



The public's right to access archived material online took precedence over the right of convicted persons to be forgotten

In today's **Chamber judgment**¹ in the case of [M.L. and W.W. v. Germany](#) (application nos. 60798/10 and 65599/10) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 8 (right to respect for private life) of the European Convention on Human Rights.

The case concerned the refusal by the Federal Court of Justice to issue an injunction prohibiting three different media from continuing to allow Internet users access to documentation concerning the applicants' conviction for the murder of a famous actor and mentioning their names in full.

The Court shared the findings of the German Federal Court, which had reiterated that the media had the task of participating in the creation of democratic opinion, by making available to the public old news items that had been preserved in their archives.

The Court reiterated that the approach to covering a given subject was a matter of journalistic freedom and that Article 10 of the Convention left it to journalists to decide what details ought to be published, provided that these decisions corresponded to the profession's ethical norms. The inclusion in a report of individualised information, such as the full name of the person in question, was an important aspect of the press's work, especially when reporting on criminal proceedings which had attracted considerable attention that remained undiminished with the passage of time.

The Court noted that during their most recent request to reopen proceedings in 2004, M.L. and W.W. had themselves contacted the press, transmitting a number of documents while inviting journalists to keep the public informed. This attitude put a different perspective on their hope of obtaining anonymity in the reports, or on the right to be forgotten online.

In conclusion, having regard to the margin of appreciation left to the national authorities when weighing up divergent interests, the importance of maintaining the accessibility of press reports which had been recognised as lawful, and the applicants' conduct *vis-à-vis* the press, the Court considered that there were no substantial grounds for it to substitute its view for that of the Federal Court of Justice.

Principal facts

The applicants, M.L. and W.W., who are half-brothers, are German nationals who were born in 1953 and 1954 and live in Munich and Erding (Germany) respectively.

In May 1993 M.L. and W.W. were convicted of murdering a very popular actor, W.S., and sentenced to life imprisonment by the domestic courts. They were released on probation in August 2007 and January 2008 respectively.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

In 2007 the applicants brought proceedings against the radio station *Deutschlandradio* in the Hamburg Regional Court, requesting anonymity of the personal data in the documentation on them which had appeared on the station's Internet site.

In two judgments of 29 February 2008 the Hamburg Regional Court granted the applicants' requests, considering in particular that their interest in no longer being confronted with their past actions so long after their conviction prevailed over the public interest in being informed. The Court of Appeal upheld those judgments. The Federal Court of Justice quashed the decisions on the grounds that the Court of Appeal had not taken sufficient account of the radio station's right to freedom of expression and, with regard to its mission, the public's interest in being informed. In July 2010 the Federal Constitutional Court decided not to entertain constitutional appeals lodged by the applicants.

A second and third set of proceedings on similar grounds brought against the weekly magazine *Der Spiegel* and the daily newspaper *Mannheimer Morgen* respectively were dealt with under the same procedure and ended with the same conclusions by the courts.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private life), the applicants complained about the refusal by the Federal Court of Justice to issue an injunction prohibiting the defendant media from keeping on their Internet portal the transcript of a radio programme by *Deutschlandfunk* and articles by *Der Spiegel* or the *Mannheimer Morgen* about their criminal trial and their conviction for murder. They complained of an infringement of their right to respect for their private life.

The applications were lodged with the European Court of Human Rights on 15 and 29 October 2010 respectively.

Judgment was given by a Chamber of seven judges, composed as follows:

Erik Møse (Norway), *President*,
Angelika Nußberger (Germany),
Yonko Grozev (Bulgaria),
Síofra O'Leary (Ireland),
Mārtiņš Mits (Latvia),
Gabriele Kucsko-Stadlmayer (Austria),
Lətif Hüseynov (Azerbaijan),

and also Milan Blaško, *Deputy Section Registrar*.

Decision of the Court

Article 8

The Court noted that the applications required an examination of the fair balance that had to be struck between the applicants' right to respect for their private life, guaranteed under Article 8 of the Convention, and the right of the radio station and press to freedom of expression and the public's right to be informed, guaranteed under Article 10.

The Court noted that it was primarily on account of search engines that the information made available by the media could be obtained easily by Internet users. However, the interference complained of by the applicants resulted from the decision by the media concerned to publish and conserve this material on their websites; the search engines merely amplified the scope of the interference.

The Court observed that the Federal Court of Justice, while recognising that M.L. and W.W. had a considerable interest in no longer being confronted with their convictions, had emphasised that the public had an interest in being informed about a topical event, and also in being able to conduct research into past events. The Federal Court had also reiterated that one of the media's tasks was to participate in creating democratic opinion, by making available to the public old news items that were preserved in their archives. The Court agreed entirely with this conclusion.

Thus, the Federal Court of Justice had referred to the risk that a decision to grant the requests to remove identifying elements from the reports could have a chilling effect on the press's freedom of expression. An obligation to examine the lawfulness of a given news report following a request from the individual concerned entailed the risk that the press would abstain from putting their archives online or that they would omit individualised information in news reports that could subsequently give rise to such requests. The rights of a person who had been the subject of an internet publication had to be balanced against the public's right to be informed about past events and contemporary history, particularly using digital press archives. In so far as M.L. and W.W. were not asking for the removal of the reports in question, but only that they be anonymised, the Court noted that rendering material anonymous was a less restrictive measure in terms of press freedom than the removal of an entire article.

However, it reiterated that the approach to covering a given subject was a matter of journalistic freedom and that Article 10 of the Convention left it to journalists to decide what details ought to be published, provided that these decisions corresponded to the profession's ethical and deontological norms. In consequence, the Court considered that the inclusion in a news report of individualised information, such as the full name of the person concerned, was an important aspect of the press's work, especially when reporting on criminal proceedings which had attracted considerable attention.

The Court concluded that the availability of the impugned reports on the media's websites at the time that the applications were lodged by M.L. and W.W. continued to contribute to a debate of general interest which had not been diminished by the passage of time.

As to how well known the applicants were, the Court observed that they were not simply private individuals who were unknown to the public at the time their request for anonymity was made. The reports in question concerned either the conduct of their criminal trial, or one of their requests for the reopening of that trial, and thus constituted information capable of contributing to a debate in a democratic society.

As to M.L.'s and W.W.'s conduct since their conviction, the Court observed that the applicants had lodged every possible judicial appeal to obtain the reopening of the criminal proceedings against them. During their most recent request to reopen proceedings in 2004, M.L. and W.W. had contacted the press, transmitting a number of documents while inviting journalists to keep the public informed. The Court noted that as a result of the applicants' conduct *vis-à-vis* the press, less weight was to be attached to their interest in no longer being confronted with their convictions through the medium of archived material on the internet. Their legitimate hope of obtaining anonymity in the reports, or even a right to be forgotten online, had thus been very limited.

With regard to the content and form of the contested documentation, the Court, like the Federal Court of Justice, considered that it concerned texts which described a judicial decision in an objective manner, the original truthfulness or lawfulness of which had never been challenged. Equally, the articles in *Der Spiegel* did not reflect a wish to denigrate M.L. and W.W. or to harm their reputation.

With regard to the dissemination of the contested publications, the Court followed the findings of the Federal Court of Justice, which had noted that this dissemination was limited in scope, especially as some of the material was subject to restrictions such as paid access or a subscription. Lastly, the

Court noted that M.L. and W.W. had provided no information about any attempts made by them to contact search-engine operators with a view to making it harder to trace information about them.

In conclusion, having regard to the margin of appreciation left to the national authorities when weighing up divergent interests, the importance of maintaining the accessibility of news reports which had been acknowledged to be lawful, and the applicants' conduct *vis-à-vis* the press, the Court considered that there were no substantial grounds for it to substitute its view for that of the Federal Court of Justice. The Court considered that the Federal Court had not failed to comply with the German State's positive obligations to protect the applicants' right to respect for their private life and held that there had been no violation of Article 8.

The judgment is available only in French.

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Press contacts

echrpress@echr.coe.int | tel.: +33 3 90 21 42 08

Denis Lambert (tel: + 33 3 90 21 41 09)

Somi Nikol (tel: + 33 3 90 21 64 25)

Tracey Turner-Tretz (tel: + 33 3 88 41 35 30)

Inci Ertekin (tel: + 33 3 90 21 55 30)

Patrick Lannin (tel: + 33 3 90 21 44 18)

The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.