FACULTY OF LAW AND CRIMINOLOGY

Article 10 and the Chilling Effect

A critical examination of how the European Court of Human Rights seeks to protect freedom of expression from the chilling effect

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Summary / Samenvatting

Over the last two decades, the European Court of Human Rights has been increasingly finding that certain interferences with freedom of expression have a "chilling effect." Indeed, the Court has used this term in some of its most seminal judgments concerning the right to freedom of expression, under Article 10 of the European Convention on Human Rights (ECHR). However, there exist fundamental questions relating to how the Court applies chilling effect reasoning in its freedom of expression case law, including questions relating to possible inconsistency in its application. And yet, there is a crucial absence of a systematic and in-depth scholarly examination of the European Court's application of the chilling effect principle. In contrast, in the United States, where the Supreme Court first developed chilling effect reasoning, there has been considerable scholarly discussion of the Supreme Court's use of chilling effect reasoning. In light of this shortcoming in European legal scholarship, the main purpose of this thesis is to address these fundamental questions, and provide a systematic and critical examination of the European Court's development and use of the chilling effect principle in its freedom of expression case law.

The thesis opens by detailing the results of empirical research examining six decades of European Court case law, revealing the extent of the Court's application of the chilling effect principle. The results are categorised by the different areas of the Court's case law where the chilling effect principle is applied, relating not only to journalists and the media, but also activists, lawyers, judges, employees, whistleblowers, and trade unions. Chapter 2 then explains how the concept of the chilling effect first entered the case law of the Court, by first examining the decisions of the European Commission of Human Rights, and drawing upon historical research focussing on applicants' lawyers arguing before the Commission. The chapter then examines how the chilling effect principle was developed over four decades of the Court's case law, in particular by the Court's 17-judge Grand Chamber. Building upon this base, the thesis then engages in a comprehensive doctrinal analysis of how the European Court has applied chilling effect reasoning in five distinct areas of the Court's case law in relation to freedom of expression and information as guaranteed by Article 10 ECHR: the protection of journalistic sources (Chapter 3); defamation proceedings (Chapter 4); criminal prosecutions against journalists (Chapter 5); judicial and legal professional freedom of expression (Chapter 6); and whistleblower, employee and trade union freedom of expression (Chapter 7). Finally, Chapter 8 provides an analysis of the findings in the preceding chapters, offers normative guidance for the Court in its future application of the chilling effect principle and formulates some proposals for future research on the chilling effect.

The main findings put forward include that the key to understanding the Court's chilling effect principle is that the particular meaning and application of the chilling effect principle very much depends upon which limb of Article 10 ECHR the Court is considering: whether there has been an interference; whether it is prescribed by law, or necessary in a democratic society. And while there are specific iterations of the Court's chilling effect principle, the thesis identifies the integral elements to the principle, based upon the central premise of protecting individuals from engaging in self-restraint or self-censorship on matters of public interest, and protecting the free flow of public-interest expression in a democratic society. The thesis argues that the principle is much more than a rhetorical flourish, and discusses the concrete consequences and impact of the Court's application of the chilling effect principle, which include: fashioning legal tests which domestic courts must apply, prohibiting certain forms of sanctions from being imposed, finding domestic legal rules and measures incompatible with Article 10 ECHR, and requiring domestic legislative reform. The thesis also reveals the considerable disagreement within the Court itself over the chilling effect principle's application. Finally, a number of recommendations are put forward,

including a stronger application of the principle of precedent, in order to ensure a more consistent application of the chilling effect principle.

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In de laatste twee decennia is het Europees Hof voor de Rechten van de Mens (EHRM) steeds vaker tot de conclusie gekomen dat bepaalde inmengingen met het recht op vrijheid van meningsuiting een *chilling effect* hebben. Het Hof heeft het *chilling effect*-principe toegepast in een aantal van zijn belangrijkste uitspraken over het recht op vrijheid van expressie en informatie, het recht dat is verankerd in Artikel 10 van het Europees Verdrag voor de Rechten van de Mens (EVRM). Er kunnen echter kritische en principiële vragen worden gesteld over de al dan niet consistente wijze waarop het Hof het *chilling effect*-principe toepast in zijn beslissingen en arresten.. Tot op heden bestaat er geen systematisch en diepgaand onderzoek naar de toepassing van het *chilling effect*-principe door het EHRM. Hierin wijkt Europa af van de Verenigde Staten, waar het *chilling effect*-principe zoals ontwikkeld door het Hooggerechtshof van de Verenigde Staten nadrukkelijk voorwerp is van een academisch debat. In het licht van deze tekortkoming in het Europese juridisch-academische discours, is het belangrijkste doel van dit proefschrift om een aantal principiële vragen te agenderen, en vooral om op een systematische en kritische wijze te onderzoeken hoe het EHRM het *chilling effect*-principe heeft ontwikkeld en heeft toegepast in zijn uitspraken over het recht op vrijheid van expressie en informatie.

Het proefschrift begint met het uiteenzetten van de resultaten van empirisch onderzoek naar zes decennia aan uitspraken van het EHRM. Hieruit blijkt de reikwijdte van de toepassing van het *chilling effect*-principe door het Hof. De resultaten zijn onderverdeeld aan de hand van de verschillende domeinen waar het *chilling effect*-principe een rol heeft gespeeld in de uitspraken van het Hof, overigens niet enkel in relatie tot journalisten en media, maar ook tot activisten, advocaten, rechters, werknemers, klokkenluiders en vakbonden. Vervolgens wordt in Hoofdstuk 2 uitgelegd hoe het concept van het *chilling effect* voor het eerst opdook in de rechtspraak van het Hof, nadat eerst de Europese Commissie voor de Rechten van de Mens dit concept heeft geïntroduceerd in een aantal beslissingen. Voor deze analyse is gebruik gemaakt van historisch onderzoek naar de wijze waarop de advocaten van slachtoffers hun zaken destijds hebben bepleit voor de Commissie, steunend op het chilling effect-concept. Het volgende hoofdstuk onderzoekt hoe het *chilling effect*-principe zich ontwikkelde in vier decennia rechtspraak van het EHRM, en dan in het bijzonder de – uit 17 rechters bestaande – Grote Kamer van het Hof. Voortbouwend op dit hoofdstuk, volgt een uitgebreide analyse van de manier waarop het EHRM het *chilling effect*-principe heeft toegepast op een aantal specifieke deelonderwerpen op het gebied van de vrijheid van expressie en informatie. De volgende deelonderwerpen komen aan bod: bronbescherming voor journalisten (Hoofdstuk 3); rechtsgedingen wegens laster en reputatieschade (Hoofdstuk 4); strafrechtelijke vervolging van journalisten (Hoofdstuk 5); expressievrijheid binnen de rechterlijke macht en advocatuur (Hoofdstuk 6); klokkenluiders en expressievrijheid van werknemers en vakbonden (Hoofdstuk 7). Tot slot geeft Hoofdstuk 8 een overzicht van de bevindingen in de voorgaande hoofdstukken. Dit hoofdstuk formuleert ook enkele normatieve richtlijnen voor het EHRM voor de toepassing van het *chilling effect*-principe in de toekomst en het sluit af met enkele voorstellen voor verder wetenschappelijk onderzoek.

Een van de belangrijkste bevindingen van het proefschrift – als het gaat om het begrijpen van de toepassing van het *chilling effect*-principe door het Hof – is dat de betekenis die aan het principe wordt toegekend en de toepassing daarvan afhankelijk is van het stadium van de toetsing aan Artikel 10 EVRM, namelijk of er sprake is van een inmenging in de

expressie- en informatievrijheid; of de inmenging voorzien is bij wet; en of de inmenging noodzakelijk is in een democratische samenleving. Hoewel het Hof het *chilling effect*-principe soms in heel specifieke situaties heeft toegepast, worden in dit proefschrift de essentiële elementen van het principe geïdentificeerd. Deze elementen zijn gebaseerd op het fundamentele uitgangspunt dat individuen moeten worden beschermd tegen terughoudendheid of autocensuur als de expressievrijheid in verband met thema's van publiek belang in het geding is, en dat in bredere zin de vrije uitwisseling van informatie over aangelegenheden van maatschappelijk belang in een democratische samenleving moet worden beschermd. Voorts wordt in het proefschrift beargumenteerd dat het *chilling effect*-principe meer is dan juridische retoriek. Het proefschrift laat de directe consequenties en impact zien van de toepassing van het *chilling effect*-principe door het Hof, waaronder: het vormgeven van een juridisch toetsingskader waar nationale rechters zich aan dienen te houden, het verbieden van bepaalde soorten sancties die zijn opgelegd, het vaststellen dat nationale wetgevingen de toepassing daarvan in strijd is met Artikel 10 EVRM, en het eisen van een herziening van nationaal recht. Het proefschrift reveleert ook dat aanzienlijke meningsverschillen bestaan binnen het Hof zelf over de toepassing van het *chilling effect*-principe. Tot slot worden enkele aanbevelingen geformuleerd, waaronder het strikter hanteren van het principe van precedentwerking, waardoor het *chilling effect*-principe consistenter kan worden toegepast door het Hof.

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Chapter 1 - Introduction

1.1 From dissent to the Grand Chamber

In June 2003, Judge Jean-Paul Costa, a future President of the European Court of Human Rights,[1] and Judge Wilhelmina Thomassen, a future Justice of the Dutch Supreme Court, wrote an influential dissenting opinion, finding that a seven-month prison sentence imposed on two Romanian journalists for defamation violated their right to freedom of expression.[2] Disagreeing with five of their judicial colleagues in a seven-judge Chamber of the European Court of Human Rights,[3] Judge Costa and Judge Thomassen held that imprisonment as a sanction for defamation targeting two public officials was "in itself excessive," emphasising that the threat of imprisonment hung over the journalists "like the sword of Damocles."[4] The Chamber majority's judgment merely described the sentences as "harsh,"[5] but because the journalists were pardoned a year later, there had thus been no violation of Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantees the right to freedom of expression.[6]

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[1] The European Court of Human Rights ("European Court") was established in 1959, under Article 19 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221 ("European Convention"). See Bernadette Rainey, Elizabeth Wicks, and Clare Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights*, 7th ed. (Oxford University Press, 2017); and Stijn Smet and Eva Brems (eds.), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford University Press, 2017).

[2] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003 (Joint dissenting opinion of Judges Costa and Thomassen, para. 6).

[3] To consider cases brought before it, the European Court sits in Chambers of seven judges, in a Grand Chamber of seventeen judges, in a single-judge formation, and in committees of three judges (see European Convention, Article 26).

[4] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003 (Joint dissenting opinion of Judges Costa and Thomassen, para. 6).

[5] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 59.

[6] European Convention, Article 10 ("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."). See Dirk Voorhoof, "Freedom of Expression under the European Human Rights System: From *Sunday Times (No. 1) v. U.K.* (1979) to *Hachette Filipacchi Associés ("Ici Paris") v. France* (2009)," (2009) *Inter-American and European Human Rights Journal* 3; Dirk Voorhoof and Hannes Cannie, "Freedom of Expression and Information in a Democratic Society: The Added but Fragile Value of the European Convention on Human Rights," 72 *International Communication Gazette* 407 (2010); Ronan Ó Fathaigh and Dirk Voorhoof, "The European Court of Human Rights, Media Freedom and Democracy," in Monroe E. Price, Stefaan Verhulst and Libby Morgan (eds.), *Routledge Handbook of Media Law* (Routledge, 2013), pp. 107-124; Dirk Voorhoof, "Freedom of Journalistic Newsgathering, Access to Information and Protection of Whistle-blowers under Article 10 ECHR and the standards of the Council of Europe," in András Koltay (ed.), *Comparative Perspectives on the Fundamental Freedom of Expression* (Wolters Kluwer, 2015), pp. 297-330; Dirk Voorhoof, "Freedom of Expression, Media and Journalism under the European Human Rights System: Characteristics, Developments, and Challenges," in Péter Molnár (ed.), *Free Speech and Censorship Around the Globe* (Central European University Press, 2015), pp. 59-104; Dirk Voorhoof, "The European Convention on Human Rights: The Right to Freedom of Expression and Information restricted by Duties and Responsibilities in a Democratic Society," (2015) 7 *Human Rights* 1; and Dirk Voorhoof et al., *Freedom of Expression, the Media and Journalists: Case-law of the European Court of Human Rights*, 4th ed. (Council of Europe, 2017).

However, 18 months later, Judge Costa and Judge Thomassen's view would ultimately prevail, when a unanimous 17-judge Grand Chamber of the Court disagreed with the Chamber majority's judgment, and laid down an important principle: in the circumstances of the case, which was a "classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest," there was "*no justification whatsoever* for the imposition of a prison sentence."[7] This was despite the Court admitting that "sentencing is in principle a matter for national courts," and despite a large majority of European states still retaining imprisonment as a possible sanction for criminal defamation.[8]

Nevertheless, the Court effectively signalled to European legislatures and courts that there is "no justification whatsoever" to impose such sentences because the threat of imprisonment creates a "chilling effect" on press freedom, meaning investigative journalists are "liable to be inhibited" from reporting on matters of general public interest if they "run the risk" of being imprisoned for defamation.[9] This need to protect journalists from a "chilling effect," building upon Judge Costa and Judge Thomassen's sword-of-Damocles metaphor, was central to the judgment in *Cumpănă and Mazăre v. Romania*, and as Judge Costa would later write in a separate opinion in 2005, is best described as the "risk of self-censorship."[10] Indeed, a U.S. Supreme Court judge, Justice Thurgood Marshall, writing in a 1973 opinion, similarly invoked the sword-of-Damocles metaphor for describing the chilling effect, emphasising that the impact of the sword of Damocles "is that it hangs - not that it drops."[11]

1.2 The application of the chilling effect

Over the past 15 years, similar to prison sentences in *Cumpănă and Mazăre*, the European Court has been regularly finding that other interferences with freedom of expression have a chilling effect, or in French, an "*effet dissuasif*."[12] Indeed, empirical research conducted for this thesis examining six decades of the European Court's case law (with the findings and results documented in Annex 1 below), revealed that the Court has used these terms in 348 judgments and decisions to date,[13] including some of its most important freedom of expression judgments. For example, consider *Goodwin v. the United Kingdom*, where the European Court disagreed with three levels of United Kingdom courts, including a unanimous Court of Appeals and House of Lords, which had ordered a journalist to disclose his confidential source,[14] with the European Court finding that source-disclosure orders have a chilling effect on press freedom, meaning "sources may be deterred from assisting the

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[7] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 116 (emphasis added).

[8] See, for example, Council of Europe, *Study on the alignment of law and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression*, CDMSI (2012) Misc11 (Council of Europe, 2012); International Press Institute, *Out of Balance: Defamation Law in the European Union: A Comparative Overview for Journalists*, *Civil Society and Policymakers* (IPI, 2015); and Organization for Security and Co-operation in Europe The Representative on Freedom of the Media, *Defamation and Insult Laws in the OSCE Region: A Comparative Study* (OSCE, 2017).

[9] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 116.

[10] *İ.A. v. Turkey* (App. no. 42571/98) 13 September 2005 (Joint dissenting opinion of Judges Costa, Cabral Barreto, and Jungwiert, dissenting, para. 6). For a critique of the term, see Steven Alan Childress, "The Empty Concept of Self-Censorship," 70 *Tulane Law Review* 1969 (1996).

[11] *Arnett v. Kennedy*, 416 U.S. 134 (1974), p. 134 (Marshall, J., dissenting).

[12] See, for example, *Brasilier v. France* (App. no. 71343/01) 11 April 2006, para. 43. Under the Rules of the Court, the official languages of the Court are English and French (Rule 34); while all decisions and judgments are given either in English or in French, unless the Court decides otherwise (Rules 57 and 76).

[13] See Annex 1 for a list of all 348 judgments and decisions delivered by the Court where "chilling effect," or "*effet dissuasif*," was explicitly mentioned, during the period 1959 until 2018.

[14] *Goodwin v. United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber).

press."[15] To protect the press from this chilling effect, the European Court fashioned a test that such orders may only be made when there is an "overriding requirement in the public interest," a test the U.K. courts had failed to satisfy by ordering disclosure.[16]

Similarly, consider *Altuğ Taner Akçam v. Turkey*,[17] where the European Court allowed a history professor to argue that Turkey's Article 301 insult law, which criminalises "denigrating Turkishness," violated freedom of expression. This was despite the professor never having been prosecuted under the law, a prosecutor issuing a decision that the professor would not be prosecuted under the law, and the Turkish parliament having amended the law. Nevertheless, the Court held that the law created a chilling effect, meaning its existence risked "discouraging one from making similar statements in the future," which, according to the Court, allowed it to review the amended law, and conclude it was "too wide and vague."[18]

Moreover, in *Kudeshkina v. Russia*,[19] the European Court disagreed with the Supreme Court of Russia, and held that a local judge's dismissal from the Moscow City Court for comments she had made to the media, violated the judge's freedom of expression. The European Court considered that imposing the "strictest available penalty," namely dismissal from judicial office, was "capable of having a 'chilling effect' on judges wishing to participate in the public debate on the effectiveness of the judicial institutions."[20] For the European Court, even sanctions in the form of dismissal may have a chilling effect, and domestic authorities must consider a less severe sanction to "correspond to the gravity of the offence."[21]

Finally, and tragically, the European Court has also had occasion to find that the killing of a journalist can have a chilling effect on the work of other journalists. As Judge Nussberger and Judge Vehabović have lamented, "nothing can have a more chilling effect on freedom of expression than the murder of a courageous and well-known journalist when the perpetrators of the crime are not identified."[22] In 2017, the European Court in *Huseynova v. Azerbaijan* had to consider the killing of an Azerbaijani journalist, and held it was "apparent that his murder could have a "chilling effect" on the work of other journalists in the country."[23]

It is clear from the examples above that, according to the European Court, a chilling effect will arise in very different circumstances, such as a threat of imprisonment (*Cumpănă and Mazăre*), a court-ordered disclosure of sources (*Goodwin*), a threat of prosecution (*Altuğ Taner Akçam*), dismissal from employment (*Kudeshkina*), and the killing of a journalist (*Huseynova*). It is also clear from these examples that the European Court is willing to take different measures to protect freedom of expression from this chilling effect, such as prohibit certain forms of sanctions (*Cumpănă and Mazăre*), lay down tests domestic courts must apply (*Goodwin*), and allow applicants victim-status to argue that a domestic law violates freedom of expression, in the absence of a prosecution or conviction under the law (*Altuğ Taner Akçam*).

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[15] *Goodwin v. United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 39.
[16] *Goodwin v. United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 39.
[17] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011.
[18] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 93. See Ronan Ó Fathaigh and Chris Wiersma, "Turkish Law Criminalising 'Denigration of Turkish Nation' Overbroad and Vague," *Strasbourg Observers*, 2 December 2011.
[19] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009.
[20] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 100.
[21] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 98.
[22] *Huseynova v. Azerbaijan* (App. no. 10653/10) 13 April 2017 (Joint partly dissenting opinion of Judges Nussberger and Vehabović, para. 1).
[23] *Huseynova v. Azerbaijan* (App. no. 10653/10) 13 April 2017, para. 115.

1.3 The absence of a chilling effect

However, a cursory look at other judgments, where the European Court does not apply chilling effect reasoning, or rejects chilling effect arguments, raises a number of important questions. Three examples are illustrative: in *Saygili and Falakaoğlu v. Turkey (No. 2)*, the Court found no chilling effect on, nor a violation of, freedom of expression, following a newspaper being banned for three days, subjected to a fine representing 90 per cent of its average sales, and its editor convicted under Turkey's anti-terrorism law, for publishing statements from a group of prisoners.[24] This was despite the Court admitting the sanctions were a "heavy penalty," the newspaper did not "personally associate themselves with the views," the statements had not contained any threats of violence, and two judges on the Court, Judge Ann Power and Judge Alvina Gyulumyan, noted that the Court's majority could not cite even "one violent word or any call to aggression."[25]

Similarly, consider *İ.A. v. Turkey*, where a publisher had been prosecuted and convicted of blasphemy, following the publication of a book which included disparaging descriptions of the Islamic prophet Muhammad.[26] The Court nowhere considered that the blasphemy law, nor conviction, may have had a chilling effect, and held the conviction compatible with freedom of expression. This was despite the publisher being sentenced to a commuted prison sentence, and Judge Jean-Paul Costa, writing in a separate opinion, of how the conviction would have a chilling effect on publishers, and who would engage in "self-censorship" by not publishing books critical of religion.[27]

Further, consider *Kasabova v. Bulgaria*, where a journalist who had been convicted of defaming a number of public officials, argued that placing the burden on defendants in criminal defamation trials to prove the truth of their statements had a chilling effect on the press.[28] The Court admitted that the rule may have a chilling effect on the "publication of material whose truth may be difficult to establish in a court of law,"[29] but curiously, the Court refused to find the rule violated freedom of expression. This judgment was all the more notable given that the Court described a number of problems with the rule's operation, including the Bulgarian courts holding the only way a journalist could corroborate an allegation that someone may have committed a criminal offence was for them to stand convicted, which the European Court described as "striking," "plainly unreasonable," and "cannot be condoned" by the Court.[30] Thus, a possible chilling effect arising does not necessarily result in a violation of freedom of expression.

The foregoing examples raise a number of fundamental questions, such as (a) why does a law criminalising insulting Turkishness have a chilling effect (*Altuğ Taner Akçam*), but a law criminalising insulting a religion does not (*İ.A.*); (b) why does the European Court lay down a rule against prison sentences to protect the press from a chilling effect (*Cumpănă and Mazăre*), but does not lay down a similar rule to protect publishers from a chilling effect (*İ.A.*), and (c) why does the Court admit a rule requiring journalists to bear the burden of proof in criminal defamation trials may have a chilling effect, but also admits reluctance to find the rule violating freedom of expression (*Kasabova*).

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[24] *Saygili and Falakaoğlu v. Turkey (No. 2)* (App. no. 38991/02) 17 February 2009.
[25] *Saygili and Falakaoğlu v. Turkey (No. 2)* (App. no. 38991/02) 17 February 2009 (Joint dissenting opinion of Judges Power and Gyulumyan).
[26] *İ.A. v. Turkey* (App. no. 42571/98) 13 September 2005. For a discussion, see Tarlach McGonagle, "An Ode to Contextualisation: *İ.A. v. Turkey*," (2010) *Irish Human Rights Law Review* 238.
[27] *İ.A. v. Turkey* (App. no. 42571/98) 13 September 2005 (Joint dissenting opinion of Judges Costa, Cabral Barreto and Jungwiert, para. 6).
[28] *Kasabova v. Bulgaria* (App. no. 22385/03) 19 April 2011.
[29] *Kasabova v. Bulgaria* (App. no. 22385/03) 19 April 2011, para. 61.
[30] *Kasabova v. Bulgaria* (App. no. 22385/03) 19 April 2011, para. 62.

1.4 The research question

The above discussion demonstrates that there exist fundamental questions relating to how the European Court considers and applies chilling effect reasoning in its freedom of expression case law, including questions relating to possible inconsistency in its application. Notably, there has never been published any systematic and in-depth scholarly examination of the use of chilling effect reasoning by the European Court in its freedom of expression case law. A number of authors have discussed the application, or non-application of chilling effect reasoning in various cases,[31] while I have written a number of articles and papers on the chilling effect principle.[32] Dirk Voorhoof and I have also been writing regular case comments,

[31] See, for example, Yutaka Arai-Takahashi, *The Margin of Appreciation and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, 2002), pp. 134-136; Jennifer McDermott, "Chilling effect of large damages," (2003) 8 *Communications Law* 381; Koen Lemmens, "Se taire par peur: l'effet dissuasif de la responsabilité civile sur la liberté d'expression," (2005) *Auteurs & Media* 32; Dirk Voorhoof, "European Court of Human Rights: Where Is the Chilling Effect?" Seminar on the European Protection on Freedom of Expression, Strasbourg, 10 October 2008; Maris Burbergs, "The chilling effect of 690,000 euro," *Strasbourg Observers*, 6 May 2010; Stijn Smet and Dirk Voorhoof, "Vrijheid van meningsuiting, foto's van publieke figuren en 'chilling effect'," (2011) *European Human Rights Cases* 781; Dirk Voorhoof, "Abuse of 'forum shopping' in defamation case and freedom of academic criticism," *Strasbourg Observers*, 8 March 2011; Dirk Voorhoof, *The Right to Freedom of Expression and Information under the European Human Rights System: Towards a more Transparent Democratic Society* (European University Institute, 2014); Onur Andreotti (ed.), *Journalism at Risk: Threats, challenges and perspectives* (Council of Europe, 2015); Yaman Akdeniz and Kerem Altıparmak, "The silencing effect on dissent and freedom of expression in Turkey," in Onur Andreotti (ed.), *Journalism at risk: threats, challenges and perspectives* (Council of Europe, 2015), pp. 145-172; Dirk Voorhoof, "Chilling Effects: The Jurisprudence of the European Court of Human Rights," (2017) 24 *International Union Rights* 3; Dirk Voorhoof, "No overbroad suppression of extremist opinions and 'hate speech,'" *Strasbourg Observers*, 12 June 2018; and Dirk Voorhoof, "Pussy Riot, the right to protest and to criticise the President, and the Patriarch: *Mariya Alekhina and Others v. Russia*," *Strasbourg Observers*, 11 September 2018; Michael T. Moran, "Criminal Defamation and Public Insult Laws in the Republic of Poland: The Curtailing of Freedom of Expression," (2018) 26 *Michigan State International Law Review* 575; and Trine Baumbach, "Chilling Effect as a European Court of Human Rights' Concept in Media Law Cases," (2018) 6 *Bergen Journal of Criminal Law and Criminal Justice* 92 (concluding that the chilling effect term is "only used in relatively few of all the judgments where the Court finds a violation of Article 10" (p. 113)). The findings of this thesis suggest the opposite, and as noted above, reveal that the Court has used the term in 348 judgments and decisions to date (see note 13 above). Baumbach's article states a Hudoc search was done for the French term "refroidissement," which yielded no results (footnote 21). However, the Court uses the French term "*effet dissuasif*" for the chilling effect (see note 12 above). Further, the article's case-law selection methodology is somewhat unclear, which includes a category on "remarkable cases," (p. 98) which is not defined; and there is no mention of admissibility decisions nor separate opinions).

[32] Ronan Ó Fathaigh, "The Growing Importance of the Chilling Effect Principle in European Court Jurisprudence," paper presented at the Queen Mary, University of London Symposium on Freedom of Expression, London, 19 March 2012; Ronan Ó Fathaigh, "The Chilling Effect Doctrine in European Human Rights Law," paper presented at the Griffith College School of Law Annual International Human Rights Conference, Cork, Ireland, 7-8 June 2012; Ronan Ó Fathaigh, "Self-Censorship and the Chilling Effect Principle in European Media Law," paper presented at the European Communication and Research and Education Association Annual Conference 2012, Istanbul, Turkey, 24-27 October 2012; Ronan Ó Fathaigh, "The Chilling Effect on Authors and Publishers," paper presented at the PEN Flanders Seminar on Free Expression and Censorship, Oostkamp, Belgium, 29 September 2012; Ronan Ó Fathaigh, "The Recognition of a Right of Reply under the European Convention," (2012) *Journal of Media Law* 322 (discussing the chilling effect of right of reply laws); Ronan Ó Fathaigh, "Criminal Defamation and Freedom of Expression: Lessons for Strasbourg from the Inter-American Court," paper presented at the Irish Society of Comparative Law Annual Conference 2013, National University of Ireland, Galway, 24-25 May 2013; Ronan Ó Fathaigh, "Article 10 and the Chilling Effect Principle," (2013) 18 *European Human Rights Law Review* 304; Ronan Ó Fathaigh, "Article 10 and the Chilling Effect Principle: How the European Court of Human Rights Protects Freedom of Expression from the Chilling Effect," Legal Research Network Conference, Ghent University, 18 October 2016; Ronan Ó Fathaigh, "*Keena v Ireland* and the Protection of Journalistic Sources," (2016) 19 *Irish Journal of European Law* 97 (discussing protection of journalists sources and the chilling effect); Ronan Ó Fathaigh, "The Chilling Effect of Liability for

drawing attention to the application, or non-application, of chilling effect reasoning in the Court's case law.[33] And there is also excellent literature documenting the chilling effect *in practice*, including from scholars, NGOs, and international and regional bodies.[34]

Online Reader Comments," International Media Law, Policy and Practice Conference, University of Amsterdam, 13 April 2017; and Ronan Ó Fathaigh, "The Chilling Effect of Liability for Online Reader Comments," (2017) *European Human Rights Law Review* 387; and R. Ó Fathaigh, "The Chilling Effect of Turkey's Article 301 Insult Law," (2019) *European Human Rights Law Review* (forthcoming).

[33] Ronan Ó Fathaigh, "*Palomo Sánchez v. Spain*," (2011) 12 *European Human Rights Cases* 1794; Ronan Ó Fathaigh and Dirk Voorhoof, "*Belpietro v. Italy*: Does Parliamentary Privilege Extend to the Press?" (2013) 14 *European Human Rights Cases* 2816; Ronan Ó Fathaigh, "Comparing Abortion to the Holocaust," *Strasbourg Observers*, 25 January 2011; Ronan Ó Fathaigh, "Banning Speech in the Public Space," *Strasbourg Observers*, 10 March 2011; Ronan Ó Fathaigh, "Absence of Prior-Notification Requirement Does Not Violate Article 8," *Strasbourg Observers*, 11 May 2011; Ronan Ó Fathaigh, "Acquittal of Broadcaster for Criminal Defamation and Insult Violates Article 8," *Strasbourg Observer*s, 14 July 2011; Ronan Ó Fathaigh and Chris Wiersma, "Turkish Law Criminalising 'Denigration of Turkish Nation' Overbroad and Vague," *Strasbourg Observers*, 2 December 2011; Ronan Ó Fathaigh and Dirk Voorhoof, "Grand Chamber Judgment on Trade Union Freedom of Expression," *Strasbourg Observers*, September 14, 2011; Ronan Ó Fathaigh, "Grand Chamber Seeks to Clarify Balancing of Article 10 and Article 8," *Strasbourg Observers*, 19 February 2012; Ronan Ó Fathaigh and Dirk Voorhoof, "Yes, Prime Minister," *Strasbourg Observers*, February 24, 2012; Ronan Ó Fathaigh and Dirk Voorhoof, "Criminal conviction of professor for refusal to give access to research files did not affect his Convention rights," *Strasbourg Observers*, 14 April 2012; Ronan Ó Fathaigh, "Banning Speech in the Public Space: Grand Chamber Agrees," *Human Rights in Ireland*, 1 August 2012; Ronan Ó Fathaigh, "Ban on Political Advertising Does Not Violate Article 10," *Strasbourg Observers*, 24 April 2013; Ronan Ó Fathaigh and Dirk Voorhoof, "Newspaper Editor Criminally Liable for Senator's Op-Ed, But Prison Sentence Violated Article 10," *Strasbourg Observers*, 7 October 2013; Ronan Ó Fathaigh and Dirk Voorhoof, "The press and NGOs' right of access to official documents under strict scrutiny of the European Court of Human Rights," *Strasbourg Observers*, 3 December 2013; Ronan Ó Fathaigh, and Dirk Voorhoof, "German Court Injunction Banning Political Leaflet Violated Article 10," *Strasbourg Observers*, 20 May 2014; Ronan Ó Fathaigh, "A Lesson for Applicants: Don't Agree to a Relinquishment to the Grand Chamber," *Strasbourg Observers*, 4 July 2014; Ronan Ó Fathaigh, "Imposing Costs on Newspaper in Successful Source-Protection Case Did Not Violate Article 10," *Strasbourg Observers*, 17 November 2014; Ronan Ó Fathaigh, "Protestor's arrest and conviction for disobeying a police order violated Article 11," *Strasbourg Observers*, 11 October 2015; Ronan Ó Fathaigh, "Ordering politician to publish apology for defaming Polish newspaper violated Article 10," *Strasbourg Observers*, 14 July 2016; Ronan Ó Fathaigh, "Polish mayor's private prosecution of local journalist for insult violated Article 10," *Strasbourg Observers*, 12 August 2016; Ronan Ó Fathaigh, "€1.25 million defamation award against newspaper violated Article 10," *Strasbourg Observers*, 19 June 2017; Ronan Ó Fathaigh and D. Voorhoof, "Conviction for performance-art protest at war memorial did not violate Article 10," *Strasbourg Observers*, 19 March 2018; and Ronan Ó Fathaigh, "Prosecution of a publisher for 'denigration' Turkey violated Article 10," *Strasbourg Observers*, 29 October 2018.

[34] See Eric Barendt, Laurence Lustgarten, and Kenneth Norrie, *Libel and the Media: The Chilling Effect* (Clarendon Press, 1997); PEN, *Chilling Effects: NSA Surveillance Drives U.S. Writers to Self-Censor* (PEN America, 2013); Sarah Clarke, Marian Botsford Fraser, and Ann Harrison (eds.), *Surveillance, Secrecy and Self-Censorship: New Digital Freedom Challenges in Turkey* (PEN International and PEN Norway, 2014); OSCE Representative on Freedom of the Media, *New Challenges to Freedom of Expression: Countering Online Abuse of Female Journalists* (OSCE, 2016) (on the chilling effect experienced by female journalists); Marilyn Clark and Anna Grech, *Journalists under pressure - Unwarranted interference, fear and self-censorship in Europe* (Council of Europe, 2017) (documenting the violence, fear and self-censorship journalists in Europe are often exposed to; using a survey based on a sample of 940 journalists reporting from the 47 Council of Europe member states and Belarus, with the support of the Association of European Journalists, the European Federation of Journalists, Index on Censorship, the International News Safety Institute and Reporters without Borders); Paul Bradshaw, "Chilling Effect: Regional journalists' source protection and information security practice in the wake of the Snowden and Regulation of Investigatory Powers Act (RIPA) revelations," (2017) 5 *Digital Journalism* 334; Sibel Oral, Özlem Altunok, and Seçil Epik, *Censorship and Self-censorship in Turkey: September 2016 - December 2017* (Platform Against Censorship and Self-Censorship, 2018); Nik Williams, David McMenemy, and Lauren Smith, *Scottish Chilling: Impact of Government and Corporate Surveillance on Writers* (Scottish PEN, 2018); Yaman Akdeniz and Kerem Altıparmak, *Turkey: Freedom of Expression in Jeopardy - Violations of the Rights of Authors, Publishers and Academics under the State of Emergency* (English PEN, 2018).

But there is a crucial absence of a full and comprehensive examination of how the European Court's case law more broadly is affected by chilling effect reasoning. In contrast, in the United States, where the U.S. Supreme Court first developed chilling effect reasoning,[35] there has been considerable scholarly discussion of the Supreme Court's use of chilling effect reasoning.[36]

In light of this shortcoming in legal scholarship, the main purpose of this thesis is to fill this gap in European academic literature, and provide a systematic examination of the European Court's development and use of chilling effect reasoning in its freedom of expression case law. In this regard, the main research question addressed in this thesis is:

> What is the European Court's chilling effect principle, and how does the Court apply this principle in its freedom of expression case law?

In order to answer this research question, the thesis proceeds in two steps. First, a number of sub-questions are addressed in Chapter 2: (a) how did the concept of the chilling effect enter the case law of the European Court; (b) what exactly does the Court mean by a chilling effect; and does the Court attach different meanings to the chilling effect; (c) is use of chilling effect reasoning exclusive to freedom of expression case law, or does the Court use chilling effect reasoning when considering other Convention articles; (d) is there much agreement, or disagreement, within the Court on the application of chilling effect reasoning; and (e) does the Court explain why a chilling effect may not arise?

Building upon this base, the thesis in Chapters 3-7 then engages in a comprehensive doctrinal analysis of how the European Court has applied chilling effect reasoning in five distinct areas of the Court's case law.[37] Each of these chapters examine a set of specific questions, concerning how the Court considers and applies chilling effect reasoning: (a) what exactly does the Court mean when it states that there is a chilling effect on freedom of expression; (b) under what limb of Article 10 does the Court apply chilling effect reasoning; (c) what is the consequence, if any, of the Court using chilling effect reasoning in its case law;

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[35] The chilling effect was first mentioned by Chief Justice Warren in a dissenting opinion, joined by Justice Black, Justice Douglas and Justice Brennan, in *Times Film Corp. v. City of Chicago et al.*, 365 U.S. 43 (1961), p. 74 (Warren, C.J., dissenting) (judgment concerned a Chicago law requiring the submission of all motion pictures for censorship prior to their public exhibition). However, there were also judgments before *Times Film Corp* which were based on chilling effect reasoning, although not using the specific term "chilling effect;" such as *Wieman v. Updegrapp*, 344 U.S. 183 (1952), p. 195 (Frankfurter J., concurring) ("It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.") (judgment concerned state employees required to take a "loyalty oath"). For a discussion of the early case law, see Frederick Schauer, "Fear, Risk and the First Amendment: Unravelling the 'Chilling Effect'," (1978) 58 *Boston University Law Review* 68.

[36] See, for example, Note, "The Chilling Effect in Constitutional Law," (1969) 69 *Columbia Law Review* 808; Note, "The First Amendment Overbreadth Doctrine," (1970) 83 *Harvard Law Review* 844; Frederick Schauer, "Fear, Risk and the First Amendment: Unravelling the 'Chilling Effect'," (1978) 58 *Boston University Law Review* 685; Tamara Jacobs, "The Chilling Effect in Press Cases: Judicial Thumb on the Scales," (1980) 15 *Harvard Civil Rights-Civil Liberties Law Review* 685; Michael N. Dolich, "Alleging a First Amendment 'Chilling Effect' to Create a Plaintiff's Standing: A Practical Approach," 43 *Drake Law Review* 175 (1994); Robert A. Sedler, "Self-Censorship and the First Amendment" (2011) *Notre Dame Journal of Law, Ethics and Public Policy* 13; Leslie Kendrick, "Speech, Intent, and the Chilling Effect," (2013) 54 *William & Mary Law Review* 1633; Brandice Canes-Wrone and Michael C. Dorf, "Measuring the Chilling Effect," (2015) 90 *New York University Law Review* 1095; and Anna V. Pinchuk, "Countering Free Speech: CVE Pilot Programs' Chilling Effect on Protected Speech and Expression," (2018) 68 *Syracuse Law Review* 661.

[37] Article 10 and the protection of journalistic sources (Chapter 3); Article 10 and defamation proceedings (Chapter 4); Article 10 and criminal prosecutions against journalists (Chapter 5); Article 10 and interferences with a judge or lawyer's freedom of expression (Chapter 6); and Article 10 and interferences with a whistleblower, employee or trade unionist's freedom of expression (Chapter 7).

(d) is there much agreement, or disagreement, within the Court on the application of chilling effect reasoning; (e) does the Court explain the application, or non-application, of chilling effect reasoning; and (f) how does the Court use prior case law when considering and applying the chilling effect. The analysis of the findings includes discussion of possible inconsistency in the application of the chilling effect principle, and suggests some normative guidance for the European Court for its future application of the chilling effect principle.

An important theme running through this thesis is consistency in case law, and it must be asked why consistency in the European Court's case law is so important. The basic answer is that case-law consistency is integral to the rule of law and legal certainty,[38] and as the European Court's Grand Chamber itself recognises, the persistence of conflicting court judgments can create a "state of legal uncertainty likely to reduce public confidence in the judicial system."[39] This stems from the view that consistent application of the law is essential for the principle of equality before the law, and citizens justifiably expect to be treated as others are, and rely on previous decisions in comparable cases in order to predict the legal effects of their acts or omissions.[40] Indeed, the Council of Europe's Consultative Council of European Judges has endorsed this view in its 2017 Opinion on the matter,[41] reiterating that conflicting case law reduces public confidence in the judicial system, "which is one of the essential components of a state based on the rule of law."[42] Of course, and as the Court has recognised, the principle of legal certainty does not mean that there must be absolute consistency in case-law, as case-law is "not unchanging, but on the contrary, evolutive in essence."[43] Scholarship on the European Court also emphasises the importance of consistency in the Court's case law. Building upon Tom Tyler's work,[44] Eva Brems and Laurens Lavrysen have explained how consistency in the European Court's case law, as an element of procedural justice, can strengthen the Court's legitimacy.[45] Janneke Gerards ties the issue of consistency to clarity and predictability, in particular for national courts, which in turn helps avoid European Convention violations from occurring at the national level.[46] Thus, this thesis will have regard to these overarching principles as it conducts its examination of the chilling effect case law.

The focus of this thesis is on the Court's consideration and application of the chilling effect principle in its freedom of expression case law under Article 10 of the European Convention, and with less of a focus on the Court's case law concerning other rights and

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[38] *Nejdet Şahin and Perihan Şahin v. Turkey* (App. no. 13279/05) 20 October 2011 (Grand Chamber), para. 57 ("The persistence of conflicting court decisions, on the other hand, can create a state of legal uncertainty likely to reduce public confidence in the judicial system, whereas such confidence is clearly one of the essential components of a State based on the rule of law."). Similarly, the European Convention itself recognises the importance of case-law consistency, where Article 30 allows relinquishment to the Grand Chamber, where the resolution of a question might have a result "inconsistent" with a previous judgment.

[39] *Nejdet Şahin and Perihan Şahin v. Turkey* (App. no. 13279/05) 20 October 2011 (Grand Chamber), para. 57.

[40] Consultative Council of European Judges, *Opinion No. 20 on the role of the courts with respect to uniform application of law*, CCJE(2017)4, 10 November 2017, para. 5.

[41] Consultative Council of European Judges, *Opinion No. 20 on the role of the courts with respect to uniform application of law*, CCJE(2017)4, 10 November 2017.

[42] Consultative Council of European Judges, *Opinion No. 20 on the role of the courts with respect to uniform application of law*, CCJE(2017)4, 10 November 2017, paras. 5-6.

[43] *Nejdet Şahin and Perihan Şahin v. Turkey* (App. no. 13279/05) 20 October 2011 (Grand Chamber), para. 84.

[44] Tom R. Tyler, "Procedural Justice and the Courts," (2007-2008) 44 *Court Review* 26. See also, Nils Engstad, "Consistency of the case law as a prerequisite to legal certainty: European and national perspectives," High-Level Conference on the Harmonisation of Case Law and Judicial Practice, Athens, 29 September 2017; and John E. Coons, "Consistency," 75 *California Law Review* 59 (1987).

[45] Eva Brems and Laurens Lavrysen, "Procedural Justice in Human Rights Adjudication: The European Court of Human Rights," (2013) 35 *Human Rights Quarterly* 181, p. 187.

[46] See Janneke Gerards, "Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights," (2018) *European Human Rights Law Review* 1, p. 6.

freedoms guaranteed by the European Convention that use related chilling effect reasoning, such as freedom of assembly,[47] the right to petition the Court,[48] or the right to respect for private and family life.[49] The reason for this focus is because of the impact and relevance the chilling effect principle has on the Court's case law on freedom of expression; and based on the research findings detailed in Annex 1, the majority (71%) of the Court's 348 judgments and decisions considering and applying chilling effect reasoning concern Article 10 and freedom of expression. In addition, the research findings detailed in Chapter 2 also reveal that over two-thirds of the former European Commission of Human Rights' decisions considering or applying chilling effect reasoning also concern Article 10 and freedom of expression;[50] while nearly all (20 of 23) of the Court's Grand Chamber judgments considering or applying chilling effect reasoning concern Article 10 and freedom of expression.[51] The focus on the

[47] See, for example, *Balçık v. Turkey* (App. no. 25/02) 29 November 2007, para. 41 (holding that prosecuting protestors, even where they are acquitted, can have a "chilling effect" on freedom of assembly).

[48] See, for example, *Yefimenko v. Russia* (App. no. 152/04) 12 February 2013, para. 164 (holding that the monitoring of a prisoner's correspondence had a chilling effect on the right to petition the Court).

[49] See, for example, *Tysiąc v. Poland* (App. no. 5410/03) 20 March 2007, para. 116 (holding laws prohibiting abortion "have a chilling effect on doctors").

[50] See Chapter 2, Section 2.3.6 (*X. v. Federal Republic of Germany* (App. no. 9228/80) 16 December 1982 (Commission Decision) (Article 10 and dismissal over anti-constitutional views); *Kosiek v. Federal Republic of Germany* (App. no. 9704/82) 11 May 1984 (Commission Report) (Article 10 and dismissal over anti-constitutional views); *Leigh, Guardian Newspapers Ltd., The Observer Ltd. v. the United Kingdom* (App. no. 10039/82) 11 May 1984 (Commission Decision) (Article 10 and journalist's access to documents opened in court); *P.H. and H.H. v. the United Kingdom* (App. no. 12175/86) 12 May 1988 (Commission Decision) (Article 10 and surveillance of civil rights activists); *Hewitt and Harman v. the United Kingdom* (App. no. 12175/86) 9 May 1989 (Commission Report) (Article 10 and surveillance of civil rights activists); *Times Newspapers Ltd. v. the United Kingdom* (App. no. 14631/89) 5 March 1990 (Commission Decision) (Article 10 and damages awards in defamation proceedings); *Times Newspapers Ltd. and Neil v. the United Kingdom* (App. no. 14644/89) 11 April 1991 (Commission Decision) (Article 10 and order against newspaper to account for profits over publication of book extracts); *Times Newspapers Ltd. and Neil v. the United Kingdom* (App. no. 14644/89) 8 October 1991 (Commission Report) (Article 10 and order against newspaper to account for profits over publication of book extracts); *S. and G. v. the United Kingdom* (App. no. 17634/91) 2 September 1991 (Commission Decision) (Article 10 and artist's prosecution for outraging public decency); *Goodwin v. the United Kingdom* (App no 17488/90) 7 September 1993 (Commission Decision) (Article 10 and protection of journalistic sources); *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission Report) (Article 10 and protection of journalistic sources); and *Brind and Others v. the United Kingdom* (App. no. 18714/91) 9 May 1994 (Commission Decision) (Article 10 and prohibition on broadcasting interviews with certain political parties).

[51] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber) (Article 10 and protection of journalistic sources); *Wille v. Liechtenstein* (App. No. 28396/95) 28 October 1999 (Grand Chamber) (Article 10 and a judge's non-reappointment over remarks made in public); *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber) (Article 10 and journalists convicted of defamation); *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber) (Article 10 and journalists convicted of defamation); *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber) (Article 10 and lawyer convicted of contempt of court); *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber) (Article 10 and newspapers convicted of defamation); *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber) (Article 10 and a journalist's conviction for publishing secret official deliberations); *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber) (Article 10 and a whistleblower's dismissal); *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber) (Article 10 and protection of journalistic sources); *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber) (Article 10 and employees' dismissal for trade union expression); *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber) (Article 10 and newspaper's fined for report on public figure); *Mouvement raëlien suisse v. Switzerland* (App. no. 16354/06) 13 July 2012 (Grand Chamber) (Article 10 and ban on poster campaign); *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber) (Article 10 and lawyer convicted of defamation); *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber) (Article 10 and news website's liability for reader comments); *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber) (Article 10 and

Court's freedom of expression case law also allowed for in-depth analysis of the five distinct areas of the Court's freedom of expression case law discussed in Chapter 3-7,[52] and the posing of the specific research questions in these chapters.

This thesis draws upon the invaluable scholarship on strengthening the legal reasoning of the European Court, undertaken by Eva Brems and other scholars at the Human Rights Centre at Ghent University.[53] In particular, this thesis situates itself within the framework of scholarly analysis of the European Court's case law, which applies different methodologies in order to study and clarify the reasoning of the European Court, and formulate suggestions or recommendations to improve the quality, consistency, and coherence of the Court's case law in general, and with regard to certain topics. In this regard, Laurens Lavrysen has critically analysed the European Court's case law on positive obligations, and put forward a coherent approach to proportionality reasoning for negative and positive obligations under the European Convention.[54] Similarly, Stijn Smet examined conflicts between human rights, including the European Court's case law on freedom of expression and right to protection of reputation, and put forward an important model for resolving conflicts between human rights.[55] Notably, Smet has argued that it is not only consistency in case law that is important, but also coherence. In order to achieve coherence, it requires: (a) the absence of logical contradictions within or between cases; and (b) that the whole body of case law "makes sense" i.e., decisions in individual cases should fit together with those in other cases, be maximally rationally justified, and give proper guidance for future cases.[56] This thesis attempts to bring coherence in Smet's sense to the European Court's case law on the chilling effect.

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photojournalist's conviction for disobeying police order); *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber) (Article 10 and liability for publishing public figure's photographs); *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber) (Article 10 and journalist's conviction for publishing confidential court materials); *Karácsony and Others v. Hungary* (App. no. 42461/13 and 44357/13) 17 May 2016 (Grand Chamber) (Article 10 and parliamentarians' sanctioned for protesting in parliament); *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber) (Article 10 and termination of a judge's mandate); *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (App. no. 931/13) 27 June 2017 (Grand Chamber) (Article 10 and media company prohibited from publishing taxation data); and *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber) (Article 10 and civil defamation proceedings against NGO).

[52] Article 10 and the protection of journalistic sources (Chapter 3); Article 10 and defamation proceedings (Chapter 4); Article 10 and criminal prosecutions against journalists (Chapter 5); Article 10 and interferences with a judge or lawyer's freedom of expression (Chapter 6); and Article 10 and interferences with a whistleblower, employee or trade unionist's freedom of expression (Chapter 7).

[53] See Eva Brems and Janneke Gerards, *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (Cambridge University Press, 2014); Brems and Laurens Lavrysen, "Procedural Justice in Human Rights Adjudication: The European Court of Human Rights," (2013) 35 *Human Rights Quarterly* 181; Saïla Ouald Chaib, *Belief in Justice Towards more inclusivity in and through the Freedom of Religion Case Law of the European Court of Human Rights* (Doctoral dissertation, Ghent University, 2015); Saïla Ouald Chaib, "Procedural Fairness as a Vehicle for Inclusion in the Freedom of Religion Jurisprudence of the Strasbourg Court," (2016) *Human Rights Law Review* 483; Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia, 2016); Stijn Smet, *Resolving Conflicts between Human Rights: The Judge's Dilemma* (Routledge, 2017); and Stijn Smet and Eva Brems (eds.), *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford University Press, 2017).

[54] Laurens Lavrysen, *Human Rights in a Positive State: Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights* (Intersentia, 2017). See also Laurens Lavrysen, "Causation and Positive Obligations under the European Convention on Human Rights: A Reply to Vladislava Stoyanova," (2018) 18 *Human Rights Law Review* 705.

[55] See Stijn Smet, "Freedom of Expression and the Right to Reputation: Human Rights in Conflict," (2010) 26 *American University International Law Review* 183; and Stijn Smet, *Resolving Conflicts between Human Rights: The Judge's Dilemma* (Routledge, 2017).

[56] Stijn Smet, *Resolving Conflicts between Human Rights: The Judge's Dilemma* (Routledge, 2017), p. 123.

The thesis also draws upon scholarship on the chilling effect and freedom of expression, and in particular the work of Koen Lemmens;[57] and Frederick Schauer and Robert Sedler on the U.S. Supreme Court's case law.[58] As discussed later, the underlying premise of the European Court's chilling effect principle mirrors Schauer's conceptualisation of the chilling effect, that the danger of the chilling effect lies in the fact that deterred by the "fear of punishment," some individuals refrain from saying or publishing that which they lawfully could and should.[59] Thus, something that "ought" to be expressed is not.[60] This creates a harm that flows from the non-exercise of a constitutional right, but also a general societal loss which results when freedoms guaranteed by the First Amendment to the U.S. Constitution are not exercised.[61] The European Court similarly recognises this harm flowing from the chilling effect on freedom of expression, similarly emphasising that the chilling effect not only harms the individual applicant, but also "works to the detriment of society as a whole."[62] Notably, and as the findings in Chapter 2 reveal, U.S. Supreme Court case law on the chilling effect played a major role in the early development of the Article 10 chilling effect principle, particularly in applicants' chilling effect arguments before the European Commission, and in the Commission's development of its own chilling effect principle.[63] Some of the most important freedom of expression judgments delivered by the U.S. Supreme Court, such as *New York Times Co. v. Sullivan*, concerning defamation of public officials,[64] *Mills v. Alabama*, concerning bans on election-day editorials,[65] *Branzburg v. Hayes*, concerning protection of journalistic sources,[66] and *Laird v. Tatum,* concerning military surveillance of protest groups,[67] all applied or considered chilling effect reasoning. However, as detailed in the findings in Chapters 3-7, there are also limits to discussing U.S. Supreme Court case law. This is because the European Court has developed in its own distinct chilling effect principle, where the Court rarely, if ever, cites U.S. Supreme Court case law when developing and applying its own chilling effect principle under Article 10.

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[57] Koen Lemmens, "Se taire par peur: l'effet dissuasif de la responsabilité civile sur la liberté d"expression," (2005) *Auteurs & Media* 32.

[58] See Frederick Schauer, "Fear, Risk and the First Amendment: Unravelling the 'Chilling Effect'," (1978) 58 *Boston University Law Review* 685; Robert A. Sedler, "Self-Censorship and the First Amendment" (2011) *Notre Dame Journal of Law, Ethics and Public Policy* 13. Also, Note, "The Chilling Effect in Constitutional Law," (1969) 69 *Columbia Law Review* 808; Note, "The First Amendment Overbreadth Doctrine," (1970) 83 *Harvard Law Review* 844; Tamara Jacobs, "The Chilling Effect in Press Cases: Judicial Thumb on the Scales," (1980) 15 *Harvard Civil Rights-Civil Liberties Law Review* 685; Michael N. Dolich, "Alleging a First Amendment 'Chilling Effect' to Create a Plaintiff's Standing: A Practical Approach," 43 *Drake Law Review* 175 (1994); Leslie Kendrick, "Speech, Intent, and the Chilling Effect," (2013) 54 *William & Mary Law Review* 1633; Brandice Canes-Wrone and Michael C. Dorf, "Measuring the Chilling Effect," (2015) 90 *New York University Law Review* 1095; and Anna V. Pinchuk, "Countering Free Speech: CVE Pilot Programs' Chilling Effect on Protected Speech and Expression," (2018) 68 *Syracuse Law Review* 661.

[59] Frederick Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'," (1978) 58 *Boston University Law Review* 685, p. 393.

[60]Frederick Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'," (1978) 58 *Boston University Law Review* 685, p. 393.

[61] U.S. Const. Amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."). See generally, Eugene Volokh, *The First Amendment and Related Statutes: Problems, Cases and Policy Arguments*, 4th ed. (Foundation Press, 2016).

[62] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114. See also, *Kaperzyński v. Poland* (App. no. 43206/07) 3 April 2012, para. 70; and *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 167.

[63] See Chapter 2, Section 2.3.6.

[64] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

[65] *Mills v. Alabama*, 384 U.S. 214 (1966).

[66] *Branzburg v. Hayes*, 408 U.S. 665 (1971).

[67] *Laird v. Tatum*, 408 U.S. 676 (1972).

1.5 Methodology and structure

The research methodology used during the writing of this thesis was as follows.[68] First, a combination of an empirical and historical approach was adopted for understanding how chilling effect reasoning first entered European Court case law. In this regard, it was necessary to examine the admissibility decisions and reports of the European Commission of Human Rights, which existed alongside the Court until 1998.[69] This was because until Protocol No. 11 to the European Convention entered into force in 1998,[70] it was the European Commission that referred cases to the European Court for consideration, with the Court considering the Commission's report, and the Commission's delegate made submissions to the Court on the merits of the case.[71] The Court's official case-law database, Hudoc,[72] was used to identify the Commission's decisions and reports between 1959 and 1998 which considered chilling effect reasoning, by using key-word searches for "chilling effect," and in French, "*effet dissuasif*;" and variants of these terms, such as deterring effect, chilling, chill, discourage, dissuading, *dissuader*, etc. This included references not only in the Commission's reasoning, but also where these terms were referred to by the applicant, government, or in separate opinions. This yielded 19 decisions and reports, which were then categorised on the basis of the Convention article being considered, and the specific issue under consideration (e.g., *X. v. Federal Republic of Germany* (App. no. 9228/80) 16 December 1982 (Commission Decision) (Article 10 and dismissal over anti-constitutional views), and are discussed fully in Chapter 2.[73]

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[68] For a discussion on legal research methodology, see: David Feldman, "The Nature of Legal Scholarship," (1989) 52 *Modern Law Review* 498 (1989); Terry Hutchinson and Nigel Duncan, "Defining and Describing What We Do: Doctrinal Legal Research," (2012) 17 *Deakin Law Review* 83; Tom R. Tyler, "Methodology in Legal Research," (2017) 13 *Utrecht Law Review* 130; and Philip Langbroek, Kees van den Bos, Marc Simon Thomas, Michael Milo, Wibo van Rossum, "Methodology of Legal Research: Challenges and Opportunities," (2017) 13 *Utrecht Law Review* 1.

[69] See Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, 11 May 1994, E.T.S. 155. See generally, John T. White, "The European Commission of Human Rights: An Analysis and Appraisal," (1977) 3 *Brooklyn Journal of International Law* 119.

[70] Protocol No. 11 ("Considering that it is therefore desirable to amend certain provisions of the Convention with a view, in particular, to replacing the existing European Commission and Court of Human Rights with a new permanent Court").

[71] See, for one of the earliest examples concerning Article 10, *Handyside v. the United Kingdom* (App. no. 5493/72) 7 December 1976, referred to the Court following *Handyside v. the United Kingdom* (App. no. 5493/72) 30 September 1975 (Commission Report).

[72] http://hudoc.echr.coe.int.

[73] *Donnelly v. the United Kingdom* (App. nos. 5577/72 and 5583/72) 5 April 1973 (Commission Decision) (Article 3 and police interrogation); *X. v. the United Kingdom* (App. no. 7525/76) 3 March 1978 (Commission Decision) (Article 8 and law on homosexuality); *X. v. Federal Republic of Germany* (App. no. 9228/80) 16 December 1982 (Commission Decision) (Article 10 and dismissal over anti-constitutional views); *X. v. the United Kingdom* (App. no. 7525/76) 3 March 1978 (Commission Decision) (Article 8 and law on homosexuality); *Dudgeon v. the United Kingdom* (App. no. 7525/76) 13 March 1980 (Commission Report) (Article 8 and law on homosexuality); *Leigh, Guardian Newspapers Ltd., The Observer Ltd. v. the United Kingdom* (App. no. 10039/82) 11 May 1984 (Commission Decision) (Article 10 and journalist's access to documents opened in court); *Kosiek v. Federal Republic of Germany* (App. no. 9704/82) 11 May 1984 (Commission Report) (Article 10 and dismissal over anti-constitutional views); *Norris and National Gay Federation v. Ireland* (App. no. 10581/83) 16 May 1985 (Commission Decision) (Article 8 and law on homosexuality); *Norris v. Ireland* (App. no. 10581/83) 12 March 1987 (Commission Report) (Article 8 and law on homosexuality); *P.H. and H.H. v. the United Kingdom* (App. no. 12175/86) 12 May 1988 (Commission Decision) (Article 10 and surveillance of civil rights activists); *Hewitt and Harman v. the United Kingdom* (App. no. 12175/86) 9 May 1989 (Commission Report) (Article 10 and surveillance of civil rights activists); *Times Newspapers Ltd. v. the United Kingdom* (App. no. 14631/89) 5 March 1990 (Commission Decision) (Article 10 and damages awards in defamation proceedings); *Times Newspapers Ltd. and Neil v. the United Kingdom* (App.

The second step was to identify the Court's admissibility decisions and judgments, from 1959 until 2018, where chilling effect, or *effet dissuasif*, was explicitly mentioned. This would include not only in the Court's reasoning, but also where the chilling effect was referred to by the applicant, government, third-party interveners, or in separate opinions. Therefore, the Hudoc database was used to identify these admissibility decisions and judgments, and yielded 348 admissibility decisions and judgments, which are fully set out in Annex 1 to this thesis. For each admissibility decision and judgment in Annex 1, there is a brief description identifying which article of the Convention is involved, a description of the applicant, and what specific issue was involved, e.g., *Campos Dâmaso v. Portugal* (App. no. 17107/05) 24 April 2008 (Article 10 and journalist's conviction for defamation). The inclusion of the Convention article, applicant, and issue involved, allowed for easy grouping of the judgments and decisions, and by using key-word searches, revealed how many judgments and decisions involve Article 10 (246), how many judgments and decisions involve a journalist's freedom of expression (79), or how many judgments and decisions involve defamation proceedings (111).

On the basis of the research for Annex 1, it was possible to determine what percentage of the total case-law which considered chilling effect reasoning concerns the right to freedom of expression under Article 10, namely 71%. Thus, the majority of case-law considering chilling effect reasoning concerns Article 10, and provides a good justification for the focus of this thesis. This was not the sole reason for focussing on freedom of expression case law; as not only was there an increasing prevalence of chilling effect reasoning in freedom of expression case law, but, as mentioned above, the principle was featuring in some of the most prominent judgments of the Court. There also seemed to be some conflicting views within the Court on the application, or non-application of chilling effect reasoning. Further, as the results in Annex 1 demonstrate, there was recent increased frequency in the application of the principle. However, it is also important to note that chilling effect reasoning is considered in other areas of European Convention case law, with 14% of the case law concerning freedom of assembly and association under Article 11,[74] 7% concerning the right of individual petition under Article 34,[75] 5% concerning the right to private and family life under Article 8,[76] while there were also cases under Article 6 and the right to a fair trial,[77] Article 2 and the right to life,[78] Article 14 and prohibition of discrimination,[79] and Article 18 and limitation on use of

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no. 14644/89) 11 April 1991 (Commission Decision) (Article 10 and order against newspaper to account for profits over publication of book extracts); *Times Newspapers Ltd. and Neil v. the United Kingdom* (App. no. 14644/89) 8 October 1991 (Commission Report) (Article 10 and order against newspaper to account for profits over publication of book extracts); *S. and G. v. the United Kingdom* (App. no. 17634/91) 2 September 1991 (Commission Decision) (Article 10 and artist's prosecution for outraging public decency); *Goodwin v. the United Kingdom* (App no 17488/90) 7 September 1993 (Commission Decision) (Article 10 and protection of journalistic sources); *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission Report) (Article 10 and protection of journalistic sources); *Brind and Others v. the United Kingdom* (App. no. 18714/91) 9 May 1994 (Commission Decision) (Article 10 and prohibition on broadcasting interviews with certain political parties); and *Elçi and Others, Sahin v. Turkey* (App. nos. 23145/93 and 25091/94) 2 December 1996 (Commission Decision) (Former Article 25 and right of individual petition).

[74] See, for example, *Balçık v. Turkey* (App. no. 25/02) 29 November 2007, para. 41 (holding that prosecuting protestors, even where they are acquitted, can have a "chilling effect" on freedom of assembly).

[75] See, for example, *Yefimenko v. Russia* (App. no. 152/04) 12 February 2013, para. 164 (holding that the monitoring of a prisoner's correspondence had a chilling effect on the right to petition the Court).

[76] See, for example, *Tysiąc v. Poland* (App. no. 5410/03) 20 March 2007, para. 116 (holding laws prohibiting abortion "have a chilling effect on doctors").

[77] See, for example, *Khodorkovskiy and Lebedev v. Russia* (App. nos. 11082/06 and 13772/05) 25 July 2013 (Article 6 and lawyer-client privilege).

[78] See, *Armani Da Silva v. the United Kingdom* (App. no. 5878/08) 30 March 2016 (Grand Chamber) (Article 2 and investigation into police shooting) and *Huseynova v. Azerbaijan* (App. no. 10653/10) 13 April 2017 (Article 2 and killing of journalist).

restrictions on rights.[80] Further, it was possible to then group the Article 10 case law by a number of issues, namely: Article 10 and the protection of journalistic sources (discussed in Chapter 3); Article 10 and defamation proceedings (discussed in Chapter 4); Article 10 and criminal prosecutions against journalists (discussed in Chapter 5); Article 10 and interferences with a judge or lawyer's freedom of expression (discussed in Chapter 6); and Article 10 and interferences with a whistleblower, employee or trade unionist's freedom of expression (discussed in Chapter 7).

As such, the thesis was divided into chapters to reflect these different areas of Article 10 case law where chilling effect reasoning was used: Chapter 2 is the foundational chapter, and begins with an analysis of the results of the empirical research on the European Commission's decisions and reports, and shows how the chilling effect first entered the Commission, what European Convention rights were involved, and how the chilling effect principle developed. The chapter also draws upon historical research focussing on the lawyers arguing before the Commission, and their use of chilling effect reasoning. The chapter then examines how the concept of the chilling effect entered the case law of the European Court, and what European Convention rights were involved, and how the chilling effect principle developed over four decades of case-law. In particular, given that the Grand Chamber delivered 23 judgments where it has considered, or applied, chilling effect reasoning, [81] a full

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[79] See *Partei Die Friesen v. Germany* (App. no. 65480/10) 28 January 2016 (Article 14, in conjunction with Article 3 of Protocol No. 1, and parliamentary election threshold).

[80] See *Aliyev v. Azerbaijan* (App. nos. 68762/14 and 71200/14) 20 September 2018 (Article 18, in conjunction with Articles 5 and 8, and a lawyer's prosecution for NGO activity).

[81] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber) (Article 10 and protection of journalistic sources); *Wille v. Liechtenstein* (App. No. 28396/95) 28 October 1999 (Grand Chamber) (Article 10 and a judge's non-reappointment over remarks made in public); *Al-Adsani v. the United Kingdom* (App. no. 35763/97) 21 November 2001 (Grand Chamber) (Article 6 and refugees); *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber) (Article 10 and journalists convicted of defamation); *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber) (Article 10 and journalists convicted of defamation); *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber) (Article 10 and lawyer convicted of contempt of court); *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber) (Article 10 and newspapers convicted of defamation); *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber) (Article 10 and a journalist's conviction for publishing secret official deliberations); *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber) (Article 10 and a whistleblower's dismissal); *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber) (Article 10 and protection of journalistic sources); *A, B and C v. Ireland* (App. no. 25579/05) 16 December 2010 (Grand Chamber) (Article 8 and abortion); *Kudrevičius and Others v. Lithuania* (App. no. 37553/05) 15 October 2015 (Grand Chamber) (Article 11 and convictions for farmers' demonstration); and *Janowiec and Others v. Russia* (App. no. 55508/07 and 29520/09) 21 October 2013 (Grand Chamber) (Article 34 and right to individual petition); *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber) (Article 10 and employees' dismissal for trade union expression); *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber) (Article 10 and newspaper's fined for report on public figure); *Mouvement raëlien suisse v. Switzerland* (App. no. 16354/06) 13 July 2012 (Grand Chamber) (Article 10 and ban on poster campaign); *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber) (Article 10 and lawyer convicted of defamation); *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber) (Article 10 and news website's liability for reader comments); *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber) (Article 10 and photojournalist's conviction for disobeying police order); *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber) (Article 10 and liability for publishing public figure's photographs); *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber) (Article 10 and journalist's conviction for publishing confidential court materials); *Karácsony and Others v. Hungary* (App. no. 42461/13 and 44357/13) 17 May 2016 (Grand Chamber) (Article 10 and parliamentarians' sanctioned for protesting in parliament); *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber) (Article 10 and termination of a judge's mandate); *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (App. no. 931/13) 27 June 2017 (Grand Chamber) (Article 10 and media company prohibited from publishing taxation data); and *Medžlis Islamske*

discussion of these judgments is provided in order to get an overall understanding of the principle. The chapter also describes the different branches of European Convention law which adopt chilling effect reasoning, and elaborates upon the Article 10 case law which will be examined in the proceeding chapters. Next, Chapter 3 examines the first substantive area of Article 10 case law profoundly affected by chilling effect reasoning, namely protection of journalistic sources. In Chapter 4, the area of Article 10 case law where chilling effect reasoning is arguably most contentious is examined, namely defamation and the protection of reputation. In Chapter 5, the Court's consideration of the chilling effect principle in its case law concerning Article 10 and the prosecution of journalists for criminal offences will be examined. Following this, Chapter 6 concerns judicial and legal professional freedom of expression and the chilling effect; and Chapter 7 discusses how the Court seeks to protect whistleblowers, employees and trade unions from the chilling effect. Finally, Chapter 8 brings together the observations and discussion in the substantive chapters, seeks to bring theoretical coherence to the application and impact of chilling effect reasoning, and provide possible guidance to the European Court where there may be uncertainty in the contours of the chilling effect's application. Notably, a fuller explanation of how the subject of each chapter was chosen will be provided in Chapter 2.

Moreover, many cases apply chilling effect reasoning without explicit reference to the term, but only through reference to a previous case establishing the principle. In order to identify these cases, it was necessary to use the Hudoc database to find subsequent application of these cases and principles. For example, the seminal *Jersild v. Denmark* judgment, decided by a 19-judge Grand Chamber in 1994, laid down the principle in paragraph 35 that "punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest".[82] As will be argued in later chapters, this "hampering" of the press is an application of chilling effect reasoning, and in order to gather together all cases on the chilling effect, it was necessary to find all subsequent applications of *Jersild*'s paragraph 35 by using key-word searches of paragraph 35 wording in Hudoc.

Perhaps the most difficult part of the research was identifying case law where chilling effect reasoning was *not* used, but where other similar case law might suggest it would be at least mentioned by the Court. A number of cases were easily identified, where one of the parties included chilling effect reasoning in their submissions, but which did not then feature in the Court's reasoning. However, the most difficult task was identifying case law where chilling effect reasoning was not used in one judgment, but had been used in a different but arguably similar judgment, such as those mentioned above (*Saygili and Falakaoğlu (No. 2)*, *İ.A.*, and *Kasabova*). This could only be overcome by examining the respective lines of case law, meaning that it was necessary to compile subject areas where chilling effect reasoning had been used, and track its application and non-application in subsequent case law in that subject area. Thus, the grouping of the case law areas made such an analysis possible.

Building upon the foregoing methodology, each of the subsequent chapters examines a number of specific questions concerning how the Court considers and applies chilling effect reasoning. The first two questions have a somewhat descriptive purpose: (1) what does the Court mean when it states that there is a chilling effect on freedom of expression; (2) does the Court apply chilling effect reasoning when considering (a) whether an applicant may claim to be a "victim" under Article 34;[83] (b) whether there has been an "interference" with freedom of

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Zajednice Brčko and Others v. Bosnia and Herzegovina (App. no. 17224/11) 27 June 2017 (Grand Chamber) (Article 10 and civil defamation proceedings against an NGO).

[82] *Jersild v. Denmark* (App. no. 15890/89) 23 September 1994 (Grand Chamber), para. 35.

[83] European Convention, Article 34 ("The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting

expression under Article 10; (c) whether an interference has been "prescribed by law," or, (d) whether an interference is "necessary in a democratic society." The remaining questions are more substantive: (3) what is the consequence, if any, of the Court using chilling effect reasoning in its case law; (4) is there much agreement, or disagreement, within the Court on the application of chilling effect reasoning; (5) does the Court explain the application, or non-application, of chilling effect reasoning; and (6) how does the Court use prior case law when considering and applying the chilling effect?

Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.").

Chapter 2 - The Origin and Development of the Chilling Effect Principle

2.1 Introduction

The first question this chapter addresses is how the concept of the chilling effect entered the case law of the European Court of Human Rights, and the Court's freedom of expression case law in particular. Was it the result of submissions made by an applicant, government, or third-party intervener; or did the Court itself develop the concept based on the wording of the European Convention, freedom of expression principles or theory, or relying upon case law from another jurisdiction? In order to answer these questions, it is necessary to first examine the admissibility decisions and reports of the European Commission of Human Rights, which existed alongside the European Court until 1998.[1] The reason for examining the European Commission is because from the foundation of the European Court in 1959, and the Court becoming permanent in 1998, the Court only delivered one judgment explicitly relying upon, or considering, the "chilling effect" principle.[2] However, during the same period, the European Commission relied upon, or considered, the chilling effect principle in 19 cases.[3]

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[1] See Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, 11 May 1994, E.T.S. 155. For early commentary, see Jack Greenberg and Anthony R. Shalit, "New Horizons for Human Rights: The European Convention, Court, and Commission of Human Rights," (1963) 63 *Columbia Law Review* 1384; Anthony McNulty, "The Practice of the European Commission of Human Rights," (1965) 11 *Howard Law Journal* 430; and John T. White, "The European Commission of Human Rights: An Analysis and Appraisal," (1977) 3 *Brooklyn Journal of International Law* 119.

[2] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 39 ("Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest."). However, there were earlier judgments relying upon chilling effect reasoning, but not using the term explicitly, such as *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 44 ("although the penalty imposed on the author did not strictly speaking prevent him from expressing himself, it nonetheless amounted to a kind of censure, which would be *likely to discourage* him from making criticisms of that kind again in future") (emphasis added); or *Observer and Guardian v. the United Kingdom* (App. no. 135858/88) 26 November 1991 (Partly dissenting opinion of Judge Martens, para. 6) ("A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraints 'freeze' it, at least for a time.'") (emphasis added). These are discussed below in Section 2.4.2.

[3] *Donnelly v. the United Kingdom* (App. nos. 5577/72 and 5583/72) 5 April 1973 (Commission Decision) (Article 3 and police interrogation); *X. v. the United Kingdom* (App. no. 7525/76) 3 March 1978 (Commission Decision) (Article 8 and law on homosexuality); *X. v. Federal Republic of Germany* (App. no. 9228/80) 16 December 1982 (Commission Decision) (Article 10 and dismissal over anti-constitutional views); *X. v. the United Kingdom* (App. no. 7525/76) 3 March 1978 (Commission Decision) (Article 8 and law on homosexuality); *Dudgeon v. the United Kingdom* (App. no. 7525/76) 13 March 1980 (Commission Report) (Article 8 and law on homosexuality); *Leigh, Guardian Newspapers Ltd., The Observer Ltd. v. the United Kingdom* (App. no. 10039/82) 11 May 1984 (Commission Decision) (Article 10 and journalist's access to documents opened in court); *Kosiek v. Federal Republic of Germany* (App. no. 9704/82) 11 May 1984 (Commission Report) (Article 10 and dismissal over anti-constitutional views); *Norris and National Gay Federation v. Ireland* (App. no. 10581/83) 16 May 1985 (Commission Decision) (Article 8 and law on homosexuality); *Norris v. Ireland* (App. no. 10581/83) 12 March 1987 (Commission Report) (Article 8 and law on homosexuality); *P.H. and H.H. v. the United Kingdom* (App. no. 12175/86) 12 May 1988 (Commission Decision) (Article 10 and surveillance of civil rights activists); *Hewitt and Harman v. the United Kingdom* (App. no. 12175/86) 9 May 1989 (Commission Report) (Article 10 and surveillance of civil rights activists); *Times Newspapers Ltd. v. the United Kingdom* (App. no. 14631/89) 5 March 1990 (Commission Decision) (Article 10 and damages awards in defamation proceedings); *Times Newspapers Ltd. and Neil v. the United Kingdom* (App. no. 14644/89) 11 April 1991 (Commission Decision) (Article 10 and order against newspaper to account for profits over publication of book extracts); *Times Newspapers Ltd. and Neil v. the United Kingdom* (App. no. 14644/89) 8 October 1991 (Commission Report) (Article 10 and order against newspaper to account

Therefore, the chapter first begins with an analysis of the European Commission's decisions and reports, and will attempt to discover how the chilling effect first entered the Commission, what European Convention rights were involved, and how the chilling effect principle developed. The chapter then examines how the concept of the chilling effect entered the case law of the European Court, and similarly, what European Convention rights were involved, and how the chilling effect principle developed. In particular, given that the Grand Chamber has delivered 23 judgments where it has considered, or applied, chilling effect reasoning,[4] a full discussion of these judgments is provided in order to provide an overall sense of how the chilling effect developed over four decades.

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for profits over publication of book extracts); *S. and G. v. the United Kingdom* (App. no. 17634/91) 2 September 1991 (Commission Decision) (Article 10 and artist's prosecution for outraging public decency); *Goodwin v. the United Kingdom* (App no 17488/90) 7 September 1993 (Commission Decision) (Article 10 and protection of journalistic sources); *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission Report) (Article 10 and protection of journalistic sources); *Brind and Others v. the United Kingdom* (App. no. 18714/91) 9 May 1994 (Commission Decision) (Article 10 and prohibition on broadcasting interviews with certain political parties); and *Elçi and Others, Sahin v. Turkey* (App. nos. 23145/93 and 25091/94) 2 December 1996 (Commission Decision) (Former Article 25 and right of individual petition).

[4] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber) (Article 10 and protection of journalistic sources); *Wille v. Liechtenstein* (App. No. 28396/95) 28 October 1999 (Grand Chamber) (Article 10 and a judge's non-reappointment over remarks made in public); *Al-Adsani v. the United Kingdom* (App. no. 35763/97) 21 November 2001 (Grand Chamber) (Article 6 and refugees); *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber) (Article 10 and journalists convicted of defamation); *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber) (Article 10 and journalists convicted of defamation); *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber) (Article 10 and lawyer convicted of contempt of court); *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber) (Article 10 and newspapers convicted of defamation); *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber) (Article 10 and a journalist's conviction for publishing secret official deliberations); *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber) (Article 10 and a whistleblower's dismissal); *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber) (Article 10 and protection of journalistic sources); *A, B and C v. Ireland* (App. no. 25579/05) 16 December 2010 (Grand Chamber) (Article 8 and abortion); *Kudrevičius and Others v. Lithuania* (App. no. 37553/05) 15 October 2015 (Grand Chamber) (Article 11 and convictions for farmers' demonstration); and *Janowiec and Others v. Russia* (App. no. 55508/07 and 29520/09) 21 October 2013 (Grand Chamber) (Article 34 and right to individual petition); *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber) (Article 10 and employees' dismissal for trade union expression); *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber) (Article 10 and newspaper's fined for report on public figure); *Mouvement raëlien suisse v. Switzerland* (App. no. 16354/06) 13 July 2012 (Grand Chamber) (Article 10 and ban on poster campaign); *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber) (Article 10 and lawyer convicted of defamation); *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber) (Article 10 and news website's liability for reader comments); *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber) (Article 10 and photojournalist's conviction for disobeying police order); *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber) (Article 10 and liability for publishing public figure's photographs); *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber) (Article 10 and journalist's conviction for publishing confidential court materials); *Karácsony and Others v. Hungary* (App. no. 42461/13 and 44357/13) 17 May 2016 (Grand Chamber) (Article 10 and parliamentarians' sanctioned for protesting in parliament); *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber) (Article 10 and termination of a judge's mandate); *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (App. no. 931/13) 27 June 2017 (Grand Chamber) (Article 10 and media company prohibited from publishing taxation data); and *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber) (Article 10 and civil defamation proceedings against an NGO).

2.2 From New Orleans to Strasbourg

The story of the European Court's chilling effect principle begins not in Strasbourg, where the Court sits, but in New Orleans, Louisiana, at the height of the U.S. civil rights movement in October 1963. Only two months earlier, the largest civil rights protest in U.S. history was held in Washington, D.C., where Dr. Martin Luther King Jr. had delivered his famous "I Have a Dream" speech.[5] A year later, the landmark U.S. Civil Rights Act 1964 would be passed, which prohibited discrimination based on race, colour, religion or national origin, and provided for racial integration in schools and public facilities.[6] However, there were many opposed to the civil rights movement, and racial desegregation in particular. And in October 1963, the full extent of local-government opposition to the civil rights movement was brought to bear on James Dombrowski, a 66-year-old Methodist minister from New Orleans. Dombrowski had dedicated his life to achieving civil rights, and was director of a local civil rights organisation, the Southern Conference Education Fund (SCEF), based in Louisiana.[7]

On the afternoon of 4 October 1963, Dombrowski's home and office were raided as part of an operation involving nearly 100 police officers, and he was arrested under Louisiana's anti-communist law, the Subversive Activities and Communist Control Law. A "truckload" of documents were seized by police, including his organisation's membership lists, and subscription lists to the organisation's newspaper.[8] A judge later quashed the arrest warrant "as not based on probable cause."[9] However, James Pfister, a member of Louisiana's legislature, and chairman of Louisiana's so-called "Joint Legislative Committee on Un-American Activities," had a resolution passed naming Dombrowski's organisation as a "communist front," and called on the Attorney General to prosecute Dombrowski under Louisiana's anti-communist law.

A grand jury was convened to consider whether Dombrowski should be prosecuted, but rather than wait until a decision on a prosecution was made, Dombrowski decided to do something quite radical: he sought a court injunction to prevent Pfister from prosecuting, or even threatening to prosecute him, under the anti-communist law, as he claimed the law violated his right to freedom of speech under the First Amendment to the U.S Constitution.[10] A district court rejected the application, holding that Dombrowski had failed to show sufficient "injury," as he could instead simply assert his constitutional rights, such as freedom of speech, in his defence to any criminal prosecution.[11] Moreover, it was not appropriate for courts to declare laws unconstitutional before any convictions were imposed.

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[5] Edwin Kenworthy, "200,000 March for Civil Rights in Orderly Washington Rally; President Sees Gain for Negro," *The New York Times*, 29 August 1963; Damon J. Keith, "What Happens to a Dream Deferred: An Assessment of Civil Rights Law Twenty Years After the 1963 March on Washington," (1984) 19 *Harvard Civil Rights-Civil Liberties Law Review* 469.

[6] Leland Ware, "Civil Rights and the 1960s: A Decade of Unparalleled Progress," (2013) 72 *Maryland Law Review* 1087, p. 1091.

[7] See Frank Adams, *James A. Dombrowski: An American Heretic, 1897-1983* (University of Tennessee Press, 1992).

[8] *Dombrowski v. Pfister*, 380 U.S. 479 (1964). See Marc Stickgold, "Variations on the Theme of Dombrowski v. Pfister: Federal Intervention in State Criminal Proceedings Affecting First Amendment Rights," (1968) *Wisconsin Law Review* 369; and Owen Fiss, "Dombrowski," (1977) 86 *Yale Law Journal* 1103.

[9] *Dombrowski v. Pfister*, 380 U.S. 479 (1964), 488.

[10] U.S. Const. Amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."). See generally, Eugene Volokh, *The First Amendment and Related Statutes: Problems, Cases and Policy Arguments*, 4th ed. (Foundation Press, 2016).

[11] *Dombrowski v. Pfister*, 227 F. Supp. 556 (1964).

However, Dombrowski appealed to the U.S. Supreme Court, and in April 1965, the Court delivered its *Dombrowski v. Pfister* judgment,[12] finding Louisiana's anti-communist law violated the First Amendment's guarantee of freedom of speech, and granted a permanent injunction preventing prosecutions against Dombrowski under the law. The first major hurdle Dombrowski had to overcome was whether he had "standing," as he had never been convicted of any offence under the law. However, the Supreme Court held that Dombrowski did indeed have standing because the threatened prosecution created a "chilling effect upon the exercise of First Amendment rights,"[13] meaning it "frightened off potential members and contributors" of the civil rights organisation, "paralyzed operations and threatened exposure of the identity of adherents to a locally unpopular cause," and further arrests and seizures "will cause the organization inconvenience or worse."[14] The Court said "vindication of freedom of expression" should not have to "await the outcome of protracted litigation,"[15] and the "prospect of ultimate failure of such prosecutions by no means dispels their chilling effect on protected expression."[16]

Having granted standing, the Court reviewed Louisiana's law, and held that a number of the provisions, such as "Communist front organisation," and "subversive organisation," were "overly broad," and "created a 'danger zone' within which protected expression may be inhibited."[17] The Court held that so long as the statute remained available to the State, a "chilling effect on protected expression" will exist.[18] The significance of the Court's judgment in *Dombrowski* was evident from the dissenting opinion of Justice John Marshall Harlan, arguing that the Court majority's judgment would result in the "paralyzing of state criminal processes," and the majority had "made no effort to give the state statute a narrowing construction," and declined to allow the Louisiana courts to do the same.[19] However, this demonstrates how important the Court's majority considered the principle that freedom of expression should be protected from the chilling effect of overboard criminal laws. Indeed, Owen Fiss, writing in the *Yale Law Journal* after the judgment, who had been involved in civil rights litigation with the U.S. Department of Justice, emphasised that the *Dombrowski* case was "at the core of many of our litigation strategies," and "opened the federal trial courts" to the civil rights movement.[20]

The *Dombrowski* judgment was delivered in 1964, and during the surrounding decade alone, chilling effect reasoning was applied by the U.S. Supreme Court in over 26 judgments,[21] including some of the most important free speech judgments delivered during

[12] *Dombrowski v. Pfister*, 380 U.S. 479 (1964).
[13] *Dombrowski v. Pfister*, 380 U.S. 479 (1964), p. 487.
[14] *Dombrowski v. Pfister*, 380 U.S. 479 (1964), p. 479.
[15] *Dombrowski v. Pfister*, 380 U.S. 479 (1964), p. 487.
[16] *Dombrowski v. Pfister*, 380 U.S. 479 (1964), p. 494.
[17] *Dombrowski v. Pfister*, 380 U.S. 479 (1964), p. 494.
[18] *Dombrowski v. Pfister*, 380 U.S. 479 (1964), p. 494.
[19] *Dombrowski v. Pfister*, 380 U.S. 479 (1964), p. 501 (Harlan J., dissenting).
[20] Owen Fiss, "Dombrowski," (1977) 86 *Yale Law Journal* 1103, p. 1103.
[21] *Times Film Corp v. City of Chicago*, 365 U.S. 43 (1961); *Gibson v. Florida Legislative Investigation Committee* 372 U.S. 539 (1963); *Quantity of Copies of Books v. Kansas* 378 U.S. 205 (1964); *New York Times Co. v. Sullivan* 376 U.S. 254 (1964); *Freedman v. Maryland* 380 U.S. 51 (1965); *Mills v. Alabama* 384 U.S. 214 (1966); *City of Greenwood v. Peacock* 384 U.S. 808 (1966); *Keyishian v. Board of Regents of the University of the State of New York* 385 U.S. 589 (1967); *Walker v. City of Birmingham* 388 U.S. 307 (1967); *Zwickler v. Koota* 389 U.S. 241 (1967); *WEB DuBois Clubs of America v. Clark* 389 U.S. 309 (1967); *Times v. Hill* 385 U.S. 374 (1967); *North Carolina v. Pearce* 395 U.S. 711 (1968); *Oestereich v. Selective Service System Local Board No 11* 393 U.S. 233 (1968); *U.S. v. Jackson* 390 U.S. 570 (1968); *Cameron v. Johnson* 390 U.S. 611 (1968); *Shapiro v. Thompson* 394 U.S. 618 (1969); *Younger v. Harris* 401 U.S. 37 (1970); *Law Students Civil Rights Research Council, Inc. v. Wadmond* 401 U.S. 154 (1971); *Byrne v. Karalexis* 401 U.S. 216 (1971); *Branzburg v. Hayes* 408 U.S. 665 91971); *U.S. v. White* 401 U.S. 745 (1971); *Healy v. James* 408 U.S. 169 (1972); *Moose*

that period, such as *New York Times Co. v. Sullivan*, concerning defamation of public officials,[22] *Mills v. Alabama*, concerning bans on election-day editorials,[23] *Branzburg v. Hayes*, concerning protection of journalistic sources,[24] and *Laird v. Tatum,* concerning military surveillance of protest groups.[25] Given that the chilling effect had not appeared prominently in Supreme Court judgments before 1961,[26] scholars took note, and during the same period, a number of law review articles were published, including a number of notable articles in the *Boston University Law Review, Columbia Law Review, Harvard Law Review*, and *Yale Law Journal*, seeking to make sense of this chilling effect reasoning.[27] The scholarship argued that the chilling effect principle was now a fundamental "conceptual doctrine" under the First Amendment, and sought to highlight its "true importance in [F]irst [A]mendment adjudication."[28]

2.3 European Commission of Human Rights

The reason for mentioning the prevalence of chilling effect reasoning in U.S. Supreme Court judgments during the period of the 1960s and 1970s, is to provide the backdrop for putting forward a possible explanation as to how chilling effect reasoning was first introduced to the European Court of Human Rights in Strasbourg. This was because during this period of civil rights activism, and the U.S. Supreme Court's concern for protecting the First Amendment's guarantee of freedom of expression from the chilling effect, a human rights lawyer returned from New Haven, Connecticut, having spent a period at Yale Law School, and took up the cause of civil rights in Northern Ireland. The lawyer was Professor Kevin Boyle, educated at Queen's University, Belfast, who returned from Connecticut in 1973, and argued his first case before the European Commission the same year.[29] Along with his colleague, Professor Hurst Hannum, a U.S.-educated lawyer, they would introduce an argument before the European Commission of Human Rights, based on the *Dombrowski* judgment, which would be the first instance of the chilling effect principle in the case law of the European Commission.

Lodge No. 107 v. Irvis 407 U.S. 163 (1972); *Cole v. Richardson* 405 U.S. 676 (1972); and *Laird v. Tatum* 408 U.S. 1 (1972).

[22] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

[23] *Mills v. Alabama* 384, U.S. 214 (1966).

[24] *Branzburg v. Hayes*, 408 U.S. 665 (1971).

[25] *Laird v. Tatum*, 408 U.S. 676 (1972).

[26] In the judgments before *Dombrowski*, the chilling effect was mentioned in a dissenting opinion's footnote in *Times Film Corp v. City of Chicago*, 365 U.S. 43 (1961) (Warren, C.J., dissenting, p. 74); and was only mentioned in passing in the conclusion in *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963), p. 557.

[27] Note, "HUAC and the Chilling Effect: The Dombrowski Rationale Applied," (1967) 21 *Rutgers Law Review* 679; Note, "The Chilling Effect in Constitutional Law," (1969) 69 *Columbia Law Review* 808; Note, "The First Amendment Overbreadth Doctrine," (1970) 83 *Harvard Law Review* 844 (1970); John S. Vento, "Constitutional Law - Chilling Effect on First Amendment Rights - Army Surveillance of Civilian Political Activity," (1973) 11 *Duquesne Law Review* 419 (1973); Brenda T. Simensky, "Chilling Effect on First Amendment Rights," (1974) 40 *Brooklyn Law Review* 1097; Owen Fiss, "Dombrowski," (1977) 86 *Yale Law Journal* 1103; Frederick Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'," (1978) 58 *Boston University Law Review* 685; and Tamara Jacobs, "The Chilling Effect in Press Cases: Judicial Thumb on the Scales," (1980) 15 *Harvard Civil Rights-Civil Liberties Law Review* 685.

[28] Frederick Schauer, "'Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'," (1978) 58 *Boston University Law Review* 685, p. 732.

[29] Nigel Rodley, "Kevin Boyle obituary," *The Guardian*, 2 January 2011.

2.3.1 The chilling effect of police brutality

Boyle and Hannum's first case before the European Commission involved a number of men from Northern Ireland who had alleged brutality at the hands of the police and army while in custody.[30] Boyle and Hannum made a notable argument before the European Commission, arguing that there was an "administrative practice" of police brutality in Northern Ireland, in violation of the European Convention's prohibition on torture under Article 3,[31] and sought an injunction to prevent future brutality.[32] They submitted various reports from two government-appointed commissions, and the non-governmental organisation Amnesty International, which detailed over 150 allegations of brutality in custody. However, this argument based on an "administrative practice" was a difficult one to make, as the U.K. government countered that the applicants could not claim to be "victim of a violation" of the Convention under the then-Article 25,[33] as it was in effect an *actio popularis*, and the Commission was "not competent" to examine the question *in abstracto*.[34] Moreover, the government pointed out that some police officers had in fact been prosecuted for assault (although they had been acquitted), and the applicants had failed to exhaust domestic remedies (none had taken full civil actions against the police over the alleged brutality).

It was at this point that Boyle and Hannum drew upon language from the *Dombrowski* judgment to counter the government's "victim" argument, and argued that where police brutality was widespread, it would have a "chilling effect on all members of society, and would inhibit the full exercise of the political rights as well as violate the rights of those actually brutalised."[35] In *Dombrowski*, the U.S. Supreme Court held that prosecutions would "inhibit the full exercise of First Amendment freedoms,"[36] and have a "chilling effect upon the exercise of First Amendment rights."[37] In effect, Boyle and Hannum were inviting the Commission to not to treat the complaint as an *actio popularis*, and instead examine whether there was a general policy of police brutality. This was essential, according to Boyle and Hannum, because if such a policy did in fact exist, it would have a chilling effect on other Convention rights, such as freedom of expression and peaceful assembly.

This was the first time chilling effect arguments had been used before the European Commission, and the *Dombrowski* judgment was significant for Boyle and Hannum's submissions on the point (although the judgment was not cited), given the amount of borrowed language. In April 1973, the Commission decided that the application was admissible, finding that the applicants had "provided evidence which prima facie

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[30] *Donnelly and Others v. the United Kingdom* (App. nos. 5577/72 and 5583/71) 5 April 1973 (Commission Decision). See Brice Dickson, *The European Convention on Human Rights and the Conflict in Northern Ireland* (Oxford University Press, 2010), pp. 142-146.

[31] European Convention, Article 3 ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment.").

[32] *Donnelly and Others v. the United Kingdom* (App. no. 5577/72 and 5583/72) 5 April 1973 (Commission Decision), para. 4.

[33] Convention for the Protection of Human Rights and Fundamental Freedoms and Protocol, 4 November 1950, C.E.T.S. No. 5, Article 25 ("The Commission may receive petitions addresses to the Secretary-General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions.").

[34] *Donnelly and Others v. the United Kingdom* (App. no. 5577/72 and 5583/72) 5 April 1973 (Commission Decision), para. 13.

[35] *Donnelly and Others v. the United Kingdom* (App. no. 5572/72 and 5583/72) 5 April 1973 (Commission Decision), para. 39.

[36] *Dombrowski v. Pfister*, 380 U.S. 479 (1965), p. 486.

[37] *Dombrowski v. Pfister*, 380 U.S. 479 (1965), p. 487.

substantiates their allegations of the existence of an administrative practice in violation of Article 3."[38] However, the Commission did not use chilling effect reasoning in its decision, and the impact of the argument on members of the Commission is difficult to discern fully. What is evident is that the European Commission had been exposed to the chilling effect argument, and as demonstrated below, would adopt such reasoning in later decisions.

2.3.2 The chilling effect of the "fear of prosecution"

While the Commission did not use chilling effect reasoning in its *Donnelly* decision, Boyle would be back before the Commission three years later in 1976, and this time the chilling effect argument would prove quite decisive. Boyle was representing Jeffrey Dudgeon, a 35-year-old clerk from Belfast, and he sought to argue that a nineteenth-century law in Northern Ireland which criminalised "buggery" violated Dudgeon's Article 8 right to respect for his private life.[39] The case arose when police had been searching Dudgeon's home for drugs, and came across letters and diary entries where Dudgeon had described his homosexual activities. Dudgeon was questioned by police about his "sexual life" for four hours, and a file was sent to the public prosecutor. However, the prosecutor and Attorney General decided not to prosecute Dudgeon.

Three months after this incident, Dudgeon made an application to the European Commission, represented by Boyle, claiming that the criminalisation of buggery was a violation of his Article 8 right to respect for his private life. However, Dudgeon had never been prosecuted nor convicted, and a major hurdle for him was whether he could claim to be a "victim" under the then-Article 25 of the European Convention. To overcome this hurdle, Boyle argued that the law created a "fear of prosecution," had a "chilling effect" on the free expression of sexuality, and Dudgeon had suffered psychological injury and harm as a result.[40] Unlike in *Donnelly*, the Commission adopted chilling effect reasoning, and unanimously declared the application admissible, finding that there had been an "interference" with Dudgeon's Article 8 right because of the "risk of prosecution" and the "existence of the law will give rise to a *degree of fear or restraint* on the part of male homosexuals."[41] The Commission ultimately concluded that the prohibition of private consensual homosexual acts violated Article 8.[42]

Three years after the Commission's *Dudgeon* decision, a member of the Irish Senate, David Norris, and chairman of the Irish Gay Rights Movement, also made an application to the Commission, concerning the same nineteenth-century law which had been at issue in *Dudgeon*, and which was also in force in Ireland.[43] Similar to Dudgeon, Norris had never been prosecuted under the law, but unlike Dudgeon, he had never even been questioned by the police. Norris used the language from *Dudgeon*, arguing that he was exposed to a

[38] *Donnelly and Others v. the United Kingdom* (App. no. 5577/72 and 5583/72) 5 April 1973 (Commission Decision), para. 4.
[39] *X v. the United Kingdom* (App. no. 7525/76) 3 March 1978 (Commission Decision) (concerning the Offences against the Person Act 1861, and the Criminal Law Amendment Act 1885). European Convention, Article 8 ("1. Everyone has the right to respect for his private and family life, his home and his correspondence. 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 in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.").
[40] *X. v. the United Kingdom* (App. no. 7525/76) 3 March 1978 (Commission Decision), para. 120.
[41] *X. v. the United Kingdom* (App. no. 7525/76) 13 March 1980 (Commission Report), para. 94 (Emphasis added).
[42] *Dudgeon v. the United Kingdom* (App. no. 7525/76) 13 March 1980 (Commission Report), para. 116.
[43] *Norris and National Gay Federation v. Ireland* (App. no. 10581/83) 16 May 1985 (Commission Decision).

"continuing risk of prosecution,"[44] and the "fear of prosecution" was "constant."[45] The Irish government argued that Norris was "complaining, in the abstract, of the mere existence of certain penal laws," and allowing the application would be "stretching the notion of victim" under the Convention "to the outermost limit."[46]

Similar to *Dudgeon*, the Commission held that Norris could claim to be a "victim" under the Convention's then-Article 25. The Commission referred to *Dudgeon*, and adopted chilling effect reasoning, holding that the main purpose of the legislation was to deter the proscribed behaviour, and it "cannot be said" that Norris "runs no risk of prosecution."[47] The Commission noted that Norris claimed to have suffered great stress due to the "fear of prosecution," and the Commission had "no reason to doubt the general truth of these claims."[48] As such, the laws at issue were an "interference" with Norris's Article 8 right to respect for his private life, as the existence of the law will "give rise to a *degree of fear or restraint* on the part of male homosexuals."[49] The Commission then examined the proportionality of the law, and found it indistinguishable from *Dudgeon*, holding that the law "by reason of its breadth and absolute character" was disproportionate,[50] as the government had provided no sufficient justification for criminalising homosexual acts among consenting adult men. Notably, five members of the Commission dissented, arguing that Norris' application was "in the nature of an *actio popularis*," and reiterated there had been no prosecutions under the law for many years.[51] The dissent, however, did not address the majority's chilling effect reasoning, and failed to engage with *Dudgeon*, where there had similarly been no prosecutions.

2.3.3 The chilling effect of loyalty laws

While *Dudgeon* adopted chilling effect reasoning, centred on the risk of prosecution creating fear or restraint on the exercise of Convention rights, the Commission would specifically adopt the term chilling effect in the 1982 case, *X. v. Federal Republic of Germany*,[52] and indeed explicitly rely upon U.S. Supreme Court case law. The applicant in *X.* was Rolf Kosiek, a physics lecturer at a college in southern Germany, and one year into his employment, the college principal asked the government Ministry of Science and Arts to grant him tenure, and confirm him as a public servant for life. However, the Ministry responded that it had doubts over the Kosiek's "allegiance to the Constitution in the light of his political attitudes and activities."[53] Kosiek had been an elected member of the National Democratic Party of Germany (NDP), a far-right party, and had also written a number of books on his political views. Indeed, in 1974, Kosiek was interviewed by the Ministry "on the subject of his attitude to the Constitution," and he was dismissed from his position "since his attitude did not reveal sufficient allegiance to the democratic constitutional basic order."[54] The

[44] *Norris v. Ireland* (App. no. 10581/83) 12 March 1987 (Commission Report), para. 34.
[45] *Norris v. Ireland* (App. no. 10581/83) 12 March 1987 (Commission Report), para. 49.
[46] *Norris v. Ireland* (App. no. 10581/83) 12 March 1987 (Commission Report), para. 42.
[47] *Norris v. Ireland* (App. no. 10581/83) 12 March 1987 (Commission Report), para. 55.
[48] *Norris v. Ireland* (App. no. 10581/83) 12 March 1987 (Commission Report), para. 55.
[49] *Norris v. Ireland* (App. no. 10581/83) 12 March 1987 (Commission Report), para. 94 (Emphasis added).
[50] *Norris v. Ireland* (App. no. 10581/83) 12 March 1987 (Commission Report), para. 63.
[51] *Norris v. Ireland* (App. no. 10581/83) 12 March 1987 (Commission Report) (Dissenting opinion of Mr. B. Kiernan, joined by MM. Sperduti, Gözübüyük, Weitzel and Soyer).
[52] See *X. v. Federal Republic of Germany* (App. no. 9704/82) 16 December 1982 (Commission Decision); and *X. Federal Republic of Germany* (App. no. 9228/80) 16 December 1982 (Commission Decision). The Court would also examine the applications in *Kosiek v. Germany* (App. no. 9704/82) 28 August 1986; and *Glasenapp v. Germany* (App. no. 9228/80) 28 August 1986.
[53] *X. v. Federal Republic of Germany* (App. no. 9704/82) 16 December 1982 (Commission Decision), p. 244.
[54] *X. v. Federal Republic of Germany* (App. no. 9704/82) 16 December 1982 (Commission Decision), p. 244.

German courts ultimately held that Kosiek's dismissal was consistent with a 1972 Decree on the appointment of extremists to the civil service,[55] which permitted dismissal for failure to "comply with his duty of loyalty to the Constitution."[56]

Kosiek made an application to the European Commission, arguing his dismissal over his political activities and beliefs violated his right to freedom of expression under Article 10 of the European Convention. In particular, he argued that the NPD was not a banned organisation. The German government argued that Kosiek had not been prevented from holding or expressing his opinions, and was, in effect, arguing for a right of access to the public service, a right not guaranteed by the Convention.[57]

The question for the Commission was whether Kosiek's right to freedom of expression was at issue, and whether Article 10 protects individuals only from the complete suppression of an opinion, or also covers "limitations of a more indirect kind" which are nevertheless directly connected with the holding or expression of an opinion.[58] In this regard, the Commission held that Article 10 does not merely forbid the complete interruption and prevention of freedom of expression, but may extend further to protect the individual against certain other restrictions or penalties which result directly from the expression of an opinion.[59] Appling this principle, the Commission held that there had been an interference with Kosiek's freedom of expression, as he was required to express his opinions and reveal his attitudes, formally declare his allegiance to the German Basic Law, and his appointment was terminated in the light of opinions and attitudes and by reference to his lawful political activities and the contents of his two books.[60]

Crucially, the Commission stated that it "found support" for this interpretation of Article 10 from the case law of the U.S. Supreme Court controlling the oath of allegiance procedure on the basis of the right to freedom of expression, because of the "'chilling effect' such requirements may have for the free expression of opinions in society."[61] The Commission cited the U.S. Supreme Court's 1966 judgment in *Keyishian v. Board of Regents of the University of the State of New York*,[62] where it held that sections of New York's Education Law and Civil Service Law, which prevented the appointment or retention of "subversive" persons in university employment, violated the First Amendment's guarantee of freedom of speech.[63] The Court in *Keyishian* relied upon *Dombrowski*, and held that First Amendment freedoms need "breathing space to survive," and because the chilling effect upon the exercise of vital First Amendment rights must be guarded against, the government may regulate in the area only with narrow specificity.[64]

Based on the foregoing, the Commission held that the application was admissible under Article 10.[65] Two years later, the Commission delivered its Report,[66] and applied its reasoning from its admissibility decision that there had been an interference with Kosiek's freedom of expression. However, the Commission ultimately held, by 10 votes to seven, that

[55] See *Kosiek v. Germany* (App. no. 9704/82) 28 August 1986, para. 15.
[56] *X. v. Federal Republic of Germany* (App. no. 9704/82) 16 December 1982 (Commission decision), p. 244.
[57] *X. v. Federal Republic of Germany* (App. no. 9704/82) 16 December 1982 (Commission decision), p. 248.
[58] *X. v. Federal Republic of Germany* (App. no. 9704/82) 16 December 1982 (Commission decision), p. 249.
[59] *X. v. Federal Republic of Germany* (App. no. 9704/82) 16 December 1982 (Commission decision), p. 249.
[60] *X. v. Federal Republic of Germany* (App. no. 9704/82) 16 December 1982 (Commission decision), p. 249.
[61] *X. v. Federal Republic of Germany* (App. no. 9704/82) 16 December 1982 (Commission decision), p. 249.
[62] *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967). See Note, "Loyalty Oaths," (1968) 77 *Yale Law Journal* 739; and John Nowak, et al., *Constitutional Law* (West Publishing Co., 1978), pp. 359-801.
[63] *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967), 604.
[64] *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967), 604.
[65] *X. v. Federal Republic of Germany* (App. no. 9704/82) 16 December 1982 (Commission Decision), p. 249.
[66] *Kosiek v. Federal Republic of Germany* (App. no. 9704/82) 11 May 1984 (Commission Report).

the interference had been "necessary in a democratic society," as the domestic courts had been entitled to conclude that Kosiek's views rendered him unfit to be a civil servant, taking account of Kosiek's views, which included the "inherent differences between races," the "naiveté of the concept of racial equality," the "biological 'fact' of the inferior intelligence of blacks compared with whites," and the "undesirable consequences of racial intermarriage."[67]

Thus, the Commission's decision in *X. v. Federal Republic of Germany*, was the first time the Commission used the term chilling effect, as the basis for finding that Article 10 protects individuals from indirect limitations on freedom of expression. Further, it was the first time the Commission explicitly relied upon U.S. Supreme Court case law when interpreting freedom of expression principles under Article 10.

2.3.4 The chilling effect on the media

The cases up to this point involved activists, prisoners, and teachers, and the first case involving journalists invoking chilling effect arguments before the Commission occurred in 1984 in *Leigh, Guardian Newspapers Ltd., The Observer Ltd v. the United Kingdom*.[68] The case involved David Leigh, a journalist with *The Guardian* and *The Observer* newspapers, who had written an article on U.K. prison policy, based on government documents which had been read out in open court, and which he had been allowed to inspect in a lawyer's office during a trial. However, contempt of court proceedings were initiated against the lawyer for allowing the documents to be inspected by the journalist, and the House of Lords, the U.K.'s highest court, ultimately found that the lawyer had acted in contempt of court. The House of Lords held that there was an implied obligation on the lawyer not to use the documents for any ulterior purpose despite the fact that they had been read out in open court.[69]

The House of Lords' decision was quite controversial at the time, and had resulted in a three-votes-to-two majority judgment.[70] Leigh noted that in his 30 years as a journalist, it had been common practice to ask parties for documents which had been put in evidence during a public hearing. As such, Leigh and *The Guardian*'s publisher made an application to the European Commission, claiming that the House of Lords' judgment had violated their Article 10 right to freedom of expression. Notably, the applicants argued that the House of Lords' decision had a continuing "chilling effect" on their right to free expression.[71] In particular, the applicants submitted affidavits from various journalists and editors affirming that after the House of Lords decision, lawyers had been more reluctant to allow them access to *any* documents connected with court proceedings.[72] Further, they were hindered in their receipt of information given at public court hearings, because their potential sources were concerned about possible proceedings for contempt; and indeed, the journalists themselves "face the real risk of proceedings for contempt of court."[73]

The question for the Commission was whether the applicants could be considered "victims" under the then-Article 25 of the Convention. First, the Commission noted that it

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[67] *Kosiek v. Federal Republic of Germany* (App. no. 9704/82) 11 May 1984 (Commission Report), para. 104.
[68] *Leigh, Guardian Newspapers Ltd., The Observer Ltd v. the United Kingdom* (App. no. 10039/82) 11 May 1984 (Commission Decision).
[69] *Leigh, Guardian Newspapers Ltd., The Observer Ltd v. the United Kingdom* (App. no. 10039/82) 11 May 1984 (Commission Decision), p. 75.
[70] *Home Office v. Harman* (1981) 1 All ER 532 (House of Lords).
[71] *Leigh, Guardian Newspapers Ltd., The Observer Ltd v. the United Kingdom* (App. no. 10039/82) 11 May 1984 (Commission Decision), p. 76.
[72] *Leigh, Guardian Newspapers Ltd., The Observer Ltd v. the United Kingdom* (App. no. 10039/82) 11 May 1984 (Commission Decision), p. 76.
[73] *Leigh, Guardian Newspapers Ltd., The Observer Ltd v. the United Kingdom* (App. no. 10039/82) 11 May 1984 (Commission Decision), p. 77.

was not empowered under the Convention to examine complaints *in abstracto*, and it did not allow for a kind of *actio popularis* where applicants merely consider a particular legal provision is in conflict with a provision of the Convention.[74] The Commission held that an individual must show that the measures complained of have been applied "to his detriment."[75] The Commission applied this principle to the applicant newspapers, and noted that the newspapers remained free to publish articles on prison policy, and no effort had been made to restrain or fetter such publications. No action had been taken against *The Guardian* when it published Leigh's original story. The Commission held that the concept of "victim" could not be interpreted so broadly as to encompass "every newspaper or journalist who might be affected by the House of Lords judgment."[76] The Commission then elaborated on what it considered "detriment," holding that it must "be of a less indirect and remote nature."[77] It followed, according to the Commission, that the complaint was an *actio popularis*, and the newspapers could not be regarded as victims.

The Commission then examined whether Leigh could claim to be a "victim." The Commission noted that Leigh was able to publish the article "with complete freedom."[78] No attempt had been made to restrain publication or bring contempt proceedings against him. The Commission did accept that as a result of the House of Lords' judgment he was "unable to gain further access to the discovered document on which he based his first article," but the Commission said that "such a restriction must be seen as an indirect consequence of the decision of the House of Lords and one which affected every journalist in the United Kingdom."[79] Thus, the Commission concluded that the applicants could not claim to be a "victim" under the then-Article 25, and as such, the application was rejected as inadmissible.

The Commission in *Leigh* was unwilling to adopt the chilling effect argument put forward by the applicant, and took a markedly different approach to the concept of a victim to that in *Dudgeon* and *Norris*. Curiously, the Commission in *Leigh* did not attempt to square its view with the *Dudgeon* or *Norris* decisions. And notably, the Commission did not engage with the sworn affidavit the applicants submitted to the Commission from journalists and editors on the reluctance of lawyers to provide the media with information following the House of Lords' judgment.

Following the unsuccessful attempt by media applicants in *Leigh* for the Commission to apply chilling effect reasoning, the second case involving the media adopting chilling effect arguments before the Commission was also unsuccessful. The case was *Times Newspapers Ltd. v. the United Kingdom*.[80] The applicant published the *Times* and *Sunday Times* newspapers, and made an application to the European Commission, claiming that Section 69(1) of the U.K.'s Supreme Court Act 1981, which allowed juries to award damages

[74] *Leigh, Guardian Newspapers Ltd., The Observer Ltd v. the United Kingdom* (App. no. 10039/82) 11 May 1984 (Commission Decision), p. 78.
[75] *Leigh, Guardian Newspapers Ltd., The Observer Ltd v. the United Kingdom* (App. no. 10039/82) 11 May 1984 (Commission Decision), p. 78. As authority for this principle, the Commission cited the Court's judgment in *Klass and others v. Germany* (App. no. 5029/71) 6 September 1978, para. 33. Curiously, however, the Commission in *Leigh* omits to cite the next sentence in *Klass*, which reads, "Nevertheless, as both the Government and the Commission pointed out, a law may by itself violate the rights of an individual if the individual is directly affected by the law in the absence of any specific measure of implementation."
[76] *Leigh, Guardian Newspapers Ltd., The Observer Ltd v. the United Kingdom* (App. no. 10039/82) 11 May 1984 (Commission Decision), p. 78.
[77] *Leigh, Guardian Newspapers Ltd., The Observer Ltd v. the United Kingdom* (App. no. 10039/82) 11 May 1984 (Commission Decision), p. 78.
[78] *Leigh, Guardian Newspapers Ltd., The Observer Ltd v. the United Kingdom* (App. no. 10039/82) 11 May 1984 (Commission Decision), p. 78.
[79] *Leigh, Guardian Newspapers Ltd., The Observer Ltd v. the United Kingdom* (App. no. 10039/82) 11 May 1984 (Commission Decision), p. 78.
[80] *Times Newspapers Ltd. v. the United Kingdom* (App. no. 14631/89) 5 March 1990 (Commission Decision).

in libel proceedings, violated Article 10 of the European Convention. In particular, the applicant argued that juries determined damages without any judicial guidance, resulting in "unprincipled, arbitrary and unpredictable" awards, which has an "inhibiting effect" on newspapers.[81] Notably, the applicant relied upon the U.S. Supreme Court judgment in *New York Times Co. v. Sullivan*,[82] for the principle that unpredictable jury awards impose a "pall of fear and timidity ... upon those who would give voice to public criticism,"[83] and creates an atmosphere in which the freedoms guaranteed by Article 10 cannot effectively survive.[84] The applicant also included in its submissions a number of domestic cases where large jury awards had been made,[85] and referred to domestic court judgments where judges had criticised the libel damages regime.[86]

Again, the first question for the Commission was whether the applicant publisher could claim to be a "victim" of a violation of the Convention under the then-Article 25. In this regard, the Commission noted that the applicant had not complained of any arbitrary or excessive award for defamation made by a jury against any of the newspapers which it published, nor had it referred to any article "which it claims these newspapers have been deterred from publishing as a result of their fear of a large award of damages being made."[87] Thus, the Commission considered that the applicant was complaining "essentially of the general state of the law relating to jury trial in defamation actions."[88] Notably, the Commission did admit that in certain circumstances a newspaper could claim to be a victim of a violation of Article 10 where no defamation proceedings had been brought against a newspaper, for example where the law of defamation was "too vague to allow the risk of proceedings to be predicted."[89] However, the Commission found that this was not the case, as the applicant "has not been able to show with reference to any particular jury award or to any specific article or statement that its newspapers have in any respect been inhibited from imparting information."[90] Thus, the Commission held that the applicant could not claim to be a victim under the then-Article 25.

Unlike the *Leigh, Guardian Newspapers Ltd., The Observer Ltd* case, the Commission in *Times Newspapers Ltd.* addressed the *Dudgeon* and *Norris* cases, and sought to distinguish them. The Commission held that in contrast to *Dudgeon* and *Norris*, in which

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[81] *Times Newspapers Ltd. v. the United Kingdom* (App. no. 14631/89) 5 March 1990 (Commission Decision), para. 1.
[82] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
[83] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), p. 278.
[84] *Times Newspapers Ltd. v. the United Kingdom* (App. no. 14631/89) 5 March 1990 (Commission Decision), p. 3.
[85] *Times Newspapers Ltd. v. the United Kingdom* (App. no. 14631/89) 5 March 1990 (Commission Decision), p. 3 ("Recent large awards include £450,000 in the case of *Packard v. Eleftherotypia* (3 June 1987), £500,000 in the case of *Archer v. The Star* (26 July 1987), £260,000 in the case of *Sethia v. Mail on Sunday* (4 November 1987), £300,000 in the case of *Freeman v. Stationery Trade News* (17 March 1988), £310,000 in the case of *Fox & Gibbons v. Sourakia* (13 July 1988), £150,000 in the case of *Maddocks v. Anglers Mail* (April 1989), £ 600,000 in the case of *Sutcliffe v. Private Eye* (May 1989, subsequently reduced on appeal by agreement between the parties) and £1,500,000 in the case of *Lord Aldington v. Nikolai Tolstoy and Nigel Watts* (30 November 1989).").
[86] *Times Newspapers Ltd. v. the United Kingdom* (App. no. 14631/89) 5 March 1990 (Commission Decision), p. 3 (See, e.g., "It is notorious, however, that juries have often awarded utterly extravagant sums in such cases.").
[87] *Times Newspapers Ltd. v. the United Kingdom* (App. no. 14631/89) 5 March 1990 (Commission Decision), para. 1.
[88] *Times Newspapers Ltd. v. the United Kingdom* (App. no. 14631/89) 5 March 1990 (Commission Decision), para. 1.
[89] *Times Newspapers Ltd. v. the United Kingdom* (App. no. 14631/89) 5 March 1990 (Commission Decision), para. 1.
[90] *Times Newspapers Ltd. v. the United Kingdom* (App. no. 14631/89) 5 March 1990 (Commission Decision), para. 1.

the acts concerned "were themselves protected under the Convention," the publication of defamatory material is not as such protected under Article 10.[91] According to the Commission, Article 10 could not be relied upon to assert a right to publish articles or statements of a defamatory nature.

The chilling effect argument was finally successfully put forward in 1991 in the case of *Times Newspapers Ltd. and Neil v. the United Kingdom*,[92] which involved the publication by *The Sunday Times* of extracts from the book *Spycatcher*. The book was written by a former member of the U.K.'s intelligence agency MI5, and contained several allegations of misconduct on the part of MI5. The U.K. Attorney General had already been granted temporary injunctions against two other newspapers, *The Observer* and *Guardian*, from reporting allegations in *Spycatcher* on the basis that the author had breached his "duty of confidentiality" to the British Crown.[93] As such, the Attorney General initiated proceedings against the applicants, namely the publisher of the *Sunday Times* and its editor, for breach of confidence. The House of Lords ultimately held that the applicants were in breach of confidence, as it found that they also came under a duty of confidence not to publish confidential information.[94] As a consequence, the House of Lords ordered the applicants to account for any profits made, and pay costs, to the Attorney General from the publication of extracts from the book.

Subsequently, the applicants made an application to the European Commission, claiming the order violated the right to freedom of expression under Article 10. In particular, the applicants argued that the orders had a "chilling effect on freedom of expression, inhibiting the applicants for the future," and the judgment would "deter future publication of information in circumstances similar to those of the present case," and thus constituted a substantial continuing restriction on freedom of expression.[95]

In April 1991, the Commission found that the application was admissible.[96] Thus, in its later Report in October 1991, the first question for the Commission was where there had been an interference with the applicants' right to freedom of expression under Article 10. On this point, the government argued that the applicants had not accounted for profits to date, and it seemed that sales of the newspaper were not greatly increased.[97] Thus, any profits made were probably minimal. Further, the award of costs against the applicants did not amount to a penalty, being the simple application of a general practice that in all civil cases, the loser pays. However, the Commission held that there had been an interference, finding that although the order to account for profits had not been paid, and may have been "minimal," it had not been renounced nor waived, and "could be enforced if the Attorney General wishes."[98] Further, although the payment of costs is a normal consequence of

[91] *Times Newspapers Ltd. v. the United Kingdom* (App. no. 14631/89) 5 March 1990 (Commission Decision), para. 1.
[92] *Times Newspapers Ltd. and Neil v. the United Kingdom* (App. no. 14644/89) 11 April 1991 (Commission Decision); and *Times Newspapers Ltd. and Neil v. the United Kingdom* (App. no. 14644/89) 8 October 1991 (Commission Report).
[93] *Times Newspapers Ltd. and Neil v. the United Kingdom* (App. no. 14644/89) 8 October 1991 (Commission Report), para. 21.
[94] *Times Newspapers Ltd. and Neil v. the United Kingdom* (App. no. 14644/89) 8 October 1991 (Commission Report), para. 24.
[95] *Times Newspapers Ltd. and Neil v. the United Kingdom* (App. no. 14644/89) 8 October 1991 (Commission Report), para. 35.
[96] *Times Newspapers Ltd. and Neil v. the United Kingdom* (App. no. 14644/89) 11 April 1991 (Commission Decision).
[97] *Times Newspapers Ltd. and Neil v. the United Kingdom* (App. no. 14644/89) 8 October 1991 (Commission Report), para. 36.
[98] *Times Newspapers Ltd. and Neil v. the United Kingdom* (App. no. 14644/89) 8 October 1991 (Commission Report), para. 36.

unsuccessful civil litigation, the Commission held it would be "unrealistic to dismiss the *deterrent effect* of costs' liability in any future exercise of the applicants' freedom of expression on a similar matter."[99] Thus, the account for profits and liability to pay costs must have had a "restraining influence" on the media's freedom of expression, and thus there had been an interference with the applicants' Article 10 right to freedom of expression.[100]

The Commission went on to consider whether the interference had been necessary in a democratic society. The Commission considered the order to account for profits and pay partial costs was necessary in that it met a pressing social need to sanction the applicants' violation of breach of confidence, and given the "minor nature, impact and consequences" of the sanctions, the Commission concluded that they were proportionate to the legitimate aim of preventing the disclosure of information received in confidence and could be regarded as necessary in a democratic society.[101] Thus, the Commission concluded there had been no violation of Article 10. *Times Newspapers Ltd. and Neil* was the first decision from the Commission applying chilling effect reasoning involving the media. While the Commission ultimately concluded that there had been no violation of Article 10, the Commission did apply chilling effect reasoning in finding that there had been an interference with freedom of expression.

Two years later, the Commission delivered one of the most significant decisions applying chilling effect reasoning involving journalistic freedom of expression, and finding a violation of Article 10. The case was *Goodwin v. the United Kingdom*,[102] where a journalist again adopted chilling effect arguments. The applicant was a journalist with *The Engineer* magazine, and in 1989, a confidential source telephoned him, with information that a certain company, Tetra Ltd., had financial problems, "as a result of an expected loss of £2.1 million."[103] The information had been derived from a draft confidential corporate plan by Tetra. The applicant intended to write an article on the information, and contacted the company to "check the facts and seek its comments on the information."[104] On the same day, the company successfully sought an order from the High Court for an injunction restraining the magazine from "publishing any information derived from the corporate plan."[105] The company argued that if the corporate plan was made public, it "could result in a complete loss of confidence in the company on the part of its actual and potential creditors," and "would inevitably lead to problems with Tetra's refinancing negotiations."[106] The High Court also ordered the applicant to disclose his notes of the telephone conversation, and "for the source's identity to be disclosed in order to enable Tetra to bring proceedings against the source."[107] The order was upheld on appeal by both the Court of Appeal and the House of Lords. The applicant was later fined £5,000 for contempt of court.

The applicant made an application to the European Commission, and claimed that the order violated his right to freedom of expression under Article 10. In particular, the applicant

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[99] *Times Newspapers Ltd. and Neil v. the United Kingdom* (App. no. 14644/89) 8 October 1991 (Commission Report), para. 38 (emphasis added).
[100] *Times Newspapers Ltd. and Neil v. the United Kingdom* (App. no. 14644/89) 8 October 1991 (Commission Report), para. 38.
[101] *Times Newspapers Ltd. and Neil v. the United Kingdom* (App. no. 14644/89) 8 October 1991 (Commission Report), para. 56.
[102] See *Goodwin v. the United Kingdom* (App. no. 17488/90) 7 September 1993 (Commission Decision); and *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission Report); and *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber).
[103] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 11.
[104] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 11.
[105] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 11.
[106] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 11.
[107] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 15.

argued that the order had a "chilling effect on the likelihood of sources communicating information to journalists such as himself," and it cast a "disproportionate chilling effect on the free flow of information generally."[108] This argument was based on language from the U.S. Supreme Court judgment in *Branzburg v. Hayes*, where the Court had considered protection of journalistic sources, and where it had been argued that sources would be "measurably deterred from furnishing publishable information, all to the detriment of the free flow of information."[109]

The first question for the Commission was whether there had been an "interference" with freedom of expression. In this regard, the Commission applied chilling effect reasoning, and found that the disclosure order had a "potential chilling effect on the readiness of people to give information to journalists such as the applicant."[110] Thus, the Commission held that compulsion to provide information as to a journalist's sources must constitute a restriction in the "capacity of a journalist freely to receive and impart information without interference by a public authority."[111] The Commission found that the interference was "prescribed by law," and pursued a "legitimate aim," and the main question was whether the interference was "necessary in a democratic society."[112] In this regard, the Commission held that "protection of the sources from which journalists derive information is an essential means of enabling the press to perform its important function of 'public watchdog' in a democratic society."[113] Moreover, "if journalists could be compelled to reveal their sources, this would make it much more difficult for them to obtain information and as a consequence, to inform the public about matters of public interest."[114]

The Commission found that any compulsion to reveal sources "must be limited to exceptional circumstances where vital public or individual interests are at stake."[115] The Commission ultimately concluded that there did not exist "any exceptional circumstances" which would have justified a departure to be made from the fundamental principle that the sources of the press should be protected from disclosure.[116] The Commission stated (a) that it "did not" find that the allegation was "substantiated before the domestic courts" that the company risked being wound up, with a loss of livelihood for 400 employees, if there was any further leak of information; (b) it was "not convinced that the giving of information as to possible losses and the intention of the company to seek further financing would have entailed the dire consequences predicted with regard to confidence of customers, suppliers and financing partners," and (c) despite the continuing anonymity of the source the company had "apparently suffered none of the harm adverted to in the proceedings in the domestic courts."[117] On the basis of these considerations, the Commission held that the restrictions

[108] *Goodwin v. the United Kingdom* (App. no. 17488/90) 7 September 1993 (Commission Admissibility Decision), p. 5.
[109] *Branzburg v. Hayes*, 408 U.S. 665 (1972), p. 680. Notably, the Supreme Court in *Branzburg* held, by five-votes-to-four, that "requiring newsmen to appear and testify before state or federal grand juries" does not violate the "freedom of speech and press guaranteed by the First Amendment." (*Branzburg v. Hayes*, 408 U.S. 665 (1972), p. 667). Indeed, the Supreme Court majority noted that "[e]stimates of the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative." (*Branzburg v. Hayes*, 408 U.S. 665 (1972), p. 693-694).
[110] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission Report), para. 48.
[111] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission Report), para. 48.
[112] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission Report), para. 50-58.
[113] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission Report), para. 64.
[114] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission Report), para. 64
[115] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission Report), para. 64
[116] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission Report), para. 69.
[117] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission Report), para. 67.

which the disclosure order imposed on the applicant could not reasonably be considered to have been "necessary in a democratic society," and thus in violation of Article 10.[118]

The Commission in *Goodwin* applied the chilling effect principle in finding that there had been an interference with freedom of expression, and crucially, also applied the principle in finding that the interference had not been necessary in a democratic society. Indeed, to protect journalistic sources from a chilling effect, the Commission fashioned a strict test that there must exist exceptional circumstances before a journalistic may be ordered to reveal a source. The strength of this test is starkly evident by the manner in which the Commission rejected the domestic courts' reasons (a) - (c), essentially rejecting that the domestic courts had a sufficient basis for the findings they had made. Such as approach would also be later adopted by the Court in its *Goodwin* judgment.[119]

A year later, however, the Commission reverted to not adopting chilling effect arguments made by journalists. The case was *Brind and Others v. the United Kingdom*,[120] where the applicants included a number of BBC journalists and other journalists based in London. The case concerned two Directions issued by the U.K. Secretary of State for the Home Department in 1988 under the Broadcast Act 1981, which prohibited the broadcast of interviews with members of, and spokesmen, for certain Northern Ireland terrorist organisations, and also including the Sinn Féin and Republican Sinn Féin political parties. The applicants challenged the Directions in the domestic courts, but the House of Lords ultimately held that it was within the Secretary of State's discretion to find it "necessary to deny to the terrorist and his supporters the opportunity to speak directly to the public through the most influential of the media of communication and that this justified some interference with editorial freedom."[121]

The applicants then made an application to the European Commission, arguing that the Directions were an unjustified interference with their right to receive and impart information under Article 10. In particular, the applicants argued that the Directions had a "'chilling effect' on coverage of issues in Northern Ireland," and included a number of examples,[122] such as past interviews with Sinn Féin members which could now not be broadcast, and interviews with local Sinn Féin politicians on topics such as hospital closures. Further, the penalty for non-compliance with the Directions, namely a loss of the right to broadcast, was "so enormous that broadcasters will always err on the safe side, with the result that a substantial 'chilling effect' is brought about."[123]

The first question for the Commission was whether there had been an interference with the applicants' freedom of expression. The Commission held that the Directions had a

[118] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission Report), para. 69.
[119] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996. See Section 2.4.1 below.
[120] *Brind and Others v. the United Kingdom (*App. no. 18714/91) 9 May 1994 (Commission Decision).
[121] *Brind and Others v. the United Kingdom (*App. no. 18714/91) 9 May 1994 (Commission Decision), p. 4.
[122] *Brind and Others v. the United Kingdom (*App. no. 18714/91) 9 May 1994 (Commission Decision), p. 5 (for example, an interview with Gerry Adams, President of Sinn Fein and later Member of Parliament for West Belfast, which was conducted in 1982, can no longer be retransmitted; another interview with Gerry Adams MP conducted by the "World in Action" programme cannot be retransmitted; an interview with Ms McGuiness, a Sinn Fein local councillor, produced in the week following the Directive, which relates inter alia to her campaign over the closure of the local hospital was banned by the IBA in consequence of the directives; an interview with a Sinn Fein spokesman about the SDLP/Sinn Fein talks, conducted and transmitted by the BBC in September 1988, cannot be retransmitted; "phone-in" radio programmes require examination of callers' political views prior to permitting them access to the airwaves; historical programmes such as "Ireland - A Television History" and "The Troubles" have been refused repeat showings because they contain historical documentary footage of notable Irish leaders who were in the past members or supporters of the IRA or Sinn Fein; a record made by the Irish folk singing group The Pogues was banned from air play on radio stations by the IBA on the grounds that its lyrics were supportive of the IRA).
[123] *Brind and Others v. the United Kingdom* (App. no. 18714/91) 9 May 1994 (Commission Decision), p. 6.

"real impact" on the way the applicants undertook their journalistic functions, and found they had been subjected to an interference with their rights under Article 10.[124] Then, the Commission held that the Directives had been "prescribed by law," and the main question was whether the interference was necessary in a democratic society. The Commission noted that the applicants were "affected by the Directions in the way they perform their functions," and it must be "inconvenient for journalists to have to use the voice of an actor for the broadcasting of certain interviews," but the Commission concluded that bearing in mind the "margin of appreciation," the "limited extent" of the interference with the applicants' rights and the "importance of measures to combat terrorism," that it cannot be said that the interference was disproportionate to the aim sought to be pursued.[125] Thus, the Commission rejected the application as manifestly ill-founded.

Brind was notable for the Commission not applying the chilling effect principle in finding that there had been an interference with freedom of expression, and merely stating that the Directions had a "real impact" on journalistic functions, without further elaboration. The applicants in *Brind* also introduced evidence of the chilling effect, but rather than engage with these examples of programmes not being broadcast, the Commission merely held that there had been "inconveniences" for the journalists. *Brind* was also the first invocation of the margin of appreciation principle in the context of chilling effect arguments, and may explain the limited nature of the review adopted by the Commission.

2.3.5 The chilling effect of surveillance

The Commission had also considered government surveillance of activists, and whether a chilling effect on freedom of expression may arise. The case in point was *P.H. and H.H. v. the United Kingdom*,[126] which arose when Channel 4 broadcast revelations by a former member of MI5 that the non-governmental organisation, the National Council for Civil Liberties (NCCL), was under surveillance for "subversive" activities.[127] It was also revealed that the first applicant, who was General Secretary of the NCCL, and the second applicant, a legal officer with the NCCL, had both been classified as "subversive" and "communist sympathisers" by MI5 due to their prominent participation in the activities of the NCCL.[128] Following a letter from the U.K. Home Secretary to the applicants, declining to order an enquiry, and failing to provide an assurance that they were not a target of surveillance, the applicants made an application to the European Commission alleging a violation of their right to freedom of expression under Article 10, and their right to private life under Article 8.

On the Article 10 point, the applicants argued that assessments made about them by MI5 may be used to damage them in their political or professional careers, and this prospect can have a "chilling effect on their expressions of honest opinion" and as a "potential reprisal for exercising their right of free speech."[129] Further, Article 10 protected against not only governmental prohibition of certain views, but also interferences which have the effect of "deterring people from expressing their views," and surveillance has a chilling effect not only on them but on those who communicate with them, and will be deterred from expressing their true opinions and beliefs.[130] These submissions by the applicants were similar to language in

[124] *Brind and Others v. the United Kingdom* (App. no. 18714/91) 9 May 1994 (Commission Decision), p. 7.
[125] *Brind and Others v. the United Kingdom* (App. no. 18714/91) 9 May 1994 (Commission Decision), p. 11.
[126] *P.H. and H.H. v. the United Kingdom* (App. no. 12175/86) 12 May 1988 (Commission Decision); and *Hewitt and Harman v. the United Kingdom* (App. no. 12175/86) 9 May 1989 (Commission Report).
[127] *P.H. and H.H. v. the United Kingdom* (App. no. 12175/86) 12 May 1988 (Commission Decision), p. 3.
[128] *P.H. and H.H. v. the United Kingdom* (App. no. 12175/86) 12 May 1988 (Commission Decision), p. 3.
[129] *P.H. and H.H. v. the United Kingdom* (App. no. 12175/86) 12 May 1988 (Commission Decision), p. 4.
[130] *P.H. and H.H. v. the United Kingdom* (App. no. 12175/86) 12 May 1988 (Commission Decision), p. 8.

the 1972 U.S. Supreme Court judgment in *Laird v. Tatum*,[131] a similar case which had arisen following the publication of an article in the *Washington Monthly* magazine, which alleged that the U.S. military regularly engaged in surveillance of civilian political activity.[132] In *Laird*, the Court had stated that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights."[133]

Notably, the Commission found that the application was admissible.[134] However, when the Commission delivered its Report, it only found a violation of Article 8, and held that it did "not consider it necessary to examine" the complaints relating to Articles 10 in view of the finding of a violation of Article 8.[135] The important point is that while the Commission did not examine the Article 10 chilling effect argument in the end, it had found the Article 10 complaint admissible. As discussed below in Chapter 3, the Court would ultimately adopt chilling effect reasoning in later judgments concerning the surveillance of journalists.[136]

2.3.6 The chilling effect on the right of individual petition

Professor Kevin Boyle returned before the Commission in 1996 to argue on behalf of a number of applicants in similar circumstances to those in *Donnelly* concerning police brutality. But this time, Boyle used the chilling effect principle to claim that there had been a violation of the right of individual petition to the Court. The case was *Elçi and Others v. Turkey*,[137] where the applicants were sixteen lawyers who had been arrested and detained under Turkish anti-terrorism law in late 1993 in south-east Turkey. The applicants initiated proceedings before the Diyarbakir State Security Court, complaining of torture, ill-treatment or undue pressure during their police custody. After the hearings, the State Security Court took certain procedural decisions in which, however, no mention was made of the complaints relating to torture, ill-treatment or undue pressure.[138] Subsequently, the applicants made an application to the European Commission, alleging violations of Article 3 (prohibition of torture), Article 5 (right to liberty and security), Article 8 (right to private life) and the then-Article 25 (right to individual petition),[139] over their arrest and circumstances of custody.

The applicants were represented by Boyle, and on the then-Article 25 point (States "undertake not to hinder in any way the effective exercise" of the right to petition the

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[131] *Laird v. Tatum*, 408 U.S. 1 (1972).
[132] *Laird v. Tatum*, 408 U.S. 1 (1972). See Karen A. Shaffer, "Tatum v. Laird: Military Encroachment On First Amendment Rights," (1971) 21 *American University Law Review* 264 (1971), and Francis Pennington, "First Amendment Suits Against Governmental Surveillance: Getting Beyond the Justifiability Threshold," (1976) 20 *St Louis University Law Journal* 692.
[133] *Laird v. Tatum*, 408 U.S. 1 (1972), p. 11.
[134] *P.H. and H.H. v. the United Kingdom* (App. no. 12175/86) 12 May 1988 (Commission Decision), p. 11.
[135] *Hewitt and Harman v. the United Kingdom* (App. no. 12175/86) 9 May 1989 (Commission Report), para. 57.
[136] See Chapter 3, Section 3.3.3.
[137] *Elçi and Others, Sahin v. Turkey* (App. nos. 23145/93 and 25091/94) 2 December 1996 (Commission Decision); and *Elçi and Others v. Turkey* (App. nos. 23145/93 and 25091/94) 13 December 2003.
[138] *Elçi and Others, Sahin v. Turkey* (App. nos. 23145/93 and 25091/94) 2 December 1996 (Commission Decision), p. 13.
[139] European Convention, former Article 25 ("The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in [the] Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.").

Commission), Boyle argued that the applicants had been charged simply on the basis of making applications to the Commission, and that the detention of all the applicants and the treatment to which they were subjected could have a "chilling effect" on their preparedness to assist in bringing cases before the Commission.[140] Notably, the Commission declared the application admissible in late 1996.[141] Of further note, the case was transmitted to the European Court on 1 November 1999 under Protocol No. 11 to the European Convention,[142] as the Commission had not yet completed its examination of the merits of the applications by that date.[143]

Importantly, the Court would later find violations of Articles 3, 5 and 8, including over particularly "serious and cruel" physical and mental violence against some applicants while in police custody.[144] On the Article 25 point, the Court adopted chilling effect reasoning, and laid down the principle under Article 25 (which was now Article 34), that the applicants should be able to communicate freely with the Convention organs without being subjected to any form of pressure from the authorities to withdraw or modify their complaints, which includes "improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention remedy."[145] Applying this principle, the Court accepted that the events to which the applicants were subjected "could have had a damaging effect on the applicants' professional activities, albeit of a temporary nature." While the Court ultimately concluded that there had been no violation of the former Article 25 due to "considerable confusion" over whether there had been references to "European human rights associations" during the applicants' interrogations,[146] the Court expressed its concern as to the "inevitable chilling effect that this case must have had on all persons involved in criminal defence work or human rights protection in Turkey."[147]

2.3.7 Assessing the Commission's view

From reading through the Commission's case law, and having regard to the questions posed in the introduction to this Chapter,[148] a number of observations may be made. The first concerns the influence of applicants adopting chilling-effect arguments, and the success of these arguments before the Commission. Consider *Dudgeon* and *Norris*, where the Commission adopted the applicants' arguments, finding that the chilling effect of the fear of prosecution will permit an applicant to claim to be a victim of a violation of the Convention, even where no prosecution has taken place.

While these decisions were delivered in the early 1980s, this chilling effect principle based on the fear and risk of prosecution has been built upon in the European Court's case

[140] *Elçi and Others, Sahin v. Turkey* (App. nos. 23145/93 and 25091/94) 2 November 1996 (Commission Decision), p. 13.
[141] *Elçi and Others, Sahin v. Turkey* (App. nos. 23145/93 and 25091/94) 2 November 1996 (Commission Decision).
[142] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, 11 May 1994, E.T.S. No. 155, Article 5(3) ("Applications which have been declared admissible at the date of entry into force of this Protocol shall continue to be dealt with by members of the Commission within a period of one year thereafter. Any applications the examination of which has not been completed within the aforesaid period shall be transmitted to the Court which shall examine them as admissible cases in accordance with the provisions of this Protocol.").
[143] *Elçi and Others v. Turkey* (App. nos. 23145/93 and 25091/94) 13 November 2003, para. 6.
[144] *Elçi and Others v. Turkey* (App. nos. 23145/93 and 25091/94) 13 November 2003, para. 646.
[145] *Elçi and Others v. Turkey* (App. nos. 23145/93 and 25091/94) 13 November 2003, para. 711.
[146] *Elçi and Others v. Turkey* (App. nos. 23145/93 and 25091/94) 13 November 2003, para. 712.
[147] *Elçi and Others v. Turkey* (App. nos. 23145/93 and 25091/94) 13 November 2003, para. 714.
[148] (a) how did the chilling effect first enter the Commission's case law, (b) what European Convention rights were involved, and (c) how was the chilling effect principle applied in freedom of expression cases.

law over four decades, and has been applied in important judgments, such as the 2004 Grand Chamber judgment in *Cumpănă and Mazăre v. Romania*,[149] finding that the fear of prison sentences has a chilling effect on journalistic freedom of expression,[150] or the 2011 judgment in *Altuğ Taner Akçam v. Turkey*,[151] that the fear of prosecution and future risk of prosecution created a chilling effect and self-restraint in an academic's writings.[152] Frederik Schauer similarly identified fear and risk to be the central pillars in the U.S. Supreme Court's chilling effect doctrine.[153] Schauer explained that the danger of the chilling effect lies in the fact that deterred by the "fear of punishment," some individuals refrain from saying or publishing that which they lawfully could and should.[154] Thus, something that "ought" to be expressed is not.[155] This creates a harm that flows from the non-exercise of a constitutional right, but also a general societal loss which results when the freedoms guaranteed by the First Amendment are not exercised. [156] Indeed, the European Court itself has recognised this harm, finding that the chilling effect "works to the detriment of society as a whole."[157] Thus, the seeds of this principle were laid by the Commission's early decisions such as *Dudgeon* and *Norris* in their concern for the chilling effect from the fear of prosecution, built upon the influential submissions of the applicants.

Similarly, chilling effect arguments by the applicants in *Goodwin,* and *Elçi* were also successful, and would also be built upon by the Commission, and indeed by the Court when it considered these two cases.[158] While in *Times Newspapers Ltd. and Neil*, and *Brind,* chilling effect arguments were also effective for the applicants in claiming that there had been an interference with their freedom of expression; but not ultimately on whether Article 10 had been violated. However, it must also be recognised that the Commission was not receptive to chilling effect arguments in all the cases, notably the media applicants in the *Leigh* and *Times Newspapers Ltd.* cases. In both cases, the Commission found the applications inadmissible, as the applicants could not be considered as a victim of a violation of the Convention under the former Article 25. In *Leigh*, the Commission found that the concept of victim could not be interpreted so broadly as to encompass every newspaper or journalist who might be affected by the domestic judgment at issue,[159] while the restriction on the journalist had only been an

[149] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber).
[150] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114.
[151] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011.
[152] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011.
[153] Schauer, Frederick, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'," (1978) 58 *Boston University Law Review* 685
[154] Frederick Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'," (1978) 58 *Boston University Law Review* 685, p. 393.
[155]Frederick Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'," (1978) 58 *Boston University Law Review* 685, p. 393.
[156] Frederick Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'," (1978) 58 *Boston University Law Review* 685,
[157] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114. See also, *Kaperzyński v. Poland* (App. no. 43206/07) 3 April 2012, para. 70; and *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 167.
[158] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 39 ("Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest."); and *Elci and Others v. Turkey* (App. nos. 23145/93 and 25091/94) 13 November 2003, para. 714 ("More generally, the Court expresses its concern as to the inevitable chilling effect that this case must have had on all persons involved in criminal defence work or human rights protection in Turkey.")
[159] *Leigh, Guardian Newspapers Ltd., The Observer Ltd v. the United Kingdom* (App. no. 10039/82) 11 May 1984 (Commission Decision), p. 78.

"indirect consequence."[160] Similarly, in *Times Newspapers Ltd*, the Commission held that the applicant had "not been able to show with reference to any particular jury award or to any specific article or statement that its newspapers have in any respect been inhibited from imparting information."[161]

The second point is the influence of U.S. Supreme Court case law in applicants' chilling effect arguments before the European Commission. In *Donnelly*, the applicants relied upon language from the Supreme Court's judgment in *Dombrowski*; in *X. v. Federal Republic of Germany*, the Commission itself explicitly cited the Supreme Court's judgment in *Keyishian*; in *Times Newspapers Ltd.* the applicant cited the Supreme Court's judgment in *New York Times v. Sullivan*; the applicant in *Goodwin* relied upon language from a dissenting opinion in the Supreme Court's *Branzburg* judgment; while the applicants in *P.H. and H.H.* also relied upon language from the Supreme Court's *Laird* judgment. Thus, given the Commission also used language from *Dombrowski* in its *Dudgeon* and *Norris* decisions, it is fair to say that U.S. Supreme Court case law on the chilling effect principle played a significant role not only in applicants' submissions before the Commission, but also in the Commission's development of its own chilling effect principle.

The third point concerns which articles of the Convention are involved. Two-thirds of the cases involved Article 10 and the right to freedom of expression,[162] while there was one case concerning Article 3,[163] two concerning Article 8,[164] and one concerning the former Article 25.[165] And the final point concerns under what limb of Article 10 chilling effect reasoning is used: in *Dudgeon* and *Norris*, chilling effect reasoning was used to find that the applicant could be considered a "victim" under the former Article 25; in *X. v. Federal Republic of Germany*, *Times Newspapers Ltd. and Neil*, and *Brind*, the Commission used chilling effect reasoning in finding that there had been an interference with Article 10; while

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[160] *Leigh, Guardian Newspapers Ltd., The Observer Ltd v. the United Kingdom* (App. no. 10039/82) 11 May 1984 (Commission Decision), p. 78.

[161] *Times Newspapers Ltd. v. the United Kingdom* (App. no. 14631/89) 5 March 1990 (Commission Decision), para. 1.

[162] *X. v. Federal Republic of Germany* (App. no. 9228/80) 16 December 1982 (Commission Decision) (Article 10 and dismissal over anti-constitutional views); *Kosiek v. Federal Republic of Germany* (App. no. 9704/82) 11 May 1984 (Commission Report) (Article 10 and dismissal over anti-constitutional views); *Leigh, Guardian Newspapers Ltd., The Observer Ltd. v. the United Kingdom* (App. no. 10039/82) 11 May 1984 (Commission Decision) (Article 10 and journalist's access to documents opened in court); *P.H. and H.H. v. the United Kingdom* (App. no. 12175/86) 12 May 1988 (Commission Decision) (Article 10 and surveillance of civil rights activists); *Hewitt and Harman v. the United Kingdom* (App. no. 12175/86) 9 May 1989 (Commission Report) (Article 10 and surveillance of civil rights activists); *Times Newspapers Ltd. v. the United Kingdom* (App. no. 14631/89) 5 March 1990 (Commission Decision) (Article 10 and damages awards in defamation proceedings); *Times Newspapers Ltd. and Neil v. the United Kingdom* (App. no. 14644/89) 11 April 1991 (Commission Decision) (Article 10 and order against newspaper to account for profits over publication of book extracts); *Times Newspapers Ltd. and Neil v. the United Kingdom* (App. no. 14644/89) 8 October 1991 (Commission Report) (Article 10 and order against newspaper to account for profits over publication of book extracts); *S. and G. v. the United Kingdom* (App. no. 17634/91) 2 September 1991 (Commission Decision) (Article 10 and artist's prosecution for outraging public decency); *Goodwin v. the United Kingdom* (App no 17488/90) 7 September 1993 (Commission Decision) (Article 10 and protection of journalistic sources); *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission Report) (Article 10 and protection of journalistic sources); and *Brind and Others v. the United Kingdom* (App. no. 18714/91) 9 May 1994 (Commission Decision) (Article 10 and prohibition on broadcasting interviews with certain political parties).

[163] *Donnelly v. the United Kingdom* (App. nos. 5577/72 and 5583/72) 5 April 1973 (Commission Decision).

[164] *X. v. the United Kingdom* (App. no. 7525/76) 3 March 1978 (Commission Decision); *Dudgeon v. the United Kingdom* (App. no. 7525/76) 13 March 1980 (Commission Report); *Norris and National Gay Federation v. Ireland* (App. no. 10581/83) 16 May 1985 (Commission Decision); and *Norris v. Ireland* (App. no. 10581/83) 12 March 1987 (Commission Report).

[165] *Elçi and Others, Sahin v. Turkey* (App. nos. 23145/93 and 25091/94) 2 December 1996 (Commission Decision).

in *Goodwin*, the Commission not only used chilling effect reasoning in finding that there had been an interference with Article 10, but also in finding that the interference had not been necessary in a democratic society. Thus, the Commission mainly used chilling effect reasoning when finding that there had been an interference with Article 10.

2.4 European Court of Human Rights

While the previous section concerned the European Commission's application of the chilling effect, this section provides an analysis of the chilling effect in the European Court's case law, in particular how the chilling effect entered the Court's case law, what European Convention rights were involved, and how the chilling effect principle developed. As mentioned in Chapter 1, research for this thesis resulted in the identification of over 348 judgments and decisions to date where the European Court has used chilling effect reasoning.[166] Further, this research also resulted in identifying 23 judgments to date where the 17-judge Grand Chamber of the Court has considered, or applied, chilling effect reasoning.[167]

In order to provide an overall discussion of how the chilling effect developed over four decades of case law, the analysis in this section is divided into different periods of the Court since its foundation: first, the period 1959 - 1998 of the old Court prior to Protocol No. 11; then 1998 - 2007, when the new Court was under the presidency of Judge Luzius Wildhaber; then 2007 - 2011 under the presidency of Judge Jean-Paul Costa; 2011 - 2012 under the presidency of Judge Nicolas Bratza; 2012 - 2015 under the presidency of Judge Dean Spielmann; and finally, 2015 - 2018, under the presidency of Judge Guido Raimondi.[168]

For each period, the number of judgments and decisions where the Court considered, or applied, chilling effect reasoning is set out, in addition to the Convention articles, and specific issues under consideration. This is to provide insight into how the Court's case law developed over the years, and the frequency of the chilling effect being applied in the case law. Further, there is a specific focus in the discussion on the Grand Chamber judgments which have considered, or applied, chilling effect reasoning. There are a number of reasons for focusing the discussion on Grand Chamber judgments in this chapter. The first is practical, given that there are over 348 judgments and decisions to be considered, tracing the chilling effect's development through the Grand Chamber's case law provides a manageable method to understand the main issues that have arisen during the past decades.

The second reason is of more substance: Grand Chamber judgments have more weight as authorities than Chamber judgments and decisions. There is a questionable view, even expressed by national judges, that the European Court does not have a principle of precedent, also known as *stare decisis* in Latin.[169] However, since 2001, the Court has developed such a principle: "it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from *precedents* laid down in

[166] See Appendix 1 for a list of all 348 judgments and decisions delivered by the Court where "chilling effect," or "*effet dissuasif*," was explicitly mentioned, during the period 1959 until 2018.
[167] See references in footnote 4 above, and Appendix 1.
[168] Judge Luzius Wildhaber was President of the Court from 1 November 1998 - 18 January 2007; Judge Jean-Paul Costa was President of the Court from 19 January 2007 - 3 November 2011; Judge Nicolas Bratza was President of the Court from 4 November 2011 - 31 October 2012; Judge Dean Spielmann was President of the Court from 1 November 2012 - 31 October 2015; Judge Guido Raimondi is President of the Court from 1 November 2018 - present. See European Court of Human Rights, "Judges of the Court since 1959," May 2017.
[169] For example, a U.K. Supreme Court justice has written that European Court case law "is not binding upon anyone, even upon them. They have no concept of *ratio decidendi* and *stare decisis*." (see Brenda Hale, "*Argentoratum Locutum*: Is Strasbourg or the Supreme Court Supreme?" (2012) 12 *Human Rights Law Review* 65, p. 68.

previous cases."[170] This principle has been applied in many judgments, with the Court referring to prior case law as "precedent,"[171] and the principle was recently reaffirmed by the Grand Chamber in 2016, with the Court reiterating that "it should not depart, without good reason, from precedents laid down in previous cases."[172] Indeed, the Grand Chamber held that in certain cases, the "Court's precedents should be followed even more strictly so as to ensure that the requirements of foreseeability and consistency, which serve the interests of all the parties to the proceedings, are met."[173]

Within this system, it is the Grand Chamber which has the power to reverse the judgment of a Chamber, such as in *Sabri Güneş v. Turkey*, where the Grand Chamber reversed the finding of a Chamber, with the Grand Chamber finding that there had been "no reason to justify departing from the precedents."[174] Moreover, Article 30 of the Convention provides that "where the resolution of a question before the Chamber might have a result *inconsistent* with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber."[175] And as is evident in the discussion below, Grand Chamber judgments routinely only cite previous Grand Chamber judgments when considering the chilling effect. For example, in one of the more recent Grand Chamber judgment considering the chilling effect, *Baka v. Hungary*,[176] the Court only cited previous Grand Chamber judgments when discussing the chilling effect, even though there were many other Chamber judgments on point.[177]

A final reason for focusing on Grand Chamber judgments, and particularly during the period of a Court's president, is that during a certain judge's presidency, the same President and Vice-President of the Court, and Presidents of the Sections, will usually sit in Grand Chamber judgments during this period, as per the Rules of the Court.[178] This means that while some of the 17 judges who sit in any given Grand Chamber judgment are selected by the "drawing of lots,"[179] the President, Vice Presidents, and Section Presidents, usually sit consistently, and allow analysis of how this group of judges applies the chilling effect across a number of Grand Chamber judgments.

2.4.1 The old Court (1959 - 1998)

Beginning the examination with the European Court prior to Protocol No. 11 coming into force, the European Court's first explicit application of the "chilling effect" term was in *Goodwin v. the United Kingdom*,[180] which as discussed above, concerned freedom of expression and the protection of journalistic sources. Following the Commission's decision in

[170] *Chapman v. the United Kingdom* (App. no. 27238/95) 18 January 2001 (Grand Chamber), para. 70 (emphasis added).
[171] See, for example, *Kart v. Turkey* (App. no. 8917/05) 3 December 2009 (Grand Chamber), para. 64.
[172] *Magyar Helsinki Bizottság v. Hungary* (App. no. 18030/11) 8 November 2016 (Grand Chamber), para. 150.
[173] *Sabri Güneş v. Turkey* (App. no. 27396/06) 29 June 2012 (Grand Chamber), para. 50.
[174] *Sabri Güneş v. Turkey* (App. no. 27396/06) 29 June 2012 (Grand Chamber), para. 59.
[175] European Convention, Article 30.
[176] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber).
[177] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 160 (citing *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 95; and *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 127).
[178] European Court of Human Rights, Rules of Court, Rule 24(2)(a) ("The Grand Chamber shall include the President and the Vice-Presidents of the Court and the Presidents of the Sections.").
[179] European Court of Human Rights, Rules of Court, Rule 24(2)(e) ("The judges and substitute judges who are to complete the Grand Chamber in each case referred to it shall be designated from among the remaining judges by a drawing of lots by the President of the Court in the presence of the Registrar.").
[180] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber).

1994, the Commission referred the case to the European Court, which delivered its judgment in 1996. The main question for the Court had been whether the disclosure order and fine were "necessary in a democratic society" under Article 10.

First, the Court laid down a number of principles, stating that "protection of journalistic sources" was one of the "basic conditions for press freedom."[181] The Court stated that without the protection of journalistic sources, sources "may be deterred from assisting the press in informing the public on matters of public interest."[182] This would mean the "public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected."[183] Crucially, the Court held that having regard to the "potentially chilling effect" an order for source disclosure has on the exercise of press freedom, such as an order "cannot be compatible" with Article 10 unless it is justified by an "overriding requirement in the public interest."[184] Moreover, the Court held that "limitations on the confidentially of journalistic sources" call for the "most careful scrutiny" by the Court.[185]

The Court then sought to apply these principles to the disclosure order. The Court first held that the disclosure order "merely served to reinforce the injunction," as the threat of damage to the company "had thus already largely been neutralised by the injunction," as "the injunction was effective in stopping dissemination of the confidential information by the press."[186] The Court noted that the purpose of the disclosure order was to prevent publication "directly by the applicant journalist's source," and to bring "proceedings against him or her for recovery of the missing document, for an injunction against further disclosure by him or her and for compensation for damage," and "unmasking a disloyal employee or collaborator, who might have continuing access to its premises, in order to terminate his or her association with the company."[187]

The Court admitted that these were "undoubtedly relevant reasons."[188] However, the Court held that the "considerations to be taken into account by the Convention institutions for their review under paragraph 2 of Article 10 (art. 10-2) tip the balance of competing interests in favour of the interest of democratic society in securing a free press."[189] The Court held that bringing proceedings against the source, the residual threat of damage through dissemination of the confidential information otherwise than by the press, in obtaining compensation and in unmasking a disloyal employee or collaborator were, even if considered cumulatively, sufficient to outweigh the vital public interest in the protection of the applicant journalist's source."[190] The Court concluded that "the further purposes served by the disclosure order, when measured against the standards imposed by the Convention, amount to an overriding requirement in the public interest."[191]

Focussing on the Court's chilling effect reasoning, and attempting to determine what the Court exactly means when it mentions a chilling effect, it seems that the chilling effect the Court has in mind is the "deterring effect" an order for source disclosure has on other sources "from assisting the press in informing the public on matters of public interest."[192] In

[181] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 39.
[182] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 39.
[183] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 39.
[184] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 39.
[185] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 40.
[186] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 42.
[187] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 44.
[188] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 45.
[189] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 45.
[190] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 45.
[191] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 45.
[192] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 39.

other words, there is a chilling effect on the exercise of press freedom, where the public-watchdog role of the press "may be undermined," and the press' ability to provide information "may be adversely affected."[193] Thus, there are two elements to the chilling effect, namely the deterrence" of sources from assisting the press, and the consequent adverse effect on the press in providing information. The second point concerning the chilling effect is that the Court seems to be taking account of future risk. In this regard, the Court mentions the "potentially" chilling effect, sources "may" be deterred, and the press' public-watchdog role "may" be undermined and "may" be adversely affected.[194] The Court's use of "potentially," and "may," rather than, *the* chilling effect, or *will be* undermined, seems to suggest that the Court is concerned about future risk, rather than a definite and certain chilling effect.

The final point is whether the recognition of a chilling effect by the Court has any consequence in the outcome of the judgment. There is an argument that the Court's recognition of the chilling effect has a strong role in the Court's conclusion: notably, the Court states that the "considerations to be taken into account by the Convention institutions for their review under paragraph 2 of Article 10 "tip the balance of competing interests in favour of the interest of democratic society in securing a free press."[195] The Court explicitly refers to "paragraphs 39 and 40" of its judgment as the "considerations" that tip this balance. The Court's reasoning concerning the chilling effect is contained in paragraph 39, and according to the Court, protecting the press from the "potentially chilling effect" was a crucial "consideration" for the Court's review.

2.4.2 Presidency of Judge Wildhaber (1998 - 2006)

Following the establishment of the European Court on a permanent basis, the first judgment explicitly applying the chilling effect principle was delivered a year later in 1999 in *Smith and Grady v. the United Kingdom*.[196] It concerned the applicants' discharge from the U.K. air force on the basis of their sexual orientation. The Court ultimately held that there had been a violation of the right to respect for private life under Article 8. However, the applicants also argued that the Ministry of Defence's policy against homosexuals in the armed forces violated their right to freedom of expression, as it had a "chilling effect" on their right to communicate their own sexual identity and was a "powerful inhibiting factor" in their right to express themselves.[197] Importantly, the Court held that the "chilling effect" of the policy "could constitute an interference with their freedom of expression," given the "silence" it "imposed" on the applicants.[198] However, the Court concluded that the Article 10 issue was "subsidiary" to Article 8, and decided it was not necessary to also fully examine the Article 10 issue.[199] Nonetheless, the Court laid down the principle that where a government policy imposes a threat upon a person's freedom of expression, this will constitute a chilling effect, and an interference with freedom of expression for the purposes of Article 10. The Court provided no authority for its proposition concerning the chilling effect, but was somewhat similar to the Court's judgments in *Dudgeon* and *Norris*, where it had found violations of Article 8. While the Court did not use the term chilling effect, in both *Dudgeon* and *Norris*, the Court held that the "very existence" of the legislation at issue "continuously and directly

[193] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 39.
[194] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 39.
[195] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 45.
[196] *Smith and Grady v. the United Kingdom* (App. nos. 33985/96 and 33986/96) 27 September 1999.
[197] *Smith and Grady v. the United Kingdom* (App. nos. 33985/96 and 33986/96) 27 September 1999, para. 126.
[198] *Smith and Grady v. the United Kingdom* (App. nos. 33985/96 and 33986/96) 27 September 1999, para. 127.
[199] *Smith and Grady v. the United Kingdom* (App. nos. 33985/96 and 33986/96) 27 September 1999, para. 128.

affects" private life due to the fear of the law.[200] This type of chilling effect reasoning differed from the chilling effect reasoning applied in *Goodwin*, concerning "deterring" sources from "assisting the press."[201]

Following the *Smith and Grady* judgment, there were four Grand Chamber judgments that applied or considered chilling effect reasoning during the Presidency of Judge Wildhaber, namely *Wille v. Liechtenstein*, *Pedersen and Baadsgaard v. Denmark*, *Cumpănă and Mazăre v. Romania*, and *Kyprianou v. Cyprus*.[202] A notable point is that all of these Grand Chamber judgments concerned Article 10 and the right to freedom of expression, with two judgments concerning journalists convicted of defamation (*Pedersen and Baadsgaard* and *Cumpănă and Mazăre*), while the other two concerned a judge's non-reappointment over remarks reported in a newspaper (*Wille*), and a lawyer's conviction for contempt of court (*Kyprianou*). Thus, chilling effect reasoning was mainly adopted by the Grand Chamber in its Article 10 case law during this period.

The foregoing point is also evident when examining the Chamber judgments and decisions delivered during the period of the Judge Wildhaber's presidency. There were 27 judgments and decisions considering chilling effect reasoning, and the highest proportion thereof concerned journalists convicted of defamation.[203] In addition, Article 10 and other issues related to defamation also feature in the case law, such as parliamentary privilege,[204] environmental activists liable for defamation,[205] damages against a newspaper for defamation,[206] political candidates liable or convicted for defamation,[207] and a political party member convicted of group libel.[208]

The next highest proportion of judgments and decisions concerned Article 10 and lawyers convicted or censured over statements made.[209] There were also a number of other issues under Article 10, including a publisher's blasphemy conviction,[210] a politician

[200] *Dudgeon v. the United Kingdom* (App. no 7525/76) 22 October 1981, para. 41; and *Norris v. Ireland* (App. no. 10581/83) 26 October 1988, para. 38.
[201] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 39.
[202] *Wille v. Liechtenstein* (App. No. 28396/95) 28 October 1999 (Grand Chamber) (Article 10 and a judge's non-reappointment over remarks made in public); *Al-Adsani v. the United Kingdom* (App. no. 35763/97) 21 November 2001 (Grand Chamber) (Article 6 and refugees); *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber) (Article 10 and journalists convicted of defamation); *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber) (Article 10 and journalists convicted of defamation); and *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber) (Article 10 and lawyer convicted of contempt of court).
[203] *Bergens Tidende and Others v. Norway* (App. no. 26132/95) 2 May 2000 (Article 10 and journalists liable for defamation); *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006 (Article 10 and editor's conviction for defamation); *Radio Twist a.s. v. Slovakia* (App. no. 62202/00) 19 December 2006 (Article 10 and broadcaster liable for defamation); *Tourancheau and July v. France* (App. no. 53886/00) 24 November 2005 (Article 10 and journalists convicted of defamation).
[204] *A. v. the United Kingdom* (App. No. 35373/97) 17 December 2002 (parliamentary privilege and defamation).
[205] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005 (environmental activists liable for defamation).
[206] *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland* (App. no. 55120/00) 16 June 2005 (newspaper liable for defamation damages and Article 10).
[207] *Malisiewicz-Gąsior v. Poland* (App. no. 43797/98) 6 April 2006 (Article 10 and political candidate's conviction for defamation); *Brasilier v. France* (App. no. 71343/01) 11 April 2006 (Article 10 and political candidate liable for defamation).
[208] *Metzger v. Germany* (App. no. 56720/00) 17 November 2005 (Article 10 and political party member convicted of group libel).
[209] *Nikula v. Finland* (App. No. 31611/96) 21 March 2002 (lawyer convicted of defamation); *Steur v. the Netherlands* (App. No. 39657/98) (28 November 2003 (defence lawyer censured); *Kyprianou v. Cyprus* (App. no. 73797/01) 27 January 2004 (Article 6 and lawyer convicted of contempt of court).
[210] *İ.A. v. Turkey* (App. no. 42571/98) 13 September 2005 (publisher convicted of blasphemy and Article 10).

convicted of incitement to hatred,[211] a conviction for publishing obscene pictures on the internet,[212] and an intelligence service official convicted of disclosing secret information.[213] Finally, there was one judgment concerning Article 34 on the right of individual petition,[214] and a single judgment on right to freedom of assembly under Article 11 and a political party being banned from holding demonstrations.[215] In light of these figures, Article 10 is the Convention article pursuant to which chilling effect reasoning was most frequently adopted or considered. At this point, it is worth pausing for a moment to consider exactly how the European Court uses chilling effect reasoning. In order to get a sense of this, it is proposed to first discuss the four Grand Chamber judgments delivered during the Wildhaber Presidency.

2.4.2.1 Grand Chamber judgments

The first Grand Chamber judgment during the Wildhaber Presidency applying chilling effect reasoning was the case of *Wille v. Liechtenstein*,[216] where the applicant was President of the Liechtenstein Administrative Court. In 1995, a newspaper reported on a lecture the applicant had given, where he had expressed the view that the Liechtenstein Constitutional Court was "competent to decide on the interpretation of the Constitution in case of disagreement between the Prince (government) and the Diet."[217] Liechtenstein's monarch, Prince Hans-Adam II, wrote a letter to the applicant, referring to the lecture, and stated that "you still do not consider yourself bound by the Constitution and hold views that are clearly in violation of both the spirit and the letter thereof."[218] The letter concluded with the Prince stating "your attitude, Dr Wille, makes you unsuitable for public office," and "I shall not appoint you again to a public office should you be proposed by the Diet or any other body."[219] When the applicant's term of office was up for renewal, the Prince refused to accept the applicant's proposed appointment by the Liechtenstein parliament.

The applicant made an application to the European Court, arguing that there had been a violation of his right to freedom of expression under Article 10, as he had not been reappointed "on account of the views expressed by him in the course of a public lecture on constitutional law."[220] The first question for the Court was whether there had actually been an "interference" with the applicant's right to freedom of expression under Article 10. In this regard, the Court adopted chilling effect reasoning, and held that the Prince's letter constituted a "reprimand" for the applicant's "previous exercise" of his right to freedom of expression, and had a "chilling effect" on his freedom of expression.[221] By this "chilling effect," the Court meant that the "reprimand" by the Prince was "likely to discourage him from makings statements of that kind in the future."[222] Therefore, the Court held that there

[211] *Erbakan v. Turkey* (App. no. 59405/00) 6 July 2006 (Article 10 and politician convicted of incitement to hatred).
[212] *Perrin v. the United Kingdom* (App. no. 5446/03) 18 October 2005 (Admissibility decision) (Article 10 and conviction for publishing obscene images on the internet).
[213] *Blake v. the United Kingdom* (App. no. 68890/01) 25 October 2005 (Article 10 and intelligence service official's conviction for disclosing secret information).
[214] *McShane v. the United Kingdom* (App. no. 43290/98) 28 May 2002 (Article 34); *Elçi and Others v. Turkey* (App. Nos. 23145/93 and 25091/94) 13 November 2003 (Article 34)
[215] *Christian Democratic People's Party v. Moldova* (App. no. 28793/02) 14 February 2006 (Article 11 and political party being banned from holding demonstrations).
[216] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber).
[217] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 8.
[218] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 11.
[219] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 11.
[220] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 35.
[221] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 50.
[222] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 50.

had been "an interference with the exercise of the applicant's right to freedom of expression."[223]

Having held that there had been an interference, the main question[224] for the Court was whether the interference had been "necessary in a democratic society," and concluded that there had been a violation of Article 10. The government had argued that the applicant's lecture "contained a controversial political statement and a subtle but significant provocation of one of the sovereigns of Liechtenstein."[225] However the Court noted that the applicant's opinion on whether "one of the sovereigns of the State was subject to the jurisdiction of a constitutional court," could not be regarded as an "untenable proposition," as it was shared "by a considerable number of persons in Liechtenstein."[226] Second, the Court noted that there was no evidence that the applicant's remarks concerned "pending cases, severe criticism of persons or public institutions or insults of high officials or the Prince."[227] Further, the Court pointed out that in the Liechtenstein government's arguments "no reference was made to any incident suggesting that the applicant's view, as expressed at the lecture in question, had a bearing on his performance as President of the Administrative Court or on any other pending or imminent proceedings."[228] Taking these considerations into account, the Court held that the Prince's action "appears disproportionate," and the government's reasons were "not sufficient to show that the interference complained of was "necessary in a democratic society."[229]

Focusing for the moment on the Court's use of the chilling effect principle, it is notable that the Court adopts chilling effect reasoning when finding that there has been an "interference" with freedom of expression. Second, the Court was basically holding that a chilling effect arises where even a "reprimand" can "discourage" an individual "from making similar statements of that kind in the future."[230] Notably, the Court did not provide an authority for this proposition. In *Goodwin*, the chilling effect was that journalistic sources might be "deterred from assisting the press."[231] In *Wille*, while the chilling effect did not concern press freedom, nor journalistic sources, it was similar in that in that it focused on future freedom of expression which may be discouraged.

Although the Court does not cite any case law on its chilling effect point, the phrase used by the Court to illustrate the chilling effect, namely "likely to discourage him from makings statements of that kind in the future," does in fact have a strong basis in the Court's case law. Indeed, it was established in the Court's 1986 judgment concerning defamation in *Lingens v. Austria*.[232] In *Lingens*, the Court held that a fine imposed on a journalist for defaming a politician "would be likely to discourage him from making criticisms of that kind again in future."[233] Thus, the language used in *Wille* was almost identical to the language in *Lingens*:

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[223] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 51.
[224] The Court did not decide the question of whether the interference had been "prescribed by law" and pursed a "legitimate aim," but held instead that, "Assuming that the interference was prescribed by law and pursued a legitimate aim, as the Government claimed, the Court considers that it was not "necessary in a democratic society", for the following reasons" (*Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 56).
[225] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 60.
[226] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 69.
[227] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 67.
[228] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 69.
[229] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 70.
[230] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 50.
[231] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 39.
[232] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986.
[233] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 44.

"which would be likely to discourage him from making criticisms of that kind again in future" (*Lingens*, para. 44).

"as it was likely to discourage him from making statements of that kind in the future" (*Wille*, para. 50).

Lingens also held that fining a journalist "would be likely to deter journalists from contributing to issues of public interest, and "liable to hamper the press in performing its task as purveyor of information and public watchdog."[234] Thus, it may be argued that the chilling effect principle applied by the Court in *Wille* to establish that the applicant's freedom of expression was interfered with is rooted in the *Lingens* judgment. Moreover, the *Lingens* judgment would also seem to be a much earlier application of chilling effect reasoning than the Court's *Goodwin* judgment, and suggests that the chilling effect principle has its roots in the Court's judgments on defamation.[235]

While *Wille* applied chilling effect reasoning under the "interference" limb of Article 10, the next Grand Chamber judgments applying chilling effect reasoning concerned journalists convicted of criminal defamation. Indeed, the two judgments, *Cumpănă and Mazăre v. Romania*,[236] and *Pedersen and Baadsgaard v. Denmark,*[237] were delivered on the same day in late 2004. The first case was *Cumpănă and Mazăre*, which concerned two journalists who had published an article in the Romanian newspaper *Telegraf*, with the article questioning the legality of a contract between a city council and a private company for towing illegally parked vehicles. The article named a deputy mayor and his legal advisor as responsible for the "scam,"[238] and included allegations that the advisor may have "accepted bribes."[239] A cartoon accompanied the article depicting the mayor and the married advisor arm in arm with a bag of banknotes.

The advisor instituted criminal proceedings against the applicants for insult and defamation under Articles 205 and 206 of the Criminal Code. The Romanian courts ultimately convicted the applicants, and held that the article and cartoon had asserted the advisor "had been involved in fraudulent activities,"[240] and insinuated "an extramarital relationship."[241] The applicants were sentenced to seven months' imprisonment for defamation, and prohibited from working as journalists for one year.[242] However, the applicants did not serve their prison sentence, as it had been immediately suspended,[243] and the President of Romania later "granted the applicants a pardon in respect of their custodial sentence."[244]

The applicants made an application to the European Court, claiming that their convictions violated Article 10, and had been "intended to intimidate" their newspaper and the Romanian press "in general."[245] In 2003, the Court's Second Section delivered its Chamber judgment, and held that there had been no violation of Article 10. The Court found

[234] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 44.
[235] This point is explored in Chapter 4 below.
[236] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber).
[237] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber).
[238] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 10.
[239] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 12.
[240] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 12.
[241] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 56.
[242] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 37.
[243] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 31.
[244] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 35.
[245] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 41.

that the article and cartoon made "unsubstantiated accusations" of criminal conduct,[246] and insinuated "an extramarital affair.[247] In addition, the Court held that while the sanctions imposed were "harsh,"[248] the Court held they were not disproportionate as the applicants "did not serve their custodial sentence, being granted a pardon."[249] The Court also noted that it "appears from the evidence" that the prohibition on practising as journalists "had no practical consequences,"[250] as the second applicant "continued to work for the T. newspaper," and the first applicant leaving his post "was due not to the prohibition on his working as a journalist but to staff cutbacks."[251] Notably, there was no mention of a chilling effect by the majority. However, the two dissenting judges, Judge Jean-Paul Costa and Judge Wilhelmina Thomassen, found a violation of Article 10, and argued that "sentencing the applicants to imprisonment was in itself excessive."[252] While the sentences were pardoned, for more than a year they "hung over the applicants' heads like the sword of Damocles."[253]

In 2003, a five-judge panel of the Court's Grand Chamber accepted a request from the applicants that the case be referred to the Grand Chamber,[254] and in 2004, the 17-judge Grand Chamber delivered its judgment.[255] The Grand Chamber judgment in *Cumpănă and Mazăre* unanimously found that there had been a violation of Article 10.[256] The Grand Chamber agreed with the Chamber judgment that the Romanian courts' findings concerning insult and defamation "met a 'pressing social need'" under Article 10,[257] and "may have been justified by the concern to restore the balance between the various competing interests at stake."[258] The Court had particular regard to the fact the applicants had "failed to adduce evidence at any stage of the [domestic] proceedings to substantiate their allegations or provide a sufficient factual basis for them."[259] However, the Court then went on to examine the "proportionality of the sanction," and under this heading, introduced the concept of the chilling effect into the equation.

The Court held that investigative journalists "are liable to be inhibited from reporting on matters of general public interest," if they run the "risk" of being sentenced to imprisonment or to a prohibition on the exercise of their profession.[260] The Court stated that the "chilling effect that the fear of such sanctions has on the exercise of journalistic freedom of expression is evident," with the Court citing *Wille* and *Goodwin* as authority for this proposition.[261] This chilling effect "works to the detriment of society as a whole," and is a "factor which goes to the proportionality," of the sanctions imposed.[262] The Court accepted that sentencing was "in principle a matter for the national courts," however it introduced a

[246] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 55.
[247] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 56.
[248] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 56.
[249] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 59.
[250] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 59.
[251] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 59.
[252] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003 (Joint dissenting opinion of Judges Costa and Thomassen, para. 7).
[253] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003 (Joint dissenting opinion of Judges Costa and Thomassen, para. 7).
[254] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 10.
[255] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber).
[256] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 122.
[257] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 110.
[258] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 120.
[259] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 104.
[260] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 113.
[261] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114.
[262] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114.

caveat: the imposition of prison sentences for a press offence will be compatible with Article 10 only in "exceptional circumstances," such as for hate speech or incitement to violence.[263]

The Court then applied this chilling effect principle to the sanctions imposed, and held that the circumstances of the case, namely "a classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest," presented "no justification whatsoever for the imposition of a prison sentence."[264] This was because such a sanction, "by its very nature, will have a chilling effect."[265] Notably, the Court found that it was irrelevant "that the applicants did not serve their prison sentence," because pardons are "discretionary," and it did not "expunge their conviction."[266] Moreover, the Court also admitted that the sanction prohibiting the applicants from working as journalists did not appear to have "any significant practical consequences," but held it was nonetheless "particularly severe and could not in any circumstances have been justified."[267] The Grand Chamber unanimously concluded the "criminal sanction and the accompanying prohibitions" went beyond what would have amounted to a "necessary" restriction on the applicants' freedom of expression.[268]

It is worth pausing for a moment to consider the Grand Chamber's chilling effect principle. First, it was a rejection of the Second Section majority's judgment that it was crucial to have regard to the "evidence" that the sanctions "had no practical consequences."[269] In contrast, the Grand Chamber approved the principle that it is instead crucial to have regard to the "chilling effect" that the "fear of such sanctions" has on the exercise of journalistic freedom of expression more generally.[270] Second, and similar to *Goodwin*, the Court in *Cumpănă and Mazăre* relied upon the chilling effect in laying down an "exceptional circumstances" test: in *Goodwin*, the Court held that an order for source disclosure was only compatible with Article 10 if "justified by an overriding requirement in the public interest;"[271] and similarly in *Cumpănă and Mazăre*, the Court held that a prison sentence for a press offence was only compatible with Article 10 in "exceptional circumstances."[272]

Focussing on the concept of the chilling effect being put forward by the Court, it states that the chilling effect occurs where investigative journalists are "liable to be inhibited" from reporting on matters of general public interest if they "run the risk" of being sentenced to imprisonment.[273] Notably, and unlike in *Wille*, the Grand Chamber in *Cumpănă and Mazăre* provided two Grand Chamber authorities for its chilling effect principle, namely paragraph 50 in *Wille*, and paragraph 39 in *Goodwin*.[274] While neither *Wille* nor *Goodwin* concerned imprisonment for defamation, it seems that the unifying principle underlying the chilling effect reasoning in all three cases is the likelihood of freedom of expression being "discouraged" (*Wille*), "deterred" (*Goodwin*), or "inhibited" (*Cumpănă and Mazăre*) in the future. Thus, *Cumpănă and Mazăre* seems to be the first Grand Chamber judgment which attempted to root the chilling effect in prior case law, and use these authorities to provide protection for journalistic freedom of expression from the chilling effect of prison sentences for defamation.

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[263] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 115.
[264] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 116.
[265] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 116.
[266] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 116.
[267] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 118.
[268] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 120-121.
[269] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 59.
[270] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114.
[271] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 39.
[272] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 115.
[273] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 113.
[274] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114.

On the same day as *Cumpănă and Mazăre* was delivered, the Grand Chamber delivered a second judgment concerning journalistic freedom of expression and the chilling effect. The case was *Pedersen and Baadsgaard v. Denmark*,[275] and concerned two television journalists who had produced documentaries entitled *Convicted of Murder* and *The Blind Eye of the Police* broadcast in 1990 and 1991. The documentaries dealt with a murder trial where X had been convicted of murder, and included allegations about whether a named police chief superintendent involved in the investigation decided that a report "should not be included in the case file? Or did he and the chief inspector of the Flying Squad conceal the witness's statement from the defence, the judges and the jury?"[276]

Following the broadcasts, the chief superintendent reported the applicants and the television station to the police for defamation. At first instance, the Gladsaxe City Court found that the questions put in the television programme concerning the chief superintendent were defamatory, which was ultimately upheld on appeal by the Danish Supreme Court. The journalists were each sentenced to twenty day-fines of 400 Danish krone (or twenty days' imprisonment in default), and ordered to pay compensation of 100,000 kroner to the estate of the deceased chief superintendent.[277]

The applicants made an application to the European Court, and in 2003, the Court's First Section found there had been no violation of Article 10, by four votes to three.[278] Neither the Court majority's judgment nor the dissent mentioned the chilling effect.[279] It was not until the Grand Chamber considered the case in 2004 that the chilling effect featured.[280] The Grand Chamber first noted that the applicants were not convicted for "criticising the conduct of the police," but on "a much narrower ground," for making a "specific allegation against a named individual."[281] The Court agreed with the Danish Supreme Court that the questions posed in the documentaries "left the viewers" with the impression that the named chief superintendent "had taken part in the suppression and thus committed a serious criminal offence."[282] The Court held that the "accusation against the named chief superintendent, although made indirectly and by way of a series of questions, was an allegation of fact susceptible of proof," and the applicants "never endeavoured to provide any justification for their allegation, and its veracity has never been proved."[283] The Court concluded that the applicants "lacked a sufficient factual basis for the allegation, made in the television programme broadcast on 22 April 1991, that the named chief superintendent had deliberately suppressed a vital piece of evidence in the murder case," and consequently the Danish authorities were "entitled to consider that there was a "pressing social need" to take action under the applicable law in relation to that allegation."[284]

Finally, and notably, the Court, similar to *Cumpănă and Mazăre*, examined the "nature and severity of the penalty imposed."[285] The Court noted that the journalists were sentenced to the twenty day-fines (equivalent of 1,078 euro), and to pay compensation (equivalent of 13,469 euro), and concluded that it did "not find these penalties excessive in the circumstances or to be of such a kind as to have a 'chilling effect' on the exercise of

[275] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber).
[276] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 21.
[277] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 37.
[278] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 19 June 2003.
[279] See *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 19 June 2003 (Partly dissenting opinion of judge Rozakis joined by Judge Kovler and Judge Steiner).
[280] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber).
[281] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 72.
[282] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 75.
[283] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 76.
[284] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 92.
[285] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 93.

media freedom."[286] Similar to *Cumpănă and Mazăre*, the Court cited *Wille*.[287] However, the Court did not elaborate further on the chilling effect, and confined itself to holding that it did not find these penalties "excessive in the circumstances or to be of such a kind as to have a 'chilling effect' on the exercise of media freedom."[288]

At this point it is necessary to point out the Grand Chamber divided nine votes to eight on whether there had been a violation of Article 10. While the dissent did not mention the chilling effect, nor discuss the nature and severity of the penalties,[289] the Court majority's conclusion on the chilling effect point contrasts sharply with *Cumpănă and Mazăre*: first, the Court majority, while purportedly considering the chilling effect principle, does not elaborate upon the principle, and crucially does not mention the finding in *Cumpănă and Mazăre* that a chilling effect will arise where investigative journalists are inhibited if they "run the risk" of "being sentenced to imprisonment."[290] The Court in *Pedersen and Baadsgaard* did not mention in its application of the chilling effect, that although the sanctions imposed on the journalists were fines, the journalists were subject to "twenty days' imprisonment in default."[291] It is arguable that this risk of imprisonment gave rise to a similar chilling effect on journalistic freedom of expression as in *Cumpănă and Mazăre*. While the point will be further discussed in a later chapter on defamation (Chapter 3), the *Pedersen and Baadsgaard* judgment is curious in its application of chilling effect reasoning in not having regard to the threat of imprisonment, and may not be fully consistent with *Cumpănă and Mazăre.* Indeed, in *Cumpănă and Mazăre*, the journalists were pardoned, and never served their prison sentences, with the Court remarking that the pardon did not "expunge their conviction."[292]

Nearly 12 months to the day following *Cumpănă and Mazăre* and *Pedersen and Baadsgaard*, the Grand Chamber again applied chilling effect reasoning in a unanimous Article 10 judgment in *Kyprianou v. Cyprus*.[293] The case involved a Cypriot lawyer who was defending a person accused of murder before the Limassol Assize Court in 2001. During cross-examination, the applicant took issue with the judges, and asked to be allowed to withdraw from the case, stating "since the Court considers that I am not doing my job properly in defending this man," and "since you are preventing me from continuing my cross-examination on significant points of the case," and "I am sorry that when I was cross-examining the members of the Court were talking to each other, passing *ravasakia* ["love letters"] among themselves."[294] The judges stated in reply that "[w]e consider that what has just been said by Mr Kyprianou, and in particular the manner with which he addresses the Court, constitutes a contempt of court."[295]

The Court took a short break, and when it returned, it sentenced the applicant to five days' imprisonment for "unacceptable contempt of court," after having "accused the Court" of "restricting him and of doing justice in secret."[296] The applicant served his prison sentence, and he later filed an unsuccessful appeal to the Cypriot Supreme Court, which upheld the

[286] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 93.
[287] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 93, citing *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 50, and *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 54.
[288] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 93.
[289] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber) (Joint partly dissenting opinion of Judges Rozakis, Türmen, Strážnická, Bîrsan, Casadevall, Zupančič, Maruste and Hajiyev).
[290] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114.
[291] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 33.
[292] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 116.
[293] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber).
[294] *Kyprianou v. Cyprus* (App. no. 73797/01) 27 January 2004, para. 12.
[295] *Kyprianou v. Cyprus* (App. no. 73797/01) 27 January 2004, para. 12.
[296] *Kyprianou v. Cyprus* (App. no. 73797/01) 27 January 2004, para. 13.

conviction. The applicant then made an application to the European Court, claiming that the conviction for contempt of court violated his right to freedom of expression under Article 10, and the right to a fair trial under Article 6 of the European Convention. Notably, the applicant argued that the imposition of a prison sentence would have a "general "chilling effect" on the conduct of advocates in court," in violation of Article 10.[297]

In January 2004, the Court's Second Section delivered its Chamber judgment, and found a violation of Article 6, including that here had been a breach of the "principle of impartiality," as the matter should have been "determined by a different bench from the one before which the problem arose."[298] However, on the Article 10 point, the Court held that it was not necessary "to examine separately whether Article 10 was also violated," as the "essential issues raised by the applicant" had already been considered under Article 6.[299] However, following a request from the government, a panel of the Grand Chamber accepted the request for a referral to the Grand Chamber,[300] and in 2005, the 17-judge Court delivered its judgment. The Grand Chamber similarly found that there had been a violation of Article 6, and crucially for present purposes, unanimously found that there had also been a violation of Article 10.

First, the Court held that under Article 10, the "freedom of speech guarantee" extends to lawyers pleading of behalf of their clients.[301] But the Court also added that a lawyer's freedom of expression in the courtroom is not unlimited and certain interests, such as the authority of the judiciary, are important enough to justify restrictions on this right.[302] Notably, and similar to *Cumpănă and Mazăre*, the Court laid down the general principle concerning prison sentences and a lawyer's freedom of expression: the Court held that the imposition of a prison sentence would "inevitably, by its very nature, have a 'chilling effect', not only on the particular lawyer concerned but on the profession of lawyers as a whole."[303] The Court elaborated upon what it meant by a chilling effect, stating that it means lawyers might "feel constrained" in their choice of pleadings or motions during legal proceedings.[304] This language is similar to that of *Cumpănă and Mazăre*, that a prison sentence, "by its very nature, will inevitably have a chilling effect,"[305] an effect that works to the detriment of society "as a whole."[306] Further, the Court in *Kyprianou*, similar to *Cumpănă and Mazăre*, recognised that "even if in principle sentencing is a matter for the national courts," and held that only in "exceptional circumstances" can a restriction be imposed on a defence lawyer's freedom of expression.[307]

The Court then applied these principles, and held that the applicant's comments, "albeit discourteous," were "aimed at and limited to" the manner in which the judges were trying the case, in particular concerning the cross-examination of a witness he was carrying out in the course of defending his client against a charge of murder.[308] The Court then applied its chilling effect principle, and held that five day's imprisonment "was disproportionately severe," and "capable of having a 'chilling effect' on the performance by lawyers of their

[297] *Kyprianou v. Cyprus* (App. no. 73797/01) 27 January 2004, para. 71.
[298] *Kyprianou v. Cyprus* (App. no. 73797/01) 27 January 2004, para. 37..
[299] *Kyprianou v. Cyprus* (App. no. 73797/01) 27 January 2004, para. 72.
[300] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 9.
[301] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 151.
[302] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 174.
[303] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 175.
[304] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 175.
[305] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 116.
[306] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114.
[307] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 174.
[308] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 179.

duties as defence counsel."[309] Importantly, the Court noted that even though the applicant had "only served part of the prison sentence," this "does not alter the conclusion."[310]

Thus, unlike *Pedersen and Baadsgaard*, the Grand Chamber's judgment in *Cumpănă and Mazăre* and its chilling effect principle featured quite prominently in *Kyprianou.* From the application of the chilling effect principle in the Grand Chamber during the Wildhaber Presidency in *Wille*, *Cumpănă and Mazăre*, *Pedersen and Baadsgaard*, and *Kyprianou*, a number of points can be made. First, all the judgments concerned Article 10 and freedom of expression, and the chilling effect does not seem to have been used by the Grand Chamber under other European Convention articles. Second, it seems from *Cumpănă and Mazăre*, *Pedersen and Baadsgaard*, and *Kyprianou* that prison sentences for journalistic freedom of expression, and a lawyer's freedom of expression, will only be consistent with Article 10 in very exceptional circumstances. Third, in all four judgments, the Court is concerned with a chilling effect that may arise in the future, and considers not only the individual applicant, but also other individuals who may be chilled in the future. Fourth, while the Court in *Goodwin* and *Wille* did not seem to ground the chilling effect in prior case law, it is evident from the above discussion that *Wille* was grounded in *Lingens*. Further, *Cumpănă and Mazăre*, *Pedersen and Baadsgaard*, and *Kyprianou* all grounded their chilling effect reasoning in *Goodwin* and *Wille*. Finally, it should be mentioned that there was quite some unanimity in the application of the chilling effect, with *Cumpănă and Mazăre* and *Kyprianou* being unanimous among all 17 judges, and only one judge dissenting in *Wille*, and while *Pedersen and Baadsgaard* was divided nine-votes-to-eight, there did not seem to be much disagreement over the application of the chilling effect, as the dissent did not mention it.

2.4.3 Presidency of Judge Costa (2007 - 2011)

The second President of the permanent Court was Judge Jean-Paul Costa.[311] During the Costa Presidency the Grand Chamber applied, or considered, chilling effect reasoning in five judgments, namely *Lindon, Otchakovsky-Laurens and July v. France*,[312] (hereinafter *Lindon*), *Stoll v. Switzerland*,[313] *Guja v. Moldova*,[314] *Sanoma Uitgevers B.V. v. the Netherlands*,[315] and *A, B and C v. Ireland*.[316] Notably, four of the Grand Chamber judgments concerned freedom of expression and Article 10, with two judgments concerning issues considered earlier, namely journalists convicted of defamation (*Lindon*), and protection of journalistic sources (*Sanoma*). However, two new issues were also considered under Article 10, namely a journalist's conviction for publishing official secrets (*Stoll*), and a whistleblower's freedom of expression (*Guja*). The Grand Chamber also applied chilling effect reasoning under the Article 8 right to respect for private life and access to abortion (*A, B and C*).

While there were a similar amount of Grand Chamber judgments concerning the chilling effect during the Wildhaber Presidency and Costa Presidency, the amount of

[309] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 181.
[310] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 182.
[311] Judge Jean-Paul Costa was President of the Court from 19 January 2007 - 3 November 2011. See European Court of Human Rights, "Judges of the Court since 1959," May 2017.
[312] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber) (Article 10 and newspapers convicted of defamation).
[313] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber) (Article 10 and a journalist's conviction for publishing secret official deliberations).
[314] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber) (Article 10 and a whistleblower's dismissal).
[315] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber) (Article 10 and protection of journalistic sources).
[316] *A, B and C v. Ireland* (App. no. 25579/05) 16 December 2010 (Grand Chamber) (Article 8 and abortion).

Chamber judgments and decisions during the Costa Presidency increased fourfold, totally 90 judgments and decisions during 2007-2011.[317] This was compared to 23 judgments and

[317] *Krasulya v. Russia* (App. no. 12365/03) 22 February 2007 (Article 10 and editor's conviction for defamation); *Tønsberg Blad AS and Haukom v. Norway* (App. no. 510/04) 1 March 2007 (Article 10 and defamation proceedings against newspaper publisher); *Tysiąc v. Poland* (App. no. 5410/03) 20 March 2007 (Article 8 and abortion legislation); *Lombardo and Others v. Malta* (App. no. 7333/06) 20 April 2007 (Article 10 and civil defamation proceedings against councillors); *Bączkowski and Others v. Poland* (App. no. 1543/06) 3 May 2007 (Article 11 and refusal to authorise assembly); *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007 (Article 10 and journalists convicted of defamation); *Nurmagomedov v. Russia* (App. no. 30138/02) 7 June 2007) (Article 34 and right of individual petition); *Hachette Filipacchi Associes v. France* (App. No. 71111/01) 14 June 2007 (Article 10 and magazine ordered to publish statement on photograph published); *Bitiyeva and X v. Russia* (App. nos. 57953/00 and 37392/03) 21 June 2007 (Article 34 and killing of applicant); *Artun and Güvener v. Turkey* (App. no. 75510/01) 26 June 2007 (Article 10 and journalists convicted for insulting president); *a/s Diena and Ozoliņš v. Lithuania* (App. no. 16657/03) 12 July 2007 (Article 10 and civil proceedings against newspaper for defaming minister); *Ormanni v. Italy* (App. no. 30278/04) 17 July 2007 (Article 10 and journalist convicted of defamation); *Dyuldin and Kislov v. Russia* (App. no. 25968/02) 31 July 2007 (Article 10 and civil proceedings for defaming regional authorities); *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber) (Article 10 and newspapers convicted of defamation); *Colibaba v. Moldova* (App. no. 29089/06) 31 October 2007 (Article 34 and right of individual petition); *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007 (Article 10 and protection of journalistic sources); *Desjardin v. France* (App. no. 22567/03) 22 November 2007 (Article 10 and politician's conviction for defamation over pamphlet); *Timpul Info-Magazin and Anghel v. Moldova* (App. no. 42864/05) 27 November 2007 (Article 10 and civil defamation proceedings against newspaper); *Balçik and Others v. Turkey* (App. no. 25/02) 29 November 2007 (Article 11 and prosecution for unlawful assembly); *Nurettin Aldemir and Others v. Turkey* App. nos. 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 and 32138/02)) 18 December 2007 (Article 11 and police action over unlawful assembly); *Masschelin v. Belgium* (App. no. 20528/05) 20 November 2007 (Admissibility decision) (Article 10 and journalist's conviction for access to criminal file); *Mechenkov v. Russia* (App. no. 35421/05) 7 February 2008 (Article 34 and right of individual petition); *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber) (Article 10 and whistleblower's dismissal); *Rumyana Ivanova v. Bulgaria* (App. no. 36207/03) 14 February 2008 (Article 10 and journalist's conviction for defamation); *Azevedo v. Portugal* (App. no. 20620/04) 27 March 2008 (Article 10 and book author's conviction for defamation); *Campos Dâmaso v. Portugal* (App. no. 17107/05) 24 April 2008 (Article 10 and journalist's conviction for defamation); *Vajnai v. Hungary* (App. no. 33629/06) 8 July 2008 (Article 10 and prosecution for wearing totalitarian symbol in public); *Schmidt v. Austria* (App. no. 513/05) 17 July 2008 (Article 10 and lawyer's reprimand for defamation); *Flux v. Moldova (No. 6)* (App. no. 22824/04) 29 July 2008 (Article 10 and newspaper's conviction for defamation); *Eva Molnár v. Hungary* (App. no. 10346/05) 7 October 2008 (Article 11 and police dispersal of demonstration); *Godlevskiy v. Russia* (App. no. 14888/03) 23 October 2008 (Article 10 and civil defamation proceedings against journalist); *Kandzkov v. Bulgaria* (App. no. 68294/01) 6 November 2008 (Article 10 and politician's prosecution for hooliganism and insult); *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008 (Article 10 and disciplinary proceedings against lawyer); *Armonienė v. Lithuania* (App. no. 36919/02) 25 November 2008 (Article 8 and legislative ceiling on damages for invasion of privacy); *Biriuk v. Lithuania* (App. no. 23373/03) 25 November 2008 (Article 8 and legislative ceiling on damages for invasion of privacy); *Juppala v. Finland* (App. no. 18620/03) 2 December 2008 (Article 10 and criminal prosecution for defamation); *K.U. v. Finland* (App. no. 2872/02) 2 December 2008 (Article 8 and absence of legislation to identify internet user); *Katrami v. Greece* (App. no. 19331/05) 6 December 2007 (Article 10 and journalist's conviction for insult); *Panovits v. Cyprus* (App. No. 4268/04) 11 December 2008 (Article 6 and lawyer's conviction for contempt of court); and *Mahmudov and Agazade v. Azerbaijan* (App. no. 35877/04) 18 December 2008 (Article 10 and editor's conviction for breach of privacy); *Dilipak (III) v. Turkey* (App. no. 29413/05) 23 September 2008 (Admissibility decision) (Article 10 and civil defamation proceedings against journalist); *Women on Waves v. Portugal* (App. no. 31276/05) 3 February 2009 (Article 10 and refusal to allow protest ship into territorial waters); *Saygili and Falakaoğlu v. Turkey (No. 2)* (App. no. 38991/02) 17 February 2009 (Article 10 and journalists' conviction for publishing declarations of terrorist organisations); *Marchenko v. Ukraine* (App. no. 4063/04) 19 February 2009 (Article 10 and union teacher's conviction for defamation); *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009 (Article 10 and judge's dismissal from office); *Times Newspapers Ltd (Nos. 1 and 2) v. the United Kingdom* (App. nos. 3002/03 and 23676/03) 10 March 2009 (Article 10 and civil defamation proceedings against newspaper); *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 31 March 2009 (Article 10 and protection of journalistic sources); *Kydonis v. Greece* (App. no. 24444/07) 2 April 2009 (Article 10 and journalist's conviction for defamation); *Brunet-Lecomte and Tanant v. France* (App. no. 12662/06) 8

October 2009 (Article 10 and journalists' conviction for defamation); *Serkan Yılmaz and Others v. Turkey* (App. no. 25499/04) 13 October 2009 (Article 11 and police intervention during demonstration); *Alves da Silva v. Portugal* (App. no. 41665/07) 22 October 2009 (Article 10 and prosecution for defamation over satirical work displayed at carnival); *Europapress Holding d.o.o. v. Croatia* (App. no. 25333/06) 22 October 2009 (Article 10 and civil defamation proceedings against newspaper); *Karsai v. Hungary* (App. no. 5380/07) 1 December 2009 (Article 10 and civil defamation proceedings against historian); and *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009 (Article 10 and protection of journalistic sources); *The Wall Street Journal Europe v. the United Kingdom* (App. no. 28577/05) 10 February 2009 (Admissibility decision) (Article 10 and civil defamation proceedings against newspaper); and *Moreira v. Portugal* (App. no. 20156/08) 22 September 2002 (Admissibility decision) (Article 10 and journalist's conviction for defamation).

[317] *Gillan and Quinton v. the United Kingdom* (App. no. 4158/05) 12 January 2010 (Article 10 and police stop and search powers); *Shugayev v. Russia* (App. no. 11020/03) 14 January 2010 (Article 34 and right of individual petition); *Laranjeira Marques da Silva v. Portugal* (App. no. 16983/06) 19 January 2010 (Article 10 and journalist's conviction for aggravated defamation); *Renaud v. France* (App. no. 13290/07) 25 February 2010 (Article 10 and criminal defamation prosecution over comments about mayor); *Görkan v. Turkey* (App. no. 13002/05) 16 March 2010 (Article 10 and newspaper vendor's detention by police); *Ruokanen and Others v. Finland* (App. no. 45130/06) 6 April 2010 (Article 10 and journalists' prosecution for aggravated defamation); *Fatullayev v. Azerbaijan* (App. no. 40984/07) 22 April 2010 (Article 10 and criminal proceedings against editor for defamation); *Mariapori v. Finland* (App. no. 37751/07) 6 July 2010 (Article 10 and book author's conviction for defamation); *Lopata v. Russia* (App. no. 72250/01) 13 July 2010 (Article 34 and right of individual petition); *Gazeta Ukraina-Tsentr v. Ukraine* (App. no. 16695/04) 15 July 2010 (Article 10 and civil defamation proceedings against newspaper); *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) 14 September 2010 (Article 10 and authorities' failure to protect journalist against attack); *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber) (Article 10 and protection of journalistic sources); *Gillberg v. Sweden* (App. no. 41723/06) 2 November 2010 (Article 10 and professor's conviction for misuse of office); *Henryk Urban and Ryszard Urban v. Poland* (App. no. 23614/08) 30 November 2010 (Article 6 and right to a fair trial); *Público - Comunicação Social, S.A. and Others v. Portugal* (App. no. 39324/07) 7 December 2010 (Article 10 and civil defamation proceedings against newspaper publisher); *A, B and C. v. Ireland* (App. no. 25579/05) 16 December 2010 (Grand Chamber) (Article 8 and criminal legislation on abortion); and *Novaya Gazeta v. Voronezhe v. Russia* (App. no. 27570/03) 21 December 2010 (Article 10 and civil defamation proceedings against journalists); *Barata Monteiro da Costa Nogueira and Patrício Pereira v. Portugal* (App. no. 4035/08) 11 January 2011 (Article 10 and politicians' conviction for defamation); *MGN Limited v. the United Kingdom* (App. no. 39401/04) 18 January 2011 (Article 10 and newspaper's legal fees following privacy proceedings); *Igor Kabanov v. Russia* (App. no. 8921/05) 3 February 2011 (Article 10 and disbarment proceedings against lawyer); *Otegi Mondragon v. Spain* (App. no. 2034/07) 15 March 2011 (Article 10 and conviction for insulting king); *Kasabova v. Bulgaria* (App. no. 22385/03) 19 April 2011 (Article 10 and criminal defamation proceedings against journalist); *Bozhkov v. Bulgaria* (App. no. 3316/04) 19 April 2011 (Article 10 and criminal defamation proceedings against journalist); *Mosley v. the United Kingdom* (App. no. 48009/08) 10 May 2011 (Article 8 and absence of prior-notification rule for protecting private life); *R.R. v. Poland* (App. no. 27617/04) 26 June 2011 (Article 8 and abortion legislation); *Kania and Kittel v. Poland* (App. no. 35105/04) 21 June 2011 (Article 10 and civil defamation proceedings against newspaper); *Wizerkaniuk v. Poland* (App. no. 18990/05) 5 July 2011 (Article 10 and requirement for consent before publishing interviews); *Buldakov v. Russia* (App. no. 23294/05) 19 July 2011 (Article 34 and right of individual petition); *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011 (Article 10 and employee's dismissal); *Palomo Sánchez v. Spain and Others* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber) (Article 10 and union members' dismissal for insult); *Şişman and Others v. Turkey* (App. no. 1305/05) 27 September 2011 (Article 11 and disciplinary proceedings against union members); *United Macedonian Organisation Ilinden and Ivanov v. Bulgaria (No. 2)* (App. no. 37586/04) 18 October 2011 (Article 11 and police activity against demonstrators); *Singartiyski and Others v. Bulgaria* (App. no. 48284/07) 18 October 2011 (Article 11 and police activity against demonstrators); *Altuğ Taner Akçam v. Turkey* (App. no. 27250/07) 25 October 2011 (Article 10 and criminal proceedings for insulting Turkey); *Fratanoló v. Hungary* (App. no. 29459/10) 3 November 2011 (Article 10 and conviction for displaying a totalitarian symbol); *Mizzi v. Malta* (App. no. 17320/10) 22 November 2011 (Article 10 and civil defamation proceedings against journalist); *Schwabe and M.G. v. Germany* (App. nos. 8080/08 and 8577/08) 1 December 2011 (Article 11 and detention of protestors); and *Mor v. France* (App. no. 28198/09) 15 December 2011 (Article 10 and lawyer's conviction for breaching confidentiality of investigation); *Yleisradio Oy v. Finland* (App. no. 30881/09) 8 February 2011 (Admissibility decision) (Article 10 and privacy proceedings against broadcaster); and *Mikkelsen and Christensen v. Denmark* (App. no. 22918/08) 24 May 2011 (Article 10 and journalists' prosecution for possession of fireworks).

decisions during the eight-year period of the Wildhaber Presidency. The vast majority of these judgments concerned freedom of expression, and it is proposed to examine the distinct issues in the Chapters which follow.

2.4.3.1 Grand Chamber judgments

It is proposed to run through the Grand Chamber judgments to assess how application of the chilling effect principle developed during the Costa Presidency, and how it may be compared to the Wildhaber Presidency. The first Grand Chamber judgment which considered chilling effect reasoning was *Lindon*.[318] The applicants were the author of the book *Le Procès de Jean-Marie Le Pen* (*Jean-Marie Le Pen on Trial*), the chairman of the book's publishing company, and the director of the French newspaper *Libération*. The book was written as a novel, but was based on real events, namely the murders of a young Moroccan and Frenchman of Comorian origin killed by militants of the Front National party. The book included passages concerning the chairman of the party, Jean-Marie Le Pen, such as "Isn't the Chairman of the Front National responsible for the murder committed by one of his teenage militants inflamed by his rhetoric,"[319] a "chief of a gang of killers," and a "vampire who thrives on the bitterness of his electorate, but sometimes also on their blood."[320]

Following publication of the book, Front National and Le Pen brought proceedings against the first two applicants in the Paris Criminal Court for the offence of public defamation. The first applicant was convicted of defamation, and the second applicant of complicity in that offence, over a number of passages in the book. The convictions were ultimately upheld by France's highest court, the Court of Cassation, and each was ordered to pay a fine (2,286 euro), and jointly pay damages (3,811 euro) to the political party and chairman. Following the convictions, *Libération* published an article signed by 97 writers concerning the first two applicants' conviction, and reproduced passages from the book. Subsequently, the newspaper's director was also convicted of defamation for having reproduced passages from the book.[321] The director was ordered to pay a fine (2,286 euro) and an award (3,811 euro) to each of the two civil parties. This conviction was also ultimately upheld by the Court of Cassation.

All three applicants made an application to the European Court, claiming their convictions violated their Article 10 right to freedom of expression. The First Section of the Court relinquished jurisdiction in favour of the Grand Chamber, and in 2007 the Grand Chamber delivered its judgment.[322] The main question for the Court was whether the convictions had been necessary in a democratic society, and concerning the first and second applicants, the Court held that the domestic courts "made a reasonable assessment of the facts," in finding that to liken an individual, although a politician, to the "chief of a gang of killers," to assert that a murder, even one committed by a fictional character, was "advocated" by him, and to describe him as a "vampire who thrives on the bitterness of his electorate, but sometimes also on their blood," overstepped the permissible limits in such

[318] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber) (Article 10 and newspaper convicted of defamation).
[319] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber), para. 11.
[320] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber), para. 50.
[321] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber), para. 23.
[322] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber).

matters.[323] The Court also had regard to the nature of the remarks made, in particular to the "underlying intention to stigmatise the other side, and to the fact that their content is such as to stir up violence and hatred, thus going beyond what is tolerable in political debate, even in respect of a figure who occupies an extremist position in the political spectrum."[324] Similarly, in relation to the third applicant, the Court held that it was not "unreasonable" for the domestic courts to impose a defamation conviction, having regard to the content of the impugned passages, to the potential impact on the public of the remarks found to be defamatory on account of their publication by a national daily newspaper with a large circulation, and to the fact that it was "not necessary to reproduce them in order to give a complete account of the conviction of the first two applicants and the resulting criticism."[325] Thus, the Court held that the convictions were based on "relevant and sufficient" reasons.

The Court then turned to the proportionality of the penalties. In relation to the first and second applicants, the Court noted that they were found guilty of an offence and ordered them to pay a fine, "so in that respect alone the measures imposed on them were already very serious."[326] However, the Court introduced a principle not mentioned in *Cumpănă and Mazăre* and *Pedersen and Baadsgaard*, that in view of the "margin of appreciation" left to Contracting States by Article 10 of the Convention, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued.[327] The Court then examined the fines and damages ordered, but held that they were "moderate,"[328] and were not disproportionate. Similarly, in relation to the third applicant, the Court noted that the fine and damages ordered were of a "moderate nature," and not disproportionate.[329] The Court thus concluded that there had been no violation of Article 10.

Focusing on the Court's review of the nature and severity of the sanctions, it is curious that the Court nowhere mentions the chilling effect principle, nowhere mentions, nor even cites, *Cumpănă and Mazăre*, nor makes any mention of the chilling affect discussed in *Pedersen and Baadsgaard* (even though the Court ultimately held there had been no chilling effect). Further, the margin of appreciation principle the Court laid down in *Lindon* was nowhere mentioned in *Cumpănă and Mazăre* nor *Pedersen and Baadsgaard*.

Not surprisingly, there was a vigorous dissent in *Lindon* over the non-application of *Cumpănă and Mazăre*, and notably, the acting President of the Court, the Vice-President, and a future President of the Court, dissented in *Lindon* (Judges Christos Rozakis, Nicolas Bratza and Françoise Tulkens). The dissenting opinion lambasted the majority for not engaging in any "review of the proportionality of the sanctions," and criticised the majority for not applying the *Cumpănă and Mazăre* chilling effect principle.[330] The dissent added that "it may also be questioned whether it is still justified, in the twenty-first century, for damage to

[323] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber), para. 57.
[324] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber), para. 57.
[325] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber), para. 66.
[326] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber), para. 59.
[327] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber), para. 59.
[328] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber), para. 59.
[329] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber), para. 59.
[330] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber) (Joint partly dissenting opinion of Judges Rozakis, Bratza, Tulkens and Šikuta, para, 7).

reputation through the press, media or other forms of communication to entail punishment in the criminal courts."[331]

Thus, the Court majority's judgment in *Lindon* was the first Grand Chamber judgment to not apply chilling effect reasoning in relation to criminal defamation, in stark contrast to *Cumpănă and Mazăre* and *Pedersen and Baadsgaard*. Indeed, the *Lindon* judgment seems to be the first Grand Chamber judgment where there was serious disagreement over the invocation of the chilling effect principle. Finally, *Lindon* was the first Grand Chamber judgment where the margin of appreciation principle was applied to temper the application of the chilling effect principle.

Two months after the *Lindon* judgment, the Grand Chamber delivered another divided judgment concerning a journalist's freedom of expression in *Stoll v. Switzerland*.[332] The case arose when the *Sonntags-Zeitung* newspaper published two articles by the applicant journalist, entitled "Ambassador Jagmetti insults the Jews," and "The ambassador in bathrobe and climbing boots puts his foot in it." The articles were based on a confidential strategy paper drawn up by the Swiss ambassador to the United States, which the applicant had acquired.[333] The confidential paper contained the "strategy to be adopted by the Swiss Government in the negotiations between the World Jewish Congress and Swiss banks concerning compensation due to Holocaust victims for unclaimed assets deposited in Swiss banks."[334]

Following publication of the articles, the applicant was prosecuted for contravening Article 293§1 of the Swiss Criminal Code on "publication of secret official deliberations."[335] The Zürich District Office convicted the applicant, and fined him 4,000 Swiss francs (2,382 euro). The fine was reduced to 800 francs (520 euro) on appeal, but the conviction was ultimately upheld by the Swiss Federal Court. Subsequently, the applicant made an application to the European Court, claiming his conviction for publication of secret official deliberations violated his right to freedom of expression.

In 2006, the Court's Fourth Section delivered its Chamber judgment,[336] while the Grand Chamber would deliver its judgment in 2007.[337] The principal question for the Fourth Section was whether the conviction had been necessary in a democratic society. Ultimately, the Fourth Section held that there had been a violation of Article 10, finding that it was "not persuaded" that disclosure of aspects of the strategy to be adopted by the Swiss Government in the negotiations concerning the assets of Holocaust victims and Switzerland's role in the Second World War was "capable of prejudicing interests that were so important that they outweighed freedom of expression in a democratic society."[338] The Fourth Section also examined the nature and severity of the penalty imposed.[339] The Court noted that the penalty imposed on the applicant was "relatively light" (around 520 euro); however the Court held that what matters is not that the applicant was sentenced to a minor penalty, "but that he was convicted at all."[340] Further, the Court recognised that while the penalty "did not prevent the

[331] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber) (Joint partly dissenting opinion of Judges Rozakis, Bratza, Tulkens and Šikuta, para, 7).
[332] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber).
[333] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 9.
[334] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 44.
[335] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 21.
[336] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006.
[337] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber).
[338] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 52.
[339] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 57.
[340] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 57. The Court cited *Jersild v. Denmark* (App. no. 15890/89) 23 September 1994 (Grand Chamber), para. 35 ("The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution

applicant from expressing himself," the conviction "nonetheless amounted to a kind of censorship which was likely to discourage him from making criticisms of that kind again in the future."[341] In the context of a political debate, such a conviction was "likely to deter journalists from contributing to public discussion of issues affecting the life of the community," and "liable to hamper the press in the performance of its task of purveyor of information and public watchdog."[342] The Court concluded that in light of these considerations, the applicant's conviction "was not reasonably proportionate to the legitimate aim pursued, in view of the interest of a democratic society in ensuring and maintaining the freedom of the press," in violation of Article 10.

Following the Chamber judgment in *Stoll*, the Swiss government requested that the case be referred to the Grand Chamber, and a panel of the Grand Chamber granted the request.[343] In 2007, the Grand Chamber delivered its judgment in *Stoll*, and by a majority, found there had been *no* violation of Article 10. At the outset, the Grand Chamber stated that the issue under consideration was the "dissemination of confidential information," and it laid down a number of different aspects which must be examined in order to determine whether the interference was necessary in a democratic society: (α) the issue at stake (β) the interests at stake; (γ) the review of the measure by the domestic courts; (δ) the conduct of the applicant; and (ε) whether the penalty imposed was proportionate.[344] The Court held, similar to the Chamber judgment, that the articles "concerned matters of public interest,"[345] However, the Court also held that publication of the articles was "liable to cause considerable damage to the interests of the respondent party in the present case,"[346] in particular "negative repercussions on the smooth progress of the negotiations in which Switzerland was engaged."[347]

In relation to the "conduct of the applicant," the Court examined, what it termed, "ethics of journalism," namely, how the applicant obtained the reports and the "form of the articles."[348] The Court admitted that "applicant was apparently not the person responsible for leaking the document."[349] However, the Court held that "the fact that the applicant did not act illegally in that respect is not necessarily a determining factor," as "he could not claim in good faith to be unaware that disclosure of the document in question was punishable under Article 293 of the Criminal Code."[350] The Court then held that the articles were "clearly reductive and truncated,"[351] the "vocabulary used by the applicant tends to suggest that the ambassador's remarks were anti-Semitic,"[352] and the articles were "sensationalist."[353] The Court concluded that "the truncated and reductive form of the articles in question, which was liable to mislead the reader as to the ambassador's personality and abilities, considerably

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of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so. In this regard the Court does not accept the Government's argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted.")

[341] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 58.
[342] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 58.
[343] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 8.
[344] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 112.
[345] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 118.
[346] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 136.
[347] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 132.
[348] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 140.
[349] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 141.
[350] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 144.
[351] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 147.
[352] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 148.
[353] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 149.

detracted from the importance of their contribution to the public debate protected by Article 10 of the Convention."[354]

Finally, the Court considered "whether the penalty imposed was proportionate."[355] The Court noted that it "must be satisfied that the penalty does not amount to a form of censorship intended to discourage the press from expressing criticism."[356] The Court also noted that "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."[357] The Court also recognised that "a person's conviction may in some cases be more important than the minor nature of the penalty imposed."[358] However, the Court added a new principle, noting that "a consensus appears to exist among the member States of the Council of Europe on the need for appropriate criminal sanctions to prevent the disclosure of certain confidential items of information."[359]

The Court examined the penalties imposed, and observed that "the penalty imposed on the applicant could hardly be said to have prevented him from expressing his views, coming as it did after the articles had been published."[360] Second, the amount of the fine was "relatively small," "imposed for an offence coming under the head of 'minor offences'," and "more severe sanctions" apply in other member states.[361] Third, the Court admitted that "it is true that no action was taken to prosecute" the other journalists who had published the report in full, but this was immaterial, as "the principle of discretionary prosecution leaves States considerable room for manoeuvre in deciding whether or not to institute proceedings against someone thought to have committed an offence," and prosecutors "have the right, in particular, to take account of considerations of professional ethics."[362] Finally, in relation to the "deterrent effect," the Court held that "while this danger is inherent in any criminal penalty, the relatively modest amount of the fine must be borne in mind in the instant case.[363] The Court concluded that the fine imposed was not disproportionate, and in light of all the considerations, the domestic authorities "did not overstep their margin of appreciation," and the applicant's conviction was proportionate to the legitimate aim pursued.[364] Thus, there had been no violation of Article 10.

However, a number of judges dissented, finding that there had been a violation of Article 10.[365] In particular, the dissent argued the majority's judgment was "a dangerous and unjustified departure from the Court's well-established case-law."[366] Notably, the dissent also addressed the penalty imposed and its potentially adverse effect on the exercise of journalistic freedom. The dissent subscribed "to the conclusions of the Chamber in this case," which had applied the chilling effect: the conviction amounted to a kind of censorship which was likely to discourage the journalist from making criticisms of that kind again in the future. In the context of a political debate such a conviction is likely to deter journalists from contributing

[354] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 152.
[355] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 153.
[356] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 154.
[357] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 154.
[358] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 154.
[359] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 155.
[360] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 155.
[361] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 157.
[362] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 159.
[363] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 160.
[364] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 162.
[365] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber) (Dissenting opinion of Judge Zagrebelsky joined by Judges Lorenzen, Fura-Sandström, Jaeger and Popović).
[366] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber) (Dissenting opinion of Judge Zagrebelsky joined by Judges Lorenzen, Fura-Sandström, Jaeger and Popović, para. 2).

to public discussion of issues affecting the life of the community. By the same token, it is liable to hamper the press in the performance of its task of purveyor of information and public watchdog.[367] Moreover, the dissent in *Stoll* cited with approval the Court's application of the chilling effect in *Dupuis and Others v. France*,[368] where the Court applied *Cumpănă and Mazăre*, holding that the "relatively moderate nature of a fine" does not suffice to negate the chilling effect on freedom of expression.

While there is much to say on *Stoll* generally, the focus is on the majority's consideration of the chilling effect. First, while the majority held that the "relatively modest amount of the fine must be borne in mind" in relation to the chilling effect, it may be argued that the majority's judgment was at least admirable for fully engaging with the chilling effect, reiterating the principles, and attempting to engage with the case law. In this regard, the Grand Chamber's *Stoll* judgment is somewhat more notable for its engagement with the chilling effect than *Lindon*. Indeed, the Grand Chamber's engagement with the chilling effect is also much more satisfactory than the dissenting opinion in the Fourth Section's *Stoll* judgment, where the dissent seemed not to even engage with the principle.[369]

The Court does hold that because "a consensus appears to exist among the member States of the Council of Europe on the need for appropriate criminal sanctions to prevent the disclosure of certain confidential items of information," this somehow outweighs the Court's chilling effect principle applied in a number of judgments (*Jersild*, *Lopes Gomes da Silva, Cumpănă and Mazăre*, *Dammann*, and *Dupuis and Others*), which the Court in *Stoll* itself cites. The Court's argument seems to be a version of the margin of appreciation argument which the Court's majority adopted in *Lindon*, that "in view of the margin of appreciation left to Contracting States by Article 10 of the Convention, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued."[370] Similarly, in *Cumpănă and Mazăre*, the vast majority of Council of Europe member states provided for prison sentences for defamation, and that did not make a difference to the analysis. Finally, and perhaps the strongest criticism of the *Stoll* majority's judgment, is that the Court does not consider *other* journalists that will be deterred from engaging in public interest expression *in the future*. This principle of having regard not only to the individual journalists, but other journalists in the future, is arguably absent from the *Stoll* majority's judgment, even though it was in applied in *Wille* and *Cumpănă and Mazăre*.

Lindon and *Stoll* resulted in a divided Grand Chamber, but the next two Grand Chamber judgments applying the chilling effect principle resulted in two unanimous judgments by the 17-judge Court. The first was *Guja v. Moldova*,[371] and concerned a whistleblower's freedom of expression. The applicant was the Head of the Press Department of the Moldova Prosecutor General's Office. In 2003, the applicant sent a newspaper two letters that had been sent to the Prosecutor General's Office from a member of the Moldova Parliament urging the Prosecutor General to "intervene in this case," in a case that had been taken against four police officers.[372] The newspaper later published an article based on the letters, headlined "Vadim Mişin intimidating prosecutors."[373] The applicant later admitted that he had supplied the newspaper with the letters, and the applicant was dismissed from the Prosecutor General's Office. The Office found that the applicant had breached its internal

[367] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 58.
[368] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007.
[369] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006 (Dissenting opinion of Judge Wildhaber, joined by Judges Borrego Borrego and Šikuta).
[370] *Lindon, Otchakovsky-Laurens and July v. France* (App. nos. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber), para. 59.
[371] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber).
[372] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 10.
[373] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 15.

regulations for disclosing letters which were "secret," and for failing to "consult the heads of other departments of the Prosecutor General's Office before handing them over."[374] The applicant was dismissed, and ultimately failed in his appeals before the domestic courts.

The applicant then made an application to the European Court, arguing that his dismissal for the disclosure of the impugned letters to the press "amounted to a breach of his right to freedom of expression" under Article 10.[375] The Fourth Section relinquished jurisdiction in favour of the Grand Chamber, and in 2008 the Court delivered its judgment. The government had argued that there had been no interference with the applicant's freedom of expression, as he had not been dismissed for exercising his freedom of expression but "simply for breaching the internal regulations of the Prosecutor General's Office."[376] However, the Court held that Article 10 "extends to the workplace in general,"[377] and includes the freedom to impart information.[378] As the applicant was dismissed for his "participation in the publication of the letters," there had thus been an interference with Article 10. [379]

The Court examined whether the interference had been necessary in a democratic society, and first reiterated that Article 10 applies "also to the workplace, and that civil servants, such as the applicant, enjoy the right to freedom of expression."[380] The Court also noted that "employees have a duty of loyalty, reserve and discretion to their employer. This is particularly so in the case of civil servants since the very nature of civil service requires that a civil servant is bound by a duty of loyalty and discretion."[381] Crucially, the Court then elaborated upon six criteria,[382] to determine whether the applicant's dismissal had been "necessary in a democratic society," and ultimately held that there had been a violation of Article 10. The Court held that the "public interest in having information about undue pressure and wrongdoing within the Prosecutor's Office revealed is so important in a democratic society that it outweighed the interest in maintaining public confidence in the Prosecutor General's Office."[383]

For present purposes, it is notable that the final criterion considered by the Court in *Guja* was "the severity of the sanction."[384] The Court noted that the sanction, namely dismissal, was the "heaviest sanction possible."[385] The Court then applied chilling effect reasoning, and held that the sanction "not only had negative repercussions on the applicant's career but it could also have a serious chilling effect on other employees from the Prosecutor's Office and discourage them from reporting any misconduct."[386] Moreover, "in view of the media coverage of the applicant's case," the sanction "could have a chilling effect not only on employees of the Prosecutor's Office but also on many other civil servants and employees."[387] The Court concluded "that the interference with the applicant's right to

[374] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 21.
[375] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 48.
[376] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 50.
[377] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 52.
[378] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 53
[379] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 53.
[380] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 53.
[381] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 53.
[382] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 74 - 78. ((i) Whether the applicant had alternative channels for the disclosure; (ii) The public interest in the disclosed information; (iii) (iii) The authenticity of the disclosed information; (iv) The detriment to the Prosecutor General's Office; (v) Whether the applicant acted in good faith; (vi) The severity of the sanction.
[383] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 91.
[384] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 95.
[385] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 95.
[386] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 95.
[387] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 95.

freedom of expression, in particular his right to impart information, was not 'necessary in a democratic society'."[388]

Notably, the Court's Grand Chamber judgment in *Guja* was unanimous, and the application of chilling effect reasoning mirrored the chilling effect reasoning in both *Goodwin* ("sources may be deterred assisting the press in informing the public on matters of public interest"[389]), and *Cumpănă and Mazăre* ("investigative journalists are liable to be inhibited from reporting on matters of general public interest"[390]). The Court in *Guja* not only had regard to the individual applicant ("negative repercussions on the applicant's career") but also to other individuals who may be discouraged from exercising their freedom of expression in the future ("serious chilling effect on other employees from the Prosecutor's Office and discourage them from reporting any misconduct").[391] A quite unique consideration of the Court's holding in *Guja* was that "in view of the media coverage of the applicant's case, the sanction could have a chilling effect not only on employees of the Prosecutor's Office but also on many other civil servants and employees."[392] The Court's reliance on "in view of the media coverage of the applicant's case," was not a feature of the chilling effect principle applied in the Grand Chamber judgments on protection of journalistic sources, or journalistic freedom of expression, or judicial and lawyer's freedom of expression.

The unanimity in *Guja* also continued to the next Grand Chamber judgment applying chilling effect reasoning, namely *Sanoma Uitgevers B.V. v. the Netherlands*.[393] This was the first Grand Chamber judgment since *Goodwin* in 1996 on protection of journalistic sources, and the applicant in *Sanoma* was the publisher of the Dutch car magazine *Autoweek*. In January 2003, some of the magazine's journalists had attended an illegal street race in the northern Dutch town of Hoorn, and with the permission of the participants, photographed the race, promising to anonymise the photographs. Police arrived later, and ended the race, but no arrests were made.

A month later, a police officer telephoned the magazine, and asked for all photographs taken of the street race. The magazine's editor refused, informing the officer that they had guaranteed anonymity to the race participants, and that "the press was reasonably protected against this kind of action."[394] A few hours later, two officers arrived at the magazine's offices, and presented a summons that had been granted by a public prosecutor, ordering the magazine to surrender the photographs. The magazine refused to surrender the photographs. Two public prosecutors then phoned the magazine's lawyers that the photographs were needed as "it concerned a matter of life and death,"[395] but would not disclose what the specific need was. The police then arrested the magazine's editor, and threatened to "seal and search" the whole office for the "entire weekend" and "remove all computers."[396] The disk with the photographs was passed to the magazine's lawyers, and the police then went to the lawyer's office. The police agreed to call an investigating judge by phone, and the judge expressed the view that the criminal investigation outweighed the

[388] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 97.
[389] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 39.
[390] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 113.
[391] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 97.
[392] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 95.
[393] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber).
[394] Sanoma Uitgevers B.V. v. the Netherlands (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 15.
[395] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 17.
[396] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 18.

magazine's journalistic privilege. The next day the lawyers, on the instruction of the applicants, and "under protest" surrendered the photographs to the police.[397]

The magazine applied to have the seizure set aside, but a Regional Court ruled that protection of journalistic sources "should yield to general investigation interests," in particular where "the undertaking to the journalistic source concerned the street race whereas the investigation did not concern that race."[398] The Court did acknowledge that the police actions were "rash," and could have been "more tactful."[399] The Dutch Supreme Court later declared an appeal inadmissible.

The magazine's publisher made an application to the European Court, claiming that it had been compelled to disclose information to the police that would have enabled their journalists' sources to have been revealed in violation of Article 10.[400] Ultimately, the Grand Chamber found that there had been a violation of Article 10, on the basis that the "compulsion by the authorities to disclose information" had not been "prescribed by law."[401] The Court held that Dutch legislation did not provide for a review by a "judge or other independent and impartial body"[402] to assess whether the interest of a criminal investigation overrode the public interest in the protection of journalistic sources. The Court held that a public prosecutor issuing a seizure order was not "objective and impartial."[403]

Notably, the Grand Chamber adopted chilling effect reasoning in two instances. First, when the Court was for the first time at Grand Chamber level declaring protection of journalistic sources a "right," not merely an interest, under Article 10.[404] The Court reiterated that without such a right, "sources may be deterred from assisting the press in informing the public on matters of public interest," and it was the cornerstone of freedom of the press.[405] Second, and arguably more significantly, the Court adopted chilling effect reasoning to find that there had been an "interference" with the magazine's freedom of expression, even though, as the Court admitted, "it is true that no search or seizure took place in the present case."[406] The Court nonetheless held that a chilling effect will arise "wherever journalists are seen to assist in the identification of anonymous sources."[407] This concern for a future chilling effect, even where no search took place, arguably mirrors the Court's reasoning in *Cumpănă and Mazăre*, where the Court admitted that the applicants "did not serve their

[397] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 22.
[398] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 25.
[399] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 25.
[400] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 101.
[401] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 101.
[402] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 90.
[403] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 93.
[404] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 50.
[405] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 50.
[406] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 71.
[407] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 71.

prison sentence" as they had been granted a presidential pardon, but the Court nevertheless held that such a sanction will "inevitably have a chilling effect."[408]

2.4.4 Presidency of Judge Bratza (2011 - 2012)

Judge Nicolas Bratza was President of the Court for little over a year,[409] and yet, three Grand Chamber judgments were delivered during this presidency which considered chilling effect reasoning, and related to freedom of expression: *Palomo Sánchez and Others v. Spain* (dismissal of trade union members for offensive expression),[410] *Axel Springer AG v. Germany* (newspaper prohibited reporting on a public figure's arrest and conviction),[411] and *Mouvement raëlien suisse v. Switzerland* (ban on a poster campaign).[412] Notably, and as is discussed below, all three judgments resulted in quite a divided Court: 12 votes to five finding no violation of Article 10 in *Palomo Sánchez*; 12 votes to five finding a violation of Article 10 in *Axel Springer*; and nine votes to eight in finding no violation of Article 10 in *Mouvement raëlien*. There were also a high number of 23 judgments and decisions in 2012 which considered, or applied, chilling effect reasoning.[413]

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[408] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 116.

[409] Judge Nicolas Bratza was President of the Court from 4 November 2011 - 31 October 2012. See European Court of Human Rights, "Judges of the Court since 1959," May 2017.

[410] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber) (Article 10 and employees' dismissal for trade union expression).

[411] *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber).

[412] *Mouvement raëlien suisse v. Switzerland* (App. no. 16354/06) 13 July 2012 (Grand Chamber).

[413] *Szerdahelyi v. Hungary* (App. no. 30385/07) 17 January 2012 (Article 11 and legal basis for ban on demonstration); *Patyi v. Hungary (No. 2)* (App. no. 35127/08) 17 January 2012 (Article 11 and legal basis for ban on demonstration); *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber) (Article 10 and injunction against newspaper); *Kaperzyński v. Poland* (App. no. 43206/07) 3 April 2012 (Article 10 and newspaper's prosecution for failure to publish rectification or reply); *Hakobyan and Others v. Armenia* (App. no. 34320/04) 10 April 2012 (Article 11 and detention of protestors); *Lesquen du Plessis-Casso v. France* (App. no. 54216/09) 12 April 2012 (Article 10 and politician's conviction for defamation); *Tatár and Fáber v. Hungary* (App. nos. 26005/08 and 26160/08) 12 June 2012 (Article 10 and protestors' conviction for symbolic political protest); *Tănăsoaica v. Romania* (App. no. 3490/03) 19 June 2012 (Article 10 and journalist's conviction for defamation); *Ciesielczyk v. Poland* (App. no. 12484/05) 26 June 2012 (Article 10 and journalist's conviction for defamation);*Mouvement Raëlien Suisse v. Switzerland* (App. no. 16354/06) 13 July 2012 (Grand Chamber) (Article 10 and prohibition on displaying posters in public); *Marin Kostov v. Bulgaria* (App. no. 13801/07) 24 July 2012 (Article 10 and prisoner's administrative punishment); *Lewandowski-Malec v. Poland* (App. no. 39660/07) 18 September 2012 (Article 10 and prosecution for defamation over comments on mayor); *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. no. 11828/08) 25 September 2012 (Article 11, in light of Article 10, and government minister's statements concerning police union); *Yordanova and Toshev v. Bulgaria* (App. no. 5126/05) 2 October 2012 (Article 10 and civil defamation proceedings against journalists); *Catan and Others v. Moldova and Russia* (App. nos. 43370/04 ... 18454/06) 19 October 2012 (Grand Chamber) (Article 8 and use of Latin script in schools); *Çelik v. Turkey (No. 3)* (App. no. 36487/07) 15 November 2012 (Article 11 and police action against demonstrators); *Harabin v. Slovakia* (App. no. 58688/11) 20 November 2012 (Article 10 and sanctioning of supreme court president); *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012 (Article 10 and protection of journalistic sources); *Disk and Kesk v. Turkey* (App. no. 38676/08) 27 November 2012 (Article 11 and police conduct at demonstration); *Tangiyev v. Russia* (App. no. 27610/05) 11 December 2012 (Article 34 and right of individual petition); and *Ahmet Yıldırım v. Turkey* (App. no. 3111/10) 18 December 2012 (Article 10 and blocking of Google Sites); *Seckerson and Times Newspapers Limited v. the United Kingdom* (App. nos. 32844/10 and 33510/10) 24 January 2012 (Admissibility decision) (Article 10 and newspaper convicted of contempt of court); and *Charalambous and Others v. Turkey* (App. no. 46744/07) April 2012 (Admissibility decision) (Article 34 and right of individual petition).

2.4.4.1 Grand Chamber judgments

The first Grand Chamber judgment delivered with Judge Nicolas Bratza as President, and considering chilling effect reasoning, was that of *Palomo Sánchez and Others v. Spain*.[414] The case concerned the dismissal of trade union members for "offensive" expression; however, unlike *Guja* and *Sanoma*, the *Palomo Sánchez* judgment resulted in a divided Court similar to that in *Lindon* and *Pedersen and Baadsgaard*. In *Palomo Sánchez* the applicants were employed as delivery men by the company P., and were members of the executive committee of a trade union. The union published a monthly news bulletin, and in April 2002, the bulletin included a cartoon of the human resources manager, G., sitting behind a desk under which a person on all fours, and two other employees, "who were watching the scene while waiting to take their turn to satisfy the manager like their colleague."[415] The bulletin also included articles, which included criticism of two colleagues who "had testified in favour of the company P. in proceedings that the applicants had brought against their employer."[416] The bulletin was distributed among the company's workers and displayed on the union's notice board located on the company's premises. Following publication of the bulletin, the applicants were dismissed on grounds of "serious misconduct."[417] The Employment Tribunal of Barcelona found the dismissals were justified under the Labour Regulations, holding that the cartoon and articles were "offensive," and impugned the "honour and dignity" of the manager and two employees concerned.[418] The decision was ultimately upheld by the Spanish Constitutional Court.

The applicants then made an application to the European Court, claiming that they had been dismissed "on account of the content of the news bulletin," in violation of Article 10, and the "expressions had been used in a jocular spirit and not with any intent to insult."[419] The Third Section of the Court issued a Chamber judgment in 2009, and held that there had been no violation of Article 10.[420] The applicants requested a referral to the Grand Chamber, and a panel of the Grand Chamber granted the request.[421] At the outset, the Grand Chamber, unlike the Chamber judgment, considered it appropriate to examine the facts under Article 10, "interpreted in the light of Article 11."[422] This was because the "facts of the present case are such that the question of freedom of expression is closely related to that of freedom of association in a trade-union context."[423] The Court then went on to determine whether "the

[414] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber).
[415] *Aguilera Jimenez and Others v. Spain* (App. nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06 and 28964/06) 8 December 2009, para. 6.
[416] *Aguilera Jimenez and Others v. Spain* (App. nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06 and 28964/06) 8 December 2009, para. 6.
[417] *Aguilera Jimenez and Others v. Spain* (App. nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06 and 28964/06) 8 December 2009, para. 7.
[418] *Aguilera Jimenez and Others v. Spain* (App. nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06 and 28964/06) 8 December 2009, para. 8.
[419] *Aguilera Jimenez and Others v. Spain* (App. nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06 and 28964/06) 8 December 2009, para. 20.
[420] *Aguilera Jimenez and Others v. Spain* (App. nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06 and 28964/06) 8 December 2009, para. 37.
[421] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 6. See R. Ó Fathaigh and D. Voorhoof, "Grand Chamber Judgment on Trade Union Freedom of Expression," *Strasbourg Observers*, 14 September 2011. See also, R. Ó Fathaigh, "Palomo Sánchez v. Spain," (2011) 12 *European Human Rights Cases* 1794.
[422] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber).
[423] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber).

sanction imposed on the applicants was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it were 'relevant and sufficient'."[424] The first question asked by the Court was whether the applicants' comments could be regarded as harmful to the reputation of others. In this regard, the Court noted that the articles "contained explicit accusations of 'infamy' against A. and B., denouncing them for 'selling' the other workers,"[425] and were expressed in "vexatious and injurious terms for the persons concerned."[426] The Court concluded that the domestic courts' conclusion that the applicants had "overstepped the limits of admissible criticism in labour relations cannot be regarded as unfounded or devoid of a reasonable basis in fact."[427]

Notably, the Court then went on to consider whether the sanction of dismissal was "proportionate to the degree of seriousness of the impugned remarks."[428] The Court held that the publications were "a matter of general interest for the workers of the company P."[429] However, the Court held that "the existence of such a matter cannot justify the use of offensive cartoons or expressions, even in the context of labour relations."[430] The Court concluded that "an attack on the respectability of individuals by using grossly insulting or offensive expressions in the professional environment is, on account of its disruptive effects, a particularly serious form of misconduct capable of justifying severe sanctions."[431]

The Court nowhere mentioned the *Guja* judgment, and nowhere mentioned the chilling effect principle. This was particularly curious given that the Court admitted that the expression at issue concerned a "matter of general interest,"[432] and the Court in *Guja* had emphasised the "great importance" of not "discouraging" discussion of "topics of public concern."[433] Indeed, in the Chamber judgment, which the Grand Chamber presumably would have considered, the dissenting judge alluded to this principle, that trade union members must not be "discouraged, for fear of disciplinary sanctions, from making clear their opinions on contentious matters."[434] Nevertheless, the Court in *Palomo Sánchez* chose not to consider the chilling effect, and concluded that "using grossly insulting or offensive expressions" justifies "severe sanctions."[435] Thus, there had been no violation of Article 10, read in the light of Article 11.

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[424] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 63.
[425] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 67.
[426] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 67.
[427] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 67.
[428] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 69.
[429] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 72.
[430] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 73.
[431] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 76.
[432] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 72. A dissenting judge also considered the chilling effect in *Catan and Others v. Moldova and Russia* (App. nos. 43370/04, 18454/06 and 8252/05) 19 October 2012, concerning Article 8 and right to one's language.
[433] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 91.
[434] *Aguilera Jiménez and Others v. Spain* (App. nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06 and 28964/06) 8 December 2009 (Dissenting opinion of Judge Power, para. 9).
[435] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 76.

Notably, the dissenting opinion, which was joined by the Vice-President, Judge Françoise Tulkens (who also joined the dissenting opinion in *Lindon*), applied the chilling effect principle. The dissent held that imposing such a "harsh sanction" is likely to have a "'chilling effect' on the conduct of trade unionists and to encroach directly upon the raison d'être of a trade union."[436] The dissent also grounded the application of the chilling effect principle in prior case law, relying upon both *Wille* and *Goodwin* as authorities.[437]

It is arguable that the approach of the majority in *Palomo Sánchez* is quite close to that of the majority in *Lindon*, where the Court does not seem to engage with the chilling effect principle, and similarly does not engage with the case law.[438] This approach of effectively ignoring the chilling effect, rather than trying to distinguish the case law, or argue why it does not apply, is quite disappointing. In contrast, while there may be disagreement over the correctness of the conclusion in *Pedersen and Baadsgaard*, at least the majority engaged with the chilling effect principle, and sought to argue why it was not engaged.[439]

The division within the Court in *Palomo Sánchez* continued in the Court's next relevant Grand Chamber judgment in *Axel Springer AG v. Germany*.[440] The case involved an injunction and fines (11,000 euro) imposed by the German courts on a newspaper for publishing an article detailing the arrest and conviction of a well-known actor for possession of cocaine. The Grand Chamber took the opportunity to lay down a six-part test[441] for considering whether there had been a fair balance struck between the Article 10 right to freedom of expression, and the Article 8 right to respect for private life.[442] The Court concluded that there had been a violation of Article 10, placing particular weight on the fact the article was on a matter of public interest, concerned a public figure, the information was true, and had been confirmed from a prosecutor's office.[443]

Importantly, and similar in a sense to the final criteria in *Guja*,[444] the Court held that in relation to the sanctions imposed, "although these were lenient, they were capable of having a chilling effect."[445] Notably, in laying down the criteria on sanctions, the Court cited the chilling effect principle from paragraph 93 of *Pedersen and Baadsgaard*, that the Court should consider whether the sanctions are "of such a kind as to have a "chilling effect" on the exercise of media freedom."[446] As mentioned above, this principle was based on *Wille* and *Goodwin*, which were cited with approval by the Court in *Pedersen and Baadsgaard*.[447]

However, five judges in *Axel Springer* dissented, and would have held that there was no violation of Article 10. Notably, the dissent chose not to discuss the chilling effect, and instead focused on the standard of scrutiny applied by the majority. The dissent argued that the European Court should only interfere with domestic courts' determination where it had

[436] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber) (Joint dissenting opinion of Judges Tulkens, Davíd Thór Björgvinsson, Jočienė, Popović and Vučinić, para. 17).
[437] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber) (Joint dissenting opinion of Judges Tulkens, Davíd Thór Björgvinsson, Jočienė, Popović and Vučinić, footnote 11).
[438] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber), para. 68.
[439] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 93.
[440] *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber).
[441] *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber), para. 90-94.
[442] *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber), para. 84
[443] *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber), para. 104.
[444] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 95.
[445] *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber), para. 109.
[446] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 93.
[447] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 93.

been "manifestly unreasonable."[448] However, the dissent offered no authority for this proposition, and nowhere discussed, nor cited, any of the previous Grand Chamber judgments applying, or considering the chilling effect, in particular *Pedersen and Baadsgaard*, which had been applied by the majority.[449] It is arguable that the approach of the majority was more appropriate, and consistent with prior case law.

The final relevant Grand Chamber judgment during the Bratza Presidency again generated division within the Court in *Mouvement raëlien suisse v. Switzerland*.[450] The Grand Chamber divided nine-votes-to-eight in finding that there had been no violation of Article 10 where Swiss police authorities had prohibited a poster campaign by a quasi-religious association. The applicant association was the Swiss branch of the Raëlien Movement, an association whose members believe life on earth was created by extra-terrestrials. The association sought to conduct a poster campaign, with the posters featuring extra-terrestrials, flying saucers, and the words "The message from the extra-terrestrials. Science at last replaces religion."[451] The poster also included the website address of the Raëlien Movement.

The Neuchâtel police authorities refused permission for the poster campaign on the grounds of public order and morals, and the domestic courts upheld this decision. The Swiss courts held that although the poster itself was not objectionable, because the Raëlien website address was included, the courts had to have regard to documents published on the website. The courts held the poster campaign could be prohibited on the basis that: (a) there was a link on the website to a company proposing cloning services; (b) the association advocated "geniocracy" i.e. government by those with a higher intelligence; and (c) there had been allegations of sexual offences against some members of the association.[452]

The applicant association made an application to the European Court arguing that the ban on its poster campaign was a violation of its right to freedom of expression under Article 10. The First Section first considered the application, and held that there had been no violation of Article 10.[453] A Grand Chamber panel accepted a request for referral, and the Grand Chamber subsequently held, by nine votes to eight, that the refusal to permit the posters was not a violation of Article 10.[454] The Court reasoned that because the main aim of the poster and website was to merely draw people to the cause of the Raëlien Movement, the speech at issue was to be categorised as somewhere between commercial speech and proselytising speech.[455] States were granted a wide margin of appreciation when regulating such categories of speech, and therefore, the Court would only substitute its own assessment of the reasons for the poster ban in very limited circumstances.[456] The majority concluded that the Swiss courts were reasonably entitled to consider that (a) the website link to a company proposing cloning services; (b) advocacy of "geniocracy"; and (c) allegations of sexual offences, when taken together justified the poster ban.[457] Thus, there had been no violation of Article 10.

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[448] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber) (Dissenting opinion of Judge López Guerra joined by Judges Jungwiert, Jaeger, Villiger and Poalelungi, para. 7).
[449] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber) (Dissenting opinion of Judge López Guerra joined by Judges Jungwiert, Jaeger, Villiger and Poalelungi).
[450] *Mouvement raëlien suisse v. Switzerland* (App. no. 16354/06) 13 July 2012 (Grand Chamber). See Ronan Ó Fathaigh, "Banning Speech in the Public Space," *Strasbourg Observers*, 10 March 2011; and Ronan Ó Fathaigh, "Banning Speech in the Public Space: Grand Chamber Agrees," *Human Rights in Ireland*, 1 August 2012.
[451] *Mouvement raëlien suisse v. Switzerland* (App. no. 16354/06) 13 July 2012 (Grand Chamber), para. 14.
[452] *Mouvement raëlien suisse v. Switzerland* (App. no. 16354/06) 13 July 2012 (Grand Chamber), para. 21.
[453] *Mouvement raëlien suisse v. Switzerland* (App. no. 16354/06) 13 January 2011.
[454] *Mouvement raëlien suisse v. Switzerland* (App. no. 16354/06) 13 July 2012 (Grand Chamber).
[455] *Mouvement raëlien suisse v. Switzerland* (App. no. 16354/06) 13 July 2012 (Grand Chamber), para. 62.
[456] *Mouvement raëlien suisse v. Switzerland* (App. no. 16354/06) 13 July 2012 (Grand Chamber), para. 66.
[457] *Mouvement raëlien suisse v. Switzerland* (App. no. 16354/06) 13 July 2012 (Grand Chamber), para. 72.

Eight judges dissented, and two of the dissenting opinions sought to apply chilling effect reasoning in finding that there had been a violation of Article 10. First, in the joint dissenting opinion of Judges Sajó, Lazarova Trajkovska and Vučinić, the chilling effect was invoked, where the judges argued that the ban "expressed an official legal position on the views of the applicant association, with obvious additional censorial effect."[458] The opinion argued that similar to banning demonstrations, the refusal to give authorisation in this case could have had a chilling effect on the applicant and others participating in the movement and sharing similar convictions. This could also have "discouraged other persons from making themselves acquainted with those ideas on the grounds that they did not have official authorisation."[459] Moreover, in the dissenting opinion of Judge Pinto de Albuquerque, it was argued that there was an "inadmissible pattern of content-based discriminatory conduct" by the Swiss authorities in refusing three times to allow the association access the public forum.[460] The opinion argued that this "State conduct inevitably produces a chilling effect not only in regard to the applicant association, but also in regard to any person wishing to communicate ideas not shared by the majority."[461]

Similar to *Lindon* and *Palomo Sánchez*, the Court majority's judgment in *Mouvement raëlien suisse* is open to the same critique, where the Court does not seem to engage with the chilling effect principle, similarly does not engage with the case law; nor does it engage with the case law cited by the dissent.

2.4.5 Presidency of Judge Spielmann (2012 - 2015)

Following Judge Bratza's Presidency, the fourth President of the Court in the period under consideration was Judge Dean Spielmann.[462] During Judge Spielmann's three-year presidency, five Grand Chamber judgments were delivered which considered chilling effect reasoning, with three judgments concerning Article 10 and freedom of expression, namely: *Morice v. France,*[463] concerning a lawyer convicted of defamation, *Delfi AS v. Estonia*[464] concerning a news website's liability for reader comments, and *Pentikäinen v. Finland*,[465] concerning a photojournalist's conviction for disobeying police orders. The other two Grand Chamber judgments concerned Article 34 and the right of individual petition,[466] and Article 11 and the conviction of farmers participating in a demonstration.[467] And during this period,

[458] *Mouvement raëlien suisse v. Switzerland* (App. no. 16354/06) 13 July 2012 (Grand Chamber) (Joint dissenting opinion of Judges Sajó, Lazarova Trajkovska and Vučinić) (no paragraph numbers).
[459] *Mouvement raëlien suisse v. Switzerland* (App. no. 16354/06) 13 July 2012 (Grand Chamber) (Joint dissenting opinion of Judges Sajó, Lazarova Trajkovska and Vučinić).
[460] *Mouvement raëlien suisse v. Switzerland* (App. no. 16354/06) 13 July 2012 (Grand Chamber) (Dissenting opinion of Judge Pinto de Albuquerque
[461] *Mouvement raëlien suisse v. Switzerland* (App. no. 16354/06) 13 July 2012 (Grand Chamber) (Dissenting opinion of Judge Pinto de Albuquerque).
[462] Judge Dean Spielmann was President of the Court from 1 November 2012 - 31 October 2015. See European Court of Human Rights, "Judges of the Court since 1959," May 2017.
[463] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber) (Article 10 and lawyer convicted of defamation). See I. Høedt-Rasmussen and D. Voorhoof, "A great victory for the whole legal profession," *Strasbourg Observers*, 6 May 2015.
[464] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber) (Article 10 and news website's liability for reader comments).
[465] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber) (Article 10 and photojournalist's conviction for disobeying police order).
[466] *Janowiec and Others v. Russia* (App. no. 55508/07 and 29520/09) 21 October 2013 (Grand Chamber) (Article 34 and right to individual petition).
[467] *Kudrevičius and Others v. Lithuania* (App. no. 37553/05) 15 October 2015 (Grand Chamber) (Article 11 and convictions for farmers' demonstration).

the trend of an ever-increasing number of Chamber judgments and decisions continued, where chilling effect reasoning was considered, or applied, in 72 judgments and decisions.[468]

[468] *Yefimenko v. Russia* (App. no. 152/04) 12 February 2013 (Article 34 and right of individual petition); *Bucur and Toma v. Romania* (App. no. 40238/02) 8 January 2013 (Article 10 and intelligence service whistleblower's two-year prison sentence); *Eon v. France* (App. no. 26118/10) 14 March 2013 (Article 10 and activist's conviction for insulting president); *Alpatu Israilova v. Russia* (App. no. 15438/08) 14 March 2013 (Article 34 and right of individual petition); *Reznik v. Russia* (App. no. 4977/05) 4 April 2013 (Article 10 and defamation proceedings against president of Moscow bar); *Gross v. Switzerland* (App. no. 67810/10) 14 May 2013 (Article 8 and lack of legal guidelines for regulating admission of drug); *Yepishan v. Russia* (App. no. 591/07) 27 June 2013 (Article 34 and right of individual petition); *Morice v. France* (App. no. 29369/10) 11 July 2013 (Article 10 and lawyer's conviction for defamation); *Wegrzynowski and Smolczewski v. Poland* (App. no. 33846/07) 16 July 2013 (Article 8 and request for newspaper article deleted from archive); *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013 (Article 10 and protection of journalistic sources); *Sampaio e Paiva de Melo v. Portugal* (App. no. 33287/10) 23 July 2013 (Article 10 and journalist's conviction for defamation); *Khodorkovskiy and Lebedev v. Russia* (App. nos. 11082/06 and 13772/05) 25 July 2013 (Article 6 and lawyer-client privilege); *Welsh and Silva Canha v. Portugal* (App. no. 16812/11) 17 September 2013 (Article 10 and journalist's conviction for defamation); *Belpietro v. Italy* (App. no. 43612/10) 24 September 2013 (Article 10 and editor's conviction for defamation); *Kasparov v. Russia* (App. no. 21613/07) 3 October 2013 (Article 11 and prior ban on protest); *Cumhuriyet Vakfi and Others v. Turkey* (App. no. 28255/07) 8 October 2013 (Article 10 and interim injunction against reporting articles on prime minster); *Ricci v. Italy* (App. no. 30210/06) 8 October 2013 (Article 10 and journalist's conviction for violation of privacy); *Delfi v. Estonia* (App. no. 64569/09) 10 October 2013 (Article 10 and news website's liability for reader comments); *Jean-Jacques Morel v. France* (App. no. 25689/10) 10 October 2013 (Article 10 and politician's conviction for defamation); *Janowiec and Others v. Russia* (App. nos. 55508/07 and 295520/09) 21 October 2013 (Grand Chamber) (Article 34 and right of individual petition); *Ungváry v. Hungary* (App. no. 64520/10) 3 December 2013 (Article 10 and civil defamation proceedings against historian); *Mehmet Hatip Dicle v. Turkey* (App. no. 9858/04) 15 October 2013 (Article 10 and politician's conviction for incitement); *Perinçek v. Switzerland* (App. no. 27510/08) 17 December 2013 (Article 10 and politician's conviction for denying Armenian genocide); *Mika v. Greece* (App. no. 10347/10) 19 December 2013 (Article 10 and politician's conviction for defamation); *Jhangiryan v. Armenia* (App. no. 8696/09) 5 February 2013 (Admissibility decision) (Article 10 and prosecutor's dismissal from office); and *Stowarzyszenie "Poznańska Masa Krytyczna" v. Poland* (App. no. 26818/11) 22 October 2013 (Admissibility decision) (Article 11 and prohibition on demonstration).; *De Lesquen du Plessis-Casso* v. *France (No. 2)* (App. no. 34400/10) 30 January 2014 (Article 10 and politician's conviction for defamation); *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014 (Article 10 and photojournalist's conviction for disobeying police order); *Tešić v. Serbia* (App. nos. 4678/07 and 50591/12) 11 February 2014 (Article 10 and defamation conviction imposed on newspaper interviewee); *Nosov and Others v. Russia* (App. nos. 9117/04 and 10441/04) 20 February 2014 (Article 11 and prior ban on assembly); *Dilipak and Karakaya v. Turkey* (App. nos. 7942/05 and 24838/05) 4 March 2014 (Article 10 and civil defamation proceedings against journalists); *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* (App. no. 31045/10) 8 April 2014 (Article 11 and ban on taking secondary industrial action); *Brosa v. Germany* (App. no. 5709/09) 8 April 2014 (Article 10 and defamation injunction against political activist); *Taranenko v. Russia* (App. no. 19554/05) 15 May 2014 (Article 10, in the light of Article 11, and unauthorised protest in parliamentary building); *Baka v. Hungary* (App. no. 20261/12) 27 May 2014 (Article 10 and removal of supreme court president); *A.B. v. Switzerland* (App. no. 56925/08) 1 July 2014 (Article 10 and journalist's conviction for publishing confidential court materials); *Nedim Şener v. Turkey* (App. no. 38270/11) 8 July 2014 (Article 10 and pre-trial detention of journalist for aiding a criminal organisation); *Şik v. Turkey* (App. no. 53413/11) 8 July 2014 (Article 10 and journalist's pre-trial detention); *Axel Springer AG v. Germany (No. 2)* (App. no. 48311/10) 10 July 2014 (Article 10 and injunction against publication of newspaper article); *Nemtsov v. Russia* (App. no. 1774/11) 31 July 2014 (Article 11 and arrest, detention and conviction for protest activity); *Szél and Others v. Hungary* (App. no. 44357/13) 16 September 2014 (Article 10 and fine imposed on legislators for banner displayed in parliament); *Karácsony and Others v. Hungary* (App. no. 42461/13) 16 September 2014 (Article 10 and fine imposed on legislators for banner display in parliament); *Yilmaz Yildiz and Others v. Turkey* (App. no. 4524/06) 14 October 2014 (Article 11 and fines for demonstrating and reading press statement); *Murat Vural v. Turkey* (App. no. 9540/07) 21 October 2014 (Article 10 and conviction for insulting memory of Atatürk); and *Navalnyy and Yashin v. Russia* (App. no. 76204/11) 4 December 2014 (Article 11 and arrest of protestors); *Roşca Stănescu v. Romania* (App. no. 49357/08) 28 January 2014 (Admissibility decision) (Article 10 and government minister's remarks about a journalist); *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision) (Article 10 and protection of journalistic sources); and *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision) (Article 10 and protection of journalistic sources); *Rubins v. Latvia*

2.4.5.1 Grand Chamber judgments

In contrast to the previous three divided Grand Chamber judgments, the first Grand Chamber judgment under the Presidency of Judge Spielmann was the unanimous judgment in *Morice v. France*,[469] where the Court reversed a Chamber judgment finding that there had been no violation of Article 10. The applicant in *Morice* was a Paris-based lawyer, who sent a letter to the French Minister of Justice in connection with the judicial investigation into the death of a judge. The applicant was the lawyer of the deceased judge's wife, and in the letter, stated that the "conduct of judges M. and L.L., [which was] completely at odds with the principles of impartiality and fairness."[470] Further, the letter asked for an investigation into "the numerous shortcomings which [had] been brought to light in the course of the judicial investigation."[471] The letter was reported in *Le Monde* newspaper, which included quotes from the applicant, including that the judge's conduct was "completely at odds with the principles of impartiality and fairness," and that the letter "shows the extent of the connivance between the Djibouti public prosecutor and the French judges," and "one cannot but find it outrageous."[472]

The two judges mentioned filed a criminal complaint for defamation against the newspaper, its journalist, and the applicant. The applicant was ultimately convicted of defamation, for questioning one judge's "capacity to discharge her duties as a judge," and the courts found that the use of the word "connivance" clearly and directly suggested that the judges had been collaborating with an official of a foreign country to act in a biased and

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(App. no. 79040) 13 January 2015 (Article 10 and dismissal of university professor); *Petropavlovskis v. Latvia* (App. no. 44230/06) 13 January 2015 (Article 10 and refusal to grant citizenship due to political views); *Pinto Pinheiro Marques v. Portugal* (App. no. 26671/09) 22 January 2015 (Article 10 and historian's conviction for defaming municipal authority); *Kincses v. Hungary* (App. no. 66232/10) 27 January 2015 (Article 10 and lawyer disciplined for comments about judge); *Almeida Leitão Bento Fernandes v. Portugal* (App. no. 25790/11) 12 March 2015 (Article 10 and book author's conviction for defaming deceased individual); *Kopanitsyn v. Russia* (App. no. 43231/04) 12 March 2015 (Article 34 and right of individual petition); *İsmail Sezer v. Turkey* (App. no. 36807/07) 24 March 2014 (Article 11 and teacher's reprimand for union activities); *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber) (Article 10 and lawyer convicted of defamation); *Delfi v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber) (Article 10 and news website's liability for reader comments); *Özçelebi v. Turkey* (App. no. 34823/05) 23 June 2015 (Article 10 and conviction for insulting memory of Atatürk); *Akarsubaşı v. Turkey* (App. no. 70396/11) 21 July 2015 (Article 11 and trade unionist fined over press conference); *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015 (Article 10 and criminal proceedings against journalist for criticising military); *Karpyuk and Others v. Ukraine* (App. nos. 30582/04 and 32152/04) 6 October 2015 (Article 11 and convictions for participating in mass disorder); *Gafgaz Mammadov v. Azerbaijan* (App. no. 60259/11) 15 October 2015 (Article 11 and protestor's conviction for disobeying police order); *Kudrevičius v. Lithuania* (App. no. 37553/05) 15 October 2015 (Grand Chamber) (Article 11 and convictions for farmer demonstration); *Dilek Aslan v. Turkey* (App. no. 34364/08) 20 October 2015 (Article 11 and conviction for refusing to give name while handing out leaflets); *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber) (Article 10 and photojournalist's conviction for disobeying police order); *Annagi Hajibeyli v. Azerbaijan* (App. no. 2204/11) 22 October 2015 (Article 34 and right of individual petition); *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber) (Article 10 and newspaper's liability for publishing public figure's photographs); *Mikhatlova v. Russia* (App. no. 46998/08) 19 November 2015 (Article 6 and free legal aid); *Prompt v. France* (App. no. 30936/12) 3 December 2015 (Article 10 and author liable for defamation over book); and *Bono v. France* (App. no. 29024/11) 15 December 2015 (Article 10 and disciplinary sanction imposed on lawyer); *Kudeshkina v. Russia* (App. no. 28727/11) 17 February 2015 (Admissibility decision) (Article 10, and 46, and judge's dismissal from judiciary); *Bakiyev v. Russia* (App. no. 9728/05) 20 October 2015 (Admissibility decision) (Article 34 and right of individual petition); and *Yeliseyev v. Russia* (App. no. 923/03) 20 October 2015 (Admissibility decision) (Article 34 and right of individual petition).

[469] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber) (Article 10 and lawyer convicted of defamation).

[470] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 15.

[471] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 15.

[472] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 34.

unfair manner.[473] The applicant was sentenced to a fine of 4,000 euro, and was ordered to pay jointly with the newspaper and journalist, 7,500 euro in damages to each of the judges, and 1,000 euro in costs, and 4,000 in further costs (jointly with the newspaper and journalist).

The applicant made an application to the European Court, claiming the conviction and sanctions imposed had been a violation of his right to freedom of expression. In particular, the applicant invoked chilling effect reasoning, arguing that the "harshness of the penalties imposed on him, both civil and criminal, was such as to deter him from speaking in the media to denounce any shortcomings in the judicial system."[474] In 2013, the Fifth Section of the Court delivered its Chamber judgment, and held by a majority, that there had been no violation of Article 10.[475] The Court noted that the applicant was found guilty of an offence and ordered to pay a fine. However, the Court held that "in view of the margin of appreciation left to Contracting States by Article 10 of the Convention, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued."[476] One judge dissented, Judge Yudkivska, and questioned the majority's conclusion on the criminal proceedings for defamation. The dissent argued that the applicant's conviction for making value judgments "appears disproportionate," as the "very existence of criminal proceedings has a chilling effect; lawyers defending their clients' rights should not have to fear prosecution on that account."[477]

In 2015, the Grand Chamber delivered its judgment in *Morice*, and unanimously found a violation of Article 10. The Court found that while the remarks "could admittedly be regarded as harsh,"[478] and of a "somewhat hostile nature,"[479] they concerned a "matter of public interest,"[480] and "constituted value judgments with a sufficient "factual basis."[481] Notably, the Court in *Morice* laid down five criteria for determining whether a restriction on a defence counsel's freedom of expression has been necessary in a democratic society.[482] In particular, the final criteria concerned the "sanctions imposed," and the Court cited *Cumpănă and Mazăre* and its principle that "interference with freedom of expression may have a chilling effect on the exercise on that freedom," and a "risk" of a "relatively moderate nature of a fine" would not suffice to negate this chilling effect.[483] Indeed, the Court in *Morice* emphasised this point, and held that "even when the sanction is the lightest possible," such as a guilty verdict with a discharge in respect of the criminal sentence and an award of only a "token euro" in damages, this "does not suffice to negate the risk of a chilling effect on the exercise of freedom of expression.[484] Moreover, this chilling effect is "all the more unacceptable in the case of a lawyer who is required to ensure the effective defence of his clients."[485]

Finally, the Court reiterated that the "dominant position of the State institutions requires the authorities to show restraint in resorting to criminal proceedings," with the Court

[473] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 39.
[474] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 86.
[475] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 109.
[476] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 108 (citing *Radio France and Others v. France* (App. no. 53984/00) 30 March 2004, para. 40).
[477] *Morice v. France* (App. no. 29369/10) 11 July 2013 (Partly dissenting opinion of Judge Yudkivska, para. 15).
[478] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 174.
[479] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 167.
[480] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 167.
[481] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 174.
[482] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 146-176 ((a) the applicant's status as a lawyer; (b) contribution to a debate on a matter of public interest; (c) the nature of the impugned remarks; (d) the specific circumstances of the case; and (e) the sanctions imposed).
[483] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para.176.
[484] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para.127 and 176.
[485] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 127.

earlier approving the principle in *Kyprianou* that it is only in "exceptional circumstances" that a restriction, "even by way of a lenient criminal penalty," can be imposed of a defence counsel's freedom of expression.[486] Applying these principles, the Court noted that the applicant's "punishment" was not confined to a criminal conviction, but included fines, damages and costs ordered against the applicant, with the domestic judges having "expressly taken into account the applicant's status as a lawyer to justify their severity and to impose on him 'a fine of a sufficiently high amount'."[487] The Court held that the sanction imposed on him "was not the 'lightest possible," but was, "on the contrary, of some significance, and his status as a lawyer was even relied upon to justify greater severity."[488]

It would seem from the Court's reasoning that because of the chilling effect on a defence counsel's freedom of expression, there should be "restraint" in resorting to criminal proceedings, and only in "exceptional cases," can a restriction, "even by way of a lenient criminal penalty," be "accepted as necessary in a democratic society."[489] It is notable in this regard that the Court in *Morice* nowhere mentioned the principle from *Lindon* that "in view of the margin of appreciation left to Contracting States by Article 10 of the Convention, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued."[490] Given that the Court in *Morice* relied upon other principles from *Lindon*, it is arguable that the Court in *Morice* may have been rejecting this margin of appreciation principle, at least with respect to defence counsels' freedom of expression, and returning to the path laid in *Cumpănă and Mazăre* and *Kyprianou*.

Two months after *Morice*, the second judgment was *Delfi AS v. Estonia,*[491] but division returned to the Grand Chamber, holding by 15 votes to two, that there had been no violation of Article 10, where a news website had been held liable for reader comments. The case began in 2006, when an Estonian news website, Delfi.ee, published an article criticising a ferry company operating on the Estonian coast. A number of readers posted comments under the article, targeting a board member of the company, which included, "burn in your own ship, sick Jew," "into the oven," and "kill this bastard."[492] Six weeks later, the board member asked Delfi to remove the reader comments, and sought over 500,000 Estonian kroons (around 30,000 euro) in damages. Delfi immediately removed the comments, but refused to pay any damages. The board member then initiated civil proceedings against Delfi for violation of his "personality rights," and the Estonian Supreme Court ultimately upheld his claim, awarding 320 euro. The Supreme Court found Delfi "should have prevented the publication" of the comments, as they were "clearly unlawful contents," which was "obvious to a sensible reader," and Delfi had a duty under Estonia's Obligations Act to "avoid causing harm."[493] Delfi was also liable under the Obligations Act for failing to remove the comments "on its own initiative."[494] It did not matter that Delfi removed the comments when notified.

Delfi made an application to the European Court, arguing that imposing liability for the reader comments violated its right to freedom of expression under Article 10. Following an initial judgment from the First Section of the Court finding, unanimously, that there had

[486] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 135.
[487] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 175.
[488] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 175.
[489] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 135.
[490] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02(22 October 2007 (Grand Chamber), para. 59.
[491] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber) (Article 10 and news website's liability for reader comments). See generally R. Ó Fathaigh, "The Chilling Effect of Liability for Online Reader Comments" (2017) *European Human Rights Law Review* 324.
[492] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 18.
[493] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 31.
[494] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 31.

been no violation of Article 10,[495] the case was referred to the Court's 17-judge Grand Chamber. In 2015, the Grand Chamber delivered its judgment, and by a majority, also held that there had been no violation of Article 10.[496] The Grand Chamber laid down a four-step test for assessing whether imposing liability on Delfi was consistent with Article 10: (a) the context of the comments, (b) the measures applied by the applicant company in order to prevent or remove defamatory comments, (c) the liability of the actual authors of the comments as an alternative to the applicant company's liability, and (d) the consequences of the domestic proceedings for the applicant company.[497]

The Grand Chamber essentially classified the comments as "clearly unlawful contents,"[498] and on this basis, held that it was consistent with Article 10 to impose liability for failing to remove this type of expression "without delay," and, most importantly, "even without notice."[499] Notably, the Court was not quite clear as to its classification of the comments, failing to cite any specific comments in its judgment, and variously describing the case as concerning "liability for defamatory or other types of unlawful speech,"[500] "clearly unlawful contents,"[501] "clearly unlawful speech, which infringes the personality rights of others,"[502] "mainly" hate speech, and "speech that directly advocated acts of violence."[503] However, it is not proposed to discuss the correctness of the Grand Chamber's judgment generally, but rather to focus on its treatment of the argument surrounding the chilling effect.

Delfi's argument was that imposing liability had a chilling effect on freedom of expression. It is worth teasing out exactly what Delfi meant by a chilling effect: Delfi argued that imposing liability meant that it would be forced to employ an "army of highly trained moderators to patrol" comments, and this would lead to them removing, "just in case," any "sensitive comments," and all comments would be moderated so they were "limited to the least controversial issues."[504] Otherwise, Delfi argued, it could "avoid such a massive risk" by closing the reader comments altogether.[505] Thus, Delfi's basic chilling effect argument was that the "risk" of liability meant it could either limit reader comments to the least controversial, or close reader comments completely.

Curiously, the majority in *Delfi* nowhere mentions a chilling effect, even though the Estonian government addressed the argument,[506] as did the dissent.[507] But while the majority did not mention a chilling effect explicitly, it did in a sense address it. First, the Court examined the broader impact of the Estonian Supreme Court's judgment, and said that while Estonian courts were imposing liability on other websites, "no awards have been made for non-pecuniary damage."[508] The Court also noted that the number of comments on Delfi "has continued to increase."[509] Finally, the Court admitted that Delfi had set up a "team of moderators" to monitor comments, but did not think this a major consequence to Delfi's

[495] *Delfi AS v. Estonia* (App. no. 64569/09) 10 October 2013.
[496] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber).
[497] *Delfi AS v. Estonia* (App. no. 64569/09) 10 October 2013, para. 64.
[498] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 141.
[499] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 159.
[500] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 110.
[501] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 141.
[502] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 115.
[503] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 117.
[504] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 159.
[505] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 72.
[506] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 92.
[507] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber) (Joint dissenting opinion of Judges Sajó and Tsotsoria, para. 20).
[508] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 160.
[509] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 161.

"business model."[510] Of course, the award of damages of 320 euro was "by no means" disproportionate.[511] Thus, and in fairness to the majority, while it did not mention the chilling effect explicitly, it did in a way engage with the chilling effect argument, considering there was no evidence of a chilling effect, as no orders to pay damages were being imposed on other websites, and comments were actually increasing.

This was the first Grand Chamber judgment where a majority of the Court sought to dismiss the chilling effect based on arguments over a lack of evidence for a chilling effect. Nonetheless, it is not exactly clear why the *Delfi* majority seemed to reject the chilling effect argument in the manner that it did.[512] Notably, in paragraphs 160 and 161, where it attempts to describe the lack of evidence for a chilling effect, there is no reference to any prior authority. Indeed, there is no engagement by the *Delfi* majority with any of the case law concerning the chilling effect. This issue of whether there must be evidence of a chilling effect will be explored below;[513] however, at this point it is worth noting that this search for evidence had not been evident in Grand Chamber judgments up to this point.

A possible explanation for the *Delfi* majority's non-application of the chilling effect may be the view within the Court that where "hate speech" is purportedly involved, the importance of having regard to the chilling effect is substantially reduced, to the point where it is not even mentioned. Support for this view may also be found if we frame *Lindon* in a similar manner, as the *Lindon* majority explicitly described the expression at issue as, "their content is such as to stir up violence and hatred."[514] Similarly to *Delfi*, the *Lindon* majority nowhere even mentioned the chilling effect principle.

Five months after *Delfi*, disagreement continued on the chilling effect in *Pentikäinen v. Finland*,[515] with the Grand Chamber holding by 13 votes to four, that there had been no violation of Article 10. However, unlike in *Delfi*, both the majority and dissent considered the chilling effect argument, coming to different conclusions. The applicant in *Pentikäinen* was a photographer and journalist for the weekly magazine *Suomen Kuvalehti*. In 2006, the applicant was sent by the magazine to take photographs of an "exceptionally large" demonstration which was being held in Helsinki, with over 450 police officers policing the demonstration. As the demonstration began, bottles, and stones were thrown at police. Within an hour, the police decided to intervene, considering that it had "turned into a riot," and announced several times over loudspeakers, that the demonstration was stopped and that the crowd should leave the scene.[516] Hundreds of people left voluntarily; and later the police decided to "seal off the demonstration," only allowing people to leave through "exit routs," with people being asked to show ID and have their belonging "checked."[517] However, a group of 20 demonstrators remained, who had been asked to leave by the police, or be arrested. The applicant remained at the scene, claiming that he thought the request to leave "only applied to the demonstrators."[518] A short time later, the police arrested the remaining

[510] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 161.
[511] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 160.
[512] It could be argued that *Delfi* was an exceptional case, given the Court's concern for the "hate speech" which seemed to be involved. However, it is worth noting that the "domestic post-*Delfi* case-law" referred to by the *Delfi* majority in dismissing evidence of a chilling effect involved *defamation*, and not hate speech (see *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 43)
[513] See Chapter 4, Section 4.2.3.
[514] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber), para. 57.
[515] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber) (Article 10 and photojournalist's conviction for disobeying police order). See Dirk Voorhoof, "Journalist must comply with police order to disperse while covering demonstration," *Strasbourg Observers*, 26 October 2015.
[516] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 20.
[517] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014, para. 10.
[518] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014, para. 11.

demonstrators, and as the applicant was leaving the scene he was also arrested for "contumacy towards the police" under Chapter 16 of the Finnish Penal Code.[519]

The applicant was brought to a police station, detained for over 17 hours, and interrogated for 30 minutes. Over eight months later, the applicant was prosecuted for "contumacy towards the police," and in 2007, the Helsinki District Court convicted the applicant. However, the Court did not impose any penalty. The Court held that the police actions "had been legal," the applicant "had been aware of the orders," and "decided to ignore them." [520] The Court found the "conditions for restricting Pentikäinen's freedom of expression by ordering him to disperse along with the remaining crowd were fulfilled."[521] The Court waived the penalty, as the applicant was "forced to adapt his behaviour in the situation due to the conflicting expectations expressed by the police, on the one hand, and by his profession and employer, on the other hand."[522] The judgment was upheld on appeal.

The applicant made an application to the European Court, claiming that his arrest, detention and conviction violated Article 10. The Fourth Section delivered a Chamber judgment in 2014, and found no violation of Article 10.[523] The applicant requested that the case be referred to the Grand Chamber, and in 2014, the Panel of the Grand Chamber accepted that request.[524] A year and a half later in October 2015, the Grand Chamber delivered its judgment in *Pentikäinen.* Notably, while the applicant did not seem to explicitly rely upon the chilling effect in the submissions before the Fourth Section,[525] the applicant did so in the Grand Chamber. The applicant claimed that his arrest, detention and conviction violated Article 10, and argued that it "constituted a 'chilling effect' on his rights and work,"[526] and the District Court's judgment would have a "'chilling effect' on journalism,"[527] with his 17-hour detention period being "disproportionate."[528]

The main question for the Court was whether the applicant's "apprehension, detention and conviction" was necessary in a democratic society.[529] The Court also noted that the case involved whether "measures taken against a journalist who failed to comply with police orders while taking photos in order to report on a demonstration that had turned violent."[530] The Court said it would "examine the applicant's apprehension, detention and conviction in turn, in order to determine whether the impugned interference, seen as a whole, was supported by relevant and sufficient reasons and was proportionate to the legitimate aims pursued."[531]

In relation to the applicant's "apprehension," the Court held that the applicant had not been "unaware" of the police orders, and by not obeying the orders given by the police, the applicant "knowingly took the risk of being apprehended for contumacy towards the police."[532] The Court then considered the applicant's detention, noting that he was detained for 17.5 hours. However, the Court also noted that the issue of the "alleged unlawfulness of the applicant's detention exceeding 12 hours falls outside the scope of examination by the

[519] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 37.
[520] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 37.
[521] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 37.
[522] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 37.
[523] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014, para. 27.
[524] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 4.
[525] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014, para. 26-27.
[526] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 71.
[527] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 71.
[528] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 71.
[529] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 81.
[530] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 93.
[531] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 94.
[532] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 100.

Grand Chamber."[533] Third, the Court considered the applicant's conviction. The Court noted that "of the fifty or so journalists present at the demonstration site, the applicant was the only one to claim that his freedom of expression was violated in the context of the demonstration."[534] The Court also emphasised "once more" that the conduct sanctioned by the criminal conviction was "not the applicant's journalistic activity as such, i.e. any publication made by him." The conviction concerns "only his refusal to comply with a police order at the very end of the demonstration, which had been judged by the police to have become a riot."[535] The Court held that the fact that the applicant was a journalist "did not entitle him to preferential or different treatment in comparison to the other people left at the scene."[536] The Court also held that journalists "cannot be exempted from their duty to obey the ordinary criminal law solely on the basis that Article 10 affords them protection."[537]

Finally, the Court sought to examine the "nature and severity" of the penalty imposed, noting that the District Court "refrained from imposing any penalty on the applicant as his act was considered 'excusable'."[538] The Court noted that a person's conviction "may be more important than the minor nature of the penalty imposed,"[539] citing *Stoll*. However, the Court held that the applicant's conviction "had no adverse material consequences for him," as the conviction was not "even entered in his criminal record."[540] The Court concluded that the conviction was "only to a formal finding of the offence committed by him and, as such, could hardly, if at all, have any "chilling effect" on persons taking part in protest actions or in the work of journalists at large."[541] Thus, the Court held that the conviction was proportionate, with no violation of Article 10.

Judge Robert Spano wrote a dissenting opinion, which was notably joined by the President of the Court, Judge Spielmann, and two other judges. The dissent described the majority's finding that the decision to prosecute and convict a journalist for a criminal offence "does not, in a case such as the present one, have, by itself, a chilling effect on journalistic activity" as "overly simplistic and unconvincing."[542] In contrast, the dissent held that the majority's judgment, "accepting as permissible under Article 10 § 2 of the Convention the prosecution of the applicant and his conviction for a criminal offence, will have a significant deterrent effect on journalistic activity in similar situations occurring regularly all over Europe."[543] The dissent concluded that the majority had "limited their findings" under the *Stoll* criteria.

Thus, it seems that the *Pentikäinen* majority accepted that "the fact of a person's conviction may be more important than the minor nature of the penalty imposed," but because there were "no adverse material consequences" for the applicant (i.e. no fine, or criminal record), there was no chilling effect.[544] While the majority cited *Stoll* at paragraph 154 as authority for the first part of this proposition, crucially the majority fail to cite any

[533] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 102.
[534] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 107.
[535] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 108.
[536] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 109.
[537] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 110.
[538] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 112.
[539] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 113.
[540] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 113.
[541] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 113.
[542] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber) (Dissenting opinion of Judge Spano joined by Judges Spielmann, Lemmens and Dedov, para. 12).
[543] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber) (Dissenting opinion of Judge Spano joined by Judges Spielmann, Lemmens and Dedov, para. 12).
[544] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 113.

authority for the proposition that no individual "adverse consequences" for the applicant were decisive.

It is arguable that there are in fact two authorities which point in the opposite direction: first, it must be mentioned that in *Cumpănă and Mazăre,* the Court held that it was immaterial that the sanctions did not have "any significant practical consequences for the applicants."[545] Second, in *Morice*, the Court reiterated that "even when the sanction is the lightest possible, such as a guilty verdict with a discharge in respect of the criminal sentence," it nevertheless constitutes a criminal sanction, and "in any event, that fact cannot suffice, in itself, to justify the interference with the applicant's freedom of expression"[546] The Court in both *Cumpănă and Mazăre* and *Morice* emphasised that what matters is that the "interference with freedom of expression may have a chilling effect on the exercise of that freedom."[547] Finally, it is not quite clear why the *Pentikäinen* majority did not apply the principle, only a few months earlier approved in *Morice*, that "the dominant position of the State institutions requires the authorities to show restraint in resorting to criminal proceedings."[548] If there was no reason to impose a "recorded" criminal conviction on the applicant, it is difficult to see the reason for resorting to criminal proceedings in the first place, consistent with *Morice*.

There may be reasonable points of disagreement over the *Pentikäinen* majority's application of the chilling effect principle, it is notable that unlike the *Delfi* majority, the *Pentikäinen* majority discussed, to an extent, the chilling effect case law, and engaged with its principles. Moreover, the *Pentikäinen* majority in the Grand Chamber at least considered the principle that "a person's conviction may be more important than the minor nature of the penalty imposed," and whether a chilling effect might arise "on the work of journalists."[549] It should be noted that the Fourth Section's judgment in *Pentikäinen* did not apply these principles.

While *Pentikäinen* resulted in a divided Grand Chamber, the final judgment delivered during the period when Judge Spielmann was President, and applying chilling effect reasoning, was *Couderc and Hachette Filipacchi Associés v. France*, on a newspaper's liability for publishing a public figure's photograph.[550] The applicants in Couderc were the director and publishing company of the weekly magazine *Paris Match*. The case arose in 2005 when the magazine published an article headlined "Albert of Monaco: Alexandre, the secret child," and consisted of an interview with a woman who stated that the father of her son was Prince Albert of Monaco. The article included a small photograph showing the Prince with the child in his arms.

The Prince brought proceedings over the article, claiming it interfered with his right to private life and protection of his own image. The Nanterre Tribunal de Grande Instance ordered the applicant to pay the Prince 50,000 euro in damages, and ordered that details of the judgment be printed on the magazine's entire front cover, at the publishing company's expense and on pain of a daily fine.[551] The Court found that the article and photographs "fell within the most intimate sphere of love and family life," and amounted to a "serious and

[545] *Cumpănă and Mazăre v. Romania* (App. no. 3334/96) 17 December 2004 (Grand Chamber), para. 118.
[546] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 176.
[547] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 176, citing *Cumpănă and Mazăre v. Romania* (App. no. 3334/96) 17 December 2004 (Grand Chamber), para. 114..
[548] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 176.
[549] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 113.
[550] *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber).
[551] *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber), para. 19.

wilful breach of the claimant's fundamental personality rights."[552] The judgment was upheld on appeal by the French Court of Cassation.

The applicants subsequently made an application to the European Court, claiming a violation of their right to freedom of expression. In 2014, the Fifth Section of the Court delivered a Chamber judgment, and by four-votes-three, found a violation of Article 10.[553] Following a request for a referral, the Grand Chamber delivered its judgment in 2015, and similarly found a violation of Article 10, but unanimously. The applicants had argued before the Grand Camber that there had been an "excessive interference" with freedom of expression," with a "clearly chilling effect."[554]

The main question for the Court was whether a "fair balance" had been struck between the right to respect for private life and the right to freedom of expression,[555] and the Court applied the *Axel Springer* criteria in this regard. The Court noted that the article contributed to the coverage of a subject of public interest,[556] concerned a prominent public figure,[557] the article was a means of expression for the interviewee and her son,[558] and photographs were not taken without the Prince's knowledge or in circumstances showing him in an unfavourable light.[559] In relation to the final *Axel Springer* criteria on the severity of the sanction, the Court in *Couderc* reiterated that "irrespective of whether or not the sanction imposed was a minor one, what matters is the very fact of judgment being given against the person concerned, including where such a ruling is solely civil in nature."[560] The Court then recited the chilling effect principle, and held that "any undue restriction on freedom of expression effectively entails a risk of obstructing or paralysing future media coverage of similar questions."[561] The Court applied these principles to the 50,000 euro damages award, and the order to publish a statement detailing the judgment, and concluded that the Court "cannot consider those penalties to be insignificant."[562] In light of these considerations, the Court held the domestic courts failed to give due consideration to the principles laid down by the Court's case-law, and there had thus been a violation of Article 10.

In *Couderc*, while the Court recognised that undue restrictions on freedom of expression effectively entail a risk of obstructing or paralysing future media coverage of similar questions, it simply stated that the damages and order to publish a statement were not insignificant. But the Court seemed to stop short of explicitly holding that the orders had a chilling effect, limiting itself to finding that they were not insignificant. The reticence on the part of the Court may be partly explained by the Court delivering a unanimous judgment with

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[552] *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber), para. 21.
[553] *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 12 June 2014.
[554] *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber), para. 47.
[555] *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber), para. 82.
[556] *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber), para. 116.
[557] *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber), para. 124.
[558] *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber), para. 127.
[559] *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber), para. 135.
[560] *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber), para. 151.
[561] *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber), para. 151.
[562] *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber), para. 152.

all 17 judges voting to join the judgment's wording; the absence of a more explicit application of the chilling effect principle may have been to appease some judges, given the disagreement evident in the Grand Chamber in prior judgments on the chilling effect point.

2.4.6 Presidency of Judge Raimondi (2015 - 2018)

At the time of writing, the current President of the Court is Judge Guido Raimondi, who was elected to serve from November 2015.[563] Since then, there have been five Grand Chamber judgments delivered which considered chilling effect reasoning, with four of the judgments concerning Article 10: *Bédat v. Switzerland*, on a journalist's conviction for publishing confidential court materials,[564] *Karácsony and Others v. Hungary*, concerning a group of parliamentarians sanctioned for protesting in parliament,[565] *Baka v. Hungary* on termination of a judge's mandate, [566] *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*, on defamation proceedings against a non-governmental organisation,[567] and *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, concerning a media company prohibited from publishing taxation data.[568] Moreover, a dissenting opinion in a judgment concerning the Article 8 and home births invoked chilling effect reasoning.[569] In addition, during 2016 - 2018, there were over 102 Chamber judgments,[570] and 17 decisions,[571] which considered, or applied, chilling effect reasoning; the highest number in a four-year period.

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[563] Judge Guido Raimondi was President of the Court from 1 November 2015 - May 2019. In April 2019, the Court elected Judge Linos-Alexandre Sicilianos as President of the Court, serving from 5 May 2019. See, European Court of Human Rights, "Linos-Alexandre Sicilianos, judge in respect of Greece, today elected President of the European Court of Human Rights," 1 April 2019.

[564] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber) (Article 10 and journalist's conviction for publishing confidential court materials).

[565] *Karácsony and Others v. Hungary* (App. no. 42461/13 and 44357/13) 17 May 2016 (Grand Chamber) (Article 10 and parliamentarians' sanctioned for protesting in parliament).

[566] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber) (Article 10 and termination of a judge's mandate).

[567] *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber) (Article 10 and civil defamation proceedings against NGO).

[568] *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (App. no. 931/13) 27 June 2017 (Grand Chamber) (Article 10 and media company prohibited from publishing taxation data).

[569] *Dubská and Krejzová v. the Czech Republic* (App. no. 28859/11 and 28473/12) 15 November 2016 (Grand Chamber) (Article 8 and home births) (Dissenting opinion of Judges Sajó, Karakaş, Nicolaou, Laffranque and Keller, para. 11).

[570] *Frumkin v. Russia* (App. no. 74568) 5 January 2016 (Article 11 and arrest and administrative conviction of protestor); *Rodriguez Ravelo v. Spain* (App. no. 48074/10) 12 January 2016 (Article 10 and lawyer's conviction for defamation); *Görmüş and Others v. Turkey* (App. no. 49085/07) 19 January 2016 (Article 10 and protection of journalistic sources); *de Carolis and France Télévisions v. France* (App. no. 29313/10) 21 January 2016 (Article 10 and broadcaster's conviction for defamation); *Siderzhuik v. Ukraine* (App. no. 16901/03) 21 January 2016 (Article 10 and civil defamation proceedings against history professor); *Partei Die Friesen v. Germany* (App. no. 65480/10) 28 January 2016 (Article 14, in conjunction with Article 3 of Protocol No. 1, and parliamentary election threshold); *Erdener v. Turkey* (App. no. 23497/05) 2 February 2016 (Article 10 and member of parliament's conviction for defamation) *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (App. no. 22947/13) 2 February 2016 (Article 10 and liability for third-party defamatory comments); *Hilal Mammadov v. Azerbaijan* (App. no. 81553/12) 4 February 2016 (Article 34 and right of individual petition); *Ibrahimov and Others v. Azerbaijan* (App. no. 69234/11) 11 February 2016 (Article 11 and ban on public demonstration); *Huseynli and Others v. Azerbaijan* (App. no. 67360/11) 11 February 2016 (Article 11 and arrest and conviction of demonstrators); *Société de Conception de Presse et d'Édition v. France* (App. no. 4683/11) 25 February 2016 (Article 10 and magazine ordered to black-out photograph); *Rusu v. Romania* (App. no. 25721/04) 8 March 2016 (Article 10 and criminal proceedings against local journalist for defamation); *Rasul Jafarov v. Azerbaijan* (App. no. 69981/14) 17 March 2016 (Article 34 and right of individual petition); *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber) (Article 10 and journalist's conviction for publishing confidential court materials); *Armani Da Silva v. the United Kingdom* (App. no. 5878/08) 30 March

2016 (Grand Chamber) (Article 2 and investigation into police shooting); *Novikova and others v. Russia* (App. nos. 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13) 26 April 2016 (Article 10 and prosecution of protestors' solo demonstrations); *Karácsony and Others v. Hungary* (App. no. 42461/13) 17 May 2016 (Grand Chamber) (Article 10 and parliamentarians' sanctioned for protesting in parliament); *Nadtoka v. Russia* (App. no. 38010/05) 31 May 2016 (Article 10 and journalist's conviction for insult); *Instytut Ekonomichnykh Reform, TOV v. Ukraine* (App. no. 61561/08) 2 June 2016 (Article 10 and civil defamation proceedings against newspaper); *Madaus v. Germany* (App. no. 44164/14) 9 June 2016 (Article 6 and right to protection of reputation as a civil right); *Jiménez Losantos v. Spain* (App. no. 53421/10) 14 June 2016 (Article 10 and radio host's conviction for insulting mayor); *Versini-Campinchi and Crasnianski v. France* (App. no. 49176/11) 16 June 2016 (Article 8 and lawyer-client privilege); *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber) (Article 10 and termination of a judge's mandate); *Reichman v. France* (App. no. 50147/11) 12 July 2016 (Article 10 and radio host's conviction for defamation); *Do Carmo de Portugal e Castro Câmara v. Portugal* (App. no. 53139/11) 4 October 2016 (Article 10 and journalist convicted of defamation); *Yaroslav Belousov v. Russia* (App. nos. 2653/13 and 60980/14) 4 October 2016 (Article 11 and arrest and conviction of protestors); *Dorota Kania v. Poland (No. 2)* (App. no. 44436/13) 4 October 2016 (Article 10 and journalist convicted for defaming academic); *Szanyi v. Hungary* (App. no. 35493/13) 8 November 2016 (Article 10 and member of parliament sanctioned for middle finger in parliament); *Boykanov v. Bulgaria* (App. no. 18288/06) 11 November 2016 (Article 10 and individual's conviction for defaming judge); *Dubská and Krejzová v. the Czech Republic* (App. nos. 28859/11 and 28473/12) 15 November 2016 (Grand Chamber) (Article 8 and legislation on home births); *Savda v. Turkey (No. 2)* (App. no. 2458/12) 15 November 2016 (Article 10 and conscientious objector's conviction for press statement); *Kunitsyna v. Russia* (App. no. 9406/05) 13 December 2016 (Article 10 and civil defamation proceedings against journalist); *Kasparov and Others v. Russia (No. 2)* (App. no. 51988/07) 13 December 2016 (Article 11 and protestor's conviction for administrative offences); and *M.P. v. Finland* (App. no. 36487/12) 15 December 2016 (Article 10 and wife convicted for defaming husband in child proceedings); *Tavares de Almeida Fernandes and Almeida Fernandes v. Portugal* (App. no. 31566/13) 17 January 2017 (Article 10 and civil defamation proceedings against journalist by judge); *Navalnyy v. Russia* (App. no. 29580/12 … 43746/14) 2 February 2017 (Article 11 and severe restrictions on peaceful assemblies); *Lashmankin and Others v. Russia* (App. nos. 57818/09 … 37038/13) 7 February 2017 (Article 11 and severe limitations on plans for public events); *Selmani and Others v. the former Yugoslav Republic of Macedonia* (App. no. 67259/14) 9 February 2017 (Article 10 and forcible removal of journalists from the parliament gallery); *Athanasios Makris v. Greece* (App. no. 55135/10) 9 March 2017 (Article 10 and politician's defamation conviction for criticising mayor); *Ahmed v. the United Kingdom* (App. no. 59727/13) 2 March 2017 (Article 34 and right of individual petition); *Döner and Others v. Turkey* (App. no. 29994/02) 7 March 2017 (Article 10 and prosecution of parents for education in Kurdish); *Tek Gıda İş Sendikası v. Turkey* (App. no. 35009/05) 4 April 2017 (Article 11 and company's dismissal of all trade union members); *Huseynova v. Azerbaijan* (App. no. 10653/10) 13 April 2017 (Article 2 and killing of journalist); *Davydov and Others v. Russia* (App. no. 75947/11) 30 May 2017 (Article 34 and right of individual petition); *Giesbert and others v. France* (App. no. 68974/11) 1 June 2017 (Article 10 and fining of magazine for publishing documents from criminal proceedings); *Y. v. Switzerland* (App. no. 22998/13) 6 June 2017 (Article 10 and journalist fined for breaching secrecy of judicial investigation); *Arnarson v. Iceland* (App. no. 58781/13) 13 June 2017 (Article 10 and news website journalist civilly liable for defamation); *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017 (Article 10 and civil proceedings against newspaper for defaming government consultant); *Ali Çetin v. Turkey* (App. no. 30905/09) 19 June 2017 (Article 10 and defamation conviction for criticising civil servant in letter); *Bayev and Others v. Russia* (App. nos. 67667/09, 44092/12 and 56717/12) 20 June 2017 (Article 10 and conviction of activists under law banning promotion of homosexuality); *Ghiulfer Predescu v. Romania* (App. no. 29751/09) 27 June 2017 (Article 10 and civil proceedings against journalist for defaming mayor); *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (App. no. 931/13) 27 June 2017 (Grand Chamber) (Article 10 and media company prohibited from publishing taxation data); *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber) (Article 10 and civil defamation proceedings against NGO); *Kącki v. Poland* (App. no. 10947/11) 4 July 2017 (Article 10 and journalist criminally responsible for defamation of politician); *Halldórsson v. Iceland* (App. no. 44322/13) 4 July 2017 (Article 10 and broadcast journalist liable for civil defamation of company official); *Mesut Yıldız v. Turkey* (App. no. 8157/10) 18 July 2017 (Article 11 and conviction for slogans chanted during festival); *Lacroix v. France* (App. no. 41519/12) 7 September 2017 (Article 10 and municipal councillor's conviction for defamation of mayor); *Axel Springer SE and RTL Television GmbH v. Germany* (App. no. 51405/12) 21 September 2017 (Article 10 and ban on publishing photographs of criminal defendant); *Dmitriyevskiy v. Russia* (App. no. 42168/06) 3 October 2017 (Article 10 and editor's conviction for publication of statements by Chechen separatists); *Novaya Gazeta and Milashina v. Russia* (App. no. 45083/06) 3 October 2017 (Article 10 and defamation proceedings over media reports on Kursk investigation); *Becker v. Norway* (App. no. 21272/12) 5

October 2017 (Article 10 and protection of journalistic sources); *Fatih Taş v. Turkey* (no. 2) (App. no. 6813/09) 10 October 2017 (Article 10 and publisher's conviction for disseminating terrorist organisation propaganda); *Verlagsgruppe Droemer Knaur GmbH & Co. KG v. Germany* (App. no. 35030/13) 19 October 2017 (Article 10 and book publisher ordered to pay damages over allegations in book); *Fuchsmann v. Germany* (App. no. 71233/13) 19 October 2017 (Article 8 and refusal to order injunction over newspaper article); *Einarsson v. Iceland* (App. no. 24703/15) 7 November 2017 (Article 8 and courts' rejection of defamation claim concerning rape accusation); *Işıkırık v. Turkey* (App. no. 41226/09) 14 November 2017 (Article 11 and Article 10, and conviction for membership of an illegal organisation); *Redaktsiya Gazety Zemlyaki v. Russia* (App. no. 16224/05) 21 November 2017 (Article 10 and defamation proceedings against newspaper for depicting public official as Osama bin Laden); *MAC TV s.r.o. v. Slovakia* (App. no. 13466/12) 28 November 2017 (Article 10 and fining of broadcaster over report on death of Polish president); and *Frisk and Jensen v. Denmark* (App. no. 19657/12) 5 December 2017 (Article 10 and journalists' defamation conviction for defamation of hospital and hospital official); *GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland* (App. no. 18597/13) 9 January 2018 (Article 10 and defamation proceedings against NGO); *Akarsubaşı and Alçiçek v. Turkey* (App. no. 19620/12) 23 January 2018 (Article 11 and union members fined for demonstration); *Kiril Ivanov v. Bulgaria* (App. no. 17599/07) 11 January 2018 (Article 11 and ban on demonstration); *Čeferin v. Slovenia* (App. no. 40975/08) 16 January 2018 (Article 10 and contempt of court proceedings against lawyer); *Barabanov v. Russia* (App. nos. 4966/13 and 5550/15) 30 January 2018 (Article 11, in light of Article 10, and protestor's conviction for mass disorder); *Polikhovich v. Russia* (App. nos. 62630/13 and 5562/15) 30 January 2018 (Article 11 and protestor's prosecution and conviction); *Stepan Zimin v. Russia* (App. nos. 63686/13 and 60894/14) 30 January 2018 (Article 11 and protestor's conviction for mass disorder); *Butkevich v. Russia* (App. no. 5865/07) 13 February 2018 (Article 11 and protestor's prosecution and conviction); *Ivashchenko v. Russia* (App. no. 61064/10) 13 February 2018 (Article 8 and search of journalist's data storage devices); *Sinkova v. Ukraine* (App. no. 39496/11) 27 February 2018 (Article 10 and protestor's conviction for performance-art protest); *Mikhaylova v. Ukraine* (App. no. 10644/08) 6 March 2018 (Article 10 and lay litigant's prosecution for contempt of court); *Mehmet Hasan Altan v. Turkey* (App. no. 13237/17) 20 March 2019 (Article 10 and professor and journalist's arrest and detention under anti-terrorism legislation); *Şahin Alpay v. Turkey* (App. no. 16538/17) 20 March 2018 (Article 10 and journalist's arrest and detention for membership of terrorist organisation); *Falzon v. Malta* (App. no. 45791/13) 20 March 2018 (Article 10 and defamation proceedings against politician); *Uzan v. Turkey* (App. no. 30569/09) 20 March 2018 (Article 10 and politician's conviction for insulting prime minister); *Fatih Taş v. Turkey (no. 3)* (App. no. 45281/08) 24 April 2018 (Article 10 and criminal proceedings against publisher under anti-terrorism law); *Fatih Taş v. Turkey (no. 4)* (App. no. 51511/08) 24 April 2018 (Article 10 and criminal processing against publisher under anti-terrorism law); *Lutskevich v. Russia* (App. nos. 6312/13 and 60902/14) 15 May 2018 (Article 11 and protestor's conviction for mass disorder); *Rungainis v. Latvia* (App. no. 40597/08) 14 June 2018 (Article 10 and defamation proceedings against banker); *Kula v. Turkey* (App. no. 20233/06) 19 June 2018 (Article 10 and professor's reprimand for taking part in television programme); *Gîrleanu v. Romania* (App. no. 50376/09) 26 June 2018 (Article 10 and criminal proceedings against a journalist for disclosure of classified documents); *Paraskevopoulos v. Greece* (App. no. 64184/11) 28 June 2018 (Article 10 and defamation conviction over criticism of local politician); *M.L. and W.W. v. Germany* (App. nos. 60798/10 and 65599/10) 28 June 2018 (Article 8 and courts' refusal to remove names for media archives); *Bakır and Others v. Turkey* (App. no. 46713/10) 10 July 2018 (Article 10 and 11, and protestor's conviction under anti-terrorism legislation); *İmret v. Turkey (no. 2)* (App. no. 57316/10) 10 July 2918 (Article 10 and 11, and political official convicted under anti-terrorism law for participating in demonstration); *Mariya Alekhina and Others v. Russia* (App. no. 38004/12) 17 July 2018 (Article 10 and conviction for hooliganism over performance-art protest); *Makraduli v. the former Yugoslav Republic of Macedonia* (App. nos. 64659/11 and 24133/13) 19 July 2018 (Article 10 and politician convicted of defamation); *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018 (Article 10 and criminal proceedings against publisher for denigrating Turkey); *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018 (Article 10 and bulk interception of communications); *Aliyev v. Azerbaijan* (App. nos. 68762/14 and 71200/14) 20 September 2018 (Article 18, in conjunction with 5 and 8, and a lawyer's prosecution for NGO activity); *Fedchenko v. Russia* (no. 4) (App. no. 17221/13) 2 October 2018 (Article 10 and civil defamation proceedings against editor); and *Tuskia and Others v. Georgia* (App. no. 14237/07) 11 October 2018 (Article 11, in the light of 10, and administrative proceedings against professors over protest).

[571] *Verlagsgruppe Handelsblatt GmbH & Co. KG v. Germany* (App. no. 52205/11) 15 March 2016 (Admissibility decision) (Article 10 and injunction against magazine for satirical doctored photograph); *Telegraaf Media Nederland Landelijke Media B.V. and van der Graaf, v. the Netherlands* (App. no. 33847/11) 30 August 2016 (Admissibility decision) (Article 10 and protection of journalistic sources); *Gaunt v. the United Kingdom* (App. no. 26448/12) 6 September 2016 (Article 10 and radio host's sanctioning by media authority); and *Van Beukering and Het Parool v. the Netherlands* (App. no. 27323/14) 20 September 2016 (Admissibility

2.4.6.1 Grand Chamber judgments

The first Grand Chamber judgment considering chilling effect reasoning during the Raimondi Presidency was *Bédat v. Switzerland*, and concerned the prosecution of a journalist under a Swiss law prohibiting "publication of secret official deliberations."[572] The applicant in *Bédat* was a journalist with the weekly magazine *L'Illustré*, and in 2003, published an article entitled "Tragedy on the Lausanne Bridge – the reckless driver's version – Questioning of the mad driver."[573] The article concerned criminal proceedings against M.B., a driver who had killed three pedestrians, and thrown himself off Lausanne Bridge. The article was based on "confidential information" from M.B.'s case file, including "records of interviews and correspondence" and "statements by the accused's wife and doctor."[574] A copy of the case file had been lost by one of the parties to the criminal proceedings, and an "unknown" person found and gave the copy to the applicant journalist.[575]

Criminal proceedings were brought against the applicant on the initiative of the public prosecutor for having published "secret official deliberations" in violation of Article 293 of the Swiss Criminal Code. In 2004 the Lausanne investigating judge sentenced the applicant to one month's imprisonment, suspended for one year. On appeal, the Lausanne Police Court replaced the prison sentence with a fine of 4,000 Swiss francs (2,667 euro). The conviction was upheld by the Federal Court, noting that the article contained "excerpts from records of interviews of the accused and reproduced certain letters sent by the latter to the investigating judge," which "can validly be classified secret."[576]

The applicant made an application to the European Court, claiming his conviction violated his right to freedom of expression. In 2014, the Second Section of the Court held, by four votes to three, that there had been a violation of Article 10.[577] However, when the case was considered by Grand Chamber, the Court held by 15 votes to two, that there had been *no* violation of Article 10. The main question for the Court was whether the journalist's conviction had been necessary in a democratic society.

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decision) (Article 10 and copyright proceedings against newspaper for publishing defendant's photograph).; *Folnegović v. Croatia* (App. no. 13946/15) 10 January 2017 (Admissibility decision) (Article 34 and right of individual petition); *Travaglio v. Italy* (App. no. 64746/14) 24 January 2017 (Admissibility decision) (Article 10 and journalist convicted of defaming politician); *Pihl v. Sweden* (App. no. 74742/14) 7 February 2017 (Admissibility decision) (Article 8 and courts' failure to find website liable for defamatory comment); *A.M. and A.K. v. Hungary* (App. nos. 21320/15 and 35837/15) 4 April 2017 (Admissibility decision) (Article 8 and prohibition on medicinal cannabis); *Metis Yayıncılık Limited Şirketi and Sökmen v. Turkey* (App. no. 4751/07) 20 June 2017 (Admissibility decision) (Article 10 and criminal proceedings against book publisher under Article 301 law); *Bayar v. Turkey* (App. no. 47098/11) 4 July 2017 (Admissibility decision) (Article 10 and editor convicted of publishing PKK statement); *Stoyanov v. Bulgaria* (App. no. 19557/05) 4 April 2017 (Admissibility decision) (Article 10 and criminal proceedings for the production, distribution and sale of pornographic books); *Tamiz v. the United Kingdom* (App. no. 687714/14) 19 September 2017 (Admissibility decision) (Article 8 and right to protection of reputation); and *Anthony France v. the United Kingdom* (App. no. 25357/16) 26 September 2017 (Committee admissibility decision) (Article 10 and protection of journalistic sources); *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision) (Article 10 and journalist's conviction for forging documents); *Avisa Nordland AS v. Norway* (App. no. 30563/15) 20 February 2018 (Admissibility decision) (Article 10 and civil defamation proceedings against newspaper); *Meslot v. France* (App. no. 50538/12) 9 January 2018 (Admissibility decision) (Article 10 and politician's conviction for contempt of court); and *Hanbayat and Other v. Turkey* (App. no. 6940/07) 6 February 2018 (Admissibility decision) (Article 10 and criminal proceedings against relatives for "apology" of crimes committed).

[572] Article 293, Swiss Criminal Code.

[573] *A.B. v. Switzerland* (App. no. 56925/08) 1 July 2014, para. 6.

[574] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 66.

[575] *A.B. v. Switzerland* (App. no. 56925/08) 1 July 2014, para. 9.

[576] *A.B. v. Switzerland* (App. no. 56925/08) 1 July 2014, para. 13.

[577] *A.B. v. Switzerland* (App. no. 56925/08) 1 July 2014.

The Grand Chamber took the opportunity to list the criteria to be followed by national authorities in weighing up the interests involved in cases "involving a breach by a journalist of the secrecy of judicial investigations,"[578] namely (i) how the applicant came into possession of the information at issue, (ii) the content of the impugned article; (iii) the contribution of the impugned article to a public-interest debate; (iv) the influence of the impugned article on the criminal proceedings; (v) any infringement of the accused's private life; and (vi) the proportionality of the penalty imposed.[579] In applying these criteria, the Court noted (a) the article's "sensationalist" and "mocking tone," describing the accused's "repeated lies,"[580] (b) it could not "have contributed to any public debate,"[581] (c) it "entailed an inherent risk of influencing the course of proceedings,"[582] and (d) the information disclosed was "highly personal, and even medical," including statements by the accused person's doctor, which "called for the highest level of protection under Article 8."[583]

For the present discussion, it is relevant to focus on how the Court considered the chilling effect principle under its final criterion, namely the proportionality of the penalty imposed. First, the Court recited the principles from *Stoll* that (a) the Court "must be satisfied" that a penalty "does not amount to a form of censorship intended to discourage the press from expressing criticism;"[584] and (b) such a sanction is "likely to deter journalists" and "liable to hamper the press."[585] Moreover, the Court recognised that "a person's conviction may in some cases be more important than the minor nature of the penalty imposed."[586] Notably, and unlike the Court in *Pentikäinen*, the Court in *Bédat* cited the principle from *Morice*, that the "dominant position of the State institutions requires the authorities to show restraint in resorting to criminal proceedings."[587]

Notwithstanding these principles, the Court held "nonetheless," that it did not consider that "recourse to criminal proceedings and the penalty imposed" were disproportionate.[588] The Court noted that the original suspended sentence of one month's imprisonment was "subsequently commuted" to a fine, and was not paid by the applicant "but was advanced by his employer."[589] The Court reiterated that the purpose of the penalty 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."[590] It followed, according to the Court, that "it cannot be maintained" that such a penalty would have a "deterrent effect" on the exercise of freedom of expression by the applicant or any other journalist.[591]

It could be argued that the distinguishing feature the *Bédat* majority took into account was that the prison sentence was commuted, and it was the applicant's employer - the magazine - that paid the fine. However, there are two counterarguments: first, the *Bédat* majority do not apply *Cumpănă and Mazăre*: it is the fear of a prison sentence which causes a chilling effect, and it is immaterial that a prison sentence is later pardoned (as in *Cumpănă and Mazăre*), or suspended.[592] Second, the *Bédat* majority offer no authority for the

[578] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 55.
[579] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 56-81.
[580] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 60.
[581] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 66.
[582] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 69.
[583] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 76.
[584] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 79.
[585] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 79.
[586] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 79.
[587] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 81.
[588] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 81.
[589] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 81.
[590] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 81.
[591] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 81.
[592] See, for example, *Mariapori v. Finland* (App. no. 37751/07) 6 July 2010, para. 68. See Section 4.6.1 below.

proposition that because a journalist's employer paid a fine, it becomes proportionate. It is still the case that the fine was imposed on the journalist, and it was only later that the magazine paid the fine. The subsequent payment of the fine does not seem relevant to the imposition of the fine on the journalist at the time of sentencing.

Indeed, the dissenting opinion made these points, holding that the sanction was "more than merely symbolic," and "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."[593] In a similar vein, Judge Yudkivska argued in dissent that "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."[594]

Two months after *Bédat* was delivered, the Grand Chamber again issued a judgment which considered chilling effect reasoning, but relating to a protest by parliamentarians. The case was *Karácsony and Others v. Hungary*,[595] and the applicants members of the Hungarian parliament. The applicants had been involved of protests in parliament, including where three of the applicants placed a wheelbarrow filled with soil on the table in front of the Prime Minister; while another used a megaphone to speak. Following each of the protests, the Speaker of the parliament proposed various fines[596] on the applicants for their conduct, which was considered to be gravely offensive to parliamentary order. Decisions approving the Speaker's proposals were adopted by a plenary session, without debate.

The applicants made an application to the European Court, complaining that the decisions to fine them for their conduct in parliament violated their right to freedom of expression under Article 10. In two Chamber judgments delivered in 2014, the Second Section of the Court held that there had been violations of Article 10.[597] A Grand Chamber panel accepted the Hungarian government's request for a referral, and in 2016, the Grand Chamber delivered its unanimous judgment, also finding violations of Article 10.[598]

First, the Court held that on the facts of the case, the Court was satisfied that the applicants did not receive sanctions for expressing their views on issues debated in Parliament, but rather "for the time, place and manner in which they had done so."[599] However, the Court then stated that it saw "no need to rule on whether, bearing in mind the State's wide margin of appreciation, those reasons as such were also sufficient to show that the disputed interference was 'necessary'."[600] The Court found it "more appropriate" to concentrate its review on whether the restriction on the applicants' right to freedom of expression was accompanied by effective and adequate safeguards against abuse.[601]

The Court held that the domestic legislation did not provide for any possibility for the parliamentarians concerned to be involved in the relevant procedure, notably by being heard.

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[593] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber) (Dissenting opinion of Judge López Guerra, para. 15).
[594] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber) (Dissenting opinion of Judge Yudkivska, para. 21).
[595] *Karácsony and Others v. Hungary* (App. no. 42461/13 and 44357/13) 17 May 2016 (Grand Chamber).
[596] See *Karácsony and Others v. Hungary* (App. no. 42461/13 and 44357/13) 17 May 2016 (Grand Chamber), para. 14, 17, and 25.
[597] *Karácsony and Others v. Hungary* (App. no. 42461/13) 16 September 2014; and *Szél and Others v. Hungary* (App. no. 44357/13) 16 September 2014.
[598] *Karácsony and Others v. Hungary* (App. no. 42461/13 and 44357/13) 17 May 2016 (Grand Chamber).
[599] *Karácsony and Others v. Hungary* (App. no. 42461/13 and 44357/13) 17 May 2016 (Grand Chamber), para. 150.
[600] *Karácsony and Others v. Hungary* (App. no. 42461/13 and 44357/13) 17 May 2016 (Grand Chamber), para. 150.
[601] *Karácsony and Others v. Hungary* (App. no. 42461/13 and 44357/13) 17 May 2016 (Grand Chamber), para. 151.

The procedure in the applicants' case consisted of a written proposal of the Speaker to impose fines and its subsequent adoption by the plenary without debate. Thus, the procedure did not afford the applicants any procedural safeguards.[602] On this basis, the Court concluded that there had been a violation of Article 10, because of the absence of "adequate procedural safeguards."[603]

Notably, the Grand Chamber judgment did not touch upon the chilling effect, even though the applicant had argued that the penalties had a chilling effect,[604] and the government made an argument rebutting the chilling effect.[605] Indeed, in the Chamber judgments, the Second Section had held that the fines "were significant in amount (up to one third of the monthly salary) and, especially taken cumulatively, could be seen to have a chilling effect on opposition or minority speech and expressions in Parliament."[606] The Second Section went so far as to hold that "the interference consisted in the application of serious sanctions with a chilling effect on the parliamentary opposition," and had been imposed "without consideration of less intrusive measures, such as warnings or reprimands."[607] It is not clear why the Grand Chamber did not consider it appropriate to examine the individual sanctions themselves, rather than focus on the "procedural" aspect of the fine being imposed.[608] It is only possible to speculate as to the reason. Nonetheless, one possible reason may be that in order for all 17 judges to vote unanimously, the focus of the judgment had to be on procedure, rather than on the chilling effect, which had caused such disagreement in *Bédat*.[609]

There may have been hesitancy in *Karácsony and Others* to apply the chilling effect principle, but no such hesitation was evident in next Grand Chamber judgment where the chilling effect had been argued. The case was *Baka v. Hungary*,[610] where the Court considered whether the termination of a judge's mandate violated Article 10. The applicant in the case, András Baka, was President of the Supreme Court of Hungary, and a former judge of the European Court itself.[611] In 2009, the applicant had been elected by the Parliament of Hungary as President of the Supreme Court for a six-year term until 2015. The applicant was also President of the National Council of Justice, with the explicit statutory obligation to express an opinion on parliamentary bills that affected the judiciary.[612]

In a speech before Parliament in late October 2011, the applicant raised concerns about the proposal to replace the National Council of Justice by an external administration entrusted with the management of the courts. In his speech, the applicant strongly criticised the proposal, and stated that the new body would have "excessive," "unconstitutional" and

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[602] *Karácsony and Others v. Hungary* (App. no. 42461/13 and 44357/13) 17 May 2016 (Grand Chamber), para. 159.
[603] *Karácsony and Others v. Hungary* (App. no. 42461/13 and 44357/13) 17 May 2016 (Grand Chamber), para. 162.
[604] *Karácsony and Others v. Hungary* (App. no. 42461/13 and 44357/13) 17 May 2016 (Grand Chamber), para. 95.
[605] *Karácsony and Others v. Hungary* (App. no. 42461/13 and 44357/13) 17 May 2016 (Grand Chamber), para. 109.
[606] *Szél and Others v. Hungary* (App. no. 44357/13) 16 September 2014, para. 84; and *Karácsony and Others v. Hungary* (App. no. 42461/13) 16 September 2014, para. 87.
[607] *Szél and Others v. Hungary* (App. no. 44357/13) 16 September 2014, para. 85; and *Karácsony and Others v. Hungary* (App. no. 42461/13) 16 September 2014, para. 88..
[608] *Karácsony and Others v. Hungary* (App. no. 42461/13 and 44357/13) 17 May 2016 (Grand Chamber), para. 161.
[609] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 79.
[610] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber).
[611] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 12 (The applicant served for 17 years (1991-2008) as a judge at the European Court of Human Rights).
[612] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 13.

"uncontrollable" powers.[613] Notably, in November 2011, Parliament adopted two bills, and as a consequence of the entry into force of these legislative amendments, the applicant's mandate as President of the Supreme Court terminated in January 2012, three years before its expected date of expiry.[614] Moreover, a new criterion was for the post of President of the new *Kúria* (Supreme Court). The candidates for that post had to be judges appointed for an indeterminate term, having served at least five years as a judge in Hungary. The time served as a judge in an international court was not covered, which resulted in the applicant's ineligibility for the post of President of the new *Kúria*.

The applicant made an application to the European Court, claiming that his mandate had been terminated as a result of views he had expressed in his capacity as President of the Supreme Court and the National Council of Justice, concerning legislative reforms affecting the judiciary.[615] The Second Section delivered its Chamber judgment in 2014,[616] and unanimously held that there had been a violation of Article 10. In 2016, the Grand Chamber delivered its judgment,[617] and also held that there had been a violation of Article 10. The first question for the Grand Chamber was whether there had been an "interference" with the applicant's freedom of expression. The Court held that there was "prima facie evidence of a causal link between the applicant's exercise of his freedom of expression and the termination of his mandate."[618] The Court noted that "all of the proposals to terminate his mandate as President of the Supreme Court were made public and submitted to Parliament between 19 and 23 November 2011, shortly after his parliamentary speech of 3 November 2011, and were adopted within a strikingly short time."[619] The Court concluded that the "premature termination of the applicant's mandate as President of the Supreme Court constituted an interference with the exercise of his right to freedom of expression," citing *Wille*.[620]

The Court then examined whether the interference pursued a legitimate aim. However, the Court rejected the government's argument that the applicant's office "was very much of an administrative and 'governmental' nature, which justified the termination of his mandate with a view to increasing the independence of the judiciary."[621] The Court considered that "this measure could not serve the aim of increasing the independence of the judiciary, since it was simultaneously a "consequence of the previous exercise of the right to freedom of expression by the applicant, who was the highest office-holder in the judiciary."[622] The Court noted that since there had been no "legitimate aim," it was usually not necessary to examine whether the interference was "necessary in a democratic society."[623] However, the Court held that "in the particular circumstances of the present case," the Court considered it "important" to also examine this question.[624]

The Court noted the applicant had expressed his views on the legislative reforms at issue in his professional capacity as President of the Supreme Court, which had been "not only his right," but also his "duty as President of the National Council of Justice to express his opinion on legislative reforms affecting the judiciary."[625] The Court fully reiterated the

[613] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 145.
[614] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 33.
[615] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 123.
[616] *Baka v. Hungary* (App. no. 20261/12) 27 May 2014.
[617] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber).
[618] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 148.
[619] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 146.
[620] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 152.
[621] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 155.
[622] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 156.
[623] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 157.
[624] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 157.
[625] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 168.

chilling effect principle, stating that the "fear of sanction" has a chilling effect on the exercise of freedom of expression, in particular on "other judges wishing to participate in the public debate on issues related to the administration of justice and the judiciary."[626] The Court emphasised that this chilling effect "works to the detriment of society as a whole."[627] The Court, in no uncertain terms, held that the premature termination of the applicant's mandate "undoubtedly had a 'chilling effect' in that it must have discouraged not only him but also other judges and court presidents in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary."[628]

Baka was a powerful application of the chilling effect principle, in contrast to the hesitancy in judgments such as *Couderc*. It fully laid out how regard must be had to the chilling effect not only on the individual judge, but also on *other* judges and court presidents *in future* from participating in public debate. *Baka* also typified the approach of fully considering all limbs of Article 10, instead of stopping short after finding that an interference with freedom of expression did not pursue a legitimate aim; a contrasting approach to *Sanoma*, which ended its analysis after finding an interference had not been prescribed by law.

Turning to the latest Grand Chamber judgment considering chilling effect reasoning, the case was *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*[629] *(*hereinafter *Medžlis Islamske*). The applicants in the case were four non-governmental organisations, and concerned the appointment of a director to a public radio station. The case arose in 2003, when the applicants wrote a letter to the three highest authorities in Brčko District, including the Governor, concerning the appointment of a director to Brčko District's' public radio station. The letter reported "unofficial information" concerning a candidate for the position of director, M.S., who was a "person who lacks the professional and moral qualities for such a position."[630] The letter stated that "according to our information," M.S. had said Muslims "did not possess culture," that on the radio's premises, she "tore to pieces" a calendar showing religious services during Ramadan.[631] The information in the letter was based on discussions with employees of the radio station who had visited one of the applicants to discuss M.S.'s behaviour in the workplace.[632] Later the same month, the letter was published in three daily newspapers.

Subsequently M.S. brought civil defamation proceedings against the applicants over the letter. Ultimately, the Brčko District Court of Appeal found the applicants could "be held responsible for defamation," even where they had not disseminated the statement in the media.[633] The Court of Appeal concluded that the applicants had disseminated statements "which they knew or ought to have known were false," and damaged M.S.'s reputation.[634]

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[626] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 167.
[627] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 167.
[628] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 173.
[629] *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber). See Alex Bailin and Jessica Jones, "'Political defamation' and public servants' reputational rights," *Inforrm*, 11 July 2017.
[630] *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 10.
[631] *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 11.
[632] *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 24.
[633] *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 18.
[634] *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 28.

The Court of Appeal ordered the applicants to retract the letter within 15 days, "failing which they would have to pay jointly the equivalent of 1,280 euro in non-pecuniary damages."[635] The applicants were further ordered to give the judgment to the BD radio and television and to two newspapers for publication at the applicants' own expense. In December 2007, M.S. filed for enforcement of the judgment, and the applicants paid the equivalent of 1,445 euro (inclusive of interest and enforcement costs)."[636]

The applicants made an application to the European Court, arguing that there had been a violation of their right to freedom of expression. The applicants argued that "their intention had been to inform those in authority about certain irregularities in a matter of considerable public interest and to prompt them to investigate the allegations made in the letter,"[637] and its subsequent publication had occurred without their knowledge.

In 2015, the Fourth Section held, by a majority of four votes to three, that there had been no violation of Article 10,[638] finding that the applicants "had acted negligently in reporting M.S.'s alleged misconduct," and "had simply passed on the information they received without making a reasonable effort to verify its accuracy."[639] In 2017, the Grand Chamber delivered its 55-page judgment.[640] Notably, the third-party interveners, which include a freedom-of-expression NGO,[641] submitted that a lower level of protection for citizens who reported information to the authorities would have a "chilling effect on the freedom of expression."[642]

The Court first considered whether the applicants' reporting could be qualified as whistle-blowing, but held that as there was an "absence of any issue of loyalty, reserve and discretion," there was no need to enquire into the case-law on whistle-blowing.[643] The Court then examined the letter, finding that it "concerned matters of public concern,"[644] and concerned a "civil servan[t] acting in an official capacity."[645] However, the Court agreed with the domestic courts that the letter was defamatory, and found no reasons to depart from the domestic courts finding that "the applicants "did not make reasonable efforts to verify the truthfulness of [those] statements of fact before [reporting], but merely made [those

[635] *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 29.
[636] *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 31.
[637] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 13 October 2015, para. 23.
[638] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 13 October 2015.
[639] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 13 October 2015, para. 34.
[640] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 62.
[641] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber).
[642] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 63.
[643] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 80.
[644] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 94.
[645] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 98.

statements]."[646] The Court concluded that the applicants "did not have a sufficient factual basis for their impugned allegations about M.S. in their letter."[647]

Finally, the Court considered the severity of the sanction imposed on the applicants. The Court held that it "did not consider" that the order to retract the letter within fifteen days or pay damages raised any issue under the Convention.[648] This was because, according to the Court, "it was only after expiration of the time-limit set by the BD Court of Appeal that the domestic courts began taking measures to enforce the payment order."[649] Second, the Court held that it was "satisfied that the amount of damages which the applicants were ordered to pay was not, in itself, disproportionate."[650] Thus, according to the Court, "it is of no relevance that in determining this amount the BD Court of Appeal took into account the publication of the impugned letter in the media despite not having relied on that fact in finding the applicants liable for defamation."[651]

Curiously, the Court nowhere mentions the chilling effect. When the Court is considering the principles to be applied under the heading, "the severity of the sanctions," it is notable that the Court does not cite *Axel Springer, Couderc*, nor *Morice*, which all held that even "lenient" sanctions are "capable of having a chilling effect;"[652] that "irrespective of whether or not the sanction imposed was a minor one, what matters is the very fact of judgment being given against the person concerned, including where such a ruling is solely civil in nature;"[653] and "interference with freedom of expression may have a chilling effect on the exercise of that freedom. The relatively moderate nature of the fines does not suffice to negate the risk of a chilling effect on the exercise of freedom of expression."[654] Two of these Grand Chamber judgments concerned civil proceedings, while the third concerned relatively moderate fines. Six judges dissented, in some of the strongest terms used about a majority judgment, including that it was "simply not convincing,"[655] based on an "oversimplified understanding of the scope of Article 10,"[656] and the majority had "gone down a path that is not supported by the facts of the case."[657]

A possible explanation for the majority's approach might be the view within the Court, similar to the hate-speech concern in *Lindon* and *Delfi*, that because the allegations did not have a "sufficient factual basis," the importance of having regard to the chilling effect is substantially reduced, to the point where it is not even mentioned. But while it might an acceptable view that punishing hate speech will not have a chilling effect on expression on

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[646] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 117.
[647] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 117.
[648] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 104.
[649] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 104.
[650] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 104.
[651] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 104.
[652] *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber), para.
[653] *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber), para. 151.
[654] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 127.
[655] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber) (Dissenting opinion of Judge Kūris, para. 5).
[656] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber) (Dissenting opinion of Judge Vehabović).
[657] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber) (Jointing dissenting opinion of Judges Sajó, Karakaş, Motoc and Mits).

matters of public interest, the expression at issue in *Medžlis Islamske* was expression on a matter of public interest, and targeting a public official. This is exactly the type of expression the chilling effect principle is designed to afford a breathing space.

2.5 Conclusion

The previous section discussed the consideration, and application, of chilling effect reasoning in Grand Chamber judgments, spanning over two decades. The preliminary questions to be answered are: what articles of the Convention do these cases mainly concern, and what particular issues do these cases mainly concern. It is quite notable that of the 23 Grand Chamber judgments, the vast majority, 20 in total, concerned Article 10 and the right to freedom of expression.[658] The other Convention articles included Article 6, Article 8, Article 11, and Article 34.[659] There are also certain recurring issues in these judgments. The largest proportion of judgments concerned restrictions on freedom of expression due to defamation proceedings (*Pedersen and Baadsgaard*, *Cumpănă and Mazăre*, *Lindon*, *Axel Springer*, *Delfi*, and *Medžlis Islamske*). The second largest proportion of judgments concerned restrictions on a judge's or lawyer's freedom of expression (*Wille*, *Kyprianou*, *Morice*, and *Baka*). Further, there were three judgments concerning journalists convicted of "ordinary" criminal law offences (*Stoll*, *Pentikäinen*, and *Bédat*). Similarly, there were two judgments concerning restrictions on whistleblowing and employees' (trade unionists') freedom of expression (*Guja*

[658] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber) (Article 10 and protection of journalistic sources); *Wille v. Liechtenstein* (App. No. 28396/95) 28 October 1999 (Grand Chamber) (Article 10 and a judge's non-reappointment over remarks made in public); *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber) (Article 10 and journalists convicted of defamation); *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber) (Article 10 and journalists convicted of defamation); *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber) (Article 10 and lawyer convicted of contempt of court); *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber) (Article 10 and newspapers convicted of defamation); *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber) (Article 10 and a journalist's conviction for publishing secret official deliberations); *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber) (Article 10 and a whistleblower's dismissal); *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber) (Article 10 and protection of journalistic sources); *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber) (Article 10 and employees' dismissal for trade union expression); *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber) (Article 10 and newspaper's fined for report on public figure); *Mouvement raëlien suisse v. Switzerland* (App. no. 16354/06) 13 July 2012 (Grand Chamber) (Article 10 and ban on poster campaign); *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber) (Article 10 and lawyer convicted of defamation); *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber) (Article 10 and news website's liability for reader comments); *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber) (Article 10 and photojournalist's conviction for disobeying police order); *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber) (Article 10 and liability for publishing public figure's photographs); *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber) (Article 10 and journalist's conviction for publishing confidential court materials); *Karácsony and Others v. Hungary* (App. no. 42461/13 and 44357/13) 17 May 2016 (Grand Chamber) (Article 10 and parliamentarians' sanctioned for protesting in parliament); *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber) (Article 10 and termination of a judge's mandate); *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (App. no. 931/13) 27 June 2017 (Grand Chamber) (Article 10 and media company prohibited from publishing taxation data); and *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber) (Article 10 and civil defamation proceedings against NGO).

[659] *Al-Adsani v. the United Kingdom* (App. no. 35763/97) 21 November 2001 (Grand Chamber) (Article 6 and refugees); *A, B and C v. Ireland* (App. no. 25579/05) 16 December 2010 (Grand Chamber) (Article 8 and abortion); *Kudrevičius and Others v. Lithuania* (App. no. 37553/05) 15 October 2015 (Grand Chamber) (Article 11 and convictions for farmers' demonstration); and *Janowiec and Others v. Russia* (App. no. 55508/07 and 29520/09) 21 October 2013 (Grand Chamber) (Article 34 and right to individual petition).

and *Palomo Sánchez*), and two judgments concerning protection of journalistic sources (*Goodwin* and *Sanoma*). Finally, there were single judgments concerning restrictions on poster campaigns (*Mouvement raëlien suisse*), and restrictions on parliamentarians' freedom of expression (*Karácsony*). It is also quite notable that of the 20 Grand Chamber judgments concerning Article 10, over half of these judgments concern *media* and *journalistic* freedom of expression in particular.[660]

On the basis of these findings, the focus of this thesis, namely freedom of expression, is the most appropriate area of examination in relation to the chilling effect. Moreover, given the recurring issues that have been identified, it is appropriate to divide further examination of the chilling effect into the areas of concern which have been identified. First, a chapter examining the consideration, and application, of chilling effect reasoning in relation to freedom of expression and defamation proceedings. Second a chapter examining judges' and lawyers' freedom of expression. Third, a chapter on employee's freedom of expression, such as whistleblowing and trade union freedom of expression. Fourth, a chapter on protection of journalistic sources. Finally, a chapter on journalists convicted of "ordinary" criminal law offences.

Before moving to the in-depth examination and discussion of these issues in subsequent chapters, a number of preliminary observations may be made over the consideration, and application, of chilling effect reasoning in Grand Chamber judgments. Concerning which limb of Article 10 chilling effect reasoning was considered, or applied, the findings above reveal that chilling effect reasoning is mainly used when the Court is examining whether a restriction on freedom of expression is "necessary in a democratic society," which is the third limb under Article 10 (e.g., *Pedersen and Baadsgaard*, *Axel Springer*). Indeed, under this limb, chilling effect reasoning is usually considered in relation to the sanctions or penalties imposed (e.g., *Morice, Guja, Stoll*). But chilling effect reasoning is also applied when the Court examines whether there has been an "interference" with freedom of expression, under the first limb of Article 10 (e.g., *Wille*), and also whether an interference has been "prescribed by law" (e.g. *Sanoma*).

The second point concerns the Grand Chamber's reliance on prior authority when considering, or applying, the chilling effect. At the outset, such as in *Wille*, the Court did not offer authority when applying the chilling effect, and in a sense just declared it.[661] But on closer examination, while the Court did not cite any case law on its chilling effect point, the terms used by the Court to illustrate the chilling effect, ("likely to discourage him from makings statements of that kind in the future") did in fact have a strong basis in the Court's case law, as it was established in the Court's 1986 judgment concerning defamation in

[660] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber) (Article 10 and journalists convicted of defamation); *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber) (Article 10 and journalists convicted of defamation); *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber) (Article 10 and newspapers convicted of defamation); *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber) (Article 10 and a journalist's conviction for publishing secret official deliberations); *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber) (Article 10 and protection of journalistic sources); *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber) (Article 10 and newspaper's fined for report on public figure); *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber) (Article 10 and news website's liability for reader comments); *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber) (Article 10 and photojournalist's conviction for disobeying police order); *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber) (Article 10 and media liability for publishing public figure's photographs); and *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber) (Article 10 and journalist's conviction for publishing confidential court materials).

[661] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 50 (no citation of case law concerning the chilling effect).

Lingens v. Austria.[662] In *Lingens*, the Court held that a fine imposed on a journalist for defaming a politician "would be likely to discourage him from making criticisms of that kind again in future."[663] The language used in *Wille* was almost identical to the language in *Lingens.* As the Grand Chamber case law on the chilling effect developed, the Court began to cite authority regularly when considering the chilling effect, and in most judgments, such as *Baka*,[664] the Court cites prior case law on the chilling effect. A related point, is how the Court cites prior case law from different areas of Article 10 case law when discussing the chilling effect. For example, in *Cumpănă and Mazăre*, in a case concerning sanctioning journalists for defamation, the Court relies upon both *Wille* and *Goodwin* when discussing the chilling effect, cases not concerning defamation, but rather the fear of sanctions.[665] From the Grand Chamber judgments discussed, it is clear that the Court tends to cite prior Grand Chamber judgments when considering the chilling effect, as opposed to Chamber judgments (e.g., *Baka*).[666]

The discussion above also revealed considerable disagreement within the Grand Chamber over the application of chilling effect reasoning. From the discussion, three main approaches arise: the first is where both the majority and dissent recite the chilling effect principles, discuss the case law, and come to different conclusions as to its application. This approach is evident in judgments such as *Pentikäinen*.[667] While there may be disagreements over the appropriateness of applying the chilling effect, at least the reasoning of both views (majority and dissent) is evident. The second approach is where there is disagreement over the application of the chilling effect, but only the majority or dissent discuss and apply it. This approach is evident in cases such as *Palomo Sánchez*,[668] where only one view (the dissent) discusses the chilling effect. While there have been a number of judgments (*Stoll*, *Delfi*, *Bédat*) where the Chamber judgments considered the chilling effect; however, when the cases reached the Grand Chamber, the majority judgment did not apply it.

It was also recognised above that in order to understand the non-application of the chilling effect in *Lindon* and *Delfi*, we must have regard to the view within the Court that where hate speech is purportedly involved, the importance of having regard to the chilling effect is substantially reduced, to the point where it is not even mentioned. This may of course be a legitimate view, but if indeed this is the case, the Court needs to explicitly explain this position, rather than simply omit any mention of the chilling effect. One possible explanation the Court could engage in is to explicitly emphasise that the Court's chilling effect principle under Article 10 is designed to protect expression *on matters of public interest*.

Finally, the discussion also revealed that while there may be subtle differences in the meaning the Court attached to the chilling effect depending on which limb of Article 10 was being considered, there were common underlying elements across all the Grand Chamber

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[662] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986.
[663] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 44.
[664] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016, para. 160 (citing *Guja*, para. 95 and *Morice*, para. 127).
[665] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114 (citing *Wille*, para. 50; and *Goodwin*, para. 39). There is nothing objectionable about this; it is just notable that the Court in many instances considers the chilling effect arguably as a unified concept which touches many different areas of freedom of expression.
[666] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 160 (citing the Grand Chamber judgments in *Guja*, para. 95; and *Morice*, para. 127.
[667] See *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 113 (compare, Dissenting opinion of Judge Spano joined by Judges Spielmann, Lemmens and Dedov, para. 12).
[668] See *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 69-76 (compare, Joint dissenting opinion of Judges Tulkens, Davíd Thór Björgvinsson, Jočienė, Popović and Vučinić, para. 17).

judgments: namely, deterrence, fear and self-censorship. This was typified when looking at *Wille*, concerning a judge's freedom of expression, and *Goodwin*, concerning a journalist's freedom of expression. In *Wille*, the Court applied the chilling effect principle in finding that there had been an interference with freedom of expression: a monarch's reprimand was likely to deter a judge from engaging in similar expression in the future due to the fear of a threatened sanction.[669] In *Goodwin*, the Court applied the chilling effect principle in finding that an interference had not necessary in a democratic society: disclosure orders may deter sources from assisting the press in informing the public on matters of public interest due to a fear of identification.[670] While the judge would be chilled in *Wille*, and sources would be chilled in *Goodwin*, the underlying elements were similar: a government measure (whether a monarch's reprimand, or a court-ordered disclosure) would deter future free expression due to a fear of sanction. Sedler's definition of the chilling effect is similar: a decision to "refrain from speaking or publishing due to the fear of governmental sanction under a law prohibiting or regulating expression."[671] Not only will there be harm to the individual judge, journalist, or source in the form of self-censorship, as later explained in *Cumpănă and Mazăre*, *Kyprianou*, and *Baka*, the chilling effect harms society as a whole,[672] and where future expression is deterred, the public is denied information and opinions that should have been expressed. Faber has elaborated upon this societal harm that flows from laws that over-deter speech and leads to a suboptimal amount of total information disseminated in society,[673] while Schauer similarly points to the general societal loss which results when the freedoms guaranteed by the First Amendment are not exercised.[674] Of course, the scope of protection of freedom of speech under the First Amendment, as interpreted by the U.S. Supreme Court, is somewhat different to Article 10, as interpreted by the European Court, particular relating to hate speech,[675] and defamation of public officials.[676] But the general point is still valid, although the expression which the European Court is most concerned about may be expression on matters of public interest.

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[669] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 50.
[670] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 39.
[671] Robert A. Sedler, "Self-Censorship and the First Amendment" (2011) *Notre Dame Journal of Law, Ethics and Public Policy* 13, p. 14. See also Brandice Canes-Wrone and Michael C. Dorf, "Measuring the Chilling Effect," (2015) 90 *New York University Law Review* 1095, p. 1096.
[672] See *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114; *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 174; and *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 167.
[673] Daniel A. Farber, "Commentary, Free Speech Without Romance: Public Choice and the First Amendment," (1991) 105 *Harvard Law Review* 554, p. 568.
[674] Frederick Schauer, "Fear, Risk and the First Amendment: Unraveling the Chilling Effect," (1978) 58 *Boston University Law Review* 685, p. 693.
[675] See, for example, *Matal v. Tam*, 582 U.S. __ (2017), p. 25 ("Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate."). See also, Eugene Volokh, "Supreme Court unanimously reaffirms: There is no 'hate speech' exception to the First Amendment," *The Washington Post*, 19 June 2017. See Hannes Cannie and Dirk Voorhoof, "The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?" (2011) 29 *Netherlands Quarterly of Human Rights* 54; Antoine Buyse, "Dangerous Expressions: The ECHR, Violence and Free Speech," (2014) 63 *International and Comparative Law Quarterly* 491; Koen Lemmens, "Hate Speech in the case law of the European Court of Human Rights - Good Intentions make Bad Law," in Afshin Ellian and Gelijn Molier (eds.), *Freedom of Speech under Attack* (Eleven International Publishing, 2015); and Philippe Yves Kuhn, "Reforming the Approach to Racial and Religious Hate Speech Under Article 10 of the European Convention on Human Rights," (2019) *Human Rights Law Review* 1.
[676] See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), p. 279.

Chapter 3 - Protection of Journalistic Sources and the Chilling Effect

3.1 Introduction

The previous chapter sought to provide an analysis of how the European Commission of Human Rights, and the Grand Chamber of the European Court of Human Rights, considered the chilling effect principle, and the chapter also offered some preliminary observations on the principle and its application. Building upon this base, the purpose of this chapter, and the next four chapters, is to examine the chilling effect principle in five distinct areas related to Article 10 identified in the previous chapter where the chilling effect principle features most prominently, namely, (a) freedom of expression and the protection of journalistic sources, (b) freedom of expression and defamation proceedings, (c) freedom of expression and criminal prosecutions, (d) judicial and legal professional freedom of expression, and (e) whistleblower, employee and trade union freedom of expression.

It is proposed to first focus on the chilling effect and the protection of journalistic sources.[1] There are a number of reasons for this approach. First, the European Court's first explicit application of the chilling effect term was in *Goodwin v. the United Kingdom*,[2] which concerned freedom of expression and the protection of journalistic sources. Indeed, following *Goodwin*, there is a distinct line of case law concerning the protection of journalistic sources, with the Court considering or applying chilling effect reasoning in over 21 judgments and decisions.[3] As such, it seems appropriate to first begin the substantive discussion of chilling

[1] For European literature, see David Sandy, "False sources and the freedom of the press," (2002) *New Law Journal* 856; Timothy Pinto, "How sacred is the rule against the disclosure of journalists' sources?" (2003) *Entertainment Law Review* 170; Inger Hoedt-Rasmussen and Dirk Voorhoof, "The confidentiality of the lawyer-client relationship under pressure? *Roemen and Schmit v Luxembourg*," (2003) *European Human Rights Law Review* (Supp.) 147; Ruth Costigan, "Protection of journalists' sources," (2007) *Public Law* 464; Dirk Voorhoof, "The Protection of Journalistic Sources under Fire?" in Dirk Voorhoof (ed.), *European Media Law: Collection of Materials 2009-2010* (Knops Publishing, 2009), pp. 266-84; Dirk Voorhoof, "Freedom of Journalistic Newsgathering, Access to Information and Protection of Whistle-blowers under Article 10 ECHR and the Standards of the Council of Europe," in Onur Andreotti (ed.), *Journalism at Risk. Threats, challenges and perspectives* (Council of Europe, 2015), pp. 105-143; Dirk Voorhoof, "Investigative journalism, access to information, protection of sources and whistleblowers," in Dirk Voorhoof et al., *European Centre for Press and Media Freedom ECtHR Conference 2017* (ECPMF, 2017). See also Carl Fridh Kleberg, *The Death of Source Protection? Protecting journalists' sources in a post-Snowden age* (London School of Economics, 2015); Julie Posetti, *Protecting Journalism Sources in the Digital Age* (UNESCO, 2017); and Judith Townend and Richard Danbury, *Protecting Sources and Whistleblowers in a Digital Age* (Institute of Advanced Legal Studies, University of London & Guardian News and Media, 2017).

[2] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber).

[3] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber); *De Haes and Gijsels v. Belgium* (App. no. 19983/92) 24 February 1997; *Ernst and Others v. Belgium* (App. no. 33400/96) 15 July 2003; *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003; *Nordisk Film & TV A/S v. Denmark* (App. no. 40485/02) 8 December 2005 (Admissibility decision); *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision); *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007; *Tillack v. Belgium* (App. No. 20477/05) 27 November 27 2007; *Sanoma Uitgevers B.V. v. the Netherlands* (App. No. 38224/03) 31 March 2009; *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009; *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber); *Martin v. France* (App. No. 30002/08), 12 April 2012; *Ressiot v. France* (App. Nos. 15054/07 and 15066/07) 28 June 2012; *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012; *Saint-Paul Luxembourg SA v. Luxembourg* (App. no. 26419/10) 18 April 2013; *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013; *Stichting Ostade Blade v. the Netherlands* (App. No.8406/06) 27 May 2014 (Admissibility decision); *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision); *Görmüş and Others v. Turkey* (App. no. 49085/07) 19 January 2016; *Telegraaf Media Nederland Landelijke Media B.V. and van der Graaf, v. the Netherlands* (App. no. 33847/11) 30 August 2016 (Admissibility decision); *Becker v. Norway* (App. no. 21272/12) 5 October 2017; *Anthony France v. the United Kingdom* (App. no. 25357/16) 26 September 2017 (Admissibility decision); and

effect reasoning by examining the Court's case law on protection of journalistic sources. The second reason for beginning with a discussion of protection of journalistic sources and the chilling effect is that the Court's judgment in *Goodwin*, and its chilling effect principle, was not only relied upon in the Court's case law on protection of journalistic sources, but also the Court's case law in other areas related to Article 10, including in the Grand Chamber's judgment in *Cumpănă and Mazăre v. Romania* concerning criminal defamation,[4] and other defamation judgments,[5] and judgments involving protestors prosecuted for administrative offences.[6] Notably, the Grand Chamber in *Cumpănă and Mazăre* relied upon *Goodwin*'s paragraph 39 for its finding that the "chilling effect that the fear of such sanctions has on the exercise of journalistic freedom of expression is evident."[7] This principle has in turn been applied in other areas of Article 10 case law, such as the Grand Chamber judgment in *Morice v. France* concerning a lawyer's freedom of expression, that "interference with freedom of expression may have a chilling effect on the exercise of that freedom."[8] The *Goodwin* judgment is thus an appropriate judgment to begin the analysis, given that it is basis for many later applications of the chilling effect principle.

The case law is examined in chronological order, and the chapter addresses the questions posed in Chapter 1: what does the Court mean when it states that there is a chilling effect on freedom of expression; does the Court apply chilling effect reasoning when considering (a) whether an applicant may claim to be a victim under Article 34; (b) whether there has been an "interference" with freedom of expression under Article 10; (c) whether an interference has been "prescribed by law," or, (d) whether an interference is "necessary in a democratic society." The remaining questions are: what is the consequence, if any, of the Court using chilling effect reasoning in its case law concerning protection of journalistic sources; is there much agreement, or disagreement, within the Court on the application of chilling effect reasoning; does the Court explain the application, or non-application, of chilling effect reasoning; and how does the Court use prior case law when considering and applying the chilling effect.

Finally it is important to note that the purpose of this chapter is to analyse the consideration, and application, of chilling effect reasoning in the Court's case law on protection of journalistic sources, and not to discuss generally this area of case law.[9] The purpose of this chapter and thesis generally, is to provide a better understanding of the chilling effect, and as such, in the analysis and discussion which follows, it will focus on the chilling effect reasoning.

Big Brother Watch and Others v. the United Kingdom (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018.

[4] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114 (citing *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 39).

[5] See, for example, *Radio Twist, A.S. v. Slovakia* (App. no. 62202/00) 19 December 2006, para. 53 ("the potential chilling effect of the imposed penalties on the press in the performance of its task of purveyor of information and public watchdog in the future must also be taken into consideration"); *Wizerkaniuk v. Poland* (App. no. 18990/05) 5 July 2011, para. 68 ("The chilling effect that the fear of criminal sanctions has on the exercise of journalistic freedom of expression is evident"); and *Kaperzyński v. Poland* (App. no. 43206/07) 3 April 2012, para. 70 ("The chilling effect that the fear of criminal sanctions has on the exercise of journalistic freedom of expression is evident").

[6] *Novikova and others v. Russia* (App. nos. 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13) 26 April 2016, para. 211 ("the high level of fines was conducive to creating a "chilling effect" on legitimate recourse to protests and such form of expression as a solo demonstration") (citing *Goodwin*, para. 39).

[7] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114 (citing *Goodwin,* para. 39).

[8] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 176.

[9] For excellent discussion, see the references in footnote 1 above.

3.2 *Goodwin* and the early case law

While already mentioned in the previous chapter, it is appropriate to first begin and recall the European Commission's decision in *Goodwin v. the United Kingdom*,[10] where it considered a journalist's argument that a court order to disclose a confidential source had a "chilling effect on the likelihood of sources communicating information to journalists such as himself," and would cast a "chilling effect on the free flow of information generally."[11] As noted earlier, this argument was based on language from the U.S. Supreme Court judgment in *Branzburg v. Hayes*, where the Court had considered protection of journalistic sources, and where it had been argued that sources would be "measurably deterred from furnishing publishable information, all to the detriment of the free flow of information."[12]

The first question for the Commission was whether there had been an "interference" with the right to freedom of expression. In this regard, the Commission applied chilling effect reasoning, and found that the disclosure order had a "potential chilling effect on the readiness of people to give information to journalists such as the applicant."[13] Thus, the Commission held that compulsion to provide information as to a journalist's sources must in particular constitute a restriction in the capacity of a journalist freely to receive and impart information without interference by a public authority."[14] The Commission also found that the interference was "prescribed by law," and pursued a "legitimate aim," and the main question was whether the interference was "necessary in a democratic society."[15]

In this regard, the Commission held that "protection of the sources from which journalists derive information is an essential means of enabling the press to perform its important function of 'public watchdog' in a democratic society."[16] Moreover, "if journalists could be compelled to reveal their sources, this would make it much more difficult for them to obtain information and as a consequence, to inform the public about matters of public interest."[17] The Commission held that any compulsion to reveal sources "must be limited to exceptional circumstances where vital public or individual interests are at stake."[18] The Commission ultimately concluded that there did not exist "any exceptional circumstances which would have justified a departure to be made from the fundamental principle that the sources of the press should be protected from disclosure."[19]

The first point worth making in relation to the *Goodwin* decision and its consideration of the chilling effect, is that the Commission was applying chilling effect reasoning when considering whether there had been an "interference" with the right to freedom of expression. In this regard, the Commission held that "the disclosure order has a potential chilling effect on the readiness of people to give information to journalists such as the applicant."[20] It was because of this "potential chilling effect," a disclosure order would restrict the "capacity of a

[10] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission Report).
[11] *Goodwin v. the United Kingdom* (App. no. 17488/90) 7 September 1993 (Commission Decision), p. 5.
[12] *Branzburg v. Hayes*, 408 U.S. 665 (1972), p. 680. Notably, the Supreme Court in *Branzburg* held, by five-votes-to-four, that "requiring newsmen to appear and testify before state or federal grand juries" does not violate the "freedom of speech and press guaranteed by the First Amendment." (*Branzburg v. Hayes*, 408 U.S. 665 (1972), p. 667). Indeed, the Supreme Court majority noted that "the inhibiting effect of such subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative." (*Branzburg v. Hayes*, 408 U.S. 665 (1972), p. 693-694).
[13] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission report), para. 48.
[14] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission report), para. 48.
[15] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission report), para. 50-58.
[16] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission report), para. 64.
[17] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission report), para. 64
[18] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission report), para. 64
[19] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission report), para. 69.
[20] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission report), para. 48.

journalist freely to receive and impart information," and thus there had been an interference. Second, the Commission also applied chilling effect reasoning when considering whether the interference had been necessary in democratic society, holding that if journalists could be compelled to reveal their sources, this would "make it much more difficult for them to obtain information and as a consequence, to inform the public about matters of public interest."[21] It would seem that it is the chilling effect on the readiness of people to give information to journalists is what would "make it much more difficult" for journalists to obtain information.[22] Third, what is the consequence of the Commission finding that a disclosure order has a potential chilling effect? It is because of this "potential chilling effect," the Commission laid down a test of sorts, holding that a disclosure order may only be made in "exceptional circumstances where vital public or individual interests are at stake."[23] This threshold the Commission laid down was arguably quite high, given the level of scrutiny it applied, stating that it was "not convinced" of the domestic courts' concerns, and finding them not "substantiated."[24]

The following year after the Commission delivered *Goodwin*,[25] the Commission was presented with its first application of its *Goodwin* decision in *De Haes and Gijsels v. Belgium*.[26] The applicants were two Belgian journalists, and in 1986 published five articles in the weekly magazine *Humo*, in which they criticised judges of the Antwerp Court of Appeal for having awarded custody of children to their father, a notary, even though the notary's wife had lodged a criminal complaint accusing him of incest and of abusing the children.[27] The articles had been based on detailed information about the circumstances in which the decisions on the custody of the children were taken, including opinions of several experts who were said to have advised the applicants to disclose them in the interests of the children.[28]

Following publication of the articles, three judges and an advocate-general of the Antwerp Court of Appeal instituted proceedings against the applicants for compensation over defamatory statements.[29] During the proceedings, the applicants had requested that the Crown Counsel produce the documents mentioned in the disputed articles, or to study the opinions of Professors [MA], [MC] and [MD] on the medical condition of the notary's children, which had been filed with the judicial authorities. The applicants had not produced that evidence in court as they had not wished to disclose their sources of information.[30] However, the courts refused to admit in evidence the documents referred to in the impugned articles or hear their witnesses.[31] The Brussels tribunal de première instance found that the applicants had "committed a fault in attacking the plaintiffs' honour and reputation by means of irresponsible accusations and offensive insinuations,"[32] ordered the applicants to pay each plaintiff one franc in damages, and to publish the judgment in *Humo*; and also gave the plaintiffs leave to have the judgment published at the applicants' expense in six daily

[21] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission report), para. 64.
[22] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission report), para. 64.
[23] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission report), para. 64.
[24] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission report), para. 67.
[25] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission report), para. 48.
[26] *De Haes and Gijsels v. Belgium* (App. no. 19983/92) 29 November 1995 (Commission report). See also, *De Haes and Gijsels v. Belgium* (App. no. 19983/92) 24 February 1997.
[27] *De Haes and Gijsels v. Belgium* (App. no. 19983/92) 24 February 1997, para. 7.
[28] *De Haes and Gijsels v. Belgium* (App. no. 19983/92) 24 February 1997, para. 39.
[29] *De Haes and Gijsels v. Belgium* (App. no. 19983/92) 24 February 1997, para. 9.
[30] *De Haes and Gijsels v. Belgium* (App. no. 19983/92) 24 February 1997, para. 9.
[31] *De Haes and Gijsels v. Belgium* (App. no. 19983/92) 24 February 1997, para. 50.
[32] *De Haes and Gijsels v. Belgium* (App. no. 19983/92) 24 February 1997, para. 14.

newspapers. The judgment against the applicants was ultimately upheld by the Court of Cassation.

The applicants then made an application to the European Commission, claiming that the judgments against them had infringed their right to freedom of expression under Article 10, and that they had not had a fair trial under Article 6. First, the Commission found that there had been a violation of Article 10, as the language in the articles came within the "journalistic freedom" to have recourse to "exaggeration or even provocation."[33] Notably, the Commission also found that there had been a violation of Article 6 over the refusal to admit in evidence the documents filed with judicial authorities, as an alternative to the sources of the journalists, and applied *Goodwin* in this regard. The Commission reiterated that protection of the sources from which journalists derive information is an essential means of enabling the press to perform its important function of "public watchdog" in a democratic society.[34] If journalists could be compelled to reveal their sources, this would make it much more difficult for them to obtain information and as a consequence, to inform the public about matters of public interest. Further, the documents were essential to the question of whether the applicants' criticism was based on a sufficient factual basis.[35] As such, the refusal of the domestic courts to admit in evidence the documents filed with judicial authorities was likely to affect the applicants' ability to influence the outcome of the proceedings and the essential "equality of arms" between the parties,[36] and thus constituted a serious disadvantage for the applicants in the presentation of their arguments. The Commission concluded that the applicants did not therefore benefit from a trial in accordance with the requirements of Article 6.[37]

De Haes and Gijsels was notable for applying *Goodwin*, and the principle of the protection of journalistic sources, under Article 6 and the right to a fair trial. On the chilling effect, the Commission applied the principle by holding that if a journalist could be compelled to reveal their sources, "this would make it much more difficult for them to obtain information and as a consequence, to inform the public about matters of public interest."[38] As explained in the Commission's *Goodwin* decision, this was caused by such orders having "a potential chilling effect on the readiness of people to give information to journalists."[39]

Two months later, and indeed one month before the European Court delivered its *Goodwin* judgment,[40] the Commission again considered the protection of journalistic sources, where a broadcaster made arguments based on chilling effect reasoning. The case was *British Broadcasting Corporation v. the United Kingdom*,[41] where a U.K. court had issued a witness summons on the broadcaster BBC to produce "all material in your possession or control (whether transmitted or untransmitted)" related to the Tottenham riots which had occurred in the autumn of 1985.[42] During the riots, a police officer had been killed, and three men were later convicted of murdering the police officer. However, these convictions were overturned in 1991, with two police officers charged in 1992 with perverting the course of justice by forging notes of an interview, and the defence requested the BBC's footage.

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[33] *De Haes and Gijsels v. Belgium* (App. no. 19983/92) 29 November 1995 (Commission report), para. 63.
[34] *De Haes and Gijsels v. Belgium* (App. no. 19983/92) 29 November 1995 (Commission report), para. 79.
[35] *De Haes and Gijsels v. Belgium* (App. no. 19983/92) 29 November 1995 (Commission report), para. 79.
[36] *De Haes and Gijsels v. Belgium* (App. no. 19983/92) 29 November 1995 (Commission report), para. 79.
[37] *De Haes and Gijsels v. Belgium* (App. no. 19983/92) 29 November 1995 (Commission report), para. 85.
[38] *De Haes and Gijsels v. Belgium* (App. no. 19983/92) 29 November 1995 (Commission report), para. 79.
[39] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission report), para. 20.
[40] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber).
[41] *British Broadcasting Corporation v. the United Kingdom* (App. no. 25798/94) 18 January 1996 (Commission Report). See Peter Victor, "Silcott officer will return in triumph," *The Independent*, 31 July 1994.
[42] *British Broadcasting Corporation v. the United Kingdom* (App. no. 25798/94) 18 January 1996 (Commission report) (no paragraph numbers).

The BBC made an application to the European Commission, claiming that the requirement to disclose material it had filmed of the riots violated the right to freedom of expression under Article 10. The BBC argued that the order was an interference with the BBC's freedom of expression because it required the disclosure of information obtained, "despite the considerable risks which this creates for journalists and film crew," and was not necessary in a democratic society.[43] First, the Commission considered whether there had been an interference with the applicant broadcaster's right to freedom of expression. The Commission noted the case was "different" from *Goodwin*, as in *Goodwin*, the journalist had received information "on a confidential and unattributable basis," whereas the information which the BBC obtained "comprised recordings of events which took place in public and to which no particular secrecy or duty of confidentiality could possibly attach."[44] However, the Commission held nonetheless, that it would "assume" an interference with the applicant's right to freedom of expression.[45]

The main question for the Commission was whether the interference had been necessary in a democratic society. The applicant had argued that "the obligation to disclose untransmitted material increases the risk for film crews, as they will be associated with the law enforcement agencies by by-standers if such material is subsequently liable to be used in court."[46] However, the Commission rejected the argument, and held that it was "not satisfied" the "risks to film crews are greater if untransmitted material is liable to be produced in court."[47] The Commission considered that any risk to film crews flowed from their presence at incidents such as riots, and from the fact they were filming such incidents, rather than from any possibility that untransmitted material may subsequently be made available to the courts.[48] Ultimately, the Commission held that the "duty to give evidence is a normal civic duty in a democratic society," and in a criminal trial, it is "for the judge to consider the evidence before the court," and not "for the potential witness," as "the full picture should be before the criminal court."[49]

The *British Broadcasting Corporation* decision is relevant for the present discussion in that the Commission dismissed the applicant's argument that the obligation to disclose untransmitted material "increases the risk for film crews, as they will be associated with the law enforcement agencies by by-standers if such material is subsequently liable to be used in court."[50] This argument was based on chilling effect reasoning, as the applicant was arguing that the "risk for film crews" during newsgathering would interfere with their freedom of expression, which was similar to the Commission's *Goodwin* chilling effect reasoning, that disclosure orders "would make it much more difficult for [journalists] to obtain information and as a consequence, to inform the public about matters of public interest."[51]

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[43] *British Broadcasting Corporation v. the United Kingdom* (App. no. 25798/94) 18 January 1996 (Commission Report) (no paragraph numbers).
[44] *British Broadcasting Corporation v. the United Kingdom* (App. no. 25798/94) 18 January 1996 (Commission Report) (no paragraph numbers).
[45] *British Broadcasting Corporation v. the United Kingdom* (App. no. 25798/94) 18 January 1996 (Commission Report) (no paragraph numbers).
[46] *British Broadcasting Corporation v. the United Kingdom* (App. no. 25798/94) 18 January 1996 (Commission Report) (no paragraph numbers).
[47] *British Broadcasting Corporation v. the United Kingdom* (App. no. 25798/94) 18 January 1996 (Commission Report) (no paragraph numbers).
[48] *British Broadcasting Corporation v. the United Kingdom* (App. no. 25798/94) 18 January 1996 (Commission Report) (no paragraph numbers).
[49] *British Broadcasting Corporation v. the United Kingdom* (App. no. 25798/94) 18 January 1996 (Commission report) (no paragraph numbers).
[50] *British Broadcasting Corporation v. the United Kingdom* (App. no. 25798/94) 18 January 1996(Commission Report) (no paragraph numbers).
[51] *De Haes and Gijsels v. Belgium* (App. no. 19983/92) 29 November 1995 (Commission report), para. 79.

However, what is quite notable is how the Commission dismissed the argument, finding that it was not satisfied the risks to film crews were greater if untransmitted material is liable to be produced in court,[52] and any risk to film crews was because of their presence at such incidents and that they are filming such incidents, rather than from any possibility that untransmitted material may subsequently be made available to the courts.[53] Thus, it seemed that the Commission was placing the burden on the applicant to "satisfy" the Commission of a "greater risk" occurring, and the Commission was not prepared to make such an assumption. This arguably contrasts with the Commission's acceptance in *Goodwin* that compelling journalists to reveal sources "would make it much more difficult for them to obtain information and as a consequence, to inform the public about matters of public interest."[54] In the context of Chapter 2's discussion of the Grand Chamber judgment in *Delfi*,[55] it could be argued that the Commission's dismissal of the chilling effect argument in *British Broadcasting Corporation* was an early example of disregarding the chilling effect principle because of the lack of evidence. The *British Broadcasting Corporation* decision is worth noting at this point also due to the fact similar issues would later be considered by the Court, and the chilling effect principle would feature quite prominently.[56]

A month after the *British Broadcasting Corporation* decision, the Court, sitting as a Grand Chamber, delivered its judgment in *Goodwin v. the United Kingdom*.[57] As mentioned previously, the Court held that "protection of journalistic sources" was one of the "basic conditions for press freedom."[58] The Court stated that without the protection of journalistic sources, sources "may be deterred from assisting the press in information the public on matters of public interest."[59] This would mean the "public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected."[60] Crucially, the Court held that having regard to the "potentially chilling effect" an order for source disclosure has on the exercise of press freedom, such an order "cannot be compatible" with Article 10 unless it is justified by an "overriding requirement in the public interest."[61] Moreover, the Court held that "limitations on the confidentially of journalistic sources" call for the "most careful scrutiny" by the Court.[62]

The Court then sought to apply these principles to the disclosure order. The Court first held that the disclosure order "merely served to reinforce the injunction," as the threat of damage to the company "had thus already largely been neutralised by the injunction," as "the injunction was effective in stopping dissemination of the confidential information by the

[52] *British Broadcasting Corporation v. the United Kingdom* (App. no. 25798/94) 18 January 1996 (Commission report), para. 2.
[53] *British Broadcasting Corporation v. the United Kingdom* (App. no. 25798/94) 18 January 1996 (Commission report), para. 2.
[54] *Goodwin v. the United Kingdom* (App. no. 17488/90) 1 March 1994 (Commission report), para. 64
[55] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 160-161.
[56] See *Nordisk Film & TV A/S v. Denmark* (App. no. 40485/02) 8 December 2005 (Admissibility decision) (no paragraph numbers) ("the applicant company was not ordered to disclose its journalistic source of information. Rather, it was ordered to hand over part of its own research-material. The Court does not dispute that Article 10 of the Convention may be applicable in such a situation and that a compulsory hand over of research material may have a chilling effect on the exercise of journalistic freedom of expression."); and *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 71 ("the Court emphasises that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources") which are discussed below.
[57] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber).
[58] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 39.
[59] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 39.
[60] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 39.
[61] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 39.
[62] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 40.

press."[63] The Court noted that the purpose of the disclosure order was to prevent publication "directly by the applicant journalist's source," and to bring "proceedings against him or her for recovery of the missing document, for an injunction against further disclosure by him or her and for compensation for damage," and "unmasking a disloyal employee or collaborator, who might have continuing access to its premises, in order to terminate his or her association with the company."[64]

The Court admitted that these were "undoubtedly relevant reasons." However, the Court held that the considerations to be taken into account by the Convention institutions for their review under paragraph 2 of Article 10 "tip the balance of competing interests in favour of the interest of democratic society in securing a free press."[65] The Court held that "by proceedings against the source, the residual threat of damage through dissemination of the confidential information otherwise than by the press, in obtaining compensation and in unmasking a disloyal employee or collaborator were, even if considered cumulatively, sufficient to outweigh the vital public interest in the protection of the applicant journalist's source."[66] The Court concluded that the further purposes served by the disclosure order, when measured against the standards imposed by the Convention, did not amount to an overriding requirement in the public interest.[67]

Focusing on the Court's chilling effect reasoning, it seems that the chilling effect the Court had in mind is the "deterring effect" an order for source disclosure has on other sources "from assisting the press in informing the public on matters of public interest."[68] In other words, there is a chilling effect on the exercise of press freedom, where the public-watchdog role of the press "may be undermined," and the press's ability to provide information "may be adversely affected."[69] Thus, there may be two elements to the chilling effect, namely the "deterrence" of sources from assisting the press, and the consequent "adverse effect" on the press in providing information to the public. The second point concerning the chilling effect is that the Court seems to be taking account of future risk. The Court mentions a "potentially" chilling effect, sources "may" be deterred, and the press' public-watchdog role "may" be undermined and "may" be adversely affected.[70] The Court's use of potentially, and may, rather than, *the* chilling effect, or *will be* undermined, suggests that the Court is concerned about future risk, rather than a definite and certain chilling effect.

The final point is whether the recognition of a chilling effect by the Court has any consequence in the outcome of the judgment. There is an argument that the Court's recognition of the chilling effect has a strong impact in the Court's conclusion: notably, the Court states that the "considerations to be taken into account by the Convention institutions for their review under paragraph 2 of Article 10 "tip the balance of competing interests in favour of the interest of democratic society in securing a free press."[71] The Court explicitly refers to "paragraphs 39 and 40" of its judgment as the "considerations" that tip this balance. The Court's reasoning concerning the chilling effect is contained in paragraph 39, and thus, according to the Court, it would seem that protecting the press from the "potentially chilling effect" was a crucial "consideration" for the Court's review.

[63] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 42.
[64] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 44.
[65] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 45.
[66] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 45.
[67] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 45.
[68] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 39.
[69] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 39.
[70] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 39.
[71] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 45.

The following year after *Goodwin*, the Court delivered its judgment in *De Haes and Gijsels v. Belgium*,[72] and similar to the Commission, found violations of both Article 10 and Article 6. Notably relevant for present the discussion, the Court similarly applied chilling effect reasoning when considering Article 6, and the domestic courts' refusal to admit in evidence the documents referred to in the impugned articles (which had been filed with the judicial authorities), or hear at least some of their witnesses. The Court stated that it did not share the domestic courts' opinion that the request for production of documents "demonstrated the lack of care with which Mr De Haes and Mr Gijsels had written their articles."[73] Instead, the Court held that it considered the "journalists' concern not to risk compromising their sources of information by lodging the documents in question themselves was legitimate,"[74] citing with approval the Court's *Goodwin* judgment. The Court concluded that the outright rejection by the domestic courts to at least study the opinion of the three professors whose examinations had prompted the applicants to write their articles, put the applicants at a substantial disadvantage vis-à-vis the plaintiffs. There was therefore a breach of the principle of equality of arms under Article 6's guarantee of a right to a fair trial.

3.3 The permanent Court's consideration of the chilling effect

3.1 Search and seizure and the chilling effect

Following Protocol No. 11, it was not until 2003 that the permanent Court considered protection of journalistic sources and the chilling effect. But the question before the Court did not concern a judge ordering a journalist to disclose his source to a court, but rather, in the words of the Court, "a more drastic measure," namely, police searches of a journalist's home and media offices, and seizure of journalistic material.[75] The case was *Roemen and Schmit v. Luxembourg*,[76] where the *Lëtzebuerger Journal* newspaper published an article disclosing that a government minister had been fined by the Luxembourg tax authority. [77] The article was based on a leaked confidential letter from the tax authority that had been sent anonymously to the newspaper, and one of the newspaper's journalists, Robert Roemen, gave the letter to his lawyer, Anne-Marie Schmit, for safe keeping.

Following publication of the article, the government minister made a criminal complaint, and the public prosecutor opened an investigation into the leak of confidential information, requesting an investigating judge to investigate the newspaper's journalist for the alleged offence of "handling information disclosed in breach of professional confidence."[78] The prosecutor also requested warrants to search the journalist's home, the newspaper's offices, and the lawyer's office. The judge issued the warrants, and the journalist's home and office were searched, but nothing was seized. The lawyer's office was also searched, and the leaked letter seized.

Roemen applied to have the warrant set aside, arguing that it violated press freedom, but the District Court dismissed the application, holding that the investigating judge was perfectly entitled to "assemble evidence of and establish the truth concerning possible

[72] *De Haes and Gijsels v. Belgium* (App. no. 19983/92) 24 February 1997.
[73] *De Haes and Gijsels v. Belgium* (App. no. 19983/92) 24 February 1997, para. 55.
[74] *De Haes and Gijsels v. Belgium* (App. no. 19983/92) 24 February 1997, para. 55.
[75] *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003, para. 57.
[76] *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003.
[77] *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003. See Inger Hoedt-Rasmussen and Dirk Voorhoof, "The confidentiality of the lawyer-client relationship under pressure? Roemen and Schmit v Luxembourg," (2003) *European Human Rights Law Review* (Supp) 147.
[78] *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003, para. 15.

criminal offences" that may have "facilitated the publication of a newspaper article."[79] Roemen's lawyer also applied to have the search set aside, and successfully argued that the search had violated Luxembourg's Lawyers Act, as the police report of the search had omitted to include the observations of the Bar Council's vice president, who had been present during the search. The District Court ordered the letter be returned to the lawyer. However, the investigating judge issued a fresh search warrant, and the letter was again seized from the lawyer's office. The second seizure was upheld on appeal.

Over two-and-a-half years following the seizure, Roemen was charged with handling information received in breach of professional confidence. But the District Court would later quash the charges, and the investigating judge informed the journalist the investigation had ended. While the charges were ruled to be "null and void,"[80] Roemen and his lawyer decided to make an application to the European Court, arguing that the searches had violated their rights under both Article 8 and 10 of the Convention.[81] The Court decided to first examine Roemen's complaint under Article 10. The government argued that the *Goodwin* case was inapplicable, as Roemen had not been required to reveal his source, but had been *merely* subjected to a search of his home and office. Moreover, the government's interest was an "allegation of breach of professional confidence," while in *Goodwin* it had only concerned "the economic interests of a private undertaking."[82]

The European Court wholly rejected the government's arguments, holding that a search conducted with a view to uncover a journalist's source is a "more drastic measure" than an order to divulge a source's identity.[83] This was because officials who raid a journalist's workplace unannounced, "armed" with search warrants, have "very wide" powers and "have access to all the documentation held by the journalist."[84] Searches undermined the protection of sources to an "even greater extent" than the measures in *Goodwin*.[85] The Court applied its strict test under *Goodwin*, that the government must demonstrate an "overriding requirement in the public interest" for the search, and the "most careful scrutiny" must be applied by the Court.[86]

Applying the *Goodwin* test to the issuing of the search warrants, the Court noted that (a) the searches were not carried out in order to seek evidence of an offence committed by the journalist "other than in his capacity as a journalist," and (b) measures "other than searches" of the journalist's home and workplace might have uncovered the perpetrators of the offences, such as questioning tax authority officials.[87] It followed, according to the Court, that the government had "entirely failed to show" that domestic authorities would not have been able to ascertain whether, "in the first instance," there had been a breach of professional confidence "without searching" the journalist's home and workplace.[88] Thus, the Court concluded that the search was disproportionate, as "it was carried out at such an early stage of the proceedings,"[89] in violation of Article 10.

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[79] *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003, para. 20.
[80] *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003, para. 36.
[81] Of note, Dean Spielmann, a future president of the European Court, represented both Roemen and Schmit before the European Court (See *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003, para. 1).
[82] *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003, para. 45.
[83] *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003, para. 57.
[84] *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003, para. 57.
[85] *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003, para. 57.
[86] *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003, para. 46 and 57.
[87] *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003, para. 56.
[88] *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003, para. 56.
[89] *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003, para. 71.

The Court also reviewed the searches of the lawyer's office under Article 8's protection of the home, and correspondence. The Court held that Article 8's protection of the "home" extended to the lawyer's office. The Court noted that the search was accompanied by special procedural safeguards, such as in the presence of the investigating judge, a public prosecutor's official, and the Bar Council's president. But the Court was also "bound to note" that the search warrant was "drafted in relatively wide terms," and granted investigators "relatively wide powers."[90] And "above all," the ultimate purpose of the search "was to establish the journalist's source through his lawyer," thus "had a bearing on" the journalist's rights under Article 10.[91] The Court concluded that the search was "disproportionate," as "it was carried out at such an early stage of the proceedings."[92]

A number of points can be made concerning the Court's use of chilling effect reasoning. First, the applicant had argued that the searches "were liable to deter journalists from performing their essential role as "watchdogs" to keep the public informed on matters of public interest."[93] The Court held that "the fact that the searches proved unproductive did not deprive them of their purpose," which was to identify the journalists' source.[94] Second, the Court held that search warrants, "undermined the protection of sources to an even greater extent than the measures in *Goodwin*."[95] The Court reiterated that when protection of sources is undermined, "sources may be deterred from assisting the press in informing the public on matters of public interest."[96] Fourth, it seems that the Court in *Roemen and Schmit* was taking account of future sources being "deterred from assisting the press."[97] This concern for other future sources being deterred, even where a source has not been identified, mirrors the reasoning of the Court discussed in the Grand Chamber judgments in *Wille* and *Cumpănă and Mazăre*, that the unifying principle underlying the chilling effect reasoning in all three cases is the likelihood of freedom of expression being discouraged (*Wille*), deterred (*Goodwin*), or inhibited (*Cumpănă and Mazăre*) in the future.

Five months after the Court delivered *Roemen and Schmit*, the Court was again called upon to consider search and seizure warrants issued against the media, but this time on a truly massive scale. The case was *Ernst v. Belgium*,[98] and arose following numerous leaks to the media of confidential information during a number of high-profile criminal cases in Belgium, allegedly in breach of professional secrecy. A judge was appointed to investigate the leaks, and issued warrants to search the offices of a number of media offices. In one afternoon, and on foot of these warrants, 160 police officers simultaneously searched the offices of three Belgian newspapers, *De Morgen*, *Le Soir* and *Le Soir Illustré*, and the public broadcaster RTBF. Documents, computer disks and hard drives were seized, with searches taking between 30 minutes and three hours. None of the media involved received copies of the warrants. Most of the seized material was returned within a few days, but other material was retained by the authorities.

No charges were brought against any journalists, and a number of journalists and two media associations made an application to the European Court, arguing the searches violated Articles 10 and 8 of the Convention. The Court first considered Article 10, and held that the searches "without a doubt" fell within the field of protection of journalistic sources, and the

[90] *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003, para. 71.
[91] *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003, para. 71.
[92] *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003, para. 71.
[93] *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003, para. 44.
[94] *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003, para. 47.
[95] *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003, para. 58.
[96] *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003, para. 46.
[97] *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003, para. 46.
[98] *Ernst and Others v. Belgium* (App. no. 33400/96) 15 July 2003.

lack of apparent results did not deprive them of their purpose, which was to "find those responsible for the leak and thus the source of information for journalists."[99]

The Court then applied *Roemen and Schmit*, and noted (a) the government "does not indicate" how the newspapers and broadcaster were involved in any alleged offences, (b) the government had "not provided any indication" on internal investigations to determine the sources of the leaks, and (c) the government "fails to demonstrate" that without the searches the authorities would not have been able to first seek possible breaches of professional secrecy within the courts involved.[100] The Court stated it was "struck" by the "massive nature" of the searches, and "wondered" whether other measures other than searches, such as internal investigations, would not have allowed the identification of the leaks.[101] The Court concluded that the government had "not demonstrated" that the reasons for the searches were sufficient under Article 10, and thus there had been a violation of Article 10.[102]

Unlike *Roemen and Schmit*, where the journalist had not been able to argue under Article 8 (as the issue was not raised in the domestic courts), the Court in *Ernst* considered the journalists' arguments under Article 8. The Court confirmed that Article 8's protection of the "home" included a journalist's office, and also a company's office.[103] The Court then applied Article 8, and held that there had been a violation because (a) there had been no alleged offence against the journalists, (b) warrants were drafted in broad terms, (c) the warrant was "without any limitations," and (d) gave "no information on the investigation in question," nor on the "exact place to visit and items to be seized."[104] The Court noted that the journalists "were left in the dark as to the real motives of the searches," and concluded that the searches were "disproportionate" under Article 8.[105]

Thus, both *Roemen and Schmit* and *Ernst*, applied chilling effect reasoning in finding that even where no journalistic source is discovered, the protection of journalistic sources still applies. In this regard, it is helpful to bring up at this stage the Grand Chamber's judgment in *Delfi* discussed in the previous chapter, where the Court sought to find evidence of a chilling effect.[106] This had also been a feature of the European Commission's decision in *British Broadcasting Corporation*.[107] In contrast to *Delfi*, both *Roemen and Schmit* and *Ernst* are examples of the Court being concerned about a "potential chilling effect," even where no sources are discovered, and even where there is no evidence of sources being discovered.

3.3.2 Journalistic research material

Notably, both *Roemen and Schmit* and *Ernst* found violations of Article 10 when applying *Goodwin* and its chilling effect reasoning. However, in 2005, the Court delivered its first decision where a disclosure order was found not to violate Article 10 and the protection of journalistic sources. The case was *Nordisk Film & TV A/S v. Denmark*,[108] where the applicant was a television production company which had investigated and reported on the Danish Paedophile Association. In 1999, a journalist with Nordisk Film went undercover posing as a member of the group. The journalist was invited to private meetings, and befriended a member ("Mogens") who told the journalist about a hotel in India run by a Danish paedophile

[99] *Ernst and Others v. Belgium* (App. no. 33400/96) 15 July 2003, para. 100.
[100] *Ernst and Others v. Belgium* (App. no. 33400/96) 15 July 2003, para. 101-102.
[101] *Ernst and Others v. Belgium* (App. no. 33400/96) 15 July 2003, para. 101.
[102] *Ernst and Others v. Belgium* (App. no. 33400/96) 15 July 2003, para. 105.
[103] *Ernst and Others v. Belgium* (App. no. 33400/96) 15 July 2003, para. 109.
[104] *Ernst and Others v. Belgium* (App. no. 33400/96) 15 July 2003, para. 116.
[105] *Ernst and Others v. Belgium* (App. no. 33400/96) 15 July 2003, para. 117.
[106] *Delfi AS v. Estonia* (App. no. 64568/09) 16 June 2015 (Grand Chamber), para. 160-161.
[107] *British Broadcasting Corporation v. the United Kingdom* (App. no. 25798/94) 18 January 1996, para. 2.
[108] *Nordisk Film & TV A/S v. Denmark* (App. no. 40485/02) 8 December 2005 (Admissibility decision).

where it was possible to have sex with underage boys. The journalist visited the hotel, interviewing a boy, and made notes and video recordings using a hidden camera. Nordisk Film contacted the Paedophile Association before broadcasting its programme, assuring that it would anonymise their identities, with their faces and voices blurred.[109]

The programme was broadcast in 2000, and the day after the broadcast, the person named "Mogens" was arrested and charged with sexual offences. Subsequently, the public prosecutor sought a court order requiring Nordisk Film to hand over un-broadcasted footage from the applicant's footage. The City Court refused to grant the order, having regard to the media interest in protecting their sources, and because the raw material "had little or no evidential value."[110] The High Court upheld this decision. However, the public prosecutor appealed to the Supreme Court, where the Supreme Court overturned the City and High Court decisions, and held that Nordisk Film was required to hand over "limited specified unedited footage and notes" related solely to one member ("Mogens") of the paedophile association."[111] The Court also ruled that video footage and notes that may reveal the identity of other members of the paedophile association were exempt from disclosure. The Court made reference to the criminal offence Mogens had been charged with, namely sexual relations with underage boys. Months later, the charges against Mogens were dropped.

Nordisk Film made an application to the European Court, arguing the production order violated its Article 10 right to freedom of expression. First, the Court held that participants in the programme could not be regarded as "sources of journalistic information in the traditional sense," as they were unaware that the journalist was a journalist, unaware that they were being recorded, and did not consent to being filmed or recorded.[112] Thus, the Court held that the applicant was not ordered to disclose its journalistic source of information.[113] Instead, it had been "ordered to hand over part of its own research-material."[114] The Court "did not dispute" that Article 10 may be applicable in such a situation, and that "a compulsory hand over of research material may have a chilling effect on the exercise of journalistic freedom of expression," citing *Cumpănă and Mazăre* as authority.[115] Crucially, however, the Court held that "this matter can only be properly addressed in the circumstances of a given case."[116]

Further, the Court stated it was "not convinced" that the degree of protection under Article 10 to be applied in a situation like the present can reach the same level as that afforded to journalists, when it comes to their right to keep their sources confidential. This was because protection of sources is "two-fold," relating not only to the journalist, but also to the source who volunteers to assist the press in informing the public about matters of public

[109] *Nordisk Film & TV A/S v. Denmark* (App. no. 40485/02) 8 December 2005 (Admissibility decision) (no paragraph numbers).
[110] *Nordisk Film & TV A/S v. Denmark* (App. no. 40485/02) 8 December 2005 (Admissibility decision) (no paragraph numbers).
[111] *Nordisk Film & TV A/S v. Denmark* (App. no. 40485/02) 8 December 2005 (Admissibility decision) (no paragraph numbers).
[112] *Nordisk Film & TV A/S v. Denmark* (App. no. 40485/02) 8 December 2005 (Admissibility decision) (no paragraph numbers).
[113] *Nordisk Film & TV A/S v. Denmark* (App. no. 40485/02) 8 December 2005 (Admissibility decision) (no paragraph numbers).
[114] *Nordisk Film & TV A/S v. Denmark* (App. no. 40485/02) 8 December 2005 (Admissibility decision) (no paragraph numbers).
[115] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114.
[116] *Nordisk Film & TV A/S v. Denmark* (App. no. 40485/02) 8 December 2005 (Admissibility decision) (no paragraph numbers).

interest.[117] This was a new statement of principle by the Court, and no case law was cited as authority.

Notably, the Court then referred to Article 3 of the Convention, and stated that States are required to take measures to ensure individuals are not subjected to torture or inhuman or degrading treatment, including "ill-treatment administered by private individuals," and in particular, "children and other vulnerable persons."[118] The Court then noted that the Supreme Court had found that non-edited recordings and the notes made by the journalist "could assist the investigation and production of evidence in the case against "Mogens", whose identity as stated was already known to the police."[119] Moreover, the Supreme Court ordered that the applicant company hand over a "limited part of the unedited footage," namely recordings in which Mogens or the boy participates, and the journalist's notes on these. Further, these recordings and notes were "exempted from the order whenever that would entail a risk of revealing the identity" of other participants.[120] Thus, the Supreme Court's order was "limited to the applicant company's own research-material, and merely a part thereof."[121] The European Court concluded that it was satisfied that the order to compel the applicant company to hand over the limited unedited footage in which "Mogens" or the Indian boy participated, and the journalist's notes relating thereto was not disproportionate to the legitimate aim pursued, and that the reasons given by the Supreme Court in justification of those measures were relevant and sufficient. Thus, the application was held to be inadmissible, as manifestly ill-founded under Article 35.

There are some possible difficulties with the Court's application of the chilling effect principle in *Nordisk*. First, the Court admits that "a compulsory hand over of research material may have a chilling effect on the exercise of journalistic freedom of expression," but then qualifies this by holding that "this matter can only be properly addressed in the circumstances of a given case." However, in *Cumpănă and Mazăre*, there was no such qualification, and the Court in *Nordisk* seems to add this qualification without a basis in prior authority. It must be reiterated that in both *Roemen and Schmit* and *Ernst*, no source was discovered, and no source documents were discovered, only research material: the police "have access to all the documentation held by the journalist."[122] There is a reasonable argument to be made that the documents seized in *Roemen and Schmit* and *Ernst*, and the documents ordered to be disclosed in *Nordisk*, were quite similar, although the scale was different.

However, while there may be disagreement over the application of chilling effect of the disclosure order, what is notable about the Court's decision in *Nordisk* is that the Court actively engaged with the chilling effect principle, engaged with the case law (such as *Goodwin*, *Cumpănă and Mazăre,* and *Roemen and Schmit*), and sought to explain why there was no chilling effect associated with the disclosure order. Thus, *Nordisk* is a good example of the Court engaging fully with the chilling effect principle and case law, while deciding not to apply it. This is similar to the Grand Chamber judgments discussed in the previous chapter, such as *Stoll*. Finally, the Court's reference to Article 3 and ensuring children are not

[117] *Nordisk Film & TV A/S v. Denmark* (App. no. 40485/02) 8 December 2005 (Admissibility decision) (no paragraph numbers).
[118] *Nordisk Film & TV A/S v. Denmark* (App. no. 40485/02) 8 December 2005 (Admissibility decision) (no paragraph numbers).
[119] *Nordisk Film & TV A/S v. Denmark* (App. no. 40485/02) 8 December 2005 (Admissibility decision) (no paragraph numbers).
[120] *Nordisk Film & TV A/S v. Denmark* (App. no. 40485/02) 8 December 2005 (Admissibility decision) (no paragraph numbers).
[121] *Nordisk Film & TV A/S v. Denmark* (App. no. 40485/02) 8 December 2005 (Admissibility decision) (no paragraph numbers).
[122] *Roemen and Schmit v. Luxembourg* (App. no. 51772/99) 25 February 2003, para. 57.

subjected to ill-treatment, and the nature of the alleged serious criminal offences, involved, cannot be ignored, and goes a long way to possibly explaining the Court's approach, and were considerations which outweighed any concern for the potential chilling effect.

3.3.3 Surveillance of journalists and the chilling effect

Six months after the *Nordisk* decision, a second admissibility decision was delivered concerning protection of journalistic sources, and with chilling effect reasoning considered, but on a different issue affecting protections of sources: government surveillance. The case was *Weber and Saravia v. Germany*,[123] where the first applicant was a journalist who worked for various German and international newspapers and broadcasters, and her work focused on issues such as drug trafficking, arms dealing, and money laundering. The second applicant took telephone messages for the first applicant when she was on assignment.[124] In 1995, the applicants lodged a constitutional complaint in the German Federal Constitutional Court, concerning amendments made under the Fight against Crime Act of 28 October 1994 to Germany's surveillance law, the so-called G 10 Act.[125] The amendments extended the powers of Germany's Federal Intelligence Service to engage in "strategic monitoring" of international telecommunications, allowing the collection of information "by intercepting telecommunications in order to identify and avert serious dangers facing the Federal Republic of Germany."[126]

The applicants argued that the amendments violated the right to secrecy of telecommunications and freedom of the press. The Federal Constitutional Court held that certain provisions of the Fight against Crime Act were incompatible, or only partly compatible, with the Basic Law, and set a deadline of June 2001 for the legislature to bring the situation into line with the Constitution. The Federal Constitutional Court found that the two impugned provisions concerning transmission to other authorities of data obtained by means of strategic monitoring, namely section 3(3)[127] and (5),[128] of the Fight against Crime Act infringed the freedom of the press. In order to ensure that data was used only for the purpose which had justified their collection, it ordered that section 3(3) could be applied only if the personal data transmitted to the Federal Government were marked and remained connected to the purposes which had justified their collection.[129] As regards the transmission of data to the authorities listed in section 3(5), the Court laid down stricter conditions for transmission by ordering that there had to be specific facts arousing a suspicion that someone had committed one of the offences listed in section 3(3) and that the transmission had to be recorded in minutes. The Court stressed that such safeguards could also ensure that the

[123] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision).
[124] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision), para. 6.
[125] Act of 13 August 1968 on Restrictions on the Secrecy of Mail, Post and Telecommunications. See *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision), para. 3.
[126] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision), para. 4.
[127] See *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision), para. 35 ("The Federal Constitutional Court found that section 3(3), second sentence, in its present version, failed to comply with Articles 10 and 5 § 1, second sentence, of the Basic Law. The provision did not contain sufficient safeguards to guarantee that the duty of the Federal Intelligence Service to report to the Federal Government, which included the transmission of personal data, would be performed solely for the purposes which had justified the collection of the data (*Zweckbindung*).").
[128] See *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision), para. 39 ("The Federal Constitutional Court further found that section 3(5) was not fully compatible with Articles 10 and 5 § 1, second sentence, of the Basic Law. It held that Article 10 did not prohibit the transmission to the authorities listed in section 3(5), first sentence, of information which was relevant for the prevention and investigation of criminal offences.").
[129] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision), para. 150.

Federal Intelligence Service took into account the important concerns of non-disclosure of sources and confidentiality of editorial work protected by the freedom of the press enshrined in Article 5 § 1 of the Basic Law. A new version of the G 10 Act, which took into account the principles laid down by the Federal Constitutional Court in its judgment of 14 July 1999, came into force on 26 June 2001.

The applicants made an application to the European Court, arguing that the provisions of the Fight against Crime Act amending the G 10 Act, as interpreted and modified by the Federal Constitutional Court, violated both Article 8 and 10 of the European Convention. For present purposes, the focus is on Article 10. In particular the first applicant argued that the impugned monitoring powers prejudiced the work of journalists investigating issues targeted by surveillance measures, as she could no longer guarantee that information she received in the course of her journalistic activities remained confidential.

The first question for the Court was whether there had been an interference with the applicant journalist's freedom of expression. The Court reiterated the chilling effect principle from *Goodwin*: that the protection of journalistic sources is one of the cornerstones of freedom of the press. And without such protection, sources may be "deterred" from assisting the press in informing the public about matters of public interest.[130] As a result, the vital public-watchdog role of the press may be undermined, and the ability of the press to provide accurate and reliable information may be adversely affected.[131]

The Court stated that legislation permitting a system for effecting secret surveillance of communications involves a "threat of surveillance," and strikes at the freedom of communication between users of telecommunications services, and therefore amounts in itself to an interference with the exercise of the applicant's right to private life under Article 8.[132] The Court held that such reasoning was similarly applicable under Article 10.

The Court then noted that the applicant journalist communicated with persons she wished to interview on subjects such as drugs and arms trafficking or preparations for war, which were also the focus of strategic monitoring.[133] The Court applied chilling effect reasoning, and held that there was a "danger" her telecommunications for journalistic purposes might be monitored and that her journalistic sources "might be either disclosed or deterred from calling or providing information by telephone."[134] Thus, the Court held that the surveillance measures interfered with the applicant's freedom of expression,[135] and "irrespective of any measures actually taken against her."[136]

Having found that there had been an interference with the journalist's freedom of expression, the Court also held that the interference had been prescribed by law,[137] and pursued the legitimate aim of protection of the interests of national security.[138] Thus, the final question was whether the interference had been necessary in a democratic society, and the Court applied the test from *Goodwin*: having regard to the importance of the protection of journalistic sources for the freedom of the press in a democratic society, an interference cannot be compatible with Article 10 of the Convention unless it is justified by an

[130] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision), para. 150.
[131] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision), para. 143, citing *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 39; and *Roemen and Schmit v. Luxembourg* (App. No. 51722/99) 25 February 2003, para. 46.
[132] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision), para.144.
[133] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision), para.145.
[134] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision), para. 145.
[135] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision), para. 146.
[136] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision), para. 144.
[137] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision), para. 147.
[138] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision), para. 149.

"overriding requirement in the public interest."[139] First, the Court held that the interference with freedom of expression by means of strategic monitoring cannot be characterised as "particularly serious," as (a) the strategic monitoring was carried out in order to prevent certain offences, and was not aimed at monitoring journalists; (b) generally the authorities would know only when examining the intercepted telecommunications, if at all, that a journalist's conversation had been monitored; and (c) surveillance measures were not directed at uncovering journalistic sources.[140]

The Court admitted that the amended G 10 Act did not contain "special rules safeguarding the protection of freedom of the press and, in particular, the non-disclosure of sources, once the authorities had become aware that they had intercepted a journalist's conversation."[141] However, the Court observed that the impugned provisions contained safeguards to keep the interference with the secrecy of telecommunications, and the freedom of the press, within the limits of what was necessary to achieve the legitimate aims pursued. The data obtained were "used only to prevent certain serious criminal offences," and was considered "adequate and effective for keeping the disclosure of journalistic sources to an unavoidable minimum."[142] Thus, the Court concluded that the German government had adduced relevant and sufficient reasons to justify interference with freedom of expression, and the complaints under Article 10 must be dismissed as being manifestly ill-founded.

Although the Court concluded that there had been no violation of Article 10, the Court's application of the chilling effect in *Weber and Saravia* was significant in a number of respects. The Court applied chilling effect reasoning in finding that surveillance legislation "interfered" with a journalist's freedom of expression,[143] and crucially, "irrespective of any measures actually taken against her."[144] This was because journalistic sources might be "deterred from calling or providing information by telephone."[145] This continues the underlying principle in both *Roemen and Schmit* and *Ernst* of the Court being concerned about a "potential chilling effect," even where no sources are discovered, and even where there is no evidence of sources being discovered. Further, an important consequence of the Court's application of the chilling effect principle in *Weber and Saravia* is that it required the Court to apply *Goodwin*'s high standard of review: the necessity of surveillance legislation's interference with freedom of expression must be justified by an "overriding requirement in the public interest."[146]

3.3.4 Imprisonment for refusing to identify source

Following *Weber and Saravia*, the Court applied chilling effect reasoning in its judgment *Voskuil v. Netherlands* judgment,[147] which was the first judgment from the Court where it considered a criminal defendant seeking to have a journalist reveal his source or source material, similar to the Commission's decision in *British Broadcasting Corporation*. The applicant was Koen Voskuil, a journalist with the *Sp!ts* tabloid newspaper. In 2002, the applicant published an article entitled, "Chance Hit or Perfect Shot," which included

[139] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision), para. 149.
[140] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision), para. 151.
[141] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision), para. 152.
[142] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision), para. 152.
[143] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (admissibility decision), para. 146.
[144] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (admissibility decision), para. 144.
[145] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (admissibility decision), para. 145.
[146] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (admissibility decision), para. 149. See also *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, discussed below in Section 3.5.7.
[147] *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007.

allegations that the Amsterdam police had staged the flooding of a building in order to gain access to an apartment where arms had been found. The article included a quote from an unnamed source in the Amsterdam police stating, "That is what we made of it. Sometimes you just need a breakthrough in an investigation."[148]

Three men had been convicted of arms trafficking following the police search of their apartment in question. The men subsequently appealed their convictions, and in the Amsterdam Court of Appeal, the applicant was summoned to appear as a witness at the request of the defence. The applicant was asked whether the policeman he had quoted in his article was also involved in the investigation of the flat or was aware of that investigation.[149] However, the applicant invoked his right of non-disclosure, and refused to answer whether his police source had been involved in the investigation, or was merely aware of it. The Court of Appeal ruled that Voskuil was required to answer the question, as the truth of the source's statement "might affect the conviction of the accused," and also "the integrity of the police."[150] The President of the Court reminded the applicant that the court was empowered to order his detention for failure to comply with a judicial order, and as such, Voskuil testified that his source had been "aware of, and involved in, the investigation."[151]

The defence counsel then asked Voskuil to identify his source, which Voskuil refused to do, invoking his right not to disclose his sources. Following deliberation, the Court of Appeal ordered Voskuil to reveal his source, which he again refused to do.[152] The Court then ordered Voskuil's committal to prison for a maximum of 30 days.[153] Voskuil lodged a request with the Court of Appeal to be released from detention. At the hearing, the Advocate General reported that, following the applicant's statements, a police inspector had carried out an internal investigation, which had revealed that only eight police officers had been involved in the investigations; and all these officers had made sworn affidavits to the effect that they had never been in contact with the applicant.

In subsequent proceedings before the Court of Appeal, the applicant once again refused to reveal the identity of his source. On foot of this, the Court of Appeal decided to lift the order for the applicant's detention, on the basis that "no support for, or confirmation of, the applicant's statement that he had received information from a police officer who had been involved in both investigations" could be found in statements made by other persons.[154] The applicant's statement "had been contradicted by ten police officers," and therefore, "no credence could be attached to his statement."[155] Thus, the applicant's detention "no longer served any purpose."[156] Voskuil was released, having spent 17 days in detention.

Voskuil made an application to the European Court, claiming the denial of his right as a journalist not to disclose his source of information, and the order to detain him in order to compel him to do so, violated his right to freedom of expression under Article 10.[157] The Dutch government agreed there had been an interference with the applicant's right to freedom of expression, and the main question for the European Court was whether the interference had been necessary in a democratic society. The Court first reiterated the test from *Goodwin* that given the importance of the protection of journalistic sources for press freedom in a democratic society, and the potentially chilling effect an order of source disclosure has on the

[148] *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007, para. 9.
[149] *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007, para. 11.
[150] *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007, para. 11.
[151] *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007, para. 11.
[152] *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007, para. 12.
[153] *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007, para. 14.
[154] *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007, para. 24.
[155] *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007, para. 24.
[156] *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007, para. 24.
[157] *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007, para. 45.

exercise of that freedom, such a measure cannot be compatible with Article 10 unless it is justified by an "overriding requirement in the public interest."[158]

The Court then examined the two reasons put forward to require the applicant to identify his source: (a) to guard the integrity of the Amsterdam police; and (b) to secure a fair trial for the accused. The Court first considered reason (b), and noted that "[w]hatever the potential significance in the criminal proceedings of the information which the Court of Appeal tried to obtain from the applicant, the Court of Appeal was not prevented from considering the merits of the charges against the three accused; it was apparently able to substitute the evidence of other witnesses for that which it had attempted to extract from the applicant."[159] Thus, the Court held that this reason given for the interference "lacks relevance."[160]

The Court then turned to reason (a), namely to protect "the integrity of the Amsterdam police."[161] The Court stated that it was not in a position to establish "whether or not there was any truth in the allegations published by the applicant,"[162] but noted that the Court of Appeal took them seriously enough to order the applicant's detention, and similar allegations were aired in other print media. Further, the Court understood the government's concern about the possible effects of any suggestion of foul play on the part of public authority, especially if it is false.[163] However, the Court held that "in a democratic state governed by the rule of law the use of improper methods by public authority is precisely the kind of issue about which the public have the right to be informed."[164]

Finally, the Court stated that it was "struck by the lengths to which the Netherlands authorities were prepared to go" to learn the source's identity.[165] The Court then applied chilling effect reasoning, and held that such "far-reaching measures cannot but discourage persons who have true and accurate information relating to wrongdoing of the kind here at issue from coming forward and sharing their knowledge with the press in future cases."[166] The Court concluded that the facts to be considered "tip the balance" of competing interests in favour of the interest of democratic society in securing a free press, and held the government's interest in knowing the identity of the applicant's source was not sufficient to override the applicant's interest in concealing it.[167] Thus, there had been a violation of Article 10.

The *Voskuil* judgment's use of chilling effect reasoning had an important consequence on the standard of review the Court adopted. The Court held that as one of the "Convention institutions," (as stated in *Goodwin*) its review under Article 10 means that it must take into account certain "considerations," including "the potentially chilling effect an order of source disclosure has on the exercise" of press freedom. Because of this, the Court held that it must "tip the balance of competing interests in favour of the interest of democratic society in securing a free press."[168] This idea of the Court's concern for the chilling effect "tipping the

[158] *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007, para. 65.
[159] *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007, para. 67. The Court noted from paragraph 26: "The criminal proceedings against the three accused continued on 30 October 2000 before the Court of Appeal in a new composition. The applicant was again heard as a witness, as were seven other journalists who had also published articles about the case against K. and the possibility of the flooding having been staged. The Court of Appeal also heard two plumbers and the caretaker of the building."
[160] *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007, para. 67.
[161] *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007, para. 66.
[162] *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007, para. 69.
[163] *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007, para. 70.
[164] *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007, para. 70.
[165] *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007, para. 71.
[166] *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007, para. 71.
[167] *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007, para. 72.
[168] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 45.

balance" was applied not only in *Goodwin*, but also in cases such as *Roemen and Schmit*,[169] and again demonstrated the strict standard of review the Court applied.

3.3.5 Protection of sources is a right, not a mere privilege

The Court's resolve in protecting journalistic sources from a chilling effect was aptly demonstrated in 2007, where the Court was faced with the question whether a search and seizure was appropriate where a journalist was, according to a government, suspected of bribing a public official to leak confidential documents. The case was *Tillack v. Belgium*,[170] where the applicant was a journalist with the magazine *Stern*. In 2002, *Stern* published two articles by the applicant on an EU anti-fraud agency, based on leaked confidential documents from within the agency. The agency - the European Anti-Fraud Office - opened an internal investigation to identify the person who had disclosed the documents to the applicant. The agency then released a press release, including allegations that "it was not excluded that payment might have been made to somebody within [the agency] for these documents."[171]

Following its internal investigation, the agency made a complaint to the Belgian authorities, and an investigating judge was appointed to identify "persons unknown" for breach of professional confidence and bribery of a civil servant.[172] At the request of the investigating judge, the applicant's home and *Stern*'s offices were searched, and "almost all" of his working papers were seized, including 16 crates of paper, two boxes of files, two computers, and four mobile telephones.[173] No inventory of the seized documents was made, and the police lost one crate of papers, which was not discovered until seven months later.[174] Following the raid, the applicant made an application to have the warrant set aside, and the investigation terminated. However, the investigating judge rejected the application, and a lower court dismissed an appeal, holding that protection of journalistic sources cannot be used "to cover up offences," in particular where the journalist was suspected of "bribery."[175] Belgium's Court of Cassation ultimately dismissed an appeal.

The applicant made an application to the European Court, claiming the searches and seizures carried out at his home and office had violated his right to freedom of expression. First, the Court held that the searches at the applicant's home and place of work "undoubtedly" amounted to an interference with Article 10,[176] and the main question was whether the interference had been necessary in a democratic society. Notably, the Belgian government argued that the case was "fundamentally" different from the previous cases for two reasons: (a) the journalist's "conduct" was relevant, in that the purpose of the searches had been to find evidence that the journalist "had offered and accepted bribes as principal or joint principal,"[177] and (b) the agency had first "taken care to carry out an internal investigation before lodging its criminal complaint."[178]

While it seemed that the existence of a preliminary internal investigation might affect the outcome of the case, the Court nonetheless, and unanimously, found a violation of Article

[169] *Roemen and Schmit v. Luxembourg* (App. no. 51772/99) 25 February 2003, para. 58 ("the considerations to be taken into account by the Convention institutions for their review under paragraph 2 of Article 10 tip the balance of competing interests in favour of the interest of democratic society in securing a free press").
[170] *Tillack v. Belgium* (App. No.20477/05) 27 November 2007.
[171] *Tillack v. Belgium* (App. no. 20477/05) 27 November 2007, para. 12.
[172] *Tillack v. Belgium* (App. no. 20477/05) 27 November 2007, para. 15.
[173] *Tillack v. Belgium* (App. no. 20477/05) 27 November 2007, para. 16.
[174] *Tillack v. Belgium* (App. no. 20477/05) 27 November 2007, para. 16.
[175] *Tillack v. Belgium* (App. no. 20477/05) 27 November 2007, para. 22.
[176] *Tillack v. Belgium* (App. no. 20477/05) 27 November 2007, para. 56.
[177] *Tillack v. Belgium* (App. no. 20477/05) 27 November 2007, para. 49.
[178] *Tillack v. Belgium* (App. no. 20477/05) 27 November 2007, para. 51.

10. First, the Court noted that when the searches were carried out, "their aim was to reveal the source of the information reported by the applicant in his articles,"[179] and as the suspicions of bribery on the applicant's part were based on "mere rumours," as revealed by subsequent European Ombudsman inquiries,[180] there was no overriding requirement in the public interest to justify such measures.[181] The measures undoubtedly impinged on the protection of journalists' sources, and the fact that the searches and seizures apparently "proved unproductive" did not deprive them of their purpose: to establish, for the benefit of the agency, the identity of the person responsible for disclosing the confidential information.[182]

The Court then laid down a new statement of principle, finding that the "right" of journalists not to disclose their sources was not a "mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources," but "part and parcel of the right to information, to be treated with the utmost caution."[183] This applied all the more in the instant case, where the suspicions against the applicant were based on "vague, unsubstantiated rumours," as was subsequently confirmed by the fact that he was not charged.[184] Moreover, the Court noted the "amount of property seized," where no inventory had been drawn up, and police had lost a crate of papers, which was not returned till later.[185] Thus, the Court concluded that the searches were "disproportionate," and violated Article 10.

Tillack continued the trend established in *Roemen and Schmit*, *Ernst*, and *Voskuil*, that the fact that the searches and seizures proved unproductive did not deprive them of their purpose,[186] with the Court's concern being to protect journalistic sources from a potentially chilling effect in the future. Further, *Tillack* again demonstrated the strictness of the Court's standard of review, dismissing the government's submissions that the suspicions associated with the applicant were based on a sufficient basis. Significantly, the Court also dismissed the government's argument that the case was fundamentally different from its previous case law because the journalist's "conduct" was relevant, as the investigation concerned alleged criminal acts committed by the journalist (bribery). Nevertheless, the Court found that the right to protection of journalistic sources applied, even in such circumstances, and subjected the reasons for suspicion to utmost scrutiny.

3.3.6 Third Section disagreement over the chilling effect

A notable feature of the judgments to date, *Roemen and Schmit*, *Ernst*, *Voskuil* and *Tillack*, was the unanimity in the Court, with four unanimous judgments finding violations of Article 10, and applying the chilling effect principle. However, in 2009, disagreement emerged in the Court's Third Section for the first time in *Sanoma Uitgevers B.V. v. Netherlands*.[187] As already mentioned,[188] the case involved a threatened police search of a magazine's office in order to seize photographs of an illegal street race. The magazine's publisher made an

[179] *Tillack v. Belgium* (App. no. 20477/05) 27 November 2007, para. 63.
[180] See *Tillack v. Belgium* (App. no. 20477/05) 27 November 2007, para. 13 ("By proceeding to make allegations of bribery without a factual basis that is both sufficient and available for public scrutiny, OLAF has gone beyond what is proportional to the purpose pursued by its action. This constitutes an instance of maladministration.").
[181] *Tillack v. Belgium* (App. no. 20477/05) 27 November 2007, para. 63.
[182] *Tillack v. Belgium* (App. no. 20477/05) 27 November 2007, para. 64.
[183] *Tillack v. Belgium* (App. no. 20477/05) 27 November 2007, para. 65.
[184] *Tillack v. Belgium* (App. no. 20477/05) 27 November 2007, para. 65.
[185] *Tillack v. Belgium* (App. no. 20477/05) 27 November 2007, para. 66.
[186] *Tillack v. Belgium* (App. no. 20477/05) 27 November 2007, para. 64.
[187] *Sanoma Uitgevers B.V. v. Netherlands* (App. No. 38224/03) 31 March 2009; and *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber). See Paul David Mora and Ashley Savage, "Independent judicial oversight to guarantee proportionate revelations of journalistic sources under art.10 ECHR," (2011) 22 *Entertainment Law Review* 65.
[188] See Section 2.4.3 above.

application to the European Court, claiming that it had been compelled to disclose information to the police that would have enabled their journalists' sources to have been revealed in violation of Article 10.[189] The Third Section of the Court delivered it judgment in 2009, and held by four-votes-to-three, that there had been no violation of Article 10. On whether there had been an interference with freedom of expression, the Court stated that "[w]hatever may have been published in Autoweek after the seizure of the CD-ROM, the Court accepts that at the time when the CD-ROM was handed over the information stored on it was not yet known to the public prosecutor or the police."[190] According to the Court, it followed that the applicant company's rights under Article 10 as a purveyor of information have been made subject to an interference in the form of a "restriction" and that Article 10 was applicable.[191]

The Court then addressed whether the interference had been prescribed by law, as the applicant had argued that amendments to the Code of Criminal Procedure had removed the decision whether or not to honour a journalist's refusal to give evidence from the investigating judge and transferred it to the public prosecutor and the police. The Court admitted that "it is true" that the Code of Criminal Procedure did not set out a requirement of prior judicial control, but the Court stated it "must have regard" to the involvement of an investigating judge in the process.[192] The Court held that it saw "no need on this occasion to rule on the question of statutory procedural safeguards," notwithstanding the concern expressed later in its judgment.[193]

The Court then examined whether the interference had been necessary in a democratic society. The Court noted that had the applicant company "not bowed to the pressure exerted by the police" and the prosecuting authorities, the offices of the magazine's editors and those of other magazines published by the applicant company would have been closed down for a significant time.[194] This "threat" was plainly a credible one, and the Court stated that it must take it as seriously as had the threat been carried out. However, the Court held that the threat was "not sufficient for the Court to find that the interference complained of was in itself disproportionate."[195] The Court then said that *Ernst*, *Roemen and Schmit*, and *Voskuil* were "dissimilar cases," as the police demand was not intended to identify the magazine's sources for prosecution, but rather "to identify a vehicle used in crimes quite unrelated to the illegal street race."[196] The Court admitted that a compulsory handover of journalistic material may have a chilling effect on the exercise of journalistic freedom of expression, but it did not follow per se that the authorities are in all such cases prevented from demanding such handover; whether this is so will depend on the facts of the case.[197]

In this regard, the Court held the crimes at issue were serious crimes, and the Court was satisfied that the information contained on the CD-ROM was relevant to these crimes and capable of identifying their perpetrators.[198] Given that the participation of the suspected vehicle in the street race only became known to the police after the race had taken place, the Court was satisfied that "no reasonable alternative" possibility of identifying the vehicle

[189] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 101.
[190] *Sanoma Uitgevers B.V. v. the Netherlands* (App. No. 38224/03) 31 March 2009, para. 50.
[191] *Sanoma Uitgevers B.V. v. the Netherlands* (App. No. 38224/03) 31 March 2009, para. 50.
[192] *Sanoma Uitgevers B.V. v. the Netherlands* (App. No. 38224/03) 31 March 2009, para. 52.
[193] *Sanoma Uitgevers B.V. v. the Netherlands* (App. No. 38224/03) 31 March 2009, para. 52.
[194] *Sanoma Uitgevers B.V. v. the Netherlands* (App. No. 38224/03) 31 March 2009, para. 55.
[195] *Sanoma Uitgevers B.V. v. the Netherlands* (App. No. 38224/03) 31 March 2009, para. 56.
[196] *Sanoma Uitgevers B.V. v. the Netherlands* (App. No. 38224/03) 31 March 2009, para. 57.
[197] *Sanoma Uitgevers B.V. v. the Netherlands* (App. No. 38224/03) 31 March 2009, para. 57.
[198] *Sanoma Uitgevers B.V. v. the Netherlands* (App. No. 38224/03) 31 March 2009, para. 59.

existed at any relevant time.[199] Finally, the Court had regard to the extent of judicial involvement in the case, and found it "disquieting" that the prior involvement of an independent judge is no longer a statutory requirement.[200] However, the Court held that the public prosecutor obtaining the approval of the investigating judge even without being so obliged by domestic law, and the applicant company's statutory entitlement to review *post factum* the lawfulness of the seizure by the Regional Court, was sufficient to satisfy the requirements of Article 10.[201] The Court concluded that there had been no violation of Article 10, although agreeing with the domestic courts that the actions of the police and prosecutors were "characterised by a regrettable lack of moderation."[202]

Curiously, the Court majority in *Sanoma* did not cite a number of principles: (a) the principle from *Goodwin* and *Roemen and Schmit* that because of the potential chilling effect, limitations on the confidentiality of journalistic sources call for the "most careful scrutiny" by the Court;[203] (b) the principle from *Tillack* that protection of sources is a right, and not a "mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources;"[204] and (c) the principle from *Goodwin* that the national margin of appreciation is "circumscribed" by the interest of a free press, and that interest will "weigh heavily" in the balance.[205]

Notably, Judge Power, joined by Judges Gyulumyan and Ziemele, wrote a dissenting opinion, arguing that the Court majority's judgment "sends out a dangerous signal to police forces throughout Europe, some of whose members may, at times, be tempted to display a similar 'regrettable lack of moderation'."[206] Unlike the majority, the dissenting opinion held that in view of the potentially chilling effect an order for non-voluntary disclosure has on the exercise of press freedom, interferences must be "strictly necessary," and the "most careful scrutiny" test must be applied, citing *Roemen and Schmit*.[207]

On the absence of prior judicial involvement, the dissent described this as "somewhat more than 'disquieting'" and the police's action as "a great deal more than 'regrettable'."[208] Second, in assessing the government's interest, the dissent held that the government had "failed, entirely" to show the police would not have been able to identify the vehicle in some other way.[209] The government had offered "no evidence" or "even one alternative effort" to obtain evidence, while the police's "first port of call" was the magazine.[210] As such, there had been a violation of Article 10. The opinion ended with the dissenting judges arguing that the Court's judgment will "render it almost impossible for journalists to rest secure in the

[199] *Sanoma Uitgevers B.V. v. the Netherlands* (App. No. 38224/03) 31 March 2009, para. 60.
[200] *Sanoma Uitgevers B.V. v. the Netherlands* (App. No. 38224/03) 31 March 2009, para. 62.
[201] *Sanoma Uitgevers B.V. v. the Netherlands* (App. No. 38224/03) 31 March 2009, para. 62.
[202] *Sanoma Uitgevers B.V. v. the Netherlands* (App. No. 38224/03) 31 March 2009, para. 63
[203] *Roemen and Schmit v. Luxembourg* (App. no. 51772/99) 25 February 2003, para. 46.
[204] *Tillack v. Belgium* (App. no. 20477/05) 27 November 2007, para. 65.
[205] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 40.
[206] *Sanoma Uitgevers B.V. v. the Netherlands* (App. No. 38224/03) 31 March 2009 (Dissenting opinion of Judge Power joined by Judges Gyulumyan and Ziemele).
[207] *Sanoma Uitgevers B.V. v. the Netherlands* (App. No. 38224/03) 31 March 2009 (Dissenting opinion of Judge Power joined by Judges Gyulumyan and Ziemele, para. 1).
[208] *Sanoma Uitgevers B.V. v. the Netherlands* (App. No. 38224/03) 31 March 2009 (Dissenting opinion of Judge Power joined by Judges Gyulumyan and Ziemele, para. 1).
[209] *Sanoma Uitgevers B.V. v. the Netherlands* (App. No. 38224/03) 31 March 2009 (Dissenting opinion of Judge Power joined by Judges Gyulumyan and Ziemele, para. 1).
[210] *Sanoma Uitgevers B.V. v. the Netherlands* (App. No. 38224/03) 31 March 2009 (Dissenting opinion of Judge Power joined by Judges Gyulumyan and Ziemele, para. 1).

knowledge that, as a matter of general legal principle, their confidential sources and the materials obtained thereby are protected at law."[211]

3.3.7 Anonymous sources and the chilling effect

Eight months after the Chamber judgment in *Sanoma*, a differently constituted Section of the Court again considered the chilling effect and protection of journalistic sources, and unanimity in the Court's application of the chilling effect returned. The question before the Court was whether a chilling effect would arise where anonymous sources were involved, and what relevance was a supposed *bad faith* on the part of a source. The case was *Financial Times Ltd and Others v. the United Kingdom*,[212] where the applicants were four newspaper publishers and a news agency: Financial Times, Independent News & Media; Guardian Newspapers; Times Newspapers; and the Reuters Group.

The case began in 2001, when an unknown person ("X") sent copies of a leaked document to various news media organisations, including the *Financial Times*, *The Guardian*, *The Times* and Reuters, from an address in Belgium. The document was a presentation from investment advisers Goldman Sachs to a large Belgian beer-brewing corporation, Interbrew, and included details of a potential takeover by Interbrew of South African Breweries (SAB). A journalist with the *Financial Times* who received the leaked document telephoned Goldman Sachs, and told them that he had received the document and he intended to publish it. Later that day, the *Financial Times* published an article on its website stating that Interbrew had been plotting a bid for SAB, and that documents seen by the newspaper indicated that an approach could be made in December 2001. *The Times*, *Guardian*, and Reuters also received anonymous copies, and published articles on the document. Following the leak, Interbrew instructed Kroll, a security and risk company, to assist in identifying X. However, Kroll did not identify X.

Interbrew launched proceedings against the applicants in the High Court, and obtained a temporary injunction restraining the newspapers from destroying the leaked document they had obtained, and requiring them to surrender the document, and any envelopes or packing in which they were delivered. The High Court held that there had been a deliberate attempt to mix with that "confidential information [also] false information to create a false market in the shares" of Interbrew, which was a "serious criminal offence."[213] The applicants appealed to the Court of Appeal, which upheld the production order. The source had a "maleficent purpose," calculated to do harm "for profit or spite."[214] The Court of Appeal concluded that the public interest in protecting the source of such a leak is "not sufficient to withstand the countervailing public interest in letting Interbrew seek justice in the court against the source."[215] The House of Lords refused to consider the appeal. The applicants refused to comply with the order,[216] and made an application to the European Court.

Before the European Court, the applicants claimed that the order to disclose the leaked document violated their right to freedom of expression. The first question for the Court was whether there had been an interference with the applicants' right to freedom of expression, as the disclosure order had not been enforced against the applicants. However, the

[211] *Sanoma Uitgevers B.V. v. the Netherlands* (App. No. 38224/03) 31 March 2009 (Dissenting opinion of Judge Power joined by Judges Gyulumyan and Ziemele, para. 8). The Grand Chamber would ultimately consider the case, discussed below in Section 3.4.
[212] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009.
[213] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 23.
[214] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 27.
[215] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 27.
[216] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 28.

Court held that non-enforcement did "not remove the harm," and however unlikely such a course of action currently appears, the order remains "capable of being enforced."[217] The main question was whether the interference had been necessary in a democratic society.

First, unlike in the *Sanoma* Chamber judgment, the Court reiterated all the principles from *Goodwin*: given the potentially chilling effect of a disclosure order, (a) there must be an overriding requirement in the public interest, (b) the national margin of appreciation is circumscribed by the interest of a free press, which will "weigh heavily," and (c) limitations on the confidentiality of journalistic sources call for the "most careful scrutiny."[218] Next, the Court turned to the impact of disclosure orders and anonymous sources, and adopted chilling effect reasoning: disclosure orders have a "detrimental impact" not only on the source in question, whose identity may be revealed, but also on the newspaper against which the order is directed, "whose reputation may be negatively affected in the eyes of future potential sources by the disclosure," and on the members of the public, who have an interest in receiving information imparted through anonymous sources and who are also potential sources themselves.[219] The Court cited *Voskuil* as authority for this principle.[220]

The Court then turned to potentially bad-faith sources, and stated that while public perception of the principle of non-disclosure of sources would suffer no real damage where it was overridden in circumstances where a source was clearly acting in bad faith with a harmful purpose and disclosed intentionally falsified information, courts "should be slow to assume," in the absence of compelling evidence, that these factors are present in any particular case.[221] Notwithstanding this, the Court emphasised the conduct of the source can "never be decisive" in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into consideration in carrying out the balancing exercise required under Article 10.[222]

The Court then applied these principles, and concluded that there had been a violation of Article 10. The Court first noted that in *Goodwin*, the Court had not considered "allegations as to the source's improper motives to be relevant," in finding a violation of Article 10, even though the High Court had held that the source was trying to "secure the damaging publication of information."[223] In this regard, the Court held in *Financial Times* that the legal proceedings against the applicants did not allow X's purpose to be ascertained with the necessary degree of certainty, and the Court would therefore not place significant weight on X's alleged purpose.[224] Second, on whether the document had been doctored, the Court held it had not been established with the "necessary degree of certainty" that the leaked document was not authentic, and as such, the authenticity of the leaked document cannot be seen as an important factor.[225]

The final consideration was whether Interbrew's interests in (a) identifying and bringing proceedings against the source to prevent further dissemination, and (b) recovering damages for any loss sustained, outweighed the public interest in the protection of journalistic sources.[226] The Court noted that in all unauthorised leak cases there is a "general risk of

[217] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 56.
[218] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 59-60.
[219] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 63.
[220] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 63, citing *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007, para. 71.
[221] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 63.
[222] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 63.
[223] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 66.
[224] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 66.
[225] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 66.
[226] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 68.

future unauthorised leaks" where the source remains undetected.[227] The Court noted that unlike in *Goodwin*, Interbrew did not seek an injunction prior to publication of the initial *Financial Times* article.[228] Second, the Court stated that the aim of preventing further leaks will justify an order for disclosure of a source only in "exceptional circumstances" where (i) there is no reasonable and "less invasive alternative means" of averting the risk, and (ii) where such risk is "sufficiently serious and defined" to render such an order necessary under Article 10.[229] The Court stated "it was true" the U.K. Court of Appeal had found there were no less invasive alternative means of discovering the source because the security and risk consultants had failed to identify the source.[230] But this was not sufficient for the European Court, noting that the "full details of the inquiries made were not given in Interbrew's evidence," and the Court of Appeal's conclusion was "based on *inferences* from the evidence before the court."[231]

The final point concerned, unlike in *Goodwin*, that the newspapers were not required to disclose documents which would "directly result in the identification of the source," but only documents "which might, upon examination, lead to such identification."[232] But the Court held that this distinction was not crucial, as a "chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources."[233] In the present case, it was "sufficient that information or assistance was required under the disclosure order for the purpose of identifying X."[234] The Court held that Interbrew's interests in eliminating the threat of future damage, and obtaining damages for past breaches of confidence, were "even if considered cumulatively" insufficient to outweigh the public interest in the protection of the journalist's sources.[235] Thus, there had been a violation of Article 10.

As mentioned above, the *Financial Times* judgment, unlike the *Sanoma* Chamber judgment, reiterated all the principles from *Goodwin*: given the potentially chilling effect of a disclosure order, (a) there must be an overriding requirement in the public interest, (b) the national margin of appreciation is circumscribed by the interest of a free press, which will "weigh heavily," and (c) imitations on the confidentiality of journalistic sources call for the "most careful scrutiny."[236] Next, the Court turned to the impact of disclosure orders and anonymous sources, and adopted chilling effect reasoning: disclosure orders have a "detrimental impact" not only on the source in question, whose identity may be revealed, but also on the newspaper against which the order is directed, "whose reputation may be negatively affected in the eyes of future potential sources by the disclosure," and on the members of the public, who have an interest in receiving information imparted through anonymous sources and who are also potential sources themselves.[237]

The *Financial Times* case significantly developed the source-protection case law, extending it to anonymous sources, holding that the chilling effect principle included affecting the reputation of newspapers in the eyes of potential sources and the public, and may chill members of the public, and introduced a presumption that sources are acting bona fides in disclosing information. But it must also be recognised that there was no promise of confidentiality to the source in *Financial Times*, as had been held in *Nordisk*. So *Financial*

[227] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 69.
[228] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 69.
[229] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 69.
[230] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 69.
[231] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 69.
[232] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 70.
[233] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 70.
[234] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 70.
[235] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 71.
[236] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 59-60.
[237] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 63.

Times would seem to reject the authority of *Nordisk* on this promise-of-confidentiality point. The Court held that "a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources."[238]

3.4 The Grand Chamber in *Sanoma* unanimously applies the chilling effect

A year after *Financial Times*, the Grand Chamber of the Court delivered its judgment in *Sanoma*.[239] Unlike the Third Section's majority judgment, the Grand Chamber unanimously found a violation of Article 10, with the Netherlands judge who voted with the majority in the Chamber judgment, deciding to change his vote when he sat in the Grand Chamber, finding a violation of Article 10 along with his colleagues.[240] The Grand Chamber found that there had been a violation of Article 10 on the basis that the "compulsion by the authorities to disclose information" had not been "prescribed by law."[241]

Unlike the Chamber judgment, the Grand Chamber began by adopting chilling effect reasoning in declaring, for the first time at Grand Chamber level, that protection of journalistic sources is a "right," not merely an interest, under Article 10.[242] The Court reiterated that without such a right, "sources may be deterred from assisting the press in informing the public on matters of public interest."[243] Similarly, unlike the Chamber judgment, the Court reiterated that it must apply "special scrutiny," when determining whether there is an "overriding requirement in the public interest" to interfere with this right.[244]

The Court then moved on to the first question of whether there had been an interference with freedom of expression. Again, the Court adopted chilling effect reasoning to find that there had been an "interference" with the applicant's freedom of expression, even though, as the Court admitted, "it is true that no search or seizure took place in the present case."[245] The Court nonetheless held that a chilling effect will arise "wherever journalists are seen to assist in the identification of anonymous sources."[246]

Having found an interference, the Court then examined whether the interference had been prescribed by law. The Court again reiterated the "right" to protection of journalistic sources was of such "vital importance" that there must be "procedural safeguards" which are "commensurate."[247] The Court then laid down some rules. There must be a "review by a

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[238] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 70.
[239] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber).
[240] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber) (Concurring opinion of Judge Myjer, para. 1) ("I was one of the majority of four to three who found no violation … I am now prepared to cross the room and join my colleagues in finding that there has been a violation of Article 10").
[241] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 101.
[242] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 50.
[243] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 50.
[244] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 51.
[245] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 71.
[246] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 71.
[247] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 88.

judge or other independent and impartial decision-making body."[248] This body should be "separate from the executive and other interested parties," and should decide there exists an "overriding requirement in the public interest" prior to the handing over of journalistic material and to "prevent unnecessary access to information capable of disclosing the source's identity if it does not."[249] The Court accepted that in some circumstances, it may be impractical for prosecutors to "state elaborate reasons" for urgent orders or requests, and in such circumstance, independent review carried out "at the very least prior to the access and use of obtained material" should be sufficient to determine government's interest.[250] However, the Court said that "independent review that only takes place subsequently to handing over of material capable of revealing" journalistic source "would undermine the very essence" of the right.[251]

The prior review must also be done with reference to the material so the interests "can be properly assessed,"[252] and the decision taken should be governed by "clear criteria" which should include whether a "less intrusive measure" can suffice to serve the overriding public interests.[253] It should also be open to the body to refuse to make a disclosure order or "make a limited or qualified order" to protect the source.[254] And in situations of urgency, a procedure should exist to identify and isolate, prior to the exploitation of the material by the authorities, information that could lead to identification of sources.[255]

The Court then assessed the procedure in the Netherlands, and noted that the decision to order was made by a public prosecutor, rather than an independent judge. The Court held that the "involvement of the investigating judge" could not be held as an adequate safeguard.[256] This was because it lacked any basis in law, and occurred "at the sufferance of the public prosecutor."[257] Moreover, he was called "as an advisory role," and it was not open to him to "reject or allow a request for an order, or to qualify or limit" such an order.[258]

The Court found that the lack of prior authorisation was "scarcely compatible with the rule of law," and was not cured by the review post factum by the regional court, finding a violation of Article 10 because there was "no procedure attended by adequate legal safeguards" to allow an independent assessment as to whether the criminal investigation's interest overrode the public interest in protection of sources.[259] The Court concluded that the

[248] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 90.
[249] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 90.
[250] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 91.
[251] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 91.
[252] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 92.
[253] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 92.
[254] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 92.
[255] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 92.
[256] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 96.
[257] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 96.
[258] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 96.
[259] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 100.

compulsion by the authorities to disclose information was not "prescribed by law," in violation of Article 10, and given this finding, the Court considered there was no need to ascertain whether the other requirements of the second paragraph of Article 10 of the Convention were complied with.[260]

Sanoma was the first Grand Chamber judgment on protection of journalistic sources since *Goodwin* in 1996, and the Grand Chamber continued the application of chilling effect reasoning similar to *Roemen and Schmit* and other judgments, to find that there had been an interference with the freedom of expression, even though, as the Court admitted, "it is true that no search or seizure took place in the present case."[261] The Court nonetheless held that a chilling effect will arise "wherever journalists are seen to assist in the identification of anonymous sources."[262] This concern for a future chilling effect, even where no search took place, again mirrors the Court's reasoning in *Cumpănă and Mazăre*, where the Court admitted that the journalists "did not serve their prison sentence" but the Court nevertheless held that such a sanction will "inevitably have a chilling effect."[263] The *Sanoma* judgment also brought unanimity back to the Court, and was the first judgment where the Court found an interference with protection of journalistic sources had not been prescribed by law, and effectively laid down rules to be included in domestic legislation regulating the issue.

But while the Grand Chamber's judgment in *Sanoma* was a landmark on the prescribed by law issue, the Court did stop short of delivering its views on the necessary in a democratic society point. Thus, there was silence from the Grand Chamber on the actions of the police, who, it must be remembered, had threatened to effectively shut down a media office for a weekend in order to seize the photos. This reticence to discuss the actions of the police, and elaborate upon the chilling effect of police search and seizure, would prove a missed opportunity, given that a trilogy of judgments would arise over the very issue.

3.5 Post-*Sanoma* consideration of the chilling effect

3.5.1 The Fifth Section's trilogy on search and seizure

Following the Grand Chamber's *Sanoma* judgment, the Court's Fifth Section delivered a trilogy of judgments over a 12-month period on the chilling effect of police searches and seizures.[264] The first case was similar to *Tillack*, in that a government had first conducted an investigation before ordering the search. But as will be seen, the post-*Sanoma* case law continued to demonstrate a remarkably strict standard of scrutiny being applied, with the Third Section's deferential approach in the *Sanoma* Chamber judgment being abandoned.

The first judgment, *Martin and Others v. France*,[265] was delivered in April 2012, where the applicants were journalists with the French newspaper *Midi Libre*. In 2005, the newspaper published several articles, written by the applicants, based on a leaked confidential

[260] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 101.
[261] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 71.
[262] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 71.
[263] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 116.
[264] *Martin and Others v. France* (App. no. 30002/08) 12 April 2012; *Ressiot and Others v. France* (App. nos. 15054/07 and 15066/07) 28 June 2012; and *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013.
[265] *Martin and Others v. France* (App. no. 30002/08) 12 April 2012. Interestingly, the lawyer who had argued the *Roemen and Schmit* case, Dean Spielmann, was now a judge of the European Court in *Martin*: Judge Dean Spielmann.

report from a regional audit office (*la Chambre régionale des comptes*), which criticised management of the Languedoc-Roussillon region during the period when a French senator was president of the regional council.[266]

The senator filed a criminal complaint for breach of professional secrecy under L.241-6 *du code des juridictions financières*, and eight months after the articles had been published, an investigating judge ordered a search of the newspaper's offices.[267] During the search, a copy of the confidential report was seized, along with an applicant journalist's notebook and various documents, and all the applicant journalists' computer hard drives were copied.[268] The judge then charged the four applicant journalists with breach of professional secrecy.[269] The applicants applied to have the search and seizure declared void, arguing that there had been a violation of Article 10. The Montpellier Court of Appeal dismissed the application, holding that the principle of secrecy of journalistic sources "should not hinder the discovery of the truth in criminal cases."[270] This decision was upheld by France's Court of Cassation. In 2007, the investigating judge dismissed the charges against the journalists, holding that it could not be established if the source of the leak was bound by professional secrecy.[271]

The applicants then made an application to the European Court, claiming that the search of the newspaper's offices to discover the source of a leak violated Article 10. The French government argued that since the search had not discovered the source, there had been no interference with Article 10.[272] The government also argued that "other investigative measures" had been taken prior to the search, when staff members of the regional audit agency had been interviewed, but the source of the leak had not been identified.[273] The search had been carried out "as a last resort."[274]

Before addressing whether there had been an interference with freedom of expression, the Court laid out a strict standard of review based on the case law: press freedom "will weigh heavily" in the proportionality review, the state has a "limited" margin of appreciation, there is "little scope" for restrictions on "political speech," and the "most careful scrutiny" must be applied where the measures taken are capable of having a chilling effect on the press in debates over matters of legitimate public concern.[275] The Court then turned to whether there had been an interference with freedom of expression, and reiterated that based on *Sanoma*, and earlier case law, searches of journalists' homes and workplaces seeking to identify those who had provided the journalists with confidential information constituted an interference with Article 10.[276] This is so, "even if unproductive," a search conducted with a view to uncover a journalist's source is a more drastic measure than an order to divulge the source's identity.[277] Therefore the Court found that there had been an interference with Article 10, and the main question was whether it had been necessary in a democratic society.

First, the Court noted the contents of the confidential report were "undoubtedly" a matter of public interest, and it was the "role of investigative journalists" to bring such

[266] *Martin and Others v. France* (App. no. 30002/08) 12 April 2012, para. 7.
[267] *Martin and Others v. France* (App. no. 30002/08) 12 April 2012, para. 11.
[268] *Martin and Others v. France* (App. no. 30002/08) 12 April 2012, para. 12.
[269] *Martin and Others v. France* (App. no. 30002/08) 12 April 2012, para. 15.
[270] *Martin and Others v. France* (App. no. 30002/08) 12 April 2012, para. 18 ("le principe de la protection des sources journalistiques ne saurait entraver la recherche et la manifestation de la vérité en matière pénale").
[271] *Martin and Others v. France* (App. no. 30002/08) 12 April 2012, para. 24.
[272] *Martin and Others v. France* (App. no. 30002/08) 12 April 2012, para. 42.
[273] *Martin and Others v. France* (App. no. 30002/08) 12 April 2012, para. 52.
[274] *Martin and Others v. France* (App. no. 30002/08) 12 April 2012, para. 53.
[275] *Martin and Others v. France* (App. no. 30002/08) 12 April 2012, para. 58-67.
[276] *Martin and Others v. France* (App. no. 30002/08) 12 April 2012, para. 70.
[277] *Martin and Others v. France* (App. no. 30002/08) 12 April 2012, para. 70.

information to the public.[278] Second, the Court took note of the government's argument that measures were taken to try identify the leak, but the Court held that the government gave "no details" on the nature of the investigative measures "allegedly" carried out before the search.[279] Third, the Court also noted that the Court of Appeal itself took the view that it was "not necessary" for the investigating judge to have carried out all other measures before the search, and it was the judge's sole responsibility to determine if a search should be conducted.[280] Finally, the Court held that government had "failed to demonstrate" that in the absence of the searches, the government would not have been able to determine whether there had been a breach of professional secrecy.[281] In view of all these considerations, the Court concluded that the grounds relied upon by the government were not "sufficient" to justify the search, and reiterated the principle from *Goodwin* that the considerations to be taken into account by the Convention institutions for their review under Article 10 "tip the balance of competing interests in favour of the interest of democratic society in securing a free press."[282] As such, the Court unanimously held that there had been a violation of Article 10.

The Fifth Section's judgment in *Martin and Others* applied the strict test under *Goodwin* to find that although the government had carried out an investigation before seeking a search and seizure warrant, the European Court considered this had not satisfied Article 10 review, as the government gave no details on the nature of the investigative measures, with the Court referring to measures as "allegedly" carried out.[283]

The Fifth Section delivered its second judgment considering the chilling effect of police search and seizure just over two months later in *Ressiot and Others v. France*.[284] The applicants were five journalists who worked for the sport newspaper *L'Equipe* and the weekly magazine *Le Point*. The case began in 2004, when a judicial investigation was opened into possible doping by cyclists belonging to the Cofidis cycling team. Subsequently, *Le Point* published an article, written by three of the applicants, which included a verbatim transcript of telephone tapping carried out by police investigating use of prohibited substances by the Cofidis team.[285] A week later, another article was published by these applicants listing what had been discovered during a search as part of the investigation. Three months later *L'Equipe* published its own article about the investigation, which also included verbatim extracts from documents made by the investigation.[286]

The police launched an investigation into the leaked documents, and the investigating judge authorised the tapping of a number of police officers' phones and the third applicant journalist's phone for one month.[287] In 2005, the investigating judge issued a search and seizure warrant for the headquarters of *Le Point* and *L'Equipe* for records of the leak, and searches of the homes of the first two applicants. [288] Three applicant journalists' computers were seized and placed under seal, and fax and phone number lists were also seized.[289]

The applicants sought annulments of the searches and seizures carried out, invoking their Article 10 right to freedom of expression, and confidentiality of journalists' sources. Ultimately, both the Versailles Court of Appeal and the Court of Cassation found that the

[278] *Martin and Others v. France* (App. no. 30002/08) 12 April 2012, para. 79.
[279] *Martin and Others v. France* (App. no. 30002/08) 12 April 2012, para. 83.
[280] *Martin and Others v. France* (App. no. 30002/08) 12 April 2012, para. 86.
[281] *Martin and Others v. France* (App. no. 30002/08) 12 April 2012, para. 86.
[282] *Martin and Others v. France* (App. no. 30002/08) 12 April 2012, para. 87.
[283] *Martin and Others v. France* (App. no. 30002/08) 12 April 2012, para. 83.
[284] *Ressiot and Others v. France* (App. nos. 15054/07 and 15066/07) 28 June 2012.
[285] *Ressiot and Others v. France* (App. nos. 15054/07 and 15066/07) 28 June 2012, para. 9.
[286] *Ressiot and Others v. France* (App. nos. 15054/07 and 15066/07) 28 June 2012, para. 19.
[287] *Ressiot and Others v. France* (App. nos. 15054/07 and 15066/07) 28 June 2012, para. 22.
[288] *Ressiot and Others v. France* (App. nos. 15054/07 and 15066/07) 28 June 2012, para. 26.
[289] *Ressiot and Others v. France* (App. nos. 15054/07 and 15066/07) 28 June 2012, para. 27.

searches had been necessary to protect the presumption of innocence and the secrecy of the investigation under Articles 9-1 of the Civil Code and 11 of the Code of Criminal Procedure.[290] The Court of Cassation also held that there was no requirement to find the perpetrator of the breach of secrecy of an investigation before attempting to identify the perpetrators of a "possible concealment."[291]

Subsequently, the applicants made an application to the European Court, arguing a violation of Article 10, and specifically argued that the searches and seizures would "dissuade their sources, and were disproportionate interferences with freedom of expression"[292] The government agreed that there had been an interference with freedom of expression, and the main question for the Court was whether the interference had been necessary in a democratic society.

The Court applied its "most careful scrutiny" review under *Roemen and Schmit*, and the need to demonstrate an overriding public interest requirement under *Goodwin*.[293] Second, the Court held that doping in professional sport was a debate of very important public interest, and the public had a legitimate interest in being informed about the investigation.[294] The Court noted that the Court of Appeal had considered that the articles had caused "considerable discomfort" for the investigation and had "torpedoed" the investigation.[295] However, the Court also noted that the investigating judge, in an interview with another newspaper, *Le Monde,* about possible complications with the investigation, replied it was not a priority for the Ministry of Justice, that the number of police who were assisting was insufficient; and the judge never mentioned that the articles affected the investigations.[296] Third, the Court noted the "extent" of the measures ordered in the case.[297] The Court reiterated that there is a requirement to establish the existence of a pressing social need justifying the interferences with freedom of expression.[298] However, the Court noted that the searches and seizures at the offices of *Le Point* and *L'Equipe*, and the searches carried out at the home of the first two applicants, were validated by the investigating judge "without having demonstrated the existence of a pressing social need."[299] The Court also noted that during the search of *Le Point*, the computers of the third and fourth applicants were seized.[300] The Court considered that these searches and seizures undermined the protection of sources to an even greater extent than the measures in issue in *Goodwin*.[301] In light of these considerations, the Court concluded that the means used were not reasonably proportionate to the legitimate aims, having regard to the interest of a democratic society in ensuring and maintaining freedom of the press.[302] Thus, the Court unanimously held that there had been a violation of Article 10.

Again, the strict standard of review the Court applied in *Ressiot* was most clearly evident from the Court rejecting the Court of Appeal's finding that newspaper articles had

[290] *Ressiot and Others v. France* (App. nos. 15054/07 and 15066/07) 28 June 2012, para. 38.
[291] *Ressiot and Others v. France* (App. nos. 15054/07 and 15066/07) 28 June 2012, para. 52.
[292] *Ressiot and Others v. France* (App. nos. 15054/07 and 15066/07) 28 June 2012, para. 80.
[293] *Ressiot and Others v. France* (App. nos. 15054/07 and 15066/07) 28 June 2012, para. 102.
[294] *Ressiot and Others v. France* (App. nos. 15054/07 and 15066/07) 28 June 2012, para. 102.
[295] *Ressiot and Others v. France* (App. nos. 15054/07 and 15066/07) 28 June 2012, para. 118.
[296] *Ressiot and Others v. France* (App. nos. 15054/07 and 15066/07) 28 June 2012, para. 119.
[297] *Ressiot and Others v. France* (App. nos. 15054/07 and 15066/07) 28 June 2012, para. 125.
[298] *Ressiot and Others v. France* (App. nos. 15054/07 and 15066/07) 28 June 2012, para. 125.
[299] *Ressiot and Others v. France* (App. nos. 15054/07 and 15066/07) 28 June 2012, para. 125.
[300] *Ressiot and Others v. France* (App. nos. 15054/07 and 15066/07) 28 June 2012, para. 125.
[301] *Ressiot and Others v. France* (App. nos. 15054/07 and 15066/07) 28 June 2012, para. 125.
[302] *Ressiot and Others v. France* (App. nos. 15054/07 and 15066/07) 28 June 2012, para. 127.

torpedoed the investigation,[303] and with the European Court instead relying upon the investigating judge's comments to the media as a basis for rejecting this view.

The final case in the trilogy was *Saint-Paul Luxembourg S.A. v. Luxembourg*,[304] where the Fifth Section again considered a newspaper publisher arguing that a search and seizure warrant had an "intimidatory effect" on press freedom.[305] The applicant was the publisher of Portuguese-language newspaper *Contacto Semanário* in Luxembourg, and in 2009, published an article describing the situation of families who had lost custody of their children. The article was based on judicial decisions, and concerned cases of families losing custody of their children. In one example, the article named two teenagers involved, and their social worker. The article was written by the newspaper's journalist Alberto De Araujo Martins Domingos, but the article was signed "Domingos Martins."[306] The social worker lodged a complaint for criminal defamation, and the public prosecutor opened an investigation into the alleged defamation, and violations of Luxembourg's Youth Welfare Act, which made it an offence to identify minors subject to care proceedings.[307]

An investigating judge issued a search warrant in respect of the newspaper's publisher - the applicant company - to seize "any documents and items, in whatever form and on whatever medium, connected with the offences charged, including any element conducive to identifying the perpetrator of the offence or the *Contacto* newspaper employee who wrote the article."[308] Police officers executed the warrant, and, according the newspaper, the police officers had "forced" their cooperation,[309] and the journalist who had written the article surrendered his notebook, various documents, computer files and disks. No charges were brought against the journalist, and the applicant company applied to the *chambre du conseil* of the District Court to have the search and seizure warrant declared null and void.[310] The following day, the investigating judge, "of his own motion," ordered the discontinuation of the seizure and the return of all the documents and items seized during the search.[311] Ultimately, both the *chambre du conseil* of the District Court and *chambre du conseil* of the Court of Appeal upheld the order.[312]

The applicant company made an application to the European Court, arguing that the search and seizure had violated its right under Article 8's protection of the "home,"[313] and Article 10's guarantee of freedom of expression, as the search was designed to uncover the journalist's sources and had an "intimidatory effect."[314] The Court first dealt with the Article 8 point, where the publisher argued the search was disproportionate as its purpose had been to identify the author of the article, and there were other means to obtain this information, such as writing to the editor. The government argued that the police had "not actively searched for documents," and the search was thus "fairly unintrusive."[315] First, the Court confirmed that Article 8's protection of the home extended to the publisher's offices.[316] Second, citing *Sanoma*, the Court held that "cooperation under threat of a search cannot cancel out the

[303] *Ressiot and Others v. France* (App. nos. 15054/07 and 15066/07) 28 June 2012, para. 118.
[304] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013.
[305] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 47.
[306] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 7.
[307] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 10.
[308] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 11.
[309] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 14.
[310] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 14.
[311] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 18.
[312] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 21.
[313] European Convention, Article 8 ("1. Everyone has the right to respect for his ... home ...").
[314] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 47.
[315] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 35.
[316] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 37.

interfering nature of such an act,"[317] and as such there had been an interference with Article 8. The Court then examined whether the interference had been necessary, and held that exceptions must be "interpreted narrowly," and the need for them "convincingly established."[318] The Court noted that the journalist had signed his article "Domingos Martins," and even though the list of officially recognised journalists in Luxembourg included no such name, it had contained the name of "De Araujo Martins Domingos Alberto." The Court further noted that the list also points out that "De Araujo Martins Domingos Alberto" works for the newspaper *Contacto*, and given the similarity in the names, the Court held the investigating judge could have begun by ordering a less intrusive measure than a search in order to confirm the identity of the author of the article.[319] Thus, according to the Court, the search and seizure were unnecessary at that stage, and therefore not reasonably proportionate, in violation of Article 8.

The Court then turned to Article 10, and the applicant's claim the warrant was designed to discover the journalist's sources and had an intimidatory effect.[320] The Court first considered whether there had been an interference with freedom of expression, and the government denied that the aim of the search and seizure had been to ascertain the journalist's sources. The Court held that the concept of journalistic source is "any person who provides information to a journalist;" and "information identifying a source" to include, in so far as they are likely to lead to the identification of a source, both "the factual circumstances of acquiring information from a source by a journalist" and "the unpublished content of the information provided by a source to a journalist."[321] The Court also approved the principle in *Roemen and Schmit* that a warrant was a more drastic measure than an order to divulge the source's identity, because investigators who raid a journalist's workplace unannounced and armed with search warrants have very wide investigative powers, as, by definition, they have access to all the documentation held by the journalist.[322]

Applying these principles, the Court held that there had been an interference, as the police officers "were capable, due to the warrant in issue, of accessing information which the journalist did not wish to publish and which was liable to disclose the identities of other sources."[323] This was so, even though the Court admitted that "the case file does not indicate that any sources were found other than those already published in the article."[324]

The Court then turned to whether the interference had been necessary in a democratic society. In this regard, the Court recalled that under *Roemen and Schmit*, the "most careful scrutiny" must be applied by the Court when reviewing limitations on the confidentiality of journalistic sources.[325] The Court then examined the specifics of the warrant: First, the Court noted the "broad wording" of the warrant, and the fact that the police officers executing the warrant had the task of assessing the need to seize any material, with the absence of any safeguard measure.[326] Second, although the Court could not deduce from the evidence whether the purpose of the search was to disclose the journalist's sources, the wording of the warrant "is clearly too broad to rule out that possibility."[327] In this regard, the Court did not accept the government's explanation that the sources were already mentioned in the

[317] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 38.
[318] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 43.
[319] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 44.
[320] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 44.
[321] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 50.
[322] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 52.
[323] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 54.
[324] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 54.
[325] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 58.
[326] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 60.
[327] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 60.

impugned article, as the fact of some sources having been published "did not rule out the discovery of other potential sources during the search."[328] Thus, the Court considered that the search and seizure were disproportionate as it enabled the police officers to search for the journalist's sources.[329] Finally, the Court was also concerned about the insertion of a USB flash drive into a computer, which could facilitate the retrieval of data from the computer's memory, and information unrelated to the offence in question.[330]

Thus, the warrant issued was not narrow enough to avoid any abuse, and because the purported sole object of the warrant was to identify the journalist who wrote the article, a warrant limited to this object would have been sufficient.[331] The Court concluded that the search and seizure at the newspaper's headquarters was disproportionate, and a violation of Article 10.

While the Grand Chamber in *Sanoma* had not considered the necessity of the police search at issue, the Fifth Section's judgment in *Saint-Paul Luxembourg* and its consideration of the necessary in a democratic society limb of Article 10, indicated the Court's view that overbroad wording in search warrants, and police officers having the task of assessing the need to seize any material, did not satisfy the Court's concern for protecting against the chilling effect on sources.[332]

3.5.2 Targeted surveillance of journalists and the chilling effect

The Court had first considered the chilling effect of government surveillance on the protection of journalistic sources in its 2006 decision in *Weber and Saravia*, finding no violation of Article 10. Six years later, the issue again arose for the Court, but this time was targeted government surveillance of two journalists in order to identify their source. The case was *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands*,[333] where first applicant was the publisher of the Dutch newspaper, *De Telegraaf*, while the second and third applicants were journalists with the newspaper. The case began in 2006 when the newspaper published a front-page article by the second and third applicants entitled "AIVD secrets in possession of drugs mafia: Top criminals made use of information."[334] The article alleged that State secrets from investigations of the Netherlands intelligence agency (AIVD) were circulating amongst criminals in Amsterdam, and the article was based on "documents and statements with which this newspaper has been acquainted."[335] The article also alleged that the AIVD had recruited an informant close to a well-known criminal due to "strong presumptions of the existence of corruption within the Amsterdam police force," and the informant had reported that "corruption was so rampant that liquidations were actually carried out using weapons seized by the police."[336]

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[328] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 61.
[329] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 61.
[330] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 61.
[331] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 61.
[332] *Saint-Paul Luxembourg S.A. v. Luxembourg* (App. no. 26419/10) 18 April 2013, para. 60.
[333] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012. See Dirk Voorhoof, "Telegraaf Judgment on Protection of Journalists' Sources," *ECHR Blog*, 23 November 2012.
[334] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012, para. 10.
[335] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012, para. 10.
[336] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012, para. 10.

Five days after publication, a detective chief superintendent of the National Police Internal Investigations Department issued an order against *De Telegraaf* to surrender all documents concerning State secrets and operational activities of the AIVD.[337] The first applicant lodged an objection with the Regional Court of The Hague, and the applicant offered to destroy the documents. However, the Supreme Court ultimately upheld the surrender order, finding that the interference with the right to source protection was justified by the weighty social interest that State secret information should not circulate in public.[338] The Supreme Court also rejected the applicant's fear that examination of the documents might lead to identification of the source because fingerprints might be found on these papers, finding that "examination of the documents, although possible, is not necessary to determine the identity of the leak within the AIVD, that already being possible using the contents of the documents, which are already known to the AIVD."[339]

Subsequently, a government minister transmitted a report to Parliament on the AIVD's own investigation into the leak, which stated that "it was considered necessary, among other things, to use special powers against the journalists of *De Telegraaf* who were in possession of the leaked file,"[340] and included that "journalists have lawfully had their telephones tapped."[341] The second and third applicants wrote to the Minister giving notice of a complaint concerning the AIVD's actions, and the Minister forwarded the complaint to the Supervisory Board for Intelligence and Security Services. The Board ultimately held that the use of special powers against the applicants met the requirements of "necessity, subsidiarity and proportionality."[342]

The applicants then made an application to the European Court, making two distinct claims. First, it was claimed the use of special powers against the second and third applicants had been a violation of both Article 8 and Article 10. The second claim was the order to surrender the original documents was a violation of Article 10. The Court first turned to the claim regarding the use of special powers, and the preliminary issue was whether there had been an interference with freedom of expression and the right to respect for private life. The government argued that protection of journalistic sources was not at issue, as the AIVD had used special powers not to establish the identity of the applicants' journalistic sources of information, but solely to identify the AIVD staff member who had leaked the documents.[343]

The Court first stated that it was "prepared to accept" that the AIVD's purpose in seeking to identify the person who supplied the secret documents to the applicants was "subordinate to its main aim, which was to discover and then close the leak of secret information from within its own ranks."[344] However, the Court then added that this was "not decisive," and that its understanding of "information identifying a source" included

[337] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012, para. 19.
[338] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012, para. 24.
[339] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012, para. 24.
[340] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012, para. 41.
[341] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012, para. 41.
[342] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012, para. 43.
[343] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012, para. 85.
[344] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012, para. 86.

information "likely to lead to the identification of a source."[345] The Court then cited *Roemen and Schmit*'s paragraph 52, and held that the AIVD sought, by the use of special powers, to "circumvent the protection of a journalistic source."[346] The Court therefore held that there had been an interference with Article 10, and because the Article 8 issue was "so intertwined" with the Article 10 issue, the Court decided to consider the matter under Articles 8 and 10 "concurrently."[347]

The Court then considered whether the interference was "in accordance with the law" (Article 8) or "prescribed by law" (Article 10). The Court found that the statutory basis for the interference was section 6(2)(a) of the 2002 Intelligence and Security Services Act. The Court then turned to the applicants' argument that "their status as journalists required special safeguards to ensure adequate protection of their journalistic sources."[348] The Court held that *Weber and Saravia* was distinguishable, as the aim of strategic monitoring was not to identify journalists' sources. But in *Telegraaf*, the Court held that it was characterised precisely by the "targeted surveillance of journalists in order to determine from whence they have obtained their information."[349] Second, the Court noted that in *Sanoma*, the Court found inadequate under Article 10 the involvement of an investigating judge, and judicial review *post factum* could not cure these failings.[350]

The Court then stated that the AIVD's use of special powers had been authorised "without prior review by an independent body with the power to prevent or terminate it," noting that it appeared to have been authorised by the Minister of the Interior, if not by the head of the AIVD or even a subordinate AIVD official.[351] Further, the Court held that review post factum, whether by the Supervisory Board, the Committee on the Intelligence and Security Services of the Lower House of Parliament, or the National Ombudsman, "cannot restore the confidentiality of journalistic sources once it is destroyed."[352] The Court therefore held that the law did not provide safeguards appropriate to the use of powers of surveillance against journalists with a view to discovering their journalistic sources, in violation of Articles 8 and 10 of the Convention.

Having examined the surveillance issue, the Court then turned to the applicants claim that the order to surrender the original documents had been a violation of Article 10. The government agreed that there had been an interference with freedom of expression, and the main question for the Court was whether it had been necessary in a democratic society. The Court reiterated the principle from *Goodwin*, that given importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling

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[345] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012, para. 86.
[346] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012, para. 87, citing *Roemen and Schmit*, para. 52 ("On the contrary, the aim was to identify those responsible for an alleged breach of professional confidence and any subsequent wrongdoing by the first applicant in the course of his duties. The measures thus undoubtedly came within the sphere of the protection of journalistic sources.").
[347] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012, para. 88.
[348] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012, para. 95
[349] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012, para. 97
[350] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012, para. 100.
[351] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012, para. 100.
[352] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012, para. 101.

effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 unless it is justified by an "overriding requirement in the public interest."[353] The Court then considered the three reasons put forward by the government for the production order: (a) the need to identify the AIVD official, (b) withdrawing the documents from public circulation, and (c) to check whether all the AIVD's documents which were leaked were withdrawn from public circulation.

First, the Court held that the public prosecutor "admitted, even without detailed technical examination of the documents the culprits could be found simply by studying the contents of the documents and identifying the officials who had had access to them."[354] Therefore, the Court held that the need to identify the AIVD official concerned cannot alone justify the surrender order. Second, the Court admitted that "the full contents of the documents had not come to the knowledge of the general public," but held that it was "highly likely that that information had long been circulating outside the AIVD and had come to the knowledge of persons described by the parties as criminals."[355] Therefore, the Court held that removing the documents from circulation would no longer prevent code names and AIVD informants from falling into the wrong hands. Finally, the Court accepted that it was a legitimate concern for the AIVD to check whether all the documents removed from its systems had been withdrawn from circulation. But the Court held that this was not sufficient to find it constituted "an overriding requirement in the public interest" justifying disclosure of the journalistic source. The Court held that the "actual handover of the documents" was not necessary, as the newspaper's documents were copies not originals, and "visual inspection to verify that they were complete, followed by their destruction "would have sufficed."[356] The Court therefore concluded that there had been a violation of Article 10.

Telegraaf built upon the Grand Chamber's *Sanoma* judgment in terms of procedural safeguards in order to protect journalistic sources from the chilling effect of targeted governmental surveillance. Coupled with this, the Court's continued strict standard of review applied to the government's reasons for the disclosure order, namely an intelligence agency's interest in removing leaked documents from public circulation, again typified the Court's near-absolute test under *Goodwin*.

3.5.3 The Court again worries about chilling effect on anonymous sources

The Court's *Financial Times* judgment on the chilling effect arising from journalists being seen to assist in the identification of anonymous sources arose again for the Court in the 2010 judgment in N*agla v. Latvia*.[357] But instead of a court order to reveal an anonymous source's documents, the measures employed by the Latvian authorities included searching a journalist's home, and seizing her journalistic material. The applicant was an investigative journalist with the Latvian broadcaster Latvijas televīzija (LTV), and in 2010 she received an email from an anonymous source ("Neo"), claiming that there were security flaws in a database maintained by Latvia's State Revenue Service.[358] The source then sent examples of the data to the applicant, including salary figures of other employees at the broadcaster. The

[353] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012, para. 127
[354] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012, para. 129
[355] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012, para. 130
[356] *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (App. no. 39315/06) 22 November 2012, para. 131
[357] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013.
[358] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 7.

applicant contacted the Revenue Service to inform them of a possible security breach. During the broadcast of her weekly investigative news programme *De facto*, the applicant reported that there had been a massive data leak from Revenue Service, and the information concerned the income, tax payments and personal details of public officials, as well as private individuals. Following the broadcast, the anonymous source published, through Twitter, salaries at various public institutions, including the names of some officials. [359]

Criminal proceedings were instituted concerning the data leak on the application of the Revenue Service. Three months after the broadcast, the investigating authorities established that computer IP addresses which had been used to connect to the Revenue Service, had been used by a certain individual ("I.P."), and it was also established that this person had made several phone calls to the applicant's phone number.[360] The same day, a police investigator drew up an "urgent procedure" search warrant, which was authorised by a public prosecutor the same day, to search the applicant's home, and seize material "illegally downloaded" from the Revenue Service's system.[361] The police conducted a search, and seized a personal laptop, an external hard drive, a memory card and four flash drives, which the applicant stated contained a large body of her personal data as well as most of her work-related material.[362] The next day, the police informed the investigating judge of the urgent procedure search, and the judge "retrospectively approved" the search warrant.[363] No reasons were given by the judge.[364]

The applicant made an application to the President of the first-instance court, seeking to have the warrant declared unlawful, but this was rejected, with the President finding that there was "no reasonable ground to believe" the search was performed not to discover sources, but rather to seize the downloaded material.[365] As to the necessity of the urgent procedure, the judge ruled that due to the nature of cybercrime and ease of destruction, the procedure was justified.[366] In 2010, the Latvian Ombudsman delivered an opinion, which was not binding on the domestic authorities, on the search warrant issued by the investigator under the urgent procedure, and found that the supervising prosecutor and the court "failed to effect a critical examination of the urgency and the necessity of such a measure and did not sufficiently evaluate the threat to freedom of expression."[367]

The applicant then made an application to the European Court, claiming the search and seizure had violated her right to freedom of expression. The Court first considered whether the search at the applicant's home fell "within the scope of Article 10,"[368] as the government argued the search "had not been carried out with a view to establishing the identity of the applicant's source of information but rather to gather evidence in the criminal proceedings against I.P."[369] However, the Court rejected the government's argument, and applied the chilling effect reasoning from *Financial Times*: while recognising the importance of securing evidence in criminal proceedings, a "chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources."[370] The Court in *Nagla* held that irrespective of whether the identity of the applicant's source was discovered during the

[359] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 10.
[360] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 14.
[361] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 20.
[362] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 22.
[363] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 24.
[364] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 24.
[365] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 25.
[366] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 25.
[367] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 30
[368] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 78
[369] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 78.
[370] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 82.

search, it "nevertheless remains" that the seized data storage devices contained not only information capable of identifying her source of information (circumstances of acquiring information from her source, or unpublished content), but also information capable of identifying her other sources of information.[371] Further, the Court reiterated the principle under *Roemen and Schmit* and *Ernst*, that it did not need to be demonstrated that the search "yielded any results or indeed proved otherwise productive."[372] In light of this, the Court rejected the government's argument that the search did not relate to journalistic sources. The Court held that the search at the applicant's home and the information capable of being discovered therefrom, came within the sphere of the protection under Article 10; and held that there had been an interference with freedom of expression.[373]

The Court then examined whether the interference had been prescribed by law. The Court admitted that the investigating judge's approval of the warrant "was not made in a separate decision," but "limited to an 'approval' written on the search warrant;" however, the Court noted the reasons for that decision were explained in writing by the President after the applicant's complaint against the decision.[374] The Court then noted that, unlike in *Sanoma*, the investigating judge had the authority to revoke the search warrant, declare evidence inadmissible, and withhold disclosure of journalistic sources. These two elements were "sufficient to differentiate this case" from *Sanoma*.[375] Thus, for the Court, the Latvian procedure was prescribed by law.[376]

The Court then moved on to determine whether the interference had been necessary in a democratic society. The Court stated that there was a fundamental difference between the *Nagla* case and other cases, in that it was an "even more" drastic measure as the search warrant was drafted in such "vague terms as to allow the seizure of 'any information' pertaining to the crime under investigation allegedly committed by the journalist's source."[377] The Court reiterated that limitations on the confidentiality of journalistic sources call for the "most careful scrutiny" by the Court.[378] Second, the Court laid down a new principle that any search involving the seizure of data storage devices such as laptops, external hard drives, memory cards and flash drives belonging to a journalist raises a question of the journalist's freedom of expression including source protection and that the "access to the information contained therein must be protected by sufficient and adequate safeguards against abuse."[379]

In this regard, the Court noted that the investigating judge's involvement in an immediate post factum review was provided for in the law, but Court held that the investigating judge "failed to establish that the interests of the investigation in securing evidence were sufficient to override the public interest in the protection of the journalist's freedom of expression, including source protection and protection against the handover of the research material."[380] Further, the Court considered that the "scarce reasoning" of the President of the court as to the perishable nature of evidence linked to cybercrimes in general, "cannot be considered sufficient in the present case," given the investigating authorities' delay in carrying out the search and the lack of any indication of impending destruction of evidence.[381] Finally, there was no suggestion that the applicant was implicated in the events

[371] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 82.
[372] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 82.
[373] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 82.
[374] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 89.
[375] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 90.
[376] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 91.
[377] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 95.
[378] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 95.
[379] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 101.
[380] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 101.
[381] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 101.

"other than in her capacity as a journalist."[382] Based on these considerations, the Court held that "relevant and sufficient" reasons had not been given for the interference, and therefore, there had been a violation of Article 10 of the Convention.

Nagla again demonstrates the Court's concern not so much with whether an individual applicant's source has been discovered, but rather a concern about a chilling effect on *other* sources[383] which will arise from a search and seizure. Further, *Nagla* again indicated the Court's rejection of the government's argument, and indeed, the domestic judge's decision, that because the search had not been carried out with a view to establishing the identity of the applicant's source of information but rather to gather evidence in criminal proceedings, this removed the chilling effect of the search.

3.5.4 Disagreement arises in *Ostade Blade* and *Keena and Kennedy*

While the post-*Sanoma* judgments all led to violations of Article 10, and near unanimity in the application of chilling effect reasoning where protection of journalistic sources was being considered, two admissibility decisions were delivered in 2014 which bucked this trend. The first case was *Stichting Ostade Blade v. the Netherlands*,[384] where the applicant was the publisher of the Dutch magazine *Ravage*. In May 1996, the magazine's editor published a press release, announcing that in its next issue the following day, it would include a letter of the Earth Liberation Front (ELF) claiming responsibility for a bomb attack two weeks earlier in the eastern city of Arnhem. The following day, a search warrant was issued by the Arnhem Regional Court to search the magazine's offices, in the context of criminal investigations against the perpetrators of three bomb attacks that had occurred in Arnhem.[385]

During the search, the investigating judge informed the magazine's editor (Mr. K.) that the investigating authorities were in search of the letter, and "possible links between the organisation that had claimed responsibility for the bomb attack and the magazine."[386] When it became apparent that it would take much time to make copies of all the relevant materials, the investigating judge asked the editor whether he wished the copying to continue at the magazine's offices or whether he preferred the police to take the relevant materials away to continue copying. The editor agreed to the latter. Police seized four computers which included a subscriber database, lists of addresses, a large number of application forms of new subscribers, address wrappers, an agenda, a telephone index, a typewriter, data of contact persons and other editorial materials as well as private data of the editors.[387]

Following the search, the seized computers were returned to the magazine a week later. The typewriter was returned two weeks later, with a new ribbon; while in June, in a letter to the magazine's lawyer, the investigating judge stated that all seized documents had been destroyed, including the original typewriter ribbon.[388] The applicant and editor lodged proceedings for compensation over the search and seizures. In December 1996, the president of the Regional Court of The Hague considered that the State's aim to find ELF's letter had been the direct reason for the search and that "neither the magazine nor its editors had been

[382] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 101.
[383] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 82.
[384] *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision).
[385] *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision), para. 6.
[386] *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision), para. 8.
[387] *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision), para. 10.
[388] *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision), para. 13.

considered criminal suspects."[389] The Court awarded the applicant compensation for pecuniary loss. However, in 1998, the Regional Court of The Hague dismissed claims by the applicant and editor for compensation resulting from a violation of their right to freedom of expression, and their right to respect for their privacy. The Court held that had been an "overriding requirement in the public interest to search for the letter and for other indications on the magazine's premises regarding links between the magazine and the perpetrators of the bomb attacks."[390] Ultimately, following a Supreme Court appeal, the Amsterdam Court of Appeal held in November 2007 that (a) there had been no other way to find the letter than to search for it, and that the requirement of proportionality had also been respected because the search related to the identification of perpetrators of serious criminal offences; and (b) in relation to the seizure of the computers, the Court noted that the possibility that ELF's letter was saved as a digital document warranted the search of these.[391] The Court of Appeal also held that in relation to the State's aim to search for possible links between the organisation that had claimed responsibility for the bomb attack and the magazine, the State had not specified the grounds on which those links were the subject of investigation, and thus there had been violation of Articles 10 and 8 of the European Convention.[392]

In 2007, the editor was arrested in Spain, and confessed to police that he had committed the bomb attacks, and had sent the letter claiming responsibility for the attacks to the magazine by fax. A year later, the editor was convicted of murdering a political activist in 2005, and arson attacks including the bomb attacks, and received a life sentence.[393]

The applicant publisher made an application to the European Court, claiming that the search for the letter on the magazine's premises had violated its right to protect its journalistic sources.[394] Of its own motion, the Court asked the parties that given that the domestic courts acknowledged violations of the applicant's rights under Articles 8 and 10 in relation to the search in relation to the aim of finding links between the ELF and the magazine, could the applicant still claim "to be a 'victim' for purposes of Article 34 of the Convention?"[395] The first question was whether there had been an interference with the applicant's right to freedom of expression. The Court held that the order to hand over the letter, which was followed by a search of the applicant foundation's premises when it was not obeyed, constituted an interference, citing *Roemen and Schmit* and *Sanoma*.[396]

But before turning to whether the interference was prescribed law, and necessary in a democratic society, the Court stated that it "must determine the nature of the interference."[397] The Court said that not every individual who is used by a journalist for information is a source in the sense of the Court's case law. The Court said that it was "undeniable" that

[389] *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision), para. 15.
[390] *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision), para. 17.
[391] *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision), para. 26.
[392] *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision), para. 27.
[393] *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision), para. 33.
[394] *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision), para. 45.
[395] *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision), para. 42.
[396] *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision), para. 58.
[397] *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision), para. 59.

protection of a "journalistic source properly so-called" was not in issue.[398] The Court noted that the source "was not motivated by the desire to provide information which the public were entitled to know," but rather, "was claiming responsibility for crimes which he had himself committed," and "his purpose in seeking publicity through the magazine *Ravage* was to don the veil of anonymity with a view to evading his own criminal accountability."[399] It followed, according to the Court, that the source "was not, in principle, entitled to the same protection as the 'sources' in cases like *Goodwin*, *Roemen and Schmit*, *Ernst and Others*, *Voskuil*, *Tillack*, *Financial Times*, *Sanoma*, and *Telegraaf*.[400]

The Court then said that as source protection was "not in issue," it was necessary to consider whether the interference was necessary in a democratic society. First, the Court said "it cannot but have regard to the inherent dangerousness of the crimes committed," and this was "sufficient justification" for the search and seizure.[401] The Court dismissed the magazine's argument that "other investigative leads were available," and held that the letter was not "incapable of yielding useful information."[402] And finally, the Court dismissed the argument that the search "destroyed the confidentiality of information entrusted to the magazine's editors," noting that "nothing is known about this information," nor has the applicant foundation suggested that it, its informants and contributors or its readership suffered as a result."[403] Therefore, the Court concluded, by a majority, that the application was "manifestly ill-founded," and rejected the application.

It must be recognised that the decision was "by a majority," so at least one judge (and possibly two or three) voted to grant admissibility, and as such, there existed some possible weaknesses in the Court's reasoning. First, the Court stated that the search was an interference with the magazine's right to receive and impart information, but because the magazine's source was not a "'source' properly so-called," a low degree of scrutiny under Article 10 was applied. But this is arguably inconsistent with both *Tillack* and *Nagla*, where the Court held that a search, *in and of itself*, interferes with the right to protection of journalistic sources, and the right cannot "be taken away" depending on the unlawfulness of the source, and the conduct of the source is one element "in the balancing exercise."[404] And notably, the Court in *Stichting Ostade Blade* rejected the chilling effect of the search, stating that nothing was known about the information and the applicant had not shown its informants and contributors or its readership suffered,[405] which was a manifestation of the evidence-based rejection of the chilling effect. Such an approach is difficult to square with the post-*Goodwin* case law, but it may be speculated that the Court's reluctance to grant admissibility was that the domestic courts had already acknowledged violations of the applicant's rights under Articles 8 and 10 of the Convention in relation to the search.

The second admissibility decision where the Court considered, but rejected, chilling effect arguments made by journalists concerning the protection of journalistic sources was

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[398] *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision), para. 59.
[399] *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision), para. 59
[400] *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision), para. 65.
[401] *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision), para. 70.
[402] *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision), para. 71.
[403] *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision), para. 72.
[404] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 97.
[405] *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision), para. 72.

Keena and Kennedy v. Ireland,[406] where the applicants were a journalist and editor of *The Irish Times* newspaper. The case arose in 2006, when the newspaper published a front-page story detailing how a government Tribunal of Inquiry had written to a named businessman, seeking information on possible payments made to then Irish prime minister Bertie Ahern. The article was written by the applicant journalist, and had been based on a leaked Tribunal letter the journalist had received anonymously two days earlier. Hours after the article had been published, the Tribunal wrote to the newspaper's then-editor, the second applicant, to "express its concern" that the newspaper had relied upon confidential Tribunal material,[407] and the editor confirmed that the article had been based on a Tribunal letter it had received from an anonymous source.[408] Three days later, the Tribunal issued an order requiring the newspaper to hand over the Tribunal's correspondence.[409] However, the applicant editor informed the Tribunal that the correspondence had been destroyed, and "disputed the right of Tribunal" to make such as an order.[410] The Tribunal then summoned the applicants to appear before it, and produce any copies of the Tribunal's correspondence, and answer all questions about the source. The applicants appeared before the Tribunal, but refused to answer any questions "which they considered might lead to the identification of the source of the leak of confidential information."[411] The Tribunal issued a ruling, holding that the applicants were in breach of the Tribunal's order, and it would apply to the High Court "to compel the applicants to comply with its orders."[412]

The High Court ruled that the Tribunal had the necessary legal power to summon the journalists to answer questions put to them about the leaked document,[413] and then went on to consider whether such an order could be made in light of the journalists' privilege against disclosure of their sources. The Court held that this journalistic privilege was "overwhelmingly outweighed" by the need to "preserve public confidence in the Tribunal."[414] Moreover, "only the slightest of weight" should be attached to journalistic privilege when it involved "anonymous communication."[415] And crucially, the High Court stated that the "destruction of these documents" was a relevant consideration to which "great weight"' must be given.[416] The journalists appealed to the Supreme Court, which delivered a unanimous judgment in 2009, overturning the High Court judgment. The Supreme Court agreed with the High Court's assessment that the journalists had engaged in "reprehensible conduct" in destroying the documents, but held that the High Court had erred in attaching "great weight" to this consideration.[417] Moreover, given that the source was anonymous, and the documents "no longer exist,"[418] the Supreme Court considered that the benefit to the Tribunal in asking the journalists about the source was "speculative at best."[419] Thus, the Tribunal's order failed the test under *Goodwin v. the United Kingdom*, that journalists can

[406] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision). See Ronan Ó Fathaigh, "Imposing Costs on Newspaper in Successful Source-Protection Case Did Not Violate Article 10," Strasbourg Observers, 17 November 2014; and Ronan Ó Fathaigh, "*Keena v Ireland* and the Protection of Journalistic Sources," (2016) 19 *Irish Journal of European Law* 97.
[407] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 7.
[408] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 7.
[409] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 9.
[410] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 9.
[411] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 11.
[412] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 11.
[413] *Judge Mahon v. Keena & Anor* [2007] IEHC 348 (23 October 2007).
[414] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 20.
[415] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 20.
[416] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 19.
[417] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 24.
[418] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 26.
[419] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 25.

only be compelled to answer questions about their sources if justified by an "overriding requirement in the public interest."[420]

However, four months later, the Supreme Court issued a ruling on costs, and held that the journalists were to pay the Tribunal's legal costs, then totalling €393,000 (not including the newspaper's own costs).[421] The Court held that although the winning party will usually have their costs paid, this principle may be departed from in "exceptional cases".[422] The "reprehensible conduct" of the journalists in destroying the documents "determined" the outcome of the case, and "was such as to deprive them of their normal expectation" of a costs award in their favour.[423] The Tribunal was "fully entitled" to seek the assistance of the High Court, and consequently, the journalists were to pay for the Tribunal's costs.[424]

The applicants then made an application to the European Court, claiming the Supreme Court's costs ruling violated Article 10. They argued they had been "penalised" by the Supreme Court for protecting their source; and the costs ruling would have a chilling effect on the press as journalists could now be compelled, "under threat of an order of costs," to disclose their sources; and the rules on costs were "so vague" as to allow "arbitrariness."[425]

The question for the Court was whether there had been an interference with the applicants' freedom of expression. The Court stated at the outset that it did not consider that the Supreme Court's ruling on costs "should be characterised as an interference with the applicants' right under Article 10 to protect the secrecy of the source who provided them with the confidential documents of the Tribunal."[426] First, the Court dismissed the claim that the Tribunal's attempt to discover the source was "inherently misconceived" or a "direct threat" to the right to protection of journalistic sources, which "justified" destroying the document. The Court held that the Tribunal's interest in discovering the source was not "necessarily devoid of merit."[427] The issue of balancing the competing interests was for the domestic courts, and they would have been able to do so "had the applicants not destroyed the documents."[428] It followed, according to the Court, that destroying the documents was not a "legitimate exercise" of their Article 10 right to protect their sources.[429] Moreover, the Court rejected the argument that even though the leaked document had been destroyed, the Irish courts were still able to rule on the case. The Court said that this was to "misconstrue the Supreme Court's decision," as the journalists had "presented to the Tribunal" and the courts a "*fait accompli*," and "undermined the judiciary."[430] The Court agreed with the Irish Supreme Court that the destruction of the documents had "deprived the courts of any power to give effect to any order of the Tribunal."[431]

Finally, the Court rejected the argument that the costs order would have a chilling effect on free expression because (a) as a "general principle" costs are a matter for the "discretion" of domestic courts,[432] and (b) the costs order would have "no impact" on "public

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[420] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 26.
[421] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 28.
[422] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 27.
[423] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 27.
[424] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 27. For commentary, see Eoin O'Dell, "The *Irish Times* should appeal the costs order to the ECHR - Part I," *Cearta.ie*, 7 December 2009; and Eoin O'Dell, "The *Irish Times* should appeal the costs order to the ECHR - Part II," *Cearta.ie*, 8 December 2009.
[425] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 40.
[426] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 45.
[427] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 46.
[428] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 46.
[429] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 48.
[430] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 49.
[431] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 49.
[432] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 50.

interest journalists" who "recognise and respect the rule of law," (c) nothing in the costs ruling would restrict publication of a public interest story, compel disclosure of sources or interfere in any other way with the work of journalism.[433] For the European Court, the ruling "simply signified" that nobody may "usurp the judicial function."[434] It followed, according to the Court, that there was no interference with the applicants' right to freedom of expression, and the application was thus "manifestly ill-founded," and inadmissible.

The *Keena and Kennedy* decision was again by a majority, and this author has criticised the decision elsewhere on a number of grounds.[435] But focussing on the chilling effect, the Court rejected the chilling effect of the costs order, holding that as a "general principle" costs are a matter "for the discretion" of domestic courts, citing *Christodoulou v. Cyprus*,[436] as the sole authority for this proposition. But this reliance on *Christodoulou* for such a deferential review is quite questionable: it is arguable that *Christodoulou* is inapplicable, as it involved the Article 6 right to a fair trial, and whether a costs order following a successful challenge to a rent decision was "fair." However, more importantly, *Christodoulou* is arguably not controlling, when we consider two Article 10 cases the Court in *Keena and Kennedy* fails to apply, and actually concern the press and costs rulings: in *MGN Limited v. the United Kingdom*, the Court applied its highest level of scrutiny, the "most careful scrutiny" test,[437] when deciding whether a costs order against a newspaper violated Article 10, and totally rejected any sort of *Christodoulou*-type deference to domestic courts. Similarly, in *Kasabova v. Bulgaria*, the Court again applied its "most careful scrutiny" test to a costs order imposed on a journalist.[438] Both *MGN* and *Kasabova* were unanimous judgments, delivered after *Christodoulou*, neither mention *Christodoulou*, and indeed, it would appear that *Christodoulou* has never even been applied in an Article 10 case before *Keena and Kennedy*. Not only would *MGN* and *Kasabova* point to an application of the "most careful scrutiny" test, but importantly, in the Grand Chamber's *Sanoma* judgment, the Court held that not only must there be an "overriding requirement in the public interest" for a source-disclosure order, but also for any other "interference" with the right to protection of sources.[439] And most curiously of all, the Court in *Keena and Kennedy* nowhere even cites *Financial Times* on anonymous sources, which also applied the "most careful scrutiny."[440]

The Court's dismissal of the chilling effect argument on the basis that the costs ruling would have no impact on public interest journalists who respect the rule of law is similar to the dismissal of the chilling effect argument by the European Commission back in 1990 in *Times Newspapers Ltd.*[441] The Commission had rejected the applicant newspaper's argument that the fear of a large defamation damages award created a chilling effect, with the Commission stating it could not accept such an argument as there was no right to publish defamatory articles under the Convention. Thus, in both *Keena and Kennedy* and *Times Newspapers Ltd.*, the Court and Commission were essentially rejecting the view that any chilling effect could arise for journalists who simply follow the law on either source disclosure or defamation. Of course, this view ignores a fundamental proposition

[433] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 50.
[434] *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision), para. 50.
[435] See Ronan Ó Fathaigh, "*Keena v Ireland* and the Protection of Journalistic Sources," (2016) 19 *Irish Journal of European Law* 97.
[436] *Christodoulou v. Cyprus* (App. no. 30282/06) 16 July 2009.
[437] *MGN Limited v. the United Kingdom* (App. no. 39401/04) 18 January 2011, para. 201.
[438] *Kasabova v. Bulgaria* (App. no. 22385/03) 19 April 2011, para. 55.
[439] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 51.
[440] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 60.
[441] *Times Newspapers Ltd. v. the United Kingdom* (App. no. 14631/89) 5 March 1990 (Commission Decision). See Section 2.2.4 above.

underpinning the chilling effect, as Schauer emphasises, that all legal proceedings, and indeed the entire legal process, is surrounded by *uncertainty*.[442] For the Court and Commission to simply state that journalists need not fear high awards of damages or costs if they simply follow the law, is to ignore the uncertainty of the law, and in particular its application. Again, as Schauer argues, given the overriding uncertainty in legal proceedings, errors of different kinds can occur, and it is this potential for error which creates a chilling effect.[443] The *Keena and Kennedy* case is in fact a great example of the potential for error in legal proceedings, where the Irish High Court got the judgment in a sense wrong, with the Supreme Court overturning the High Court's judgment.

3.5.5 Search and seizure and the chilling effect on whistleblowers

Not since the Fifth Section's trilogy of judgments on search and seizure had the Court been called upon to consider the chilling effect on protection of journalistic sources due to such searches. And in 2016, the Court was again called upon to apply these judgments to a search and seizure against a Turkish newspaper, where data on 46 computers was copied during a search. The case was *Görmüş and Others v. Turkey*,[444] and the applicants were journalists with the weekly magazine *Nokta*. In 2007, the magazine published an article based on documents classified as "confidential" by the General Staff of the Turkish Armed forces, which included a system for assessing editors and journalists introduced by the General Staff, in order to exclude certain journalists considered to be "hostile" to the armed forces from certain invitations and activities.[445]

Following publication of the article, an official from the Military Prosecutor's Office telephoned the first applicant, who was editor of the magazine, and requested that he deliver the documents which the article had been based upon. The first applicant refused, and a Military Court subsequently ordered a search and seizure of the magazine's offices. At midday on 13 April 2007, officials from the Bakırköy Prosecutor's Office and police officers arrived at the magazine's offices, and the editor handed over the documents which had been requested. The police and officials then copied data from 46 computers at the magazine's offices to external memory disks. The magazine's lawyers signed the minutes of the search warrant, but included a statement that they considered the search and seizure had violated the protection of journalistic sources.[446] The applicants had sought an annulment of the search and seizure warrant; however, a Military Court rejected the application. The Court held that the purpose of the search was only to clarify the circumstances of the disclosure of a document classified as "secret," and was not intended to identify those responsible for the leak or to force journalists to disclose their sources of information.[447] Moreover, the Penal Code provided for sanctions against anyone who retained or published information that had been prohibited for the protection of State security and it did not exempt journalists of "criminal responsibility."[448]

The applicants made an application to the European Court, claiming that the search and seizure had violated their right to freedom of expression, and constituted a "form of

[442] Frederick Schauer, "Fear, Risk and the First Amendment: Unraveling the Chilling Effect," (1978) 58 *Boston University Law Review* 685, p. 687.
[443] Frederick Schauer, "Fear, Risk and the First Amendment: Unraveling the Chilling Effect," (1978) 58 *Boston University Law Review* 685, p. 687.
[444] *Görmüş and Others v. Turkey* (App. no. 49085/07) 19 January 2016.
[445] *Görmüş and Others v. Turkey* (App. no. 49085/07) 19 January 2016, para. 7.
[446] *Görmüş and Others v. Turkey* (App. no. 49085/07) 19 January 2016, para. 21.
[447] *Görmüş and Others v. Turkey* (App. no. 49085/07) 19 January 2016, para. 23.
[448] *Görmüş and Others v. Turkey* (App. no. 49085/07) 19 January 2016, para. 23.

intimidation" of their journalistic activities.[449] The government did not dispute that there had been an interference with freedom of expression, with the Court holding that the search and seizure of the applicants' data in computer and printed form constituted an interference with freedom of expression.[450] The main question for the Court was whether the interference had been necessary in a democratic society.

The Court stated at the outset that it would examine the interference under a number of criteria, namely the "interests at stake," the "review exercised by the domestic courts," the "conduct of the applicants," and the "proportionality of the measures."[451] While the Court did not provide an authority for these considerations, they mirrored those applied by the Court in *Stoll* at paragraph 112.[452] First, the Court held that the article and information disclosure "were likely to contribute to the public debate."[453] Second, the Court held that the search and seizure, "which extended beyond the initial request" for the confidential document, and included transferring the content of 46 computers, was such as to "discourage potential sources assisting the press in informing the public about questions concerning the armed forces."[454] Third, the Court stated that the applicants cannot be criticised for publishing the information "without having waited until their sources and / or whistleblowers had expressed their concerns through the chain of command," as Turkish legislation contained no provisions concerning disclosures by members of the armed forces with regard to potentially unlawful acts committed in their workplace.[455] Fourth, the Court held that although the documents mentioned in the article were "confidential," the government had not submitted "relevant and convincing evidence capable of justifying such classification."[456] Fifth, the Court noted that the "formal application of the concept of confidentiality" to the documents from military sources had prevented the domestic courts from reviewing whether the interference had been compatible with Article 10.[457]

Finally, the Court examined the "nature and severity" of the impugned measures.[458] The Court reiterated the principle that it "must be satisfied" that the measure at issue does not amount to "a form of censorship intended to discourage the press from expressing criticism."[459] This is because "in the context of a debate on a topic of public interest, such measures are likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, they are liable to hamper the press in performing its task as purveyor of information and public watchdog."[460] The Court then examined the measures, and considered that the search of the magazine's offices and "the transfer to external discs of the entire content 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 informers. The indiscriminate retrieval of all the data in the software packages had enabled the authorities to gather information that was unconnected to the acts in issue."[461] In this regard, the Court held that the search and seizure was likely not only to have

[449] *Görmüş and Others v. Turkey* (App. no. 49085/07) 19 January 2016, para. 27.
[450] *Görmüş and Others v. Turkey* (App. no. 49085/07) 19 January 2016, para. 32.
[451] *Görmüş and Others v. Turkey* (App. no. 49085/07) 19 January 2016, para. 32.
[452] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 112 ("in the present case, a number of different aspects must be examined: the interests at stake (β), the review of the measure by the domestic courts (γ), the conduct of the applicant (δ) and whether the penalty imposed was proportionate (ε).")
[453] *Görmüş and Others v. Turkey* (App. no. 49085/07) 19 January 2016, para. 56.
[454] *Görmüş and Others v. Turkey* (App. no. 49085/07) 19 January 2016, para. 59.
[455] *Görmüş and Others v. Turkey* (App. no. 49085/07) 19 January 2016, para. 61.
[456] *Görmüş and Others v. Turkey* (App. no. 49085/07) 19 January 2016, para. 62.
[457] *Görmüş and Others v. Turkey* (App. no. 49085/07) 19 January 2016, para. 66.
[458] *Görmüş and Others v. Turkey* (App. no. 49085/07) 19 January 2016, para. 71.
[459] *Görmüş and Others v. Turkey* (App. no. 49085/07) 19 January 2016, para. 72.
[460] *Görmüş and Others v. Turkey* (App. no. 49085/07) 19 January 2016, para. 72.
[461] *Görmüş and Others v. Turkey* (App. no. 49085/07) 19 January 2016, para. 74

"very negative repercussions" on the relationships of the journalists in question with their sources, but could also have a serious and "chilling effect on other journalists or other whistleblowers who were State officials," and could discourage them from reporting any misconduct or controversial acts by public authorities.[462] The Court thus considered that the measures had been "disproportionate," in violation of Article 10.[463]

The result in *Görmüş and Others* was a consistent application of the strict standard of review the Court had applied post-*Sanoma*, typified by the Court's conclusion that although the documents mentioned in the article were classified confidential, the Court would not accept such a classification at face value, finding that the government had a burden to prove such a classification, and holding that the government had not submitted relevant and convincing evidence capable of justifying such classification.

But curiously, the Court did add that the applicants could not be criticised for publishing the information without having waited until their sources or whistleblowers had expressed their concerns through the chain of command, as Turkish legislation contained no provisions concerning disclosures by members of the armed forces with regard to potentially unlawful acts committed in their workplace.[464] This was a new criterion for the Court, and could be read as suggesting that where a source has not used internal disclosure mechanisms provided for in legislation, this may somehow affect a journalist's right to protection of journalistic sources. This is arguably a dangerous road for the Court to travel down, given that the burden has always been on the government to satisfy *Goodwin*'s strict test, and it has never been the case that a journalist must satisfy any requirement that a source/whistleblower took a certain course of action before the right to protection of journalistic sources applies.

3.5.6 Orders to testify and the chilling effect

The Court has dealt with many aspects of the protection of journalistic sources and the chilling effect, from disclosure orders, search and seizure warrants, threatened searches, anonymous sources, and costs orders, and yet, a further issue arose in the case of *Becker v. Norway*,[465] where a journalist's alleged source had allegedly revealed him to the police. This gave rise to considerable disagreement between a Norwegian journalist that a disclosure order created a chilling effect on protection of journalistic sources, and the Norwegian government, arguing no chilling effect would arise on the "willingness of future sources to confide in journalists."[466]

The applicant in *Becker* was a journalist with the Norwegian newspaper *Dagens Næringsliv* (DN). In 2007, the applicant published an article entitled "Fears of DNO collapse" on the newspaper's website. The article was based on a letter the applicant had received by fax from a source, with the letter giving the impression that it had been written on behalf of a number of DNO bond holders who were seriously concerned about the company's liquidity, finances and future. [467] The following Monday, DNO stock fell by 4.1%, after the content of the letter had become known. The Oslo stock exchange suspected market manipulation and forwarded the case to the Financial Supervisory Authority with suspicions that a Mr. X had infringed the Act on the Trade of Financial Assets.

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[462] *Görmüş and Others v. Turkey* (App. no. 49085/07) 19 January 2016, para. 74.
[463] *Görmüş and Others v. Turkey* (App. no. 49085/07) 19 January 2016, para. 75.
[464] *Görmüş and Others v. Turkey* (App. no. 49085/07) 19 January 2016, para. 61.
[465] *Becker v. Norway* (App. no. 21272/12) 5 October 2017 (Article 10 and protection of journalistic sources). See Dirk Voorhoof, "Robust protection of journalistic sources remains a basic condition for press freedom," *Strasbourg Observers*, 10 October 2017.
[466] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 56.
[467] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 6.

Nearly a year later in 2008, the applicant was questioned by the police, who informed her that a Mr. X had told the police that he had given the applicant the letter, and was handed a signed statement from Mr. X in which he confirmed this.[468] The applicant refused to give information beyond that she had received the letter on which the article was based by fax, referring to protection of her sources.[469] Mr. X was indicted for market manipulation and insider trading, and during the criminal case, the Oslo City Court summoned the applicant as a witness. The applicant confirmed she had received a letter by fax, but refused to answer questions about possible contacts between her and Mr. X and other sources.[470]

A month later, the City Court held that the applicant had a duty to give evidence about her contacts with Mr X, but the obligation to make a statement is, however, "limited to the contact with the defendant as a source and not her communication with possible other unknown sources."[471] Notably, the prosecutor stated during the hearing that he would not seek postponement of the case as the prosecuting authority considered the case "to be sufficiently disclosed even without the statement" of the applicant.[472] A month later, Mr. X was convicted by the City Court, and sentenced to 18 months in prison.

The applicant appealed the City Court's order to testify, but the Supreme Court upheld the order, finding that the case had been "based on the fact that the journalist had allowed herself to be used by the source in his efforts to manipulate the bonds market in a criminal manner."[473] Further, where the source had come forward, there was thus no source to protect, and disclosure of the source's identity would have no consequences for the free flow of information.

Following the Supreme Court judgment, the High Court summoned the applicant as a witness in Mr. X's appeal against his conviction. The applicant would not reply to questions about her contacts with Mr. X. The High Court subsequently ordered the applicant to pay a fine of 30,000 Norwegian kroner (3,700 euro) for an offence "against the good order of court proceedings" (failing which she would be liable to ten days' imprisonment).[474]

The applicant then made an application to the European Court, claiming the order requiring her to give evidence about her contacts with Mr. X had violated her right to freedom of expression. In particular, the applicant argued that if future potential sources learnt that their identity might be investigated by the police and that they could subsequently be the subject of great interest in court, this would have an "obvious chilling effect."[475] The parties agreed that there had been an interference with freedom of expression, and the main question for the Court was whether it had been necessary in a democratic society.

First, the Court described Mr. X as the "alleged source" of the applicant's article, and noted the case did not involve allegations of unlawful activity by the applicant, or criminal investigations of or proceedings against her, beyond those related to her refusal to give evidence on her contact with Mr. X.[476] Second, the Court noted that the applicant was not expressly ordered to reveal the identity of the source, or sources of the information in her article, but rather ordered to testify "on her contact with Mr. X, who himself had declared that he was the source."[477] The Court stated that while not formally a matter of a journalist assisting in the identification of anonymous sources, it considered that the "possible effects of

[468] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 9.
[469] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 9.
[470] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 10.
[471] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 13.
[472] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 14
[473] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 26
[474] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 35.
[475] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 50.
[476] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 71.
[477] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 72.

the order were nonetheless of such a nature that the general principles developed with respect to orders of source disclosure are applicable to the case."[478] Third, the Court held that a journalist's protection under Article 10 cannot automatically be removed by virtue of a source's own conduct, and this included "where a source comes forward."[479] The Court noted that it had held in *Nagla* that source protection under Article 10 also applies where a source's identity was known to the investigating authorities before a search.[480] The Court added that given Mr X's motivation for presenting himself to the applicant as a source and the fact that he came forward during the investigation, suggested that the "degree of protection under Article 10 of the Convention to be applied in the present case cannot reach the same level as that afforded to journalists who have been assisted by persons of unknown identity to inform the public about matters of public interest or matters concerning others."[481]

The Court then applied these principles, and noted that the decision as to whether the order against the applicant was "necessary" mainly had to turn on an assessment of the need for her evidence during the criminal investigation and subsequent court proceedings against Mr. X.[482] First, the Court noted that the applicant's refusal to disclose her source or sources did not at any point in time hinder the investigation of the case or the proceedings against Mr. X.[483] The City Court and the High Court had not given any indication that the applicant's refusal to give evidence had attracted any concerns of those courts as regards the case or the evidence against Mr. X.[484] Second, the Court noted that the Supreme Court had remarked that it "seemed likely that the applicant's statement might significantly assist in elucidating the further circumstances surrounding the defendant's contact with her."[485] However, the European Court noted that he applicant's refusal to disclose her source or sources "did not at any point in time hinder the progress of the case," which had been similarly found in *Voskuil*.[486]

Finally, the Court turned to the chilling effect, and cited the *Financial Times*' principle that a chilling effect will arise "wherever journalists are seen to assist in the identification of anonymous sources."[487] The Court noted that in the present case the disclosure order was limited to ordering the applicant to testify about her contact with Mr X, who himself had declared that he was the source. However, the Court stated that "[w]hile it may be true that the public perception of the principle of non-disclosure of sources would suffer no real damage in this situation," citing *Financial Times*, the Court considered that the circumstances of the case were not sufficient to compel the applicant to testify.[488] In light of these considerations, the Court concluded that the reasons given in favour of compelling the applicant to testify about her contact with Mr X, though relevant, were insufficient. Thus, there was no "overriding requirement in the public interest," and as such, there was a violation of Article 10.[489]

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[478] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 72.
[479] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 74.
[480] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 74, citing *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 95 ("the fact that I.P.'s identity had been known to the investigating authorities prior to the applicant's search, which fact does not remove the applicant's protection under Article 10 of the Convention.")
[481] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 76.
[482] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 78.
[483] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 80.
[484] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 80.
[485] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 81.
[486] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 81.
[487] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 82.
[488] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 82.
[489] *Becker v. Norway* (App. no. 21272/12) 5 October 2017, para. 83.

Becker was an extension of *Financial Times*, applying the principle that the conduct of the source could never be decisive in determining whether a disclosure order ought to be made but would operate as merely one factor to be taken into account, and *Nagla*'s principle that the fact a source's identity is allegedly known does not remove a journalist's protection under Article 10. The Court in *Becker* held that a journalist's protection under Article 10 cannot automatically be removed by virtue of a source's own conduct, and this included where a source comes forward. As such, the government must still satisfy the test under *Goodwin* where a journalist is ordered to testify concerning a journalistic source, with the Court in *Becker* concluding that there had been no overriding requirement in the public interest.[490]

3.5.7 Bulk surveillance and the chilling effect

In *Weber and Saravia*, the Court had reviewed domestic surveillance legislation and considered the potential chilling effect on journalistic sources, and in 2018, the Court was again called upon to review the chilling effect of domestic surveillance legislation, this time in the U.K. The case was *Big Brother Watch and Others v. the United Kingdom,*[491] and arose from three separate applications[492] to the European Court, following revelations in 2013 by the former U.S. intelligence official Edward Snowden relating to surveillance programmes operated by U.S. and U.K. intelligence services.[493] There were 16 applicants in the case, mainly NGOs, claiming violations of various articles of the European Convention over U.K. intelligence services obtaining or intercepting their electronic communications. The Court delivered a mammoth 212-page judgment in 2018, and it is proposed to focus on the complaints relating to protection of journalistic sources under Article 10.[494]

Under Article 10, the Court considered the complaints by the applicants in the second of the joined cases, namely a U.K. journalist (Alice Ross) and the London-based newsgathering organisation the Bureau of Investigative Journalism.[495] Further, the Court permitted third-party interventions on the Article 10 complaint by other NGOs, including the National Union of Journalists, the International Federation of Journalists, and the Media Lawyers' Association.

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[490] Although the Court applied the *Goodwin* test, it did curiously state at paragraph 76, that the degree of protection under Article 10 of the Convention to be applied in the present case cannot reach the same level as that afforded to journalists who have been assisted by persons of unknown identity to inform the public about matters of public interest. This was taken from *Nordisk Film* and *Stichting Ostade Blade*, but as Judge Tsotsoria pointed out in his concurring opinion in *Becker*, the Court in both these cases did not find that journalistic sources had been involved, but rather research material (*Nordisk Film*), and the author of a letter who was not a "journalistic source" (*Stichting Ostade Blade*). According to Judge Tsotsoria, "Applying Convention principles developed under other circumstances, without explanation or context, does no good either to the consistency of the case-law or in general, the protection of freedom of expression."

[491] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018 (Article 10 and bulk interception of communications). See Judith Vermeulen, "Big brother may continue watching you," *Strasbourg Observers*, 12 October 2018. On bulk surveillance generally, see Thorsten Wetzling and Kilian Vieth, *Upping the Ante on Bulk Surveillance: An International Compendium of Good Legal Safeguards and Oversight Innovations* (Heinrich Böll Stiftung, 2018).

[492] App. nos. 58170/13, 62322/14 and 24960/15. See *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 1.

[493] See, for example, Glenn Greenwald and Ewen MacAskill, "Boundless Informant: the NSA's secret tool to track global surveillance data," *The Guardian*, 11 June 2013.

[494] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 469 - 500.

[495] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 469.

The applicants made complaints about two provisions in the U.K. legal framework for bulk interception of electronic communications. The first was section 8(4) of the Regulation of Investigatory Powers Act 2000, which allows the Secretary of State to issue a warrant for the interception of "external communications in the course of their transmission by means of a telecommunication system."[496] The Secretary of State must also issue a certificate setting out a description of the intercepted material which he considers necessary to examine, and stating that he considers the examination of that material to be necessary for the reasons set out in section 5(3) (that is, necessary in the interests of national security, for the purpose of preventing or detecting serious crime, or for safeguarding the economic well-being of the United Kingdom).[497]

The second provision was Chapter II of Part 1 of the Regulation of Investigatory Powers Act 2000, which sets out the framework under which public authorities may acquire communications data from communications service providers. Under Chapter II, authorisation for the acquisition of communications data from communications service providers is granted by a "designated person" prescribed by an order made by the Secretary of State.[498] The designated person may only grant an authorisation if he believes it is necessary on a specified ground, including preventing or detecting crime or preventing disorder.[499]

The applicants claimed that both the section 8(4) regime and the Chapter II regime violated Article 10, in particular, the safeguards for the protection of journalistic sources established in *Sanoma* and *Telegraaf*.[500] Before examining whether the applicants could claim to be "victims," and whether there had been an interference with their freedom of expression, the Court reiterated the chilling effect principle in *Goodwin*: without protection of journalistic sources, sources may be deterred from assisting the press in informing the public about matters of public interest.[501] Given the importance of the protection of journalistic sources for press freedom in a democratic society, an interference cannot be compatible with Article 10 unless it is justified by an "overriding requirement in the public interest."[502]

The Court examined whether these applicants could be considered "victims" of an interference with Article 10, and the Court cited the chilling effect principle from *Weber and Saravia*: a system for effecting secret surveillance of communications involves a threat of surveillance, and there was a danger that telecommunications for journalistic purposes might be monitored and journalistic sources might be either disclosed or deterred from calling or providing information.[503] The Court in *Big Brother Watch* held that the applicants were

[496] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 67.
[497] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 68.
[498] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 111.
[499] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 112.
[500] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 477-479.
[501] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 476.
[502] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 488.
[503] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 476.

journalists, and could similarly claim to be "victims" of an interference with their Article 10 rights by virtue of the operation of the section 8(4) regime.[504]

The Court held that the section 8(4) regime was prescribed by law,[505] and the main question was whether the interference had been necessary in a democratic society. First, the Court noted that the surveillance measures under the section 8(4) regime, similar to those considered in *Weber and Saravia,* were not aimed at monitoring journalists or uncovering journalistic sources.[506] The Court in *Big Brother Watch* confirmed that interception of such communications could not, by itself, be characterised as a particularly serious interference with freedom of expression. However, the Court added that the interference "will be greater" where communications are "selected for examination," and would only satisfy the *Goodwin* test of "justified by an overriding requirement in the public interest" if (a) accompanied by sufficient safeguards relating both to the circumstances in which they may be selected intentionally for examination, and (b) to the protection of confidentiality where they have been selected, either intentionally or otherwise, for examination.[507]

The Court then examined the section 8(4) regime, and stated that in the "Article 10 context," it was of "particular concern" that (a) there were no requirements circumscribing the intelligence services' power to search for confidential journalistic or other material (such as using a journalist's email address as a selector), or (b) no requirements on analysts, in selecting material for examination, to give any particular consideration to whether such material is or may be involved.[508] Thus, the Court considered that analysts could "search and examine without restriction both the content and the related communications data of these intercepted communications."[509]

The Court concluded that because of the "potential chilling effect that any perceived interference with the confidentiality of their communications and, in particular, their sources might have on the freedom of the press," and the absence of any arrangements limiting the intelligence services' ability to search and examine such material other than where "it is justified by an overriding requirement in the public interest," there had been a violation of Article 10.[510]

The Court then examined the Chapter II regime, where the applicants complained under Article 10 about the regime for the acquisition of communications data from communication service providers. The Court acknowledged that the Chapter II regime contained "enhanced protection" where data is sought for the purpose of identifying a journalist's source: where an application is intended to determine the source of journalistic information, there must be an "overriding requirement in the public interest," and there must be an application to a court for a production order to obtain this data.[511]

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[504] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 490.
[505] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 491.
[506] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 492.
[507] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 492.
[508] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 493.
[509] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 493.
[510] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 495.
[511] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 498.

However, the Court noted that these enhanced protections only apply where the purpose of the application is to "determine a source," but did not apply in "every case" where there is a request for the communications data of a journalist, or where "collateral intrusion" is likely.[512] Further, in cases concerning access to a journalist's communications data there were no special provisions restricting access to the purpose of combating serious crime. Therefore, the Court held that the Chapter II regime was not "in accordance with the law," in violation of Article 10.[513]

Weber and Saravia had been the first instance of the Court considering the chilling effect of government surveillance on protection of journalistic sources, and essentially reviewed the law *in abstracto*, holding that the German legislation was consistent with Article 10. In *Big Brother Watch*, the Court also essentially reviewed the U.K. legislation i*n abstracto*, but similar to *Telegraaf*, laid down certain safeguards which must be included in domestic legislation to protect journalistic sources from a chilling effect: (a) there should be requirements limiting intelligence services' power to search for confidential journalistic material, or other material, such as using a journalist's email address as a selector; and (b) enhanced protections should apply in *every case* where there is a request for a journalist's communications data, or where collateral intrusion is likely. *Big Brother Watch* signals the Court's special concern for protection of journalistic sources, and protecting against the chilling effect: to the extent that journalistic communications, even where the purpose of surveillance is not to determine a journalist's source, must still be subject to enhanced protection under domestic legislation, for the sole reason that it is *journalistic* communication.

3.6 Conclusion

The analysis in this chapter on the protection of journalistic sources focused on a number of government measures taken against journalists: disclosure orders issued by courts for a journalist to reveal a source, disclosure orders issued by prosecutors, police search and seizures conducted at journalists' homes and editorial offices, police seizure of a journalist's research material, government surveillance of telecommunications, a journalist's detention for refusal to disclose a source, disclosure orders to surrender anonymous sources' documents, targeted surveillance of journalists, legal costs orders against journalists, orders to testify, and bulk surveillance.

A remarkable feature of this case law is that, apart from four admissibility decisions,[514] the Court found that *all* of these government measures have a potential chilling effect. The nature of the chilling effect of these government measures is that (a) future sources may be deterred from assisting the press in informing the public on matters of public interest, (b) they may discourage other journalists from reporting any misconduct or controversial acts by public authorities; (c) they may deter potential whistleblowers from assisting the press in informing the public on matters of public interest; and (d) they may deter members of the public who are also potential sources themselves.

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[512] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 499.

[513] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 499.

[514] *Nordisk Film & TV A/S v. Denmark* (App. no. 40485/02) 8 December 2005 (Admissibility decision); *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision); *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision); and *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision).

An equally remarkable feature of the Court's application of the chilling effect principle in its case law on protection of sources is that the Court found violations of Article 10 in *all* of the judgments considered in this chapter. The only exception was the Chamber judgment in *Sanoma*, which, when it reached the Grand Chamber, resulted in a unanimous 17-judge judgment finding a violation of article 10. Indeed, the Dutch judge in the Chamber judgment in *Sanoma,*[515] decided to change his vote when he sat in the Grand Chamber, and found a violation of Article 10 along with his colleagues.[516] There was also remarkable unanimity in nearly all the judgments: *Roemen and Schmit*, *Ernst*, *Tillack*, *Voskuil*, *Sanoma*, *Martin*, *Ressiot*, *Saint-Paul*, *Nagla* and *Görmüş*, were unanimous on the application of the chilling effect, with only *Telegraaf* drawing a dissenting opinion.

The reason for the consistent findings of violations of Article 10 was because the Court fashioned a strict test for protecting the right to protection of journalistic sources from a chilling effect: (a) there must be an "overriding requirement in the public interest," (b) the national margin of appreciation is circumscribed by the interest of a free press, which will "weigh heavily," (c) limitations on the confidentiality of journalistic sources call for the "most careful scrutiny."[517] The strength of this test is demonstrated not only when we consider that the government in *all* of these cases *never* demonstrated the necessity of a measure, with the Court rejecting as not outweighing the right to protection of sources, an intelligence service's interest in removing a leaked document from public circulation, a government's interest in the "prevention of disorder or crime" by prosecuting public officials who had leaked documents to the press, or a government's interest in the "prevention of disorder or crime" by prosecuting public officials for possible bribery following leaks to the press.

The Court rarely applies the chilling effect principle when considering whether an interference has been prescribed by law, but while the application of the chilling effect in this regard may be rare, the consequence of the Court's review will mean domestic legislation or practice will need to be amended. This is demonstrated where the Court applied the principle in *Sanoma* in finding that an order for the surrender of journalistic material was not prescribed by law, as there had been an absence of prior review by a judge (or other independent and impartial decision-making body).[518] This was because there must be legal procedural safeguards to avoid the potential detrimental impact of disclosure orders not only on the source, but also on the newspaper, whose reputation may be negatively affected in the eyes of future potential sources, and resulting in a chilling effect on future potential sources. Similarly, in *Big Brother Watch*, the Court found surveillance legislation which did not provide enhanced protection in every case where there was a request for the communications data of a journalist was not prescribed by law, in violation of Article 10.[519] Without this

[515] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 31 March 2009 (Judges Josep Casadevall (Andorra), Corneliu Bîrsan (Romania), Egbert Myjer (Netherlands), and Luis López Guerra (Spain) voted for a finding of no violations of Article 10).

[516] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber) (Concurring opinion of Judge Myjer, para. 1) ("I was one of the majority of four to three who found no violation … I am now prepared to cross the room and join my colleagues in finding that there has been a violation of Article 10").

[517] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 59-60.

[518] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 90.

[519] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 498.

protection, sources may be deterred from assisting the press in informing the public about matters of public interest.[520]

Similar to the Grand Chamber judgments such as *Wille* and *Cumpănă and Mazăre*, the Court in its protection of journalistic sources judgments is concerned with a chilling effect which *may arise in the future*. This is particularly important for the Court, as demonstrated in *Sanoma*, where the Grand Chamber adopted chilling effect reasoning to find that there had been an interference with the magazine's freedom of expression, even though, as the Court admitted, "no search or seizure took place."[521] The Court nonetheless held that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources."[522] Similarly, in *Nagla*, the Court applied chilling effect reasoning in finding that there had been an interference with freedom of expression, where it had *not* been demonstrated that the search yielded any results or indeed proved otherwise productive.[523] And in *Weber and Saravia*, the Court applied chilling effect reasoning in finding that surveillance legislation interfered with a journalist's freedom of expression,[524] even where no measure had actually been taken against the journalist.[525] This was because journalistic sources might be deterred in the future from calling or providing information by telephone."[526] And related to this point, is that the Court when applying the chilling effect principle, has regard not only to the individual applicant, but also to other individuals exercising freedom of expression. In *Financial Times*, the Court held that disclosure orders not only have a detrimental effect on the applicant newspapers, but also on members of the public, who have an interest in receiving information imparted through anonymous sources.[527]

Finally, the observation made in the previous chapter, pointing to *Delfi*, that a Grand Chamber majority dismissed the chilling effect because of the lack of evidence, is also to be seen in some of the Court's protection of sources jurisprudence. This type of dismissal of the chilling effect was also applied by a majority of the Court in *Ostade Blade*, where the Court held that "[n]othing is known about this information, nor has the applicant foundation suggested that it, its informants and contributors or its readership suffered as a result."[528]

[520] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 387.
[521] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 71.
[522] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 71.
[523] *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013, para. 82.
[524] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision), para. 146.
[525] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision), para. 144.
[526] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision), para. 145.
[527] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 63.
[528] *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (admissibility decision), para. 72.

Chapter 4 - Defamation Proceedings and the Chilling Effect on Freedom of Expression

4.1 Introduction

Following the discussion of the protection of journalistic sources and the chilling effect, the next area to be examined relating to Article 10 is that concerning freedom of expression and criminal and civil defamation proceedings. As noted in Chapter 2, of the 20 Grand Chamber judgments concerning Article 10 and considering the chilling effect principle, the largest proportion concerned criminal and civil proceedings in order to protect reputation or respect private life.[1] This included six Grand Chamber judgments involving civil or criminal defamation proceedings against journalists and the media, one judgment involving criminal defamation proceedings against a lawyer, and one judgment involving civil defamation proceedings against non-governmental organisations. Further, research undertaken for this thesis revealed that of the 348 judgments and decisions where the Court has considered or applied the chilling effect, the largest proportion by far, totalling 113 judgments and decisions, concerned freedom of expression and criminal and civil proceedings for defamation.[2]

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[1] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber) (Article 10 and journalists convicted of defamation); *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber) (Article 10 and journalists convicted of defamation); *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber) (Article 10 and newspapers convicted of defamation); *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber) (Article 10 and newspaper's fined for report on public figure); *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber) (Article 10 and lawyer convicted of defamation); *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber) (Article 10 and news website's liability for reader comments); *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber) (Article 10 and media liability for publishing public figure's photographs); and *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber) (Article 10 and civil defamation proceedings against NGO).

[2] *Bergens Tidende and Others v. Norway* (App. no. 26132/95) 2 May 2000 (Article 10 and journalists liable for defamation); *Nikula v. Finland* (App. No. 31611/96) 21 March 2002 (Article 10 and lawyer convicted of defamation); *A. v. the United Kingdom* (App. no. 35373/97) 17 December 2002 (Article 6 and parliamentary immunity for defamation); *Mahon and Kent v. the United Kingdom* (App. no. 70434/01) 8 July 2003 (Admissibility decision) (Article 6 and inability to issue defamation claim); *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber) (Article 10 and journalists convicted of defamation); *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber) (Article 10 and journalists convicted of defamation); *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005 (Article 10 and civil defamation proceedings against environmental activists); *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland* (App. no. 55120/00) 16 June 2005 (Article 10 and civil defamation proceedings against newspaper); *Tourancheau and July v. France* (App. no. 53886/00) 24 November 2005 (Article 10 and journalists convicted of defamation); *Times Newspapers Ltd. v. the United Kingdom* (Nos. 1 and 2) (App. nos. 23676/03 and 3002/03) 11 October 2005 (Admissibility decision) (Article 10 and civil defamation proceedings against newspaper); *Metzger v. Germany* (App. no. 56720/00) 17 November 2005 (Admissibility decision) (Article 10 and political party member convicted of group defamation); *Malisiewicz-Gąsior v. Poland* (App. no. 43797/98) 6 April 2006 (Article 10 and political candidate's conviction for defamation); *Brasilier v. France* (App. no. 71343/01) 11 April 2006 (Article 10 and political candidate liable for defamation); *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006 (Article 10 and editor's conviction for defamation); *Radio Twist a.s. v. Slovakia* (App. no. 62202/00) 19 December 2006 (Article 10 and broadcaster liable for defamation); *Virolainen v. Finland* (App. no. 29172/02) 7 February 2006 (Admissibility decision) (Article 10 and lawyer's conviction for defamation); *Krasulya v. Russia* (App. no. 12365/03) 22 February 2007 (Article 10 and editor's conviction for defamation); *Tønsberg Blad AS and Haukom v. Norway* (App. no. 510/04) 1 March 2007 (Article 10 and defamation proceedings against newspaper publisher); *Lombardo and Others v. Malta* (App. no. 7333/06) 20 April 2007 (Article 10 and civil defamation proceedings against councillors); *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007 (Article 10 and journalists convicted of defamation); *a/s Diena and Ozoliņš v. Lithuania* (App. no. 16657/03) 12 July 2007 (Article 10 and civil defamation proceedings against newspaper for defaming minister); *Ormanni v.*

Italy (App. no. 30278/04) 17 July 2007 (Article 10 and journalist convicted of defamation); *Dyuldin and Kislov v. Russia* (App. no. 25968/02) 31 July 2007 (Article 10 and civil proceedings for defamation of regional authorities); *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber) (Article 10 and newspaper convicted of defamation); *Desjardin v. France* (App. no. 22567/03) 22 November 2007 (Article 10 and politician's conviction for defamation over pamphlet); *Timpul Info-Magazin and Anghel v. Moldova* (App. no. 42864/05) 27 November 2007 (Article 10 and civil defamation proceedings against newspaper); *Rumyana Ivanova v. Bulgaria* (App. no. 36207/03) 14 February 2008 (Article 10 and journalist's conviction for defamation); *Azevedo v. Portugal* (App. no. 20620/04) 27 March 2008 (Article 10 and book author's conviction for defamation); *Campos Dâmaso v. Portugal* (App. no. 17107/05) 24 April 2008 (Article 10 and journalist's conviction for defamation); *Schmidt v. Austria* (App. no. 513/05) 17 July 2008 (Article 10 and lawyer's reprimand for defamation); *Flux v. Moldova (No. 6)* (App. no. 22824/04) 29 July 2008 (Article 10 and newspaper's conviction for defamation); *Godlevskiy v. Russia* (App. no. 14888/03) 23 October 2008 (Article 10 and civil defamation proceedings against journalist); *Juppala v. Finland* (App. no. 18620/03) 2 December 2008 (Article 10 and criminal prosecution for defamation); *Dilipak (III) v. Turkey* (App. no. 29413/05) 23 September 2008 (Admissibility decision) (Article 10 and civil defamation proceedings against journalist); *Marchenko v. Ukraine* (App. no. 4063/04) 19 February 2009 (Article 10 and union teacher's conviction for defamation); *Times Newspapers Ltd (Nos. 1 and 2) v. the United Kingdom* (App. nos. 3002/03 and 23676/03) 10 March 2009 (Article 10 and civil defamation proceedings against newspaper); *Kydonis v. Greece* (App. no. 24444/07) 2 April 2009 (Article 10 and journalist's conviction for defamation); *Brunet-Lecomte and Tanant v. France* (App. no. 12662/06) 8 October 2009 (Article 10 and journalists' conviction for defamation); *Alves da Silva v. Portugal* (App. no. 41665/07) 22 October 2009 (Article 10 and prosecution for defamation over satirical work displayed at carnival); *Europapress Holding d.o.o. v. Croatia* (App. no. 25333/06) 22 October 2009 (Article 10 and civil defamation proceedings against newspaper); *Karsai v. Hungary* (App. no. 5380/07) 1 December 2009 (Article 10 and civil defamation proceedings against historian); *The Wall Street Journal Europe v. the United Kingdom* (App. no. 28577/05) 10 February 2009 (Admissibility decision) (Article 10 and civil defamation proceedings against newspaper); *Moreira v. Portugal* (App. no. 20156/08) 22 September 2002 (Admissibility decision) (Article 10 and journalist's conviction for defamation); *Laranjeira Marques da Silva v. Portugal* (App. no. 16983/06) 19 January 2010 (Article 10 and journalist's conviction for aggravated defamation); *Renaud v. France* (App. no. 13290/07) 25 February 2010 (Article 10 and criminal defamation prosecution over comments about mayor); *Ruokanen and Others v. Finland* (App. no. 45130/06) 6 April 2010 (Article 10 and journalists' prosecution for aggravated defamation); *Fatullayev v. Azerbaijan* (App. no. 40984/07) 22 April 2010 (Article 10 and criminal proceedings against editor for defamation); *Mariapori v. Finland* (App. no. 37751/07) 6 July 2010 (Article 10 and book author's conviction for defamation); *Gazeta Ukraina-Tsentr v. Ukraine* (App. no. 16695/04) 15 July 2010 (Article 10 and civil defamation proceedings against newspaper); *Público - Comunicação Social, S.A. and Others v. Portugal* (App. no. 39324/07) 7 December 2010 (Article 10 and civil defamation proceedings against newspaper publisher); *Novaya Gazeta v. Voronezhe v. Russia* (App. no. 27570/03) 21 December 2010 (Article 10 and civil defamation proceedings against journalists); *Barata Monteiro da Costa Nogueira and Patrício Pereira v. Portugal* (App. no. 4035/08) 11 January 2011 (Article 10 and politicians' conviction for defamation); *Kasabova v. Bulgaria* (App. no. 22385/03) 19 April 2011 (Article 10 and criminal defamation proceedings against journalist); *Bozhkov v. Bulgaria* (App. no. 3316/04) 19 April 2011 (Article 10 and criminal defamation proceedings against journalist); *Kania and Kittel v. Poland* (App. no. 35105/04) 21 June 2011 (Article 10 and civil defamation proceedings against newspaper); *Mizzi v. Malta* (App. no. 17320/10) 22 November 2011 (Article 10 and civil defamation proceedings against journalist); *Lesquen du Plessis-Casso v. France* (App. no. 54216/09) 12 April 2012 (Article 10 and politician's conviction for defamation); *Tănăsoaica v. Romania* (App. no. 3490/03) 19 June 2012 (Article 10 and journalist's conviction for defamation); *Ciesielczyk v. Poland* (App. no. 12484/05) 26 June 2012 (Article 10 and journalist's conviction for defamation); *Lewandowski-Malec v. Poland* (App. no. 39660/07) 18 September 2012 (Article 10 and prosecution for defamation over comments on mayor); *Yordanova and Toshev v. Bulgaria* (App. no. 5126/05) 2 October 2012 (Article 10 and civil defamation proceedings against journalists); *Reznik v. Russia* (App. no. 4977/05) 4 April 2013 (Article 10 and defamation proceedings against president of Moscow bar); *Morice v. France* (App. no. 29369/10) 11 July 2013 (Article 10 and lawyer's conviction for defamation); *Sampaio e Paiva de Melo v. Portugal* (App. no. 33287/10) 23 July 2013 (Article 10 and journalist's conviction for defamation); *Welsh and Silva Canha v. Portugal* (App. no. 16812/11) 17 September 2013 (Article 10 and journalist's conviction for defamation); *Belpietro v. Italy* (App. no. 43612/10) 24 September 2013 (Article 10 and editor's conviction for defamation); *Jean-Jacques Morel v. France* (App. no. 25689/10) 10 October 2013 (Article 10 and politician's conviction for defamation); *Ungváry v. Hungary* (App. no. 64520/10) 3 December 2013 (Article 10 and civil defamation proceedings against historian); *Mika v. Greece* (App. no. 10347/10) 19 December 2013 (Article 10 and politician's conviction for defamation); *De Lesquen du Plessis-Casso* v. *France (No. 2)* (App. no. 34400/10) 30 January 2014 (Article 10

and politician's conviction for defamation); *Tešić v. Serbia* (App. nos. 4678/07 and 50591/12) 11 February 2014 (Article 10 and defamation conviction imposed on newspaper interviewee); *Dilipak and Karakaya v. Turkey* (App. nos. 7942/05 and 24838/05) 4 March 2014 (Article 10 and civil defamation proceedings against journalists); *Brosa v. Germany* (App. no. 5709/09) 8 April 2014 (Article 10 and defamation injunction against political activist); *Pinto Pinheiro Marques v. Portugal* (App. no. 26671/09) 22 January 2015 (Article 10 and historian's defamation conviction for defaming municipal authority); *Almeida Leitão Bento Fernandes v. Portugal* (App. no. 25790/11) 12 March 2015 (Article 10 and book author's defamation conviction for defaming deceased individual); *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber) (Article 10 and lawyer convicted of defamation); *Delfi v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber) (Article 10 and news website's liability for reader comments); *Prompt v. France* (App. no. 30936/12) 3 December 2015 (Article 10 and author liable for defamation over book); *Rodriguez Ravelo v. Spain* (App. no. 48074/10) 12 January 2016 (Article 10 and lawyer's conviction for defamation); *de Carolis and France Télévisions v. France* (App. no. 29313/10) 21 January 2016 (Article 10 and broadcaster's conviction for defamation); *Siderzhuik v. Ukraine* (App. no. 16901/03) 21 January 2016 (Article 10 and civil defamation proceedings against history professor); *Erdener v. Turkey* (App. no. 23497/05) 2 February 2016 (Article 10 and member of parliament's conviction for defamation); *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (App. no. 22947/13) 2 February 2016 (Article 10 and liability for third-party defamatory comments); *Rusu v. Romania* (App. no. 25721/04) 8 March 2016 (Article 10 and criminal proceedings against local journalist for defamation); *Instytut Ekonomichnykh Reform, TOV v. Ukraine* (App. no. 61561/08) 2 June 2016 (Article 10 and civil defamation proceedings against newspaper); *Reichman v. France* (App. no. 50147/11) 12 July 2016 (Article 10 and radio host's conviction for defamation); *Do Carmo de Portugal e Castro Câmara v. Portugal* (App. no. 53139/11) 4 October 2016 (Article 10 and journalist convicted of defamation); *Dorota Kania v. Poland (No. 2)* (App. no. 44436/13) 4 October 2016 (Article 10 and journalist's defamation conviction for defaming academic); *Boykanov v. Bulgaria* (App. no. 18288/06) 11 November 2016 (Article 10 and individual's defamation conviction for defaming judge); *Kunitsyna v. Russia* (App. no. 9406/05) 13 December 2016 (Article 10 and civil defamation proceedings against journalist); *M.P. v. Finland* (App. no. 36487/12) 15 December 2016 (Article 10 and wife convicted for defamation of husband in child proceedings); *Tavares de Almeida Fernandes and Almeida Fernandes v. Portugal* (App. no. 31566/13) 17 January 2017 (Article 10 and civil defamation proceedings against journalist by judge); *Travaglio v. Italy* (App. no. 64746/14) 24 January 2017 (Admissibility decision) (Article 10 and journalist's defamation conviction for defaming politician); *Pihl v. Sweden* (App. no. 74742/14) 7 February 2017 (Admissibility decision) (Article 8 and courts' failure to find website liable for defamatory comment); *Athanasios Makris v. Greece* (App. no. 55135/10) 9 March 2017 (Article 10 and politician's defamation conviction for criticising mayor); *Arnarson v. Iceland* (App. no. 58781/13) 13 June 2017 (Article 10 and news website journalist civilly liable for defamation); *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017 (Article 10 and civil defamation proceedings against newspaper for defaming government consultant); *Ali Çetin v. Turkey* (App. no. 30905/09) 19 June 2017 (Article 10 and defamation conviction for criticising civil servant in letter); *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber) (Article 10 and civil defamation proceedings against NGO); *Ghiulfer Predescu v. Romania* (App. no. 29751/09) 27 June 2017 (Article 10 and civil defamation proceedings against journalist for defaming mayor); *Kącki v. Poland* (App. no. 10947/11) 4 July 2017 (Article 10 and journalist criminally responsible for defamation of politician); *Halldórsson v. Iceland* (App. no. 44322/13) 4 July 2017 (Article 10 and broadcast journalist liable for civil defamation of company official); *Lacroix v. France* (App. no. 41519/12) 7 September 2017 (Article 10 and municipal councillor's conviction for defamation of mayor); *Novaya Gazeta and Milashina v. Russia* (App. no. 45083/06) 3 October 2017 (Article 10 and defamation proceedings over media reports on Kursk investigation); *Einarsson v. Iceland* (App. no. 24703/15) 7 November 2017 (Article 8 and courts' rejection of defamation claim concerning rape accusation); *Redaktsiya Gazety Zemlyaki v. Russia* (App. no. 16224/05) 21 November 2017 (Article 10 and defamation proceedings against newspaper for depicting public official as Osama bin Laden); *Frisk and Jensen v. Denmark* (App. no. 19657/12) 5 December 2017 (Article 10 and journalists' defamation conviction for defamation of hospital and hospital official); *GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland* (App. no. 18597/13) 9 January 2018 (Article 10 and defamation proceedings against NGO); *Falzon v. Malta* (App. no. 45791/13) 20 March 2018 (Article 10 and defamation proceedings against politician); *Rungainis v. Latvia* (App. no. 40597/08) 14 June 2018 (Article 10 and defamation proceedings against banker); *Paraskevopoulos v. Greece* (App. no. 64184/11) 28 June 2018 (Article 10 and defamation conviction over criticism of local politician); *Makraduli v. the former Yugoslav Republic of Macedonia* (App. nos. 64659/11 and 24133/13) 19 July 2018 (Article 10 and politician convicted of defamation); *Fedchenko v. Russia* (no. 4) (App. no. 17221/13) 2 October 2018 (Article 10 and civil defamation proceedings against editor); *Toranzo Gomez v. Spain* (App. no. 26922/14) 20 November 2018 (Article 10 and activist's conviction for defamation); *Avisa Nordland AS v. Norway* (App. no. 30563/15) 20 February 2018 (Admissibility decision) (Article 10 and civil

The purpose of this chapter is to focus on the Court's consideration of the chilling effect principle in its case law concerning criminal and civil defamation proceedings. The chapter focuses in particular on proceedings against journalists,[3] activists,[4] non-governmental organisations,[5] politicians,[6] and private individuals.[7] There are also judgments and decisions involving defamation proceedings against lawyers, employees, or trade unionists; however, it is proposed to focus on these restrictions on lawyers' and employees' freedom of expression in later chapters.[8]

Similar to the analysis in the previous chapter, the case law is examined in chronological order. However, many judgments and decisions raise quite similar issues in their application of the chilling effect principle, and it would be impractical to exhaustively run through all the case law. As such, the chapter begins with the Court's case law on criminal defamation and its application of the chilling effect, and then analyses the Court's case law on civil defamation and the application of the chilling effect.

The chapter addresses the questions posed in Chapter 1: what does the Court mean when it states that there is a chilling effect on freedom of expression; does the Court apply chilling effect reasoning when considering (a) whether an applicant may claim to be a victim under Article 34; (b) whether there has been an "interference" with freedom of expression under Article 10; (c) whether an interference has been "prescribed by law," or, (d) whether an interference is "necessary in a democratic society." The remaining questions are more substantive: what is the consequence, if any, of the Court using chilling effect reasoning in its case law concerning freedom of expression and defamation proceedings; is there much agreement, or disagreement, within the Court on the application of chilling effect reasoning; does the Court explain the application, or non-application, of chilling effect reasoning; and how does the Court use prior case law when considering and applying the chilling effect. Finally, the purpose of this chapter is to discuss the consideration, and application, of chilling effect reasoning in the Court's case law on civil and criminal defamation proceedings, and not so much to discuss generally this area of case law.[9] The purpose of this chapter and thesis is to provide a better understanding of the chilling effect, and as such, in the analysis and discussion which follows, it will focus on the chilling effect reasoning.

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defamation proceedings against newspaper); and *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16) 4 December 2018 (Article 10 and news website's liability for defamation).

[3] For a recent example, see *Fedchenko v. Russia* (no. 4) (App. no. 17221/13) 2 October 2018 (Article 10 and civil defamation proceedings against editor).

[4] For a recent example, see *Toranzo Gomez v. Spain* (App. no. 26922/14) 20 November 2018 (Article 10 and activist's conviction for defamation).

[5] See, *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber) (Article 10 and non-governmental organisation liable for defaming a public servant).

[6] See, *Lewandowska-Malec v. Poland* (App. no. 39660/07) 18 September 2012 (Article 10 and a politician convicted of defamation).

[7] See, *M.P. v. Finland* (App. no. 36487/12) 15 December 2016 (Article 10 and wife's conviction for defaming husband).

[8] See Chapter 6 - Judicial and Legal Professional Freedom of Expression and the Chilling Effect; and Chapter 7 - Protecting Whistleblowers, Employees and Unions from the Chilling Effect.

[9] See generally, Stijn Smet, "Freedom of Expression and the Right to Reputation: Human Rights in Conflict," (2010) 26 *American University International Law Review* 183; Tarlach McGonagle, *Freedom of Expression and Defamation*: *A study of the case law of the European Court of Human Rights* (Council of Europe, 2016); and Dirk Voorhoof, "Freedom of Expression Versus Privacy and the Right to Reputation: How to Preserve Public Interest Journalism," in Stijn Smet and Eva Brems (eds.), *When Human Rights Clash at the European Court of Human Rights* (Oxford University Press, 2017), pp. 148–170.

4.2 The Court's early case law

4.2.1 *Lingens* and the chilling effect of criminal defamation

As detailed in Chapter 2, it was as far back as 1984 when the European Commission first considered an argument from journalists claiming unpredictable damages' awards in civil defamation proceedings had a chilling effect on the media.[10] In contrast, it was not until 2000 when the Court first considered an argument from the media explicitly invoking the chilling effect, when the Norwegian newspaper *Bergens Tidende,* claimed that a damages and costs order in a defamation trial against it, was the "largest financial penalty ever imposed" by a Norwegian court in a defamation case, and had a "chilling effect on the exercise of press freedom in Norway."[11] Before turning to the Court's consideration of the chilling effect argument in *Bergens Tidende and Others v. Norway*,[12] there was earlier application of chilling effect reasoning by the Court in an earlier defamation case, although the term was not *explicitly* used.

The case was the 1986 judgment in *Lingens v. Austria*,[13] where the applicant was the editor of the Austrian magazine *Profil*. In 1975, the applicant published an article which criticised the retiring Chancellor, Bruno Kreisky, for supporting the President of the Austrian Liberal Party, who had served in an SS infantry during the Second World War, and "for his accommodating attitude towards former Nazis who had recently taken part in Austrian politics."[14] The applicant's article stated, "In truth Mr. Kreisky's behaviour cannot be criticised on rational grounds but only on irrational grounds: it is immoral, undignified."[15]

Following publication of the articles, the then-Chancellor initiated a private prosecution against the applicant for defamation, which was criminalised under Article 111 of the Austrian Criminal Code. Notably, Article 112 provided that "evidence of the truth and of good faith shall not be admissible unless the person making the statement pleads the correctness of the statement or his good faith."[16] In 1981, the Vienna Regional Court found the applicant guilty of defamation for having used the expressions the "basest opportunism," "immoral," and "undignified."[17] The Court also held the applicant had not produced any evidence to prove the truth of the first expression, and insufficient evidence for the latter expressions.[18] The Court imposed a fine of 20,000 Schillings, and ordered the confiscation of the articles and publication of the judgment.[19] On appeal, the Vienna Court of Appeal reduced the fine imposed to 15,000 Schillings, but confirmed the Regional Court's conviction,[20] holding that "basest opportunism" meant that a person was "acting for a specific purpose with complete disregard of moral considerations and this in itself constituted an attack on Mr. Kreisky's reputation."[21]

The applicant made an application to the European Commission, claiming his conviction for defamation violated his right to freedom of expression under Article 10. In

[10] *Times Newspapers Ltd. v. the United Kingdom* (App. no. 14631/89) 5 March 1990 (Commission Decision), para. 1.
[11] *Bergens Tidende and Others v. Norway* (App. no. 26132/95) 2 May 2000, para. 38.
[12] *Bergens Tidende and Others v. Norway* (App. no. 26132/95) 2 May 2000.
[13] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986.
[14] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 14.
[15] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 15.
[16] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 20.
[17] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 26.
[18] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 26.
[19] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 21.
[20] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 27.
[21] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 29.

1984, the Commission held that there had been a violation of Article 10, and there was no mention in the Report of the chilling effect or chilling effect reasoning.[22] The case was referred to the European Court, which delivered its judgment in 1986,[23]and the main question for the Court was whether the conviction for defamation had been necessary in a democratic society.

First, the Court laid down the principle that under Article 10, the limits of acceptable criticism are "wider as regards a politician as such than as regards a private individual."[24] A politician "inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance."[25] In this regard, the Court noted that the articles concerned "political issues of public interest in Austria," namely discussions concerning the attitude of Austrians, and the Chancellor in particular, to National Socialism and to the participation of former Nazis in the governance of the country.[26]

The Court also noted that the Austrian courts held some of the expressions used in the articles were defamatory, namely "basest opportunism," "immoral," and "undignified,"[27] and that the applicant had not established the truth of his statements.[28] However, the Court held that a "careful distinction needs to be made between facts and value-judgments" and while the "existence of facts can be demonstrated," the "truth of value-judgments is not susceptible of proof."[29] Applying this principle, the Court held that the facts upon which the applicant's value-judgment was based were "undisputed, as was also his good faith."[30] Further, the impugned expressions had targeted the Chancellor "in his capacity as a politician," and were "therefore to be seen against the background of a post-election political controversy,"[31] while the "content and tone of the articles were on the whole fairly balanced."[32]

The Court then turned to the penalty imposed on the applicant, and noted that the penalty "did not strictly speaking prevent him from expressing himself."[33] However, the Court then stated at paragraph 44, which is worth setting out in full, that the penalty nonetheless:

> "amounted to a kind of censure, which would be *likely to discourage* him from making criticisms of that kind again in future ... such a sentence would be *likely to deter* journalists from contributing to public discussion of issues affecting the life of the community ... a sanction such as this is *liable to hamper* the press in performing its task as purveyor of information and public watchdog."[34] (emphasis added).

The Court held that based on these considerations, the interference with the applicant's exercise of the freedom of expression was not "necessary in a democratic society," and the Court unanimously concluded that there had been a violation of Article 10.[35]

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[22] *Lingens v. Austria (*App. no. 9815/82) 5 October 1983 (Commission Decision); and *Lingens v. Austria (*App. no. 9815/82) 11 October 1984 (Commission Report).
[23] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986.
[24] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 42.
[25] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 42.
[26] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 43.
[27] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 45.
[28] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 46.
[29] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 46.
[30] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 46.
[31] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 43.
[32] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 43.
[33] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 44.
[34] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986.
[35] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 47.

The *Lingens* judgment is well-known for its principles that the limits of acceptable criticism are wider regarding a politician, and that although the existence of facts can be demonstrated, the truth of value-judgments is not susceptible to proof. For present purposes, the focus is on the Court's paragraph 44. The Court applied chilling effect reasoning, with three elements involved, to the effect that while the defamation conviction did not prevent expression in this instance, it was likely to *discourage him* from making similar criticism *in the future*, likely to *deter other* journalists from contributing to public discussion, and liable to *hamper the press* generally. Under Article 10, the Court was taking into account not only the chilling effect on the individual applicant, but also *other* journalists would be chilled, and the press in the general would be chilled. This paragraph from *Lingens*, as mentioned in the previous chapter, would form the basis for the Grand Chamber's chilling effect principle in *Wille*, that the reprimand imposed on a judge had a chilling effect on the exercise by the applicant of his freedom of expression, as it was likely to *discourage* him from making statements of that kind in the future,[36] and in *Goodwin*, that without protection of journalistic sources, sources may be *deterred* from assisting the press in informing the public on matters of public interest.[37]

While the Court does not cite any U.S. case law in the *Lingens* judgment, the language of defamation proceedings discouraging future freedom of expression is strikingly similar to the chilling effect reasoning in the U.S. Supreme Court's judgment in *New York Times Co. v. Sullivan*,[38] which also concerned defamation and the defence of truth. In *Sullivan*, the U.S. Supreme Court had held that the right to freedom of speech under the First Amendment to the U.S. Constitution,[39] prohibited a "public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[40] The Supreme Court stated that where the burden of proof was on defendants in defamation proceedings, it leads to "self-censorship," and "would-be critics of official conduct may be *deterred* from voicing their criticism," even though it is believed to be true and even though it is in fact true, because of *doubt* whether it can be proved in court or *fear* of the expense of having to do so."[41]

4.2.2 The chilling effect of damages and costs orders

As mentioned above, following *Lingens*, it was not until 2000 when the Court first considered an argument from the media explicitly invoking the chilling effect term in *Bergens Tidende and Others v. Norway*.[42] The applicants in the case were the Norwegian newspaper *Bergens Tidende*, the newspaper's former editor-in-chief, and one its journalists. The case arose when the newspaper published a front-page article entitled "Beautification resulted in disfigurement," and a number of follow up articles, which described in detail how women had experienced their situation after allegedly failed operations and a lack of care and follow-up by a surgeon (Dr. R) at a cosmetic surgery clinic in Bergen. The articles included criticism of Dr. R., including quotes from the women stating "immediately after the operation, I

[36] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 50.
[37] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 39
[38] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
[39] U.S. Const. Amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."). See generally, Eugene Volokh, *The First Amendment and Related Statutes: Problems, Cases and Policy Arguments*, 4th ed. (Foundation Press, 2016).
[40] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), p. 279.
[41] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), p. 279.
[42] *Bergens Tidende and Others v. Norway* (App. no. 26132/95) 2 May 2000.

noticed there was something quite wrong. One of my breasts had swollen up and become hard and painful. When I consulted Dr R., he trivialised the whole matter," that another "had lost confidence in Dr R. and his methods of treatment," and "after two or three weeks of repeated "treatment" and half-hearted attempts by the doctor to remedy the blunder, however, I couldn't stand it anymore and I gave up."[43]

Following publication of the articles, Dr R. instituted defamation proceedings against the applicants. At first instance, the Bergen City Court found the article had been defamatory, as the criticism against Dr R. "had been made in an unjustified manner, destroying the public's confidence in him as a surgeon," although the Court also added that the criticism had been caused mainly by his own conduct.[44] The Supreme Court ultimately upheld the judgment, as the articles contained an "accusation against Dr R. that he performed his surgical activities in a reckless way," and the newspaper must be "criticised for a lack of balance in the articles and for using unnecessarily strong and, to some extent, misleading expressions."[45] The Supreme Court ordered that the first applicant newspaper pay Dr. R. over 900,000 Norwegian krone,[46] that the second and third applicants each pay him 15,000 Norwegian krone, plus costs, which resulted in first applicant paying an additional 200,000 krone, and the second and third applicants each paid 4,000 krone in interest.[47]

The applicants made an application to the European Court, claiming that the Norwegian Supreme Court's judgment violated their right to freedom of expression under Article 10. In particular, the applicants argued that the damages and costs order, which was the "largest financial penalty ever imposed by a Norwegian court in a defamation case," had a "chilling effect on the exercise of press freedom in Norway."[48]

The Court first noted that the articles "raised serious issues affecting the public interest," and recounted the personal experiences of a number of women who had undergone cosmetic surgery.[49] Notably, the Court then applied chilling effect reasoning when considering the standard of scrutiny it must apply, stating that where measures taken by domestic authorities are "capable of discouraging the press from disseminating information on matters of legitimate public concern," the Court must apply "careful scrutiny" of the proportionality of the measures."[50] The Court examined the articles, and laid emphasis on the fact that the articles "consisted essentially of reported and highly critical accounts given by a number of women of their experiences as former patients" of the cosmetic surgeon.[51] The Court attached "considerable weight" to the fact that the women's accounts "were found not only to have been essentially correct but also to have been accurately recorded by the newspaper;"[52] and the Court was "unable to accept that the reporting of the accounts of the women showed a lack of any proper balance."[53] Further, the surgeon had been "invited to comment on the allegations made in the interviews with the newspaper."[54]

The Court concluded that the interest of Dr R. in protecting his professional reputation was "not sufficient to outweigh the important public interest in the freedom of the press to

[43] *Bergens Tidende and Others v. Norway* (App. no. 26132/95) 2 May 2000, para. 12.
[44] *Bergens Tidende and Others v. Norway* (App. no. 26132/95) 2 May 2000, para. 20.
[45] *Bergens Tidende and Others v. Norway* (App. no. 26132/95) 2 May 2000, para. 24.
[46] While the order was made in 1990, for a rough reference point, 900,000 Norwegian krone would be 92,000 euro in 2018.
[47] *Bergens Tidende and Others v. Norway* (App. no. 26132/95) 2 May 2000, para. 24.
[48] *Bergens Tidende and Others v. Norway* (App. no. 26132/95) 2 May 2000, para. 38.
[49] *Bergens Tidende and Others v. Norway* (App. no. 26132/95) 2 May 2000, para. 51.
[50] *Bergens Tidende and Others v. Norway* (App. no. 26132/95) 2 May 2000, para. 52.
[51] *Bergens Tidende and Others v. Norway* (App. no. 26132/95) 2 May 2000, para. 54.
[52] *Bergens Tidende and Others v. Norway* (App. no. 26132/95) 2 May 2000, para. 54.
[53] *Bergens Tidende and Others v. Norway* (App. no. 26132/95) 2 May 2000, para. 57.
[54] *Bergens Tidende and Others v. Norway* (App. no. 26132/95) 2 May 2000, para. 57.

impart information on matters of legitimate public concern," and the reasons relied upon by the Sate were "not sufficient to show that the interference complained of was 'necessary in a democratic society.'"[55] Therefore, the Court unanimously held there had been a violation of Article 10.

Notably, the Court in *Bergens Tidende and Others* did not explicitly respond to the applicants' submission that the damages and costs order was the "largest financial penalty ever imposed by a Norwegian court in a defamation case," and had a "chilling effect on the exercise of press freedom in Norway."[56] The Court did note the "substantial award of damages," and concluded there was "no reasonable relationship of proportionality between the restrictions placed and by the measures applied by the Supreme Court on the applicants' right to freedom of expression."[57] While in later judgments, the Court would specifically focus on the chilling effect of damages and costs orders in defamation cases,[58] in *Bergens Tidende and Others* the Court instead applied chilling effect reasoning in determining the standard of scrutiny to be applied under Article 10. The Court held that where measures taken by domestic authorities are "capable of discouraging the press from disseminating information on matters of legitimate public concern," the Court must apply "careful scrutiny" of the proportionality of the measures."[59] Similar to *Lingens*, this language of "discouraging the press," is similar to the chilling effect reasoning in *Goodwin*,[60] and *Wille,*[61] and the Court later states that the "measures" it is considering include "the substantial award of damages."[62] Thus, the main consequence of the chilling effect was on the standard of scrutiny to be applied. This focus on the standard of scrutiny is consistent with *Goodwin*, where because of the potential chilling effect of source disclosure orders, there must be an "overriding requirement in the public interest," with the "most careful scrutiny" by the Court.[63]

4.2.3 Disagreement emerges in *Nikula*

Two years after *Bergens Tidende and Others*, the Court for the first time explicitly used the chilling effect term in a judgment concerning defamation proceedings, namely *Nikula v. Finland*.[64] While *Lingens* and *Bergens Tidende and Others* had concerned journalists, *Nikula* actually concerned the prosecution of a defence lawyer for criminal defamation, initiated by a public prosecutor for criticism made during a trial. While the Court applied the chilling effect principle, it was in fact a third-part intervener in the case which included in its submissions to the Court that even relatively light criminal sanctions for defamation may serve to "chill even appropriate and measured criticism."[65]

The applicant was a lawyer in Kokkola, and in 1993, appeared as a defence counsel in criminal proceedings against I.S., who had been charged with aiding and abetting fraud and abusing a position of trust.[66] During the proceedings, the public prosecutor, T., had

[55] *Bergens Tidende and Others v. Norway* (App. no. 26132/95) 2 May 2000, para. 60.
[56] *Bergens Tidende and Others v. Norway* (App. no. 26132/95) 2 May 2000, para. 38.
[57] *Bergens Tidende and Others v. Norway* (App. no. 26132/95) 2 May 2000, para. 60.
[58] See, *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017.
[59] *Bergens Tidende and Others v. Norway* (App. no. 26132/95) 2 May 2000, para. 52.
[60] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 39 ("Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest.")
[61] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 50 ("had a chilling effect on the exercise by the applicant of his freedom of expression, as it was likely to discourage him from making statements of that kind in the future.")
[62] *Bergens Tidende and Others v. Norway* (App. no. 26132/95) 2 May 2000, para. 55.
[63] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 40.
[64] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002.
[65] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 23.
[66] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 10.

summoned a witness to testify, but the applicant objected to this on behalf of her client. Before the Kokkola City Court, she made a number of submissions, including that the "prosecutor's arrangement shows that he seeks, by means of procedural tactics, to make a witness out of a co-accused so as to support the indictment."[67] The applicant continued that "precedent disclosed unlawful behaviour similar to that of the prosecutor in the present case," and the prosecutor had "committed role manipulation, thereby breaching his official duties."[68]

The public prosecutor, T., initiated a private prosecution against the applicant for criminal defamation, under Chapter 27 of Finland's Penal Code. In 1994, the Court of Appeal convicted the applicant of public defamation committed "without better knowledge, i.e. negligent defamation,"[69] and sentenced her to a fine of 716 euro, ordered her to pay 505 euro in damages to the prosecutor, 1,345 for his costs, and pay 50 euro in costs to the State.[70] The Court of Appeal held that the applicant had alleged that T. had, in assessing who should be charged in the case, "deliberately abused his discretion and thereby breached his official duties," which was "defamatory in nature and capable of subjecting [T.] to contempt or of hampering the exercise of his official duties or career."[71] Two years later, the Supreme Court upheld the Court of Appeal's reasons, but set aside the applicant's sentence, considering that her offence had been minor in nature: the fine imposed was lifted, but the obligation to pay damages and costs was upheld.[72]

The applicant made an application to the European Court, arguing that her conviction for defaming the prosecutor had violated her Article 10 right "to express herself freely in her capacity as defence counsel."[73] The Court first laid down a number of general principles relating to a lawyer's freedom of expression, including that lawyers are "certainly entitled to comment in public on the administration of justice."[74] The Court then examined the statements at issue, and noted that "it is true that the applicant accused prosecutor T. of unlawful conduct."[75] However, the Court also noted that the criticism was directed at the "prosecution strategy purportedly chosen" by the prosecutor, and "was strictly limited to T.'s performance as prosecutor in the case."[76] The Court held that in that "procedural context," the prosecutor "had to tolerate very considerable criticism by the applicant in her capacity as defence counsel."[77] The Court also noted that there was no indication the prosecutor "requested the presiding judge to react to the applicant's criticism."[78]

Finally, the Court had regard to the sanctions imposed on the applicant, and noted that the applicant was convicted "merely of negligent defamation," the Supreme Court had "waived her sentence, considering the offence to have been minor in nature," and "the fine imposed on her was therefore lifted."[79] However, the Court also noted that "her obligation to pay damages and costs remained."[80] The Court held that, even so, the "threat of an ex post facto review of counsel's criticism of another party to criminal proceedings is difficult to

[67] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 10.
[68] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 10.
[69] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 17.
[70] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 17.
[71] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 17.
[72] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 18.
[73] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 29.
[74] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 46.
[75] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 51.
[76] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 51.
[77] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 51.
[78] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 51.
[79] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 54.
[80] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 54.

reconcile with defence counsel's duty to defend their clients' interests zealously."[81] It followed, according to the Court, that it should be counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a counsel's argument "without being influenced by the potential 'chilling effect' of even a relatively light criminal penalty or an obligation to pay compensation for harm suffered or costs incurred."[82] Because of this potential chilling effect, the Court held that it was only in "exceptional cases" that restrictions, "even by way of a lenient criminal penalty," of defence counsel's freedom of expression can be accepted as necessary in a democratic society.[83] In light of these considerations, the Court held the applicant's conviction and ordering her to pay damages and costs was not proportionate to the legitimate aim sought to be achieved, in violation of Article 10.[84]

For the Court in *Nikula*, a defence counsel's freedom of expression must not be affected by any potential chilling effect which flows from the fear of even a light criminal penalty, a compensation order or costs order. Because of the Court's concern for the chilling effect in *Nikula,* the Court fashioned a strict test for when restrictions may be imposed on a lawyer's freedom of expression: the test being only in exceptional cases. While the Court did not cite prior case law on the chilling effect point, the Court spoke about the *potential* chilling effect, which was the phrase used in *Goodwin*.[85] In *Goodwin*, the consequence of the application of the chilling effect was similarly the fashioning of a strict test for restriction on the protection of journalistic sources: an overriding requirement in the public interest.[86]

Notably, two judges dissented in *Nikula*, and disagreed with the majority that there had been a chilling effect. The dissenting opinion pointed out that the proceedings had been "whittled down to the mere payment of damages and costs," and "[n]o mention was made in the criminal records."[87] It followed, according to the dissent, that "it could hardly be argued that the decision complained of was such as to jeopardise the applicant's future career."[88] The dissent was arguing that the sanctions imposed, namely payment of damages and costs, and no criminal record, meant there was insufficient evidence for a chilling effect on the individual applicant, and any broader potential chilling effect on freedom of expression in the future, was not relevant.

This was the first time this evidence-based argument for rejecting application of the chilling effect was employed in a judgment concerning defamation proceedings, and it would resurface in the next Chamber judgment issued by the Court on criminal defamation in *Cumpănă and Mazăre v. Romania*.[89] The dissent's view was similar to the Chamber majority in *Cumpănă and Mazăre*, where it was held that the sanctions imposed on a journalist did not have a chilling effect, as there the sanctions "had no practical consequences,"[90] and the journalist "continued to work for the T. newspaper."[91]

However, as was discussed in the previous chapter, the subsequent Grand Chamber judgment in *Cumpănă and Mazăre* departed from this view, holding that is instead crucial to

[81] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 54.
[82] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 54.
[83] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 55.
[84] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 56.
[85] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 39.
[86] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 39.
[87] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002 (Dissenting opinion of Judges Caflisch and Pastor Ridruejo, para. 7).
[88] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002 (Dissenting opinion of Judges Caflisch and Pastor Ridruejo, para. 7).
[89] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003.
[90] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 59.
[91] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 59.

have regard to the chilling effect that the "fear" of sanctions has on the exercise of journalistic freedom of expression more generally.[92] Notably, the dissent in *Nikula* provided no authority when discussing the sanctions. Equally, the majority had provided no authority when discussing the chilling effect. This type of argument was also seen in Chapter 2's discussion of the Grand Chamber judgment in *Delfi*,[93] and in Chapter 3 in its discussion of *Ostade Blade*,[94] where the Court sought evidence of a chilling effect, but concluded that there was none.

4.2.4 Second Section seeks evidence for a chilling effect

Nikula had concerned a lawyer's freedom of expression and a criminal prosecution for defamation, with the resultant disagreement over the chilling effect. This disagreement continued to the realm of journalistic freedom of expression, and the case was the seven-judge Chamber judgment in *Cumpănă and Mazăre v. Romania*,[95] which was the precursor to the later Grand Chamber judgment.[96] As mentioned earlier,[97] the applicants in *Cumpănă and Mazăre* were two journalists who had been convicted of criminal defamation, and sentenced to seven months' imprisonment, and prohibited from "working as journalists" for one year.[98] However, the applicants did not serve their prison sentence, as it had been immediately suspended,[99] and the President of Romania granted the applicants a pardon "in respect of their custodial sentence" a year later.[100]

The applicants made an application to the European Court, claiming that their convictions violated Article 10, with the applicants employing chilling effect reasoning to the effect that the prosecution was "intended to intimidate their newspaper," and the "Romanian press in general."[101] In 2003, the Court's Second Section delivered its Chamber judgment, and held that there had been *no* violation of Article 10. The Court found that the article and cartoon made "unsubstantiated accusations" of criminal conduct,[102] and insinuated "an extramarital affair.[103] In addition, the Court held that while the sanctions imposed were "harsh,"[104] the Court held they were not disproportionate as the applicants "did not serve their custodial sentence, being granted a pardon."[105] The Court also noted that it "appears from the evidence" that the prohibition on practising as journalists "had no practical consequences,"[106] as the second applicant "continued to work for the T. newspaper", and the first applicant

[92] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114.
[93] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 161 ("it does not appear that the applicant company had to change its business model," and the number of comments "has continued to increase."
[94] *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (admissibility decision), para. 72 ("nor has the applicant foundation suggested that it, its informants and contributors or its readership suffered as a result.")
[95] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 56.
[96] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber).
[97] See Section 2.4.2 above.
[98] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 37.
[99] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 31.
[100] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 35.
[101] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 41.
[102] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 55.
[103] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 56.
[104] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 56.
[105] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 59.
[106] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 59.

leaving his post "was due not to the prohibition on his working as a journalist but to staff cutbacks."[107] Notably, there was no mention of a chilling effect by the majority.

However, the two dissenting judges, Judge Jean-Paul Costa and Judge Wilhelmina Thomassen, found a violation of Article 10, and argued that "sentencing the applicants to imprisonment was in itself excessive."[108] While the sentences were pardoned, for more than a year they "hung over the applicants' heads like the sword of Damocles."[109] The approach of the Court majority in *Cumpănă and Mazăre*, where it examines the "evidence" for a chilling effect, but concludes that there have been "no practical consequences" for the individual applicants, is similar to that in a case such as *Delfi*,[110] where the applicant news website did not have "to change its business model," and "according to the information available," the number of reader comments "continued to increase."[111] In contrast, the dissent in *Cumpănă and Mazăre* found a violation of Article 10, and argued that a pardon is a "discretionary favour dependent on a prerogative order," and "does not erase their conviction."[112] Moreover, the dissent invoked chilling effect reasoning, arguing that the sentence "hung over the applicants' heads like the sword of Damocles," and the penalties had "serious implications in terms of freedom of the press."[113]

4.3 The Grand Chamber worries about future risk of the chilling effect

In 2003 a five-judge panel of the Court's Grand Chamber accepted a request from the applicants in *Cumpănă and Mazăre* that the case be referred to the Grand Chamber,[114] and in December 2005, the 17-judge Grand Chamber delivered its judgment.[115] Given the disagreement in the Second Section over whether the Court should seek evidence of the "practical consequences" when considering if a sanction had a chilling effect, there was an opportunity for the Grand Chamber to signal its positon. In this regard, and as mentioned in Chapter 2, the Grand Chamber judgment in *Cumpănă and Mazăre* unanimously found that there had been a violation of Article 10,[116] and laid down significant principles concerning the chilling effect.

For the first time by the Grand Chamber, the Court recognised that the "protection of reputation" is a "right," which, "as an aspect of private life, is protected by Article 8 of the Convention."[117] And in this regard, the Grand Chamber agreed with the Chamber judgment that the Romanian courts' findings concerning defamation "met a 'pressing social need'" under Article 10,[118] and "may have been justified by the concern to restore the balance between the various competing interests at stake."[119] The Court had particular regard to the fact the applicants had "failed to adduce evidence at any stage of the [domestic] proceedings

[107] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 59.
[108] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003 (Joint dissenting opinion of Judges Costa and Thomassen, para. 7).
[109] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003 (Joint dissenting opinion of Judges Costa and Thomassen, para. 7).
[110] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber).
[111] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 161.
[112] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003 (Joint dissenting opinion of Judges Costa and Thomassen, para. 7).
[113] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003 (Joint dissenting opinion of Judges Costa and Thomassen, para. 7).
[114] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 10.
[115] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber).
[116] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 122.
[117] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 91.
[118] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 110.
[119] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 120.

to substantiate their allegations or provide a sufficient factual basis for them."[120] However, the Court then went on to examine the "proportionality of the sanction," and under this heading, introduced the concept of the chilling effect into the equation.

The Court held the investigative journalists "are liable to be inhibited from reporting on matters of general public interest," if they run the "risk" of being sentenced to imprisonment or to a prohibition on the exercise of their profession.[121] The Court stated that the "chilling effect that the fear of such sanctions has on the exercise of journalistic freedom of expression is evident," with the Court citing *Wille*, *Nikula* and *Goodwin* as authority for this proposition.[122] This chilling effect "works to the detriment of society as a whole," and is a "factor which goes to the proportionality," of the sanctions imposed.[123] The Court accepted that sentencing was "in principle a matter for the national courts," however it introduced an important caveat: the imposition of prison sentences for a press offence will be compatible with Article 10 only in "exceptional circumstances," such as for hate speech or incitement to violence.[124]

The Court then applied this chilling effect principle to the sanctions imposed, and held that the circumstances of the case, namely "a classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest," presented "no justification whatsoever for the imposition of a prison sentence."[125] This was because such a sanction, "by its very nature, will have a chilling effect."[126] Notably, the Court found that it was irrelevant "that the applicants did not serve their prison sentence," because the pardons were "discretionary," and did not "expunge their conviction."[127] Moreover, the Court also admitted that the sanction prohibiting the applicants from working as journalists did not appear to have "any significant practical consequences," it was nonetheless "particularly severe and could not in any circumstances have been justified."[128] Thus, the Grand Chamber unanimously[129] concluded that the "criminal sanction and the accompanying prohibitions" went beyond what would have amounted to a "necessary" restriction on the applicants' freedom of expression.[130]

It is worth pausing for a moment to consider the Grand Chamber's chilling effect principle. First, it seemed to have been a rejection of the Second Section majority's judgment that it was crucial to have regard to the evidence that the sanctions "had no practical consequences."[131] In contrast, the Grand Chamber approved the principle that it is instead crucial to have regard to the chilling effect that the *fear* of such sanctions has on the exercise of journalistic freedom of expression more generally.[132] Second, and similar to *Goodwin*, the Court in *Cumpănă and Mazăre* relied upon the chilling effect in laying down an "exceptional circumstances" test: in *Goodwin*, the Court held that an order for source disclosure was only compatible with Article 10 if "justified by an overriding requirement in the public

[120] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 104.
[121] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 113.
[122] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114.
[123] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114.
[124] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 115.
[125] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 116.
[126] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 116.
[127] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 116.
[128] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 118.
[129] The Romania judge, Judge Bîrsan, switched his vote in the Grand Chamber, but did not write a separate opinion explaining his changed vote.
[130] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 120-121.
[131] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 59.
[132] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114.

interest;"[133] and similarly in *Cumpănă and Mazăre*, the Court held that a prison sentence for a press offence was only compatible with Article 10 in "exceptional circumstances."[134]

The significance of the holding in *Cumpănă and Mazăre* is apparent when we consider that the Court effectively removed the option from domestic authorities of imposing prison sentences on the press for defamatory and insulting remarks, so long as the subject matter is a debate of public interest. The basis for this holding was that the threat of imprisonment creates a chilling effect generally on journalistic freedom of expression, "which works to the detriment of society as a whole."[135] Thus, the Court considered that it was legitimate to take into account the deterring effect a threat of imprisonment might have on *other* individuals in the *future* wishing to express themselves on a debate of public interest. Moreover, the Court's reasoning seems to admit that it will tolerate future attacks on reputation as a necessary cost, so as to ensure that no future debate on matters of public interest is "chilled" or "deterred" due to a fear of sanctions. This is because, as the Court itself recognises, prison sentences would have a higher likelihood of deterring defamatory expression.

Notably, on the same day as *Cumpănă and Mazăre* was delivered, the Grand Chamber delivered a second judgment concerning journalistic freedom of expression, defamation and the chilling effect. The case was *Pedersen and Baadsgaard v. Denmark*,[136] and at the outset, it is worth noting that the Court, unlike in *Cumpănă and Mazăre,* was not unanimous, and divided nine-votes-to-eight in finding *no* violation of Article 10. As mentioned earlier,[137] the applicants were two television journalists who had been convicted of defaming a police chief superintendent, which was ultimately upheld on appeal by the Supreme Court. The journalists were each sentenced to twenty day-fines of 400 Danish krone (or twenty days' imprisonment in default), and ordered to pay compensation of 100,000 Danish krone to the estate of the deceased chief superintendent.[138]

The applicants made an application to the European Court, and in 2003, the Court's First Section found there had been no violation of Article 10, by four-votes-to-three.[139] Notably, neither the majority nor the dissent mentioned the chilling effect, and it was not until the Grand Chamber considered the case in its 2004 judgment that the chilling effect featured.[140] The Grand Chamber first noted that the applicants were not convicted for "criticising the conduct of the police," but rather on "a much narrower ground, namely for making a specific allegation against a named individual."[141] The Court held that the accusation against the chief superintendent, "although made indirectly and by way of a series of questions, was an allegation of fact susceptible of proof," and the applicants "never endeavoured to provide any justification for their allegation, and its veracity has never been proved."[142] The Court majority concluded that the applicants "lacked a sufficient factual basis for the allegation, made in the television programme broadcast on 22 April 1991, that the named chief superintendent had deliberately suppressed a vital piece of evidence in the murder case," and consequently the Danish authorities were "entitled to consider that there

[133] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 39.
[134] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 115.
[135] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114.
[136] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber).
[137] See Section 2.4.2 above.
[138] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 37.
[139] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 19 June 2003.
[140] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber).
[141] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 72.

was a "pressing social need" to take action under the applicable law in relation to that allegation."[143]

Finally, and notably, the Court, similar to *Cumpănă and Mazăre*, examined the "nature and severity of the penalty imposed."[144] The Court noted that the journalists were sentenced to the twenty day-fines (equivalent of 1,078 euros), and order to pay compensation (equivalent of 13,469 euros), and concluded that it did "not find these penalties excessive in the circumstances or to be of such a kind as to have a 'chilling effect' on the exercise of media freedom."[145] Similar to *Cumpănă and Mazăre*, the Court cited *Wille*, and *Nikula*.[146] However, the Court majority did not elaborate further on the chilling effect, and confined itself to holding that it did "not find these penalties excessive in the circumstances or to be of such a kind as to have a 'chilling effect' on the exercise of media freedom."[147]

It does seem curious how little the Court in *Pedersen and Baadsgaard* had to say about the chilling effect, given that the judgment involved "journalistic freedom,"[148] broadcasts reporting on "matters of public interest,"[149] targeting "civil servants acting in an official capacity,"[150] journalists convicted of criminal defamation, and carrying a risk of "twenty days' imprisonment in default" of criminal fines.[151] Notably, the Court in *Pedersen and Baadsgaard* relied upon paragraph 54 of *Nikula* as authority for the proposition that the sanctions did not have a chilling effect on the exercise of media freedom.[152] However, it is arguable that *Nikula* may point in the opposite direction, given that in *Nikula* what created the chilling effect was the "obligation to pay compensation for harm suffered or costs incurred," where the fine had been "lifted," and the sentence "waived."[153] In contrast, in *Pedersen and Baadsgaard,* the journalists were sentenced to fines, ordered to pay compensation, and carried the risk of "twenty days' imprisonment in default."[154]

It is difficult to see why the Court in *Pedersen and Baadsgaard* was hesitant in applying the chilling effect reasoning it had applied in *Cumpănă and Mazăre*, and indeed, *Nikula*. While it may only be speculation, it can be suggested that given the close vote, namely nine votes to eight, the Court in *Pedersen and Baadsgaard* was not able to form a majority of judges to agree upon including the chilling effect reasoning in the majority judgment.

4.4 The application of *Cumpănă and Mazăre* and the chilling effect

While there may be disagreement over the application of the chilling effect in *Pedersen and Baadsgaard*, the fact remains that in December 2004, the Grand Chamber of the Court delivered two judgments (*Pedersen and Baadsgaard* and *Cumpănă and Mazăre*) concerning journalistic freedom and criminal defamation, and applied chilling effect reasoning in both

[143] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 92.
[144] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 93.
[145] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 93.
[146] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 93, citing *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 50, and *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 54.
[147] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 93.
[148] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 71.
[149] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 72.
[150] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 80.
[151] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 33.
[152] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 93.
[153] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 54.
[154] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 33.

judgments. This would result in a line of cases applying the chilling effect principle where the Court considered defamation proceedings and freedom of expression.

4.4.1 Prison sentences and the chilling effect

Two years after *Cumpănă and Mazăre*, the First Section was presented with an opportunity to apply *Cumpănă and Mazăre* where a political candidate had received a *suspended* prison sentence following a conviction for criminal defamation over statements targeting a public official during a debate of public interest. The case was *Malisiewicz-Gąsior v. Poland*,[155] and the applicant was a candidate in the Polish parliamentary elections in 2003. She published an article in the weekly newspaper *Angora*, and the article set out the reasons for the applicant's candidature, and also targeted the Deputy Speaker of the Polish parliament, Andrzej Kern, for having initiated failed criminal proceedings against the applicant. In the *Angora* article, the applicant alleged the Deputy Speaker had influenced the proceedings against her, and that, "directed by emotions and personal animosities, [he] made the persons responsible for respecting the law – the Regional Prosecutor and his Deputy, and even the Minister of Justice - breach the law because of 'the solidarity of colleagues'."[156]

The Deputy Speaker initiated a private bill of indictment against the applicant for defamation. The Skierniewice District Court convicted the applicant of defamation for the statement above. The Court found as unsubstantiated the allegation that Mr. Kern suggested, ordered, or in other manner "made the prosecutor to give decision to detain the applicant on remand".[157] The applicant was sentenced to one year's imprisonment, suspended for three years. She was ordered to pay for the publication of the judgment in one national newspaper, and the announcement containing her apologies in the weekly *Angora*. Moreover, the applicant was ordered to reimburse the private prosecutor 480 Polish złoty (180 euro) for costs, and to pay a 90 złoty (17 euro) fee to the State Treasury. The conviction was ultimately upheld by the Court of Cassation.

Following the applicant's failure to apologise to the Deputy Speaker, there were two further hearings in the Skierniewice District Court in late 2000 on the enforcement of the applicant's prison sentence over the failure to apologise. However, the Skierniewice District Court decided not to enforce the suspended prison sentence imposed on the applicant.[158]

The applicant subsequently made an application to the European Court, claiming her conviction for defamation violated her right to freedom of expression under Article 10. The main question for the Court was whether the conviction had been necessary in a democratic society. The Court first reiterated that "very strong reasons" are required to justify restrictions on political speech,[159] and there is "little scope" under Article 10 for restrictions on political speech or on debate on questions of public interest.[160] Applying chilling effect reasoning, the Court noted that allowing broad restrictions on political speech in "individual cases" would affect respect for the freedom of expression "in general in the State concerned."[161] The Court then reviewed the domestic courts' decisions.

The Court considered that the applicant's allegations of abuse of power were not a "gratuitous personal attack," but were "part of a political debate."[162] The Court also

[155] *Malisiewicz-Gąsior v. Poland* (App. no. 43797/98) 6 April 2006.
[156] *Malisiewicz-Gąsior v. Poland* (App. no. 43797/98) 6 April 2006, para. 23.
[157] *Malisiewicz-Gąsior v. Poland* (App. no. 43797/98) 6 April 2006, para. 30.
[158] *Malisiewicz-Gąsior v. Poland* (App. no. 43797/98) 6 April 2006, para. 43.
[159] *Malisiewicz-Gąsior v. Poland* (App. no. 43797/98) 6 April 2006, para. 66.
[160] *Malisiewicz-Gąsior v. Poland* (App. no. 43797/98) 6 April 2006, para. 57.
[161] *Malisiewicz-Gąsior v. Poland* (App. no. 43797/98) 6 April 2006, para. 66.
[162] *Malisiewicz-Gąsior v. Poland* (App. no. 43797/98) 6 April 2006, para. 66

considered that even if some of the statements contained "harsh words," they were made against a "well-known politician in regard to whom the limits of acceptable criticism are wider than as regards a private individual."[163] Notably, the Court held that neither the first-instance nor the appellate courts "took into account the fact that Mr Kern, being a politician, should have shown a greater degree of tolerance towards criticism."[164] According to the Court, the domestic courts therefore "cannot be considered as having applied the standards embodied in Article 10" and the Court's case-law.[165]

Finally, the Court turned to the "nature and severity of the penalty," and noted that the applicant had been sentenced to a prison term of one year suspended for three years. The government argued that the applicant "did not suffer any prejudice since the prison sentence had not been enforced."[166] However, the Court rejected the argument, and held that "what matters here is not that her sentence was not enforced," but that the applicant "was convicted at all."[167] Moreover, it did not "expunge her conviction and [did] not quash the applicant's criminal record."[168] The Court then applied the *Cumpănă and Mazăre* chilling effect principle, holding that the "circumstances of the instant case," namely "defamation of a politician in the context of a heated political debate," present "no justification for the imposition of a prison sentence."[169] This was because the conviction of the applicant "must have had 'a chilling effect' on the freedom of expression in public debate in general."[170] In conclusion, the Court unanimously held that there had been a violation of Article 10.

Malisiewicz-Gąsior stands for the proposition that defamation of a politician in the context of a political debate presents no justification for the imposition of a prison sentence, even where the sentence is not enforced, because of the chilling effect on freedom of expression in public debate *in general*.[171] The Court in *Malisiewicz-Gąsior* also applied similar chilling effect reasoning earlier in the judgment, finding that allowing restrictions on political speech in *individual* cases would affect respect for the freedom of expression *in general*.

4.4.2 Criminal proceedings and the chilling effect

The *Cumpănă and Mazăre* chilling effect principle concerning the chilling effect of the fear of criminal sanction and proceedings was a consequence of a subtle trend discernible from the Court's case law dating back to *Castells v. Spain* in 1992.[172] This trend hinted at a questioning of the actual validity of the use of the criminal law, in and of itself, as a means of punishing defamation and insult, in certain circumstances. In *Castells*, an opposition politician had been convicted of insulting the Spanish government, having denounced government involvement in right-wing extremist violence in the Basque Country. The Court found a violation of Article 10, and held as a matter of principle that because of the "dominant position" the government occupies, it must "display restraint" when resorting to criminal proceedings, especially when other means are available for replying to attacks.[173] Of note, the Court stated: "[n]evertheless it remains open to the competent State authorities to

[163] *Malisiewicz-Gąsior v. Poland* (App. no. 43797/98) 6 April 2006, para. 66.
[164] *Malisiewicz-Gąsior v. Poland* (App. no. 43797/98) 6 April 2006, para. 67.
[165] *Malisiewicz-Gąsior v. Poland* (App. no. 43797/98) 6 April 2006, para. 67.
[166] *Malisiewicz-Gąsior v. Poland* (App. no. 43797/98) 6 April 2006, para. 68.
[167] *Malisiewicz-Gąsior v. Poland* (App. no. 43797/98) 6 April 2006, para. 68.
[168] *Malisiewicz-Gąsior v. Poland* (App. no. 43797/98) 6 April 2006, para. 68.
[169] *Malisiewicz-Gąsior v. Poland* (App. no. 43797/98) 6 April 2006, para. 68.
[170] *Malisiewicz-Gąsior v. Poland* (App. no. 43797/98) 6 April 2006, para. 68.
[171] *Malisiewicz-Gąsior v. Poland* (App. no. 43797/98) 6 April 2006, para. 68.
[172] *Castells v. Spain* (App. no. 11798/85) 23 April 1992.
[173] *Castells v. Spain* (App. no. 11798/85) 23 April 1992, para. 46.

adopt, in their capacity as guarantors of public order, measures, even of a criminal law nature, intended to react appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith."[174] The Court seemed to be holding that the criminal law should only be used in response to defamatory statements in very narrowly defined circumstances, namely when the statements are devoid of a foundation, or made in bad faith.

One of the most important subsequent judgments to deal with the compatibility of a criminal conviction and Article 10, was *Lopes Gomes da Silva v. Portugal* in 2000.[175] The applicant newspaper manager had been convicted of libel for an editorial describing the views of a political candidate as "grotesque", "buffoonish" and "coarse anti-Semitism." The journalist was fined a relatively small sum, with the Court admitting that the fine was "minor," however, it went to hold: "[c]ontrary to the Government's affirmation, what matters is not that the applicant was sentenced to a minor penalty, but that he was convicted at all," and the journalist's conviction was "not therefore reasonably proportionate to the pursuit of the legitimate aim, having regard to the interest of a democratic society in ensuring and maintaining the freedom of the press."[176]

The holding in *Lopes Gomes da Silva* was based upon the 1994 Grand Chamber judgment in *Jersild v. Denmark*, where the Court had made it clear that "the Court does not accept the Government's argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted."[177] It is clear that there were no arguments made in *Castells*, *Lopes Gomes da Silva* nor in *Jersild* that the use of criminal law *per se* was incompatible with Article 10, and the European Court never explicitly said as much. However, the holding in *Lopes Gomes da Silva* was applied in a line of subsequent case law, where the Court held various criminal convictions imposed on journalists, in and of themselves, violated Article 10.[178]

Thus, it was arguable that the trajectory of such judgments was towards a finding that the very use of the criminal law as a response to an attack on reputation within the context of a public debate, violated Article 10, particularly in light of the chilling effect principle developed in *Cumpănă and Mazăre*. Indeed, two weeks after the Court's judgment in *Malisiewicz-Gąsior*, the Court in *Raichinov v. Bulgaria*,[179] cited *Cumpănă and Mazăre* as authority for the proposition that while the use of criminal proceedings to protect reputation did not automatically contravene Article 10, such proceedings would only be proportionate "in certain grave cases - for instance in the case of speech inciting violence," and would depend upon whether the authorities could have used other means, such as civil or disciplinary remedies.[180] This holding, in particular the "grave cases" language, seemed to extend the *Cumpănă* chilling effect principle to the actual use of the criminal law to protect reputation, and had echoes of the *Castells* judgment.

The *Cumpănă and Mazăre* chilling effect principle was again applied three months later in *Lyashko v. Ukraine*,[181] where the applicant was editor-in-chief of the Ukrainian daily newspaper *Polityka*, and published a number of articles concerning the acting Prime Minister of Ukraine, and an Odessa police chief. The firsts two articles described the dismissal of the President of the Black Sea Shipping Company, a State-owned company, and alleged the

[174] *Castells v. Spain* (App. no. 11798/85) 23 April 1992, para. 46.
[175] *Lopes Gomes da Silva v. Portugal* (App. no. 37698/97) 28 September 2000.
[176] *Lopes Gomes da Silva v. Portugal* (App. no. 37698/97) 28 September 2000.
[177] *Jersild v. Denmark* (App. no. 15890/89) 23 September 1994, para. 35.
[178] See, for example, *Urbino Rodrigues v. Portugal* (App. no. 75088/01) 29 November 2005; *Roseiro Bento v. Portugal* (App. no. 29288/02) 18 April 2006; and *Standard Verlags GmbH and Krawagna-Pfeifer v. Austria* (App. no. 19710/02) 2 November 2006.
[179] *Raichinov v. Bulgaria* (App. no. 47579/99) 20 April 2006.
[180] *Raichinov v. Bulgaria* (App. no. 47579/99) 20 April 2006, para. 50.
[181] *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006.

acting Prime Minister dismissed the company president "because of his involvement in financing the *Polityka*."[182] The articles also alleged that the acting Prime Minster had personally instructed the General Prosecutor to institute criminal proceedings against the applicant.[183] The third and fourth articles concerned General G., the Chief of the Odessa Regional Police Department, and concerned the "alleged relationship" between General G. and a certain Mr S., "who was reported to have been involved in criminal activity."[184]

Following publication of the articles, the General Prosecutor's Office charged the applicant with "intentional defamation in print" and an "unfounded accusation of committing a serious crime."[185] In 2001, following two judgments on jurisdiction, the Minsky District Court of Kyiv convicted the applicant of intentional defamation in print and an unfounded accusation of committing a grave offence, and was sentenced to two years' imprisonment on probation, and a two-year prohibition on occupying posts involving media management.[186] The Court held that the applicant published "intentionally false and malicious statements to the effect that Mr Durdynets had persecuted the *Polityka*, had unlawfully dismissed Mr Stoginenko for his financing the newspaper and had summoned the General Prosecutor to his office with a view of giving him an order to institute criminal proceedings against the applicant."[187] Further, the Court also held that the applicant had "intentionally defamed the law enforcement agencies of Ukraine by publishing libellous and false information regarding General G., namely that Mr S. was involved in criminal activity and that Mr G. had had illegal links with this person."[188] However, in 2001, the Kyiv City Court of Appeal quashed the applicant's sentence for intentional defamation in print and an unfounded accusation of committing a grave offence as these offences had been decriminalised by the new Criminal Code adopted in 2001, and the applicant was exempted from punishment for abuse of office, on account of expiry of the statutory limitation period.[189]

The applicant made an application to the European Court, claiming that his trial and conviction violated his right to freedom of expression under Article 10. However, the government argued that the applicant could not claim to be a "victim" under Article 34, as the charges were "dismissed on appeal and the applicant received no criminal record," and as such, "neither his professional life nor his freedom of expression was impaired by the criminal proceedings in issue."[190] The Court rejected the argument, and applying the chilling effect principle, held that although the applicant was "exempted from punishment," the domestic court decisions "gave a strong indication to the applicant that the authorities were displeased with the publications and that, unless he modified his behaviour in future, he would run the risk of being prosecuted again."[191] Therefore, the applicant could claim to be a victim of a violation of the Convention.

The main question the Court posed was whether the interference, in the form of a five-year long trial, and a conviction for defaming an acting Prime Minister and a high-ranking police official, and abusing power (but had not been punished as the former offence was decriminalised, and the latter one was time barred) was necessary in a democratic society.[192] The Court unanimously found that there had been a violation of Article 10.

[182] *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006, para. 7.
[183] *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006, para. 8.
[184] *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006, para. 9.
[185] *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006, para. 11.
[186] *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006, para. 17.
[187] *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006, para. 14.
[188] *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006, para. 15.
[189] *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006, para. 18.
[190] *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006, para. 30.
[191] *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006, para. 32.
[192] *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006, para. 32.

Notably, the Court first held that because of the "dominant position which the Government occupies," this "makes it necessary for it to display restraint in resorting to criminal proceedings."[193] The Court held that the applicant's assertions that the dismissal was "unlawful and caused by personal bias on the part of Mr Durdynets" were value judgments used in the course of public debate which are not susceptible of proof."[194] Moreover, the Court held that the articles were "framed in a particularly strong terms," however, having regard to the fact that they were "written on matters of serious public interest and concerned public figures and politicians," the Court held that the language used "cannot be regarded as excessive."[195]

Finally, the Court examined the nature and severity of the penalty imposed, and held that the applicant's conviction and sentence to two years' imprisonment and a prohibition on occupying posts in media management, imposed following a trial lasting several years could have had a considerable "chilling effect" on the applicant's freedom of expression."[196] The Court found that the chilling effect on freedom of expression had not been "substantially mitigated," because the applicant had not been punished because of procedural reasons, and partly due to the decriminalisation of the imputed offence."[197] The Court therefore concluded that there had been a violation of Article 10.

The *Lyashko* judgment was quite significant, in that the Court applied chilling effect reasoning not only in relation to the conviction and sentence, but in relation to the question of whether the applicant could claim to be victim of a violation, even where the applicant was "eventually exempted from punishment."[198] The Court in *Lyashko* also applied the principle that because of the dominant position of the government, it must display restraint in resorting to criminal proceedings.[199] This principle had a long history in Article 10 case law, having been first applied in *Castells*,[200] (and later by the Grand Chamber),[201] where a journalist had been prosecuted for insulting the Spanish government. The Court in *Lyashko* was thus fusing the chilling effect principle with the *Castells* principle.

Following *Lyashko*, the next judgment concerning criminal defamation proceedings and considering the chilling effect was *Krasulya v. Russia*,[202] delivered in 2007. The applicant was editor-in-chief of a regional newspaper *Noviy Grazhdanskiy Mir*, and in 2002, the newspaper published an editorial concerning the then-governor of the Stavropol region, Governor Chernogorov. The article alleged that the decision by a majority of members of the Stavropol town legislative body to change the procedure of appointment of the town's mayor was taken under pressure from Mr Chernogorov. In particular, the article stated that "each

[193] *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006, para. 41.
[194] *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006, para. 50.
[195] *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006, para. 56.
[196] *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006, para. 57.
[197] *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006, para. 57.
[198] *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006, para. 32.
[199] *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006, para. 41.
[200] *Castells v. Spain* (App. no. 11798/85) 23 April 1992, para. 46 ("the dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media."). It was also applied in *Raichinov v. Bulgaria* (App. no. 47579/99) 20 April 2006, para. 51 (the Court reiterates that the dominant position which those in power occupy makes it necessary for them to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified criticisms of their adversaries."); and *Dyuldin and Kislov v. Russia* (App. no. 25968/02) 31 July 2007, para. 45 ("the dominant position which the government occupies makes it necessary for it to display restraint in resorting to libel proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.").
[201] For example, see *Ceylan v. Turkey* (App. no. 23556/94) 8 July 1999 (Grand Chamber), para. 34.
[202] *Krasulya v. Russia* (App. no. 12365/03) 22 February 2007.

member of the legislature has been caught in a web of sale-and-purchase transactions. We can only speculate what wonders they will be promised by Chernogorov's representatives. One thing is sure, nobody will offer the legislators more than the governor himself."[203]

Following publication of the editorial, the prosecutor's office of the Stavropol Region granted a request of Governor Chernogorov, and initiated criminal proceedings against the applicant for dissemination of defamatory statements in the mass media. In 2002, the Oktyabrskiy District Court of Stavropol found the applicant guilty of defamation. The Court held that the above statements "accuse the governor Chernogorov of bribing the members of the legislature for adoption of a desired decision."[204] The applicant was given a suspended sentence of one year's imprisonment, conditional on six months' probation.[205] The Criminal Division of the Stavropol Regional Court ultimately upheld the conviction on appeal.

The applicant made an application to the European Court, claiming a violation of his right of freedom of expression. The principal question for the Court was whether the conviction had been necessary in a democratic society. The Court first applied *Lingens*, noting that the applicant's criticism was "directed against the regional governor Mr Chernogorov, a professional politician in respect of whom the limits of acceptable criticism are wider than in the case of a private individual."[206] Second, the Court noted that the Russian courts characterised the applicant's statements as "statements of fact and found him liable for his failure to show the veracity of those allegations."[207] In this regard, the Court held that the applicant's statement were a "fair comment on an important matter of public interest," and were based on "sufficient facts."[208] The Court stated that it was undisputed that the governor attended the session of the town legislature and endeavoured to persuade the lawmakers to vote for a law abolishing mayoral elections in the town; and according to the European Court, this constituted a "sufficient factual basis for the applicant's allegations that the governor and his aides had interfered with the legislative process."[209] The article was "strongly worded," but did not resort to "offensive or intemperate language and did not go beyond the generally acceptable degree of exaggeration or provocation."[210]

Finally, the Court examined the nature and severity of the penalties imposed. The Court noted that the applicant was convicted and sentenced to one year's imprisonment in criminal proceedings, and the sentence was suspended, on the condition that he did not commit any further offence in his capacity as editor within six months.[211] The Court applied chilling effect reasoning, and held that although the sentence was suspended, the applicant was "faced with the threat of imprisonment," and the sentence condition had a "chilling effect on the applicant by restricting his journalistic freedom and reducing his ability to impart information and ideas on matters of public interest."[212] The sentence was thus "disproportionately severe," and in light of all the considerations, the conviction was not compatible with the principles embodied in Article 10, in violation of Article 10.[213]

Krasulya continued the application of the *Cumpănă and Mazăre* chilling effect principle to suspended conditional prison sentences, and continued the underlying view that the Court was willing to tolerate future attacks on reputation as a necessary cost, so as to

[203] *Krasulya v. Russia* (App. no. 12365/03) 22 February 2007, para. 8.
[204] *Krasulya v. Russia* (App. no. 12365/03) 22 February 2007, para. 19.
[205] *Krasulya v. Russia* (App. no. 12365/03) 22 February 2007, para. 21.
[206] *Krasulya v. Russia* (App. no. 12365/03) 22 February 2007, para. 37.
[207] *Krasulya v. Russia* (App. no. 12365/03) 22 February 2007, para. 39.
[208] *Krasulya v. Russia* (App. no. 12365/03) 22 February 2007, para. 41.
[209] *Krasulya v. Russia* (App. no. 12365/03) 22 February 2007, para. 41.
[210] *Krasulya v. Russia* (App. no. 12365/03) 22 February 2007, para. 43.
[211] *Krasulya v. Russia* (App. no. 12365/03) 22 February 2007, para. 44.
[212] *Krasulya v. Russia* (App. no. 12365/03) 22 February 2007, para. 44.
[213] *Krasulya v. Russia* (App. no. 12365/03) 22 February 2007, para. 44.

ensure that no future debate on matters of public interest was chilled or deterred due to a fear of sanctions. This is apparent when we consider the threat of a conditional prison sentence ensures a higher likelihood that no attack on reputation will take place in those six months.

4.4.3 Criminal fines and costs and the chilling effect

While *Malisiewicz-Gąsior*, *Lyashko* and *Krasulya* all concerned the threat of prison sentences for criminal defamation, whether suspended, conditional, or later quashed, the next judgment concerned only fines and costs imposed for criminal defamation, and arguably came within the *Nikula* and *Pedersen and Baadsgaard* judgments. The case was *Tønsbergs Blad AS and Haukom v. Norway*,[214] where the applicants were the publisher of the Norwegian newspaper *Tønsbergs Blad*, and its former editor, Marit Haukom. In 2000, the newspaper published a front-page story headlined, "May be forced to sell: [H.K.] and Tom Vidar Rygh will have to explain themselves on permanent residence requirements." The article concerned permanent residence requirements as applied to a famous singer (H.K.), and about well-known businessman Tom Vidar Rygh, who at the time was a board member of Orkla ASA, one of Norway's largest industrial companies.[215] The article included statements that "[a]ccording to the understanding of *Tønsbergs Blad*, [H.K. and Mr. Rygh's] properties are on a list which the Tjøme Municipality will submit to the County Governor in the very near future. The list includes properties whose use is thought not to be in conformity with the permanent residence requirements."[216]

In 2000, Rygh instituted private criminal proceedings against the applicants for defamation. A year later, the City Court acquitted the applicants, and ordered Rygh to pay 183,387 Norwegian kroner in costs. The Court found that a defamatory allegation had been made but, with reference to Article 10 of the European Convention, "attached special importance to the public interest of the permanent residence issue and to the freedom of the press in respect of presentation and form."[217] However, in 2002, the High Court found the article defamatory, holding that although a breach of the residence requirements did not constitute a criminal offence, "in a place like Tjøme, many people would regard it as being immoral and an affront to the public interest."[218] The Supreme Court dismissed the applicants' appeal and ordered them to pay Rygh 673,879 krone for legal costs.[219]

The applicant made an application to the European Court, claiming a violation of Article 10, in particular that "denying the press any latitude in daily news coverage would in itself have a chilling effect," and the damages and costs awards were "under no circumstances proportionate to the aim pursued."[220] The main question for the Court was whether the Supreme Court judgment against the applicants was necessary in a democratic society. The Court first reiterated the principle from *Bergens Tidende and Others* that the "most careful scrutiny" was called for when, as in this case, the "measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern."[221]

The Court then turned to the statements at issue, and noted that they consisted of "factual statements, not value judgments, to the effect that Mr Rygh's name was on the

[214] *Tønsbergs Blad AS and Haukom v. Norway* (App. no. 510/04) 1 March 2007.
[215] *Tønsbergs Blad AS and Haukom v. Norway* (App. no. 510/04) 1 March 2007, para. 9.
[216] *Tønsbergs Blad AS and Haukom v. Norway* (App. no. 510/04) 1 March 2007, para. 12.
[217] *Tønsbergs Blad AS and Haukom v. Norway* (App. no. 510/04) 1 March 2007, para. 10.
[218] *Tønsbergs Blad AS and Haukom v. Norway* (App. no. 510/04) 1 March 2007, para. 32.
[219] *Tønsbergs Blad AS and Haukom v. Norway* (App. no. 510/04) 1 March 2007, para. 38.
[220] *Tønsbergs Blad AS and Haukom v. Norway* (App. no. 510/04) 1 March 2007, para. 69.
[221] *Tønsbergs Blad AS and Haukom v. Norway* (App. no. 510/04) 1 March 2007, para. 88. .

Municipality's list of persons whom it considered to be in breach of the residence requirements."[222] However, the Court considered that this was a "bare allegation presented without any criticism and only with a suggestion that Mr Rygh might be forced to sell his property."[223] Second, the Court further noted that the disputed allegations "were presented with precautionary qualifications," and even though the news item was presented in a "somewhat sensationalist style," the Court considered the overall impression given by the newspaper report was that "rather than inviting the reader to reach any foregone conclusion about any failure on Mr Rygh's part, it raised question marks with respect to both whether he had breached the said requirements and whether those requirements should be maintained, modified or repealed."[224] Third, the Court held that there was "substantial evidence" to corroborate the newspaper's contention that the Municipality at the time held the view that Mr Rygh was in breach of the relevant residence requirements.[225] Thus, the Court held that "having regard to the relatively minor nature and limited degree of the defamation at issue and the important public interests involved, the Court is satisfied that the newspaper took sufficient steps to verify the truth of the disputed allegation and acted in good faith."[226]

Finally, the Court noted that the applicants "had to defend their cause in judicial defamation proceedings pursued at three judicial levels," and were ordered to pay compensation of NOK 50,000 in damages, NOK 673,829 for the plaintiff's legal costs, (approximately 90,000 euro),[227] and "bearing their own costs"[228] (approximately 135,000 euro).[229] The proceedings resulted in an "excessive and disproportionate burden being placed on the applicants, which was capable of having a chilling effect on press freedom in the respondent State."[230] The Court therefore concluded that was no reasonable relationship of proportionality between the restrictions on the applicants' right to freedom of expression and the legitimate aim pursued; and as such, there had been a violation of Article 10.[231]

In simple numbers, in *Pedersen and Baadsgaard*, the fines and compensation imposed were equivalent to a total of 14,000 euro, but the Court made no mention of costs.[232] In contrast, in *Tønsbergs Blad and Haukom*, the compensation and plaintiff's costs totalled 90,000 euro, and their own costs totalled 135,000 euro.[233] *Tønsbergs Blad and Haukom* demonstrated how criminal fines, and costs, could have a chilling effect, and crucially, not only on the individual applicant, but also "on press freedom in the respondent State."[234]

4.5 Grand Chamber disagreement in *Lindon* over the chilling effect

The Chamber judgments concerning criminal defamation delivered after *Cumpănă and Mazăre*, and applying the chilling effect principle, were all unanimous: *Malisiewicz-Gąsior* (unanimous), *Lyashko* (unanimous), *Krasulya* (unanimous); and *Tønsbergs Blad*, (unanimous). However, something curious happened six months after *Tønsbergs Blad*, when the Grand Chamber delivered a judgment in October 2007 on criminal defamation and the

[222] *Tønsbergs Blad AS and Haukom v. Norway* (App. no. 510/04) 1 March 2007, para. 91.
[223] *Tønsbergs Blad AS and Haukom v. Norway* (App. no. 510/04) 1 March 2007, para. 91.
[224] *Tønsbergs Blad AS and Haukom v. Norway* (App. no. 510/04) 1 March 2007, para. 92.
[225] *Tønsbergs Blad AS and Haukom v. Norway* (App. no. 510/04) 1 March 2007, para. 99.
[226] *Tønsbergs Blad AS and Haukom v. Norway* (App. no. 510/04) 1 March 2007, para. 101.
[227] *Tønsbergs Blad AS and Haukom v. Norway* (App. no. 510/04) 1 March 2007, para. 105.
[228] *Tønsbergs Blad AS and Haukom v. Norway* (App. no. 510/04) 1 March 2007, para. 102.
[229] *Tønsbergs Blad AS and Haukom v. Norway* (App. no. 510/04) 1 March 2007, para. 108.
[230] *Tønsbergs Blad AS and Haukom v. Norway* (App. no. 510/04) 1 March 2007, para. 102.
[231] *Tønsbergs Blad AS and Haukom v. Norway* (App. no. 510/04) 1 March 2007, para. 103.
[232] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 93.
[233] *Tønsbergs Blad AS and Haukom v. Norway* (App. no. 510/04) 1 March 2007, para. 110.
[234] *Tønsbergs Blad AS and Haukom v. Norway* (App. no. 510/04) 1 March 2007, para. 102.

prosecution of a publishing company, an author, and the director of the French newspaper *Libération*. Curiously, the Grand Chamber judgment resulted in a divided Court, with the Court majority finding no violation of Article 10, and at no point throughout the judgment, even mentioning the chilling effect principle. What was even more curious, was that the Court majority judgment nowhere even cited *Cumpănă and Mazăre*, nor any of these Chamber judgments (*Malisiewicz-Gąsior*, *Lyashko*, *Krasulya*, and *Tønsbergs Blad*).

The case was *Lindon, Otchakovsky-Laurens and July v. France*,[235] and as mentioned earlier, the applicants were the author of the book *Le Procès de Jean-Marie Le Pen* (*Jean-Marie Le Pen on Trial*), the chairman of the book's publishing company, and director of the newspaper *Libération*. The political party Front National, and its chairman, Jean-Marie Le Pen, successfully brought proceedings against the applicants for the offence of public defamation.

All three applicants made an application to the European Court, claiming their convictions violated their Article 10 right to freedom of expression. The First Section of the Court relinquished jurisdiction in favour of the Grand Chamber, and in 2007 the Grand Chamber delivered its judgment.[236] The main question for the Court was whether the convictions had been necessary in a democratic society, and concerning the first and second applicants, the Court held that the domestic courts "made a reasonable assessment of the facts," in finding that to liken an individual, although a politician, to the "chief of a gang of killers," to assert that a murder, even one committed by a fictional character, was "advocated" by him, and to describe him as a "vampire who thrives on the bitterness of his electorate, but sometimes also on their blood," overstepped the permissible limits in such matters."[237] The Court also had regard to the nature of the remarks made, in particular to the "underlying intention to stigmatise the other side, and to the fact that their content is such as to stir up violence and hatred, thus going beyond what is tolerable in political debate, even in respect of a figure who occupies an extremist position in the political spectrum."[238] Similarly, in relation to the third applicant, the Court held that it was not "unreasonable" for the domestic courts to impose a defamation conviction, having regard to the content of the impugned passages, to the potential impact on the public of the remarks found to be defamatory on account of their publication by a national daily newspaper with a large circulation, and to the fact that it was "not necessary to reproduce them in order to give a complete account of the conviction of the first two applicants and the resulting criticism."[239] Thus, the Court held that the convictions were based on "relevant and sufficient" reasons.

Finally, the Court turned to the proportionality of the penalties. In relation to the first and second applicants, the Court noted that they were found guilty of an offence and ordered to pay a fine, "so in that respect alone the measures imposed on them were already very serious."[240] However, the Court introduced a principle not mentioned in *Cumpănă and Mazăre* and *Pedersen and Baadsgaard*, that in view of the "margin of appreciation" left to Contracting States by Article 10 of the Convention, a criminal measure as a response to

[235] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber) (Article 10 and newspaper convicted of defamation).
[236] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber).
[237] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber), para. 57.
[238] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber), para. 57.
[239] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber), para. 66.
[240] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber), para. 59.

defamation cannot, as such, be considered disproportionate to the aim pursued.[241] The Court then examined the fines and damages ordered, but held that they were "moderate,"[242] and were not disproportionate. Similarly, in relation to the third applicant, the Court noted that the fine and damages ordered were of a "moderate nature," and were not disproportionate.[243] Thus the Court concluded that there had been no violation of Article 10.

Focusing on the Court's review of the nature and severity of the sanctions, it is curious that the Court nowhere mentions the chilling effect principle, nowhere mentions, nor even cites, *Cumpănă and Mazăre*, or any mention of the chilling affect discussed in *Pedersen and Baadsgaard* (even though the Court ultimately held there had been no chilling effect). Further, the margin of appreciation principle the Court laid down in *Lindon* was nowhere mentioned in *Cumpănă and Mazăre* nor *Pedersen and Baadsgaard*. Of course, it cannot be ignored that many Council of Europe Member States still maintain criminal defamation laws,[244] and this may explain the majority's reluctance to extend the *Cumpănă and Mazăre* principle. However, even assuming that the broader structural consequences justified a margin of appreciation, there was, arguably, a political consensus on the issue, with the majority in *Lindon* failing to mention that the Parliamentary Assembly of the Council of Europe had only three weeks prior to *Lindon* being delivered, adopted the Resolution "Towards decriminalisation of defamation," and had in fact singled out the French press law as in need of amendment "in light of the Court's case law."[245] Indeed France had already been singled out in the previous 2003 Recommendation of the Parliamentary Assembly on press freedom.[246]

It could be argued that the *Lindon* majority considered that the expression involved was akin to hate speech, emphasising that the "content is such as to stir up violence and hatred."[247] As such, the non-application of the chilling effect may be a manifestation of the view within the Court's that where hate speech is purportedly involved, the importance of having regard to the chilling effect is substantially reduced, to the point where it is not even mentioned. But there is an obvious objection to this view, as the applicants were prosecuted for defamation, not for hate speech or incitement to violence or hatred, and indeed, the French courts nowhere made such a finding. Therefore, the *Lindon* majority may have been in a way, *tuning up* the seriousness of the expression involved, in order to put aside an application of the chilling effect principle.

Not surprisingly, there was a vigorous dissent in *Lindon* over the non-application of *Cumpănă and Mazăre*, and notably, the acting President of the Court, the Vice-President, and a future President of the Court, dissented in *Lindon* (Judges Rozakis, Bratza and Tulkens).

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[241] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber), para. 59.
[242] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber), para. 59.
[243] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber), para. 59.
[244] See, for example, Council of Europe, *Study on the alignment of law and practices concerning defamation with the relevant case-law of the European Court of Human Rights on freedom of expression*, CDMSI (2012) Misc11 (Council of Europe, 2012); International Press Institute, *Out of Balance: Defamation Law in the European Union: A Comparative Overview for Journalists*, *Civil Society and Policymakers* (IPI, 2015); and Organization for Security and Co-operation in Europe The Representative on Freedom of the Media, *Defamation and Insult Laws in the OSCE Region: A Comparative Study* (OSCE, 2017).
[245] Parliamentary Assembly of the Council of Europe, Towards decriminalisation of defamation, Resolution 1577 (2007), 4 October 2007, para. 17.6.2.
[246] Parliamentary Assembly of the Council of Europe, Freedom of expression in the media in Europe, Recommendation 1589(2003), 28 January 2003, para. 11.
[247] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber), para. 57.

The dissenting opinion lambasted the majority for not engaging in any "review of the proportionality of the sanctions," and criticised the majority for not applying the *Cumpănă and Mazăre* chilling effect principle.[248] The dissent added that "it may also be questioned whether it is still justified, in the twenty-first century, for damage to reputation through the press, media or other forms of communication to entail punishment in the criminal courts."[249]

The Court's majority judgment in *Lindon* was the first Grand Chamber judgment to not apply chilling effect reasoning in relation to criminal defamation, in stark contrast to *Cumpănă and Mazăre* and *Pedersen and Baadsgaard*. Indeed, the *Lindon* judgment was the first Grand Chamber judgment on criminal defamation where there was serious disagreement over the invocation of the chilling effect principle. Finally, *Lindon* was the first Grand Chamber judgment where the margin of appreciation principle was applied to temper the application of the chilling effect principle.

4.6 Post-*Lindon* application of the chilling effect

4.6.1 Suspended and conditional prison sentences

While the *Lindon* majority did not apply the chilling effect principle, the *Cumpănă and Mazăre* chilling effect principle continued to be applied in a line of case law to find "no justification whatsoever" for the imposition, or threat of prison sentences, on journalists, such as in *Mahmudov and Agazade v. Azerbaijan*.[250] Similarly, in *Marchenko v. Ukraine*,[251] the imposition of suspended prison sentences on non-journalists was held to violate Article 10. The applicants had been convicted of defamation for displaying placards accusing a school director of misappropriating public funds. The Court held that the domestic courts acted within their margin of appreciation in considering it necessary to convict the applicants for defamation for the display of placards at the picket. However, the Court held that the sentencing of the applicants to one year's imprisonment, even though it was suspended, was invalid due to its chilling effect on public debate concerning misappropriation of public funds.

Indeed, the Court has further developed its *Cumpănă and Mazăre* principle, holding in *Mariapori v. Finland* that conditional prison sentences have an unjustifiable chilling effect on freedom of expression.[252] The applicant in *Mariapori* was convicted of aggravated defamation following publication of a book where she alleged that a tax inspector had "committed perjury ... intentionally." She was sentenced to four months' conditional imprisonment, meaning no imprisonment would be served where no further offences were committed during the period. No imprisonment ensued. The European Court held that the interference with freedom of expression "may have been justified," but applied its chilling effect principle, finding that the case was a classic instance of defamation of an individual in

[248] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber) (Joint partly dissenting opinion of Judges Rozakis, Bratza, Tulkens and Šikuta, para, 7).
[249] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber) (Joint partly dissenting opinion of Judges Rozakis, Bratza, Tulkens and Šikuta, para, 7).
[250] *Mahmudov and Agazade v. Azerbaijan* (App. no. 35877/04) 18 December 2008, para. 51 ("the circumstances of the instant case present no justification for the imposition of a prison sentence. Such a sanction, by its very nature, has a chilling effect on the exercise of journalistic freedom. The fact that the applicants did not serve their prison sentence and that their convictions were expunged, does not alter that conclusion, seeing that they were exempted from serving their sentence only owing to a fortunate coincidence of an amnesty act which happened to apply to a wide variety of criminal cases at the relevant period of time and which was not adopted with a specific aim of redressing the applicants' particular situation.").
[251] *Marchenko v. Ukraine* (App. no. 4063/04) 19 February 2009, para. 52.
[252] *Mariapori v. Finland* (App. no. 37751/07) 6 July 2010, para. 68.

the context of a debate on an important matter of legitimate public interest, which presented no justification whatsoever for the imposition of a prison sentence. Such a sanction by its very nature has a chilling effect on public debate, and the fact that the sentence was conditional was irrelevant.[253]Thus, it was not the imposition of a prison sentence that was invalidated, but the condition that a prison sentence would be imposed if further offences were committed. The European Court again displayed a willingness to allow future unjustified damage to reputation as a necessary cost, so as to ensure expression on matters of public interest is not "deterred" or "chilled" in the future. This is apparent when we consider that the threat of a conditional prison sentence ensures a higher likelihood that damage to reputation will not take place in those four months.

4.6.2 Article 46 and immediate prison release

The strength of the Court's *Cumpănă and Mazăre* chilling effect principle was demonstrated in *Fatullayev v. Azerbaijan*, where the Court exercised its rarely used power under Article 46 of the Convention to order that the applicant should be immediately released following his imprisonment for defamation, holding that "having regard to the particular circumstances of the case and the urgent need to put an end to the violations of Article 10 of the Convention, the Court considers that, as one of the means to discharge its obligation under Article 46 of the Convention, the respondent State shall secure the applicant's immediate release."[254] This was because the applicant's conviction, and the "particularly severe sanction" imposed were capable of producing a chilling effect on the exercise of journalistic freedom of expression in Azerbaijan and dissuading the press from openly discussing matters of public concern.[255] The judgment was delivered on April 2010, and the Azerbaijan Supreme Court held in November 2010, that the applicant should be released.[256]

4.6.3 Individualisation of damages and costs

A further consequence of the chilling effect principle developed in *Cumpănă and Mazăre* has been its impact on the proportionality assessment of damages and costs orders in defamation proceedings. The pre-*Cumpănă and Mazăre* position was enunciated in *Tolstoy Miloslavsky v. the United Kingdom*, where it was held that there must be a "reasonable relationship of proportionality" between an award of damages and the injury to the reputation suffered.[257] However, the *Cumpănă* principle has now broadened the proportionality analysis through the individualisation of damages and costs orders: in determining proportionality, the Court not only has regard to the injury to reputation, but also has regard to the impact of the totality (both damages and costs) of the orders on the *individual means* of the defendant.

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[253] *Mariapori v. Finland* (App. no. 37751/07) 6 July 2010, para. 68.
[254] *Fatullayev v. Azerbaijan* (App. no. 40984/07) 22 April 2010, para. 177.
[255] *Fatullayev v. Azerbaijan* (App. no. 40984/07) 22 April 2010, para. 128.
[256] Committee of Ministers Secretariat, "Communication from the government in the case of Fatullayev v. Azerbaijan (Application No. 40984/07)," DH-DD (2010) 604, 29 November 2010. See also the application of Article 46 in *Youth Initiative for Human Rights v. Serbia* (App. no. 48135/06) 25 June 2013, para. 32 (the "most natural execution of [the] judgment ... would have been to secure that the intelligence agency of Serbia provide the applicant with the information requested"). See also *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018), discussed below in Section 5.9.3.
[257] *Tolstoy Miloslavsky v. the United Kingdom* (App. no. 18139/91), para. 49. See also Dirk Voorhoof, "Freedom of Expression under the European Human Rights System: From *Sunday Times (No. 1) v. U.K.* (1979) to *Hachette Filipacchi Associés ("Ici Paris") v. France* (2009)," (2009) *Inter-American and European Human Rights Journal* 3.

One of the best examples of this individualisation of damages and costs approach is the Court's judgment in *Kasabova v. Bulgaria*.[258] The case concerned a journalist who had been convicted of defamation over newspaper articles containing allegations of corruption on the part of a number of school inspectors. The journalist was fined. The European Court accepted that the conviction for defamation could be accepted as necessary for protecting the reputation of the school inspectors.[259] However, the Court then assessed the proportionality of the sanctions imposed, and sought to apply the *Cumpănă and Mazăre* chilling effect principle: "the nature and severity of the penalties must not be such as to dissuade the press from taking part in the discussion of matters of legitimate public concern."[260]

The Court noted the four fines imposed on the journalist came to nearly 3,000 Bulgarian leva (1,500 euro),[261] which the Court described as "considerable when weighed against her salary."[262] The Court then considered that the fines could not be looked at in isolation, but "together with the damages and the costs awarded to the complainants", bringing the total to over 7,000 leva (3,500 euro). The Court compared this figure with the minimum monthly salaries in Bulgaria, and noted that the sum was nearly seventy minimum monthly salaries, and more than thirty-five monthly salaries of the applicant. The Court then had regard to evidence the applicant had "struggled for years" to pay the sums, and concluded that the sums imposed were disproportionate, resulting in a violation of Article 10.[263]

The significance of the Court's application of the chilling effect principle is reinforced when we consider that the Bulgarian courts had already sought to apply proportionality analysis in coming to the sums imposed. The Bulgarian courts had imposed an "average penalty, [in view] of the balance of mitigating and aggravating factors," including the lack of criminal record, intention, and seriousness of the libel. The Bulgarian courts had also waived the criminal liability, and imposed only an administrative fine.[264] It seems that the application of separate proportionality analysis to (i) the damages imposed, and (ii) costs imposed, was not sufficient for the European Court, as the Bulgarian courts had failed to take account of the totality of the sums imposed. On the basis of the *Cumpănă and Mazăre* judgment, *Kasabova* extends the required proportionality analysis to a broader investigation of the effect of damages and costs on the individual applicant.

The approach in *Kasabova* was similarly applied in the *Bozhkov v. Bulgaria* judgment, where the Court found 6,000 leva (3,000 euro) was a disproportionate sum in light of the chilling effect of the sanction on the applicant and other journalists.[265] Of note, *Kasabova*-type analysis regarding the individualisation of damages and costs was used in *Semik-Orzech v. Poland*, and the Court came to the opposite conclusion.[266] The Court held that although an order to pay nearly 30,000 Polish zlotys (6,900 euro) to a charity was "significant," the impact on the applicant was not excessive because the applicant was not individually liable for the sum, as it had been imposed jointly with another defendant.[267] Thus, it may be inferred that had the sum been applied to the applicant individually, it may

[258] *Kasabova v. Bulgaria* (App. no. 22385/03) 19 April 2011.
[259] *Kasabova v. Bulgaria* (App. no. 22385/03) 19 April 2011, para. 68.
[260] *Kasabova v. Bulgaria* (App. no. 22385/03) 19 April 2011, para. 68. The Court uses the phrases "dissuasive effect" and "chilling effect" interchangeably, explained by the Court's French translation of chilling effect being "effet dissuasif."
[261] Approximately 1,500 euro.
[262] *Kasabova v. Bulgaria* (App. no. 22385/03) 19 April 2011, para. 71.
[263] *Kasabova v. Bulgaria* (App. no. 22385/03) 19 April 2011, para. 71.
[264] See *Kasabova v. Bulgaria* (App. no. 22385/03) 19 April 2011, para. 23 (reproducing the judgment of the Burgas District Court).
[265] *Bozhkov v. Bulgaria* (App. no. 3316/04) 19 April 2011, para. 55.
[266] *Semik-Orzech v. Poland* (App. no. 39900/06) 15 November 2011.
[267] *Semik-Orzech v. Poland* (App. no. 39900/06) 15 November 15 2011, para. 65.

have been disproportionate. Thus, the individualisation of damages and costs cuts both ways, so a damages and costs award will be disproportionate if imposed on an impecunious defendant, and it follows that the same order would be proportionate if imposed on a wealthy newspaper company.

This logic is further evidenced in *Ziembiński v. Poland*, where the Court reviewed the proportionality analysis of the Polish courts.[268] The Polish courts had imposed damages and costs of nearly 10,000 zlotys (3,200 euro). The European Court applied its chilling effect principle, and concluded that the sum was proportionate as the Polish courts had taken into account not only the gravity of the offence, but had also had regard to the profits of the applicant in coming to the sum of damages. Although the domestic courts had not taken account of the "aggregate" amount of damages, fines, and costs (as done in *Kasabova*), the Court concluded such an assessment would not have made the sanctions disproportionate. Finally, in the Court's 2017 judgment in *Cheltsova v. Russia*,[269] the European Court found the defamation damages ordered against the retired editor of a local independent weekly newspaper published in the town of Fryazino, northwest of Moscow, was disproportionate, as the amount was "four times [the editor's] monthly income."[270]

Thus, there are two distinct types of applications of the individualisation of damages: (a) where the Court considers that it may have been necessary to restrict freedom of expression in the form of defamation proceedings due to the content of the expression, but the specific sanction imposed violated Article 10 due to its chilling effect; and (b) where the Court considers that the domestic courts failed to take into account certain principles when finding a statement defamatory, such as it targeting a public official or some other Article 10 principle, and in addition the sanction was such as to have a chilling effect.

4.6.4 Presumption of falsity

It has been shown that the divorcing of the substantive question of whether statements are defamatory, from the proportionality of the sanction, has led to certain types of sanctions being in effect prohibited, in addition to the requirement of individualisation of damages and costs orders. However, this divorce has sometimes resulted in the Court deciding to avoid ruling on the substantive question, and instead focusing on the proportionality of the sanctions, while leaving the substantive question open. The most blatant example of this approach was in *Kasabova v. Bulgaria*,[271] which is also an important authority applying the chilling effect principle to the presumption of falsity rule in defamation.

As mentioned above, *Kasabova* concerned a journalist convicted of defamation for publishing an article containing allegations of corruption on the part of a number of school inspectors. The allegations were based on anonymous testimony from a number of parents. The main question before the Court concerned the rule under Bulgarian criminal law that the burden of proof in criminal defamation proceedings was on the defendant to prove the truth of the impugned statements. The applicant journalist contended that this presumption of falsity in criminal defamation trials was inconsistent with Article 10. It was argued that the European Court should follow the reasoning of the U.S. Supreme Court in *New York Times Co. v. Sullivan* that the burden of proof upon defendants in civil litigation to prove the truth of a statement violated the First Amendment's guarantee of freedom of speech due to its

[268] *Ziembiński v. Poland* (App. no. 46712/06) 24 July 2012.
[269] *Cheltsova v. Russia* (App. no. 44294/06) 16 June 2017.
[270] *Cheltsova v. Russia* (App. no. 44294/06) 16 June 2017, para. 85.
[271] *Kasabova v. Bulgaria* (App. no. 22385/03) 19 April 2011.

chilling effect on speech.[272] Such reasoning would apply even more forcefully where criminal litigation was concerned.

The European Court refused to consider the rule in the abstract, although it did admit that "taken in isolation," it could be seen as "unduly inhibiting the publication of material whose truth may be difficult to establish in a court of law."[273] However, the Court held that the chilling effect of the rule was significantly tempered by the *mens rea* requirement under Bulgarian defamation law, which a defendant could rebut by "simply showing" he had acted "fairly and responsibly."[274] The Court proceeded to consider the application of the rule in the instant case, and admitted there were a number of difficulties in the domestic courts' consideration of the fair and responsible standard.

First, the Court noted that the Bulgarian courts had held that the only way of corroborating an allegation that someone had committed a criminal offence was for them to stand convicted of it, which the European Court described as "striking," "plainly unreasonable," and "perhaps erroneous under Bulgarian law." The Court could not "condone" this approach, and referred at length to the weight of its authority on this point.[275] Second, the Bulgarian courts had emphasised the failure of the journalist to cite the names of the parents who had made allegations, but remarkably, the European Court stated that while this approach "might raise an issue" under the right to protection of sources, it did not admonish the domestic courts for this approach.[276] Third, the Court criticised the domestic courts for not considering that the article had been on a matter of public interest, and also that the gist of the complainants' side had been included.[277]

Notwithstanding all of this criticism in the application of the burden of proof rule, the Court concluded it was "not necessary to take a firm stance on that point," as the Court would proceed to find the sanction imposed, as discussed above, was disproportionate.[278] This reluctance on the part of the Court to rule on the substantive issue, and instead focusing on the proportionality of the sanction, is notable. There seemed to be a reluctance on the part of the Court to fully apply its chilling effect principle to the substantive issue in hand.

4.6.5 Fifth Section disagreement over chilling effect of criminal proceedings

Two years later in 2013, a majority of the Fifth Section of the Court, in an application against France, refused to engage with an applicant's submission that criminal proceedings for defamation had a chilling effect, even though the government sought to rebut the argument, and the dissent also addressed the issue. The case would ultimately reach the Grand Chamber, and allow the Court to consider whether the approach in *Lindon* would continue.

The case was *Morice v. France*,[279] and as mentioned above, the applicant lawyer had been convicted of defaming two judges, and sentenced to a fine of 4,000 euro, and was

[272] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), p. 279 ("A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions ... leads to a comparable 'self-censorship' ... under such a rule, would be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.")
[273] *Kasabova v. Bulgaria* (App. no. 22385/03) 19 April 2011, para. 61.
[274] *Kasabova v. Bulgaria* (App. no. 22385/03) 19 April 2011, para. 61.
[275] *Kasabova v. Bulgaria* (App. no. 22385/03) 19 April 2011, para. 62 (The Court cited, among others, *Flux v. Moldova (No. 6)* (App. no. 22824/04) 29 July 2008, para. 3 ("The Court would underline that it does not accept the reasoning of the first instance-court, namely that the allegations of serious misconduct ... should have first been proved in criminal proceedings.").
[276] *Kasabova v. Bulgaria* (App. no. 22385/03) 19 April 2011, para. 65.
[277] *Kasabova v. Bulgaria* (App. no. 22385/03) 19 April 2011, para. 67.
[278] *Kasabova v. Bulgaria* (App. no. 22385/03) 19 April 2011, para. 68.
[279] *Morice v. France* (App. no. 29369/10) 11 July 2013.

ordered to pay jointly with a newspaper and journalist, 7,500 euro in damages to each of the judges, and 1,000 euro in costs, and 4,000 in further costs (jointly with the newspaper and journalist).[280] Before the European Court, the applicant invoked chilling effect reasoning, arguing that the "harshness of the penalties imposed on him, both civil and criminal, was such as to deter him from speaking in the media to denounce any shortcomings in the judicial system."[281]

In July 2013, the Fifth Section of the Court delivered its Chamber judgment, and held by a majority, that there had been no violation of Article 10.[282] The main question for the Court was whether the applicant's conviction for defamation had been necessary in a democratic society. The Court first noted that the applicant had "not confined himself in the article to factual statements," but had "accompanied those factual observations with value judgments" which cast doubt on the impartiality and fairness of judge M. and alleged that there was some connivance between the investigating judges and the Djibouti prosecutor.[283] Thus, the Court held that the applicant "behaved in a manner which overstepped the limits that lawyers have to observe in publicly criticising the justice system."[284] The Court found that the domestic courts were "justified in finding that the comments in question, made by a lawyer, were serious and insulting vis-à-vis judge M., that they were capable of undermining public confidence in the judicial system unnecessarily."[285] The Court added that it could also be "inferred from the applicant's comments, as the Court of Appeal noted, that they were driven by some personal animosity towards judge M."[286]

Finally, the Court examined the nature and severity of the penalties imposed. The Court noted that the applicant was "found guilty of an offence and ordered to pay a fine."[287] However, the Court held that "in view of the margin of appreciation left to Contracting States by Article 10 of the Convention, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued."[288] Further, the Court held that the amount of the fine imposed, 4,000 euros, did "not appear excessive," and the "same is true" of the 7,500 euros damages that he was ordered to pay to the civil parties, jointly with his two co-defendants.[289] Thus, according to the Court, the measures imposed on the applicant were not disproportionate to the legitimate aim pursued. In light of these considerations, the Court held that the domestic authorities did not overstep their margin of appreciation in sentencing the applicant, and therefore there had been no violation of Article 10.

One judge dissented, Judge Yudkivska, finding that there had been a violation of Article 10,[290] and in particular questioned the absence of the chilling effect principle from the majority's conclusion concerning the criminal proceedings. The dissent argued that the applicant's conviction "for making value judgments appears disproportionate," as the "very existence of criminal proceedings has a chilling effect; lawyers defending their clients' rights should not have to fear prosecution on that account."[291]

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[280] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 46.
[281] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 86.
[282] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 109.
[283] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 102.
[284] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 106.
[285] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 107.
[286] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 107.
[287] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 108.
[288] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 108 (citing *Radio France and Others v. France* (App. no. 53984/00) 30 March 2004, para. 40).
[289] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 108.
[290] *Morice v. France* (App. no. 29369/10) 11 July 2013 (Partly dissenting opinion of Judge Yudkivska).
[291] *Morice v. France* (App. no. 29369/10) 11 July 2013 (Partly dissenting opinion of Judge Yudkivska, para. 15).

The Court majority's judgment in *Morice* nowhere mentioned the chilling effect, even though the applicant made submissions on the point, the dissenting opinion addressed the issue, and indeed, the government itself responded to these submissions.[292] And most curiously of all, the majority in *Morice* nowhere even mentioned *Nikula* and its application of the chilling effect principle, even though the dissenting opinion specifically mentioned it.

4.7 Grand Chamber unanimity in *Morice* on the chilling effect

In December 2013, following a request from the applicant in *Morice* that the case be referred to the Grand Chamber, a panel of the Grand Chamber granted the request,[293] and in 2015, the Grand Chamber delivered its judgment in *Morice*, and unanimously found a violation of Article 10. The Grand Chamber's judgment in *Morice* bore startling similarity to *Cumpănă and Mazăre*, where a majority Chamber judgment had omitted any mention of the chilling effect principle, with a unanimous Grand Chamber setting aside the Chamber judgment, and applying the chilling effect principle as central to its conclusion. Indeed, similar to *Cumpănă and Mazăre*, the national judge (Judge André Potocki) who had voted in the Chamber judgment for no violation of Article 10, switched his vote in the Grand Chamber, but did not write a separate opinion to explain his vote.

The Grand Chamber first found that while the remarks "could admittedly be regarded as harsh,"[294] and of a "somewhat hostile nature,"[295] they concerned a "matter of public interest,"[296] and "constituted value judgments with a sufficient "factual basis."[297] Notably, the Grand Chamber in *Morice* laid down five criteria for determining whether a restriction on a defence counsel's freedom of expression has been necessary in a democratic society.[298] In particular, the final criteria concerned the "sanctions imposed," and the Grand Chamber applied *Cumpănă and Mazăre* and its chilling effect principle that "interference with freedom of expression may have a chilling effect on the exercise on that freedom," and a "risk" of a "relatively moderate nature of a fine" would not suffice to negate this chilling effect.[299] Indeed, the Court in *Morice* emphasised this point, and held that "even when the sanction is the lightest possible," such as a guilty verdict with a discharge in respect of the criminal sentence, and an award of only a "token euro" in damages, this "does not suffice to negate the risk of a chilling effect on the exercise of freedom of expression."[300] Moreover, this chilling effect is "all the more unacceptable in the case of a lawyer who is required to ensure the effective defence of his clients."[301]

Finally, the Court reiterated that the "dominant position of the State institutions requires the authorities to show restraint in resorting to criminal proceedings," with the Court earlier approving the principle that it is only in "exceptional circumstances" that a restriction, "even by way of a lenient criminal penalty," can be imposed of a defence counsel's freedom

[292] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 96.
[293] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 5. See Inger Høedt-Rasmussen and Dirk Voorhoof, "A great victory for the whole legal profession," Strasbourg Observers, 6 May 2015.
[294] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 174.
[295] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 167.
[296] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 167.
[297] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 174.
[298] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 146-176 ((a) the applicant's status as a lawyer; (b) contribution to a debate on a matter of public interest; (c) the nature of the impugned remarks; (d) the specific circumstances of the case; and (e) the sanctions imposed).
[299] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para.176.
[300] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para.127 and 176.
[301] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 127.

of expression.[302] Applying these principles, the Court noted that the applicant's "punishment" was not confined to a criminal conviction, but included fines, damages and costs ordered against the applicant, with the domestic judges having "expressly taken into account the applicant's status as a lawyer to justify their severity and to impose on him 'a fine of a sufficiently high amount'."[303] The Court held that the sanction imposed on him "was not the 'lightest possible," but was, "on the contrary, of some significance, and his status as a lawyer was even relied upon to justify greater severity."[304]

The Grand Chamber's reasoning in *Morice* was that because of the chilling effect of criminal defamation proceedings on freedom of expression, there should be "restraint" in resorting to criminal proceedings, and only in "exceptional cases," can a restriction, "even by way of a lenient criminal penalty," be "accepted as necessary in a democratic society."[305] Thus, the Grand Chamber not only applied *Cumpănă and Mazăre,* but followed the line of case law in *Castells, Nikula*, and the subsequent cases. This seemed to be a rejection of the *Lindon* majority's approach, and of immense importance, is that the Grand Chamber in *Morice* nowhere mentioned the principle from *Lindon* that "in view of the margin of appreciation left to Contracting States by Article 10 of the Convention, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued."[306] Given that the Court in *Morice* relied upon other principles from *Lindon*, it is arguable that the Court in *Morice* was rejecting this margin of appreciation principle. Indeed, the Chamber judgment in *Morice* had mentioned the margin of appreciation principle, and as such, this lends weight to the view that the Grand Chamber was rejecting it outright.

4.7.1 Third Section unanimity on chilling effect of activist's prosecution

The Grand Chamber's application of the chilling effect principle to criminal proceedings in *Morice*, and the rejection of *Lindon*, has continued following *Morice*, most recently in the unanimous Third Section judgment in *Toranzo Gomez v. Spain*.[307] The applicant was a member of an activist group which had occupied the a social centre in Seville. In 2007, the Seville First-Instance Court ordered the eviction of all the occupants, and on the day of removal, the applicant and another protester, R.D.P., had attached themselves to the floor of a room.[308] During the applicant's and the other protestor's removal by the police, police officers "fixed a rope to their waist and wrist, respectively, and tried to pull them out of the tube to which they were fixed, to no avail."[309] The applicant eventually asked police to untie him, and he end his protest. The applicant and R.D.P. were immediately arrested and brought before a judge.

The following day, the applicant participated in a press conference during which he commented on the eviction, and the techniques the police and fire fighters had used, including that the "torture was physical and psychological. The physical torture was undertaken only by national police officers and was insanely observed by the fire fighters," and the "physical torture that I am going to describe ... was very subtle so that it did not leave marks, but it caused intense pain."[310]

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[302] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 135.
[303] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 175.
[304] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 175.
[305] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 135.
[306] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02 (22 October 2007 (Grand Chamber), para. 59.
[307] *Toranzo Gomez v. Spain* (App. no. 26922/14) 20 November 2018.
[308] *Toranzo Gomez v. Spain* (App. no. 26922/14) 20 November 2018, para. 10.
[309] *Toranzo Gomez v. Spain* (App. no. 26922/14) 20 November 2018, para. 12.
[310] *Toranzo Gomez v. Spain* (App. no. 26922/14) 20 November 2018, para. 17.

Following the statements, the Government of Andalusia lodged a complaint with the public prosecutor, requesting the initiation of a criminal investigation, and an investigating judge ordered the opening of an investigation, with the applicant charged with defamation.[311] In 2011, Seville Criminal Judge No. 13 convicted the applicant of slander, holding that the applicant's remarks constituted a "direct accusation of the commission of a crime - namely torture - which was untrue."[312] The criminal judge noted that the behaviour of the police officers did not disclose all the elements under the legal classification of torture.[313] The judge sentenced the applicant to a 20-month fine with a daily amount of 10 euro. The applicant was ordered to pay compensation to two police officers for damages, totalling 1,200 euro, with one day's imprisonment for every two-day fines unpaid in default. Furthermore, the applicant was ordered to publish the judgment in the media which had participated in the press conference at his own expense.[314] On appeal, the Seville *Audiencia Provincial* ordered the fine to be reduced to a 12-month fine with a daily amount of 10 euro, but upheld the remaining elements of the first-instance judgment. The Constitutional Court ultimately dismissed an appeal as inadmissible.

The applicant made an application to the European Court, claiming his conviction for defamation violated his right to freedom of expression. The Court considered that it must take into account five criteria: (a) the nature of the applicant's statements, (b) the context of the interference and the method employed by the Spanish courts to justify the applicant's conviction, (c) the extent to which the individual policemen and the firemen were affected; (d) the severity of the interference; and (e) balancing the applicant's right to freedom of expression against the policemen's right to respect for their private life.[315] Applying these criteria, the Court unanimously concluded that the standards applied by the domestic courts failed to ensure a fair balance between the relevant rights and related interests.[316]

The Court first considered that there was nothing to suggest that the applicant's allegations were made "otherwise than in good faith and in pursuit of the legitimate aim of debating a matter of public interest,"[317] and "did not refer to an aspect of the police officers' private life as such but rather to their behaviour as a public authority."[318] Crucially, the Court held that the expression "torture" used by the applicant "cannot but be interpreted as a value judgment," the veracity of which was "not susceptible of proof."[319] While value judgments may be excessive in the absence of any factual basis, the Court held that the "factual basis at issue is to be found in the judgments issued by the Criminal Court and the Audiencia Provincial, which clearly described the police methods," and corresponded with the applicant's descriptions.[320] Thus, the Court considered that the applicant used the word "torture" in a "colloquial manner with the purpose of denouncing the police methods."[321]

The Court then examined the nature and severity of the penalties. Notably, the Court reiterated the principle that the dominant position occupied by government institutions "requires the authorities to display restraint in resorting to criminal proceedings."[322] The Court then noted that the applicant was ordered to pay a 12-day fine with a daily amount of

[311] *Toranzo Gomez v. Spain* (App. no. 26922/14) 20 November 2018, para. 19.
[312] *Toranzo Gomez v. Spain* (App. no. 26922/14) 20 November 2018, para. 22.
[313] *Toranzo Gomez v. Spain* (App. no. 26922/14) 20 November 2018, para. 22.
[314] *Toranzo Gomez v. Spain* (App. no. 26922/14) 20 November 2018, para. 20.
[315] *Toranzo Gomez v. Spain* (App. no. 26922/14) 20 November 2018, para. 54-65.
[316] *Toranzo Gomez v. Spain* (App. no. 26922/14) 20 November 2018, para. 66.
[317] *Toranzo Gomez v. Spain* (App. no. 26922/14) 20 November 2018, para. 58.
[318] *Toranzo Gomez v. Spain* (App. no. 26922/14) 20 November 2018, para. 57.
[319] *Toranzo Gomez v. Spain* (App. no. 26922/14) 20 November 2018, para. 59.
[320] *Toranzo Gomez v. Spain* (App. no. 26922/14) 20 November 2018, para. 59.
[321] *Toranzo Gomez v. Spain* (App. no. 26922/14) 20 November 2018, para. 59.
[322] *Toranzo Gomez v. Spain* (App. no. 26922/14) 20 November 2018, para. 62.

10 euro, as well as compensation of a total amount of 1,200 euro, and "should the applicant not voluntarily pay the imposed fine, he would be subject to one day's imprisonment for every two day fines unpaid."[323] Further, the applicant was also ordered to publish at his own expense the judgment in the media which had covered the press conference. Applying the chilling effect principle, the Court held that these sanctions may have had a "chilling effect" on the exercise of the applicant's freedom of expression as it "may have discouraged him from criticising the actions of public officials."[324]

Finally, the Court again applied chilling effect reasoning, finding that restricting the applicant's right to criticise the actions of public powers by imposing an obligation to accurately respect the legal definition of torture would be "imposing a heavy burden on the applicant (as well as on an average citizen)," and disproportionally undermining his right to freedom of expression.[325] In conclusion, the Court unanimously held that the sanction imposed on the applicant lacked appropriate justification, and the domestic courts failed to ensure a fair balance between the relevant rights and related interests, in violation of Article 10.[326]

The *Toranzo Gomez* judgment is one of the latest judgments, at the time of writing, from the Court on the chilling effect of criminal defamation proceedings against an activist for expression which concerned a matter of public interest, and targeted public officials acting in their official capacity. The judgment was unanimous, and nowhere applied the margin of appreciation principle from *Lindon*, instead applying *Cumpănă and Mazăre's* chilling effect principle, and the *Morice* principle that because of the chilling effect, government institutions are required to display restraint in resorting to criminal proceedings. The Court in *Toranzo Gomez*, in applying the chilling effect principle, laid emphasis on the fact that should the applicant not voluntarily pay the criminal fine, he would be subject to imprisonment. This represents a rejection of the Court majority's approach in *Pedersen and Baadsgaard*, where the Court had ignored that the journalists were subject to imprisonment in default of fine.[327] Thus, *Toranzo Gomez* represents the latest repudiation of the two Grand Chamber aberrations in the *Lindon* and *Pedersen and Baadsgaard* judgments, and carries forth instead the chilling effect principle established in *Lingens*, and developed in *Cumpănă and Mazăre* and *Morice*.

4.8 Civil defamation proceedings and the chilling effect

4.8.1 The Court's early case law

A consequence of the widespread continued criminalisation of defamation among member states of the Council of Europe is that the proportion of European Court case law on civil defamation proceedings is lower than criminal defamation. Before 2012, there had been no Grand Chamber judgments concerning civil defamation where the Court considered chilling effect reasoning. However, there were a number of pre-2012 Chamber judgments considering civil defamation, and to these we now turn.

[323] *Toranzo Gomez v. Spain* (App. no. 26922/14) 20 November 2018, para. 63.
[324] *Toranzo Gomez v. Spain* (App. no. 26922/14) 20 November 2018, para. 64.
[325] *Toranzo Gomez v. Spain* (App. no. 26922/14) 20 November 2018, para. 64.
[326] *Toranzo Gomez v. Spain* (App. no. 26922/14) 20 November 2018, para. 66-68.
[327] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 33 ("The applicants were each sentenced to twenty day-fines of DKK 400 (or twenty days' imprisonment in default)").

4.8.1.1 The chilling effect on activists and campaign groups

The first judgment delivered by the Court where it explicitly applied the chilling effet term in this context involved civil defamation proceedings taken by a large corporation against two environmental activists. The case was *Steel and Morris v. the United Kingdom*,[328] where the applicants were two London-based activists with the small campaign group London Greenpeace, and was unconnected to Greenpeace International. The case arose in 1986, when London Greenpeace began a campaign against the McDonald's fast food company, and the applicants distributed a six-page leaflet entitled, "What's wrong with McDonald's?" The leaflet included statements such as "McCancer, McMurder, McDisease," and that "McDonald's is directly involved in this economic imperialism, which keeps most black people poor and hungry while many whites grow fat," "McDonald's [uses] lethal poisons to destroy vast areas of Central American rainforest," and "[i]n what way are McDonald's responsible for torture and murder?"[329] In 1990, McDonald's initiated civil defamation proceedings against the applicants, claiming damages of up to 100,000 British pounds for libel caused by the publication of the leaflet. The applicants applied for legal aid but were refused, as legal aid was not available for defamation proceedings in the United Kingdom.

The High Court trial lasted an incredible 313 court days, and was the longest trial in English legal history.[330] Following the trial, the High Court judge found that the applicants were responsible for the publication of several thousand copies of the leaflet,[331] and found a number of statements were defamatory, including the allegation that eating McDonalds food would lead to a very real risk of cancer of the breast and of the bowel, and had not been proven. The judge awarded McDonald's 60,000 pounds in damages, McDonald's did not ask for an order that the applicants pay their costs. On appeal, the Court of Appeal reduced the damages payable to McDonald's, so that the first applicant was liable for 36,000 pounds, and the second applicant was liable for 40,000 pounds. Ultimately, the House of Lords refused the applicants leave to appeal.

The applicants made an application to the European Court, claiming a violation of their Article 6 right to a fair trial over the lack of legal aid, and a violation of their Article 10 right to freedom of expression. The European Court unanimously held that there had been a violation of both Article 6 and 10, and on the Article 6 claim, held that the denial of legal aid deprived the applicants of the "opportunity to present their case effectively before the court and contributed to an unacceptable inequality of arms with McDonald's."[332] For present purposes, the focus is on the Article 10 claim.

The Court first reiterated that political expression, including expression on matters of public interest, requires a "high level of protection" under Article 10, and noted that the leaflet contained "very serious allegations on topics of general concern," including abusive farming and employment practices, deforestation, the exploitation of children and parents through aggressive advertising.[333] Second, the Court rejected the government's argument that because applicants were not journalists, they should "not attract the high level of protection afforded to the press under Article 10."[334] The Court instead held that in a democratic society even small and informal campaign groups, such as London Greenpeace, must be able to carry on their activities effectively, and there exists a "strong public interest in enabling such

[328] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005.
[329] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 12.
[330] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 19.
[331] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 26.
[332] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 72.
[333] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 88.
[334] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 89.

groups and individuals outside the mainstream to contribute to the public debate."[335] The Court considered the statements in the leaflets, and noted that the allegations were of a very serious nature, and were "presented as statements of fact rather than value judgments."[336] The Court agreed with the domestic courts that while much of the material included in the leaflet was already in the public domain, the material relied on "did not support the allegations in the leaflet."[337] Further, the Court held that it "was not in principle incompatible with Article 10 to place on a defendant in libel proceedings the onus of proving to the civil standard the truth of defamatory statements."[338]

The Court then turned to the issue of whether a corporation should be entitled to sue for defamation. The Court held that it did not consider the fact that the plaintiff was a large multinational company "should in principle deprive it of a right to defend itself against defamatory allegations or entail that the applicants should not have been required to prove the truth of the statements made,"[339] and a member state enjoys a "margin of appreciation as to the means it provides under domestic law to enable a company to challenge the truth, and limit the damage, of allegations which risk harming its reputation."[340] However, the Court added that where a state decides to provide such a means, "it is essential, in order to safeguard the countervailing interests in free expression and open debate, that a measure of procedural fairness and equality of arms is provided for." [341]

On this issue of procedural fairness, the Court noted that it had already found that the lack of legal aid rendered the defamation proceedings unfair under Article 6. The Court held that the "inequality of arms and the difficulties under which the applicants laboured are also significant in assessing the proportionality of the interference under Article 10."[342] The Court noted that the applicants had the choice to either "withdraw the leaflet and apologise to McDonald's, or bear the burden of proving, without legal aid, the truth of the allegations contained in it."[343] The Court held that it "did not consider that the correct balance was struck" between the need to protect the applicants' rights to freedom of expression and the need to protect McDonald's reputation, "given the enormity and complexity of that undertaking" for the applicants.[344] Notably, the Court applied chilling effect reasoning, finding that the "general interest in promoting the free circulation of information and ideas about the activities of powerful commercial entities," and the "possible 'chilling' effect on others," were also important factors to be considered, "bearing in mind the legitimate and important role that campaign groups can play in stimulating public discussion."[345] Thus, the Court held that the lack of procedural fairness and equality gave rise to a breach of Article 10.[346]

Finally, the Court examined the size of the award of damages. It noted that a damages award for defamation "must bear a reasonable relationship of proportionality to the injury to reputation suffered."[347] The Court noted on the one hand that the sums eventually awarded (36,000 and 40,000 pounds), although relatively moderate by contemporary standards in

[335] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 89.
[336] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 90.
[337] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 92.
[338] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 93.
[339] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 94.
[340] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 94.
[341] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 95.
[342] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 95.
[343] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 95.
[344] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 95.
[345] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 95.
[346] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 95.
[347] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 96.

defamation cases in England and Wales, were "very substantial when compared to the modest incomes and resources of the two applicants."[348] The Court also noted the plaintiffs - large and powerful corporate entities - were not required to, and did not, establish that they had in fact suffered any financial loss. The Court admitted that "[w]hile it is true that no steps have to date been taken to enforce the damages award against either applicant," the fact remained that the substantial sums awarded against them had "remained enforceable since the decision of the Court of Appeal."[349] In such, circumstances, the Court held that the award of damages was "disproportionate to the legitimate aim served."[350]The Court concluded that given the lack of procedural fairness and the disproportionate award of damages, there had been a violation of Article 10.

Steel and Morris was delivered a month-and-a-half after *Cumpănă and Mazăre*, but did not cite the judgment when applying the chilling effect. This may be explained by the fact the Court in *Steel and Morris* first deliberated three months before *Cumpănă and Mazăre* was delivered, and there may not have been time to include the judgment. Instead, the Court in *Steel and Morris* cited *Lingen*'s paragraph 44 as authority for the principle that the "possible 'chilling' effect *on others* was an important factor to be considered," especially given the important role campaign groups can play in stimulating public discussion.[351] The Court's application of the chilling effect in *Steel and Morris* did mirror the principle from *Cumpănă and Mazăre,* that while no steps had been taken to enforce the damages award, the fact remained that the substantial sums awarded against them have remained enforceable, echoing that where journalist do not serve a sentence, this does not remove the chilling effect; or as Judges Costa and Thomassen wrote two years earlier, it "hung over the applicants' heads like the sword of Damocles."[352]

4.8.1.2 Civil defamation proceedings and the chilling effect

While *Cumpănă and Mazăre* was not specifically cited in *Steel and Morris*, two years later the Fourth Section of the Court unanimously found civil defamation proceedings over a newspaper article criticising a local council had a chilling effect, relying upon *Cumpănă and Mazăre*. The case was *Lombardo and Others v. Malta*,[353] where the first three applicants were councillors on the Fgura Local Council, while the fourth applicant was the editor of the Maltese newspaper *In-Nazzjon Taghna*. The case began in May 2001, when the first three applicants presented a motion calling for the Fgura Local Council to hold a public consultation meeting on a controversial road project. However, the Local Council rejected the motion. In August 2001, first three applicants published an article in the newspaper *In-Nazzjon Taghna* on the road project, and stated that "The Fgura Local Council did not consult the public and is ignoring public opinion on the matter."[354]

Three months after publication of the article, the Fgura Local Council sued the applicants for defamation. A year later, the Court of Magistrates found in favour of the Local Council, and ordered the applicants to pay 2,000 liri (4,800 euro) for moral damage.[355] The Court found that "a number of measures had been taken in order to submit the project to public scrutiny," and "it was not true, as claimed by the applicants, that the proposal that part

[348] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 96.
[349] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 96.
[350] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 97.
[351] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 95 .
[352] *Cumpănă and Mazăre v. Romania* (App. no. 3348/96) 10 June 2003 (Joint dissenting opinion of Judges Costa and Thomassen).
[353] *Lombardo and Others v. Malta*, (App. no. 7333/06) 24 April 2007.
[354] *Lombardo and Others v. Malta*, (App. no. 7333/06) 24 April 2007 para. 9.
[355] *Lombardo and Others v. Malta*, (App. no. 7333/06) 24 April 2007, para. 12.

of Hompesch Road should become one-way had been rejected."[356] The Court also concluded that the fourth applicant, as editor of the newspaper, had been aware of the controversy and believed that the comment of the first three applicants had been justified.[357] In 2003, the Court of Appeal confirmed the finding that the publication had been defamatory, but decided to reduce the amount of the damages to 600 liri (1,440 euro).[358] The Constitutional Court ultimately upheld the judgment, finding that although the limits of acceptable criticism were wider with respect to governments, the attribution of false facts was not protected by freedom of expression.[359]

The applicants made an application to the European Court, claiming the civil defamation proceedings by the local council violated their right to freedom of expression. The Court first held that a local council, being an elected political body made up of persons mandated by their constituents, should be "expected to display a high degree of tolerance to criticism."[360] Second, the "subject matter of the publication was the applicants' assessment of the situation regarding the [road project] which was part of a political debate which had been discussed in the local media."[361] The Court examined the domestic court decisions, and noted they did not accept it was a value-judgment but considered it to be a "statement of fact" given that the Local Council had indeed taken a number of measures to submit the project to public scrutiny.[362] However, the European Court stated it disagreed with the conclusion reached by the domestic courts.[363] The Court observed that the statement at issue consisted of two allegations: the Local Council (i) did not consult the public, and (ii) was ignoring public opinion on the matter. The Court held that the first allegation was "capable of various interpretations."[364] It found that the allegations had a "factual basis," in that the Local Council had rejected a motion presented by the applicants calling for the holding of a public consultation meeting about the road project, and the rejection of the applicants' motion provided a "sufficient factual basis for the allegation that the Local Council had not consulted the public so as to allow that allegation to be construed as a value judgment."[365]

Finally, the Court cited *Wille*, *Nikula*, and *Cumpănă and Mazăre*, and recalled the "chilling effect that the fear of sanction has on the exercise of freedom of expression."[366] The Court reiterated that the chilling effect, "which works to the detriment of society as a whole, is likewise a factor which goes to the proportionality of, and thus the justification for, the sanctions imposed on the applicants."[367] The Court noted that the government "relied on the relatively lenient nature of the sanction imposed," but the Court held that the award of damages "constituted a reprimand" for the exercise by the applicants of their right to freedom of expression.[368] The Court considered that even given the "relatively low amount of damages awarded," the sanction imposed "could be considered to have had a chilling effect on the exercise by the applicants of their right to freedom of expression as it was capable of discouraging them from making statements critical of the Local Council's policies in the

[356] *Lombardo and Others v. Malta*, (App. no. 7333/06) 24 April 2007, para. 15.
[357] *Lombardo and Others v. Malta*, (App. no. 7333/06) 24 April 2007, para. 17.
[358] *Lombardo and Others v. Malta*, (App. no. 7333/06) 24 April 2007, para. 20.
[359] *Lombardo and Others v. Malta*, (App. no. 7333/06) 24 April 2007, para. 32.
[360] *Lombardo and Others v. Malta*, (App. no. 7333/06) 24 April 2007, para. 54.
[361] *Lombardo and Others v. Malta*, (App. no. 7333/06) 24 April 2007, para. 55.
[362] *Lombardo and Others v. Malta*, (App. no. 7333/06) 24 April 2007, para. 57.
[363] *Lombardo and Others v. Malta*, (App. no. 7333/06) 24 April 2007, para. 58.
[364] *Lombardo and Others v. Malta*, (App. no. 7333/06) 24 April 2007, para. 59.
[365] *Lombardo and Others v. Malta*, (App. no. 7333/06) 24 April 2007, para. 59.
[366] *Lombardo and Others v. Malta*, (App. no. 7333/06) 24 April 2007, para. 61.
[367] *Lombardo and Others v. Malta*, (App. no. 7333/06) 24 April 2007, para. 61.
[368] *Lombardo and Others v. Malta*, (App. no. 7333/06) 24 April 2007, para. 61.

future."[369] In light of the these considerations, the Court unanimously held that there had been a violation of Article 10, and the fact that the proceedings were "civil rather than criminal in nature," and the award "relatively modest," did not detract from the fact that the standards applied by the courts were not compatible with the principles embodied in Article 10.[370]

The Court in *Lombardo and Others* brought together the chilling effect principles from *Wille*, *Nikula*, and *Cumpănă and Mazăre*, and emphasised the importance attached to ensuring there was no chilling effect *in the future* on expression relating to public interest criticism of local government. The Court was not holding that civil defamation proceedings, as such, are not inconsistent with Article 10, but that such proceedings produce a chilling effect when they concern matters of public interest, targeting local government. Notably, a consequence of the Court's application of the chilling effect principle is that it was prepared to accept that expression criticising local government can "lack a clear basis in fact" and the distinction between fact and value judgments "is of less significance."

Three months later, the Court was again confronted with the question of the chilling effect of civil defamation proceedings initiated by local government. The case was *Dyuldin and Kislov v. Russia*,[371] where the first applicant was a trade-union leader, and the second applicant was a journalist in Penza. The case arose in August 2000, when the *Novaya birzhevaya gazeta* newspaper published an open letter on its front page, which was signed by the applicants and four newspaper editors. The open letter had been adopted by the Penza Regional Voters' Association Civic Unity, of which the applicants were members, and independent media in the Penza Region. The open letter included statements that the "regional authorities have started reprisals against the independent media. Journalists are subjected to threats and beatings, our publications are prohibited from being printed and distributed in the region."[372]

In February 2001, twelve members of the Penza Regional Government lodged a civil defamation action against the applicants and other signatories to the letter, as well as the newspaper that published it. In May 2001, the Leninskiy District Court of Penza found the statements in the letter "were not true and damaged the honour and dignity of the plaintiffs as the members of the Penza Regional Government."[373] The Court held that "any State official in the Penza Region ... falls into the category of 'regional authority'," and the District Court "found no evidence to support the statements referring to the persecution of journalists in the Penza Region," noting that "one of the signatories, the editor-in-chief of a local newspaper, could not prove that an attack on one of his journalists had been politically motivated."[374] The Court ordered that all the plaintiffs be jointly compensated for non-pecuniary damage: the defendant newspaper was to pay 50,000 roubles (680 euro), and each of the applicants was to pay 2,500 roubles (34 euro). The Penza Regional Court ultimately upheld the judgment.

The applicants made an application to the European Court, claiming the defamation judgment against them violated their right to freedom of expression. The Court first noted that the domestic courts had accepted the plaintiffs had been affected by the publication, and could sue in defamation, because the terms "regional authorities," and "team," had been "broad enough to cover any State official who worked in the executive branch of the Penza Regional Government, as the plaintiffs did." However, the European Court held it was "not

[369] *Lombardo and Others v. Malta*, (App. no. 7333/06) 24 April 2007, para. 61.
[370] *Lombardo and Others v. Malta*, (App. no. 7333/06) 24 April 2007, para. 62.
[371] *Dyuldin and Kislov v. Russia* (App. no. 25968/02) 31 July 2007.
[372] *Dyuldin and Kislov v. Russia* (App. no. 25968/02) 31 July 2007, para. 10
[373] *Dyuldin and Kislov v. Russia* (App. no. 25968/02) 31 July 2007, para. 19.
[374] *Dyuldin and Kislov v. Russia* (App. no. 25968/02) 31 July 2007, para. 19.

convinced that in reaching this finding the domestic courts applied standards which were in conformity with the principles embodied in Article 10."[375]

At this point, the Court laid down the principle that a "fundamental requirement" of the law of defamation is that to give rise to a cause of action the defamatory statement "must refer to a particular person."[376] The Court applied chilling effect reasoning, noting that if all government officials were allowed to sue in defamation in connection with any statement critical of government affairs, even in situations where the official was not referred to by name or in an otherwise identifiable manner, journalists would be "inundated with lawsuits."[377] This would result in an "excessive and disproportionate burden being placed on the media, straining their resources and involving them in endless litigation," and would "inevitably have a chilling effect on the press in the performance of its task of purveyor of information and public watchdog."[378] Further, the Court applied the *Castells* principle that the "dominant position which the government occupies makes it necessary for it to display restraint in resorting to libel proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media."[379]

The Court considered that the expressions used in the letter should be characterised as value judgments rather than statements of fact,[380] and was founded on the applicants' "first-hand knowledge of the situation and experience of working in the media."[381] The Court further noted with "concern" that the domestic courts adopted an "unusually high standard of proof," finding that a description of the governor's policy as "destructive" would only be true if it was based on a scientifically sound comprehensive assessment of the social and economic development of the region.[382] The Court stressed that the degree of precision which ought to be observed by a journalist when expressing his opinion on a matter of public concern could "hardly be compared with that for making economic forecasts."[383] The Court applied *Lombardo and Others*, and held that the distinction between statements of fact and value judgments is of "less significance" in the present case where the impugned statement was made in the "course of a lively political debate at local level," and where elected officials and journalists should enjoy a "wide freedom to criticise the actions of a local authority," even where the statements made may "lack a clear basis in fact."[384] The Court concluded that the interference was not "necessary in a democratic society," and there had therefore been a violation of Article 10 of the Convention.

The Court in *Dyuldin and Kislov* went quite far in protecting expression criticising local government from a chilling effect, effectively ruling that a domestic court principle which permitted public officials to sue a newspaper even where they had not been named in a press article, violated a "fundamental requirement" of Article 10: this requirement was that to give rise to a cause of action the defamatory statement "must refer to a particular person."[385] The reason for this fundamental requirement was to protect against the chilling effect. Coupled with this fundamental requirement, the Court approved *Lombardo and Others*, and accepted that expression criticising local government can "lack a clear basis in fact."

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[375] *Dyuldin and Kislov v. Russia* (App. no. 25968/02) 31 July 2007, para. 43.
[376] *Dyuldin and Kislov v. Russia* (App. no. 25968/02) 31 July 2007, para. 43.
[377] *Dyuldin and Kislov v. Russia* (App. no. 25968/02) 31 July 2007, para. 43.
[378] *Dyuldin and Kislov v. Russia* (App. no. 25968/02) 31 July 2007, para. 43.
[379] *Dyuldin and Kislov v. Russia* (App. no. 25968/02) 31 July 2007, para. 45.
[380] *Dyuldin and Kislov v. Russia* (App. no. 25968/02) 31 July 2007, para. 48.
[381] *Dyuldin and Kislov v. Russia* (App. no. 25968/02) 31 July 2007, para. 48.
[382] *Dyuldin and Kislov v. Russia* (App. no. 25968/02) 31 July 2007, para. 48.
[383] *Dyuldin and Kislov v. Russia* (App. no. 25968/02) 31 July 2007, para. 48.
[384] *Dyuldin and Kislov v. Russia* (App. no. 25968/02) 31 July 2007, para. 49.
[385] *Dyuldin and Kislov v. Russia* (App. no. 25968/02) 31 July 2007, para. 43.

4.8.1.3 Grand Chamber criteria for balancing Article 8 and Article 10

At this point, we must turn to a 2012 judgment from the Grand Chamber, and while it did not concern civil defamation proceedings, the Court took the opportunity to lay down the criteria where there is a conflict between the right to freedom of expression and the right to respect for private life. This is relevant for the present discussion, as the Court confirmed, as had been held in *Cumpănă and Mazăre*, that Article 8 includes a right to protection of reputation. But crucially, the Grand Chamber laid down a threshold test for when Article 8 is triggered. The case was *Axel Springer AG v. Germany*,[386] and concerned an injunction and fines (11,000 euro) imposed on a newspaper for publishing an article detailing the arrest and conviction of a well-known actor. The Grand Chamber took the opportunity to lay down a six-part test[387] for considering whether there had been a fair balance struck between the Article 10 right to freedom of expression, and the Article 8 right to respect for private life.[388] The Court also held that in order for Article 8 to be engaged, an attack on a person's reputation must "attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life."[389] Further, Article 8 "cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence."[390] The Court concluded that there had been a violation of Article 10, placing particular weight on the fact the article was on a matter of public interest, concerned a public figure, the information was true, and had been confirmed from a prosecutor's office.[391]

Importantly, the Court held that in relation to the sanctions imposed, "although these were lenient, they were capable of having a chilling effect."[392] Notably, in laying down the criteria on sanctions, the Court cited the chilling effect principle from paragraph 93 of *Pedersen and Baadsgaard*, that the Court should consider whether the sanctions are "of such a kind as to have a "chilling effect" on the exercise of media freedom."[393] As mentioned above, this principle was based on *Wille* and *Goodwin*, which were cited with approval by the Court in *Pedersen and Baadsgaard*.[394]

The Court would return to the chilling effect of injunctions in the case of *Cumhuriyet Vakfı and Others v. Turkey*,[395] where an interim injunction had been granted to protect a public official's reputation. The case concerned a front-page advertisement published by the Turkish daily newspaper *Cumhuriyet*, consisting of a quote from the presidential candidate Abdullah Gül. The quote read, "It is the end of the republic in Turkey ... We definitely want to change the secular system."[396] The newspaper also published an article explaining that it

[386] *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber). See Ronan Ó Fathaigh, "Grand Chamber Seeks to Clarify Balancing of Article 10 and Article 8," *Strasbourg Observers*, 21 February 2012. See also, Dirk Voorhoof, "Freedom of Expression Versus Privacy and the Right to Reputation: How to Preserve Public Interest Journalism," in Stijn Smet and Eva Brems (eds.), *When Human Rights Clash at the European Court of Human Rights* (Oxford University Press, 2017), pp. 148–170.
[387] *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber), para. 90-94.
[388] *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber), para. 84
[389] *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber), para. 83.
[390] *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber), para. 83.
[391] *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber), para. 104.
[392] *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber), para. 109.
[393] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 93.
[394] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber), para. 93.
[395] *Cumhuriyet Vakfı and Others v. Turkey* (App. no. 28255/07) 8 October 2013. See also, e.g., *Brosa v. Germany* (App. no. 5709/09) 17 April 2014 (Article 10 and injunction on distributing leaflets targeting a political candidate); and Ronan Ó Fathaigh and Dirk Voorhoof, "German Court Injunction Banning Political Leaflet Violated Article 10: Brosa v. Germany," *Strasbourg Observers*, 21 May 2014.
[396] *Cumhuriyet Vakfı and Others v. Turkey* (App. no. 28255/07) 8 October 2013, para. 10.

was a direct quote from an interview that Gül had given to the British newspaper *The Guardian*.

Gül subsequently brought a civil action for defamation against the newspaper over the quote, and secured an interim injunction, prohibiting "publication of the material attributed to the claimant Abdullah Gül," as well as "any news that may be subject to the [present] court proceedings, be suspended/prevented as a precautionary measure."[397] The European Court would later review the interim injunction, and unanimously conclude that there had been a violation of Article 10. The main question had been whether the injunction had been necessary in a democratic society, and the Court stated that because of the "inherent dangers" of prior restraints on publication, they were subject to the "most careful scrutiny."[398] The Court then examined the injunction, including (a) the scope of the interim injunction; (b) the duration of the interim injunction; (c) and the "severity of the punishment" had the injunction been violated. The Court held that due to its "procedural deficiencies," and the "severity of the punishment failure to comply with the interim injunction would have entailed" (one to six months' imprisonment),[399] there had been a violation of Article 10. Notably, in relation to the "sheer scope" of the injunction, the Court applied chilling effect reasoning, finding that the lack of clarity as to what material could and could not be published may have had a "general chilling effect on the reporting of these matters at a period of intense political debate regarding the Presidential elections," which affected "not only *Cumhuriyet* as the measure's direct addressee," but also "all media outlets in the country."[400] The Court had regard to the applicants' claim that neither *Cumhuriyet* nor the other major newspapers in Turkey had even reported on the interim injunction order obtained by Mr Gül.[401]

This concern about taking into account the broader chilling effect of an injunction was also at play in the somewhat different, but related, question of whether newspapers should be required to give advance notice to a person before publishing private details (i.e. pre-notification). This issue was raised in *Mosley v. the United Kingdom*,[402] where it was argued that to ensure effective protection of the right to respect for private life, the positive obligations under Article 8 should include a requirement of a legally binding pre-notification rule on newspapers. However, the Court unanimously held that there had been no violation of Article 8 by the absence of pre-notification requirement in U.K. law.

Importantly, the Court noted that any prior-notification rule would only be as effective as the sanctions imposed for non-observance of the rule. The Court considered that civil fines would be unlikely to deter newspapers publishing material without prior-notification, and made reference to the fact that the newspaper in the instant case would probably have run the risk of non-notification. Thus, punitive or criminal sanctions would be the only effective sanction, and the Court considered that such sanctions would have a broader "chilling effect which would be felt in the spheres of political reporting and investigative journalism," which attract a high level of speech protection.[403] Further, the Court emphasised the need to look "beyond the facts of the present case" and consider the "broader impact of a pre-notification requirement," including the chilling effect to which a pre-notification requirement risks giving rise to on expression on matters of public interest.[404]

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[397] *Cumhuriyet Vakfı and Others v. Turkey* (App. no. 28255/07) 8 October 2013, para. 20.
[398] *Cumhuriyet Vakfı and Others v. Turkey* (App. no. 28255/07) 8 October 2013, para. 61.
[399] *Cumhuriyet Vakfı and Others v. Turkey* (App. no. 28255/07) 8 October 2013, para. 75.
[400] *Cumhuriyet Vakfı and Others v. Turkey* (App. no. 28255/07) 8 October 2013, para. 63.
[401] *Cumhuriyet Vakfı and Others v. Turkey* (App. no. 28255/07) 8 October 2013, para. 63.
[402] *Mosley v. the United Kingdom* (App. no. 48009/08) 10 May 2011. See Ronan Ó Fathaigh, "Absence of prior-notification requirement does not violate Article 8: Mosley v UK," *Strasbourg Observers*, 11 May 2011.
[403] *Mosley v. the United Kingdom* (App. no. 48009/08) 10 May 2011, para. 129.
[404] *Mosley v. the United Kingdom* (App. no. 48009/08) 10 May 2011, para. 129.

4.8.2 Grand Chamber disagreement in *Delfi*

Three years after *Axel Springer*, the Grand Chamber would finally deliver its first judgment concerning civil liability for defamation in the case of *Delfi AS v. Estonia*.[405] As mentioned above, the case involved imposing liability on a news website for reader comments, and the news website claimed a violation of its right to freedom of expression under Article 10. Following an initial judgment from the First Section of the Court finding, unanimously, that there had been no violation of Article 10,[406] the case was referred to the Court's 17-judge Grand Chamber. In 2015, the Grand Chamber delivered its judgment, and by a majority, also held that there had been no violation of Article 10.[407] The Grand Chamber laid down a four-step test for assessing whether imposing liability on Delfi was consistent with Article 10: (a) the context of the comments, (b) the measures applied by the applicant company in order to prevent or remove defamatory comments, (c) the liability of the actual authors of the comments as an alternative to the applicant company's liability, and (d) the consequences of the domestic proceedings for the applicant company.[408]

The Grand Chamber essentially classified the comments as "clearly unlawful contents,"[409] and on this basis, held that it was consistent with Article 10 to impose liability for failing to remove this type of expression "without delay," and, most importantly, "even without notice."[410] Notably, the Court was not quite clear as to its classification of the comments, failing to cite any specific comments in its judgment, and variously describing the case as concerning "liability for defamatory or other types of unlawful speech,"[411] "clearly unlawful contents",[412] "clearly unlawful speech, which infringes the personality rights of others,"[413] "mainly" hate speech, and "speech that directly advocated acts of violence."[414] However, the purpose at this point of the thesis is not to discuss the correctness of the Grand Chamber's judgment generally, but rather focus on its treatment of the argument surrounding a chilling effect on free expression.

Delfi's argument was that imposing liability had a chilling effect on freedom of expression: Delfi argued that imposing liability meant that it would be forced to employ an "army of highly trained moderators to patrol" comments, and this would lead to them removing, "just in case," any "sensitive comments", and all comments would be moderated so they were "limited to the least controversial issues."[415] Otherwise, Delfi argued, it could "avoid such a massive risk" by closing the reader comment altogether.[416] Thus, Delfi's basic chilling effect argument was that the "risk" of liability meant it could either limit reader comments to the least controversial, or close reader comments completely.

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[405] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber) (Article 10 and news website's liability for reader comments). There has been much commentary on *Delfi*; see, for example, Robert Spano, "Intermediary Liability for Online User Comments under the European Convention on Human Rights," (2017) 17 *Human Rights Law Review* 665; and Ronan Ó Fathaigh, "The Chilling Effect of Liability for Online Reader Comments," (2017) *European Human Rights Law Review* 387.
[406] *Delfi AS v. Estonia* (App. no. 64569/09) 10 October 2013.
[407] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber).
[408] *Delfi AS v. Estonia* (App. no. 64569/09) 10 October 2013, para. 64.
[409] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 141.
[410] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 159.
[411] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 110.
[412] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 141.
[413] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 115.
[414] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 117.
[415] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 159.
[416] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 72.

Curiously, the majority in *Delfi* nowhere mentions a chilling effect, even though the Estonian government addressed the argument,[417] as did the dissent.[418] But while the majority did not mention a chilling effect explicitly, it did in a sense address it. First, the Court examined the broader impact of the Estonian Supreme Court's judgment, and said that while Estonian courts were imposing liability on other websites, "no awards have been made for non-pecuniary damage".[419] The Court also noted that the number of comments on Delfi "has continued to increase".[420] Finally, the Court admitted that Delfi had set up a "team of moderators" to monitor comments, but did not think this a major consequence to Delfi's "business model".[421] Of course, the fine of 320 euro was "by no means" disproportionate.[422] Thus, and in fairness to the majority, while it did not mention the chilling effect explicitly, it did in a way engage with the chilling effect argument, considering there was no evidence of a chilling effect, as no fines were being imposed, and comments were actually increasing.

It is arguable that this was the first Grand Chamber judgment where a majority of the Court sought to dismiss the chilling effect, based on arguments on a lack of evidence for a chilling effect. Nonetheless, it is not exactly clear why the *Delfi* majority seemed to reject the chilling effect argument in the manner that it did.[423] Notably, in paragraphs 160 and 161, where it attempts to describe the lack of evidence for a chilling effect, there is no reference to any prior authority. Indeed, there is no engagement by the *Delfi* majority with any of the case law concerning the chilling effect.

The omission by the Grand Chamber of the chilling effect principle in *Delfi* was made all the more curious, given that it had been applied in *Axel Springer*, and three months later after *Delfi*, the Grand Chamber again applied the principle in another judgment not involving civil defamation, but civil proceedings for invasion of privacy: the case was *Couderc and Hachette Filipacchi Associés v. France* (hereinafter, *Couderc*), concerning the liability of the magazine *Paris Match* for publishing an article about, and a photograph of, the Prince of Monaco.[424] In 2005, the Prince brought proceedings over the article, claiming it interfered with his right to private life and protection of his own image. The Nanterre Tribunal de Grande Instance ordered the applicant to pay the Prince 50,000 euro in damages, and ordered that details of the judgment be printed on the magazine's entire front cover, at the publishing company's expense and on pain of a daily fine. The court found that the article and photographs "fell within the most intimate sphere of love and family life", and "amounts to a serious and wilful breach of the claimant's fundamental personality rights".[425] The judgment was upheld on appeal ultimately by the French Court of Cassation.

The European Court reviewed the domestic courts' judgments concerning the Paris Match article, and unanimously concluded that there had been a violation of Article 10. The

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[417] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 92.
[418] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber) (Joint dissenting opinion of Judges Sajó and Tsotsoria, para. 20).
[419] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 160.
[420] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 161.
[421] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 161.
[422] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 160.
[423] A possible explanation for the *Delfi* majority's non-application of the chilling effect may be the view within the Court that where hate speech is purportedly involved, the importance of having regard to the chilling effect is substantially reduced, to the point where it is not even mentioned. Support for this view may also be found if we frame *Lindon* in a similar manner, as the *Lindon* majority explicitly described the expression at issue as, "their content is such as to stir up violence and hatred."[423] Similarly to *Delfi*, the *Lindon* majority nowhere even mentioned the chilling effect principle.
[424] *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber) (Article 10 and liability for publishing public figure's photographs).
[425] *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber), para. 21.

Court considered that the question before it was whether a "fair balance" had been struck between the right to respect for private life and the right to freedom of expression.[426] The Court applied the *Axel Springer* criteria, and notably, the applicant argued that there had been an "excessive interference with its freedom of expression", with a "clearly chilling effect."[427]

In relation to the final *Axel Springer* criteria on the "severity of the sanction," the Court in *Couderc* reiterated that "irrespective of whether or not the sanction imposed was a minor one, what matters is the very fact of judgment being given against the person concerned, including where such a ruling is solely civil in nature."[428] The Court then recited the chilling effect principle, and held that "any undue restriction on freedom of expression effectively entails a risk of obstructing or paralysing future media coverage of similar questions."[429] The Court applied these principles to the 50,000 euro damages award, and the order to publish a statement detailing the judgment, and concluded that the Court "cannot consider those penalties to be insignificant."[430]

Couderc concerned civil proceedings, and emphasises how peculiar *Delfi* was in the Grand Chamber's line of judgments on civil proceedings interfering with freedom of expression, where both *Axel Springer* and *Couderc* had applied the principle, and yet, in *Delfi*, there was not one mention. However, as discussed below, the post-*Delfi* case law would move away from this omission of the chilling effect principle.

4.8.3 Post-*Delfi* application of the chilling effect

4.8.3.1 Fourth Section worries about future risk of a chilling effect

A little over seven months after the Grand Chamber's *Delfi* judgment, the seven-judge Fourth Section of the Court was called upon to consider the same issue as *Delfi*, but this time by a Hungarian news website, Index.hu. The case was *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*,[431] and first concerned the Hungarian self-regulatory body for internet content providers MTE.[432] On its website, MTE.hu, the association published an opinion criticising a property website, and a reader posted a comment saying the property website was a "sly, rubbish, mug company." The Hungarian news website, Index.hu, published a news article on the association's opinion. Under this article, another user commented that "people like this should go and shit a hedgehog." A week later, the property website sued MTE and Index.hu for defamation, and both immediately removed the comments following the initiation of court proceedings. However, the Hungarian Constitutional Court ultimately held that MTE and Index were liable for defamation, as by

[426] *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber), para. 82.
[427] *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber), para. 47.
[428] *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber), para. 151.
[429] *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber), para. 151.
[430] *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber), para. 152.
[431] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (App. No. 22947/13) 2 February 2016. See Tarlach McGonagle, "*Magyar Tartalomszolgátatók Egyesülete (MTE) and Index.hu Zrt v. Hungary*," (2016) *European Human Rights Cases* 140; and Eileen Weinert, "*MTE v Hungary*: the first European Court of Human Rights ruling on liability for user comments after Delfi AS v Estonia" (2016) *Entertainment Law Review* 135.
[432] Magyar Tartalomszolgáltatók Egyesülete (MTE).

"enabling readers to make comments" they had "assumed objective liability."[433] The Hungarian courts did not impose damages, but ordered both MTE and Index.hu to pay the property company's court fees, and legal costs.

Both MTE and Index.hu made an application to the European Court, arguing that imposing liability for defamatory reader comments violated their right to freedom of expression under Article 10. The European Court's Fourth Section reviewed the finding of liability, and applied a modified five-step test based on *Delfi*.[434] However, unlike *Delfi*, the Fourth Section concluded that there had been a violation of Article 10. The Court classified the comments as only "vulgar", and "free of the pivotal element of hate speech".[435] The Court held that imposing liability on MTE and Index, "reflected a notion of liability which effectively precludes the balancing of competing rights", namely freedom of expression under Article 10, and protection of reputation under Article 8.[436] Crucially, the Court held that the "notice-and-take-down" system operated by MTE and Index was a "viable avenue" to protect reputation, where individuals "could indicate unlawful comments to the service provider so that they be removed."[437]

For the purposes of the present discussion, it is worth highlighting how the Fourth Section dealt with the chilling effect argument. Similar to *Delfi*, the applicants argued that the imposition of liability would have an "undue chilling effect" on freedom of expression.[438] Notably, and unlike the majority judgment in *Delfi*, the Fourth Section in *MTE and Index* directly relied upon the chilling effect argument. The Fourth Section held that imposing liability "may" have "foreseeable negative consequences" on the comment environment, and these consequences "may have, directly or indirectly," a "chilling effect on the freedom of expression on the Internet."[439] The Court elaborated on these negative consequences, giving the example of "impelling" the closure of comment sections "altogether."[440] Importantly, the Fourth Section held that expecting the website to assume some comments might be in breach of the law would require "excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet."[441] The Court also said that while no fines were imposed on MTE and Index, "it cannot be excluded" that imposing liability "might produce a legal basis for a further legal action resulting a (*sic*) damage award".[442]

It is worth pausing for a moment to compare how the *Delfi* majority and Fourth Section in *MTE and Index* treated the chilling effect argument. First, for the *Delfi* majority, there was no evidence of a chilling effect on the comment environment, as comments had

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[433] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (App. No. 22947/13) 2 February 2016, para. 22.
[434] The Court applied the four steps at para. 144 - 161 of *Delfi*, and added a fifth step concerning "consequences of the comments for the injured party" (*Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (App. No. 22947/13) 2 February 2016, para. 84).
[435] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (App. No. 22947/13) 2 February 2016, para. 70.
[436] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (App. No. 22947/13) 2 February 2016, para. 89.
[437] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (App. No. 22947/13) 2 February 2016, para. 81.
[438] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (App. No. 22947/13) 2 February 2016, para. 36.
[439] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (App. No. 22947/13) 2 February 2016, para. 86.
[440] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (App. No. 22947/13) 2 February 2016, para. 86.
[441] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (App. No. 22947/13) 2 February 2016, para. 82.
[442] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (App. No. 22947/13) 2 February 2016, para. 86.

"continued to increase," even after liability had been imposed.[443] In contrast, the Fourth Section in *MTE and Index* did not investigate whether the comments had actually been affected, but instead held that it "may" require closure of the comment space altogether.[444] Second, for the *Delfi* majority, there was no evidence of awards being made in domestic courts for "non-pecuniary damage," following the imposition of liability. In contrast, the Fourth Section in *MTE and Index* admitted that "no awards were made for non-pecuniary damage," but held that it "cannot be excluded" there might be a "further legal action resulting a (*sic*) damage award."[445]

Thus, there seemed to be two radically different approaches in the *Delfi* majority and the Fourth Section in *MTE and Index* on how to respond to the chilling effect argument. For the Fourth Section in *MTE and Index*, it was not so much concerned about looking for evidence, but instead about future risk, where fines might later be imposed, or comment sections might be closed down altogether. And it contrasts very sharply with the *Delfi* majority's treatment of the chilling effect, where it was focused on, what it considered, was evidence that comments were increasing, and no fines were being imposed in later cases.

4.8.3.3 Third Section also worries about the future

While *MTE and Index* was delivered in February 2016, exactly twelve months later in February 2017, another section of the Court, the Third Section, was also called upon to consider the chilling effect argument over liability for online reader comments. The case was *Pihl v. Sweden*,[446] and concerned a blog post published in 2011 on a Swedish non-profit association's website. The post included an allegation that a man named Rolf Pihl was involved in a Nazi party. A reader commented under the blog saying Pihl was "a real hash-junkie." A week later, Pihl asked that the blog and comment be removed, and the next day the association removed it, and published a clarification and apology. Nevertheless, Pihl sued the association for defamation. However, the Swedish courts dismissed the claim regarding the blog post, as it was "covered" by a regulation in Sweden's Fundamental Law on Freedom of Expression.[447] In relation to the reader comment, the courts found that while the comment was defamatory, there were no legal grounds for holding the association liable for failing to remove the comment "sooner than it had done".[448]

Unlike in *Delfi* and *MTE and Index*, it was not the website which made an application to the European Court, but rather Pihl, arguing that Sweden had violated his Article 8 right to protection of reputation,[449] by failing to hold the website liable for the defamatory reader comment. In *Pihl*, the Third Section applied the five-step test set out in *MTE and Index*, and held that there had been no violation of Article 8. The Court held that although the comment was "offensive," it certainly did not amount to hate speech or incitement to violence (unlike

[443] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 161.
[444] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (App. No. 22947/13) 2 February 2016, para. 86.
[445] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (App. No. 22947/13) 2 February 2016, para. 86.
[446] *Pihl v. Sweden* (App. no.74742/14) 7 February 2017 (Admissibility decision). See Drk Voorhoof, "*Pihl v. Sweden*: non-profit blog operator is not liable for defamatory users' comments in case of prompt removal upon notice," *Strasbourg Observers*, 20 March 2017.
[447] *Pihl v. Sweden* (App. no.74742/14) 7 February 2017 (Admissibility decision), para. 9.
[448] *Pihl v. Sweden* (App. no.74742/14) 7 February 2017 (Admissibility decision), para. 12.
[449] See *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber), para. 83 ("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").

in *Delfi*).[450] Importantly, the Third Section applied the principle from *MTE and Index* that expecting the website to assume some comments might be in breach of the law would require "excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet."[451] The Court noted that the comment was removed one day after being notified, and a new blog post was published with an explanation for the error and an apology.[452] In light of this, the Court concluded that the Swedish courts acted within their "margin of appreciation" and "struck a fair balance" between Pihl's rights under Article 8 and the association's right to freedom of expression under Article 10.[453]

Notably, the Third Section, on its own motion (neither the applicant nor the government argued the point), brought up the chilling effect, even though it admitted that "the domestic proceedings had no consequences for the association in the present case."[454] Nonetheless, referring to *MTE and Index*, the Third Section stated if liability was imposed, it "may have negative consequences on the comment-related environment," and thus a "chilling effect on freedom of expression via internet."[455] This chilling effect "could be particularly detrimental for a non-commercial website."[456] Thus, the Third Section in *Pihl* considered it crucial to take account of a potential chilling effect that may arise in other cases, even in a case where there had been "no consequences" for the website at issue. The approach in *Pihl* is arguably an extension of how the Fourth Section approached the chilling effect argument, and a rejection of the approach adopted by the *Delfi* majority.

The differing treatment of the chilling effect argument by the *Delfi* majority, and the Fourth Section in *MTE and Index* and Third Section in *Pihl*, raises the question of whether either approach is consistent with how the Court has responded to chilling effect arguments in other areas of Article 10 case law. Without seeking to be overly simplistic, the *Delfi* majority sought evidence for a chilling effect, and concluded there was none; while in *MTE and Index* and *Pihl*, the Court was more worried about future risk of a chilling effect (using terms such as "may have", "might produce", and "could be").

First, when reference is made to the Court's case law on the right to protection of journalistic sources, it seems that the Court is also concerned about a future chilling effect, and not about searching for evidence. In the seminal protection of journalistic sources judgment in *Goodwin v. UK*, the Court had regard to the "potentially" chilling effect a source-disclosure order had on freedom of expression.[457] This is in contrast to the U.S. Supreme Court in its *Branzburg v. Hayes* judgment on a similar issue, where the Supreme Court's majority had sought evidence for a chilling effect, and noted that the estimates of the chilling effect of disclosure orders were "widely divergent and to a great extent speculative."[458] The European Court's concern for a future chilling effect continues in the Grand Chamber's most recent protection of journalistic sources judgment in *Sanoma Uitgevers BV v. Netherlands*.[459] In *Sanoma*, the Court was faced with the question of whether a threatened police search of a Dutch magazine's offices to obtain footage of an illegal street race violated the right to protection of journalistic sources. Notably, even though the Court admitted that "it is true that no search or seizure took place in the present case", the Court nonetheless found that a chilling effect will arise wherever journalists are seen to assist in the

[450] *Pihl v. Sweden* (App. no.74742/14) 7 February 2017 (Admissibility decision), para. 25.
[451] *Pihl v. Sweden* (App. no.74742/14) 7 February 2017 (Admissibility decision), para. 31.
[452] *Pihl v. Sweden* (App. no.74742/14) 7 February 2017 (Admissibility decision), para. 32.
[453] *Pihl v. Sweden* (App. no.74742/14) 7 February 2017 (Admissibility decision), para. 37.
[454] *Pihl v. Sweden* (App. no.74742/14) 7 February 2017 (Admissibility decision), para. 35.
[455] *Pihl v. Sweden* (App. no.74742/14) 7 February 2017 (Admissibility decision), para. 35.
[456] *Pihl v. Sweden* (App. no.74742/14) 7 February 2017 (Admissibility decision), para. 35.
[457] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 39.
[458] *Branzburg v. Hayes*, 408 U.S. 665 (1971), p. 694.
[459] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber).

identification of anonymous sources.[460] Second, a similar trend is evident in the Court's case law on criminal defamation. Take the Grand Chamber's unanimous judgment in *Cumpănă and Mazăre v. Romania*,[461] where the Court found that the "fear" of prison sentences for defamation has a chilling effect on freedom of expression.[462] Notably, similar to *Sanoma* in that no search took place, the Court in *Cumpănă and Mazăre* admitted that the journalists "did not serve their prison sentence" as they had been granted a presidential pardon, but the Court nevertheless held such a sanction will "inevitably have a chilling effect".[463]

The Court's approach in its protection of journalistic sources (*Goodwin* and *Sanoma*) and criminal defamation (*Cumpănă and Mazăre*) jurisprudence all mirror the classic chilling effect principle reiterated by the Court in *Altuğ Taner Akçam v. Turkey*.[464] A chilling effect arises from a legal rule where the "risk" of being affected by the rule discourages a person from engaging in similar expression "in the future",[465] or forces a person to display "self-restraint" in their expression to avoid liability.[466] In *Altuğ Taner Akçam*, the Court found that Turkey's Article 301 insult law violated Article 10 due to its "unacceptably broad terms", and found that it had a chilling effect on the applicant, even though the applicant "was not prosecuted and convicted of the offence."[467] What concerned the Court was the chilling effect on freedom of expression, because in the "future an investigation could potentially be brought" and the "future risk of prosecution".[468] Thus, it is arguable that the *Delfi* majority's rejection of the chilling effect argument was inconsistent with the Court's treatment of similar chilling effect arguments in other areas of the Court's freedom of expression jurisprudence. Indeed, it is arguable that the Fourth Section's approach in *MTE and Index* and Third Section's approach in *Pihl*, is more in line with the Article 10 case law discussed.

4.8.3.4 Fifth Section finds high damages have a chilling effect

Following *Pihl,* the Court returned to the issue that opened this section of the thesis, on the chilling effect of large damages awards for defamation similar to *Steel and Morris*. But the case would demonstrate how far the Court's application of the chilling effect principle had come: requiring that domestic courts provide *specific* reasons for coming to exact figures in damages for defamation, with the European Court applying its "most careful scrutiny" standard of review. The case was *Independent Newspapers (Ireland) Ltd. v. Ireland*,[469] where the applicant was the publisher of the Irish newspaper the *Evening Herald*. The case arose in 2004, when the newspaper published a number of articles concerning a consultant working for an Irish government ministry. While the articles had raised issues over the awarding of certain government contracts, the articles also referred to "rumours of an intimate relationship" between the married consultant and a government minister.[470] The consultant

[460] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 71.
[461] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber).
[462] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114.
[463] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 116. Similarly, concerning civil defamation, the Court has held that "it is not necessary to rule on whether the present damages' award had, as a matter of fact, a chilling effect on the press: as matter of principle, unpredictably large damages' awards in libel cases are considered capable of having such an effect" (*Independent Newspapers (Ireland) Limited v. Ireland* (App. No. 28199/05) 15 June 2017, para. 114).
[464] *Altuğ Taner Akçam v. Turkey* (App. no. 27250/07) 25 October 2011.
[465] *Altuğ Taner Akçam v. Turkey* (App. no. 27250/07) 25 October 2011, para. 68.
[466] *Altuğ Taner Akçam v. Turkey* (App. no. 27250/07) 25 October 2011, para. 75.
[467] *Altuğ Taner Akçam v. Turkey* (App. no. 27250/07) 25 October 2011, para. 75.
[468] *Altuğ Taner Akçam v. Turkey* (App. no. 27250/07) 25 October 2011, para. 75 - 76.
[469] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017.
[470] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017, para. 10.

sued for civil defamation, and a High Court jury found the articles were defamatory, having "alleged an extra-marital affair."[471] The jury awarded 1,872,000 euro in damages to the consultant. However, in 2014, the Supreme Court allowed an appeal over the amount of damages, holding that it was "so disproportionate to the injury suffered and wrong done that no reasonable jury would have made such an award."[472] Instead, the Supreme Court substituted a sum of 1,250,000 euro in damages.

The applicant publisher made an application to the European Court, claiming the damages award was excessive, and "signified the absence of adequate and effective safeguards" in Irish defamation law, in violation of Article 10's guarantee of freedom of expression.[473] Representative associations of Irish national and regional newspapers also made a third-party intervention, arguing that Irish defamation law had a chilling effect on newspapers, leading to a "marked reluctance to publish stories of grave public interest for fear of very high awards of compensation."[474]

The parties agreed that there had been an interference with freedom of expression, and the first issue was whether the interference was prescribed by law. The Court then moved on to consider whether the damages award was necessary in a democratic society, and the Court stated it would examine the "adequacy and efficacy" of the "domestic safeguards against disproportionate awards."[475] The Court also noted that it was proceeding on the basis that it was an "established fact" the articles were defamatory.[476] As a preliminary matter, the Court held that the "unusual size" of the awards, even by "domestic standards," at both High Court and Supreme Court level, was enough "to trigger" the Court's review. [477] The Court then examined the High Court and Supreme Court awards in detail.

In relation the High Court, the Court noted that the judge had provided some guidance to the jury on how to assess damages, such as the nature of the libel. However, the Court noted that in relation to the "quantum of damages," the judge said "he was not permitted to give any such guideline," or "any figure or range of figures."[478] The Court held that the judge's directions "remained inevitably quite generic," and "caused him both frustration and regret."[479] The Court concluded that the judge's direction was not "such as to reliably guide the jury towards an assessment of damages" that was proportionate.[480]

The Court then turned to the Supreme Court's decision. It noted that the Supreme Court had found the jury award disproportionate, and it followed, that in setting aside the jury award, "the appellate safeguard was effective."[481] However, the Court said that Article 10 analysis did not end there, and as the Supreme Court had substituted its own award of damages, the Court was required to examine "the process for arriving at that award."[482] As the Supreme Court award was "higher than any award ever made by a jury or appellate court," the European Court held that "very strong justification would be required for such a heavy sanction."[483] However, the Court would not "second guess the final award," but

[471] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017, para. 19.
[472] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017, para. 24.
[473] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017, para. 55.
[474] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017, para. 77.
[475] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017, para. 82.
[476] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017, para. 83.
[477] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017, para. 84.
[478] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017, para. 86
[479] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017, para. 90.
[480] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017, para. 92.
[481] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017, para. 93.
[482] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017, para. 94.
[483] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017, para. 95.

examine whether the "process followed" disclosed "relevant and sufficient reasons supporting the conclusion finally reached."[484]

The Court noted that the Supreme Court's judgment "does not provide an explanation for the final award," and "did not explain," apart from reference to principles which had been put to the jury in the High Court, "how it arrived at the figure of EUR 1.25 million."[485] The Court stated that while jury assessment of damages "may be inherently complex and uncertain," judicial control at appellate level "should, through the statement of reasons for the award, reduce uncertainty to the extent possible."[486] The Court held that "clarification was lacking regarding why, in particular, the highest ever award was required in a case which the Supreme Court did not categorise as one of the gravest and most serious libels."[487] Crucially, the Court held that given the "exceptional nature" of the damages award, this "pointed to a need for comprehensive reasons explaining the final award."[488] This was particularly so given that the award "had the capacity to act as a benchmark for future defamation awards and out-of-court settlement."[489] Thus, the Court found that the Supreme Court had failed to provide "very strong justification" for its award, and thus violated Article 10.[490]

The unanimous judgment was significant for finding that unpredictably high damages have a chilling effect, and require the most careful scrutiny and very strong justification. Further, it was not necessary to rule on whether the impugned damages' award had, as a matter of fact, a chilling effect on the press. As a matter of principle, unpredictably large damages' awards in libel cases are considered capable of having such an effect and therefore require the most careful scrutiny.[491] Second, this was a judgment where the Court recognised that it was an "established fact" the articles were "defamatory in the serious manner," and yet the Court found that the damages order violated Article 10. This was a rejection of the European Commission's view in 1990, dismissing the chilling effect of defamation damages on the basis that the publication of defamatory material is not protected under Article 10.[492]

4.8.3.5 Grand Chamber in *Medžlis Islamske Zajednice Brčko*

The chilling effect of civil defamation proceedings returned to the Grand Chamber two weeks after *Independent Newspapers*, and was the first Grand Chamber judgment delivered since *Delfi* on civil defamation proceedings and the chilling effect. But similar to *Delfi*, the Grand Chamber remained silent on the chilling effect issue. The case was *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*,[493] and as mentioned earlier, involved four applicant NGOs that were successfully sued for defamation over a letter they had sent to authorities about a candidate for director of a public radio station.[494]

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[484] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017, para. 96.
[485] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017, para. 99.
[486] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017, para. 99.
[487] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017, para. 100.
[488] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017, para. 100.
[489] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017, para. 100.
[490] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017, para. 104.
[491] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017, para. 85.
[492] *Times Newspapers Ltd. v. the United Kingdom* (App. no. 14631/89) 5 March 1990 (Commission Decision), para. 1.
[493] *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber). See Alex Bailin and Jessica Jones, "'Political defamation' and public servants' reputational rights," *Inforrm*, 11 July 2017.
[494] The Brčko Branch of the Islamic Community of Bosnia and Herzegovina, the Bosniac Cultural Society, the Bosniac Charity Association "Merhamet," and the Council of Bosniac Intellectuals.

In 2015, the Fourth Section held, by a majority of four votes to three, that there had been no violation of Article 10.[495] The Court noted that the applicants "did not resort in their letter to abusive, strong or intemperate language," and their complaint was not "vexatious or [constitute] a gratuitous personal attack on M.S."[496] However, the Court found that the applicants "had acted negligently in reporting M.S.'s alleged misconduct," and "had simply passed on the information they received without making a reasonable effort to verify its accuracy."[497] Finally, the Court considered the penalties imposed, and held that it "had regard to the award of damages made against the applicants in the context of a civil action and did not find it to be disproportionate."[498]

In 2017, the Grand Chamber delivered its 55-page judgment.[499] Notably, the third-party interveners, which include a freedom-of-expression NGO,[500] submitted that a lower level of protection for citizens who reported information to the authorities would have a "chilling effect on the freedom of expression."[501] The Court first considered whether the applicants' reporting could be qualified as whistle-blowing, and held that as there was an "absence of any issue of loyalty, reserve and discretion," there was no need to enquire into the kind of issue which has been central in the above case-law on whistle-blowing. [502]

The Court underlined the importance of the role of an NGO "reporting on alleged misconduct or irregularities by public officials," even where it is not based on direct personal experience.[503] The Court also reiterated that when an NGO draws attention to matters of public interest, it is exercising a "public watchdog role of similar importance to that of the press," and may be characterised as a "social 'watchdog' warranting similar protection under the Convention as that afforded to the press."[504] However, the Court added a caveat, finding that an NGO performing a public watchdog role is "likely to have greater impact when reporting on irregularities of public officials, and will often dispose of greater means of verifying and corroborating the veracity of criticism than would be the case of an individual reporting on what he or she has observed personally."[505]

The Court then applied the principles, and noted that the letter "concerned matters of public concern," and concerned a "civil servan[t] acting in an official capacity."[506] However, the Court agreed with the domestic courts that the letter was defamatory, and the "allegations

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[495] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 13 October 2015.
[496] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 13 October 2015, para.
[497] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 13 October 2015, para. 34.
[498] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 13 October 2015, para. 35.
[499] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 62.
[500] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber).
[501] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 63.
[502] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 80.
[503] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 86.
[504] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 86.
[505] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 87.
[506] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 98.

cast M.S. in a very negative light and were liable to portray her as a person who was disrespectful and contemptuous in her opinions and sentiments about Muslims and ethnic Bosniacs."[507] Further, the Court found no reasons to depart from the domestic courts finding. that "the applicants "did not make reasonable efforts to verify the truthfulness of [those] statements of fact before [reporting], but merely made [those statements]."[508] The Court concluded accordingly that the applicants "did not have a sufficient factual basis for their impugned allegations about M.S. in their letter."[509]

Finally, the Court considered the "severity of the sanction imposed on the applicants."[510] The Court held that it "did not consider" that the order to retract the letter within fifteen days or pay damages raised any issue under the Convention.[511] This was because, according to the Court, "it was only after expiration of the time-limit set by the BD Court of Appeal that the domestic courts began taking measures to enforce the payment order."[512] Second, the Court held that it was "satisfied that the amount of damages which the applicants were ordered to pay was not, in itself, disproportionate."[513] Thus, according to the Court, "it is of no relevance that in determining this amount the BD Court of Appeal took into account the publication of the impugned letter in the media despite not having relied on that fact in finding the applicants liable for defamation."[514]

Curiously, the Court nowhere mentions the chilling effect. In this regard, there are three points which may be made. First, when the Court is considering the principles to be applied under the heading, "the severity of the sanctions," it is curious that the Court does not cite *Axel Springer, Couderc*, nor *Morice*, which all held that even "lenient" sanctions are "capable of having a chilling effect;"[515] that "irrespective of whether or not the sanction imposed was a minor one, what matters is the very fact of judgment being given against the person concerned, including where such a ruling is solely civil in nature;"[516] and "interference with freedom of expression may have a chilling effect on the exercise of that freedom. The relatively moderate nature of the fines does not suffice to negate the risk of a chilling effect on the exercise of freedom of expression."[517] Two of these Grand Chamber judgments concerned civil proceedings, both considered the chilling effect which may arise from a civil sanction on freedom of expression, while the third concerned relatively moderate fines. Second, there are questions over the Court's holding that "it is of no relevance that in determining" the amount of damages and the publication order, the domestic courts "took into account the publication of the impugned letter in the media despite not having relied on

[507] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 104.
[508] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 117.
[509] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 117.
[510] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 104.
[511] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 104.
[512] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 104.
[513] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 104.
[514] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 104.
[515] *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber), para.
[516] *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber), para. 151.
[517] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 127.

that fact in finding the applicants liable for defamation."[518] However, is arguably not consistent with *Ghiulfer Predescu v. Romania,*[519] which had held that domestic courts must "convincingly justify how the amount awarded as compensation was proportionate to the impugned acts."[520] It is difficult to see how sanctioning the applicants for publication of the letter in the media, when the applicants did not publish the letter in the media ("it was not proven that they had been responsible for its publication"[521]), satisfies the principle in *Ghiulfer Predescu.* Finally, the Court in *Medžlis Islamske* does not apply the *Kasabova* line of case law, and examine whether the damages order and costs of the publication order were proportionate to the applicants' financial means, and whether the damages order and publication order costs were proportionate to the average wage in Bosnia and Herzegovina.

4.8.3.6 Third Section unanimously finds civil defamation proceedings had chilling effect

Notwithstanding the remarkable refusal of the Court at Grand Chamber level to apply the chilling effect principle where civil defamation proceedings are involved, at Chamber level, the chilling effect principle continues to be applied where public officials are involved. This is typified by the 2018 judgment in *Fedchenko v. Russia (No. 4)*,[522] which involved a public official successfully suing a Russian journalist over an article concerning a matter of public interest. The applicant in *Fedchenko (No. 4)* was editor of the weekly newspaper *Bryanskiye Budni*. The case arose in 2012 when the applicant published an article in the newspaper which discussed criminal proceedings against two men on charges of obtaining land by fraud. The article included introductory sentences that, "The lads wanted to replicate the deed of the Bryansk thieves from the local administration," and "they got carried away by the example of the big Bryansk thieves and failed to take into account that the latter were protected from all sides."[523] While these sentences did not mention any officials by name, later in the article the applicant mentioned another criminal case which had been discontinued against the Deputy Governor of the Bryansk Region, Nikolay Simonenko.

Following publication of the article, the Deputy Governor brought civil defamation proceedings against the applicant over the article, and sought 300,000 Russian roubles (4,000 euro) in damages. The Bryansk Regional Court allowed the claim against the applicant, and ordered him to publish a retraction within fifteen days, and awarded the claimant damages of 5,000 Russian rubles (125 euros). It also ordered the applicant to pay fees of 200 rubles (2 euro).[524] The Court held that the above passages had "definitely referred to Mr Simonenko as his photograph had been published next to the article," and meant that the plaintiff had "committed offences and had abused his official position for personal gain."[525]

The applicant made an application to the European Court, claiming the proceedings against him were a violation of his right to freedom of expression. The parties agreed that the civil proceedings for defamation constituted an interference with freedom of expression, and the main question for the Court was whether the interference had been necessary in a democratic society. First, the Court applied chilling effect reasoning in setting out its standard of review, stating that the "most careful scrutiny" is required when the measures taken or

[518] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 120.
[519] *Ghiulfer Predescu v. Romania* (App. no. 29751/09) 27 June 2017.
[520] *Ghiulfer Predescu v. Romania* (App. no. 29751/09) 27 June 2017, para. 62.
[521] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 90.
[522] *Fedchenko v. Russia (No. 4)* (App. no. 17221/13) 2 October 2018.
[523] *Fedchenko v. Russia (No. 4)* (App. no. 17221/13) 2 October 2018, para. 8.
[524] *Fedchenko v. Russia (No. 4)* (App. no. 17221/13) 2 October 2018, para. 13.
[525] *Fedchenko v. Russia (No. 4)* (App. no. 17221/13) 2 October 2018, para. 14.

sanctions imposed by the national authority are "capable of discouraging the participation of the press in debates over matters of legitimate public concern."[526] Second, the Court noted that the plaintiff was a deputy governor of the Bryansk Region, and reiterated that a politician acting in his public capacity "inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists."[527]

The Court then examined the impugned passages, and noted that the applicant did not mention Mr. Simonenko by name, but referred to "the big Bryansk thieves," "Bryansk thieves from the authorities," and "thief-officials." The Court further noted that the Bryansk Regional Court held that these terms "implied a reference to the criminal proceedings against Mr Simonenko and thus affected him directly."[528] However, the European Court stated that it was "not convinced by such an interpretation."[529] This was because a "fundamental requirement" of the law of defamation is that in order to give rise to a cause of action the defamatory statement "must refer to a particular person."[530] The Court applied chilling effect reasoning for this requirement, stating that if all public officials were allowed to sue in defamation in connection with any statement critical of the administration of State affairs, even in situations where the official was not referred to by name or in an otherwise identifiable manner, journalists "would be inundated with lawsuits."[531] This would result in an "excessive and disproportionate burden being placed on the media, straining their resources and involving them in endless litigation," and also "inevitably have a chilling effect on the press in the performance of its task of purveyor of information and public watchdog."[532] The Court further noted that the photograph accompanying the article only included the deputy governor along with other people.[533]

The Court held that even assuming that Mr Simonenko could be considered to have been directly affected by the passages, the Court found that they constituted "value judgments" which had a "sufficient factual basis given criminal proceedings instituted against certain regional officials, including Mr Simonenko."[534] Further, the Court considered that calling the regional officials "thieves" did not overstep the "margins of a degree of exaggeration, or even provocation covered by journalistic freedom."[535] Finally, the Court held that the fact that the proceedings "were civil rather than criminal in nature," and the final award was "relatively small," did not detract from the fact that the standards applied by the domestic courts were not compatible with the principles under Article 10,[536] The Court unanimously concluded that the domestic courts did not adduce "sufficient" reasons to justify the interference, thus not "necessary in a democratic society," in violation of Article 10.[537]

The Court in *Fedchenko (No. 4)* applied chilling effect reasoning in setting out its standard of review, holding that the most careful scrutiny is required when the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern. And similar to *Lombardo and Others*, the Court in *Fedchenko (No. 4)* also applied the chilling effect principle in essentially laying down a rule under Article 10 that a fundamental requirement of

[526] *Fedchenko v. Russia (No. 4)* (App. no. 17221/13) 2 October 2018, para. 39.
[527] *Fedchenko v. Russia (No. 4)* (App. no. 17221/13) 2 October 2018, para. 40.
[528] *Fedchenko v. Russia (No. 4)* (App. no. 17221/13) 2 October 2018, para. 44.
[529] *Fedchenko v. Russia (No. 4)* (App. no. 17221/13) 2 October 2018, para. 44.
[530] *Fedchenko v. Russia (No. 4)* (App. no. 17221/13) 2 October 2018, para. 45.
[531] *Fedchenko v. Russia (No. 4)* (App. no. 17221/13) 2 October 2018, para. 45.
[532] *Fedchenko v. Russia (No. 4)* (App. no. 17221/13) 2 October 2018, para. 45..
[533] *Fedchenko v. Russia (No. 4)* (App. no. 17221/13) 2 October 2018, para. 46.
[534] *Fedchenko v. Russia (No. 4)* (App. no. 17221/13) 2 October 2018, para. 47.
[535] *Fedchenko v. Russia (No. 4)* (App. no. 17221/13) 2 October 2018, para. 49.
[536] *Fedchenko v. Russia (No. 4)* (App. no. 17221/13) 2 October 2018, para. 50.
[537] *Fedchenko v. Russia (No. 4)* (App. no. 17221/13) 2 October 2018, para. 51.

the law of defamation is that in order to give rise to a cause of action the defamatory statement must refer to a particular person. This was because if public officials were allowed to sue in defamation in connection with any statement critical of administration of State affairs, even in situations where the official was not referred to by name or in an otherwise identifiable manner, journalists would be inundated with lawsuits. This would result in an excessive and disproportionate burden being placed on the media, straining their resources and involving them in endless litigation, it would also inevitably have a chilling effect on the press in the performance of its task of purveyor of information and public watchdog.

4.8.3.7 Fourth Section fears future risk of chilling effect

In late 2018, the Court returned to the issue of imposing liability on news websites, and continued the application of the chilling effect principle from *MTE and Index* and *Pihl*, and limiting *Delfi*'s influence further. The case was *Magyar Jeti Zrt v. Hungary*,[538] where the applicant was a Hungarian news website, 444.hu. The case arose in 2013, when the applicant published an article by one of its journalists, entitled "Football supporters heading to Romania stopped to threaten gypsy pupils." The article reported how a bus of Hungarian football supporters on their way to a Romania-Hungary game had stopped to "threaten mostly Gypsy pupils at a primary school in Konyár."[539] The article ended by stating that a phone conversation between the president of the Roma local government and a parent had been uploaded to YouTube, with the words "uploaded to YouTube," being a hyperlink to a video on the video-sharing website YouTube. The video had been uploaded to YouTube the day before by a Roma media outlet, and was an interview with the local president, where he stated that "They attacked the school, Jobbik attacked it," and "Members of Jobbik, I add, they were members of Jobbik, they were members of Jobbik for sure."[540]

Jobbik is a right-wing political party, and a month after the article's publication, the political party initiated civil defamation proceedings against the interviewed president, the media outlet that published the interview, and the applicant for publishing a hyperlink to the interview. The High Court held that the president's statements in the interview "falsely conveyed the impression that Jobbik had been involved in the incident in Konyár," violating the party's reputation.[541] The Court also held that the applicant was liable for disseminating the defamatory statement, and ordered the applicant to publish excerpts of the judgment on its website, and remove the hyperlink to the video from its online article. The judgment was ultimately upheld by both the *Kúria* (Supreme Court) and Constitutional Court, which held that "providing a hyperlink to content qualified as dissemination of facts," even if the disseminator had not identified itself with the content or wrongly trusted the truthfulness of the statement.[542]

The applicant made an application to the European Court, claiming that holding the website liable for content via a hyperlink was a violation of its right to freedom of expression under Article 10. The main question[543] for the Court was whether the interference had been necessary in a democratic society. Crucially, the European Court stated that it "cannot agree"

[538] *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16) 4 December 2018.
[539] *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16) 4 December 2018.
[540] *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16) 4 December 2018, para. 8.
[541] *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16) 4 December 2018, para. 13.
[542] *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16) 4 December 2018, para. 20.
[543] The Court noted that there was "neither explicit legal regulation nor case-law on the admissibility and limitations of hyperlinks", but the Court held that given its conclusion about the necessity of the interference, it considered it "not necessary to decide on the question whether the application of the relevant provisions of the Civil Code to the applicant company's situation was foreseeable." See *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16) 4 December 2018, para. 60-61.

with the domestic courts' approach of "equating the mere posting of a hyperlink with the dissemination of the defamatory information, automatically entailing liability for the content itself."[544] Instead, for the European Court, the issue of whether the posting of a hyperlink may, justifiably from the perspective of Article 10, give rise to such liability requires an individual assessment in each case, regard being had to five elements.[545] In particular, the Court applied the chilling effect principle from *Jersild*, that "punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest," and there must be "particularly strong reasons for doing so."[546] Applying these elements, the Court held that the article: did not amount to an "endorsement of the incriminated content,"[547] it "repeated none of the defamatory statements," and was limited to posting the hyperlink.[548] Further, the Court held that the applicant's journalist could "reasonably assume" that the hyperlinked content, although "perhaps controversial," was within the "realm of permissible criticism of political parties," and not "unlawful."[549] The Court noted that the domestic courts found the president's statements to be defamatory because they implied, without a factual basis, that persons associated with Jobbik had committed acts of a racist nature; but the European Court stated it was satisfied that such utterances could "not be seen as clearly unlawful from the outset."[550] And as the article repeated none of the defamatory statements, and the publication was limited to posting a hyperlink, there was no question over the journalist's good faith.[551]

Finally, the Court noted that Hungarian law, as interpreted by the courts, "excluded any meaningful assessment" of the applicant's freedom-of-expression rights under Article 10, in a situation where restrictions would have required the "utmost scrutiny, given the debate on a matter of general interest,"[552] and "precluded any balancing between the competing rights."[553] The Court then applied the chilling effect principle, and held that objective liability may have "foreseeable negative consequences on the flow of information on the Internet," including "impelling article authors and publishers to refrain altogether from hyperlinking to material over whose changeable content they have no control."[554] For the Court, this may have "directly or indirectly, a chilling effect on freedom of expression on the Internet."[555] In light of these considerations, the Court unanimously concluded that imposing objective liability on the applicant was not based on "relevant and sufficient grounds," and a disproportionate restriction on freedom of expression, in violation of Article 10.[556]

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[544] *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16) 4 December 2018, para. 76.
[545] *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16) 4 December 2018, para. 77 ("(i) did the journalist endorse the impugned content; (ii) did the journalist repeat the impugned content (without endorsing it); (iii) did the journalist merely put an hyperlink to the impugned content (without endorsing or repeating it); (iv) did the journalist know or could reasonably have known that the impugned content was defamatory or otherwise unlawful; (v) did the journalist act in good faith, respect the ethics of journalism and perform the due diligence expected in responsible journalism?").
[546] *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16) 4 December 2018, para. 80, citing *Jersild v. Denmark* (App. no. 15890/89) 23 September 1994, para. 35.
[547] *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16) 4 December 2018, para. 79.
[548] *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16) 4 December 2018, para. 80.
[549] *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16) 4 December 2018, para. 82.
[550] *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16) 4 December 2018, para. 82.
[551] *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16) 4 December 2018, para. 80.
[552] *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16) 4 December 2018, para. 83.
[553] *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16) 4 December 2018, para. 83.
[554] *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16) 4 December 2018, para. 83.
[555] *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16) 4 December 2018, para. 83.
[556] *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16) 4 December 2018, para. 84.

The Court in *Magyar Jeti Zrt* applied the chilling effect principle in two respects: the first was applying *Jersild'*s paragraph 35 that punishing journalists for reporting interviews of public interest would seriously hamper press freedom. Given the Court's concern for protecting the press from this chilling effect, and the strict standard of scrutiny under *Jersild*, it was no surprise the Court in *Magyar Jeti Zrt* found automatic liability for posting a hyperlink to a defamatory statement uttered in an interview on a matter of public interest was not consistent with Article 10. The Court in *Magyar Jeti Zrt* also continued its focus on the future risk of a chilling effect on news websites, similar to both *MTE and Index* and *Pihl*, particularly the risk of "impelling article authors and publishers to refrain altogether from hyperlinking to material over whose changeable content they have no control."[557] This was a rejection of *Delfi*'s focus on seeking evidence, which the Hungarian government had itself argued: there were "insignificant consequences" on the applicant of paying the court fees and publishing the judgment.[558]

4.8 Conclusion

The analysis in this chapter on criminal and civil defamation proceedings revealed that the Court mainly applies the chilling effect principle when considering whether an interference with freedom of expression has been necessary in a democratic society. In contrast to Chapter 3, an undeniable feature of the Court's application of the chilling effect has been the disagreement within the Court in relation to certain measures resulting from criminal or civil defamation proceedings, particularly on whether a criminal conviction, in and of itself, has a chilling effect on freedom of expression. The debate within the Court was evident in *Pedersen and Baadsgaard*, and *Lindon*, and with the most recent Grand Chamber judgment on the issue being *Morice*, where the Court, unanimously held that criminal proceedings may have a chilling effect on the exercise of freedom of expression, and even relatively moderate fines do not suffice to negate the risk of a chilling effect on the exercise of freedom of expression.[559]

The nature of the chilling effect the Court has in mind is that due to the fear of sanctions, individuals are liable to be inhibited from engaging in expression on matters of general public interest where they run the risk of being sentenced to such sanctions.[560] This chilling effect imposes a detriment not only on the individual, and other individuals engaging in similar expression, but crucially, the Court recognises the detriment caused to "society as a whole," as the public is denied being information of a public interest.[561] At a theoretical level, the chilling effect principle seems to be based on the idea that certain interferences with freedom of expression must be considered not only in the light of the individual applicant, but also in light of the broader effect this interference has generally on freedom of expression. This is a radical proposition, as it is premised on the notion that a certain amount of objectionable expression must be tolerated in order to ensure that the bulk of future legitimate expression is protected, and as Lemmens argues, create further "breathing space" for freedom of expression to flourish.[562]

[557] *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16) 4 December 2018, para. 84.
[558] *Magyar Jeti Zrt v. Hungary* (App. no. 11257/16) 4 December 2018, para. 49.
[559] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 127.
[560] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 113.
[561] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 113.
[562] See Koen Lemmens, "Se taire par peur: l'effet dissuasif de la responsabilité civile sur la liberté d"expression," (2005) *Auteurs & Media* 32, p. 34; and also, *NAACP v. Button*, 371 U.S. 415 (1963), p. 433.

This understanding of the Court's concern for creating a breathing space, or in the words of Schauer, a "buffer zone of strategic protection,"[563] also explains why the European Court never went down the road of the U.S. Supreme Court's majority in *Branzburg v. Hayes* in seeking specific evidence for a chilling effect.[564] The European Court's view reflects Schauer's view that the chilling effect is *not* an empirical prediction, but rather a doctrinal method of looking at the right to freedom of expression.[565] This is because the chilling effect principle is based on the assumption that the legal system is imperfect, and its only certainty is the "certainty of error," and that an erroneous restriction of expression has, by hypothesis, more social disutility than an erroneous overextension of freedom of expression.[566] Because of this risk of error, "legal rules must be designed so as to favour the overcautious, and in favour of protection rather than non-protection."[567] Thus, the chilling effect principle flows *not* from a "*specific* behavioral state of the world," but from an understanding of the "comparative nature of the errors that are bound to occur."[568] By comparing rather than measuring, the "behavioral imprecision" of the chilling effect concept becomes "irrelevant." Thus, is *not* necessary to "measure that uncertainty," but only to realize that it exists in all cases.[569] The European Court has recognised this, emphasising that it is not necessary to prove, "as a matter of fact," a specific chilling effect, but rather recognise "as a matter of principle," it arises from certain government measures and the uncertainty of the legal system.[570] Given the inevitability of error, and the preference for errors made in favour of free expression, it is essential to design rules and procedures that minimise the occurrence of the harm flowing from wrongful restriction on freedom of expression.[571]

To protect freedom of expression from the chilling effect of criminal defamation proceedings, the Court, similarly to protection of sources, has fashioned tests: (a) government must display restraint in resorting to criminal proceedings, (b) criminal proceedings to protect reputation are only proportionate in "certain grave cases," such as speech inciting violence,[572] and (c) the imposition of prison sentences for a press offence will be compatible with Article 10 only in "exceptional circumstances," such as where other rights are seriously impaired or for hate speech. Importantly, the Court held that defamation of an individual in the context of a debate on an important matter of legitimate public interest, presents "no justification whatsoever for the imposition of a prison sentence."[573] Indeed, this chapter has demonstrated that the chilling effect principle has been instrumental in allowing the European Court to effectively remove certain sentencing options for defamatory expression on matters of public interest. The strength of the Court's concern for protecting freedom of expression from the chilling effect of prison sentences, has led the Court to use its power under Article 46 of the

[563] Frederick Schauer, Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'," (1978) *Boston University Law Review* 685, p. 710.
[564] *Branzburg v. Hayes* 408 U.S. 665 (1971), p. 694.
[565] Frederick Schauer, Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'," (1978) *Boston University Law Review* 685, p. 731.
[566] Frederick Schauer, Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'," (1978) *Boston University Law Review* 685, p. 688.
[567] Frederick Schauer, Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'," (1978) *Boston University Law Review* 685, p. 688.
[568] Frederick Schauer, Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'," (1978) *Boston University Law Review* 685, p. 688.
[569] Frederick Schauer, Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'," (1978) *Boston University Law Review* 685, p. 732.
[570] *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017, para. 85.
[571] Frederick Schauer, Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'," (1978) *Boston University Law Review* 685, p. 732.
[572] *Raichinov v. Bulgaria* (App. no. 47579/99) 20 April 2009, para. 50.
[573] *Mariapori v. Finland* (App. no. 37751/07) 6 July 2010, para. 68.

Convention, to find that an applicant must be immediately released following his imprisonment for defamation.[574]

The Court's concern for protecting public interest expression from the chilling effect was also demonstrated in the application of the victim-status chilling effect principle under Article 34, where the Court allowed an applicant to claim a prosecution for defaming a public figure violated Article 10, even where the charges were dismissed following decriminalisation of defamation, and no criminal record recorded.[575] The Court admitted the applicant had been exempted from punishment, but a chilling effect arose by the fact the criminal proceedings "gave a strong indication to the applicant that the authorities were displeased with the publications," and unless he modified his behaviour in future, he would run the risk of being prosecuted again.[576] Thus, the Court sought to protect the applicant from engaging in self-censorship by allowing him to have the European Court provide a judgment on the proceedings themselves, and insulate him from future prosecutions.

Similar to the Grand Chamber judgments considering chilling effect reasoning, and the protection of journalistic sources case law, certain European Court judges dismiss the chilling effect by purportedly examining "evidence" for a chilling effect, and concluding that there have been "no practical consequences" for the individual applicants. The best examples were when the Second Section majority's judgment in *Cumpănă and Mazăre* held that it was crucial to have regard to the "evidence" that the sanctions "had no practical consequences,"[577] and the similar argument was made by the majority in *Delfi*,[578] where the Court emphasised the applicant news website did not have "to change its business model," and "according to the information available," the number of reader comments "continued to increase."[579] In contrast, the Grand Chamber in *Cumpănă and Mazăre* rejected the Chamber's approach, and approved the principle that it is instead crucial to have regard to the "chilling effect" that the "fear of such sanctions" has on the exercise of journalistic freedom of expression more generally.[580] Relatedly, and continuing the trend from protection of journalistic sources,[581] the defamation case law also demonstrates that the chilling effect on an individual is not the crucial element, but rather the broader chilling effect on freedom of expression. This is typified in judgments such as *Steel and Morris*, where the Court admitted that "it is true that no steps have to date been taken to enforce the damages award against either applicant, the fact remains that the substantial sums awarded against them have remained enforceable."[582] Similarly in *Pihl*, the Court admitted that "the domestic proceedings had no consequences for the association in the present case," nevertheless, the Court took into account that imposing liability for reader comments may have "a chilling effect on freedom of expression via internet."[583]

Of course, some members of the Court, when refusing to apply the chilling effect, invoke a margin of appreciation, with the most notable instances being in *Lindon*, and the Chamber judgment in *Morice*. But this chapter has argued that the margin of appreciation argument is difficult to square with the weight of authority in the Court's case law on the

[574] *Fatullayev v. Azerbaijan* (App. no. 40984/07) 22 April 2010, para. 177.
[575] *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006, para. 18. See Chapter 4, Section 4.4.1.
[576] *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006, para. 32.
[577] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 59.
[578] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber).
[579] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 161.
[580] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114.
[581] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 71 ("it is true that no search or seizure took place in the present case, the Court emphasises that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources").
[582] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005, para. 97.
[583] *Pihl v. Sweden* (App. no. 74742/14) 7 February 2017 (admissibility decision), para. 35.

chilling effect of criminal defamation proceedings, and seems to longer hold water with a majority of the Court, as evident from the unanimous Grand Chamber judgment in *Morice*, and the subsequent case law.

There is also an important practical lesson to be learned concerning the fate of the chilling effect principle from two cases in particular discussed in this chapter, *Cumpănă and Mazăre* and *Morice*. In *Cumpănă and Mazăre*, the Chamber majority judgment refused to apply the chilling effect principle to the conviction of two journalists, with only two judges expressing a dissenting opinion. Through the perseverance of the applicants in requesting a Grand Chamber referral, and the five-judge panel of the Grand Chamber granting the request, a unanimous Grand Chamber was able to lay down a chilling effect principle that was subsequently applied in a line of cases. But had the applicant journalists not made this request, nor had the Grand Chamber panel accepted the request, the *Cumpănă and Mazăre* Grand Chamber judgment may never have come about, and the influence of the chilling effect principle in criminal defamation case law might have been considerably reduced (especially if coupled with *Lindon* becoming the dominant judgment). A similar lesson may be gleaned from *Morice*, where only one judge dissented from the Chamber judgment's refusal to apply the chilling effect principle. Through the perseverance of the applicant in requesting a Grand Chamber referral, even though he had succeeded in demonstrating a violation of Article 6, and the five-judge panel of the Grand Chamber granting the request, the Grand Chamber was able to deliver a unanimous judgment finding a violation of Article 10 and applying the chilling effect principle.

Further, the findings in this chapter reveal that while the vast majority of defamation proceedings considered by the Court concern journalists, the Court has also demonstrated a determination to not only protect journalists from the chilling effect, but also activists, politicians, lawyers, and bloggers. Notably, where the media, according to a majority of the Court at least, engage in expression where the "content is such as to stir up violence and hatred,"[584] (*Lindon*), or expression that "constituted hate speech and speech that directly advocated acts of violence,"[585] (*Delfi*), the fact that it is the media engaging, or facilitating such expression, will not be enough for the invocation of the chilling effect principle.

Finally, this chapter also indicates how the Court has adapted the chilling effect principle to the online environment, in particular online news media. While *Delfi* was perhaps a misstep, it has arguably been remedied by the subsequent judgments in *MTE and Index*, *Pihl*, and *Magyar Jeti Zrt*, with the Court seeking to protect distinct features of the online freedom of expression environment, such as the online comment environment and hyperlinking, from the chilling effect.[586]

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[584] *Lindon, Otchakovsky-Laurens and July v. France* (App. nos. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber), para. 57.

[585] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 117.

[586] While not concerning defamation proceedings, see also, *M.L. and W.W. v. Germany* (App. nos. 60798/10 and 65599/10) 28 June 2018, where the Court found no violation of Article 8 over the refusal of the German courts to issue an injunction prohibiting three media organisations from continuing to allow Internet users access to documentation about a murder case, which listed the full names of the convicted murderers. The Court had regard to the "risk of a chilling effect" on freedom of expression, with the risk of the media, lacking sufficient staff and time to deal with such requests, would no longer include elements in their reporting that may later become illicit (para. 103). See Hugh Tomlinson and Aidan Wills, "ML and WW v Germany, Article 8 right to be forgotten and the media," *Inforrm*, 4 July 2018; and Dirk Voorhoof, "M.L. and W.W. v. Germany," (2018) *IRIS*-8/1.

Chapter 5 - Criminal Prosecutions and the Chilling Effect on Freedom of Expression

5.1 Introduction

In Chapter 2, it was noted that the largest proportion of Grand Chamber judgments, concerning freedom of expression and the chilling effect, involved defamation proceedings against the media.[1] Many of these judgments concerned criminal prosecutions against journalists, in particular under criminal defamation laws, and these were discussed, along with a considerable number of Chamber judgments, in Chapter 4.[2] It was also noted in Chapter 2 that there were three additional Grand Chamber judgments concerning criminal prosecutions against journalists that did not involve prosecutions under criminal defamation laws, namely *Stoll v. Switzerland*,[3] concerning a journalist's prosecution for publication of "secret official deliberations," *Pentikäinen v. Finland*,[4] concerning a journalist's arrest, detention and prosecution for "contumacy towards the police," and *Bédat v. Switzerland*,[5] also concerning a journalist's prosecution for publication of "secret official deliberations."[6]

In contrast to the Court's case law on criminal prosecutions under defamation laws, the Court in *Stoll* and *Pentikäinen* has applied the principle that journalists have a duty to obey the "ordinary criminal law," finding that "journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection."[7] Further, in all three Grand Chamber judgments in *Stoll*, *Pentikäinen*, and *Bédat*, the Court found no violation of freedom of expression, and did not find a chilling effect on journalistic freedom of expression. The purpose of this Chapter is to critically examine the Court's consideration of the chilling effect principle in its case law concerning the prosecution of journalists under, what the Court describes as, the "ordinary criminal law." The research for this thesis of Article 10 case law revealed that there have been more than 19 judgments and decisions concerning the prosecution of journalists under the "ordinary criminal law" or "*les lois pénales de droit commun*,"[8] and with the Court considering, or applying, the chilling effect principle.

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[1] *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber); *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber); *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber); *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber); *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber); and *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber).

[2] See, for example, *Lingens v. Austria* (App. no. 9815/82) 8 July 1986 (Plenary Court); *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber); *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber); and *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber).

[3] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber) (Article 10 and a journalist's conviction for publishing secret official deliberations).

[4] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber) (Article 10 and photojournalist's conviction for disobeying police order).

[5] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber) (Article 10 and journalist's conviction for publishing confidential court materials).

[6] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 16.

[7] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 102; and *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 91.

[8] *Fressoz and Roire v. France* (App. no. 29183/95) 21 January 1999 (Grand Chamber), para. 52; *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007, para. 43; *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 102; *Adamek v. Germany* (App. no. 22107/05) 25 March 2008 (Admissibility decision), para. "The Law" (no paragraph numbers in decision); *Mikkelsen and Christensen v. Denmark* (App. no. 22918/08) 24 May 2011 (Admissibility decision), para. "The Law" (no paragraph numbers in decision); *A.B. v. Switzerland* (App. no. 56925/08) 1 July 2014, para. 51; *Haldimann and Others v.*

It is also proposed to broaden this discussion out, and to examine how the Court considers and applies the chilling effect principle where journalists are prosecuted for offences which are not described by the Court as "ordinary criminal law" offences, and are not prosecutions under criminal defamation laws. As will be seen, the Court has not been very clear on the concept of "ordinary criminal law" offences, but seem to be criminal laws "not based on restrictions specific to the press," but based on a "general prohibition forming part of the ordinary criminal law."[9] As such, it is proposed to examine criminal investigations and prosecutions undertaken for, what Judge Sajó and Judge Karakaş have remarked as, "journalistic activity that [is] critical of the State," but is classed by prosecutors as not journalistic but "plainly illegal," such as denigrating the State.[10] This is a necessary course of action, as research of Article 10 case law revealed that there a quite a number of Chamber judgments and decisions concerning such criminal prosecutions of journalists, and where the Court has applied the chilling effect principle.[11]

Thus, this chapter will be divided into two main sections. The first section will critically discuss the Court's case law concerning the prosecution of journalists under the "ordinary criminal law," and how the chilling effect principle is considered and applied. The second section will then critically examine the Court's case law concerning the prosecution of journalists more generally, under various provisions of criminal law. The final section will attempt to draw conclusions from this discussion, and how these conclusions might relate to the conclusions reached in Chapters 3 and 4, which also concerned other aspects of journalistic freedom of expression.

Similar to previous chapters, it is proposed to examine a number of specific questions in this Chapter concerning how the Court considers and applies chilling effect reasoning when examining interferences with freedom of expression in the form of criminal proceedings: what does the Court mean when it states that there is a chilling effect on freedom of expression; does the Court apply chilling effect reasoning when considering (a) whether an applicant may claim to be a victim under Article 34; (b) whether there has been an "interference" with freedom of expression under Article 10; (c) whether an interference has been "prescribed by law," or, (d) whether an interference is "necessary in a democratic society." The remaining questions are more substantive: what is the consequence, if any, of the Court using chilling effect reasoning in its case law concerning journalistic freedom of expression and criminal proceedings; is there much agreement, or disagreement, within the Court on the application of chilling effect reasoning; does the Court explain the application, or non-application, of chilling effect reasoning; and how does the Court use prior case law when considering and applying the chilling effect. Finally, as with the other chapters, it is not proposed to offer a general discussion of the case law in this area of Article 10, but rather to focus on understanding how the Court considers and applies the chilling effect principle.

Switzerland (App. no. 21830/09) 24 February 2015, para. 47; *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 91; *Erdtmann v. Germany* (App. no. 56328/10) 5 January 2016 (Admissibility decision), para. 22; *Salihu v. Sweden* (App. no. 33628/15) 10 May 2016 (Admissibility decision), para. 53; *Pinto Coelho v. Portugal (No. 2)* (App. no. 48718/11) 22 March 2016, para. 45; *Brambilla and Others v. Italy* (App. no. 22567/09) 23 June 2016 (Admissibility decision), para. 55; and *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision) (Article 10 and journalist's conviction for forging documents).

[9] *Erdtmann v. Germany* (App. no. 56328/10) 5 January 2016 (Admissibility decision), para. 22.

[10] *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (App. no. 931/13) 27 June 2017 (Grand Chamber) (Dissenting opinion of Judges Sajó and Karakaş, para. 21).

[11] See, for example, *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) 14 September 2010; *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011; *Nedim Şener v. Turkey* (App. no. 38270/11) 8 July 2014; *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015; *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, which are discussed below.

5.2 The Court's early case law finding a chilling effect

5.2.1 Journalists prosecuted for "aiding and abetting" racist remarks

The discussion begins with the Court's judgment from 1994 in *Jersild v. Denmark*,[12] which arguably laid the basis for the subsequent case law in this area, and in particular the Court's consideration of the chilling effect of prosecuting journalists. The applicant in *Jersild* was a journalist with the Danish Broadcasting Corporation. In 1985, as part of its Sunday News Magazine, the broadcaster broadcast a pre-recorded interview made by the applicant with a number of youths known as "Greenjackets," from the Copenhagen area. During the broadcast, some of the youths made racists remarks, including, "Just take a picture of a gorilla, man, and then look at a nigger, it's the same body structure and everything."[13] Following the broadcast, the youths were prosecuted and convicted under Article 266(b) of the Penal Code for "degrading a group of persons on account of their race." Notably, the applicant was also prosecuted for "aiding and abetting" the offence under Article 23 of the Penal Code, in conjunction with Article 266(b).[14] The City Court of Copenhagen convicted the applicant, finding he "had been well aware in advance that discriminatory statements of a racist nature were likely to be made during the interview," and during the interview "beer, partly paid for by Danmarks Radio, was consumed."[15] The applicant was sentenced to fines totalling 1,000 Danish kroner (130 euro), or alternatively to five days' imprisonment. The conviction was ultimately upheld by the Danish Supreme Court.

The applicant subsequently made an application to the European Commission of Human Rights, claiming that his conviction violated his right to freedom of expression under Article 10. The European Commission found that there had been a violation of Article 10, and following a referral from the Commission, the European Court also found a violation of Article 10. The Court placed particular emphasis on the fact that the applicant "clearly dissociated him from the persons interviewed," and "rebutted some of the racist statements."[16] Notably, the Court applied the principle that the "punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest," with the Court stating that such punishment "should not be envisaged unless there are particularly strong reasons for doing so."[17]

The Court applied this principle, and "even having regard to the manner in which the applicant prepared the Greenjackets item," the Court held that it had "not been shown that, considered as a whole, the feature was such as to justify also his conviction of, and punishment for, a criminal offence under the Penal Code."[18] Crucially, the Court rejected "the Government's argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted."[19]

Three points may be made about *Jersild* for the present discussion. First, while *Jersild* did not explicitly use the chilling effect term, it is arguable that the Court was using chilling effect reasoning. In particular, the Court's principle that "punishment of a journalist for

[12] *Jersild v. Denmark* (App. no. 15890/89) 23 September 1994 (Grand Chamber).
[13] *Jersild v. Denmark* (App. no. 15890/89) 23 September 1994 (Grand Chamber), para. 11.
[14] *Jersild v. Denmark* (App. no. 15890/89) 23 September 1994 (Grand Chamber), para. 19 ("A provision establishing a criminal offence shall apply to any person who has assisted the commission of the offence by instigation, advice or action.").
[15] *Jersild v. Denmark* (App. no. 15890/89) 23 September 1994 (Grand Chamber), para. 14
[16] *Jersild v. Denmark* (App. no. 15890/89) 23 September 1994 (Grand Chamber), para. 34
[17] *Jersild v. Denmark* (App. no. 15890/89) 23 September 1994 (Grand Chamber), para. 35.
[18] *Jersild v. Denmark* (App. no. 15890/89) 23 September 1994 (Grand Chamber), para. 35.
[19] *Jersild v. Denmark* (App. no. 15890/89) 23 September 1994 (Grand Chamber), para. 35.

assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest,"[20] and the phrase "seriously hamper the contribution of the press," is a form of chilling effect reasoning, indicating that punishing one journalist will "hamper" other journalists. Indeed, this principle would be later cited by the Grand Chamber in *Stoll v. Switzerland*, as authority for the proposition that the Court must be satisfied a penalty "does not amount to a form of censorship intended to discourage the press from expressing criticism," which is "likely to deter journalists from contributing to public discussion of issues affecting the life of the community."[21]

Second, because of the danger of "seriously hamper[ing] the contribution of the press to discussion of matters of public interest," there must be "particularly strong reasons" for punishing a journalist.[22] This suggests that the burden is on the government to show such "particularly strong reasons," and is similar to, for example, the Court's later principle in *Goodwin*, that because of the danger of the "potentially chilling effect" of a source disclosure order on press freedom, the burden is on the government to demonstrate an "overriding requirement in the public interest."[23]

The third point concerns the government's argument that the fine "was at the lower end of the scale of sanctions applicable" and "was therefore not likely to deter any journalist from contributing to public discussion."[24] Crucially, however, the Court explicitly held that it "does not accept the Government's argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted."[25] Thus, the Court was holding that it is the journalist's conviction, in and of itself, which "seriously hamper[s] the contribution of the press to discussion of matters of public interest."[26] Indeed, the Court held that "it has not been shown that, considered as a whole, the feature was such as to justify also his conviction of, and punishment for, a criminal offence under the Penal Code."[27] As will be discussed below, there would be much disagreement in the Court's later case law over this principle.[28]

5.2.2 Journalists prosecuted for offence of "handling" photocopies of tax returns

Following the establishment of the permanent Court in 1999, the first Grand Chamber judgment to introduce the concept of "ordinary criminal law"[29] offences in the context of the criminal prosecution of journalists was *Fressoz and Roire v. France*.[30] The journalists would argue that they were prosecuted for a "purely technical offence," which "disguised" what was really a desire to penalise them for publishing confidential information. The applicants were

[20] *Jersild v. Denmark* (App. no. 15890/89) 23 September 1994 (Grand Chamber), para. 35.
[21] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 154.
[22] *Jersild v. Denmark* (App. no. 15890/89) 23 September 1994 (Grand Chamber), para. 35.
[23] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 39.
[24] *Jersild v. Denmark* (App. no. 15890/89) 23 September 1994 (Grand Chamber), para. 29.
[25] *Jersild v. Denmark* (App. no. 15890/89) 23 September 1994 (Grand Chamber), para. 35.
[26] *Jersild v. Denmark* (App. no. 15890/89) 23 September 1994 (Grand Chamber), para. 35.
[27] *Jersild v. Denmark* (App. no. 15890/89) 23 September 1994 (Grand Chamber), para. 35.
[28] See, for example, the contrasting view in the Chamber and Grand Chamber in *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 57 ("what matters is not that the applicant was sentenced to a minor penalty, but that he was convicted at all"); and *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2009 (Grand Chamber), para. 160 ("as regards the possible deterrent effect of the fine, the Court takes the view that, while this danger is inherent in any criminal penalty, the relatively modest amount of the fine must be borne in mind in the instant case").
[29] *Fressoz and Roire v. France* (App. no. 29183/98) 21 January 1999 (Grand Chamber), para. 46 ("the Court stresses that journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection").
[30] *Fressoz and Roire v. France* (App. no. 29183/98) 21 January 1999 (Grand Chamber).

journalists with the satirical French weekly magazine *Le Canard enchaîné*, and in 1989, the magazine published an article written by the first applicant, entitled "Calvet turbo-charges his salary." The article detailed the salary of the chairman of the car company Peugeot, with the article including a photocopy of the chairman's tax assessment forms. Following publication of the article, the applicants were charged with handling copies of tax assessment notices obtained through a breach of professional confidence, unlawful removal of deeds or documents and theft.[31] The Paris Court of Appeal convicted the applicants under the Code of Tax Procedure, of "handling photocopies" of the tax returns "obtained through a breach of professional confidence," and sentenced them to fines (10,000 and 5,000 francs) (9,000 and 4,500 euro), damages (1 franc), and costs (10,000 francs) (9,000 euro).[32] The convictions were upheld by the French Court of Cassation.

Before the European Court, the applicants argued they had been convicted of the "purely technical offence" of handling photocopies, which "disguised what was really a desire to penalise them for publishing the information, although publication in itself was quite lawful."[33] Indeed, the Court, sitting in a 17-judge Grand Chamber, unanimously held that the journalists' conviction had violated their right to freedom of expression under Article 10. Notably, the Court introduced the principle that "journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection."[34] The Court then noted that although publication of the tax assessments case "was prohibited," the "information they contained was not confidential," as "local taxpayers may consult a list of the people liable for tax in their municipality, with details of each taxpayer's taxable income and tax liability."[35] The Court also noted that the article concerned a "matter of general interest,"[36] and the applicants had acted in "good faith."[37] The Court concluded there had been "no overriding requirement for the information to be protected as confidential," and Article 10 "protects journalists' right to divulge information on issues of general interest."[38]

Notably, there did not seem to be any chilling effect reasoning in *Fressoz and Roire*, and the Court did not consider whether the severity of the penalty imposed had a chilling effect. However, the judgment is important for the present discussion, as it established the principle that "journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection."[39] While the Court laid down this principle, it must be remembered that the Court *unanimously* held that the conviction violated Article 10. Thus, it seemed that the Court was not holding that journalists can never be "released from their duty to obey the ordinary criminal law," it will depend, as the Court held in *Fressoz and Roire*, on whether the government can demonstrate an "overriding requirement in the public interest" to justify "an interference with the exercise of press freedom."[40] The wording of the test, of course, mirrored the Court's test in *Goodwin*.

[31] *Fressoz and Roire v. France* (App. no. 29183/98) 21 January 1999 (Grand Chamber), para. 15.
[32] *Fressoz and Roire v. France* (App. no. 29183/98) 21 January 1999 (Grand Chamber), para. 22.
[33] *Fressoz and Roire v. France* (App. no. 29183/98) 21 January 1999 (Grand Chamber), para. 46.
[34] *Fressoz and Roire v. France* (App. no. 29183/98) 21 January 1999 (Grand Chamber), para. 52.
[35] *Fressoz and Roire v. France* (App. no. 29183/98) 21 January 1999 (Grand Chamber), para. 53.
[36] *Fressoz and Roire v. France* (App. no. 29183/98) 21 January 1999 (Grand Chamber), para. 50.
[37] *Fressoz and Roire v. France* (App. no. 29183/98) 21 January 1999 (Grand Chamber), para. 55.
[38] *Fressoz and Roire v. France* (App. no. 29183/98) 21 January 1999 (Grand Chamber), para. 54.
[39] *Fressoz and Roire v. France* (App. no. 29183/98) 21 January 1999 (Grand Chamber), para. 52.
[40] *Fressoz and Roire v. France* (App. no. 29183/98) 21 January 1999 (Grand Chamber), para. 51.

5.2.3 Fourth Section finds a chilling effect in *Stoll* and *Dammann*

Following *Fressoz and Roire*, two judgments were delivered by the Fourth Section of the Court on the same day in April 2006, and both judgments considered whether the prosecutions of journalists had a chilling effect on freedom of expression. The first was the Chamber judgment in *Stoll v. Switzerland*.[41] As mentioned in Chapter 2, the case involved the applicant journalist's prosecution for contravening Article 293 of the Swiss Criminal Code on publication of secret official deliberations.[42] Subsequently, the applicant made an application to the European Court, claiming his conviction for publication of secret official deliberations violated his right to freedom of expression. In April 2006, the Fourth Section of the Court delivered its Chamber judgment (the Grand Chamber would deliver a judgment in December 2007).[43] The principal question for the Court was whether the interference with the applicant's freedom of expression had been necessary in a democratic society.

The Court first noted that the applicant had been convicted for having published in a Swiss weekly newspaper a confidential report written by Switzerland's ambassador to the United States,[44] and that the newspaper articles "directly targeted a senior official, namely a member of the diplomatic corps with the rank of ambassador, who was in charge of a particularly important mission in the United States," and as such, the "margin of appreciation of the Swiss courts was therefore narrower than in the case of a 'private' individual."[45]

The Court held that the information contained in the report "raised matters of public interest," and the articles were published "in the context of a public debate."[46] The Court also noted that the document revealed that the persons dealing with the matter had not yet formed a very clear idea as to Switzerland's responsibility and what steps the Government should take, and the Court acknowledged "the public had a legitimate interest in receiving information about the officials dealing with such a sensitive matter and their negotiating style and strategy."[47]Crucially, the Court considered that the document was "marked simply 'Confidential'," which, according to the Court, represented a "low degree of secrecy."[48] In this regard, the Court stated that it was "not persuaded" that disclosure of aspects of the strategy to be adopted by the Swiss Government in these negotiations was "capable of prejudicing interests that were so important that they outweighed freedom of expression in a democratic society."[49]

Finally, the Court examined the "nature and severity of the penalty imposed."[50] The Court noted that the penalty imposed on the applicant was "relatively light" (around 520 euro); however the Court held that "what matters is not that the applicant was sentenced to a minor penalty, but that he was convicted at all,"[51] citing *Jersild*'s paragraph 35.[52] Further, the

[41] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006.
[42] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 21.
[43] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber).
[44] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 44.
[45] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 47.
[46] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 49.
[47] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 49.
[48] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 50.
[49] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 52.
[50] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 57.
[51] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 57.
[52] *Jersild v. Denmark* (App. no. 15890/89) 23 September 1994 (Grand Chamber), para. 35 ("The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so. In this regard the Court does not accept the Government's argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted.")

Court recognised that while the penalty "did not prevent the applicant from expressing himself," the conviction "nonetheless amounted to a kind of censorship which was likely to discourage him from making criticisms of that kind again in the future."[53] Further, in the context of a political debate such a conviction was "likely to deter journalists from contributing to public discussion of issues affecting the life of the community," and "liable to hamper the press in the performance of its task of purveyor of information and public watchdog."[54] The Court concluded that in light of these considerations, the applicant's conviction "was not reasonably proportionate to the legitimate aim pursued, in view of the interest of a democratic society in ensuring and maintaining the freedom of the press," in violation of Article 10.

A number of points may be made when focusing on the Court's examination of the "nature and severity of the penalty imposed."[55] First, the Court was applying chilling effect reasoning in relation to the nature and severity of the penalty. The language of the Court, in particular that the penalty "amounted to a kind of censorship," "discourage him from making criticisms of that kind again in the future," and "likely to deter journalists," and "liable to hamper the press," was based on the Grand Chamber's judgment in *Wille*.[56] In *Wille*, the Court held that a judge's reprimand "had a chilling effect on the exercise by the applicant of his freedom of expression, as it was likely to discourage him from making statements of that kind in the future,"[57] which is near identical language to the Court's holding in *Stoll*, that the conviction "was likely to discourage him from making criticisms of that kind again in the future."[58]

Further, it seems that the chilling effect that the Court has in mind is that not only will the applicant journalist's expression be discouraged ("likely to discourage him"), but also other journalists in the future ("likely to deter journalists"), and the press more generally ("liable to hamper the press"). Thus, the chilling effect principle applied by the Court in *Stoll* mirrors the Court's application of the chilling effect principle in other areas, such as in the Grand Chamber's judgment in *Kyprianou*, that there was a chilling effect "not only on the particular lawyer concerned but on the profession of lawyers as a whole."[59]

Notably, three judges dissented in *Stoll* (Judge Wildhaber, Judge Borrego Borrego, and Judge Šikuta), arguing that there had been no violation of Article 10.[60] However, the dissenting opinion did not address the "nature and severity of the penalty imposed,"[61] did not discuss the conviction, fine or the chilling effect on the individual journalist, or the press more generally. Over a year and a half later, the Grand Chamber would deliver its judgment in *Stoll*,[62] and would agree with the dissenting opinion, finding that there had been no violation of Article 10. Notably, unlike the Chamber dissent however, the Grand Chamber would discuss the chilling effect, but conclude that "the relatively modest amount of the fine must be borne in mind in the instant case."[63]

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[53] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 58.
[54] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 58.
[55] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 57.
[56] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber).
[57] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 50.
[58] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 58.
[59] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 175.
[60] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006 (Dissenting opinion of Judge Wildhaber, joined by Judges Borrego Borrego and Šikuta).
[61] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 57.
[62] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber).
[63] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 160 ("as regards the possible deterrent effect of the fine, the Court takes the view that, while this danger is inherent in any criminal penalty, the relatively modest amount of the fine must be borne in mind in the instant case").

The same day as the Fourth Section delivered its *Stoll* judgment, it also delivered a second judgment concerning another journalist who had been prosecuted under a different provision of the Swiss Criminal Code, and also considered the chilling effect. The case was *Dammann v. Switzerland*,[64] and concerned a Zurich-based journalist who was a court reporter with the daily newspaper *Blick*. In 1997, the applicant telephoned the Public Prosecutor's Office to inquire about those arrested for a major robbery which had taken place in a post office in Zurich, where 53 million Swiss francs had been stolen. An administrative assistant informed the applicant that none of the prosecutors were available; however, the applicant told the assistant that he had a list of individuals arrested for the robbery, and asked the assistant to look into information held by the Prosecutor's Office on whether the individuals had any previous convictions. The applicant faxed a list of names to the assistant, who consulted the prosecuting authorities' database, and sent the applicant a fax containing the information he had requested. The applicant did not publish the information.

Having shown the fax to a police officer, the applicant was prosecuted for "inciting" another to breach official secrecy, under Article 320 § 1 and 24 § 1 of the Swiss Criminal Code. In 1999, the applicant was acquitted in the Zurich District Court. But he was later convicted in the Zurich Appeal Court, which held that as an experienced court reporter, he must have known that the assistant was bound by professional secrecy, and that information on those involved in criminal proceedings was confidential. The applicant was sentenced to a fine of 500 Swiss francs (325 euro), which was ultimately upheld by the Swiss Federal Court.

The applicant made an application to the European Court, claiming that his conviction for breach of official secrecy violated his right to freedom of expression. The main question for the Court was whether the conviction had been "necessary in a democratic society."[65] The Court first noted that the case did not concern the restraining of a publication as such or a conviction following a publication, but a "preparatory step towards publication, namely a journalist's research and investigative activities."[66] The Court held that this preparatory phase called for the "closest scrutiny" on account of the "great danger represented by such a restriction on freedom of expression."[67] The Court then noted that while "data relating to the criminal record of suspects are *a priori* worthy of protection," the Court also noted that "such information could have been obtained by other means, in particular through consultation of law reports or press archives."[68] In that regard, the Court held that the information which the applicant "sought to obtain, namely the criminal record of the suspected persons and their possible links to the narcotics community, were likely to raise issues of general interest."[69] The Court also emphasised that "it does not appear that the applicant tricked, threatened or pressurised to obtain the necessary information,"[70] and the Court noted that "no damage was caused to the rights of the persons concerned."[71]

Finally, and similar to the Fourth Section's judgment in *Stoll*, the Court examined the "nature and severity of the penalty imposed."[72] The Court noted that the fine was "relatively light" (500 Swiss francs, or 325 euro).[73] But the Court reiterated, "contrary to the Government's contention, what matters is not that the applicant was sentenced to a minor

[64] *Dammann v. Switzerland* (App. no. 77551/01) 25 April 2006.
[65] *Dammann v. Switzerland* (App. no. 77551/01) 25 April 2006, para. 49.
[66] *Dammann v. Switzerland* (App. no. 77551/01) 25 April 2006, para. 49.
[67] *Dammann v. Switzerland* (App. no. 77551/01) 25 April 2006, para. 52.
[68] *Dammann v. Switzerland* (App. no. 77551/01) 25 April 2006, para. 53.
[69] *Dammann v. Switzerland* (App. no. 77551/01) 25 April 2006, para. 54.
[70] *Dammann v. Switzerland* (App. no. 77551/01) 25 April 2006, para. 55.
[71] *Dammann v. Switzerland* (App. no. 77551/01) 25 April 2006, para. 56.
[72] *Dammann v. Switzerland* (App. no. 77551/01) 25 April 2006, para. 57.
[73] *Dammann v. Switzerland* (App. no. 77551/01) 25 April 2006, para. 57..

penalty, but that he was convicted at all,"[74] citing *Jersild*'s paragraph 35,[75] and *Lopes Gomes da Silva v. Portugal*.[76] Further, the Court noted that while the penalty "did not prevent the applicant from expressing himself," the conviction "nonetheless amounted to a kind of censorship which was likely to discourage him from undertaking research, inherent in his profession, with a view to preparing an informed press article on a topical subject."[77] The conviction was a punishment for a "step that had been taken prior to publication," and such a conviction "may deter journalists from contributing to public discussion of issues affecting the life of the community and "is liable to hamper the press in the performance of its task of purveyor of information and public watchdog,"[78] In view of these considerations, the Court concluded that the conviction of the journalist was not reasonably proportionate, given the "interest of democratic society in ensuring and maintaining freedom of the press," in violation of Article 10.[79]

Thus, the Court in *Dammann* applied a chilling effect principle similar to *Stoll*, relying upon *Jersild*, and based upon the chilling effect principle in *Wille*. Notably, the same seven judges that sat in *Stoll* also sat in *Dammann*. However, there were no dissenting opinions in *Dammann*. The question may be raised as to whether the three dissenting judges in *Stoll* agreed with the chilling effect principle applied in *Dammann*, but disagreed as to its application in *Stoll*. Unfortunately, and as noted above, the dissenting opinion in *Stoll* did not address the "nature and severity of the penalty imposed,"[80] and no separate opinion was delivered in *Dammann*, given its unanimity.

5.2.4 Journalists convicted of "offence of handling" under Criminal Code

Two months before the Grand Chamber's judgment in *Stoll*, a different Section of the Court, the Third Section, delivered another Chamber judgment where a number of journalists were prosecuted for the "offence of handling" under Article 321-1 of the French Criminal Code.[81] The Court also considered whether this prosecution might have a chilling effect, and similar to *Stoll* and *Dammann*, found a violation of Article 10. The case was *Dupuis and Others v.*

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[74] *Dammann v. Switzerland* (App. no. 77551/01) 25 April 2006, para. 57.

[75] *Jersild v. Denmark* (App. no. 15890/89) 23 September 1994 (Grand Chamber), para. 35 ("The punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so. In this regard the Court does not accept the Government's argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted.")

[76] *Lopes Gomes da Silva v. Portugal* (App. no. 37698/97) 28 September 2000, para. 36 ("Contrary to the Government's affirmations, what matters is not that the applicant was sentenced to a minor penalty, but that he was convicted at all (see the *Jersild* judgment cited above, pp. 25-26, § 35).").

[77] *Dammann v. Switzerland* (App. no. 77551/01) 25 April 2006, para. 57.

[78] *Dammann v. Switzerland* (App. no. 77551/01) 25 April 2006, para. 57, citing *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 44 ("although the penalty imposed on the author did not strictly speaking prevent him from expressing himself, it nonetheless amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in future … In the context of political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.").

[79] *Dammann v. Switzerland* (App. no. 77551/01) 25 April 2006, para. 58.

[80] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006 (Dissenting opinion of Judge Wildhaber, joined by Judges Borrego Borrego and Šikuta).

[81] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007, para. 19 ("The offence of handling (*recel*) is constituted by the concealment, possession or transmission of a thing, or by the fact of acting as an intermediary with a view to its transmission, in the knowledge that the said object was obtained by means of a serious crime (crime) or other major offence (*délit*).").

France,[82] where the applicants were two journalists who had published a book entitled "Les Oreilles du Président" ("The President's Ears"). The book concerned an "anti-terrorist unit" at the Elysée Palace, which operated between 1983 and 1986 within the office of the French President, engaging in telephone tapping and recording. The book included in its appendices six "facsimile telephone-tap transcripts," and a list of individuals who had been under surveillance.[83] A week after the book was published, an official (G.M.) who had worked in the President's private office, and had been placed under a formal judicial investigation, lodged a criminal complaint against the applicants, "accusing them of handling documents obtained through a breach of professional confidence, of knowingly deriving an advantage from such a breach and of handling stolen property."[84]

In 1998, the Paris *tribunal de grande instance* found the applicants guilty of the offence of "handling information obtained through a breach of the secrecy of the investigation or through a breach of professional confidence,"[85] under various articles of the Criminal Code. The Court found that the facsimiles in the book came from a "judicial investigation file, which was only accessible to persons bound by the secrecy of the judicial investigation or by a duty of professional confidence."[86] The Court ordered each of them to pay a fine of 5,000 francs (762 euros), and also ordered them, jointly and severally, to pay 50,000 francs (7,622 euro) in damages. The convictions were ultimately upheld by the Court of Cassation.

The applicants made an application to the European Court, claiming that their convictions violated their right to freedom of expression. The Court noted that it had to determine whether the aim of protecting the secrecy of a judicial investigation provided relevant and sufficient justification for the interference with freedom of expression.[87] The Court first held that the book concerned an issue of "considerable public interest."[88] Second, the Court noted that at the time when the book was published, in addition to very wide media coverage of the so-called "Elysée eavesdropping" case, it was already publicly known that G.M. had been placed under investigation, in the context of a pre-trial judicial investigation which had started about three years earlier, and which ultimately led to his conviction and suspended prison sentence.[89] Third, the Court held that the government had failed to show how, in the circumstances of the case, the disclosure of confidential information "could have had a negative impact on G.M.'s right to the presumption of innocence or on his conviction and sentence almost ten years after that publication."[90] Further, following the publication of the book and while the judicial investigation was ongoing, G.M. regularly commented on the case in numerous press articles. In those circumstances, the protection of the information on account of its confidentiality did not constitute an "overriding requirement."[91]

Finally, the Court examined the "nature and severity of the penalty."[92] The Court noted that the journalists were fined 762 euro each and were also ordered jointly to pay 7,622 euro in damages.[93] The Court held that the amount of the fine, "although admittedly fairly moderate," and the award of damages in addition to it, do not appear to have been justified in

[82] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007.
[83] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007, para. 8.
[84] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007, para. 8.
[85] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007, para. 10.
[86] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007, para. 10.
[87] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007, para. 44.
[88] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007, para. 10.
[89] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007, para. 44.
[90] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007, para. 44.
[91] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007, para. 44.
[92] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007, para. 47.
[93] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007, para. 48.

the circumstances of the case.[94] Notably, the Court then applied the Grand Chamber's *Cumpănă and Mazăre* judgment, citing its paragraph 114, and stating that "interference with freedom of expression may have a chilling effect on the exercise of that freedom - an effect that the relatively moderate nature of a fine would not suffice to negate."[95] The Court then concluded that applicants' conviction was a "disproportionate interference" with their freedom of expression in violation of Article 10.[96]

Notably, *Dupuis and Others* was unanimous, and found that the journalists' conviction for the offence of handling based on the reproduction and use in their book of documents from an investigation file,"[97] may have a "chilling effect" on the exercise of freedom of expression.[98] In this regard, the Court held that the moderate nature of the fine "would not suffice" to negate this chilling effect.[99] Thus, the conviction for the offence of handling, in and of itself, seemed to create the chilling effect. This would be in line with *Jersild*, and the Fourth Section's judgments in *Stoll* and *Dammann*. Finally, it must be highlighted, similar to *Fressoz and Roire*, that the Court in *Dupuis and Others* reiterated that "journalists cannot, in principle, be released from their duty to abide by the ordinary criminal law on the basis that Article 10 affords them protection."[100] However, this principle did not outweigh the "right of journalists to divulge information on issues of public interest" in this instance.[101]

5.3 Grand Chamber in *Stoll* disagrees over chilling effect of journalist's conviction

At this stage it might be helpful to pause for a moment, before discussing the Grand Chamber's judgment in *Stoll*. Up to this point, there had been five judgments concerning the prosecutions of journalists for various offences, and in all five judgments, including two Grand Chamber judgments (*Jersild* and *Fressoz and Roire*), there had been violations of Article 10. In particular, *Jersild*,[102] *Stoll*,[103] *Dammann*,[104] and *Dupuis and Others*,[105] had all applied the chilling effect principle, that not only must the individual applicant journalist's freedom of expression be taken into account, but also the chilling effect on other journalists and the press more generally. Further, it must also be noted how the application of the chilling effect principle was built upon prior authority in each case: in *Stoll*, the Court relied

[94] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007, para. 48.
[95] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007, para. 48.
[96] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007, para. 49.
[97] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007, para. 45.
[98] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007, para. 48.
[99] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007, para. 48.
[100] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007, para. 43.
[101] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007, para. 46.
[102] *Jersild v. Denmark* (App. no. 15890/89) 23 September 1994 (Grand Chamber), para. 35 ("would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.").
[103] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 49. ("In the context of a political debate such a conviction 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 the performance of its task of purveyor of information and public watchdog.").
[104] *Dammann v. Switzerland* (App. no. 77551/01) 25 April 2006, para. 58 ("Sanctionnant ainsi un comportement intervenu à un stade préalable à la publication, pareille condamnation risque de dissuader les journalistes de contribuer à la discussion publique de questions qui intéressent la vie de la collectivité.").
[105] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007, para. 48 ("interference with freedom of expression might have a chilling effect on the exercise of that freedom (see, mutatis mutandis, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 114, ECHR 2004-XI) – an effect that the relatively moderate nature of a fine would not suffice to negate.").

upon *Jersild*, *Lopes Gomes da Silva*, and *Lingens*;[106] in *Dammann*, the Court relied upon *Jersild*, *Lopes Gomes da Silva*, and *Lingens*;[107] and in *Dupuis and Others*, the Court relied upon *Cumpănă and Mazăre*.[108]

As noted above, following the Chamber judgment in *Stoll*, the Swiss government requested that the case be referred to the Grand Chamber, and a panel of the Grand Chamber granted the request.[109] In December 2007, following *Dammann* and *Dupuis and Others* being delivered, the Grand Chamber delivered its judgment in *Stoll*, and by a majority, found there had been *no* violation of Article 10.

At the outset, the Grand Chamber stated that the issue under consideration was the "dissemination of confidential information," and it laid down a number of different criteria which must be examined in order to determine whether the interference was necessary in a democratic society: (α) the issue at stake (β) the interests at stake; (γ) the review of the measure by the domestic courts; (δ) the conduct of the applicant; and (ε) whether the penalty imposed was proportionate.[110] First, the Court held, similar to the Chamber judgment, that the articles "concerned matters of public interest,"[111] However, the Court also held that publication of the articles was "liable to cause considerable damage to the interests of the respondent party in the present case,"[112] in particular "negative repercussions on the smooth progress of the negotiations in which Switzerland was engaged."[113] Second, the Court held that the "Federal Court verified whether the 'confidential' classification of the ambassador's report had been justified and weighed up the interests at stake," and "it cannot be said that the formal notion of secrecy on which Article 293 of the Criminal Code is based" prevented the Federal Court from "determining whether the interference in issue was compatible with Article 10."[114]

In relation to the "conduct of the applicant," the Court examined, what it termed, "ethics of journalism," namely, how the applicant obtained the reports and the "form of the articles."[115] The Court admitted that the applicant was "apparently not the person responsible for leaking the document."[116] However, the Court held that "the fact that the applicant did not act illegally in that respect is not necessarily a determining factor," as "he could not claim in good faith to be unaware that disclosure of the document in question was punishable under Article 293 of the Criminal Code."[117] The Court then held that the articles were "clearly reductive and truncated,"[118] the "vocabulary used by the applicant tends to suggest that the ambassador's remarks were anti-Semitic,"[119] and the articles were "sensationalist."[120] The Court concluded that "the truncated and reductive form of the articles in question, which was liable to mislead the reader as to the ambassador's personality and abilities, considerably detracted from the importance of their contribution to the public debate protected by Article 10 of the Convention."[121]

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[106] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 49
[107] *Dammann v. Switzerland* (App. no. 77551/01) 25 April 2006, para. 58
[108] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007, para. 48
[109] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 8.
[110] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 112.
[111] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 118.
[112] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 136.
[113] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 132.
[114] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 139.
[115] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 140.
[116] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 141.
[117] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 144.
[118] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 147.
[119] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 148.
[120] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 149.
[121] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 152.

Finally, the Court considered "whether the penalty imposed was proportionate."[122] First, the Court noted that it "must be satisfied that the penalty does not amount to a form of censorship intended[123] to discourage the press from expressing criticism."[124] The Court also noted that "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."[125] The Court also recognised that "a person's conviction may in some cases be more important than the minor nature of the penalty imposed."[126] However, the Court added a new principle, noting that "a consensus appears to exist among the member States of the Council of Europe on the need for appropriate criminal sanctions to prevent the disclosure of certain confidential items of information."[127]

The Court examined the penalties imposed, and observed that the penalty "could hardly be said to have prevented him from expressing his views, coming as it did after the articles had been published."[128] Second, the amount of the fine was "relatively small," "imposed for an offence coming under the head of 'minor offences'," and "more severe sanctions" apply in other member states.[129] Third, the Court admitted that "it is true that no action was taken to prosecute" the other journalists who had published the report in full, but this was immaterial, as "the principle of discretionary prosecution leaves States considerable room for manoeuvre in deciding whether or not to institute proceedings against someone thought to have committed an offence," and prosecutors "have the right, in particular, to take account of considerations of professional ethics."[130] Finally, in relation to the "deterrent effect," the Court held that "while this danger is inherent in any criminal penalty, the relatively modest amount of the fine must be borne in mind in the instant case.[131]

The Court concluded that the fine imposed was not disproportionate, and in light of all the considerations, the domestic authorities "did not overstep their margin of appreciation," and the application's conviction was proportionate to the legitimate aim pursued.[132] Thus, there had been no violation of Article 10.

A number of judges dissented, finding that there had been a violation of Article 10. In particular, the dissent argued the majority's judgment was "a dangerous and unjustified departure from the Court's well-established case-law."[133] The "examination and criticism of the form of the articles" were "unduly harsh in view of the fact that the journalist focused his remarks on the ambassador (who did not complain as a result)," and "the majority's criticism

[122] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 153.
[123] It should be noted that the Court's use of "intended to discourage" is curious, as the phrase used in *Lingens* at para. 44 (which the majority in *Stoll* cite) is "likely to discourage." The use of the phrase *intended* to discourage suggests that it must be demonstrated that there was an intention to discourage on the part of the prosecutor. However, in none of the Court's case law on the chilling effect up to this point was it ever stated that that a penalty must have been "intended to discourage." The chilling effect was always caused by the risk of discouraging future expression. Indeed, in the Chamber judgment in *Stoll*, the Court correctly used the phrase was "likely to discourage," citing *Lingens'* para. 44. In the later Chamber judgment in *A.B. v. Switzerland* (App. no. 56925/08) 1 July 2014, para. 60, the Court reverted back to "tending to discourage" (see Section 5.4.5 below).
[124] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 154.
[125] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 154.
[126] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 154.
[127] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 155.
[128] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 155.
[129] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 157.
[130] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 159.
[131] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 160.
[132] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 162.
[133] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber) (Dissenting opinion of Judge Zagrebelsky joined by Judges Lorenzen, Fura-Sandström, Jaeger and Popović, para. 2).

concerning the form of the applicant's articles is not relevant from the Court's perspective."[134]

Notably, the dissent also addressed the "penalty imposed and its potentially adverse effect on the exercise of journalistic freedom." The dissent subscribed "to the conclusions of the Chamber in this case," which had applied the chilling effect: the conviction amounted to a kind of censorship which was likely to discourage the journalist from making criticisms of that kind again in the future. In the context of a political debate such a conviction 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 the performance of its task of purveyor of information and public watchdog.[135] Moreover, the dissent in *Stoll* cited with approval the Court's application of the chilling effect in *Dupuis and Others v. France*,[136] where the Court applied *Cumpănă and Mazăre*, holding that the "relatively moderate nature of a fine" does not suffice to negate the chilling effect on freedom of expression.

There are also a number of criticisms of the majority's judgment concerning the "conduct of the applicant."[137] However, while there is much to say on *Stoll* generally, it is proposed to focus on the majority's consideration of the chilling effect. First, while the majority held that the "relatively modest amount of the fine must be borne in mind" in relation to the chilling effect, it may be argued that the majority's judgment was at least admirable for fully engaging with the chilling effect, reiterating the principles, and attempting to engage with the case law. In this regard, the Grand Chamber's *Stoll* judgment is somewhat more notable for its engagement with the chilling effect than other judgments, such as *Lindon* or *Delfi*, discussed in Chapter 4.[138] Indeed, the Grand Chamber's judgment engagement with the chilling effect is also much more satisfactory than the dissenting opinion in the Fourth Section's *Stoll* judgment, where the dissent did not even engage with the principle.[139]

Notwithstanding the last point, however, there are a number of criticisms that may be levelled at the Grand Chamber majority's treatment of the chilling effect in *Stoll*. The Court seems to hold that because "a consensus appears to exist among the member States of the Council of Europe on the need for appropriate criminal sanctions to prevent the disclosure of certain confidential items of information," this somehow outweighs the Court's chilling effect principle applied in *Jersild*, *Lopes Gomes da Silva, Cumpănă and Mazăre*, *Dammann*, and *Dupuis and Others*, which the Court in *Stoll* itself cites. The Court's argument seems to be a version of the margin of appreciation argument which the Court's majority adopted in *Lindon*, that "in view of the margin of appreciation left to Contracting States by Article 10 of the Convention, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued."[140] It should be pointed out that the *Lindon* judgment was delivered by the Grand Chamber twelve days after *Stoll*.

However, the *Stoll* majority does not cite any prior case law on the "consensus" point being relevant, and it must be pointed out that in *Jersild*, *Dammann,* and *Dupuis and Others,* when applying the chilling effect, there was no mention of any "consensus" being relevant. It should also be pointed out that the vast majority of Council of Europe member states criminalised defamation when *Lopes Gomes da Silva* was delivered, and that did not make a

[134] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber) (Dissenting opinion of Judge Zagrebelsky joined by Judges Lorenzen, Fura-Sandström, Jaeger and Popović, para. 12).
[135] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006, para. 58.
[136] *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007.
[137] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 140-152.
[138] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 160-161.
[139] *Stoll v. Switzerland* (App. no. 69698/01) 25 April 2006 (Dissenting opinion of Judge Wildhaber, joined by Judges Borrego Borrego and Šikuta).
[140] *Lindon, Otchakovsky-Laurens and July v. France* (App. nos. 21279/02 and 36448/02) 22 October 2007, para. 59.

difference to the Court's analysis. Similarly, in *Cumpănă and Mazăre*, the vast majority of Council of Europe member states provided for prison sentences for defamation, and that did not make a difference to the analysis. It must be pointed out that applying the chilling effect principle does not mean that there cannot be criminal sanctions *per se*, it means that the government must have "particularly strong reasons for doing so,"[141] and only in "exceptional circumstances."[142] Finally, perhaps the strongest criticism of the *Stoll* majority's judgment, is that the Court neglects considering *other* journalists that will be deterred from engaging in public interest expression. This principle of having regard not only to the individual journalists, but other journalists in the future, is arguably absent from the *Stoll* majority's judgment, even though it was applied in *Wille* and *Cumpănă and Mazăre*. As a matter of principle, it could be argued that having regard to this future chilling effect is merely having regard to a speculative empirical consideration. However, similar to the concluding point in Chapter 4, the chilling effect principle is *not* based on some speculative empirical claim about the future, but rather a recognition of the inherent risk of error in the legal system. This risk of error is actually seen to be at work in *Stoll* itself, with the Chamber judgment in a sense getting it wrong, with the Grand Chamber coming to a different conclusion. The reason why the chilling effect principle should be applied in *Stoll* is that the expression at issue concerned a matter of public interest, and the reason for convicting the applicant was due to non-adherence to the vague concept of ethics of journalism. This is precisely the type of expression the chilling effect principle is designed to give, as Lemmens writes, "breathing space" to under Article 10, and insulate this expression from the inherent risk of error of courts in applying an ethics-of-journalism-type analysis.[143] Finally, the *Stoll* majority do not seem to distinguish *Dupuis and Others*, and indeed the *Stoll* majority do not even cite *Dupuis and Others*.

5.4 Post-*Stoll* consideration of the chilling effect

5.4.1 Journalist convicted for "interception of messages"

Following *Stoll*, one of the first cases considering a journalist's prosecution, resulted in the Court finding that the journalist's application was inadmissible as "manifestly ill-founded." The case was *Adamek v. Germany*,[144] and concerned a journalist who worked on a television programme for the East German Broadcasting Service. The programme dealt with allegations that the Potsdam police "when calling towing services, gave preference to certain enterprises."[145] During the programme, broadcast in May 1998, the applicant filmed an individual who parked his towing service car near the motorway to wait for a message from the police radio in order to be able to get to the scene of an accident or breakdown in time. The programme referred to a recording from the police radio, "from which it could be understood that the police gave preference to a certain towing service," with the recordings from the police radio being broadcast.[146]

Following the programme's broadcast, the applicant was prosecuted under Section 86 and 95 of the Telecommunications Act, which provide that "interception by means of radio

[141] *Jersild v. Denmark* (App. no. 15890/89) 23 September 1994 (Grand Chamber), para. 35.
[142] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 115.
[143] Koen Lemmens, "Se taire par peur: l'effet dissuasif de la responsabilité civile sur la liberté d"expression," (2005) *Auteurs & Media* 32, p. 38.
[144] *Adamek v. Germany* (App. no. 22107/05) 25 March 2008 (Admissibility decision) (no paragraph numbers).
[145] *Adamek v. Germany* (App. no. 22107/05) 25 March 2008 (Admissibility decision) (no paragraph numbers).
[146] *Adamek v. Germany* (App. no. 22107/05) 25 March 2008 (Admissibility decision) (no paragraph numbers).

equipment of messages not intended for the radio equipment shall not be permitted."[147] The Potsdam District Court convicted the applicant for having "unlawfully communicated the excerpts which he had intercepted from the police radio," and sentenced him to a fine of 450 euros. The conviction was upheld on appeal, with the courts holding that the secrecy of the police radio communications "deserved priority over the interest of the general public in the present case, in particular because the applicant could have reported on the shortcomings in a different manner."[148]

The applicant made an application to the European Court, arguing that his conviction violated his right to freedom of expression, and the main question was whether the conviction had been necessary in a democratic society. First, the Court reiterated that "journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection," citing *Stoll*.[149] The Court then recounted what the domestic court had found, that the importance of the secrecy of police radio communications "deserved priority over the interest of the general public in the present case, in particular because the applicant could have reported on the shortcomings in a different manner without being in violation of the provisions of the Telecommunications Act."[150] The Court stated that the domestic courts "did not prevent the applicant from reporting on the shortcomings within the police service as such."[151] Finally, the Court noted that the domestic courts, when sentencing the applicant, "took into account that the applicant had felt obliged as a journalist to report to the public illegal conduct by the police," and imposed a "relatively low fine."[152] Based on these considerations, the Court held that "it cannot be said that the applicant's conviction amounted to a disproportionate and hence unjustified restriction of his right to freedom of expression." Thus, according to the Court, the complaint "must be rejected as manifestly ill-founded."[153]

It must be pointed out how little substantive analysis the Court applied in *Adamek* concerning the journalist's conviction. In particular, the Court did not apply a number of the criteria laid down in *Stoll*, including (a) the "public interest" in the broadcast,[154] (b) that the "conviction of a journalist for disclosing information considered to be confidential or secret may discourage those working in the media from informing the public on matters of public interest," (c) the manner in which the applicant obtained the report, (d) the form of the articles, and (e) there being no reason to doubt the journalist's "good faith." Finally, and most crucially, the Court in *Adamek* nowhere seeks to apply the line of case law on the chilling effect which was applied in *Stoll* concerning the chilling effect, namely *Jersild*, *Dammann*, and *Dupuis and Others*.

Even though the Court in *Stoll* concluded that there had been no violation of Article 10, the Court did approve the principle that 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."[155] It does not seem that the Court in *Adamek* engaged in this scrutiny, which the Court in *Stoll* stated that the Court "must be satisfied," which would imply a duty on the Court to engage in this scrutiny. Thus, it is arguable that *Adamek* did not follow the criteria

[147] *Adamek v. Germany* (App. no. 22107/05) 25 March 2008 (Admissibility decision) (no paragraph numbers).
[148] *Adamek v. Germany* (App. no. 22107/05) 25 March 2008 (Admissibility decision) (no paragraph numbers).
[149] *Adamek v. Germany* (App. no. 22107/05) 25 March 2008 (Admissibility decision) (no paragraph numbers).
[150] *Adamek v. Germany* (App. no. 22107/05) 25 March 2008 (Admissibility decision) (no paragraph numbers).
[151] *Adamek v. Germany* (App. no. 22107/05) 25 March 2008 (Admissibility decision) (no paragraph numbers).
[152] *Adamek v. Germany* (App. no. 22107/05) 25 March 2008 (Admissibility decision) (no paragraph numbers).
[153] *Adamek v. Germany* (App. no. 22107/05) 25 March 2008 (Admissibility decision) (no paragraph numbers).
[154] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 117.
[155] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 154.

established in *Stoll*, and only seemed to apply one criterion, namely the "duty to obey" ordinary criminal law.

5.4.2 Journalists convicted under Fireworks Act during documentary making

While the Court in *Adamek* did not apply the chilling effect principle, in the Court's next decision, two Danish journalists argued that their criminal conviction had violated Article 10, in part due to "the chilling effect on investigative journalism that will flow from the Court should it uphold the criminal conviction in question."[156] The case was *Mikkelsen and Christensen v. Denmark*,[157] and concerned journalists with the broadcaster Danmarks Radio. In 2005, the applicants prepared a documentary about the import and distribution of illegal fireworks in Denmark. As part of the research, the applicants bought a number of illegal fireworks in a basement in Copenhagen (the fireworks were classed as "minor blast: pyrotechnics," and "handling of the display shells was safe, provided they remained in their original packaging").[158] The applicants filmed the purchase with a hidden camera. Before the purchase, the applicants had contacted the police in two different regions, Århus and Copenhagen, and informed them of their research and the documentary to be broadcast. Immediately after buying the fireworks, the applicants drove to a police station in Copenhagen and handed over the fireworks to the police.

However, the journalists were prosecuted for having "acquired illegal fireworks without permission from the municipality," under section 7 of Denmark's Fireworks Act.[159] A City Court convicted the applicants, and sentenced them to a fine of 6,000 Danish kroner (800 euro). The conviction was upheld on appeal, with the courts holding that although the broadcast was deemed to have "significant news and information value," there were no "compelling reasons" leading to "impunity for the defendants' violation" of the Fireworks Act. Notably, the courts did find it established that the Århus Police "had indicated that, in view of the special purpose of the acquisition of illegal fireworks, the [applicants] would not be charged with the purchase."[160] However, no such indication was found by the courts from the Copenhagen Police.

The applicants made an application to the European Court, claiming that their conviction violated their right to freedom of expression. It was argued that "they had not merely been convicted under the fireworks legislation; rather they were convicted under the fireworks legislation in the course of their work as journalists in researching a relevant and important story on illegal fireworks."[161]

First, the Court said its "view" was that there had been an "interference" with freedom of expression, noting that the applicants had been convicted of having acquired illegal fireworks, and the "purchase was filmed and used in the applicants' journalistic

[156] *Mikkelsen and Christensen v. Denmark* (App. no. 22918/08) 24 May 2011 (Admissibility decision) (no paragraph numbers).
[157] *Mikkelsen and Christensen v. Denmark* (App. no. 22918/08) 24 May 2011 (Admissibility decision) (no paragraph numbers).
[158] *Mikkelsen and Christensen v. Denmark* (App. no. 22918/08) 24 May 2011 (Admissibility decision) (no paragraph numbers).
[159] *Mikkelsen and Christensen v. Denmark* (App. no. 22918/08) 24 May 2011 (Admissibility decision) (no paragraph numbers).
[160] *Mikkelsen and Christensen v. Denmark* (App. no. 22918/08) 24 May 2011 (Admissibility decision) (no paragraph numbers).
[161] *Mikkelsen and Christensen v. Denmark* (App. no. 22918/08) 24 May 2011 (Admissibility decision) (no paragraph numbers).

documentary."[162] For the Court, the "crucial issue" was whether the interference had been necessary in a democratic society.[163] However, the Court held that the conviction had not been "disproportionate," and that the application must be rejected as "manifestly ill-founded."[164] In reaching this conclusion, the Court first noted that the documentary was "not stopped or in any way impeded," and the conviction was based "solely on the ground that they acquired eight illegal chrysanthemum shells without permission."[165] Next, the Court held that it was "not convinced" that the purchase of the fireworks was needed to demonstrate the fireworks were being sold by organised crime, or "that the applicants could not have reported on the failures of the authorities without being in violation" of the Fireworks Act.[166] Further, in relation to "promised impunity" from the police, the Court recalled what the domestic courts had found, and noted the courts had "thoroughly examined the question."[167] Finally, on the "penalty imposed," the Court simply held that the fine of 6,000 kroner "cannot be considered excessive."[168]

The most striking element of the Court's decision in *Mikkelsen and Christensen* is how the Court did not cite, nor apply, the unanimous *Dammann* judgment, which is arguably directly relevant, concerning: "a preparatory step towards publication, namely a journalist's research and investigative activities."[169] Notably, the Court in *Dammann* held that this preparatory phase "called for the closest scrutiny on account of the great danger represented by that sort of restriction on freedom of expression."[170] Further, the Court had applied the chilling effect principle in *Dammann*, holding that a conviction for pre-publication journalistic activity "may deter journalists from contributing to public discussion of issues affecting the life of the community and "is liable to hamper the press in the performance of its task of purveyor of information and public watchdog."[171] It must be pointed out that the Court in *Stoll* specifically cited *Dammann* with approval on four different occasions,[172] and the Court in *Mikkelsen and Christensen* does not appear to explain why it did not apply *Dammann* and its chilling effect principle. It is difficult to see that the level of scrutiny applied by the Court in *Mikkelsen and Christensen* is equivalent to "the closest scrutiny" applied in *Dammann*, with the Court seemingly just reiterating what the Danish courts had

[162] *Mikkelsen and Christensen v. Denmark* (App. no. 22918/08) 24 May 2011 (Admissibility decision) (no paragraph numbers).
[163] *Mikkelsen and Christensen v. Denmark* (App. no. 22918/08) 24 May 2011 (Admissibility decision) (no paragraph numbers).
[164] *Mikkelsen and Christensen v. Denmark* (App. no. 22918/08) 24 May 2011 (Admissibility decision) (no paragraph numbers).
[165] *Mikkelsen and Christensen v. Denmark* (App. no. 22918/08) 24 May 2011 (Admissibility decision) (no paragraph numbers).
[166] *Mikkelsen and Christensen v. Denmark* (App. no. 22918/08) 24 May 2011 (Admissibility decision) (no paragraph numbers).
[167] *Mikkelsen and Christensen v. Denmark* (App. no. 22918/08) 24 May 2011 (Admissibility decision) (no paragraph numbers).
[168] *Mikkelsen and Christensen v. Denmark* (App. no. 22918/08) 24 May 2011 (Admissibility decision) (no paragraph numbers).
[169] *Dammann v. Switzerland* (App. no. 77551/01) 25 April 2006, para. 49.
[170] *Dammann v. Switzerland* (App. no. 77551/01) 25 April 2006, para. 52.
[171] *Dammann v. Switzerland* (App. no. 77551/01) 25 April 2006, para. 57, citing *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 44 ("although the penalty imposed on the author did not strictly speaking prevent him from expressing himself, it nonetheless amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in future … In the context of political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.")
[172] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 109 (citing *Dammann*), 141(citing *Dammann*), 143(citing *Dammann*), and 154 (citing *Dammann*).

concluded. On the other hand, implicit in the Court's decision may have been the "compelling safety considerations" which underpinned the fireworks legislation,[173] and the government's argument that the applicants were not certified pyrotechnicians, and there could have been "very serious consequences if the box of chrysanthemum shells had detonated by accident during transportation."[174] These may be legitimate reasons; although the applicant argued otherwise. However, the Court's closest scrutiny test requires the Court to explicit subject these reasons to Article 10 scrutiny, and explain why a criminal prosecution was necessary in a democratic society, and why the chilling effect principle does not apply, rather than merely repeat some domestic court considerations.

5.4.3 Journalist prosecuted for interception of confidential communications

The Court was next confronted with the question of whether a television journalist's conviction, and suspended prison sentence, for illegal interception and disclosure of confidential communications from another television station's unbroadcasted footage, was consistent with Article 10. The case was *Ricci v. Italy*,[175] where the applicant was the presenter of a satirical television programme on the private channel Canale 5 in Italy. The case arose when recordings were intercepted by Canale 5 devices of the public broadcaster RAI's unbroadcast programme footage. The footage showed a row between two guests, during the recording of RAI's programme, with the presenter seen acknowledging that individuals had been invited for the sole purpose of provoking an argument that would attract a large number of viewers.[176] The applicant decided to broadcast the intercepted footage during his satirical programme, in order to denounce the "true nature of television."[177] The public broadcaster lodged a criminal complaint against the applicant, and the applicant was convicted under Article 617 of the Criminal Code for fraudulent interception and disclosure of confidential communications.[178] The domestic courts sentenced the applicant to a suspended prison sentence of over four months. The applicant was also ordered to pay, by way of an advance, 10,000 euro to each of the civil parties (RAI and the presenter). However, on appeal, Italy's Court of Cassation declared the offence time-barred, and quashed the lower court judgment without remitting it. However, it upheld the order that the applicant was to compensate the civil parties and ordered him to pay RAI's legal costs.

Following the applicant's application to the European Court over his conviction, the Court applied its *Stoll* criteria as to whether there had been a violation of Article 10. The Court held that the applicant's broadcast had concerned a matter of public interest,[179] but crucially also held that the applicant could not have been unaware that the recording had been made on a channel reserved for the internal use of RAI.[180] Broadcasting the footage would disregard RAI's confidentiality of communications, and as such, the Court held that the applicant had not acted in accordance with the ethics of journalism.[181] Therefore, the Court considered it could not conclude that a conviction was in itself contrary to Article 10.[182]

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[173] *Mikkelsen and Christensen v. Denmark* (App. no. 22918/08) 24 May 2011 (Admissibility decision) (no paragraph numbers).
[174] *Mikkelsen and Christensen v. Denmark* (App. no. 22918/08) 24 May 2011 (Admissibility decision) (no paragraph numbers).
[175] *Ricci v. Italy* (App. no. 30210/06) 8 October 2013.
[176] *Ricci v. Italy* (App. no. 30210/06) 8 October 2013, para. 8.
[177] *Ricci v. Italy* (App. no. 30210/06) 8 October 2013, para. 9.
[178] *Ricci v. Italy* (App. no. 30210/06) 8 October 2013, para.11.
[179] *Ricci v. Italy* (App. no. 30210/06) 8 October 2013, para.55.
[180] *Ricci v. Italy* (App. no. 30210/06) 8 October 2013, para.57.
[181] *Ricci v. Italy* (App. no. 30210/06) 8 October 2013, para.57.
[182] *Ricci v. Italy* (App. no. 30210/06) 8 October 2013, para.58.

However, the Court then turned to the penalties imposed, and crucially, applied *Cumpănă and Mazăre*'s chilling effect principle.[183] The Court noted that in addition to the award of compensation, the applicant had been sentenced to four months and five days in prison. Even though it had been a suspended sentence, and the Court of Cassation had found the offence to be time-barred, the European Court held that the "fact that a prison sentence had been handed down must have had a significant chilling effect."[184] Further, the case involved broadcasting of a video with content that was not likely to cause significant damage, and therefore not marked by any "exceptional circumstance" justifying recourse to such a harsh sanction.[185] As such, the Court concluded that there had been a violation of Article 10.

Ricci represented a strong application of *Cumpănă and Mazăre*, finding that although the conviction may have been consistent with Article 10, the Court conducted a separate proportionality analysis of the penalty imposed, and found a suspended prison sentence violated Article 10 due to its chilling effect. Crucially, violating a domestic criminal provision did not simply mean that "exceptional circumstances" existed under *Cumpănă and Mazăre* to impose a suspended prison sentence.

5.4.4 Disagreement in *Pentikäinen* over journalist's arrest and prosecution

Following the two decisions in *Adamek* and *Mikkelsen and Christensen*, and the judgment in *Ricci*, the Court was confronted with whether a chilling effect arose not only where a journalist was prosecuted for "contumacy towards the police" under Finland's Penal Code, but also where the journalist had been arrested and detained under the same provision. The case was *Pentikäinen v. Finland*,[186] and would eventually lead to a divided Grand Chamber judgment, where there would be considerable disagreement over the application of the chilling effect principle.[187]

As mentioned earlier, the applicant had been arrested for contumacy towards the police" under the Finnish Penal Code,[188] when leaving the scene of a demonstration he had been covering. The applicant was brought to a police station, and detained for over 17 hours, and was interrogated for 30 minutes. The Helsinki District Court later convicted the applicant of the offence. The applicant then made an application to the European Court, claiming that his arrest, detention and conviction had violated his right to freedom of expression.[189] The Fourth Section delivered its Chamber judgment in 2014, and found no violation of Article 10.[190] First, the Court held that the applicant's "arrest and conviction were the consequence of his conduct as newspaper photographer and journalist when disobeying the police," and thus it was to be presumed that there had been an interference with freedom of expression.[191]

The Fourth Section then considered the question of whether the applicant's arrest and conviction had been "necessary in a democratic society."[192] The Court began by examining the applicant's arrest, and noted that the arrest "took place in the context of a demonstration

[183] *Ricci v. Italy* (App. no. 30210/06) 8 October 2013, para.52.
[184] *Ricci v. Italy* (App. no. 30210/06) 8 October 2013, para.59.
[185] *Ricci v. Italy* (App. no. 30210/06) 8 October 2013, para.60.
[186] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014.
[187] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber). See D. Voorhoof, "Journalist must comply with police order to disperse while covering demonstration" *Strasbourg Observers*, 26 October 2015.
[188] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 37.
[189] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014, para. 27.
[190] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014, para. 27.
[191] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014, para. 35.
[192] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014, para. 37.

in which he had participated as a photographer and journalist."[193] However, the Court also noted that the applicant was not "in any way prevented from taking photographs of the demonstration,"[194] and "was not as such prevented from exercising his freedom of expression and reporting the event."[195] The Court did admit that "it is not entirely clear at what stage the police learned that the applicant was a journalist," but held that "the applicant failed to make clear efforts to identify himself as a journalist."[196] The Court held that his "arrest and conviction only related to disobeying the police as he failed to obey their orders," and the fact he was a journalist "did not give him a greater right to stay at the scene than the other people."[197]

The Court then turned to the applicant's detention, and noted the government's argument that the "length of the detention is mainly explained by the fact that the applicant was detained late at night and that the domestic law prohibited interrogations between 10 p.m. and 7 a.m.," in addition to the arrest and detention of 121 other persons which "may also have delayed the applicant's release."[198] Finally, the Court considered the applicant's conviction. The Court noted that the prosecution was "directed against altogether 74 defendants who were accused of several types of offences," and that the domestic courts had found the applicant "had committed a crime by disobeying the lawful orders of the police."[199] Further, the Court noted that the domestic courts "did not impose any penalty on the applicant as his act was considered excusable," because, "as a photographer and journalist," he was "confronted with contradictory expectations, arising from obligations imposed on the one hand by the police and on the other hand by his employer."[200] Finally, the Court noted that "no entry of the conviction was made on the applicant's criminal record as no penalty was imposed."[201] The Court concluded that domestic courts were entitled to decide that the interference complained of was "necessary in a democratic society."[202]

Two judges dissented, finding that there had been a violation of Article 10, and argued it was "likely to create a "chilling effect" on press freedom."[203] The dissent considered that the police order to leave "should not have been intended or interpreted as directed against the applicant as a journalist covering the events in question," as "his presence was not connected with what needed to be countered and resolved."[204] Crucially, the dissent held that "if the domestic courts were unable to adopt such an interpretative approach, they were bound, in applying Article 10 of the Convention, to balance the competing interests involved, yet they failed to do so."[205] The dissent then pointed to the Court's case law on protection of journalistic sources, in particular *Voskuil*.[206] The dissent recalled that the journalist in *Voskuil*, "who was called as a witness in criminal proceedings, refused to name his source even when the judge ordered him to do so," and was punished by detention for

[193] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014, para. 42.
[194] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014, para. 43.
[195] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014, para. 47.
[196] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014, para. 46.
[197] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014, para. 47.
[198] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014, para. 48.
[199] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014, para. 54.
[200] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014, para. 54.
[201] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014, para. 54.
[202] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014, para. 55.
[203] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014 (Dissenting opinion of Judge Nicolaou joined by Judge de Gaetano, para. 13).
[204] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014 (Dissenting opinion of Judge Nicolaou joined by Judge de Gaetano, para. 13).
[205] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014 (Dissenting opinion of Judge Nicolaou joined by Judge de Gaetano, para. 13).
[206] *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007.

non-compliance. However, the Court in *Voskuil* held that "the judicial order was not justified by an overriding requirement in the public interest and so, in balancing the competing interests, "the interest of a democratic society in securing a free press" had to prevail."[207] The dissent in *Pentikäinen* held that no "balancing exercise was carried out in the present case," and the conviction was likely to create a "chilling effect" on press freedom."[208]

In addition to the dissent's criticism, two further points may be offered on the chilling effect point. First, and similar to *Adamek* and *Mikkelsen and Christensen,* the *Pentikäinen* majority did not mention the chilling effect principle from *Dammann*, nor did the majority cite *Dammann*. Indeed, the majority did not apply the principle from *Stoll* that it "must be satisfied that the penalty does not amount to a form of censorship intended to discourage the press from expressing criticism," and that "a person's conviction may in some cases be more important than the minor nature of the penalty imposed."[209] It should be noted that in neither of these cases was it suggested that the crucial element was that a conviction was entered in a "criminal record."[210] The crucial element was the conviction. The chilling effect arises from other journalists fearing prosecutions and convictions, and not just an entry being made in a journalist's "criminal record."[211]

5.4.5 Disagreement in *Bédat* over chilling effect of journalist's conviction

The disagreement within the Court over the chilling effect of a journalist's conviction continued in the next judgment delivered four months after the Chamber judgment in *Pentikäinen*.[212] The case was *A.B. v. Switzerland,*[213] (later referred to as *Bédat v. Switzerland* in the Grand Chamber) and as mentioned earlier, concerned the prosecution of a journalist under the Swiss law prohibiting publication of secret official deliberations over an article entitled "Tragedy on the Lausanne Bridge – the reckless driver's version – Questioning of the mad driver."

The applicant made an application to the European Court, claiming his conviction violated his right to freedom of expression. The Court examined whether the interference had been "necessary in a democratic society."[214] First, the Court held that the article "addressed a matter of public interest," examining "the personality of the accused (M.B.) and attempted to understand his animus, while highlighting the manner in which the police and judicial authorities were dealing with M.B., who seemed to be suffering from psychiatric disorders."[215] Second, the Court noted that the applicant was "an experienced journalist, must have known that the documents had come from the investigation file," and reiterated that "journalists cannot, in principle, be released from their duty to obey the ordinary criminal law."[216] However, the Court held that the government "failed to show how, in the circumstances of the case, the disclosure of this kind of confidential information could have had a negative impact either on the accused's right to be presumed innocent or on his

[207] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014 (Dissenting opinion of Judge Nicolaou joined by Judge de Gaetano, para. 13).
[208] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014 (Dissenting opinion of Judge Nicolaou joined by Judge de Gaetano).
[209] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 154.
[210] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014, para. 54.
[211] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014, para. 54.
[212] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014.
[213] *A.B. v. Switzerland* (App. no. 56925/08) 1 July 2014.
[214] *A.B. v. Switzerland* (App. no. 56925/08) 1 July 2014, para. 42.
[215] *A.B. v. Switzerland* (App. no. 56925/08) 1 July 2014, para. 49..
[216] *A.B. v. Switzerland* (App. no. 56925/08) 1 July 2014, para. 51.

trial."[217] Further, the Court held that the government "did not provide sufficient justification for the penalty imposed on the applicant for disclosing personal information concerning M.B.,"[218] as M.B. had not availed of any remedies for damage to his reputation. The Court also held that while the article was "provocative," Article 10 protects freedom of expression that may "offend, shock or disturb." Moreover, the article did not reveal "details of an individual's strictly private life," but rather "concerned the functioning of the criminal justice system in one specific case."[219]

Finally, the Court examined the "nature and severity of the penalty imposed."[220] The Court applied the chilling effect principle from *Lingens* and *Stoll*, and reiterated that it "must ensure that the penalty does not amount to a form of censorship tending to discourage the press from making criticisms. In the context of debate on a matter of public interest, such a sanction may well 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 media in performing their task as a purveyor of information and public watchdog."[221] The Court noted that "unlike in the *Stoll* case," the amount of the fine was "fairly high."[222] In this regard, the Court held that the "deterrent effect of the fine, while inherent in any criminal penalty, was not insignificant in the present case," and "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."[223]

Notably, the Court specifically cited *Jersild*'s paragraph 35 ("the Court does not accept the Government's argument that the limited nature of the fine is relevant; what matters is that the journalist was convicted"), *Lopes Gomes da Silva*'s paragraph 36 ("Contrary to the Government's affirmations, what matters is not that the applicant was sentenced to a minor penalty, but that he was convicted at all"), *Dammann*'s paragraph 57 ("Contrary to the Government's affirmations, what matters is not that the applicant was sentenced to a minor penalty, but that he was convicted at all"), and *Stoll*'s paragraph 154 ("the fact of a person's conviction may in some cases be more important than the minor nature of the penalty imposed").

Three judges dissented, holding that there had been no violation of Article 10.[224] Notably, the dissent also addressed the majority's holding on the nature and severity of the penalties. First, the dissent admitted that the fine "was fairly high" and "might have had a deterrent effect, as is inherent in any criminal sanction."[225] However, the dissent held that it did not consider "the penalty was such as to have a deterrent effect on the exercise of freedom of the press in accordance with the ethics of journalism."[226] Further, the fine "did not exceed half the amount of the applicant's monthly income at the material time."[227] However, the dissent did not discuss the principles from *Jersild*, *Lopes Gomes da Silva*, *Dammann* and

[217] *A.B. v. Switzerland* (App. no. 56925/08) 1 July 2014, para. 51.
[218] *A.B. v. Switzerland* (App. no. 56925/08) 1 July 2014, para. 56.
[219] *A.B. v. Switzerland* (App. no. 56925/08) 1 July 2014, para. 58.
[220] *A.B. v. Switzerland* (App. no. 56925/08) 1 July 2014, para. 59.
[221] *A.B. v. Switzerland* (App. no. 56925/08) 1 July 2014, para. 60.
[222] *A.B. v. Switzerland* (App. no. 56925/08) 1 July 2014, para. 61.
[223] *A.B. v. Switzerland* (App. no. 56925/08) 1 July 2014, para. 62.
[224] *A.B. v. Switzerland* (App. no. 56925/08) 1 July 2014 (Joint dissenting opinion of Judges Karakaş, Keller and Lemmens).
[225] *A.B. v. Switzerland* (App. no. 56925/08) 1 July 2014 (Joint dissenting opinion of Judges Karakaş, Keller and Lemmens, para. 5).
[226] *A.B. v. Switzerland* (App. no. 56925/08) 1 July 2014 (Joint dissenting opinion of Judges Karakaş, Keller and Lemmens, para. 5).
[227] *A.B. v. Switzerland* (App. no. 56925/08) 1 July 2014 (Joint dissenting opinion of Judges Karakaş, Keller and Lemmens, para. 5).

Stoll, rejecting that the "limited nature of the fine is relevant; what matters is that the journalist was convicted."[228]

The dissenting opinion's dismissal of the chilling effect argument on the basis that the fine would not have a chilling effect on the press who acted *in accordance with the ethics of journalism*, is reminiscent of the argument made by the majority in *Keena and Kennedy* (discussed in Chapter 3): a costs order would not have a chilling effect on public interest journalists *who respect the rule of law*.[229] As in *Keena and Kennedy*, the dissent in *A.B. (Bédat)* were essentially rejecting that a criminal fine could give rise to a chilling effect on journalists who simply abide by the ethics of journalism. And again, this view ignores a fundamental proposition underpinning the chilling effect: the uncertainty of legal proceedings. Indeed, the concept of the ethics of journalism is equally uncertain, and *A.B. (Bédat)* is itself another great example of the uncertainty of the legal process, where the Chamber judgment held that the journalist's article concerned a matter of public interest, while in the Grand Chamber, the Court held the journalist's article could not have contributed to any public debate. [230]

5.4.6 Journalists convicted for "intercepting and recording conversations"

Following the Second Section's Chamber judgment in *A.B.* (*Bédat*), a similarly constituted Second Section again addressed the conviction of journalists, and whether a chilling effect reasoning should be applied. The case was *Haldimann and Others v. Switzerland*,[231] and concerned four editors and journalists for a long-running weekly consumer-protection programme called *Kassensturz* on Swiss German television (SF DRS). In 2003, the applicants prepared a programme on practices in the life-insurance market, and arranged a meeting with an insurance broker from company "X". One of the applicants posed as a customer interested in taking out life insurance, and the SF DRS crew installed two hidden cameras in a room in which the meeting was to take place, transmitting the recording of the conversation to a neighbouring room. Once the meeting had finished, the third applicant joined the broker, introduced herself as an editor of *Kassensturz* and explained to the broker that the conversation had been filmed. The third applicant told him that he had made some crucial errors during the meeting and asked him for his views, but he refused to comment.

The first and second applicants subsequently decided to broadcast part of the filmed meeting during an edition of *Kassensturz*. The X company was invited to comment on the conversation and the criticism of the broker's methods, and they assured the company that his face and voice would be disguised and would therefore not be recognisable. Before the programme was broadcast, the applicants proceeded to pixelate the broker's face so that only his hair, skin colour and clothes could still be made out. His voice was also distorted.

In 2003, the broker unsuccessfully brought a civil action in the Zürich District Court, seeking an injunction preventing the programme from being broadcast. However, following the broadcast, the applicants were prosecuted under Article 179 bis (intercepting and recording conversations of others) and Article 179 ter (unauthorised recording of conversations) of the Swiss Criminal Code. Initially, the Dielsdorf District Court found the applicants not guilty. However, on appeal, the Court of Appeal of the Canton of Zürich found the first three applicants guilty of recording conversations of others, and breaching confidentiality or privacy by means of a camera. The fourth applicant was also found guilty of unauthorised recording of conversations. The first three applicants were given suspended

[228] *Jersild v. Denmark* (App. no. 15890/89) 23 September 1994 (Grand Chamber), para. 35.
[229] See Chapter 3, Section 3.19, above.
[230] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 66.
[231] *Haldimann and Others v. Switzerland* (App. no. 21830/09) 24 February 2015.

penalties of fifteen day-fines of 350 Swiss francs, 200 francs and 100 francs respectively (310, 170 and 90 euro), while the fourth applicant received a penalty of five day-fines of 30 francs.[232] Ultimately, the Federal Court upheld the convictions. The Federal Court held that the applicants had committed acts falling under the Criminal Code. The Court admitted that there was "a significant public interest in being informed about practices employed in the insurance field,"[233] and that this interest was liable to be weightier than the individual interests at stake. However, it considered that the applicants "could have achieved their aims by other means entailing less interference with the broker's private interests," or "instead of filming the meeting with a hidden camera, the journalist could have drawn up a record of the conversation."[234]

The applicants made an application to the European Court, claiming that their convictions violated their right to freedom of expression. In particular, the applicants argued that the domestic courts were "attempting to impose absolute censorship on journalistic research involving covert investigative techniques, in particular the use of a hidden camera."[235] The Court first reiterated the principle that "notwithstanding the vital role played by the media in a democratic society, journalists cannot in principle be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection."[236] The Court noted that the programme "did not seek" to criticise the broker "personally," but to "denounce certain commercial practices employed within his profession," and thus "the impact of the report on the broker's personal reputation was therefore limited."[237]

Further, the Court had regard to a "decisive factor in the present case," in that the applicants had pixelated the broker's face; and they also distorted his voice. Lastly, the meeting did not take place in the broker's usual business premises."[238] The Court therefore concluded that "having regard to the circumstances of the case, that the interference with the private life of the broker – who, it reiterates, declined to comment on the interview – was not so serious as to override the public interest in information about alleged malpractice in the field of insurance brokerage."[239]

Finally, the Court considered the nature and severity of the sanction. The Court applied the principle that "a person's conviction in itself may be more important than the minor nature of the penalty imposed."[240] The Court held that "although the pecuniary penalties of twelve day-fines for the first three applicants and four day-fines for the fourth applicants were relatively modest, the Court considers that the sanction imposed by the criminal court may be liable to deter the media from expressing criticism."[241] This was the case "even though the applicants themselves were not denied the opportunity to broadcast their report."[242]

Focusing on the chilling effect principle, the Court in *Haldimann* was applying the principle that even where the criminal sanctions imposed on the individual journalists are "relatively modest," what matters is that the criminal sanction "may be liable to deter the

[232] *Haldimann and Others v. Switzerland* (App. no. 21830/09) 24 February 2015, para. 17.
[233] *Haldimann and Others v. Switzerland* (App. no. 21830/09) 24 February 2015, para. 20.
[234] *Haldimann and Others v. Switzerland* (App. no. 21830/09) 24 February 2015, para. 20.
[235] *Haldimann and Others v. Switzerland* (App. no. 21830/09) 24 February 2015, para. 27.
[236] *Haldimann and Others v. Switzerland* (App. no. 21830/09) 24 February 2015, para. 47.
[237] *Haldimann and Others v. Switzerland* (App. no. 21830/09) 24 February 2015, para. 52.
[238] *Haldimann and Others v. Switzerland* (App. no. 21830/09) 24 February 2015, para. 65.
[239] *Haldimann and Others v. Switzerland* (App. no. 21830/09) 24 February 2015, para. 65.
[240] *Haldimann and Others v. Switzerland* (App. no. 21830/09) 24 February 2015, para. 67.
[241] *Haldimann and Others v. Switzerland* (App. no. 21830/09) 24 February 2015, para. 67.
[242] *Haldimann and Others v. Switzerland* (App. no. 21830/09) 24 February 2015, para. 67.

media from expressing criticism."[243] This is a similar application of the chilling effect by the Court considering a lawyer's freedom of expression, even where "no sanction was imposed" on an individual lawyer, what matters is "the potential 'chilling effect' of even a relatively light criminal penalty" on other lawyers' freedom of expression.[244] Further, the Court in *Haldimann* was applying the chilling effect principle from *Lingens*, *Lopes Gomes da Silva*, and *Dammann*, which were cited with approval in *Stoll*.

One judge dissented. However, the dissenting opinion did not address the "nature and severity of the sanction," nor did it seem to address the chilling effect principle, nor the case law on the point.[245] The dissent considered whether the interference had been necessary in a democratic society in three paragraphs ("my views can be briefly stated"),[246] and concluded that "I do not consider that the applicants' conviction was disproportionate."[247]

5.5 Grand Chamber disagreement in *Pentikäinen* over the chilling effect

As noted above, the applicant in *Pentikäinen* requested that the case be referred to the Grand Chamber, and in 2014, a panel of the Grand Chamber accepted that request.[248] A year and a half later in October 2015, the Grand Chamber delivered its judgment in *Pentikäinen.* Notably, while the applicant did not explicitly rely upon the chilling effect in the submissions before the Fourth Section,[249] the applicant did so in the Grand Chamber. The applicant claimed that his arrest, detention and conviction violated Article 10, and argued that it "constituted a 'chilling effect' on his rights and work",[250] and the District Court's judgment would have a "'chilling effect' on journalism,"[251] with his 17-hour detention period being "disproportionate."[252]

The Grand Chamber first held that there had been an "interference" with the applicant's right to freedom of expression, as his "journalistic functions had been adversely affected as he was present at the scene as a newspaper photographer in order to report on the events."[253] The main question for the Court was whether the applicant's "apprehension, detention and conviction" was necessary in a democratic society.[254] The Court also noted that the case involved "measures taken against a journalist who failed to comply with police orders while taking photos in order to report on a demonstration that had turned violent."[255] The Court said it would "examine the applicant's apprehension, detention and conviction in turn, in order to determine whether the impugned interference, seen as a whole, was supported by relevant and sufficient reasons and was proportionate to the legitimate aims pursued."[256]

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[243] *Haldimann and Others v. Switzerland* (App. no. 21830/09) 24 February 2015, para. 67.
[244] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 54.
[245] *Haldimann and Others v. Switzerland* (App. no. 21830/09) 24 February 2015 (Dissenting opinion of Judge Lemmens).
[246] *Haldimann and Others v. Switzerland* (App. no. 21830/09) 24 February 2015 (Dissenting opinion of Judge Lemmens, para. 5).
[247] *Haldimann and Others v. Switzerland* (App. no. 21830/09) 24 February 2015 (Dissenting opinion of Judge Lemmens, para. 5).
[248] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 4.
[249] *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014, para. 26-27.
[250] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 71.
[251] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 71.
[252] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 71.
[253] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 83.
[254] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 81.
[255] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 93.
[256] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 94.

First, in relation to the applicant's "apprehension," the Court held that the applicant had not been "unaware of the police orders," and "by not obeying the orders given by the police, the applicant knowingly took the risk of being apprehended for contumacy towards the police."[257] The Court then considered the applicant's detention, noting that he was detained for 17 hours. However, the Court also noted that "the issue of the alleged unlawfulness of the applicant's detention exceeding 12 hours falls outside the scope of examination by the Grand Chamber."[258] The Court then considered the applicant's conviction. The Court noted that "of the fifty or so journalists present at the demonstration site, the applicant was the only one to claim that his freedom of expression was violated in the context of the demonstration."[259] The Court also "emphasises once more that the conduct sanctioned by the criminal conviction was not the applicant's journalistic activity as such, i.e. any publication made by him." The conviction concerned "only his refusal to comply with a police order at the very end of the demonstration, which had been judged by the police to have become a riot."[260] The Court held that "the fact that the applicant was a journalist did not entitle him to preferential or different treatment in comparison to the other people left at the scene."[261] The Court also held that journalists cannot be exempted from their "duty to obey the ordinary criminal law" solely on the basis that Article 10 affords them protection.[262] The Court did note that while the District Court's reasons for the conviction were "succinct", they were nonetheless "relevant and sufficient."[263]

Finally, the Court sought to examine the "nature and severity" of the penalty imposed, noting that the District Court "refrained from imposing any penalty on the applicant as his act was considered 'excusable'."[264] The Court noted that a person's conviction "may be more important than the minor nature of the penalty imposed",[265] citing *Stoll*. However, the Court held that the applicant's conviction "had no adverse material consequences for him", as the conviction was not "even entered in his criminal record."[266] The Court concluded that the conviction amounted "only to a formal finding of the offence committed by him and, as such, could hardly, if at all, have any 'chilling effect' on persons taking part in protest actions or in the work of journalists at large."[267] Thus, the Court held that the conviction was proportionate, with no violation of Article 10.

Judge Spano wrote a dissenting opinion, which was notably joined by the President of the Court, Judge Spielmann, and two other judges.[268] The dissent described the majority's finding that the decision to prosecute and convict a journalist for a criminal offence does not, "in a case such as the present one, have, by itself," a chilling effect on journalistic activity as "overly simplistic and unconvincing."[269] In contrast, the dissent held that the majority's judgment, "accepting as permissible under Article 10 § 2 of the Convention the prosecution of the applicant and his conviction for a criminal offence, will have a significant deterrent

[257] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 100.
[258] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 102.
[259] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 107.
[260] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 108.
[261] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 109.
[262] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 110.
[263] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 111.
[264] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 112.
[265] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 113.
[266] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 113.
[267] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 113.
[268] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber) (Dissenting opinion of Judge Spano joined by Judges Spielmann, Lemmens and Dedov).
[269] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber) (Dissenting opinion of Judge Spano joined by Judges Spielmann, Lemmens and Dedov, para. 12).

effect on journalistic activity in similar situations occurring regularly all over Europe."[270] The dissent concluded that the majority had "limited their findings" under the *Stoll* criteria.

Thus, it seems that the *Pentikäinen* majority accepted that "the fact of a person's conviction may be more important than the minor nature of the penalty imposed," but because there were "no adverse material consequences" for the applicant (i.e. no fine, or criminal record), there was no chilling effect.[271] While the majority cited *Stoll* at paragraph 154 as authority for the first part of this proposition, crucially the majority fails to cite any authority for the proposition the fact that there were no individual "adverse consequences" for the applicant was decisive.

It is arguable that there are in fact two authorities which point in the opposite direction: first, it must be mentioned that in *Cumpănă and Mazăre,* the Court held that it was immaterial that the sanctions did not have "any significant practical consequences for the applicants."[272] Second, in *Morice*, the Court reiterated that "even when the sanction is the lightest possible, such as a guilty verdict with a discharge in respect of the criminal sentence," it nevertheless constitutes a criminal sanction, and "in any event, that fact cannot suffice, in itself, to justify the interference with the applicant's freedom of expression."[273] The Court in both *Cumpănă and Mazăre* and *Morice* emphasised that what matters is that the "interference with freedom of expression may have a chilling effect on the exercise of that freedom."[274] Finally, it is not quite clear why the *Pentikäinen* majority did not apply the principle, only a few months earlier approved in *Morice*, that "the dominant position of the State institutions requires the authorities to show restraint in resorting to criminal proceedings."[275]

Nonetheless, while there may be reasonable points of disagreement over the *Pentikäinen* majority's application of the chilling effect principle, it is notable that unlike the *Delfi* majority, the *Pentikäinen* majority discussed, to an extent, the chilling effect case law, and engaged with its principles. Moreover, the *Pentikäinen* majority in the Grand Chamber at least considered the principle that "a person's conviction may be more important than the minor nature of the penalty imposed," and whether a chilling effect might arise "on the work of journalists."[276] It should be noted that the Fourth Section's judgment in *Pentikäinen* did not apply these principles.

5.6 Post- *Pentikäinen* consideration of the chilling effect

5.6.1 Fifth Section decision finds conviction has no chilling effect

Following the Grand Chamber's judgment in *Pentikäinen*, the judgment was subsequently applied a few months later to the question of whether a journalist's conviction for taking a knife on board a plane as part of a television documentary violated Article 10. The case was *Erdtmann v. Germany*,[277] and concerned a journalist who, with the prior approval of the German television channel Pro7, researched the effectiveness of security checks at four airports in Germany. The applicant concealed a butterfly knife inside his camera bag. The

[270] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber) (Dissenting opinion of Judge Spano joined by Judges Spielmann, Lemmens and Dedov, para. 12).
[271] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 113.
[272] *Cumpănă and Mazăre v. Romania* (App. no. 3334/96) 17 December 2004 (Grand Chamber), para. 118.
[273] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 176.
[274] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 176, citing *Cumpănă and Mazăre v. Romania* (App. no. 3334/96) 17 December 2004 (Grand Chamber), para. 114.
[275] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 176.
[276] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 113.
[277] *Erdtmann v. Germany* (App. no. 56328/10) 5 January 2016 (Admissibility decision).

applicant then entered airports on four different occasions, passed through security and boarded four different airplanes, flying from one city to the next. The applicant filmed himself with a hidden camera going through the security checks.

The documentary was broadcast in 2002 by Pro7 (and subsequently served as a training video for security personnel at airports).[278] However, following the broadcast, the journalist was charged with carrying a weapon on board a plane. Notably, the public prosecutor offered to discontinue the criminal investigation on the condition that the applicant paid 2,000 euro to a charitable organisation.[279] The applicant rejected the offer, and in 2003, the Düsseldorf District Court convicted the applicant for carrying a weapon under two sections of the Air Traffic Act. The Court sentenced the applicant to a fine of 750 euro. The Court held that "his actions could not be justified by the freedom of the press either, since journalistic freedom did not include a right to break the law."[280] On appeal, the fine was "deferred," with the applicant sentenced to a "warning with a deferred fine" of 750 euro.[281] The Düsseldorf Regional Court held that it was not possible to acquit the applicant due to the clear letter of the law, and it was not possible to discontinue the proceedings due to the public prosecutor's refusal to do so.[282] Ultimately, the Federal Constitutional Court refused to admit the applicant's constitutional complaint.

The applicant made an application to the European Court, claiming that his conviction violated his journalistic freedom of expression under Article 10. The Court first addressed the question of whether there had been an interference with freedom of expression. The Court noted that "neither the applicant nor the television channel were hindered from creating or showing the television programme and that the applicant's conviction did not concern broadcasting the programme as such."[283] However, the Court held that the applicant's conviction for carrying a weapon on board an airplane was "a consequence of his conduct as a television reporter, and may therefore be regarded as an interference with his freedom of expression."[284] The main issue was whether the interference was necessary in a democratic society.

The Court noted that the applicant's conviction "did not relate to broadcasting the report or filming the security checks with a hidden camera and therefore not to his journalistic activity as such."[285] In the Court's view, the applicant was convicted for "carrying a weapon on an aeroplane, based on a general prohibition forming part of the ordinary criminal law."[286] The Court recounted that the domestic courts had considered the applicant's role "as a journalist," but this "could not justify or excuse the applicant's conduct."[287] In particular, the applicant "could have revealed the security flaws at the airport without committing a criminal offence, for example by abandoning the attempted offence by disposing of the knife after the security check-points."[288]

Finally, the Court considered the nature and the severity of the penalty imposed. The Court noted that the domestic courts, when sentencing the applicant, noted the documentary had "increased airport security," it was a report on an "issue of general public interest," and the knife had been "securely stowed away," with "no concrete threat for the other

[278] *Erdtmann v. Germany* (App. no. 56328/10) 5 January 2016 (Admissibility decision), para. 3.
[279] *Erdtmann v. Germany* (App. no. 56328/10) 5 January 2016 (Admissibility decision), para. 5.
[280] *Erdtmann v. Germany* (App. no. 56328/10) 5 January 2016 (Admissibility decision), para. 4.
[281] *Erdtmann v. Germany* (App. no. 56328/10) 5 January 2016 (Admissibility decision), para. 7.
[282] *Erdtmann v. Germany* (App. no. 56328/10) 5 January 2016 (Admissibility decision), para. 7.
[283] *Erdtmann v. Germany* (App. no. 56328/10) 5 January 2016 (Admissibility decision), para. 16.
[284] *Erdtmann v. Germany* (App. no. 56328/10) 5 January 2016 (Admissibility decision), para. 16.
[285] *Erdtmann v. Germany* (App. no. 56328/10) 5 January 2016 (Admissibility decision), para. 22.
[286] *Erdtmann v. Germany* (App. no. 56328/10) 5 January 2016 (Admissibility decision), para. 22.
[287] *Erdtmann v. Germany* (App. no. 56328/10) 5 January 2016 (Admissibility decision), para. 23.
[288] *Erdtmann v. Germany* (App. no. 56328/10) 5 January 2016 (Admissibility decision), para. 23.

passengers."[289] Thus, the applicant had been sentenced to a "warning with a deferred fine," which was the "most lenient sentence possible," with the maximum sentence being imprisonment.[290] On this basis, the European Court held that it was "satisfied" the penalty would not have a chilling effect, holding that it "would not discourage the press from investigating a certain topic or expressing an opinion on topics of public debate."[291] The Court concluded that there had been no violation of Article 10, and that the complaint should be rejected as "manifestly ill-founded."[292]

It would seem that a majority of the Court were so concerned with the offence concerning a weapon, and given the "inherent dangerousness of weapons," there should be little, if any, concern for the chilling effect on future expression on matters of public interest. Notably, the Court's decision was "by a majority," with at least one judge dissenting, and possibly three. However, as with admissibility decisions, the votes of individual judges are not disclosed, and separates opinions are not delivered. In this light, it is notable that the Court in *Erdtmann* did not address the point, addressed by the domestic courts, over the public prosecutor's offer to discontinue the criminal investigation on the condition that the applicant paid 2,000 euro to a charitable organisation.[293] There is a reasonable argument to be made that where a prosecutor offers to discontinue a criminal investigation, but nonetheless decided to prosecute a journalist for refusing to accept an offer to pay a penalty in the form of a charitable donation, this may fall foul of the principle that government authorities "display restraint in resorting to criminal proceedings,"[294] which had been reiterated by the Grand Chamber in *Morice* a few months earlier. Further, it is difficult to see how the Court's standard of scrutiny in *Erdtmann* was consistent with *Dammann*, that restrictions on freedom of the press at the pre-publication phase fall within the scope of the Court's review, and call for the most careful scrutiny. It is also difficult to see why all the reasons applied by the domestic courts at the sentencing phase should not have applied instead when considering the conviction itself. Had the Court recognised the chilling effect of prosecuting a journalist for conduct which the domestic courts classed as involving "no concrete threat for the other passengers,"[295] over three levels of domestic courts, it would have meant that most careful scrutiny would have to be applied. This would mean properly subjecting the domestic courts' reasoning to strict scrutiny, and also the prosecutor's decision to prosecute, especially where the courts had noted that it was "not possible to discontinue the proceedings" because of the "public prosecutor's refusal to do so."[296] Finally, the Court in *Erdtmann* only cites *Halidmann* with no comment in its final paragraph, but does not attempt to distinguish it, and its application of the chilling effect principle.

5.6.2 Journalist convicted for illegally broadcasting court recordings

Only two months after *Erdtmann*, the Court was again called upon to consider another prosecution of a television journalist, but with the Court considering that the conviction would have a chilling effect, notwithstanding the journalist's "duty to obey the ordinary criminal law." The case was *Pinto Coelho v. Portugal (No. 2)*,[297] and concerned a journalist with the Portuguese television channel SIC (*Sociedade Independente de Comunicação*). In

[289] *Erdtmann v. Germany* (App. no. 56328/10) 5 January 2016 (Admissibility decision), para. 25.
[290] *Erdtmann v. Germany* (App. no. 56328/10) 5 January 2016 (Admissibility decision), para. 25.
[291] *Erdtmann v. Germany* (App. no. 56328/10) 5 January 2016 (Admissibility decision), para. 26.
[292] *Erdtmann v. Germany* (App. no. 56328/10) 5 January 2016 (Admissibility decision), para. 28.
[293] *Erdtmann v. Germany* (App. no. 56328/10) 5 January 2016 (Admissibility decision), para. 5.
[294] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 127.
[295] *Erdtmann v. Germany* (App. no. 56328/10) 5 January 2016 (Admissibility decision), para. 25.
[296] *Erdtmann v. Germany* (App. no. 56328/10) 5 January 2016 (Admissibility decision), para. 7.
[297] *Pinto Coelho v. Portugal (No. 2)* (App. no. 48718/11) 22 March 2016.

2005, the channel broadcast a report by the applicant concerning an 18-year-old defendant who had been sentenced to a four-year prison sentence for aggravated robbery. The applicant's broadcast claimed there had been a miscarriage of justice, and the broadcast included excerpts from sounds recordings from within the court hearing itself, accompanied by subtitles. In addition, the voices of the three judges sitting on the bench and of the witnesses were digitally altered.

Following the broadcast, the journalist and three others from the broadcaster were prosecuted for transmission of audio extracts from the court hearing or of film footage of the courtroom without permission, under Article 88 § 2 (b) Code of Criminal Procedure and Article 348 § 1 (a) of the Criminal Code. In 2008, the applicant was convicted in the Oeiras District Court, and sentenced to 60 day fines totalling 1,500 euro, and ordered to pay costs. The conviction was upheld on appeal, with the domestic courts holding that as the applicant was a journalist, she would have known that transmission of the audio extracts was prohibited by law.[298]

The applicant made an application to the European Court, claiming that her conviction violated her right to freedom of expression under Article 10. The government did not dispute that there had been an interference with the applicant's freedom of expression, and the main question for the Court was whether it had been necessary in a democratic society. First, the Court noted that the broadcast concerned a "matter of general interest," namely a possible miscarriage of justice.[299] Second, the Court examined the "conduct" of the applicant, and noted that the applicant had not engaged in any "unlawful conduct" in obtaining the audio extracts, but the applicant had "been in a position to foresee that broadcasting the impugned report was punishable under the Criminal Code."[300] However, the Court noted that it was "not obvious that broadcasting the audio extracts could have had an adverse effect on the proper administration of justice," as the case had already been decided by the time of the broadcast.[301] Moreover, none of the persons involved in the case had complained, and their voices had been distorted.

Finally, the Court turned to the nature and severity of the penalty imposed. The Court reiterated the chilling effect principle, noting that the Court that "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."[302] The Court noted that the applicant was ordered to pay a fine (1,500 euro), and the costs of the proceedings. The Court held that although the fine may seem moderate, this did not in any way limit the chilling effect, given the weight of the penalty incurred. In this regard, the Court applied *Jersild*, *Lopes Gomes da Silva*, and *Dammann*, and held that "it may be that the very fact of the conviction is more important than the minor nature of the sentence."[303] As such, the Court unanimously held that there had been a violation of Article 10.

The Court's *Pinto Coelho* judgment bucked the trend following the Grand Chamber's *Stoll* judgment, and engaged in a full application of the chilling effect case law, applying the question from *Stoll* itself that it "must be satisfied" that the penalty does not amount to a form of censorship intended to discourage the press from expressing criticism. The question had

[298] *Pinto Coelho v. Portugal (No. 2)* (App. no. 48718/11) 22 March 2016, para. 17.
[299] *Pinto Coelho v. Portugal (No. 2)* (App. no. 48718/11) 22 March 2016, para. 44.
[300] *Pinto Coelho v. Portugal (No. 2)* (App. no. 48718/11) 22 March 2016, para. 44.
[301] *Pinto Coelho v. Portugal (No. 2)* (App. no. 48718/11) 22 March 2016, para. 50.
[302] *Pinto Coelho v. Portugal (No. 2)* (App. no. 48718/11) 22 March 2016, para. 52.
[303] *Pinto Coelho v. Portugal (No. 2)* (App. no. 48718/11) 22 March 2016, para. 53.

been crucially absent from the decision in *Erdtmann.* The Court's judgment in *Pinto Coelho* suggested that the *Pentikäinen* judgment may not result in the side-lining of the chilling effect principle. *Pinto Coelho* also suggests that the Court was willing to infer an *intention* to discourage the press, where the broadcast concerned a matter of public interest, and could not have raised adverse effects on the proper administration of justice.

5.7 Grand Chamber disagreement in *Bédat* over the chilling effect

As noted above, in 2014, the Second Section of the Court in *Bédat* held, by four votes to three, that there had been a violation of Article 10. However, when the case was considered by Grand Chamber in 2016, the Court held by 15 votes to two, that there had been *no* violation of Article 10. Similar to the Chamber judgment, the main question for the Court was whether the journalist's conviction had been necessary in a democratic society.

The Grand Chamber first took the opportunity to list the "criteria" to be followed by national authorities in weighing up the interests involved in cases "involving a breach by a journalist of the secrecy of judicial investigations."[304] For the present discussion, it is relevant to focus on how the Court considered the chilling effect principle under its final criteria, namely the proportionality of the penalty imposed. The Court first recited the principles from *Stoll* that (a) the Court "must be satisfied" that a penalty "does not amount to a form of censorship intended to discourage the press from expressing criticism,"[305] and (b) such a sanction is "likely to deter journalists" and "liable to hamper the press."[306] Moreover, the Court recognised that "a person's conviction may in some cases be more important than the minor nature of the penalty imposed."[307] Notably, and unlike the Court in *Pentikäinen*, the Grand Chamber cited the principle from *Morice*, that "the dominant position of the State institutions requires the authorities to show restraint in resorting to criminal proceedings."[308]

However, notwithstanding these principles, the Court held "nonetheless," that it did not consider that "recourse to criminal proceedings and the penalty imposed" were disproportionate.[309] The Court noted that the original suspended sentence of one month's imprisonment was "subsequently commuted" to a fine, and was "not paid by the applicant but was advanced by his employer."[310] The Court reiterated that the purpose of the penalty "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."[311] Thus, it followed, according to the majority, that "it cannot be maintained" that such a penalty would have a "deterrent effect" on the exercise of freedom of expression by the applicant or any other journalist.[312]

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[304] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 55 ((i) how the applicant came into possession of the information at issue, (ii) the content of the impugned article; (iii) the contribution of the impugned article to a public-interest debate; (iv) the influence of the impugned article on the criminal proceedings; (v) any infringement of the accused's private life; and (vi) the proportionality of the penalty imposed. In applying these criteria, the Court noted (a) the article's "sensationalist" and "mocking tone," describing the accused's "repeated lies," (b) it could not "have contributed to any public debate," (c) it "entailed an inherent risk of influencing the course of proceedings," and (d) the information disclosed was "highly personal, and even medical," including statements by the accused person's doctor, which "called for the highest level of protection under Article 8.").
[305] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 79.
[306] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 79.
[307] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 79.
[308] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 81.
[309] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 81.
[310] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 81.
[311] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 81.
[312] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 81.

The distinguishing features the *Bédat* majority took into account was that the prison sentence was commuted, and it was the applicant's employer - the magazine - that paid the fine. However, there are two counterarguments: first, the *Bédat* majority does not apply *Cumpănă and Mazăre*, as it is the "fear" of a prison sentence, which causes a chilling effect, and it is immaterial that a prison sentence was later pardoned (as in *Cumpănă and Mazăre*), or commuted (as in *Bédat*). Second, the *Bédat* majority offers no authority for the proposition that because a journalist's employer paid a fine, it becomes proportionate. It is still the case that the fine was imposed on the journalist, and it was only later that the magazine paid the fine. The subsequent payment of the fine does not seem relevant to the imposition of the fine on the journalist at the time of sentencing.

Indeed, the dissenting opinion made these points, holding that the sanction was "more than merely symbolic," and "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."[313] In a similar vein, Judge Yudkivska argued in dissent that "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."[314]

5.8 Post- *Bédat* consideration of the chilling effect

5.8.1 Journalists convicted under Weapons Act

Following the Grand Chamber's judgment in *Bédat*, there have been two more recent and notable cases involving journalists convicted for a weapons offence (similar to *Erdtmann* discussed above), and for intercepting police communications (similar to *Adamek* discussed above), and where the Court again considered the chilling effect. The first of these cases was *Salihu and Others v. Sweden*,[315] which concerned three applicant journalists, namely the editor-in-chief, the news editor and a journalist with the Swedish tabloid newspaper *Kvällsposten.* In 2010, following several shootings in the city of Malmö, the first applicant editor-in-chief decided that the newspaper should attempt to buy a firearm to "investigate how easy it was to obtain one."[316] It was agreed that the third applicant would buy a firearm, but no ammunition. It would then be handed over to the police as soon as possible, and it would be "openly accounted for in the newspaper, no matter what the result was."[317]

In October 2010 the third applicant made contact with a number of people in the Malmö area who claimed that they could sell him a firearm, and the same evening he successfully bought a firearm. When the firearm was handed over, a photographer was present and the second applicant was listening via a mobile telephone. Afterwards, the third applicant and the photographer transported the firearm in their car to their hotel, which took approximately 25 minutes. The third applicant called the police, and two police officers arrived at the hotel around 30 minutes later and collected it. The following day the newspaper published an article which portrayed the events.

Two months later, the public prosecutor decided to prosecute the applicants under the Weapons Act, and in 2012, the District Court convicted the third applicant of unlawful

[313] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber) (Dissenting opinion of Judge López Guerra, para. 15).
[314] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber) (Dissenting opinion of Judge Yudkivska, para. 21).
[315] *Salihu and Others v. Sweden* (App. no. 33628/15) 10 May 2016 (Admissibility decision).
[316] *Salihu and Others v. Sweden* (App. no. 33628/15) 10 May 2016 (Admissibility decision), para. 5.
[317] *Salihu and Others v. Sweden* (App. no. 33628/15) 10 May 2016 (Admissibility decision), para. 5.

"possession" of a firearm, the first applicant was convicted of "incitement" to a weapons offence, and the second applicant convicted of "complicity" to a weapons offence under the Penal Code.[318] The Court imposed a suspended sentence, and ordered them to pay a fine of 30,000 Swedish kronor (3,200 euro), 13,500 kronor (1,400 euro) and 14,400 kronor (1,500 euro), respectively.[319] On appeal, the Supreme Court upheld the convictions, but removed the suspended sentences, and instead increased the fines to 80,000 kronor (8,400 euro) for the first applicant, 53,600 kronor (5,700 euro) for the second applicant, and 42,400 kronor (4,400 euro) for the third applicant.[320] The Supreme Court held that although the "purpose of buying and possessing the weapon was to obtain information in order to publish an article," the prosecution "was not for the actual publishing of the article."[321] The Court reduced the sentences as "there had been no risk that the firearm would be used, and that it was for a journalistic purpose."[322]

The applicants made an application to the European Court, claiming that their convictions violated Article 10, as "they were journalists investigating, and trying to shed light on, a question of public importance."[323] The Court first held that the convictions interfered with the applicants' rights under Article 10 as "they were convicted of acts that were part of an investigation for an article to be published, even though they were not convicted of the actual publishing."[324] Second, the Court stressed that "the present case does not concern the prohibition of that publication or any sanctions imposed in respect of the publication," as also noted by the Supreme Court.[325] Furthermore, the applicants' convictions were "not based on restrictions specific to the press," and they had been "convicted solely because of their failure to comply with the Weapons Act as applicable to all."[326] Third, while the Court admitted that the topic of the article was as of "public interest," the Court held that the "question if it was easy to purchase a firearm could have been illustrated in other ways and that the weight of the journalistic interest did not motivate that an offer to purchase a firearm was carried through."[327]

Finally, the Court examined the nature and severity of the penalty imposed. The Court noted that the District Court "reduced the sentences which will normally be imposed because of the journalistic purpose and the special circumstances of the case," and instead of sentencing the applicants to imprisonment, they were given suspended sentences and fines.[328] The Court also noted that the Supreme Court "reduced the sentences even further, taking the same circumstances into account," and "replaced the suspended sentences with mere fines."[329] However, the Court did admit that "these fines were higher than those imposed by the lower courts."[330] Nonetheless, the Court held that this was a "substantial reduction of the penal element and, even though the actual fines were higher, they were day-fines calculated in relation to each applicant's income and can neither be considered excessive nor be liable to have a deterrent effect on the exercise of freedom of expression by the applicants or other

[318] *Salihu and Others v. Sweden* (App. no. 33628/15) 10 May 2016 (Admissibility decision), para. 16.
[319] *Salihu and Others v. Sweden* (App. no. 33628/15) 10 May 2016 (Admissibility decision), para. 16.
[320] *Salihu and Others v. Sweden* (App. no. 33628/15) 10 May 2016 (Admissibility decision), para. 24.
[321] *Salihu and Others v. Sweden* (App. no. 33628/15) 10 May 2016 (Admissibility decision), para. 24.
[322] *Salihu and Others v. Sweden* (App. no. 33628/15) 10 May 2016 (Admissibility decision), para. 24.
[323] *Salihu and Others v. Sweden* (App. no. 33628/15) 10 May 2016 (Admissibility decision), para. 38.
[324] *Salihu and Others v. Sweden* (App. no. 33628/15) 10 May 2016 (Admissibility decision), para. 49.
[325] *Salihu and Others v. Sweden* (App. no. 33628/15) 10 May 2016 (Admissibility decision), para. 49.
[326] *Salihu and Others v. Sweden* (App. no. 33628/15) 10 May 2016 (Admissibility decision), para. 55.
[327] *Salihu and Others v. Sweden* (App. no. 33628/15) 10 May 2016 (Admissibility decision), para. 57.
[328] *Salihu and Others v. Sweden* (App. no. 33628/15) 10 May 2016 (Admissibility decision), para. 58.
[329] *Salihu and Others v. Sweden* (App. no. 33628/15) 10 May 2016 (Admissibility decision), para. 58
[330] *Salihu and Others v. Sweden* (App. no. 33628/15) 10 May 2016 (Admissibility decision), para. 58

journalists."[331] Based on these considerations, the Court concluded that there had been no violation of Article 10, and the complaint should be rejected as "manifestly ill-founded."

Focusing on the chilling effect reasoning, the Court notably does not explicitly mention the amount of the fines in its paragraph 58, which is in contrast to both *Bédat* and *Stoll*, which the Court in *Salihu and Others* relies upon. In *Bédat*, the Court mentioned the amount of the fine, which was 2,667 euro; while in *Stoll*, the Court also explicitly mentioned the fine in its review, approximately 476 euro. In this regard, it is worth recalling that the Supreme Court in *Salihu and Others*, "increased the fines" to roughly 8,400 euro for the first applicant, 5,700 euro for the second applicant, and 4,400 euro for the third applicant. Therefore, the Court in *Salihu and Others* considered an 8,000 euro fine imposed on the first applicant as comparable to a 2,500 euro fine imposed in *Bédat*, which "was not paid by the applicant but was advanced by his employer."[332] Moreover, it should be pointed out that the Chamber judgment in *Bédat* described the fine as "fairly high," and compared it with *Stoll*. This point was not disputed by the Grand Chamber, which only seemed to put emphasis on the fact the fine "was not paid by the applicant but was advanced by his employer." It is at least arguable that such a comparison is open to question, and it is all the more curious why the Court in *Salihu and Others* omitted the figures during its chilling effect analysis.

5.8.2 Journalists convicted over accessing police communications

In *Salihu and Others,* the Court had laid emphasis on the fact that suspended prison sentences had been replaced with fines. But in 2016, a judgment was delivered by the Court that seemed to find that three Italian journalists given suspended prison sentences, did not trigger application of the chilling effect principle. The case was *Brambilla and Others v. Italy*,[333] where three local newspaper journalists had used a radio set to access the frequencies used by the police, so they could arrive quickly on a scene when reporting on specific incidents. In 2002, the applicants listened in on a conversation during which the Merate *carabinieri* Operations Centre decided to send a patrol to a location where, according to anonymous sources, weapons had been stored illegally. The *carabinieri* accordingly went to the location, and the second and third applicants arrived on the scene immediately afterwards.[334] Subsequently, the *carabinieri* searched the applicants' car, and found two radios that were capable of intercepting police radio communications. The *carabinieri* then went to the journalists' editorial office and seized two radio receivers.[335]

Criminal proceedings were instituted against the first and second applicants under Article 617 of the Criminal Code for illegally installing equipment designed to intercept communications between law-enforcement agencies' operations centres and patrols; while the third applicant was charged with accessing the communications.[336] In 2004, the Lecco District Court acquitted the applicants, holding that the relevant articles of the Criminal Code were to be interpreted in the light of Article 15 of the Constitution, which only protected communications of a confidential nature.[337] The District Court observed that the radio device used by the law-enforcement agencies was unable to ensure the confidentiality of the information it transmitted. However, in 2007, the Milan Court of Appeal convicted the first and second applicants and sentenced them to one year and three months' imprisonment; and

[331] *Salihu and Others v. Sweden* (App. no. 33628/15) 10 May 2016 (Admissibility decision), para. 58.
[332] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 81.
[333] *Brambilla and Others v. Italy* (App. no. 22567/09) 23 June 2016.
[334] *Brambilla and Others v. Italy* (App. no. 22567/09) 23 June 2016, para. 8.
[335] *Brambilla and Others v. Italy* (App. no. 22567/09) 23 June 2016, para. 11.
[336] *Brambilla and Others v. Italy* (App. no. 22567/09) 23 June 2016, para. 12.
[337] *Brambilla and Others v. Italy* (App. no. 22567/09) 23 June 2016, para. 13.

the third applicant was also convicted, and sentenced to six months' imprisonment. However, the Court of Appeal suspended the sentences. The Court held that amendments to the Criminal Code had extended the scope of criminal responsibility to include the interception of conversations between the law-enforcement agencies' operations centres and patrols.[338] The convictions were ultimately upheld by the Court of Cassation, finding that the right to impart information "might have prevailed over the public interests protected by criminal law in a case of alleged defamation."[339] However, that right "could not take precedence in a case concerning the illegal interception of communications between law-enforcement officers."[340]

The applicants made an application to the European Court, claiming that their convictions had violated their right to freedom of expression, and in particular, the custodial sentences imposed on them had been excessive.[341] The Court first noted its "doubts" about whether there had been an interference with freedom of expression, but held that "even assuming that Article 10 was applicable," the custodial sentences imposed were prescribed by law and pursued a legitimate aim.[342] The main question for the Court was whether the interference had been necessary in a democratic society.

The Court first noted that the interests to be weighed were the "proper functioning of the law-enforcement agencies," and, the interest of readers in receiving information.[343] Curiously, with the Court offering no authority, the Court added that the public interest in knowing about local news items "cannot carry the same weight as the public interest in obtaining information about a matter of general and historical concern or of considerable media interest, subjects which the Court has already had occasion to examine."[344] The Court then noted the applicants were "not prohibited from bringing news items to the public's attention," and their conviction was based "solely on the possession and use of radio equipment in order to obtain relevant information more rapidly by intercepting police communications, which were confidential under domestic law."[345] The Court then considered that the decisions of the Milan Court of Appeal and the Court of Cassation, to the effect that communications between law-enforcement officers were confidential and that the applicants' actions were therefore to be classified as criminal conduct, were "properly reasoned."[346]

Finally, the Court examined the "severity of the penalty imposed," and noted that the penalty consisted of "custodial sentences of one year and three months for the first two applicants and six months for the third, together with the seizure of their radio equipment."[347] The Court then reiterated that the concept of responsible journalism requires that "whenever a journalist's conduct flouts the duty to abide by ordinary criminal law, the journalist has to be aware that he or she is liable to face legal sanctions, including of a criminal character,"[348] citing *Pentikäinen*. The Court then simply noted that the Milan Court of Appeal suspended the applicants' sentences, and that there was no evidence that they served them, and as such, the "penalties imposed on the applicants do not appear disproportionate."[349] The Court therefore concluded that there had been no violation of Article 10.

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[338] *Brambilla and Others v. Italy* (App. no. 22567/09) 23 June 2016, para. 20.
[339] *Brambilla and Others v. Italy* (App. no. 22567/09) 23 June 2016, para. 24.
[340] *Brambilla and Others v. Italy* (App. no. 22567/09) 23 June 2016, para. 24.
[341] *Brambilla and Others v. Italy* (App. no. 22567/09) 23 June 2016, para. 47.
[342] *Brambilla and Others v. Italy* (App. no. 22567/09) 23 June 2016, para. 49.
[343] *Brambilla and Others v. Italy* (App. no. 22567/09) 23 June 2016, para. 58.
[344] *Brambilla and Others v. Italy* (App. no. 22567/09) 23 June 2016, para. 59.
[345] *Brambilla and Others v. Italy* (App. no. 22567/09) 23 June 2016, para. 61.
[346] *Brambilla and Others v. Italy* (App. no. 22567/09) 23 June 2016, para. 62.
[347] *Brambilla and Others v. Italy* (App. no. 22567/09) 23 June 2016, para. 63.
[348] *Brambilla and Others v. Italy* (App. no. 22567/09) 23 June 2016, para. 64.
[349] *Brambilla and Others v. Italy* (App. no. 22567/09) 23 June 2016, para. 66.

Judge Spano wrote a concurring opinion, and while voting to find no violation of Article 10, noted some issues with the Court's judgment that were "problematic."[350] While Judge Spano did not refer to the absence of the chilling effect consideration under *Stoll*, he noted that the domestic courts "did not engage in a balancing of the conflicting interests at stake as is normally required in Article 10 cases of this nature under the second of the *Stoll* criteria," and the Court should have recognised this problematic nature of the domestic courts' review."[351] While Judge Spano's point is correct, the Court's judgment also does not apply the chilling effect principle concerning prison sentences, established in *Cumpănă and Mazăre*, and applied in the line of case law discussed in Chapter 4. It should also be remembered that in *Stoll* the Court recognised the chilling effect of a criminal penalty, but held that the "relatively modest amount of the fine" was crucial. But in *Brambilla*, the penalty was a suspended prison sentence, and the Court's simple statement in *Brambilla* that such penalties "do not appear disproportionate" is difficult to square with the Grand Chamber's test of the "most careful scrutiny" in *Stoll*, and most crucially with *Cumpănă and Mazăre*, that prison sentences imposed on the press are only compatible with Article 10 in "exceptional circumstances," with the "most careful scrutiny" being applied, because of the chilling effect which will "inevitably arise," and the fact that the journalists did not serve their prison sentence does not alter that conclusion.

It seems that the Court majority in *Brambilla* did not consider that the expression at issue was expression on matters of public interest, subject to Article 10's highest level of protection, but rather a technique to arrive quickly on a scene when wishing to report on specific incidents. Thus, the view within the Court majority may have been that the sanction imposed would have a *desirable* chilling effect, deterring future interferences with the proper functioning of the law-enforcement communications. Indeed, the concept of a desirable chilling effect is evident in the Court's case law, but where the expression does not involve expression on matters of public interest.[352] The case on point is *Biriuk v. Lithuania*, which did not involve expression on matters of public interest, but rather a newspaper article disclosing information of a "purely private nature" (a person's HIV-positive diagnosis).[353] For the European Court, a domestic legislative cap on judicial awards of compensation for violations of the right to privacy, even in cases of "an outrageous abuse of press freedom," would prevent the courts from "*sufficiently deterring the recurrence* of such abuses"[354] (i.e., a desirable chilling effect on future non-public-interest expression). Thus, if we read *Brambilla* within the *Biriuk* framework of a case not involving expression of matters of public interest, then the suspended prison sentence may have been an application of a desirable chilling effect. But even if this represented the majority's view in *Brambilla*, it is still open to the objection that it did not distinguish the chilling effect on this basis, but instead ignored it without explanation.

5.8.3 Journalist convicted of using false documents

In 2018, the trend *Salihu and Others* and *Brambilla and Others* has indeed continued, where certain Sections of the Court continued not to apply the chilling effect principle where

[350] *Brambilla and Others v. Italy* (App. no. 22567/09) 23 June 2016 (Concurring opinion of Judge Spano, para. 10).
[351] *Brambilla and Others v. Italy* (App. no. 22567/09) 23 June 2016 (Concurring opinion of Judge Spano, para. 10).
[352] See *Biriuk v. Lithuania* (App. no. 23373/03) 25 November 2008, para. 46 (a statutory limit on damages failed in "sufficiently deterring the recurrence of such abuses" of press freedom).
[353] *Biriuk v. Lithuania* (App. no. 23373/03) 25 November 2008, para. 41.
[354] *Biriuk v. Lithuania* (App. no. 23373/03) 25 November 2008, para. 46.

journalists have been prosecuted; and seem to refuse to even consider the case law on the point. This was typified in the Fifth Section' 2018 decision in *Gęsina-Torres v. Poland*.[355] The applicant was a journalist, and in 2012 concluded a contract with the Polish public broadcaster for a programme on the alleged ill-treatment of refugees in a detention centre run by the Border Guard near Białystok, on the Polish border. In January 2013, the applicant arrived in Białystok and provoked police officers into stopping him to check his identity documents. The applicant gave the police a false name, and said he had crossed the Polish border illegally after losing his documents. The applicant was arrested, and by a subsequent judicial decision, detained in the Border Guard's centre for aliens in Białystok.[356] The applicant signed all documents relating to his arrest and detention under a false name.[357] The applicant stayed in the centre for three weeks, attempting to make recordings with a device placed in his watch, until his real identity was discovered in late January 2013 (the programme based on the material gathered by the applicant was broadcast on an unspecified date).

Criminal proceedings were subsequently initiated against the applicant under various articles of the Criminal Code for "use of forged documents," committed by way of signing documents relating to his arrest and detention under a false name, and of "giving false testimony" by making false statements about how he had illegally crossed the Polish border.[358] In 2013, the Białystok District Court found the applicant guilty of the offences, finding that the applicant's conduct had "jeopardised the administration of justice as the court which had decided to place him in the detention centre for aliens had been misled about his identity."[359] The Court held that the proceedings "could not reasonably be regarded as an interference with his right to freedom of expression."[360] The Court decided not to impose a penalty on the applicant, noting his intention had merely been to confirm allegations about the treatment of aliens in the centre, but ordered the applicant to pay 2,000 Polish zlotys (460 euro) to a charity and 747 zlotys (170 euro) in costs.[361] However, the prosecution appealed, and the conviction was ultimately upheld, but with the appellate court sentencing the applicant to a fine of 2,000 zlotys (460 euro), and ordered him to pay court fees of 300 zlotys (70 euro).[362]

The applicant made an application to the European Court, claiming that his conviction for the use of forged identity documents and giving false testimony "in the context of investigative journalism" violated his right to freedom of expression.[363] In particular, the applicant submitted that the criminal proceedings had a "negative impact on his career," and not only had a fine been imposed on him, but the sentence had "led to the creation of a criminal record."[364] This had a "serious impact on his professional life," as he could not apply for posts in the public sector, his ability to borrow was limited and under Polish law he could not hold certain posts, such as an editor-in-chief.[365]

The Court first held that the applicant was convicted for the manner in which he gathered information in order to produce a television programme, and this had been an

[355] *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision).
[356] *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision), para. 8.
[357] *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision), para. 9.
[358] *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision), para. 12.
[359] *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision), para. 8.
[360] *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision), para. 16.
[361] *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision), para. 17.
[362] *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision), para. 20.
[363] *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision), para. 28.
[364] *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision), para. 28.
[365] *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision), para. 35.

interference with his right to freedom of expression under Article 10.[366] The main question was whether the interference had been necessary in a democratic society. The Court noted that the investigation carried out by the applicant "concerned a matter of public interest,"[367] but also noted that the applicant knew that by using forged documents and a false identity he would be acting in breach of the law.[368] The Court reviewed the domestic courts decisions, and noted that the courts examined whether information concerning the "alarming" situation in the camps was "already in circulation" when the applicant started his impersonation.[369] Thus, for the European Court, it had been shown that "other means of gathering information had proved effective for disclosing and establishing facts concerning allegations of ill-treatment of foreigners in the detention centres."[370] The Court also noted the domestic courts had referred to the European Court's case-law when it "stressed the duties and responsibilities of journalists," and weighed the arguments by the applicant in defence of his stance and his freedom of expression against another important interest, namely the interest that a democratic society has in "preserving the authority of the judiciary."[371]

Finally, the Court noted that the applicant was fined 2,000 zlotys, and ordered to pay aggregate costs of 300 zlotys for proceedings over two levels of jurisdiction, which the Court said "cannot be regarded as a harsh sentence."[372] Further, the Court noted that the domestic courts "did not deprive him of his liberty and never envisaged such action."[373] In light of these considerations, the Court concluded that the domestic courts relied on grounds which were both relevant and sufficient, and there was "no failure to examine the case in so far as it lent itself for assessment in the light of Article 10."[374] Thus, the application was rejected as manifestly ill-founded.

Of the post-*Pentikäinen* case law concerning the prosecution of journalists for criminal law offences, it not unfair to say that *Gęsina-Torres* represents the most limited judgment in terms of applying relevant prior case law. The Court in *Gęsina-Torres* held that it was required to review (a) whether the issue was of public interest (b); whether the applicant knew that their actions infringed ordinary criminal law, (c) whether the issue concerned could be illustrated in other ways; and (d) the way in which the information was obtained and its veracity. But this ignores even what *Stoll* had held, that the Court must consider "whether the penalty imposed was proportionate;" what *Pentikäinen* had held, that the Court must considered "the nature and severity of the penalty imposed;" and what *Bédat* had held, that the Court must consider the "proportionality of the penalty imposed."

Not only did the Court not apply the full criteria from *Stoll*, *Pentikäinen*, and *Bédat*, the Court nowhere recited, nor applied, the chilling effect principle. The Court in *Gęsina-Torres* actually admitted that the applicant's investigation "concerned a matter of public interest," and yet, failed to apply the principle from *Stoll*, that where the expression concerns a matter of public interest, the Court must be satisfied that the penalty does not amount to a form of censorship intended to discourage the press from expressing criticism. This is precisely because, 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," and "hamper the press in performing its task as purveyor of information and

[366] *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision), para. 51.
[367] *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision), para. 54.
[368] *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision), para. 56.
[369] *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision), para. 57.
[370] *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision), para. 57.
[371] *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision), para. 58.
[372] *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision), para. 61.
[373] *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision), para. 61.
[374] *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision), para. 62.

public watchdog."[375] One of the reasons the *Pentikäinen* majority gave for finding that the penalty had not had a chilling effect was that it had not "even entered in his criminal record,"[376] and yet, the Court in *Gęsina-Torres* remained completely silent on the applicant's submission not only that his conviction had led to the creation of a criminal record, but also the serious consequences which flowed from such a record.[377] Finally, the Court did not apply the principle from *Dammann* concerning "preparatory steps towards publication," and that this preparatory phase "called for the closest scrutiny" by the Court, on account of the great danger represented by restrictions on this phases of journalistic research.[378]

5.9 Criminal proceedings against journalists for non-ordinary offences

In mid-2017, the acting President of the Court, Judge Sajó, along with Judge Karakaş, wrote a dissenting opinion in an unrelated judgment, and what is notable for present purposes is that it also discussed *Salihu*, *Bédat*, *Pentikäinen*, and *Erdtmann*, in relation to the "concept of 'responsible journalism'."[379] According to Judges Sajó and Karakaş, the concept "has been used, albeit not explicitly, to allow a less strict analysis of the balancing performed by the State and the proportionality of the measure adopted."[380] The dissent argued that "allowing States to determine the boundaries of these concepts is to implicitly endorse a position, which is emerging in some member States, that journalistic activity that [is] critical of the State is not journalistic but plainly illegal as a form of terrorism or a threat to national security. Article 10 does not endow national courts with such fundamental authority, and neither should this Court."[381]

From the findings above, it does seem that Judge Sajó and Judge Karakaş's view is reflected in the case law, in that there was no violation of Article 10 in the three Grand Chamber judgments in *Stoll*, *Bédat*, and *Pentikäinen*, and no violation of Article 10 in the Chamber decisions in *Salihu, and Erdtmann*. Indeed, other judgments and decisions could be included, such as *Adamek*, *Mikkelsen* and *Christensen, Brambilla and Others*, and *Gęsina-Torres*. The purpose of this second section of the chapter is to examine how the Court considers chilling effect reasoning where journalists are prosecuted for offences which the Court does not describe as "ordinary criminal law" offences. In particular, it is proposed to examine the types of prosecutions which Judge Sajó and Judge Karakaş mention in their dissent, namely "journalistic activity that [is] critical of the State is not journalistic but plainly illegal as a form of terrorism or a threat to national security."[382]

[375] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 154.
[376] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 113.
[377] *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision), para. 35 ("Such a record had had a serious impact on his professional life as he could not apply for posts in the public sector, his ability to borrow was limited and under Polish law he could not hold certain posts (for example as an editor").
[378] *Dammann v. Switzerland* (App. no. 77551/01) 25 April 2006, para. 52.
[379] *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (App. no. 931/13) 27 June 2017 (Grand Chamber) (Dissenting opinion of Judges Sajó and Karakaş, para. 21).
[380] *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (App. no. 931/13) 27 June 2017 (Grand Chamber) (Dissenting opinion of Judges Sajó and Karakaş, para. 21).
[381] *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (App. no. 931/13) 27 June 2017 (Grand Chamber) (Dissenting opinion of Judges Sajó and Karakaş, para. 21).
[382] *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (App. no. 931/13) 27 June 2017 (Grand Chamber) (Dissenting opinion of Judges Sajó and Karakaş, para. 21).

5.9.1 Journalist convicted of "denigrating" the State

A case on point is that of *Dink v. Turkey*,[383] which concerned a journalist who was editor-in-chief of the weekly newspaper *Agos*. The case arose in late 2003, when the applicant published a series of articles on the identity of Turkish citizens of Armenian origin, and one article headlined, "Getting to know Armenia." The article included the statement that the "purified blood that will replace the blood poisoned by the 'Turk' can be found in the noble vein linking Armenians to Armenia," and the applicant argued that the Armenian authorities should work more actively to strengthen the diaspora's ties with the country, which would lead to a healthier construction of national identity.[384]

In 2004, a member of a Turkish nationalist group made a criminal complaint over the articles, and the Şişli prosecutor's office brought criminal proceedings against the applicant under Article 159 of the Turkish Penal Code, which prohibited "publicly denigrat[ing] Turkishness, the Republic or the Grand National Assembly of Turkey."[385] Nationalists demonstrated against the applicant during the trial, and in 2005, the Şişli Criminal Court convicted the applicant of denigrating Turkishness, and imposed a six-month prison sentence. The Court held that applicant's article which included the statement, "the purified blood that will replace the blood poisoned by the 'Turk' can be found in the noble vein linking Armenians to Armenia," constituted a denigration of Turkishness. The decision was upheld by Court of Cassation, and while proceedings were still ongoing, tragically, in January 2007, the applicant was shot dead while in the newspaper's offices. A number of the applicant's relatives made an application to the European Court, claiming that Turkey had failed to fulfil its positive obligation under Article 2 of the European Convention to protect the life of the applicant.[386] The Court unanimously found that there had been a violation of Article 2. However, what is particularly important for present purposes, is that the applicants also claimed that Dink's conviction for denigrating Turkishness had violated his right to freedom of expression under Article 10.[387]

The first issue for the Court was whether the applicant could claim to be a victim under Article 34 of the Convention, and whether there had been an "interference" with freedom of expression, as the government argued that the applicant had "died before a final conviction was pronounced by the Criminal Court."[388] However, the Court held that there had been an interference with freedom of expression, holding that "even if criminal proceedings are abandoned on procedural grounds, where the risk of being found guilty and punished remains, the person concerned may validly claim to have been directly affected by the law in question and claim to be a victim of a violation of the Convention."[389] The Court held that the application was admissible, and that the "confirmation of guilt" by the Court of Cassation, "taken alone or in combination with the absence of measures protecting the applicant against the attack by ultra-nationalist militants," constituted an interference with freedom of expression.[390]

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[383] *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 et 7124/09) 14 September 2010. See Lourdes Peroni, "Freedom of Expression in Turkey: When Changes in the Wording Are Not Enough," *Strasbourg Observers*, 5 October 2010/

[384] *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) 14 September 2010, para. 16.

[385] *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) 14 September 2010, para. 54.

[386] *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) 14 September 2010, para. 55.

[387] *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) 14 September 2010, para. 94.

[388] *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) 14 September 2010, para. 102.

[389] *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) 14 September 2010, para. 105, citing *Bowman v. the United Kingdom* (App. no. 24839/94) 19 February 1998 (Grand Chamber), para. 29.

[390] *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) 14 September 2010, para. 108.

The second issue was whether the interference had been "prescribed by law," as the applicants argued that the term "Turkishness" had an "extraordinarily flexible scope."[391] In this regard, the Court admitted that "serious doubts may arise as to the foreseeability for the applicant Fırat Dink of his criminalisation under Article 301 of the Criminal Code."[392] However, the Court decided that "in view of the conclusion reached by the Court on the necessity of the interference," it was not necessary to decide the question of "prescribed by law."[393] Moreover, on the question of whether the law "pursued a legitimate aim," the Court held that it was "deeply hesitant" as to whether the aim of the prevention of disorder or crime was applicable, but considered the question "closely linked to the examination of the necessity of the interference."[394]

Notably, the Court applied the principle from *Castells*, that "the Government's dominant position requires it to exercise restraint in the use of criminal proceedings, especially if there are other means of responding to unjustified attacks and criticisms by its opponents."[395] The Court examined the statements in the articles, and crucially, the Court held that "taken as a whole," the articles did not "incite violence, armed resistance or uprising, which, in its view, is an essential element to be taken into consideration."[396] Further, the articles were not "gratuitously offensive."[397] The Court concluded that the applicant's conviction "did not correspond to any "pressing social need."[398]

Finally, the Court addressed the "positive obligation of the State" under Article 10.[399] Notably, the Court held that "the positive obligations under Article 10 of the Convention require States to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear."[400] The Court applied this principle, and held that the failure of the security forces to protect the life of the applicant against the attack by members of an ultra-nationalist group, "added to the verdict of guilty pronounced by the criminal courts in the absence of any pressing social need, also resulted in a breach by the Government of its positive obligations with regard to the applicant's freedom of expression.[401]

Focusing on the Court's use of chilling effect reasoning, in relation to the positive obligations under Article 10, the Court held that the State is required "to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear."[402] This concept of "fear" is linked to the Court's case law applying the chilling effect, where the fear of being sentenced to imprisonment for reporting on matters of public interest creates a chilling effect on journalistic freedom of expression.[403] And in *Baka*, the chilling effect was the fear of sanctions has on the exercise of freedom of expression, in particular on other judges wishing to participate in the public debate on issues related to the administration of justice and the judiciary. This effect, which works to the detriment of society as a whole, is also a factor that

[391] *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) 14 September 2010, para. 112.
[392] *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) 14 September 2010, para. 116.
[393] *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) 14 September 2010, para. 116.
[394] *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) 14 September 2010, para. 118.
[395] *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) 14 September 2010, para. 133.
[396] *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) 14 September 2010, para. 134.
[397] *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) 14 September 2010, para. 135.
[398] *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) 14 September 2010, para. 136.
[399] *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) 14 September 2010, para. 137.
[400] *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) 14 September 2010, para. 137.
[401] *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) 14 September 2010, para. 138.
[402] *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) 14 September 2010, para. 137.
[403] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114.

concerns the proportionality of the sanction or punitive measure imposed."[404] Notably, two judges in *Dink*, Judge Sajó and Judge Tsotsoria, wrote a concurring opinion, arguing that the Court should have held that Article 301 was not "prescribed by law," considering that the very existence of Article 301 was "unacceptable", as it was "too broad" and "unclear", creating a constant "temptation of self-censorship," [405] The Court's focus on proportionality was not the "best way" to protect freedom of expression against this "self-censorship."[406]

5.9.3 Criminal investigation had a chilling effect

One year after the *Dink* judgment, the Court would again consider Turkey's Article 301 and consider the chilling effect of this provision, but crucially, the Court would apply the chilling effect principle in allowing an individual to claim an interference with freedom of expression, even where no prosecution had been initiated under the law (similar to *Dudgeon* and *Norris* in the Commission). The case was *Altuğ Taner Akçam v. Turkey*,[407] where the applicant published an editorial opinion in the *AGOS* newspaper in October 2006, criticising the earlier prosecution of the applicant in *Dink* under Article 301, and requested, as an act of solidarity, that he also be prosecuted for his similar views on the 1915 Armenian question. A week later, a criminal complaint was lodged with the Eyüp public prosecutor, alleging that the applicant's article violated Articles 301, 214 (incitement to commit an offence), 215 (praising a crime and a criminal) and 216 (incitement to hatred and hostility among the people) of the Turkish Criminal Code. The applicant was summoned to the Şişli public prosecutor's office to make a statement, and was "informed that he would be brought to the public prosecutor's office by force, in accordance with Articles 145 and 146 of the Criminal Code, if he did not comply with the summons."[408] However, in January 2007, the investigation against the applicant was terminated by the Şişli public prosecutor, concluding that the newspaper article "came within the realm of protected expression under Article 10."[409] A further complaint was filed against the public prosecutor's non-prosecution decision, however in 2007, the Beyoğlu Assize Court held that the non-prosecution decision "was in accordance with procedure and law."[410] No further investigation was instigated against the applicant after 2007.

The applicant made an application to the European Court, claiming that the very "existence" of Article 301 of the Turkish Criminal Code interfered with his right to freedom of expression.[411] In particular, the applicant argued that "the mere fact that an investigation could potentially be brought against him under this provision" caused him "fear of prosecution."[412] The first question for the was Court whether there had been an "interference" with the applicant's freedom of expression, as the government argued that (a) Article 301 "had never been applied against the applicant," (b) "the proceedings in question had been terminated by a definitive non-prosecution decision by the public prosecutor," and (c) the

[404] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 167.
[405] *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) 14 September 2010, (Concurring opinion of Judge Sajó, joined by Judge Tsotsoria).
[406] *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09) 14 September 2010, (Concurring opinion of Judge Sajó, joined by Judge Tsotsoria).
[407] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011. See Ronan Ó Fathaigh and Chris Wiersma, "Turkish Law Criminalising 'Denigration of Turkish Nation' Overbroad and Vague," *Strasbourg Observers*, 2 December 2011.
[408] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011.
[409] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 10.
[410] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 12.
[411] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 53.
[412] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 53.

applicant "had not produced reasonable and convincing evidence of the likelihood that a violation affecting him personally would occur."[413]

First, the Court noted, citing the *Dudgeon* and *Norris* judgments, that it is "open to a person to contend that a law violates his rights, in the absence of an individual measure of implementation, if he is required either to modify his conduct because of it or risk being prosecuted."[414] This occurred because of the "chilling effect that the fear of sanction has on the exercise of freedom of expression, even in the event of an eventual acquittal, considering the likelihood of such fear discouraging one from making similar statements in the future."[415]

The Court held that "even though the impugned provision has not yet been applied to the applicant's detriment, the mere fact that in the future an investigation could potentially be brought against him has caused him stress, apprehension and fear of prosecution. This situation has also forced the applicant to modify his conduct by displaying self-restraint in his academic work in order not to risk prosecution under Article 301."[416] The Court then turned to the "risk of prosecution."[417] The Court held that "even though the Ministry of Justice carries out a prior control in criminal investigations under Article 301 and the provision has not been applied in this particular type of case for a considerable time, it may be applied again in such cases at any time in the future, if for example there is a change of political will by the current Government or a change of policy by a newly formed Government." Thus, the applicant "can be said to run the risk of being directly affected by the provision in question."[418] Further, the Court noted that "thought and opinions on public matters are of a vulnerable nature."[419] It followed, according to the Court, that "the very possibility of interference by the authorities or by private parties acting without proper control or even with the support of the authorities may impose a serious burden on the free formation of ideas and democratic debate and have a chilling effect."[420]

The Court concluded that the criminal investigation commenced against the applicant and the standpoint of the Turkish criminal courts on the Armenian issue in their application of Article 301 of the Criminal Code, as well as the public campaign against the applicant in respect of the investigation, confirmed that there existed a "considerable risk of prosecution faced by persons who express "unfavourable" opinions on this matter and indicates that the threat hanging over the applicant is real."[421] In such circumstances, the Court dismissed the government's argument concerning the applicant's lack of victim status, and also held that there had been an interference with the applicant's right to freedom of expression under Article 10.

Having held that there had been an interference with the applicant's freedom of expression, the Court then examined whether the interference had been "prescribed by law."[422] First, the Court noted that while the Turkish legislator's aim of protecting and preserving values and State institutions from public denigration "can be accepted to a certain extent," the Court held that "the scope of the terms under Article 301 of the Criminal Code, as interpreted by the judiciary, is "too wide and vague," and thus the provision "constitutes a continuing threat to the exercise of the right to freedom of expression."[423] Second, the Court

[413] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 60-63.
[414] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 68.
[415] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 68.
[416] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 75.
[417] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 76.
[418] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 78.
[419] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 81.
[420] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 81.
[421] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 82.
[422] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 85-96.
[423] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 85-96.

noted that three major amendments had been made to the law, namely (a) the terms "Turkishness" and "Republic" were replaced by "Turkish Nation" and "State of the Republic of Turkey;" (b) the maximum length of imprisonment imposable on those found guilty was reduced; and (c) any investigation into an offence is subject to the permission from the Minister of Justice.[424] However, the Court held that the amendments did not introduce a "substantial change or contribute to the widening of the protection of the right to freedom of expression," and the inclusion of permission from the Minister of Justice did not "remove the risk" of arbitrary prosecutions, as "any political change in time might affect the interpretative attitudes of the Ministry of Justice and open the way for arbitrary prosecutions."[425] It followed, according to the Court, that Article 301 did not meet the "quality of law" required, due to its "unacceptably broad terms [which] result in a lack of foreseeability as to its effects."[426] Thus, the interference had not been prescribed by law, resulting in a violation of Article 10.

The significance of the Court's judgment in *Altuğ Taner Akçam* is apparent when we consider that (i) the law under consideration had undergone an amendment since the time of the application, (ii) there had been no prosecution against the applicant, with a non-prosecution decision being issued; and (iii) the applicant had made no challenge to the law in the domestic courts. Nonetheless, the Court's application of the chilling effect principle allowed it to review the compatibility of the amended law with Article 10, and ultimately finding a violation, as it was overbroad and vague. Thus, the Court applied the chilling effect when finding an interference with freedom of expression, and when considering whether the interference was prescribed by law. This was the first time in the Court's case law on criminal prosecutions, and with the case only involving a criminal *investigation* over a newspaper article, that it found the interference at issue was not prescribed by law.

The chilling effect principle applied in *Altuğ Taner Akçam* was that a chilling effect arises from a legal rule where the "risk" of being affected by the rule discourages a person from engaging in similar expression "in the future,"[427] or forces a person to display "self-restraint" in their expression to avoid liability.[428] The Court found that Turkey's Article 301 insult law violated Article 10 due to its "unacceptably broad terms," and found that it had a chilling effect on the applicant, even though the applicant "was not prosecuted and convicted of the offence".[429] What concerned the Court was the chilling effect on freedom of expression, because *in the future* an investigation could *potentially* be brought and the *future risk* of prosecution"[430]

5.9.3 Statute-barred criminal proceedings have a chilling effect

The Court's *Altuğ Taner Akçam* judgment rightly sought to protect expression on matters of public interest from the chilling effect of criminal investigations and future risk of prosecution under overbroad and vague criminal laws. The Court would apply *Altuğ Taner Akçam* again when a journalist was not only investigated, but subjected to over seven years of criminal proceedings, which only ended when the proceedings became statute-barred. The case was *Dilipak v. Turkey*,[431] where it was alleged that the criminal proceedings were

[424] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 90.
[425] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 94.
[426] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 95.
[427] *Altuğ Taner Akçam v. Turkey* (App. no. 27250/07) 25 October 2011, para. 68.
[428] *Altuğ Taner Akçam v. Turkey* (App. no. 27250/07) 25 October 2011, para. 75.
[429] *Altuğ Taner Akçam v. Turkey* (App. no. 27250/07) 25 October 2011, para. 75.
[430] *Altuğ Taner Akçam v. Turkey* (App. no. 27250/07) 25 October 2011, para. 75 - 76.
[431] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015.

designed to deter him from exercising his profession, and have a chilling effect on *all* journalists dealing with political topics in Turkey.[432]

The applicant in *Dilipak* was an Istanbul-based journalist who wrote a front-page article in a 2003 edition of the weekly magazine *Türkiye'de Cuma*. The article was entitled "If the pashas refuse to obey," and criticised a number of high-ranking officers in the Turkish military who were about to retire. The articles included allegations that some generals in the army "appeared to have links with certain business circles, the media, senior civil servants and even the Mafia, endeavouring to create a political atmosphere that tallied with their worldview."[433]

Six months later, the Military Prosecutor's Office with the Third Army Corps in Istanbul applied to the Military Court for the applicant's prosecution under Article 95 §§ 4 and 5 of the Military Criminal Code, for "damaging hierarchical relations within the army and undermining confidence in commanding officers."[434] Seven months later, the Military Court declined jurisdiction in favour of the Bakırköy Assize Court, holding that the offence at issue was not military in nature and the applicant should be tried by the non-military courts for "denigration of the State armed forces," which was punishable under Article 159 of the former Criminal Code.[435] The Military Prosecutor lodged an appeal, and in 2005, the Military Court of Cassation quashed the decision declining jurisdiction and referred the case back to the Military Court, finding that the article was "liable to undermine the lower ranks' confidence in [the generals] and thus damage hierarchical relations within the armed forces."[436] Following this, between 2006 and 2010, the case was considered by five different courts considering jurisdiction issues,[437] until finally, in June 2010, the Bakırköy 2nd criminal court declared the proceedings statute-barred under the Military Criminal Code.

While the applicant was never convicted, he made an application to the European Court, claiming that the criminal *proceedings* against him for offences involving denigration of the army violated his right to freedom of expression, as they were designed to "deter him from exercising his profession," and "constituted a threat against him and also against all journalists dealing with political topics," in particular criticism of the military. [438]

The first question for the Court was whether there had been an interference with the applicant's right to freedom of expression, as the government argued that the applicant had not been convicted by the criminal courts, and the prosecution "had been abandoned on expiry of the limitation period."[439] The Court noted that certain circumstances which have a chilling effect on freedom of expression do in fact confer on those concerned – persons who have not been finally convicted – the status of victim of interference in the exercise of their right to that freedom," citing *Financial Times*, and *Wille*.[440] Moreover, where criminal prosecutions based on specific criminal legislation are discontinued for "procedural reasons but the risk remains that the party concerned will be found guilty and punished," that party may validly claim to be the victim of a violation of the Convention."[441]

The Court held that the six-and-a-half years of criminal proceedings conducted against the applicant, partly before the military courts, for very serious crimes, "in view of the chilling effect which those proceedings may well have caused, cannot be viewed as solely

[432] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015, para. 34.
[433] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015, para. 5.
[434] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015, para. 6.
[435] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015, para. 8.
[436] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015, para. 12.
[437] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015, para. 14-17.
[438] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015, para. 34.
[439] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015, para. 43.
[440] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015, para. 44.
[441] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015, para. 45.

comprising purely hypothetical risks to the applicant, but that they constituted genuine and effective restrictions *per se*."[442] The declaration that the proceedings had become time-barred merely put an end to these risks but "did not alter the fact that those risks had placed the applicant under pressure for a substantial period of time."[443] Thus, the Court held that there had been an interference with freedom of expression. The Court then considered whether the interference had been "prescribed by law," but concluded that "in view of its finding as regards the necessity of the interference, the Court considers it unnecessary to decide on this matter."[444]

The Court moved to whether the interference had been necessary in a democratic society. The Court first noted that the article concerned an issue which was "indubitably a matter of public interest in a democratic society," targeting high-ranking military officers.[445] While the article included "severe, scathing criticism," the Court held that it was in no way gratuitously offensive or insulting, or that it constituted incitement to violence or hatred.[446] The Court then added that the commencement of criminal proceedings "looked rather like an attempt by the competent authorities to use criminal proceedings to suppress ideas or opinions considered as disruptive or shocking, whereas in fact they had been expressed in response to publicly stated viewpoints concerning the sphere of general politics."[447]

Finally, the Court held that by prosecuting the applicant "for serious crimes over a considerable length of time, the judicial authorities had a chilling effect on the applicant's desire to express his views on matters of public interest."[448] The Court accepted the applicant's submission that commencing such proceedings was liable to "create a climate of self-censorship affecting both himself and (all) other journalists who might be considering commenting on the actions and statements of members of the armed forces relating to general politics in the country."[449] The Court reiterated that because of the dominant position occupied by State bodies, they are required to "show restraint in their recourse to criminal law, especially if they have other means of replying to unjustified media attacks and criticisms."[450] The Court concluded that the "impugned measure" ("the continuation over a considerable period of time of criminal proceedings against the applicant on the basis of serious criminal charges subject to prison sentences") was not proportionate to the legitimate aim pursued, and in violation Article 10.[451]

Similar to *Altuğ Taner Akçam*, the Court in *Dilipak* applied the chilling effect principle when considering whether there had been an interference with freedom of expression, but unlike *Altuğ Taner Akçam*, the Court in *Dilipak* applied the chilling effect principle on the question of whether the interference had been necessary in a democratic society. The Court in *Dilipak* showed some reluctance in considering whether the interference had been prescribed by law. On the chilling effect of the criminal proceedings, the Court in *Dilipak* found not only that there was a chilling effect on the individual application, the proceedings also created a climate of self-censorship affecting *all other* journalists who might be considering commenting on the actions and statements of members of the armed forces.[452]

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[442] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015, para. 50.
[443] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015.
[444] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015, para. 58
[445] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015, para. 67.
[446] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015, para. 68.
[447] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015, para. 68.
[448] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015, para. 72.
[449] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015, para. 72.
[450] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015, para. 72
[451] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015, para. 73
[452] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015, para. 72.

The *Dilipak* judgment was unanimous, but the Court's reluctance to consider whether the interference was prescribed by law was taken to task in a concurring opinion by Judge Pinto de Albuquerque.[453] Judge Pinto de Albuquerque noted that the Court had made "crystal-clear" in *Altuğ Taner Akçam* that the "notorious Article 301 had to be reformed," but "no changes were made," and the concurring opinion noted the "inertia of the Turkish legislature in this area of criminal policy since *Altuğ Taner Akçam*."[454] As such, Judge Pinto de Albuquerque was convinced the "time has come to express a clear and solid position of principle," and it was "indispensable to issue an injunction to the respondent State under Article 46."[455] Given the "large number of legal suits brought against journalists," the Turkish legislature must abolish Article 301 or replace it with a criminal provision "criminalising assaults on the reputation of State bodies created strictly as a bulwark against a clear and imminent threat to national security."[456] Thus, Judge Pinto de Albuquerque was calling upon the Court to apply Article 46 of the European Convention,[457] and find that the domestic law should be brought into line with Article 10.

In late 2018, the Court followed Judge Pinto de Albuquerque, and unanimously held, in another case involving criminal proceedings against a journalist, amending Turkey's Article 159/301 law would "constitute an appropriate form of execution" of the Court's judgment under Article 46, due to its chilling effect. The case was *Fatih Taş v. Turkey (No. 5)*,[458] where the applicant was Fatih Taş, who was the owner and chief editor of the Istanbul-based publishing house Aram Publishing. In early 2004, the applicant's publishing company published a book comprising a collection of articles concerning the disappearance of a young journalist, Nazım Babaoğlu, in Turkey's south-east city of Siverek in 1994. The book alleged the journalist had been kidnapped by town guards, and included passages critical of State authorities, including that there was a "State-mafia-criminal gang relationship," and the Kurdish people had stood up to "massacres of the past," like those "perpetrated in bloody fascist dictatorships."[459]

Three months after the book's publication, the Istanbul Public Prosecutor charged the applicant under Article 159 of the former Criminal Code, which criminalised "publicly denigrating the Republic," over the above passages.[460] The offence carried a possible three-year prison sentence. While awaiting trial, Article 159 was replaced by Article 301 of the new Criminal Code, which introduced a provision allowing prison sentences to be commuted to a judicial fine in certain circumstances.[461] Nevertheless, over a year later in 2005, the Istanbul Criminal Court convicted the applicant of denigrating the Republic, and imposed a six-month prison sentence. Notably, 18 months later in 2007, the Court of Cassation quashed the first-instance court's judgment, finding it had failed to correctly apply the most favourable provision under the new Criminal Code. When the case returned to the Istanbul

[453] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015 (Concurring opinion of Judge Pinto de Albuquerque).
[454] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015 (Concurring opinion of Judge Pinto de Albuquerque, para. 15).
[455] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015 (Concurring opinion of Judge Pinto de Albuquerque, para. 1).
[456] *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015 (Concurring opinion of Judge Pinto de Albuquerque, para. 15).
[457] European Convention, Article 46 ("1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.").
[458] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018.
[459] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 12. See Ronan Ó Fathaigh, "Prosecution of publisher for 'denigration' of Turkey violated Article 10," *Strasbourg Observers*, 29 October 2018.
[460] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 14.
[461] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 18.

Criminal Court in 2008, the applicant was instead sentenced to a judicial fine. However, the proceedings finally came to an end three years later, when the Court of Cassation struck the case out as being "time-barred."[462]

The applicant subsequently made an application to the European Court, claiming the seven years of criminal proceedings against him had violated his Article 10 right to freedom of expression. The first question for the Court was whether there had been an "interference" with Taş's freedom of expression. The Turkish government argued criminal proceedings alone could not constitute an "interference," pointing out the proceedings had ended with neither a conviction nor sentence imposed, having been ultimately ruled time-barred.[463] However, the Court rejected the government's argument, and applied the principle from *Dilipak*: criminal proceedings against a journalist, based on serious charges over a considerable length of time, are liable to have a "chilling effect" on a journalist's desire to express his views on matters of public interest, and create a "climate of self-censorship affecting both himself and (all) other journalists."[464] Such criminal proceedings, even where eventually declared statute-barred, constitute an interference with freedom of expression, as such a declaration does not alter the fact the proceedings placed the journalist "under pressure for a substantial period of time."[465] The Court in *Fatih Taş (No. 5)* similarly found the criminal proceedings, lasting over seven years, and eventually struck out as statute-barred, constituted an interference with the applicant's Article 10 right to free expression.

The Court then noted that the interference had a legal basis under Article 159 of the former Criminal Code, and Article 301 of the new Code, but reiterated "doubts as to the foreseeability of these provisions," which had been expressed in earlier case law.[466] In particular, the Court cited *Altuğ Taner Akçam*, where the Court had stated Article 301 had "unacceptably broad terms," and was a "continuing threat to the exercise of the right to freedom of expression."[467] However, the Court in *Fatih Taş (No. 5)* considered it "not necessary to decide" the issue of foreseeability, given its conclusion on the necessity of the interference.[468]

The Court then turned to whether the proceedings had been "necessary in a democratic society." It noted that the book dealt with the disappearance of a journalist, which was "undeniably a subject of general interest."[469] The Court then reviewed the passages, and noted they were "harsh and exaggerated criticisms of the State authorities," but were not "gratuitously offensive or abusive," and "did not incite violence or hatred," which was the essential element to be considered under Article 10.[470] Consequently, the Court held the criminal proceedings, which had been liable to have a chilling effect on the applicant's expression on matters of public interest, did "not meet a pressing social need," and were "not necessary in a democratic society."[471] The Court therefore concluded there had been a violation of Article 10.

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[462] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 13.
[463] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 24.
[464] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 29.
[465] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 29.
[466] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 33.
[467] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 32, citing *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 93.
[468] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 33.
[469] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 39.
[470] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 39.
[471] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 40.

Finally, the Court turned to Article 46 of the Convention on the execution of judgments.[472] The Court earlier noted it had already considered 13 cases concerning prosecutions under Article 159/301.[473] Notably, the Court considered its conclusion in *Fatih Taş (No.* 5), as well as previous judgments concerning similar prosecutions, stemmed from a problem relating to the application of Article 159/301 in a manner "incompatible with the criteria established by the Court's case-law."[474] Thus, the Court held that "bringing the relevant domestic law into conformity" with the Court's case-law would "constitute an appropriate form of execution which would make it possible to put an end to the violations found."[475]

Fatih Taş (No. 5) was the first time the Court applied Article 46 of the Convention due to a law's chilling effect and its continuing threat to the exercise of the right to freedom of expression, with the Court essentially holding that amending the law would constitute an appropriate form of execution of the Court's judgment. It represented only the second time the Court had applied Article 46 due to the chilling effect of a government interference, with the first application being *Fatullayev v. Azerbaijan* (discussed in Chapter 4), where the Court held that a journalist should be immediately released following his imprisonment for defamation.[476] The Court's *Fatullayev* judgment demonstrated the strength of the Court's *Cumpănă and Mazăre* judgment on protecting journalistic freedom of expression on matters of public interest from the chilling effect of prison sentences. Similarly, the Court's judgment in *Fatih Taş (No. 5)* now demonstrates the strength of the Court's *Altuğ Taner Akçam* judgment on protecting freedom of expression on matters of public interest from the chilling effect of overbroad and vague criminal laws.

5.10 Conclusion

The findings in this chapter on the prosecution of journalists for ordinary criminal law offences, and other non-defamation-related prosecutions against journalists, revealed that the Court's application of the chilling effect principle mainly concerns the necessary in a democratic society limb of Article 10. The focus on the Court's chilling effect principle is mainly on the nature and severity of the sanction imposed, with the Court requiring that it must be satisfied that a penalty does not amount to a form of censorship intended to discourage the press from expressing criticism.[477] The nature of the chilling effect is that in debates on matters of public interest, such a sanction is likely to deter not only the individual journalist, but other journalists from contributing to discussion of issues of public interest in the future.[478]

However, as the analysis in this chapter demonstrated, there is major disagreement in the Court on when to apply this chilling effect principle where a journalist commits what the Court terms, an ordinary criminal law offence.[479] The divided Grand Chamber judgments in

[472] European Convention, Article 46 ("1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.").
[473] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 28.
[474] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 45.
[475] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 45.
[476] *Fatullayev v. Azerbaijan* (App. no. 40984/07) 22 April 2010, para. 177. See Chapter 4, section 4.6.2.
[477] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 154.
[478] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 154.
[479] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 102; and *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 91.

Stoll,[480] concerning a journalist's prosecution for publication of secret official deliberations, *Pentikäinen*,[481] concerning a journalist's arrest, detention and prosecution for contumacy towards the police, and *Bédat*,[482] concerning a journalist's prosecution for publication of secret official deliberations,[483] are a testament to the disagreement within the Court. Indeed, this disagreement is amplified in the Chamber judgments and decisions discussed, and a particular critique put forward in this chapter is the notable non-engagement of certain judges with the prior case law, typified by the *Brambilla* judgment, where the penalty was a suspended prison sentence, and the Court simply stated the penalties "do not appear disproportionate," which is difficult to square with the Grand Chamber's test of the "most careful scrutiny" in *Stoll*.

There appear two approaches when the Court, or members of the Court, may reject application of the chilling effect principle. The first is to invoke a consensus argument, such as in *Stoll*, where the Court held that "a consensus appears to exist among the member States of the Council of Europe on the need for appropriate criminal sanctions to prevent the disclosure of certain confidential items of information."[484] This somehow outweighed the Court's chilling effect principle applied in *Jersild*, *Lopes Gomes da Silva, Cumpănă and Mazăre*, *Dammann*, and *Dupuis and Others*. The Court's argument seems to be a version of the margin of appreciation argument which the Court's majority adopted in *Lindon*, that "in view of the margin of appreciation left to Contracting States by Article 10 of the Convention, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued."[485] Unlike *Lindon* and the defamation case law discussed in Chapter 4, the subsequent Grand Chamber judgments discussed in this chapter have not sought to temper the application of *Stoll*, and have instead embraced the non-application of the chilling effect principle. The second approach for not applying the chilling effect principle is to lay emphasis on the lack of adverse consequences for an individual journalist, typified by the Court in *Pentikäinen*, finding that the applicant's conviction "had no adverse material consequences for him," as the conviction was not "even entered in his criminal record."[486] Again it was argued in this chapter that this approach is difficult to square with the Court's case law on the chilling effect. Further, the analysis above also indicates a great deal of uncertainty over the application of the principle that interferences with the preparatory phase of journalism are subject to the "closest scrutiny" by the Court, due to the danger of the chilling effect which flows from such interferences with free expression.

In total contrast to the case law on ordinary criminal law offences, the findings in the final section of this chapter on the criminal prosecution of journalists, demonstrate the concern the Court has for the chilling effect of prosecutions for non-ordinary criminal law offences. Indeed, the Court's concern for protecting freedom of expression from the chilling effect of overbroad and vague criminal law provisions has also led the Court to apply Article 46 finding that amending a law would "constitute an appropriate form of execution" of the

[480] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber) (Article 10 and a journalist's conviction for publishing secret official deliberations).
[481] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber) (Article 10 and photojournalist's conviction for disobeying police order).
[482] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber) (Article 10 and journalist's conviction for publishing confidential court materials).
[483] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 16.
[484] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 155.
[485] *Lindon, Otchakovsky-Laurens and July v. France* (App. nos. 21279/02 and 36448/02) 22 October 2007, para. 59.
[486] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 113.

Court's judgment.[487] The case of *Fatih Taş (No.* 5) was discussed in Chapter 5, and the line of cases concerning prosecutions under Turkey's Article 301 insult law. The Court noted it had already considered 13 cases concerning prosecutions under Article 301 (and the former Article 159),[488] and found that its conclusion in *Fatih Taş (No.* 5), as well as previous judgments concerning similar prosecutions, stemmed from a problem relating to the application of Article 159/301 in a manner "incompatible with the criteria established by the Court's case-law."[489] Thus, the Court held that "bringing the relevant domestic law into conformity" with the Court's case-law would constitute an appropriate form of execution which would make it possible to put an end to the violations found.[490]

[487] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 45. See Ronan Ó Fathaigh, "Prosecution of a publisher for 'denigration' of Turkey violated Article 10," *Strasbourg Observers*, 29 October 2018.
[488] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 28.
[489] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 45.
[490] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 45.

Chapter 6 - Judicial and Legal Professional Freedom of Expression and the Chilling Effect

6.1 Introduction

As noted in Chapter 2, the second largest proportion of Grand Chamber judgments considering the chilling effect principle concerned interferences with a judge or lawyer's freedom of expression. These judgments were *Wille v. Liechtenstein* (a judge's non-reappointment),[1] *Kyprianou v. Cyprus* (a lawyer's conviction for contempt of court),[2] *Morice v. France* (a lawyer's conviction for defamation),[3] and *Baka v. Hungary* (a judge's mandate terminated).[4] Research also revealed that there have been over 22 judgments and decisions involving judicial and legal professional freedom of expression where the Court has considered, or applied, chilling effect reasoning.[5] Indeed, the Court has on a number of occasions singled out the principles which apply to a "lawyer's freedom of expression,"[6] and the principles which also apply to the "freedom of expression of judges."[7] In this regard, the reason for examining the case law on both a judge's freedom of expression, and a lawyer's freedom of expression, is that the Court treats the case law as quite interrelated. As will be discussed below, when considering the potential chilling effect on a judge's freedom of expression, such as in *Kudeshkina v. Russia*, the Court relies upon its prior case law

[1] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber).
[2] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber).
[3] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber). See Inger Høedt-Rasmussen and Dirk Voorhoof, "A great victory for the whole legal profession," *Strasbourg Observers*, 6 May 2015.
[4] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber).
[5] *Wille v. Liechtenstein* (App. No. 28396/95) 28 October 1999 (Grand Chamber) (Article 10 and a judge's non-reappointment over remarks made in public); *Nikula v. Finland* (App. No. 31611/96) 21 March 2002 (Article 10 and lawyer convicted of defamation); *Steur v. the Netherlands* (App. no. 39657/98) 28 November 2003 (Article 10 and defence lawyer censured); *Kyprianou v. Cyprus* (App. no. 73797/01) 27 January 2004 (Article 10 and lawyer convicted of contempt of court); *Harabin v. Slovakia* (App. no. 62584/00) 29 June 2004 (Admissibility decision) (Article 10 and judge's dismissal); *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber) (Article 10 and lawyer convicted of contempt of court); *Virolainen v. Finland* (App. no. 29172/02) 7 February 2006 (Admissibility decision) (Article 10 and lawyer's conviction for defamation); *Schmidt v. Austria* (App. no. 513/05) 17 July 2008 (Article 10 and lawyer's reprimand for defamation); *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008 (Article 10 and disciplinary proceedings against lawyer); *Panovits v. Cyprus* (App. No. 4268/04) 11 December 2008 (Article 6 and lawyer's conviction for contempt of court); *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009 (Article 10 and judge's dismissal from office); *Igor Kabanov v. Russia* (App. no. 8921/05) 3 February 2011 (Article 10 and disbarment proceedings against lawyer); *Mor v. France* (App. no. 28198/09) 15 December 2011 (Article 10 and lawyer's conviction for breaching confidentiality of investigation); *Morice v. France* (App. no. 29369/10) 11 July 2013 (Article 10 and lawyer's conviction for defamation); *Kincses v. Hungary* (App. no. 66232/10) 27 January 2015 (Article 10 and lawyer disciplined for comments about judge); *Kudeshkina v. Russia* (App. no. 28727/11) 17 February 2015 (Admissibility decision) (Article 10, and 46, and judge's dismissal from judiciary); *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber) (Article 10 and lawyer convicted of defamation); *Bono v. France* (App. no. 29024/11) 15 December 2015 (Article 10 and disciplinary sanction imposed on lawyer); *Rodriguez Ravelo v. Spain* (App. no. 48074/10) 12 January 2016 (Article 10 and lawyer's conviction for defamation); *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber) (Article 10 and termination of a judge's mandate); *Čeferin v. Slovenia* (App. no. 40975/08) 16 January 2018 (Article 10 and contempt of court proceedings against lawyer); and *Aliyev v. Azerbaijan* (App. nos. 68762/14 and 71200/14) 20 September 2018 (Article 18, in conjunction with 5 and 8, and a lawyer's prosecution for NGO activity).
[6] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 174 ("a lawyer's freedom of expression in the courtroom is not unlimited"); and *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 132-139 ("The status and freedom of expression of lawyers").
[7] See, for example, *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 162-167 ("General principles on freedom of expression of judges").

considering the potential chilling effect on a lawyer's freedom of expression.[8] Similarly, the Grand Chamber in *Baka v, Hungary*,[9] on the chilling effect of a judge's mandate being terminated, relied upon[10] the earlier Grand Chamber judgment in *Morice v. France*,[11] concerning a lawyer's conviction for defamation.

Similar to previous chapters, it is proposed to examine a number of questions in this chapter concerning how the Court considers and applies chilling effect reasoning when examining restrictions on a judge's or lawyer's freedom of expression: what does the Court mean when it states that there is a chilling effect on freedom of expression; does the Court apply chilling effect reasoning when considering (a) whether an applicant may claim to be a victim under Article 34; (b) whether there has been an "interference" with freedom of expression under Article 10; (c) whether an interference has been "prescribed by law," or, (d) whether an interference is "necessary in a democratic society." The remaining questions are: what is the consequence, if any, of the Court using chilling effect reasoning in its case law; is there much agreement, or disagreement, within the Court on the application of chilling effect reasoning; does the Court explain the application, or non-application, of chilling effect reasoning; and how does the Court use prior case law when considering and applying the chilling effect. Finally, as with the other chapters, it is not proposed to offer a general discussion of the case law in this area of Article 10 case law, but rather to focus on understanding how the Court considers and applies the chilling effect principle.

6.2 The Grand Chamber in *Wille* and the chilling effect

The first judgment concerning judicial freedom of expression which considered chilling effect reasoning, and indeed the first Grand Chamber judgment of the permanent Court explicitly applying the chilling effect principle, was *Wille v. Liechtenstein*.[12] As mentioned earlier, the applicant judge had made an application to the European Court, arguing that his non-reappointment had been a violation of his right to freedom of expression under Article 10, as he had not been reappointed "on account of the views expressed by him in the course of a public lecture on constitutional law."[13] The first question for the Court was whether there had actually been an "interference" with the applicant's right to freedom of expression under Article 10. In this regard, the Court adopted chilling effect reasoning, and held that the Prince's letter constituted a "reprimand" for the applicant's "previous exercise" of his right to freedom of expression, and had a "chilling effect" on his freedom of expression.[14] By this "chilling effect," the Court meant that the "reprimand" by the Prince was "likely to discourage him from makings statements of that kind in the future."[15] Therefore, the Court held that there had been "an interference with the exercise of the applicant's right to freedom of expression."[16]

[8] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 99 (citing *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 54 (Article 10 and a lawyer's conviction for defamation).
[9] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber).
[10] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 160 (citing *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 127).
[11] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber).
[12] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber).
[13] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 35.
[14] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 50.
[15] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 50.
[16] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 51.

Having held that there had been an interference, the main question[17] for the Court was whether the interference had been "necessary in a democratic society," and it concluded that there had been a violation of Article 10. The government had argued that the applicant's lecture "contained a controversial political statement and a subtle but significant provocation of one of the sovereigns of Liechtenstein."[18] The Court first noted that the applicant's opinion on whether "one of the sovereigns of the State was subject to the jurisdiction of a constitutional court," could not be regarded as an "untenable proposition," as it was shared "by a considerable number of persons in Liechtenstein."[19] The Court also noted that there was no evidence that the applicant's remarks concerned "pending cases, severe criticism of persons or public institutions or insults of high officials or the Prince."[20] Further, the Court pointed out that the Liechtenstein government's arguments made no reference "to any incident suggesting that the applicant's view, as expressed at the lecture in question, had a bearing on his performance as President of the Administrative Court or on any other pending or imminent proceedings."[21] Taking these considerations into account, the Court held that the Prince's action "appears disproportionate," and the government's reasons were not sufficient to show that the interference was "necessary in a democratic society".[22]

Focusing for the moment on the Court's use of the chilling effect principle, it is notable that the Court adopts chilling effect reasoning when finding that there has been an "interference" with freedom of expression. The Court was also basically holding that a chilling effect arises where even a "reprimand" can "discourage" an individual "from making similar statements of that kind in the future.[23] Notably, the Court did not seem to provide an authority for this proposition concerning the chilling effect. However, while the Court does not cite any case law on its chilling effect point, the phrase used by the Court to illustrate the chilling effect, namely "likely to discourage him from makings statements of that kind in the future," does in fact have a strong basis in the Court's case law. Indeed, it was established in the Court's 1986 judgment concerning defamation in *Lingens v. Austria*.[24] As discussed in Chapter 4, in *Lingens*, the Court held that a fine imposed on a journalist for defaming a politician "would be likely to discourage him from making criticisms of that kind again in future."[25] Thus, the language used in *Wille* was almost identical to the language in *Lingens*: "which would be likely to discourage him from making criticisms of that kind again in future,"[26] compared to "as it was likely to discourage him from making statements of that kind in the future."[27]

Lingens also held that fining a journalist "would be likely to deter journalists from contributing to issues of public interest," and "liable to hamper the press in performing its task as purveyor of information and public watchdog."[28] Thus, it may be argued that the

[17] The Court did not decide the question of whether the interference had been "prescribed by law" and pursed a "legitimate aim," but held instead that, "Assuming that the interference was prescribed by law and pursued a legitimate aim, as the Government claimed, the Court considers that it was not "necessary in a democratic society", for the following reasons" (*Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 56).
[18] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 60.
[19] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 69.
[20] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 67.
[21] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 69.
[22] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 70.
[23] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 50.
[24] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986.
[25] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 44.
[26] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 44.
[27] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 50.
[28] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 44.

chilling effect principle applied by the Court in *Wille* to establish that the applicant's freedom of expression was interfered with is rooted in the *Lingens* judgment.

6.3 Post-*Wille* application of the chilling effect

6.3.1 Criminal proceedings against lawyer had a chilling effect

While *Wille* concerned a judge's freedom of expression, the next judgment considering chilling effect reasoning was *Nikula v. Finland*,[29] which concerned a defence counsel's freedom of expression. The case arose when the applicant made a number of submissions on behalf of her client, including that the "prosecutor's arrangement shows that he seeks, by means of procedural tactics, to make a witness out of a co-accused so as to support the indictment."[30] The applicant continued that "precedent disclosed unlawful behaviour similar to that of the prosecutor in the present case," and the prosecutor had "committed role manipulation, thereby breaching his official duties."[31]

The public prosecutor, T., reported the applicant's statements to the Prosecuting Counsel of the Court of Appeal, who formed the view that the applicant had been guilty of defamation but decided not to indict her, since the offence had been of a minor character.[32] Following this, the prosecutor T. initiated a private prosecution against the applicant for criminal defamation. In 1994, the Court of Appeal convicted the applicant of public defamation committed "without better knowledge, i.e. negligent defamation,"[33] and sentenced her to a fine of 716 euro, and ordered her to pay 505 euro in damages to the prosecutor, 1,345 euro for his costs, and ordered her to pay 50 euro in costs to the State.[34] The Court of Appeal held that the applicant had alleged that T. had, in assessing who should be charged in the case, "deliberately abused his discretion and thereby breached his official duties," which was "defamatory in nature and [capable] of subjecting [T.] to contempt or of hampering the exercise of his official duties or career."[35] Two years later, the Supreme Court upheld the Court of Appeal's reasons, but set aside the applicant's sentence, considering that her offence had been minor in nature: the fine imposed was lifted, but the obligation to pay damages and costs was upheld.[36]

The applicant made an application to the European Court, arguing that her conviction for defaming the prosecutor had violated her Article 10 right "to express herself freely in her capacity as defence counsel."[37] Notably, a third-party intervener in the case, the non-governmental organisation Interights, made the submission that even "a relatively light criminal sanction" may already serve to have a chilling effect on even appropriate and measured criticism.[38]

The main question for the Court was whether the applicant's conviction had been "necessary in a democratic society." The Court first laid down a number of general principles relating to a "counsel's freedom of expression," including that lawyers are "certainly entitled to comment in public on the administration of justice."[39] The Court then examined the

[29] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002.
[30] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 10.
[31] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 10.
[32] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 14.
[33] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 17.
[34] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 17.
[35] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 17.
[36] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 18.
[37] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 29.
[38] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 23.
[39] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 46.

statements at issue, and noted that "it is true that the applicant accused prosecutor T. of unlawful conduct."[40] However, the Court also noted that the criticism "was directed at the prosecution strategy purportedly chosen" by the prosecutor, and "was strictly limited to T.'s performance as prosecutor in the case."[41] The Court held that in that "procedural context," the prosecutor "had to tolerate very considerable criticism by the applicant in her capacity as defence counsel."[42] The Court also noted that there was no indication the prosecutor "requested the presiding judge to react to the applicant's criticism."[43]

Finally, the Court had regard to the sanctions imposed on the applicant, and noted that the applicant was convicted "merely of negligent defamation," the Supreme Court had "waived her sentence, considering the offence to have been minor in nature," and "the fine imposed on her was therefore lifted."[44] However, the Court also noted that "her obligation to pay damages and costs remained."[45] The Court held that, "even so, the threat of an ex post facto review of counsel's criticism of another party to criminal proceedings – which the public prosecutor doubtless must be considered to be – is difficult to reconcile with defence counsel's duty to defend their clients' interests zealously."[46] It followed, according to the Court, that "it should be primarily for counsel themselves, subject to supervision by the bench, to assess the relevance and usefulness of a defence argument without being influenced by the potential "chilling effect" of even a relatively light criminal penalty or an obligation to pay compensation for harm suffered or costs incurred."[47]

Notably for present purposes, the Court held that because of this potential chilling effect, it is only in *exceptional cases* that a restriction (even a lenient criminal penalty) of a defence counsel's freedom of expression will be accepted as necessary in a democratic society.[48] The Court concluded that the government failed to provide a "pressing social need" for restricting the applicant's freedom of expression, and therefore, there had been a violation of Article 10.[49]

For the Court in *Nikula*, a defence counsel's freedom of expression must not be affected by any potential chilling effect which flows from the fear of even a light criminal penalty, a compensation order or costs order. Because of the Court's concern for the chilling effect in *Nikula,* it resulted in the Court fashioning a strict test for when restrictions may be imposed on a lawyer's freedom of expression, being only in exceptional cases. While the Court did not cite prior case law on the chilling effect point, the Court spoke about the *potential* chilling effect, which was the phrase used in *Goodwin*, of the "potentially chilling effect."[50] In *Goodwin*, the consequence of the application of the chilling effect was similarly the fashioning of a strict test for restriction on the protection of journalistic sources, namely an overriding requirement in the public interest.[51]

Notably, two judges dissented in *Nikula*, and disagreed with the majority that there had been a chilling effect. The dissenting opinion pointed out that the proceedings had been "whittled down to the mere payment of damages and costs," and "[n]o mention was made in

[40] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 51.
[41] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 51.
[42] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 51.
[43] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 51.
[44] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 54.
[45] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 54.
[46] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 54.
[47] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 54.
[48] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 55.
[49] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 55-56.
[50] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 39.
[51] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 39.

the criminal records."[52] It followed, according to the dissent, that "it could hardly be argued that the decision complained of was such as to jeopardise the applicant's future career."[53] The dissent was arguing that the sanctions imposed, namely payment of damages and costs, and no criminal record, meant there was insufficient evidence for a chilling effect on the individual applicant, and any broader potential chilling effect on freedom of expression in the future, was not relevant.

This was the first time this evidence-based argument was used for rejecting application of the chilling effect in a judgment concerning defamation proceedings, and it would resurface in a subsequent Chamber judgment, discussed in Chapter 4, on criminal defamation in *Cumpănă and Mazăre v. Romania.*[54] The dissent's view in *Nikula* was similar to the Chamber majority in *Cumpănă and Mazăre*, where it was held that the sanctions imposed on a journalist did not have a chilling effect, as there the sanctions "had no practical consequences,"[55] and the journalist "continued to work for the T. newspaper."[56] However, as discussed, the subsequent Grand Chamber judgment in *Cumpănă and Mazăre* departed from this view, holding that it is instead crucial to have regard to the "chilling effect" that the "fear" of sanctions has on the exercise of journalistic freedom of expression more generally.[57] Notably, the dissent in *Nikula* provided no authority when discussing the sanctions. But equally, the majority had provided no authority when discussing the chilling effect.

6.3.2 Disciplinary proceedings against lawyer had a chilling effect

While there was disagreement in *Nikula* over whether the measures had a chilling effect, more than a year after *Nikula*, the Court was again presented with the issue of a chilling effect on a lawyer's freedom of expression, but the Court came to a unanimous judgment. The case was *Steur v. the Netherlands*,[58] and in 1992, the applicant lawyer was acting for an individual being prosecuted for social security fraud.[59] During related civil proceedings, the applicant had stated that a statement recorded in writing by his client "cannot have been obtained in any other way than by the application of pressure in an unacceptable manner in order to procure incriminating statements, the significance of which was not or not sufficiently understood by Mr B" (a social security investigating officer).[60]

The investigating officer subsequently filed a disciplinary complaint against the applicant under the Netherlands Legal Profession Act, complaining that the applicant's "unfounded insinuations had tarnished his professional honour and good reputation."[61] The complaint was ultimately upheld by the Disciplinary Appeals Tribunal, which found that a lawyer was "not entitled to express reproaches of the kind in issue without any factual support."[62] However, because of the "limited degree of seriousness of the applicant's

[52] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002 (Dissenting opinion of Judges Caflisch and Pastor Ridruejo, para. 7).
[53] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002 (Dissenting opinion of Judges Caflisch and Pastor Ridruejo, para. 7).
[54] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003
[55] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 59.
[56] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 59.
[57] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114.
[58] *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003.
[59] *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003, para. 11.
[60] *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003, para. 12.
[61] *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003, para. 13.
[62] *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003, para. 20.

conduct," it was considered sufficient to declare the complaint "well-founded without imposing any sanction."[63]

The applicant made an application to the European Court, arguing that the Disciplinary Appeals Tribunal's decision was a violation of his right to freedom of expression. The first question for the Court was whether there had been an "interference" with the applicant's freedom of expression, as the government argued that there had been no sanction.[64] The Court admitted that "no sanction was imposed on the applicant – not even the lightest sanction, a mere admonition."[65] However, the Court held that there had been an "interference" with freedom of expression, noting that the applicant was "formally found at fault in that he had breached the applicable professional standards."[66] The Court adopted chilling effect reasoning holding that this could have a "negative effect," in that "he might feel restricted in his choice of factual and legal arguments when defending his clients in future cases."[67] The Court specifically relied upon the finding in *Nikula* that the sentence imposed had been "waived," and did not prevent the Court finding that Article 10 was nonetheless applicable.[68]

The Court then turned to whether the interference had been necessary in a democratic society, and unanimously concluded that there had been a violation of Article 10. The Court had particular regard to the fact that the applicant's criticism "was strictly limited to Mr W.'s actions as an investigating officer in the case against the applicant's client," did not amount to a "personal insult,"[69] and the "limits of acceptable criticism may in some circumstances be wider with regard to civil servants exercising their powers."[70] Moreover, the Court noted that the domestic authorities "did not attempt to establish the truth or falsehood of the impugned statement," nor did they address whether the statement was made in "good faith."[71]

Finally, the Court noted that while "no sanction was imposed," the Court held that "even so, the threat of an ex post facto review of his criticism with respect to the manner in which evidence was taken from his client is difficult to reconcile with his duty as an advocate to defend the interests of his clients and could have a 'chilling effect' on the practice of his profession."[72] It followed, according to the Court, that there had been a violation of Article 10.

Notably, while there was disagreement in *Nikula* over the chilling effect of the sanctions imposed, the Court in *Steur* was unanimous. Indeed, *Steur* seems to stand for the proposition that even where no sanction is imposed, the "threat" of an "ex post fact review" of a lawyer's expression may have a "chilling effect'" on a lawyer's practice of his profession.[73] Thus, it seemed that *Steur* was a reaffirmation of the majority's judgment in *Nikula*, and a possible rejection of the dissenting opinion in *Nikula*. *Steur* was concerned about the lawyer's "future"[74] freedom of expression. Further, *Steur* was notable as the first judgment since *Wille* using chilling effect reasoning when finding that there had been an interference with freedom of expression i.e. a "mere admonition" (in *Steur*),[75] and similarly a

[63] *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003, para. 15.
[64] *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003, para. 27.
[65] *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003, para. 29.
[66] *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003, para. 29.
[67] *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003, para. 29.
[68] *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003, para. 29.
[69] *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003, para. 41.
[70] *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003, para. 40.
[71] *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003, para. 42.
[72] *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003, para. 44.
[73] *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003, para. 44.
[74] *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003, para. 29.
[75] *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003, para. 29.

"reprimand" (in *Wille*),[76] would result in the applicant being "restricted in his choice of factual and legal arguments when defending his clients in future cases" (in *Steur*),[77] or was "likely to discourage him from making statements of that kind in the future" (in *Wille*).[78]

6.3.3 Second Section in *Kyprianou* does not address lawyer's prison sentence

Some three months after the *Steur* judgment was delivered, the Court was again presented with a similar argument that a sanction imposed on a lawyer "would have a general 'chilling effect' on lawyers in court."[79] However, this time the sanction had been a five-day prison sentence. The case was *Kyprianou v. Cyprus*,[80] where the applicant lawyer was sentenced to five days' imprisonment for "unacceptable contempt of court," after having "accused the Court" of "restricting him and of doing justice in secret."[81] The applicant served his prison sentence, and he later filed an unsuccessful appeal to the Cypriot Supreme Court, which upheld the conviction. The applicant then made an application to the European Court, claiming that his conviction for contempt of court violated his right to freedom of expression under Article 10, and his right to a fair trial under Article 6. Notably, the applicant argued that the imposition of a prison sentence would have a "general "chilling effect" on the conduct of advocates in court," in violation of Article 10.[82]

In 2004, the Court's Second Section delivered its Chamber judgment, and found a violation of Article 6, including that here had been a breach of the "principle of impartiality," as the matter should have been "determined by a different bench from the one before which the problem arose."[83] However, on the Article 10 point, the Court held that it was not necessary "to examine separately whether Article 10 was also violated," as the "essential issues raised by the applicant" had already been considered under Article 6.[84] It was curious that the Second Section was hesitant to consider the Article 10 point, given that a prison sentence had been imposed as a restriction on the exercise of freedom of expression. A possible explanation is that six of the seven judges[85] that delivered the Second Section's judgment in *Kyprianou* had also been in the majority[86] in the Second Section's judgment in *Cumpănă and Mazăre*, which had been delivered a few months earlier. As discussed in Chapter 4, this majority had not applied the chilling effect to the imposition of a prison sentence, and this may explain the reticence of Second Section's judgment in *Kyprianou*. But as will be revealed, the Grand Chamber would reconsider *Kyprianou*, and unanimously find a violation of Article 10, and as discussed in Chapter 4, similarly, the Grand Chamber would also reconsider *Cumpănă and Mazăre*, and unanimously find a violation of Article 10.

6.4 Grand Chamber unanimity in *Kyprianou* on the chilling effect

Following a request for a referral, a panel of the Grand Chamber accepted the request for a referral to the Grand Chamber,[87] and in December 2005, the 17-judge Court delivered its

[76] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 50.
[77] *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003, para. 29.
[78] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 50.
[79] *Kyprianou v. Cyprus* (App. no. 73797/01) 27 January 2004, para. 71.
[80] *Kyprianou v. Cyprus* (App. no. 73797/01) 27 January 2004.
[81] *Kyprianou v. Cyprus* (App. no. 73797/01) 27 January 2004, para. 13.
[82] *Kyprianou v. Cyprus* (App. no. 73797/01) 27 January 2004, para. 71.
[83] *Kyprianou v. Cyprus* (App. no. 73797/01) 27 January 2004, para. 37..
[84] *Kyprianou v. Cyprus* (App. no. 73797/01) 27 January 2004, para. 72.
[85] Judge Costa, President, Judges Loucaides, Bîrsan, Jungwiert, Butkevych, Mularoni, and Baka.
[86] Judge Costa, President, Judges Loucaides, Bîrsan, Jungwiert, Butkevych, Mularoni, and Thomassen.
[87] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 9.

judgment. The Grand Chamber similarly found that there had been a violation of Article 6, and crucially for present purposes, found unanimously that there had also been a violation of Article 10. The Court first held that under Article 10, the "freedom of speech guarantee" extends to lawyers pleading on behalf of their clients.[88] However, the Court also added that a lawyer's freedom of expression in the courtroom is not unlimited and certain interests, such as the authority of the judiciary, are important enough to justify restrictions on this right.[89] Notably, and similar to *Cumpănă and Mazăre*, the Court laid down a general principle concerning prison sentences and a lawyer's freedom of expression: the Court held that the imposition of a prison sentence would "inevitably, by its very nature, have a 'chilling effect', not only on the particular lawyer concerned but on the profession of lawyers as a whole."[90] The Court elaborated upon what it meant by a chilling effect, stating that it means lawyers might "feel constrained" in their choice of pleadings or motions during legal proceedings.[91] This language is similar to that of *Cumpănă and Mazăre*, that a prison sentence, "by its very nature, will inevitably have a chilling effect,"[92] an effect that works to the detriment of society "as a whole."[93] Further, the Court in *Kyprianou*, similar to *Cumpănă and Mazăre*, recognised that "in principle sentencing is a matter for the national courts," but held that only in "exceptional circumstances" can a restriction be imposed on a defence lawyer's freedom of expression.[94]

The Court then applied these principles, and held that the applicant's comments, "albeit discourteous," were "aimed at and limited to" the manner in which the judges were trying the case, in particular concerning the cross-examination of a witness he was carrying out in the course of defending his client against a charge of murder.[95] The Court then applied its chilling effect principle, and held that five day's imprisonment "was disproportionately severe," and "capable of having a 'chilling effect' on the performance by lawyers of their duties as defence counsel."[96] Importantly, the Court noted that even though the applicant had "only served part of the prison sentence," this "does not alter the conclusion."[97]

Notably, the Grand Chamber's judgment in *Cumpănă and Mazăre* had been delivered a number of months before *Kyprianou* in December 2004,[98] and its chilling effect principle featured quite prominently in *Kyprianou*. Further, it is important to note that the Grand Chamber in *Kyprianou* specifically approved the principle in *Nikula* that it is only in "exceptional circumstances" that a restriction - "even by way of a lenient criminal penalty - of defence counsel's freedom of expression can be accepted as necessary in a democratic society."[99] Moreover, the Grand Chamber in *Kyprianou* seemed to reject the dissenting view in *Nikula* that regard should only be had to the individual "applicant's future career,"[100] with *Kyprianou* instead holding that regard must be had to the chilling effect "not only on the particular lawyer concerned but on the profession of lawyers as a whole."[101]

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[88] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 151.
[89] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 174.
[90] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 175.
[91] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 175.
[92] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 116.
[93] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114.
[94] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 174.
[95] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 179.
[96] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 181.
[97] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 182.
[98] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber).
[99] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 174.
[100] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002 (Dissenting opinion of Judges Caflisch and Pastor Ridruejo, para. 7).
[101] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 175.

In *Kyprianou*, Judge Jean-Paul Costa voted in the Chamber judgment that it was not "necessary" to examine whether Article 10 had been violated, and address the applicant's argument that the conviction had a chilling effect on lawyers.[102] However, as President of the Section, Judge Costa was also required to sit in the subsequent Grand Chamber judgment in *Kyprianou*, which held that a "custodial sentence would inevitably, by its very nature, have a 'chilling effect'."[103] Notably, Judge Costa wrote a separate opinion to explain his vote, admitting that he "undoubtedly attached insufficient importance to the leading judgment *Nikula v. Finland* which has been cited several times by the Grand Chamber."[104] Judge Costa explained that his vote changed: "after reading the observations of the parties and third-party interveners before the Grand Chamber**,** and having (carefully) listened to the addresses at the hearing and to my colleagues' arguments during the deliberations, I have changed my mind."[105]

6.5 Post-*Kyprianou* application of the chilling effect

6.5.1 First Section disagreement on chilling effect of disciplinary sanction

Following *Nikula*, *Steur*, and *Kyprianou*, where the Court had applied chilling effect reasoning in finding a violation of a lawyer's freedom of expression under Article 10, in 2008, a curious judgment was delivered by the Court's First Section on the same issue. The case was *Schmidt v. Austria*,[106] which concerned a Vienna-based lawyer who at the time, represented a commercial manager in administrative criminal proceedings before the Eisenstadt Municipal Office for alleged violations of the Frozen Food Labelling Decree, and taken by the Vienna Food Inspection Agency. In his observations to the Office, the applicant included a statement that, "[s]ince the samples taken are not labelled as frozen food (contrary to the attempt to play tricks on my client (*Schummelversuch*) in the expert opinion underlying the criminal charge), they are not covered by Section 1 § 1 (1) of the FFLD."[107] Subsequently, the Office requested the Vienna Bar Association to institute proceedings against the applicant, claiming that his "serious and unfounded allegations had tarnished the Vienna Food Inspection Agency's reputation and were incompatible with a lawyer's professional duties."[108]

Ultimately, the Disciplinary Council of the Vienna Bar Association found that the applicant had used "a defamatory and disparaging expression," and had "failed to indicate any facts or circumstances which would have justified the use of the expression 'attempt to play tricks on my client'."[109] The applicant was issued a "written reprimand," under the Disciplinary Act, and ordered to pay the costs of the proceedings.[110] The Austrian Constitutional Court later dismissed a complaint by the applicant over the decision.

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[102] *Kyprianou v. Cyprus* (App. no. 73797/01) 27 January 2004, para. 71 ([The applicant] submitted that the imposition of such a plainly disproportionate penalty would have a general "chilling effect" on the conduct of advocates in court, to the potential detriment of their clients' cases.").
[103] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 175.
[104] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber) (Partly dissenting opinion of Judge Costa, para. 8).
[105] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber) (Partly dissenting opinion of Judge Costa, para. 4).
[106] *Schmidt v. Austria* (App. no. 513/05) 17 July 2008.
[107] *Schmidt v. Austria* (App. no. 513/05) 17 July 2008, para. 5.
[108] *Schmidt v. Austria* (App. no. 513/05) 17 July 2008, para. 6.
[109] *Schmidt v. Austria* (App. no. 513/05) 17 July 2008, para. 14.
[110] *Schmidt v. Austria* (App. no. 513/05) 17 July 2008, para. 13.

The applicant then made an application to the European Court, arguing that there had been both a violation of his Article 6 right over the "length of the proceedings," and his Article 10 right to freedom of expression. The Court first unanimously held that there had been a violation of Article 6, as the length of the domestic proceedings was "excessive and failed to meet the 'reasonable time' requirement" under Article 6.[111] The Court then examined the Article 10 complaint, and by a majority of four-votes-to-three, held that there had been *no* violation of Article 10. The Court first held that the "written reprimand" had been an "interference" with freedom of expression,[112] and the main question was whether it had been necessary in a democratic society.

The Court noted that the applicant's remarks "accused the Vienna Food Inspection Agency of attempting to play tricks on his client."[113] In this regard, the Court admitted that the statement "did not amount to personal insult," and that under its case-law, "increased protection is provided for statements whereby an accused criticises" bodies such as the Agency, which the Court found was "comparable" to a prosecutor.[114] However, the Court held that the "decisive factor" was that the applicant's allegations were "indeed not supported by any facts," and the statement "did not give any details which would have explained why the applicant thought that the Vienna Food Inspection Agency had acted improperly when bringing charges against his client." [115] Finally, the Court examined the sanction imposed, and noted that in contrast to *Nikula*, "what was at stake was not a criminal penalty but a disciplinary sanction."[116] The Court held that with regard to the "proportionality of the penalty," the "most lenient sanction provided for in section 16 (1) of the Disciplinary Act was applied, namely a written reprimand."[117] In light of the considerations, the Court concluded that there had been no violation of Article 10.

Curiously, the *Schmidt* majority did not seem to make any reference to the chilling effect principle which had been established in *Nikula*, *Steur* and *Kyprianou*. Indeed, it would seem that the principle from *Nikula* and *Steur* that even where "no sanction was imposed" (*Steur*), or where only an "obligation to pay damages and costs remained" (*Nikula*), nonetheless, "the threat of an ex post facto review of his criticism" could have a "chilling effect" on the practice of his profession" (*Steur*).[118] Further, not only does the *Schmidt* majority not apply the chilling effect principle, the majority does not cite *Steur* at all, even though the judgment can be seen as directly on point (a "mere admonition"[119] imposed by a legal disciplinary body). Moreover, the *Steur* judgment had been cited with approval by the Grand Chamber in *Kyprianou* on four separate occasions.[120] Indeed, *Kyprianou* at paragraph 151 cites with approval *Steur*'s paragraph 44, and *Nikula*'s paragraph 54, which concern the chilling effect of "ex post facto review."[121]

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[111] *Schmidt v. Austria* (App. no. 513/05) 17 July 2008, para. 28.
[112] *Schmidt v. Austria* (App. no. 513/05) 17 July 2008, para. 35.
[113] *Schmidt v. Austria* (App. no. 513/05) 17 July 2008, para. 38.
[114] *Schmidt v. Austria* (App. no. 513/05) 17 July 2008, para. 39.
[115] *Schmidt v. Austria* (App. no. 513/05) 17 July 2008, para. 41.
[116] *Schmidt v. Austria* (App. no. 513/05) 17 July 2008, para. 42.
[117] *Schmidt v. Austria* (App. no. 513/05) 17 July 2008, para. 43.
[118] *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003, para. 44 (citing *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 54).
[119] *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003, para. 29.
[120] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 151 (citing *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003), para. 175 (citing *Steur*, para. 37 and 44), and para. 181 (citing *Steur*, para. 44).
[121] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 151 (citing *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 54; and *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003, para. 44.

Therefore, it was not surprising that three judges dissented in *Schmidt*, including the Section President, Judge Rozakis, and a future President of the Court, Judge Spielmann. The dissent had particular difficulty with the majority's position on the sanction: the majority had "wrongly characterised the written reprimand as a lenient sanction," as it was "clearly disproportionate."[122] This was because the Court has "already found that the mere threat of an *ex post facto* review of criticism voiced by counsel is difficult to reconcile with his duty to defend the interest of his client and would have a "chilling effect" on the practice of his profession," with the dissent citing both *Nikula*'s paragraph 54 and *Steur*'s paragraph 44.[123]

6.5.2 First Section disagreement on chilling effect of judge's dismissal

Schmidt was delivered in July 2008, and a few months later in early 2009, the Court's First Section again delivered a similarly divided judgment when considering the chilling effect. However, the judgment in *Kudeshkina v. Russia*,[124] did not concern a lawyer's freedom of expression, but rather a judge's freedom of expression. Nonetheless, the disagreement evident in *Schmidt* continued in *Kudeshkina*, but in *Kudeshkina* the Court majority applied the chilling effect principle. The applicant in *Kudeshkina* was a judge on the Moscow City Court, having worked as a judge for 18 years. In October 2003, the applicant decided to stand as a candidate in general elections for the State Duma of the Russian Federation, with her election campaign including a programme for judicial reform. The Judiciary Qualification Board of Moscow granted the applicant's request for suspension from her judicial functions pending the elections. During the election campaign, the applicant gave interviews to the media, when she stated, "Years of working in the Moscow City Court have led me to doubt the existence of independent courts in Moscow. Instances of a court being put under pressure to take a certain decision are not that rare, not only in cases of great public interest but also in cases encroaching on the interests of certain individuals of consequence or of particular groups."[125] Further, in an interview the applicant made remarks, stating a judge "often finds himself in a position of an ordinary clerk, a subordinate of a court president," and the "mechanism of how a decision is imposed on a judge is not to contact [the judge] directly, instead a prosecutor or an interested person calls the court president, who then tries to talk the judge into a 'right' decision."[126]

The applicant was not elected during the elections on 7 December 2003, and the Judiciary Qualification Board of Moscow reinstated the applicant in her judicial functions as of 8 December 2003. A few days earlier, on 2 December 2003, the applicant had lodged a complaint with the High Judiciary Qualification Panel against the President of the Moscow City Court, claiming the President of the Moscow City Court, "be charged with a disciplinary offence for exerting unlawful pressure on me in June 2003, when I was presiding in the criminal proceedings against P.V. Zaytsev."[127] On 17 May 2004, the applicant was informed by letter that her complaint against the court president had been examined and that no further action was considered necessary.[128]

On an unidentified date, the President of the Moscow Judicial Council sought termination of the applicant's office as judge, applying to the Judiciary Qualification Board

[122] *Schmidt v. Austria* (App. no. 513/05) 17 July 2008 (Joint dissenting opinion of Judges Rozakis, Vajić and Spielmann, para. 8).
[123] *Schmidt v. Austria* (App. no. 513/05) 17 July 2008 (Joint dissenting opinion of Judges Rozakis, Vajić and Spielmann, para. 8).
[124] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009.
[125] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 19.
[126] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 21.
[127] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 24.
[128] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 31.

of Moscow, and alleging that during her election campaign the applicant had "intentionally insulted the court system and individual judges and had made false statements that could mislead the public and undermine the authority of the judiciary."[129] On 19 May 2004, the Judiciary Qualification Board of Moscow decided that the applicant had committed a disciplinary offence, finding the applicant's statements to the media "degraded the honour and dignity of a judge, discredited the authority of the judiciary [and] caused substantial damage to the prestige of the judicial profession."[130] The Board held that the applicant's office as a judge was to be terminated in accordance with the Law "On the Status of Judges in the Russian Federation."[131] On 8 October 2004, the Moscow City Court upheld the decision of the Judiciary Qualification Board of Moscow, finding that the applicant's statements in the media were "false, unsubstantiated and damaging to the reputation of the judiciary and the authority of all law courts," and the applicant had "publicly expressed an opinion prejudicial to the outcome of a pending criminal case."[132] The decision was ultimately upheld by the Supreme Court of the Russian Federation.

The applicant made an application to the European Court, claiming that her dismissal from judicial office violated her right to freedom of expression under Article 10. At the outset, the Court noted the parties agreed that the "decision to bar the applicant from holding judicial office was prompted by her statements to the media," and that her dismissal had been an interference with her freedom of expression.[133] The main question for the Court was whether the interference had been necessary in a democratic society.

The Court first reiterated the principle from *Wille* that it is "incumbent on public officials serving in the judiciary that they should show restraint in exercising their freedom of expression in all cases where the authority and impartiality of the judiciary are likely to be called into question."[134] However, the Court also noted that in the context of election debates, the Court has "attributed particular significance to the unhindered exercise of freedom of speech by candidates."[135] Turning to the facts, the Court noted that the applicant had been reproached for having "disclosed specific factual information concerning the criminal proceedings against Zaytsev before the judgment in this case had entered into legal force."[136] However, the Court also noted that the domestic authorities "did not rely on any specific statements in this respect."[137] The Court stated that it saw "nothing in the three impugned interviews that would justify the claims of 'disclosure'."[138] The applicant had "described her experience as a judge in the criminal proceedings against Zaytsev, alleging that the court was under pressure from various officials, in particular the Moscow City Court President."[139]

The Court held that the applicant's statements "were not entirely devoid of any factual grounds, and therefore were not to be regarded as a gratuitous personal attack but as a fair comment on a matter of great public importance."[140] Further, the Court considered that the applicant's "fears as regards the impartiality of the Moscow City Court were justified on account of her allegations against that Court's President."[141] However, the Court noted that

[129] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 32.
[130] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 34.
[131] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 34.
[132] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 39.
[133] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 79.
[134] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 86.
[135] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 87.
[136] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 90.
[137] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 91.
[138] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 91.
[139] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 91.
[140] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 95.
[141] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 97.

these arguments were not given consideration by the domestic courts, and "this failure constituted a grave procedural omission."[142] Thus, the Court found that the "manner in which the disciplinary sanction was imposed on the applicant fell short of securing important procedural guarantees."[143]

Finally, the Court examined the sanctions that had been imposed, and this is where the Court applied chilling effect reasoning. The Court first noted that the sanction was "undoubtedly a severe penalty," and was "the strictest available penalty that could be imposed."[144] The Court held that it "did not correspond to the gravity of the offence," and could "undoubtedly discourage other judges in the future from making statements critical of public institutions or policies, for fear of the loss of judicial office." This was because of the "'chilling effect' that the fear of sanction has on the exercise of freedom of expression," which works "to the detriment of society as a whole."[145] The Court relied upon *Wille*, *Cumpănă and Mazăre*, and *Nikula*, as authorities, and concluded that the sanction was "disproportionately severe on the applicant," and "capable of having a "chilling effect" on judges wishing to participate in the public debate on the effectiveness of the judicial institutions."[146] Thus, there had been a violation of Article 10.

Three judges dissented (Judge Kovler, Judge Steiner and Judge Nicolaou),[147] and while the dissent disagreed with the majority on the sanctions point, there was no discussion of the case law relied upon by the majority. For instance, Judge Kovler, joined by Judge Steiner, simply noted that the majority "draws attention to the "chilling effect that the fear of sanction has on the exercise of freedom of expression."[148] Without engaging with the issue, Judge Kovler simply states dryly that "I am afraid that the 'chilling effect' of this judgment could be to create an impression that the need to protect the authority of the judiciary is much less important than the need to protect civil servants' right to freedom of expression."[149] Similarly, Judge Nicolaou simply concluded that "in these circumstances the disciplinary sanction imposed on the applicant was not, in my opinion, disproportionate,"[150] without discussing any of the case law on the proportionality of sanctions, such as *Cumpănă and Mazăre v. Romania*, *Nikula*, or *Steur*.

Finally, it is also important to recognise that the composition of the First Section in *Schmidt* and *Kudeshkina* was quite similar, with five of the same judges sitting in both judgments,[151] and both judgments resulting in four-to-three votes, but coming to opposite conclusions. Notably, the dissenting group of judges in *Schmidt* (Judges Rozakis, Vajić, and Spielmann) who applied the chilling effect case law were in the majority in *Kudeshkina.* Similarly, the dissenting group of judges in *Kudeshkina* (Judges Kovler and Steiner) who did not apply chilling effect case law, were in the majority for *Schmidt*. Thus, it could be suggested that the contrasting outcomes in *Schmidt* and *Kudeshkina* may have been down to

[142] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 97.
[143] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 97.
[144] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 98.
[145] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 99.
[146] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 100.
[147] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009 (Dissenting opinion of Judge Kovler joined by Judge Steiner; Dissenting opinion of Judge Nicolaou).
[148] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009 (Dissenting opinion of Judge Kovler joined by Judge Steiner, para. 12).
[149] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009 (Dissenting opinion of Judge Kovler joined by Judge Steiner, para. 12).
[150] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009 (Dissenting opinion of Judge Nicolaou, para. 9).
[151] Judges Rozakis, Vajić, Spielmann, Kovler, Steiner sat in both *Schmidt* and *Kudeshkina*. The additional judges in *Schmidt* were Judge Jebens and Judge Hajiyev. While in *Kudeshkina* the additional judges were Judge Malinverni and Judge Nicolaou.

the composition of the Court, as had the composition been exactly the same for both judgments, there may have been similar outcomes.

6.5.3 Third Section unanimity on chilling effect of prosecutor's dismissal

There were thus contrasting approaches to the application of chilling effect principle in both *Schmidt* and *Kudeshkina*. However, both *Schmidt* and *Kudeshkina* concerned disciplinary proceedings, rather than criminal proceedings, in contrast to *Kyprianou* and *Nikula*. And it was this issue of criminal proceedings that the next judgment considered whether such criminal proceedings, and any subsequent criminal sanction, would have a chilling effect. The case was *Kayasu v. Turkey*,[152] where the applicant was a public prosecutor in Ankara. The case arose in August 1999, when the applicant, "as a citizen," lodged a complaint against a number of former army generals as the main perpetrators of the Turkish military coup of September 1980 to the public prosecutor of the Ankara State Security Court.[153] The complaint included that "[s]ince 1908, military coups have always been considered legitimate in our country. Turkey is the only country where the perpetrators of military coups not only are not tried but become President of the Republic. Similarly, Turkey is the only country where the people are afraid of the state, the state is afraid of the army and the army is afraid of the people."[154] No action was taken, although it did receive some coverage in the media. However, in February 2000, the Supreme Council of Judges and Public Prosecutors imposed a disciplinary sanction on the applicant in the form of a reprimand, having found that the words used by the applicant in his complaint were "liable to offend certain statesmen who had worked to secure the stability and viability of the State," and made public his petition by informing the press.[155] The decision was ultimately upheld on appeal.

Subsequently, the applicant, in his capacity as a public prosecutor, drew up an indictment against a former Chief of Staff and former President of Turkey who had been the main instigator of the military coup of 1980.[156] On 1 April 2000, the Chief Public Prosecutor considered that the submissions filed by the applicant amounted to an allegation of an offence and, on that account, took no further action on them by virtue of transitional Article 15 of the Constitution, which provided that the instigators of the 1980 coup were immune from prosecution.[157] However, a day earlier, on 29 March 2000, the Ministry of Justice gave permission to prosecute the applicant for "abuse of position" under Article 240(1) of the Criminal Code, on the ground that he had distributed copies of the indictment to the press and given statements to journalists he had received at his home,[158] and of the offence of insulting the armed forces under Article 159 of the former Criminal Code.

The applicant was ultimately convicted on both counts by the Court of Cassation, and was sentenced to suspended criminal fines.[159] The Court held that the indictment drawn up by the applicant had "gone beyond the bounds of criticism and was directed at the armed forces as a whole, accusing them of being an institution that abused its power and had no hesitation in pointing its weapons at citizens and destroying the rule of law."[160] Further, by distributing the document in question to journalists, the applicant had "sought to reach a wider audience,

[152] *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008.
[153] *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008, para. 5.
[154] *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008, para. 7.
[155] *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008, para. 10.
[156] *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008, para. 18.
[157] *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008, para. 21.
[158] *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008, para. 20.
[159] *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008, para. 20.
[160] *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008, para. 34.

thereby demonstrating his intention to insult and offend the State's military forces."[161] Subsequently, the Supreme Council of Judges and Public Prosecutors dismissed the applicant from his post, which was upheld on appeal. The applicant was no longer entitled to practise law as a result of his dismissal.[162]

Following his dismissal, the applicant made an application to the European Court, claiming that the disciplinary and criminal sanctions imposed on him violated his right to freedom of expression under Article 10. First, the Court held that there had been an interference with freedom of expression, noting that the grounds for the disciplinary proceedings and criminal proceedings were based on the applicant's exercise of freedom of expression in the form of the content of the texts drafted by the applicant, and the communication to the press of these texts.[163]

The main question for the Court had been whether the interference had been necessary in a democratic society. The Court first noted that the statements in question had been made in the particular context of a historical, political and legal debate concerning the possibility of prosecuting the instigators of the coup of September 1980, and held that this was "unquestionably a matter of general interest, in which the applicant had intended to participate both as an ordinary citizen and as a public prosecutor."[164] Second, the Court noted that while the content of the documents in question had been "critical and accusatory towards the instigators of the coup," and the statements were "acerbic and at times sarcastic," the Court held that they "could hardly be described as insulting."[165] Further, with regard to the applicant using his position as a prosecutor in notifying the press, the Court held that the issue went "beyond the expression of a personal opinion," that would run counter to one of the legitimate interests provided for in Article 10(2), but was rather expression on a fundamental issue concerning a "dysfunctional democratic system," citing *Wille*.[166] The Court held that this issue had to be taken into account in weighing up the competing interests under the Convention.[167] In this regard, the Court held that the applicant's conviction under Article 159 of the Criminal Code, did not meet any "pressing social need," as the increased protection afforded to the armed forces by former Article 159 of the Criminal Code "undermined freedom of expression."[168]

Finally, the Court examined the sanctions imposed. The Court noted that the sanctions imposed on the applicant had the direct effect of his dismissal from the post of public prosecutor, and the impossibility for him to exercise any other judicial function. The Court held that "it is inevitable that the imposition of a criminal sanction on an official belonging to the judiciary would, by its very nature, have a chilling effect, not only on the official concerned but also on the profession as a whole."[169] Further, for the public to have confidence in the administration of justice, "they must have confidence in the ability of judges and prosecutors to uphold effectively the principles of the rule of law."[170] It followed that "any chilling effect was an important factor to be considered in striking the appropriate balance between the right of a member of the legal service to freedom of expression and any other legitimate competing interest in the context of the proper administration of justice."[171]

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[161] *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008, para. 38.
[162] *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008, para. 46.
[163] *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008, para. 80.
[164] *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008, para. 93.
[165] *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008, para. 98.
[166] *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008, para. 98
[167] *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008, para. 98
[168] *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008, para. 104
[169] *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008, para. 105.
[170] *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008, para. 105.
[171] *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008, para. 106.

The Court concluded that the sanction imposed, a result of which he had been permanently dismissed from his post as a prosecutor and prohibited from practising law, had been disproportionate to any legitimate aim pursued,[172] in violation of Article 10.

Kayasu thus continued the Court's application of the chilling effect from *Nikula*, that the sanction would inevitably, by its very nature, have a chilling effect, not only on the particular lawyer concerned but on the profession of lawyers as a whole. This principle of not only having regard to the chilling effect on the individual applicant, but on all other judges and lawyers in the future, was applied in *Steur*, *Kyprianou,* and the majority in *Kudeshkina.* The Court's judgment in *Kayasu* suggested the majority's non-application of the chilling effect principle in *Schmidt* was an aberration in the Court's case law.

6.5.4 First Section unanimity on chilling effect of lawyer's disbarment

The Court's continued unanimous application of the chilling effect principle arose three years after the *Kayasu* judgment, when the First Section of the Court would again consider the issue of the chilling effect of restricting a lawyer's freedom of expression. Five judges that had sat in *Schmidt* also sat in the new case, namely *Igor Kabanov v. Russia*.[173] But rather than a divided judgment finding no violation of Article 10, with no mention on the chilling effect, as in *Schmidt*, there was total unanimity in *Igor Kabanov*, finding a violation of Article 10, and applying the chilling effect principle.

The applicant in *Igor Kabanov v. Russia*,[174] was an advocate, and the case arose in August 2003, when the Primorskiy District Court of Arkhangelsk, chaired by Judge V., removed the applicant from his position as defence counsel for a Mr R.[175] The District Court found that the applicant had acted contrary to the Code of Criminal Procedure and the Advocate's Code of Ethics, as he had "provided legal advice and acted as counsel in respect of persons whose interests were in conflict."[176] Following the trial, the applicant asked the Regional Court for supervisory review of the judicial decision to remove him from being Mr R.'s representative, which was dismissed by Judge A. of the Regional Court.

The applicant then filed a complaint against the judges who had participated in the proceedings for the determination of the criminal charge against Mr R., alleging that they had acted in violation of the rules of criminal procedure. The complaint was addressed to the President of the Supreme Court of the Russian Federation with a copy to the President of the Arkhangelsk Regional Court, and included the following statements, "Judges A. and V. used to 'plough the fields of justice together' at the Arkhangelsk Regional Prosecutor's Office, and, apparently, they 'continue their joint efforts now' at the Arkhangelsk Regional Court," and "either judge A. is not quite familiar with the law, which is sad, or judge A. wilfully and knowingly restricts my access to court, which is twice as sad."[177]

Subsequently, the President of the Arkhangelsk Regional Court lodged a complaint with the Council of the Arkhangelsk Region Bar Association, alleging the comments were "offensive" and incompatible with the Advocate's Code of Professional Conduct.[178] The Council of the Arkhangelsk Region Bar Association held a disciplinary hearing, and found that the applicant had made "tactless remarks in respect of certain judges of the Arkhangelsk Regional Court, which amounts to a violation of the Advocate's Code of Professional

[172] *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008, para. 107.
[173] *Igor Kabanov v. Russia* (App. No. 8921/05) 3 February 2011.
[174] *Igor Kabanov v. Russia* (App. No. 8921/05) 3 February 2011.
[175] *Igor Kabanov v. Russia* (App. No. 8921/05) 3 February 2011, para. 8.
[176] *Igor Kabanov v. Russia* (App. No. 8921/05) 3 February 2011, para. 8.
[177] *Igor Kabanov v. Russia* (App. No. 8921/05) 3 February 2011, para. 14.
[178] *Igor Kabanov v. Russia* (App. No. 8921/05) 3 February 2011, para. 15.

Conduct."[179] The Council terminated the applicant's bar membership, and the decision was ultimately upheld by the Arkhangelsk Regional Court on appeal.[180]

The applicant then made an application to the European Court, claiming that his disbarment had been a violation of his right to freedom of expression under Article 10. The parties agreed that the applicant's disbarment constituted an interference with his right to freedom of expression, and the main question was whether it had been necessary in a democratic society. The Court stated that, under *Kyprianou*, it must ascertain whether a fair balance was struck between, the need to protect the authority of the judiciary and the protection of the applicant's freedom of expression in his capacity as a lawyer.[181] The Court examined the applicants' comments, and noted that while they were "discourteous," they were "aimed at and limited to the manner in which the judges were trying the case, in particular as regards his removal from the position of legal counsel representing Mr R. in the course of the criminal proceedings and the judges' refusal to act on his request for supervisory review."[182]

The Court then noted that the domestic courts decided to disbar the applicant, which the Court held "cannot but be regarded as a harsh sanction,"[183] and rejected the government's argument that the applicant's disbarment was commensurate with the seriousness of the offence, with the Court noting the "alternatives available."[184] The Court applied the chilling effect principle in *Kyprianou*, and held that the penalty was "disproportionately severe" for the applicant, and "capable of having a chilling effect on the performance by lawyers of their duties as defence counsel."[185] Thus, the Court concluded that domestic authorities had failed to strike the right balance between the need to protect the authority of the judiciary and the need to protect the applicant's right to freedom of expression, in violation of Article 10.[186]

The Court in *Igor Kabanov*, in contrast to *Schmidt*, continued the application of the *Kyprianou* chilling effect principle, and had regard to the broader effect the sanction would have on other lawyers in the future. The composition of the First Section in *Igor Kabanov* was the same as in *Kudeshkina*, but in *Igor Kabanov* there was a unanimous application of the chilling effect. Thus, the dissenting judges in *Kudeshkina* now seemed to have accepted the application of the chilling effect principle and the prior case law on the principle.

6.5.5 Unanimity in *Mor* on chilling effect of criminal proceedings

The unanimity in the Court's application of the chilling effect principle continued, extending application of the chilling effect to criminal *proceedings* against a lawyer. The case was *Mor v. France*,[187] where the applicant was a lawyer representing parents of a boy who had died from an illness contracted after being vaccinated against hepatitis B, and lodged a criminal complaint alleging manslaughter.[188] A judicial investigation was opened, and complaints concerning similar cases against the pharmaceutical companies distributing the vaccine were lodged by the applicant on behalf of other clients and attached to the initial investigation. In November 2002, a 450-page expert report was given to the investigating judge by a doctor specialising in pharmaco-epidemiology. Extracts from the report were published by the

[179] *Igor Kabanov v. Russia* (App. No. 8921/05) 3 February 2011, para. 16.
[180] *Igor Kabanov v. Russia* (App. No. 8921/05) 3 February 2011, para. 20.
[181] *Igor Kabanov v. Russia* (App. No. 8921/05) 3 February 2011, para. 54.
[182] *Igor Kabanov v. Russia* (App. No. 8921/05) 3 February 2011, para. 55.
[183] *Igor Kabanov v. Russia* (App. No. 8921/05) 3 February 2011, para. 55.
[184] *Igor Kabanov v. Russia* (App. No. 8921/05) 3 February 2011, para. 56.
[185] *Igor Kabanov v. Russia* (App. No. 8921/05) 3 February 2011, para. 57.
[186] *Igor Kabanov v. Russia* (App. No. 8921/05) 3 February 2011, para. 58.
[187] *Mor v. France* (App. no. 28198/09) 15 December 2011.
[188] *Mor v. France* (App. no. 28198/09) 15 December 2011, para. 7.

French newspapers *Le Parisien* and *Le Figaro*, and the news agency AFP. Later in November 2002, *Le Parisien* published an article entitled "B vaccine: the report that points the finger," stating that an "explosive expert report has just been given to [the investigating judge] in charge of investigating the deaths of six children and adults after vaccination against hepatitis B," which was "damning" for the French health authorities.[189] At the request of her clients, the applicant gave interviews to the media, discussing the expert report, and made comments including that the expert had been subject to "pressure" following requests for records from laboratories.[190]

A month later in December 2002, a pharmaceutical laboratory, which would have been the only laboratory to distribute the vaccine against hepatitis B, lodged a complaint as a civil party for violation of the secrecy of the instruction and breach of professional secrecy.[191] In 2006, the investigating judge referred the applicant to the Paris Criminal Court for having, in her capacity as a lawyer, revealed the existence and content of documents appearing in an investigation, in this case, an expert report received by the investigating judge in charge of the proceedings, which was an offence under Articles 226-13 and 226-31 of the Criminal Code.[192] In May 2007, the Criminal Court found the applicant guilty of a breach of professional secrecy, and held that the prior disclosure of the report, in particular to the journalists who questioned her, was immaterial.[193] However, the applicant was exempted from punishment given that the statements were made five years earlier, as well as the "repeated violations of secrecy by others without prosecution."[194] In relation to the civil party, the applicant was ordered to pay one euro to the laboratory.[195] The judgment was upheld by the Paris Court of Appeal, and the Court of Cassation.

The applicant then made an application to the European Court, claiming her criminal conviction for breach of professional secrecy violated her right to freedom of expression under Article 10. The parties agreed that the applicant's conviction constituted an interference with the right to freedom of expression, and the main question for the Court was whether it had been necessary in a democratic society. The Court first noted that the applicant had made comments "concerning the expert report in her capacity as a lawyer for victims who were civil parties, whereas the report was covered by the secrecy of the investigation and the judicial investigation had been in progress."[196] The Court also noted that the applicant had not "been penalised for disclosing the expert report to the media, but for disclosing information contained therein."[197] Further, the Court stated that when the applicant answered the journalists' questions, the media was "already in possession of all or parts of the expert report."[198]

The Court examined the applicant's comments to the media, and considered that the applicant's statements were part of a "debate of general interest," and reiterated that there was "little scope" under Article 10 for restriction on political expression.[199] The Court noted that with the exception of the allegations that the expert had been subjected to pressure, the applicant had "confined herself to commenting on information already widely disseminated in the article preceding her interview which had been taken up in other sections of the

[189] *Mor v. France* (App. no. 28198/09) 15 December 2011, para. 13.
[190] *Mor v. France* (App. no. 28198/09) 15 December 2011, para. 14.
[191] *Mor v. France* (App. no. 28198/09) 15 December 2011, para. 16.
[192] *Mor v. France* (App. no. 28198/09) 15 December 2011, para. 19.
[193] *Mor v. France* (App. no. 28198/09) 15 December 2011, para. 20.
[194] *Mor v. France* (App. no. 28198/09) 15 December 2011, para. 21.
[195] *Mor v. France* (App. no. 28198/09) 15 December 2011, para. 21.
[196] *Mor v. France* (App. no. 28198/09) 15 December 2011, para. 50.
[197] *Mor v. France* (App. no. 28198/09) 15 December 2011, para. 51.
[198] *Mor v. France* (App. no. 28198/09) 15 December 2011, para. 51.
[199] *Mor v. France* (App. no. 28198/09) 15 December 2011, para. 53.

media."[200] Further, in relation to the allegations that pressure had been exerted on the expert, which had not been mentioned in the initial *Le Parisien* article, the Court noted that the applicant's comments had "related more to the conditions in which the expert had had to compile the report than to the content of the report itself."[201] The Court accepted the applicant's argument that she had wished to alert the public and comment on the content of the report in the interests of the defence, given that the families of the victims, whom she was representing, had a "clear interest" in informing the public of "any external pressure exerted on the expert, the importance of whose findings was not in dispute in the instant case."[202] The Court held that the applicant's statements "could not be said to have been liable to hamper the proper administration of justice or to breach the right of those implicated to be presumed innocent."[203] On the contrary, giving an interview to the press was a legitimate part of her clients' defence, given that the case had aroused interest in the media and among the general public.[204]

Finally, the Court examined the sanctions imposed, and noted that the applicant had been "exempted from punishment" and only been ordered to pay a symbolic euro in damages.[205] However, the Court stated that although it had been the most lenient sanction possible, "it is nevertheless a criminal sanction."[206] The Court then applied the chilling effect principle based on *Cumpănă and Mazăre*, that "interference with freedom of expression may have a chilling effect on the exercise of that freedom, a risk that the relatively moderate nature of a fine would not suffice to negate."[207] The Court concluded that the interference with the applicant's freedom of expression had not met a "pressing social need," and had been disproportionate, in violation of Article 10.[208]

The Court's judgment in *Mor* applied the principle where an individual is subject only to a guilty verdict, with a discharge of the criminal sentence, it nevertheless constitutes a criminal sanction, and that fact cannot suffice, in itself, to justify the interference with the applicant's freedom of expression because of the chilling effect. Relevant for the discussion below, there was no mention of a margin of appreciation in *Mor*, suggesting that a criminal sanction, in and of itself, has a chilling effect, as had been held in *Nikula*.

6.5.6 Disagreement in *Morice* over chilling effect of criminal proceedings

Based on *Nikula*, *Steur*, and *Kyprianou*, (a) a defence counsel should not be influenced by the potential chilling effect of even a relatively light criminal penalty or an obligation to pay compensation for harm suffered or costs incurred,[209] and (b) it is only in "exceptional cases" that restriction (even a lenient criminal penalty) of a defence counsel's freedom of expression can be accepted as necessary in a democratic society.[210] However, in July 2013, something quite curious happened, when the Fifth Section of the Court found that where a lawyer had been "found guilty of an offence and ordered to pay a fine," it concluded that "in view of the margin of appreciation," the "measures imposed on the applicant were not

[200] *Mor v. France* (App. no. 28198/09) 15 December 2011, para. 21.
[201] *Mor v. France* (App. no. 28198/09) 15 December 2011, para. 58.
[202] *Mor v. France* (App. no. 28198/09) 15 December 2011, para. 59.
[203] *Mor v. France* (App. no. 28198/09) 15 December 2011, para. 59.
[204] *Mor v. France* (App. no. 28198/09) 15 December 2011, para. 59.
[205] *Mor v. France* (App. no. 28198/09) 15 December 2011, para. 61.
[206] *Mor v. France* (App. no. 28198/09) 15 December 2011, para. 61.
[207] *Mor v. France* (App. no. 28198/09) 15 December 2011, para. 61.
[208] *Mor v. France* (App. no. 28198/09) 15 December 2011, para. 62.
[209] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 54.
[210] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 55.

disproportionate."[211] The Court also refused to engage with an applicant's submission that criminal proceedings had a chilling effect, even though the government sought to rebut the argument, and the dissent also addressed the issue.

The case was *Morice v. France*,[212] and as mentioned above, the applicant was a lawyer, who had been convicted of defaming two judges. The applicant made an application to the European Court, claiming the conviction and sanctions imposed had been a violation of his right to freedom of expression. In particular, the applicant invoked chilling effect reasoning, arguing that the "harshness of the penalties imposed on him, both civil and criminal, was such as to deter him from speaking in the media to denounce any shortcomings in the judicial system."[213]

In July 2013, the Fifth Section of the Court delivered its Chamber judgment, and held by a majority, that there had been no violation of Article 10.[214] The main question for the Court was whether the applicant's conviction for defamation had been necessary in a democratic society. The Court first noted that the applicant had "not confined himself in the article to factual statements," but had "accompanied those factual observations with value judgments" which cast doubt on the impartiality and fairness of judge M. and alleged that there was some connivance between the investigating judges and the Djibouti prosecutor.[215] The Court found that the applicant "publicly attacked, in a mainstream daily newspaper, the investigating judge and the functioning of the judicial system just one day after contacting the Minister of Justice, without waiting for a response to his request."[216] Second, the Court stated that "even if his aim had been to alert the public with regard to possible problems in the functioning of the justice system," he did so in "particularly virulent terms with the risk of influencing not only the Minister of Justice but also the Investigation Division which was examining his complaint in the Scientology case."[217] Thus, the Court held that the applicant "behaved in a manner which overstepped the limits that lawyers have to observe in publicly criticising the justice system."[218] The Court also found that the domestic courts were "justified in finding that the comments in question, made by a lawyer, were serious and insulting vis-à-vis judge M., that they were capable of undermining public confidence in the judicial system unnecessarily."[219] The Court added that it could also be "inferred from the applicant's comments, as the Court of Appeal noted, that they were driven by some personal animosity towards judge M."[220]

Finally, the Court examined the nature and severity of the penalties imposed. The Court noted that the applicant was "found guilty of an offence and ordered to pay a fine."[221] However, the Court then added a new principle, which had not been referred to in any of the previous case law on lawyers' freedom of expression, holding: "in view of the margin of appreciation left to Contracting States by Article 10 of the Convention, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued."[222] Further, the Court held that the amount of the fine imposed, 4,000 euros, did "not appear excessive," and the "same is true" of the 7,500 euros damages that he was

[211] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 108.
[212] *Morice v. France* (App. no. 29369/10) 11 July 2013.
[213] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 86.
[214] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 109.
[215] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 102.
[216] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 106.
[217] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 106.
[218] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 106.
[219] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 107.
[220] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 107.
[221] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 108.
[222] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 108.

ordered to pay to the civil parties, jointly with his two co-defendants.[223] Thus, according to the Court, the measures imposed on the applicant were not disproportionate to the legitimate aim pursued. In light of these considerations, the Court held that the domestic authorities did not overstep their margin of appreciation in sentencing the applicant, and therefore there had been no violation of Article 10.

One judge dissented, Judge Yudkivska, finding that there had been a violation of Article 10,[224] and in particular questioned the absence of the chilling effect principle from the majority's conclusion concerning the criminal proceedings. The dissent argued that the applicant's conviction "for making value judgments appears disproportionate," as the "very existence of criminal proceedings has a chilling effect; lawyers defending their clients' rights should not have to fear prosecution on that account."[225]

It must be emphasised that the Court majority's judgment in *Morice* nowhere mentioned the chilling effect, even though the applicant made submissions on the point, the dissenting opinion addressed the issue, and indeed, the government itself responded to these submissions.[226] And most curiously of all, the majority in *Morice* nowhere even mentioned *Nikula* and its application of the chilling effect principle, even though the dissenting opinion specifically mentioned it.

6.5.7 Second Section finds no chilling effect of disciplinary proceedings

The Court's non-application of the chilling effect principle in *Morice* actually continued when the Court was faced with the question, similar to *Steur*, of whether disciplinary proceedings against a lawyer had a chilling effect, with the Court dismissing the principle. The case was *Kincses v. Hungary*,[227] where the applicant was a practising lawyer and member of the Békés County Bar Association. The case arose in March 2003, when the applicant was appearing as the legal representative of a hunting association before the Battonya District Court. The applicant filed a notice of appeal with the Békés County Regional Court, in which he requested the court to initiate proceedings with a view to examining the first-instance judge's competence to exercise the duties of a judge.[228] The written appeal submissions included statements that "Of course, we do not assume any professional incompetence on the side of the sitting judge," it is "not a question of bias but that of clear-cut professional incompetence," and "we cannot but call into question the professional competence of the sitting judge."[229]

Following the motion being transferred to Békés County Regional Court, that Court's vice-president indicated to the Békés County Bar Association that the applicant's

[223] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 108.
[224] *Morice v. France* (App. no. 29369/10) 11 July 2013 (Partly dissenting opinion of Judge Yudkivska).
[225] *Morice v. France* (App. no. 29369/10) 11 July 2013 (Partly dissenting opinion of Judge Yudkivska, para. 15).
[226] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 96.
[227] *Kincses v. Hungary* (App. no. 66232/10) 27 January 2015. See also *Fuchs v. Germany* (App. nos. 29222/11 and 64345/11) 27 January 2015) (Admissibility decision) (defence counsel's conviction for defamation, and disciplinary reprimand, did not violate Article 10. The Court had particular regard to the expression being "offensive," and constituting "abusive verbal attacks" of an expert, and "did not contain any objective criticism of the expert's work.") (paras. 41-42); and *Peruzzi v. Italy* (App. no. 39294/09) 30 June 2015 (lawyer's conviction for defamation of a judge did not violate Article 10. Again, the Court had particular regard to the expression involving descriptions of the judge as being a "biased" judge, and for having "wilfully made mistakes, by malicious intent, serious misconduct or negligence." (para. 57). For the European Court, this implied disregarding the ethical obligations inherent in the duty of a judge, or "even that she had committed a criminal offence," and the applicant "never sought to prove the veracity" of the statements) (para. 60).
[228] *Kincses v. Hungary* (App. no. 66232/10) 27 January 2015, para. 6.
[229] *Kincses v. Hungary* (App. no. 66232/10) 27 January 2015, para. 6.

submissions "should give rise to disciplinary proceedings."[230] In April 2003, the President of the Bar Association informed the applicant about the opening of disciplinary proceedings, and in June 2004 the Szeged Bar Association Disciplinary Board fined the applicant 300,000 Hungarian forints (1,000 euro) for having committed a serious disciplinary offence. However, following a successful judicial review, the Szeged Bar Association Disciplinary Board reconsidered the case, and in 2008, fined the applicant 170,000 Hungarian forints (570 euro) for having committed a deliberate disciplinary offence. The Board was of the opinion that the statements above amounted to "disrespecting the court's dignity and to denying the judge the requisite respect."[231] The Budapest Regional Court dismissed the applicant's action challenging the disciplinary sanction, finding that the statements had "accused the court as an institution, and not merely the sitting judge, of circumventing the law."[232] The decision was ultimately upheld by the Supreme Court.

The applicant made an application to the European Court, claiming the fine for a disciplinary offence violated his right to freedom of expression under Article 10. The Court agreed that fining the applicant for a disciplinary offence amounted to an interference with his freedom of expression, and the main question had been whether it had been necessary in a democratic society.

The Court first stated that counsels can find themselves in the "delicate situation where they have to decide whether or not they should object to, or complain about, the conduct of the court, keeping in mind their client's best interests."[233] Further, they might "feel constrained in their choice of pleadings, procedural motions, etc., during proceedings before the courts, possibly to the potential detriment of their client's case. For the public to have confidence in the administration of justice they must have confidence in the ability of the legal profession to provide effective representation."[234] It followed, according to the Court, that any "chilling effect" of even a relatively light penalty is an important factor to be considered in striking the appropriate balance between courts and lawyers in the context of an effective administration of justice.[235]

The Court then examined the statements involved, and noted that the applicant, acting as the legal representative of a client in civil proceedings, and in written submissions prepared in that capacity, "accused the sitting judge of professional incompetence."[236] It followed, according to the Court, that the protection of the interest of the proper administration of justice and the dignity of the legal profession was "not to be weighed against the interest in the open discussion of matters of public concern or freedom of the press."[237] Second, the Court noted that the statements "were not only a criticism of the reasoning in the judgment, but, as found by the Disciplinary Board and the domestic courts, amounted to belittling the sitting judge's professional capacities and implied that the court in question had circumvented the law."[238] The Court held that given that the remarks were "in part sarcastic, in part overtly insulting," it did not find the domestic courts' assessment "unreasonable."[239]

Finally, the Court examined the nature and severity of the penalties imposed. The Court noted that the applicant was "merely fined, in an amount not excessive," and in the

[230] *Kincses v. Hungary* (App. no. 66232/10) 27 January 2015, para. 7.
[231] *Kincses v. Hungary* (App. no. 66232/10) 27 January 2015, para. 9.
[232] *Kincses v. Hungary* (App. no. 66232/10) 27 January 2015, para. 11.
[233] *Kincses v. Hungary* (App. no. 66232/10) 27 January 2015, para. 34.
[234] *Kincses v. Hungary* (App. no. 66232/10) 27 January 2015, para. 34.
[235] *Kincses v. Hungary* (App. no. 66232/10) 27 January 2015, para. 34.
[236] *Kincses v. Hungary* (App. no. 66232/10) 27 January 2015, para. 34.
[237] *Kincses v. Hungary* (App. no. 66232/10) 27 January 2015, para. 39.
[238] *Kincses v. Hungary* (App. no. 66232/10) 27 January 2015, para. 40.
[239] *Kincses v. Hungary* (App. no. 66232/10) 27 January 2015, para. 40.

course of disciplinary proceedings, "which were not made public and had no consequences on his right to exercise his profession."[240] Thus, according to the Court, the case could be distinguished from the case of *Nikula* in which a "criminal sanction, albeit a lenient one, was imposed on the applicant."[241] In light of these considerations, the Court held that the reasons advanced by the Disciplinary Board and the domestic courts were sufficient and relevant to justify the interference, and that the sanction imposed on the applicant was not disproportionate to the legitimate aim pursued.[242] Thus, the Court concluded that there had been no violation of Article 10.

While the Court in *Kincses* mentions the chilling effect at paragraph 34 when setting out the Article 10 principles to be applied, the Court does not engage with the principle at paragraph 42 when considering the nature and severity of the penalties imposed. But the most curious aspect of *Kincses* is the Court's non-application of *Steur*, which actually concerned disciplinary proceedings, with the Court in *Kincses* instead just attempting to distinguish the earlier case of *Nikula* which had concerned criminal proceedings. The Court in *Steur* of course held - unanimously - even where no sanction was imposed the threat of an ex post facto review in disciplinary proceedings could have a chilling effect on the practice of the profession as a whole.

Instead of applying *Steur,* the Court in *Kincses* seemed to dismiss the chilling effect because (a) the disciplinary proceedings were not public, and (b) had no consequences on the right to exercise his profession. Reason (a) had never been even mentioned in any of the Court's case law up to this point, and the Court offered no authority on the point. Using this argument would also *ipso facto* exclude chilling effect reasoning from disciplinary sanctions. Not only was this reason never previously applied, it arguably does not even hold up, given that the subsequent court proceedings were public. And reason (b) seems to be a version of the "no practical consequences" argument, dismissed by the Court in *Cumpănă and Mazăre*.

While it is only speculation, the Court's reluctance to apply the chilling effect principle may be explained by the fact the Court unanimously found a violation of Article 6 in *Kincses* over the length of the proceedings (seven years),[243] and there may have been judges wishing to avoid a divided judgment, which the application of the chilling effect to disciplinary proceedings may have given rise to. However, a more nuanced explanation may have been the Court's concern that the expression at issue involved "belittling the sitting judge's professional capacities," was "overtly insulting," and "implied that the court in question had circumvented the law."[244] The view within the Court may have been that there should be little concern for the chilling effect, as the "requirement of protection of the interest of the proper administration of justice and the dignity of the legal profession is not to be weighed against the interest in the open discussion of matters of public concern or freedom of the press."[245]

6.6 Grand Chamber in *Morice* reaffirms chilling effect of criminal proceedings

In December 2013, following a request from the applicant in *Morice* that the case be referred to the Grand Chamber, a panel of the Grand Chamber granted the request,[246] and in 2015, the

[240] *Kincses v. Hungary* (App. no. 66232/10) 27 January 2015, para. 42.
[241] *Kincses v. Hungary* (App. no. 66232/10) 27 January 2015, para. 42.
[242] *Kincses v. Hungary* (App. no. 66232/10) 27 January 2015, para. 43.
[243] *Kincses v. Hungary* (App. no. 66232/10) 27 January 2015, para. 46.
[244] *Kincses v. Hungary* (App. no. 66232/10) 27 January 2015, para. 40.
[245] *Kincses v. Hungary* (App. no. 66232/10) 27 January 2015, para. 39.
[246] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 5. See Inger Høedt-Rasmussen and Dirk Voorhoof, "A great victory for the whole legal profession," *Strasbourg Observers*, 6 May 2015.

Grand Chamber delivered its judgment in *Morice*, and unanimously found a violation of Article 10. The Grand Chamber's judgment in *Morice* bore resemblance to *Kyprianou,* in that a Chamber judgment had omitted any mention of the chilling effect principle, with a unanimous Grand Chamber setting aside the Chamber judgment, and applying the chilling effect principle as central to its conclusion. Indeed, similar to *Kyprianou*, the national judge who had voted in the Chamber judgment for no violation of Article 10, switched his vote in the Grand Chamber, but did not write a separate opinion to explain his vote.[247]

The Grand Chamber first noted that while the remarks "could admittedly be regarded as harsh,"[248] and of a "somewhat hostile nature,"[249] they concerned a "matter of public interest,"[250] and "constituted value judgments with a sufficient "factual basis."[251] Notably, the Court in *Morice* laid down five criteria for determining whether a restriction on a defence counsel's freedom of expression has been necessary in a democratic society.[252] In particular, the final criteria concerned the "sanctions imposed," and the Court cited *Cumpănă and Mazăre* and its principle that "interference with freedom of expression may have a chilling effect on the exercise of that freedom," and a "risk" of a "relatively moderate" fine would not suffice to negate this chilling effect.[253] Indeed, the Court in *Morice* emphasised this point, and held that "even when the sanction is the lightest possible," such as a guilty verdict with a discharge in respect of the criminal sentence and an award of only a "token euro" in damages, this "does not suffice to negate the risk of a chilling effect on the exercise of freedom of expression."[254] Moreover, this chilling effect is "all the more unacceptable in the case of a lawyer who is required to ensure the effective defence of his clients."[255]

Finally, the Court reiterated that the "dominant position of the State institutions requires the authorities to show restraint in resorting to criminal proceedings," with the Court earlier approving the principle in *Kyprianou* that it is only in "exceptional circumstances" that a restriction, "even by way of a lenient criminal penalty," can be imposed of a defence counsel's freedom of expression.[256] Applying these principles, the Court noted that the applicant's "punishment" was not confined to a criminal conviction, but included fines, damages and costs ordered against the applicant, with the domestic judges having "expressly taken into account the applicant's status as a lawyer to justify their severity and to impose on him 'a fine of a sufficiently high amount'."[257] The Court held that the sanction imposed on him "was not the 'lightest possible," but was, "on the contrary, of some significance, and his status as a lawyer was even relied upon to justify greater severity."[258]

It would seem from the Court's reasoning that because of the chilling effect on a defence's counsel's freedom of expression, there should be "restraint" in resorting to criminal proceedings, and only in "exceptional cases," can a restriction, "even by way of a lenient criminal penalty", can be "accepted as necessary in a democratic society."[259] It is notable in this regard that the Court in *Morice* nowhere mentioned the principle that "in view of the

[247] Judge André Potocki.
[248] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 174.
[249] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 167.
[250] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 167.
[251] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 174.
[252] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 146-176 ((a) the applicant's status as a lawyer; (b) contribution to a debate on a matter of public interest; (c) the nature of the impugned remarks; (d) the specific circumstances of the case; and (e) the sanctions imposed).
[253] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para.176.
[254] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para.127 and 176.
[255] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 127.
[256] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 135.
[257] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 175.
[258] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 175.
[259] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 135.

margin of appreciation left to Contracting States by Article 10 of the Convention, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued."[260] The Grand Chamber's judgment in *Morice* represented a rejection of the Fifth Section majority's approach, where it be must remembered, had not mentioned the chilling effect, even though the applicant made submissions on the point, the dissenting opinion addressed the issue; and had not even mentioned *Nikula*. The Grand Chamber's judgment in *Morice* was unanimous, and unlike the Court's case law on the prosecution of journalists discussed in the Chapter 5, the Grand Chamber in *Morice* was, in a sense, correcting the non-application of the principle by some Sections of the Court.

6.6.1 Disciplinary sanction imposed on lawyer had a chilling effect

The first test of whether a new momentum in the application of the chilling effect following *Morice* would trickle down to the Sections of the Court occurred eight months later, when the Second Section was presented with whether disciplinary sanctions imposed on a lawyer had a chilling effect. This was a similar issue to *Kincses*, but instead, the Court would now unanimously find a violation of Article 10, and applied *Steur* on the chilling effect of disciplinary proceedings. The case was *Bono v. France*,[261] where the applicant was a Paris-based lawyer, and the case arose when the applicant was representing an individual, Mr. S.A., in criminal proceedings before the French courts on a charge of criminal conspiracy for the preparation of terrorism. S.A. had been arrested in Damascus, Syria, in 2003, and in April 2004, investigating judges in the anti-terrorism judicial investigation division of the Paris *tribunal de grande instance*, issued an international letter of request to the Syrian military authorities for the purpose of questioning S.A.[262] The investigating judges went to Damascus for the execution of the letter of request, and in May 2004, the investigating judges issued an international arrest warrant, and S.A. was extradited to France in June 2004.[263]

In 2005, before the Paris Criminal Court, the applicant requested in his written pleadings that documents that had been obtained, according to the applicant, through torture by the Syrian secret services, be excluded from the S.A.'s file, including his written confession.[264] In these pleadings, the applicant stated that there had been "complicity on the part of the French investigating judges in the use of torture against S.A. in Syria by military personnel of the secret service."[265] In 2006, the Paris Criminal Court excluded the documents obtained through the international letter of request, but nonetheless found S.A. guilty and sentenced him to nine years' imprisonment.[266]

In the applicant's 85-page pleadings to the Paris Court of Appeal, he sought the exclusion of documents obtained under torture, and made a number of statements, including "the French investigating judges allowed the Syrian secret services to torture [S.A.] without intervening, and it can even be shown that they promoted torture - this amounts to a judicial outsourcing of torture," and "Complicity of the French investigating judges in the use of the torture against Mr. [S.A.] in Syria by military personnel of the secret services."[267] In 2007, the Paris Court of Appeal upheld the conviction, and excluded the documents in question. The Court of Appeal's judgment indicated that its President had asked the applicant to

[260] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02(22 October 2007 (Grand Chamber), para. 59.
[261] *Bono v. France* (App. no. 29024/11) 15 December 2015.
[262] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 8.
[263] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 11.
[264] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 13.
[265] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 13.
[266] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 14.
[267] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 15.

"moderate his remarks concerning the allegations of complicity on the part of the investigating judges in the use of the torture against S.A." in his pleadings.[268]

Subsequently in 2008, the Chairman of the Paris Bar Association informed the public prosecutor at the Paris Court of Appeal, who had sent him a copy of the applicant's pleadings, that the Chairman "did not intend to act upon this matter."[269] However, a month later, the public prosecutor asked the Disciplinary Board of the Paris Bar Association to bring disciplinary proceedings against the applicant for "disregarding the essential principles of honour, tactfulness and moderation governing the legal profession."[270] However, the Disciplinary Board of the Paris Bar Association dismissed all the charges against the applicant, finding that the applicant's remarks "did not constitute personal attacks on the judges, but sought to call into question the manner in which they had conducted the proceedings, and that the remarks were 'obviously not unrelated to the facts of the case'."[271]

The public prosecutor appealed, and in June 2009, the Paris Court of Appeal quashed the decision of the Bar Association, and issued the applicant with a reprimand accompanied by disqualification from professional bodies for a period of five years.[272] The Court held that the remarks "were not merely intended to criticise the conduct of the judicial investigation and challenge the validity of S.A.'s statements during his interrogation, they also called into question the moral integrity of the investigating judges at a personal level."[273] In 2010, the Court of Cassation upheld the Paris Court of Appeal's judgment, finding that the applicant's remarks had "personally impugned the moral integrity of those judges, accusing them of deliberately promoting the use of torture and of being actively complicit in the ill-treatment inflicted by the Syrian investigators."[274] According to the Court of Cassation, the Paris Court of Appeal was "justified its decision to impose on the lawyer a mere reprimand together with a temporary disqualification from membership of professional bodies and councils."[275]

The applicant subsequently made an application to the European Court, claiming that the disciplinary penalty imposed on him was a violation Article 10. The government agreed that there had been an interference with freedom of expression, and the main question for the Court was whether it had been necessary in a democratic society. First, the Court reiterated the chilling effect principle from *Nikula* and *Steur*, that "*ex post facto* review of remarks made by a lawyer in the courtroom is difficult to reconcile with defence counsel's duty to defend their clients' interests zealously and could have a 'chilling' effect on the practise of the legal profession."[276]

Second, the Court noted that the remarks, "on account of their virulence, were clearly insulting for the investigating judges."[277] The Court found that the applicant's remarks "accusing the investigating judges of being complicit in torture were not necessary for the pursuit of his stated aim, namely to have the statements taken from S.A. under torture excluded from the evidence, especially as the first-instance court had already accepted that request."[278] But according to the Court, it must "nevertheless" be ascertained whether the

[268] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 16.
[269] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 17.
[270] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 18.
[271] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 19.
[272] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 21.
[273] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 21.
[274] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 23.
[275] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 23.
[276] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 55.
[277] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 51.
[278] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 51.

disciplinary sanction imposed on the applicant by the Paris Court of Appeal "struck a fair balance between courts and lawyers in the context of a fair administration of justice."[279]

The Court then noted that the remarks had "been made in a judicial context, because they had been transmitted in writing when the applicant submitted his pleadings before the Paris Court of Appeal."[280] Further, the Court held that the remarks were "more like value judgments," and unlike the domestic courts, considered the remarks "did have some factual basis,"[281] in that one of the investigating judges "followed [the interviews] in real time, in Damascus," and further, the "methods of the Syrian police were notorious, as shown by the witness statements adduced in the Criminal Court in the present case and also by all the international reports on this subject."[282] The Court also found that the applicant's criticisms "remained inside the 'courtroom'," as they were contained in written pleadings, and not therefore capable of undermining or threatening the functioning of the justice system or the reputation of the judiciary among the general public.[283] In this regard, the Court noted that the Paris Court of Appeal and the Court of Cassation had "failed to take this contextual element into account and did not give consideration to the limited audience to which the remarks had been addressed."[284]

Finally, the Court turned to the disciplinary sanction imposed on the applicant, and applied the principles from *Nikula* and *Steur* on the chilling effect. The Court stated that not only were there "negative repercussions of such a sanction on the professional career of a lawyer," but held that any *ex post facto* review of offending oral or written submissions on the part of a lawyer must be implemented with "particular prudence and moderation."[285] This was to "ensure that such review does not constitute for the [lawyer] a threat with a 'chilling' effect that would harm the defence of their clients' interests."[286]

Applying these principles to the present case, the Court noted that the President of the Court of Appeal had already at the hearing "invited the applicant to moderate his remarks," and then, deeming them excessive, had indicated in its judgment that "it dismissed the relevant submissions on the ground that the remarks were dishonourable."[287] The judges had found this warning to be sufficient, and "not considered it appropriate to ask the Principal Public Prosecutor to refer the matter to the disciplinary bodies."[288] The European Court then noted that it was "only several months after the filing of the impugned pleadings in the Court of Appeal, and after that court's judgment, that the said prosecutor initiated disciplinary proceedings."[289]

In light of these circumstances, the Court held that by "going beyond the firm and dispassionate position of the Court of Appeal and imposing a disciplinary sanction on the applicant, the authorities excessively undermined the lawyer's task of defending his client."[290] The Court unanimously concluded that there had been a violation of Article 10 "on account of the disproportionate nature of the sanction" imposed on the applicant.[291]

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[279] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 51.
[280] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 52.
[281] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 52.
[282] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 53.
[283] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 54.
[284] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 54.
[285] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 55.
[286] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 55.
[287] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 55.
[288] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 55.
[289] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 55.
[290] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 56.
[291] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 56.

This was a powerful application of the chilling effect principle by the Court in *Bono*, effectively applying an approach similar to *Cumpănă and Mazăre*, where the Court sanction imposed is essentially divorced from the nature of the comments. The Court's judgment in *Bono* also in effect rejects the approach in *Kincses* of (a) ignoring the *Steur* judgment, and (b) having regard to disciplinary proceedings not being public. The judgment in *Bono* seemed to side-line *Kincses*, and continued the momentum of the chilling effect principle's application.

6.7 Grand Chamber in *Baka* finds termination of judge's mandate had chilling effect

The unanimous application of the chilling effect principle by the Grand Chamber in *Morice* was continued by the Grand Chamber again a year later, where the Court again unanimously applied the principle where a Hungarian judge's mandate had been terminated over critical public remarks on government legislation. The case was *Baka v. Hungary*,[292] and as mentioned earlier, the applicant judge made an application to the European Court, complaining that his mandate as President of the Supreme Court had been terminated as a result of the views he had expressed publicly in his capacity as President of the Supreme Court and the National Council of Justice, concerning legislative reforms affecting the judiciary.[293] The Second Section delivered its Chamber judgment in 2014,[294] and unanimously held that there had been a violation of Article 10. In 2016, the Grand Chamber its judgment,[295] and also held that there had been a violation of Article 10.

The first question for the Grand Chamber was whether there had been an "interference" with the applicant's freedom of expression. In this regard, the Court held that there was "prima facie evidence of a causal link between the applicant's exercise of his freedom of expression and the termination of his mandate."[296] The Court noted that "all of the proposals to terminate his mandate as President of the Supreme Court were made public and submitted to Parliament between 19 and 23 November 2011, shortly after his parliamentary speech of 3 November 2011, and were adopted within a strikingly short time."[297] The Court concluded that the "premature termination of the applicant's mandate as President of the Supreme Court constituted an interference with the exercise of his right to freedom of expression", citing *Wille*.[298]

The Court then examined whether the interference "pursued a legitimate aim." However, the Court rejected the government's argument that the applicant's office "was very much of an administrative and 'governmental' nature, which justified the termination of his mandate with a view to increasing the independence of the judiciary."[299] The Court considered that "this measure could not serve the aim of increasing the independence of the judiciary, since it was simultaneously, and for the reasons set out above, a consequence of the previous exercise of the right to freedom of expression by the applicant, who was the highest office-holder in the judiciary."[300] The Court noted that since there had been no "legitimate aim," it was usually not necessary to examine whether the interference was "necessary in a

[292] *Baka v. Hungary* (App. no. 20261/12) 27 May 2014; and *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber).
[293] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 123.
[294] *Baka v. Hungary* (App. no. 20261/12) 27 May 2014.
[295] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber).
[296] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 148.
[297] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 146.
[298] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 152.
[299] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 155.
[300] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 156.

democratic society."[301] However, the Court held that "in the particular circumstances of the present case," the Court considered it "important" to also examine this question.[302]

The Court noted the applicant had expressed his views on the legislative reforms at issue in his professional capacity as President of the Supreme Court and of the National Council of Justice, which had been "not only his right," but also his "duty as President of the National Council of Justice to express his opinion on legislative reforms affecting the judiciary," after having gathered and summarised the opinions of lower courts.[303] The Court fully reiterated the chilling effect principle, stating that the "fear of sanction" has a chilling effect on the exercise of freedom of expression, in particular on "other judges wishing to participate in the public debate on issues related to the administration of justice and the judiciary."[304] The Court emphasised that this chilling effect "works to the detriment of society as a whole."[305] The Court, in no uncertain terms, held that premature termination of the applicant's mandate "undoubtedly had a 'chilling effect' in that it must have discouraged not only him but also other judges and court presidents in future from participating in public debate on legislative reforms affecting the judiciary and more generally on issues concerning the independence of the judiciary."[306]

Baka was a powerful application of the chilling effect principle, and fully laid out how regard must be had to the chilling effect not only on the individual judge, but also the undoubted chilling effect on *other* judges and court presidents *in future* from participating in public debate. *Baka* also typified the approach of fully considering all limbs of Article 10, instead of stopping short after finding that an interference with freedom of expression did not pursue a legitimate aim; and went on to fully consider the question of whether the interference had been necessary in a democratic society. Combined with *Morice*, the Grand Chamber in *Baka* had sent a loud signal that the chilling effect principle was central to its case law regarding judicial and legal professional freedom of expression.

6.8 Post-*Morice* and *Baka* application of the chilling effect

6.8.1 Contempt of court proceedings against lawyer had a chilling effect

The effect of *Morice* and *Baka* has continued to 2018,[307] where the Court has unanimously found a violation of Article 10 where contempt of court proceedings had been initiated against a lawyer. Building upon the Grand Chamber's concern for protecting against the chilling effect, the Court seems to go out of its way to emphasise the chilling effect, as it had been argued the domestic courts had "ignored"[308] the chilling effect. The applicant in *Čeferin v. Slovenia*,[309] was a practising defence lawyer in Ljubljana, and the case arose in 2004 in the Ljubljana District Court. During the trial of the applicant's client, who had been charged with three murders, the applicant made a number of statements regarding a psychologist and psychiatrist who had been appointed as sworn-in experts, including that the psychiatrist "used

[301] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 157.
[302] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 157.
[303] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 168.
[304] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 167.
[305] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 167.
[306] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 173.
[307] Also note *Ottan v. France* (App. no. 41841/12) 19 April 2018 (Article 10 and disciplinary proceedings against lawyer for comments made to the media about a jury's composition); and *Hajibeyli and Aliyev v. Azerbaijan* (App. nos. 6477/08 and 10414/08) 19 April 2018 (Article 10 and refusal to admit applicant lawyers to the Bar), where the Court found violations of Article 10 without reference to the chilling effect principle.
[308] *Čeferin v. Slovenia* (App. no. 40975/08) 16 January 2018, para. 37.
[309] *Čeferin v. Slovenia* (App. no. 40975/08) 16 January 2018.

psychological methods which he absolutely did not understand," and "the psychologist [applied] outdated psychological methods from the stone age of psychology and unscientific psychodynamic concepts."[310] Further, during appeal proceedings in 2005, the applicant criticised the actions of the public prosecutor, accusing him of hiding lie-detector test results; criticised the work of the certified experts appointed in the case, whose opinion he claimed had been decisive for the conviction, and called the proceedings an ongoing judicial farce; and accused the experts of negligence, incompetence, of abusing or misusing methods of diagnosis, of uncritical behaviour and/or linked their alleged ignorance of the alternative facts to a possible narcissistic behaviour.[311]

In March 2004, the Ljubljana District Court fined the applicant 150,000 Slovenian tolars (625 euros) for contempt of court for his statements given at the trial hearing regarding the expert witnesses. The Court considered the applicant had expressed "insulting value judgments with regard to the expert witnesses' professional qualifications," and the Court held that the "professional competence of certified experts approved by the Ministry of Justice was not open to doubt."[312] In 2008, the Constitutional Court dismissed the applicant's constitutional complaint.[313] Further, in February 2005, the Ljubljana Higher Court issued a decision fining the applicant 400,000 tolars (1,670 euro) for contempt of court for his statements in the appeal proceedings regarding the expert witnesses, the State Prosecutor and the first-instance court.[314] In 2006, the Supreme Court dismissed the applicant's appeal. The Court referred to the applicant's statements and upheld the view that he "had expressed contempt for the court experts, not only regarding their professional abilities but also by attributing to them negative personal characteristics, thereby expressing insulting value judgments."[315]

The applicant made an application to the European Court, claiming both sets of contempt of court proceedings had violated his right to freedom of expression. The parties agreed that the fines imposed for contempt of court were an interference with the applicant's freedom of expression, and the main question for the European Court was thus whether the interference had been necessary in a democratic society.

The Court first noted that the applicant's remarks were made "in a forum where his client's rights were naturally to be vigorously defended," and "confined to the courtroom, as opposed to the criticism of a judge voiced in, for instance, the media."[316] The Court held that the domestic courts in both sets of contempt of court proceedings had "failed to put the applicant's remarks in the context and form in which they were expressed."[317] Second, the noted that the Ljubljana Higher Court and the Supreme Court did not "in any way" appear to have afforded increased protection to the impugned statements directed at the public prosecutor's actions, given that the limits of acceptable criticism may be wider for criticism of a public prosecutor acting in official capacity.[318] Further, the Court expressed "serious disquiet" that the Higher or Constitutional Court did not sufficiently assess the Ljubljana District Court's view that the professional competence of the certified experts could not be open to doubt because they were approved by the Ministry of Justice, with the European Court noting that such experts "should tolerate criticism of the performance of their

[310] *Čeferin v. Slovenia* (App. no. 40975/08) 16 January 2018, para. 8.
[311] *Čeferin v. Slovenia* (App. no. 40975/08) 16 January 2018, para. 52.
[312] *Čeferin v. Slovenia* (App. no. 40975/08) 16 January 2018, para. 12.
[313] *Čeferin v. Slovenia* (App. no. 40975/08) 16 January 2018, para. 16.
[314] *Čeferin v. Slovenia* (App. no. 40975/08) 16 January 2018, para. 19.
[315] *Čeferin v. Slovenia* (App. no. 40975/08) 16 January 2018, para. 22.
[316] *Čeferin v. Slovenia* (App. no. 40975/08) 16 January 2018, para. 54.
[317] *Čeferin v. Slovenia* (App. no. 40975/08) 16 January 2018, para. 55.
[318] *Čeferin v. Slovenia* (App. no. 40975/08) 16 January 2018, para. 56.

duties."[319] Third, the Court noted that the domestic decisions cited the expressions which the courts regarded as contemptuous, "without giving the context in which they had been made," seemed to rely "solely on the semantic meaning of the words and phrases the applicant used," and none of the courts "explored the relation of the impugned statements to the facts of the case."[320] Further, the Court stated that it was "striking" the applicant had "not been afforded any opportunity to explain or defend himself before the fines were imposed on him."[321] In light of these factors, the Court held that the domestic courts have not furnished "relevant and sufficient" reasons to justify the restriction of the applicant's freedom of expression.[322]

Finally, the Court held that the finding made it "unnecessary for the Court to pursue its examination of whether the amount of the fine in the applicant's case was proportionate to the aim pursued."[323] Notwithstanding this, the Court nonetheless noted that the fines "were not insignificant," and even if "they were to be considered moderate," this did not suffice to negate the "risk of a chilling effect on the exercise of freedom of expression," which was all the more unacceptable in the case of a lawyer who is required to ensure the effective defence of his client.[324] The Court therefore concluded that there had been a violation of Article 10.

The *Čeferin* judgment was notable for applying the chilling effect principle to the sanctions imposed, even though it had found that the domestic courts had failed to provide relevant and sufficient reasons to justify the restriction of the applicant's freedom of expression. The Court could simply have said nothing about the chilling effect of even a moderate fine. Instead, the Court decided to send an important message to the Slovenian domestic courts to apply the *Morice* principle that the relatively moderate nature of fines does not suffice to negate the risk of a chilling effect on the exercise of freedom of expression, and domestic authorities are required to display restraint in criminal contempt of court proceedings. The applicant had specifically argued the domestic courts had ignored the chilling effect principle,[325] and the European Court was responding to this submission in order to signal the importance of this principle under Article 10 in order to guarantee lawyer's freedom of expression, especially when related to the effective defence of their client.

6.9 Conclusion

The findings in this chapter on the Court's consideration of judicial and legal professional freedom of expression, and application of the chilling effect, reveal that it mainly concerned the necessary in a democratic society limb of Article 10. The Court has also on a handful of occasions applied the principle when the Court examines whether there has been an interference with freedom of expression, most notably in *Steur*: although no sanction was imposed on the applicant (not even the lightest sanction, but a mere admonition),[326] there still was an interference with freedom of expression due to the chilling effect of feeling restricted in the choice of factual and legal arguments due to fear of *ex post facto* review in the future.[327]

The government measures at issue included disciplinary proceedings and criminal proceedings against lawyers, and dismissals, non-reappointment, or mandates terminated of

[319] *Čeferin v. Slovenia* (App. no. 40975/08) 16 January 2018, para. 58.
[320] *Čeferin v. Slovenia* (App. no. 40975/08) 16 January 2018, para. 62.
[321] *Čeferin v. Slovenia* (App. no. 40975/08) 16 January 2018, para. 64.
[322] *Čeferin v. Slovenia* (App. no. 40975/08) 16 January 2018, para. 66.
[323] *Čeferin v. Slovenia* (App. no. 40975/08) 16 January 2018, para. 67.
[324] *Čeferin v. Slovenia* (App. no. 40975/08) 16 January 2018, para. 67.
[325] *Čeferin v. Slovenia* (App. no. 40975/08) 16 January 2018, para. 37.
[326] *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003, para. 29.
[327] *Steur v. the Netherlands* (App. no. 39657/98) 28 October 2003, para. 29.

judges. There were two features of the meaning attached by the Court to the chilling effect in this context. The first related to judicial freedom of expression, and chilling effect arises where due to the fear of sanction, judges are discouraged from participating in public debate, or making statements concerning a matter of public interest in the future.[328] The Court anchored the detriment caused by this potential chilling effect to the detriment suffered by society as a whole.[329] The second meaning attached by the Court to the chilling effect relates to a lawyer's freedom of expression, where the Court seeks to protect defence counsel in particular from being influenced by the potential chilling effect of even a relatively light criminal penalty or an obligation to pay compensation for harm suffered or costs incurred.[330] This concern has led the Grand Chamber in *Kyprianou* and *Morice* to also fashion a test that it is only in "exceptional circumstances" that a restriction, even by way of a lenient criminal penalty, of defence counsels' freedom of expression can be accepted as necessary in a democratic society.[331] This was because the Court was concerned with the chilling effect not only on the particular lawyer concerned, but also on the profession of lawyers as a whole.[332]

The Court's concern for protecting a lawyer's freedom of expression from the chilling effect has also allowed the Court to conduct a separate proportionality assessment of sanctions imposed, even where the underlying expression at issue may objectionable. Such an approach of divorcing the sanction from the nature of the expression, had led the Court to find that a lawyer's expression accusing investigating judges of being complicit in torture was objectionable, but nevertheless, the Court considered that it should separately ascertain whether the disciplinary sanction imposed was proportionate.[333] The Court applied its chilling effect principle, and found that imposing a disciplinary sanction excessively undermined the lawyer's freedom of expression.[334] This of course mirrors the approach first adopted in *Cumpănă and Mazăre*, where the Court has found that domestic courts' findings that a newspaper was defamatory "met a 'pressing social need'" under Article 10,[335] the Court then went on to examine "proportionality of the sanction," and under this heading, introduced the concept of the chilling effect into the equation.

A distinct finding from this chapter is the role of the Grand Chamber in actually reaffirming the chilling effect principle after certain Sections or judges of the Court choose to omit application of the principle. This contrasts to the role the Grand Chamber adopted in the Court's case law on the prosecution of journalists for ordinary criminal law offences (Chapter 5), where the Grand Chamber could be seen to actually temper the development and application of the chilling effect principle, such as in *Stoll*, *Pentikäinen*, and *Bédat*. The Grand Chamber's judgments discussed in this chapter - *Kyprianou*, *Morice*, and *Baka* - in fact reasserted the centrality of the chilling effect principle. This was most evident in *Kyprianou*, where the Chamber judgment had remained silent on Article 10, and the chilling effect of a prison sentence imposed on a lawyer, with the Grand Chamber instead finding a unanimous violation of Article 10, and unanimously applying the chilling effect principle.

Related to the foregoing point is how certain Sections or judges of the Court reject application of the chilling effect principle. The greatest challenge to the chilling effect principle was mounted in the Fifth Section's judgment in *Morice*, where the majority sought to invoke the margin of appreciation principle. Not only this, but the majority omitted any

[328] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 99.
[329] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 99.
[330] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 54.
[331] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 174.
[332] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 175.
[333] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 51.
[334] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 56.
[335] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 110.

mention of the chilling effect, even though the applicant made submissions on the point, the dissenting opinion addressed the issue, and indeed, the government itself responded to these submissions.[336] This was the approach of the majority in *Lindon*, discussed in Chapter 4, of simply ignoring the chilling effect principle, and instead invoking the margin of appreciation. But thankfully, the Grand Chamber in *Morice* did not take the bait, and instead reaffirmed the chilling effect principle, and rejected the Fifth Section's approach, with not one mention of the margin of appreciation. Instead, the Grand Chamber in *Morice* laid down two tests: (a) the dominant position of the State institutions requires the authorities to show restraint in resorting to criminal proceedings,[337] and (b) it is only in "exceptional cases" that restrictions (even a lenient criminal penalty) of defence counsel's freedom of expression can be accepted as necessary in a democratic society.[338]

Finally, the analysis in this chapter reveals the particular role of the individual views of judges, and the composition of various Sections of the Court, explaining the non-application of the chilling effect principle. This revelation was most evident in the Second Section's judgment in *Kyprianou*, where the Court refused to consider whether a prison sentence had a chilling effect. Research revealed that the judges in *Kyprianou* had been the same judges in the Second Section's judgment in *Cumpănă and Mazăre*, which had similarly refused to hold that prison sentences imposed on journalists had a chilling effect. Similarly, research on the composition of the First Section revealed that the First Section's majority in *Schmidt* which chose not to apply the chilling effect was the same group of judges in the First Section's minority in *Kudeshkina* who would not have applied the apply chilling effect principle. This seems to suggest the need for judges to give reasons for departing from prior case law, instead of simple statements such as, "I am afraid that the "chilling effect" of this judgment could be to create an impression that the need to protect the authority of the judiciary is much less important than the need to protect civil servants' right to freedom of expression;"[339] rather than explaining why the prior case law on the chilling effect was not applicable.

[336] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 96.
[337] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 176.
[338] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 135.
[339] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009 (Dissenting opinion of Judge Kovler joined by Judge Steiner, para. 12).

Chapter 7 - Protecting Whistleblowers, Employees and Unions from the Chilling Effect

7.1 Introduction

As noted in Chapter 2, the Grand Chamber has delivered three judgments relating to employees, whistleblowers, and trade union members' freedom of expression (*Guja v. Moldova*,[1] *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*,[2] and *Palomo Sánchez and Others v. Spain*),[3] where the chilling effect principle was considered, or applied. Research also revealed that the Court has delivered over 20 judgments and decisions where it has considered, or applied, the chilling effect reasoning relating to employees, whistleblowers, trade unions, and trade union members.[4] The purpose of this chapter is to

[1] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber) (Article 10 and a whistleblower's dismissal). See also, Recommendation CM/Rec(2014)7 of the Committee of Ministers to member States on the protection of whistleblowers, 30 April 2014. For a discussion of the Court's case law in the right to freedom of expression in the workplace, see Dirk Voorhoof and Patrick Humblet, "The Right to Freedom of Expression in the Workplace under Article 10 ECHR," in Filip Dorssemont, Klaus Lörcher, and Isabelle Schömann (eds.), *The European Convention on Human Rights and the Employment Relation* (Hart Publishing, 2013). For a discussion of the protection of whistleblowers in the Court's case law, see Dirk Voorhoof, "Freedom of Journalistic Newsgathering, Access to Information and Protection of Whistle-blowers under Article 10 ECHR and the standards of the Council of Europe," in András Koltay (ed.), *Comparative Perspectives on the Fundamental Freedom of Expression* (Wolters Kluwer, 2015), pp. 297-330. See also David Kaye, United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Report to the General Assembly on the protection of sources and whistleblowers, A/70/361, 8 September 2015. For recent developments in the European Union, see Vigjilenca Abazi and Flutura Kusari, "Comparing the Proposed EU Directive on Protection of Whistleblowers with the Principles of the European Court of Human Rights," *Strasbourg Observers*, 22 October 2018.

[2] *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber). See Stijn Smet, "Medžlis Islamske Zajednice Brčko v Bosnia and Herzegovina: A Simple Speech Case Made Unbelievably Complex?" *Strasbourg Observers*, 9 August 2017.

[3] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber) (Article 10 and employees' dismissal for trade union expression).

[4] *Ezelin v. France* (App. no. 11800/85) 26 April 1991 (Article 11 and disciplinary sanction imposed on lawyer); *Karaçay v. Turkey* (App. no. 6615/03) 27 March 2007 (Article 11 and disciplinary proceedings against trade union member); *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber) (Article 10 and a civil servant's dismissal); *Marchenko v. Ukraine* (App. no. 4063/04) 19 February 2009; *Wojtas-Kaleta v. Poland* (App. no. 20436/02) 16 July 2009 (Article 10 and reprimand imposed on journalist); *Aguilera Jimenez and Others v. Spain* (App. nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06 and 28964/06) 8 December 2009 (Article 10 and employees' dismissal for trade union expression); *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011 (Article 10 and employee's dismissal); *Palomo Sánchez v. Spain and Others* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber) (Article 10 and employees' dismissal for trade union expression); *Şişman and Others v. Turkey* (App. no. 1305/05) 27 September 2011 (Article 11 and disciplinary proceedings against union members); *Vellutini and Michel v. France* (App. No. 32820/09) 6 October 2011 (Article 11 and defamation proceedings against trade union members); *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012 (Article 11, in light of Article 10, and government minister's statements concerning police union); *Szima v. Hungary* (App. no. 29723/11) 9 October 2012 (Article 10 and trade union member's conviction for insubordination); *Bucur and Toma v. Romania* (App. no. 40238/02) 8 January 2013 (Article 10 and intelligence service whistleblower's two-year prison sentence); *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014 (Article 10 and journalist's dismissal for breaching confidentiality clause); *Rubins v. Latvia* (App. no. 79040) 13 January 2015 (Article 10 and dismissal of university professor); *Aurelian Oprea v. Romania* (App. no. 12138/08) 19 January 2016 (Article 10 and professor liable for defamation); *Marunić v. Croatia* (App. no. 51706/11) 28 March 2017 (Article 10 and director dismissed for comments in the media); *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber); *Tek Gıda İş Sendikası v. Turkey* (App. no. 35009/05) 4 April 2017 (Article 11 and company's dismissal of all trade union members); *Guja v. the Republic of Moldova (no. 2)* (App. no. 1085/10) 27 February 2018 (Article 10 and whistleblower's dismissal despite earlier Court judgment); and *Kula v. Turkey* (App. no. 20233/06) 19 June 2018 (Article 10 and professor's reprimand for taking part in television programme).

critically examine the Court's consideration of the chilling effect principle in its case law concerning freedom of expression of employees, whistleblowers, trade unions, and trade union members.

The Court has held that freedom of expression applies to the workplace,[5] and is applicably not only in relations between employers and employees where they are governed by public law, but also applies where "such relations are governed by private law."[6] Thus, the case law in this chapter concerns not only civil servants, but also employees at State-owned companies and public broadcasters, and indeed, private companies. Importantly, the Court has also held that Article 10 includes protection of whistleblowers, in that civil servants, and other employees generally, have a right "to report illegal conduct and wrongdoing at their place of work,"[7] and there is a particular focus on the application of the chilling effect in the Court's case law on whistleblowers in this chapter.

A distinct feature of the Court's case law on freedom of expression relating to the workplace is the particular relevance of not only Article 10 of the Convention, but also Article 11, which guarantees the right to freedom of assembly and association.[8] This is because employees engaging in freedom of expression may be doing so in their capacity not only as employees, but also in their capacity as members of a trade union. In this regard, the Court has held on numerous occasions that the right to freedom of expression under Article 10 is "one of the principal means of securing effective enjoyment of the right to freedom of assembly and association as enshrined in Article 11,"[9] and in this respect, a number of judgments are discussed where Article 10 is interpreted in the light of Article 11, or vice versa, and particularly where trade union freedom is concerned. Further, the Court has also held that where an applicant is an employee *and* a trade unionist, the "combined professional and trade-union roles must be taken into consideration for the purposes of examining whether the interference complained of was necessary in a democratic society."[10]

Similar to previous chapters, it is proposed to examine a number of questions in this chapter concerning how the Court considers and applies chilling effect reasoning when examining restrictions on freedom of expression: what does the Court mean when it states that there is a chilling effect on freedom of expression; does the Court apply chilling effect reasoning when considering (a) whether an applicant may claim to be a victim under Article 34; (b) whether there has been an "interference" with freedom of expression under Article 10; (c) whether an interference has been "prescribed by law," or, (d) whether an interference is "necessary in a democratic society." The remaining questions are: what is the consequence, if any, of the Court using chilling effect reasoning in its case law; is there much agreement, or disagreement, within the Court on the application of chilling effect reasoning; does the Court explain the application, or non-application, of chilling effect reasoning; and how does the Court use prior case law when considering and applying the chilling effect. Finally, as with the other chapters, it is not proposed to offer a general discussion of the case law in this area

[5] *Aurelian Oprea v. Romania* (App. no. 12138/08) 19 January 2016, para. 59.
[6] *Fuentes Bobo v. Spain* (App. no. 39293/98) 29 February 2000, para. 38.
[7] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 97.
[8] European Convention, Article 11 ("1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.").
[9] *Nilsen and Johnsen v. Norway* (App. no. 23118/93) 25 November 1999 (Grand Chamber), para. 44. See also, *Vellutini and Michel v. France* (App. no. 32820/09) 6 October 2011.
[10] *Wojtas-Kaleta v. Poland* (App. no. 20346/02) 16 July 2009, para. 45.

of Article 10 case law, but rather to focus on understanding how the Court considers and applies the chilling effect principle.

7.2 The Court's pre-*Guja* application of the chilling effect

7.2.1 Dismissal for anti-constitutional views in *Kosiek* and *Vogt*

The seminal judgment on protection of whistleblowers and employee freedom of expression was delivered in 2008 in the Grand Chamber's unanimous *Guja v. Moldova* judgment.[11] But before this case, a number of earlier judgments applied, or considered, chilling effect reasoning where there had been restrictions on employees' and trade union members' freedom of expression. The first judgment to be discussed is the Court's 1986 judgment in *Kosiek v. Germany*.[12] As discussed in Chapter 2, the European Commission explicitly applied the chilling effect principle in finding that there had been an interference with freedom of expression, and indeed relied upon and cited U.S. Supreme Court case law on the chilling effect.[1314]

The case was referred to the European Court, and the first issue for the Court was whether there had been an interference with the applicant's freedom of expression. However, in complete contrast to the Commission, the Court held that there had been *no* interference with freedom of expression.[15] The first question the Court asked itself was whether the applicant's dismissal amounted to an interference with the exercise of freedom of expression, or whether the "measure lay within the sphere of the right of access to the civil service, a right that is not secured in the Convention."[16] The Court noted that the decision to dismiss the applicant was "based on the political stances the applicant had adopted."[17] The Court also noted that the Ministry came to the conclusion that Kosiek did not meet one of the conditions (consistently uphold the free democratic system) of eligibility laid down in the Act for the post in question, as a result of which it decided not to give him tenure and so dismissed him from his post as a probationary civil servant.[18] Crucially, the Court held that the requirement applied to *recruitment* to the civil service, a matter that had been deliberately omitted from the Convention.[19]

It followed, according to the Court, that "access to the civil service" lay at the heart of the issue submitted to the Court, and in refusing the applicant such access the responsible Ministry took account of his opinions and activities "merely in order to determine whether he had proved himself during his probationary period and whether he possessed one of the necessary personal qualifications for the post in question."[20] Thus, there had been no interference with the exercise of freedom of expression under Article 10.

The Court's focus in *Kosiek* on a right of access to the civil service was quite curious, and may be explained by the Court's reluctance to even suggest that it was recognising a right

[11] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 97.
[12] *Kosiek v. Germany* (App. no. 9704/82) 28 August 1986.
[13] See *X. v. Federal Republic of Germany* (App. no. 9704/82) 16 December 1982 (Commission decision), p. 249, relying upon *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967), p. 604.
[14] *X. v. Federal Republic of Germany* (App. no. 9704/82) 16 December 1982 (Commission decision), p. 244.
[15] *Kosiek v. Germany* (App. no. 9704/82) 28 August 1986.
[16] *Kosiek v. Germany* (App. no. 9704/82) 28 August 1986, para. 36.
[17] *Kosiek v. Germany* (App. no. 9704/82) 28 August 1986, para. 37.
[18] *Kosiek v. Germany* (App. no. 9704/82) 28 August 1986, para. 38.
[19] *Kosiek v. Germany* (App. no. 9704/82) 28 August 1986, para. 38.
[20] *Kosiek v. Germany* (App. no. 9704/82) 28 August 1986, para. 39.

included in the International Covenant on Civil and Political Rights,[21] but deliberately omitted from the European Convention. Even the Vice-President of the Court, Judge Cremona, in his concurring opinion, said it was "clear" the applicant was dismissed due to his political opinion, and the majority's argument that the German authorities merely took account of the applicant's opinions was an "understatement," and was instead the "essential basis" of the dismissal.[22] The case fell "squarely" under Article 10.[23] Whatever the reason for the Court's approach, it also meant that the Court chose not to apply the Commission's chilling effect principle in finding an interference with freedom of expression.

In 1992, the Court again considered a dismissal for anti-constitutional views in the case of *Vogt v. Germany*,[24] where the applicant was a secondary-school teacher at a State secondary school in Jever, Lower Saxony. The applicant had previously studied literature and languages, and had become a member of the German Communist Party (DKP). Following university, she sat the State examinations to become a teacher, and obtained a post from August 1977 as a teacher with the status of probationary civil servant, in a State secondary school in Jever. In 1979, before the end of her probationary period, she was appointed a permanent civil servant.[25] The applicant taught German and French, and in 1982, an assessment report described her capabilities and work as "entirely satisfactory," and she was "held in high regard by her pupils and their parents and by her colleagues."[26]

However, in 1982, three years after she had become permanent, the Weser-Ems Regional Council initiated disciplinary proceedings against the applicant on the ground that she had failed to comply with the "duty of loyalty to the Constitution" as a civil servant under the Lower Saxony Civil Service Act.[27] The Council's indictment made reference to various political activities the applicant had engaged in on behalf of the DKP since 1980, and had stood as a DKP candidate in 1982 elections.[28] The Disciplinary Division of the Oldenburg Administrative Court held that the applicant had failed to comply with her duty of political loyalty and ordered her dismissal as a disciplinary measure.[29] The applicant's dismissal was ultimately upheld by the Federal Constitutional Court. The Court held that the applicant had breached her duties as a civil servant by her membership of the DKP and her active role within the party,[30] and the disciplinary tribunals had been entitled to find that the DKP's aims were "anti-constitutional."[31]

The applicant made an application to the European Commission, claiming her dismissal from the civil service on account of her political activities had violated her right to freedom of expression under Article 10. In 1993, the Commission delivered its Report, and held that there had been a violation of Article 10.[32] The first question for the Commission was whether there had been an interference with freedom of expression. The Commission noted that the applicant, at the time of her dismissal, had been a "permanent civil servant with

[21] International Covenant on Civil and Political Rights, Article 25 (c) ("Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: To have access, on general terms of equality, to public service in his country.")
[22] *Kosiek v. Germany* (App. no. 9704/82) 28 August 1986 (Concurring opinion of Judge Cremona).
[23] *Kosiek v. Germany* (App. no. 9704/82) 28 August 1986 (Concurring opinion of Judge Cremona).
[24] *Vogt v. Germany* (App. no. 17851/91) 26 September 1995 (Grand Chamber).
[25] *Vogt v. Germany* (App. no. 17851/91) 26 September 1995 (Grand Chamber), para. 9.
[26] *Vogt v. Germany* (App. no. 17851/91) 26 September 1995 (Grand Chamber), para. 10.
[27] *Vogt v. Germany* (App. no. 17851/91) 26 September 1995 (Grand Chamber), para. 11.
[28] *Vogt v. Germany* (App. no. 17851/91) 26 September 1995 (Grand Chamber), para. 11.
[29] *Vogt v. Germany* (App. no. 17851/91) 26 September 1995 (Grand Chamber), para. 20.
[30] *Vogt v. Germany* (App. no. 17851/91) 26 September 1995 (Grand Chamber), para. 23.
[31] *Vogt v. Germany* (App. no. 17851/91) 26 September 1995 (Grand Chamber), para. 23.
[32] *Vogt v. Germany* (App. no. 17851/91) 30 November 1993 (Commission Report). See also *Vogt v. Germany* (App. no. 17851/91) 19 October 1992 (Commission Decision).

tenure for life."[33] On this basis, the Commission distinguished the Court's *Kosiek* judgment, as it concerned dismissal of *probationary* civil servants, and as such "access to the civil service" had been "at the heart of the issue."[34] As the applicant in *Vogt* had been dismissed on "account of her political activities in the DKP," there had been an interference with her freedom of expression.[35] The Commission ultimately concluded that the interference had not been necessary in a democratic society. The Commission applied chilling effect reasoning, and held that an "exaggerated test of conformity with the civil servant's duty of allegiance to the democratic order may *discourage* the free expression of diverse opinions, which is expressly guaranteed by the Convention."[36] In this regard, the Commission noted that the applicant (a) had not been dismissed for having "attempted to indoctrinate her pupils," or expressing her opinions in the school;[37] (b) had never made a public statement "which showed clearly that she was an enemy of the democratic constitutional order,"[38] and (c) the "general political situation in Europe had completely change and the threat of a communist overthrow had considerably diminished."[39] Thus, the Commission concluded that the operation of "loyalty control" did not correspond to a pressing social need, and the applicant's dismissal, was not necessary in a democratic society.[40]

The case was referred to the European Court by the Commission, and in 1995, the Court delivered its judgment.[41] The first question for the Court, similar to the Commission, was whether there had been an interference with freedom of expression. The Court first set out a general principle that as a "general rule the guarantees in the Convention extend to civil servants," and the status of permanent civil servant that the applicant had obtained when she was appointed a secondary-school teacher "did not deprive her of the protection of Article 10."[42] Similar to the Commission, the Court held that *Kosiek* was distinguishable, as it had concerned a refusal to grant access to the civil service, and "access to the civil service had therefore been at the heart of the issue."[43] The Court in *Vogt* noted that the applicant had been a "permanent civil servant," and had been dismissed for "allegedly having failed to comply with the duty owed by every civil servant to uphold the free democratic system" due to her activities on behalf of the DKP and by her refusal to dissociate herself from that party expressed views inimical to the democratic system.[44] Thus, there had been an interference with her freedom of expression under Article 10. The main question for the Court was whether the interference had been necessary in a democratic society.

The Court held that although a State may impose on civil servants, on account of their status, a "duty of discretion," they still "qualify for the protection of Article 10."[45] The Court also noted that when a civil servant's freedom of expression is in issue, the "duties and responsibilities" referred to in paragraph 2 of Article 10 "assume a special significance," and this justifies "leaving to the national authorities a certain margin of appreciation."[46] Third, the Court noted the dismissal as a secondary-school teacher was a "very severe measure," as it

[33] *Vogt v. Germany* (App. no. 17851/91) 30 November 1993 (Commission Report), para. 49.
[34] *Vogt v. Germany* (App. no. 17851/91) 30 November 1993 (Commission Report), para. 49.
[35] *Vogt v. Germany* (App. no. 17851/91) 30 November 1993 (Commission Report), para. 49.
[36] *Vogt v. Germany* (App. no. 17851/91) 30 November 1993 (Commission Report), para. 72.
[37] *Vogt v. Germany* (App. no. 17851/91) 30 November 1993 (Commission Report), para. 67.
[38] *Vogt v. Germany* (App. no. 17851/91) 30 November 1993 (Commission Report), para. 77.
[39] *Vogt v. Germany* (App. no. 17851/91) 30 November 1993 (Commission Report), para. 81.
[40] *Vogt v. Germany* (App. no. 17851/91) 30 November 1993 (Commission Report), para. 81.
[41] *Vogt v. Germany* (App. no. 17851/91) 26 September 1995 (Grand Chamber).
[42] *Vogt v. Germany* (App. no. 17851/91) 26 September 1995 (Grand Chamber), para. 43.
[43] *Vogt v. Germany* (App. no. 17851/91) 26 September 1995 (Grand Chamber), para. 44.
[44] *Vogt v. Germany* (App. no. 17851/91) 26 September 1995 (Grand Chamber), para. 44.
[45] *Vogt v. Germany* (App. no. 17851/91) 26 September 1995 (Grand Chamber), para. 53.
[46] *Vogt v. Germany* (App. no. 17851/91) 26 September 1995 (Grand Chamber), para. 53.

affected their reputation, they "lose their livelihood," and it may be "nigh impossible" to get a similar post.[47]

Applying these principles to the applicant's case, the Court noted (a) the domestic courts recognised that the applicant had always carried out her duties in a way that was beyond reproach; (b) there was "no evidence" that the applicant herself, "even outside her work at school actually made anti-constitutional statements or personally adopted an anti-constitutional stance;" (c) and there was no instance where the applicant had "actually made specific pronouncements belying her emphatic assertion that she upheld the values of the German constitutional order," and (d) the DKP had not been banned, and the applicant's activities on its behalf were entirely lawful.[48] In light of these considerations, the Court held that it had not been established convincingly that it was necessary in a democratic society to dismiss the applicant, in violation of Article 10.

While the Commission in *Vogt* applied chilling effect reasoning in finding that duty of allegiance tests may *discourage* the free expression of diverse opinions, the Court in *Vogt* nowhere applied this principle. Further, when the Court examined the sanction at issue, namely dismissal, it focused exclusively on the impact for the individual applicant, and did not take into account any broader chilling effect on other civil servants' freedom of expression or political activities. Thus, the Court's first two judgments on civil servant freedom of expression in *Kosiek* and *Vogt* chose not to apply chilling effect reasoning, in contrast to the Commission's application of chilling effect reasoning, including the citation of U.S. Supreme Court case law on the point. The Court nowhere explained why it chose not to follow the Commission's chilling effect reasoning in these judgments. But as will be seen below, the chilling effect principle would thereafter become a central pillar when examining restrictions on a civil servant's freedom of expression.

7.2.2 Disciplinary proceedings for taking part in assembly

While chilling effect reasoning was not applied by the Court in *Kosiek* and *Vogt*, the first judgment where chilling effect reasoning was applied involved a lawyer who was a trade union representative. The applicant in *Ezelin v. France*,[49] was a lawyer and Vice-Chairman of the Trade Union of the Guadeloupe Bar. Guadeloupe is a French region in the Leeward Islands of the Caribbean, and the case arose in February 1983, when the applicant took part in a demonstration organised by a number of Guadeloupe independence movements and trade unions to "protest against two court decisions whereby prison sentences and fines were imposed on three militants for criminal damage to public buildings."[50] The applicant carried a placard which stated "Trade Union of the Guadeloupe Bar against the Security and Freedom Act."[51]

The police report of the demonstration stated that during the demonstration, "offensive and insulting graffiti [was painted] in green, red and black on the walls of the administrative buildings."[52] A judicial investigation was initiated into the "commission by a person or persons unknown of offences of criminal damage to public buildings and insulting the judiciary."[53]

[47] *Vogt v. Germany* (App. no. 17851/91) 26 September 1995 (Grand Chamber), para. 60.
[48] *Vogt v. Germany* (App. no. 17851/91) 26 September 1995 (Grand Chamber), para. 60.
[49] *Ezelin v. France* (App. no. 11800/85) 26 April 1991.
[50] *Ezelin v. France* (App. no. 11800/85) 26 April 1991, para. 10.
[51] *Ezelin v. France* (App. no. 11800/85) 26 April 1991, para. 14.
[52] *Ezelin v. France* (App. no. 11800/85) 26 April 1991, para. 11.
[53] *Ezelin v. France* (App. no. 11800/85) 26 April 1991, para. 12.

Notably, the Principal Public Prosecutor wrote to the Chairman of the Guadeloupe Bar stating that it appeared from the police report that "Mr Ezelin, of the Guadeloupe Bar, took part in a public demonstration against the judiciary in circumstances likely to entail criminal liability under Article 226 of the Criminal Code."[54] The Bar Chairman conducted an investigation, but concluded that "no act, gesture or words insulting to the judiciary [could] be attributed to" the applicant, and it did not seem the applicant could have "incurred any liability in exercising his right to join a demonstration which had not been prohibited, carrying a placard with the words 'Trade Union of the Guadeloupe Bar against the Security and Freedom Act'."[55]

Subsequently, the Principal Public Prosecutor sent the Chairman of the Bar a complaint against the applicant. The Bar Council held a disciplinary hearing, and in its decision, held that the applicant had not committed any breach of disciplinary regulations.[56] However, the Basse-Terre Court of Appeal reversed the Bar Council's decision and imposed the disciplinary penalty of a "reprimand" on the applicant. The judgment was upheld on appeal by France's Court of Cassation, finding that the applicant had been at a demonstration where "insults had been uttered and offensive graffiti daubed on all the walls of the Law Courts, directed against the judiciary as a whole."[57] The Court of Cassation held that the Court of Appeal was entitled to infer from (a) the applicant's behaviour of "not at any time express[ing] his disapproval of these excesses, or leav[ing] the procession in order to dissociate himself from these criminal acts" was a breach of discretion amounting to a disciplinary offence.[58]

The applicant made an application to the European Commission, claiming that the disciplinary sanction imposed on him violated his right to freedom of expression and freedom of assembly and association under Article 10 and Article 11. In particular, the applicant argued the sanction imposed "resulted in his being prevented from expressing his ideas and his trade-union demands."[59] In 1989, the Commission issued its Report, finding that there had been a violation of Article 11, without applying chilling effect reasoning, and finding that no separate issue arose under Article 10.[60] The application was then referred to the Court by the Commission, and in 1991 the Court delivered its judgment.[61]

The first question for the Court was whether to consider the application under Article 10 or 11. While the Court held that the main question at issue concerned Article 11, the Court also held that "notwithstanding its autonomous role and particular sphere of application," Article 11 must, in the present case, also be considered in the light of Article 10.[62] This was because the "protection of personal opinions, secured by Article 10, is one of the objectives of freedom of peaceful assembly."[63] The Court then turned to whether there had been an interference with the applicant's freedom of peaceful assembly. The Court noted that prior notice had been given of the demonstration, it was not prohibited, and in joining it, the applicant availed himself of his freedom of peaceful assembly.[64] Further, neither the police

[54] *Ezelin v. France* (App. no. 11800/85) 26 April 1991, para. 13.
[55] *Ezelin v. France* (App. no. 11800/85) 26 April 1991, para. 14.
[56] *Ezelin v. France* (App. no. 11800/85) 26 April 1991, para. 18.
[57] *Ezelin v. France* (App. no. 11800/85) 26 April 1991, para. 21.
[58] *Ezelin v. France* (App. no. 11800/85) 26 April 1991, para. 21.
[59] *Ezelin v. France* (App. no. 11800/85) 26 April 1991, para. 46.
[60] See *Ezelin v. France* (App. no. 11800/85) 1 March 189 (Commission Decision); *Ezelin v. France* (App. no. 11800/85) 14 December 1989 (Commission Report).
[61] *Ezelin v. France* (App. no. 11800/85) 26 April 1991.
[62] *Ezelin v. France* (App. no. 11800/85) 26 April 1991, para. 37.
[63] *Ezelin v. France* (App. no. 11800/85) 26 April 1991, para. 37.
[64] *Ezelin v. France* (App. no. 11800/85) 26 April 1991, para. 41.

report, nor any other evidence showed the applicant made threats or daubed graffiti.[65] Therefore, the Court held that there had been an interference with freedom of assembly.

The main question for the Court had been whether the interference had been necessary in a democratic society. The Court first examined the disciplinary sanction "in the light of the case as a whole," and having regard to the "special importance of freedom of peaceful assembly and freedom of expression, which are closely linked in this instance."[66] Second, the Court applied chilling effect reasoning at paragraph 52, holding that the proportionality principle "demands that a balance be struck between the requirements of the purposes listed in Article 11 § 2 and those of the free expression of opinions by word, gesture or even silence by persons assembled on the streets or in other public places."[67] This was because the "pursuit of a just balance must not result in avocats *being discouraged, for fear of disciplinary sanctions*, from making clear their beliefs on such occasions."[68]

The Court applied these principles to the disciplinary sanction, and noted that the sanction "was at the lower end of the scale of disciplinary penalties," and "had mainly moral force, since it did not entail any ban, even a temporary one, on practising the profession or on sitting as a member of the Bar Council."[69] However, the Court held that "freedom to take part in a peaceful assembly - in this instance a demonstration that had not been prohibited - is of such importance that it cannot be restricted in any way, even for an avocat, so long as the person concerned does not himself commit any reprehensible act on such an occasion."[70] The Court concluded that the sanction, "however minimal," was not necessary in a democratic society.[71]

While the Court in *Ezelin* did not use the term chilling effect, the judgment was an early application of chilling effect reasoning by the Court, laying down the principle that individuals should not be subject to a chilling effect in the form of being discouraged from expressing their beliefs in assemblies for fear of disciplinary sanctions. This fear of sanctions mirrors the European Commission's decision applying the chilling effect of the fear of prosecutions, such as in *Dudgeon* and *Norris*,[72] and also mirrored *Lingens*' paragraph 44 that a criminal sanction would be likely to discourage a journalist from making public-interest criticisms of a similar kind again in future.[73] Indeed, *Ezelin*'s paragraph 52 would be later applied by the Court in finding that even minimal sanctions may be such as to dissuade trade union members from legitimately defending the interests of the trade union's members.[74] Further, the Court's concern for protecting an individual from a chilling effect on taking part in a peaceful assembly, meant the Court used quite forceful words, holding that this freedom "cannot be restricted in any way," even for a lawyer, so long as the person concerned does not himself commit any reprehensible act on such an occasion.

The final point concerning *Ezelin* is how little the Court had to say about the trade union aspect to the case, focusing instead on the chilling effect on individuals seeking to engage in free expression during assemblies. But it will be seen how the *Ezelin* judgment

[65] *Ezelin v. France* (App. no. 11800/85) 26 April 1991, para. 41.
[66] *Ezelin v. France* (App. no. 11800/85) 26 April 1991, para. 51.
[67] *Ezelin v. France* (App. no. 11800/85) 26 April 1991, para. 52.
[68] *Ezelin v. France* (App. no. 11800/85) 26 April 1991, para. 52 (emphasis added).
[69] *Ezelin v. France* (App. no. 11800/85) 26 April 1991, para. 53.
[70] *Ezelin v. France* (App. no. 11800/85) 26 April 1991, para. 53.
[71] *Ezelin v. France* (App. no. 11800/85) 26 April 1991, para. 53.
[72] *X. v. the United Kingdom* (App. no. 7525/76) 13 March 1980 (Commission Report), para. 94, *Norris v. Ireland* (App. no. 10581/83) 12 March 1987 (Commission Report), para. 55.
[73] *Lingens v. Austria* (App. no. 9815/82) 8 July 1986, para. 44.
[74] *Karaçay v. Turkey* (App. no. 6615/03) 27 March 2007, para. 37.

would be central for the Court when considering interferences with trade union members' freedom of expression in later case law.[75]

7.2.3 No mention of chilling effect of employee's dismissals

Kosiek and *Vogt* had of course concerned civil servants, and in 2000, the Court extended Article 10's protection of freedom of expression to employees of private undertakings, and considered whether an employee's dismissal for remarks made in the media violated Article 10. The case was *Fuentes Bobo v. Spain*,[76] where the applicant was a programme producer with the Spanish television company TVE.[77] The case arose in 1993 when several thousand employees of TVE protested against a plan to reduce public television jobs. Following the demonstration, the applicant and a colleague co-authored an article in the newspaper *Diario 16* criticising certain actions of management. TVE instituted disciplinary proceedings against the applicant, and he was suspended without pay for 60 days. The applicant appealed the decisions, and in late November 1993, the applicant took part in two radio programmes on a private radio station, where he made a number of comments about the sanctions imposed on him and about TVE managers, including calling them "leeches,"[78] and stating they "shit on the staff."[79] Following these broadcasts, the applicant was subject to new disciplinary proceedings, and he was dismissed. This dismissal was ultimately upheld as lawful by the Spanish Constitutional Court, finding that the applicant used "clearly offensive" and insulting remarks directed at TVE managers, and these remarks were excluded from the scope of protection of the right to freedom of expression.[80]

The applicant made an application to the European Court, claiming that his dismissal violated his right to freedom of expression under Article 10. The first question for the Court had been whether there had been an interference with the applicant's freedom of expression. The government argued that as the broadcaster was a "private undertaking," the Spanish State could not be considered responsible for the dismissal.[81] However, the Court rejected this argument, and held that Article 10 was "applicable not only in relations between employers and employees where they are governed by public law but may also apply where such relations are governed by private law."[82] Further, the State has "a positive obligation to protect the right to freedom of expression against attacks by even private persons."[83] Thus, the Court held that the dismissal had been an interference with freedom of expression. The main question was therefore whether the interference had been necessary in a democratic society.

The Court first noted that the applicant had been dismissed for having made remarks about managers of TVE, his employer, which were considered offensive,[84] and it held that it saw "no reason to call into question the findings of the Spanish courts according to which the applicant's statements were liable to damage the reputation of others."[85] The Court

[75] See *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 52.
[76] *Fuentes Bobo v. Spain* (App. no. 39293/98) 29 February 2000.
[77] TVE was the public broadcaster in Spain, but a private undertaking.
[78] *Fuentes Bobo v. Spain* (App. no. 39293/98) 29 February 2000, para. 24.
[79] *Fuentes Bobo v. Spain* (App. no. 39293/98) 29 February 2000, para. 24.
[80] *Fuentes Bobo v. Spain* (App. no. 39293/98) 29 February 2000, para. 32.
[81] *Fuentes Bobo v. Spain* (App. no. 39293/98) 29 February 2000, para. 37.
[82] *Fuentes Bobo v. Spain* (App. no. 39293/98) 29 February 2000, para. 38.
[83] *Fuentes Bobo v. Spain* (App. no. 39293/98) 29 February 2000, para. 38.
[84] *Fuentes Bobo v. Spain* (App. no. 39293/98) 29 February 2000, para. 45.
[85] *Fuentes Bobo v. Spain* (App. no. 39293/98) 29 February 2000, para. 45.

considered that the sole question was whether the "penalty imposed on the applicant was proportionate to the legitimate aim protected and hence necessary in a democratic society."[86]

First, the Court considered that the statements "were in the particular context of a labour dispute between the applicant and his employer following the abolition of the programme for which he was responsible, coupled with a wide public debate concerning matters of public interest relating to the management of public broadcasting."[87] Second, the remarks in question were first used by the radio presenter, with the applicant "merely confirming them, in the context of a lively and spontaneous exchange of comments between the applicant and the presenter."[88] Further, it did not appear that TVE, or persons alleged to have been the subject of the offensive remarks, had initiated legal proceedings for defamation or insult against the applicant.[89]

Finally, the Court examined the severity of the sanction, and found that TVE imposed the "maximum penalty" provided for in the legislation, namely the termination of the contract of employment without a right to compensation.[90] The Court held that it was "indisputable" that the penalty, especially in view of the applicant's length of service and age, was "extremely severe," whereas other less severe and more appropriate disciplinary measures could have been considered.[91] In light of these considerations, the Court held that there was no reasonable relationship of proportionality between the penalty imposed on the applicant and the legitimate aim pursued, and there had therefore been a violation of Article 10.

Similar to *Vogt*, the Court in *Fuentes Bobo* only focussed on the applicant's individual circumstances, and there was no real discussion of other employees or journalists, and exercising their freedom of expression in the future. But the *Fuentes Bobo* judgment was an early application of the Court's approach of separating the substantive issue from the sanction, and focusing solely on the sanction, as done by the Grand Chamber in *Cumpănă and Mazăre v. Romania*.[92]

Following *Fuentes Bobo*, the Court would again consider an employee's dismissal for critical remarks of management, and whether the dismissal was consistent with Article 10. And again, the Court would focus exclusively on the individual applicant, with no consideration of any broader chilling effect on other employees. The case was *Diego Nafría v. Spain*,[93] where the applicant was an inspector at the Bank of Spain, and the case arose in 1997 when the applicant sent a letter to the Deputy Director General of the Bank. The letter concerned previous disciplinary proceedings taken against the applicant, and the letter accused the Bank's Governor and other senior officials of the Bank of "serious irregularities" in their conduct.[94] The applicant also sent a copy of the letter to two colleagues at the Bank, and a handwritten copy of the letter was affixed to the notice board at his place of work.[95] Two weeks later, the Bank dismissed the applicant, as the accusations in the letter affected the reputation of those named, and involved a serious breach of the applicant's contractual

[86] *Fuentes Bobo v. Spain* (App. no. 39293/98) 29 February 2000, para. 45.
[87] *Fuentes Bobo v. Spain* (App. no. 39293/98) 29 February 2000, para. 48.
[88] *Fuentes Bobo v. Spain* (App. no. 39293/98) 29 February 2000, para. 48.
[89] *Fuentes Bobo v. Spain* (App. no. 39293/98) 29 February 2000, para. 48.
[90] *Fuentes Bobo v. Spain* (App. no. 39293/98) 29 February 2000, para. 49.
[91] *Fuentes Bobo v. Spain* (App. no. 39293/98) 29 February 2000, para. 49.
[92] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004, para. 110 ("the Court finds in the circumstances of the case that the domestic authorities were entitled to consider it necessary to restrict the exercise of the applicants' right to freedom of expression and that the applicants' conviction for insult and defamation accordingly met a "pressing social need". What remains to be determined is whether the interference in issue was proportionate to the legitimate aim pursued, in view of the sanctions imposed.").
[93] *Diego Nafría v. Spain* (App. no. 46833/99) 14 March 2002.
[94] *Diego Nafría v. Spain* (App. no. 46833/99) 14 March 2002, para. 18.
[95] *Diego Nafría v. Spain* (App. no. 46833/99) 14 March 2002, para. 19.

obligations.[96] Ultimately, the Constitutional Court upheld the dismissal, with the domestic courts holding that it was insulting to make serious and totally unsubstantiated accusations against a number of directors of the Bank, including its Governor.[97]

The applicant made an application to the European Court, claiming that his dismissal from the Bank of Spain was a violation of his right to freedom of expression, and the main question for the Court was whether the dismissal had been necessary in a democratic society. The Court first stated, similar to *Fuentes Bobo*, that it saw no reason to call into question the findings of the domestic courts that the accusations made by the applicant were likely to harm the reputation of others.[98] Therefore, the Court held that the sole issue to be determined was whether the penalty imposed on the applicant was proportionate to the legitimate aim pursued and therefore necessary in a democratic society.[99]

The Court held that the accusation in the applicant's letter "did not form part of any public debate concerning questions of general interest relating to the management of the national bank,"[100] and although the applicant referred to major scandals which allegedly occurred within the Bank of Spain, the Court noted that he had not produced any evidence of any connection between these so-called scandals and his dispute with the Bank.[101] Second, the Court held that unlike the remarks at issue in *Fuentes Bobo*, the remarks were not uttered in the context of a lively and spontaneous verbal exchange, but were "well-reasoned written assertions," with the applicant admitting that he was fully aware of their content.[102] The Court concluded that the domestic authorities had not exceeded their margin of appreciation in finding that the applicant had made serious and unfounded accusations and imposing the sanction on the applicant. Thus, there had been no violation of Article 10.

Similar to *Fuentes Bobo*, the Court in *Diego Nafría* did not apply any chilling effect reasoning, but did adopt the same approach of focussing on the sanction imposed, and conducted a separate proportionality analysis. But the Court in *Diego Nafría* not only did not apply chilling effect reasoning, it also did not explore whether there were other less restrictive sanctions, other than dismissal, that could have been imposed, and what the consequences might have been for the individual applicant.

7.2.4 Second Section finds a chilling effect on trade unionists

While *Fuentes Bobo* and *Diego Nafría* did not apply chilling effect reasoning, four years later in 2007, and a year before the *Guja* judgment, the Court applied chilling effect reasoning and applied *Ezelin* where a trade unionist had been given a disciplinary penalty. The case was *Karaçay v. Turkey*,[103] where the applicant was a public-sector electrician, and member of the local branch of the trade union *Yapı Yol Sen*, which was affiliated with the larger public sector union *Kesk*. The case arose in September 2002, when the *Kesk* union organised a demonstration in Istanbul to defend the salaries of civil servants, and in October 2002, the applicant was informed by the Ministry of Regional Planning that a disciplinary investigation had initiated over his participation in the *Kesk* union's earlier demonstration.[104] In December 2002, the applicant was given a disciplinary sanction in the form of a reprimand for taking part in the demonstration in September 2002 called by *Kesk*.

[96] *Diego Nafría v. Spain* (App. no. 46833/99) 14 March 2002, para. 21.
[97] *Diego Nafría v. Spain* (App. no. 46833/99) 14 March 2002, para. 24.
[98] *Diego Nafría v. Spain* (App. no. 46833/99) 14 March 2002, para. 36.
[99] *Diego Nafría v. Spain* (App. no. 46833/99) 14 March 2002, para. 36.
[100] *Diego Nafría v. Spain* (App. no. 46833/99) 14 March 2002, para. 38.
[101] *Diego Nafría v. Spain* (App. no. 46833/99) 14 March 2002, para. 38.
[102] *Diego Nafría v. Spain* (App. no. 46833/99) 14 March 2002, para. 41.
[103] *Karaçay v. Turkey* (App. no. 6615/03) 27 March 2007.
[104] *Karaçay v. Turkey* (App. no. 6615/03) 27 March 2007, para. 9.

Turkish law did not provide for any remedy by which to review the lawfulness of a disciplinary measure,[105] and the applicant made an application to the European Court, claiming the disciplinary warning imposed violated his right to freedom of assembly. The Court held that there had been an interference with freedom of assembly, and the main question was whether it had been necessary in a democratic society. The Court first noted that the national day of action at issue had been the subject of a prior declaration at the national level and was not prohibited. In joining it, the applicant exercised his freedom of peaceful assembly, with the Court citing *Ezelin*.[106] The Court then stated that it would examine the disciplinary measure "in the light of the whole case," and the "prominent place" of freedom of peaceful assembly.[107] The Court noted that the applicant had been given a warning for his participation in the demonstration, and held that "the sanction at issue, however minimal, is such as to dissuade members of trade unions from legitimately participating in strike days or actions to defend the interests of their members."[108] The Court cited *Ezelin* at paragraph 53 as authority for this proposition. The Court therefore concluded that the "warning" issued was not necessary in democratic society, and in violation Article 11.

The Court's judgment in *Karaçay,* in contrast to *Ezelin*, specifically applied the chilling effect principle taking account of the trade union element, finding that even a minimal sanction can have a chilling effect on other trade union members in the future participating in demonstrations. Further, the *Karaçay* judgment meant that the chilling effect principle in *Ezelin* was not confined to lawyers, but extended to public sector employees and other trade union members.

7.3 Grand Chamber in *Guja* unanimously finds dismissal had a chilling effect

It is fair to say that the chilling effect principle's application in the Court's case law on employee freedom of expression was quite sporadic up to 2008, and in its slow development contrasts sharply with its application in the areas examined in Chapters 3-6. In addition, the early judgments in *Fuentes Bobo* and *Diego Nafría* only had regard to the individual consequences of dismissal for the individual employee.

But in February 2008, this would all change with the Grand Chamber's consideration of an employee's dismissal for reporting possible wronging within a prosecutor's office to the media. The case was *Guja v. Moldova*,[109] and the applicant was the Head of the Press Department of the Moldova Prosecutor General's Office. The case arose in January 2003, when the applicant sent a newspaper two letters that had been sent to the Prosecutor General's Office from a member of the Moldova Parliament urging the Prosecutor General to "intervene in this case," in a case that had been taken against four police officers.[110] The newspaper later published an article based on the letters, headlined "Vadim Mişin intimidating prosecutors."[111] The applicant later admitted that he had supplied the newspaper with the letters, and the applicant was dismissed from the Prosecutor General's Office. The Office found that the applicant had breached its internal regulations for disclosing letters which were "secret," and for failing to "consult the heads of other departments of the

[105] *Karaçay v. Turkey* (App. no. 6615/03) 27 March 2007, para. 44.
[106] *Karaçay v. Turkey* (App. no. 6615/03) 27 March 2007, para. 36.
[107] *Karaçay v. Turkey* (App. no. 6615/03) 27 March 2007, para. 37.
[108] *Karaçay v. Turkey* (App. no. 6615/03) 27 March 2007, para. 37.
[109] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber).
[110] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 10.
[111] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 15.

Prosecutor General's Office before handing them over."[112] The applicant was dismissed in March 2003, and ultimately failed in his appeals before the domestic courts to be reinstated.

The applicant then made an application to the European Court, arguing that his dismissal for the disclosure of the impugned letters to the press "amounted to a breach of his right to freedom of expression" under Article 10.[113] The government argued that there had been no "interference" with the applicant's freedom of expression, as he "had not been dismissed for exercising his freedom of expression but simply for breaching the internal regulations of the Prosecutor General's Office."[114] However, the Court held that Article 10 "extends to the workplace in general,"[115] and "includes the freedom to impart information."[116] As the applicant was dismissed "for his participation in the publication of the letters," there had thus been an interference with Article 10.[117]

The Court examined whether the interference had been necessary in a democratic society, and first reiterated that Article 10 applies "also to the workplace, and that civil servants, such as the applicant, enjoy the right to freedom of expression."[118] The Court also noted that "employees have a duty of loyalty, reserve and discretion to their employer. This is particularly so in the case of civil servants since the very nature of civil service requires that a civil servant is bound by a duty of loyalty and discretion."[119] Crucially, the Court then elaborated upon six criteria,[120] to determine whether the applicant's dismissal had been "necessary in a democratic society," and ultimately held that there had been a violation of Article 10. The Court held that the "public interest in having information about undue pressure and wrongdoing within the Prosecutor's Office revealed is so important in a democratic society that it outweighed the interest in maintaining public confidence in the Prosecutor General's Office."[121]

For present purposes, it is notable that the final criterion considered by the Court in *Guja* was "the severity of the sanction."[122] The Court noted that the sanction, namely dismissal, was the "heaviest sanction possible."[123] The Court then applied chilling effect reasoning, and held that the sanction "not only had negative repercussions on the applicant's career but it could also have a serious chilling effect on other employees from the Prosecutor's Office and discourage them from reporting any misconduct."[124] Moreover, "in view of the media coverage of the applicant's case," the sanction "could have a chilling effect not only on employees of the Prosecutor's Office but also on many other civil servants and employees."[125] The Court concluded "that the interference with the applicant's right to freedom of expression, in particular his right to impart information, was not 'necessary in a democratic society'."[126]

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[112] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 21.
[113] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 48.
[114] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 50.
[115] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 52.
[116] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 53
[117] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 53.
[118] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 53.
[119] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 53.
[120] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 74 - 78. ((i) Whether the applicant had alternative channels for the disclosure; (ii) The public interest in the disclosed information; (iii) (iii) The authenticity of the disclosed information; (iv) The detriment to the Prosecutor General's Office; (v) Whether the applicant acted in good faith; (vi) The severity of the sanction.).
[121] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 91.
[122] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 95.
[123] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 95.
[124] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 95.
[125] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 95.
[126] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 97.

Notably, the Court's Grand Chamber judgment in *Guja* was unanimous, and the application of chilling effect reasoning seemed to mirror the chilling effect reasoning in the Court's protection of journalistic sources case law (for example, *Goodwin*, "sources may be deterred assisting the press in informing the public on matters of public interest"[127]) and *Cumpănă and Mazăre* ("investigative journalists are liable to be inhibited from reporting on matters of general public interest"[128]). The Court in *Guja* not only had regard to the individual applicant ("negative repercussions on the applicant's career") but also to other individuals who may be discouraged from exercising their freedom of expression in the future ("serious chilling effect on other employees from the Prosecutor's Office and discourage them from reporting any misconduct").[129] Thus, the sanction affects a number of individuals, including (a) the applicant, (b) other employees of the Prosecutor's Office, and (c) other civil servant and employees. *Guja* did represent a shift away from the narrow focus in *Fuentes Bobo* and *Diego Nafría* of only having regard to the consequences of dismissal for the individual employee.

A quite unique consideration of the Court's holding in *Guja* was that "in view of the media coverage of the applicant's case, the sanction could have a chilling effect not only on employees of the Prosecutor's Office but also on many other civil servants and employees."[130] The Court's reliance on "in view of the media coverage of the applicant's case," was not a feature of the chilling effect principle applied in the Court's case law on protection of journalistic sources, or journalistic freedom of expression, or judicial and lawyer's freedom of expression.

7.4 Post-*Guja* application of the chilling effect

7.4.1 Trade union member's prosecution for reporting school irregularities

The first application of the Grand Chamber's *Guja* judgment arose in early 2009, where a trade union member had not been dismissed, but rather prosecuted and sentenced to a suspended prison term for reporting a school director's alleged mismanagement to a government audit agency, and a public prosecutor. The case was *Marchenko v. Ukraine*,[131] and the applicant was a teacher at a boarding school in western Ukraine, and head of the school branch of the VOST trade union. The case arose in 1997, when the applicant, in his capacity as a trade union leader made several applications to a public audit service known as the KRU. The applications concerned the school director, Mrs. P., and alleging that the director had "abused her office and misused School property and funds."[132] The KRU held an investigation, and found "certain shortcomings on the part of the School administration in the handling of humanitarian aid, charity and the bricks. However, no evidence was found that any of the humanitarian aid or charity monies or any bricks had been appropriated by Mrs. P."[133] The applicant, on behalf of the School branch of the VOST, made a criminal complaint against Mrs P. to the Lychakivsky District Prosecutor's Office, similar to the complaints to the KRU. The Prosecutor's Office dismissed the complaint for want of evidence of criminal conduct by Mrs P., but opened an investigation into the circumstances of the disappearance of other equipment. Finally, several representatives of the Regional VOST picketed the

[127] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996, para. 39.
[128] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 113.
[129] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 97.
[130] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 95.
[131] *Marchenko v. Ukraine* (App. no. 4063/04) 19 February 2009.
[132] *Marchenko v. Ukraine* (App. no. 4063/04) 19 February 2009, para. 11.
[133] *Marchenko v. Ukraine* (App. no. 4063/04) 19 February 2009, para. 14.

Lychakivsky District Administration protesting against the alleged abuses by Mrs P., which including placards with slogans reading, "Mrs P. and Mrs N. - return humanitarian aid and 20,000 bricks from the school wall to the disabled children."[134]

In 1998, Mrs. P. brought a private prosecution against the applicant for criminal defamation over the letters to the KRU and the Prosecutor's Office, which had "falsely accused her of abuse of office and misappropriation of public funds," and for organising and participating in the picket, during which "demonstrators displayed offensive placards."[135] Three years later in 2001, the Shevchenkivsky Court found the applicant guilty of defamation, and imposed a fine, and one year's imprisonment as a sentence, suspended for one year. The Court found that the letters signed by the applicant, meant Mrs P. had been "baselessly accused of misappropriation of public funds,"[136] and found evidence of the applicant holding a slogan during the picket. The Supreme Court ultimately upheld the applicant's conviction, with the Court rejecting the applicant's argument that he had "acted in his official capacity as a local VOST leader, empowered by the union members to inform the authorities about Mrs P.'s official misconduct and that according to the findings of the KRU and the law-enforcement authorities his accusations had not been entirely baseless."[137]

The applicant made an application to the European Court, claiming that his conviction for defamation was a violation of the right to freedom of expression. The Court first noted that the domestic courts convicted the applicant on the basis of two set of facts: first, the letters which the applicant had sent to the KRU and the prosecutor's office, and second, the picket which he had organised and taken part in.[138] The Court held that there had been an interference with the applicant's freedom of expression in both instances, and the main question was whether it had been necessary in a democratic society.

The Court first considered the letter, and applied *Guja*, stating that, notwithstanding the role played by the applicant in his capacity as union representative, he had was obliged to have regard to the duty of loyalty, reserve and discretion owed by him to his employer.[139] However, the Court also held that the "signalling by an employee in the public sector of illegal conduct or wrongdoing in the workplace must be protected, in particular where the employee concerned is a part of a small group of persons aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large."[140] Thus, such a disclosure should be "made in the first place to the person's superior or other competent authority or body. It is only where this is clearly impracticable that the information could, as a last resort, be disclosed to the public."[141]

The Court applied these principles from *Guja*, and held that as regards the fact that the applicant signed several letters to the KRU and the prosecutors' office demanding investigations into Mrs P.'s official conduct, he "cannot be reproached for doing so in bad faith, in particular, as he had acted on behalf of his trade union and presented various materials in support of his allegations."[142] The Court therefore held that, in so far as the interference with the applicant's freedom of expression was based on the letters addressed to the competent authorities, its "necessity" had "not been established."[143]

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[134] *Marchenko v. Ukraine* (App. no. 4063/04) 19 February 2009, para. 16.
[135] *Marchenko v. Ukraine* (App. no. 4063/04) 19 February 2009, para. 17.
[136] *Marchenko v. Ukraine* (App. no. 4063/04) 19 February 2009, para. 25.
[137] *Marchenko v. Ukraine* (App. no. 4063/04) 19 February 2009, para. 26.
[138] *Marchenko v. Ukraine* (App. no. 4063/04) 19 February 2009, para. 43.
[139] *Marchenko v. Ukraine* (App. no. 4063/04) 19 February 2009, para. 45.
[140] *Marchenko v. Ukraine* (App. no. 4063/04) 19 February 2009, para. 46.
[141] *Marchenko v. Ukraine* (App. no. 4063/04) 19 February 2009, para. 46.
[142] *Marchenko v. Ukraine* (App. no. 4063/04) 19 February 2009, para. 47.
[143] *Marchenko v. Ukraine* (App. no. 4063/04) 19 February 2009, para. 47.

The Court turned to the picket, and stated that having regard the "nature of the accusations against Mrs P. displayed in the slogans," the applicant's duty of discretion vis-à-vis his employer, and that he engaged in the public picketing "before exhausting other procedural means of complaining about Mrs P.'s official misconduct," the Court accepted that the domestic authorities "acted within their margin of appreciation in considering it necessary to convict the applicant for defamation, in so far as his actions concerned organisation of and participation in the picketing."[144] However, notwithstanding this finding, the Court then turned to whether the interference was proportionate to the legitimate aim pursued, "in view of the sanctions imposed."[145]

The Court examined the sanctions, namely a fine and one year's imprisonment. The Court applied the *Cumpănă and Mazăre* chilling effect principle, stating that states must not "unduly hinde[r]" public debate concerning matters of public concern, such as misappropriation of public funds, and the instant case "a classic case of defamation of an individual in the context of a debate on a matter of public interest – presented no justification for the imposition of a prison sentence."[146] This was because such a sanction, "by its very nature, will inevitably have a chilling effect on public discussion," and the fact the applicant's sentence was suspended does not alter that conclusion particularly as the "conviction itself was not expunged."[147] The Court concluded that in convicting the applicant over the letters sent to KRU and the prosecutor's office, and the lengthy suspended prison sentence imposed, the domestic courts went beyond what amounted to a necessary interference with the applicant's freedom of expression, in violation of Article 10.[148]

Marchenko was notable in two respects: first, in its application of *Guja*, and combining the fact that the applicant was acting in his capacity as a trade union member, which meant for the Court that his bona fides had been established. And second, because of the Court's application of the *Cumpănă and Mazăre* chilling effect principle, that because the expression at issue concerned a matter of public interest, there was no justification for a prison sentence, even if suspended.

7.4.2 Journalist's reprimand for criticising public broadcaster

The situation of disciplinary proceeding against a journalist for criticising a broadcaster, similar to the case of *Fuentes Bobo*, would next arise for the Court. But unlike the Court in *Fuentes Bobo*, the Court would not focus exclusively on the sanction imposed, but rather apply the principles from *Guja* to the question of whether the journalist's criticism was a matter of public interest. The case was *Wojtas-Kaleta v. Poland*,[149] and the applicant was a journalist employed by Telewizja Polska Spółka Akcjna (TVP), the Polish public television company, and was also the President of the Polish Public Television Journalists' Union. The case arose in 1999, when the *Gazeta Wyborcza* newspaper quoted an opinion which had been expressed by the applicant in an interview in her capacity as the President of the Polish Public Television Journalists' Union in relation to two classical music programmes which had been taken off the air by TVP, including "Director K. stated that the changes were not aimed at getting rid of classical music but, on the contrary, at creating new possibilities for it. I take this statement at face value, although no steps have been taken so far which could confirm

[144] *Marchenko v. Ukraine* (App. no. 4063/04) 19 February 2009, para. 51.
[145] *Marchenko v. Ukraine* (App. no. 4063/04) 19 February 2009, para. 51.
[146] *Marchenko v. Ukraine* (App. no. 4063/04) 19 February 2009, para. 52.
[147] *Marchenko v. Ukraine* (App. no. 4063/04) 19 February 2009, para. 52.
[148] *Marchenko v. Ukraine* (App. no. 4063/04) 19 February 2009, para. 53.
[149] *Wojtas-Kaleta v. Poland* (App. no. 20436/02) 16 July 2009.

these good intentions."[150] The applicant also signed an open letter by 34 representatives of cultural and artistic circles in Wrocław to the board of TVP, and mentioned two music programmes which had been discontinued and replaced by "pseudo-musical kitsch."[151]

Two weeks later, the applicant was reprimanded by TVP for "failing to observe the company's general regulation no. 14 § 2, which required her to protect her employer's good name."[152] The reprimand was to be kept in the applicant's records for a period of up to one year, depending on the applicant's behaviour.[153] The applicant lodged a claim against TVP with the Wrocław District Court, requesting that the reprimand be withdrawn. However, in January 2001, the Wrocław District Court dismissed her claim, agreeing with the employer's arguments that the "issue of changes in television programming was not a matter on which the trade union could comment and that the applicant had failed to observe the obligation of loyalty imposed on her as an employee."[154] The Court found that the applicant was "guilty of having behaved in an unlawful manner and that this was a necessary and sufficient prerequisite for the disciplinary measure imposed on her."[155] In April 2001, the Wroclaw Regional Court upheld the judgment, finding that the applicant had "acted to the detriment of the employer and had thus breached her obligation of loyalty. Consequently, the employer had been entitled to impose the reprimand on her."[156]

The applicant made an application to the European Court, claiming the disciplinary reprimand violated her right to freedom of expression. The parties agreed that there had been an interference with freedom of expression, and the main question was whether it had been necessary in a democratic society. The Court reiterated that freedom of expression applies in the workplace, and the Court did not think it necessary to "draw a distinction between the applicant's role as an employee of a public television company, a trade-union activist and a journalist," and make a separate analysis of the scope of that freedom which she could legitimately enjoy in each of these roles.[157] However, the Court did hold that the applicant's "combined professional and trade-union roles must be taken into consideration for the purposes of examining whether the interference complained of was necessary in a democratic society."[158] Second, the Court held that given the role of journalists in society, the "obligation of discretion and constraint cannot be said to apply with equal force to journalists."[159] Further, the Court held that the applicant's "obligations of loyalty and constraint must be weighed against the public character of the broadcasting company she worked for."[160]

The Court then sought to apply the *Guja* judgment, and first held that the applicant's statements were of "public interest and concern."[161] The Court noted that the domestic courts had endorsed the employer's "very wide interpretation of the employees' obligation to protect its good name,"[162] and "limited their analysis to a finding that her comments amounted to acting to the employer's detriment," and did not examine "whether and how the subject matter of the applicant's comments and the context in which they had been made could have

[150] *Wojtas-Kaleta v. Poland* (App. no. 20436/02) 16 July 2009, para. 7.
[151] *Wojtas-Kaleta v. Poland* (App. no. 20436/02) 16 July 2009, para. 8.
[152] *Wojtas-Kaleta v. Poland* (App. no. 20436/02) 16 July 2009, para. 9.
[153] *Wojtas-Kaleta v. Poland* (App. no. 20436/02) 16 July 2009, para. 9.
[154] *Wojtas-Kaleta v. Poland* (App. no. 20436/02) 16 July 2009, para. 12.
[155] *Wojtas-Kaleta v. Poland* (App. no. 20436/02) 16 July 2009, para. 12.
[156] *Wojtas-Kaleta v. Poland* (App. no. 20436/02) 16 July 2009, para. 14.
[157] *Wojtas-Kaleta v. Poland* (App. no. 20436/02) 16 July 2009, para. 45.
[158] *Wojtas-Kaleta v. Poland* (App. no. 20436/02) 16 July 2009, para. 45.
[159] *Wojtas-Kaleta v. Poland* (App. no. 20436/02) 16 July 2009, para. 46.
[160] *Wojtas-Kaleta v. Poland* (App. no. 20436/02) 16 July 2009, para. 47.
[161] *Wojtas-Kaleta v. Poland* (App. no. 20436/02) 16 July 2009, para. 46.
[162] *Wojtas-Kaleta v. Poland* (App. no. 20436/02) 16 July 2009, para. 48.

affected the permissible scope of her freedom of expression."[163] Further, the Court held that the applicant's statements had a sufficient factual basis, and, in part, "amounted to value judgments, the truth of which is not susceptible of proof."[164] Finally, the Court noted that the applicant's comments were not a gratuitous personal attack on another, no intention to offend could be ascribed to the applicant, and unlike in *Diego Nafría*, the tone of the statements was measured, and she did not make any personal accusations against named members of the management.[165] The Court also noted that the applicant's good faith had never been challenged.[166] In light of these considerations, and given the importance of the right to freedom of expression on matters of general interest, the Court concluded that the interference with the applicant's right to freedom of expression was not necessary in a democratic society, in violation of Article 10.[167]

Notably, the Court in *Wojtas-Kaleta* did not apply the chilling effect principle, and indeed, did not even examine the severity of the sanction imposed, namely the reprimand, which was the final criterion under *Guja*. This may be explained by the unanimity of the Court, and had the Court held that a mere reprimand had a chilling effect it might have resulted in division in the Court along the lines of Chapter 6 disciplinary reprimands against lawyers. But unlike in *Ezelin*, the Court in *Wojtas-Kaleta* considered that the combined professional and trade-union roles had to be taken into consideration when examining whether an interference with freedom of expression was necessary in a democratic society. However, in its analysis, the Court paid little regard to the applicant's role as a trade union activist, and did not consider the applicant's submissions before the domestic courts that she had been commenting in her capacity as the president of a trade union, and the reprimand "had been an act of revenge by her employer for her trade-union activity."[168]

7.4.3 First Section's decision on dismissal for statements to the media

Then in 2010, the First Section of the Court delivered a curious admissibility decision in *Balenović v. Croatia*,[169] where an employee at a state-owned oil company was summarily dismissed for comments made to the media about irregularities at the company. But the Court refused to apply the chilling effect principle to the severity of the sanction.

The applicant in *Balenović*, was a project manager employed by the national oil company of Croatia, INA (Industrija nafte d.d.). The case arose in January 2001, when the applicant, in the course of her work, prepared a report, which analysed issues relating to losses of petrol during transport from refineries to petrol stations. The applicant's findings "suggested that the relevant persons in INA had shown considerable laxity as regards claiming compensation for the remaining losses."[170] The applicant informed her immediate superior Ž.V. of her findings and gave him a copy of the report. The applicant also sent a letter to INA's general director, T.D., and asked for a meeting. She indicated that she would like to discuss issues relating to petrol losses during transport and attached a copy of her report. She received no response, and the applicant sent a letter to the chairman of INA's supervisory board, and met him to discuss the issues raised in her letter to T.D.

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[163] *Wojtas-Kaleta v. Poland* (App. no. 20436/02) 16 July 2009, para. 49.
[164] *Wojtas-Kaleta v. Poland* (App. no. 20436/02) 16 July 2009, para. 50.
[165] *Wojtas-Kaleta v. Poland* (App. no. 20436/02) 16 July 2009, para. 51.
[166] *Wojtas-Kaleta v. Poland* (App. no. 20436/02) 16 July 2009, para. 51.
[167] *Wojtas-Kaleta v. Poland* (App. no. 20436/02) 16 July 2009, para. 52.
[168] *Wojtas-Kaleta v. Poland* (App. no. 20436/02) 16 July 2009, para. 11.
[169] *Balenović v. Croatia* (App. no. 28369/07) 30 September 2010.
[170] *Balenović v. Croatia* (App. no. 28369/07) 30 September 2010 (Admissibility decision) (No paragraph numbers).

In early April 2001, the daily newspaper *Slobodna Dalmacija* published an article entitled "The problems started when I discovered manipulations," which contained an interview with the applicant in which she raised her concerns about INA's business policy. In later articles, the applicant's letter to T.D. and S.L. were published by the newspaper.[171] On 7 April 2001, the newspaper published an article entitled, "Private hauliers are earning 20 thousand (German) marks per month – Vesna Balenović presents new evidence of fraud within INA," including quotes from the applicant that "Private hauliers providing services to transport oil derivatives for INA are in collusion with INA's management, and therefore it suits all of them that this kind of public call for tenders, which has now been issued, goes ahead and is implemented."[172]

A week after publication of the articles, the applicant was summarily dismissed by INA on account of her statements in the press, as she had "harmed the business reputation of INA by her unauthorised statements in the daily newspaper."[173] In May 2001, the applicant brought a civil action against INA challenging her dismissal, and also filed a criminal complaint against several INA executives over several criminal offences such as business misfeasance, abuse of authority in business operations and conclusion of a prejudicial contract. In December 2002, the Court upheld her dismissal, finding that "she acted contrary to the interests of the employer," and "regardless of the employer's ownership structure and the accuracy of the published information, in that she made extremely negative statements in the media, as a result of which she primarily harmed the reputation of the employer."[174] In 2006, the Constitutional Court dismissed the applicant's complaint, finding a "breach of an employee's duties towards an employer cannot be justified by the right to express a personal opinion in the manner presented by the complainant in her constitutional complaint."[175] In 2004, the State Attorney's Office also dismissed the applicant's criminal complaint.

The applicant made an application to the European Court, claiming that her dismissal over her statements to the press was a violation of her right to freedom of expression. First, the Court noted that applicant was working for the national oil company of Croatia, of which the State was the sole stockholder at the time, but was not a civil servant, and as such her status was similar to the status of the applicants in *Fuentes Bobo* and *Wojtas-Kaleta*.[176] The Court reiterated that Article 10 also applies when the relations between employer and employee are governed by private law, and held that the applicant's dismissal on account of her statements to the press constituted interference with her right to freedom of expression.[177] The Court then turned to whether the interference had been necessary in a democratic society.

The Court first considered that it "could be argued that the issues raised by the applicant were of legitimate public concern."[178] Second, the Court stated that it "shares the view" of the Supreme Court that a "company whose management tolerates and encourages

[171] *Balenović v. Croatia* (App. no. 28369/07) 30 September 2010 (Admissibility decision) (No paragraph numbers).
[172] *Balenović v. Croatia* (App. no. 28369/07) 30 September 2010 (Admissibility decision) (No paragraph numbers).
[173] *Balenović v. Croatia* (App. no. 28369/07) 30 September 2010 (Admissibility decision) (No paragraph numbers).
[174] *Balenović v. Croatia* (App. no. 28369/07) 30 September 2010 (Admissibility decision) (No paragraph numbers).
[175] *Balenović v. Croatia* (App. no. 28369/07) 30 September 2010 (Admissibility decision) (No paragraph numbers).
[176] *Balenović v. Croatia* (App. no. 28369/07) 30 September 2010 (Admissibility decision) (No paragraph numbers).
[177] *Balenović v. Croatia* (App. no. 28369/07) 30 September 2010 (Admissibility decision) (No paragraph numbers).
[178] *Balenović v. Croatia* (App. no. 28369/07) 30 September 2010 (Admissibility decision) (No paragraph numbers).

criminal activities certainly cannot have a good reputation and be trusted in the business world."[179] Crucially, the Court stated that there were three factors to be taken into account: (a) the applicant's situation as an employee, (b) the nature of the means she used in making her statements, and (c) the authenticity of the information disclosed.[180]

First, the Court held that although the applicant's statements in part amounted to value judgments, such as her initial criticism of INA's business policy in the field of transport, her allegations of fraud within INA contained "specific allegations of fact, which as such were susceptible to proof."[181] Further, the Court considered that the applicant's allegations "appear quite serious," accusing INA's management of "'tunnelling,' a form of white-collar crime endemic in transitional economies of Central Europe," and therefore required "substantial justification, especially given that they were made in a high-circulation daily newspaper."[182] According to the Court, the applicant provided "no evidence whatsoever in support of her allegations of criminal conduct on the part of INA's executives," which was confirmed by the State Attorney who dismissed the applicant's criminal complaint. The European Court also held that the applicant was "motivated by a concern to publicise her own professional grievances rather than by her genuine concern for INA's business interests," while the "content and the tone of her statements to the press," coupled with the lack of any factual basis for her most serious allegations, "suggest" they were a "petulant reaction to the behaviour of INA's management, which ignored her business proposals."[183] The Court stated that this was "corroborated" by the fact that the applicant's serious accusations against certain members of INA's management were first made in the press, and that only after she had been dismissed on that account, did she file a criminal complaint against them with the State Attorney's Office.

The Court concluded that although the applicant's dismissal was a "severe sanction for her behaviour," the foregoing considerations were "sufficient for the Court to conclude that the interference complained of was not disproportionate."[184] It followed, according to the Court, that the complaint was inadmissible under Article 35.

Curiously, the Court did not examine the final criteria under *Guja*, namely the severity of the sanction, and whether dismissal could have a serious chilling effect on other employees of INA, and on other civil servants. It is not quite clear why the Court in *Balenović* did not at least discuss whether such a "severe sanction" might not have a chilling effect on other employees. It could be argued that the Court side-lined application of the chilling effect principle due to the expression involving "allegations of criminal conduct," with "no evidence whatsoever in support;"[185] a type of defamatory expression deserving of little protection under Article 10. But nonetheless, the Court in *Balenović*, even though it held that the case was similar to *Fuentes Bobo*, did not separate the penalty from the substantive issue, and take into account that it was indisputable that the penalty, especially in view of the

[179] *Balenović v. Croatia* (App. no. 28369/07) 30 September 2010 (Admissibility decision) (No paragraph numbers).
[180] *Balenović v. Croatia* (App. no. 28369/07) 30 September 2010 (Admissibility decision) (No paragraph numbers).
[181] *Balenović v. Croatia* (App. no. 28369/07) 30 September 2010 (Admissibility decision) (No paragraph numbers).
[182] *Balenović v. Croatia* (App. no. 28369/07) 30 September 2010 (Admissibility decision) (No paragraph numbers).
[183] *Balenović v. Croatia* (App. no. 28369/07) 30 September 2010 Admissibility decision) (No paragraph numbers).
[184] *Balenović v. Croatia* (App. no. 28369/07) 30 September 2010 Admissibility decision) (No paragraph numbers).
[185] *Balenović v. Croatia* (App. no. 28369/07) 30 September 2010 Admissibility decision) (No paragraph numbers).

applicant's *length of service and age*, was extremely severe, whereas other less severe and more appropriate disciplinary measures could have been considered. The applicant in *Balenović* had worked at INA for 19 years, and was 47 years old when dismissed. In *Fuentes Bobo*, the applicant had worked for TVE for 23 years, and was 54 years old.

7.4.4 Dismissal over criminal complaint could have serious chilling effect

The non-application of the chilling effect principle in *Balenović*, coupled with its non-application in *Wojtas-Kaleta* (even though the Court had found a violation of Article 10), suggested that *Guja*'s final criteria on the severity of a sanction and the potential chilling effect may have become side-lined in the Court's case law. However, in an application against Germany, where an employee had been dismissed for filing a criminal complaint over irregularities at a State-owned company, the chilling effect principle would be unanimously applied. The case was *Heinisch v. Germany*,[186] where the applicant was a geriatric nurse working for Vivantes, a State-owned company in Berlin, which specialised in health care for the elderly. The case arose in 2003, when the applicant and her colleagues regularly indicated to the management that they were overburdened on account of staff shortages and therefore had difficulties carrying out their duties. In late 2003, the Medical Review Board of the Health Insurance Fund found "serious shortcomings in the care provided, on grounds of, inter alia, staff shortages, inadequate standards and unsatisfactory care as well as inadequate documentation of care."[187] Following a number of further notifications to her superiors explaining the situation, the applicant fell ill and consulted a lawyer.[188] In November 2004, the applicant's lawyer wrote to the Vivantes management, and "requested the management to specify how they intended to avoid criminal responsibility – also for the staff – and how they intended to ensure that the patients could be properly cared for."[189] Vivantes management rejected the applicant's accusations.

In December 2004, the applicant's lawyer lodged a criminal complaint against Vivantes for aggravated fraud and requested the public prosecutor to examine the circumstances of the case. The criminal complaint included the passages that "The company Vivantes GmbH, which has financial difficulties and is aware of this, has deceived family members, because the care provided does not in any way correspond to or justify the fees paid. Vivantes GmbH is therefore enriching itself and accepts the inadequacy of the medical and hygienic care," and engages in "intimidating staff," and "tries to cover up existing problems."[190] In January 2005, the Berlin Public Prosecutor's Office discontinued the preliminary investigations against Vivantes, and two weeks later, the nursing home dismissed the applicant "on account of her repeated illness."[191] The applicant contacted her trade union, and it distributed a leaflet, which stated that the applicant had lodged a criminal complaint but that this had not resulted in a criminal investigation and that she had been dismissed on account of her illness. The applicant sent a leaflet by fax to the residential home, where it was distributed, and "only then did Vivantes become aware of the applicant's criminal complaint."[192] In February 2005, the applicant's employer dismissed her without notice on

[186] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011.
[187] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 9.
[188] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 10.
[189] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 11.
[190] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 15.
[191] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 17.
[192] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 19.

suspicion of having initiated the production and dissemination of the leaflet.[193] The issue was reported in a television programme and in two articles published in different newspapers.

The applicant challenged her dismissal in the domestic courts, but in 2006, the Berlin Labour Court of Appeal found that the dismissal had been lawful as the applicant's criminal complaint had provided a "compelling reason" for the termination of the employment relationship without notice.[194] The Court of Appeal found that the applicant had "frivolously based the criminal complaint on facts that she could not prove in the course of the proceedings since, in particular, merely referring to the shortage of staff was not sufficient to enable her to allege fraud, and since she had failed to further specify the alleged instruction to falsify records, which was also evidenced by the fact that the public prosecutor had not opened an investigation."[195] Further, the criminal complaint "amounted to a disproportionate reaction to the denial by Vivantes of any staff shortages, since the applicant had never attempted to have her allegation of fraud examined internally and since, moreover, she had intended to put undue pressure on her employer by provoking a public discussion of the issue."[196] The judgment was upheld by the Federal Labour Court, and the Federal Constitutional Court refused to consider the applicant's complaint.

The applicant then made an application to the European Court, arguing that her dismissal without notice for lodging a criminal complaint against her employer violated her right to freedom of expression under Article 10.[197] First, the Court noted that it was not disputed by the parties that the "criminal complaint lodged by the applicant had to be regarded as whistle-blowing on the alleged unlawful conduct of the employer," and "fell within the ambit of Article 10.[198] In this regard, the Court held that the dismissal had been an interference with the applicant's freedom of expression, as Article 10 applies between "employer and employee," even when governed by "private law," as the State has a "positive obligation to protect the right to freedom of expression even in the sphere of relations between individuals."[199]

The Court reiterated the six criteria it had established in *Guja* for weighing of the employee's rights and the conflicting interests of the employer.[200] The Court held that (a) the information disclosed by the applicant was "undeniably of public interest,"[201] (b) the applicant had "disclosed the factual circumstances on which her subsequent criminal complaint was based" in her previous notifications to her employer,[202] (c) the allegations made were "not devoid of factual background" and the applicant had not "knowingly or frivolously reported incorrect information,"[203] (d) the applicant "acted in good faith when submitting her criminal complaint against her employer,"[204] (e) and "allegations of fraud, were certainly prejudicial to Vivante's business reputation and commercial interests."[205]

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[193] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 21.
[194] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 28.
[195] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 28.
[196] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 28.
[197] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 41.
[198] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 43.
[199] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 44 (citing *Fuentes Bobo v. Spain* (App. no. 39293/98) 29 February 2000, para. 38).
[200] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 91-92 ((α) The public interest in the disclosed information; (β) Whether the applicant had alternative channels for making the disclosure; (γ) The authenticity of the disclosed information; (δ) Whether the applicant acted in good faith; (ε) The detriment to the employer; and (ζ) The severity of the sanction).
[201] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 71.
[202] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 72.
[203] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 79.
[204] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 87.
[205] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 88.

However, this was outweighed by the "public interest in receiving information about shortcomings in the provision of institutional care for the elderly by a State-owned company."[206]

Finally, the Court noted that the "heaviest sanction possible under labour law," had been imposed.[207] Importantly, the Court held that the sanction "not only had negative repercussions on the applicant's career but it could also have a serious chilling effect on other employees of Vivantes and discourage them from reporting any shortcomings in institutional care."[208] Further, "in view of the media coverage" of the case, the sanction "could have a chilling effect not only on employees of Vivantes but also on other employees in the nursing service sector."[209] The Court reiterated that the chilling effect "works to the detriment of society as a whole and also has to be taken into consideration when assessing the proportionality of, and thus the justification for, the sanctions imposed on the applicant," who was "entitled to bring the matter at issue to the public's attention"[210] The Court concluded that the applicant's dismissal "was disproportionately severe," and the domestic courts failed to strike a fair balance between the employer's reputation and rights and the applicant's right to freedom of expression, in violation of Article 10.[211]

Heinisch was the first judgment to fully apply *Guja*'s chilling effect principle, and emphasised that the sanction not only had negative repercussions on the applicant's career, but might also have a serious chilling effect on other employees and discourage them from reporting on matters of public interest. This was in contrast to *Balenović*, and may be explained by the Court's recognition in *Heinisch* that the expression was on a matter of public interest, and had a sufficient factual basis. The Court in *Heinisch* also reiterated the "in view of the media coverage" aspect of *Guja*, and held that as a consequence, the sanction could have a chilling effect on other employees in the nursing service sector. Notably, the Court in *Heinisch* added the principle that the chilling effect works to the detriment of society as a whole and also has to be taken into consideration when assessing the proportionality of, and thus the justification for, the sanctions imposed on the applicant, who was entitled to bring the matter at issue to the public's attention. This of course, was from *Cumpănă and Mazăre*, and helped to explain the importance of preventing a chilling effect in order to ensure the free flow of information on matters of public interest to the public.

7.4.5 Third Section disagrees over chilling effect of trade unionists' dismissal

The unanimity in *Heinisch* suggested the chilling effect's application may come more to the fore in the Court's case law where employees are dismissed for engaging in freedom of expression on matters of public interest. However, this would prove short-lived, when the Court would next consider the dismissal of trade union members for "offensive" expression; and would ultimately result in a divided Chamber and Grand Chamber judgments. The case was *Aguilera Jimenez and Others v. Spain,*[212] (*Palomo Sánchez and Others* in the Grand Chamber) and as mentioned earlier, the applicants made an application to the European Court, claiming that they had been dismissed "on account of the content of the news bulletin," in violation of Article 10, and that the "expressions had been used in a jocular spirit

[206] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 90.
[207] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 91.
[208] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 91.
[209] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 91.
[210] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 91.
[211] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 94.
[212] *Aguilera Jimenez and Others v. Spain* (App. nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06 and 28964/06) 8 December 2009.

and not with any intent to insult."[213] The Third Section of the Court issued a Chamber judgment in December 2009, and held that there had been no violation of Article 10.[214] The Court first found that there had been an interference with the applicants' freedom of expression, as Article 10 is "binding" between an employer and employee "governed by private law."[215] However, the Court concluded the domestic courts "did not overstep their margin of appreciation in penalising the applicants."[216] First, the Court noted that the articles "did not fall within the context of any public debate on matters of general interest, but related to issues that specifically concerned company P,"[217] and saw "no reason call into question the findings of the domestic courts," that the cartoon and articles "had been offensive and likely to harm the reputation of others."[218]

Notably, the Court's majority did not mention the chilling effect, and only applied the *Fuentes Bobo* judgment when considering the "necessary in a democratic society" point.[219] Moreover, the Court's majority did not apply *Guja* or *Heinisch* in relation to the sanction of dismissal. However, the dissenting opinion of Judge Power took issue with the majority's failure to "examine the severity of the disciplinary sanction imposed."[220] The dissent argued that when balancing the free expression of opinions by persons "acting in a representative capacity," the balance "must not result in trade union representatives being discouraged, for fear of disciplinary sanctions, from making clear their opinions on contentious matters arising between employers and employees."[221] The dissent concluded that the expression involved, while "crude," was not so reprehensible as to "warrant the ultimate disciplinary sanction, namely, summary and permanent dismissal."[222]

7.5 Grand Chamber disagrees over chilling effect of trade unionists' dismissal

The applicants in *Aguilera Jimenez and Others* (now *Palomo Sánchez and Others*) requested a referral to the Grand Chamber, and in May 2010, a panel of the Grand Chamber granted the request.[223] At the outset, the Grand Chamber, unlike the Chamber judgment, considered it

[213] *Aguilera Jimenez and Others v. Spain* (App. nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06 and 28964/06) 8 December 2009, para. 20.
[214] *Aguilera Jimenez and Others v. Spain* (App. nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06 and 28964/06) 8 December 2009, para. 37.
[215] *Aguilera Jimenez and Others v. Spain* (App. nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06 and 28964/06) 8 December 2009, para. 25.
[216] *Aguilera Jimenez and Others v. Spain* (App. nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06 and 28964/06) 8 December 2009, para. 36.
[217] *Aguilera Jimenez and Others v. Spain* (App. nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06 and 28964/06) 8 December 2009, para. 32.
[218] *Aguilera Jimenez and Others v. Spain* (App. nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06 and 28964/06) 8 December 2009, para. 30.
[219] *Aguilera Jimenez and Others v. Spain* (App. nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06 and 28964/06) 8 December 2009, para. 27 and 35.
[220] *Aguilera Jimenez and Others v. Spain* (App. nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06 and 28964/06) 8 December 2009 (Dissenting opinion of Judge Power, para. 9).
[221] *Aguilera Jimenez and Others v. Spain* (App. nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06 and 28964/06) 8 December 2009 (Dissenting opinion of Judge Power, para. 9).
[222] *Aguilera Jimenez and Others v. Spain* (App. nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06 and 28964/06) 8 December 2009 (Dissenting opinion of Judge Power, para. 9).
[223] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 6. See R. Ó Fathaigh and D. Voorhoof, "Grand Chamber Judgment on Trade Union Freedom of Expression," *Strasbourg Observers*, 14 September 2011. See also, R. Ó Fathaigh, "Palomo Sánchez v. Spain," (2011) 12 *European Human Rights Cases* 1794.

appropriate to examine the facts under Article 10, "interpreted in the light of Article 11."[224] This was because the "facts of the present case are such that the question of freedom of expression is closely related to that of freedom of association in a trade-union context."[225] The Court then went on to determine whether "the sanction imposed on the applicants was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it were 'relevant and sufficient'."[226] The first question asked by the Court was whether the applicants' comments could be regarded as harmful to the reputation of others. In this regard, the Court noted that the articles "contained explicit accusations of 'infamy' against A. and B., denouncing them for 'selling' the other workers,"[227] and were "expressed in vexatious and injurious terms for the persons concerned."[228] The Court concluded that the domestic courts' conclusion "that the applicants had overstepped the limits of admissible criticism in labour relations cannot be regarded as unfounded or devoid of a reasonable basis in fact."[229]

Notably, the Court then went on to consider "whether the sanction of dismissal was proportionate to the degree of seriousness of the impugned remarks,"[230] which the Chamber judgment did not appear to do so explicitly. First, and unlike the Chamber judgment, the Court held that the publications were "a matter of general interest for the workers of the company P."[231] However, the Court held that "the existence of such a matter cannot justify the use of offensive cartoons or expressions, even in the context of labour relations."[232] The Court concluded that "an attack on the respectability of individuals by using grossly insulting or offensive expressions in the professional environment is, on account of its disruptive effects, a particularly serious form of misconduct capable of justifying severe sanctions."[233]

Similar to the Chamber judgment, the Court nowhere mentioned the *Guja* nor *Heinisch* judgments (not even one citation), and nowhere mentioned the chilling effect principle. This is particularly curious given that the Court admitted that the expression at issue concerned a "matter of general interest,"[234] and the Court in *Guja* had emphasised the "great importance" of not "discouraging" discussion of "topics of public concern."[235] Indeed, in the Chamber judgment, which the Grand Chamber presumably would have considered, the

[224] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber).
[225] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber).
[226] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 63.
[227] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 67.
[228] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 67.
[229] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 67.
[230] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 69.
[231] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 72.
[232] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 73.
[233] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 76.
[234] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 72. A dissenting judge also considered the chilling effect in *Catan and Others v. Moldova and Russia* (App. nos. 43370/04, 18454/06 and 8252/05) 19 October 2012, concerning Article 8 and right to one's language.
[235] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 91.

dissenting judge alluded to this principle, that trade union members must not be "discouraged, for fear of disciplinary sanctions, from making clear their opinions on contentious matters."[236] Nevertheless, the majority in *Palomo Sánchez* chose not to consider the chilling effect, and concluded that "using grossly insulting or offensive expressions" justifies "severe sanctions."[237] Thus, there had been no violation of Article 10, read in the light of Article 11.

Notably, the dissenting opinion, which was joined by the Vice-President, Judge Tulkens (who also joined the dissenting opinion in *Lindon*), applied the chilling effect principle. The dissent held that imposing such a "harsh sanction" is likely to have a "'chilling effect' on the conduct of trade unionists and to encroach directly upon the raison d'être of a trade union."[238] The dissent also grounded the application of the chilling effect principle in prior case law, relying upon both *Wille* and *Goodwin* as authorities.[239]

It is arguable that the approach of the majority in *Palomo Sánchez* is quite close to that of the majority in *Lindon*, where the Court did not engage with the chilling effect principle, and similarly does not engage with the case law.[240] This approach of essentially ignoring the chilling effect principle and the case law, rather than trying to distinguish the case law, or argue why it does not apply, is quite questionable. In order to explain the approach, it may be suggested that the non-application of the chilling effect in *Palomo Sánchez* reflected the view held by the majority that grossly insulting expression is not the type of expression where the chilling effect should be considered; similar to the majority's view in *Lindon*, that where the expression involves hate speech, the chilling effect on such expression in the future is not a main concern.

7.6 Post- *Palomo Sánchez* application of the chilling effect

7.6.1 Second Section and Fifth Section seem not to follow *Palomo Sánchez*

Less than a fortnight after the Grand Chamber's judgment in *Palomo Sánchez* had been delivered, the Second Section of the Court considered a related issue of a trade union's board members being disciplined for displaying a union poster in the workplace. The applicants in *Şişman and Others v. Turkey*,[241] were civil servants in the tax offices of the Ministry of Finance, and were board members of a local trade union affiliated with the Trade Union Confederation of Public-Sector Employees. In May 2004, disciplinary proceedings were instituted against them for putting up posters encouraging participation in the annual 1 May workers' demonstration on their own office walls, rather than on the notice board set aside for that purpose. The applicants were issued a "reprimand," on the ground that posters displayed in areas other than the designated notice board were forbidden and constituted "visual

[236] *Aguilera Jiménez and Others v. Spain* (App. nos. 28389/06, 28955/06, 28957/06, 28959/06, 28961/06 and 28964/06) 8 December 2009 (Dissenting opinion of Judge Power, para. 9).
[237] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 76.
[238] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber) (Joint dissenting opinion of Judges Tulkens, Davíd Thór Björgvinsson, Jočienė, Popović and Vučinić, para. 17).
[239] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber) (Joint dissenting opinion of Judges Tulkens, Davíd Thór Björgvinsson, Jočienė, Popović and Vučinić, footnote 11).
[240] *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber), para. 68.
[241] *Şişman and Others v. Turkey* (App. No. 1305/05) 27 September 2011.

pollution."[242] The applicants were also subject to a deduction in pay as a disciplinary sanction. Subsequently, the tax offices upheld the measures under the Civil Servants Act, but downgraded the reprimands to "warnings."[243]

The applicants made an application to the European Court, complaining that the disciplinary sanctions violated their right to freedom of association under Article 11, and their right to freedom of expression under Article 10. In particular, the applicants argued that the sanctions "amounted to intimidation against the trade union."[244] The Court decided to examine the complaint "solely in the light of Article 11."[245] First, the Court held that the warning issued for having placed union posters on the office walls was an "interference" with the right to freedom of association.[246] The Court then focused on whether the interferences had been necessary in a democratic society, and unanimously concluded that there had been a violation of Article 11. The Court placed particular emphasis on the fact that the applicants "had not engaged in fly-posting causing visual pollution throughout their workplace," and "the posters in question had not contained any statements or illustrations that were illegal or shocking to the public."[247]

Finally, when examining the sanctions, the Court applied chilling effect reasoning, and held that the sanction, "however minimal," was such as to "dissuade members of trade unions from freely exercising their activities."[248] The Court cited *Karaçay* at paragraph 37 as authority for the proposition, where the Court had also held that a "warning," while "minimal," was "such as to dissuade members of trade unions from legitimately participating in strike days or actions to defend the interests of their members."[249] Of note, the Court also awarded the applicants non-pecuniary damages in respect of the salary deductions that had been imposed.[250]

Şişman and Others, in contrast to *Palomo Sánchez*, applied the chilling effect principle, and relying upon the pre-*Palomo Sánchez* case law. *Şişman and Others* thus suggested that the wider ramifications of the Grand Chamber's non-application of the chilling effect principle may not be felt beyond cases involving "insulting "expression.

One month later, another Section of the Court, the Fifth Section, also considered the application of chilling effect reasoning concerning a police trade unionist's freedom of expression. The case was *Vellutini and Michel v. France*,[251] where the applicants were president and secretary-general of a police union. In February 2007, the applicants distributed a leaflet to the residents of the town of Vendays-Montalivet, which included statements that the municipal mayor, "flouts the law," and "publicly insults your policewoman by claiming that she is mentally ill."[252] The mayor initiated defamation proceeding against the applicants, and the Bordeaux Criminal Court convicted the applicants of "public defamation against a citizen holding public office," imposing a fine of 1,000 euro on each applicant, in addition to joint liability for damages of 5,000 euro. [253]

The applicants made an application to the European Court, claiming that their conviction for defamation was in violation of their right to freedom of expression under

[242] *Şişman and Others v. Turkey* (App. No. 1305/05) 27 September 2011.
[243] *Şişman and Others v. Turkey* (App. No. 1305/05) 27 September 2011, para. 12.
[244] *Şişman and Others v. Turkey* (App. No. 1305/05) 27 September 2011, para. 30.
[245] *Şişman and Others v. Turkey* (App. No. 1305/05) 27 September 2011, para. 16.
[246] *Şişman and Others v. Turkey* (App. No. 1305/05) 27 September 2011, para. 23.
[247] *Şişman and Others v. Turkey* (App. No. 1305/05) 27 September 2011, para. 33.
[248] *Şişman and Others v. Turkey* (App. No. 1305/05) 27 September 2011, para. 34.
[249] *Karaçay v. Turkey* (App. no. 6615/03) 27 March 2007, para. 37.
[250] *Şişman and Others v. Turkey* (App. No. 1305/05) 27 September 2011, para. 43-46.
[251] *Vellutini and Michel v. France* (App. No. 32820/09) 6 October 2011.
[252] *Vellutini and Michel v. France* (App. No. 32820/09) 6 October 2011, para. 16.
[253] *Vellutini and Michel v. France* (App. No. 32820/09) 6 October 2011, para.

Article 10, and their right to freedom of association under Article 11. The Court decided to examine the complaint under Article 10, but considered that "account should be taken" of the fact that the applicants' statements were made "in their capacity as officials of a trade union in relation to the employment situation of one of its members."[254] Crucially, the Court held that the "expressions used had not reflected any manifest personal animosity; on the contrary, they fell within the limits of admissible criticism afforded to trade-union representatives in a debate of general interest."[255]

Finally, the Court went on to consider the nature and severity of the penalties imposed, citing paragraph 111 from *Cumpănă and Mazăre*, that the Court must "exercise the utmost caution" where measures or sanctions imposed are such as to "dissuade the press from taking part in the discussion of matters of legitimate public concern."[256] The Court noted that the applicants were ordered to pay a fine of 1,000 euro each, in addition to being jointly liable for damages of 5,000 euro. The Court concluded that such sanctions "must be regarded as disproportionate."[257]

Notably, while the Court in *Vellutini and Michel* held the sanctions imposed were disproportionate, the Court did not seem to mention the broader chilling effect such sanctions may have on other trade unions. The Court also and remained silent on whether a chilling effect arises from criminal proceedings, and whether the principle that recourse to criminal proceedings should be used only in "exceptional circumstances" applied.

7.6.2 Minister's statement had chilling effect on police trade union

One year later, another police union's freedom of expression was again under consideration by the Court, but the Court would divide over the question of a violation of Article 10 and the chilling effect. The case was *Trade Union of the Police in the Slovak Republic and Others v. Slovakia*,[258] and concerned a police trade union, and three members of the union. In October 2005, the union organised a demonstration in Bratislava concerning policemen's social security and low remuneration. During the demonstration, participants shouted the "Government should step down," and one banner read "If the State doesn't pay a policeman, the mafia will do so with pleasure."[259] Following the demonstration, the Minister of the Interior made a number of statements in the media, including that "he would dismiss anyone who acted contrary to the ethical code of the police again," that the first applicant union's representatives had "lost credibility," that he was "not obliged to negotiate with those representatives," and that he had sanctioned the first applicant's president for making what he considered to be false statements.[260] The applicants lodged a complaint with the Constitutional Court. They alleged a breach of Articles 10 and 11 of the Convention and their constitutional equivalents over the Minister's statements. However, the Constitutional Court held that the Minister of the Interior had been entitled to express his opinion on the situation within the Ministry for which he was politically responsible.

The applicants made an application to the European Court, claiming that the government minister's statements had violated their right to freedom of expression and

[254] *Vellutini and Michel v. France* (App. No. 32820/09) 6 October 2011, para. 32.
[255] *Vellutini and Michel v. France* (App. No. 32820/09) 6 October 2011, para. 32.
[256] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004, para. 111.
[257] *Vellutini and Michel v. France* (App. No. 32820/09) 6 October 2011, para. 43.
[258] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012.
[259] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 6.
[260] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 71.

freedom of assembly and association, in particular that the minister's "reaction had been excessive as it had involved threats, including possible dismissal from the police force,"[261] and that the applicants were "intimidated," and "under threat if they continued their activities."[262]

The first question for the Court was whether there had been an "interference" with the applicants' Article 10 and 11 rights, with the government arguing that the Minister's statements were a "reaction to excessive and inappropriate views expressed at the public meeting," and "no specific action had been taken in respect of the first, second or fourth applicants."[263] The Court noted that the facts of the case "are such that the question of freedom of expression is closely related to that of freedom of association in a trade-union context,"[264] and decided it would consider the case "principally" under Article 11, "whilst interpreting it in the light of Article 10," citing *Palomo Sánchez*.[265]

Notably, the Court reiterated the chilling effect principle that "national authorities must ensure that disproportionate penalties do not dissuade trade union representatives from seeking to express and defend their members' interests."[266] The Court noted that the Minister's statements "indicated that he might no longer communicate with the representatives" of the police union, and "that he had sanctioned its president by transferring him to a different position and that he might sanction other policemen more severely."[267] In light of this, the Court held that the applicants were "intimidated" by the Minister's statements, which was "a situation which could have thus had a chilling effect and discouraged them from pursuing activities within the first applicant trade union."[268] On this basis, the Court considered that there had been an "interference" with the applicants' exercise of the right to freedom of association.[269]

The Court then considered whether the interference had been "prescribed by law," and held that the Minister's statements pursued the aim of ensuring compliance with the Ethical Code of Members of the Police Corps, which provided that when expressing views in public, police officers must act in an impartial and reserved manner.[270] Crucially, the Court then examined whether the interference had been necessary in a democratic society. First, the Court held that it was "relevant" that the Minister's statements implying the possibility of the imposition of further sanctions were "exclusively directed against" the "calls for the

[261] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 6.
[262] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 49.
[263] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 50.
[264] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 51.
[265] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 52 (citing *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 52).
[266] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 55.
[267] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 59.
[268] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 60.
[269] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 61.
[270] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 63.

Government's resignation," and the Minister "expressly acknowledged the right of the police to elect their trade union representatives."[271]

The Court did admit that "while it is true that he had stated that he was not obliged to negotiate with those representatives who, in his view, had lost credibility," the Court held that "it does not appear from the documents submitted" that the union's right to be heard "was subsequently impaired."[272] Similarly, the Court held that "it has not been shown" that the first applicant was prevented from pursuing trade union activities; and "there is no indication" that the applicants were prevented, "as a result of the impugned statements or any consecutive action," from availing themselves of their freedom of association as representatives or members of the first applicant association.[273] Therefore, the Court concluded that there had been no violation Article 11, read in the light of Article 10.

Two judges dissented in *Trade Union of the Police in the Slovak Republic and Others*, namely Judge Myjer, and Judge Gyulumyan, and expressly criticised the majority for not considering the chilling effect in finding that the interference had not been disproportionate.[274] The dissent held that the Minister's statements were "indeed capable of creating an atmosphere of fear, were indeed intimidating, and did indeed create a situation which could have had a chilling effect and discouraged trade union members from pursuing activities within the trade union."[275] This was "reinforced" by the Minister "imposing a sanction on the president of the trade union – which demonstrated that his reaction was no empty threat."[276] The dissent concluded that the Minister "undermined the very essence of the trade union's rights" by acting to "muzzle the trade union's leadership."[277]

In light of *Trade Union of the Police in the Slovak Republic and Others*, two main points seem evident. First, the Court, unanimously, applied chilling effect reasoning in finding that there had been an interference with the applicants' right to association, read in the light of their right to freedom of expression. This was because where a government minster's statements "intimidated" trade union members, this was a situation which could have a chilling effect and discouraged them from pursuing activities within the trade union.[278] The application of the chilling effect principle by the Court under the "interference" limb, was arguably quite similar to that in *Wille*,[279] concerning an interference with a judge's freedom of expression. In *Wille*, the Court held that a monarch's letter announcing "the intention to sanction the applicant because he had freely expressed his opinion," had a "chilling effect on the exercise by the applicant of his freedom of expression, as it was likely to discourage him from making statements of that kind in the future."[280]

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[271] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 72
[272] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 73.
[273] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 74.
[274] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012 (Dissenting opinion of Judge Myjer joined by Judge Gyulumyan).
[275] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012 (Dissenting opinion of Judge Myjer joined by Judge Gyulumyan, para. 7).
[276] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012 (Dissenting opinion of Judge Myjer joined by Judge Gyulumyan, para. 7).
[277] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012 (Dissenting opinion of Judge Myjer joined by Judge Gyulumyan, para. 7).
[278] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 60.
[279] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber).
[280] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 50.

The second point, however, concerns how the Court majority considered that the minister's statements did not violate Article 11 read in the light of Article 10. The Court majority admitted that the applicants "were intimidated by the Minister's statements," and was thus "a situation which could have thus had a chilling effect and discouraged them from pursuing activities within the first applicant trade union."[281] However, the Court majority later held that "it does not appear from the documents," "it has not been shown," and "there is no indication" that the union's right to be heard was impaired, that it was prevented from pursuing trade union activities, or that the applicants were prevented from exercising their freedom of association.[282] From the language of the Court majority, it seems that the Court was admitting a chilling effect could arise, but examining the evidence, there had been no practical consequences. On the other hand, the dissent considered the chilling effect created by the "atmosphere of fear" was a violation of Article 11 read in the light of Article 10. [283]

However, as has been argued in the preceding chapters, in *Goodwin* (sources "may" be deterred), and *Wille* ("likely to discourage"), the chilling effect arises from "fear" and "risk" (*Cumpănă and Mazăre*), and the crucial component is not the "practical consequences" for the individual applicants, but the broader chilling effect on other trade unions "in the future." This was even reflected in *Palomo Sánchez*, and mentioned explicitly by the Court majority in *Trade Union of the Police in the Slovak Republic and Others*, that penalties should not "dissuade trade-union representatives from seeking to express and defend their members' interests."[284]

7.6.3 Criminal conviction had no chilling effect on a police trade unionist

Two weeks after *Trade Union of the Police in the Slovak Republic and Others* had been delivered, the Court again delivered a third judgment concerning a police trade union's activity, and again the Court would divide. The case was *Szima v. Hungary*,[285] and the applicant was chairperson of Tettrekész Police Trade Union. Between 2007 and 2009 she published a number of writings on the trade union's website, which was effectively under her editorial control, concerning outstanding remunerations due to police staff, alleged nepotism and undue political influence in the force, as well as dubious qualifications of senior police staff, including the statement that "it is almost a prerequisite of becoming a senior police officer to have a political background or to be a relative or a descendant of other senior police officers."[286] The applicant was convicted under section 357 of the Criminal Code for "instigation to insubordination," and sentenced to a fine and demotion.[287] In 2010, the Military Bench of the Budapest Court of Appeal upheld the applicant's conviction.

The applicant made an application to the European Court, claiming that the criminal proceedings on account of her statements, "as part of her trade-union activity," violated her right to freedom of expression under Article 10.[288] The Court first held that as the applicant

[281] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 60.
[282] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 73.
[283] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012 (Dissenting opinion of Judge Myjer joined by Judge Gyulumyan, para. 7).
[284] *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 56.
[285] *Szima v. Hungary* (App. no. 29723/11) 9 October 2012. See Dirk Voorhoof, "New Judgment on Trade Union Freedom of Expression," *Strasbourg Observers*, 7 November 2012.
[286] *Szima v. Hungary* (App. no. 29723/11) 9 October 2012, para. 8.
[287] *Szima v. Hungary* (App. no. 29723/11) 9 October 2012, para. 7.
[288] *Szima v. Hungary* (App. no. 29723/11) 9 October 2012, para. 13.

was a "trade-union leader," the Court would examine the case under Article 10 interpreted in the light of Article 11, citing *Palomo Sánchez and Others*.[289] The main question for the Court was whether the applicant's conviction was necessary in democratic society under Article 10 interpreted in the light of Article 11.

The Court first admitted that some statements concerning outstanding remunerations were "clearly related to trade union activities and their sanctioning therefore appears difficult to reconcile with the prerogatives of a trade union leader."[290] Similarly, the Court admitted that the "attack on the Head of the National Police Department is a pure value judgment and enjoys as such a high level of protection under Article 10."[291] Further, the Court noted that the domestic courts "rather surprisingly," refused to accept evidence, "which fact alone would have cast doubt on the legitimacy of the sanction imposed on the applicant, had that sanction been applied for that sole reason."[292]

However, the Court then went on to hold that the allegations against the senior police management, in particular those concerning "political bias and agenda, transgressions, unprofessionalism and nepotism," were "capable of causing insubordination since they might discredit the legitimacy of police actions."[293] The Court did admit that the allegations were "predominantly value-judgments," but the applicant "did not provide any clear factual basis for those statements."[294] Further, the Court noted as a "matter of serious concern," that the applicant "was barred from submitting evidence in the domestic proceedings."[295] Nonetheless, the Court held that as a high-ranking officer and trade union leader, the applicant "should have had to exercise her right to freedom of expression in accordance with the duties and responsibilities which that right carries with it in the specific circumstances of her status and in view of the special requirement of discipline in the police force."[296] The Court concluded that "in view of the margin of appreciation," the "maintenance of discipline by sanctioning accusatory opinions which undermine the trust in, and the credibility of, the police leadership," represented a "pressing social need," and the reasons adduced by the national authorities to justify it are relevant and sufficient.[297]

One judge dissented, Judge Tulkens, and criticised the majority for not examining the "harshness of the penalty," finding that while the fine "may be regarded as lenient, the same cannot be said of the demotion, which in my view is a harsh sanction and, in the context of the present case, a disproportionate one."[298]

The Court's majority in *Szima* did not mention the chilling effect principle, and indeed did not examine the severity of penalties imposed. The majority emphasised three times the margin of appreciation, and this principle seemed to have outweighed application of the Court's prior case law on the chilling effect principle. Indeed, the standard of scrutiny applied by the Court in *Szima* was quite deferential, with the Court admitting that it was a "matter of serious concern" that the applicant was prevented from submitting evidence in the domestic proceedings,[299] but this did not suffice to find a violation of Article 10.

[289] *Szima v. Hungary* (App. no. 29723/11) 9 October 2012, para. 13.
[290] *Szima v. Hungary* (App. no. 29723/11) 9 October 2012, para. 32.
[291] *Szima v. Hungary* (App. no. 29723/11) 9 October 2012, para. 32.
[292] *Szima v. Hungary* (App. no. 29723/11) 9 October 2012, para. 32.
[293] *Szima v. Hungary* (App. no. 29723/11) 9 October 2012, para. 32.
[294] *Szima v. Hungary* (App. no. 29723/11) 9 October 2012, para. 33.
[295] *Szima v. Hungary* (App. no. 29723/11) 9 October 2012, para. 32.
[296] *Szima v. Hungary* (App. no. 29723/11) 9 October 2012, para. 32.
[297] *Szima v. Hungary* (App. no. 29723/11) 9 October 2012, para. 32.
[298] *Szima v. Hungary* (App. no. 29723/11) 9 October 2012 (Dissenting opinion of Judge Tulkens, para. 6).
[299] *Szima v. Hungary* (App. no. 29723/11) 9 October 2012, para. 32.

7.6.4 Intelligence official's dismissal had a chilling effect

The three judgments in *Vellutini and Michel, Trade Union of the Police in the Slovak Republic and Others*, and *Szima*, all concerned police trade unions and union members, and application of the chilling effect principle in light of *Palomo Sánchez*. But in 2013, the issue of protection of whistleblowers would return, and unlike in *Guja* and *Heinisch*, the whistleblower had been prosecuted and given a suspended prison sentence. The case was *Bucur and Toma v. Romania*,[300] where the first applicant, Constantin Bucur, worked in the surveillance department of the Romanian Intelligence Service (SRI), while the second applicant, Mircea Toma, was a journalist for the Romanian newspaper *Academia Caţavencu*. The case arose in 1996, when the first applicant noticed a number of irregularities in some surveillance operations, including tapping-authorisations not including the required information, and with a number of journalists, politicians and businessmen being tapped without apparent sufficient justification.[301] The first applicant made his concerns known to his colleagues and the Head of Department, but was reprimanded and advised not to pursue it.[302] The first applicant then contacted a Member of Parliament on the Parliamentary Intelligence Commission, but was told that it would be futile to disclose the information to the Commission, given the close links between the Commission's Chairman and the Intelligence Service.[303] The Member of Parliament advised the first applicant to hold a press conference.

The first applicant then took eleven cassettes from an SRI facility, which contained conversations of a number of journalists and politicians, and made them available to the press at a press conference in May 1996.[304] One of the tapes contained the recording of a telephone conversation between the second applicant and his daughter, and later the second applicant and some of his colleagues in the editorial staff of the newspaper *Academia Caţavencu* lodged a criminal complaint over the illegal interception of telephone calls made from the newspaper's offices.[305] Following the press conference, a Military Prosecutor authorised a search of the first applicant's home, and he was charged with a number of offences including transmitting classified information.[306] Two years later in 1998, the first applicant was convicted by the Military Court, and received a suspended two-year prison sentence.[307] The Romanian Military Court of Appeal upheld the conviction on appeal, as did the Supreme Court.

Focusing on the first applicant's application to the European Court, it was claimed that his conviction was a violation of his right to freedom of expression. The Court first held that there had been an interference with freedom of expression, and the main question was whether it had been necessary in a democratic society. The Court sought to apply the six-part criteria set out in *Guja* on the protection of whistleblowers: (a) did the applicant have alternative channels to disclose the information; (b) the public-interest value of the disclosure; (c) the authenticity of the information made public; (d) the damage done to the intelligence service; (e) the applicant's good faith; and (f) the severity of the sanction.[308]

The Court applied the *Guja* criteria, and held that the first applicant was justified in making the disclosure to the press, given the inadequacies of the internal avenues within the

[300] *Bucur and Toma v. Romania* (App. no. 40238/02) 8 January 2013.
[301] *Bucur and Toma v. Romania* (App. no. 40238/02) 8 January 2013, para. 8.
[302] *Bucur and Toma v. Romania* (App. no. 40238/02) 8 January 2013, para. 9.
[303] *Bucur and Toma v. Romania* (App. no. 40238/02) 8 January 2013, para. 9.
[304] *Bucur and Toma v. Romania* (App. no. 40238/02) 8 January 2013, para. 11.
[305] *Bucur and Toma v. Romania* (App. no. 40238/02) 8 January 2013, para. 50.
[306] *Bucur and Toma v. Romania* (App. no. 40238/02) 8 January 2013, para. 19.
[307] *Bucur and Toma v. Romania* (App. no. 40238/02) 8 January 2013, para. 41.
[308] *Bucur and Toma v. Romania* (App. no. 40238/02) 8 January 2013, para. 95-119.

Intelligence Service.[309] There was an "undeniable" public interest in the information disclosed, as it concerned abuse of surveillance power,[310] the information was authentic,[311] and the first applicant had demonstrated his good faith by first approaching a superior and Member of Parliament.[312] The Court also considered that the interest in maintaining public confidence in the Intelligence Service did not outweigh the public's right to disclosure of unlawful surveillance activity.[313]

Finally, the Court turned to the severity of the sanction. The Court noted that the first applicant had been sentenced to a suspended sentence of two years' imprisonment. The Court applied *Guja* and *Heinisch*, and held that the sanction would not only have had a very "negative impact on his career, it was also likely to act as a deterrent to other SRI officials and discourage them from reporting improper actions."[314] Further, in view of the media coverage of the applicant's case, the sanction could have a chilling effect not only on SRI officials but also on other officials and employees."[315]

Bucur and Toma thus continued the consistent application of the chilling effect principle where the Court classifies the applicant as a whistleblower, as in *Guja* and *Heinisch*. *Bucur and Toma* was particularly notable in that it involved an illegal act (leaking classified information), and damage to public confidence in the Intelligence Service, and yet, the chilling effect principle was applied. The chilling effect principle's application was due to the undeniable public interest expression involved. The Court in *Bucur and Toma* also continued *Guja* and *Heinisch*'s emphasis on the contribution of media coverage to the chilling effect, affecting not intelligence agency officials, but also other officials and employees.[316]

7.6.5 Journalist's dismissal for breaching confidentiality clause

The Court would again consider a journalist's dismissal from a broadcaster, but while the Court applied *Guja* to the question, and found a violation of Article 10, the Court curiously omitted the chilling effect principle from its consideration. The case was *Matúz v. Hungary*,[317] where the applicant was a television journalist, employed by the State television company Magyar Televízió Zrt. He was also chairman of the Trade Union of Public Service Broadcasters. The case arose in 2003, when the applicant was an editor and presenter of a cultural programme called *Éjjeli menedék* (Night Shelter) which involved interviews with various cultural figures. Following the appointment of a new cultural director, the applicant had apparently contacted the television company's president, since he had perceived the new director's conduct in modifying certain contents of *Éjjeli menedék* as "censorship."[318] The applicant received no response to his complaint. In June 2003, the editor-in-chief of the programme sent a letter to the board of Magyar Televízió Zrt, stating that the appointment of the new cultural director had "led to censorship of the programme by his suggesting

[309] *Bucur and Toma v. Romania* (App. no. 40238/02) 8 January 2013, para. 100.
[310] *Bucur and Toma v. Romania* (App. no. 40238/02) 8 January 2013, para. 101.
[311] *Bucur and Toma v. Romania* (App. no. 40238/02) 8 January 2013, para. 113.
[312] *Bucur and Toma v. Romania* (App. no. 40238/02) 8 January 2013, para. 118.
[313] *Bucur and Toma v. Romania* (App. no. 40238/02) 8 January 2013, para. 115.
[314] *Bucur and Toma v. Romania* (App. no. 40238/02) 8 January 2013, para. 119.
[315] *Bucur and Toma v. Romania* (App. no. 40238/02) 8 January 2013, para. 119.
[316] *Bucur and Toma v. Romania* (App. no. 40238/02) 8 January 2013, para. 119.
[317] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014 (Article 10 and journalist's dismissal for breaching confidentiality clause). See Dirk Voorhoof, "Whistleblower Protection for Journalist Who Alarmed Public Opinion about Censorship on TV," *Strasbourg Observers*, 25 November 2014.
[318] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 7.

modifications to, and the deletion of, certain contents."[319] The letter was also published by a Hungarian newspaper online.[320]

In 2004, the applicant published a book entitled "The Antifascist and the Hungarista - Secrets from the Hungarian Television," with the preface of the book stating that "it would contain documentary evidence of censorship exercised in the State television company."[321] Each chapter of the book contained an extract from different interviews recorded in 2003, which had not been broadcast in the cultural programme, apparently on the basis of the instructions of the new cultural director. The book also included in-house letter exchanges between the cultural director and the editor-in-chief concerning the suggested changes in the programme.[322]

Following publication of the book, the television company dismissed the applicant and the editor-in-chief of Éjjeli menedék, with "immediate effect," as by publishing the book, he had "breached the confidentiality clause contained in his labour contract."[323] The applicant challenged his dismissal, but the Budapest Labour Court dismissed the applicant's action, stating that he had breached his obligations under his work contract by publishing information about his employer without its consent. In 2009, the Budapest Regional Court dismissed an appeal, finding publication of the book might have had a "certain detrimental effect on the television company's reputation."[324] Finally, in 2010, the Supreme Court upheld the decision, finding that the applicant had "breached the contract by means of the unauthorised publication of internal documents of his former employer," and expressly excluded from its scrutiny the question whether or not the applicant's freedom of expression justified a breach of his contract.[325]

The applicant made an application to the European Court, claiming that his dismissal on the ground of publishing a book including internal documents of his employer amounted to a breach of his right to freedom of expression. First, the Court reiterated that the "protection of Article 10 of the Convention extends to the workplace in general," and the disciplinary measure dismissing the applicant for publishing a book containing confidential information about his employer constituted an interference with the exercise of the right protected by Article 10.[326] The Court then turned to whether the interference was necessary in a democratic society

The Court first noted that the case "bears a certain resemblance" to *Fuentes Bobo* and *Wojtas-Kaleta*, and raised the problem of "how the limits of loyalty of journalists working for such companies should be delineated and, in consequence, what restrictions can be imposed on them in public debate."[327] The Court held that where the right to freedom of expression of a person bound by professional confidentiality is being balanced against the right of employers to manage their staff, the relevant criteria were contained in *Guja*.[328]

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[319] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 8.
[320] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 8.
[321] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 9.
[322] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 9.
[323] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 10.
[324] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 14.
[325] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 16.
[326] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 27.
[327] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 32.
[328] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 33 ("(a) public interest involved in the disclosed information; (b) authenticity of the information disclosed; (c) the damage, if any, suffered by the authority as a result of the disclosure in question; (d) the motive behind the actions of the reporting employee; (e) whether, in the light of duty of discretion owed by an employee toward his or her employer, the information was made public as a last resort, following disclosure to a superior or other competent body; and (f) severity of the sanction imposed.").

Applying the *Guja* criteria, the Court found the book "concerned a matter of public interest."[329] Further, the Court was of the view that the applicant's combined "professional and trade-union roles must be taken into consideration for the purposes of examining whether the interference complained of was necessary in a democratic society,"[330] and "having regard to the role played by journalists in society and to their responsibilities to contribute to and encourage public debate, the obligation of discretion and confidentiality constraints cannot be said to apply with equal force to journalists, given that it is in the nature of their functions to impart information and ideas."[331] The Court held that given these elements, domestic authorities "should have paid particular attention to the public interest attached to the applicant's conduct."[332]

In relation to the criterion of accuracy, the Court held that the documents were authentic, and his comments had a factual basis.[333] And on the damage to the television company, the Court noted that although the publication of the documents in the impugned book was a breach of confidentiality, "their substance in general had already been made accessible through an online publication and was known to a number of people."[334] Fourth, the Court noted that the applicant's account of his motives had not been called into question before the domestic courts,[335] and the applicant's decision to make the impugned information and documents public was "based on the experience that neither his complaint to the president of the television company nor the editor-in-chief's letter to the board had prompted any response."[336] Finally, the Court noted that a "rather severe sanction was imposed on the applicant, namely the termination of his employment with immediate effect."[337]

The Court held that the domestic courts "paid no heed to the applicant's argument that he had been exercising his freedom of expression in the public interest, and limited their analysis to finding that he had breached his contractual obligations."[338] In light of these considerations, the Court held the interference with the applicant's right to freedom of expression was not necessary in a democratic society, in violation of Article 10.[339]

The Court in *Matúz* did unanimously find a violation of Article 10. But there did not seem to be chilling effect reasoning in the Court's judgment, and it is notable how little was said by the Court in relation to the sanction of dismissal, merely one sentence where it noted "that a rather severe sanction was imposed on the applicant, namely the termination of his employment with immediate effect."[340] The Court chose not to apply the principle from *Guja* that the sanction would not only have negative repercussions on the applicant's career, but it could also have a serious chilling effect on other employees and discourage them from reporting any misconduct."[341] And nothing about the media coverage of the case. *Matúz* mirrors *Fuentes Bobo*, of only focusing on the individual applicant, and did not seem to bring the threat of a chilling effect on other journalists in the future into the mix.

[329] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 37.
[330] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 39.
[331] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 39.
[332] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 40.
[333] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 41.
[334] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 43.
[335] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 46.
[336] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 47.
[337] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 48.
[338] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 48.
[339] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 50.
[340] *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 48.
[341] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 95.

7.6.6 Fourth Section disagreement over chilling effect of professor's dismissal

The Court's sole focus in *Matúz* was on the individual applicant, but a different Section of the Court would apply *Guja* to a professor's dismissal, and even though the professor had taken up another position in another university, the Court would hold that sanction still was liable to have a serious chilling effect on other employees of the university and to discourage them from raising criticism. The case was *Rubins v. Latvia,*[342] and the applicant was a professor and the head of a department o in Riga Stradiņa University. Following the university's announcement that the department would be merged with another in 2010, the applicant sent various emails to the Rector of the University, concerning the circumstances of the reorganisation and the abolition of his department. The emails "criticised the lack of democracy and accountability in the leadership of the organisation," and "drew the recipients' attention to the alleged mismanagement of the University's finances."[343] The applicant also sent an email, with the subject "Settlement agreement" which detailed "two ways of settling his dispute with the University," and asked the Rector to agree to one of the options before the meeting of the constituent assembly took place, detailed several existing problems at the University, and informed the Rector of his "intention to inform the members of the assembly about the problems if no agreement was reached."[344]

In May 2010, the applicant was dismissed, as he was deemed to have acted in contravention of several provisions of the University's staff regulations. The dismissal notice stated that the ground for dismissal was "the email you sent to the Rector of [the University] on 20 [March] 2010, in which, while addressing the Rector concerning issues of interest to you, you included inappropriate demands, including elements of blackmail and undisguised threats. As a consequence your actions are considered as very grave infringements of basic ethical principles and standards of behaviour, and as absolutely contrary to good morals."[345] The applicant initiated civil proceedings seeking an order for his reinstatement, which was ultimately rejected by the domestic courts.

The applicant then made an application to the European Court, claiming his dismissal violated Article 10, as "he had been punished for expressing a legitimate opinion about problems prevailing in the University and for attempting to resolve his employment situation."[346] In particular, the applicant argued that his dismissal had a "dissuasive effect."[347] First, the Court held that the applicant's dismissal amounted to an "interference" with freedom of expression, and the main question for the Court was whether the interference had been "necessary in a democratic society." In this regard, the Courts noted that there were four specific considerations it "must take into account," namely (a) the public interest of the impugned remarks, (b) the applicant's motive, (c) harm to the reputation of others, and (d) the severity of the measure.[348]

First, the Court held that the issues invoked by the applicant "were of some public interest and that the truthfulness of the information was not challenged by the parties," which was "not assessed at all" by the domestic courts.[349] Second, with regard to the applicant's motives, the Court noted that the applicant "attempted first to address the issues within the hierarchy," it was not unreasonable to address the demands to the university Rector, and the

[342] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015. See D. Voorhoof, "Response to comment on Rubins v. Latvia: adjudication is not erroneous at all," *Strasbourg Observers*, 14 April 2015.
[343] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015, para. 9.
[344] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015, para. 45.
[345] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015, para. 17.
[346] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015, para. 52.
[347] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015, para. 58.
[348] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015, para. 82-92.
[349] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015, para. 85.

applicant's proposed settlement was "not unreasonable."[350] Third, the Court distinguished *Palomo Sánchez*, and held that neither in the email nor in the subsequent publication "did the applicant divulge any private information damaging to the honour and dignity of his colleagues or his employer in general."[351]

Finally, the Court examined the severity of the measure. The government argued that because the "applicant's career had not been affected," the dismissal was not severe.[352] However, the Court held it was the "harshest sanction available and, disregarding the fact that the applicant took up a post in another university soon afterwards, was liable to have a serious chilling effect on other employees of the University and to discourage them from raising criticism."[353] In light of these considerations, the Court concluded that the reasons relied on by the domestic courts were not sufficient to show that the interference with the applicant's right to freedom of expression was "necessary in a democratic society," and thus there had been a violation of Article 10.[354]

Focusing on the chilling effect principle applied by the Court in *Rubins*, it seems that the principle is based upon both *Guja* and *Heinisch*. In *Rubins*, the Court held that dismissal would not only have a chilling effect on the applicant, but also be "liable to have a serious chilling effect on other employees of the University and to discourage them from raising criticism."[355] This wording is similar to the conclusion in *Guja*, that dismissal "not only had negative repercussions on the applicant's career," but it could also "have a serious chilling effect on other employees from the Prosecutor's Office and discourage them from reporting any misconduct."[356] Similarly, in *Heinisch*, the Court held that dismissal "not only had negative repercussions on the applicant's career," but also could have "a serious chilling effect on other employees of Vivantes and discourage them from reporting any shortcomings in institutional care."[357]

Two judges dissented in *Rubins*, namely Judge Mahoney and Judge Wojtyczek.[358] On the "severity of measure" point, the dissent simply stated that "given what the appeal court took to be the seriousness of the disloyal conduct of the applicant as established by the evidence before it, the sanction of dismissal cannot be regarded as disproportionate."[359] However, the dissent does not seek to distinguish the earlier case law in *Guja*, *Heinisch*, or explain how *Palomo Sánchez* might be applicable. Indeed, the dissenting opinion in *Rubins* does not cite even one prior case from the Court's case law.[360]

Rubins also seemed to be a rejection of the approach in *Matúz* of focusing solely on the individual applicant, with the Court in *Rubins* finding that just because the applicant took up a post in another university soon afterwards, the sanction still was liable to have a serious chilling effect on other employees of the university and to discourage them from raising criticism.

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[350] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015, para. 88.
[351] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015, para. 91.
[352] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015, para. 92.
[353] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015, para. 92.
[354] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015, para. 93.
[355] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015, para. 92.
[356] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 95.
[357] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 91.
[358] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015 (Dissenting opinion of Judges Mahoney and Wojtyczek).
[359] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015 (Dissenting opinion of Judges Mahoney and Wojtyczek, para. 14).
[360] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015 (Dissenting opinion of Judges Mahoney and Wojtyczek).

7.6.7 Civil proceeding against professor for disclosing allegations of corruption

Following *Matúz*, the Court again considered a professor's freedom of expression, where it was argued that statements he made at a press conference should be regarded as whistleblowing on illegal and immoral conduct in his university department.[361] The case was *Aurelian Oprea v. Romania*,[362] where the applicant was an associate professor at a university in Bucharest, and was secretary-general of the European Association of University Teaching Staff in Romania. The case arose in early 2005, when the applicant made a disclosure to the university Dean and Rector about another university professor (O.A.A) who had published a book, "which was mostly (80%) a copy of another book," and benefitted from the "protection of the deputy rector, Professor N.C.I., who was also the scientific referent of the book."[363] The disclosure had not been followed up by any measures, and in June 2005, the *România liberă* newspaper then published an article entitled "University lecturer ostracised because he denounced university corruption,"[364] which referred to the applicant's disclosure.

Then in August 2005, the Association organised a press conference on corruption at universities, and the applicant, in his capacity as secretary-general of the Association, delivered a speech about corruption in his own university. The applicant referred to O.A.A.'s 80% copied book, and that it had been "written under the direct supervision and guidance of N.C.I, who had written a eulogistic foreword to the book."[365] The applicant criticised the way in which N.C.I. had managed public funding of scientific research, that he was occupying too many positions as professor at several different universities, to be able to handle them properly; and that in the department led by N.C.I. "there was a mafia-type organisation."[366]

In 2005, N.C.I. lodged a joint criminal and civil complaint against the applicant for defamation. The Bucharest County Court dismissed the criminal defamation complaint, as a direct consequence of an amendment made to the Criminal Code regarding the decriminalisation of defamation. However, in 2006, the Bucharest Civil Court of First Instance allowed the action, and awarded 20,000 lei in damages to N.C.I. The judgment was upheld on appeal, and the applicant was ordered to pay the N.C.I.'s legal expenses. In March 2008, the University issued a decision ordering the seizure of one third of the applicant's monthly salary up to 27,877 Romanian lei (7,470 euro), representing compensation for non-pecuniary damage and the legal expenses awarded to N.C.I. by the domestic courts.[367]

The applicant made an application to the European Court, claiming that his right to freedom of expression had been violated. The parties agreed that the civil defamation judgment against the applicant was an interference with his freedom of expression, and the main issue for the Court was whether it had been necessary in a democratic society. The Court stated that it did not consider the case "as a whistle-blower case," but appreciated "that the applicant's reasons, as presented by the applicant himself, for the impugned statements are relevant for the assessment of the proportionality of the interference in the applicant's exercise of his freedom of expression."[368]Notwithstanding this statement by the Court, it held that "particular attention must be paid in determining the extent to which interference with the applicant's freedom of expression was proportionate to the public interest in the disclosed information,"[369] and went on to apply the six criteria from *Guja*.[370]

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[361] *Aurelian Oprea v. Romania* (App. no. 12138/08) 19 January 2016, para. 45.
[362] *Aurelian Oprea v. Romania* (App. no. 12138/08) 19 January 2016.
[363] *Aurelian Oprea v. Romania* (App. no. 12138/08) 19 January 2016, para. 9.
[364] *Aurelian Oprea v. Romania* (App. no. 12138/08) 19 January 2016, para. 10.
[365] *Aurelian Oprea v. Romania* (App. no. 12138/08) 19 January 2016, para. 11.
[366] *Aurelian Oprea v. Romania* (App. no. 12138/08) 19 January 2016, para. 14.
[367] *Aurelian Oprea v. Romania* (App. no. 12138/08) 19 January 2016, para. 28.
[368] *Aurelian Oprea v. Romania* (App. no. 12138/08) 19 January 2016, para. 69.
[369] *Aurelian Oprea v. Romania* (App. no. 12138/08) 19 January 2016, para. 57.

First, the applicant's "allegations were of public interest,"[371] and the public had a legitimate interest in being informed, particularly "given the position of the plaintiff vis-à-vis the institution concerned."[372] Second, the applicant "endeavoured to demonstrate that his statements had been well-founded by submitting extensive documentary evidence,"[373] and the "allegations were not entirely devoid of factual grounds and did not amount to a gratuitous personal attack on N.C.I. and O.A.A."[374] Third, the Court saw "no reason to doubt that the applicant acted in good faith and in the belief that it was in the public interest to disclose the alleged shortcomings in his University to the public."[375] Fourth, applicant had informed the rector of the University and the Ministry of Education about the shortcomings perceived by him in the management of the department lead by N.C.I. before disclosing them to the press.[376] Fifth, in relation to the damage, if any, suffered by N.C.I., it held that the domestic courts did not "convincingly establish that the interference caused any particular harm to N.C.I. personally, or that his career was adversely affected."[377]

Finally, the Court engaged in an "attentive analysis of the sanction imposed on the applicant and its consequences,"[378] and noted the applicant had been ordered to pay damages and legal expenses. In this regard, the Court admitted that "it is true that the criminal proceedings against the applicant were stopped."[379] However, the Court held that, "although the applicant did not specify his monthly income at the relevant time," it considered "that the civil damages he was ordered to pay to the plaintiff were substantial when compared with the incomes and resources of academics in Romania.[380] The Court concluded that having "weighed up the other different interests involved," it considered that the interference with the applicant's right to freedom of expression was not "necessary in a democratic society."[381]

The Court's analysis of the sanctions imposed in *Aurelian Oprea* by having regard to the level of income for academic in Romania, mirrors the analysis in the Court's case law on a journalist's freedom of expression and the individualisation of damages, such as *Kasabova v. Bulgaria.*[382] But in *Kasabova*, the Court emphasised the potential chilling effect of the fines on the individual journalist, but also, *other* journalists in the future. Again, while *Aurelian Oprea* found a violation of Article 10, and purported to apply *Guja*, it did not apply the chilling effect principle, even where the university issued a decision ordering the seizure of one third of the applicant's monthly salary.

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[370] See *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 34 ("(a) public interest involved in the disclosed information; (b) authenticity of the information disclosed; (c) the damage, if any, suffered by the authority as a result of the disclosure in question; (d) the motive behind the actions of the reporting employee; (e) whether, in the light of duty of discretion owed by an employee toward his or her employer, the information was made public as a last resort, following disclosure to a superior or other competent body; and (f) severity of the sanction imposed.").

[371] *Aurelian Oprea v. Romania* (App. no. 12138/08) 19 January 2016, para. 65.

[372] *Aurelian Oprea v. Romania* (App. no. 12138/08) 19 January 2016, para. 65.

[373] *Aurelian Oprea v. Romania* (App. no. 12138/08) 19 January 2016, para. 67.

[374] *Aurelian Oprea v. Romania* (App. no. 12138/08) 19 January 2016, para. 71.

[375] *Aurelian Oprea v. Romania* (App. no. 12138/08) 19 January 2016, para. 71.

[376] *Aurelian Oprea v. Romania* (App. no. 12138/08) 19 January 2016, para. 71.

[377] *Aurelian Oprea v. Romania* (App. no. 12138/08) 19 January 2016, para. 75.

[378] *Aurelian Oprea v. Romania* (App. no. 12138/08) 19 January 2016, para. 76.

[379] *Aurelian Oprea v. Romania* (App. no. 12138/08) 19 January 2016, para. 78.

[380] *Aurelian Oprea v. Romania* (App. no. 12138/08) 19 January 2016, para. 78.

[381] *Aurelian Oprea v. Romania* (App. no. 12138/08) 19 January 2016, para. 79.

[382] *Kasabova v. Bulgaria* (App. no. 22385/03) 19 April 2011, para. 71 ("n any event, the Court finds that the overall sum which the applicant was required to pay was a far more important factor in terms of the potential chilling effect of the proceedings on her and other journalists. The four fines imposed on her came to a total of BGN 2,800, which, even taken alone, looks considerable when weighed against her salary.").

7.6.8 Fourth Section finds no need to examine severity of sanction

The Court's reticence in applying the chilling effect principle again manifested itself in the 2017 judgment in *Marunić v. Croatia*,[383] where the Court applied the *Guja* judgment to a dismissal for comments made in the media, but stopped short of examining the severity of the sanction. The applicant in *Marunić* was a director of a municipal utility company, KD Kostrena, which was owned by the Municipality of Kostrena, on the Croatian coast. The company mainly provided public utility services such as parking. The case arose in 2007, when the Mayor of Kostrena Municipality, who was chairman of the company's General Meeting, was quoted in an article published in the *Novi list* newspaper, criticising how the applicant performed her job. Eight days later, the newspaper published an article, with the applicant's reply to the Mayor's remarks. The article included statements from the applicant, including that, "Kostrena Municipality still requires [the company] to charge for parking even though [the company] Lenac refused to do so because of unresolved property issues. That case has now gone to court," and "Given that my work has been called into question I demand an audit of KD Kostrena, and the involvement of the Office for the Prevention of Corruption and Organised Crime and the State Attorney's Office."[384]

Two weeks later, the applicant was dismissed by the company for statements she had made in the media, which were regarded as "being damaging to the company's business reputation,"[385] in particular by alleging that the company was "acting unlawfully, that it was charging for parking where it was not allowed," and demanding an audit, and the involvement of the anti-corruption office and state attorney's office..[386] The applicant challenged her dismissal, but in 2009, the Supreme Court held that the applicant, by stating that the company "had acted illegally, namely by charging for parking when it was not allowed [to do so], asking that the [company] be audited, and also seeking the intervention of [the prosecuting authorities] with a view to verifying the activities of the defendant company," had "significant repercussions on the employment relationship between the parties and gives the employer a justified reason for terminating the employment contract."[387]

The applicant made an application to the European Court, claiming her dismissal had violated her right to freedom of expression. The Court held that the applicant's dismissal on account of her statements to the press had constituted an interference with her right to freedom of expression, and the main question was whether it had been necessary in a democratic society. First, the Court held that the case was different in "one crucial respect" to *Guja* and *Heinisch*, in that the applicant "made the impugned statements only after she had herself been criticised in the media by the chairman of the company's General Meeting."[388] According to the Court, in these circumstances, it could not have been expected of the applicant that she should remain silent and not defend her reputation in the same way, as to do so would "overstretch her duty of loyalty, contrary to Article 10."[389] Further, the Court rejected the government's argument that the applicant should have used "other effective, but more discreet," internal means.[390]

First, the Court held that even though the main aim of the applicant's statements had been to deny the mayor's accusations rather than to point to irregularities, the "information

[383] *Marunić v. Croatia* (App. no. 51706/11) 28 March 2017 (Article 10 and director's dismissed for comments in the media).
[384] *Marunić v. Croatia* (App. no. 51706/11) 28 March 2017, para. 8.
[385] *Marunić v. Croatia* (App. no. 51706/11) 28 March 2017, para. 9.
[386] *Marunić v. Croatia* (App. no. 51706/11) 28 March 2017, para. 9.
[387] *Marunić v. Croatia* (App. no. 51706/11) 28 March 2017, para. 16. .
[388] *Marunić v. Croatia* (App. no. 51706/11) 28 March 2017, para. 52.
[389] *Marunić v. Croatia* (App. no. 51706/11) 28 March 2017, para. 52.
[390] *Marunić v. Croatia* (App. no. 51706/11) 28 March 2017, para. 54.

she gave in reply was of public interest."[391] Second, the Court noted that the applicant "did not expressly state in the impugned article that the company had been collecting parking fees 'unlawfully' or 'illegally'."[392] Further, the Court held that the applicant's statement implying that the company had been unlawfully charging for parking was a "value judgment which had a sufficient factual basis because it could reasonably be argued that collecting parking fees on someone else's land was unlawful."[393]

Based on these considerations, the Court concluded that the applicant's statements in reply to those of M.U. "did not exceed the limits of permissible criticism," and therefore the Court found that the interference with the applicant's freedom of expression in the form of her summary dismissal was not "necessary in a democratic society" for the protection of the business reputation of the company.[394] Notably, the Court stated that this finding "obviates the need to further examine the nature and severity of the sanction imposed, namely the applicant's dismissal,"[395] and held that there had been a violation of Article 10.

The Court's choice in *Marunić* not to examine the severity of the sanction in the form of a dismissal meant that it was also a lost opportunity to apply the chilling effect principle. As argued elsewhere, if the Court wishes to protect individuals from the chilling effect flowing from fear of dismissal when engaging in freedom of expression, the Court should always engage in chilling effect analysis of the severity of dismissal as a sanction. Domestic courts, including the domestic courts in *Marunić*, need guidance from the European Court on the chilling effect fear of dismissal can create among other employees and officials, and the Court choosing not to examine the severity of a sanction represents a lost opportunity to signal this chilling effect principle to domestic courts. Again, a possible reason for the Court's reticence in examining the sanction, and applying the chilling effect, may be that the Court wished to avoid a divided judgment, as there had been a unanimous vote in *Marunić*.

7.7 Grand Chamber disagreement over proceedings against NGOs for disclosures

The previous Grand Chamber judgment in *Guja* was delivered in 2008, and more than nine years later in summer 2017, the Grand Chamber was confronted with the opportunity to reaffirm the chilling effect principle. The case before it in *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*,[396] and as mentioned earlier, was somewhat different to *Guja*, in that a number of applicant NGOs were seeking whistleblower protection under Article 10 for reporting irregularities about a public official, which had been communicated to the NGOs by employees from the public official's office. It was argued that a lower level of protection for citizens who reported information to the authorities would have a "chilling effect on the freedom of expression."[397]

The applicants made an application to the European Court, arguing that there had been a violation of their right to freedom of expression. The applicants argued that "their intention had been to inform those in authority about certain irregularities in a matter of considerable public interest and to prompt them to investigate the allegations made in the

[391] *Marunić v. Croatia* (App. no. 51706/11) 28 March 2017, para. 57.
[392] *Marunić v. Croatia* (App. no. 51706/11) 28 March 2017, para. 60.
[393] *Marunić v. Croatia* (App. no. 51706/11) 28 March 2017, para. 61.
[394] *Marunić v. Croatia* (App. no. 51706/11) 28 March 2017, para. 64.
[395] *Marunić v. Croatia* (App. no. 51706/11) 28 March 2017, para. 65.
[396] *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber).
[397] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 63.

letter,"[398] and its subsequent publication had occurred without their knowledge. In 2017, the Grand Chamber delivered its 55-page judgment.[399] , and the main question for the Court was whether it had been necessary in a democratic society.

First, the Court considered whether the applicants' reporting could be qualified as whistle-blowing, "as this phenomenon has been defined in its case-law."[400] However, the Court noted that the applicants were not in any "subordinated work-based relationship with the BD public radio," and "had no exclusive access to and direct knowledge of that information."[401] The Court also noted that the applicants "apparently acted as 'a vehicle for communication' between the radio's employees (regarding the alleged misconduct of M.S. in the workplace) and the BD authorities."[402] The Court held that as there was an "absence of any issue of loyalty, reserve and discretion," there was no need to enquire into the kind of issue which has been central in the above case-law on whistle-blowing, namely whether there existed any alternative channels or other effective means for the applicants of remedying the alleged wrongdoing. [403]

Second, the Court underlined the important role of an NGO in "reporting on alleged misconduct or irregularities by public officials," even where it is not based on direct personal experience.[404] The Court also reiterated that when an NGO draws attention to matters of public interest, it is exercising a "public watchdog role of similar importance to that of the press," and may be characterised as a "social 'watchdog' warranting similar protection under the Convention as that afforded to the press."[405] However, the Court added a caveat, finding that an NGO performing a public watchdog role is "likely to have greater impact when reporting on irregularities of public officials, and will often dispose of greater means of verifying and corroborating the veracity of criticism than would be the case of an individual reporting on what he or she has observed personally."[406]

The Court then applied the principles, and noted that the letter "concerned matters of public concern,"[407]and concerned a "civil servan[t] acting in an official capacity."[408] However, the Court agreed with the domestic courts that the letter was defamatory, and the "allegations cast M.S. in a very negative light and were liable to portray her as a person who was disrespectful and contemptuous in her opinions and sentiments about Muslims and ethnic

[398] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 13 October 2015, para. 23.
[399] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 62.
[400] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 80.
[401] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 80.
[402] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 80.
[403] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 80.
[404] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 86.
[405] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 86.
[406] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 87.
[407] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 94.
[408] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 98.

Bosniacs."[409] Further, the Court found no reasons to depart from the domestic court's finding that "the applicants "did not make reasonable efforts to verify the truthfulness of [those] statements of fact before [reporting], but merely made [those statements]."[410] The Court concluded that the applicants "did not have a sufficient factual basis for their impugned allegations about M.S. in their letter."[411]

Finally, the Court considered the "severity of the sanction imposed on the applicants."[412] The Court held that it "did not consider" that the order to retract the letter within fifteen days or pay damages raised any issue under the Convention.[413] This was because, according to the Court, "it was only after expiration of the time-limit set by the BD Court of Appeal that the domestic courts began taking measures to enforce the payment order."[414] Second, the Court held that it was "satisfied that the amount of damages which the applicants were ordered to pay was not, in itself, disproportionate."[415] Thus, according to the Court, "it is of no relevance that in determining this amount the BD Court of Appeal took into account the publication of the impugned letter in the media despite not having relied on that fact in finding the applicants liable for defamation."[416]

Six judges dissented, in some of the strongest terms used about a majority judgment, including that it was "simply not convincing,"[417] based on an "oversimplified understanding of the scope of Article 10,"[418] and the majority had "gone down a path that is not supported by the facts of the case."[419] Notably, the dissent focused on the whistleblower issue, and held that "with respect to the matters brought to their attention by the employees of BD public radio who came to discuss the behaviour of M.S. in the workplace," the NGO acted as a "quasi-whistleblower."[420] The dissent argued that this was an "important aspect of the case that must not be neglected."[421] Thus, acting as a quasi-whistleblower and reporting alleged misconduct to the authorities in a private letter requires the "application of a more subjective and lenient approach than in completely different factual situations."[422] It was "unjustified to assess the truthfulness of the statements contained in a private letter with the same rigour as if

[409] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 104.
[410] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 117.
[411] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 117.
[412] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 104.
[413] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 104.
[414] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 104.
[415] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 104.
[416] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 104.
[417] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber) (Dissenting opinion of Judge Kūris, para. 5).
[418] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber) (Dissenting opinion of Judge Vehabović).
[419] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber) (Jointing dissenting opinion of Judges Sajó, Karakaş, Motoc and Mits).
[420] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber) (Jointing dissenting opinion of Judges Sajó, Karakaş, Motoc and Mits).
[421] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber) (Jointing dissenting opinion of Judges Sajó, Karakaş, Motoc and Mits).
[422] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber) (Jointing dissenting opinion of Judges Sajó, Karakaş, Motoc and Mits).

they were contained in an article published by the applicants in the press," and the dissent concluded the four statements had a "factual basis that was sufficient in the context of the case."[423] Finally, the dissent held that the applicants "cannot be held responsible" for the letter being published in three newspapers and made public.[424] The dissent held that the "strong element" in the case was the "right of citizens to inform public authorities about irregularities by public officials (or officials to be)," and the case "should have been decided that way."[425]

The Court's majority judgment in *Medžlis Islamske* did not mention the chilling effect, and has already been criticised in Chapter 4 under the Court's case law on defamation, particularly for not applying chilling effect principle from the leading judgment on NGOs in *Steel and Morris*,.[426] But under the case law discussed in this chapter, *Medžlis Islamske* suggests that a majority within the Court are hesitant about the principle's application outside of, what the majority consider, clear-cut whistleblower situations. The majority chose not to adopt the Court's approach in *Aurelian Oprea*, which also concerned civil defamation, which found that although it did not consider the case as a "whistle-blower case," the Court appreciated that the "applicant's reasons" for the impugned statements are relevant for the assessment of the proportionality of the interference in the applicant's exercise of his freedom of expression,[427] and as such, went on to apply the six criteria from *Guja*:[428] The contrast between the standard of scrutiny applied in *Aurelian Oprea*, where the Court examined whether the damages order and costs of the publication order were proportionate to the applicants' financial means, and to the average wage in Romania, could not be even more removed from the light review applied in *Medžlis Islamske*; finding it irrelevant that the domestic courts took into account publication of the impugned letter in the media, despite the applicants having not published the letter in the media ("it was not proven that they had been responsible for its publication"[429]).

7.8 Post-*Medžlis Islamske* application of the chilling effect

7.8.1 Disciplinary sanction on university professor had a chilling effect

Palomo Sánchez and *Medžlis Islamske* indicated the Grand Chamber's reticence in applying the chilling effect principle; but similar to the post-*Palomo Sánchez* case law, certain Sections of the Court continue to apply the chilling effect principle. Indeed, in 2018, the Court would for again consider disciplinary proceedings against a university professor, and indeed, would unanimously apply the chilling effect principle to the question of whether there had been an

[423] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber) (Jointing dissenting opinion of Judges Sajó, Karakaş, Motoc and Mits).
[424] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber) (Jointing dissenting opinion of Judges Sajó, Karakaş, Motoc and Mits).
[425] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber) (Jointing dissenting opinion of Judges Sajó, Karakaş, Motoc and Mits).
[426] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 95.
[427] *Aurelian Oprea v. Romania* (App. no. 12138/08) 19 January 2016, para. 69.
[428] See *Matúz v. Hungary* (App. no. 73571/10) 21 October 2014, para. 34 ("(a) public interest involved in the disclosed information; (b) authenticity of the information disclosed; (c) the damage, if any, suffered by the authority as a result of the disclosure in question; (d) the motive behind the actions of the reporting employee; (e) whether, in the light of duty of discretion owed by an employee toward his or her employer, the information was made public as a last resort, following disclosure to a superior or other competent body; and (f) severity of the sanction imposed.").
[429] *Medžlis Islamske Zajednice Brčko and others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber), para. 90.

interference with freedom of expression. The case was *Kula v. Turkey*,[430] and the applicant was a university professor specialising in German, and based at the Faculty of Science and Literature at Mersin University in southern Turkey. The case arose in 2001, when the applicant was invited to Istanbul to participate in a television programme to be broadcast live in March 2001 on a public service channel. The television debate was on the "cultural structure of the European Union and the traditional structure of Turkey."[431] The applicant informed the course director that he had been invited to the programme.[432] The director expressed his "doubts as to whether there was a link between the applicant's area of specialty and the theme of the programme,"[433] and the Dean decided that the applicant's participation in the programme was "not considered appropriate."[434] Nevertheless, the applicant participated in the television programme in Istanbul in March 2011.

The following month, the applicant participated in another edition of the television programme in April 2011, following an international conference held in Istanbul which the applicant had been authorised to attend by the Dean.[435] Two weeks later, a disciplinary inquiry was held into the applicant's participation in the television programme in Istanbul without the authorisation of the university, and found that the request for authorisation to participate in the March 2001 programme had been rejected "having regard to the opinion of the course director, who had considered that the subject of the programme was not directly related to the applicant's field of specialty."[436] Further, the disciplinary board also found that the applicant had also participated in the April 2001 programme without authorisation. The board held that the applicant had violated Article 8/g of the Disciplinary Rules, which prohibits an official "leaving the boundaries of his city of residence without authorisation."[437] The Rector of the university imposed a reprimand.[438] The applicant sought judicial review of the university's decision, invoking his academic freedom, but the Administrative Court of Adana held the disciplinary sanction was "not unlawful," finding that it was "indisputable" that the applicant had left his town of residence despite the rejection of his request to participate in the television program in question.[439] The decision was upheld by the highest administrative court, the Council of State.

The applicant subsequently made an application to the European Court, claiming the disciplinary reprimand imposed was a violation of his freedom of expression under Article 10. The first question for the Court was whether there had been an interference with the applicant's right to freedom of expression. The government had argued that the applicant had been authorised over 12 times by the university to participate in events outside his town of residence, but on the two occasions at issue, there had been no authorisations.[440] Thus, the disciplinary sanction imposed had "nothing to do" with the applicant's freedom of expression.[441]

The Court first noted that the applicant received a disciplinary sanction, namely a reprimand, for "leaving" his town of residence without his superiors' authorisation.[442]

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[430] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018.
[431] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 6.
[432] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 8.
[433] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 8.
[434] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 9.
[435] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 13.
[436] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 15.
[437] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 15.
[438] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 15.
[439] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 20.
[440] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 33.
[441] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 34.
[442] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 36.

However, the Court held that the sanction in question was "in fact" due to the participation of the applicant in a television programme that his superiors had not approved.[443] The Court stated it appeared from the decisions of the university authorities that the "origin of the sanction imposed was essentially the initial refusal of the Dean of the faculty at the request of the applicant to participate" in the television programme,[444] and the authorities appeared to have "taken into consideration, during the disciplinary investigation against the applicant, the advisability of his participation in the broadcasts."[445]

The Court rejected the government' view, and held that the application essentially related to the applicant's exercise of his freedom of expression as an academic on a television programme organised outside his town of residence, and "undoubtedly" to the applicant's "academic freedom," which includes academics' freedom to express freely their opinion, and the freedom to distribute knowledge and truth without restriction.[446] Applying chilling effect reasoning, the Court held that the sanction imposed, "however minimal," could have had an impact on the applicant's exercise of his freedom of expression, and even have had a "chilling effect on it."[447] Thus, there had been an interference with the applicant's freedom of expression.

The main question then for the Court was whether the interference had been necessary in a democratic society. The Court reiterated that restrictions on freedom of expression must be "convincingly established,"[448] and with "careful scrutiny" of any restrictions on academic freedom.[449] The Court then noted the Dean's decision not to authorise the applicant to participate in the programme did "not explain the reasons for this refusal," and that the Dean's letter only referred to "doubts on the sufficiency of the applicant's knowledge of the issue as the basis for the refusal decision."[450] Further, the Dean's decision, in which a disciplinary sanction was imposed on the applicant for leaving the boundaries of his city of residence without authorisation, was "based solely" on Article 8/g of the Disciplinary Regulation and did "not provide further details on the grounds for the sanction."[451] The Court noted that it had not been argued that hat the applicant's unauthorised departure had disrupted the public university service; or that the applicant had abandoned his duties in order to appear on the programme in question; or that in taking part, he had acted or spoken in a manner detrimental to the university's reputation.[452] The Court then reviewed the domestic court decisions, and held it was "impossible to determine from those decisions whether the penalty imposed on the applicant was necessary in view of the legitimate aim pursued by the authorities."[453] Further, the judgment of the Administrative Court was "limited to the examination of the factual verification relating to the applicant's exit outside his city of residence without authorisation," and provided "no evidence to suggest that it examined the necessity of the sanction in the light of the academic freedom invoked by the applicant expressly before it."[454]

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[443] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 37.
[444] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 37.
[445] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 37.
[446] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 38, citing *Sorguç v. Turkey* (App. no. 17089/03) 23 June 2009.
[447] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 39.
[448] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 47.
[449] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 46, citing *Mustafa Erdoğan and Others v. Turkey* (App. nos. 346/04 and 39779/04) 27 May 2014, para. 40.
[450] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 48.
[451] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 48.
[452] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 47.
[453] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 50.
[454] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 50.

The Court concluded that in the absence of sufficient and relevant reasons by the national courts to justify the interference at issue, the Court considered that the national courts did not apply the principles laid down under Article 10.[455] Therefore, the Court unanimously held that there had been a violation of Article 10.

The Court in *Kula* applied the chilling effect principle in finding that there had been an interference with an academic's freedom of expression, emphasising that even a minimal sanction in the form of a reprimand could have had a chilling effect on freedom of expression. The Court linked this chilling effect to academic freedom, which includes freedom to conduct research and distribute knowledge and truth without restriction. In addition, the Court's standard of scrutiny in determining that there had been an interference with freedom of expression was quite strict, rejecting the domestic courts' characterisation of the reason for the sanction as simply having no authorisation from the university to travel. The Court also rejected the domestic courts as not having sufficient reasons, even though the applicant had formally violated the rules.

7.9 Conclusion

The findings in this chapter on whistleblower, employee, and trade union freedom of expression, and the Court's consideration of the chilling effect principle, demonstrate that the principle is mainly applied under the necessary in a democratic society limb of Article 10. The Court's principle is that due to a fear of sanctions (such as a reprimand or dismissal), employees may be discouraged from reporting misconduct or engaging in expression on matters of public interest.[456] The Court seeks to protect not only the individual employee from this chilling effect, but also to prevent a chilling effect on other employees and other individuals who may be discouraged from exercising their freedom of expression in the future by reporting misconduct or on other matters concerning a public interest.

What seems quite unique to whistleblower freedom of expression case law, is the Court's holding in *Guja*, and the subsequent line of case law, that the Court also took into account the "media coverage" of the whistleblower's sanction and case, which could have a chilling effect not only on employees at the whistleblower's office but also on many other civil servants and employees.[457] Thus, the sanction created a chilling effect on a number of individuals, including (a) the whistleblower, (b) other employees at the whistleblower's office, and (c) other civil servants and employees. The Court's reliance on the media coverage of an applicant's case, is not a feature of the chilling effect principle applied in other areas of Article 10 case law examined in Chapters 3-6.

This chapter's discussion of trade union expression also explained that the Court considers that a chilling effect will arise where trade unions and trade-union members are dissuaded from seeking to express and defend their members' interests due to a fear of sanction or reprisal.[458] In order to protect against this chilling effect the Court has also formulated a test under the necessary in a democratic society-limb of Article 10 that national authorities must ensure that disproportionate penalties do not dissuade trade union representatives from seeking to express and defend their members' interests.[459] Notably, where the Court applies the chilling effect principle on whether there has been an interference

[455] *Kula v. Turkey* (App. no. 20233/06) 19 June 2018, para. 52.
[456] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 95.
[457] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 95.
[458] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 55.
[459] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 55.

with trade union freedom of expression, the approach taken is quite expansive. Indeed, the Court found an interference where a government minster's public remarks "intimidated" trade union members, which created a situation which could have had a chilling effect and discouraged the trade union from pursuing trade union activities.[460]

The Court's concern for protecting against the risk of a chilling effect, even where an individual applicant's situation may suggest the chilling effect had not yet materialised, is also a feature of this chapter's analysis. Importantly, where a government argued that the Court should have regard to the fact the "applicant's career had not been affected" by a dismissal, as the applicant took up a post soon afterwards,[461] the Court rejected this line of argument. For the Court, the dismissal was liable to have a serious chilling effect on other employees,[462] and it was irrelevant the applicant took up a post. This mirrors the Court's reasoning in *Cumpănă and Mazăre*, where the Court disregarded the fact the journalist "continued to work for the T. newspaper,"[463] following his defamation conviction, and thus, it was argued that the sanctions "had no practical consequences."[464] Instead, the Grand Chamber in *Cumpănă and Mazăre* held that the "chilling effect that the fear of such sanctions has on the exercise of journalistic freedom of expression is evident,"[465] even though it did not appear that there were "any significant practical consequences for the applicants."[466]

But it must be admitted from this chapter's discussion that the Court is quite reticent in its application of the chilling effect principle, particularly relating to a trade unionist's dismissal, even if the dismissal resulted from an exercise of freedom of expression on a matter of public interest or trade union expression. The reticence is also evident in the case law involving an employee's dismissal, where the employee is not classified by the Court as a whistleblower. This approach may stem from as far back as *Fuentes Bobo*, where although a violation of Article 10 was found, the Court's analysis focused exclusively on the individual applicant, and not on any broader chilling effect on others. Indeed, the early Court judgments in *Kosiek* and *Vogt* took a completely difference approach to the European Commission's decisions, where the latter applied chilling effect reasoning, and yet, the Court chose not to.

The Grand Chamber has also not helped. While the *Guja* judgment was a landmark judgment, its chilling effect principle has not been more widely applied, apart from a couple of judgments, and the subsequent Grand Chamber judgment in *Palomo Sánchez* remained silent on the chilling effect principle. This arguably has contributed to the regular non-application of the chilling effect principle. This has led to considerable disagreement within the Court. The approach of some judges in dismissing the chilling effect principle has been quite inadequate when the principle of precedent is brought into the frame. The approach involves simple non-engagement with the principle. Take *Rubins v. Latvia*,[467] where the Court held that a professor's dismissal was the "harshest sanction," and was "liable to have a serious chilling effect on other employees of the University and to discourage them from raising criticism.[468] This principle had a clear basis in the Court's case law, based upon the holding in *Guja* (dismissal "could also have a serious chilling effect on other employees," and "discourage them from reporting any misconduct"),[469] and *Heinisch* (dismissal "could

[460] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 60.
[461] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015, para. 92.
[462] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015, para. 92.
[463] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 59.
[464] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 59.
[465] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114.
[466] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 118.
[467] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015.
[468] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015, para. 92.
[469] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 95.

also have a serious chilling effect on other employees," and "discourage them from reporting any shortcomings").[470] In response to this conclusion, the dissent simply held that given "seriousness of the disloyal conduct of the applicant as established by the evidence before it, the sanction of dismissal cannot be regarded as disproportionate."[471] The dissent does not even seek to distinguish the earlier case law in *Guja*, or *Heinisch*, or, on the other hand, explain how judgments such as *Palomo Sánchez* might instead be applicable. Indeed, the dissenting opinion in *Rubins* does not seem to cite even one prior case from the Court's case law.[472] Of course, the dissent may have held the view, similar to view of some judges concerning hate speech (*Lindon* and *Delfi*), or insulting expression (*Palomo Sánchez*), that the chilling effect principle should be side-lined in such instances, to the point of no referral. This is all well and good; however, this must be explained by the dissent; and in any event, the expression involved in *Rubins* was public interest expression, and the truthfulness of the expression was not questioned.

[470] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 91.
[471] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015 (Dissenting opinion of Judges Mahoney and Wojtyczek, para. 14).
[472] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015 (Dissenting opinion of Judges Mahoney and Wojtyczek).

Chapter 8 - Conclusions and Recommendations

8.1 Introduction

The purpose of this thesis has been to provide a systematic, and critical, examination of the European Court's chilling effect principle in its freedom of expression case law. As such, the main research question posed at the beginning of this thesis was:

> What is the European Court's chilling effect principle, and how does the Court apply this principle in its freedom of expression case law?

In order to answer this research question, a number of sub-questions were posed and addressed in Chapter 1 and 2,[1] in addition to a set of questions on the application of the chilling effect principle in Chapters 3-7.[2] The purpose of this concluding Chapter 8 is to provide an analysis of the findings presented in the preceding chapters, provide normative guidance for the European Court for its future application of the chilling effect principle, and suggest further areas of study for future research. Based on the findings of the preceding chapters, a definition of the European Court's chilling effect principle would be:

> a chilling effect arises from a legal rule (or government measure) where the risk (or fear) of being affected by the rule (or measure) discourages a person (or other persons engaging in similar public-interest expression) from engaging in free expression on matters of public interest in the future, or forces a person to display self-restraint (or self-censorship) in their public-interest expression to avoid liability (or sanction).

The elements of this definition are explained below, and as the findings in this thesis demonstrate, how the Court applies this chilling effect principle in its freedom of expression case law very much depends upon which limb of Article 10 is under consideration.

8.2 Explaining the origin and development of the chilling effect principle

To explain how the chilling effect principle entered the case law of the European Court, Chapter 2 provided a historical analysis of how the principle first entered the case law of the European Commission of Human Rights, and later the European Court's case law. Chapter 2's analysis revealed the central influence of applicants (or rather, their lawyers) arguing for the application of the chilling effect principle, and the success of these arguments before the European Commission of Human Rights. The analysis also revealed the influence of U.S.

[1] (a) how did the concept of the chilling effect enter the case law of the European Court; (b) what exactly does the Court mean by a chilling effect; or does the Court attach different meanings to the chilling effect; (c) is use of chilling effect reasoning exclusive to freedom of expression case law, or does the Court use chilling effect reasoning when considering other Convention articles; (d) is there much agreement, or disagreement, within the Court on the application of chilling effect reasoning; and (e) does the Court explain why a chilling effect may arise or not arise.

[2] what does the Court mean when it states that there is a chilling effect on freedom of expression; does the Court apply chilling effect reasoning when considering (i) whether an applicant may claim to be a victim under Article 34; (ii) whether there has been an "interference" with freedom of expression under Article 10; (iii) whether an interference has been "prescribed by law," or, (iv) whether an interference is "necessary in a democratic society." The remaining questions were: what is the consequence, if any, of the Court using chilling effect reasoning in its case law; is there much agreement, or disagreement, within the Court on the application of chilling effect reasoning; does the Court explain the application, or non-application, of chilling effect reasoning; and how does the Court use prior case law when considering and applying the chilling effect.

Supreme Court case law in applicants' chilling effect arguments before the European Commission, and indeed, that U.S. Supreme Court case law played a major role not only in applicants' submissions before the Commission, but also in the Commission's development of its own chilling effect principle.[3]

On the meaning of the European Commission's chilling effect principle, Chapter 2's findings suggested that the two central pillars of the principle were *fear* and *risk* affecting the full exercise of Convention rights and freedoms. This aligned with Schauer's (and Sedler's) scholarship on U.S. Supreme Court case law, that the danger of the chilling effect is that deterred by the fear of punishment, or risk of prosecution, some individuals refrain from saying or publishing that which they lawfully could and should say or publish.[4] Thus, something that ought to be expressed is not. This creates a harm that flows from the non-exercise of a constitutional right, but also a general societal loss which results when the freedoms guaranteed by the First Amendment are not exercised. The European Court itself would later explicitly recognise this harm, emphasising that the chilling effect works to the detriment of society as a whole. The purpose of the chilling effect principle is to provide "breathing space"[5] for expression on matters of public interest, built upon the recognition of the "vulnerable nature" of expression on matters of public interest,[6] similar to the U.S. Supreme Court's recognition of the "sensitive nature" of constitutionally protected expression under the First Amendment.[7]

While fear and risk of prosecution were the central pillars of the European Commission's chilling effect principle, the Commission's application of the principle was mainly under the former Article 25 of the Convention, on whether an applicant could claim to be a victim of a violation of the Convention; and under Article 10's first limb, on whether there had been an interference with freedom of expression. As discussed, when the Commission or the Court received an application claiming a violation of Article 10, there were a number of questions to be asked by the Commission or Court: whether there had been an interference with freedom of expression, whether the interference was prescribed by law; whether the interference pursued a legitimate aim, and finally, whether the interference was necessary in a democratic society. The Commission's application of the chilling effect principle was mainly in finding that there had been an interference with freedom of expression, and contrasts sharply with the Court's application of the chilling effect principle, which was overwhelmingly under the "necessary in a democratic society"-limb of Article 10. The reason for the Commission's focus on the principle's application to the question of whether there had been an interference may be partly explained by the nature of the applications before the Commission: individuals claiming that the mere existence of a law, and its possible enforcement against them, violated their Convention rights. The applicants

[3] On judicial dialogue, see Antoine Buyse, "Tacit citing: the scarcity of judicial dialogue between the global and the regional human rights mechanisms in freedom of expression cases," in Tarlach McGonagle and Yvonne Donders (eds.), *The United Nations and Freedom of Expression and Information: Critical Perspectives* (Cambridge University Press, 2015), pp. 443-465; and Amrei Müller (ed.), *Judicial Dialogue and Human Rights* (Cambridge University Press, 2017).

[4] Frederick Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'," (1978) 58 *Boston University Law Review* 685, p. 693. Schauer defines the U.S. Supreme Court's chilling effect principle in the following terms: "A chilling effect occurs when individuals seeking to engage in activity protected by the first amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity." (Frederick Schauer, "Fear, Risk and the First Amendment: Unraveling the Chilling Effect," (1978) 58 *Boston University Law Review* 685, p. 693). A similar point is made by Robert A. Sedler, "Self-Censorship and the First Amendment," (2012) 25 *Notre Dame Journal of Law, Ethics & Public Policy13*, p. 13.

[5] Koen Lemmens, "Se taire par peur: l'effet dissuasif de la responsabilité civile sur la liberté d"expression," (2005) *Auteurs & Media* 32, p. 34.

[6] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 81.

[7] *Dombrowski v. Pfister*, 380 US 479 (1964), p. 486.

had to focus on ensuring the Commission did not dismiss their applications as an *actio popularis*, which governments regularly argued before the Commission.

Chapter 2 also provided evidence of the link between the Commission's chilling effect principle, and its subsequent entry in the European Court's case law, as typified by the Commission's decisions and the Court's subsequent judgments in *Dudgeon*, *Norris*, *Goodwin,* and *Elçi*.[8] Building upon the Commission's chilling effect principle, the second part of Chapter 2 moved to the European Court's development of the chilling effect principle. It detailed how the frequency of the chilling effect principle being applied by the Court grew exponentially over the years, where for example, in 2006, there were seven judgments and decisions delivered by the Court where it applied, or considered the chilling effect principle; and in 2018, where the Court delivered 37 judgments and decisions applying the chilling effect principle.

The research for this thesis resulted in the identification of over 348 judgments and decisions since the establishment of the Court where the chilling effect was applied, or considered.[9] It was also determined that over 70% of this case law concerned the right to freedom of expression under Article 10, which was the focus of the thesis. Chapter 2 proceeded to examine in-depth the 23 Grand Chamber judgments where it considered, or applied, chilling effect reasoning, in order to provide an analytical overview of how the chilling effect developed over four decades. This analysis revealed that the proportion of Grand Chamber judgments concerning the right to freedom of expression actually mirrored the overall proportion of the case law concerning freedom of expression, with over 80% of the Grand Chamber judgments concerning Article 10. The analysis of the Grand Chamber judgments also resulted in the identification of certain recurring issues for further in-depth examination of the chilling effect in those areas of concern: Article 10 and the protection of journalistic sources (Chapter 3); Article 10 and defamation proceedings (Chapter 4); Article 10 and criminal prosecutions against journalists (Chapter 5); Article 10 and interferences with a judge or lawyer's freedom of expression (Chapter 6); and Article 10 and interferences with a whistleblower, employee or trade unionist's freedom of expression (Chapter 7).

The analysis of the Grand Chamber judgments in Chapter 2 already provided crucial insights into the Court's chilling effect principle. The first finding was that while there may be subtle differences in the meaning the Court attached to the chilling effect depending on which limb of Article 10 was being considered, there were common underlying elements across all the Grand Chamber judgments: namely, deterrence, fear and self-censorship. This was typified in *Wille*, concerning a judge's freedom of expression, and *Goodwin*, concerning a journalist's freedom of expression: in *Wille*, the Court applied the chilling effect principle in finding that there had been an interference with freedom of expression: a monarch's reprimand was likely to deter a judge from engaging in similar expression in the future due to the fear of a threatened sanction.[10] In *Goodwin*, the Court applied the chilling effect principle

[8] See Chapter 2, Section 2.3 above.

[9] There has been a total of 777 judgments finding a violation Article 10 between 1959-2018. See *European Court of Human Rights Annual Report 2018*, p. 179. This contrasts with the findings in Trine Baumbach, "Chilling Effect as a European Court of Human Rights' Concept in Media Law Cases," (2018) 6 *Bergen Journal of Criminal Law and Criminal Justice* 92 (concluding that the chilling effect term is "only used in relatively few of all the judgments where the Court finds a violation of Article 10") (p. 113). Baumbach's article states a Hudoc search was done for the French term "*refroidissement*," which yielded no results (footnote 21). However, the Court uses the French term "*effet dissuasif*" for the chilling. Further, the article's case-law selection methodology is somewhat unclear, which includes a category on "remarkable cases," (p. 98) which is not defined; and there is no mention of admissibility decisions nor separate opinions. Finally, the findings of this thesis reveal the different applications of the chilling effect depending upon the limb of Article 10; in addition to the consequences and impact of the principle's application.

[10] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 50.

in finding that an interference had not been necessary in a democratic society: disclosure orders may deter sources from assisting the press in informing the public on matters of public interest due to a fear of identification.[11] While the judge would be chilled in *Wille*, and sources would be chilled in *Goodwin*, the underlying elements were similar: a government measure (whether a monarch's reprimand, or a court-ordered disclosure) would deter future public interest free expression due to a fear of sanction. Sedler's definition of the chilling effect is similar: a decision to refrain from speaking or publishing due to the fear of governmental sanction under a law prohibiting or regulating expression.[12] Not only will there be harm to the individual judge, journalist, or source in the form of self-censorship; but as the Grand Chamber later explained in *Cumpănă and Mazăre*, *Kyprianou*, and *Baka*, the chilling effect harms society as a whole,[13] where future public-interest expression is deterred, and the public is denied information and opinions that should have been expressed. Faber has elaborated upon this societal harm that flows from laws that over-deter speech and leads to a suboptimal amount of total information disseminated in society,[14] while Schauer similarly points to the general societal loss which results when the freedoms guaranteed by the First Amendment are not exercised.[15]

In contrast to the European Commission's application of the chilling effect principle, Chapter 2's analysis of Grand Chamber judgments revealed that the principle was not used in finding that an applicant could claim to be a victim of a violation of the Convention under Article 34, but was rather predominantly applied when the Court is examining whether an interference with freedom of expression is necessary in a democratic society, the third limb under Article 10.[16] Indeed, under this limb, chilling effect reasoning is usually considered in relation to the sanctions or penalties imposed.[17]

An additional finding from Chapter 2 relates to the distinct issue of evidence of disagreement between judges in the Grand Chamber judgments on the chilling effect, which gave rise to the question being posed in Chapters 3-7, in order understand the nature and extent of this disagreement. Chapter 2 identified two manifestations of disagreement within the Grand Chamber: the first was where both the majority and dissent recite the chilling effect principles, discuss the case law, and come to different conclusions as to its application. This manifestation is evident in judgments such as *Pentikäinen*.[18] While there may be disagreements over the appropriateness of applying the chilling effect, at least the reasoning of both views (majority and dissent) is evident, and the contrasting views on the case law

[11] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 39.
[12] Robert A. Sedler, "Self-Censorship and the First Amendment" (2011) *Notre Dame Journal of Law, Ethics and Public Policy* 13, p. 14. See also Brandice Canes-Wrone and Michael C. Dorf, "Measuring the Chilling Effect," (2015) 90 *New York University Law Review* 1095, p. 1096.
[13] See *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114; *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 174; and *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 167.
[14] Daniel A. Farber, "Commentary, Free Speech Without Romance: Public Choice and the First Amendment," (1991) 105 *Harvard Law Review* 554, p. 568 (cited in Robert A. Sedler, "Self-Censorship and the First Amendment" (2011) *Notre Dame Journal of Law, Ethics and Public Policy* 13, p. 14.).
[15] Frederick Schauer, "Fear, Risk and the First Amendment: Unraveling the Chilling Effect," (1978) 58 *Boston University Law Review* 685, p. 693.
[16] See, e.g., *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber); *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber); *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber); *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber); and *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber).
[17] See, e.g., *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber); *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber); and *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber).
[18] See *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 113 (compare, Dissenting opinion of Judge Spano joined by Judges Spielmann, Lemmens and Dedov, para. 12).

discussed. The second manifestation is where there is disagreement over the application of the chilling effect, but only the majority or dissent discusses and applies it. This is evident in cases such as *Palomo Sánchez*,[19] where only one view (the dissent) discusses the chilling effect. This second manifestation is difficult to square with the Court's principle of precedent: the principle was reaffirmed by the Grand Chamber in 2016, with the Court reiterating that it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, *without good reason*, from precedents laid down in previous cases.[20] Importantly, the Court has dropped the proviso that "it is not formally bound to follow any of its previous judgments."[21] There is nothing inherently objectionably about the Court not applying the chilling effect principle in a given case, where the Court, or the separate opinion, gives good reasons, in the form of explaining why an earlier case should not apply. But it is objectionable when the Court, such as in *Lindon*, remains completely silent on the chilling effect, even though prior case law, directly on point, applies the chilling effect principle.[22]

Finally, a distinct feature of the Grand Chamber's development of the chilling effect principle, in contrast to the European Commission's, is the absence of U.S. Supreme Court case law being cited by the Court.[23] This may be partly explained by the point made in the next section that the European Court rarely applies the chilling effect principle to the question of whether an application can claim victim status under Article 34, and U.S. Supreme Court application of the chilling effect concerned with granting petitioners standing. The findings and observations in Chapter 2 serve as a helpful backdrop for the analysis of understanding the Court's consideration and application of the chilling effect principle in Chapters 3 - 7. It is in these chapters a full picture of the Court's chilling effect principle emerges.

8.3 Understanding the Court's application of the chilling effect principle

The first key to understanding the Court's chilling effect principle, as the discussion in Chapters 2 - 7 demonstrated, is that the particular meaning and application by the Court of the chilling effect principle depends very much on whether the Court is considering an applicant's victim status under Article 34,[24] or the limb of Article 10 that is being considered; or whether it concerns Article 10 and positive obligations, or Article 10 and application of Article 46. Table 1 below provides a general overview of the frequency of the Court's application of the chilling effect principle in these various circumstances.

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[19] See *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber), para. 69-76 (compare, Joint dissenting opinion of Judges Tulkens, Davíd Thór Björgvinsson, Jočienė, Popović and Vučinić, para. 17).

[20] *Magyar Helsinki Bizottság v. Hungary* (App. no. 18030/11) 8 November 2016 (Grand Chamber), para. 150.

[21] *Chapman v. the United Kingdom* (App. no. 27238/95) 18 January 2001.

[22] See the discussion in Chapter 4, Section 4.5.

[23] There are occasions in the European Court's case law where passages are relied upon from U.S. Supreme Court case law where no citation is provided. For example, this author noticed the European Court's reliance on a passage from *Miami Herald Publishing Co v. Tornillo*, 418 U.S. 241 (1973) at p. 258 in *Saliyev v. Russia* (App. no. 35016/03) 21 October 2010 at para. 54, where no citation was given by the European Court ("The choice of the material that goes into a newspaper, the decisions made as to limitations on the size and content of the paper and the treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment" in *Tornillo*) ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment" in *Saliyev*). See, Ronan Ó Fathaigh, "The Recognition of a Right of Reply under the European Convention," (2012) 4 *Journal of Media Law* 322, p. 328.

[24] European Convention, Article 34 ("The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.").

	Article 34 victim status	Article 10 interference	Article 10 prescribed by law	Article 10 necessary in a democratic society	Article 10 positive obligations	Article 10 Article 46
Protection of journalistic sources	Very rarely	Frequently	Sometimes	Frequently	Never	Never
Defamation proceedings	Very rarely	Frequently	Never	Frequently	Very rarely	Very rarely
Criminal prosecutions	Very rarely	Frequently	Sometimes	Frequently	Very rarely	Very rarely
Judicial and legal professional expression	Never	Frequently	Never	Frequently	Never	Never
Whistleblowers, employees and unions	Never	Frequently	Never	Frequently	Never	Never

Table 1: European Court's application of the chilling effect principle

8.3.1 Article 34 and victim status

Similar to Grand Chamber judgments, the Court in its Chamber judgments and decisions rarely applies the chilling effect principle when considering whether an applicant can claim to be a victim under Article 34. This contrasts sharply with the European Commission's case law, where the chilling effect principle was mainly applied to the question of victim status under the former Article 25 of the Convention, which mirrors the U.S. Supreme Court's early application of the chilling effect principle to granting individuals standing (whether a petitioner has standing before the U.S. Supreme Court is a similar question to whether an applicant has victim-status to bring an application before the European Court).[25]

While the Court's application of the chilling effect principle to the question of victim-status is not that frequent,[26] where the Court has applied the principle to this question, it has resulted in some of the most powerful applications of the principle. Powerful is used here in the sense that the Court has permitted applicants to claim a provision in national criminal law violates the right to freedom of expression under Article 10, even where (a) the provision had been amended since the time of the application to the Court, (b) the applicant had never been prosecuted under the provision, (c) a definitive non-prosecution decision had been issued by a prosecutor, which was upheld by the domestic courts, and (d) the applicant had made no challenge to the provision in the national courts. And yet, with the Court's application of the

[25] For a discussion of standing and the U.S. Supreme Court's overbreadth doctrine, see Robert A. Sedler, "Self-Censorship and the First Amendment," 25 *Notre Dame Journal of Law, Ethics & Public Policy* 13, p. 18.
[26] It should also be noted that outside of Article 10 case law, chilling effect reasoning has also played a role in victim-status questions under Article 8: see *Dudgeon v. the United Kingdom* (App. no. 7525/76) 22 October 1981, para. 41; and *Norris v. Ireland* (App. no. 10581/83) 26 October 1988, para. 32.

chilling effect principle, as detailed in Chapter 5, the Court held that the applicant had victim-status, and reviewed whether the provision at issue was compatible with Article 10.[27] The Court allowed the applicant to make this claim (even though the Court admitted that the provision had not yet been applied to the applicant's detriment) because of the chilling effect created by the fear of prosecution: the mere fact that *in the future* an investigation could *potentially* be brought caused a *fear* of prosecution.[28] In order to avoid prosecution, the applicant would modify his conduct by engaging in self-censorship (or self-restraint) in his future public-interest expression in order not to risk prosecution. Importantly, the Court hinges its chilling effect principle to freedom of expression concerning matters of public interest,[29] because such expression is essential to *democratic* debate. The Court has explained that application of the chilling effect principle is to protect future public interest expression which individuals are "entitled" to bring to the public's attention, and which the public is "entitled" to receive.[30]

The Court's concern for protecting public interest expression from the chilling effect was also particularly evident in Chapter 4. This was demonstrated in the application of the victim-status chilling effect principle where the Court allowed an applicant to claim a prosecution for defaming a public figure violated Article 10, even where the charges were dismissed on appeal following decriminalisation of defamation, and no criminal record recorded.[31] The Court admitted the applicant had been exempted from punishment, but a chilling effect arose by the fact that the criminal proceedings gave a strong indication to the applicant that the authorities were displeased with the publications, and unless he modified his behaviour in future, he would run the risk of being prosecuted again.[32] Thus, the Court sought to protect the applicant from engaging in self-censorship by allowing him to have the European Court provide a judgment on the proceedings themselves, and in a sense, insulate him from future prosecutions.

It is not only related to criminal prosecutions that the victim-status chilling effect principle is applied, but also where a chilling effect on journalistic sources may arise. The Court's concern for protection of journalistic sources is so strong, that it has permitted journalists involved in reporting on matters of public interest,[33] and exercising a role of public watchdog, to claim that surveillance legislation violates Article 10, even where they failed to exhaust domestic remedies.[34] This was because there was a danger that communication for journalistic purposes might be monitored and journalistic sources might be either disclosed or deterred from calling or providing information.[35] The Court again anchored application of the chilling effect principle to freedom of expression on matters of public interest, and ensuring potential futures sources discloses information of public interest would not be deterred from the threat of identification from surveillance. Finally, the analysis of the case law examined in Chapters 6 and 7 did not reveal application of the chilling effect

[27] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 81. See Chapter 5, Section 5.9.3.
[28] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 75.
[29] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 81.
[30] The point is made forcefully in *Cumpănă and Mazăre v. Romania* (App. no. 3348/96) 17 December 2004 (Grand Chamber), at para. 95.
[31] *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006, para. 18. See Chapter 4, Section 4.4.1.
[32] *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006, para. 32.
[33] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 478.
[34] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 475.
[35] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 476.

principle to the question of whether an applicant could claim to be a victim of a violation of the Convention.

8.3.2 Interference with freedom of expression

The analysis in Chapters 3-7 revealed the widespread application of the chilling effect principle to the question of whether there has been an interference with freedom of expression. This distinct application of the chilling effect principle brings to the fore the Court's concern for protecting individuals from a *future* chilling effect. This concern for a future chilling effect when considering an interference with freedom of expression is exemplified in the Court's most recent Grand Chamber judgment on protection of journalistic sources judgment. In *Sanoma*, the Court was faced with the question of whether a threatened police search of a Dutch magazine's offices to obtain footage of an illegal street race violated the right to protection of journalistic sources. Notably, even though the Court admitted that "it is true that no search or seizure took place in the present case," the Court nonetheless found that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources.[36] This concern for protecting against a future chilling effect on sources was again typified in *Weber and Saravia*, where the Court applied the chilling effect principle in finding that surveillance legislation interfered with a journalist's freedom of expression,[37] and "irrespective of any measures actually taken against her."[38] This was based on the finding that journalistic sources might be deterred from calling or providing information by phone to journalists.[39]

While the Court's concern for protecting freedom of expression from a future chilling effect is evident from government measures in the form of criminal investigations, police searches, criminal proceedings, and surveillance; a particular feature of the findings in Chapters 6 (judicial and legal professional expression) and Chapter 7 (whistleblower, employee and trade union expression) was how expansive interference by government is interpreted by the Court. The Court has even held that a government minster's statements "intimidated" trade union members, which created a situation which could have had a chilling effect and discouraged trade unions from pursuing public interest trade union activities.[40] Similarly, in *Wille*, the Court considered an "announcement" by a monarch of his intention not to reappoint a judge was a "reprimand" for previous exercise of the judge's right to freedom of expression, and had a chilling effect as it was likely to discourage the judge from engaging in similar expression in the future.[41]

Thus, the Court's application of the chilling effect under the interference-limb of Article 10 results in a number of approaches: (a) a concern for a future chilling effect where government measures may not have been taken, such as no police search, or no actual surveillance; (b) a concern for a future chilling effect where the government measure falls short of full legal proceedings in court, such as a government minster's statement, or a monarch's letter; (c) a concern for a future chilling effect where government measures are discontinued for procedural reasons, and (d) a concern for a future chilling effect where government measures have been effectively taken.

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[36] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 71.
[37] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (admissibility decision), para. 146.
[38] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (admissibility decision), para. 144.
[39] *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (admissibility decision), para. 145.
[40] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 60.
[41] *Wille v. Liechtenstein* (App. no. 28396/95) 28 October 1999 (Grand Chamber), para. 50.

8.3.3 Prescribed by law

Similar to the application of the chilling effect to victim-status, the Court rarely applies the chilling effect principle when considering whether an interference has been prescribed by law. The findings in the chapters on criminal and civil defamation (Chapter 4), judicial and legal professional expression (Chapter 6), and whistleblower, employee and union expression (Chapter 7), suggested that the Court did not apply the chilling effect under the prescribed by law limb in this case law, but there were a handful of applications in Chapter 3 (protection of journalistic sources) and Chapter 5 (prosecution of journalists). While the application of the chilling effect in this regard may be rare, the consequence of the Court's review will mean domestic legislation or practice may need to be amended. This is demonstrated in Chapter 3, where the Court applied the principle in *Sanoma* in finding that an order for the surrender of journalistic material was not prescribed by law, as there had been an absence of prior review by a judge (or other independent decision-making body).[42] This was because there must be legal procedural safeguards to avoid the potential detrimental impact of disclosure orders not only on the source, but also on the newspaper, whose reputation may be negatively affected in the eyes of future potential sources, and resulting in a chilling effect on future potential sources. Similarly, in *Big Brother Watch*, the Court found surveillance legislation which did not provide enhanced protection in every case where there was a request for the communications data of a journalist was not prescribed by law, in violation of Article 10.[43] Without this protection, sources may be deterred from assisting the press in informing the public about matters of public interest.[44] And importantly, in *Altuğ Taner Akçam*, the Court found that Turkey's Article 301 insult law was too wide and vague, and constituted a continuing threat to the exercise of the right to freedom of expression.[45]

8.3.4 Necessary in a democratic society

The most frequent application of the chilling effect principle by the European Court is to the question of whether an interference with freedom of expression is necessary in a democratic society. This was true across all areas of application.

The analysis in Chapter 3 on the protection of journalistic sources focused on a number of government measures taken against journalists: disclosure orders issued by courts for a journalist to reveal a source, disclosure orders issued by prosecutors, police search and seizures conducted at journalists' homes and editorial offices, police seizure of a journalist's research material, government surveillance of telecommunications, a journalist's detention for refusal to disclose a source, disclosure orders to surrender anonymous sources' documents, targeted surveillance of journalists, legal costs orders against journalists, orders to testify, and bulk surveillance. A remarkable feature of this case law is that, apart from four admissibility decisions,[46] the Court in its judgments found that *all* of these government measures have a potentially chilling effect. The nature of the chilling effect of these

[42] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 90.
[43] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 498.
[44] *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018, para. 387.
[45] *Altuğ Taner Akçam v. Turkey* (App. no. 27520/07) 25 October 2011, para. 85-96.
[46] *Nordisk Film & TV A/S v. Denmark* (App. no. 40485/02) 8 December 2005 (Admissibility decision); *Weber and Saravia v. Germany* (App. no. 54934/00) 29 June 2006 (Admissibility decision); *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision); and *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision).

government measures is that they (a) deter future sources from assisting the press in informing the public on matters of public interest, (b) discourage other journalists from reporting any misconduct or controversial acts by public authorities; (c) deter potential whistleblowers from assisting the press in informing the public on matters of public interest; and (d) deter members of the public who are also potential sources themselves.

An equally remarkable feature of the Court's application of the chilling effect principle in its case law on protection of journalistic sources is that apart from *Sanoma*, *Telegraaf* and *Big Brother Watch*, where the Court found that the interference had not been prescribed by law, the Court held in *all* of its other judgments that the government measures had not been necessary in a democratic society. This was because the Court fashioned a strict test for insulating the right to protection of journalistic sources from a chilling effect: (a) there must be an "overriding requirement in the public interest," (b) the national margin of appreciation is circumscribed by the interest of a free press, which will "weigh heavily," and (c) limitations on the confidentiality of journalistic sources call for the "most careful scrutiny."[47] The strength of this test is demonstrated when we consider that the government in all of these cases *never* demonstrated the necessity of a measure, with the Court rejecting as not outweighing the right to protection of sources: an intelligence service's interest in removing a leaked document from public circulation, a government's interest in the prevention of disorder or crime by prosecuting public officials who had leaked documents to the press, or a government's interest in the prevention of disorder or crime by prosecuting public officials for possible bribery following leaks to the press. A final notable feature of the case law on protection of sources and its application of the chilling effect is the near unanimity of the Court's judges in these cases. The Court's judgments applying chilling effect reasoning have been remarkably unanimous: *Roemen and Schmit*, *Ernst*, *Tillack*, *Voskuil*, *Martin*, *Sanoma*, *Ressiot*, *Saint-Paul*, *Nagla*, *Görmüş*, and *Becker*, have all been unanimous on application of the chilling effect.

The analysis in Chapter 4 on criminal and civil defamation proceedings revealed that the Court mainly applies the chilling effect principle when considering whether an interference with freedom of expression has been necessary in a democratic society. An undeniable feature of the Court's application of the chilling effect has been the disagreement within the Court in relation to certain measures resulting from criminal or civil defamation proceedings, particularly on whether a criminal conviction, in and of itself, has a chilling effect on freedom of expression. The debate within the Court was evident in *Pedersen and Baadsgaard*, and *Lindon*, and with the most recent Grand Chamber judgment on the issue being *Morice*, where the Court, unanimously held that criminal proceedings may have a chilling effect on the exercise of freedom of expression, and even relatively moderate fines do not suffice to negate the risk of a chilling effect on the exercise of freedom of expression.[48]

The nature of the chilling effect the Court has in mind is that due to the fear of sanctions, individuals may be inhibited from engaging in expression on matters of public interest where they run the risk of being sentenced to such sanctions.[49] This chilling effect imposes a detriment not only on the individual, and other individuals engaging in similar expression, but crucially, the Court recognises the detriment or harm caused to society as a whole, as the public is being denied information of a public interest.[50]

In order to protect freedom of expression from the chilling effect of criminal defamation proceedings, the Court, similar to its case law on protection of sources, has

[47] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 59-60.
[48] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 127.
[49] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 113.
[50] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 113.

fashioned these tests: (a) governments must display restraint in resorting to criminal proceedings, (b) criminal proceedings to protect reputation are only proportionate in "certain grave cases," such as speech inciting violence,[51] and (c) the imposition of prison sentences for a press offence will be compatible with Article 10 only in "exceptional circumstances," such as where other rights are seriously impaired or for hate speech. Importantly, the Court held that defamation of an individual in the context of a debate on an important matter of public interest, presents *no justification whatsoever* for the imposition of a prison sentence, even where suspended.[52]

The findings in Chapter 5 on the prosecution of journalists for ordinary criminal law offences during newsgathering, and other non-defamation prosecutions against journalists, revealed that the Court's application of the chilling effect principle mainly concerns the necessary in a democratic society limb of Article 10. The focus of the Court's application of the chilling effect principle in this case law is mainly on the nature and severity of the sanction imposed, with the Court requiring that it must be satisfied that a penalty does not amount to a form of censorship intended to discourage the press from expressing criticism.[53] The nature of the chilling effect is that in debates on a matter of public interest, such a sanction is likely to deter journalists from contributing to public discussion of issues affecting the life of the community.[54]

However, as the analysis in Chapter 5 demonstrated, there is major disagreement in the Court on when to apply this chilling effect principle where a journalist commits what the Court terms, an ordinary criminal law offence.[55] The divided Grand Chamber judgments in *Stoll*,[56] concerning a journalist's prosecution for publication of secret official deliberations, *Pentikäinen*,[57] concerning a journalist's arrest, detention and prosecution for contumacy towards the police, and *Bédat*,[58] concerning a journalist's prosecution for publication of secret official deliberations,[59] are a testament to the disagreement within the Court. Indeed, this disagreement is amplified in the Chamber judgments and decisions discussed in Chapter 5, and a particular critique developed in this thesis is the notable non-engagement of certain judges with the prior case law, typified by the 2016 judgment in *Brambilla*. The penalty was a suspended prison sentence, but the Court's majority simply stated that the penalties "do not appear disproportionate," without further analysis,[60] which is difficult to square with the Grand Chamber's test of the "most careful scrutiny" in *Stoll*.

Chapter 6's findings on the Court's consideration of judicial and legal professional freedom of expression, and application of the chilling effect principle, mainly involved the necessary in a democratic society limb of Article 10. The government measures at issue included disciplinary proceedings and criminal proceedings against lawyers, and dismissals, non-reappointment, or judicial mandates terminated. There were two features to the meaning attached by the Court to the chilling effect in this context. The first related to judicial freedom

[51] *Raichinov v. Bulgaria* (App. no. 47579/99) 20 April 2009, para. 50.
[52] *Mariapori v. Finland* (App. no. 37751/07) 6 July 2010, para. 68.
[53] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 154.
[54] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 154.
[55] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 102; and *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 91.
[56] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber).
[57] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber).
[58] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber).
[59] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 16.
[60] It was recognised above that the view within the *Brambilla* majority may have been that the sanction imposed would have a desirable chilling effect, deterring future interferences with the proper functioning of law-enforcement communications. But even if this represented the majority's view in *Brambilla*, it is still open to the objection that it did not distinguish the chilling effect on this basis, but instead ignored it without explanation.

of expression, and the chilling effect arises where, due to the fear of sanction, judges are discouraged from participating in public debate, or making statements concerning a matter of public interest in the future.[61] The Court anchored the detriment cause by this potential chilling effect to the detriment suffered by society as a whole.[62] The second meaning attached by the Court to the chilling effect relates to lawyers' freedom of expression, where the Court seeks to protect defence counsel in particular from being influenced by the potential chilling effect of even a relatively light criminal penalty or an obligation to pay compensation for harm suffered or costs incurred.[63] The Court has also linked this concern to a defence counsel's duty to defend their clients' interests zealously. This concern has led the Grand Chamber in *Kyprianou* and *Morice* to also fashion a test that it is only in "exceptional circumstances" that a restriction, even by way of a lenient criminal penalty, of defence counsels' freedom of expression can be accepted as necessary in a democratic society.[64] This was because the Court was concerned with the chilling effect not only on the particular lawyer concerned, but also on the profession of lawyers as a whole.[65] Further, the Court's application of the chilling effect principle applies to a lawyer's freedom of expression both within the courtroom, and outside the court.

The findings in Chapter 7 on whistleblower, employee, and trade union freedom of expression, and the Court's consideration of the chilling effect principle related predominantly to the necessary in a democratic society limb of Article 10. The Court's conception of the chilling effect on whistleblowers and employees engaging in freedom of expression is that due to a fear of sanctions (such as a reprimand or dismissal) employees may be discouraged from reporting misconduct or other matters concerning a public interest.[66] The Court seeks to protect not only the individual employee from this chilling effect, but also to prevent a serious chilling effect on *other* employees and other individuals who may be discouraged from exercising their freedom of expression in the future by reporting misconduct or other matters concerning a public interest. What is quite unique to employee and whistleblower freedom of expression case law, is the Court's holding in *Guja*, and the subsequent line of case law, of taking account of the media coverage of the whistleblower's case or sanctioning, which could have a chilling effect not only on employees at the whistleblower's office but also on other civil servants and employees.[67] Thus, the sanction created a chilling effect on a number of individuals, including (a) the whistleblower, (b) other employees at the whistleblower's office, and (c) other civil servants and employees. The Court's reliance on the media coverage of an applicant's case is not a feature of the chilling effect principle applied in the other areas of Article 10 case law examined.

In the Court's discussion of trade union expression, the Court explained that a chilling effect will arise where trade unions and trade-union members are dissuaded from seeking to express and defend their members' interests due to a fear of sanction or reprisal.[68] In order to protect against this chilling effect the Court has also formulated a test under the necessary in a democratic society limb of Article 10 that national authorities must ensure that disproportionate penalties do not dissuade trade union representatives from seeking to

[61] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 99.
[62] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 99.
[63] *Nikula v. Finland* (App. no. 31611/96) 21 March 2002, para. 54.
[64] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 174.
[65] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 175.
[66] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 95.
[67] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 95.
[68] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 55.

express and defend their members' interests.[69] The analysis of the case law also revealed that the application of this test is not uniformly applied by the Sections of the Court.

Finally, and more broadly, the Court has demonstrated its capacity to apply the chilling effect to the online environment, a particular feature in Chapter 4's analysis of online news media, but also in the Court's case law on protection of journalistic sources and mass surveillance online (*Big Brother Watch*). The chilling effect online may result in negative consequences on the flow of information on the Internet, closure of the online comment environment, or impelling article authors and publishers to refrain from hyperlinking to material over whose changeable content they have no control.

8.3.5 Article 10 and positive obligations

This thesis has also found that the Court's application of the chilling effect principle extends to positive obligations under Article 10 for Council of Europe Member States, which the Court had held requires States to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear.[70] This statement of principle has been subsequently applied in the Court's 2016 judgment in *Uzeyir Jafarov v. Azerbaijan*,[71] and the Court's 2017 judgment in *Huseynova v. Azerbaijan*.[72] The positive obligation is not merely a lofty ideal, but has been applied to the question of the adequacy of government investigations into the killing of a journalist, which can have a chilling effect on the work of other journalists in the country.[73] The positive obligation imposes a duty on the government to ensure investigating authorities explore with "particular diligence" whether a murder could be linked to journalistic activities, or to investigate the possibility that an attack could have been linked to the work of a journalist.[74]

8.3.6 Article 10 and Article 46

The strength of the Court's concern for protecting freedom of expression from the chilling effect of prison sentences in particular, has led the Court not only to unanimously deliver and apply its landmark *Cumpănă and Mazăre* judgment, but also to invoke a rarely used power under Article 46 of the European Convention. Article 46 concerns the execution of judgments,[75] and was applied by the Court to find that an applicant must be immediately released following his imprisonment for defamation.[76] The Court found that given the urgent need to put an end to the violation of Article 10, the Court considered that, as one of the means to discharge its obligation under Article 46 of the Convention, the "respondent State shall secure the applicant's immediate release."[77] The judgment was against Azerbaijan, and

[69] *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. No. 11828/08) 25 September 2012, para. 55.
[70] *Dink v. Turkey* (App. no. 2668/07, 6102/08, 30079/08, 7072/09 et 7124/09) 14 September 2010, para. 137.
[71] *Uzeyir Jafarov v. Azerbaijan* (App. no. 54204/08) 29 January 2015, para. 68.
[72] *Huseynova v. Azerbaijan* (App. no. 10653/10) 13 April 2017, para. 120.
[73] *Huseynova v. Azerbaijan* (App. no. 10653/10) 13 April 2017, para. 115.
[74] *Fatullayev v. Azerbaijan* (App. no. 40984/07) 22 April 2010, para. 115.
[75] European Convention, Article 46 ("1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.").
[76] *Fatullayev v. Azerbaijan* (App. no. 40984/07) 22 April 2010, para. 177.
[77] *Fatullayev v. Azerbaijan* (App. no. 40984/07) 22 April 2010, para. 177.

was delivered on April 2010, with the Azerbaijan Supreme Court holding in November 2010 that the applicant should be released.[78]

Similarly, the Court's concern for protecting freedom of expression from the chilling effect of overbroad and vague criminal law provisions has also led the Court to apply Article 46, finding that amending a law would "constitute an appropriate form of execution" of the Court's judgment.[79] The case of *Fatih Taş (No.* 5) was discussed in Chapter 5, and the line of case law concerning prosecutions under Turkey's Article 301 insult law. The Court noted it had already considered 13 cases concerning prosecutions under Article 301 (and the former Article 159),[80] and found that its conclusion in *Fatih Taş (No.* 5), as well as previous judgments concerning similar prosecutions, stemmed from a problem relating to the application of Article 159/301 in a manner "incompatible with the criteria established by the Court's case-law."[81] Thus, the Court held that bringing the relevant domestic law into conformity with the Court's case-law would constitute an appropriate form of execution which would make it possible to put an end to the violations found.[82]

8.4 The elements of the Court's chilling effect principle

The discussion above makes it clear that the Court attaches specific meanings to the chilling effect depending upon its application under the different limbs of Article 10, and depending upon the individuals expressing themselves, the nature of the expression, and the government measure involved. But while there are specific meanings attached, there are common underlying elements to all the Court's iterations of the chilling effect. The findings in the preceding chapters point to a number of elements as integral to the Court's chilling effect principle.

8.4.1 Fear, deterrence and self-censorship

The first common element is the fear and risk of engaging in freedom of expression resulting in self-censorship. Whether it is the fear or risk of a legal rule, prosecution, sanction, or identification (in the case of journalistic sources), this fear or risk creates a chilling effect, resulting in an individual being inhibited, discouraged, or deterred from engaging in freedom of expression. This results in self-restraint or self-censorship, whether in the form of a source not coming forward to a journalist with information of public interest, a journalist inhibited from reporting on matters of public interest, a news website closing a reader comment section, or a journalist discouraged from undertaking research in preparing an article on a topical subject. It also takes the form of an activist or NGO deterred from stimulating public discussion, a judge discouraged from commentating on matters of public interest, a lawyer feeling restricted in the choice of factual and legal arguments, a whistleblower or employee inhibited from reporting wrongdoing in the workplace, or a trade union dissuaded from defending its members' interests.

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[78] Committee of Ministers Secretariat, "Communication from the government in the case of Fatullayev v. Azerbaijan (Application No. 40984/07)," DH-DD (2010) 604, 29 November 2010.

[79] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 45. See Ronan Ó Fathaigh, "Prosecution of a publisher for 'denigration' of Turkey violated Article 10," *Strasbourg Observers*, 29 October 2018.

[80] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 28.

[81] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 45.

[82] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 45. See also the application of Article 46 in *Youth Initiative for Human Rights v. Serbia* (App. no. 48135/06) 25 June 2013, para. 32 ("most natural execution of its judgment, and that which would best correspond to the principle of *restitutio in integrum*, would have been to secure that the intelligence agency of Serbia provide the applicant with the information requested").

The obvious objection to this element is how speculative it is, and how can it be possible to measure concepts such as fear and risk; how do we predict fear. But the answer, and crucial for the understanding of the Court's chilling effect principle, is that the Court's chilling effect principle is not an empirical claim; it is not an empirical prediction. Rather, as discussed in the preceding chapters, the chilling effect principle is a recognition by the Court of the inevitability of error in the legal system; and crucially, of the vulnerable nature of expression on matters of public interest.[83] The chilling effect principle creates, as Lemmens writes, a "breathing space,"[84] or as Schauer writes, a "buffer zone of strategic protection,"[85] for public interest expression, and is premised upon the notion that in a democratic society, an erroneous restriction of public interest expression creates more harm than an erroneous overprotection of public interest expression.

8.4.2 Potential chilling effect, not a definitive chilling effect

The second common element is that the chilling effect principle involves a *potential* chilling effect, not a definitive chilling effect (which is sometimes overlooked by certain judges in the Court). The Court's concern has always been about a potential chilling effect, or a future risk of a chilling effect, which obviates the need for demonstrating the practical consequences of a government measure on an individual applicant or demonstrating evidence of a chilling effect. From the founding cases such as *Lingens*, *Jersild*, *Goodwin*, *Wille*, and *Cumpănă and Mazăre*, to the more recent judgments in *Morice* and *Baka*, the Court's concern has always been about future risk: in *Goodwin* (sources "may" be deterred), *Wille* ("likely" to discourage), and *Morice* ("may" have a chilling effect), with the Court's use of "potentially" and "may," rather than, "the" chilling effect, or "will be" undermined, demonstrates the Court's concern about future "risk" (*Cumpănă and Mazăre*), rather than a definite and certain chilling effect. In the seminal protection of journalistic sources judgment in *Goodwin v. United Kingdom*, the Court had regard to the "potentially" chilling effect a source-disclosure order had on freedom of expression.[86] This is in contrast to the U.S. Supreme Court in its *Branzburg v. Hayes* judgment on a similar issue, where the Supreme Court's majority had sought evidence for a chilling effect, and noted that the estimates of the chilling effect of disclosure orders were "widely divergent and to a great extent speculative."[87] For the European Court, its concern has always been about the potential chilling effect, and worrying about future risk of a chilling effect. Again, the chilling effect principle is not based on some speculative empirical claim about the future, but rather a recognition of the inherent risk of error in the legal system. As Schauer explains, the chilling effect principle flows not from a specific behavioral state of the world, but from an understanding of the comparative nature of the errors that are bound to occur: in a democratic society, an erroneous restriction of public interest expression creates more harm than an erroneous overprotection of public interest expression. By comparing rather than measuring, the behavioral imprecision of the chilling effect concept becomes irrelevant.[88]

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[83] *Altuğ Taner Akçam* v. Turkey (App. no. 27520/07) 25 October 2011, para. 81.
[84] Koen Lemmens, "Se taire par peur: l'effet dissuasif de la responsabilité civile sur la liberté d"expression," (2005) *Auteurs & Media* 32, p. 34; and see also, *NAACP v. Button*, 371 U.S. 415 (1963), p. 433.
[85] Frederick Schauer, Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'," (1978) *Boston University Law Review* 685, p. 710.
[86] *Goodwin v. United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber), para. 39.
[87] *Branzburg v. Hayes* 408 U.S. 665 (1971), p. 694.
[88] Frederick Schauer, Fear, Risk and the First Amendment: Unraveling the Chilling Effect," (1978) *Boston University Law Review* 685, p. 732.

8.4.3 Beyond the individual applicant

The third element of the Court's chilling effect principle is a concern going beyond just the individual applicant, but also taking into consideration the chilling effect on other individuals in a similar situation to the applicant, other individuals potentially engaging in future freedom of expression on a similar matter, and the public in general. The element is evident across all the preceding chapters, from a lawyer's freedom of expression, where the Court has regard to the chilling effect "not only on the particular lawyer concerned," but also "on the profession of lawyers as a whole;"[89] to protection of journalistic sources, where the Court had regard to the chilling effect not only "on the source in question," and the applicant newspapers, but also on "future potential sources;"[90] to a judge's freedom of expression,[91] where the Court has regard not only of whether "the penalty at issue was disproportionately severe on the applicant," but also the "'chilling effect' on judges wishing to participate in the public debate."[92] This integral element to the European Court's chilling effect principle is also an element which is sometimes ignored or overlooked by certain judges within the Court when refusing to apply the chilling effect principle. And yet this element is fundamental to the chilling effect principle.

8.4.4 Future risk, rather than evidence

The fourth element of the Court's chilling effect principle is avoiding the *future risk* of a chilling effect. Across all the preceding chapters, the Court's concern for future risk is evident, as typified in *Rubins*, where the Court rejected the government's argument that the Court should have regard to the fact the applicant's career had not been affected by a dismissal, as the applicant took up a post in another university soon afterwards.[93] The Court dismissed the argument, and "disregarding the fact that the applicant took up a post in another university soon afterwards," the dismissal "was liable to have a serious chilling effect on other employees of the University and to discourage them from raising criticism."[94] This mirrors the Court's reasoning in *Cumpănă and Mazăre*, where the Court disregarded the fact the journalist "continued to work for the T. newspaper,"[95] following his defamation conviction, and where it was argued that the sanctions "had no practical consequences."[96] Instead, the Grand Chamber in *Cumpănă and Mazăre* held that the chilling effect that the fear of such sanctions has on the exercise of journalistic freedom of expression is evident,[97] even though it did not appear that there were "any significant practical consequences for the applicants."[98] Similarly in *Sanoma*, even though the Court admitted that "it is true that no search or seizure took place in the present case", the Court nonetheless found that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources.[99] The Court's concern for future risk, rather than examining the practical consequences of a government measure on an individual applicant, is also an element which is sometimes

[89] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 175.
[90] *Financial Times v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 63.
[91] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009.
[92] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009, para. 100.
[93] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015, para. 92.
[94] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015, para. 92.
[95] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 59.
[96] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 59.
[97] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 114.
[98] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 118.
[99] *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber), para. 71.

ignored or overlooked by certain judges within the Court when refusing to apply the chilling effect principle. And yet this element is also integral to the chilling effect principle. And again, it reflects the notion that the chilling effect principle is not a specific empirical claim about the future, but rather a doctrine flowing from the preference for the overprotection of public interest expression.

8.4.5 Harm to democratic society

The fifth element is the harm and detriment which flows from the chilling effect. Crucially, and the reason for the European Court's concern about limiting the chilling effect, is that the harms that flows not only affects the individual applicant, but also presents a harm to democratic society, as information that ought to be expressed is not, and the public is denied information on matters of public interest. According to Schauer, this harm is also recognised under the U.S. First Amendment case law: because some individuals refrain from saying or publishing that which they lawfully could and should,[100] something that "ought" to be expressed is not.[101] This creates a harm that flows from the non-exercise of a constitutional right, but also a general societal loss which results when the freedoms guaranteed by the First Amendment are not exercised.[102] This element of the chilling effect has been explained by the Court across all its case law, although there are subtle differences in the harm flowing from certain government measures.

Thus, concerning protection of journalistic sources, the harm flowing from disclosures orders not only affects (a) the source in question, but also (b) the newspaper against which the order is directed, whose reputation may be negatively affected in the eyes of (c) future potential sources by the disclosure, and (d) members of the public, who have an interest in receiving information imparted through anonymous sources and who are also potential sources themselves.[103] Similarly, concerning protection of whistleblowers, the harm flowing from the chilling effect affects not only the individual whistleblower, but also other employees at the whistleblower's office and may discourage them from reporting misconduct, and on other civil servants and employees.[104] The Court's concern, as recognised by the Grand Chamber, is to ensure that individuals are protected from a chilling effect on freedom of expression on matters they are entitled to bring to the public's attention, who are equally entitled to receive information this information.[105]

8.4.6 Media coverage

There is a sixth *possible* element to the European Court's chilling effect principle, but possible is italicised as this element has only been articulated in one area of the Court's case law, namely the employee freedom of expression and protection of whistleblowers. The element is the broader chilling effect created by media coverage, where because an employee or whistleblower's sanctioning or dismissal received media coverage, other employees and potential whistleblowers may be discouraged reporting misconduct in the future.[106] However,

[100] Frederick Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'," (1978) 58 *Boston University Law Review* 685, p. 693.
[101] Frederick Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'," (1978) 58 *Boston University Law Review* 685, p. 693.
[102] Frederick Schauer, "Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'," (1978) 58 *Boston University Law Review* 685, p. 693.
[103] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 63.
[104] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 95.
[105] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 200 (Grand Chamber), para. 95.
[106] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008(Grand Chamber), para. 95.

the Court does not articulate this element of the chilling effect in other areas of its case law. There are two possible views on this: the first, is that because employee and whistleblower dismissals may involve internal disciplinary proceedings, and employment courts, it is only through media coverage that the sanctioning of an employee is publicised beyond the employee's company. But the second view is that there is a danger associated with the Court hinging the broader chilling effect of a dismissal on the media coverage, as it may encourage governments to argue that where there is little media coverage, the broader chilling effect does not exist. As such, this element is not integral to the Court's overall chilling effect principle, as anchoring a chilling effect on sufficient media coverage would run contrary to the Court's concern about future risk.

8.4.7 Overprotection of freedom of expression

A final element of the Court's chilling effect principle discovered in this research is that of *over-protection* of freedom of expression on matters of public interest; similar in a sense to creating a "breathing space" for public interest expression. Schauer calls this a "buffer zone of strategic protection."[107] This element is typified in the Court's case law where it applies a separate proportionality analysis to the sanction imposed, such as where the Court has found allegations to be defamatory, but because the allegations are made concerning a matter of public interest, there is *no justification whatsoever* for the imposition of prison sentences: the fear of being sentenced to imprisonment for reporting on matters of public interest creates a chilling effect on journalistic freedom of expression.[108] The significance of this holding is that the Court considered that it was legitimate to take into account the deterring effect a threat of imprisonment might have on *other* individuals in the *future* wishing to express themselves on a debate of public interest. Moreover, the Court's reasoning seems to admit that it will tolerate future attacks on reputation as a necessary cost, so as to ensure that no future debate on matters of public interest is deterred due to a fear of sanctions. This is because, as the Court itself recognises, prison sentences would have a higher likelihood of deterring defamatory expression. Thus, at a theoretical level, the chilling effect principle seems to be based on the idea that certain interferences with freedom of expression must be considered not only in the light of the individual applicant, but also in light of the broader effect this interference has on freedom of expression generally, and is premised on the notion that a certain amount of objectionable expression must be tolerated in order to ensure that the bulk of future legitimate expression is protected. This protection of freedom of expression at the expense of other interests is at the core of the chilling effect principle.

8.5 Consequences of the Court's application of the chilling effect principle

There are a number of important consequences of the Court's application of the chilling effect principle in its freedom of expression case law which are evident from the findings of this thesis. The consequences include the Court fashioning legal tests which domestic courts must apply, setting out the standard of review the Court must apply, prohibiting certain forms of sanctions, conducting separate proportionality assessment of sanctions, individualisation of costs and damages orders, finding domestic legal rules incompatible with Article 10, requiring domestic legal reform, establishing specific rights under Article 10, and requiring release from prison.

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[107] Frederick Schauer, Fear, Risk and the First Amendment: Unraveling the 'Chilling Effect'," (1978) *Boston University Law Review* 685, p. 710.
[108] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 200 (Grand Chamber), para. 116.

8.5.1 Exceptional circumstances test

One of the most important consequences of the Court's application of the chilling effect principle is that it results in the Court fashioning a test in order to ensure that a government measure does not create a chilling effect, namely its "exceptional circumstances" test. The strength of the Court's exceptional circumstances test is demonstrated by the fact that where the Court applies the test, the government rarely satisfies the test, because other fundamental rights must have been *seriously impaired*, such as for hate speech or incitement to violence. The test has been formulated and applied across the Court's case law, such as Chapter 3 (the aim of preventing further leaks will only justify an order for disclosure of a source in "exceptional circumstances," and where the risk threatened is sufficiently serious and defined),[109] Chapter 4 (prison sentences for a press offence will be compatible with journalists' freedom of expression only in "exceptional circumstances," such as hate speech and incitement to violence),[110] and Chapter 6 (only in "exceptional circumstances" can a restriction, even by way of a lenient criminal penalty, of defence counsels' freedom of expression be accepted as necessary in a democratic society.)[111] In none of the cases discussed where the "exceptional circumstances" test applied did the government satisfy the Court's review.

8.5.2 Strict standard of review

In addition to the exceptional circumstances test, the Court has also fashioned a similarly strict standard of review to protect freedom of expression from a chilling effect, namely "most careful scrutiny" review. Application of this standard of review has led the European Court to disagree with three levels of domestic courts in *Financial Times*: because of the potentially chilling effect of a disclosure order, (a) there must be an overriding requirement in the public interest, (b) the national margin of appreciation is circumscribed by the interest of a free press, which will "weigh heavily," and (c) imitations on the confidentiality of journalistic sources call for the "most careful scrutiny."[112] Similarly, in *Dammann*, the Court disagreed with three levels of Swiss domestic courts, finding restrictions on freedom of the press at the pre-publication phase fall within the scope of the Court's review, and calls for the "most careful scrutiny."[113] The Court applies the most careful scrutiny when measures taken or sanctions imposed by the national authorities are capable of discouraging the participation of the press in debates over matters of legitimate public concern.[114]

8.5.3 Separate proportionality assessment of sanctions

A third consequence of the Court's application of the chilling effect principle has been that it allows the Court to conduct a separate proportionality assessment of sanctions imposed, even where the underlying expression at issue may objectionable. The approach is particularly pronounced in the Court's case law on defamation (Chapter 4), where the Court has found that domestic courts' findings that a newspaper article was defamatory "met a 'pressing social need'" under Article 10.[115] But the Court then went on to examine the "proportionality

[109] *Financial Times v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 69.
[110] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 118.
[111] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber), para. 174.
[112] *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009, para. 59-60.
[113] *Dammann v. Switzerland* (App. no. 77551/01) 25 April 2006, para. 53.
[114] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 106.
[115] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 110.

of the sanction," and under this heading, introduced the concept of the chilling effect into the equation. The Court then applied this chilling effect principle to the sanctions imposed, and held that the circumstances of the case - a classic case of defamation of an individual in the context of a debate on a matter of legitimate public interest - presented no justification whatsoever for the imposition of a prison sentence.[116] This was because such a sanction, by its very nature, will have a chilling effect."[117] Similarly, in the Court's case law on judicial and legal professional expression (Chapter 6), such an approach of divorcing the sanction from the nature of the expression, has led the Court to find that a lawyer's expression accusing the investigating judges of being complicit in torture was objectionable, but nevertheless the Court considered that it should separately ascertain whether the disciplinary sanction imposed was proportionate.[118] The Court applied its chilling effect principle, and found that imposing a disciplinary sanction excessively undermined the lawyer's freedom of expression.[119]

8.5.4 Restricting use of certain sanctions and proceedings

A fourth consequence of the Court's application of the chilling effect principle is that it may allow the Court to restrict the use of certain sentences by domestic courts, even though the Court recognises that sentencing is in principle a matter for the national courts.[120] The Court has most notably restricted the use of prison sentences for press offences, finding that the imposition of prison sentences for a press offence will be compatible with Article 10 only in exceptional circumstances, such as for hate speech or incitement to violence.[121] The Court has also gone one step further, finding that where a case is a "classic case" of defamation of an individual in the context of a debate of public interest, there is "no justification whatsoever for the imposition of a prison sentence."[122] This was because such a sanction, "by its very nature, will have a chilling effect."[123] As discussed in Chapter 4, the chilling effect principle has been instrumental in allowing the European Court to effectively remove certain sentencing options for defamatory expression on matters of public interest. As mentioned above, the strength of the Court's concern for protecting freedom of expression from the chilling effect of prison sentences, has led the Court to use its power under Article 46 of the Convention, to find that an applicant must be immediately released following his imprisonment for defamation.[124]

A related consequence is the Court limiting the circumstances when certain proceedings are initiated against individuals exercising their freedom of expression, including (a) criminal proceedings to protect reputation are only proportionate in certain "grave cases," such as involving speech inciting violence, and depend upon whether the authorities could have used other means, such as civil or disciplinary remedies,[125] and (b) it is only in "exceptional circumstances" that a restriction, even by way of a lenient criminal penalty, can be imposed of a defence counsel's freedom of expression.[126]

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[116] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 116.
[117] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 116.
[118] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 51.
[119] *Bono v. France* (App. no. 29024/11) 15 December 2015, para. 56.
[120] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 115.
[121] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 115.
[122] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 116.
[123] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber), para. 116.
[124] *Fatullayev v. Azerbaijan* (App. no. 40984/07) 22 April 2010, para. 177.
[125] *Raichinov v. Bulgaria* (App. no. 47579/99) 20 April 2009, para. 50.
[126] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 135.

8.5.5 Requiring domestic legal change

The fifth consequence of the Court's application of the chilling effect principle has been the Court finding that certain aspects of domestic law simply do not conform with Article 10. This has been most pronounced where the Court has found that a government measure was not prescribed by law, such as in *Sanoma*. But also in *Dyuldin and Kislov*, where the Court held that a domestic rule permitting government officials to sue a newspaper, even where they had not been named in an article, violated a "fundamental requirement" of Article 10: to give rise to a cause of action a defamatory statement "must refer to a particular person."[127] The Court applied chilling effect reasoning, noting that if all government officials were allowed to sue in defamation in connection with any statement critical of government affairs, even in situations where the official was not referred to by name or in an otherwise identifiable manner, journalists would be "inundated with lawsuits."[128] This would result in an "excessive and disproportionate burden being placed on the media, straining their resources and involving them in endless litigation," and would "inevitably have a chilling effect on the press in the performance of its task of purveyor of information and public watchdog."[129]

The Court's concern for protecting freedom of expression from the chilling effect of overbroad and vague criminal law provisions has also led the Court to apply Article 46 finding that amending a law would "constitute an appropriate form of execution" of the Court's judgment.[130] This was typified in *Fatih Taş (No.* 5), and as mentioned earlier, where the Court examined prosecutions under Turkey's Article 301, and applying of Article 46 the European Convention, held that "bringing the relevant domestic law into conformity" with the Court's case-law would constitute an appropriate form of execution which would make it possible to put an end to the violations found.[131]

8.6 Explaining disagreement and non-application of the chilling effect principle

In order to fully understand the Court's chilling effect principle, and the Court's application of the principle, we must also explain the disagreement within the Court on its application, and understand the Court's non-application of the principle in certain instances. This is because the analysis in this thesis has shown that a constant feature in the preceding chapters is that there is considerable disagreement, even resulting in a number of divided Grand Chamber judgments.

8.6.1 Non-engagement with precedent or principle

When disagreement arises in the Court over the application of the chilling effect, there are two approaches evident. The first is non-engagement with precedent or principle, where a majority or minority of the Court do not engage fully with precedent on the chilling effect principle, or discuss the elements of the chilling effect principle. A case that best illustrates this is *Rubins v. Latvia*,[132] where the Court majority held that a university professor's

[127] *Dyuldin and Kislov v. Russia* (App. no. 25968/02) 31 July 2007, para. 43.
[128] *Dyuldin and Kislov v. Russia* (App. no. 25968/02) 31 July 2007, para. 43.
[129] *Dyuldin and Kislov v. Russia* (App. no. 25968/02) 31 July 2007, para. 43.
[130] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 45. See Ronan Ó Fathaigh, "Prosecution of a publisher for 'denigration' of Turkey violated Article 10," *Strasbourg Observers*, 29 October 2018.
[131] *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018, para. 45.
[132] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015.

dismissal was the harshest sanction, and was "liable to have a serious chilling effect on other employees of the University and to discourage them from raising criticism."[133] This principle had a clear basis in the Court's case law, based upon the holding in *Guja* (dismissal "could also have a serious chilling effect on other employees," and "discourage them from reporting any misconduct"),[134] and *Heinisch* (dismissal "could also have a serious chilling effect on other employees," and "discourage them from reporting any shortcomings").[135]

However, the dissent, in response to this conclusion, simply stated that given the seriousness of the disloyal conduct of the applicant, the sanction of dismissal "cannot be regarded as disproportionate."[136] But the dissent nowhere sought to engage with precedent, distinguish the earlier case law in *Guja*, *Heinisch*, or explain how a different case, such as *Palomo Sánchez*, might be applicable. Instead, the dissenting opinion in *Rubins* did not even cite one prior case from the Court's case law.[137]

Similarly, in *Kudeshkina*, where the Court majority applied the chilling effect principle, the dissenting opinions simply decided not to discuss any of the case law relied upon by the majority on the chilling effect.[138] Judge Kovler, joined by Judge Steiner, simply noted that the majority "draws attention to the "chilling effect that the fear of sanction has on the exercise of freedom of expression."[139] Without engaging with the issue, Judge Kovler dryly states that "I am afraid that the "chilling effect" of this judgment could be to create an impression that the need to protect the authority of the judiciary is much less important than the need to protect civil servants' right to freedom of expression."[140] Similarly, Judge Nicolaou simply concluded that "in these circumstances the disciplinary sanction imposed on the applicant was not, in my opinion, disproportionate,"[141] without discussing any of the case law on the proportionality of sanctions, such as *Cumpănă and Mazăre*, *Nikula*, or *Steur*.

This approach of non-engagement with precedent, or the chilling effect principle, is difficult to square with the Court's principle of precedent, reaffirmed by the Grand Chamber in 2016, with the Court holding: it is in the interest of legal certainty, foreseeability and equality before the law that it should not depart, *without good reason*, from precedents laid down in previous cases.[142] Importantly, the Court has dropped the proviso that "it is not formally bound to follow any of its previous judgments."[143] There is nothing inherently objectionably about the Court not applying the chilling effect principle in a given case, where the Court, or the separate opinion, gives good reason, in the form of explaining why an earlier case should not apply. But it is objectionable when the Court, such as in *Lindon*, remains

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[133] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015, para. 92 (citing *Palomo Sánchez and Others v. Spain* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011, para. 75).
[134] *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber), para. 95.
[135] *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011, para. 91.
[136] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015 (Dissenting opinion of Judges Mahoney and Wojtyczek, para. 14).
[137] *Rubins v. Latvia* (App. no. 79040/12) 13 January 2015 (Dissenting opinion of Judges Mahoney and Wojtyczek). See, for example, *Gollnisch v. France* (App. no. 48135/08) 7 June 2011 (Admissibility decision), where a university professor's dismissal (over remarks on the discussion of the "official truth" about the Holocaust) did not violate Article 10, with the Court noting that the professor had the possibility of working in another universities).
[138] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009 (Dissenting opinion of Judge Kovler joined by Judge Steiner; Dissenting opinion of Judge Nicolaou).
[139] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009 (Dissenting opinion of Judge Kovler joined by Judge Steiner, para. 12).
[140] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009 (Dissenting opinion of Judge Kovler joined by Judge Steiner, para. 12).
[141] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009 (Dissenting opinion of Judge Nicolaou, para.9).
[142] *Magyar Helsinki Bizottság v. Hungary* (App. no. 18030/11) 8 November 2016 (Grand Chamber), para. 150.
[143] *Chapman v. the United Kingdom* (App. no. 27238/95) 18 January 2001.

completely silent on the chilling effect, even though prior case law, directly on point, applies the chilling effect principle.[144]

Finally, the analysis in this thesis, particularly Chapter 6, reveals the notable role of the individual views of judges, and the composition of various Sections of the Court, explaining the non-application of the chilling effect principle. This revelation was most evident in the Second Section's judgment in *Kyprianou*, where the Court refused to consider whether a prison sentence had a chilling effect. Research revealed that the judges in *Kyprianou* had been the same judges in the Second Section's judgment in *Cumpănă and Mazăre*, which had similarly refused to hold that prison sentences imposed on journalists had a chilling effect. Similarly, research on the composition of the First Section revealed that the First Section's majority in *Schmidt* which chose not to apply the chilling effect was the same group of judges in the First Section's minority in *Kudeshkina* who would not have applied the apply chilling effect principle. This seems to suggest the need for judges to give reasons for departing from prior case law, instead of simple statements such as, "I am afraid that the "chilling effect" of this judgment could be to create an impression that the need to protect the authority of the judiciary is much less important than the need to protect civil servants' right to freedom of expression;"[145] rather than explaining why the prior case law on the chilling effect was not applicable.

8.6.2 Engagement with precedent and principle

The second approach where disagreement arises in the Court over the application of the chilling effect principle, is where both the majority and dissent review the chilling effect principle, discuss the case law, and come to different conclusions as to its application. This approach is evident in judgments such as *Pentikäinen*,[146] and while there may be reasonable disagreements over the appropriateness of applying the chilling effect, at least the reasoning of both views (majority and dissent) is evident. Similarly, in decisions such as *Nordisk*, what is lamentable is that the Court actively engaged with the chilling effect principle, engaged with the case law (such as *Goodwin*, *Cumpănă and Mazăre*, and *Roemen and Schmit*), and sought to explain why there was no chilling effect associated with the disclosure order. Thus, *Nordisk* is a good illustration of the Court engaging fully with the chilling effect principle and case law, while deciding not to apply it.

8.6.3 No adverse consequences for applicant or evidence of chilling effect

This thesis also reveals the points of contention within the Court over whether the absence of adverse consequences for an applicant means that the chilling effect principle can be ignored. This view is typified in the Chamber judgment in *Cumpănă and Mazăre*, where the Court majority held that prison sentences and prohibitions on working as journalists were not disproportionate as it "appear[ed] from the evidence" that there been "no practical consequences,"[147] as the second applicant "continued to work for the T. newspaper," and the applicants "did not serve their custodial sentence, being granted a pardon."[148] As discussed, this approach was dismissed by a unanimous Grand Chamber. Nonetheless, the approach has

[144] See the discussion in Chapter 4, Section 4.5.
[145] *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009 (Dissenting opinion of Judge Kovler joined by Judge Steiner, para. 12).
[146] See *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 113 (compare, Dissenting opinion of Judge Spano joined by Judges Spielmann, Lemmens and Dedov, para. 12).
[147] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 59.
[148] *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 10 June 2003, para. 59.

continued in some cases, with a majority of the Court applying such an approach in *Pentikäinen*, finding that the applicant's conviction "had no adverse material consequences for him," as the conviction was not "even entered in his criminal record."[149] The Court concluded that the conviction amounted "only to a formal finding of the offence committed by him and, as such, could hardly, if at all, have any "chilling effect" on persons taking part in protest actions or in the work of journalists at large."[150] This thesis has attempted to demonstrate in the preceding chapters, and this concluding chapter, that a focus on the adverse consequences for an individual applicant, does not accord with the case law, nor the elements of the Court's chilling effect principle identified in this thesis.

8.6.4 Margin of appreciation

A further notable approach applied by some members of the Court when refusing to apply the chilling effect is to invoke a margin of appreciation,[151] or a consensus-among-governments argument. The most notable manifestations of this approach were in *Lindon*, and *Stoll*, where in the latter majority judgment, the Court held that "a consensus appears to exist among the member States of the Council of Europe on the need for appropriate criminal sanctions to prevent the disclosure of certain confidential items of information."[152] This somehow outweighed the Court's chilling effect principle applied in *Jersild*, *Lopes Gomes da Silva, Cumpănă and Mazăre*, *Dammann*, and *Dupuis and Others*. The Court's argument seemed to be a version of the margin of appreciation argument which the Court's majority adopted in *Lindon*, that "in view of the margin of appreciation left to Contracting States by Article 10 of the Convention, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued."[153]

However, there are indications that the margin of appreciation argument no longer holds water with a majority of the Court in its case law on criminal defamation, as evident from *Morice*. The Chamber judgment invoked the margin of appreciation when considering criminal proceedings against a lawyer, and with no mention of the chilling effect principle: "in view of the margin of appreciation left to Contracting States by Article 10 of the Convention, a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued."[154] This had been the first time in the Court's case law on a lawyer's freedom of expression and criminal proceedings where the chilling effect principle had not been applied, and the first time the margin of appreciation principle applied. When the case was considered by the Grand Chamber, the Court unanimously applied the chilling effect principle, and omitted any mention of the margin of appreciation.[155]

8.6.5 Characterisation of the expression

The final approach, as evidenced in the preceding chapters, by some members of the Court when not applying the chilling effect is to *overemphasise* a certain characteristic of the expression at issue, or indeed, mischaracterise the expression. This approach is most clearly

[149] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 113.
[150] *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber), para. 113.
[151] See Koen Lemmens, "The Margin of Appreciation in the ECtHR's Case Law A European Version of the Levels of Scrutiny Doctrine?" (2018) 20 *European Journal of Law Reform* 78.
[152] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 155.
[153] *Lindon, Otchakovsky-Laurens and July v. France* (App. nos. 21279/02 and 36448/02) 22 October 2007, para. 59.
[154] *Morice v. France* (App. no. 29369/10) 11 July 2013, para. 108 (citing *Radio France and Others v. France* (App. no. 53984/00) 30 March 2004, para. 40).
[155] *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber), para. 135.

evident in: *Lindon*, characterising the expression as content "such as to stir up violence and hatred;" (in a case involving defamation); *Delfi*, characterising the expression as "hate speech and speech that directly advocated acts of violence,"[156] (in a case involving defamation); *Stoll*, overemphasising that the expression "tends to suggest that the ambassador's remarks were anti-Semitic,"[157] (in a case involving the offence of publishing secret official deliberations); or *Bédat*, overemphasising that the expression targeted a person in a "situation of vulnerability,"[158] (in a case involving the offence of publishing secret official deliberations). This approach, which in a sense tunes-up the expression from defamatory expression to hate speech, or publication of official secrets to publication of allegations of anti-Semitism, or the targeting of a vulnerable person; allows the Court to then side-line the application of the chilling effect, even to the point where it is not even mentioned. There is nothing inherently wrong with the view, held by some judges within the Court, that the Court should not have regard to the chilling effect where hate speech, or expression disclosing intimate details of private life, is involved. But an objection may be levelled at the approach of simply ignoring the chilling effect principle, and the Court's case law on the chilling effect, and instead tuning-up the expression involved, without explaining why the chilling effect does not apply. This approach is in reality just another manifestation of the non-engagement with precedent approach.

The foregoing point also brings to the fore how little the chilling effect principle features in the Court's case law on hate speech,[159] and lends weight to the view that the Court does not consider that prosecutions for hate speech have a chilling effect on public interest expression. Indeed, there may be a view within the Court that certain sanctions have a desirable chilling effect on hate speech. This concept of a desirable chilling effect is actually evident in the Court's case law, but where the expression does not involved expression on matters of public interest.[160] The leading case is *Biriuk v. Lithuania*, which did not involve expression on matters of public interest, but rather a newspaper article disclosing information of a "purely private nature" (a person's HIV-positive diagnosis).[161] For the European Court, a domestic legislative cap on judicial awards of compensation for violations of the right to privacy, even in cases of "an outrageous abuse of press freedom," would prevent the courts from "*sufficiently deterring the recurrence* of such abuses"[162] (i.e., a desirable chilling effect on future non-public-interest expression).

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[156] *Delfi AS v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber), para. 117.
[157] *Stoll v. Switzerland* (App. no. 69698/01) 10 December 2007 (Grand Chamber), para. 148.
[158] *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber), para. 78.
[159] See, for example, *Belkacem v. Belgium* (App. no. 34367/14) 27 June 2017 (Admissibility decision); *Roj TV A/S v. Denmark* (App. no. 24683/14) 17 April 2018 (Admissibility decision); and *Šimunić v. Croatia* (App. no. 20373/17) 22 January 2019 (Admissibility decision). See Hannes Cannie and Dirk Voorhoof, "The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?" (2011) 29 *Netherlands Quarterly of Human Rights* 54; Antoine Buyse, "Dangerous Expressions: The ECHR, Violence and Free Speech," (2014) 63 *International and Comparative Law Quarterly* 491; Koen Lemmens, "Hate Speech in the case law of the European Court of Human Rights - Good Intentions make Bad Law," in Afshin Ellian and Gelijn Molier (eds.), *Freedom of Speech under Attack* (Eleven International Publishing, 2015); and Philippe Yves Kuhn, "Reforming the Approach to Racial and Religious Hate Speech Under Article 10 of the European Convention on Human Rights," (2019) *Human Rights Law Review* 1.
[160] See *Biriuk v. Lithuania* (App. no. 23373/03) 25 November 2008, para. 46 (a statutory limit on damages failed in "sufficiently deterring the recurrence of such abuses" of press freedom).
[161] *Biriuk v. Lithuania* (App. no. 23373/03) 25 November 2008, para. 41.
[162] *Biriuk v. Lithuania* (App. no. 23373/03) 25 November 2008, para. 46.

8.7 Recommendations for the Court

From a freedom of expression point of view, the European Court has had an enormously positive impact on the hundreds of applicants that have successfully made applications to the Court over violations of the right to freedom of expression under Article 10.[163] The Court has developed a fundamental and core value under Article 10 with its chilling effect principle, which has a multi-faceted foundation across a number of Article 10 areas of case law. Its fundamental basis is that expression on matters of public interest much be overprotected under Article 10, in order ensure the unrestricted flow of public interest expression to the public. The vast majority of judgments discussed in this thesis are a testament to the Court's concern for protecting freedom of expression from the chilling effect.

Indeed, this thesis has demonstrated the strong impact the chilling effect principle plays when the Court is confronted with new issues concerning freedom of expression, such as online expression, or online surveillance of journalists. The Court will always be confronted with new issues, new forms of interferences with freedom of expression, and indeed, new forms of freedom of expression. And yet, given that the central premise upon which the chilling effect principle is based, namely protecting the free flow of public interest expression, it is a principle that can be adapted to these new situations, and will undoubtedly feature in the Court's case law for years to come. Of course, there will never be unanimity across the European Court's 47 judges. Where criticism has been levelled in this thesis at the Court, or dissenting or majority opinions, the bona fides of the judges has never been called into question. European Court judges are interpreting and applying the European Convention in a neutral and fair manner. However, the findings in this thesis suggest that there is room for improvement in the Court's application of the chilling effect principle, and as such some tentative recommendations are included that could assist the Court in its future application of the principle.

The first recommendation is that the Court must take more account of its own principle of precedent laid down in *Chapman*. The findings in this thesis reveal too many occasions where a Court majority or dissent, simply neglects to engage with the case law on the chilling effect, or simply does not even cite the case law. In many instances, this may not even be deliberate. Consider a very helpful concurring opinion from the former President of the Court, Judge Jean-Paul Costa, who sat in both the Chamber and Grand Chamber in *Kyprianou*.[164] Judge Costa helpfully explained his changed vote, admitting that he "undoubtedly attached insufficient importance to the leading judgment *Nikula v. Finland* which has been cited several times by the Grand Chamber."[165] While we cannot extrapolate too much from this single opinion, it does reveal that judges of the Court sometimes attach insufficient importance to prior case law. As such, it may be helpful for the Court and its judges to regularly include its *Chapman* principle of precedent in its Article 10 case law, along the lines of an additional criterion in leading Grand Chamber cases where criteria are listed in areas covered in Chapters 3 - 7: the protection of journalistic sources in *Sanoma*; civil and criminal defamation proceedings, such as *Morice*; criminal prosecutions against journalists, such as *Bédat*; judicial and legal professional freedom of expression, such as

[163] The European Court has delivered more than 20,000 judgments since 1959, with the Court delivering over 700 judgments concerning Article 10 (see European Court of Human Rights, *Overview 1959-2017 ECHR* (Council of Europe, 2017), p. 6).
[164] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber) (Partly dissenting opinion of Judge Costa).
[165] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber) (Partly dissenting opinion of Judge Costa, para. 8).

Baka; and whistleblowers, employee and trade union freedom of expression, such as *Palomo Sánchez*. The additional criteria would be simply:

> *(...) Precedent*
>
> The Court is aware of the importance of legal certainty, and the Court reiterates that it is in the interest of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (see *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, 8 November 2016, § 150, and *Chapman v. the United Kingdom* [GC], no. 27238/95, § 70, ECHR 2001-I).

Therefore, each judgment will recognise that the Court is to provide *good reasons* for not applying precedents, and in particular the precedents relating to the chilling effect. This could have the effect of more a consistent application of the chilling effect principle.

The second recommendation is that when there is disagreement over the application of the chilling effect principle, it is recommended that the judges in the majority, and in the dissent, cite the case law concerning the chilling effect when disagreeing with their colleagues. It is suggested that it is not sufficient to simply state that a restriction on freedom of expression has a chilling effect; it is necessary to explain why that is the case, what authority there is, and point out where the majority or dissent have not applied chilling effect cases. Thus, adopting approaches of active engagement with precedent and principle, as discussed above.

The third recommendation is that where a potential chilling effect on freedom of expression is recognised by the Court, all aspects of the case should be examined, including the questions of whether there has been an interference, whether it is prescribed by law, pursues a legitimate aim, and is necessary in a democratic society. This is because if the Court is taking the chilling effect seriously, what the Court states about the interference at issue will influence future individuals considering exercising their freedom of expression. In contrast, in cases such as *Sanoma* and *Kasabova*, the Court refused to examine all aspects of the interference which had a chilling effect, and thus left future individuals with little protection from this chilling effect. The suggested approach was undertaken by the Court in *Baka*, (and also in *Kyprianou*[166]), where the Court recognised the importance of examining whether an interference with a judge's freedom of expression had been necessary in a democratic society, even where it had already found there had been no legitimate aim for the interference.[167] This allowed the Court to emphasise the dangers of creating a chilling effect on judges wishing to engage in expression on matters of public interest, signalling to domestic courts to take the principle into account in future cases.

The fourth recommendation is that where a potential chilling effect on freedom of expression is identified by the Court, the application should not be dismissed at the admissibility stage, particularly where there is a split in the Court (as occurred in *Ostade Blade*, *Keena and Kennedy*, and the decisions on the prosecutions of journalists for ordinary criminal offences). Again, for the same reason that the Court is seeking to protect future individuals from the chilling effect, any uncertainty concerning an interference with freedom of expression must be fully explored in a Court judgment. This is also important because there have been several examples where a dissenting opinion, including a lone dissenting opinion in Chamber judgments, has resulted in a unanimous Grand Chamber applying the chilling effect principle which had been neglected by the Chamber judgment.

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[166] *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber).
[167] *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber), para. 157.

Finally, this thesis should serve to better inform European Court judges, and their legal assistants, on the chilling effect principle, and be a reference point for judges (in addition to practitioners and scholars of the European Court) examining a specific area of Article 10 case law where the chilling effect applies. This is the first time the case law on the chilling effect has been drawn together and analysed, and it can hopefully contribute to the principled development of the case law in the future. In many of the instances detailed in this thesis, a Court judgment, decision, or a separate opinion, does not discuss or cite previous case law on the chilling effect. The analysis in this thesis of the Court's case law on the chilling effect can hopefully contribute to the principled development of the case law in the future, sustainably integrating chilling effect reasoning in cases on the right to freedom of expression and information.

8.9 Future research

This thesis focused on the chilling effect principle as applied by the European Court of Human Rights in its freedom of expression case law. The results of the research undertaken, which are set out in Annex 1, reveal that while over two-thirds of the Court's case law applying the chilling effect concerns freedom of expression, the Court also applies the chilling effect principle under other articles of the European Convention. This includes nearly 50 judgments and decisions concerning the right to assembly and association (Article 11), in addition to numerous judgments and decisions concerning the right of individual petition (Article 34), and the right to respect for private and family life (Article 8). A particular area of the Court's case law ripe for in-depth study is the Court's application of the chilling effect principle relating to Article 11. This author has written on this subject,[168] and the Court's concern about the chilling effect which arises when police officers arrest non-violent protestors, and when domestic courts then impose convictions for alleged disobeying of police orders. Indeed, the Court has applied a remarkably strict standard of scrutiny in reviewing the police's actions and domestic courts' reasoning (including the application of domestic law).

A second area of important future research would be examining the development and application of the chilling effect principle beyond the European Court of Human Rights, and focusing on other regional and international courts and bodies that have also considered, or applied, the chilling effect principle, such as the United Nations Human Rights Committee,[169] the African Court on Human and Peoples' Rights,[170] the Inter-American Court of Human Rights,[171] and the Court of Justice of the European Union.[172] The European Court of Human

[168] See Ronan Ó Fathaigh, "Protestor's arrest and conviction for disobeying a police order violated Article 11," *Strasbourg Observers*, 22 October 2015; and from an Article 10 perspective, see Ronan Ó Fathaigh and Dirk Voorhoof, "Conviction for performance-art protest at war memorial did not violate Article 10," *Strasbourg Observers*, 19 March 2018; Ronan Ó Fathaigh and Dirk Voorhoof, "Activist's conviction for hooliganism over 'obscene' protest violated Article 10 ECHR," *Strasbourg Observers*, 23 January 2019.

[169] See, for example, *Victor Ivan Majuwana Kankanamge v. Sri Lanka*, Communication No. 909/2000, U.N. Doc. CCPR/C/81/D/909/2000 (26 August 2004), para. 9.4 ("the indictments for the criminal offence of defamation for a period of several years after the entry into force of the Optional Protocol for the State party left the author in a situation of uncertainty and intimidation, despite the author's efforts to have them terminated, and thus had a chilling effect which unduly restricted the author's exercise of his right to freedom of expression.).

[170] *Lohé Issa Konaté v. Burkina Faso*, App. no. 004/2013 (5 December 2014), para. 143 ("The Amici curiae add that criminalizing defamation not only disproportionately penalizes the accused, but also has a chilling effect on public discussions on matters of general interest."). See Tarlach McGonagle and Yvonne Donders, *The United Nations and Freedom of Expression and Information: Critical Perspectives* (Cambridge University Press, 2015).

[171] See, for example, *Herrera-Ulloa v. Costa Rica*, Series C No. 107 (2 July 2004), para. 133 ("The effect of the standard of proof required in the judgment is to restrict freedom of expression in a manner incompatible with Article 13 of the American Convention, as it has a deterrent, chilling and inhibiting effect on all those who

Rights has one of most extensive case-law corpus on freedom of expression in the world, and now that an understanding of the Court's chilling effect principle has been put forward in this thesis, it can serve as a reference point for future research on the chilling effect principle employed by these other regional and international bodies, and whether the impact of the chilling effect principle is as pronounced as it is in the European Court of Human Rights.

Further, some of the principles in the European Court's case law, such as that domestic authorities should exercise restraint in the use of criminal proceedings, or that domestic courts must apply the chilling effect tests set out above, mean that domestic prosecutors, investigating judges, and domestic courts must have regard to the Court's chilling effect principle. Future research on assessing domestic authority decisions in this regard would be essential, as would the training and education of domestic court judges and prosecutors on the chilling effect principle under Article 10. Finally, beyond legal doctrine, important future empirical research could focus on documenting and understanding the chilling effect in practice, as experienced by journalists, authors, academics, whistleblowers, and NGOs.[173]

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practice journalism."). See Eduardo Andrés Bertoni, "The Inter-American Court of Human Rights and the European Court of Human Rights: A Dialogue on Freedom of Expression Standards," (2009) *European Human Rights Law Review* 332; Antoine Buyse, "Tacit citing: the scarcity of judicial dialogue between the global and the regional human rights mechanisms in freedom of expression cases," in Tarlach McGonagle and Yvonne Donders (eds.), *The United Nations and Freedom of Expression and Information: Critical Perspectives* (Cambridge University Press, 2015, pp. 443-465; Amrei Müller (ed.), *Judicial Dialogue and Human Rights* (Cambridge University Press, 2017); and Dean Spielmann, "The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights Or how to remain good neighbours after the Opinion 2/13," Brussels, 27 March 2017.

[172] See, for example, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources*, Case C-293/12 (12 December 2013) (Opinion of Advocate General Cruz Villalón), ff. 46 ("In accordance with the 'chilling effect' doctrine. US Supreme Court, *Wiemann v. Updegraff*, 344 US 183 (1952); European Court of Human Rights, *Altuğ Taner Akçam v. Turkey*, no. 27520/07, § 81, 25 October 2011; see, inter alia, 'The Chilling Effect in Constitutional Law', *Columbia Law Review*, 1969, Volume 69, No 5, p. 808.").

[173] See for example, Marilyn Clark and Anna Grech, *Journalists under pressure - Unwarranted interference, fear and self-censorship in Europe* (Council of Europe, 2017) (documenting the violence, fear and self-censorship journalists in Europe are often exposed to; using a survey based on a sample of 940 journalists reporting from the 47 Council of Europe member states and Belarus, with the support of the Association of European Journalists, the European Federation of Journalists, Index on Censorship, the International News Safety Institute and Reporters without Borders). See also, PEN, *Chilling Effects: NSA Surveillance Drives U.S. Writers to Self-Censor* (PEN America, 2013); Sarah Clarke, Marian Botsford Fraser, Ann Harrison (eds.), *Surveillance, Secrecy and Self-Censorship: New Digital Freedom Challenges in Turkey* (PEN International and PEN Norway, 2014); Yaman Akdeniz and Kerem Altıparmak, "The silencing effect on dissent and freedom of expression in Turkey," in Onur Andreotti (ed.), *Journalism at risk: threats, challenges and perspectives* (Council of Europe, 2015) pp. 145-172; OSCE Representative on Freedom of the Media, *New Challenges to Freedom of Expression: Countering Online Abuse of Female Journalists* (OSCE, 2016) (on the chilling effect experienced by female journalists); Paul Bradshaw, "Chilling Effect: Regional journalists' source protection and information security practice in the wake of the Snowden and Regulation of Investigatory Powers Act (RIPA) revelations," (2017) 5 *Digital Journalism* 334; Yaman Akdeniz and Kerem Altıparmak, *Turkey: Freedom of Expression in Jeopardy - Violations of the Rights of Authors, Publishers and Academics under the State of Emergency* (English PEN, 2018); Sibel Oral, Özlem Altunok, and Seçil Epik, Cen*sorship and Self-censorship in Turkey: September 2016 - December 2017* (Platform Against Censorship and Self-Censorship, 2018); and Nik Williams, David McMenemy, and Lauren Smith, *Scottish Chilling: Impact of Government and Corporate Surveillance on Writers* (Scottish PEN, 2018).

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Annex 1

The European Court of Human Rights was established in 1959, under Article 19 of the Convention for the Protection of Human Rights and Fundamental Freedoms. This Appendix covers the period 1959 until 2018, and Table 1 below sets out, by year, the number of judgments and admissibility decisions delivered by the Court where "chilling effect," or "*effet dissuasif*," was explicitly mentioned. This includes not only in the Court's reasoning, but also where the chilling effect is referred to by the applicant, government, third-party interveners, or in separate opinions.

For each year, the full references to all judgments and decisions are included in the endnotes, with a brief description identifying which article of the Convention is involved, and what specific issue; e.g., *Campos Dâmaso v. Portugal* (App. no. 17107/05) 24 April 2008 (Article 10 and journalist's conviction for defamation).

Table 1: Judgments and decisions of the Court

Year	**Judgments**	**Decisions**
1959 - 1995	None.	n/a.
1996	1 judgment.[1]	n/a.
1997	None.	n/a.
1998	1 judgment.[2]	None.
1999	2 judgments.[3]	2 decisions.[4]
2000	1 judgment.[5]	None.
2001	1 judgment.[6]	None.
2002	3 judgments.[7]	None.
2003	2 judgments.[8]	1 decision.[9]
2004	3 judgments.[10]	3 decisions.[11]
2005	5 judgments.[12]	5 decisions.[13]
2006	6 judgments.[14]	1 decision.[15]
2007	20 judgments.[16]	1 decision.[17]
2008	19 judgments.[18]	1 decision.[19]
2009	13 judgments.[20]	2 decisions.[21]
2010	17 judgments.[22]	None.
2011	21 judgments.[23]	2 decisions.[24]
2012	21 judgments.[25]	2 decisions.[26]
2013	24 judgments.[27]	2 decisions.[28]
2014	19 judgments.[29]	2 decisions.[30]
2015	22 judgments.[31]	3 decisions.[32]
2016	35 judgments.[33]	4 decisions.[34]
2017	35 judgments.[35]	9 decisions,[36]
2018	33 judgments.[37]	4 decisions.[38]

There were a total of 348 judgments and decisions during this period where "chilling effect," or "*effet dissuasive*," was explicitly mentioned. Table 2 sets out which articles of the Convention were involved, and what percentage of the total this number represents. For example, 247 judgments and decisions involved Article 10, which represents 71% of the total number of judgments and decisions.

The inclusion of the Convention article and issue involved allows easy grouping of the judgments and decisions, such as how many judgments and decisions involve Article 10 (244), how many judgments and decisions involve a journalist's freedom of expression (79), or how many judgments and decisions involve defamation proceedings (112).

Table 2: Articles of the European Convention involved

Article	Number of judgments/decisions	Percentage of total
Article 10	248	71%
Article 11	49	14%
Article 34	26	7%
Article 8	19	5%
Article 6	10	3%
Article 2	2	0.9%
Article 14	1	0.2%
Article 18	1	0.2%

[1] *Goodwin v. the United Kingdom* (App. no. 17488/90) 27 March 1996 (Grand Chamber) (Article 10 and protection of journalistic sources).

[2] *Steel and Others v. the United Kingdom* (App. no. 24838/94) 23 September 1998 (Article 10 and arrest and detention of protestors).

[3] *Smith and Grady v. the United Kingdom* (App. nos. 33985/96 and 33986/96) 27 September 1999 (Article 10 and government policy on homosexuals in armed forces); and *Wille v. Liechtenstein* (App. No. 28396/95) 28 October 1999 (Grand Chamber) (Article 10 and a judge's non-reappointment over remarks made in public).

[4] *Smith and Grady v. the United Kingdom* (App. nos. 33985/96 and 33986/96) 23 February 1999 (Admissibility decision) (Article 10 and government policy against homosexuals in the armed forces); and *Uykur v. Turkey* (App. no. 27599/95) 9 November 1999 (Admissibility decision) (Article 34 and right of individual petition).

[5] *Bergens Tidende and Others v. Norway* (App. no. 26132/95) 2 May 2000 (Article 10 and journalists liable for defamation).

[6] *Al-Adsani v. the United Kingdom* (App. no. 35763/97) 21 November 2001 (Grand Chamber) (Article 6 and access to a court).

[7] *Nikula v. Finland* (App. No. 31611/96) 21 March 2002 (Article 10 and lawyer convicted of defamation); *McShane v. the United Kingdom* (App. no. 43290/98) 28 May 2002 (Article 34 and right of individual petition); and *A. v. the United Kingdom* (App. no. 35373/97) 17 December 2002 (Article 6 and parliamentary immunity for defamation).

[8] *Elçi and Others v. Turkey* (App. nos. 23145/93 and 25091/94) 13 November 2003 (Article 34 and right of individual petition); and *Steur v. the Netherlands* (App. no. 39657/98) 28 November 2003 (Article 10 and defence lawyer censured).

[9] *Christian Democratic People's Party v. Moldova* (App. no. 28793/02) 22 March 2003 (Admissibility decision) (Article 11 and political party banned from holding demonstrations); *Kyprianou v. Cyprus* (App. no. 73797/01) 8 April 2003 (Admissibility decision) (Article 6 and lawyer convicted of contempt of court); and *Mahon and Kent v. the United Kingdom* (App. no. 70434/01) 8 July 2003 (Admissibility decision) (Article 6 and inability to issue defamation claim).

[10] *Kyprianou v. Cyprus* (App. no. 73797/01) 27 January 2004 (Article 10 and lawyer convicted of contempt of court); *Pedersen and Baadsgaard v. Denmark* (App. no. 49017/99) 17 December 2004 (Grand Chamber) (Article 10 and journalists convicted of defamation); and *Cumpănă and Mazăre v. Romania* (App. no. 33348/96) 17 December 2004 (Grand Chamber) (Article 10 and journalists convicted of defamation).

[11] *Harabin v. Slovakia* (App. no. 62584/00) 29 June 2004 (Admissibility decision) (Article 10 and judge's dismissal); and *Jordan v. the United Kingdom* (App. no. 22567/02) 23 November 2004 (Admissibility decision) (Article 6 and right to fair trial).

[12] *Steel and Morris v. the United Kingdom* (App. no. 68416/01) 15 February 2005 (Article 10 and civil defamation proceedings against environmental activists); *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland* (App. no. 55120/00) 16 June 2005 (Article 10 and civil defamation proceedings against newspaper); *İ.A. v. Turkey* (App. no. 42571/98) 13 September 2005 (Article 10 and publisher convicted of blasphemy); *Tourancheau and July v. France* (App. no. 53886/00) 24 November 2005 (Article 10 and journalists convicted of defamation); and *Kyprianou v. Cyprus* (App. no. 73797/01) 15 December 2005 (Grand Chamber) (Article 10 and lawyer convicted of contempt of court).

[13] *Times Newspapers Ltd. v. the United Kingdom* (Nos. 1 and 2) (App. nos. 23676/03 and 3002/03) 11 October 2005 (Admissibility decision) (Article 10 and civil defamation proceedings against newspaper); *Perrin v. the United Kingdom* (App. no. 5446/03) 18 October 2005 (Admissibility decision) (Article 10 and conviction for publishing obscene images on the internet); *Blake v. the United Kingdom* (App. no. 68890/01) 25 October 2005 (Admissibility decision) (Article 10 and intelligence service official's conviction for disclosing information); *Metzger v. Germany* (App. no. 56720/00) 17 November 2005 (Admissibility decision) (Article 10 and political party member convicted of group defamation); and *Nordisk Film & TV A/S v. Denmark* (App. no. 40485/02) 8 December 2005 (Admissibility decision) (Article 10 and protection of journalistic sources).

[14] *Christian Democratic People's Party v. Moldova* (App. no. 28793/02) 14 February 2006 (Article 11 and political party banned from holding demonstrations); *Malisiewicz-Gąsior v. Poland* (App. no. 43797/98) 6 April 2006 (Article 10 and political candidate's conviction for defamation); *Brasilier v. France* (App. no. 71343/01) 11 April 2006 (Article 10 and political candidate liable for defamation); *Erbakan v. Turkey* (App. no. 59405/00) 6 July 2006 (Article 10 and politician convicted of incitement to hatred); *Lyashko v. Ukraine* (App. no. 21040/02) 10 August 2006 (Article 10 and editor's conviction for defamation); and *Radio Twist a.s. v. Slovakia* (App. no. 62202/00) 19 December 2006 (Article 10 and broadcaster liable for defamation).

[15] *Virolainen v. Finland* (App. no. 29172/02) 7 February 2006 (Admissibility decision) (Article 10 and lawyer's conviction for defamation).

[16] *Krasulya v. Russia* (App. no. 12365/03) 22 February 2007 (Article 10 and editor's conviction for defamation); *Tønsberg Blad AS and Haukom v. Norway* (App. no. 510/04) 1 March 2007 (Article 10 and defamation proceedings against newspaper publisher); *Tysiąc v. Poland* (App. no. 5410/03) 20 March 2007 (Article 8 and abortion legislation); *Lombardo and Others v. Malta* (App. no. 7333/06) 20 April 2007 (Article 10 and civil defamation proceedings against councillors); *Bączkowski and Others v. Poland* (App. no. 1543/06) 3 May 2007 (Article 11 and refusal to authorise assembly); *Dupuis and Others v. France* (App. no. 1914/02) 7 June 2007 (Article 10 and journalists convicted of defamation); *Nurmagomedov v. Russia* (App. no. 30138/02) 7 June 2007) (Article 34 and right of individual petition); *Hachette Filipacchi Associes v. France* (App. No. 71111/01) 14 June 2007 (Article 10 and magazine ordered to publish statement on photograph published); *Bitiyeva and X v. Russia* (App. nos. 57953/00 and 37392/03) 21 June 2007 (Article 34 and killing of applicant); *Artun and Güvener v. Turkey* (App. no. 75510/01) 26 June 2007 (Article 10 and journalists convicted for insulting president); *a/s Diena and Ozoliņš v. Lithuania* (App. no. 16657/03) 12 July 2007 (Article 10 and civil defamation proceedings against newspaper for defaming minister); *Ormanni v. Italy* (App. no. 30278/04) 17 July 2007 (Article 10 and journalist convicted of defamation); *Dyuldin and Kislov v. Russia* (App. no. 25968/02) 31 July 2007 (Article 10 and civil proceedings for defamation of regional authorities); *Lindon, Otchakovsky-Laurens and July v. France* (App. no. 21279/02 and 36448/02) 22 October 2007 (Grand Chamber) (Article 10 and newspapers convicted of defamation); *Colibaba v. Moldova* (App. no. 29089/06) 31 October 2007 (Article 34 and right of individual petition); *Voskuil v. the Netherlands* (App. no. 64752/01) 22 November 2007 (Article 10 and protection of journalistic sources); *Desjardin v. France* (App. no. 22567/03) 22 November 2007 (Article 10 and politician's conviction for defamation over pamphlet); *Timpul Info-Magazin and Anghel v. Moldova* (App. no. 42864/05) 27 November 2007 (Article 10 and civil defamation proceedings against newspaper); *Balçik and Others v. Turkey* (App. no. 25/02) 29 November 2007 (Article 11 and prosecution for

unlawful assembly); *Nurettin Aldemir and Others v. Turkey* App. nos. 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 and 32138/02)) 18 December 2007 (Article 11 and police action over unlawful assembly).

[17] *Masschelin v. Belgium* (App. no. 20528/05) 20 November 2007 (Admissibility decision) (Article 10 and journalist's conviction for access to criminal file).

[18] *Mechenkov v. Russia* (App. no. 35421/05) 7 February 2008 (Article 34 and right of individual petition); *Guja v. Moldova* (App. no. 14277/04) 12 February 2008 (Grand Chamber) (Article 10 and whistleblower's dismissal); *Rumyana Ivanova v. Bulgaria* (App. no. 36207/03) 14 February 2008 (Article 10 and journalist's conviction for defamation); *Azevedo v. Portugal* (App. no. 20620/04) 27 March 2008 (Article 10 and book author's conviction for defamation); *Campos Dâmaso v. Portugal* (App. no. 17107/05) 24 April 2008 (Article 10 and journalist's conviction for defamation); *Vajnai v. Hungary* (App. no. 33629/06) 8 July 2008 (Article 10 and prosecution for wearing totalitarian symbol in public); *Schmidt v. Austria* (App. no. 513/05) 17 July 2008 (Article 10 and lawyer's reprimand for defamation); *Flux v. Moldova (No. 6)* (App. no. 22824/04) 29 July 2008 (Article 10 and newspaper's conviction for defamation); *Eva Molnár v. Hungary* (App. no. 10346/05) 7 October 2008 (Article 11 and police dispersal of demonstration); *Godlevskiy v. Russia* (App. no. 14888/03) 23 October 2008 (Article 10 and civil defamation proceedings against journalist); *Kandzkov v. Bulgaria* (App. no. 68294/01) 6 November 2008 (Article 10 and politician's prosecution for hooliganism and insult); *Kayasu v. Turkey* (App. nos. 64119/00 and 76292/01) 13 November 2008 (Article 10 and disciplinary proceedings against lawyer); *Armonienė v. Lithuania* (App. no. 36919/02) 25 November 2008 (Article 8 and legislative ceiling on damages for invasion of privacy); *Biriuk v. Lithuania* (App. no. 23373/03) 25 November 2008 (Article 8 and legislative ceiling on damages for invasion of privacy); *Juppala v. Finland* (App. no. 18620/03) 2 December 2008 (Article 10 and criminal prosecution for defamation); *K.U. v. Finland* (App. no. 2872/02) 2 December 2008 (Article 8 and absence of legislation to identify internet user); *Katrami v. Greece* (App. no. 19331/05) 6 December 2007 (Article 10 and journalist's conviction for insult); *Panovits v. Cyprus* (App. No. 4268/04) 11 December 2008 (Article 6 and lawyer's conviction for contempt of court); and *Mahmudov and Agazade v. Azerbaijan* (App. no. 35877/04) 18 December 2008 (Article 10 and editor's conviction for breach of privacy).

[19] *Dilipak (III) v. Turkey* (App. no. 29413/05) 23 September 2008 (Admissibility decision) (Article 10 and civil defamation proceedings against journalist).

[20] *Women on Waves v. Portugal* (App. no. 31276/05) 3 February 2009 (Article 10 and refusal to allow protest ship into territorial waters); *Saygili and Falakaoğlu v. Turkey (No. 2)* (App. no. 38991/02) 17 February 2009 (Article 10 and journalists' conviction for publishing declarations of terrorist organisations); *Marchenko v. Ukraine* (App. no. 4063/04) 19 February 2009 (Article 10 and union teacher's conviction for defamation); *Kudeshkina v. Russia* (App. no. 29492/05) 26 February 2009 (Article 10 and judge's dismissal from office); *Times Newspapers Ltd (Nos. 1 and 2) v. the United Kingdom* (App. nos. 3002/03 and 23676/03) 10 March 2009 (Article 10 and civil defamation proceedings against newspaper); *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 31 March 2009 (Article 10 and protection of journalistic sources); *Kydonis v. Greece* (App. no. 24444/07) 2 April 2009 (Article 10 and journalist's conviction for defamation); *Brunet-Lecomte and Tanant v. France* (App. no. 12662/06) 8 October 2009 (Article 10 and journalists' conviction for defamation); *Serkan Yılmaz and Others v. Turkey* (App. no. 25499/04) 13 October 2009 (Article 11 and police intervention during demonstration); *Alves da Silva v. Portugal* (App. no. 41665/07) 22 October 2009 (Article 10 and prosecution for defamation over satirical work displayed at carnival); *Europapress Holding d.o.o. v. Croatia* (App. no. 25333/06) 22 October 2009 (Article 10 and civil defamation proceedings against newspaper); *Karsai v. Hungary* (App. no. 5380/07) 1 December 2009 (Article 10 and civil defamation proceedings against historian); and *Financial Times Ltd and Others v. the United Kingdom* (App. no. 821/03) 15 December 2009 (Article 10 and protection of journalistic sources).

[21] *The Wall Street Journal Europe v. the United Kingdom* (App. no. 28577/05) 10 February 2009 (Admissibility decision) (Article 10 and civil defamation proceedings against newspaper); and *Moreira v. Portugal* (App. no. 20156/08) 22 September 2002 (Admissibility decision) (Article 10 and journalist's conviction for defamation).

[22] *Gillan and Quinton v. the United Kingdom* (App. no. 4158/05) 12 January 2010 (Article 10 and police stop and search powers); *Shugayev v. Russia* (App. no. 11020/03) 14 January 2010 (Article 34 and right of individual petition); *Laranjeira Marques da Silva v. Portugal* (App. no. 16983/06) 19 January 2010 (Article 10 and journalist's conviction for aggravated defamation); *Renaud v. France* (App. no. 13290/07) 25 February 2010 (Article 10 and criminal defamation prosecution over comments about mayor); *Görkan v. Turkey* (App. no. 13002/05) 16 March 2010 (Article 10 and newspaper vendor's detention by police); *Ruokanen and Others v. Finland* (App. no. 45130/06) 6 April 2010 (Article 10 and journalists' prosecution for aggravated defamation); *Fatullayev v. Azerbaijan* (App. no. 40984/07) 22 April 2010 (Article 10 and criminal proceedings against editor for defamation); *Mariapori v. Finland* (App. no. 37751/07) 6 July 2010 (Article 10 and book author's conviction for defamation); *Lopata v. Russia* (App. no. 72250/01) 13 July 2010 (Article 34 and right of individual petition); *Gazeta Ukraina-Tsentr v. Ukraine* (App. no. 16695/04) 15 July 2010 (Article 10 and civil defamation proceedings against newspaper); *Dink v. Turkey* (App. nos. 2668/07, 6102/08, 30079/08, 7072/09

and 7124/09) 14 September 2010 (Article 10 and authorities' failure to protect journalist against attack); *Sanoma Uitgevers B.V. v. the Netherlands* (App. no. 38224/03) 14 September 2010 (Grand Chamber) (Article 10 and protection of journalistic sources); *Gillberg v. Sweden* (App. no. 41723/06) 2 November 2010 (Article 10 and professor's conviction for misuse of office); *Henryk Urban and Ryszard Urban v. Poland* (App. no. 23614/08) 30 November 2010 (Article 6 and right to a fair trial); *Público - Comunicação Social, S.A. and Others v. Portugal* (App. no. 39324/07) 7 December 2010 (Article 10 and civil defamation proceedings against newspaper publisher); *A, B and C. v. Ireland* (App. no. 25579/05) 16 December 2010 (Grand Chamber) (Article 8 and criminal legislation on abortion); and *Novaya Gazeta v. Voronezhe v. Russia* (App. no. 27570/03) 21 December 2010 (Article 10 and civil defamation proceedings against journalists).

[23] *Barata Monteiro da Costa Nogueira and Patrício Pereira v. Portugal* (App. no. 4035/08) 11 January 2011 (Article 10 and politicians' conviction for defamation); *MGN Limited v. the United Kingdom* (App. no. 39401/04) 18 January 2011 (Article 10 and newspaper's legal fees following privacy proceedings); *Igor Kabanov v. Russia* (App. no. 8921/05) 3 February 2011 (Article 10 and disbarment proceedings against lawyer); *Otegi Mondragon v. Spain* (App. no. 2034/07) 15 March 2011 (Article 10 and conviction for insulting king); *Kasabova v. Bulgaria* (App. no. 22385/03) 19 April 2011 (Article 10 and criminal defamation proceedings against journalist); *Bozhkov v. Bulgaria* (App. no. 3316/04) 19 April 2011 (Article 10 and criminal defamation proceedings against journalist); *Mosley v. the United Kingdom* (App. no. 48009/08) 10 May 2011 (Article 8 and absence of prior-notification rule for protecting private life); *R.R. v. Poland* (App. no. 27617/04) 26 June 2011 (Article 8 and abortion legislation); *Kania and Kittel v. Poland* (App. no. 35105/04) 21 June 2011 (Article 10 and civil defamation proceedings against newspaper); *Wizerkaniuk v. Poland* (App. no. 18990/05) 5 July 2011 (Article 10 and requirement for consent before publishing interviews); *Buldakov v. Russia* (App. no. 23294/05) 19 July 2011 (Article 34 and right of individual petition); *Heinisch v. Germany* (App. no. 28274/08) 21 July 2011 (Article 10 and employee's dismissal); *Palomo Sánchez v. Spain and Others* (App. nos. 28955/06, 28957/06, 28959/06 and 28964/06) 12 September 2011 (Grand Chamber) (Article 10 and union members' dismissal for insult); *Şişman and Others v. Turkey* (App. no. 1305/05) 27 September 2011 (Article 11 and disciplinary proceedings against union members); *United Macedonian Organisation Ilinden and Ivanov v. Bulgaria (No. 2)* (App. no. 37586/04) 18 October 2011 (Article 11 and police activity against demonstrators); *Singartiyski and Others v. Bulgaria* (App. no. 48284/07) 18 October 2011 (Article 11 and police activity against demonstrators); *Altuğ Taner Akçam v. Turkey* (App. no. 27250/07) 25 October 2011 (Article 10 and criminal proceedings for insulting Turkey); *Fratanoló v. Hungary* (App. no. 29459/10) 3 November 2011 (Article 10 and conviction for displaying a totalitarian symbol); *Mizzi v. Malta* (App. no. 17320/10) 22 November 2011 (Article 10 and civil defamation proceedings against journalist); *Schwabe and M.G. v. Germany* (App. nos. 8080/08 and 8577/08) 1 December 2011 (Article 11 and detention of protestors); and *Mor v. France* (App. no. 28198/09) 15 December 2011 (Article 10 and lawyer's conviction for breaching confidentiality of investigation).

[24] *Yleisradio Oy v. Finland* (App. no. 30881/09) 8 February 2011 (Admissibility decision) (Article 10 and privacy proceedings against broadcaster); and *Mikkelsen and Christensen v. Denmark* (App. no. 22918/08) 24 May 2011 (Article 10 and journalists' prosecution for possession of fireworks).

[25] *Szerdahelyi v. Hungary* (App. no. 30385/07) 17 January 2012 (Article 11 and legal basis for ban on demonstration); *Patyi v. Hungary (No. 2)* (App. no. 35127/08) 17 January 2012 (Article 11 and legal basis for ban on demonstration); *Axel Springer AG v. Germany* (App. no. 39954/08) 7 February 2012 (Grand Chamber) (Article 10 and injunction against newspaper); *Kaperzyński v. Poland* (App. no. 43206/07) 3 April 2012 (Article 10 and newspaper's prosecution for failure to publish rectification or reply); *Hakobyan and Others v. Armenia* (App. no. 34320/04) 10 April 2012 (Article 11 and detention of protestors); *Lesquen du Plessis-Casso v. France* (App. no. 54216/09) 12 April 2012 (Article 10 and politician's conviction for defamation); *Tatár and Fáber v. Hungary* (App. nos. 26005/08 and 26160/08) 12 June 2012 (Article 10 and protestors' conviction for symbolic political protest); *Tănăsoaica v. Romania* (App. no. 3490/03) 19 June 2012 (Article 10 and journalist's conviction for defamation); *Ciesielczyk v. Poland* (App. no. 12484/05) 26 June 2012 (Article 10 and journalist's conviction for defamation);*Mouvement Raëlien Suisse v. Switzerland* (App. no. 16354/06) 13 July 2012 (Grand Chamber) (Article 10 and prohibition on displaying posters in public); *Marin Kostov v. Bulgaria* (App. no. 13801/07) 24 July 2012 (Article 10 and prisoner's administrative punishment); *Lewandowski-Malec v. Poland* (App. no. 39660/07) 18 September 2012 (Article 10 and prosecution for defamation over comments on mayor); *Trade Union of the Police in the Slovak Republic and Others v. Slovakia* (App. no. 11828/08) 25 September 2012 (Article 11, in light of Article 10, and government minister's statements concerning police union); *Yordanova and Toshev v. Bulgaria* (App. no. 5126/05) 2 October 2012 (Article 10 and civil defamation proceedings against journalists); *Catan and Others v. Moldova and Russia* (App. nos. 43370/04 ... 18454/06) 19 October 2012 (Grand Chamber) (Article 8 and use of Latin script in schools); *Çelik v. Turkey (No. 3)* (App. no. 36487/07) 15 November 2012 (Article 11 and police action against demonstrators); *Harabin v. Slovakia* (App. no. 58688/11) 20 November 2012 (Article 10 and sanctioning of supreme court president); *Telegraaf Media*

Nederland Landelijke Media B.V. and Others v. the Netherlands (App. no. 39315/06) 22 November 2012 (Article 10 and protection of journalistic sources); *Disk and Kesk v. Turkey* (App. no. 38676/08) 27 November 2012 (Article 11 and police conduct at demonstration); *Tangiyev v. Russia* (App. no. 27610/05) 11 December 2012 (Article 34 and right of individual petition); and *Ahmet Yıldırım v. Turkey* (App. no. 3111/10) 18 December 2012 (Article 10 and blocking of Google Sites).

[26] *Seckerson and Times Newspapers Limited v. the United Kingdom* (App. nos. 32844/10 and 33510/10) 24 January 2012 (Admissibility decision) (Article 10 and newspaper convicted of contempt of court); and *Charalambous and Others v. Turkey* (App. no. 46744/07) April 2012 (Admissibility decision) (Article 34 and right of individual petition).

[27] *Yefimenko v. Russia* (App. no. 152/04) 12 February 2013 (Article 34 and right of individual petition); *Bucur and Toma v. Romania* (App. no. 40238/02) 8 January 2013 (Article 10 and intelligence service whistleblower's two-year prison sentence); *Eon v. France* (App. no. 26118/10) 14 March 2013 (Article 10 and activist's conviction for insulting president); *Alpatu Israilova v. Russia* (App. no. 15438/08) 14 March 2013 (Article 34 and right of individual petition); *Reznik v. Russia* (App. no. 4977/05) 4 April 2013 (Article 10 and defamation proceedings against president of Moscow bar); *Gross v. Switzerland* (App. no. 67810/10) 14 May 2013 (Article 8 and lack of legal guidelines for regulating admission of drug); *Yepishan v. Russia* (App. no. 591/07) 27 June 2013 (Article 34 and right of individual petition); *Morice v. France* (App. no. 29369/10) 11 July 2013 (Article 10 and lawyer's conviction for defamation); *Wegrzynowski and Smolczewski v. Poland* (App. no. 33846/07) 16 July 2013 (Article 8 and request for newspaper article deleted from archive); *Nagla v. Latvia* (App. no. 73469/10) 16 July 2013 (Article 10 and protection of journalistic sources); *Sampaio e Paiva de Melo v. Portugal* (App. no. 33287/10) 23 July 2013 (Article 10 and journalist's conviction for defamation); *Khodorkovskiy and Lebedev v. Russia* (App. nos. 11082/06 and 13772/05) 25 July 2013 (Article 6 and lawyer-client privilege); *Welsh and Silva Canha v. Portugal* (App. no. 16812/11) 17 September 2013 (Article 10 and journalist's conviction for defamation); *Belpietro v. Italy* (App. no. 43612/10) 24 September 2013 (Article 10 and editor's conviction for defamation); *Kasparov v. Russia* (App. no. 21613/07) 3 October 2013 (Article 11 and prior ban on protest); *Cumhuriyet Vakfı and Others v. Turkey* (App. no. 28255/07) 8 October 2013 (Article 10 and interim injunction against reporting articles on prime minster); *Ricci v. Italy* (App. no. 30210/06) 8 October 2013 (Article 10 and journalist's conviction for violation of privacy); *Delfi v. Estonia* (App. no. 64569/09) 10 October 2013 (Article 10 and news website's liability for reader comments); *Jean-Jacques Morel v. France* (App. no. 25689/10) 10 October 2013 (Article 10 and politician's conviction for defamation); *Janowiec and Others v. Russia* (App. nos. 55508/07 and 295520/09) 21 October 2013 (Grand Chamber) (Article 34 and right of individual petition); *Ungváry v. Hungary* (App. no. 64520/10) 3 December 2013 (Article 10 and civil defamation proceedings against historian); *Mehmet Hatip Dicle v. Turkey* (App. no. 9858/04) 15 October 2013 (Article 10 and politician's conviction for incitement); *Perinçek v. Switzerland* (App. no. 27510/08) 17 December 2013 (Article 10 and politician's conviction for denying Armenian genocide); and *Mika v. Greece* (App. no. 10347/10) 19 December 2013 (Article 10 and politician's conviction for defamation).

[28] *Jhangiryan v. Armenia* (App. no. 8696/09) 5 February 2013 (Admissibility decision) (Article 10 and prosecutor's dismissal from office); and *Stowarzyszenie "Poznańska Masa Krytyczna" v. Poland* (App. no. 26818/11) 22 October 2013 (Admissibility decision) (Article 11 and prohibition on demonstration).

[29] *De Lesquen du Plessis-Casso* v. *France (No. 2)* (App. no. 34400/10) 30 January 2014 (Article 10 and politician's conviction for defamation); *Pentikäinen v. Finland* (App. no. 11882/10) 4 February 2014 (Article 10 and photojournalist's conviction for disobeying police order); *Tešić v. Serbia* (App. nos. 4678/07 and 50591/12) 11 February 2014 (Article 10 and defamation conviction imposed on newspaper interviewee); *Nosov and Others v. Russia* (App. nos. 9117/04 and 10441/04) 20 February 2014 (Article 11 and prior ban on assembly); *Dilipak and Karakaya v. Turkey* (App. nos. 7942/05 and 24838/05) 4 March 2014 (Article 10 and civil defamation proceedings against journalists); *National Union of Rail, Maritime and Transport Workers v. the United Kingdom* (App. no. 31045/10) 8 April 2014 (Article 11 and ban on taking secondary industrial action); *Brosa v. Germany* (App. no. 5709/09) 8 April 2014 (Article 10 and defamation injunction against political activist); *Taranenko v. Russia* (App. no. 19554/05) 15 May 2014 (Article 10, in the light of Article 11, and unauthorised protest in parliamentary building); *Baka v. Hungary* (App. no. 20261/12) 27 May 2014 (Article 10 and removal of supreme court president); *A.B. v. Switzerland* (App. no. 56925/08) 1 July 2014 (Article 10 and journalist's conviction for publishing confidential court materials); *Nedim Şener v. Turkey* (App. no. 38270/11) 8 July 2014 (Article 10 and pre-trial detention of journalist for aiding a criminal organisation); *Şik v. Turkey* (App. no. 53413/11) 8 July 2014 (Article 10 and journalist's pre-trial detention); *Axel Springer AG v. Germany (No. 2)* (App. no. 48311/10) 10 July 2014 (Article 10 and injunction against publication of newspaper article); *Nemtsov v. Russia* (App. no. 1774/11) 31 July 2014 (Article 11 and arrest, detention and conviction for protest activity); *Szél and Others v. Hungary* (App. no. 44357/13) 16 September 2014 (Article 10 and fine imposed on legislators for banner displayed in parliament); *Karácsony and Others v. Hungary* (App. no. 42461/13) 16 September 2014 (Article 10 and fine imposed on legislators for banner display in parliament); *Yilmaz Yildiz and Others v. Turkey*

(App. no. 4524/06) 14 October 2014 (Article 11 and fines for demonstrating and reading press statement); *Murat Vural v. Turkey* (App. no. 9540/07) 21 October 2014 (Article 10 and conviction for insulting memory of Atatürk); and *Navalnyy and Yashin v. Russia* (App. no. 76204/11) 4 December 2014 (Article 11 and arrest of protestors).

[30] *Roşca Stănescu v. Romania* (App. no. 49357/08) 28 January 2014 (Admissibility decision) (Article 10 and government minister's remarks about a journalist); *Stichting Ostade Blade v. the Netherlands* (App. no. 8406/06) 27 May 2014 (Admissibility decision) (Article 10 and protection of journalistic sources); and *Keena and Kennedy v. Ireland* (App. no. 29804/10) 30 September 2014 (Admissibility decision) (Article 10 and protection of journalistic sources).

[31] *Rubins v. Latvia* (App. no. 79040) 13 January 2015 (Article 10 and dismissal of university professor); *Petropavlovskis v. Latvia* (App. no. 44230/06) 13 January 2015 (Article 10 and refusal to grant citizenship due to political views); *Pinto Pinheiro Marques v. Portugal* (App. no. 26671/09) 22 January 2015 (Article 10 and historian's defamation conviction for defaming municipal authority); *Kincses v. Hungary* (App. no. 66232/10) 27 January 2015 (Article 10 and lawyer disciplined for comments about judge); *Almeida Leitão Bento Fernandes v. Portugal* (App. no. 25790/11) 12 March 2015 (Article 10 and book author's defamation conviction for defaming deceased individual); *Kopanitsyn v. Russia* (App. no. 43231/04) 12 March 2015 (Article 34 and right of individual petition); *İsmail Sezer v. Turkey* (App. no. 36807/07) 24 March 2014 (Article 11 and teacher's reprimand for union activities); *Morice v. France* (App. no. 29369/10) 23 April 2015 (Grand Chamber) (Article 10 and lawyer convicted of defamation); *Delfi v. Estonia* (App. no. 64569/09) 16 June 2015 (Grand Chamber) (Article 10 and news website's liability for reader comments); *Özçelebi v. Turkey* (App. no. 34823/05) 23 June 2015 (Article 10 and conviction for insulting memory of Atatürk); *Akarsubaşı v. Turkey* (App. no. 70396/11) 21 July 2015 (Article 11 and trade unionist fined over press conference); *Dilipak v. Turkey* (App. no. 29680/05) 15 September 2015 (Article 10 and criminal proceedings against journalist for criticising military); *Karpyuk and Others v. Ukraine* (App. nos. 30582/04 and 32152/04) 6 October 2015 (Article 11 and convictions for participating in mass disorder); *Gafgaz Mammadov v. Azerbaijan* (App. no. 60259/11) 15 October 2015 (Article 11 and protestor's conviction for disobeying police order); *Kudrevičius v. Lithuania* (App. no. 37553/05) 15 October 2015 (Grand Chamber) (Article 11 and convictions for farmer demonstration); *Dilek Aslan v. Turkey* (App. no. 34364/08) 20 October 2015 (Article 11 and conviction for refusing to give name while handing out leaflets); *Pentikäinen v. Finland* (App. no. 11882/10) 20 October 2015 (Grand Chamber) (Article 10 and photojournalist's conviction for disobeying police order); *Annagi Hajibeyli v. Azerbaijan* (App. no. 2204/11) 22 October 2015 (Article 34 and right of individual petition); *Couderc and Hachette Filipacchi Associés v. France* (App. no. 40454/07) 10 November 2015 (Grand Chamber) (Article 10 and newspaper's liability for publishing public figure's photographs); *Mikhatlova v. Russia* (App. no. 46998/08) 19 November 2015 (Article 6 and free legal aid); *Prompt v. France* (App. no. 30936/12) 3 December 2015 (Article 10 and author liable for defamation over book); and *Bono v. France* (App. no. 29024/11) 15 December 2015 (Article 10 and disciplinary sanction imposed on lawyer).

[32] *Kudeshkina v. Russia* (App. no. 28727/11) 17 February 2015 (Admissibility decision) (Article 10, and 46, and judge's dismissal from judiciary); *Bakiyev v. Russia* (App. no. 9728/05) 20 October 2015 (Admissibility decision) (Article 34 and right of individual petition); and *Yeliseyev v. Russia* (App. no. 923/03) 20 October 2015 (Admissibility decision) (Article 34 and right of individual petition).

[33] *Frumkin v. Russia* (App. no. 74568) 5 January 2016 (Article 11 and arrest and administrative conviction of protestor); *Rodriguez Ravelo v. Spain* (App. no. 48074/10) 12 January 2016 (Article 10 and lawyer's conviction for defamation); *Görmüş and Others v. Turkey* (App. no. 49085/07) 19 January 2016 (Article 10 and protection of journalistic sources); *de Carolis and France Télévisions v. France* (App. no. 29313/10) 21 January 2016 (Article 10 and broadcaster's conviction for defamation); *Siderzhuik v. Ukraine* (App. no. 16901/03) 21 January 2016 (Article 10 and civil defamation proceedings against history professor); *Partei Die Friesen v. Germany* (App. no. 65480/10) 28 January 2016 (Article 14, in conjunction with Article 3 of Protocol No. 1, and parliamentary election threshold); *Erdener v. Turkey* (App. no. 23497/05) 2 February 2016 (Article 10 and member of parliament's conviction for defamation); *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (App. no. 22947/13) 2 February 2016 (Article 10 and liability for third-party defamation comments); *Hilal Mammadov v. Azerbaijan* (App. no. 81553/12) 4 February 2016 (Article 34 and right of individual petition); *Ibrahimov and Others v. Azerbaijan* (App. no. 69234/11) 11 February 2016 (Article 11 and ban on public demonstration); *Huseynli and Others v. Azerbaijan* (App. no. 67360/11) 11 February 2016 (Article 11 and arrest and conviction of demonstrators); *Société de Conception de Presse et d'Édition v. France* (App. no. 4683/11) 25 February 2016 (Article 10 and magazine ordered to black-out photograph); *Rusu v. Romania* (App. no. 25721/04) 8 March 2016 (Article 10 and criminal proceedings against local journalist for defamation); *Rasul Jafarov v. Azerbaijan* (App. no. 69981/14) 17 March 2016 (Article 34 and right of individual petition); *Bédat v. Switzerland* (App. no. 56925/08) 29 March 2016 (Grand Chamber) (Article 10 and journalist's conviction for publishing confidential court materials); *Armani Da Silva v. the United Kingdom* (App. no. 5878/08) 30 March

2016 (Grand Chamber) (Article 2 and investigation into police shooting); *Novikova and others v. Russia* (App. nos. 25501/07, 57569/11, 80153/12, 5790/13 and 35015/13) 26 April 2016 (Article 10 and prosecution of protestors' solo demonstrations); *Karácsony and Others v. Hungary* (App. no. 42461/13) 17 May 2016 (Grand Chamber) (Article 10 and parliamentarians' sanctioned for protesting in parliament); *Nadtoka v. Russia* (App. no. 38010/05) 31 May 2016 (Article 10 and journalist's conviction for insult); *Instytut Ekonomichnykh Reform, TOV v. Ukraine* (App. no. 61561/08) 2 June 2016 (Article 10 and civil defamation proceedings against newspaper); *Madaus v. Germany* (App. no. 44164/14) 9 June 2016 (Article 6 and right to protection of reputation as a civil right); *Jiménez Losantos v. Spain* (App. no. 53421/10) 14 June 2016 (Article 10 and radio host's conviction for insulting mayor); *Versini-Campinchi and Crasnianski v. France* (App. no. 49176/11) 16 June 2016 (Article 8 and lawyer-client privilege); *Baka v. Hungary* (App. no. 20261/12) 23 June 2016 (Grand Chamber) (Article 10 and termination of a judge's mandate); *Reichman v. France* (App. no. 50147/11) 12 July 2016 (Article 10 and radio host's conviction for defamation); *Do Carmo de Portugal e Castro Câmara v. Portugal* (App. no. 53139/11) 4 October 2016 (Article 10 and journalist convicted of defamation); *Yaroslav Belousov v. Russia* (App. nos. 2653/13 and 60980/14) 4 October 2016 (Article 11 and arrest and conviction of protestors); *Dorota Kania v. Poland (No. 2)* (App. no. 44436/13) 4 October 2016 (Article 10 and journalist's defamation conviction for defaming academic); *Szanyi v. Hungary* (App. no. 35493/13) 8 November 2016 (Article 10 and member of parliament sanctioned for middle finger in parliament); *Boykanov v. Bulgaria* (App. no. 18288/06) 11 November 2016 (Article 10 and individual's defamation conviction for defaming judge); *Dubská and Krejzová v. the Czech Republic* (App. nos. 28859/11 and 28473/12) 15 November 2016 (Grand Chamber) (Article 8 and legislation on home births); *Savda v. Turkey (No. 2)* (App. no. 2458/12) 15 November 2016 (Article 10 and conscientious objector's conviction for press statement); *Kunitsyna v. Russia* (App. no. 9406/05) 13 December 2016 (Article 10 and civil defamation proceedings against journalist); *Kasparov and Others v. Russia (No. 2)* (App. no. 51988/07) 13 December 2016 (Article 11 and protestor's conviction for administrative offences); and *M.P. v. Finland* (App. no. 36487/12) 15 December 2016 (Article 10 and wife convicted for defamation of husband in child proceedings).

[34] *Verlagsgruppe Handelsblatt GmbH & Co. KG v. Germany* (App. no. 52205/11) 15 March 2016 (Admissibility decision) (Article 10 and injunction against magazine for satirical doctored photograph); *Telegraaf Media Nederland Landelijke Media B.V. and van der Graaf, v. the Netherlands* (App. no. 33847/11) 30 August 2016 (Admissibility decision) (Article 10 and protection of journalistic sources); *Gaunt v. the United Kingdom* (App. no. 26448/12) 6 September 2016 (Article 10 and radio host's sanctioning by media authority); and *Van Beukering and Het Parool v. the Netherlands* (App. no. 27323/14) 20 September 2016 (Admissibility decision) (Article 10 and copyright proceedings against newspaper for publishing defendant's photograph).

[35] *Tavares de Almeida Fernandes and Almeida Fernandes v. Portugal* (App. no. 31566/13) 17 January 2017 (Article 10 and civil defamation proceedings against journalist by judge); *Navalnyy v. Russia* (App. no. 29580/12 … 43746/14) 2 February 2017 (Article 11 and severe restrictions on peaceful assemblies); *Lashmankin and Others v. Russia* (App. nos. 57818/09 … 37038/13) 7 February 2017 (Article 11 and severe limitations on plans for public events); *Selmani and Others v. the former Yugoslav Republic of Macedonia* (App. no. 67259/14) 9 February 2017 (Article 10 and forcible removal of journalists from the parliament gallery); *Athanasios Makris v. Greece* (App. no. 55135/10) 9 March 2017 (Article 10 and politician's defamation conviction for criticising mayor); *Ahmed v. the United Kingdom* (App. no. 59727/13) 2 March 2017 (Article 34 and right of individual petition); *Döner and Others v. Turkey* (App. no. 29994/02) 7 March 2017 (Article 10 and prosecution of parents for education in Kurdish); *Tek Gıda İş Sendikası v. Turkey* (App. no. 35009/05) 4 April 2017 (Article 11 and company's dismissal of all trade union members); *Huseynova v. Azerbaijan* (App. no. 10653/10) 13 April 2017 (Article 2 and killing of journalist); *Davydov and Others v. Russia* (App. no. 75947/11) 30 May 2017 (Article 34 and right of individual petition); *Giesbert and others v. France* (App. no. 68974/11) 1 June 2017 (Article 10 and fining of magazine for publishing documents from criminal proceedings); *Y. v. Switzerland* (App. no. 22998/13) 6 June 2017 (Article 10 and journalist fined for breaching secrecy of judicial investigation); *Arnarson v. Iceland* (App. no. 58781/13) 13 June 2017 (Article 10 and news website journalist civilly liable for defamation); *Independent Newspapers (Ireland) Limited v. Ireland* (App. no. 28199/15) 15 June 2017 (Article 10 and civil defamation proceedings against newspaper for defaming government consultant); *Ali Çetin v. Turkey* (App. no. 30905/09) 19 June 2017 (Article 10 and defamation conviction for criticising civil servant in letter); *Bayev and Others v. Russia* (App. nos. 67667/09, 44092/12 and 56717/12) 20 June 2017 (Article 10 and conviction of activists under law banning promotion of homosexuality); *Ghiulfer Predescu v. Romania* (App. no. 29751/09) 27 June 2017 (Article 10 and civil defamation proceedings against journalist for defaming mayor); *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (App. no. 931/13) 27 June 2017 (Grand Chamber) (Article 10 and media company prohibited from publishing taxation data); *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (App. no. 17224/11) 27 June 2017 (Grand Chamber) (Article 10 and civil defamation proceedings against NGO); *Kącki v. Poland* (App. no. 10947/11) 4 July 2017 (Article 10 and journalist criminally responsible for defamation of politician);

Halldórsson v. Iceland (App. no. 44322/13) 4 July 2017 (Article 10 and broadcast journalist liable for civil defamation of company official); *Mesut Yıldız v. Turkey* (App. no. 8157/10) 18 July 2017 (Article 11 and conviction for slogans chanted during festival); *Lacroix v. France* (App. no. 41519/12) 7 September 2017 (Article 10 and municipal councillor's conviction for defamation of mayor); *Axel Springer SE and RTL Television GmbH v. Germany* (App. no. 51405/12) 21 September 2017 (Article 10 and ban on publishing photographs of criminal defendant); *Dmitriyevskiy v. Russia* (App. no. 42168/06) 3 October 2017 (Article 10 and editor's conviction for publication of statements by Chechen separatists); *Novaya Gazeta and Milashina v. Russia* (App. no. 45083/06) 3 October 2017 (Article 10 and defamation proceedings over media reports on Kursk investigation); *Becker v. Norway* (App. no. 21272/12) 5 October 2017 (Article 10 and protection of journalistic sources); *Fatih Taş v. Turkey* (no. 2) (App. no. 6813/09) 10 October 2017 (Article 10 and publisher's conviction for disseminating terrorist organisation propaganda); *Verlagsgruppe Droemer Knaur GmbH & Co. KG v. Germany* (App. no. 35030/13) 19 October 2017 (Article 10 and book publisher ordered to pay damages over allegations in book); *Fuchsmann v. Germany* (App. no. 71233/13) 19 October 2017 (Article 8 and refusal to order injunction over newspaper article); *Einarsson v. Iceland* (App. no. 24703/15) 7 November 2017 (Article 8 and courts' rejection of defamation claim concerning rape accusation); *Işıkırık v. Turkey* (App. no. 41226/09) 14 November 2017 (Article 11 and Article 10, and conviction for membership of an illegal organisation); *Redaktsiya Gazety Zemlyaki v. Russia* (App. no. 16224/05) 21 November 2017 (Article 10 and defamation proceedings against newspaper for depicting public official as Osama bin Laden); *MAC TV s.r.o. v. Slovakia* (App. no. 13466/12) 28 November 2017 (Article 10 and fining of broadcaster over report on death of Polish president); and *Frisk and Jensen v. Denmark* (App. no. 19657/12) 5 December 2017 (Article 10 and journalists' defamation conviction for defamation of hospital and hospital official).

[36] *Folnegović v. Croatia* (App. no. 13946/15) 10 January 2017 (Admissibility decision) (Article 34 and right of individual petition); *Travaglio v. Italy* (App. no. 64746/14) 24 January 2017 (Admissibility decision) (Article 10 and journalist's defamation conviction for defaming politician); *Pihl v. Sweden* (App. no. 74742/14) 7 February 2017 (Admissibility decision) (Article 8 and courts' failure to find website liable for defamatory comment); *A.M. and A.K. v. Hungary* (App. nos. 21320/15 and 35837/15) 4 April 2017 (Admissibility decision) (Article 8 and prohibition on medicinal cannabis); *Metis Yayıncılık Limited Şirketi and Sökmen v. Turkey* (App. no. 4751/07) 20 June 2017 (Admissibility decision) (Article 10 and criminal proceedings against book publisher under Article 301 law); *Bayar v. Turkey* (App. no. 47098/11) 4 July 2017 (Admissibility decision) (Article 10 and editor convicted of publishing PKK statement); *Stoyanov v. Bulgaria* (App. no. 19557/05) 4 April 2017 (Admissibility decision) (Article 10 and criminal proceedings for the production, distribution and sale of pornographic books); *Tamiz v. the United Kingdom* (App. no. 687714/14) 19 September 2017 (Admissibility decision) (Article 8 and right to protection of reputation); and *Anthony France v. the United Kingdom* (App. no. 25357/16) 26 September 2017 (Admissibility decision) (Article 10 and protection of journalistic sources).

[37] *GRA Stiftung gegen Rassismus und Antisemitismus v. Switzerland* (App. no. 18597/13) 9 January 2018 (Article 10 and defamation proceedings against NGO); *Akarsubaşı and Alçiçek v. Turkey* (App. no. 19620/12) 23 January 2018 (Article 11 and union members fined for demonstration); *Kiril Ivanov v. Bulgaria* (App. no. 17599/07) 11 January 2018 (Article 11 and ban on demonstration); *Čeferin v. Slovenia* (App. no. 40975/08) 16 January 2018 (Article 10 and contempt of court proceedings against lawyer); *Barabanov v. Russia* (App. nos. 4966/13 and 5550/15) 30 January 2018 (Article 11, in light of Article 10, and protestor's conviction for mass disorder); *Polikhovich v. Russia* (App. nos. 62630/13 and 5562/15) 30 January 2018 (Article 11 and protestor's prosecution and conviction); *Stepan Zimin v. Russia* (App. nos. 63686/13 and 60894/14) 30 January 2018 (Article 11 and protestor's conviction for mass disorder); *Butkevich v. Russia* (App. no. 5865/07) 13 February 2018 (Article 11 and protestor's prosecution and conviction); *Ivashchenko v. Russia* (App. no. 61064/10) 13 February 2018 (Article 8 and search of journalist's data storage devices); *Sinkova v. Ukraine* (App. no. 39496/11) 27 February 2018 (Article 10 and protestor's conviction for performance-art protest); *Mikhaylova v. Ukraine* (App. no. 10644/08) 6 March 2018 (Article 10 and lay litigant's prosecution for contempt of court); *Mehmet Hasan Altan v. Turkey* (App. no. 13237/17) 20 March 2019 (Article 10 and professor and journalist's arrest and detention under anti-terrorism legislation); *Şahin Alpay v. Turkey* (App. no. 16538/17) 20 March 2018 (Article 10 and journalist's arrest and detention for membership of terrorist organisation); *Falzon v. Malta* (App. no. 45791/13) 20 March 2018 (Article 10 and defamation proceedings against politician); *Uzan v. Turkey* (App. no. 30569/09) 20 March 2018 (Article 10 and politician's conviction for insulting prime minister); *Fatih Taş v. Turkey (no. 3)* (App. no. 45281/08) 24 April 2018 (Article 10 and criminal proceedings against publisher under anti-terrorism law); *Fatih Taş v. Turkey (no. 4)* (App. no. 51511/08) 24 April 2018 (Article 10 and criminal processing against publisher under anti-terrorism law); *Lutskevich v. Russia* (App. nos. 6312/13 and 60902/14) 15 May 2018 (Article 11 and protestor's conviction for mass disorder); *Rungainis v. Latvia* (App. no. 40597/08) 14 June 2018 (Article 10 and defamation proceedings against banker); *Kula v. Turkey* (App. no. 20233/06) 19 June 2018 (Article 10 and professor's reprimand for taking part in television programme); *Gîrleanu v. Romania* (App. no. 50376/09) 26 June 2018 (Article 10 and criminal proceedings against a journalist for disclosure of

classified documents); *Paraskevopoulos v. Greece* (App. no. 64184/11) 28 June 2018 (Article 10 and defamation conviction over criticism of local politician); *M.L. and W.W. v. Germany* (App. nos. 60798/10 and 65599/10) 28 June 2018 (Article 8 and courts' refusal to remove names for media archives); *Bakır and Others v. Turkey* (App. no. 46713/10) 10 July 2018 (Article 10 and 11, and protestor's conviction under anti-terrorism legislation); *İmret v. Turkey (no. 2)* (App. no. 57316/10) 10 July 2918 (Article 10 and 11, and political official convicted under anti-terrorism law for participating in demonstration); *Mariya Alekhina and Others v. Russia* (App. no. 38004/12) 17 July 2018 (Article 10 and conviction for hooliganism over performance-art protest); *Makraduli v. the former Yugoslav Republic of Macedonia* (App. nos. 64659/11 and 24133/13) 19 July 2018 (Article 10 and politician convicted of defamation); *Fatih Taş v. Turkey (No. 5)* (App. no. 6810/09) 4 September 2018 (Article 10 and criminal proceedings against publisher for denigrating Turkey); *Big Brother Watch and Others v. the United Kingdom* (App. nos. 58170/13, 62322/14 and 24960/15) 13 September 2018 (Article 10 and bulk interception of communications); *Aliyev v. Azerbaijan* (App. nos. 68762/14 and 71200/14) 20 September 2018 (Article 18, in conjunction with 5 and 8, and a lawyer's prosecution for NGO activity); *Fedchenko v. Russia* (no. 4) (App. no. 17221/13) 2 October 2018 (Article 10 and civil defamation proceedings against editor); *Tuskia and Others v. Georgia* (App. no. 14237/07) 11 October 2018 (Article 11, in the light of 10, and administrative proceedings against professors over protest); and *Toranzo Gomez v. Spain* (App. no. 26922/14) 20 November 2018 (Article 10 and activist's conviction for defamation).

[38] *Gęsina-Torres v. Poland* (App. no. 11915/15) 20 February 2018 (Admissibility decision) (Article 10 and journalist's conviction for forging documents); *Avisa Nordland AS v. Norway* (App. no. 30563/15) 20 February 2018 (Admissibility decision) (Article 10 and civil defamation proceedings against newspaper); *Meslot v. France* (App. no. 50538/12) 9 January 2018 (Admissibility decision) (Article 10 and politician's conviction for contempt of court); and *Hanbayat and Other v. Turkey* (App. no. 6940/07) 6 February 2018 (Admissibility decision) (Article 10 and criminal proceedings against relatives for "apology" of crimes committed).