

**EUROPEAN COURT OF HUMAN RIGHTS**  
**INTERVENTION IN SZUROVECZ V. HUNGARY (APPLICATION NO. 15428/16)**

**Introduction**

1. These written comments are made on behalf of the Media Legal Defence Initiative, Index on Censorship, Reporters Committee for Freedom of the Press, European Publishers Council, PEN International, Hungarian Helsinki Committee, the Dutch Association of Journalists, and the European Centre for Press and Media Freedom (the “**Interveners**”).<sup>1</sup>
2. The value of investigative reporting in a democracy cannot be overstated. It gives publicity to matters that would otherwise go unexposed. It informs members of the public about places or practices that have a significant impact on society, but are otherwise inaccessible or unknown to them. As has been observed on numerous occasions “[s]unlight is said to be the best of disinfectants”.<sup>2</sup> In recent years, investigative reporters have exposed mass state surveillance,<sup>3</sup> tax evasion by the global elite,<sup>4</sup> instances of modern slavery,<sup>5</sup> the plight of refugees in detention centres,<sup>6</sup> animal cruelty,<sup>7</sup> and sexual abuse in religious institutions.<sup>8</sup> A key component of effective investigative reporting is physical access to locations. Physical access enables journalists to understand the context in which stories are taking place and to observe directly the conditions and conduct in such locations. There are many recent examples of journalists successfully exposing matters of

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<sup>1</sup> These written comments are submitted pursuant to Rule 44(3) of the Rules of Court of 1 January 2016, following permission granted by the President of the Fourth Section of the European Court of Human Rights (the “ECHR”) in a letter dated 12 September 2016.

<sup>2</sup> Louis D. Brandeis (former Justice of the United States Supreme Court), *Other People's Money—and How Bankers Use It* (1914, Frederick A. Stokes Company: New York), p. 92.

<sup>3</sup> In 2013, *The Guardian* and *The New York Times* newspapers, among others, published revelations by the whistleblower Edward Snowden about mass domestic surveillance by the US National Security Agency (see *The Guardian*, *Edward Snowden: the whistleblower behind the NSA surveillance revelations* (11 June 2013), available at: <https://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance>).

<sup>4</sup> In 2016, the British Broadcasting Corporation (the “BBC”) and *The Guardian*, among others, published the Panama Papers which detailed the extensive off-shore tax arrangements by leading politicians and others. The documents were originally obtained by the German newspaper *Süddeutsche Zeitung* from an anonymous whistleblower and passed to the International Consortium of Investigative Journalists (see *The Guardian*, *Panama Papers*, available at: <https://www.theguardian.com/news/series/panama-papers>).

<sup>5</sup> In 2016, the Associated Press was awarded the Pulitzer Prize for Public Service for an investigation of severe labour abuses tied to the supply of seafood to American supermarkets and restaurants. The investigation is reported to have resulted in 2,000 slaves being freed and the perpetrators brought to justice (see *The Pulitzer Prizes*, *The 2016 Pulitzer Prize Winner in Public Service*, available at: <http://www.pulitzer.org/winners/associated-press>).

<sup>6</sup> In 2016, *The Guardian* published 2,000 leaked official documents from Australia’s off-shore detention centre detailing assaults, sexual abuse and self-harm of asylum seekers (see *The Guardian*, *Nauru Files*, available at: <https://www.theguardian.com/news/series/nauru-files>).

<sup>7</sup> In 2011, the Australian Broadcasting Corporation (the “ABC”) aired an investigative report containing footage of abuse of Australian cattle in Indonesian abattoirs. The footage was obtained by animal activists and journalists in the abattoirs. Within a week of the report, the Australian Government issued a temporary total ban on the live export of cattle to Indonesia (see ABC, *Four Corners*, *A Bloody Business* (30 May 2011) available at [http://www.abc.net.au/4corners/special\\_edits/20110530/cattle/](http://www.abc.net.au/4corners/special_edits/20110530/cattle/)).

<sup>8</sup> In 2003, *The Boston Globe* was awarded the Pulitzer Prize for Public Service for its long-running investigation into sexual abuse by priests in the Roman Catholic Church in the United States (see *The Pulitzer Prizes*, *The 2003 Pulitzer Prize Winner in Public Service*, available at: <http://www.pulitzer.org/winners/boston-globe-1>).

significant public interest by gaining physical access to areas of natural disaster,<sup>9</sup> aged care facilities,<sup>10</sup> juvenile prisons,<sup>11</sup> abattoirs,<sup>12</sup> prisons<sup>13</sup> and brothels.<sup>14</sup>

3. This intervention addresses the important question of principle concerning whether and to what extent the imposition of physical restraints on journalists accessing an area where news could be developing is permitted under Article 10 the European Convention on Human Rights (the "**Convention**"). These written comments seek to assist the European Court of Human Rights (the "**Court**") by providing an analysis of international and comparative law demonstrating that a refusal of a journalist's request to physically access places or events (e.g. to conduct interviews) during the course of his or her journalistic activity may be incompatible with Article 10 of the Convention, particularly if the subsequent reporting is intended to relate to matters of general public interest or concerns vulnerable groups. In doing so, these written comments address the following considerations:
  - a. newsgathering activity is afforded protection under Article 10 of the Convention;
  - b. restraints on journalists accessing certain places or events engages Article 10 of the Convention; and
  - c. such restraints require careful scrutiny, and are only justified where strictly necessary and proportionate.

#### **I. Newsgathering is afforded protection under Article 10 of the Convention**

4. The right to freedom of expression under Article 10 of the Convention includes the right to impart and receive information and ideas without interference by public authorities. This right is enjoyed by everyone, including the press. The Court has found that not only does the press enjoy a right to freedom of expression, it also has a "duty to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest."<sup>15</sup> By discharging this duty, the press performs its essential democratic

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<sup>9</sup> In 2006, the *Sun Herald* was awarded the Pulitzer Prize for Public Service for its comprehensive coverage of Hurricane Katrina in South Mississippi in the United States (see The Pulitzer Prizes, *The 2006 Pulitzer Prize Winner in Public Service*, available at: <http://www.pulitzer.org/winners/sun-herald>).

<sup>10</sup> The BBC's Panorama television program has exposed abuse in care homes in the UK, including, in 2011, footage of abuse at a private institution which was obtained by an undercover support worker (see BBC One, Panorama, *Undercover Care: The Abuse Exposed* (31 May 2011), available at <http://www.bbc.co.uk/programmes/b011pwt6>).

<sup>11</sup> In 2016, television programs aired on the BBC and the ABC detailing separate incidents in their respective countries of abuse by staff against children in juvenile justice centres (see BBC, *Panorama: Teenage Prison Abuse Exposed* (20 January 2016), available at <http://www.bbc.co.uk/programmes/b06ymzly>) and (see ABC, *Four Corners: Australia's Shame* (25 July 2016), available at: <http://www.abc.net.au/4corners/stories/2016/07/25/4504895.htm>).

<sup>12</sup> See footnote 5 above in relation to footage of animal cruelty taken in Indonesian abattoirs.

<sup>13</sup> In 2016, a journalist with the American on-line news publication, *Mother Jones*, worked undercover as a guard at a private prison in the US for four months. His report detailed the safety and security risks for staff and inmates that had resulted from underfunding of the prison (see Mother Jones, *My Four Months as a Private Prison Guard* (July/August 2016), available at: <http://www.motherjones.com/politics/2016/06/cca-private-prisons-corrections-corporation-inmates-investigation-bauer>).

<sup>14</sup> See, for example, the 2013 eight-part series on human trafficking prepared by WGBH Boston Public Radio, the International Center for Journalists, the Ford Foundation, and the Schuster Institute for Investigative Journalism which included on-site visits to bars in South East Asia in which the sex trade occurred: "*Special Report: Human Trafficking - Underground Trade: From Boston to Bangkok*" (January 8, 2013), available at <http://www.schusterinstituteinvestigations.org/trafficking-boston-to-bangkok>.

<sup>15</sup> ECHR, *Jersild v. Denmark*, Application No. 15890/89 (23 September 1994), par. 31.

function as a “public watchdog”.<sup>16</sup> The “watchdog” role of the media assumes particular importance where the media reports on governmental activity. Their presence is a guarantee that the state authorities can be held to account for their conduct,<sup>17</sup> which is one of the crucial elements of the democratic ideal protected by the Convention.

5. The Court has recognised the importance of protecting journalists’ newsgathering activities, which are conducted prior to publication, as a corollary to the right to freedom of expression and freedom of the press. In its case law, the Court has protected specific forms of preparatory newsgathering activity, including communications with confidential sources,<sup>18</sup> interviews with third parties,<sup>19</sup> and access to certain kinds of information.<sup>20</sup> In *Dammann v. Switzerland*, the Court considered a case where a journalist was convicted for inciting an employee of the Public Prosecutor’s Office to disclose information in breach of official secrets law. Following the disclosure, the information that was provided by the employee was never published by the journalist. In its judgment, the Court noted that, despite the fact the case did not involve the restraint of a publication or conviction following publication, where a case involves preparatory steps towards publication it will fall within the Court’s supervision.<sup>21</sup> Subsequently, in *Társaság a Szabadságjogokért v. Hungary*, the Court recognised that “the gathering of information ... is an essential preparatory step in journalism and is an inherent, protected part of press freedom.”<sup>22</sup> The Court went on to note the resulting chilling effect that can be caused by obstacles that are created to hinder certain methods of gathering information.<sup>23</sup>
6. The fundamental importance of newsgathering to the exercise of the right to freedom of expression has been recognised in the jurisprudence of a number of common law jurisdictions. In the United Kingdom (the “UK”), the House of Lords has observed that the “*role of the press in exposing abuses and miscarriages of justice has been a potent and honourable one ... but the press cannot expose that of which it is denied knowledge*”.<sup>24</sup> The US Supreme Court has opined that “without some protection for seeking out the news, freedom of the press could be eviscerated.”<sup>25</sup> The Supreme Court of Canada has gone so far as to recognise the “newsgathering rights of the press” as being protected under section

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<sup>16</sup> ECHR, *Bladet Tromsø and Stensaas v. Norway*, Application No. 21980/93 (20 May 1999), par. 59.

<sup>17</sup> ECHR, *Pentikäinen v. Finland*, Application No. 11882/10 (20 October 2015), par. 89.

<sup>18</sup> ECHR, *Goodwin v. The United Kingdom*, Application No. 17488/90 (27 March 1996), par. 39: “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 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest.”

<sup>19</sup> ECHR, *Jersild v. Denmark*, Application No. 15890/89 (23 September 1994), par. 35: the Court observed that the preparatory step of conducting interviews is “one of the most important means whereby the press is able to play its vital role of ‘public watchdog’.”

<sup>20</sup> ECHR, *Társaság a Szabadságjogokért v. Hungary*, Application No. 37374/05 (14 April 2009); ECHR, *Youth Initiative for Human Rights v. Serbia*, Application No. 48135/06 (25 June 2013); ECHR, *Kenedi v. Hungary*, Application No. 31475/05 (26 May 2009).

<sup>21</sup> ECHR, *Dammann v. Switzerland*, Application No. 77551/01 (25 April 2006), par. 52.

<sup>22</sup> ECHR, *Társaság a Szabadságjogokért v. Hungary*, Application No. 37374/05 (14 April 2009), par. 27.

<sup>23</sup> *Id.*, par. 38.

<sup>24</sup> UK House of Lords, *R v. Shayler* [2002] UKHL 11 par. 21.

<sup>25</sup> US Supreme Court, *Branzburg v. Hayes* (1972) 408 U.S. 665, p. 681.

2 (b) of the Canadian Charter of Rights and Freedoms.<sup>26</sup> The Supreme Court of Canada has also stated that “[t]he media have a vitally important role to play in a democratic society. It is the media that, by gathering and disseminating news, enable members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being.”<sup>27</sup> Consistent with this approach, the South African Constitutional Court has provided reasoning on why newsgathering activity is, and should be, protected as a corollary right to the right to freedom of expression; “[t]he right to freedom of expression would serve little purpose if the media, though entitled to convey information and broadcast footage and recordings, were not entitled to gather information, footage and recordings.”<sup>28</sup>

7. The jurisprudence of this Court and a number of common law jurisdictions clearly establishes that newsgathering is protected as an inherent and fundamental aspect of the right to freedom of expression. The right of the media to impart information under Article 10 of the Convention would be a limited one if the media could not also seek out, observe and gather that information.

## II. **Restraints on journalists accessing certain places or events engages Article 10 of the Convention**

8. Taking into consideration the inherent value of newsgathering to the exercise of the right to freedom of expression, it is an indispensable condition for the proper functioning of the media that journalists be afforded an opportunity to witness and document newsworthy events. If journalists are prevented from entering and reporting from places where important events are unfolding, they cannot effectively report on those events and, therefore, cannot properly fulfil their role as a “public watchdog” in a democratic society.
9. A physical restraint on journalists accessing certain places or events amounts to an interference with their newsgathering activities, and therefore amounts to an interference with Article 10 of the Convention. This has been recognised by the Court in *Gsell v. Switzerland*. This case concerned a magazine journalist who was told by police to return home when he was travelling to an event being held near the World Economic Forum in Davos. The police argued that these steps were taken to protect locals and guests at the World Economic Forum. The applicant had identified himself as a journalist and had shown police his press card. In its judgment, the Court reasoned that: “*The Court observes that the legal measure in question was not directed specifically at the applicant in his capacity as a journalist, but he had been a victim of a ban imposed generally by the Cantons Police on all those who wanted to travel to Davos. Nonetheless, taking everything into account, according to the Court, the measure is an ‘interference’ in the exercise of his freedom of expression, because he wanted to travel to Davos in order to write an article on a particular subject.*”<sup>29</sup>
10. This principle has similarly been recognised as an aspect of the right to freedom of expression under the International Covenant on Civil and Political Rights (“**ICCPR**”). The

<sup>26</sup> Supreme Court of Canada, *Globe and Mail v. Canada (Attorney General)* 2010 SCC 41, [2010] 2 S.C.R. 592, par. 56.

<sup>27</sup> Supreme Court of Canada, *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)* [1991] 3 S.C.R. 459, p. 475.

<sup>28</sup> South African Constitutional Court, *South African Broadcasting Corporation Limited v. National Director of Public Prosecutions and Others* [2006] ZACC 15, par. 96.

<sup>29</sup> ECHR, *Gsell v. Switzerland*, Application No. 12675/05 (8 October 2009), par. 49 [translation].

UN Human Rights Committee has stated that it is incompatible with the right to freedom of expression under Article 19 ICCPR: “*to restrict the freedom of journalists and others who seek to exercise their freedom of expression (such as persons who wish to travel to human rights-related meetings) to travel outside the State party, [and] to restrict the movement of journalists ... within the State party (including to conflict-affected locations, the sites of natural disasters and locations where there are allegations of human rights abuses).*”<sup>30</sup>

11. The Committee of Ministers of the Council of Europe has also recognised that restraints should not be placed on journalists seeking to report from locations where public interest stories may be developing. In its Declaration on the protection and promotion of investigative journalism, the Committee of Ministers called on Member States to ensure the free movement of media professionals and their access to information.<sup>31</sup> In 2016, the Committee of Ministers, whilst requesting that Member States co-operate fully with information-gathering activities, recommended that Member States should “*not unduly restrict the free movement of journalists and other media actors, including cross-border movement and access to particular areas, conflict zones, sites and forums, as appropriate, because such mobility and access is important for news and information gathering purposes.*”<sup>32</sup>
12. The Organisation for Security and Co-operation in Europe (the “OSCE”), referring to the recent and well documented influx of migrants from North Africa and the Middle East, stated that authorities should facilitate access to areas and locations where stories are developing. Moreover, it recently called upon the Participating States not to make use of broad and general notions of “public safety” or “national security” in order to prevent journalists from accessing sensitive areas. The OSCE stated that authorities should facilitate access to areas and locations where stories related to the crisis develop (border areas, refugee camps and other relevant facilities), and that authorities should allow journalists to interview or have contact with refugees in order to report on personal stories and current living conditions.<sup>33</sup>
13. It follows from the Court’s case law, as well as the authoritative interpretations of the right to freedom of expression from international human rights bodies, that placing a physical restraint on a journalist accessing a location where news may be developing amounts to an interference with the right to freedom of expression.

### **III. Restraints on journalists accessing certain places require careful scrutiny and are only justified where strictly necessary and proportionate**

14. State restrictions on a journalist’s physical access to certain places or events should be subject to close scrutiny by the Court. This has been implicitly recognised in *Dammann v.*

<sup>30</sup> UN Human Rights Committee, *General Comment No. 34: Article 19: Freedoms of opinion and expression*, UN Doc. No. CCPR/C/GC/34 (12 September 2011), par. 45 and 46; UN Human Rights Committee, *Rafael Marques de Morais v. Angola*, Communication No. 1128/2002, UN Doc CCPR/C/83/D/1128/2002 (18 April 2005). See also: *Robert W. Gauthier v. Canada*, Communication No. 633/1995, U.N. Doc. CCPR/C/65/D/633/1995 (5 May 1999).

<sup>31</sup> The Committee of Ministers of the Council of Europe, *Declaration on the protection and promotion of investigative journalism*, adopted on 26 September 2007.

<sup>32</sup> The Committee of Ministers of the Council of Europe, *Recommendation on the protection of journalism and safety of journalists and other media actors*, CM/Rec (2016/4), adopted on 13 April 2016.

<sup>33</sup> OSCE, *Communiqué no. 3/2016 by the OSCE representative on Freedom of the Media on the rights and safety of journalists reporting on refugees* (4 March 2016).

*Switzerland*, where the Court called for the “closest scrutiny” of state restrictions on journalists’ research and investigative activities on account of the greater danger represented by such restrictions.<sup>34</sup> In *Pentikäinen v. Finland*, the Grand Chamber noted that the “public watchdog” role of the press assumes particular importance where they are providing information on the state authorities’ handling of public demonstrations and the containment of disorder. The Grand Chamber noted that, in this context, “[a journalist’s] presence is a guarantee that the authorities can be held to account for their conduct”.<sup>35</sup> Accordingly, any attempt to remove journalists from the locations where such activity is taking place must be subject to “strict scrutiny”.<sup>36</sup>

15. When applying careful scrutiny to physical restraints, the following factors should be taken into account to ensure that such restraints are only imposed where it is strictly necessary and proportionate:

- (1) **access to the location is for the purpose of covering a matter of general public interest:** There is little scope under Article 10 (2) of the Convention for restrictions when a matter of public interest is at stake.<sup>37</sup> As a consequence, a high level of protection of the right to freedom of expression will normally be accorded where the proposed publication relates to a matter of public interest, with the state authorities being afforded a limited margin of appreciation.<sup>38</sup>
- (2) **the state has an “information monopoly”:** Where states have exclusive control over the information flow from a certain location by way of their ability to restrict individuals’ access to it, they will hold an “information monopoly”. This gives the state a censorial power that is capable of amounting to a particularly severe restriction on the right to freedom of expression.<sup>39</sup> In the case of *Társaság a Szabadságjogokért v. Hungary* – which concerned a request for access to information by a non-governmental organization for the purposes of contributing to a public debate – the Court noted that it had recently advanced towards a broader interpretation of the notion of “freedom to receive information”.<sup>40</sup> Furthermore, the Court reasoned that the most careful scrutiny was called for when state authorities with the censorial

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<sup>34</sup> ECHR, *Dammann v. Switzerland*, Application No. 77551/01 (25 April 2006), par. 52; ECHR, *Társaság a Szabadságjogokért v. Hungary*, Application No. 37374/05 (14 April 2009), par. 26: “...the most careful scrutiny on the part of the Court is called for when the measures taken by the national authority are capable of discouraging the participation of the press, one of society’s “watchdogs”, in the public debate on matters of legitimate public concern, even measures which merely make access to information more cumbersome.”

<sup>35</sup> ECHR, *Pentikäinen v. Finland*, Application No. 11882/10 (20 October 2015), par. 82.

<sup>36</sup> *Id.*, par. 89.

<sup>37</sup> ECHR, *Couderc and Hachette Filipacchi Associés v. France*, Application No. 40454/07 (10 November 2015), par. 96. See also: *Wingrove v. the United Kingdom*, Application No. 17419/90 (25 November 1996), par. 58.

<sup>38</sup> ECHR, *Stoll v. Switzerland*, Application No. 69698/01 (10 December 2007), par. 125. See also: The Court of Appeal of Amsterdam, ECLI:NL:GHAMS:2016:3286 (16 August 2016), par. 3.7 and 3.8. The Court of Appeal held that authorities physically hindering journalists entering refugee camps has an adverse effect on the freedom of the press. In particular, because it concerns a matter of public interest due to the large numbers of refugees entering the Netherlands.

<sup>39</sup> This censorial power will prevent journalists from bringing news stories to the public’s attention. Cf ECHR, *Pentikäinen v. Finland*, Application No. 11882/10 (20 October 2015), par. 114; ECHR, *Brambilla and Others v. Italy*, Application No. 22567/09 (23 June 2016), par. 61.

<sup>40</sup> ECHR, *Társaság a Szabadságjogokért v. Hungary*, Application No. 37374/05 (14 April 2009), par. 35.

power of an “information monopoly” interfere with the exercise of the function of the press as a “public watchdog”.<sup>41</sup>

- (3) **the refusal to grant access to the location interferes with the Article 10 rights of third parties:** Where a journalist is seeking to access a location to conduct interviews or gather information from third parties who may be willing to speak with the press, appropriate weight should be given to the rights of those third parties wishing to engage with the media. In *Couderc and Hachette Filipacchi Associés v. France*, the Grand Chamber took into account the Article 10 rights of an individual who was not party to the application or the case before the domestic courts, but who had given an interview to the applicant editor and newspaper about aspects of her private life which had been subject to legal proceedings in France. The Grand Chamber reasoned that this third party “*was certainly not bound to silence and was free to communicate. In this regard, the Court cannot ignore the fact that the disputed article was a means of expression for the interviewee and her son.*”<sup>42</sup> The Article 10 rights of third parties is particularly relevant where a third party is being contained by state authorities, and is unable to freely meet with a journalist in person. In Germany, the Federal Constitutional Court considered a case where the state authorities refused to allow a journalist visit a detainee in custody awaiting extradition. The detainee was concerned that reporting of the legal proceedings against him was untrue and biased, and wanted the journalist to interview him about the case. The Federal Constitutional Court held that the detainee’s right to freedom of expression was violated by the refusal of permission.<sup>43</sup> Similarly, in *R v. Secretary of State for the Home Department, Ex parte Simms and Another*, the UK House of Lords examined a blanket ban on journalists visiting prisoners and found it to be an unjustified limitation on the prisoners’ rights to freedom of expression. In its judgment, the UK House of Lords emphasised that “an oral interview is simply a necessary and practical extension of the right of a prisoner to correspond with journalists about his conviction”.<sup>44</sup>
- (4) **access is for the purpose of promoting or protecting the rights of vulnerable or marginalised groups:** The public interest in allowing journalists to access and report from certain locations is particularly robust where the rights of vulnerable or marginalised groups are at stake.<sup>45</sup> The UN Special Rapporteur on Freedom of Opinion and Expression has recognised the essential role of freedom of expression in development and human rights. In 2009, the Special Rapporteur urged the international community to address the exclusion of vulnerable and marginalised groups from the media. In doing so, he observed that “[m]inorities, indigenous people, migrant workers, refugees and many other vulnerable communities have faced higher barriers, some of them insurmountable, to be able to fully exercise their right

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<sup>41</sup> ECHR, *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria*, Application No. 39534/07 (28 November 2013), par. 34.

<sup>42</sup> ECHR, *Couderc and Hachette Filipacchi Associés v. France*, Application No. 40454/07 (10 November 2015).

<sup>43</sup> Federal Constitutional Court of Germany (BVerfG), 2 BvR 1439/95, 19 July 1995, published in short form in *NStZ* 1995, p. 566.

<sup>44</sup> UK House of Lords, *R v. Secretary of State for the Home Department, Ex parte Simms and Another* [2000] 2 A.C. 115, p. 131.

<sup>45</sup> More specifically in relation to the refugee crisis, the OSCE stated that “journalists must be allowed to report on the developments surrounding the refugee crisis in Europe”. OSCE, *OSCE media freedom representative calls on authorities in Croatia not to obstruct journalists in their work, following incident at border* (20 October 2015), available at: <http://www.osce.org/fom/193331>.



to impart and also to access information. For these groups, the media plays the central role of fostering social mobilization, participation in public life and access to information that is relevant for the community. Without a means to disseminate their views and problems, these communities are in effect excluded from public debates, which ultimately hinders their ability to fully enjoy their human rights.”<sup>46</sup> Therefore, if the reporting is intended to relate to vulnerable groups in society, it is of utmost importance that the media be granted access to gather information from these vulnerable groups. If it were otherwise, there would be a risk that wrong-doing would not be exposed and those responsible would not be held to account. This was observed by the High Court of Ireland in *Cogley v. RTE*, a case concerning covert filming in a care home which shed light on abuse that was taking place in the home. The High Court of Ireland emphasised the significant public importance of the story, particularly when the reporting concerned extremely vulnerable residents of a care home who had a “limited (or in many cases no) voice of their own”.<sup>47</sup> The barriers that prevent members of vulnerable and marginalised groups from participating in public life often means they ‘remain invisible’ and excluded from society<sup>48</sup> and are unable to secure justice if not for the investigations carried out by the media and other ‘social watchdogs’. In *Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania*, the Grand Chamber recognised the role of the applicant NGO in investigating and bringing legal proceedings on behalf of an incredibly vulnerable mentally disabled man, Mr Câmpeanu, following their visit to the state-run hospital where he was held. The Grand Chamber concluded that “[h]ad it not been for the [Centre for Legal Resources], the case of Mr Câmpeanu would never have been brought to the attention of the authorities, whether national or international.”<sup>49</sup>

- (5) **access would cause disruption to the legitimate public interest activities of the authorities at the location:** Another factor that may be taken into account is the extent to which access will disrupt the legitimate public interest activities of the state authorities, for instance if there is disruption to an investigation into crime or disruption to measures taken by authorities to safeguard public order. However, limitations on a journalist’s access to the location should be confined to the minimum measures necessary to prevent disruption to these activities. For instance, if disruption can be avoided by providing a specified press area or by providing a supervised tour of the location, then these measures should be adopted before resorting to wholesale restrictions on access. This consideration has been examined by the Court of Appeals of California, in *Leiserson v. City of San Diego*, when examining legislative

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<sup>46</sup> *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue* (30 April 2014), A/HRC/11/4, par. 55. See also: *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue* (20 April 2010), A/HRC/14/23, par. 56 (“poor social groups can obtain information, assert their right and participate in the public debate concerning social and political changes that would improve their situation”); UNESCO, *Colombo Declaration on Media, Development and Poverty Eradication* (2 May 2006), par. 1: “Freedom of expression should be made available to all. It requires effective local participation to empower individuals and groups to address poverty, hunger, disease, discrimination, vulnerability, social exclusion, environmental degradation and education.”

<sup>47</sup> High Court of Ireland, *Cogley v. Radio Telefis Eireann* [2005] IEHC 180 (8 June 2005), page 9.

<sup>48</sup> *Report of the Special Rapporteur on the rights of persons with disabilities, Catalina Devandas Aguilar* (2 February 2015), A/HRC/28/58.

<sup>49</sup> ECHR, *Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania*, Application No. 47848/08 (17 July 2014), par. 151.



recognition that the media should be afforded special access to disaster sites. The Court of Appeals of California reasoned that, taking into account the potential for the media to interfere with the legitimate public interest activities of the authorities in such sites, “*press representatives must be given unrestricted access ... unless police personnel at the scene reasonably determine that such unrestricted access will interfere with emergency operations. If such a determination is made, the restrictions on media access may be imposed for only so long and only to such an extent as is necessary to prevent actual interference. This means that members of the press must be accommodated with whatever limited access to the site may be afforded without interference.*”<sup>50</sup> These principles also apply where the legitimate public interest activities of the state authorities relate to the maintenance of public order. For instance, when considering the refusal of permission for a detainee to be visited by a journalist, the German Federal Constitutional Court held that the mildest measures had to be adopted when limiting freedom of expression under criminal procedure law and that there was no proven reason why the visit by the journalist should endanger order in the prison.<sup>51</sup>

- (6) **less restrictive measures are capable of protecting the other interests or rights that may be at risk:** Complete physical restraint on entering a location should only be imposed where it is not possible to adopt any other less restrictive measure capable of protecting other rights or interests that may be at risk if access to the location is granted to a journalist. This accords with the Court’s own case law which states that in order for measures to be considered necessary and proportionate in a democratic society, there must be no other means of achieving the same end that would interfere less seriously with the right to freedom of expression.<sup>52</sup> When giving consideration to this factor, courts should take into account the principle that it is not for the courts to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists.<sup>53</sup> Therefore, state bodies should give appropriate weight to the measures that journalists are willing to adopt when implementing less restrictive measures for the protection of others’ rights or interests. In *Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland*, the Court held that the absolute refusal to interview and film a prisoner appeared particularly hard to justify with regard to Article 10 of the Convention.<sup>54</sup> The Court went on to state that the “*competent authorities should have allowed the applicant company to submit practical proposals to make sure the filming could go ahead without disturbing the smooth functioning of the prison or order and security there.*”<sup>55</sup>
- (7) **sufficient safeguards are in place to prevent arbitrary abuse:** Laws governing physical restraints on journalists’ access to locations must be compatible with the rule of law. This is consistent with the Court’s case law that minimum procedural

<sup>50</sup> Court of Appeals of California, *Leiserson v. City of San Diego* 184 Cal. App. 3d 51 (6 August 1986).

<sup>51</sup> Federal Constitutional Court of Germany (BVerfG), 2 BvR 1439/95, 19 July 1995, published in short form in NStZ 1995, 566.

<sup>52</sup> ECHR, *Glor v. Switzerland*, Application No. 13444/04 (30 April 2009), par. 94; ECHR, *Women On Waves and Others v. Portugal*, Application No. 31276/05 (3 February 2009), par. 41.

<sup>53</sup> ECHR, *Jersild v. Denmark*, Application No. 15890/89 (23 September 1994), par. 31; ECHR, *De Haes and Gijssels v. Belgium*, Application No. 19983/92 (24 February 1997), par. 48.

<sup>54</sup> ECHR, *Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland*, Application No. 4124/06 (21 June 2012), par. 61.

<sup>55</sup> *Id.*

safeguards must be in place in order to ensure protection from arbitrary and unwarranted interference with the right to freedom of expression.<sup>56</sup> Laws governing access to locations therefore must provide basic procedural guarantees and safeguards against arbitrary interference with the rights protected by Article 10. The safeguards must be stated in clear and detailed terms. This Court has said that “[i]n matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.”<sup>57</sup> The degree of precision of these legal safeguards “depends to a considerable extent on the content of the instrument at issue, the field it is designed to cover, and the number and status of those to whom it is addressed.”<sup>58</sup> In relation to physical restraints on journalists’ access, the Special Mandates have stated that accreditation schemes providing privileged access to certain places and/or events “should be overseen by an independent body and accreditation decisions should be taken pursuant to a fair and transparent process, based on clear and non-discriminatory criteria published in advance.”<sup>59</sup> Safeguards against arbitrariness are particularly important where the state authorities are limiting access to a location in which matters of public interest may be developing. It would be contrary to the rule of law for the legal discretion granted to the state to be expressed in terms of an unfettered power.

## **Conclusion**

16. It is a consistent and critical theme in the Court’s Article 10 case law that the press has a vital role to play in safeguarding the proper functioning of a democratic society. Recent events in many European countries demonstrate, more than ever, the necessity of safeguarding the fundamental role of the press in obtaining and disseminating to the public information on all aspects of governmental activity. That is, after all, one of the crucial elements of the democratic ideal protected by the Convention. This case presents the Court with a critical opportunity to lend its authority to the growing recognition that measures consisting of restrictions on the rights of journalists to access areas in order to report on matters of public interest require the most careful scrutiny. Compelling public interest considerations relating to politically and socially sensitive issues often arise in relation to newsgathering at such locations. Incidents where journalists require access to areas under the control of the state and where matters of public interest are taking place occur on a regular basis throughout the territory of the Council of Europe. Physical restraints on access to journalists at those locations should be subject to careful scrutiny, as outlined above, in order to enable journalists to impart information in a real and effective way.

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<sup>56</sup> See: ECHR, *Társaság a Szabadságjogokért v. Hungary*, Application No. 37374/05 (14 April 2009), par. 27. *Youth Initiative for Human Rights v. Serbia*, Application No. 48135/06 (25 June 2013); ECHR, *Kenedi v. Hungary*, Application No. 31475/05 (26 May 2009).

<sup>57</sup> ECHR, *Sanoma Uitgevers B.V. v. The Netherlands*, Application No. 38224/03 (14 September 2010), par. 83.

<sup>58</sup> ECHR, *Editorial Board of Pravoye Delo and Shtetel v. Ukraine*, Application No. 33014/05 (5 May 2011), par. 52.

<sup>59</sup> UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, *Joint Declaration on regulation of the media, restrictions on journalists and investigating corruption* (18 April 2003).

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