European Court of Human Rights: a new judgment underscores the wide margin of appreciation for regulating parliamentary privilege

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Tarlach McGonagle
Institute for Information Law (IViR), University of Amsterdam

In its judgment in *Green v. the United Kingdom* of 8 April 2025, the European Court of Human Rights (Fourth Section), gave lengthy consideration to the scope and nature of parliamentary privilege/immunity in relation to the disclosure of confidential information that is subject to *sub judice* rules. A key question was whether the positive obligations of States Parties to the European Convention on Human Rights, pursuant to Article 8 of the Convention, require specific *ex ante* and *ex post* controls on parliamentary speech. The Court ultimately found that such a requirement does not exist at this point in time and that Article 8 had not been violated.

The applicant was a prominent businessman at the relevant time. The Telegraph Media Group intended to publish "details of serious allegations of sexual harassment and bullying made against the applicant by former employees". The applicant had previously settled actual and potential employment proceedings with former employees and those settlements were subject to non-disclosure agreements. The Court of Appeal granted an interim injunction preventing publication by *The Telegraph*. Having "examined in detail the balance to be struck between the Article 8 and Article 10 rights at issue in the case", the Court of Appeal "concluded that publication would cause immediate, substantial and possibly irreversible harm to all of the claimants, including the applicant". In the House of Lords, despite the existence of this interim injunction, Lord Hain disclosed the applicant's name under parliamentary privilege. The disclosure caused serious harm to the applicant's (financial and general) reputation, thus interfering with his right to respect for his private life.

In its assessment of the merits of the case, the European Court of Human Rights followed its by now well-established approach to the right to respect for private and family life under Article 8 of the Convention. In addition to the "primarily negative undertaking" of non-interference with individuals' right to privacy, states also have a positive obligation to ensure that this right is effective in practice. States have a wide margin of appreciation in choosing the measures they take to fulfil their relevant positive obligations. This is all the more so specifically concerning the notion of "respect", which is "not clear-cut", and due to the diversity of practices and situations obtaining in the different Council of Europe

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member states and the absence of a Europe-wide consensus. Insofar as states' positive obligations under Article 8 have implications for the right to freedom of expression, as guaranteed by Article 10, a fair balancing of the competing rights and interests must be conducted.

In this regard, it is important to consider the type of expression at issue. The Court recalled that "in a democracy Parliament is a unique and fundamentally important forum for political debate, and the right to freedom of speech therein enjoys an elevated level of protection". Very weighty reasons are therefore required to justify interference with freedom of parliamentary expression. The Court also recalled that the rule of parliamentary immunity, designed to safeguard freedom of expression in parliament, is also an important safeguard for the separation of powers between the legislature and the judiciary. The Court then explained in some detail why the regulation of the ins and outs of parliamentary immunity is in the first place a matter for national parliaments themselves, and national authorities. There is accordingly a wide margin of appreciation for states as to how they regulate parliamentary immunity. Indeed, extensive comparative research carried out by the Court revealed a range of different approaches across the 41 Council of Europe member states surveyed.

The Court focused centrally on the question whether the positive obligation under Article 8 to ensure the effective protection of the right to respect for private life requires states to implement *ex ante* and *ex post* controls to prevent members of parliament from revealing information that is subject to privacy injunctions. The Court was very conscious – and wary – of the wider implications of such a requirement, beyond the circumstances of the present case.

The UK Parliament has adopted a *sub judice* rule – a "rule limiting comment or disclosure relating to judicial proceedings, in order not to prejudge the issue or influence the jury" (Oxford Dictionary of Law). Under this rule, members of the House of Lords are required to give the Lord Speaker at least twenty-four hours' notice of any proposal to refer to a matter which is *sub judice*. This can be seen as a form of *ex ante* control on the power to use parliamentary privilege to discuss proceedings which are active before the domestic courts. As the Court also noted, the UK Parliament has in the past repeatedly considered and rejected proposals to implement further controls along the lines of those sought by the applicant. It further noted that there did not seem to be any clear signs that a different approach was now needed. In the absence of strong reasons to do so, the Court was reluctant to substitute its view for that of the national authorities, and in particular the parliament, as the latter are better positioned to assess the need to restrict the conduct of members of parliament.

In its existing case law, the Court has pronounced on the freedom of expression of members of parliament mainly in contexts before they were elected or when they were speaking outside of parliament. The Court held that for it "to find that a

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speech in Parliament, by a Member of Parliament, fell outside the scope of his or her parliamentary activity would be unprecedented, and would run counter to the operation of parliamentary privilege in the majority of member States". In the specific matter of the regulation of parliamentary immunity, the Court spelt out, clearly and firmly, its deference to the autonomy of national authorities and in particular national parliaments. The accordingly wide margin of appreciation afforded to states on such matters led the Court to find that "as things currently stand", the rule on parliamentary privilege did not exceed the margin of appreciation and there were no sufficiently strong reasons to justify "requiring it or the respondent State to introduce further *ex ante* and *ex post* controls on freedom of speech in Parliament".

Green v. the United Kingdom, No. 22077/19, 8 April 2025. ECLI:CE:ECHR:2025:0408JUD002207719

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