European Court of Human Rights: *Hurbain v. Belgium*

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The European Court of Human Rights (ECtHR) found that a court order to anonymise an article in a newspaper's electronic archive did not violate the publisher's right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR). The judgment relates to the "right to be forgotten" as part of the right to privacy under Article 8 ECHR, in particular in respect of media archives (see also Iris 2013-9/1 and Iris 2018-8/1). The ECtHR held that the order to anonymise the name of a driver who had caused a fatal accident in the online archived version of an article published twenty years previously was justified from the perspective of Article 10 ECHR. The ECtHR however clarified that this finding could not be interpreted as involving an obligation for the media to check their archives on a systematic and permanent basis: the media are only required to do so and to weigh up the various rights at stake, when they receive an explicit request to that effect.

The applicant in this case is the publisher of the daily newspaper *Le Soir.* He was ordered by a civil judgment in 2013 to render anonymous the digital version of an article published in the newspaper in 1994 and added to the online archive in 2008, in order to respect an individual's claim on the right to be forgotten. The article mentioned the full name of the individual, G., a driver who had caused a fatal road accident. The court order to anonymise the article was confirmed by the court of appeal in 2014 and upheld by the *Cour de Cassation* (Supreme Court) in 2016. *Le Soir*'s publisher, Mr Hurbain, lodged an application with the ECtHR complaining that the order for anonymisation was a breach of Article 10 ECHR. The Belgian government defended the decision of the domestic courts, while G. intervened in the proceedings before the Strasbourg Court, claiming protection under Article 8 ECHR and his right to be forgotten. The ECtHR left no doubt that in this case the rights under Article 8 and 10 needed to be balanced. More precisely, the rights of an individual who had been the subject of an online publication had to be weighed against the public's right to be informed about events of the past and contemporary history, in particular with the help of digital newspaper archives.

The ECtHR observed that the requirement for a publisher to anonymise an article whose lawfulness had not been questioned carried a risk of a chilling effect on press freedom, in other words the risk that the press might refrain from keeping certain news stories in its online archives or that it might omit individual elements

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from articles which might later become the subject of such a request. It also recognized that altering the archived version of an article would undermine the integrity of the archive and thus its very essence. Therefore domestic courts need to be particularly vigilant when granting a request for anonymisation or modification of the digital version of an archived article for the purposes of ensuring respect for a person's private life. The ECtHR clarified however that the right to maintain online archives available to the public was not an absolute right. This right had to be weighed against other rights. In that context, the criteria to be taken into account when making or keeping an archived publication available online were in principle the same as those used by the ECtHR in the context of an initial publication. In such cases the so-called "Axel Springer criteria" need to be applied (Iris 2012-3/1), although the ECtHR admitted that the relevance of some criteria may change with the passage of time in the case of archived articles.

The ECtHR noted in particular that a search on the newspaper's website or on Google, just by entering the first name and surname of the driver concerned, immediately brought up the article in question. It agreed that to keep the article online could cause indefinite and serious harm to the driver's reputation, giving him a virtual criminal record, although he had not only served his sentence after a final conviction but had also been rehabilitated. G. was not a public person, and neither did the article at issue, 20 years later, contribute to a debate of public interest. The ECtHR confirmed that the most effective way to ensure respect for G's private life, without disproportionately affecting the newspaper's freedom of expression, was to anonymise the article on the newspaper's website by replacing the individual's full name with the letter X. A relevant factor is also the passage of time (about 20 years) since the printed article's original publication: with the passage of time, a person should have the opportunity to reconstruct their life without being confronted with their past mistakes by members of the public. Name searches have become a common practice in today's society, and often searches are conducted merely out of curiosity. Another important factor is that the anonymisation on the website of *Le Soir* would not affect the text of the original article. The ECtHR explained that the nature of the measure imposed in this case ensured the integrity of the archived article as such, since it was only a matter of anonymising the online version of the article, *Le Soir* being authorised to retain the original digital and paper archives. An interested person could always request access to the original version of the article, even in digital form. It was therefore not the article itself, but its accessibility on the website of the newspaper *Le Soir,* that had been affected by the court order. The ECtHR agreed with the findings by the domestic court that the interference with Mr Hurbain's rights had not been arbitrary or manifestly unreasonable, and that the anonymization would be the most effective and proportionate measure. The reasons given by the domestic courts had thus been relevant and sufficient, and the measure imposed on Mr Hurbain could be regarded as proportionate to the legitimate aim pursued (right to respect for the driver's private life) and as

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striking a fair balance between the competing rights at stake. Therefore the ECtHR, by six votes to one, came to the conclusion that the civil judgment ordering *Le Soir* to anonymise the article at issue had constituted an interference, but not a violation with the right under Article 10 ECHR. The ECtHR explained that the conclusion it had reached in the present case did not involve any obligation for the media to check their archives on a systematic and permanent basis. When it comes to the archiving of articles, the media do not need to make an *ex ante* verification whether the rights under Article 8 ECHR are respected. They are only required to make such verification, and therefore to weigh up the various rights at stake, when they received an express request to that effect.

The dissenting opinion of Judge Pavli emphasizes more than the majority's finding the importance of the integrity of news archives and the maintenance of Internet archives as a critical aspect of the role of the press in a democracy. According to Judge Pavli, the Court's judgment goes against an emerging but clear European consensus that right to be forgotten claims in the online realm can, and should, be effectively addressed through deindexation of search engine results. To fulfil their Article 10 function, digital press archives must be complete and historically accurate: any tampering with their content could undermine their underlying purpose, which is to maintain a full historical record. Judge Pavli argues in essence that G's privacy rights could have been adequately protected by removing the article from name-based search results on general search engines: such a measure would have prevented the article from becoming easily accessible through curiosity-driven or other random search queries. At the same time, it would have preserved the integrity of press archives and allowed full access to the unaltered original source to those persons (journalists, researchers or others) who might become specifically interested in the past events covered in the article.

This judgment is not final: at its meeting on 11 October 2021 the Grand Chamber panel of five judges decided to refer the case *Hurbain v. Belgium* (application no. 57292/16) to the Grand Chamber of the European Court of Human Rights

Arrêt de la Cour européenne des droits de l'homme, troisième section, rendu le 22 juin 2021 dans l'affaire Hurbain c. Belgique, requête n° 57292/16

https://hudoc.echr.coe.int/eng?i=001-210467

Judgment of the European Court of Human Rights (Section III) in the case Hurbain v. Belgium (application no. 57292/16), 22 June 2021

Grand Chamber Panel's decisions - October 2021

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