nor the domestic courts for that matter, should substitute their own views for those of the press as to what technique of reporting should be adopted by journalists, in weighing up the interests at stake it nevertheless takes account of the content, vocabulary and format of the publication, and of the headings and sub-headings (whether chosen by the journalist or the editors), and the accuracy of the information (see *Stoll*, cited above, §§ 146 et seq., especially 146, 147 and 149).

In the instant case the cantonal court ruled that the tone adopted by the appellant in his article showed that his main concern was not, as he claims, to inform the general public about the State's conduct of the criminal investigation. The headline of the article ('Questioning of the mad driver', 'the reckless driver's version') already lacked objectivity. It suggested that the case had already been tried in the author's view, in the sense that the fatalities on the Lausanne Bridge had been caused not by an ordinary motorist but by a 'mad driver', a man 'oblivious to the events and all the hubbub around him'. The journalist concluded by wondering whether the driver was in fact doing his best to 'make himself impossible to defend'. The manner in which he quoted the excerpts from the records of interviews and reproduced the letters sent by the defendant to the judge pointed to the motives of the author of the impugned article: he confined himself to sensationalism, his *modus operandi* being exclusively geared to satisfying the relatively unhealthy curiosity which anyone is liable to feel about this type of case. Readers of this highly biased publication would have formed an opinion and subjectively prejudged the future action to be taken by the courts regarding this case, without the least respect for the principle of presumption of innocence (see judgment appealed against, point 2, pp. 9 et seq.). The cantonal court concluded that this factor did not indicate that the public interest in receiving information prevailed. That court cannot be criticised on that account.

8.3. The appellant also submitted that the records of interviews and the letters would in any case be mentioned in subsequent public hearings. He inferred from this that preserving the confidentiality of this information could therefore not be justified by any 'pressing social need'.

However, the mere possibility that the secrecy of criminal investigations might be lifted during a subsequent phase of proceedings, particularly during the trial, which is generally subject to the publicity principle, does not undermine the justification for keeping judicial investigations confidential, because the primary aim is to protect the opinion-forming and decision-making processes on the part not only of the trial court but also of the investigating authority, until the completion of this secret phase of

proceedings. Moreover, far from being neutral and comprehensive, the publication in issue included comments and assessments which presented the information in issue in a particular light, without providing the opportunities for adversarial argument which are the very essence of proceedings in trial courts.

8.4. Lastly, the appellant did not explicitly criticise the amount of the fine imposed on him. Nor did he challenge the refusal to grant him a probationary period after which the fine would be struck out (former Article 49, point 4, in conjunction with former Article 106, paragraph 3, of the Criminal Code) under Swiss law. From the angle of weighing up the interest in the interference, we might simply note that the fine imposed, the amount of which took into account a previous conviction dating back to 1998 (imposition of a CHF 2,000 fine, which could be struck out after a two-year probationary period, for coercion and defamation), does not exceed half the amount of the appellant's monthly income at the material time (see Police Court judgment, point 1, p. 5), and there is nothing to suggest that his freelance status at the time of the first-instance judgment led to any significant drop in his earnings. It should also be pointed out that at CHF 4,000 the amount of the fine is below the statutory maximum set out in former Article 106, paragraph 1, of the Criminal Code (as in force until 31 December 2006), and that this maximum amount, set by the legislature more than thirty years ago, was not revised until the entry into force of the new general section of the Criminal Code, which now sets a figure of CHF 10,000 (see Article 106, paragraph 1, of the Criminal Code as in force since 1 January 2007). Furthermore, the sanction for the offence with which the appellant is charged did not prevent him from expressing his views, since it was imposed after the article had been published (see *Stoll*, cited above, § 156). That being the case, it is unclear, in view of the nature of the offence charged (the least serious in the classification set out in the Swiss Criminal Code), the amount of the fine and the time of its imposition, how the sanction imposed on the applicant could be regarded as a form of censorship.

8.5. It follows from the foregoing that the appellant disclosed a secret within the meaning of Article 293, paragraph 1, of the Criminal Code and that he cannot rely on any justifying factor in his favour. The decision appealed against does not violate federal law as interpreted in the light of the Convention provisions relied upon by the appellant."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal Code of 21 December 1937 (version in force until 31 December 2006)

17. The relevant provisions of the Criminal Code read as follows.

Article 39 – Short periods of imprisonment [*arrêts*]

"1. Short periods of imprisonment [*arrêts*] correspond to the least severe custodial sentence available. Their duration is one day minimum and three months maximum ..."

Article 293 – Publication of secret official deliberations

"1. Anyone who, without being entitled to do so, makes public all or part of the documents, investigations or deliberations of any authority which are secret by law or

by virtue of a decision taken by such an authority acting within its powers shall be punished with imprisonment [*arrêts*] or a fine.

2. Complicity in such acts shall be punishable.

3. The court may decide not to impose any penalty if the secret concerned is of minor importance."

B. Criminal Code of 21 December 1937 (version in force since 1 January 2007)

18. The provisions of the Criminal Code read as follows.

Article 293 – Publication of secret official deliberations

"1. Anyone who, without being entitled to do so, makes public all or part of the documents, investigations or deliberations of any authority which are secret by law or by virtue of a decision taken by such an authority acting within its powers shall be punished with a fine.

2. Complicity in such acts shall be punishable.

3. The court may decide not to impose any penalty if the secret concerned is of minor importance."

C. Code of Criminal Procedure of the Canton of Vaud of 12 September 1967

19. The relevant provisions of the Code of Criminal Procedure of the Canton of Vaud of 12 September 1967 read as follows.

Article 166 – Secrecy

"Preliminary police inquiries shall be secret. Articles 184 to 186 are applicable by analogy."

Article 184 – Secrecy of investigations

"1. All investigations must remain secret until their final conclusion.

2. Secrecy shall concern all evidence uncovered by the investigation itself and all non-public investigative decisions and measures."

Article 185 – Persons bound to secrecy

"Judges, prosecutors and judicial staff may not disclose items of evidence or information on the investigation to anyone who does not have access to the files, except to the extent that such disclosure would be useful to the investigation or is justified on public-order, administrative or judicial grounds."

Article 185a

"1. The parties, their friends and relatives, their lawyers, the latter's associates, consultants and staff, and any experts and witnesses are required to observe the secrecy of the investigation *vis-à-vis* anyone who does not have access to the files.

2. Disclosure of such information to friends or relatives by the parties or their lawyers shall not be punishable."

Article 185b

"1. As an exception to Article 185, the cantonal investigating judge and, with the latter's agreement, the judge responsible for the preliminary inquiry or senior police officers specially appointed by the cantonal government [*Conseil d'État*] (see Article 168, paragraph 3) may inform the press, radio or television about a pending investigation if so required by the public interest or considerations of fairness, particularly in the following cases:

(a) where public cooperation is required to shed light on an offence;

(b) in cases which are particularly serious or are already known to the general public;

(c) where erroneous information must be corrected or the general public reassured.

2. If a press conference is organised, counsel for the parties and the public prosecutor shall be invited to attend.

3. If incorrect information has been disclosed to the press, radio or television, the parties may apply to the cantonal investigating judge to order rectification of such information, via the same media."

Article 186 – Sanctions

"1. Anyone who breaches the secrecy of investigations shall be punished with a fine of up to five thousand Swiss francs, unless this act is punishable under other provisions protecting secrecy.

2. In very minor cases the person in question may be exempted from any penalty.

..."

D. Directives of the Swiss Press Council

20. The Directives relating to the Declaration of the Duties and Rights of the Journalist issued by the Swiss Press Council which are relevant to the instant case read as follows.

Directive 3.8 – Right to be heard against grave accusations

"According to the principle of fairness and the general ethical requirement that both parties to a dispute must be heard (*audiatur et altera pars*), journalists are obliged to contact and hear, prior to publication, the views of those accused of serious offences. In so doing they must describe in detail the serious accusations which they are intending to publish. There is no obligation for the statements of the person accused of serious offences to be given the same weight in a report as the criticism of his or her actions. These statements must, however, be presented fairly when published in the same media report."

Directive 7.2 – Identification

"Journalists must weigh carefully the various interests involved (the general public's right to information, protection of the private sphere). Names or personally identifiable information is allowed:

– when the person involved appears publicly in relation to the issue or consents to publication in other ways;

– when the person is famous and the media report concerns the reason for his or her celebrity;

– when the person involved holds political office or a leading government or social position which is linked to the media report;

– when naming the person is necessary to avoid confusion that would be deleterious to other persons;

– when naming or identifying the person is also justified by an overriding public interest.

Where the interest in protecting private life outweighs the public interest in identification, journalists shall publish neither names nor any other information that would identify the person to third parties who do not belong to his or her family, social or professional sphere, and who are therefore informed solely through the media."

III. RELEVANT EUROPEAN INSTRUMENTS AND COMPARATIVE LAW MATERIAL

A. Recommendation Rec(2003)13 of the Committee of Ministers of the Council of Europe to member states on the provision of information through the media in relation to criminal proceedings (adopted by the Committee of Ministers on 10 July 2003)

21. The relevant passages of Recommendation Rec(2003)13 read as follows.

"...

Recalling that the media have the right to inform the public due to the right of the public to receive information, including information on matters of public concern, under Article 10 of the Convention, and that they have a professional duty to do so;

Recalling that the rights to presumption of innocence, to a fair trial and to respect for private and family life under Articles 6 and 8 of the Convention constitute fundamental requirements which must be respected in any democratic society;

Stressing the importance of media reporting in informing the public on criminal proceedings, making the deterrent function of criminal law visible as well as in ensuring public scrutiny of the functioning of the criminal justice system;

Considering the possibly conflicting interests protected by Articles 6, 8 and 10 of the Convention and the necessity to balance these rights in view of the facts of every individual case, with due regard to the supervisory role of the European Court of Human Rights in ensuring the observance of the commitments under the Convention;

...

Desirous to enhance an informed debate on the protection of the rights and interests at stake in the context of media reporting relating to criminal proceedings, and to foster good practice throughout Europe while ensuring access of the media to criminal proceedings;

...

Recommends, while acknowledging the diversity of national legal systems concerning criminal procedure, that the governments of member states:

1. take or reinforce, as the case may be, all measures which they consider necessary with a view to the implementation of the principles appended to this recommendation, within the limits of their respective constitutional provisions,

2. disseminate widely this recommendation and its appended principles, where appropriate accompanied by a translation, and

3. bring them in particular to the attention of judicial authorities and police services as well as to make them available to representative organisations of lawyers and media professionals.

Appendix to Recommendation Rec(2003)13 – Principles concerning the provision of information through the media in relation to criminal proceedings

Principle 1 – Information of the public via the media

The public must be able to receive information about the activities of judicial authorities and police services through the media. Therefore, journalists must be able to freely report and comment on the functioning of the criminal justice system, subject only to the limitations provided for under the following principles.

Principle 2 – Presumption of innocence

Respect for the principle of the presumption of innocence is an integral part of the right to a fair trial. Accordingly, opinions and information relating to on-going criminal proceedings should only be communicated or disseminated through the media where this does not prejudice the presumption of innocence of the suspect or accused.

...

Principle 6 – Regular information during criminal proceedings

In the context of criminal proceedings of public interest or other criminal proceedings which have gained the particular attention of the public, judicial authorities and police services should inform the media about their essential acts, so long as this does not prejudice the secrecy of investigations and police inquiries or delay or impede the outcome of the proceedings. In cases of criminal proceedings which continue for a long period, this information should be provided regularly.

...

Principle 8 – Protection of privacy in the context of on-going criminal proceedings

The provision of information about suspects, accused or convicted persons or other parties to criminal proceedings should respect their right to protection of privacy in accordance with Article 8 of the Convention. Particular protection should be given to parties who are minors or other vulnerable persons, as well as to victims, to witnesses and to the families of suspects, accused and convicted. In all cases, particular

consideration should be given to the harmful effect which the disclosure of information enabling their identification may have on the persons referred to in this Principle."

B. Comparative law

22. As regards the issue of penalties provided for in cases of breaches of the secrecy of criminal investigations, the Court has comparative law material at its disposal relating to thirty member States of the Council of Europe (Austria, Azerbaijan, Belgium, Bulgaria, the Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Moldova, Monaco, Poland, Portugal, Romania, Russia, Slovakia, Slovenia, Spain, Sweden, the former Yugoslav Republic of Macedonia, Turkey, Ukraine and the United Kingdom).

The disclosure of information covered by the secrecy of criminal investigations is penalised as such in all those States.

23. In twenty-three of the thirty member States concerned, the penalties are general in scope, that is to say that they may be imposed on anyone who has disclosed information covered by the secrecy of criminal investigations. In the seven remaining States (Austria, Lithuania, Luxembourg, Moldova, Romania, Spain and Ukraine), the penalties only target persons involved in the criminal investigation.

Most of those twenty-three States have opted for criminal penalties, while in Estonia, the Russian Federation and the Czech Republic a breach of the secrecy of criminal investigations is only liable to administrative sanctions.

THE LAW

24. The applicant complained that his criminal conviction had resulted in a violation of his right to freedom of expression as provided in Article 10 of the Convention, which reads as follows:

"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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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. The Chamber judgment

25. In its judgment of 1 July 2014, the Chamber concluded that there had been a violation of Article 10. It first of all considered that the applicant's conviction and the fine imposed on him for using and reproducing extracts from the investigation file in his article had amounted to interference with his right to freedom of expression and that such interference had been prescribed by law and had pursued the following legitimate aims: preventing "the disclosure of information received in confidence", maintaining "the authority and impartiality of the judiciary" and protecting "the reputation [and] rights of others".

26. The Chamber then stated that the impugned article originated from a set of judicial proceedings initiated following an incident which had occurred under exceptional circumstances, which had immediately aroused interest among the public and which had prompted many media outlets to cover the case and its handling by the criminal justice system. In the impugned article the applicant looked at the character of the accused and attempted to understand his motives, while highlighting the manner in which the police and judicial authorities were dealing with him, a man who seemed to be suffering from psychiatric disorders. The Chamber therefore concluded that the article had addressed a matter of public interest.

27. However, the Chamber noted that the applicant, an experienced journalist, must have known that the documents that had come into his possession were covered by the secrecy of judicial investigations. That being the case, he ought to have complied with the relevant legal provisions.

28. In weighing up the competing interests at stake, the Chamber found that the Federal Court had merely noted that the premature disclosure both of the records of interviews and of the letters sent by the accused to the judge had necessarily infringed both the presumption of innocence and, more broadly, the accused's right to a fair trial. However, the article in issue had not addressed the matter of the accused's guilt and had been published more than two years before the first hearing at his trial for the alleged offences. Furthermore, the accused had been tried by courts made up exclusively of professional judges, with no lay jury participating, which also reduced the risks of articles such as the present one affecting the outcome of the judicial proceedings.

29. Inasmuch as the Government had alleged that the disclosure of the documents covered by the secrecy of judicial investigations had constituted interference with the accused's right to respect for his private life, the Chamber noted that, although remedies had been available to the accused under Swiss law for claiming compensation for the damage to his reputation, he had failed to use them. Accordingly, the second legitimate aim relied upon by the Government was necessarily less important in the circumstances of the case.

30. As regards the Government's criticism of the form of the impugned article, the Chamber reiterated that in addition to the substance of the ideas and information expressed, Article 10 also protected the manner in which the latter were conveyed.

31. Finally, although the fine had been imposed for a "minor offence" and heavier penalties, including prison sentences, could be imposed for the same offence, the Chamber considered that because of its significant deterrent effect, the fine imposed in the instant case had been disproportionate to the aim pursued.

32. The Chamber concluded that the reasons put forward by the national authorities were relevant but not sufficient to justify such an interference with the applicant's right to freedom of expression.

B. The parties' submissions to the Grand Chamber

1. The applicant

33. The applicant accepted that his conviction had had a legal basis, but submitted that it had not been necessary in a democratic society.

34. He submitted first of all that the publication had not been intended to disclose confidential information but rather had satisfied a public interest, namely the obligation to inform the population of facts relating to a major event which had shocked the inhabitants of Lausanne and French-speaking Switzerland.

He contended that, although that information had indeed been formally confidential, its nature had not been such as to justify keeping it secret.

35. The applicant also pointed out that the impugned publication had not influenced the ongoing investigations or infringed the presumption of innocence in respect of the accused. As regards this latter principle, the applicant emphasised that while it was binding on State authorities, it could not prevent private individuals from forming an opinion before the end of a criminal trial. As in *Campos Dâmaso v. Portugal* (no. 17107/05, § 35, 24 April 2008), no non-professional judge could have been called on to determine the case, which had in fact been tried by a court made up exclusively of professional judges. The applicant submitted that it transpired from the Criminal Court judgment of 23 November 2005 and the Criminal Court of Cassation judgment of 26 June 2006 that the impugned article had had no impact on M.B.'s trial. Moreover, the Federal Court judgment had not established any such impact, confining itself to general considerations on the risks of collusion and the danger of evidence being tampered with or destroyed.

Moreover, the applicant submitted that, even though at the time of publication of the impugned article no one could have known that the accused's trial would take place two years later, which would have

decreased even further the potential impact of the article on the ongoing proceedings, it had been certain that the investigation leading up to the trial would continue for many more months.

36. As regards the protection of M.B.'s right to respect for his private life, the applicant reiterated that M.B. had neither applied to the courts nor had recourse to the legal remedies available to him. That being the case, the State's positive obligation to protect the accused's private life was merely a theoretical question, whereas the Court's assessment should be carried out *in concreto*. The present case involved a "virtual" balancing act between the rights of a journalist who had actually been convicted in criminal proceedings and those of an accused person who had never even intended to rely on his right to protection of his private life, despite having had the opportunity to do so.

2. The Government

37. The Government did not contest the fact that there had been an interference in the applicant's exercise of his right to freedom of expression, referring to the Chamber finding that such interference had been "prescribed by law" and had pursued a "legitimate aim".

38. The Government's arguments centred mainly on the necessity of the interference in a democratic society.

39. First of all the Government observed that in the instant case there had been no compelling reasons to inform the public that might have enabled the applicant to disregard the secrecy of the investigation. They referred to a number of cases adjudicated by the Court inferring the existence of a public interest from the high profile of the individuals involved in the criminal proceedings in question. With reference to *Leempoel & S.A. ED. Ciné Revue v. Belgium* (no. 64772/01, § 72, 9 November 2006), the Government emphasised that the mere fact that the information published might satisfy some kind of public curiosity was insufficient. They also referred to the conclusion reached by the Federal Court in its judgment of 28 April 2008 to the effect that, even though the circumstances of the accident had been unusual and had triggered a great deal of public emotion, it had nevertheless, in legal terms, simply been a road accident.

The Government further contended that the interest triggered by the media coverage of the case could not *per se* amount to a "public interest" in the disclosure of classified information. More specifically, they disputed the idea that publishing the accused's correspondence might be in the public interest, because the letters in question had shed no light on the circumstances of the accident and had related to the accused's private life.

The Government also submitted that the same applied to the publication of the extracts from the records of interviews.

40. As regards the balancing of the interests at stake, the Government reiterated that the general public's right to receive information on judicial activities was subject to respect for the rights of others to the presumption of innocence, a fair trial and protection of private and family life, as secured by Articles 6 and 8 of the Convention.

They emphasised in that context that the principle of subsidiarity which underpinned the Convention system meant that the balancing exercise in question was primarily a matter for the domestic courts, which requirement had been fulfilled in the present case because the Federal Court had conducted an in-depth assessment of the matter.

41. As regards the accused's right to respect for his private life, the Government submitted that the impugned article had included a close-up photograph of him and a whole series of strictly personal details, including data from the interview records and statements by his wife and his doctor, in addition, of course, to the letters sent by the accused to the investigating judge providing details of his private life in prison.

The Government also argued that the context of the article and the terms used had shown the accused's personality in a particularly unfavourable and indiscreet light.

The Government pointed out that Article 8 of the Convention entailed a positive obligation inherent in effective respect for private life, and that this positive obligation was especially important in the case of vulnerable persons, such as a prisoner, especially one who was apparently suffering from mental disorders. Referring to *Von Hannover v. Germany (no. 2)* ([GC], nos. 40660/08 and 60641/08, § 104, ECHR 2012), the Government observed that the choice of the means calculated to secure compliance with Article 8 of the Convention fell within the States' margin of appreciation and that in the present case the application of Article 293 of the Criminal Code provided an appropriate means of protecting the accused's private life.

Lastly, the Government contended that the Chamber had evaded the issue of weighing up the applicant's right to the exercise of the freedom of the press against the accused's right to protection of his private life by merely noting that the accused had not brought any legal action to ensure the protection of that right even though he could have done so under Swiss law. They submitted that the existence of remedies to which the accused could have had recourse did not exempt the State from fulfilling its positive obligation. The Government added that the accused, who had been incarcerated and suffered from mental disorders, had probably not been in a position to commence legal proceedings in defence of his interests.

42. As regards the protection of the ongoing investigation and the presumption of innocence, the Government submitted that the fact that the hearing had been held more than two years after the publication of the impugned article and that the accused had been tried by professional judges rather than a lay jury had been unknown at the time of publication. They

therefore argued that the Chamber had been wrong to take these facts into account in its judgment.

Furthermore, the Government submitted that the Court could not expect them to provide proof that the disclosure of confidential information had caused actual and tangible harm to the interests protected. Such a requirement would deprive the secrecy of judicial investigations of much of its meaning.

43. As regards the proportionality of the penalty imposed, the Government emphasised that the fine had not exceeded half the applicant's monthly income and had been assessed on the basis of factors including the applicant's previous record. They also pointed out that it had not been the applicant himself but his employer who had paid the fine.

C. The Court's assessment

1. Existence of an interference "prescribed by law" and pursuing a "legitimate aim"

44. In its judgment of 1 July 2014, the Chamber noted that there had been no disagreement between the parties as to the fact that the applicant's conviction had constituted an interference with his exercise of the right to freedom of expression as secured under Article 10 § 1 of the Convention.

45. Nor had it been disputed that the interference was prescribed by law, that is to say the Criminal Code and the Code of Criminal Procedure of the Canton of Vaud.

46. Furthermore, in its judgment (paragraphs 40-41) the Chamber found that the impugned measure had pursued legitimate aims, namely preventing "the disclosure of information received in confidence", maintaining "the authority and impartiality of the judiciary" and protecting "the reputation [and] rights of others"; this was also not contested by the parties.

47. The Grand Chamber sees no reason to depart from the Chamber's conclusions on these three points.

2. Necessity of the interference "in a democratic society"

(a) General principles

48. The general principles for assessing the necessity of an interference with the exercise of freedom of expression, which have been frequently reaffirmed by the Court since the judgment in *Handyside v. the United Kingdom* (7 December 1976, Series A no. 24), were summarised in *Stoll v. Switzerland* ([GC], no. 69698/01, § 101, ECHR 2007-V) and were restated more recently in *Morice v. France* ([GC], no. 29369/10, § 124, ECHR 2015) and *Pentikäinen v. Finland* ([GC], no. 11882/10, § 87, ECHR 2015):

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...
>
> (ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.
>
> (iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'... In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ..."

49. Moreover, as regards the level of protection, there is little scope under Article 10 § 2 of the Convention for restrictions on freedom of expression in two fields, namely political speech and matters of public interest (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 46, ECHR 2007-IV; *Axel Springer AG v. Germany* [GC], no. 39954/08, § 90, 7 February 2012; and *Morice*, cited above, § 125). Accordingly, a high level of protection of freedom of expression, with the authorities thus having a particularly narrow margin of appreciation, will normally be accorded where the remarks concern a matter of public interest, as is the case in particular for remarks on the functioning of the judiciary, even in the context of proceedings that are still pending (see, *mutatis mutandis*, *Roland Dumas v. France*, no. 34875/07, § 43, 15 July 2010; *Gouveia Gomes Fernandes and Freitas e Costa v. Portugal*, no. 1529/08, § 47, 29 March 2011; and *Morice*, cited above, § 125). A degree of hostility (see *E.K. v. Turkey*, no. 28496/95, §§ 79-80, 7 February 2002, and *Morice*, cited above, § 125) and the potential seriousness of certain remarks (see *Thoma v. Luxembourg*, no. 38432/97, § 57, ECHR 2001-III, and *Morice*, cited above, § 125) do not obviate the right to a high

level of protection, given the existence of a matter of public interest (see *Paturel v. France*, no. 54968/00, § 42, 22 December 2005, and *Morice*, cited above, § 125).

50. The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, as well as the need to prevent the disclosure of information received in confidence, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see *De Haes and Gijsels v. Belgium*, 24 February 1997, § 37, *Reports of Judgments and Decisions* 1997-I; *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 62, ECHR 1999-III; *Thoma*, cited above, §§ 43-45; and *Tourancheau and July v. France*, no. 53886/00, § 65, 24 November 2005).

Indeed, the protection afforded by Article 10 of the Convention to journalists is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism. The concept of responsible journalism, as a professional activity which enjoys the protection of Article 10 of the Convention, is not confined to the contents of information which is collected and/or disseminated by journalistic means (see *Pentikäinen*, cited above, § 90, and the cases referred to therein). In its judgment in *Pentikäinen*, the Court pointed out that the concept of responsible journalism also embraces the lawfulness of the conduct of a journalist, and the fact that a journalist has breached the law is a relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly (ibid.).

51. In particular, it is inconceivable that there should be no prior or contemporaneous discussion of the subject matter of trials, be it in specialised journals, in the general press or amongst the public at large. Not only do the media have the task of imparting such information and ideas; the public also has a right to receive them. However, consideration must be given to everyone's right to a fair hearing as secured under Article 6 § 1 of the Convention, which, in criminal matters, includes the right to an impartial tribunal (see *Tourancheau and July*, cited above, § 66) and the right to the presumption of innocence (ibid., § 68). As the Court has already emphasised on several occasions (ibid., § 66; see also *Worm v. Austria*, 29 August 1997, § 50, *Reports* 1997-V; *Campos Dâmaso*, cited above, § 31; *Pinto Coelho v. Portugal*, no. 28439/08, § 33, 28 June 2011; and *Ageyevy v. Russia*, no. 7075/10, §§ 224-25, 18 April 2013):

> "This must be borne in mind by journalists when commenting on pending criminal proceedings since the limits of permissible comment may not extend to statements which are likely to prejudice, whether intentionally or not, the chances of a person receiving a fair trial or to undermine the confidence of the public in the role of the courts in the administration of criminal justice."

52. Furthermore, when it is called upon to adjudicate on a conflict between two rights which enjoy equal protection under the Convention, the Court must weigh up the competing interests. The outcome of the application should not, in principle, vary according to whether it has been lodged with the Court under Article 8 of the Convention by the person who was the subject of the offending article or under Article 10 of the Convention by the author of that article, because these two rights deserve, in principle, equal respect (see *Hachette Filipacchi Associés (*ICI PARIS*) v. France*, no. 12268/03, § 41, 23 July 2009; *Timciuc v. Romania* (dec.), no. 28999/03, § 144, 12 October 2010; *Mosley v. the United Kingdom*, no. 48009/08, § 111, 10 May 2011; and *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 91, ECHR 2015). Accordingly, the margin of appreciation should in theory be the same in both cases (see *Von Hannover (no. 2)*, § 106; *Axel Springer AG*, § 87; and *Couderc and Hachette Filipacchi Associés*, § 91, all cited above).

53. The Court considers that analogous reasoning must apply in weighing up the rights secured under Articles 10 and 6 § 1 respectively.

54. Lastly, the Court reiterates that account must be taken of the need to strike the right balance between the various interests involved. Because of their direct, continuous contact with the realities of the country, a State's courts are in a better position than an international court to determine how, at a given time, the right balance can be struck. For this reason, in matters under Article 10 of the Convention, the Contracting States have a certain margin of appreciation in assessing the necessity and scope of any interference in the freedom of expression protected by that Article (see, among other authorities, *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06 and 3 others, § 54, ECHR 2011), in particular when a balance has to be struck between conflicting private interests.

Where the national authorities have weighed up the interests at stake in compliance with the criteria laid down in the Court's case-law, weighty reasons are required if it is to substitute its view for that of the domestic courts (see *MGN Limited v. the United Kingdom*, no. 39401/04, §§ 150 and 155, 18 January 2011; *Palomo Sánchez and Others*, cited above, § 57; and, more recently, *Haldimann and Others v. Switzerland*, no. 21830/09, §§ 54-55, ECHR 2015).

(b) Application of these principles to the present case

55. In the present case, the applicant's right to inform the public and the public's right to receive information come up against equally important public and private interests which are protected by the prohibition on disclosing information covered by the secrecy of criminal investigations. Those interests are the authority and impartiality of the judiciary, the effectiveness of the criminal investigation and the right of the accused to the presumption of innocence and protection of his private life. The Court

considers, as it did, *mutatis mutandis*, in *Axel Springer AG* (cited above, §§ 89-95) and *Stoll* (cited above, §§ 108-61), that it is necessary to specify the criteria to be followed by the national authorities of the States Parties to the Convention in weighing up those interests and therefore in assessing the "necessity" of the interference in cases involving a breach by a journalist of the secrecy of judicial investigations.

Those criteria emerge from the aforementioned general principles, but also, to some extent, from the legislation of the thirty Council of Europe member States the Court surveyed in connection with the present application (see paragraphs 22-23 above).

(i) How the applicant came into possession of the information in issue

56. The Court reiterates that the manner in which a person obtains information considered to be confidential or secret may be of some relevance for the balancing of interests to be carried out in the context of Article 10 § 2 (see *Stoll*, cited above, § 141).

57. In the present case it was not alleged that the applicant had obtained the information in question by unlawful means (see paragraph 12 above). Nevertheless, this is not necessarily a determining factor in assessing whether or not he complied with his duties and responsibilities when publishing the information. The fact is, as the Chamber rightly noted, that the applicant, as a professional journalist, could not have been unaware of the confidential nature of the information he was planning to publish (ibid., § 144). Moreover, at no point did the applicant dispute, either before the domestic courts or before the Court, the fact that publication of the information in question might fall within the scope of Article 293 of the Criminal Code (compare *Dupuis and Others v. France*, no. 1914/02, § 24, 7 June 2007).

(ii) Content of the impugned article

58. The Court reiterates that the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism (see *Stoll*, cited above, § 103).

Furthermore, Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed. Consequently, it is not for this Court, or for the national courts for that matter, to substitute their own views for those of the press as to what reporting technique should be adopted by journalists (ibid., § 146; see also *Laranjeira Marques da Silva v. Portugal*, no. 16983/06, § 51, 19 January 2010). Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Prager and Oberschlick v. Austria*, 26 April 1995, § 38, Series A no. 313; *Thoma*, cited above, §§ 45-46; *Perna*

v. Italy [GC], no. 48898/99, § 39, ECHR 2003-V; and *Ormanni v. Italy*, no. 30278/04, § 59, 17 July 2007).

59. In the present case, the Court notes that in its judgment of 29 April 2008 the Federal Court conducted a lengthy assessment of the article, concluding that "[t]he manner in which he quoted the excerpts from the records of interviews and reproduced the letters sent by the defendant to the judge pointed to the motives of the author of the impugned article: he confined himself to sensationalism, his *modus operandi* being exclusively geared to satisfying the relatively unhealthy curiosity which anyone is liable to feel about this type of case. Readers of this highly biased publication would have formed an opinion and subjectively prejudged the future action to be taken by the courts regarding this case, without the least respect for the principle of presumption of innocence."

60. For its part, the Court notes that, even though the impugned article did not take a specific stance on the intentional nature of the offence the accused was alleged to have committed, it nevertheless painted a highly negative picture of him, adopting an almost mocking tone. The headlines used by the applicant – "Questioning of the mad driver", "the reckless driver's version" and "He lost his marbles..." – as well as the large close-up photograph of the accused accompanying the text, leave no room for doubt that the applicant had wanted his article to have a sensationalist tone. Moreover, the article emphasised the vacuity of the accused's statements and his many contradictions, which were often explicitly described as "repeated lies", concluding with the question whether, by means of "this mixture of naivety and arrogance", M.B. was "doing everything in his power to make himself impossible to defend". The Court emphasises that those were precisely the kind of questions that the judicial authorities were called upon to answer, at both the investigation and the trial stages.

61. On this point the Court likewise sees no weighty reason to call into question the fully reasoned decision of the Federal Court.

(iii) Contribution of the impugned article to a public-interest debate

62. In its judgment of 1 July 2014, the Chamber noted that the incident which had been the subject of the criminal proceedings in issue had immediately attracted public interest and led many media outlets to cover the case and its handling by the criminal justice system.

63. The Court reiterates that it has already held that the public has a legitimate interest in the provision and availability of information on criminal proceedings, and that remarks concerning the functioning of the judiciary relate to a matter of public interest (see *Morice*, cited above, § 152).

64. In the present case the Court accepts that the subject of the article, namely the criminal investigation into the Lausanne Bridge tragedy, was a matter of public interest. This highly exceptional incident had triggered a

great deal of emotion among the population, and the judicial authorities had themselves seen fit to inform the press of certain aspects of the ongoing inquiry (see paragraph 11 above).

However, the question arising here is whether the content of the article and in particular the information which was covered by the secrecy of judicial investigations were capable of contributing to the public debate on this issue (see *Stoll*, cited above, § 121; see also *Leempoel & S.A. ED. Ciné Revue*, cited above, § 72) or served purely to satisfy the curiosity of a particular readership regarding the details of the accused's private life (see, *mutatis mutandis*, *Von Hannover v. Germany*, no. 59320/00, § 65, ECHR 2004-VI; *Société Prisma Presse v. France* (dec.), nos. 66910/01 and 71612/01, 1 July 2003; *Hachette Filipacchi Associés (*ICI PARIS*)*, cited above, § 40; and *Mosley*, cited above, § 114).

65. The Court notes in this connection that after an in-depth assessment of the content of the article, the nature of the information provided and the circumstances surrounding the "Lausanne Bridge" case, the Federal Court, in a lengthily reasoned judgment which contained no hint of arbitrariness, held that neither the disclosure of the records of interviews nor that of the letters sent by the accused to the investigating judge had provided any insights relevant to the public debate and that the interest of the public in this case had at the very most "involved satisfying an unhealthy curiosity" (see paragraph 16 above).

66. For his part, the applicant failed to demonstrate how the fact of publishing records of interviews, statements by the accused's wife and doctor and letters sent by the accused to the investigating judge concerning banal aspects of his everyday life in detention could have contributed to any public debate on the ongoing investigation.

67. Accordingly, the Court sees no weighty reason to substitute its own view for that of the Federal Court (see, *mutatis mutandis*, *MGN Limited*, §§ 150 and 155; *Palomo Sánchez and Others*, § 57; and *Haldimann and Others*, §§ 54-55, all cited above), which had a certain margin of appreciation in such matters.

(iv) Influence of the impugned article on the criminal proceedings

68. While emphasising that the rights guaranteed by Article 10 and Article 6 § 1 deserve equal respect in principle (see paragraph 53 above), the Court reiterates that it is legitimate for special protection to be afforded to the secrecy of a judicial investigation, in view of what is at stake in criminal proceedings, both for the administration of justice and for the right of persons under investigation to be presumed innocent (see *Dupuis and Others*, cited above, § 44). It emphasises that the secrecy of investigations is geared to protecting, on the one hand, the interests of the criminal proceedings by anticipating risks of collusion and the danger of evidence being tampered with or destroyed and, on the other, the interests of the

accused, notably from the angle of presumption of innocence and, more generally, his or her personal relations and interests. Such secrecy is also justified by the need to protect the opinion-forming and decision-making processes within the judiciary.

69. In the instant case, even though the impugned article did not openly support the view that the accused had acted intentionally, it was nevertheless set out in such a way as to paint a highly negative picture of him, highlighting certain disturbing aspects of his personality and concluding that he was doing "everything in his power to make himself impossible to defend" (see paragraph 60 above).

It is undeniable that the publication of an article slanted in that way at a time when the investigation was still ongoing entailed an inherent risk of influencing the course of proceedings in one way or another, whether in relation to the work of the investigating judge, the decisions of the accused's representatives, the positions of the parties claiming damages, or the objectivity of the trial court, irrespective of its composition.

70. The Grand Chamber considers that a government cannot be expected to provide *ex post facto* proof that this type of publication actually influenced the conduct of a given set of proceedings. The risk of influencing proceedings justifies *per se* the adoption by the domestic authorities of deterrent measures such as prohibition of the disclosure of secret information.

The lawfulness of those measures under domestic law and their compatibility with the requirements of the Convention must be capable of being assessed at the time of the adoption of the measures, and not, as the applicant submits, in the light of subsequent developments revealing the actual impact of the publications on the trial, such as the composition of the trial court (see paragraph 35 above).

71. The Federal Court was therefore right to hold, in its judgment of 29 April 2008, that the records of interviews and the accused's correspondence had been "discussed in the public sphere, before the conclusion of the investigation, before the trial and out of context, in a manner liable to influence the decisions taken by the investigating judge and the trial court".

(v) Infringement of the accused's private life

72. The Court reiterates that the right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life (see *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI; *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06 § 40, 21 September 2010; and *Axel Springer AG*, cited above, § 83). The concept of "private life" is a broad term which is not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person, and can therefore embrace multiple aspects of the person's

identity such as, for example, gender identification, sexual orientation, name and elements relating to a person's right to his or her image (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 66, ECHR 2008). It covers personal information which individuals can legitimately expect should not be published without their consent (see *Flinkkilä and Others v. Finland*, no. 25576/04, § 75, 6 April 2010, and *Saaristo and Others v. Finland*, no. 184/06, § 61, 12 October 2010). In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and be carried out in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *Axel Springer AG*, cited above, § 83).

73. Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91; *Armonienė v. Lithuania*, no. 36919/02, § 36, 25 November 2008; *Von Hannover (no. 2)*, cited above, § 98; and *Söderman v. Sweden* [GC], no. 5786/08, § 78, ECHR 2013). That also applies to the protection of a person's picture against abuse by third parties (see *Schüssel v. Austria* (dec.), no. 42409/98, 21 February 2002; *Von Hannover*, cited above, § 57; *Reklos and Davourlis v. Greece*, no. 1234/05, § 35, 15 January 2009; and *Von Hannover (no. 2)*, cited above, § 98).

74. The Court notes that in order to fulfil its positive obligation to safeguard one person's rights under Article 8, the State may have to restrict to some extent the rights secured under Article 10 for another person. When examining the necessity of that restriction in a democratic society in the interests of the "protection of the reputation or rights of others", the Court may be required to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely, on the one hand, freedom of expression as protected by Article 10 and, on the other, the right to respect for private life as enshrined in Article 8 (see *Hachette Filipacchi Associés (*ICI PARIS*)*, § 41; *MGN Limited*, § 142; and *Axel Springer AG*, § 84, all cited above).

75. The Government argued that in the present case the Swiss authorities had both a negative and a positive obligation to protect the accused's private life. The Government rightly observed that the choice of means calculated to secure compliance with this positive obligation fell within the States' margin of appreciation. They submitted that Article 293 of the Criminal

Code, which made it an offence to disclose classified information, fulfilled that function.

76. The Court has already examined under Article 8 the issue of respect for an accused person's private life in a case involving a violation of the secrecy of judicial investigations. In *Craxi v. Italy (no. 2)* (no. 25337/94, § 73, 17 July 2003) it held that the national authorities were not merely subject to a negative obligation not to knowingly disclose information protected by Article 8, but that they should also take steps to ensure effective protection of an accused person's right to respect for his correspondence.

Consequently, the Court considers that the criminal proceedings brought against the applicant by the cantonal prosecuting authorities were in conformity with the positive obligation incumbent on Switzerland under Article 8 of the Convention to protect the accused person's private life.

Furthermore, the information disclosed by the applicant was highly personal, and even medical, in nature, including statements by the accused's doctor (see paragraph 10 above), as well as letters sent by the accused from his place of detention to the investigating judge responsible for the case. The Court takes the view that this type of information called for the highest level of protection under Article 8; that finding is especially important as the accused was not known to the public and the mere fact that he was the subject of a criminal investigation, albeit for a very serious offence, did not justify treating him in the same manner as a public figure, who voluntarily exposes himself to publicity (see, *mutatis mutandis*, and by contrast, *Fressoz and Roire*, cited above, § 50, and *Egeland and Hanseid v. Norway*, no. 34438/04, § 62, 16 April 2009).

77. In its judgment of 1 July 2014, the Chamber held that the protection of the accused's private life, particularly the secrecy of correspondence, could have been ensured by means less damaging to the applicant's freedom of expression than a criminal conviction. The Chamber took the view that in order to uphold his rights under Article 8 of the Convention, the accused could have had recourse to the civil-law remedies available to him under Swiss law.

The Court considers that the existence of those civil-law remedies under domestic law for the protection of private life does not release the State from its positive obligation deriving, in each individual case, from Article 8 of the Convention *vis-à-vis* a person accused in criminal proceedings.

78. At all events, as regards the particular circumstances of the present case, it should be noted that when the impugned article was published the accused was in prison, and therefore in a situation of vulnerability. Moreover, there is nothing in the case file to suggest that he was informed of the publication of the article and of the nature of the information it provided. In addition, he was probably suffering from mental disorders, thus increasing his vulnerability. In those circumstances, the cantonal authorities

cannot be blamed for considering that, in order to fulfil their positive obligation to protect M.B.'s right to respect for his private life, they could not simply wait for M.B. himself to take the initiative in bringing civil proceedings against the applicant, and for consequently opting for an active approach, even one involving prosecution.

(vi) Proportionality of the penalty imposed

79. The Court reiterates that the nature and severity of the penalties imposed are further factors to be taken into account when assessing the proportionality of an interference (see, for example, *Stoll*, cited above, § 153). Furthermore, the Court must be satisfied that the penalty does not amount to a form of censorship intended to discourage the press from expressing criticism. In the context of a debate on a topic of public interest, such a sanction is likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, it is liable to hamper the press in performing its task as purveyor of information and public watchdog. In that connection, the fact of a person's conviction may in some cases be more important than the minor nature of the penalty imposed (ibid., § 154).

80. Moreover, the Court notes that the disclosure of information covered by the secrecy of judicial investigations is punishable in all thirty Council of Europe member States whose legislation was studied in the present case (see paragraphs 22-23 above).

81. It is true that the dominant position of the State institutions requires the authorities to show restraint in resorting to criminal proceedings in matters of freedom of expression (see *Castells v. Spain*, 23 April 1992, § 46, Series A no. 236; *Incal v. Turkey*, 9 June 1998, § 54, *Reports* 1998-IV; *Lehideux and Isorni v. France*, 23 September 1998, § 57, *Reports* 1998-VII; *Öztürk v. Turkey* [GC], no. 22479/93, § 66, ECHR 1999-VI; *Otegi Mondragon v. Spain*, no. 2034/07, § 58, ECHR 2011; and *Morice*, cited above, § 127). Nevertheless, in the present case, the Court considers that the recourse to criminal proceedings and the penalty imposed on the applicant did not amount to disproportionate interference in the exercise of his right to freedom of expression. The applicant was originally given a suspended sentence of one month's imprisonment (see paragraph 13 above). His sentence was subsequently commuted to a fine of CHF 4,000, which was set having regard to the applicant's previous record and was not paid by the applicant but was advanced by his employer (see paragraph 14 above). This penalty was imposed for breaching the secrecy of a criminal investigation and its purpose, in the instant case, was to protect the proper functioning of the justice system and the rights of the accused to a fair trial and respect for his private life.

The Court takes the view that, in those circumstances, it cannot be maintained that such a penalty was liable to have a deterrent effect on the

exercise of freedom of expression by the applicant or any other journalist wishing to inform the public of ongoing criminal proceedings.

(vii) Conclusion

82. In view of the foregoing, and having regard to the margin of appreciation available to States and to the fact that the exercise of balancing the various competing interests was properly conducted by the Federal Court, the Court concludes that there has been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT

Holds, by fifteen votes to two, that there has been no violation of Article 10 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 29 March 2016.

Lawrence Early	Mirjiana Lazarova Trajkovska
Jurisconsult	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) dissenting opinion of Judge López Guerra;
(b) dissenting opinion of Judge Yudkivska.

M.L.T.
T.L.E.

DISSENTING OPINION OF JUDGE LÓPEZ GUERRA

1. In consonance with the Chamber ruling and contrary to the Grand Chamber judgment, I consider that there has been a violation of Article 10 of the Convention in this case.

2. This is a highly relevant case. It deals with the extent and limits of the right to freedom of expression, a right which is vital in order to maintain "an effective political democracy", in the terms of the Preamble to the European Convention on Human Rights. It is also relevant because it refers to the limits of this right concerning the freedom to report on ongoing judicial proceedings, which may have profound legal and social consequences in a democratic society.

3. To summarise, this case involves determining whether the restrictions and the penalty imposed on the applicant by the domestic authorities violate the right to freedom of expression guaranteed in the first section of Article 10. These restrictions and penalty were based on the provisions of Article 293 of the Criminal Code. It should be noted that that Article contains a general across-the-board prohibition on publishing any documents or investigations that have been declared secret, without reference to the possible presence of a compelling public or private interest to justify that prohibition. It is an unconditional prohibition, the only exception to which is what the law describes as "secrets of minor importance".

4. The right to freedom of expression not only protects an individual's sphere of activity but is also, according to the Court case-law extensively quoted in the Grand Chamber judgment, one of the essential foundations of a democratic society. Freedom of expression is not only a subjective right, but also an objective guarantee of democracy. Furthermore, Court case-law has also emphasised that one specific aspect of freedom of expression, that is to say freedom of the press, plays an essential role in democratic societies. Consequently, and as Court case-law has also stressed, the safeguards to be afforded the press are of particular importance.

5. Therefore, when restrictions are placed on freedom of the press, the laws imposing those restrictions and also the domestic courts' application of those laws must be subjected to close scrutiny. And as guidance for that scrutiny, the Court has indicated that under Article 10 there is *little scope* (see *Morice v. France* [GC], no. 29369/10, § 125, ECHR 2015, among many others) for restrictions on freedom of expression in matters of public interest.

6. In that connection, and as stated in the Grand Chamber's reasoning (see paragraph 64), the subject of the article, namely the criminal investigation into the Lausanne Bridge tragedy and the ongoing judicial proceedings, was a matter of public interest. Moreover, the events giving rise to those proceedings had a significant impact on public opinion, not

only because of the information provided by the media and the authorities themselves, but mainly owing to the gravity of their consequences (three dead and eight wounded), and to their relation to a matter of common and general concern in all societies, such as the causes and circumstances of traffic accidents.

7. In other respects, the informal or even colloquial style used by the author of the information is irrelevant in deciding whether the reported events are in the public interest. The Court has repeatedly stated that journalistic freedom covers possible recourse to a degree of exaggeration, or even provocation (see paragraph 58 of the present judgment).

8. Any restriction on freedom of expression must be "necessary in a democratic society". Concerning the concept of necessity, since *Handyside v. the United Kingdom* (7 December 1976, § 88, Series A no. 24) the Court has repeatedly stated that "the adjective 'necessary' within the meaning of Article 10 § 2 implies the existence of a 'pressing social need'". Therefore, in this case the question was whether there was really a compelling social need to impose a criminal penalty on the applicant journalist when reporting on a matter of public interest.

9. The Grand Chamber adduces two reasons to find that need: the defence of criminal proceedings against any undue influence, and the protection of the accused person's privacy. But in the light of the facts of the case, those reasons do not really warrant restricting the applicant's freedom of expression.

10. Firstly, with regard to the risk of undue influence on the criminal proceedings deriving from the applicant's article, the content of the published information did not contain any explicit or even implicit consideration concerning the accused's guilt or innocence. And the Grand Chamber actually admits that the applicant did not support the view that the accused had acted intentionally (see paragraph 69 of the present judgment). On the contrary, the applicant merely reproduced the accused's statements, without offering any comment or opinion as to the possible outcome of the case. This makes it difficult to understand how the applicant's article could influence any future court judgment.

Moreover, the journalist's report was published about three months after the events, and considerably in advance of the domestic courts' decisions. Given the normal pace of judicial proceedings, it is simply not conceivable that information published in a journal of limited circulation could in any way influence a judgment issued much later in time. In fact, the first judgment in the case was given by the District Court of Lausanne two years and one month after the publication of the information for which the applicant was sentenced. Therefore, no possible risk of interfering in the course of the proceedings existed when the article was published, particularly in view of the fact that the judgment in question was to be

issued by a court composed of professional judges who are very unlikely to be influenced by a single newspaper article.

11. Secondly, there was no compelling social need to impose a restriction on the applicant's freedom of expression based on the requirement of protecting the accused's private life.

In that connection, from the procedural angle, this Court has in fact repeatedly insisted on the positive obligations of the State to protect the private lives of individuals. However, in this specific case the person whose private life was supposedly affected by the applicant's publication never sought to defend his right to privacy through any of the remedies afforded him under Swiss law. At no point did the accused ever suggest that his privacy had been invaded. On the contrary, it was the public authorities that used this case to apply the prohibition set out in the Criminal Code on publishing information concerning secret proceedings. There never was any conflict between the right to freedom of expression and the right to privacy, because the accused never invoked that right.

12. Furthermore, there were other means of protecting the accused's privacy less detrimental to freedom of the press. Indeed, it is the State's duty to protect an accused's private data during judicial proceedings, essentially by preventing them from being leaked to the press through the actions or omissions of State officials, or by any person bound to keep the secrecy of the proceedings.

13. From a substantive perspective, even if the information did indeed concern certain aspects of the accused's private life, those aspects (for instance, regarding his mental health) relate to the main questions of an event of public interest. And some of the allegedly private data pertaining to the accused, such as letters to the judge concerning the conditions of his remand in custody, are totally unrelated to intimate or private matters.

14. Therefore, given the nature of the information in question and the fact that the person affected by the published information never sought any legal remedy for an alleged invasion of his privacy, there was no reason in this case for the public authorities to restrict freedom of expression by imposing a penalty on the applicant journalist.

15. In connection with the proportionality of the sanction (4,000 Swiss francs), there are two aspects to consider. First, the substantive amount of the sanction renders it much more than merely symbolic. Moreover, a sanction of this magnitude obviously has a chilling effect on the exercise of freedom of expression, introducing a factor of fear and insecurity in journalists with regard to their future publications.

16. Certainly, as pointed out in the judgment (see paragraphs 22-23), there is no European standard on the matter. In some countries, the parties to a case and public officials are prohibited from revealing matters declared secret in judicial proceedings. But once secret information has been leaked to the press, the prohibition and any punishment do not extend to the

journalists publishing it. However, in other countries the prohibition also extends to journalists, as is the case in Article 293 of the Criminal Code, which, moreover and as previously indicated, does not make any exceptions for matters of compelling public interest.

Of course, the present case does not address the general compatibility of the Convention with this type of regulation or with Article 293 of the Criminal Code, but rather with the national authority's specific application of existing law. As the Chamber pointed out in its judgment (see paragraph 53 of the Chamber judgment), the formal notion of secrecy of Article 293 of the Criminal Code cannot be considered as having prevented the domestic courts, including the Federal Court, from applying and interpreting the law in a manner compatible with the Convention right to freedom of expression. The Criminal Code's regulation on secrecy is not the subject of the Court's ruling, but rather the Swiss authorities' specific application of that regulation in the applicant's case.

17. Nevertheless, although the nature of the Criminal Code's regulation on secrecy is admittedly not the main subject of this case, the terms of that regulation are not irrelevant when assessing the domestic courts' application of the law, given that the Code contains a blanket prohibition on revealing information concerning matters declared secret. Indeed, this is one of the reasons for finding a violation of the Convention.

As experience shows, it is not uncommon for judicial proceedings to address matters which are not only of general interest but also concern questions directly related to the functioning of a democratic system and to the responsibilities of holders of political, social or economic power, on which journalists have the right to report. Although the present case does not refer to that type of question, given that it concerns specific reporting on proceedings relating to a road accident, the issue it raises has a more general dimension. Any interpretation of Article 10 of the Convention which expressly or tacitly validates general and unconditional clauses restricting publications concerning judicial proceedings would conflict with the effective defence and protection of freedom of expression, particularly freedom of the press. Regardless of the advisability of this type of clauses, their application should be subject to especially stringent control in order to avoid restricting those freedoms that are essential for the functioning of a democratic society.

18. In conclusion, I consider that the Grand Chamber should have followed the Chamber's view, finding a violation of Article 10 § 1 of the Convention, given that the domestic authorities have applied a general prohibition of information, thus restricting freedom of the press on a matter of public interest, without sufficiently justifying that restriction as falling within the limits to the right to freedom of expression established in the Convention.

DISSENTING OPINION OF JUDGE YUDKIVSKA

> *"[F]ree speech and fair trials are two of the most cherished policies of our civilisation, and it would be a trying task to choose between them."*
>
> *Justice Black in Bridges v. California*[1]

When a case that has sharply divided a Chamber is referred to the Grand Chamber, it usually means that some important principles need to be clarified. The present case provided an opportunity to nuance an approach to the weighting of the conflicting interests of the media in reporting on ongoing trials, on the one hand, and protection of the private life of an accused and the interests of justice, on the other. The majority decided that in the particular circumstances of the present case the latter interests deserved greater protection.

It is true that Article 10 is the only provision in the Convention which mentions the responsibilities of the beneficiary of a guaranteed right. The majority relied, in the present case, on the concept of "responsible journalism", as developed in the Court's case-law and recently summarised in the Grand Chamber judgment in *Pentikäinen v. Finland*[2]. To my regret, I can share neither the reasoning nor the conclusion of the majority.

On 8 September 2013 a tragedy occurred on Lausanne Bridge, taking the lives of three persons and severely injuring eight more, all within seconds. For a relatively small town it was a large-scale incident: virtually every inhabitant could have known the victims or their relatives, or might have happened to be on the spot at the relevant time. A person's desire to find out what happened to his neighbours and why citizens had been left without protection was disdainfully dismissed by the Federal Court as "unhealthy curiosity", chiming in with George Bernard Shaw's belief that "most of all people are interested in what does not concern them".

It is hard to explain why the court decided that "[i]t was not a case of collective trauma on the part of the Lausanne population, which would have justified reassuring the citizens and keeping them informed of the progress of the investigation". This stance deprived the citizens of Lausanne of their right to be informed about the investigation of a crime that shocked them. Disappointingly, the majority endorsed this reasoning.

The Grand Chamber reproaches the applicant with failure "to demonstrate how the fact of publishing records of interviews, statements by the accused's wife and doctor and letters sent by the accused to the investigating judge concerning banal aspects of his everyday life in

1. 314 US 252, 260 (1941).v
2. *Pentikäinen v. Finland* [GC], no. 11882/10, ECHR 2015.

detention could have contributed to any public debate on the ongoing investigation" (see paragraph 66 of the present judgment). However, it was precisely, and naturally, M.B.'s mental state at the time of committing this crime (and the authorities' assessment of that state) which was of most interest to the general public. Therefore, not only the medical statements but also the letters to the investigating judge, in which he claimed certain rights and privileges, and the explanations of his family members were supposed to provide the general public with some idea of M.B.'s attitude toward the crime he had committed.

As the United States Supreme Court said in *Sheppard v. Maxwell*[3], "the press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism". According to Justice Brennan "free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability"[4].

However "banal" the aspects of the accused's life in detention might appear, information about them prevents proceedings "behind closed doors" from drifting into carelessness or ignorance.

In its landmark judgment in The Sunday Times *v. the United Kingdom*[5], the Court declared its position on the watchdog role of the press:

> "... Not only do the media have the task of imparting information concerning matters that come before the courts: the public also has a right to receive them."

Interference in a person's private life is an unavoidable consequence of this watchdog role. It remains to be seen whether the interference in question did not overstep acceptable limits.

In paragraph 50 of the present judgment, the Court reiterates its case-law to the effect that the press must respect certain bounds, in particular when it comes to the need to prevent the disclosure of information received in confidence. Notably, all but one case referred to in this connection concern *civil* proceedings instituted against the applicants, and violation of Article 10 was found in all these cases with reference to the role of media. The only exception is the case of *Tourancheau and July v. France*[6], in which by a very narrow margin, four votes to three, the Court found no violation of Article 10 in a criminal verdict against the applicants, who had published investigation materials prior to a trial. In that case, however, the impugned

3. 384 US 333 (1966).
4. *Nebraska Press Association v. Stuart*, 427 US 593, (1976).
5. The Sunday Times *v. the United Kingdom*, 26 April 1979, § 65, Series A no. 30.
6. *Tourancheau and July v. France*, no. 53886/00, § 65, 24 November 2005.

publication had reproduced information that clearly could have impeded the further course of the proceedings – extracts from statements made to the police and the investigating judge by one of the accused, and comments by another accused (who had a different account of the events); the author also claimed that the version given by one of them was the most trustworthy, which could, of course, have influenced the jury.

Nothing similar is to be found in the present case. The majority accepted that "the impugned article did not openly support the view that the accused had acted intentionally". Nevertheless, "a highly negative picture" of the accused, a description of "certain disturbing aspects of his personality" and the conclusion that he was doing "everything in his power to make himself impossible to defend" (see paragraph 69 of the present judgment) were found to be capable of negatively influencing the further investigations.

Being unable to share this conclusion, I wholeheartedly subscribe to the US Supreme Court's wording in *Sheppard v Maxvell* (cited above): "where there was 'no threat or menace to the integrity of the trial,' we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism."

The majority have not suggested that the integrity of the investigation was impaired, that is to say that the information published could somehow create an obstacle to further inquiry by revealing information which had to be hidden from, for instance, the co-accused or witnesses for the purposes of proper investigation. Instead, they used the following extremely vague wording: "inherent risk of influencing the course of proceedings *in one way or another*, *whether in relation to the work of the investigating judge, the decisions of the accused's representatives, the positions of the parties claiming damages, or the objectivity of the trial court*." In my opinion, unidentified potential harm to investigation cannot serve as a basis for the journalist's criminal conviction.

When it comes to the infringement of the accused's right to protection of his personal life, what strikes me in the present case is the level of paternalism demonstrated by the State authorities: lacking any relevant complaint from the defendant or his family members about interference in his private life, they instituted criminal proceedings against the applicant in order to fulfil their positive obligations under Article 8. I could not agree more with the Chamber's conclusion in this respect that "it was primarily incumbent on M.B. to ensure respect for his private life" (see paragraph 56 of the Chamber judgment).

The Grand Chamber, however, stressed that it was not clear if M.B. was even aware of the publication in question or felt that he was vulnerable (the fact that he had a wife who was also mentioned in the publication but did not consider it to be interference is completely ignored). The majority has reached an extraordinary conclusion, broadening the scope of the State's

positive obligations under Article 8, to the effect that the authorities "could not simply wait for M.B. himself to take the initiative in bringing civil proceedings against the applicant", and that their recourse to criminal prosecution in order to protect the private life of a person who does not want it to be protected is perfectly justified in the circumstances. It is to be recalled that this Court has consistently held that the State's positive obligation under Article 8 *may* extend to questions relating to the effectiveness of the criminal investigation when it comes to *serious acts, where fundamental values and essential aspects of private life are at stake*; while as regards less serious acts between individuals, even when it comes to a violation of psychological integrity, the obligation of the State under Article 8 does not always require a criminal-law framework if civil-law remedies are capable of affording sufficient protection (see summary of the relevant case-law in *Söderman v. Sweden* [GC], no. 5786/08, § 78-85, ECHR 2013).

Not only did the present case not concern the physical or psychological integrity of M.B., but also nothing extremely intimate about his private life was revealed by the applicant that could have justified his criminal prosecution.

As regards positive obligations under Article 8, the majority refers to *Craxi v. Italy (no. 2)*[7]. However, that case concerned positive obligations to investigate how the confidential information was disclosed. In the present case, equally, positive obligations would require investigation into how the leak occurred, but hardly criminal sanctions against a journalist who used that leak.

In my view, the proceedings which were brought can be seen as an overreaction by the authorities, in the absence of a civil suit from an injured party.

It is worth noting here that the conventional three-stage proportionality test requires that, having satisfied itself that the means of interference are appropriate (*Eignung*), the Court has to assess the necessity of the interference (*Erforderlichkeit*), checking if a less restrictive measure could have been used, and only then proceed to balance the aim and impact of the measure (*Zumutbarkeit*). In the present case the test already fails at the second stage – the authorities failed to verify whether the desired effect could be reached by less serious interference than a criminal conviction, that is to say whether other measures could mitigate the alleged undesirable effect of the publication.

In *Nebraska Press Association v. Stuart* (cited above) the US Supreme Court addressed the problem of imposing prior restraints on the press, prohibiting the pre-trial publication of such information as the existence or contents of a confession of the accused. Assessing the interference in

7. *Craxi v. Italy (no. 2)*, no. 25337/94, 17 July 2003.

question it acknowledged that, in order to protect the accused's fair-trial guarantees, courts could adopt less restrictive measures, but protecting the freedom of the press necessitated, for instance, changing the trial venue, giving unequivocal instructions to jurors, sequestering the jurors, limiting extrajudicial statements by any lawyer, party, witness, or court official, etc. However expensive and time-consuming these measures might be, they would achieve the aim of ensuring fair-trial guarantees and protecting the jury from outside influence, without excessive interference in press freedom.

Finally, any criminal sentence inevitably has a "chilling effect", and the fact that the applicant had never served his suspended sentence of one month's imprisonment, which was subsequently commuted to a fine, does not alter that situation.

In sum, I find that the applicant aimed to participate in a public debate on a matter of a serious public concern, namely ongoing criminal proceedings, which Lausanne citizens wanted to follow not as a matter of "unhealthy curiosity" but in order to make sure that the crime did not go unpunished. The authorities' disproportionate response in the form of a criminal conviction constituted a violation of Article 10 of the Convention.

Around 120 years ago, the prominent Russian lawyer Ivan Foinitskiy pronounced:

> "Through openness, a constant exchange of views between judges and the rest of society is maintained, and thus justice does not lose its connection with life. For citizens it is more important to be convinced that their court is just and good than to have a court that speaks the absolute truth. And this public belief in the dignity of the court is possible on the sole condition that each step in the judicial activity is known to the public."[8]

Over one hundred years later, the Committee of Ministers pointed out that "the public must be able to receive information about the activities of judicial authorities and police services through the media. Therefore, journalists must be able to freely report and comment on the functioning of the criminal justice system", subject to certain limitations[9].

This Court had always regarded the press as the servant of an effective judicial system, granting little scope for restrictions on freedom of expression in such matters as the public interest in the proper administration of justice. In my view, the present judgment constitutes a regrettable departure from this long-established position.

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8. I. Foinitskiy, "The course of criminal proceedings: in 2 volumes", SPb., 1898, volume 1, pp. 96-97.

9. Recommendation Rec(2003)13 of the Committee of Ministers of the Council of Europe to member States on the provision of information through the media in relation to criminal proceedings; see paragraph 21 of the present judgment.