

# Secret filming and the right to inform under an European constitutional perspective. The case of *Alpha Doryforiki v. Greece*

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European Court of Human Rights, 22 February 2018, *Alpha Doryforiki Tileorasi Anonymi Etairia v. Greece*, app. 72562/10

In the case in question, the European Court of Human Rights dealt with the boundaries of the right to inform in relation to use of secret tools of recording by journalists to conduct interviews on matters of public interest. In particular, the facts involved three video filmed secretly involving a Greek politician. The videos were broadcasted on TV by the applicant which, then, was sanctioned by the Greek authorities. Regarding the first video, the Court ruled that the Greek Courts had violated the applicant, as broadcaster, freedom of expression by imposing sanctions for having secretly filmed video of a politician in a gambling arcade. However, the Court held that there had been no violation in respect of the two other videos filmed secretly on private premises. In its reasoning, the ECtHR observed that the Greek authorities had not considered that the first video was not recorded on private premises and, consequently, the interference with the official's privacy rights under art. 8 ECHR was, therefore, significantly less serious than the interference related to the other two videos where the Greek courts ruled in favour of the right to privacy of the politician, taking into account, in particular, the modalities exploited to obtain information together with the journalistic duties and obligations of the broadcaster.

## Summary

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Keywords: Freedom of expression, Data protection, Right to private and family life, Right to inform, Journalism

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## 1. Introduction

The case, here analysed, deals with the exercise of the right to inform by journalists and its relative limit in relation to the protection of privacy of the person filmed by hidden recording tools.

As a preliminary remark, since the case involves the conflict between two fundamental rights, it is necessary to contextualise the relationship between freedom of expression

and privacy in the European framework and, in particular, by looking at the degree of protection recognised to these fundamental rights. Indeed, both these rights, which strongly conflict to each other almost by nature, enjoys a degree of protection which is not absolute but relative<sup>1</sup> being subject to exceptions enshrined both in the European Convention of Human Rights<sup>2</sup> (hereinafter, “ECHR”) and the Charter of Fundamental Rights of the European Union.<sup>3</sup> Moreover, as a general clause, it should be mentioned the prohibition of the abuse of a right meaning that, in the system of protection of fundamental rights, one right cannot prevail generally over the other ones, leading to their destruction.<sup>4</sup> Since a fundamental right cannot prevail generally over another one, the balancing activity is at the core of the entire system of protection of fundamental rights in Europe. For this reason, as it will appear clear in this case, the right to privacy and to inform need to be balanced and such activity is not prior established but is based on the assessment of each situation through a case-by-case analysis. However, in order to understand better the implications of such approach on judicial outcomes, it is necessary to look at interpretative criteria provided by the European Court of Human Rights (hereinafter, “ECtHR” or “Strasbourg Court”) which can be considered as a guide when dealing with similar journalistic activities.

## 2. The facts

It is time to focus on the main facts of the case in question.<sup>5</sup> The relevant events occurred in January 2002, when the applicant company, the broadcaster of the Greek television channel Alpha, transmitted a TV show named “Jungle” (*Zούγγλα*) in which

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<sup>1</sup> See, in particular, O. Pollicino - M. Bassini, *Free Speech, Defamation and the Limits to Freedom of Expression in the EU: A Comparative Analysis*, in A. Savin - J. Trzaskowski (eds.), *Research Handbook on EU Internet Law*, Cheltenham UK, 2014, 508 ss.; F. J. Borgesius - S. Kulk, *Privacy, freedom of expression, and the right to be forgotten in Europe*, Cambridge, 2018.

<sup>2</sup> According to art. 8, para. 2, ECHR: «There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others». According to art. 10, para. 2, ECHR: «The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary».

<sup>3</sup> According to art. 52, para. 1, of the Charter: «Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others».

<sup>4</sup> According to art. 17 ECHR: «Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention». A similar clause is enshrined in art. 54 of the Charter.

<sup>5</sup> See ECtHR, *Alpha Doryforiki Tileorasi Anonymi Etairia v. Greece*, app. 72562/10 (2018).

three videos, realised by a hidden camera, showed a member of the Hellenic Parliament (and, in particular, the chairman of the inter-party committee on electronic gambling) while gambling in an arcade. In particular, the first video showed the Parliamentarian entering in the gambling arcade and playing on two machines. The other two videos showed two meetings between the parliamentary deputy and the associates of the television broadcaster during which the first video was shown to the politician.<sup>6</sup> The broadcastings in questions did not go unnoticed. Indeed, in May 2002, after having held a hearing with the broadcaster, the National Radio and Television Council (*Εθνικό Συμβούλιο Ραδιοτηλεόρασης*) considered that the hidden camera report in question was not compliant with the Greek law and ordered the broadcaster to pay 200,000 euros, obliging also to transmit the content of such decision.<sup>7</sup> During the proceedings, the broadcaster acknowledged the use of the hidden camera. However, according to the applicant, the use of such technique was justified by the fact that the Parliamentarian was a public figure and that it could be no other ways to verify his gambling activity as nobody would have relied on such events without broadcasting the images in question. On the contrary, the members of National Radio and Television Council argued that, in the event that the use a hidden camera would be generally justified by referring to an overriding public interest, citizens would fear to be subject to extortion.

Against such decision, the broadcaster lodged an appeal with the Greek Supreme Administrative Court (*Συμβούλιο της Επικρατείας*) in order to obtain its annulment. The case, then, was referred to the Plenary of the Supreme Administrative Court considering, in particular, that the broadcaster complained the violation of his right to freedom of expression not only as enshrined in the Greek Constitution but also under art. 10 ECHR.

In 2010, the Plenary dismissed the application considering that the act of recording by secret means an image focused on a specific person constitutes a violation of the right to personal image, as protected by art. 9, para. 1, of the Greek Constitution and art. 8, para. 1, of the ECHR. As a result, the TV broadcasting of images gathered through secret means cannot be covered by the legitimate exercise of the right to inform, considering that the news has been obtained violating an individual fundamental right. Therefore, the application of annulment based on reasons of journalistic interest and public interest was dismissed.

Consequently, the broadcaster decided to lodge an application to the ECtHR complaining, *inter alia*, the violation of its right to freedom of expression.

### **3. The ECtHR Decision**

Before to describe the decision of the ECtHR, it will be appropriate to preliminary summarise the arguments of the applicant and the Greek Government.

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<sup>6</sup> Some days later, the videos were broadcasted again during the TV show named “Yellow Press” (*Κίτρινος Τύπος*) by the same broadcaster.

<sup>7</sup> See Greek National Radio and Television Council, decision 214/162/23.05.2002. The decision of this authority was then confirmed by the Minister of Press and Media with the decision 3156/E/11.02.2003.

As already expressed, on the one hand, the broadcaster claimed that the decision of the National Radio and Television Council consisting in the imposition of administrative sanctions had violated its right to freedom of expression, and, in particular, the right to impart information. In particular, according to the broadcaster, the transmission of the first video in question was justified by the fact the Parliamentarian was a public figure and its participation in gambling activities was a matter of public interest, especially due to its role as chairman of the parliamentary committee on electronic gambling. The same considerations applied for the other two videos in which, according to the applicant, it was necessary to represent the behaviour of Parliamentarian consisting in the attempt to persuade the associates of the broadcaster to present the facts in another way.

On the other hand, the Governments supported the opposite position according to which there was a violation of the right to privacy of the Parliamentarian. Indeed, a restriction of the right to inform of the broadcaster did not occur since the sanction imposed regarded the illicit reproduction of the videos and not the broadcasting of them. According to the Government, there was not a violation of the right to inform and, even in the case the Court recognised it, the interference would have been justified by the fact that the applicant reported the facts by illegitimate means (i.e. a hidden camera) without either the consent or the awareness of the person involved. The Governments clarified that the applicant was aware that by filming and broadcasting the videos in question had breached art. 370A, para. 2, of the Greek Criminal Code. In particular, the Government observed that the wide protection afforded to the press did not mean that journalists were not obliged to respect national legislation and the Code on Journalistic Ethics. Moreover, the videos did not meet a public interest since the modalities were aimed at increasing the level of the TV audience, an aim which cannot justify a restriction of the right to personal identity.

Once having briefly clarified the positions of the parties, it is time to look at the ECtHR decision. Unlike the position of the Governments regarding the lack of the interference with the right to inform, the Strasbourg Court considered, instead, that the interference with the broadcaster freedom of expression existed and, moreover, the Court considered the above-mentioned argument as groundless since neither the ECtHR nor the national courts, can impose to the media the techniques of reporting to adopt in a particular case.<sup>8</sup>

Then, the Strasbourg Court analysed whether the interference in question met the conditions to restrict freedom of expression according to art. 10, para. 2, ECHR. In particular, since the restriction was prescribed by the Greek law and there was a legitimate aim to «protect the reputation and rights of the other», the Court focused on

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<sup>8</sup> See ECtHR, *Jersild v. Denmark*, app. 15890/89 (1994). According to para. 31: «[...] At the same time, 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. In this context the Court recalls that Article 10 (art. 10) protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed. [...]» See, also, *Stoll v. Switzerland*, app. 69698/01, para. 146 (2007).

the necessary character of restriction in a democratic society<sup>9</sup> following these criteria: the contribution of the report to a debate of public interest; the degree of notoriety of the person affected and the subject of the report; the prior conduct of the person concerned; the circumstances under which the video was taken; the content, form and consequences of the broadcast; the severity of the sanction.<sup>10</sup>

Firstly, the Court considered that the report was matter of public interest, in particular, because «the widespread use of gambling constituted a debate of considerable public interest» and «the report was not without political import» since the interest of the public is related also the fact the conduct of the deputy was particularly relevant due to its role of chairman of an inter-party committee on electronic gambling.<sup>11</sup>

Indeed, regarding the degree of notoriety of the person involved, the Court clarified that the «public was entitled to be informed about certain aspects of the private life of public figures»<sup>12</sup>. In the case in question, the ECtHR observed that the national courts have taken into consideration the role of the Parliamentarian as a public figure even not expressly mentioning it in their reasoning. Moreover, according to the ECtHR, the subject of the videos was not the gambling issue *per se* but the Parliamentarian activity. The report, actually, did not focus on gambling as a social issue but to the figure of the politician as a gambler.

While the Court did not add any other relevant element regarding the prior conduct of the person involved, concerning the circumstances in which the videos were obtained, the Strasbourg Court clarified preliminary that «notwithstanding the vital role played by the media in a democratic society, journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that, as journalists, Article 10 affords them a cast-iron defence»<sup>13</sup>. Indeed, the use of a hidden camera is not generally prohibited but subject to specific conditions. By looking at the facts, since the first video was obtained in a public place, the expectation of the person involved impose a different assessment of the use of a hidden camera to record videos rather than in the case of the other two videos filmed in private premises.

Then, the ECtHR addressed the last two elements. Whilst, regarding content and the effects of the broadcasting the Court observed only that the main effect was the removal of the Parliamentarian from the parliamentary group which he belonged to, the Strasbourg Court recognised that the sanction originally imposed by the Greek authorities was proportionate having considered, *inter alia*, its lenient amount and the impact of the TV as channel of communication in spreading the videos concerned.

Having said that, the ECtHR agreed with the Greek authorities in relation to the conflict between the right to impart information and the right to protect privacy. The

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<sup>9</sup> See, recently, ECtHR, *Pentikäinen v. Finland*, app. 11882/10 (2015), paras. 87-91; *Bédat v. Switzerland*, app. 56925/08 (2016), paras. 48-54; *Couderc and Hachette Filipacchi Associés v. France*, app. 40454/07 (2015), paras. 82-93.

<sup>10</sup> See ECtHR, *Couderc*, cited above, para. 93; *Axel Springer AG v. Germany*, app. 39954/08 (2012), paras. 90-95; *Von Hannover v. Germany (no. 2)*, app. 40660/08 and 60641/08 (2012), paras. 109-113.

<sup>11</sup> See ECtHR, *Alpha Doryforiki*, cited above, para. 52.

<sup>12</sup> See ECtHR, *Karhuvaara and Iltalehti v. Finland*, app 53678/00 (2004).

<sup>13</sup> See ECtHR, *Stoll*, cited above, para. 102; *Bladet Tromsø and Stensaas v. Norway*, app. 21980/93 (1999), para. 65; *Monnat v. Switzerland*, app. 73604/01 (2006), para. 66.



sanction was applied based on the way the information was obtained and to the journalistic duties and obligations of the applicant company. According to the ECtHR, these elements are reasonable as far the second and third video are concerned. On the contrary, regarding the first video, the Court observed that the Greek authorities did not take into account the circumstances under which it was obtained. Despite the use of the hidden camera to obtain the video, the Court recognised relevance to the fact that it was not recorded in private premises and that the interference with its fundamental rights was less serious. Indeed, the Strasbourg Court stated that «the domestic authorities should have included in their assessment the fact that [the politician], by entering a gambling arcade, could legitimately have expected his conduct to have been closely monitored and even recorded on camera, especially in view of the fact that he was a public figure»<sup>14</sup>.

For these reasons, only regarding the first video, the Court ruled that, in assessing the case in question, national authorities did not balance proportionally the measures with the result that they have restricted the broadcaster right to freedom of expression and its legitimate aim consisting in the right to impart information over a subject of public interest. While, concerning the second and third videos, the applicant's complaints were rejected.

#### **4. Journalism and secret filming: not a first time for the ECtHR**

Once having provided this general framework, it is possible to focus on some aspects of this decision. This case deals with a quite common practice in the field of investigative journalism.<sup>15</sup> Indeed, hiding either the identity of the journalist or the tools used to report are only two of the techniques through which reporters try to make available to the society situations of public interest. Here, the traditional question was related to the lawfulness of such activity, i.e. the limits of the right to inform.

The relevant events of the case in question were not new for the ECtHR. In *Haldimann*,<sup>16</sup> the Strasbourg Court found that, in the framework of a report about malpractices in insurance brokerage, the act of secretly filming a person (making him or her unrecognisable), which was not a public figure and in private premises, was a proportionate exercise of the right to inform. Indeed, according to the ECtHR, the interference in the private life of the broker had not been serious enough to override the public interest in receiving information on the alleged malpractice in the field of insurance brokerage. While, in *Alpha Doryforiki*, in relation to the second and third videos, the Court recognised that the filming of a video with the above-mentioned modalities but involving a public figure in a private premise was not covered by the right to inform.

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<sup>14</sup> See ECtHR, *Alpha Doryforiki*, cited above, para. 78.

<sup>15</sup> See S. Peron, *Il giornalismo d'inchiesta*, in *Responsabilità Civile e Previdenza*, 11, 2010, 2262 ss. See, generally, C. L. LaMay, *Journalism and the debate over privacy*, New York, 2003.

<sup>16</sup> See ECtHR, *Haldimann v. Switzerland*, app. 21830/09 (2015). See F. Furlan, *Haldimann c. Svizzera: via libera a giornalismo investigativo e registrazioni nascoste*, in *Quaderni Costituzionali*, 2, 2015, 466 ss.

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At first glance, although the two cases are very similar, however, the outcomes are opposite. This is an example of how the concrete application of the balancing between fundamental rights can lead to different judicial outcomes even in cases dealing with the same conflict of rights and similar facts. At this point, comparing the two above-mentioned decision will be an exercise which allows to better analyse this framework.<sup>17</sup>

In order to understand the reason of such differences, it is necessary to deeply focus on the relevant facts of the *Haldimann* case. The Strasbourg Court dealt with a case involving three Swiss journalists which agreed to organise and film by using two hidden cameras an interview between a fake customer and an insurance broker in order to highlight malpractices in the insurance brokerage and, then, broadcast the video on a weekly TV programme on consumer protection. At the end of the interview, one of the journalists introduced herself explaining what it was happening to the broker which refused to answer any other question. As programmed, some sequences of such interview were broadcasted, however, making the broker's voice and face unrecognisable.

Without analysing all the steps of the proceedings which have led to the decision of the Strasbourg Court in *Haldimann*, starting from such brief explanations of the relevant facts, it is possible to underline at least two elements in favour of the right to privacy of the broker.

Firstly, the person involved is not a politician but only an insurance broker which, consequently, cannot be considered a public figure as also specified by the Strasbourg Court.<sup>18</sup> As a result, the broker can rely on his right to privacy which would tolerate less interference than in cases which involve public figures.

Secondly, and maybe most importantly, the video was filmed not in a public place but in private premises. In this case, that reliance according to which an individual can expect to be filmed in a public place cannot be applied since the case is more similar to the second and third videos contested in *Alpha Doryforiki*. Both these circumstances constitute clues in order to consider the right to privacy as predominant over the right to inform in *Haldimann*.

One, instead, is the main argument in favour of the right to inform. The content of the video was not focused on the broker but on the specific problem of public interest (i.e. malpractices in the insurance brokerage). Indeed, unlike the *Alpha Doryforiki* case, the documentary had not aimed to directly criticised the broker but realised to denounce specific commercial practices. Furthermore, the image of the broker was modified in order not to allow its recognition. These circumstances, instead, support a more proportionate restriction of the right to privacy favouring the right to inform. However, regarding this last point, it is not clear the reasons according to which, in *Alpha Doryforiki*, the Court considered the second and third videos as affecting more

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<sup>17</sup> A similar exercise can be done by looking at the following ECtHR's decisions. See ECtHR, *Delfi AS v. Estonia*, app. 64669/09 (2015); *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, app. 22947/13 (2016). See J.T. Papp, *Liability for Third-Party Comments before the European Court of Human Rights - Comparing the Estonian Delfi and the Hungarian Index-MTE Decisions Hungarian*, Hungarian Yearbook Of International Law And European Law, 2016.

<sup>18</sup> See ECtHR, *Haldimann*, cited above, para. 52.

the right to privacy of the Parliamentarian, instead of considering them part of the gambling issue. Indeed, the fact that a public figure, which was covering at that time the role of chairman of the inter-party committee on electronic gambling, behave in a non-transparent way (i.e. trying to renegotiate the facts regarding his gambling activities) would be a matter of public interest regarding which the public deserves to be informed. As already anticipated, the qualification of a person as a public figure increases the threshold of tolerance regarding the intrusion in his or her private life.

In other words, it seems that, by looking these cases under this perspective, maybe the two decisions could be decided in opposite way, so that, in *Alpha Doryforiki*, having as example the *Haldimann* case, the Strasbourg Court could strike the balance in favour of the right to inform even for the second and third video considering, in particular, the role of the person involved in the public life. While, in *Haldimann*, the ECtHR could make prevail the right to privacy considering that the broker was not a public figure and the video was recorded in private premises.

At this point, it is necessary to raise questions about why the Court has reached to these conclusions. In order to explain such distinguishing, it is necessary to refer to a specific paragraph of the *Haldimann* decision. Indeed, the Strasbourg Court observed that «the applicants deserved the benefit of the doubt intended to comply with the ethical rules applicable to the present case regarding the method used to obtain information»<sup>19</sup>. This means that the respect of the ethics of journalism as defined by Swiss law, citing the example of their limited use of the hidden camera, was taken into account by the journalists. In particular, the Swiss journalist has protected the right to privacy of the broker making him unrecognisable. The safeguard of the right to inform as provided for by 10 ECHR to journalists in relation to reporting on issues of general interest is subject to the condition that they act in good faith and on an accurate factual basis providing “reliable and precise” information in accordance with the ethics of journalism. On the contrary, in *Alpha Doryforiki*, the journalists were aware of the fact that their conduct was illicit according to Greek criminal law and, for this reason, the lack of good faith can be considered the true reason which has led the Strasbourg Court to give a strong relevance to conducts of journalists as *discrimen* in such two decisions. Consequently, the more relevant difference for the ECtHR between these two cases has been the respect of the rules provided by national laws regarding journalistic ethics. As a result, the rules provided for by the law and the code of conducts in the field of journalist activities should be considered as a fundamental element in order to assess whether the reporter have acted in good faith, even when an event of public interest or a public figure are involved.

## **5. Is there a lesson learnt?**

The analysis of this decision, together with its precedent, seems to confirm the introductory remarks according to which the specific facts of each case can strongly influence the balancing of fundamental rights impacting on the final outcome. Indeed,

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<sup>19</sup> *Ibidem*, para. 61.



as analysed, in two similar cases, the Strasbourg Court reached two opposite decisions. Focusing on the case in question, as appeared clear, the ECtHR recognises a broad margin of the right to inform by acknowledging that a person cannot expect the same level of privacy in a public place as in private premises. While, especially with regard to second and third videos, the Court clarified that, even when a public figure is involved, the right to inform finds, however, its limit in the respect of the right to privacy. This last consideration would be particularly important for reporters whose activities should, moreover, comply with their duties and responsibilities according to national rules as stated in *Haldimann*. For this reason, it would be necessary to read these cases together without considering the case in question a *revirement* of the Strasbourg Court. Maybe, such balance would be influenced in the next future by the implementation of art. 85 of the General Data Protection Regulation<sup>20</sup> which leaves to Member States a broad margin of discretion<sup>21</sup> in balancing privacy with freedom of expression in journalistic activities. In any case, due to the fragmentation of the code of conducts of journalists across the Contracting States, it is not possible to rely on a unique source of reference for journalistic activities.

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<sup>20</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

<sup>21</sup> According to art. 85, para. 1, of the Regulation: «Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression».