

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

FIFTH SECTION

CASE OF FUCHSMANN v. GERMANY

(Application no. 71233/13)

JUDGMENT

STRASBOURG

19 October 2017

FINAL

19/01/2018

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.



In the case of Fuchsmann v. Germany,

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

Erik Møse, *President,*
Angelika Nußberger,
Nona Tsotsoria,
André Potocki,
Síofra O'Leary,
Carlo Ranzoni,
Mārtiņš Mits, *judges,*

and Milan Blaško, *Deputy Section Registrar,*

Having deliberated in private on 26 September 2017,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 71233/13) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Boris Fuchsmann ("the applicant"), on 13 November 2013.

2. The applicant was represented by Mr V. Schumacher, a lawyer practising in Düsseldorf. The German Government ("the Government") were represented by their Agents, Mr H.-J. Behrens and Mrs K. Behr, of the Federal Ministry of Justice and Consumer Protection.

3. The applicant alleged, in particular, that the domestic courts had failed to protect his private life by refusing to stop the circulation of an online newspaper article, allegedly damaging the applicant's reputation.

4. On 10 March 2016 the complaint concerning Article 8 of the Convention was communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5. Written submissions were received from the New York Times Company, which had been granted leave by the then Vice-President to intervene as a third party (Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court).

THE FACTS

I. SUBJECT MATTER OF THE CASE

6. The case concerned the publication of a newspaper article on the website of *The New York Times*. In the article the applicant had been mentioned by name and, based on reports by the US Federal Bureau of Investigation (hereinafter "the FBI") and European law-enforcement agencies, the applicant's alleged ties to Russian organised crime had been publicised. The applicant's attempt to obtain an injunction order before the domestic courts had been unsuccessful.

II. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1947 and lives in Düsseldorf. He is an internationally active entrepreneur in the media sector and chief executive officer of the media company Innova Film GmbH.

8. He also holds the position of Vice-President of the World Jewish Congress and President of the Jewish Confederation of Ukraine. In 2010 the former mayor of New York, Michael Bloomberg, publicly honoured the applicant for his efforts to improve American-Russian relations.

A. Article at issue

9. On 12 June 2001, the daily newspaper *The New York Times* published an article about an investigation into corruption against R.L. A slightly changed version was also published on the newspaper's website. The online version, which was the subject of the domestic proceedings (see paragraphs 12-20 below), reads, in so far as relevant, as follows (emphasis added and names abbreviated by the Court):

> "[L] Media Company Faces a Federal Inquiry
>
> By [R. B.]
>
> Published: June 12 2001
>
> WASHINGTON, June 10— A company owned by [R.L.], the cosmetics heir and former New York City mayoral candidate, is under investigation by federal prosecutors over allegations that it paid at least $1 million in bribes to Ukrainian officials for a valuable television license, according to lawyers and Justice Department documents.
>
> The United States attorney in Manhattan, [M.W.], has empaneled a grand jury and issued subpoenas, and prosecutors are studying some 6,000 pages of documents from Central European Media enterprise, which [R.L.] founded in 1991 as part of a plan to build a media empire in Europe. It now owns television stations in several Central and Eastern European countries.

In a Federal District Court filing in New York last year, [M.W.] sought the corporate documents, saying that they were needed for a criminal investigation into whether [R.L.]′s Central European Media had 'made corrupt and unlawful payments to Ukrainian officials' in violation of the Foreign Corrupt Practices Act, the federal law that prohibits American companies from paying bribes abroad. [R.L.] and the company did not challenge the request and turned over the documents, a lawyer said.

The payments being examined took place in 1996 after Ukraine′s licencing body granted a potentially lucrative licence to [R.L.]′s company despite the fact that the Ukraine Parliament had imposed a ban on new licences.

...

In Ukraine, Central European Media controls the most popular station through its majority-owned subsidiary Studio 1 + 1.

Prosecutors are studying two transactions related to Central European Media's Ukraine investment, according to documents and persons close to the investigation. In one, prosecutors are trying to determine if L's company paid $1.2 million to two Lebanese businessmen living in Ukraine, who then distributed it to some members of Ukraine's television licensing board.

... [R.L.]'s bid to gain the television license in Ukraine began in 1995. That year, he met in New York with [O.V.], a top adviser to Ukraine President [L.K.], to discuss business opportunities.

The initial meetings between [R.L.] and his representatives and [O.V.] were not promising. ...

[O.V.] suggested that [R.L.] team up with a new Ukrainian television broadcasting company, Studio 1 + 1, in Kiev, and he did. The principal owners were [V.R.] and Boris Fuchsmann, well known around Kiev for their influence and wealth. **Less well known were their ties to Russian organized crime, according to reports by the F.B.I. and European law enforcement agencies.**

[V.R.], who no longer has an interest in 1 + 1, has denied any links to Russian organized crime. Mr. Fuchsmann did not respond to e-mail inquiries seeking comment on the licensing deal and **the F.B.I.'s claim of his ties to organized crime,** although an assistant confirmed that he had received the inquiries.

A 1994 F.B.I. report on Russian organized crime in the United States described Mr. Fuchsmann as a gold smuggler and embezzler, whose company in Germany was part of an international organized crime network. He is barred from entering the United States.

...

Besides Mr. Fuchsmann and [V.R.], there were other, silent owners of Studio 1 + 1. In one internal fax, in April 1996, [J] described the Studio 1 + 1 shareholders as ''extremely powerful' people whom, she added, 'I will not mention on this fax.'

Central European Media now owns 60 percent of Studio 1 + 1, and Mr. Fuchsmann owns at least 30 percent, according to public statements.

At the time it went into business with Mr. Fuchsmann and [V.R.], Central European Media did not conduct investigations into their backgrounds, according to a report by [R.L.]'s New York law firm, [D.&P.].

In their 20-page report, which the prosecutors now have, the firm's lawyers said that [R.L.] had been justified in dealing with Mr. Fuchsmann and [V.R.] because they had

been highly recommended by [O.V.], whom the lawyers described as 'an ardent supporter of free-market business'.

The lawyers also concluded that Central European Media had not engaged in any illegal or improper activities. They said they could not rule out the possibility that Studio 1 + 1 had made improper payments, though they did not believe it had.

The Ukraine's television licensing board issued a broadcast license to Studio 1 + 1 not only in spite of Parliament's moratorium, but with only four of the board's eight members present; the law required at least six members for a vote.

A few days after the license was issued, Central European Media transferred $1.4 million to International Teleservices of Belize, according to a C.M.E. Wire Transfer Request. That is the second transaction being looked at by prosecutors.

The Belize company was indirectly owned by 'many high Ukrainian officials,' according to a second C.M.E. document, which did not name them.

A third document shows that International Teleservices had paid this amount to a company in Germany owned by Mr. Fuchsmann, Innova, and that Innova had paid the license fees on behalf of Studio 1 + 1. **Innova is part of a Russian organized crime network, according to U.S. and German law enforcement reports.**

It is not clear why such a circuitous route was used, and a person involved in the transaction, with inside knowledge of the owners of International Teleservices, said the $1.4 million payment was not for a license fee. He would not say what it was for.

Central European Media officials were nervous about the license they won, and sought the opinion of two law firms in Kiev. Both acknowledged 'the potential weaknesses' of the broadcasting license, according to a C.M.E. document. One week later, O.V. had secured a letter from the Ukrainian justice ministry stating that the license was valid.

Federal prosecutors, who opened their case in the wake of a number of private lawsuits challenging the legitimacy of the license award, have been examining documents for nearly a year, and the exact status of the investigation is not clear."

10. On 28 May 2001, before publication of the article, the journalist had notified the applicant, via an email to one of his employees, of the planned publication and had asked several questions. On 30 May 2001 the journalist had made a follow-up telephone call to the employee, who confirmed that the applicant had received the questions. However, the applicant refrained from answering the questions or commenting on the planned publication.

11. Since 12 June 2001 the article, showing the date of first publication, is retrievable from the website of *The New York Times*. It can also be found through online search engines such as "Google" or "Bing".

B. Court proceedings

12. On 31 July 2002 the applicant sought injunctions against certain parts of the article (highlighted in the article, see paragraph 9 above), published in the print and online versions.

1. Decisions concerning international jurisdiction and admissibility

13. On 9 January 2008 the Düsseldorf Regional Court declared the applicant's action inadmissible due to lack of international jurisdiction on the part of the German courts. It found that, at the material time, the print version of *The New York Times* was not distributed in Germany and that the Internet version of the newspaper was not directed at a readership in Germany. The Düsseldorf Court of Appeal confirmed that decision by its judgment dated 30 December 2008. On 2 March 2010 the Federal Court of Justice quashed the part of the decision regarding the applicant's claim for an injunction against the challenged statements in the online version of the article and referred that part of the action back to the Court of Appeal. The court held that the online version of the newspaper was accessible from Germany, and because it mentioned a German businessman in the article, the publication had a direct connection with Germany and German jurisdiction. It therefore affirmed the international jurisdiction of the German courts in that respect.

2. Further proceedings

14. On 22 June 2011 the Court of Appeal decided on the part of the dispute which had been referred back to it by the Federal Court of Justice. It granted the injunction in so far as the article stated that the applicant had been banned from entering the United States, and dismissed the remainder of the applicant's action for lack of merit. The Court of Appeal held that German law was applicable with regard to the online publication, as the article was accessible in Germany via the Internet and therefore the alleged violation of the applicant's reputation had at least occurred in Germany.

15. The court accepted that the statements interfered with the applicant's reputation and personality right (*allgemeines Persönlichkeitsrecht*) as protected by Article 2 § 1 and Article 1 § 1 of the Basic Law (*Grundgesetz*). However, as the statements had been made in the press, which was constitutionally protected pursuant to Article 5 § 1 of the Basic Law, it was necessary to balance both interests. Moreover, as the statements concerned a suspicion against the applicant, the presumption of innocence arising from Article 6 § 2 of the Convention and from German law also had to be taken into account. The court held that there was in principle a public interest in reporting on criminal offences, including the suspicion of their commission. On the other hand, continued the court, the interference with the rights of personality associated with such reporting required higher standards of care for newspaper reporting, because even if the investigation was later discontinued, "something of the accusation might stick to the person affected". Therefore, concrete, provable connecting facts which go beyond a vague, intangible suspicion were required, the reporting must concern an incident of great weight and the suspicion must be identified as such. In

addition, the reporting must be balanced, the journalist must not fail to report on exculpatory circumstances and the person concerned must, as a rule, be invited to make his own comments before publication.

16. As regards the statements at issue, the Court of Appeal held that there was a great informational interest on the part of the public in the reporting that the applicant, as a German businessman internationally active in the media sector, was suspected by the secret service of being involved in gold smuggling, embezzlement and organised crime. This assessment was not changed by the fact that the applicant had been mentioned by name in the article, or by the fact that when the article was published in 2001, the criminal offences mentioned therein had occurred more than sixteen years previously. Regarding the latter the court pointed out that the criminal offences had become relevant again, due to new suspicions regarding the involvement of a former mayoral candidate. For the understanding of these suspicions it had been necessary to elaborate on the companies and individuals, including the applicant, involved in the alleged corruption. Similarly, describing the suspected criminal backgrounds of some of the persons involved had been necessary for the readers' comprehension of the allegation. The court also took into account that the article remained accessible in an online archive of the daily newspaper. It held that there was a recognised public interest not only in information on current events but also in being able to research events from recent history.

17. The court further considered that the reporting was free from polemic statements and insinuations, and made it sufficiently clear that only insights from FBI reports and the law-enforcement authorities were being reported. This was expressly pointed out in the challenged article with the words, "according to reports by the F.B.I. and European law enforcement agencies". The internal FBI report was confirmed by reports of several other law-enforcement agencies, and the applicant himself, while denying any criminal activities, confirmed certain facts mentioned in those reports during the proceedings. Furthermore, the author of the article had notified the applicant via email that the article would be published. In that context the court also considered that although the applicant had been aware of the defendant's reporting even before the article had been published, he had waited for more than one year before applying for an injunction against the defendant. Therefore, the applicant had not perceived the interference with his personality right as intolerable.

18. In sum, the court concluded that the defendant had complied with the required journalistic duty of care and that the reporting had relied on sources and background information, which the journalist could reasonably consider reliable. Therefore, the informational interest of the public outweighed the concerns of protecting the applicant's personality right, even taking into account that such reporting might seriously damage his private and professional reputation. Regarding the alleged entry ban, the court

concluded that there had been no reliable sources and that the applicant had shown that he had recently travelled to the United States.

19. On 2 October 2012, the Federal Court of Justice rejected a complaint lodged by the applicant against the Court of Appeal's refusal to grant leave to appeal on points of law.

20. On 26 April 2013 the Federal Constitutional Court declined to consider a constitutional complaint (no. 1 BvR 2387/12) lodged by the applicant, without providing reasons.

III. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Basic Law

21. The relevant provisions of the Basic Law, in so far as relevant, read:

Article 1

"(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. ..."

Article 2

"(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law. ..."

Article 5

"(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honour. ..."

B. The Civil Code

22. Article 823 § 1 of the Civil Code (*Bürgerliches Gesetzbuch*) provides that anyone who, intentionally or negligently, unlawfully infringes another person's right to life, physical integrity, health, freedom, property or another similar right will be liable to pay compensation for the resulting damage.

23. In accordance with Article 1004 § 1 of the Civil Code, where a person's property is damaged otherwise than by removal or illegal retention, the owner may require the perpetrator to cease the interference. If there are reasonable fears that further damage will be inflicted, the owner may seek

an injunction. Article 1004 § 2 of the Civil Code provides that a claim is excluded if the owner is obliged to tolerate the interference.

24. A person's personality right enjoys the protection of Article 2 § 1 and Article 1 § 1 of the Basic Law, and is therefore recognised as "another similar right" within the meaning of Article 823 § 1 of the Civil Code (Federal Court of Justice, judgment of 25 May 1954, no. I ZR 211/53). Furthermore, the scope of Article 1004 of the Civil Code has been extended by the Federal Court of Justice and the provision is applicable to violations of other rights protected by Article 823 of the Civil Code. Thus it also protects a person's right to reputation and personality right (see, for example, Federal Court of Justice, judgment of 28 July 2015, no. VI ZR 340/14).

THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

25. The applicant complained that the domestic courts had failed to protect his reputation and right to respect for his private life, as provided for in Article 8 of the Convention, which reads, in so far as relevant, as follows:

> "1. Everyone has the right to respect for his private ... life ... .
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the protection of the rights and freedoms of others."

A. Admissibility

26. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

27. The applicant argued that the German courts had failed to protect him and his reputation from an article containing seriously defamatory allegations, which to date was still accessible on the Internet. He further argued that the conclusions of the Court of Appeal had been inconsistent with the general principles as outlined in the case-law of the Court. He submitted that the Court of Appeal had failed to take into account the broad

effect of an online publication, the fact that the article had not been sufficiently identified as old news, that no investigative proceedings had been initiated against the applicant concerning the allegations made in the article, and that there had not been sufficient public interest to justify mentioning him by name. Moreover, the article did not have a factual basis. In particular, an internal interim report could not be considered to have served as sufficient basis, as it contained mere speculations but no proven facts. Lastly, the applicant referred to the judgment of the Court of Justice of the European Union in the case *Google Spain SL and Google Inc. v AEPD and Gonzalez* (no. C-131/12, 13 May 2014) and argued that the reasoning regarding the right to be forgotten could be transferred to the present case.

28. The Government argued that the German courts had not failed to protect the applicant's right under Article 8 of the Convention when they had refused his request for an injunction. The courts had extensively examined his action in line with the Court's case-law regarding balancing Articles 8 and 10 of the Convention. The German courts had correctly concluded that the journalist had complied with his journalistic duty of care. In particular, the article had been free from exaggerations and based on reliable official reports. Both aspects had been considered by the Court of Appeal in detail. Moreover, the Government submitted that the public had a valid interest in the publication of articles in an online archive of a newspaper, if they had been lawfully published originally and were recognisable as archived old-news stories. In the present case, both requirements had been met. Lastly, the Government pointed out that the applicant's submissions regarding the right to be forgotten and the correlating judgment of the Court of Justice of the European Union were negligible, since the judgment concerned completely different circumstances and no relevant principles could be derived from it for the present case.

29. The New York Times Company referred to the relevant case-law of the Court and pointed out that journalists were permitted to rely on official reports from domestic authorities. It further pointed out that the member States enjoy a margin of appreciation when balancing the rights under Articles 8 and 10 of the Convention. In that regard, the third-party intervener argued that the standards applied by the German courts were consistent with the Convention and guaranteed a very high level of protection of the rights under Article 8 of the Convention.

2. The Court's assessment

30. At the outset the Court reiterates that in order for Article 8 to come into play, the attack on personal honour and reputation must attain a certain level of gravity and in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *Yarushkevych v. Ukraine* (dec.),

no. 38320/05, §§ 22-26, 31 May 2016, with further references). Given the allegations that the applicant was involved in gold smuggling, embezzlement and organised crime, the Court considers these allegations grave enough for Article 8 to come into play.

31. The Court also notes that in cases such as the present one, what is in issue is not an act by the State but the alleged inadequacy of the protection afforded by the domestic courts to the applicant's private life. It reiterates that the positive obligation inherent to Article 8 of the Convention may oblige the State to adopt measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. The applicable principles are, nonetheless, similar and regard must be had to the fair balance that has to be struck between the relevant competing interests (see *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, §§ 98 and 99, 7 February 2012, with further references).

32. Therefore, the Court considers that the present case requires an examination of the question of whether a fair balance has been struck between the applicant's right to the protection of his private life under Article 8 of the Convention and the newspaper's right to freedom of expression as guaranteed by Article 10. Having considered on numerous previous occasions similar disputes requiring an examination of the issue of a fair balance, the Court refers to the general principles relating to each of the rights in question that have been established in its case-law (see *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, §§ 83-92, 10 November 2015; *Axel Springer AG v. Germany* [GC], no. 39954/08, §§ 78-88, 7 February 2012; and *Von Hannover (no. 2)*, cited above, §§ 95-107).

33. In cases such as the present one, where the national authorities had to balance two conflicting interests, and where the exercise of striking a balance between those two rights was undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see *MGN Limited v. the United Kingdom*, no. 39401/04, §§ 150 and 155, 18 January 2011, and *Von Hannover (no. 2)*, cited above, § 107).

34. The Court has identified, in so far as relevant for the present case, the following relevant criteria in the context of balancing competing rights: the contribution to a debate of public interest; the degree to which the person affected is well-known; the subject of the news report; the prior conduct of the person concerned; the method of obtaining the information and its veracity; and the content, form and consequences of the publication (see *Couderc and Hachette Filipacchi Associés*, § 93; *Axel Springer AG*, §§ 90-95; and *Von Hannover (no. 2),* §§ 109-13, all cited above).

(a) Contribution to a debate of public interest

35. An initial essential criterion is the contribution made by articles in the press to a debate of public interest. The Court has previously recognised the existence of such an interest where the publication concerned political issues or crimes (see *Axel Springer AG*, cited above, § 90, with further references).

36. The Court of Appeal in its detailed judgment of 22 June 2011 held that there was a public interest in the suspicion that a German businessman was suspected of involvement in gold smuggling, embezzlement and organised crime (see paragraph 16 above). It emphasised that even though those allegations dated back some years, they had become relevant again due to the suspected involvement of a former New York City mayoral candidate in corruption. The court also pointed out that the latter was the actual topic of the article and that for the readers' understanding of the allegations it had been necessary to elaborate on the suspicions against the applicant (see paragraph 16 above). Moreover, given the great public interest in the corruption allegations, there was also a public interest in mentioning the applicant by name.

37. The Court agrees with the conclusion of the Court of Appeal that the article contributed to a debate of public interest and that there was public interest in the alleged involvement of the applicant and mentioning him by name.

38. The Court of Appeal further held that public interest also existed in the publication of the article in the online archive of the newspaper. It reasoned that the public had not only an interest in news about current events, but also in the possibility of researching important past events.

39. The Court agrees with this conclusion, too. It notes the substantial contribution made by Internet archives to preserving and making available news and information. Such archives constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free (see *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*, nos. 3002/03 and 23676/03, § 45, ECHR 2009).

(b) How well known is the person concerned and what is the subject of the report?

40. The role or function of the person concerned constitutes another important criterion, related to the preceding one. In that connection a distinction has to be made between private individuals and persons acting in a public context, such as political or public figures. Accordingly, whilst a private individual unknown to the public may claim particular protection of his or her right to private life, the same is not true of public figures (see *Petrenco v. Moldova*, no. 20928/05, § 55, 30 March 2010).

41. The Court notes that the Court of Appeal pointed out that, while the report primarily concerned a prominent political figure, there was a certain

interest in the applicant as a German businessman internationally active in the media sector (see paragraph 16 above). This assessment is in compliance with the Court's case-law, as it has previously held that a manager of one of the country's most prestigious enterprises can be considered by his very position in society to be a public figure (see *Verlagsgruppe News GmbH v. Austria (no. 2)*, no. 10520/02, § 36, 14 December 2006).

(c) Method of obtaining the information and its veracity

42. As regards the method of obtaining the information and its veracity, the Court reiterates that Article 10 of the Convention does not guarantee wholly unrestricted freedom of expression, even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of that provision, freedom of expression carries with it "duties and responsibilities", which also apply to the media even with respect to matters of serious public concern. By reason of these "duties and responsibilities", the safeguard afforded by Article 10 to journalists in relation to reporting on issues of public interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see, for example, *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I, and *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 78, ECHR 2004-XI).

43. Moreover, those "duties and responsibilities" are liable to assume significance when there is a question of attacking the reputation of a named individual and infringing the "rights of others". Thus, special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable with respect to the allegations (see *Pedersen and Baadsgaard*, cited above, § 78). The latter issue must be determined in the light of the situation as it presented itself to the newspaper at the material time (see *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 66, ECHR 1999-III) and requires, in turn, consideration of other elements such as the authority of the source, whether the newspaper had conducted a reasonable amount of research before publication (see *Prager and Oberschlick v. Austria*, 26 April 1995, § 37, Series A no. 313) and whether the newspaper gave the persons defamed the opportunity to defend themselves (*Bergens Tidende and Others v. Norway*, no. 26132/95, § 58, ECHR 2000-IV).

44. The Court has previously held that the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports (see *Bladet Tromsø and Stensaas*, cited above, § 68) or on information provided by a press officer at

the public prosecutor's office (see *Axel Springer AG*, cited above, § 105) without having to undertake independent research.

45. The Court observes that the main source for the statements regarding the applicant was an internal FBI report and not an officially published report or a public statement to the press by a public official. However, the Court also notes that the Court of Appeal examined the factual foundation for the statements at issue in detail and concluded that the information in the FBI report was corroborated by reports of several other law-enforcement agencies, as well as submissions by the applicant himself (see paragraphs 17 and 18 above). Consequently, the Court of Appeal concluded that the journalist had based his articles on sufficiently credible sources. Only with regard to the statement that the applicant had been barred from entering the United States did the Court of Appeal find that there was insufficient factual basis and issued a prohibitive injunction.

46. The Court sees no reasons to call the Court of Appeal's conclusion into question and agrees that there was a sufficient factual basis for the remaining statements at issue.

47. The Court further notes that the Court of Appeal established that the journalist had contacted the applicant before the publication of the article. It agrees with the Court of Appeal's conclusion that the journalist had fully complied with his journalistic "duties and responsibilities".

(d) Prior conduct of the person concerned

48. The conduct of the person concerned prior to publication of the report or the fact that the related information had already appeared in an earlier publication are also factors to be taken into consideration (see *Hachette Filipacchi Associés (Ici Paris) v. France*, no. 12268/03, §§ 52 and 53, 23 July 2009). However, the mere fact of having cooperated with the press on previous occasions cannot serve as an argument for depriving the party concerned of all protection against publications (see *Von Hannover (no. 2)*, cited above, § 111).

49. The Court notes that the Court of Appeal touched on this issue only with regard to the fact that the applicant had not replied to the journalist's questions prior to publication of the article. Since there are no further information that the applicant has actively sought the limelight, the Court concludes that the applicant's prior conduct has no consequences for the current assessment and did not affect his right to respect for private life.

(e) Content, form and consequences of the publication

50. Lastly, the way in which the report is published and the manner in which the person concerned is represented in the report are factors to be taken into consideration. Moreover, the extent to which the report has been disseminated may also be an important aspect, depending on whether the newspaper is a national or local one, and whether it has a large or a limited

circulation (see *Karhuvaara and Iltalehti v. Finland*, no. 53678/00, § 47, ECHR 2004-X).

51. Firstly, the Court agrees with the Court of Appeal that the article was free from polemic statements and insinuations, and made it sufficiently clear that only insights from reports by the FBI and other law-enforcement authorities were being reported. Moreover, the Court finds that the information disseminated mainly concerned the applicant's professional life and did not divulge any intimate private details.

52. Secondly, the Court notes that the German courts claimed lack of jurisdiction in respect of the print version of the article, as at the material time *The New York Times* was not distributed in Germany. The Federal Court of Justice, however, held that the online version of the newspaper was accessible from Germany, and that because a German businessman was mentioned in the article, the publication also had a direct connection with Germany and, as such, fell within the jurisdiction of the German courts. The Court of Appeal, however, found that the online article was accessible only as a result of a directed search with an online search engine. Therefore, the Court accepts, in the present case, the conclusion of the domestic courts that the consequences of the article in Germany were limited.

53. As far as the applicant complained that the article was also retrievable by merely searching online for his name, the Court notes that the applicant provided no information in his submissions regarding any efforts made to have the link to the article removed from online search engines.

(f) Conclusion

54. In the light of all the above-mentioned considerations, the Court considers that the Court of Appeal, in balancing the right to respect for private life with the right to freedom of expression, took into account and applied the criteria set out in the Court's case-law. The Court reiterates that, where a balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its own view for that of the domestic courts. Such strong reasons are lacking in the present case. The Court of Appeal struck a reasonable balance between the competing rights and acted within the margin of appreciation afforded to it.

55. There has accordingly been no violation of Article 8 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 19 October 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Erik Møse
Deputy Registrar	President