



Conviction of journalists for an interview using a hidden camera infringed their freedom of expression

In its **Chamber judgment**¹ issued today in the case of **Haldimann and Others v. Switzerland** (application no. 21830/09), the European Court of Human Rights held, by a majority, that there had been:

A violation of Article 10 (freedom of expression) of the European Convention on Human Rights.

The case concerned the conviction of four journalists for having recorded and broadcast an interview of a private insurance broker using a hidden camera, as part of a television documentary intended to denounce the misleading advice provided by insurance brokers.

In this case, the Court was for the first time called on to examine an application concerning the use of hidden cameras by journalists to provide public information on a subject of general interest, whereby the person filmed was targeted not in any personal capacity but as a representative of a particular professional category.

The Court considered that the interference in the private life of the broker, who had turned down an opportunity to express his views on the interview in question, had not been serious enough to override the public interest in information on malpractice in the field of insurance brokerage.

Main facts

The applicants, Ulrich Mathias Haldimann, Hansjörg Utz, Monika Annemarie Balmer and Fiona Ruth Strebelt, are Swiss nationals who were born in 1953, 1950 and 1969 and live in Uster, Zurich, Bäretswil and Nussbaumen respectively. They are journalists.

In February 2003 Ms Balmer, the editor of “*Kassensturz*”, a weekly TV programme on consumer protection, which has been a regular feature on Swiss German television (SF DRS) for many years, prepared a documentary on sales of life insurance products, against a background of public discontent with the practices used by insurance brokers.

She agreed with the editor responsible for the programme, Mr Utz, and Mr Haldimann, the editor-in-chief of SF DRS, to record interviews between customers and brokers, using a hidden camera to highlight insurance broker malpractice. Ms Strebelt, an SF DRS journalist posing as a customer, met with an insurance broker from company X on 26 February 2003. Two hidden cameras were placed in the room in which the interview was to take place, transmitting the recording of the conversation to a neighbouring room in which Ms Balmer and an insurance specialist had taken up position.

At the end of the interview Ms Balmer entered the room, introduced herself and explained to the broker that he had been filmed. The broker said that he had suspected as much, and refused to comment when invited to do so by the editor. On 25 March 2003 sequences from the recording were broadcast on the “*Kassensturz*” programme, with the broker’s face and voice disguised.

¹ Under Articles 43 and 44 of the Convention, Chamber judgments are not final. During the three-month period following a Chamber judgment’s delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Under Article 28 of the Convention, judgments delivered by a Committee are final.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

On 5 November 2007 Mr Haldimann, Mr Utz and Ms Balmer were convicted of having made a recording using a hidden camera and given penalties of 15 day-fines of 350 Swiss Francs (CHF), CHF 200 and CHF 100 respectively, while five day-fines of CHF 30 were imposed on Ms Strebel. The applicants appealed to the Federal Court, which ruled that, while acknowledging the major public interest of securing information on practices in the insurance field, which was liable to be weightier than the individual interests at issue, the journalists could have used a different approach less damaging to the broker's private interests.

By a judgment of the High Court of the Canton of Zürich of 24 February 2009, the applicants were acquitted of the charge of violating the secret or private domain by means of a film camera, and their penalties were reduced slightly to 12 day-fines for the first three applicants and four day-fines for Ms Strebel.

Complaints, procedure and composition of the Court

Relying on Article 10 (freedom of expression), the applicants complained that their sentence to payment of fines had amounted to a disproportionate interference in their right to freedom of expression.

The application was lodged with the European Court of Human Rights on 3 April 2009.

The Media Legal Defence Initiative (MLDI) was authorised to intervene in the written proceedings as a third party (under Article 36 § 2 of the Convention).

The judgment was given by a Chamber made up of the following seven judges:

Işıl Karakaş (Turkey), *President*,
András Sajó (Hungary),
Nebojša Vučinić (Montenegro),
Helen Keller (Switzerland),
Paul Lemmens (Belgium),
Egidijus Kūris (Lithuania),
Robert Spano (Iceland),

and Stanley Naismith, *Section Registrar*.

The Court's decision

The Court reiterated its case-law on attacks on the personal reputations of public figures and the six criteria which it had established in order to weigh freedom of expression against the right to private life: contributing to a debate of general interest, ascertaining how well-known the person being reported on is and the subject of the report/documentary, that person's prior conduct, the method of obtaining the information, the veracity, content, form and repercussions of the report/documentary, and the penalty imposed. The Court applied those criteria to the present case, but took account of its specificity: the person concerned, that is to say the broker, was not a well-known public figure, and the documentary in question had not been geared to criticising him personally but to denouncing specific commercial practices.

The Court first of all observed that the subject of the documentary produced, i.e. the low-quality advice offered by private insurance brokers, and therefore the inadequate protection of consumers' rights, was part of a very interesting public debate.

The Court secondly noted that, even if the broker might reasonably have believed that the interview was strictly private, the documentary in question had focused not on him personally but on specific commercial practices used within a particular professional category.

The Court further asserted that the applicants deserved the benefit of the doubt in relation to their desire to observe the ethics of journalism as defined by Swiss law, citing the example of their limited use of the hidden camera. The safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest was subject to the proviso that they were acting in good faith and on an accurate factual basis and provided “reliable and precise” information in accordance with the ethics of journalism. The Court noted in this respect that the veracity of the facts as presented by the applicants had never been contested.

As regards the manner in which the documentary had been broadcast and the broker presented, the Court observed that the recording had been broadcast in the form of a report which was particularly negative in as far as the broker was concerned, using an audio-visual media which was often much more immediate and powerful in effect than the written press. However, a decisive factor was that the applicants had disguised the broker’s face and voice and that the interview had not taken place on his usual business premises.

The Court thus held that the interference in the private life of the broker, who had decided against expressing an opinion on the interview, had not been serious enough to override the public interest in receiving information on the alleged malpractice in the field of insurance brokerage.

Lastly, the Court considered that despite the relative leniency of the penalties of 12 day-fines and four day-fines respectively, the criminal court sentence had been liable to discourage the media from expressing criticism, even though the applicants had not been prevented from broadcasting their documentary.

The Court therefore concluded that there had been a violation of Article 10.

Just satisfaction (Article 41)

Since the applicants had not submitted any claim for just satisfaction, the Court considered that there was no need to grant any compensation on this count.

Separate opinion

Judge Lemmens expressed a dissenting opinion, which is appended to the judgment.

The judgment is in French only.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.