IN THE EUROPEAN COURT OF HUMAN RIGHTS

App No. 16915/21

BETWEEN:

Danileț

Applicant

v

Romania

Respondent

Written Comments of the Third-Party Intervener

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10 October 2024

Introduction

1. These written comments are submitted by Media Defence (the 'Intervener'), pursuant to leave granted by the President of the Court in accordance with Rule 44(3) of the Rules of Court.[1]

2. In the present case, the applicant expressed his views, in strong language and on his publicly accessible Facebook account, on a matter of public interest relating to the separation of powers and the importance of maintaining the independence of institutions in a democratic state. The comments did not directly concern the functioning of the judiciary. In its judgment, the Chamber held there was a violation of Article 10 on the basis that the applicant had discussed an issue of general interest within a specific political context, and that the domestic courts failed to have sufficient regard to a number of important factors in its proportionality assessment.

3. In determining this case, the Grand Chamber is provided with an opportunity to consider the extent to which judges' speech can be restricted by state authorities. As an independent arm of the state whose function is fundamental to the rule of law, the judiciary's role must be given significant weight when assessing any restrictions imposed by other branches of the state on the right to freedom of expression of judges. Defining the legal basis on which such restrictions can lawfully be applied is essential for judges, and for society more generally.

4. In addition to providing commentary on matters relating to law, the legal system, and the administration of justice, judges also comment on urgent public interest matters affecting the functioning of democratic societies and the rule of law. On such matters, to ensure their commentary is placed in the public domain judges could rely on journalists to disseminate that information. By extension, journalists might rely on judges' commentary to explain to their readers the implications of certain complex public interest matters.

5. The outcome of this case therefore has important implications for the press. In these written comments the Intervener first highlights the role of judges' speech in ensuring effective and accurate reportage on public interest matters, concerning, for example, the functioning of a democratic society and the rule of law. It then examines the relevant factors that should be to be taken into account when considering restrictions on judges' speech in the context of public interest matters.

The role of judges' speech when reporting on public interest matters

6. As emphasised by this Court, the press as public watchdog plays a vital role in democratic societies.[2] It occupies a "a pre-eminent role in a State governed by

[1] Permission to intervene granted by way of letter from the Deputy Registrar dated 20 September 2024 directing that submissions should be filed by 10 October.
[2] See for instance ECtHR, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 59, 20 May 1999; ECtHR, *Axel Springer AG v. Germany* [GC], no. 39954/08, § 79, 7 February 2012; ECtHR,

the rule of law" by imparting information and ideas on political and other public interest matters[3] which in turn the public has a right to receive.[4] This includes topics such as the functioning of the justice system,[5] the separation of powers[6] and the rule of law more generally.[7] The public must be able to receive information about judicial and other state authorities through the media and the press must be allowed to report freely on issues relating to those institutions.[8] The emphasis is on the public's interest in receiving information to facilitate participation in informed debate and deliberation.

7. When it comes to complex or technical subjects, such as constitutional reform, treaty interpretation, or the rule of law, to carry out its duties effectively the press relies on the knowledge and views of experts who provide in-depth analysis on these topics. For journalists, judges can be a valuable and important source of information, providing expertise on these matters. This expertise assists journalists in their reporting, enhancing the understanding of the public and allowing the public to engage in informed discussion.[9] Unavoidable political implications arising out of statements made in that context should not prevent judges from commenting.[10] Having regard always to their duty of restraint, judges should not be prohibited from participation in discussions with members of the press on matters of public interest with the aim of informing and educating the public.[11]

8. Considered from the perspective of the press, this Court has, on numerous occasions, emphasised that it "has a duty to impart - in a manner consistent with its obligations and responsibilities - information and ideas on all matters

Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland [GC], no. 931/13, § 126, 27 June 2017.

[3] ECtHR, *Prager and Oberschlick v. Austria*, no. 15974/90, § 34, 26 April 1995; see also ECtHR, *Castells v. Spain*, no. 11798/85, § 43, 23 April 1992, ECtHR, *Bédat v. Switzerland* [GC], no. 56925/08, § 50, 29 March 2016.

[4] See for instance ECtHR, *Axel Springer AG v. Germany* [GC], no. 39954/08, § 79, 7 February 2012; ECtHR, *Bédat v. Switzerland* [GC], no. 56925/08, § 51, 29 March 2016; ECtHR, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 126, 27 June 2017; ECtHR, *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 71, ECHR 2004-XI.

[5] ECtHR, *Prager and Oberschlick v. Austria*, no. 15974/90, § 34, 26 April 1995; ECtHR, *Di Giovanni v. Italy*, no. 51160/06, § 71, 9 July 2013; ECtHR, *Morice v. France* [GC], no. 29369/10, §§ 128 and 152, 23 April 2015; ECtHR, *Bédat v. Switzerland* [GC], no. 56925/08, § 63, 29 March 2016; ECtHR, *Kudeshkina v. Russia*, no. 29492/05, § 86, 26 February 2009.

[6] ECtHR, *Baka v. Hungary* [GC], no. 20261/12, § 165, 23 June 2016.

[7] *Id.*

[8] Committee of Ministers, *Rec (2003)13 on the provision of information through the media in relation to criminal proceedings* (10 July 2003), available at: https://search.coe.int/cm#{%22CoEIdentifier%22:[%2209000016805df617%22],%22sort%22:[%22CoEValidationDate%20Descending%22]}

[9] See with reference to this Court's jurisprudence and other international principles: Consultative Council of European Judges, *CCJE Opinion No. 25 (2022) on freedom of expression of judges* (2 December 2022), § 48; available at: https://rm.coe.int/opinion-no-25-2022-final/1680a95347%0A%0A.

[10] ECtHR, *Wille v. Liechtenstein* [GC], no. 28396/95, § 67, ECHR 1999-VII.

[11] Consultative Council of European Judges, *CCJE Opinion No. 25 (2022) on freedom of expression of judges* (2 December 2022), § 48, "Judges have the right to make comments on matters that concern fundamental human rights, the rule of law, matters of judicial appointment or promotion and the proper functioning of the administration of justice, including the independence of the judiciary and separation of powers" (underlining added), available at: https://rm.coe.int/opinion-no-25-2022-final/1680a95347%0A%0A

of public interest".[12] Journalists are required to make that information accessible to the public in a way that can be understood.[13] Newsgathering is protected by Article 10 and this Court has recognised that "the gathering of information ... is an essential preparatory step in journalism and is an inherent, protected part of press freedom",[14] while noting the resulting chilling effect that can be caused by obstacles that are created to hinder certain methods used to gather information.[15] In its case law, the Court has protected different forms of preparatory newsgathering activity, including access to certain types of information,[16] and interviews with third parties.[17] State restrictions on the ability of journalists to access certain information should be subject to close scrutiny by the Court.

9. Support for the proposition that judges should be entitled to discuss matters of public interest without undue interference can be found in the reports of authoritative international bodies. For example, the Consultative Council of European Judges (CCJE) has encouraged engagement with the press where it suggested a range of judicial "outreach programmes" to increase communication between judiciaries and the public. A more recent CCJE report, from 2022, provided the following recommendations:

> *A judge enjoys the right to freedom of expression like any other citizen. In addition to a judge's individual entitlement, the principles of democracy, separation of powers and pluralism call for the freedom of judges to participate in debates of public interest, especially as regards matters concerning the judiciary.*
>
> *In situations where democracy, the separation of powers or the rule of law are under threat, judges must be resilient and have a duty to speak out in defence of judicial independence, the constitutional order and the restoration of democracy, both at national and international level. This includes views and opinions on issues that are politically sensitive and extends to both internal and external independence of individual judges and the judiciary in general.*[18]

10. Also noteworthy are the comments by the International Commission of Jurists in its report on judges' freedom of expression, where it noted the importance of judges engaging with the public, stating that *"[t]otal isolation from the community and society is neither realistic nor required of judges and prosecutors, nor would it be desirable in any event since the administration of justice, while based on the law and the evidence before a judicial decision-*

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[12] ECtHR, *Bédat v. Switzerland* [GC], no. 56925/08, §50, 29 March 2016.
[13] ECtHR, *Fressoz and Roire v. France,* no. 29183/95, 21 January 1999.
[14] ECtHR, *Társaság a Szabadságjogokért v. Hungary* no. 37374/05, §27, 14 April 2009.
[15] *Id.,* §38.
[16] ECtHR, *Youth Initiative for Human Rights v Serbia*, no. 48135/06, 25 June 2013.
[17] See ECtHR, *Jersild v. Denmark*, 23 September 1994, §35, Series A no. 298, in which 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'."
[18] Consultative Council of European Judges, *CCJE Opinion No. 25 (2022) on freedom of expression of judges* (2 December 2022), available at: https://rm.coe.int/opinion-no-25-2022-final/1680a95347%0A%0A

maker, should nevertheless be informed by awareness and engagement with the community and society."[19]

Relevant factors when considering restrictions on judges' speech

11. Judges enjoy the right to freedom of expression according to the same legal framework as other individuals.[20] Because of their prominent position in society this right must be exercised with restraint, and restrictions can be lawfully imposed to maintain 'the authority and impartiality of the judiciary'.[21] This duty of restraint is based on a number of well-recognised and important considerations, such as ensuring the proper administration of justice, promoting and maintaining respect for the rule of law, preserving public confidence in the legal system, including through the appearance of judicial impartiality, and safeguarding the dignity of the judiciary.

12. The focus in *Baka v Hungary*, as in other cases relating to restrictions on judges' freedom of expression, was on judges' speech relating to legislative reform and the functioning of the justice system.[22] In its analysis in *Baka*, the Grand Chamber set out the legal standard to be applied in those cases, noting the well-established requirement that judges must show restraint when exercising their freedom of expression in all cases where the authority and impartiality of the judiciary could be called in question,[23] and must ensure that the "dissemination of even accurate information … be carried out with moderation and propriety".[24] In respect of their adjudicatory function, the Grand Chamber observed that judges are required to exercise "maximum discretion with regard to the cases with which they deal in order to preserve their image as impartial judges".[25]

13. In finding a violation of Article 10 in *Baka* the Grand Chamber attached "particular importance" to the office held by the applicant, whose functions and duties included expressing his views on the legislative reforms which were likely to have an impact on the judiciary and its independence.[26]

14. Recognising that judges' speech relating to the functioning of the judiciary is public interest speech, the question in this case is the extent to which the state authorities can lawfully interfere with judges' speech relating to public interest matters more generally, and whether the guarantees provided by Article 10 apply to judges' speech on those broader matters of public interest, where the speech does not directly relate to the functioning of the judicial system or the authority and impartiality of the judiciary.

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[19] International Commission of Jurists, *Submission to the United Nations Special Rapporteur on Independence of Judges and Lawyers for his upcoming report to the Human Rights Council*, (February 2019), §9 available at: https://www.icj.org/wp-content/uploads/2019/02/Global-JudgesExpression-Advocacy-SRIJL-2019-Eng.pdf
[20] ECtHR, *Baka v. Hungary* [GC], no. 20261/12, § 140, 23 June 2016.
[21] Article 10(2)
[22] ECtHR, *Baka v. Hungary* [GC], no. 20261/12, § 164, 23 June 2016; See for example ECtHR, *Morice v. France* [GC], no. 29369/10, §168, 23 April 2015.
[23] See for example ECtHR, *Wille v. Liechtenstein* [GC], no. 28396/95, § 64, 28 October 1999.
[24] ECtHR, *Baka v. Hungary* [GC], no. 20261/12, § 164, 23 June 2016.
[25] *Id.*
[26] *Id.*, § 168

15. That this matter is now being considered by this Court is a clear indication that the legal basis for restrictions on this type of speech have yet to be set out with sufficient clarity and precision. Limitations on judges' speech on matters of public interest should be reasonably foreseeable. The legal framework should indicate the scope of the discretion conferred on the relevant state authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim sought to be achieved, to allow judges regulate their behaviour accordingly.[27]

16. This case provides the Court with the opportunity to set out that legal basis where a judge does not occupy a high-level position in the judiciary, or where the speech relates to an opinion on a subject of general interest which has no direct link to the functioning of the judiciary. Providing a clear legal basis is important for individual judges, as well as for society more generally, which, as noted above, can draw benefits from the expertise of judges.

17. The starting point in the assessment of any interference with speech should be that judges, like any other individuals, are entitled to freedom of expression and any restriction should comply with the requirements of necessity and proportionality. The Court's case law confirms that a state's authorities have a margin of appreciation when deciding whether a restriction on judges' speech is justifiable.[28] Where the speech relates to a public interest matter, the Convention standard requires very strong reasons for justifying restrictions on debates on questions of public interest. In such cases the margin of appreciation should be narrow. This is consistent with the principle that there is little scope for restrictions on political speech or on debate on matters of public interest.[29]

18. In *Baka* the Court applied a narrow margin of appreciation, stating the following:

> *Accordingly, the Court considers that the applicant's position and statements, which clearly fell within the context of a debate on matters of great public interest, called for a high degree of protection for his freedom of expression and strict scrutiny of any interference, with a correspondingly narrow margin of appreciation being afforded to the authorities of the respondent State*.[30]

19. In *Morice v. France* the Grand Chamber had seemed to go further, applying a "particularly narrow margin of appreciation", in circumstances where the applicant, a lawyer, expressed value judgments with a sufficient factual basis, finding that his remarks concerning a matter of public interest had not exceeded the limits of the right to freedom of expression. (underlining added). The Court noted that "a degree of hostility and the potential seriousness of

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[27] See ECtHR, *Telegraaf Media Nederland Landelijke Media BV v. The Netherlands*, no. 39315/06, §90, 22 Nov 2012.
[28] ECtHR, *Wille v. Liechtenstein* [GC], no. 28396/95, § 62, 28 October 1999.
[29] ECtHR, *Dichand and others v. Austria*, no. 29271/95, § 39, 26 February 2002; see also ECtHR, *Sürek v. Turkey (No. 1),* no. 26682/95, § 61, 8 July 1999.
[30] ECtHR, *Baka v. Hungary* [GC], no. 20261/12, § 162, 23 June 2016.

certain remarks do not obviate the right to a high level of protection, given the existence of a matter of public interest."[31]

20. In *Baka* the emphasis was on the public interest nature of the expression, and the concomitant contribution to a debate of public interest. Where the Article 10 rights of members of the judiciary are under consideration, the importance of the interests at stake means there is a particularly heavy onus on the state to justify any interference. The Court in *Baka* did place "particular importance" on the fact that the applicant in that case occupied a high-ranking position in the judiciary, but in so doing it did not expressly exclude other members of the judiciary from Article 10 protections for exercising their freedom of expression. The Court in *Zurek v. Poland* went some way towards clarifying that no such distinction should be applied:

    In the present case, the Court is assessing the situation of an applicant who was not only a judge, but also a member of a judicial council and its spokesperson. However, the Court would note that a similar approach would be applicable to any judge who exercises his freedom of expression – in conformity with the principles referred to in paragraph 219 above – with a view to defending the rule of law, judicial independence or other similar values falling within the debate on issues of general interest. When a judge makes such statements not only in his or her personal capacity, but also on behalf of a judicial council, judicial association or other representative body of the judiciary, the protection afforded to that judge will be heightened.[32]

21. It is worth emphasising that the position of the Court in *Zurek* was on speech protection extending to all members of the judiciary speaking about general, or public, interest matters, and in that circumstance the speech would be entitled to heightened protection and consequently the margin of appreciation would be narrower.[33]

22. It is against that backdrop that any restriction on judges' speech must be considered. While it is true that domestic courts are often in the best position to assess the impact of language where restrictions are challenged, states should have a narrow margin of appreciation and the standard of close scrutiny should apply where there is any interference with statements which are made within the context of a debate on matters of public interest.[34]

23. The suggestion by the dissenting judges in the Chamber judgement, that a narrow margin of appreciation only applies to judges' public interest speech where the judge holds a prominent position in the judiciary or where they are a member of judicial councils or other representative bodies of the judiciary, and where the speech relates to the functions of the judiciary, seems unnecessarily restrictive. As well as relying on the findings in *Baka*, reliance for that position was also placed on a small number of cases where the applicant was a member of a representative body of the judiciary. The

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[31] ECtHR, *Morice v. France* [GC], no. 29369/10, §125, 23 April 2015.
[32] ECtHR, *Zurek v. Poland*, no. 39650/18, § 222, 16 June 2022
[33] *Id.,* § 224
[34] ECtHR, *Baka v. Hungary* [GC], no. 20261/12, § 171, 23 June 2016; ECtHR, *Zurek v. Poland*, no. 39650/18, § 224, 16 June 2022

dissenting opinion also emphasised that the applicant was not a whistle-blower, even though the majority did not contend that the Article 10 protections applied to whistle-blowers in *Halet v. Luxembourg*[35] could also be applied to judges. There is no reference in the dissent to any previous cases of this Court involving the public interest speech of a lower ranking judge.

24. The Intervener submits that the majority in the Chamber decision - referencing *Baka*, *Zurek* and other cases, as well as the CCJE and other bodies - was correct in finding that the respondent state failed to subject the interference to strict scrutiny "given the narrow margin of appreciation afforded to the authorities of the respondent State in such cases". The type of commentary a judge might typically engage in could concern the implications of complex public interest matters affecting democratic societies and the rule of law. Such commentary could itself be extensive and multifaceted, touching on issues unrelated to the functioning of the judiciary. That is the nature of speech relating to issues like the rule of law and threats to democracy. The fact that such matters might have political implications should not, in and of itself, provide sufficient ground for preventing a judge from exercising their right to free expression.[36] The emphasis is on the public interest aspect of the speech.

25. Support for this approach can be found in the report that the Special Rapporteur on the independence of judges and lawyers submitted to the Human Rights Council in which they make the following observation:[37]

> *As a general principle, judges and prosecutors should not be involved in public controversies. However, in limited circumstances they may express their views and opinions on issues that are politically sensitive, for example when they participate in public debates concerning legislation and policies that may affect the judiciary or the prosecution service. In situations where democracy and the rule of law are under threat, judges have a duty to speak out in defence of the constitutional order and the restoration of democracy.*

26. The Council of Europe Recommendation on judges' independence, efficiency and responsibilities notes, consistent with the duty of restraint, that judges "may engage in activities outside their official functions", that they "should exercise restraint in their relations with the media",[38] that "this restraint cannot be precisely quantified and depends on the individual circumstances", and recognises that, where judges do engage, they should "avoid actual or perceived conflicts of interest, their participation should be restricted to activities compatible with their impartiality and independence."[39] The CCJE, in discussing the interaction between judges and the press noted that "judges

[35] ECtHR, *Halet v Luxembourg* [GC], no. 21884/18, 14 February 2023
[36] See ICJ, *Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis of 2008*, § 13, available at: https://icj2.wpenginepowered.com/wp-content/uploads/2014/03/ICJ-Declaration-Rule-of-Law-in-crisis-instrument-2008-eng.pdf. See also ECtHR, *Baka v. Hungary* [GC], no. 20261/12, §§ 162 - 167, 23 June 2016
[37] Human Rights Council, *Independence of judges and lawyers – Report of the Special Rapporteur on the independence of judges and lawyers,* A/HRC/41/48, §102, 29 April 2019
[38] Council of Europe Recommendation *CM/Rec (2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities,* Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies, §19.
[39] *Id.,* §21

have to show circumspection in their relations with the press and be able to maintain their independence and impartiality" but that they must also have regard to the fact that "[t]he right of the public to information is nevertheless a fundamental principle resulting from Article 10 of the ECHR."[40]

27. In determining the extent to which judges' speech should be protected by Article 10, the decisive question should be whether it contributes to a debate on a matter of public interest. The Court has specified that the notion of public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention, or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community.[41] It has emphasised consistently that very strong reasons are required to justify restrictions on debates on questions of public interest.[42]

28. This was the approach adopted in *Kudeshkina v. Russia* where the applicant judge had been critical of the judiciary in the context of an election campaign for parliament. Following an investigation, she lost her job and was denied any possibility of exercising the profession of judge in the future.[43] In finding a violation of Article 10 the Court referenced its case law on the "unhindered" right to free expression around elections.[44] It also noted that the applicant had "raised a very important matter of public interest, which should be open to free debate in a democratic society".[45]

29. Taking into account the prominent position held by judges in society, considering that a narrow margin of appreciation should apply to restrictions on judges' speech on matters of public interest, and noting that any such speech should be expressed with a degree of restraint, the Intervener submits that the balancing exercise between maintaining the authority and impartiality of the judiciary and ensuring the free expression of judges should have regard to the following factors:[46]

(i) The nature of the comment

The well-established requirement to distinguish between factual statements and value judgments is relevant here on the basis it is necessary to take account of the circumstances of the case and the general tone of the remarks bearing in mind that assertions about matters of public interest may, on that

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[40] Consultative Council of European Judges, *CCJE Opinion No. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality* (19 November 2022), available at: https://rm.coe.int/168070098d
[41] See ECtHR, *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, §103, 10 November 2015; ECtHR, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 171, 27 June 2017; ECtHR, *Baka v. Hungary* [GC], no. 20261/12, 23 June 2016.
[42] ECtHR, *Eigirdas and VI "Demokratijos Pletros Fondas" v. Lithuania*, no. 84051/17, §106, 12 September 2023.
[43] ECtHR, *Kudeshkina v. Russia*, no. 29492/05, §§41-42, 16 February 2009.
[44] *Id.,* § 87
[45] *Id.,* § 94
[46] European Commission for Democracy through Law (Venice Commission) report on *"the Freedom of Expression of Judges"* Opinion no 806/2015, CDL-AD(2015)018 (23 June 2015), available at: https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2015)018-e

basis, constitute value judgments rather than statements of fact.[47] Where a statement amounts to a value judgment, the proportionality of any interference should be considered based on whether there exists a sufficient "factual basis" for the impugned statement.[48] In *Kudeshkina*, the Court found that statements by the applicant, a judge, were not entirely devoid of any factual grounds and, having assessed the factual foundation of those statements, considered that they could not be regarded as personal attacks but as fair comments on a matter of great public importance.[49]

(ii) The tone of the comment

Consistent with the duty of restraint, the tone and language used by judges is a relevant consideration. On matters of public interest, speech can often be expressed in strident terms, and as referenced above, hostile speech and speech that reflects a high level of seriousness should not be restricted solely on that basis.[50] This Court has recognised that in matters of public importance expressions that could be viewed as "perhaps inappropriately strong, could be viewed as polemical, involving a certain degree of exaggeration" are nonetheless entitled to protection from interference.[51] Speech has "a certain factual background",[52] and this should be a factor in the proportionality assessment, particularly in cases involving issues such as the rule of law and maintaining democratic standards. Where that speech takes place online regard should be had to the mode of expression, which, in that context, can often be informal or exaggerated, and often takes place within a more extensive online conversation.

(iii) The context

Considering that the speech is on a matter of public interest, other relevant factors would include the political and historical background to the speech, the legal context of the speech, and whether there exists at the time of the speech being published any specific event relating to concerns around the rule of law or threats to democracy. These factors would all weigh in the balance in determining the proportionality of any interference.

(iv) The method of reporting

From the perspective of journalists, the way in which a judge's speech is reported is also a factor to be considered in the proportionality assessment, where relevant. This Court has recognised that the techniques of reporting, including editorial decisions about content, are matters for the media and not for courts, including domestic courts, to determine.[53] In cases involving the

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[47] ECtHR, *Morice v. France* [GC], no. 29369/10, §126, 23 April 2015.
[48] *Id.*
[49] ECtHR, *Kudeshkina v. Russia*, no. 29492/05, 16 February 2009.
[50] ECtHR, *Morice v. France* [GC], no. 29369/10, 23 April 2015
[51] ECtHR, *Eigirdas and VI "Demokratijos Pletros Fondas" v. Lithuania*, no. 84051/17, §113, 12 September 2023.
[52] ECtHR, *Thorgeir Thorgeirson v. Iceland*, no. 13778/88, §65, 25 June 1992.
[53] ECtHR, *Jersild v. Denmark*, no. 15890/89, 23 September 1994, §31, "...the methods of objective and balanced reporting may vary considerably, depending among other things on the media in question. It is not for this Court, nor for the national courts for that matter, to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists."

public interest courts should be slow to apply an overly rigorous approach to how journalists report that information. The Court has noted that if the national courts apply an overly rigorous approach to the assessment of journalistic reporting techniques, the press could be unduly deterred from discharging their function of keeping the public informed. Having regard to any possible chilling effect, the domestic courts are required to take into account the likely impact of their rulings not only on the individual cases before them but also on the press in general.[54]

(v) The sanctions imposed

The nature and severity of the penalty imposed is another factor to be taken into account when assessing the proportionality of an interference with judges' speech.[55] Imposing a chilling effect on speech, significant or otherwise, must be avoided unless necessary. The Court sets a relatively low bar before this possibility becomes a matter of real concern. The issue is whether the measure is "capable"[56] of having a chilling effect, in which case it requires the "most careful scrutiny". The fundamental statement of principle on this point is that close scrutiny is called for when sanctions imposed by the national authority are capable of discouraging participation in debates by the press over matters of legitimate public concern.[57] The Court has extended this principle beyond the press to anyone communicating on a matter of public interest, including judges.[58]

Conclusion

30. While the Court expressly recognises that judges are entitled to the protection of Article 10, that protection is tempered by the expectation that they will exercise their freedom of expression with restraint whenever the authority and impartiality of the judiciary might be called into question.[59] Ultimately, any restriction on speech must comply with the requirements for necessity and proportionality. So long as the dignity of the judicial office is maintained and the essence and appearance of independence and impartiality of the judiciary is not undermined, it is the Intervener's respectful submission that states must refrain from interfering with the right of judges to express their opinions on matters of public interest.

Padraig Hughes
Sabah A
Media Defence

[54] ECtHR, *Bozhkov v. Bulgaria,* no. 3316/04, 19 April 2011.
[55] ECtHR, *Katrami v. Greece*, no. 19331/05, §38, 6 December 2007.
[56] ECtHR, *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, §64, 20 May 1999
[57] *Id.*
[58] ECtHR, *OOO Memo v. Russia*, no. 2840/10, §23, 15 March 2022
[59] ECtHR, *Wille v. Liechtenstein*, [GC], no. 28396/95, §64, 28 October 1999 and ECtHR, *Kayasu v. Turkey,* nos. 64119/00 and 7629/01, §92, 13 November 2008.