European Court of Human Rights: Bédat v. Switzerland (Grand Chamber)

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In a judgment of 29 March 2016, the Grand Chamber of the European Court of Human Rights (ECtHR) in Bédat v. Switzerland found that a criminal conviction of a journalist, Arnaud Bédat, for having published documents covered by investigative secrecy in a criminal case is no violation of Article 10 of the European Convention of Human Rights (ECHR). The Grand Chamber is of the opinion that the Swiss authorities acted within their margin of appreciation and that recourse to criminal proceedings and the penalty imposed on the journalist did not amount to a disproportionate interference in the exercise of his right to freedom of expression.

The article published by Bédat in the weekly magazine L'Illustré concerned 'M.B.' and the criminal proceedings against him for having driven his car into pedestrians. The incident, in which three people died and eight others were injured, had caused great public outcry and controversy in Switzerland. The article contained a personal description of M.B., a summary of the questions put by the police officers and the investigating judge, and M.B.'s replies. It also contained the information that M.B. had been charged with premeditated murder and, in the alternative, with murder, and it was mentioned that M.B. appeared to show no remorse. The article was accompanied by several photographs of letters which M.B. had sent to the investigating judge. Criminal proceedings were brought against the journalist on the initiative of the public prosecutor for having published secret documents, in breach of Article 293 of the Swiss Criminal Code. It emerged from the investigation that one of the parties claiming damages in the proceedings against M.B. had photocopied the case file and lost one of the copies in a shopping centre. An unknown person had then brought the copy to the offices of the magazine which had published the impugned article. Bédat was found guilty of making public a series of documents which were at that stage to be considered protected as part of the secrecy of the criminal investigation, and he was ordered to pay a fine of 4,000 Swiss Francs (EUR 2,667). Bédat lodged a complaint before the ECtHR, arguing that this conviction had resulted in a violation of his right to freedom of expression.

On 1 July 2014 the Second Section of the ECtHR found that the article reported on an important case and that although the interference was prescribed by law and pursued legitimate aims, it considered that the sanction did not respond to a

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pressing social need, not being sufficiently motivated and being disproportionate. Therefore, the majority of the Court, by four votes to three, found that the criminal fine imposed on the journalist breached Article 10 of the European Convention on Human Rights (ECHR).

While the Grand Chamber agrees with the Chamber that the interference was prescribed by law and pursued legitimate aims, namely of preventing the disclosure of information received in confidence, maintaining the authority and impartiality of the judiciary and protecting the reputation and the rights of others, the majority of the Grand Chamber, with 15 votes to two, comes to another conclusion on whether the fine imposed on the journalist was necessary in a democratic society. The Grand Chamber reiterates that the protection afforded to journalists by Article 10 of the ECHR "is subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism. The concept of responsible journalism, as a professional activity which enjoys the protection of Article 10 of the ECHR, is not confined to the contents of information which is collected and/or disseminated by journalistic means (..); the concept of responsible journalism also embraces the lawfulness of the conduct of a journalist, and the fact that a journalist has breached the law is a relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly". The Grand Chamber clarifies that it must adjudicate on a conflict between two rights which enjoy equal protection under the Convention, and the Court must weigh up the competing interests. Reference is made to cases where the right to privacy (Article 8) and the right to freedom of expression (Article 10) are conflicting (see IRIS 2012-3/1) and the Court considers that an analogous reasoning must be applied in weighing up the rights secured under Article 10 and Article 6 paragraph 1 respectively. In such an approach to balancing rights, that the Court considers that where the national authorities have assessed the interests at stake in compliance with the criteria laid down in the Court's case-law, strong reasons are required if it is to substitute its view for that of the domestic courts.

The Grand Chamber takes into consideration six criteria as part of its balancing test:

(i) How the applicant came into possession of the information at issue: although Bédat had not obtained the information by unlawful means, as a professional journalist he must have been aware of the confidential nature of the information which he was planning to publish. It was not disputed that the publication of the information in question fell within the scope of Article 293 of the Swiss Criminal Code.

(ii) Content of the impugned article: the Court qualifies the impugned article about M.B. as portraying "a highly negative picture of him, adopting an almost

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mocking tone". The article had "a sensationalist tone", and it formulated a series of questions which the judicial authorities were called upon to answer, at both the investigation and the trial stages.

(iii) Contribution of the impugned article to a public-interest debate: according to the Court, the journalist failed to demonstrate how publishing records of interviews, statements by the accused's wife and doctor, and letters sent by the accused to the investigating judge concerning banal aspects of his everyday life in detention, could have contributed to any public debate on the ongoing investigation.

(iv) Influence of the impugned article on the criminal proceedings: according to the Court it is "undeniable that the publication of an article slanted in that way at a time when the investigation was still ongoing entailed an inherent risk of influencing the course of proceedings in one way or another, whether in relation to the work of the investigating judge, the decisions of the accused's representatives, the positions of the parties claiming damages, or the objectivity of the trial court, irrespective of its composition". The Court agrees with the findings by the Swiss Courts that the records of interviews and the accused's correspondence had been discussed in the public sphere before the conclusion of the investigation, before the trial and out of context, in a manner liable to influence the decisions taken by the investigating judge and the trial court.

(v) Infringement of the accused's private life: the Court agrees that the criminal proceedings brought against Bédat conformed with the positive obligation incumbent on Switzerland under Article 8 to protect the accused's private life. It also notes that when the impugned article was published the accused was in prison, and therefore in a situation of vulnerability.

(vi) Proportionality of the penalty imposed: the Court considers that the recourse to criminal proceedings and the penalty imposed on Bédat did not amount to disproportionate interference in the exercise of his right to freedom of expression. The penalty was imposed for breaching the secrecy of a criminal investigation, and its purpose was to protect the proper functioning of the justice system and the rights of the accused to a fair trial and to respect for his private life. Therefore the Court states that such a penalty could not be considered liable to have a deterrent effect on the exercise of freedom of expression by Bédat or any other journalist wishing to inform the public about ongoing criminal proceedings. Accordingly, the Court sees no strong reason to substitute its own view for that of the domestic courts. Furthermore, having regard to the margin of appreciation available to States and to the fact that the balancing the various competing interests was properly conducted by the Swiss Federal Court, the Grand Chamber concludes that there has been no violation of Article 10 of the ECHR.

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Two judges strongly dissented, Judges López Guerra and Yudkivska, the latter expressing the view that "(t)his Court had always regarded the press as the servant of an effective judicial system, granting little scope for restrictions on freedom of expression in such matters as the public interest in the proper administration of justice. … the present judgment constitutes a regrettable departure from this long-established position".

Judgment by the European Court of Human Rights, Grand Chamber, case of Bédat v. Switzerland, Application no. 56925/08 of 29 March 2016

https://hudoc.echr.coe.int/eng?i=001-161898

Judgment of the European Court of Human Rights, Second Section, case of A.B. v. Switzerland, Application no. 56925/08 of 1 July 2014

https://hudoc.echr.coe.int/eng?i=001-145457

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