European Court of Human Rights: Narbutas v. Lithuania

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In one of its last judgments in 2023, the European Court of Human Rights (ECtHR) found a violation of an applicant's rights both under Article 8 (right to privacy) and Article 10 (right to freedom of expression) of the European Convention on Human Rights (ECHR). The ECtHR found that by disclosing the identity of the applicant on the day of his arrest, by exposing him to media coverage and by publishing several (online) press releases during the pre-trial investigation, the authorities had breached the applicant's right to reputation under Article 8 ECHR.

A ban imposed on the applicant from discussing his case in the media and on his Facebook page, which had put him at a disadvantage in comparison to the authorities who had remained free to make public comments on the case, amounted to a violation of the applicant's right to freedom of expression as guaranteed under Article 10 ECHR.

The present case concerns the arrest and prosecution of Mr Šarūnas Narbutas in the context of a high-profile criminal investigation relating to Narbutas' involvement in the acquisition by the Lithuanian government of a large number of COVID-19 tests.

Narbutas had been the president of the Lithuanian Cancer Patient Coalition (POLA) and a legal advisor to the President of Lithuania. He had also been working in the area of public health and at the same time, he was a university lecturer, the head of a private company and a self-employed consultant. In 2020, he acted as an intermediary for the contacts between a Spanish pharmaceutical company and the National Public Health Surveillance Laboratory, a public entity supervised by the Ministry of Health in Lithuania. These contacts led to the purchase of 303,360 COVID-19 tests at a total cost of more than five million euros.

The Special Investigations Service (STT) opened an investigation into the circumstances of the purchase. Narbutas was arrested and held in provisional detention for two days, while he was officially notified that he was suspected of trading in influence and had requested and accepted a bribe of EUR 303 360, disguised as commission, from the pharmaceutical company.

The same day, the STT published a press release on its website, mentioning Narbutas' full name and earlier function as head of POLA, stating that he was suspected of trading in influence and that searches, seizures, interviews and other

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necessary investigative measures were being carried out in various locations in Vilnius.

The information included in the press release was republished by several major news websites. The spokesperson for the STT also gave interviews to various journalists, providing essentially the same information as in the press release. The next day, after Narbutas was released from detention and placed under house arrest, he and the prosecutor spoke to several journalists, and the videos of their interviews or quotes were published online the same day.

Some of the news articles also included photographs or videos of Narbutas being led into the courtroom by police officers with his hands behind his back. In the interviews, Narbutas criticised the STT's use of criminal-law measures against what he considered to have been lawful commercial activity. In the following days the case was breaking news in Lithuania, with several politicians commenting on the lack of transparency about purchasing such a large number of COVID-19 tests.

Narbutas continued to give more interviews to various news outlets and publish posts on his Facebook page, in which he discussed his role in the purchase of the tests, insisting that his actions had been lawful. He criticised, in particular, the actions of the STT. A few weeks later, Narbutas was officially warned by the prosecutor's office that he was not allowed to disclose information about the pre-trial investigation without the prosecutor's permission. Several appeals to lift the ban commenting on his case failed.

In 2023, Narbutas was acquitted by the Vilnius Regional Court, finding that Narbutas had not acted in breach of the criminal law. The prosecutor appealed against this acquittal, and the case was still pending during the proceedings before the ECtHR.

Narbutas lodged a series of complaints with the ECtHR, including a breach of this right to reputation under Article 8 and his right to freedom of expression under Article 10 ECHR. He complained that the STT had revealed his name and employment history on the day of his arrest in a press release, and that he was escorted to a court hearing in front of journalists. He asserted that this exposure and regularly commenting on the case in the media by the STT and public officials had violated his rights under Article 6 § 2 (presumption of innocence) and Article 8 ECHR.

The ECtHR found that the domestic authorities failed to strike a fair balance between the authorities' right to inform the public of the pre-trial investigation under Article 10 ECHR and Narbutas' right to respect for his private life, including his reputation, under Article 8 ECHR. The ECtHR was unable to find that the degree of Narbutas' notoriety or his public role was such as to justify the disclosure of his identity by the STT when announcing the suspicions against him.

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It emphasised that Narbutas was not a politician and was not in public office at the time: he was a university lecturer, the head of a private company and a self-employed consultant. Although he had previously been an advisor to an MP and the President, his work in those positions had ended ten and four years respectively prior to the events in question.

Furthermore, the ECtHR shared Narbutas' view that by making his identity public, the authorities increased the media's interest in the case and created the conditions for the impugned photographs and videos of him to be taken and published. Narbutas did not voluntarily expose himself to the public but was forced to attend the court hearing, and, under these circumstances, he had no means to protect his privacy and to prevent journalists from obtaining the images of him being led by police officers in a position which made it appear as if he was handcuffed.

The ECtHR also found that some parts in the press releases of STT, quoting the prosecutor's statements, amounted to a moral judgment of Narbutas, expressed in strong and unambiguous terms, liable to damage his reputation. Hence, although the ECtHR agreed that the pre-trial investigation against Narbutas concerned a matter of public interest and that providing the public with information about this investigation contributed to a debate of public interest, it found that the way the Lithuanian authorities had given publicity to the case had violated Narbutas' right to reputation under Article 8 ECHR.

The ECtHR also reiterated that the authorities cannot be prevented from informing the public of criminal investigations in progress. However, they are required to do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected. Lastly, the ECtHR also referred to the fact that all the press releases and articles reproducing the authorities' statements about the case were available online. It referred to the risk of harm posed by content and communications on the internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life. Such a risk of harm is certainly higher than that posed by the press, mainly on account of the important role of search engines. Therefore, the ECtHR found that the content and form of the press releases and public comments issued by the investigating authorities were not justified by the need to inform the public of the ongoing criminal proceedings and that they were such as to cause serious damage to Narbutas' reputation.

The ECtHR also found that by imposing a ban on Narbutas from discussing the case in the media and on his Facebook page, the authorities were liable for creating a chilling effect and had precluded Narbutas from expressing himself publicly about the pre-trial investigation. It observed that by the time the warning was given, a significant amount of information about the pre-trial investigation

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had already become public. There were no indications that Narbutas may have disclosed information about secret surveillance measures or any other confidential information about the pre-trial investigation.

Where a case is widely covered in the media, on account of the seriousness of the facts and the individuals likely to be implicated, an individual cannot be penalised for breaching the secrecy of the judicial investigation where they have merely made personal comments on information which is already known to the journalists and which they intend to report, with or without those comments. Therefore, the ECtHR concluded that the interference with Narbutas' right to freedom of expression violated his right under Article 10 ECHR.

Judgment by the European Court of Human Rights, Second section, in the case Narbutas v. Lithuania, Application no. 14139/21, 19 December 2023.

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