



In the European Court of Human Rights

App. No. 11915/15

Between

Endy GESINA-TORRES

Applicant

v.

POLAND

Respondent Government

Third-party intervention submissions by ARTICLE 19

Introduction

1. This third-party intervention is submitted on behalf of ARTICLE 19: Global Campaign for Free Expression (ARTICLE 19), an independent human rights organisation that works around the world to protect and promote the right to freedom of expression and the right to freedom of information. It takes its name from Article 19 of the Universal Declaration of Human Rights. ARTICLE 19 monitors threats to freedom of expression in different regions of the world, as well as national and global trends, and develops long-term strategies to address them, and advocates for the implementation of the highest standards of freedom of expression, nationally and globally.
2. ARTICLE 19 welcomes the opportunity to intervene in this case, by the leave of the President of the 4th Section of the Court of 17 February 2017, under Rule 44 (3) of the Rules of Court.
3. The applicant, Endy Gesina-Torres, is a Polish journalist who was commissioned by public service television to report on the living conditions in immigration detention centres. In order to gain access to a detention centre, the Guarded Centre for Foreigners in Białystok, he pretended to be an irregular migrant: he gave the police a fictitious name, claimed he had crossed the Polish border in an irregular manner and had no documents. By a subsequent judicial decision, the applicant spent three weeks in the facility, making recordings with his mobile phone. After his real identity was discovered, he was found guilty of various offences; however, no restriction on publishing what he had recorded during his stay in the centre was imposed.

4. The submission does not address the facts or merits of the applicant's case. Instead, it provides an overview of international and comparative standards that are relevant to the case. Namely:
 - The right of journalists to seek and impart information on matters of public concern and the corresponding right of the public to receive information and ideas, including the widest possible diversity of viewpoints;
 - The importance of the use of undercover and immersion journalistic reporting in investigative journalism;
 - The balance between investigative journalism on matters of public concern and the impact on public trust in public institutions.

I. Matters of public concern and media diversity

5. ARTICLE 19 submits that the present case has to be considered in the context of a broad right to impart information in the public interest to the public, and the corresponding right of the public to receive such information. It is a well-established principle of international law on freedom of expression that where political speech and generally matters of public interest are concerned, “a high level of protection of freedom of expression, with the authorities thus having a particularly narrow margin of appreciation, will normally be accorded.”¹
6. The free flow of information and ideas allows individuals to become aware of current events, and of the actions and decisions of public authorities, which empowers them to engage in public debates and social movements, hold elected representatives to account, and contribute to open and transparent public governance. Only an informed citizenry can take part in political, economic, social and cultural dimensions of life in society. This is the reason why media – and other contributors to public debates – have the right to ‘seek and impart’ information and ideas on matters of general interest, while the public has a corresponding right to receive them: “the adequate functioning of democracy requires the greatest possible circulation of reports, opinions and ideas on matters of public interest.”²
7. A monolithic media landscape, where a single viewpoint on the events and political happenings of the day would be available to the public, could not fulfil this fundamental role of ensuring the public’s right to know. The Committee of Ministers of the Council of Europe very clearly detailed the importance of diversity of media content in its Recommendation CM/Rec(2007)2 on media pluralism and diversity of media content, where they affirmed that

[T]he demands which result from Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms will be fully satisfied only if each person is given the possibility to form his or her own opinion from diverse sources of information.
8. Under international law, States have a positive obligation to create a legal and regulatory framework that ensures media freedom: the role of the State is to enable the development of a media landscape that represents and reflects society as a whole and that presents a

¹ European Court of Human Rights (European Court), Grand Chamber, *Bédat v. Switzerland*, App. No. 56925/08, 29 March 2016, para 49.

² Office of the Special Rapporteur for Freedom of Expression Inter American Commission on Human Rights, *The Inter-American Legal Framework regarding the Right to Freedom of Expression*, 2010, para 33.

maximum diversity of voices, viewpoints and languages.³ In that sense, the regional human rights courts have repeatedly underscored the importance of a plurality of opinions for public debate, and the importance of the public having access to information and ideas from a diversity of sources, from those with different positions or points of view, and from different media outlets, to best inform their opinion.⁴

9. Editorial independence is a crucial aspect of media freedom. The manner in which a particular matter has been investigated and discussed by a particular media company should in no way prevent other media actors from covering the same topic, bringing their own perspective as they do so. Even if current events have been discussed in print media or on web-based media, this would not bar audio-visual media from engaging in their own coverage and discussion of the issues of the day; and to convey the message through sound and images.⁵
10. Hence, ARTICLE 19 submits that the Court should pay close attention to the importance of a diversity of information being available to the public in Poland on the situation in detention facilities, and the ability of journalists to report on them.

II. Undercover reporting and investigative journalism

Legal protection

11. In certain cases, good-faith, responsible journalism done in the service of the public interest will conflict with legal requirements. As Aidan White, CEO of the Ethical Journalism Network, noted,

Breaking the law is an occupational hazard for journalists. Sometimes it's done inadvertently or to avoid unnecessary delays, such as applying for a tourist visa rather than a journalists' or business visa to avoid delays at the frontier. But sometimes it is a legitimate act of defiance, as is often the case when journalists and media defy the law to protect to their sources.⁶

12. Under international law, any restriction on freedom of expression must, *inter alia*, meet the requirement of proportionality and necessity. There must be a pressing social need for the restriction; and if a less intrusive measure is capable of achieving the same purpose as a more restrictive one, the least restrictive measure must be applied.
13. When examining the necessity and proportionality requirements, ARTICLE 19 observes that the law recognises a number of situations where public interest considerations prevail over certain legal obligations. For example, in whistle-blowing cases the balance between a violation of the legal obligation not to disclose confidential information and the right of the public to receive information on matters of public concern weighs in favour of the latter, when the whistle-blower has no alternative means to bring attention to a serious issue.

³ C.f., Office of the Special Rapporteur for Freedom of Expression Inter American Commission on Human Rights, The Inter-American Legal Framework regarding the Right to Freedom of Expression, 2010, para 198.

⁴ See, e.g. the Inter-American Court on Human Rights, *Granier v. Venezuela*, App. No. 293/2015, 22 June 2015, para 141 and 170; or European Court, Grand Chamber, *Centro Europa 7 SRL and Di Stefano v. Italy*, App. No. 38433/09, 7 June 2012, para 130.

⁵ European Court, *Manole & others v. Moldova*, App. No. 13936/02, 17 September 2009, paras 96 -97.

⁶ A. White, When Reporting Migration Means Breaking the Law in the Name of Humanity, 18 Feb. 2017, available at <http://bit.ly/2lxIZkl>.

14. While the case law of this Court maintains that the whistle-blower should have acted in good faith to deserve protection,⁷ the UN Special Rapporteur considers that “the whistle-blower’s motivations at the time of the disclosure should also be immaterial to an assessment of his or her protected status.”⁸
15. We observe that under international law, the lawfulness of a journalist’s actions is “a relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly.”⁹
16. We also note that in circumstances where a breach of law takes place in the context of a journalistic investigation that serves the public interest, the right to freedom of expression will tend to prevail over the unlawfulness of the journalists’ behaviour. In that sense, in a number of European countries, the publication of illegally recorded material is considered legal when done in the public interest.¹⁰ The exception to this balance would apply only in certain serious criminal cases (e.g. illegally purchasing firearms).¹¹ The courts also consider whether any precautions were taken to preserve the rights of others or mitigate the impact on the rights of others. For instance, when using hidden camera, journalists would be protected under freedom of expression if they take such measures as ensuring the anonymity of the person recorded (by blurring their face and/or voice)¹² or using such cameras in public, rather than private, spaces.

Ethical journalism standards on undercover reporting

17. In order to bring important information to the public, it has been recognised that journalists can, beyond “traditional” forms of information gathering, such as interviews with sources, rely on other forms of information gathering. It has been recognised that undercover reporting can be “essential to the traditional mission of media to serve a public interest.”¹³
18. For these reasons, various ethical codes and journalistic standards’ codes often state that undercover journalism is permitted where the information cannot otherwise be acquired and when there is a sufficiently strong public interest.¹⁴ For example,¹⁵ the BBC’s Editorial Guidelines have a section setting out rules on the making and subsequent use of “secret recordings”:

Normally the BBC will use secret recordings only as an investigative tool where:

- There is clear existing prima facie evidence of behaviour, or intention to carry out behaviour that it is in the public interest to reveal, and
- The recording is necessary to prove the behaviour, and

⁷ European Court, *Bucur and Toma v. Romania*, Appl. No. 40238/02, 8 Jan 2013.

⁸ UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, report to the General Assembly on the Protection of Sources and Whistle-blowers, A/70/361, 2015, para 31.

⁹ European Court, *Bédat v. Switzerland*, *op. cit.*, para 50.

¹⁰ According to a recent study covering Europe, this is the case in Belgium, Bulgaria, Czech Republic, Germany, Estonia, Hungary, Macedonia, Malta, Netherlands, Romania and Slovenia (J. Ukrow and G Iacino, Comparative Study on Investigative Journalism, European Centre for Press and Media Freedom and Institute for European Media Law, April 2016).

¹¹ European Court, *Salihu v. Sweden*, Appl. No. 33628/15, 10 May 2016, para 50; or *Brambilla v. Italy*, App. No. 22567/09, 23 June 2016, about journalists who illegally intercepted police radiocommunications.

¹² European Court, *Haldiman and others v. Switzerland*, App. No 21830/09, 24 Feb 2015.

¹³ See, e.g., Aiden White, *To Tell You The Truth*, International Federation of Journalists, 2008, p. 76.

¹⁴ See, e.g., B. Grevisse, *Déontologie du Journalisme*, De Boeck, 2010, pp. 175-177.

¹⁵ See, for another example, the Belgian Dutch-speaking Press council’s Code of Ethics, at <http://bit.ly/2nwsTXK>.

- There is no viable, alternative means of gathering the evidence that proves the behaviour.¹⁶
19. Various ethical codes also recommend that journalists and editors-in-chief hold prior discussions before engaging in undercover investigation.¹⁷ This recommendation ensures that ethical issues will be examined and debated at the time when a piece is commissioned, prior to engaging in any undercover activity.
 20. Hence, the decision to resort to undercover reporting is in no way reckless, but rather results from a cautious analysis of the need to inform the public, in circumstances which are complex to investigate.¹⁸
 21. Even if the misrepresentation of one's profession or identity can seem to contradict the principle of the integrity of journalistic ethics,¹⁹ there are indeed numerous instances where immersion or infiltration – embracing the living conditions of certain people and environments as an almost ethnological approach²⁰ – has been part of remarkable journalistic endeavours which have shed light on important issues of public interest. For example:
 - In 1962, American journalist John Howard Griffin disguised himself as a black person and reported on his experience;²¹
 - In 1986, German journalist Günter Walraff went undercover among Turkish immigrants and then told of their daily existence and abuses by law enforcement officers, employers and landlords.²² Walraff later applied a similar practice and joined the tabloid *Bild Zeitung* newspaper to expose its questionable journalistic practices;²³
 - In 2000, Magnum photographer Christopher Anderson embarked on a homemade wooden boat with a group of migrants from Haiti who were trying to reach the USA. He documented their journey up to the point where they narrowly escaped death and were rescued from the sinking frail barque by US Coast Guards;²⁴
 - In 2010, renowned French journalist Florence Aubenas spent six months as an unqualified job-seeker, pretending to have neither a diploma nor any professional training, and described her experience in her book *Le quai de Ouistreham*;²⁵
 - In 2017, French journalists infiltrated the far-right party Front National and used hidden cameras to film militants.²⁶
 22. As these examples illustrate, undercover reporting can enable journalists to bring detailed, highly informative reports on important social or political issues to the public.

¹⁶ BBC Editorial Guidelines, Section 7: privacy/secret recordings; available at <http://bbc.in/2nJE2oy>.

¹⁷ See, B.Grevisse, *op. cit.*

¹⁸ See, e.g., the Supreme Court of Sweden, *Rolfesen and Association of Norwegian Editors v. the Norwegian Prosecution Authority*, 20 November 2015 (case concerning a documentary on supporters of ISIS in Syria); available at <http://bit.ly/2nH9LGR>.

¹⁹ See B. Grevisse, *op. cit.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

²³ See, e.g., S. Chernow, *The Ethics of Undercover Journalism*, 14 Nov. 2014, available at <http://bit.ly/2nrdd6x>.

²⁴ See, e.g., K. Lubben (ed.), *MAGNUM: Contact Sheets*, Thames & Hudson, 2014, p. 434.

²⁵ F. Aubenas, *Le quai de Ouistreham*, Editions de l'Olivier, Paris, 2010.

²⁶ V. Hacot, "Documentaire sur C8: quand un élu FN tient des propos révisionnistes", 15 March 2017, available at <http://bit.ly/2ocUZp0>.

Direct testimony of the harsh living conditions of migrants, as exposed by Walraff or by Anderson, can cast a particularly strong light on issues linked to migration, a major concern in contemporary democracies. This is a concern that the Representative of the OSCE on Freedom of Media recognised, when she recommended that OSCE States should “facilitate journalists’ access to areas and locations where stories related to the crisis develop: border areas, refugee camps and other relevant facilities.”²⁷ The detailed description of the daily difficulties resulting from unemployment, as reported by Aubenas, informed public debates on education, employment and social policies in a particularly rich manner. When done in the public interest, immersion and the use of discreet techniques serve the public’s right to know in an original and inimitable fashion that only such a form of investigative journalism, which relies on direct experience, is able to produce.

23. In addition, there are situations where undercover reporting techniques are the only way to report on situations that public authorities are trying to cover up. As observed by experts on ethical journalism, “getting into a country where the government is covering up human rights abuse or fighting a secret war sometimes means a reporter has to pretend to be someone else, usually a tourist, to avoid visa bans on media.”²⁸

III. Freedom of expression and the public’s trust in public institutions

24. It is an unavoidable fact that media investigations will frequently have a certain impact upon the general public’s views on public institutions such as police forces, intelligence services or the judiciary. For instance, the right of journalists not to disclose the identity of their sources of information clearly impacts on the capacity of public authorities to identify the persons who have leaked confidential information to the press: however, journalistic sources are protected as an integral part of the right to freedom of expression, in the interests of a democratic society having a free press capable of reporting on matters of general interest.²⁹
25. Freedom of expression extends to the right to investigate and report on public authorities: the public’s right to be informed about irregularities or unlawful behaviour inside public institutions is of such importance in a democratic society that it must prevail over the interest of preserving citizens’ trust in public institutions.³⁰ The same must necessarily be true of violations of fundamental rights that take place within public institutions.
26. In a functioning democratic society, public debates about public institutions, and particularly about possible abuses or human rights violations committed within them – especially within closed institutions and institutions where individuals are deprived of their liberty – are legitimate, and must be allowed to take place without hindrance. In order to be able to take part in such discussions of the highest importance, the public has the right to be properly informed, including in a critical perspective. An open and transparent debate about public institutions, and the possible wrongdoings that may have taken place within them, is indeed the most appropriate way of reinforcing public trust.

²⁷ OSCE Representative issues recommendations on rights and safety of members of the media reporting on refugees, 4 March 2016, <http://www.osce.org/fom/225911>.

²⁸ S. Chernow, *op.cit.*

²⁹ European Court, *Ressiot and Others v. France*, App. Nos. 15054/07 and 15066/07, 28 June 2012. See also, for references to international and national comparative law, the report to the General Assembly on the Protection of Sources and Whistle-blowers, *op. cit.*

³⁰ See European Court, *Bucur and Toma v. Romania*, *op. cit.*; *De Haes and Gijssels v. Belgium*, 24 February 1997, Reports of Judgments and Decisions 1997-I; Grand Chamber, *Morice v. France*, App. No. 29369/10, April 2015; Grand Chamber, *Baka v. Hungary*, Appl. No. 20261/12, 23 June 2016; or *Bédat v. Switzerland*, *op. cit.*

Conclusions

27. ARTICLE 19 believes that media diversity can only be achieved when media outlets have at their disposal a variety of reporting and investigative techniques. They should be able to report on a given topic in the format of their choice and in conformity with established editorial guidelines and codes of conduct. Only in this way can the public have access to the widest possible range of viewpoints on matters of public concern.
28. When assessing whether an undercover reporting technique used by journalists can be restricted under the right to freedom of expression, the requirement of necessity and proportionality should include the following considerations:
- Whether the use of the techniques in the investigation is done in the public interest, serving the public's right to know on a matter of public concern. It should also ensure that the public's right to be informed about irregularities, unlawful behaviour or possible violations of fundamental rights inside public institutions and to take part in public debates about public institutions prevails over the general interest in preserving the public's trust in public institutions;
 - The extent to which the media outlet and journalist took measures to mitigate the impact on the rights of others when applying the techniques;
 - Whether the techniques were necessary to produce the specific report, including but not limited to such elements as the format of the report, access to direct testimonies, access to places and persons that are relevant in relation to the matter at hand, and immersion in a given environment in order to understand, analyse and report 'from the inside.'

In London, 29 March 2017



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