Robust protection of journalistic sources remains a basic condition for press freedom

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In the judgment in the case Becker v. Norway the ECtHR showed once more its concern about the importance of the protection of journalistic sources for press freedom and investigative journalism in particular. The ECtHR emphasised that a journalist’s protection under Article 10 ECHR cannot automatically be removed by virtue of a source’s own conduct, and that source protection applies also when a source’s identity is known. The judgment has been welcomed by the European Federation of Journalists (EFJ), as it is perceived “to strengthen the protection of journalistic sources as one of the basic conditions for media freedom”. The EFJ also calls on states “to adopt legislation with the purpose of implementing journalists’ right to protect their sources, following international standards” and strongly calls for a broad and effective protection of whistleblowers.

The law and the proceedings in Norway

The case concerns a journalist, Cecilie Langum Becker, working for DN.no, a Norwegian internet-based newspaper. Ms Becker was ordered to give evidence in a criminal case brought against one of her sources, Mr X, who was accused for market manipulation. Mr X had confirmed to the police that he had been Ms Becker’s source for an article she had written about the Norwegian Oil Company’s (DNO) allegedly difficult financial situation. The price of DNO stock decreased by 4.1% on the first trading day after the publication of Ms Becker’s article. Mr X was subsequently charged with using Ms Becker to manipulate the financial market. Ms Becker refused to testify against Mr X, and the courts therefore ordered her to testify about her contacts with him, finding that there was no source to protect as he had already come forward. They also considered that her evidence might significantly assist the courts in elucidating the case. Mr X was however convicted as charged before the final decision on Ms Becker’s duty to give evidence had been made. Relying on Article 125 of the Norwegian Code of Criminal Procedure and Article 10 ECHR, Ms Becker argued that she was under no obligation to give evidence and she refused at any stage of the proceedings to answer questions about possible contacts between her and Mr X and other sources.

Article 125 of the Code of Criminal Procedure provides that:

“The editor of a printed publication may refuse to answer questions concerning who is the author of an article or report in the publication or the source of any information contained in it. The same applies to questions concerning who is the source of other information that has been confided to the editor for use in his work. Other persons
who have acquired knowledge of the author or the source through their work for the publishers, editors, press agency or printers in question have the same right as the editor.

When important social interests indicate that the information should be given and it is of substantial significance for the clarification of the case, the court may, however, on an overall evaluation order the witness to reveal the name. If the author or source has revealed matters that it was socially important to disclose, the witness may be ordered to reveal the name only when this is found to be particularly necessary. When an answer is given, the court may decide that it shall only be given to the court and the parties at a sitting in camera and under an order to observe a duty of secrecy. The provisions of this section apply correspondingly to any director or employee of any broadcasting agency.”

On account of her refusal to comply, the High Court, in January 2012, ordered Ms Becker to pay a fine of 30,000 Norwegian kroner (NOK), approximately 3,700 euro (EUR) for an offence against the good order of court proceedings, failing which she would be liable to ten days’ imprisonment.

In March 2012 Ms Becker lodged an application with the ECtHR, alleging that she had been compelled to give evidence that would have enabled one or more journalistic sources to be identified, in violation of her right under Article 10 ECHR to receive and impart information. It took the ECtHR more than five years to decide on the case, but finally, with an unanimous vote, the fifth section of the ECtHR on 5 October 2017 found that Norway has violated Ms Becker’s right to protect her sources.

**The Court’s judgment**

First of all, it is worth observing that the judgment of the ECtHR not only refers to relevant legal provisions and jurisprudence under Norwegian law and to Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information, adopted by the Committee of Ministers of the Council of Europe on 8 March 2000. It also refers to other relevant international material such as the 8 September 2015 report to the UN General Assembly of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. The ECtHR quotes from this report, in which it is stated (§ 40):

“Revealing or coercing the revelation of the identity of a source creates disincentives for disclosure, dries up further sources to report a story accurately and damages an important tool of accountability. In the light of the importance attached to source confidentiality, any restrictions must be genuinely exceptional and subject to the highest standards, implemented by judicial authorities only. Such situations should be
limited to investigations of the most serious crimes or the protection of the life of other individuals”.

As there was no discussion in the case at issue that there had been an “interference” with the journalist’s rights under Article 10 § 1 ECHR, as it was clear that the order to give evidence was “prescribed by law” and as it was undisputed that the order had been issued for the purpose of “the prevention of crime”, the ECtHR once more needed to focus on the question whether the inference was “necessary in a democratic society”.

The ECtHR refers to its earlier case law in which it has developed the principles governing the protection of journalistic sources, such as in Goodwin v. United Kingdom (§ 65):

“Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest”.

Referring to its Grand Chamber judgment in Sanoma Uitgevers B.V. v. the Netherlands, it reiterates that

“the Court has always subjected the safeguards for respect of freedom of expression in cases under Article 10 of the Convention to special scrutiny. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society, an interference cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.”

The Court reminds that in Nagla v. Latvia it found that the fact that a source’s identity had been known to the investigating authorities prior to a search at the premises of a journalist, did not remove the journalist’s protection under Article 10 ECHR and it emphasises that a journalist’s protection under Article 10 cannot automatically be removed by virtue of a source’s own conduct. The ECtHR furthermore holds that protection afforded to journalists when it comes to their right to keep their sources confidential is “two-fold, relating not only to the journalist, but also and in particular to the source who volunteers to assist the press in informing the public about matters of public interest”, while in Voskuil v. the Netherlands the ECtHR found that the potential significance in criminal proceedings of the information sought from a journalist was insufficient under Article 10 as a reason to justify compelling
him to disclose his source or sources. It also emphasised that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources.

The ECtHR went on to consider that the possible effects of the order were of such a nature that the general principles developed with respect to orders of source disclosure were applicable to the case, and that Ms Becker’s refusal to disclose her source or sources did not at any point in time hinder the investigation of the case or the proceedings against Mr X. On the contrary, there was no indication that the Ms Becker’s refusal to give evidence attracted any concerns of the Norwegian courts with respect to the case or the evidence against Mr X. It also bore in mind that Ms Becker’s journalistic methods had never been called into question and she had not been accused of any illegal activity.

Having regard to the importance of the protection of journalistic sources for press freedom, the ECtHR finds that the reasons adduced in favour of compelling Ms Becker to testify on her contact with Mr X, though relevant, were insufficient. Therefore the ECtHR is not convinced that the impugned order was justified by an “overriding requirement in the public interest” and, hence, necessary in a democratic society. The ECtHR accordingly concludes that there has been a violation of Article 10 ECHR.

Comment

Since 1996 (Goodwin v. United Kingdom), the ECtHR has found several types of violations of journalists’ sources protection as guaranteed under Article 10 ECHR (see the factsheet of the ECtHR). Luxembourg, Belgium, the Netherlands, the United Kingdom and France at multiple occasions have been found in breach with the right of journalists to have their sources protected, while also authorities in Latvia (Nagla v. Latvia) and Turkey (Görmüs and others v. Turkey) have disrespected journalists’ rights by searching and investigating their sources. Although Norway has a positive reputation when it comes to protection of journalistic sources, as reflected e.g. in the 2015 Supreme Court judgment in the case of Rolfsen and Association of Norwegian Newspapers v. Norwegian Prosecution Authority, this time, after long deliberation, the ECtHR found that the Norwegian authorities have acted in breach with Article 10 ECHR by compelling a journalist to reveal information about a source.

While the reasoning and outcome in Becker v. Norway is consistent with and builds upon the substantial case law of the ECtHR guaranteeing robust protection of journalistic sources, even in cases where the source has been identified, also a disclaimer needs to be formulated with regard some part of the reasoning of the ECtHR in this case.

The ECtHR observes that “the present case does not involve allegations of unlawful activity by the applicant, or criminal investigations of or proceedings against her, beyond those related to her refusal to give evidence on her contact with Mr X”. And in this context, it also
notes that the Government has not questioned the journalistic methods employed by Ms Becker (§ 71).

This kind of consideration however risks undermining the protection of journalistic sources. Indeed, as a matter of principle, sources should not lose protection because of the allegedly unlawful, unethical or questionable conduct of the journalist. Furthermore, in as far as the Court’s consideration refers to the fact that the Government has not questioned the journalistic methods used by the journalist in this case, it might imply that in cases where the Government does question or criticize the journalistic methods, there would no longer be a valid claim on the right of journalistic source protection. Also in cases where a journalist is charged or prosecuted for alleged unlawful acts, the right to protection of journalistic sources should remain to be guaranteed (Tillack v. Belgium).

A recent judgment with regard to the protection of journalistic protection (Görmüş and others v. Turkey) contains a worrying consideration of a similar kind. The ECtHR acknowledged in Görmüş and others v. Turkey that the duties and responsibilities of journalists can include the duty not to publish information provided by whistle-blowers who have not first internally informed their superiors about potentially unlawful practices with their department or service. In its original French version of the judgment, the Court considered that it could accept

“que les devoirs et les responsabilités qu’assument les journalistes qui exercent leur droit à la liberté d’expression puissent inclure le devoir de ne pas publier les renseignements que des fonctionnaires lanceurs d’alerte leur ont fournis, jusqu’à ce que ces fonctionnaires aient utilisé les procédures administratives internes prévues pour faire part de leurs préoccupations à leurs supérieurs”.

This consideration however, formulated as a general principle that journalists should only publish information obtained from whistle-blowers that have first exhausted all internal procedures that are available to them, is very problematic. This approach also contrasts with earlier case law of the ECtHR in which the Court was of the opinion that a “journalist’s right not to reveal her or his sources could not be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but is part and parcel of the right to information, to be treated with the utmost caution” (Tillack v. Belgium, § 65) or in which it held that “the conduct of the source can never be decisive in determining whether a disclosure order ought to be made” (Telegraaf Media Nederland Landelijke Media B.V. and Others v. The Netherlands, § 128).

More attention is also to be given to what has been stated in the earlier mentioned 2015 report to the UN General Assembly of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, referring to the Belgian law of 7 April 2005 on protection of journalistic sources:
“National laws should ensure that protections apply strictly, with extremely limited exceptions. Under Belgian law, journalists and editorial staff may be compelled by a judge to disclose information sources only if they are of a nature to prevent crimes that pose a serious threat to the physical integrity of one or more persons, and upon a finding of the following two cumulative conditions: (a) the information is of crucial importance for preventing such crimes; and (b) the information cannot be obtained by any other means. The same conditions apply to investigative measures, such as searches, seizures and telephone tapping, with respect to journalistic sources” (§ 40).