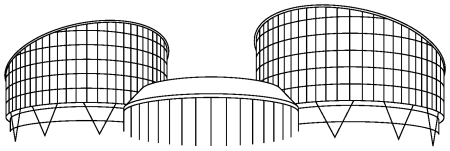

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF HALDIMANN AND OTHERS v. SWITZERLAND

(Application no. 21830/09)

JUDGMENT

STRASBOURG

24 February 2015

FINAL

24/05/2015

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Haldimann and Others v. Switzerland,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Işıl Karakaş, *President*,
András Sajó,
Nebojša Vučinić,
Helen Keller,
Paul Lemmens,
Egidijus Kūris,
Robert Spano, *judges*,
and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 20 January 2015,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 21830/09) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by four Swiss nationals, Mr Ulrich Mathias Haldimann ("the first applicant"), Mr Hansjörg Utz ("the second applicant"), Ms Monika Annemarie Balmer ("the third applicant") and Ms Fiona Ruth Strebel ("the fourth applicant"), on 3 April 2009.

2. The applicants were represented by Mr R. Mayr von Baldegg, a lawyer practising in Lucerne. The Swiss Government ("the Government") were represented by their Agent, Mr A. Scheidegger, of the European Law and International Human Rights Protection Unit, Federal Office of Justice.

3. The applicants complained of an infringement of their right to freedom of expression as guaranteed by Article 10 of the Convention.

4. On 23 November 2010 the Government were given notice of the application.

5. The Media Legal Defence Initiative (MLDI) was given leave to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1953, 1950, 1969 and 1969 and live in Uster, Zürich, Bäretswil and Nussbaumen respectively.

7. The facts of the case, as submitted by the applicants, may be summarised as follows.

8. In 2003 the third applicant, an editor on the *Kassensturz* television programme, prepared a report on practices employed in selling life-insurance products. The report was prompted by the annual reports of the Private Insurance Ombudsman for the Canton of Zürich and by letters which the programme's editors had received from viewers expressing their dissatisfaction with insurance brokers. *Kassensturz* was a long-running weekly consumer-protection programme on Swiss German television (SF DRS).

9. The third applicant agreed with the first applicant (the editor-in-chief of SF DRS) and the second applicant (the editor in charge of the programme) that she would record meetings between customers and brokers, using a hidden camera, to provide evidence of the brokers' inadequate advice. It was decided that the meetings would be recorded in a private flat and that an insurance expert would then be asked to comment on them.

10. The fourth applicant, a journalist working for SF DRS, arranged a meeting with an insurance broker from the X company, which took place on 26 February 2003. She pretended to be a customer interested in taking out life insurance. The SF DRS crew installed two hidden cameras (*Lipstickkameras*) in the room in which the meeting was to take place, transmitting the recording of the conversation to a neighbouring room where the third applicant and the insurance expert had taken up position, together with a camera operator and a technician who had been assigned to film the expert's views on the meeting.

11. Once the meeting had finished, the third applicant joined the broker and the fourth applicant in the room, introduced herself as an editor of *Kassensturz* and explained to the broker that the conversation had been filmed. The broker replied that he had suspected as much ("*Das habe ich gedacht*"). The third applicant told him that he had made some crucial errors during the meeting and asked him for his views, but he refused to comment.

12. The first and second applicants subsequently decided to broadcast part of the filmed meeting during a forthcoming edition of *Kassensturz*. They suggested that the X company be invited to comment on the conversation and the criticism of the broker's methods, and assured the company that his face and voice would be disguised and would therefore not be recognisable. Before the programme was broadcast, the applicants

proceeded to pixelate the broker's face so that only his hair and skin colour and his clothes could still be made out. His voice was also distorted.

13. On 3 March 2003 the broker brought a civil action in the Zürich District Court, seeking an injunction preventing the programme from being broadcast. The action was dismissed in a decision of 24 March 2003.

14. On 25 March 2003, the day after the application for an injunction to protect the broker's interests had been rejected, excerpts from the meeting of 26 February were broadcast, with the broker's face and voice disguised as planned.

15. On 29 August 2006 the single judge for criminal cases at the Dielsdorf District Court (Canton of Zürich) found the first three applicants not guilty of intercepting and recording conversations of others (offences under Article 179 *bis* §§ 1 and 2 of the Criminal Code), and the fourth applicant not guilty of unauthorised recording of conversations (Article 179 *ter* § 1 of the Criminal Code).

16. Both the Principal Public Prosecutor (*Oberstaatsanwalt*) of the Canton of Zürich and the broker, as an injured party, appealed against the judgment of 29 August 2006.

17. In a judgment of 5 November 2007 the Court of Appeal (*Obergericht*) of the Canton of Zürich found the first three applicants guilty of recording conversations of others (Article 179 *bis* §§ 1 and 2 of the Criminal Code) and breaching confidentiality or privacy by means of a camera (Article 179 *quater* §§ 1 and 2 of the Criminal Code). It also found the fourth applicant guilty of unauthorised recording of conversations (Article 179 *ter* § 1 of the Criminal Code) and breaching confidentiality or privacy by means of a camera (Article 179 *quater* §§ 1 and 2 of the Criminal Code). The first three applicants were given suspended penalties of fifteen day-fines of 350 Swiss francs (CHF), CHF 200 and CHF 100 respectively, while the fourth applicant received a penalty of five day-fines of CHF 30.

18. The applicants appealed jointly to the Federal Court against their convictions, relying in particular on the right to freedom of expression under Article 10 of the Convention. They argued that their recourse to the impugned technique had been necessary to achieve the aim pursued.

19. In a judgment of 7 October 2008, which was served on the applicants' representative on 15 October 2008, the Federal Court allowed the appeal in so far as it concerned the charge of breaching confidentiality or privacy by means of a camera within the meaning of Article 179 *quater* of the Criminal Code. It held that there had been a violation of the principle that the trial must relate to the charges brought and a violation of the rights of the defence, and remitted the case to the lower court.

20. The Federal Court dismissed the remainder of the appeal. It held that the applicants had committed acts falling under Article 179 *bis* §§ 1 and 2 and Article 179 *ter* § 1 of the Criminal Code and dismissed their defence of

justification. It acknowledged that there was a significant public interest in being informed about practices employed in the insurance field, and that this interest was liable to be weightier than the individual interests at stake. However, it considered that the applicants could have achieved their aims by other means entailing less interference with the broker's private interests, for example commenting on the Ombudsman's annual reports or interviewing the Ombudsman's staff or customers dissatisfied with their broker's services. It also found that instead of filming the meeting with a hidden camera, the journalist could have drawn up a record of the conversation, although it acknowledged that the probative value of that method would obviously have been less striking. Lastly, it held that the filming of a single case was insufficient to provide reliable evidence of the scale of the alleged problems, since examples of malpractice in this field were widespread and common knowledge. The broadcasting of an isolated example would therefore not enable the public to draw general conclusions about the quality of advice given by insurance companies.

21. On 24 February 2009 the Court of Appeal of the Canton of Zürich found the applicants guilty of breaching confidentiality or privacy by means of a camera, an offence under Article 179 *quater* of the Criminal Code. It therefore slightly reduced the penalties previously imposed on them: the first three applicants were given twelve day-fines of CHF 350 (approximately 290 euros (EUR)), CHF 200 (approximately EUR 160) and CHF 100 (approximately EUR 80) respectively, instead of fifteen day-fines, and the fourth applicant was given four day-fines of CHF 30 instead of five day-fines. The penalties were all suspended for a probationary period of two years. The applicants did not appeal against that judgment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

22. The relevant provisions of the Swiss Criminal Code are worded as follows:

Article 179 *bis*: Intercepting and recording conversations of others

"A person who, without the consent of all the participants, has intercepted by means of a listening device, or recorded on a recording device, a private conversation between other persons; or

a person who has used or made known to a third party a fact when he knew or should have assumed that his own knowledge of this fact had been obtained by means of an offence under the first paragraph; or

a person who has kept or made available to a third party a recording which he knew or should have assumed had been made by means of an offence under the first paragraph

shall be liable, subject to a complaint being lodged, to a custodial sentence not exceeding three years or to a fine."

Article 179 *ter*: Unauthorised recording of conversations

"A person who, without the consent of the other participants, has recorded on a recording device a private conversation in which he took part; or

a person who has kept a recording which he knew or should have assumed had been made as the result of an offence under paragraph 1 above, or who has used such a recording for his own benefit or has made it available to a third party

shall be liable, subject to a complaint being lodged, to a custodial sentence not exceeding one year or a fine."

Article 179 *quater*: Breach of confidentiality or privacy by means of a camera

"A person who, without the consent of the person concerned, has observed with a camera or recorded with an image-carrying device any matter pertaining to that person's confidential sphere or, where such a matter would not otherwise have been in public view, any matter pertaining to that person's private sphere; or

a person who has used or made known to a third party a fact when he knew or should have assumed that his own knowledge of this fact had been obtained by means of an offence under the first paragraph; or

a person who has kept or made available to a third party a recording which he knew or should have assumed had been obtained by means of an offence under the first paragraph

shall be liable, subject to a complaint being lodged, to a custodial sentence not exceeding three years or a fine."

23. The relevant passages of Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy, adopted by the Assembly on 26 June 1998, read as follows:

"10. It is therefore necessary to find a way of balancing the exercise of two fundamental rights, both of which are guaranteed in the European Convention on Human Rights: the right to respect for one's private life and the right to freedom of expression.

11. The Assembly reaffirms the importance of every person's right to privacy, and of the right to freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value.

12. However, the Assembly points out that the right to privacy afforded by Article 8 of the European Convention on Human Rights should not only protect an individual against interference by public authorities, but also against interference by private persons or institutions, including the mass media.

13. The Assembly believes that, since all member states have now ratified the European Convention on Human Rights, and since many systems of national legislation comprise provisions guaranteeing this protection, there is no need to propose that a new convention guaranteeing the right to privacy should be adopted. ..."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

24. The applicants complained of a violation of the right to freedom of expression as enshrined in Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent states from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

25. The Government contested that argument.

A. Admissibility

26. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

27. The applicants submitted that Articles 179 *bis* and 179 *ter* of the Criminal Code were not sufficiently foreseeable as to their effects. They contended that there was no explicit reference to the use of a hidden camera and that the courts' case-law and the recommendations of the Swiss Press Council were vague. The Federal Court was attempting to impose absolute censorship on journalistic research involving covert investigative techniques, in particular the use of a hidden camera.

28. The applicants added that Articles 179 *bis* and 179 *ter* of the Criminal Code did not require personal communications to be impartial and did not protect personality rights, but rather the confidentiality of communications in the private sphere. The conversation in the present case had taken place during the broker's working hours in a flat not belonging to him. Moreover, there had been no specific relationship of trust between the

journalist and the broker. The question of protecting the broker's private and intimate sphere therefore did not arise, since his voice and face had also been disguised.

29. The applicants further contended that they had complied with the duties and responsibilities incumbent on them in the circumstances at hand. They relied on decision no. 51/2007 of the Swiss Press Council, which had held that covert research was permitted if the information it sought to uncover was in the public interest and could not be obtained by any other means. The subject of the programme, which had aimed to draw public attention to malpractice in the field of private insurance in Switzerland, was of considerable public interest. Moreover, journalists were free to choose the methods they wished to employ to carry out their investigations. A realistic portrayal of the situation had been necessary in this particular case; otherwise, the broker could have successfully brought a civil claim against the journalists. The deterrent effect of the judicial decisions in issue was extremely significant, bearing in mind the absolute nature of the Federal Court's findings. The applicants pointed out that they had given the broker the opportunity to respond to the criticisms after the recording and before the broadcast, and that he had refused to do so.

(b) The Government

30. The Government did not dispute that the convictions in issue constituted "interference" with the applicants' exercise of their right to freedom of expression. However, they submitted that the interference had had a clear and foreseeable basis in law. Article 179 *bis* protected actual conversations and Article 179 *ter* protected spontaneous comments. They applied both to the intimate and private sphere and to the right to one's own image and to non-disclosure of one's own comments, and pursued the legitimate aim of protecting the reputation and rights of others.

31. The Government submitted that the fact that the broker's voice and face had been disguised had no bearing on the lawfulness of the applicants' conduct, since the recording and broadcasting were in themselves punishable by law. Furthermore, as the Federal Court had held, it was not inconceivable that the broker's relatives or colleagues might be able to recognise and identify him. In addition, no inferences could be drawn from the outcome of the domestic civil proceedings, since these were independent of the criminal proceedings and were based on a different rationale.

32. As to the proportionality of the measure in issue, the Government pointed out that the Federal Court had held that the use of a hidden camera was similar to the methods used by secret investigation authorities or the surveillance of postal correspondence and telecommunications. Such methods were permissible only if certain highly restrictive conditions were satisfied and in the case of extremely serious offences. The Federal Court's decision in the present case had clearly been issued in relation to the

specific circumstances, and not in general terms. The Government noted that the Federal Court had acknowledged that there was a considerable public interest in being informed of any shortcomings in the field of selling life insurance, but had found that the report broadcast in the present case had simply highlighted problems that were already well known, without revealing anything new. They agreed with the Federal Court that the journalists could have produced a transcript of the conversation without recording it, or could have used other means that were lawful, and that it was not the journalists' task to gather absolute proof. In addition, the applicants, as experienced journalists, must have been aware that their conduct rendered them liable to a penalty that was not unreasonable in the present case.

(c) Media Legal Defence Initiative (MLDI), third-party intervener

33. MLDI, intervening as a third party, emphasised the importance of undercover techniques in producing certain types of report, particularly when it was necessary to strip away the carefully cultivated image of powerful or sophisticated organisations or to enter a clandestine world, access to which was restricted. When used in an ethical and focused fashion, such techniques were valuable tools of last resort to expose real practices that could not realistically be identified by other means. There was a difference between recordings made at the home or office of the person concerned and recordings made elsewhere. MLDI pointed out that many European States accepted undercover techniques while regulating their use.

2. The Court's assessment

34. It is not in dispute between the parties that the applicants' conviction constituted "interference by public authority" with their right to freedom of expression.

35. Such interference will infringe the Convention unless it satisfies the requirements of paragraph 2 of Article 10. The Court must therefore determine whether it was "prescribed by law", pursued one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" to achieve those aims.

(a) Prescribed by law

36. The Court reiterates its settled case-law, according to which the expression "prescribed by law" not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects (see, among other authorities, *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V; *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, § 52, ECHR 2001-VI; *Gawęda*

v. Poland, no. 26229/95, § 39, ECHR 2002-II; and *Maestri v. Italy* [GC], no. 39748/98, § 30, ECHR 2004-I). However, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see *Kruslin v. France*, 24 April 1990, § 29, Series A no. 176-A, and *Kopp v. Switzerland*, 25 March 1998, § 59, *Reports of Judgments and Decisions* 1998-II).

37. In the present case it has not been disputed that the applicants were convicted on the basis of a law that was accessible, namely Articles 179 *bis* and 179 *ter* of the Swiss Criminal Code. However, the applicants submitted that those provisions were not foreseeable as to their effects, as they did not contain any explicit prohibition of the use of a hidden camera.

38. The Court observes that the only difference in the parties' interpretation of these two Articles of the Swiss Criminal Code concerns their purpose, namely the aspects of privacy and personality rights which they are designed to protect; the applicants have not maintained that the type of punishable conduct defined in those Articles was unclear.

39. The Court therefore considers that the applicants – as journalists and editors making television programmes for a living – could not have failed to realise that by using a hidden camera without the consent of a person who was the subject of a report and by broadcasting the report without that person's permission, they were liable to a criminal penalty.

40. It thus concludes that the impugned interference was "prescribed by law" within the meaning of the second paragraph of Article 10 of the Convention.

(b) Legitimate aim

41. The Government submitted that the applicants' conviction had pursued the legitimate aim of protecting the reputation and rights of others, specifically the insurance broker in question. The applicants, meanwhile, argued that the interference could not have pursued such an aim since the broker's face and voice had been disguised, with the result that there had been no injury to his rights and reputation.

42. The Court observes that the broker's image and voice were recorded without his knowledge and then broadcast against his wishes, anonymously but portraying him in a disparaging light – as a professional giving inaccurate advice – in a television programme with high viewing figures.

43. It therefore considers that the measure in issue may have pursued the aim of protecting the rights and reputation of others, specifically the broker's right to respect for his own image, words and reputation.

(c) Necessary in a democratic society

(i) General principles

44. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, freedom of expression is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among other authorities, *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24; *Editions Plon v. France*, no. 58148/00, § 42, ECHR 2004-IV; and *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-IV).

45. The Court has also repeatedly emphasised the essential role played by the press in a democratic society. Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, §§ 59 and 62, ECHR 1999-III, and *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 71, ECHR 2004-XI). Although formulated primarily with regard to the print media, these principles doubtless apply also to the audiovisual media (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298).

46. Article 10 § 2 of the Convention states that freedom of expression carries with it "duties and responsibilities", which also apply to the media even with respect to matters of serious public concern. These duties and responsibilities are liable to assume particular significance when there is a question of attacking the reputation of a named individual or, more generally, infringing the "rights of others". Thus, special grounds are required before the media can be released from their ordinary obligation to verify their information and not publish factual statements that are defamatory. Whether such grounds exist depends in particular on the nature and degree of the allegations in question and the extent to which the media can reasonably regard their sources as reliable in that respect (see *Pedersen and Baadsgaard*, cited above, § 78, and *Tønsbergs Blad A.S. and Haukom v. Norway*, no. 510/04, § 89, 1 March 2007).

47. The Court further reiterates that all persons, including journalists, who exercise their freedom of expression undertake "duties and responsibilities", the scope of which depends on their situation and the technical means they use (see *Stoll v. Switzerland* [GC], no. 69698/01, § 102, ECHR 2007-V). Thus, notwithstanding the vital role played by the media in a democratic society, journalists cannot in principle be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection. Paragraph 2 of Article 10 does not, moreover, guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern (ibid., § 102).

48. When examining the necessity in a democratic society of an interference in the interests of the "protection of the reputation or rights of others", the Court may be required to ascertain whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely, on the one hand, freedom of expression as protected by Article 10 and, on the other, the right to respect for private life as enshrined in Article 8 (see *Hachette Filipacchi Associés v. France*, no. 71111/01, § 43, 14 June 2007, and *MGN Limited v. the United Kingdom*, no. 39401/04, § 142, 18 January 2011).

49. Moreover, the right to protection of reputation is a right which is protected by Article 8 of the Convention as an aspect of private life (see *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI; *Pfeifer v. Austria*, no. 12556/03, § 49, 15 November 2007; *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, § 40, 21 September 2010; and *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012). In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *A. v. Norway*, no. 28070/06, § 64, 9 April 2009).

50. In previous cases the Court has had to examine attacks on the personal reputation of public figures (see *Axel Springer AG*, cited above). It has established six criteria for analysing whether a balance has been struck between the right to freedom of expression and the right to respect for private life: contribution to a debate of general interest; how well known the person concerned is and what is the subject of the report; the prior conduct of the person concerned; the method of obtaining the information and its veracity; the content, form and consequences of the publication; and the severity of the sanction imposed (ibid., §§ 90-95).

51. The Court has also dealt with cases involving defamation with a bearing on an individual's professional activities (a doctor in *Kanellopoulou v. Greece*, no. 28504/05, 11 October 2007; the director of a State-subsidised company in *Tănăsoaica v. Romania*, no. 3490/03, 19 June 2012; or judges in *Belpietro v. Italy*, no. 43612/10, 24 September 2013).

52. The present case differs from those previous cases in that, firstly, the broker was not a well-known public figure and, secondly, the report in question did not seek to criticise him personally but to denounce certain commercial practices employed within his profession (contrast *Kanellopoulou*, cited above). The impact of the report on the broker's personal reputation was therefore limited, and the Court will take this particular aspect of the case into account in applying the criteria established in its case-law.

53. The Court further reiterates that the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent an interference with the freedom of expression guaranteed under Article 10 of the Convention is necessary (see *Tammer v. Estonia*, no. 41205/98, § 60, ECHR 2001-I, and *Pedersen and Baadsgaard*, cited above, § 68).

54. In cases such as the present one the Court has held that the outcome of the application should not, in principle, vary according to whether it has been lodged with it under Article 10 of the Convention by the journalist who has published the offending article or under Article 8 by the person who was the subject of that article. Indeed, as a matter of principle these rights deserve equal respect (see *Hachette Filipacchi Associés (ICI PARIS) v. France*, no. 12268/03, § 41, 23 July 2009; *Timciuc v. Romania* (dec.), no. 28999/03, § 144, 12 October 2010; and *Mosley v. the United Kingdom*, no. 48009/08, § 111, 10 May 2011; see also paragraph 11 of the Parliamentary Assembly resolution cited in paragraph 23 above). Accordingly, the margin of appreciation should in principle be the same in both cases.

55. Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its own view for that of the domestic courts (see *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 57, 12 September 2011, and *MGN Limited*, cited above, §§ 150 and 155).

(ii) Application of these principles in the present case

56. The Court must first establish whether the report in question concerned a matter of public interest. It observes at the outset that the subject of the report, namely the poor-quality advice offered by private insurance brokers, raised an issue in terms of consumer protection and thus concerned a debate of considerable public interest.

57. It is also important to examine whether the report in question was capable of contributing to the public debate on this issue (see *Stoll*, cited above, § 121). In this connection, the Court observes that the Federal Court found that the subject could in itself have been in the public interest if the journalists had made an attempt to determine the scale of the phenomenon,

but that the report had not brought to light any new information on the quality of advice offered by insurance brokers. It further held that other methods, entailing less interference with the broker's interests, could have addressed this issue satisfactorily. The Court considers, however, that all that matters is whether the report was capable of contributing to debate on a matter of public interest and not whether it fully achieved that objective.

58. It therefore accepts that the report in issue addressed a matter of public interest.

59. The Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on freedom of expression in matters of public interest (see *Sürek v. Turkey* (no. 1) [GC], no. 26682/95, § 61, ECHR 1999-IV; *Stoll*, cited above, § 106; *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports* 1996-V; and *Dupuis and Others v. France*, no. 1914/02, § 40, 7 June 2007).

60. Admittedly, as noted above, the broker who was filmed without his knowledge was not a public figure. He had not given his consent to being filmed and could therefore have "had a reasonable expectation of privacy" as regards the conversation (see, *mutatis mutandis*, *Halford v. the United Kingdom*, 25 June 1997, §§ 44-45, *Reports* 1997-III, and *Perry v. the United Kingdom*, no. 63737/00, §§ 36-43, ECHR 2003-IX). However, the report did not focus on the broker himself but on certain commercial practices employed within a particular profession. Furthermore, the meeting did not take place in the broker's offices or any other business premises (see, by contrast and *mutatis mutandis*, *Chappell v. the United Kingdom*, 30 March 1989, § 51, Series A no. 152-A; *Niemietz v. Germany*, 16 December 1992, §§ 29-33, Series A no. 251-B; *Funke v. France*, 25 February 1993, § 48, Series A no. 256-A; *Crémieux v. France*, 25 February 1993, § 31, Series A no. 256-B; and *Miailhe v. France (no. 1)*, 25 February 1993, § 28, Series A no. 256-C). The Court therefore considers that the interference with the broker's private life was less serious than if the report had been personally and exclusively focused on him.

61. The way in which the information was obtained and its veracity are also important factors. The Court has previously held that the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism (see, for example, *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I; *Pedersen and Baadsgaard*, cited above, § 78; *Stoll*, cited above, § 103; and *Axel Springer AG*, cited above, § 93). It observes in the present case that although the parties referred to different sources, they nonetheless agreed in substance that the use of a hidden camera was not absolutely prohibited in domestic law, but could be accepted subject to strict conditions (see paragraphs 29 and 32 above). It was not disputed among the parties that the

use of this technique was permitted only where there was an overriding public interest in the dissemination of the relevant information, provided that such information could not be obtained by any other means. The Court has already established that the report concerned a matter of public interest. It considers that what is important at this stage is an assessment of the applicants' conduct. Although the broker might legitimately have felt that he had been deceived by the journalists, they nevertheless cannot be accused of having deliberately acted in breach of professional ethics. They did not disregard the rules on journalism as laid down by the Swiss Press Council (see paragraph 29 above) limiting the use of hidden cameras, but instead inferred – incorrectly, in the view of the Federal Court – that the subject of their report entitled them to obtain information by that means. The Court notes that the Swiss courts themselves were not unanimous on this question, since they acquitted the applicants at first instance before subsequently convicting them. That being so, the Court considers that the applicants should be given the benefit of the doubt as to whether they really intended to comply with the ethical rules applicable to the present case regarding the method used to obtain information.

62. As regards the facts of the case, their veracity has never been disputed. Whether it might have been of more interest to consumers, as the Government argued, to expose the scale of the alleged problems rather than their nature has no bearing on this finding.

63. The Court further reiterates that the way in which a report or photograph is published and the manner in which the person concerned is portrayed in it may also be factors to be taken into consideration (see *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft m.b.H. v. Austria (no.3)*, nos. 66298/01 and 15653/02, § 47, 13 December 2005; *Reklos and Davourlis v. Greece*, no. 1234/05, § 42, 15 January 2009; and *Jokitaipale and Others v. Finland*, no. 43349/05, § 68, 6 April 2010). The extent to which the report and photograph have been disseminated may also be an important factor, depending on whether the newspaper is a national or local one, and has a large or a limited circulation (see *Iltalehti and Karhuvaara v. Finland*, no. 6372/06, § 47, 6 April 2010).

64. In the present case the Court observes that the applicants recorded a conversation featuring the images and sound of purported negotiations between the broker and the journalist. It considers that the recording itself entailed only limited interference with the broker's interests, given that only a restricted group of individuals had access to the recording, as the Government accepted.

65. The recording was then broadcast as part of a report which was particularly disparaging towards the broker, as the Court has already noted. Although only brief excerpts of the recording were shown, this footage was liable to entail a more significant interference with the broker's right to privacy, since it was seen by a large number of viewers – approximately

10,000 according to the Government. The Court acknowledges that the audiovisual media often have a much more immediate and powerful effect than the print media (see *Jersild*, cited above, § 31). Viewers of the programme were thus able to form an opinion as to the quality of the broker's advice and his lack of professionalism. Nevertheless, a decisive factor in the present case is that the applicants had pixelated the broker's face so that only his hair and skin colour could still be made out; they also distorted his voice. Furthermore, although the broker's clothes were still visible, they did not have any distinctive features either. Lastly, the meeting did not take place in the broker's usual business premises.

66. The Court therefore considers, having regard to the circumstances of the case, that the interference with the private life of the broker – who, it reiterates, declined to comment on the interview – was not so serious (see *A. v. Norway*, cited above) as to override the public interest in information about alleged malpractice in the field of insurance brokerage.

67. Lastly, the Court must take into account the nature and severity of the sanction. It reiterates in this connection that in some cases, a person's conviction in itself may be more important than the minor nature of the penalty imposed (see *Stoll*, cited above, §§ 153-154). In the present case, although the pecuniary penalties of twelve day-fines for the first three applicants and four day-fines for the fourth applicants were relatively modest, the Court considers that the sanction imposed by the criminal court may be liable to deter the media from expressing criticism (ibid., § 154), even though the applicants themselves were not denied the opportunity to broadcast their report.

68. Having regard to the foregoing, the Court considers that the measure in dispute in the present case was not necessary in a democratic society. There has therefore been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

69. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

70. The applicants did not submit a claim for just satisfaction. Accordingly, there is no call to award them any sum on that account.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by six votes to one, that there has been a violation of Article 10 of the Convention.

Done in French, and notified in writing on 24 February 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith	Işıl Karakaş
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Lemmens is annexed to this judgment.

A.I.K.
S.H.N.

DISSENTING OPINION OF JUDGE LEMMENS

1. To my regret, I am unable to follow the majority in concluding that there has been a violation of Article 10 of the Convention in the present case.

2. This case concerns the criminal conviction of four journalists and editors for making a covert recording of a conversation between one of them and an insurance broker and broadcasting excerpts of the conversation on television, in an "anonymous" form.[1]

The convictions were based on two Articles of the Swiss Criminal Code. In the case of the first three applicants, who had not taken part themselves in the conversation with the broker, the offences in question were the recording of a private conversation between other persons without their consent (Article 179 *bis* § 1) and the disclosure to third parties of a fact obtained by means of such a recording (Article 179 *bis* § 2). In the case of the fourth applicant, who had posed as a customer and spoken with the broker, the offence consisted of the recording of a private conversation by one of the persons taking part, without the other's consent (Article 179 *ter* § 1).

The offences in question are general in scope. In providing for them, the Criminal Code is not specifically targeting journalists. The recording and the broadcasting of a private conversation are prohibited irrespective of their purpose, whether journalistic or not.

3. It seems useful to me to note how the Federal Court approached the case.

At all levels of jurisdiction, the applicants' main submission was that the above-mentioned provisions of the Criminal Code were not applicable to them, on the grounds that the conversation had not been "private". The Federal Court dismissed that argument. It found that the acts of which the applicants were accused fell – objectively and subjectively – within the scope of the provisions cited. In doing so, it explicitly held that a conversation could be protected by Articles 179 *bis* and 179 *ter* of the Criminal Code, even if it did not concern the "intimate or private" sphere of

1. I would observe that the applicants were not convicted for having made a recording with a hidden camera. The considerations set out in paragraph 61 of the judgment as to the lack of an absolute prohibition on hidden cameras in Swiss law and the rules on professional ethics laid down by the Swiss Press Council are to my mind of little relevance. It may well be true that a hidden camera can lawfully be used in certain circumstances (for example, to film what is happening at a particular location), but once this technique is used to record a private conversation, it becomes prohibited by Articles 179 *bis* and 179 *ter* of the Criminal Code. The Federal Court's judgment is clear on this point: the applicants used a technique that is prohibited and punishable by law. Rules on professional ethics cannot change that fact in any way.

those taking part.[2] In this connection, Articles 179 *bis* and 179 *ter* were, in the Federal Court's view, analogous to Article 179, which protects the secrecy of correspondence, irrespective of the contents thereof. This implies, in my opinion, that the purpose of Articles 179 *bis* and 179 *ter* is to protect in general terms the confidentiality of any private conversation.

In the proceedings before the domestic courts, the applicants relied in the alternative on freedom of opinion and information and freedom of the media for the purposes of protecting legitimate interests: they submitted that the technique they had used had been necessary to preserve overriding legitimate interests. More specifically, they maintained that the recording and broadcasting of an actual conversation had been necessary to provide the public with proof of the existence of widespread abuses in the advice given by insurance brokers.

This argument was likewise rejected by the Federal Court, which pointed out, firstly, that in order for the protection of legitimate interests to apply, the criminal act had to be a necessary and appropriate means of achieving a legitimate aim – indeed, the only possible way of achieving that aim – and that the legal interest protected by the statutory prohibition had to carry less weight than the interest which the perpetrator of the act was seeking to preserve. The Federal Court then accepted the applicants' argument that the aim of informing the public of the existence of abuses regarding insurance advice constituted a legitimate interest. It also acknowledged the specific situation of journalists, who were able to rely on freedom of the media. The reason why it nevertheless considered the applicants' line of defence unfounded was that, in the particular circumstances of the case, the technique of recording a specific conversation with a specific broker, without the latter's knowledge, and then broadcasting it had not been a "necessary" means of achieving the aim pursued. In the Federal Court's view, this aim could also have been achieved by other means, in conformity with the criminal law.[3]

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2. In paragraph 60 of the judgment, the majority consider that while the broker could have "had a reasonable expectation of privacy" as regards his conversation with the fourth applicant, various circumstances indicated that the interference with the broker's private life was relatively insignificant. In my opinion, the majority have overlooked the fact that Articles 179 *bis* and 179 *ter* of the Criminal Code guaranteed that the confidentiality of the broker's conversation with the fourth applicant would be protected. This guarantee was firmly enshrined in law and in no way amounted to a mere "reasonable expectation" on the broker's part. Furthermore, the existence of a legal guarantee could likewise not be affected by the circumstances in which the act breaching the guarantee was carried out.

3. The majority have not attached any importance to the fact that the reasoning pursued in the Federal Court's decision related mainly to the applicants' plea of justification. For example, in paragraph 57 of the judgment they criticise the Federal Court's finding that the report in issue had not added anything new to the debate on poor-quality advice. This criticism would be understandable if the Federal Court had made such an analysis in the context of assessing the "necessity" of the interference for Convention purposes, but is much less so in the context of its examination of whether the journalists' actions were

Accordingly, the Federal Court's conclusion that the applicants' conviction had been justified on legal grounds was mainly based on an interpretation of the conditions laid down in domestic law for determining whether their plea of justification was valid, and on a factual assessment of their conduct.

4. The majority take the view that the legitimate aim pursued by the interference was that of "protecting the rights and reputation of others, specifically the broker's right to respect for his own image, words and reputation" (see paragraph 43 of the judgment).

This starting-point leads the majority to treat the case as one involving a conflict between two fundamental rights: the applicants' freedom of expression and the broker's right to respect for his private life. As a logical consequence, they proceed to apply the criteria which the Court established for examining such conflicts in the case of *Axel Springer AG v. Germany* ([GC], no. 39954/08, §§ 89-95, 7 February 2012), cited in paragraph 50 of the judgment. In the majority's view, however, the two rights at stake do not carry comparable weight. Special importance is accorded to freedom of expression, bearing in mind the matter of public interest forming the subject of the report (see paragraphs 56-59 of the judgment). The same cannot be said of the broker's right to respect for his private life. In paragraph 64 the majority consider that the recording entailed only limited interference with the broker's interests, given that only a restricted group of individuals had access to it. In paragraph 65 they add that when the recording was broadcast, the applicants took steps to ensure that the broker would be less recognisable by viewers. The majority conclude in paragraph 66 that "the interference with the private life of the broker ... was not so serious ... as to override the public interest in information about alleged malpractice in the field of insurance brokerage".

To my regret, I cannot agree with this approach. As the Federal Court's judgment indicates, Articles 179 *bis* and 179 *ter* do not seek to protect the private life of specific individuals, but the general confidentiality of private conversations (see paragraph 3 above). In my opinion, the case is much more concerned with the "prevention of [public] disorder" than with the "protection of the reputation or rights of others". Therefore, I do not consider that there is any justification for applying the criteria set out in the *Axel Springer AG* judgment (see paragraphs 56-67 of the judgment). In my

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justified under domestic law. In paragraph 61 the majority criticise the Federal Court's finding that the use of a hidden camera "was permitted only where there was an overriding public interest in the dissemination of the relevant information, provided that such information could not be obtained by any other means". Again, this assessment was made by the Federal Court in the context of its examination of the applicants' plea of justification. The Federal Court did not seek to ascertain the extent to which the use of a hidden camera was acceptable, but simply determined the extent to which persons accused of recording and broadcasting a conversation protected by law could legitimately raise a plea of justification.

view, the reasoning in the present case should have been closer to that adopted in *Stoll v. Switzerland* ([GC], no. 69698/01, ECHR 2007-V), cited in paragraph 47 of the judgment. The *Stoll* case concerned a conflict between freedom of expression and preservation of the confidential nature of certain items of information. As in *Stoll*, the public-interest consideration advanced by the judicial authorities in the present case related to public order, as enshrined in criminal law, and not to merely private interests.

It is true that the Government referred solely to the legitimate aim of protecting the reputation or rights of others (see paragraph 41 of the judgment). However, in the particular circumstances of the case, where the aim referred to by the Government is not entirely consistent with the reasoning of the Federal Court judgment, I do not consider the Court to be bound by the line of argument put forward by the Government. After inviting the parties, if need be, to submit comments on whether the aim of preventing disorder should also be taken into consideration, it should have been able to focus on the latter aim.

5. As to whether the interference was necessary, my views can be briefly stated.

As the majority acknowledge, "journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection" (see *Stoll*, cited above, § 102, cited in paragraph 47 of the judgment). The question is whether the present case involved an exceptional situation. Such a situation can only result from according precedence to freedom of expression.

I accept that the report concerned a matter of public interest and that freedom of expression enjoys a high degree of protection. However, in my opinion the interest safeguarded by the statutory provisions in issue, namely protection of the confidentiality of private conversations, likewise carried considerable weight (see paragraph 4 above).

A difficult balancing exercise thus remains to be carried out. Here, the national authorities enjoy a certain margin of appreciation. In finding that the applicants' conduct could not be excused on grounds of justification – that is, by a reason allowing them to disobey the criminal law – the Federal Court does not appear to have been arbitrary or manifestly unreasonable in its assessment. Having regard to the interests at stake, I likewise do not consider that the applicants' conviction was disproportionate to the legitimate aim pursued by the law, and thus conclude that there has been no violation of Article 10 of the Convention.