European Court of Human Rights: Grand Chamber Judgment in Case of Stoll v. Switzerland

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In December 1996 the Swiss ambassador to the United States drew up a "strategic document", classified as "confidential", concerning possible strategies with regard the compensations due to Holocaust victims for unclaimed assets deposited in Swiss banks. The report was sent to the Federal Department of Foreign Affairs in Bern and to a limited list of other persons. Martin Stoll, a journalist working for the Sonntags-Zeitung, also obtained a copy of this document, probably as a result of a breach of professional confidence by one of the persons who had received a copy of this strategic paper. Shortly afterwards the Sonntags-Zeitung published two articles by Martin Stoll, accompanied by extracts from the document. In the following days other newspapers also published extracts from the report. In 1999, Stoll was sentenced to a fine of CHF 800 (EUR 520) for publishing "official confidential deliberations" within the meaning of Article 293 of the Criminal Code. This provision not only punishes the person who is responsible for the breach of confidence of official secrets, but also those who helped, as an accomplice, to publish such secrets. The Swiss Press Council, to which the case had also been referred in the meantime, found that the way in which Stoll had focused on the confidential report, by shortening the analysis and failing to place the report sufficiently into context, had irresponsibly made some extracts appear sensational and shocking. In a judgment of 25 April 2006, the Strasbourg Court of Human Rights held, by four votes to three, that the conviction of Stoll was to be considered as a breach of the journalist's freedom of expression as guaranteed by Article 10 of the Human Rights Convention. For the Court, it was of crucial importance that the information contained in the report manifestly raised matters of public interest, that the role of the media as critic and watchdog also applies to matters of foreign and financial policy and that the protection of confidentiality of diplomatic relations, although a justified principle, could not be protected at any price. Furthermore, as Stoll had only been convicted because he published parts of the document in the newspaper, the European Court was of the opinion that the finding by the Swiss Press Council that he had neglected his professional ethics by focusing on some extracts in a sensationalist way, should not be taken into account to determine whether or not the publishing of the document was legitimate.

In a judgment of 10 December 2007, the Grand Chamber of the European Court of Human Rights has now, with twelve votes to five, overruled this finding of a violation of Article 10. Although the Grand Chamber recognises that the

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information contained in the ambassador's paper concerned matters of public interest and that the articles from Stoll were published in the context of an important public, impassioned debate in Switzerland with an international dimension, it is of the opinion that the disclosure of the ambassador's report was capable of undermining the climate of discretion necessary to the successful conduct of diplomatic relations, and of having negative repercussions on the negotiations being conducted by Switzerland. The judgment underlines that the fact that Stoll did not himself act illegally by obtaining the leaked document is not necessarily a determining factor in assessing whether or not he complied with his duties and responsibilities: as a journalist he could not claim in good faith to be unaware that disclosure of the document in question was punishable under Article 293 of the Swiss Criminal Code. Finally the Court emphasised that the impugned articles were written and presented in a sensationalist style, that they suggested inappropriately that the ambassador's remarks were anti-Semitic, that they were of a trivial nature and were also inaccurate and likely to mislead the reader. Similar to the Swiss Press Council, the Court observes a number of shortcomings in the form of the published articles. The Court comes to the conclusion 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" and that there has been no violation of Article 10 of the Convention. The five dissenting judges expressed the opinion that the majority decision is a "dangerous and unjustified departure from the Court's well-established case-law concerning the nature and vital importance of freedom of expression in democratic societies". The judgment of the Grand Chamber also contrasts remarkably with the principle enshrined in the 19 December 2006 Joint Declaration by the UN, OSCE, OAS and ACHPR according to which "journalists should not be held liable for publishing classified or confidential information where they have not themselves committed a wrong in obtaining it".

Judgment of the European Court of Human Rights (Grand Chamber), case of Stoll v. Switzerland, Application no. 69698/01 of 10 December 2007

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