



Measures taken by the authorities to identify the sources for an article written on the basis of confidential documents breached freedom of expression

In today's Chamber judgment¹ in the case of [Görmüş and Others v. Turkey](#) (application no. 49085/07) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

The case concerned three different aspects of freedom of expression, namely the protection of journalistic sources, the disclosure of confidential information and the protection of whistle-blowers.

The Court held that the article published by the weekly newspaper *Nokta*, on the basis of "confidential" military documents about a system for classifying the media on the basis of whether they were "favourable" or "unfavourable" to the armed forces, was capable of contributing to public debate. Emphasising the importance of freedom of expression with regard to matters of public interest and the need to protect journalistic sources, including when those sources were State officials highlighting unsatisfactory practices in their workplace, the Court held that the interference with the journalists' right to freedom of expression, especially their right to impart information, had not been proportionate to the legitimate aim sought, had not met a pressing social need, and had not therefore been necessary in a democratic society; the interference had consisted in the seizure, retrieval and storage by the authorities of all of the magazine's computer data, even data that was unrelated to the article, with a view to identifying the public-sector whistle-blowers. Lastly, the Court considered that this measure was such as to deter potential sources from assisting the press in informing the public on matters of general interest, including when they concerned the armed forces.

Principal facts

The applicants, Ahmet Alper Görmüş, Mehmet Ferda Balancar, Ahmet Haşim Akman, Ahmet Şık, Nevzat Çiçek, and Banu Uzpeder, are Turkish nationals who live in Antalya and Istanbul (Turkey).

At the relevant time Mr Görmüş was the publishing director of the *Nokta* weekly magazine, Mr Balancar and Mr Akman were the editors-in-chief and Mr Şık, Mr Çiçek and Ms Uzpeder worked as investigative journalists for the publication.

In April 2007 *Nokta* published an article based on documents classified "confidential" by the Chief of Staff of the armed forces. The article concerned the introduction of a system for classifying publishing companies and journalists according to whether they were "favourable" or "hostile" to the armed forces, so that specific journalists could be excluded from activities organised by the army. Following a complaint by the Chief of Staff of the armed forces, the Military Court ordered a search of all the magazine's premises, demanding electronic and paper copies of the files stored on all private and professional computers, in the archives and on various data storage media. At the beginning of the search Mr Görmüş handed over the documents requested by the military

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

prosecutor to the police officers. The authorities also transferred the data stored on the magazine's 46 computers.

In the meantime, lawyers acting for *Nokta* and for Mr Görmüş had appealed against the search warrant, alleging in particular a breach of the right to protection of journalists' sources. The Military Court dismissed their appeal on the grounds that the search and seizure had only been intended to elucidate the circumstances surrounding the disclosure of a document classified as "secret" and not to identify those responsible for the leak. The court also pointed out that the Criminal Code made it an offence to procure, use, possess or publish information whose disclosure was prohibited for the purposes of protecting State security, and that journalists were not exempted from criminal liability in that connection.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression), the applicants complained that the measures taken by the relevant authorities, particularly the search of their professional premises and the seizure of their documents, had been intended to identify their sources of information and infringed their right to freedom of expression, especially their right to receive or impart information as journalists.

The application was lodged with the European Court of Human Rights on 9 November 2007.

Judgment was given by a Chamber of seven judges, composed as follows:

Julia Laffranque (Estonia), *President*,
Işıl Karakaş (Turkey),
Paul Lemmens (Belgium),
Valeriu Griţco (the Republic of Moldova),
Ksenija Turković (Croatia),
Stéphanie Mourou-Vikström (Monaco),
Georges Ravarani (Luxembourg),

and also Stanley Naismith, *Section Registrar*.

Decision of the Court

[Article 10 \(freedom of expression\)](#)

The Court first examined the contribution of the contested article to a public debate. In this connection, it noted that the disclosed documents contained assessments made by the armed forces with a view to enabling them to select the journalists who were to be invited to army events and authorised to cover their activities. The Court further noted that the contested article covered questions that had been widely discussed in the media and divided public opinion, namely the armed forces' involvement in the country's political life in general. It noted also that the main organisations representing the media had protested against this selective practice, which they described as arbitrary and harmful to freedom of expression and the freedom of the press, since journalists were classified on the basis of their political tendencies, with a view to excluding some of their number from the dissemination of information on matters of general interest. In this regard, the Court considered that the points of view defended in the article and the tone of the disclosed documents were likely to contribute to the public debate on the armed forces' relationship with political life in general.

The Court then examined the issue of the protection of journalistic sources. It noted that in order to identify the State employees who had handed over the confidential information, the judicial authorities had raided the journalists' workplace unannounced and carried out seizures, thus

obtaining access to all of the documents held by them. In the Court's opinion, this was a more serious act than a mere order to divulge the source's identity. The Court also noted that, although the publishing director had handed over the requested documents to the investigators, the latter had nonetheless proceeded to transfer data from the magazine's 46 computers. For this reason, the Court considered that the judicial authorities' intervention had extended beyond the initial request by the military prosecutor's office, namely the handing over, in its original state, of the file as provided by the whistle-blower. In the Court's view, such intervention was such as to deter potential sources from assisting the press in informing the public on matters concerning the armed forces, including when they were of public interest.

With regard to the protection of whistle-blowers who were State officials, the Court noted that the investigation was indeed intended to identify those responsible for the leak and to bring about their arrest. In this respect, the Court acknowledged that the duties and responsibilities of journalists could include the duty not to publish information provided by whistle-blower State officials until such time as the latter had made use of the administrative procedures provided for to draw their superiors' attention to potentially unlawful acts committed in their workplace. However, the Court noted that the Turkish legislation did not provide for such a procedure. Thus, the Court considered that the journalists could not be criticised for having published the contested information without waiting for their sources to raise their concerns through the chain of command.

Having regard to the question of the confidentiality of military matters, the Court acknowledged that the confidential nature of information concerning the internal organisation and functioning of the armed forces was in principle justified, but nonetheless held that this confidentiality should not be protected at any cost. In the Court's view, the media's task as purveyor of information extended to the actions of the armed forces, and preventing all public debate on these actions was unacceptable. Moreover, the Court noted that the reasons for which the contested documents had been classified as confidential were not justified, as the Government had not shown that there had been a detrimental impact as a result of their disclosure. Thus, the Court considered that the contested article had been highly pertinent in the debate on discrimination against the media by State bodies, especially as the style used in the article and the time of its publication had not raised any difficulty that was such as to damage the interests of the State.

In addition, the Court considered that it was in the public interest to maintain confidence in the State authorities' – including the armed forces' – compliance with the principle of equal treatment of the media. In this connection, it specified that citizens had an interest in receiving clarifications with regard to accusations against a public institution, alleging controversial practices in respect of freedom of the press. Thus, the Court considered that the public interest in the disclosure of information describing controversial practices on the part of the armed forces was so important in a democratic society that it outweighed the interest in maintaining public confidence in that institution.

With regard to the domestic courts' review of the case, the Court noted that the military courts had not verified if the "confidential" classification of the documents in question was justified; nor had they addressed the question of whether the interest in maintaining this confidentiality took precedence over the public's interest in learning of the difference in treatment between media outlets. Given that the military courts had failed to verify whether the "confidential" classification was justified and to balance the various competing interests, the Court noted that the formal application of the concept of confidentiality to the military documents had prevented the domestic courts from reviewing whether the interference had been compatible with Article 10 of the Convention.

Turning then to whether the journalists had complied with professional ethics, the Court did not find any shortcoming and observed that the journalists in question had had no intention other than to inform the public on a topic of general interest.

Lastly, examining the proportionality of the interference, the Court considered that the search of the magazine's premises, the transfer to external discs of the entire contents of the computers and their storage by the prosecutor's office had undermined the protection of sources to a greater extent than an order requiring them to reveal the identity of the sources, since the indiscriminate retrieval of all the data had revealed information that was unconnected to the acts in issue. In the Court's view, this intervention was likely not only to have very negative repercussions on the relationships of the journalists in question with their sources, but could also have a serious chilling effect on other journalists or other whistle-blowers who were State officials, and could discourage them from reporting any misconduct or controversial acts by public authorities. The Court considered that the intervention had been disproportionate.

Accordingly, the Court concluded that there had been a violation of Article 10 of the Convention, holding that the interference with the journalists' right to freedom of expression, especially their right to impart information, did not meet a pressing social need, had not been proportionate to the legitimate aim sought and that, in consequence, it had not been necessary in a democratic society.

Just satisfaction (Article 41)

The Court held that Turkey was to pay Ahmet Alper Görmüş 2,750 euros (EUR), the applicants Ahmet Haşim Akman and Mehmet Ferda Balancar EUR 1,650 each, the applicants Ahmet Şık and Banu Uzpeder EUR 850 each and Nevzat Çiçek EUR 500 in respect of non-pecuniary damage.

The judgment is available only in 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.