European Court of Human Rights: Fuchsmann v. Germany

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On 19 October 2017, the European Court of Human Rights (ECtHR) delivered its judgment in the case of Fuchsmann v. Germany, which concerned the online version of a New York Times article accessible in Germany. The applicant in the case is an internationally active entrepreneur in the media sector, and holds the position of Vice-President of the World Jewish Congress. In June 2001, the New York Times published an article about an investigation into corruption against R.L. The article was entitled "[L] Media Company Faces a Federal Inquiry", and included the statements that the applicant had "ties to Russian organized crime, according to reports by the FBI and European law enforcement agencies", and a "1994 FBI report on Russian organized crime in the United States described [the applicant] as a gold smuggler and embezzler, whose company in Germany was part of an international organized crime network. He is barred from entering the United States."

In July 2002, the applicant sought injunctions against certain parts of the article, including the statements above. Ultimately, in 2011, the Düsseldorf Court of Appeal granted the injunction in so far as the article stated that the applicant had been banned from entering the US. As regards the rest of the statements, the Court of Appeal held that there was a great informational interest on the part of the public in reporting that the applicant, as a German businessman internationally active in the media sector, was suspected by the secret service of being involved in gold smuggling, embezzlement and organised crime. This assessment was not changed by the fact that the criminal offences mentioned had occurred more than sixteen years previously. The court furthermore considered that the reporting made it sufficiently clear that only insights from FBI reports and the law-enforcement authorities were being reported. The court concluded that the defendant had complied with the required journalistic duty of care and that the reporting had relied on sources and background information, which the journalist could reasonably consider reliable. The injunctions were thus refused.

The applicant made an application to the ECtHR, claiming that the domestic courts had failed to protect his reputation under Article 8 of the European Convention on Human Rights (ECHR). In this regard, the Court first held that allegations that the applicant was involved in gold smuggling, embezzlement and

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organised crime were allegations grave enough for Article 8 to come into play. The Court then considered that the case required an examination of whether a fair balance had been struck between the applicant's right to the protection of his private life under Article 8 and the newspaper's right to freedom of expression under Article 10. The relevant criteria within the context of balancing these competing rights were: the contribution to a debate of public interest; the degree to which the person affected was well-known; the subject of the news report; the prior conduct of the person concerned; the method of obtaining the information and its veracity; and the content, form and consequences of the publication.

Firstly, the Court agreed that the article had contributed to a debate of public interest and that there had been a public interest in the alleged involvement of the applicant and mentioning him by name. The Court also held that a public interest also existed in the publication of the article in the online archive of the newspaper, and noted "the substantial contribution made by Internet archives to preserving and making available news and information". Secondly, the Court held that the Court of Appeal's assessment that there was a certain interest in the applicant as a German businessman internationally active in the media sector, was in compliance with the ECtHR's case law. Thirdly, the Court reiterated that that the press should normally be entitled, when contributing to public debate on matters of legitimate concern, to rely on the contents of official reports without having to undertake independent research. The Court observed that the main source for the statements regarding the applicant was an internal FBI report and not an officially published report. The Court agreed that there was a sufficient factual basis for the remaining statements at issue. Fourthly, the Court agreed with the Court of Appeal that the article was free from polemical statements and insinuations, and made it sufficiently clear that only insights from reports by the FBI and other law-enforcement authorities were being reported. Moreover, the Court found that the information disseminated had mainly concerned the applicant's professional life and had not divulged any intimate private details. The ECtHR also noted that the Court of Appeal found that the online article was accessible only as a result of a directed search with an online search engine. Therefore, the Court accepted the conclusion of the domestic courts that the consequences of the article in Germany were limited. In conclusion, the Court considered that the Court of Appeal, in balancing the right to respect for private life with the right to freedom of expression, had taken into account and applied the criteria set out in the Court's case-law. Thus, there had been no violation of Article 8.

Judgment by the European Court of Human Rights, Fifth Section, case of Fuchsmann v. Germany, Application no. 71233/13 of 19 October 2017

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