

**Written Comments
in the Case of**

Haldimann and others v Switzerland

Application No. 21830/09

A Submission to the European Court of Human Rights on behalf of the Media Legal Defence Initiative ("MLDI").

March 2011

Counsel for the Intervener:

Mark Stephens
Finers Stephens Innocent LLP
179 Great Portland Street
London
Tel: +44 (0)20 7323 4000
Fax: +44 (0)20 7580 7069

Thomas De La Mare
Blackstone Chambers
Blackstone House
Temple
London

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 21830/09

Haldimann and others v Switzerland

WRITTEN COMMENTS OF MEDIA LEGAL DEFENCE INITIATIVE

Pursuant to leave granted on 25 February 2011 by the President of the Second Section under Rule 44(3) of the Rules of Court, the Media Legal Defence Initiative hereby submits written comments on the extent to which undercover techniques are used in investigative journalism and how resulting stories have benefitted the public interest, and a brief comparative consideration of the legal framework regulating such techniques.

A. The Importance of Undercover Techniques

1. Some investigative reports justify the use of undercover means, typically those stories of real public interest in which the investigator is either seeking to strip away the carefully cultivated public relations veneer of a powerful or sophisticated organization or figure to expose what is really going on or to gain access to a clandestine world, necessarily denied to outsiders.
2. What is done in 'private' encompasses not just the personal interest justifying protection but also the reprehensible, the stuff of metaphorical "smoke-filled rooms" or the private corridors of power filled with either the participating or those powerless to speak up. As the 'watchdogs' of the public, journalists, media organisations and campaigning NGOs such as Greenpeace, Global Witness, Amnesty International and WITNESS, have a vital role uncovering and exposing such wrongdoing. Yet in order to penetrate the circle of wrongdoing or to obtain candour from the subjects of investigation covert means may on occasion be both required and proportionate.
3. The oldest form of undercover investigation relied upon the use of the assumed identity. One of the most celebrated early examples is that provided by "Nellie Bly", the progenitor of a modern Günter Wallraff. Nellie Bly, an alias of Elizabeth Cochran, was a pioneering reporter with Joseph Pulitzer's *New York Record* who, in the late 19th century, feigned insanity to gain admittance to the Women's Lunatic Asylum on Blackwell's Island in order to expose the horrific conditions to which its patients were exposed.¹
4. But such access may not be much use without proof of the story or the means tellingly to convey it to the public. It takes a brave editor today to run such a story alleging, say, endemic abuse or criminality on nothing more than the word of one reporter, particularly when defamation or libel laws may place the burden of proving serious allegations upon the word of a reporter or his or her notes hastily jotted after the event. Covert recordings (whether of sound or film) are modern tools that simultaneously prove and explain a story in a potent way that simple prose may fail to convey. It is, for instance, impossible to imagine the impact of the Abu Graib abuses on the public without the photographs we have come to associate with it.

¹ Adam Holloway, a filmmaker for the respected Granada investigative serial *World in Action* repeated this strategy when feigning schizophrenia to reveal modern-day conditions. *World in Action* was responsible for a large number of exposés using Undercover Techniques.

5. These submissions refer to all of these tools of investigation as "Undercover Techniques" and to those that specifically use recording as "Undercover Recording". The contribution of such Undercover Techniques in the hands of campaigners and journalists to exposing wrongdoing in society is evident. Used in an ethical and focused fashion these are tools of last resort to expose the true practices of the subjects of investigation, used to cast light on wrongdoing that cannot realistically be identified or proved by other means.
6. To give some examples of the potency and importance of Undercover Techniques, particularly Undercover Recordings, they have been used by campaigning groups and whistleblowers:
 - 6.1. in the various initiatives of WITNESS, a human rights organization that mobilises victims (such as exploited workers in the garments trade) to document their experiences. WITNESS provides training and support to local groups to use video in the human rights advocacy campaigns and provides guidance to users on the use of hidden cameras;²
 - 6.2. such as Global Survival Network, a WITNESS-affiliated NGO, to document over two years the operations of international people traffickers in the film *Bought & Sold*;³
 - 6.3. in the French film *Blood Coltan* to expose middlemen buying Coltan minerals indispensable from Congolese conflict areas where abuse of the miners is commonplace;
 - 6.4. by Greenpeace to substantiate stories and reports (rather than primarily for broadcast purposes). On occasion footage or recordings are used where particularly potent, as with footage of the illegal sale of harpoons,⁴ the sale of illegal whale meat,⁵ and a report on Nokia's use of toxic materials in its telephones.⁶
7. Similarly, professional journalists and filmmakers have used Undercover Techniques to expose matters as diverse as:
 - 7.1. the conduct of racist or hooligan gangs by World in Action;⁷
 - 7.2. abuse of the vulnerable in mental patient facilities and care homes for the elderly;⁸

² Witness, *Video for Change: A Guide for Advocacy and Activism* (2005) http://www.witness.org/joomla/images/stories/pdf/VideoforChange_SafetyandSecurity_Title_d.pdf.

³ See <http://video.google.com/videoplay?docid=2025515067841895496#>. See also, on people trafficking within Council of Europe States, "The Price of Sex" <http://centerforinvestigativereporting.org/blogpost/20100331mimichakarova039sreportingonsextraffickingtobeadocumentaryphotoexhibitinsf> or, <http://priceofsex.org/>

⁴ <http://www.greenpeace.org/international/en/multimedia/videos/video-archive/illegal-harpoon/>.

⁵ Greenpeace, Japan's Stolen Whale Meat Scandal, <http://www.greenpeace.org/international/Global/international/planet-2/report/2008/5/whale-meat-scandal-dossier.pdf>

⁶ Greenpeace, *Guide to Greener Electronics*, November 2007, <http://www.greenpeace.org/usa/en/news-and-blogs/news/nintendo-microsoft-and-philip/>.

⁷ <http://www.youtube.com/watch?v=zsqqLIbPbeA>

- 7.3. the corruption endemic in sport, most recently an expose of international match fixing in cricket,⁹
- 7.4. the sale of time expired and dangerous meat by Food Lion;¹⁰
- 7.5. the involvement of criminal gangs in sham weddings for immigration purposes (using stolen ID, pressured prostitutes) as recently revealed by the UK investigative television programme, *Panorama*¹¹.

Such stories often precede criminal or regulatory investigations that use the journalist's Undercover Recordings as a basis for proving the criminal case.

- 8. Any responsible journalist or campaigner understands that the greater the intrusion into the private sphere of the Undercover Technique proposed, the greater the public interest in the story must be to justify it and the greater the safeguards necessary to prevent ancillary disclosure of strictly private material. Thus, different weight is to be attached to the privacy and free speech interests when, say:
 - 8.1. filming the subject in a public or semi-public place, or a place outside the control of the subject (such as a street, a restaurant, or during a visit by the subject to the filmmaker's office or home) as opposed to in their own office or home;
 - 8.2. investigating a case of people trafficking as opposed to defective building works.
- 9. Yet any approach in which there is an absolute bar to the use of Undercover Recordings can be expected to lead to asymmetry in the cases members of the press are willing to investigate using Undercover Reporting, as:
 - 9.1. those engaging in outright, covert criminality (e.g. people trafficking, racist gangs etc) are unlikely to resort to litigation to protect their reputation, unless their position of power is such as to put them above the reputational concerns that such action will bring;
 - 9.2. whereas substantial companies (as demonstrated by the Food Lion and various care-home cases) and public personalities can be expected aggressively to assert privacy rights against allegations of mid-tier or moderate (but nevertheless significant) criminality or misconduct if such is the only way to staunch the (well-deserved) damage to corporate or personal reputation.

B. The Comparative position

- 10. In modern terms the taking and use of covert recordings raises questions of data protection or of privacy. The starting point for the analysis of rules applicable to

⁸ This subject has repeatedly been returned to by investigative reporters. For evidence of a threatened prosecution of such a reporter see <http://www.telegraph.co.uk/culture/tvandradio/5984731/BBC-journalist-arrested-after-going-undercover-at-care-home.html>

⁹ "Match-fixing" is repeatedly exposed by undercover journalism, most recently by undercover reporting and recording of Pakistani cricketers agreeing to assist in "spot-fixing".

¹⁰ 'Hidden Camera Use Defended in Food Lion Case', Washington Post 11 January 1997.

¹¹ BBC Panorama, *Inside a Big Fat Sham Wedding*, first broadcast 24 March 2011, http://news.bbc.co.uk/panorama/hi/front_page/newsid_9433000/9433554.stm

Undercover Recordings must be Council Directive 95/46/EC (“the Data Protection Directive”)¹² that aims to create a common set of rules regulating the gathering and processing of personal data across 27 of the Contracting States. Films and recordings of individuals taken undercover indubitably constitute “personal data” under the Directive’s scheme. Recital 37 and Article 9 of the Data Protection Directive recognize the potential for a clash between Articles 8 and 10 ECHR, stating:

(37) Whereas the processing of personal data for purposes of journalism or for purposes of literary or artistic expression, in particular in the audiovisual field, should qualify for exemption from the requirements of certain provisions of this Directive in so far as this is necessary to reconcile the fundamental rights of individuals with freedom of information and notably the right to receive and impart information, as guaranteed in particular in Article 10 [ECHR]; whereas Member States should therefore lay down exemptions and derogations necessary for the purpose of balance between fundamental rights as regards general measures on the legitimacy of data processing, ...

And then:

Article 9

Processing of personal data and freedom of expression

Member States shall provide for exemptions or derogations from the provisions of this [the Directive’s substantive scheme] for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.

11. The recent ECJ ruling in Case C-73/07 *Tietosuoja* (18 December 2008) confirmed that a very wide approach should be taken as to what constitutes “personal data” and that the journalistic exception in Article 9 applies if the sole object of the document is the disclosure to the public of information, opinions or ideas. Undercover Recordings according fall to be dealt with under the system of exceptions or derogations Member States are obliged to put in place pursuant to Article 9: in short, EU States are obliged to regulate or self-regulate in some way.
12. In terms of actual practice, state by state, it has not been possible for the MLDI to assemble in the time available a comprehensive survey of the legal regulation of Covert Recordings. It suffices to say that Switzerland apart (where a public interest defence may exist in theory) there are a number of states that appear to take an absolute (or verging on the absolute) approach to the illegality of Undercover Recordings made by campaigners and journalists. In particular:
 - 12.1. In Spain, since a Supreme Court Decision of 18 December 2008, MLDI understands a strict approach has been adopted towards at least the use of undercover filming materials, with the broadcast of such materials being taken as a *per se* interference with privacy rights.¹³

¹² The Data Protection Directive itself draws heavily on the 1981 Council of Europe Data Protection Convention, which includes a chapter on ‘basic data protection principles’ and which has been ratified by 43 of the member states of the CoE (<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=108&CM=8&DF=28/03/2011&CL=ENG>).

¹³ <http://merlin.obs.coe.int/iris/2009/4/article9.en.html>

- 12.2. Bulgaria operates an apparently absolute approach pursuant to Article 32(2) of its Constitution which prevents anyone being followed, photographed or filmed or recorded except where such actions are permitted by law. There is also a dedicated offence under Article 339a of the Penal Code criminalising the selling without a permit of a special technical device, a term that includes hidden cameras. In 2005, a journalist, George Buhnici, was been convicted and fined pursuant to these provisions for using a camera hidden in sunglasses to film corrupt practices at state run duty free shops and in customs.¹⁴
- 12.3. A number of other Contracting Parties formerly associated with the Soviet Union are also understood to have strict laws forbidding Undercover Recordings, perhaps as an understandable legacy of widespread, institutionalised state surveillance.
13. By contrast, in other Contracting States such as the United Kingdom,¹⁵ Germany,¹⁶ France¹⁷ Greece,¹⁸ the law recognises the place for proper, proportionate and responsible use of Undercover Techniques, and Undercover Recordings in breaking and documenting news stories exposing corruption, criminality, abuse and other serious wrong-doing.
14. In several countries, self-regulatory systems operate alongside legislative provisions and are used as a measure of first resort for those who wish to complain about the use of Undercover Techniques. For example, in Belgium the Press Council has adopted a specific "*Ethical Directive on Undercover Journalism*". Under this Directive, Undercover Techniques should be used in accordance with four criteria:
- (1) the information obtained should be of significant societal importance;
 - (2) it should not be possible to obtain the information via conventional journalistic methods;
 - (3) the risks related to this method should be in proportion to the results pursued; and
 - (4) the decision to use the undercover method and the realisation of the report should only occur after deliberation with and under the responsibility of the editors in chief.¹⁹
15. Similar Codes operate in the Netherlands²⁰ and in the UK. For example, the BBC's Editorial Guidelines contain a lengthy section setting out the BBC's rules and procedures

¹⁴ http://www.novinite.com/view_news.php?id=46695. His conviction was later apparently overturned on procedural grounds.

¹⁵ In the United Kingdom any unwarranted or excessive use of Undercover Recordings would probably give rise to liability in a breach of confidence/privacy action or one of the associated torts (trespass etc).

¹⁶ See e.g. <http://merlin.obs.coe.int/iris/2005/7/article14.en.html>

¹⁷ See <http://merlin.obs.coe.int/iris/2009/10/article12.en.html>

¹⁸ Decision of the Administrative Court of Justice Nr. 1213/2010, as reported on <http://merlin.obs.coe.int/iris/2010/7/article26.en.html>

¹⁹ Vereniging van de Raad voor de Journalistiek, *Code of Ethics* (2010), <http://www.rvdj.be/journalistieke-code>. See also recent decisions of the Flemish Press Council on this issue: Flemish Council for Journalism Ethics, Backx and others v NV VRT, 10 September 2009 (reported at <http://merlin.obs.coe.int/iris/2009/10/article5.en.html>) and Flemish Council for Journalism Ethics, Thierry V. v. NV VRT, 13 January 2011 (reported at <http://merlin.obs.coe.int/iris/2011/3/article8.en.html>).

²⁰ Leidraad van de Raad voor de Journalistiek, Section 2.1.6, September 2010: <http://www.rvdj.nl/rvdj-archive//docs/Leidraad%20RvdJ%20-%20september%202010.pdf>

on the making and subsequent use of 'secret recordings'. The BBC Guidelines provide that:

"Normally, the BBC will use secret recording 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*
- there is no viable, alternative means of gathering the evidence that proves the behaviour."*

Additionally, the BBC Rules state that secret recordings may be made "to obtain material outside the UK where a country's laws make the normal and responsible gathering of material extraordinarily difficult or impossible" or "as a method of consumer, scientific or social research in the public interest, where no other methods could naturally capture the attitudes or behaviour in question".²¹

As regards subsequent broadcast, the BBC Guidelines state that "[t]he results of the research should be edited to provide a fair and accurate representation of the research. Consent should normally be obtained retrospectively from individuals or organisations to be included in our content, or their identities should be appropriately obscured. Any proposal in these circumstances to identify individuals or organisations without their consent should be referred to Editorial Policy."²²

C. Submissions

16. The purpose of the Media Legal Defence Initiative ("MLDI") in making this intervention is not to argue for some form of *carte blanche* for campaigners and journalists from the application of privacy and related image and/or data protection laws²³ – those who recklessly flout such rules deserve no immunity – but rather to make five central submissions.
17. First, any criminal prosecution of a journalist, acting in good faith and providing reliable and precise information in accordance with standard journalistic ethics (or a reputable understanding of journalistic ethics if there are a variety of views),²⁴ simply for the use of an Undercover Technique as a means of gathering material for or evidencing a story is necessarily a substantial interference with journalistic free speech and requires careful justification under Article 10(2) ECHR.²⁵ The ECtHR has itself long held that the criminal law should be resorted to to restrict speech only in the most exceptional circumstances.²⁶ Indeed, it is difficult to see how, in many circumstances, "reliable and precise" information can be provided without the availability (if not publication) of Undercover Recordings.²⁷

²¹ BBC Editorial Guidelines, Section 7: Privacy / Secret Recording, <http://www.bbc.co.uk/guidelines/editorialguidelines/page/guidelines-privacy-practices-secret-recording/#approval-of-secret-recording>

²² Ibid., section 7.4.16.

²³ See Application No.69698/01 *Stoll v Switzerland* (2008) 47 EHRR 59 ("*Stoll*") at §102.

²⁴ *Stoll*, §103.

²⁵ See, by analogy, e.g. Application No.77551/01 *Dammann v Switzerland*, April 25, 2006 ("*Dammann*") at §§49-55, and §§58-59 where a third party illegally recorded the conversation.

²⁶ E.g. in *Gavrilovici v. Moldova* (15 December 2009, Application no. 25464/05) the Court stated at §60 that "imposing criminal sanctions on someone who exercises the right to freedom of expression can be considered compatible with Article 10 ... only in exceptional circumstances, notably where other fundamental rights have been seriously impaired".

²⁷ See, by analogy, Application no. 14277/04 *Guja v Moldova*, §75. If there are no pre-existing documents for a whistle-blower to disclose by which he can make verifiable and reliable

18. Secondly, any rule imposing a blanket ban (let alone a criminal ban) upon either: (a) the use of such Undercover Techniques to uncover such stories; or (b) upon subsequent use of recorded materials obtained as a result ("Undercover Recordings"), or information derived from such materials irrespective of the public interest or importance in the story revealed thereby, is necessarily a breach of Article 10(2) ECHR.
- 18.1. Such conclusion follows as a matter of first principle because working out whether or not the use of an Undercover Technique is justified typically involves balancing Article 8 ECHR privacy interests against the very strong public interest in a fully functioning free press as a bulwark against public and private abuses of power, as well as possibly the Convention rights engaged by the story (e.g. Article 3 or 8 in an exposé of an abusive care home or mental facility).
- 18.2. Freedom of expression constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to the press are therefore of particular importance. It is accordingly impermissible to ignore the public's vital interest in being informed about events of importance, and the corresponding role of campaigners and journalists in communicating such information to the public, by prosecuting journalists simply because the material they published or used for their story was (according to domestic law) illegally or illicitly obtained.²⁸
- 18.3. Thus, working out whether it is necessary in a democratic society or proportionate to sanction a journalist (and, if so, at what level) for seeking to expose wrongdoing by the use of Undercover Techniques when such Convention rights are in tension necessarily calls for careful factual appraisal and judgment of factors like: the place of recording; the nature and content of any expected or recorded communication; the degree of intrusion into legitimate private activity (a secluded space, for which there is no legitimate purpose, such a dog-fighting ring, is surely incapable of protection, just as a purely political conversation may be incapable of being characterized as engaging privacy rights)²⁹; the nature and number of consenting participants; the nature of interest in the story; the safeguards taken to avoid capture of extraneous private material and to avoid its use if captured. There can be no "one size fits all solution".
- 18.4. Still less can Article 8 or related confidentiality interests always take precedence over the vital public interest in a free and functioning press. Were it otherwise, it would negate the basic rule that, whenever measures are taken or sanctions are imposed by the national authority which are capable of discouraging the participation of the press in debates over matters of legitimate public concern, there must be the most careful scrutiny of such measures or sanctions..³⁰
19. Thirdly, any analysis of such public interest defence should consider two distinct groups of issue in a graduated process of justification:³¹

allegations, can it really be argued such records cannot be made covertly? Such stance would lead to a strange mismatch in the protection offered by Article 10 ECHR.

²⁸ See e.g. Application No.1914/02 *Dupuis v France* (2008) 47 EHRR 52 at §§33-38

²⁹ See *Dammann, loc cit.* §58.

³⁰ *Stoll*, §104

³¹ See, for example, the BBC guidance, which sets out a very clear editorial framework and distinguishes between gathering and transmitting material, as well as between the different purposes for which hidden recording devices may be used (e.g. entertainment v. news)

<http://www.bbc.co.uk/guidelines/editorialguidelines/page/guidelines-privacy-practices-secret-recording>.

- 19.1. First, the "news-gathering issues": did the story under investigation by the journalist justify the use of an Undercover Technique as a means to attempt to obtain proof of the story; in particular, was the story important enough to justify the Technique chosen, and did the state of the investigation require the attempt to get the evidence to be made (or, say, was there enough material gathered anyway?);
 - 19.2. Secondly, the "publishing issues": once Undercover Recordings have been made, was the use made of such material itself justified; was there a need, say, for pixellation of faces or editing of footage to remove extraneous material? Could the material be held back as simple corroboration to defend a challenge to the truth of the story etc. Or should the material have been more promptly destroyed once the anticipated story came to nothing.
20. Fourthly, the Contracting Parties have positive obligations not only to ensure that a public interest defence is in place, but also to provide a framework from which journalists and their equivalent may identify how in practice the public interest defence will operate.
- 20.1. By such positive obligations Contracting Parties discharge their obligations to ensure that limitations of both Article 8 and Article 10 ECHR rights are "in accordance with law", in particular by being reasonably predictable in advance.
 - 20.2. The existence of such positive obligation is evidenced by the terms of the Data Protection Directive and by the adoption in various Contracting States of a variety of regulatory and self-regulatory broadcasting and journalistic codes.
 - 20.3. Failure to provide any such assistance as to the circumstances in which Undercover Recordings may be legitimate, whilst leaving in place a blanket or near blanket criminal ban thereupon, necessarily has an unwarranted chilling effect upon journalistic free speech and related newsgathering activities which incompatible with the State's obligations to secure protection of the right to free speech.
21. Fifthly, any such regulatory or self-regulatory framework should accord very substantial weight to editorial decisions of campaigners and journalists as to the use of Undercover Techniques, taken in framework of ethical and professional standards set by the applicable journalistic organisations. The Court has consistently held that "*the methods of objective and balanced reporting may vary considerably, depending among other things on the medium in question; it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists*".³² The Codes referenced to in the preceding pages, and the practice of Press Councils enforcing these Codes, show that the question whether or not the use of Undercover Techniques in any given case is primarily one for senior editors within the media outlet concerned.

Other examples (Norway, Netherlands, etc.) can be found on this website which has a searchable collection of translated codes of journalistic ethics from around the world: <http://ethicnet.uta.fi/search/node/hidden>

³² *Bladet Tromsø v. Norway*, §63, and similarly, *Jersild v. Denmark*, §31.

BACKGROUND INFORMATION ABOUT THE INTERVENER

The Media Legal Defence Initiative is a non-governmental charity which works in all regions of the world to provide legal support to journalists and medial outlets who seek to protect their right to freedom of expression. It is based in London and works closely with a world-wide network of experienced media and human rights lawyers, local, national and international organisations, donors, foundations and advisors who are all concerned with defending media freedom.