



An order requiring the Mediapart site to remove transcripts and tapes of conversations that had been illegally recorded at Ms Bettencourt's home did not breach the Convention

In today's Chamber judgment¹ in the case of [Société Editrice de Mediapart and Others v. France](#) (applications no. 281/15 and no. 34445/15) the European Court of Human Rights held, unanimously, that there had been:

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

The two cases concerned an order issued against Mediapart, a news website, its publishing editor and a journalist to remove from the news company's website audio extracts and transcripts of illegal recordings made at the home of Ms Bettencourt, principal shareholder of the L'Oréal group.

The Court reiterated that Article 10 of the Convention did not guarantee a wholly unrestricted freedom of expression, even with respect to media coverage of matters of serious public concern. Exercise of this freedom carried with it "duties and responsibilities", which also applied to the press.

The applicants had been aware that disclosure of recordings made without Ms Bettencourt's knowledge was an offence, which ought to have led them to show prudence and precaution.

The Court reiterated the principle that journalists could not claim an exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising the right to freedom of expression, the offence in question had been committed during the performance of their journalistic functions.

In certain circumstances, even where a person was known to the general public, he or she could rely on a "legitimate expectation" of protection of and respect for his or her private life. Thus, the fact that an individual belonged to the category of public figures could not, especially in the case of persons who, like Ms Bettencourt, did not exercise official functions, authorise the media to violate the professional and ethical principles which had to govern their actions, or legitimise intrusions into private life. The domestic courts had found against the applicants in order to end the disturbance caused to a woman who, albeit a public figure, had never consented to the disclosure of the recordings and transcripts in question, was vulnerable and had a legitimate expectation of having the illegal publications – which she had never been able to comment on, in contrast to the option available to her during the criminal trial – removed from the news site.

The Court could see no strong reasons which required it to substitute its view for that of the domestic courts and to set aside the balancing exercise conducted by them. It was satisfied that the reasons relied upon were both relevant and sufficient to show that the interference complained of was "necessary in a democratic society" and that the order in question had not gone beyond what was necessary to protect Ms Bettencourt and P.D.M. from the interference with their right to respect for private life.

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.

Principal facts

In application no. 281/15, the applicants are the newspaper publisher Mediapart, Mr Hervé Edwy Plenel, chairperson and publishing editor of that publication, and Mr Fabrice Arfi, a journalist at Mediapart. Mr Plenel and Mr Arfi are French nationals who were born in 1952 and 1981 respectively and live in Paris. In application no. 34445/15, the applicants are Edwy Plenel and Mediapart.

In the course of 2009 a dispute arose between Ms Bettencourt and her daughter concerning large financial gifts, in particular to B., a writer and photographer. The case was widely reported in the press. Having been informed that Ms Bettencourt's daughter had transmitted to the national financial police brigade CD-ROMs of conversations recorded at her mother's home between May 2009 and May 2010 by the latter's former butler, P.B., the applicants decided to publish extracts from these recordings online between 14 and 21 June 2010.

Application no. 281/15 – urgent proceedings against the applicants by P.D.M.

On 21 June 2010 P.D.M. – Ms Bettencourt's wealth manager – brought urgent proceedings against the applicants, seeking, on the basis of Article 809 of the Code of Civil Procedure (CPC) and Articles 226-1 and 226-2 of the Criminal Code, to obtain an order that all extracts of the illegal recordings made at Ms Bettencourt's home were to be removed from Mediapart's internet site and also an order that Mediapart was not to publish these recordings, subject to a penalty of EUR 10,000 per hour of publication and per extract. He also sought an order that the respondents, jointly, were to pay him the sum of EUR 20,000.

On 1 July 2010 the President of the Paris *tribunal de grande instance* (TGI) dismissed his claims, noting that the published transcripts concerned B.'s conduct and his relationship with Ms Bettencourt, which constituted the background to the Bettencourt case, but also and primarily the management of her fortune and her possible ties to the political authorities.

The President of the TGI concluded that ordering the removal of documents corresponding to the publication of legitimate information that was of relevance to the general interest would amount to censorship and would be contrary to the public interest. By a judgment of 23 July 2010, the Paris Court of Appeal upheld the order issued by the President of the Paris TGI on 1 July 2010, holding that the sole fact that the published statements had been recorded without the consent of the speaker was not in itself sufficient to characterise the harm caused by their publication as manifestly unlawful, but that they must nevertheless have "intrude[d] on the privacy of others" as set out in Article 226-1 of the Criminal Code.

P.D.M. appealed on points of law against that judgment. On 6 October 2011 the Court of Cassation quashed the court of appeal's judgment and remitted the case to the Versailles Court of Appeal.

By a judgment of 4 July 2013, the Versailles Court of Appeal set aside the order of 1 July 2010 and ordered the applicants to remove from Mediapart's site all transcripts of the illegal recordings made in Ms Bettencourt's home and to pay P.D.M. an advance of EUR 1,000 in compensation for his non-pecuniary damage.

The applicants appealed on points of law. In a judgment delivered on 2 July 2014, the Court of Cassation dismissed that appeal. It considered, firstly, that the findings in the appeal judgment established that the statements as published constituted an interference with private life, and added, secondly, "... the [court of appeal's] judgment, after reiterating that Article 10 of the Convention provides that the freedom to receive and impart information may be subject to such restrictions as are prescribed by law and are necessary in a democratic society for the protection of the rights of others in order to prevent the disclosure of confidential information, finds in precise terms that this is particularly so with regard to the right to respect for private life, itself explicitly affirmed by Article 8 of the same Convention, which further extends its protection to every person's home...". It considered that the applicants' disclosure of the recordings could not be justified by

“press freedom or the alleged contribution to a public-interest debate, or [by] a wish to give particular credibility to certain information, which was moreover capable of being established by investigation and analysis, protected under journalists’ privilege of non-disclosure of sources”. Lastly, it held that the penalty was proportionate to the offence committed, in spite of the fact that the content of the recordings had been disseminated by other news media.

Application no. 34445/15 – urgent proceedings against the applicants by Ms Bettencourt

On 22 June 2010 Ms Bettencourt made an urgent application to the courts, on the same basis as P.D.M. in application no. 281/15, seeking to have the extracts from the illegal recordings removed from the site and a ban on their further publication. She asked that the applicants be ordered to pay her EUR 50,000.

By an order of 1 July 2010, upheld by the Paris Court of Appeal on 23 July 2010, the President of the Paris TGI dismissed Ms Bettencourt’s claims for the same reasons as those set out above with regard to application no. 281/15. Ruling on an appeal on points of law lodged by Ms Bettencourt, the Court of Cassation, in a judgment of 6 October 2011, quashed the court of appeal’s judgment and remitted the case to the Versailles Court of Appeal. In a judgment delivered on 4 July 2013, the Versailles Court of Appeal set aside the order of the President of the Paris TGI of 1 July 2010, essentially in the same terms as in the previous application, ordered the removal of the contested transcripts and audio recordings and prohibited the further publication of all or any of the conversations that had been illegally recorded in Ms Bettencourt’s home. It ordered the applicants jointly to pay Ms Bettencourt an advance of EUR 20,000 in respect of compensation for her non-pecuniary damage.

The applicants appealed on points of law. In a judgment of 15 January 2015, the Court of Cassation indicated that the breach of Ms Bettencourt’s privacy, “which cannot be justified by the fact of providing information to the public” lay, as the court of appeal’s judgment had noted, in the fact that the published extracts, in addition to being recorded over the course of a year, had been made at Ms Bettencourt’s home, without her knowledge and with full awareness of their illicit origin.

Criminal proceedings brought against the applicants

On 30 August 2013 the investigating judge ordered that P.B., who had made the recordings, be committed for trial at the Bordeaux Criminal Court under Article 226-1 of the Criminal Code. Mr Plenel, Mr Arfi and other journalists from the magazine *Le Point* were committed for trial before the same court under Article 226-2 of the Criminal Code. By a judgment of 12 January 2016, they were all acquitted. By a judgment delivered on 21 September 2017, on an appeal by the public prosecutor, the Bordeaux Court of Appeal upheld the judgment. It concluded that in publishing the contested extracts and the accompanying commentary which placed them in context, it had not been the applicants’ intention to infringe Ms Bettencourt’s privacy.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression), the applicants alleged that the court order obliging them to remove from Mediapart’s news site the written and audio extracts of the illegal recordings made in Ms Bettencourt’s home had breached their right to freedom of expression.

The application was lodged with the European Court of Human Rights on 30 December 2014.

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

Síofra O’Leary (Ireland), *President*,
Stéphanie Mourou-Vikström (Monaco),
Latif Hüseyinov (Azerbaijan),
Jovan Ilievski (North Macedonia),
Lado Chanturia (Georgia),

Ivana Jelić (Montenegro),
Mattias Guyomar (France),

and also Victor Soloveytchik, *Section Registrar*.

Decision of the Court

Given their similarity, the Court decided to join the applications.

Article 10

The Court considered that the order to remove the illegal recordings and the ban on their further publication had to be viewed as interference by the public authorities with the right to freedom of expression of the applicant publishing company and the two other applicants.

The Court found that the interference had been prescribed by law within the meaning of Article 10 of the Convention, in the absence of any challenge by the applicants regarding the legal basis of the order against them, namely Articles 809 of the Code of Civil Procedure and Articles 226-1 and 226-2 of the Criminal Code.

The Court noted that the interference had pursued the legitimate aim of protection of the reputation or rights of others, namely of P.D.M. and Ms Bettencourt. The disputed transcripts and audio extracts originated in recordings made without these persons' knowledge over almost a year, that is, from secret recordings that were capable of amounting to an offence. Irrespective of the constituent elements for prosecution and punishment as an offence under French law, this action had undoubtedly constituted a sufficiently serious intrusion to bring into play their right to respect for private life under Article 8 of the Convention.

The Court reiterated that journalists who exercised their freedom of expression undertook "duties and responsibilities". Paragraph 2 of Article 10 did not guarantee a wholly unrestricted freedom of expression even with respect to media coverage of matters of serious public concern. Thus, notwithstanding the vital role played by the press in a democratic society, journalists could not, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 afforded them a cast-iron defence. In other words, a journalist could not claim an exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising the right to freedom of expression, the offence in question was committed during the performance of his or her journalistic functions. Further, breaches of privacy resulting from intrusion in the intimate life of individuals through the use of technical devices for illegal tapping, video-recording or photography had to be subject to particularly attentive protection.

In the present case, the Court noted that the contested articles were published when Ms Bettencourt's daughter had just transmitted the CD-ROMs containing the secret recordings to the police. The applicants had transcribed these recordings on the news site, although they contained information which breached the privacy of the individuals concerned.

The applicants had been aware that disclosure of recordings made without Ms Bettencourt's knowledge was an offence, which ought to have led them to show prudence and precaution, irrespective of the fact that their actions were intended, *inter alia*, to denounce the exploitation of Ms Bettencourt's weakness. The Court of Cassation had considered that the public could have been informed about these matters by other means than providing access to the illegal recordings. While it had acquitted the applicants at the close of the criminal proceedings brought against them, the Bordeaux Court of Appeal had underlined the "futile and spectacular aspect" of their decision to provide access to some of the recordings themselves.

The Court reiterated that, in certain circumstances, even where a person was known to the general public, he or she could rely on a "legitimate expectation" of protection of and respect for his or her

private life. Thus, the fact that an individual belonged to the category of public figures could not, especially in the case of persons who, like Ms Bettencourt, did not exercise official functions, authorise the media to violate the professional and ethical principles which had to govern their actions, or legitimise intrusions into private life.

Having regard to the scope of the publications on Mediapart's site, the domestic courts could legitimately have concluded in the circumstances of the case that the public interest had to yield to Ms Bettencourt's and P.D.M.'s right to respect for their private life. Although access to the site had not been free of charge, the transcribed statements had been visible to a large number of people and had remained online for a considerable period of time. Internet sites were an information and communication tool particularly distinct from the printed media, especially with regard to their capacity to store and transmit information, and the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, was certainly higher than that posed by the press.

As to the dissuasive nature of the measures imposed on the applicants, the national courts could legitimately have considered that the passage of time had not eliminated the interference with P.D.M.'s and Ms Bettencourt's private life, given the impact of the publications, which they had assessed with regard to the manner in which the transcribed recordings had been obtained, Ms Bettencourt's vulnerability, and, more generally, the extent of their harmful effects for the individuals in question.

The Court then noted that the Court of Cassation had held that the fact that the information had been reproduced on other sites or in the written press was not to be taken into consideration. Nonetheless, in the circumstances of the case the domestic courts had found against the applicants in order to end the disturbance caused to a woman who, albeit a public figure, had never consented to the disclosure of the published extracts, was vulnerable and had a legitimate expectation of having the illegal publications – which she had never been able to comment on, in contrast to the option available to her during the criminal trial – removed from the news site.

Although the content of the recordings had been largely disseminated by the time that the court order was imposed, their verbatim publication had been unlawful from the outset and remained prohibited for the press as a whole. The Court also noted that the applicants, who had been acquitted in the criminal proceedings, had not been deprived of the possibility of fulfilling their task of providing information about the public aspect of the Bettencourt case. In this regard, the applicants had not shown, in the circumstances of this case, that the removal and ban on further publication of the contents of the recordings could indeed have had a deterrent effect on the way in which they exercised and continued to exercise their right to freedom of expression.

The Court discerned no strong reasons which would have required it to substitute its view for that of the domestic courts and to set aside the balancing exercise conducted by them. It was satisfied that the reasons relied upon were both relevant and sufficient to show that the interference complained of was "necessary in a democratic society" and that the order in question had not gone beyond what was necessary to protect Ms Bettencourt and P.D.M. from the interference with their right to respect for private life.

It followed that there had been no violation of Article 10 of the Convention.

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.