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

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The order for the publisher of the newspaper *Le Soir* to anonymise the details of a convicted offender on grounds of the "right to be forgotten" did not breach his freedom of expression

In today's **Grand Chamber** judgment[1] in the case of Hurbain v. Belgium (application no. 57292/16) the European Court of Human Rights held, by a majority (12 votes to 5), that there had been:

no violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

The case concerned the civil judgment against Mr Hurbain, as publisher of the daily newspaper *Le Soir*, ordering him to anonymise, on grounds of the "right to be forgotten", an article in the digital archives mentioning the full name of the driver responsible for a fatal road-traffic accident in 1994.

The Court noted that the national courts had taken account in a coherent manner of the nature and seriousness of the judicial facts reported on in the article in question, the fact that the article had no topical, historical or scientific interest, and the fact that the driver was not well known. In addition, they had attached importance to the serious harm suffered by the driver as a result of the continued online availability of the article with unrestricted access, which had been apt to create a "virtual criminal record", especially in view of the length of time elapsing since the original publication of the article. Furthermore, after reviewing the measures that might be considered in order to balance the rights at stake – a review whose scope had been consistent with the procedural standards applicable in Belgium – they had held that the anonymisation of the article did not impose an excessive and impracticable burden on the applicant, while constituting the most effective means of protecting the driver's privacy. Accordingly, and regard being had to the States' margin of appreciation, the Court found that the national courts had carefully balanced the rights at stake in accordance with the requirements of the Convention, such that the interference with the right guaranteed by Article 10 of the Convention on account of the anonymisation of the electronic version of the article on the website of the newspaper *Le Soir* had been limited to what was strictly necessary. It could thus, in the circumstances of the case, be regarded as necessary in a democratic society and proportionate.

A legal summary of this case will be available in the Court's database HUDOC (link).

Principal facts

The applicant, Patrick Hurbain, is a Belgian national who was born in 1959 and lives in Genappe (Belgium). He is the publisher of *Le Soir*, one of Belgium's leading French-language daily newspapers.

In a 1994 print edition an article in *Le Soir* reported, among other things, on a car accident that had caused the death of two people and injured three others. The article mentioned the full name of the driver, who was convicted in 2000. He served his sentence and was rehabilitated in 2006.

In 2008 the newspaper placed on its website an electronic version of its archives dating back to 1989 (including the above-mentioned article), which were available free of charge. In 2010 the driver contacted *Le Soir*, requesting that the article be removed from the newspaper's electronic archives or at least anonymised. The request mentioned his profession and the fact that the article appeared among the results when his name was entered in several search engines.

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

In 2010 the newspaper's legal department refused to remove the article from the archives, and later stated that it had given notice to the managing director of Google Belgium, by registered letter, to delist the article. Before the domestic courts and the Court Mr Hurbain stated that this had produced no response.

In 2012 the driver brought proceedings against Mr Hurbain seeking an order for the anonymisation of the article concerning him. In 2013 the Court of First Instance allowed most of the driver's claims. That judgment was upheld by the Court of Appeal in 2014. Mr Hurbain subsequently appealed on points of law, but his appeal was dismissed in 2016.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression) of the Convention, Mr Hurbain complained about the civil judgment ordering him to anonymise the archived version of the article in question on the website of *Le Soir*.

The application was lodged with the European Court of Human Rights on 26 September 2016.

In a Chamber judgment of 22 June 2021 the Court held, by a majority (six votes to one), that there had been no violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

On 16 September 2021 the applicant requested that the case be referred to the Grand Chamber under Article 43 of the Convention (referral to the Grand Chamber).

On 11 October 2021 the panel of the Grand Chamber accepted that request.

A number of third parties were given leave to intervene in the written procedure before the Grand Chamber (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court), including 16 different organisations and entities represented by the organisation Article 19, as well as the driver who was the subject of the article, who relied on the "right to be forgotten".

A hearing was held on 9 March 2022.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Marko **Bošnjak** (Slovenia), *President*,
Pere **Pastor Vilanova** (Andorra),
Arnfinn **Bårdsen** (Norway),
Faris **Vehabović** (Bosnia and Herzegovina),
Egidijus **Kūris** (Lithuania),
Iulia Antoanella **Motoc** (Romania),
Yonko **Grozev** (Bulgaria),
Carlo **Ranzoni** (Liechtenstein),
Alena **Poláčková** (Slovakia),
Tim **Eicke** (the United Kingdom),
Jovan **Ilievski** (North Macedonia),
Jolien **Schukking** (the Netherlands),
Péter **Paczolay** (Hungary),
Gilberto **Felici** (San Marino),
Lorraine **Schembri Orland** (Malta),
Ana Maria **Guerra Martins** (Portugal),
Frédéric **Krenc** (Belgium),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar.*

Decision of the Court

The question which the Court was called on to address in the present case was whether the decisions of the Belgian courts ordering the applicant to anonymise the electronic version of the impugned article on the website of the newspaper *Le Soir*, on grounds of the "right to be forgotten", amounted to a violation of freedom of expression under Article 10 of the Convention. The Court specified that the case concerned the electronic archived version of an article rather than the original version, adding that it was solely the continued availability of the information on the Internet, rather than its original publication *per se*, that was at issue. The original article had been published in a lawful and non-defamatory manner. Information that was published and subsequently archived on the website of a news outlet for the purposes of journalism was a matter going to the heart of freedom of expression as protected by Article 10 of the Convention.

In the Court's view, for the press to be able properly to perform its task of creating archives, it had to be able to establish and maintain comprehensive records. Since the role of archives was to ensure the continued availability of information that had been published lawfully at a certain point in time, they should, as a general rule, remain authentic, reliable and complete. Accordingly, the integrity of digital press archives should be the guiding principle underlying the examination of any request for the removal or alteration of all or part of an archived article which contributed to the preservation of memory, especially if, as in the present case, the lawfulness of the article had never been called into question. Furthermore, although the freedom of expression protected by Article 10 of the Convention was not absolute, including when it came to media coverage of matters of public interest, the national authorities nevertheless had to be particularly vigilant in examining requests, grounded on respect for private life, for removal or alteration of the electronic version of an archived article whose lawfulness had not been called into question at the time of its initial publication. Such requests called for thorough examination.

Hence, the Court considered that its assessment should take account of the different context of the present case compared with cases concerning initial publication. It also found that the criteria it had employed hitherto in order to resolve a conflict between the respective rights under Article 10 (freedom of expression) and Article 8 (right to respect for private life) of the Convention needed to be adjusted. In that connection the Court specified that the balancing of these various rights of equal value to be carried out in the context of a request to alter journalistic content that was archived online should take into account the criteria set out below. It further observed that data subjects were not obliged to contact the original website, either beforehand or simultaneously, in order to exercise their rights *vis-à-vis* search engines, as these were two different forms of processing, each with its own grounds of legitimacy and with different impacts on the individual's rights and interests. Likewise, the examination of an action against the publisher of a news website could not be made contingent on a prior request for delisting.

With regard to the various criteria, the Court noted the following.

As to the nature of the archived information, the Court noted that the article in issue reported on a number of road-traffic accidents that had occurred in 1994, of which the accident caused by the driver in the present case was one. The facts reported on had been of a judicial nature and did not fall into the category of offences whose significance, owing to their seriousness, was unaltered by the passage of time. The Court also noted that the events had not been the subject of media coverage with the exception of the article in question.

Regarding the time that had elapsed since the events and since initial and online publication, the Court observed that the article in issue, which had been published in 1994, was placed online in the archives of the newspaper *Le Soir* in 2008. The passage of time had been a relevant factor in the Liège Court of Appeal's assessment. That court had noted that a significant length of time (16 years) had elapsed between the initial publication of the article and the first request for anonymisation; in all, some 20 years had passed by the time of delivery of its judgment. Thus, the Court considered

that the driver, who had been rehabilitated in 2006, had had a legitimate interest, after all that time, in seeking to be allowed to reintegrate into society without being permanently reminded of his past.

As to the contemporary interest of the information, the Court noted the Liège Court of Appeal's finding that, 20 years after the events, the identity of a person who was not a public figure did not add to the public interest of the article, which merely made a statistical contribution to a public debate on road safety. In the Court of Appeal's view, the events reported on in the article were clearly not of historical significance either, as the article related to an unexceptional – albeit tragic – short news story which was not alleged, still less demonstrated, to have been a source of particular public concern. The Court saw no reason to question the duly reasoned assessment of the national court in that regard.

***As to the question whether the person claiming entitlement to be forgotten was well known, and his or her conduct since the events*,** the Liège Court of Appeal had observed that the driver did not hold any public office. Hence, the mere fact that he was a doctor in no sense justified his continued identification in the online article some 20 years after the events. He was an individual unknown to the general public both at the time of the events and at the time of his request for anonymisation. Moreover, there was nothing to suggest that he had made contact with the media in order to publicise his situation, either when the article first appeared in 1994 or when it was placed online in 2008. On the contrary, all the steps taken by him demonstrated a desire to stay out of the spotlight.

With regard to the negative repercussions of the continued availability of the information online, the Court noted the Liège Court of Appeal's finding that the electronic archiving of an article concerning the commission of an offence should not create a kind of "virtual criminal record" for the driver, who had served his sentence and been rehabilitated. The Court of Appeal had observed that a simple search based on the driver's first name and surname in the search engine of the website of *Le Soir* or on Google immediately brought up the article. In the Court of Appeal's view, this was undoubtedly a source of harm to the driver, at least of a psychological nature. Such a situation made knowledge of his previous conviction readily accessible to a wide audience which – since he was a doctor – inevitably included patients, colleagues and acquaintances, and had thus been liable to stigmatise him, seriously damage his reputation and prevent him from reintegrating into society normally. The Court saw no strong reason to call into question the duly reasoned decision of the Liège Court of Appeal in that regard.

As to the degree of accessibility of the information in the digital archives, the domestic courts had observed that when they were placed online in 2008, the archives of the newspaper *Le Soir* had been available free of charge. Moreover, it was not in dispute that when the driver had made his request, and throughout the domestic proceedings, the archives had continued to be accessible without restrictions and free of charge. In view of this high degree of accessibility, the Court considered that the continued presence of the article in question in the archives had undoubtedly caused harm to the driver.

As to the impact of the measure on freedom of expression and more specifically on freedom of the press, the Liège Court of Appeal had found that the most effective means of protecting the driver's privacy without interfering to a disproportionate extent with the applicant's freedom of expression was to anonymise the article on the website of *Le Soir* by replacing the driver's first name and surname with the letter X. In that connection the Court had previously held that anonymisation was less detrimental to freedom of expression than the removal of an entire article. It noted that anonymisation constituted a particular means of altering archived material in that it concerned only the first name and surname of the person concerned and did not otherwise affect the content of the information conveyed. The Court further noted that the Liège Court of Appeal had taken care to assess the implications of the measure for the driver, for the public who were entitled to have access to the information, and for the applicant. It had concluded that the fact of acceding to the driver's request did not confer on each and every individual a subjective right to rewrite history, nor did it

make it possible to "falsify history" or impose an "excessive burden of responsibility" on the applicant. As to the importance to be attached to the integrity of the archives, the Liège Court of Appeal had made clear that the applicant had not been requested to remove the article from the archives, but simply to render the electronic version anonymous. It had also stressed that the paper archives remained intact and that the applicant could still ensure the integrity of the original digital version. Hence the original, non-anonymised, version of the article was still available in print form and could be consulted by any person who was interested, thus fulfilling its inherent role as an archive record.

Lastly, regarding the possible chilling effect on freedom of the press stemming from the obligation for a publisher to anonymise an article that had been published initially in a lawful manner, the Court considered that it did not appear from the file that the anonymisation order had had such an impact on the performance by *Le Soir* of its journalistic tasks.

In sum, the Court noted that the national courts had taken account in a coherent manner of the nature and seriousness of the judicial facts reported on in the article in question, the fact that the article had no topical, historical or scientific interest, and the fact that the driver was not well known. In addition, they had attached importance to the serious harm suffered by the driver as a result of the continued online availability of the article with unrestricted access, which had been apt to create a "virtual criminal record", especially in view of the length of time elapsing since the original publication of the article. Furthermore, after reviewing the measures that might be considered in order to balance the rights at stake – a review whose scope had been consistent with the procedural standards applicable in Belgium – they had held that the anonymisation of the article did not impose an excessive and impracticable burden on the applicant, while constituting the most effective means of protecting the driver's privacy.

Accordingly, and regard being had to the States' margin of appreciation, the Court found that the national courts had carefully balanced the rights at stake in accordance with the requirements of the Convention, such that the interference with the right guaranteed by Article 10 of the Convention on account of the anonymisation of the electronic version of the article on the website of the newspaper *Le Soir* had been limited to what was strictly necessary. It could thus, in the circumstances of the case, be regarded as necessary in a democratic society and proportionate.

The Court therefore saw no strong reasons to substitute its own view for that of the domestic courts and to disregard the outcome of the balancing exercise carried out by them. Accordingly, it found that there had been no violation of Article 10 of the Convention.

Separate opinions

Judge Krenc expressed a concurring opinion. Judge Ranzoni expressed a dissenting opinion, joined by Judges Kūris, Grozev, Eicke and Schembri Orland. These opinions are annexed to the judgment.

The judgment is available in English and French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.