European Court of Human Rights: *Société Éditrice de Mediapart and others v. France*

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The European Court of Human Rights (ECtHR) has delivered a judgment on the rights and duties and responsibilities of journalists and online media when publishing illegal recordings containing private and intimate information. The case concerns the judicial orders requiring the news website Mediapart to remove transcripts and tapes of conversations that had been illegally recorded at the home of Ms Bettencourt, the principal shareholder of the L'Oréal group. The ECtHR found the exposure of the illegal recordings to be of such a serious nature that the judicial orders to remove them from the news website did not breach the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR).

The judgment deals with two applications concerning two separate judicial orders issued against Mediapart, a news website, and its publishing editor, Edwy Plénel, and a journalist, Fabrice Arfi, to remove audio extracts and transcripts of illegal recordings made at the home of Bettencourt from the news company's website. The recordings where secretly made by Bettencourt's butler over a period of more then a year during some of her meetings and conversations with other persons. Bettencourt's daughter had transmitted CD-ROMs with those recordings to the national financial police brigade. The recordings formed part of the evidence in what became a major criminal case regarding the abuse of Bettencourt's weakness and the mismanagement of her fortune, also involving some public figures. When the case was widely reported in the press, in June 2010, Mediapart decided to publish extracts from these recordings online on its news website. First P.D.M. – Bettencourt's wealth manager – and later Bettencourt herself brought urgent proceedings seeking to obtain an order for all extracts of the illegal recordings made at Bettencourt's home to be removed from Mediapart's Internet site because of breach of privacy. After several years of proceedings, including a series of judgments by the Court of Cassation, Mediapart was ordered to remove all extracts from its news site, as the disclosure of the recordings could not be justified on the grounds of freedom of the press or the alleged contribution to a debate of public interest. The orders to remove the illegal recordings were considered proportionate to the offence committed, in spite of the fact that the content of the recordings had also been disseminated by other news media. Mediapart and its publishing editor were also ordered to pay damages in compensation for non-pecuniary damages. In the meantime, criminal proceedings

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were brought against Plenel and Arfi and other journalists who had been involved in publishing the illegal recordings. All journalists were acquitted on the grounds that, in publishing the contested extracts and the accompanying commentary which placed them in context, it had not been the journalists' intention to infringe Bettencourt's privacy.

In 2014, Mediapart, Plenel and Arfi lodged an application with the ECtHR, alleging that the court orders obliging them to remove the written and audio extracts of the illegal recordings made in Bettencourt's home from Mediapart's news site had breached their right to freedom of expression under Article 10 ECHR. The Court reiterates that Article 10 does not guarantee a wholly unrestricted freedom of expression, even with respect to media coverage of matters of serious public concern. Exercise of this freedom carries with it duties and responsibilities which also apply to the press. A journalist cannot claim exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising their right to freedom of expression, the offence in question was committed during the performance of his or her journalistic functions. Furthermore, breaches of privacy resulting from the intrusion into the private life of individuals through the use of technical devices for illegal tapping, video recording or photography are to be subject to particularly attentive protection. Mediapart had been aware that the disclosure of recordings made without Bettencourt's knowledge was an offence, which ought to have led them to show prudence and precaution, irrespective of the fact that their actions were intended, *inter alia*, to denounce the exploitation of Bettencourt's weakness. The ECtHR also refers to the French courts' findings that the public could have been informed about these matters by means other than providing access to the illegal recordings, and that Mediapart's decision to publish the recordings had an unnecessary spectacular dimension. The Court reiterates that, in certain circumstances, even when a person was known to the general public, he or she could rely on the legitimate expectation that his or her private life would be protected and respected. The fact that an individual belongs to the category of public figures does not authorise the media to violate the professional and ethical principles which had to govern their actions, or legitimise intrusions into a person's private life, especially in the case of persons who, like Bettencourt, did not exercise official functions.

Having regard to the scope of the publications on Mediapart's site, the domestic courts legitimately concluded in the circumstances of the case that the public interest had to yield to Bettencourt's and P.D.M.'s right to respect for their private life. Although access to the site had not been free of charge, the transcribed statements had been visible to a large number of people and had remained online for a considerable period of time. Internet sites are an information and communication tool particularly distinct from the printed media, especially with regard to their capacity to store and transmit information, and the risk of harm to the exercise and enjoyment of human rights and freedoms posed by content and communications on the Internet, particularly the right to respect for private life, is

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certainly higher than that posed by the press. The ECtHR refers to the domestic courts' arguments to end the disturbance caused to a woman who, albeit being a public figure, had never consented to the disclosure of the published extracts. They also referred to the fact that Bettencourt was vulnerable and had a legitimate expectation of having the illegal publications, containing sensitive intimate information, removed from the news site. Although the content of the recordings had been largely disseminated by the time the court order was imposed, their verbatim publication had been unlawful from the outset and remained prohibited for the press as a whole. The Court also notes that the applicants, who had been acquitted in the criminal proceedings, have not been deprived of the possibility of fulfilling their task of providing information about the public aspect of the Bettencourt case. In this regard, the applicants had not shown, in the circumstances of this case, that the removal of the contents of the recordings and the ban on their further publication had indeed had a chilling effect on the way in which they exercised and continued to exercise their right to freedom of expression. Furthermore, the order to remove the illegal recordings from Mediapart's website was the only effective measure to stop the intrusion into Bettencourt's and P.D.M.'s private life. Finally, the ECtHR discerns no strong reasons which would require it to substitute its view for that of the domestic courts and to set aside the balancing exercise conducted by them. It is satisfied that the reasons relied upon were both relevant and sufficient to show that the interference complained of was "necessary in a democratic society" and that the orders in question had not gone beyond what was necessary to protect Bettencourt and P.D.M. from the interference with their right to respect for private life. Unanimously, the ECtHR comes to the conclusion that there has been no violation of Article 10 ECHR.

Judgment by the European Court of Human Rights, Fifth Section, in the case of Société Éditrice de Mediapart and others v. France, Application Nos. 281/15 et 34445/15, 14 January 2021

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