

## Disclosing journalistic sources already revealed. The *Becker v. Norway* case

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European Court of Human Rights, 5 January 2018, *Becker v. Norway*, app. 21727/12

The journalist's protection under Art. 10 ECHR cannot automatically be removed by virtue of a source's own conduct. Source protection applies even when a source's identity is known.

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, a judicial order aimed to obtain the disclosure of the journalist's source, even when the source revealed freely this information, cannot be compatible with Art. 10 of the Convention unless it is justified by an overriding requirement in the public interest.

### Summary

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### Keywords

Press Freedom, Journalistic Sources, Freedom of Expression, European Convention on Human Rights, European Court of Human Rights.

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## 1. Introduction

Should the right of the journalist not to disclose information about his or her sources be protected where the source reveals voluntarily his or her identity? In *Becker v. Norway*<sup>1</sup>, the European Court of Human Rights addressed this question. In particular, the case in question involves the refusal of a journalist to comply with the Court order to testify since answering the question of the Court could reveal the identity of the source or other information. Source protection allows journalists to gather and reveal information in the public interest. In order to benefit from this system, anonymity and other

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<sup>1</sup> ECtHR, *Becker v. Norway*, app. 21727/12 (2018).

similar safeguards aim to protect journalistic sources from reprisals deriving from their exposure.

In this scenario, the Strasbourg Court dealt essentially with two main conflicting interests: on the one hand, the protection to journalistic sources to ensure press freedom and, on the other hand, the need to obtain evidence for contrasting serious crimes and guarantee a fair trial to the accused.

## **2. Facts of the case**

A journalist of the Norwegian online newspaper Dagens Næringsliv (hereinafter, “DN”), received a letter addressed to a trustee company representing the interests of bondholders in the Norwegian Oil Company (hereinafter, “DNO”). Such a letter gave the impression that it had been written on behalf of a number of bondholders who were seriously concerned about the company’s liquidity, finances and future. On the contrary, the letter had been drafted only on the behalf of the owner of a single bond acquired the same day when he asked his attorney to prepare the letter at stake. Thus, the applicant published an article to express her concerns regarding the content of the letter in question and, as a result, the price of DNO stock fell right after the publication of the article.

As a result, the Oslo stock exchange (*Oslo børs*) forwarded the case to the Financial Supervisory Authority (*Kredittilsynet*) suspecting that the single-bond owner had infringed the Act on the Trade of Financial Assets.

During the investigations, the single-bond owner confirmed to be the source of the article published in DN. In June 2010, he was indicted for market abuse crimes, especially market manipulation and insider trading, according to the Act on the Trade of Financial Assets.

During the criminal proceedings against the defendant before the Oslo City Court (*tingrett*), the applicant, summoned as a witness, refused to answer the questions about her contact with the defendant by relying on Art. 125 of the Code of Criminal Procedure<sup>2</sup> and Art. 10 of the Convention<sup>3</sup>.

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<sup>2</sup> According to Art. 125 of the Norwegian Criminal Code: «The editor of a printed publication may refuse to answer questions as to who is the author of an article or report in the publication or the source of any information contained in it. The same applies to questions as to who is the source of other information that has been confided to the editor for use in his work. Other persons who have acquired knowledge of the author or the source through their work for the publishers, editors, press agency or printers in question have the same right as the editor. When important social interests indicate that the information should be given and it is of substantial significance for the clarification of the case, the court may, however, on an overall evaluation, order the witness to reveal the name. If the author or source has revealed matters that it was socially important to disclose, the witness may be ordered to reveal the name only when this is found to be particularly necessary. When an answer is given, the court may decide that it shall only be given to the court and the parties at a sitting in camera and under an order to observe a duty of secrecy. The provisions of this section apply correspondingly to any director or employee of any broadcasting agency». See also Art. 108: «Unless otherwise provided by statute, every person summoned to attend as a witness is bound to do so and to give evidence before the court».

<sup>3</sup> According to Art. 10 ECHR: «1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference

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Despite of the applicant's claim, according to the Court of first instance, the journalist was obliged to give evidence about the contacts with the defendant since this duty was «limited to the contact with the defendant as a source and not her communication with possible other unknown sources with whom she has been in contact and who may be protected by the protection of sources»<sup>4</sup>.

Once the Court of first instance convicted the defendant for the aforementioned crime, the applicant could lodge an appeal to the Borgarting High Court (*lagmannsrett*) which, however, rejected the applicants' claim relying generally on the ground that the journalist knew the source in question. In addition, the Supreme Court rejected the further appeal of the applicant holding that Art. 125 did not apply when sources had come forward and confirmed their role.

Two main interpretations of the aforementioned provision were at stake. On the one hand, the majority observed, *inter alia*, that the obligation to testify in this case would not undermine the public general trust regarding the protection of journalistic sources. Indeed, according to the majority, in this case, it was not at stake the disclosure of sources but rather whether the source was known by other means.

On the other hand, according to the minority, a literal interpretation would suggest that members of the press have an absolute right to refuse to answer questions regarding their sources since Art. 125 does not provide any exception. This argument was rooted in the need to grant effective protection of journalistic sources and, as a result, it would not be possible to oblige a journalist to confirm or deny whether a person claiming to be the source is right even where there is a strong evidence of this fact.

The High Court examined the applicants also during the appeal proceedings brought by the defendant. Even in this case, the journalist refused again to answer the questions whether the defendant was the source of information of the article published on DN. The refusal to testify led the Court to order the journalist to pay a fine of (about) 3,700 euro for an offence against the good order of court proceedings, failing which she would be liable to ten days' imprisonment.

The High Court convicted also the defendant and sentenced him to one year and six months' imprisonment.

### 3. The decision of the ECtHR

After having received the applicant's complaint, the Strasbourg Court agreed on the existence of an interference with Art. 10 of the Convention and recognised the le-

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by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. 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>4</sup> ECtHR, *Becker*, cit., § 13.

gitimate aim of the limitation. Then, the Court focused on examining whether the restriction in question was prescribed by law and necessary in a democratic society. Regarding the first parameter, the Court agreed with the Governments and the majority opinion of the national High Court. In particular, the Court observed that the expression “prescribed by law” refers to the “quality” of the law in question<sup>5</sup>. In this case, according to the Court, the order was based on arts 108 and 125 of the Code of Criminal Procedure. Even if the first paragraph of Art. 125 would not apply in this case, the applicant was obliged to give evidence to comply with Art. 108.

Focusing on the second condition, first, the Court recalled the principles of source disclosure in order to assess the potential effects of the order to testify. The Court considered source protection as “basic condition” for press freedom observing: «Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. [...] 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 Art. 10 of the Convention unless it is justified by an overriding requirement in the public interest»<sup>6</sup>.

The Court observed that the effects of a disclosure order affect not only the source at stake but also the newspaper «whose reputation may be negatively affected in the eyes of future potential sources by the disclosure, and on the members of the public, who have an interest in receiving information imparted through anonymous sources and who are also potential sources themselves»<sup>7</sup>. However, the Court did not exclude that some circumstances could justify a disclosure order as in the case of the “source’s harmful purpose”<sup>8</sup>.

Moreover, regarding the necessity to obtain the disclosure of the source in order to ensure a fair trial for the accused, the Court clarified that, whatever the potential significance in the criminal proceedings at stake, there is no grounds to require the disclosure where the national Court can rely on the evidence of other witnesses which can provide the same information that the journalist knows about the source<sup>9</sup>.

Moving to the case in question, the Strasbourg Court recognised that the aim of the Court of first instance’s order was only to understand whether the defendant contacted the journalist. However, according to the Court, the above-mentioned principles are applicable to this case.

The Court clarified that, even where a source was clearly acting in bad faith with a harmful purpose, the protection ensured to journalists cannot be automatically put aside with the result that the above-mentioned subjective element can be taken into consideration only as one of the factors in the balancing between freedom of expres-

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<sup>5</sup> According to the Strasbourg Court, the law should be both adequately accessible and foreseeable, that is, formulated with sufficient precision to enable the individual – if need be with appropriate advice – to regulate his conduct. ECtHR *Sanoma Uitgevers B.V. v. the Netherlands*, app. 38224/03 (2009), § 81.

<sup>6</sup> ECtHR, *Goodwin v. the United Kingdom*, app. 17488/90 (1996), § 39; *Sanoma*, cit., § 51.

<sup>7</sup> ECtHR, *Financial Times Ltd and Others v. the United Kingdom*, app. 821/03 (2009), § 63.

<sup>8</sup> *Ibid.* 66.

<sup>9</sup> ECtHR, *Voskuil v. the Netherlands*, app. 64752/01 (2007), § 67.

sion and other interests<sup>10</sup>. Indeed, this protection is not subject to the source's own conduct like in the case in question where a source comes forward.

The Court has held that protection afforded to journalists in respect of their right to keep their sources confidential is «two-fold, relating not only to the journalist, but also and in particular to the source who volunteers to assist the press in informing the public about matters of public interest»<sup>11</sup>. However, the circumstances of the case, especially the fact that the source had revealed voluntarily his identity, leads the Courts to observe that «the degree of protection under Art. 10 of the Convention to be applied in the present case cannot reach the same level as that afforded to journalists who have been assisted by persons of unknown identity to inform the public about matters of public interest or matters concerning others»<sup>12</sup>.

Although the Strasbourg Court expressly agreed with the Supreme Court that, where the source comes forward, the concerns regarding disclosure would be mitigated, this circumstance was not considered “decisive” in the proportionality assessment.

As a result, the Strasbourg Court considered the possibility for the national Court to convict the defendant without having obtained the disclosure of the source as a significant parameter for its decision. Indeed, the Court focused on «the need of [obtaining the] evidence during the criminal investigation and subsequent court proceedings» of the contact between the applicant and the defendant. Firstly, the defendant has never denied having this contact with the journalist. Moreover, focusing on the assessment of the necessity to prevent crime and disorders, the Court observed that applicant's refusal to disclose her source did not hinder the investigation of the case or the proceedings against the defendant<sup>13</sup>. In particular, the Court focused on the fact that the national Courts were not prevented to consider the merit of the charges in the lack of the applicant's testimony and this fact was confirmed also by the prosecutor's position showing that the case was “sufficiently made out”<sup>14</sup>.

Consequently, the Court considered that, in this case, the compelling interests could not justify the obligation for the applicant to testify and it recognised a violation of Art. 10 of the Convention.

#### **4. A strong or fragmented protection of journalistic sources in the European framework?**

It was not the first time the Strasbourg Court addressed the protection of journalistic sources but the Court has never addressed a case like this before. However, the general principles of disclosure of journalistic sources were clear to the Strasbourg Court

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<sup>10</sup> ECtHR, *Financial Times Ltd*, cit., § 63 and 66; *Telegraaf Media Nederland Landelijke Media B.V. and Others v. The Netherlands*, app. 39315/06 (2012), § 128.

<sup>11</sup> ECtHR, *Nordisk Film & TV A/S v. Denmark (dec.)*, app. 40485/02 (2005); *Stichting Oostdeutsche Zeitung v. the Netherlands (dec.)*, app. 8406/06 (2014), § 64.

<sup>12</sup> ECtHR, *Becker*, cit., § 76.

<sup>13</sup> *Ibid.*, 80.

<sup>14</sup> ECtHR, *Voskuil*, cit.

coming both from its case law<sup>15</sup> and the Council of Europe Recommendations<sup>16</sup>.

Before to analyse the Court decision, it is crucial to briefly highlight the main arguments of the parties in order to clarify the interests at stake.

The applicant's position was clear and can be compared to that of the minority in the Supreme Court decision. Indeed, the journalist claimed that the decision of the national courts interfered with her right to freedom of expression according to Art. 10 of the Convention. In particular, the limitation of this fundamental right was not prescribed by law since, according to a literal interpretation of Art. 125, journalists could not be obliged to reveal their sources without any exception. Moreover, in the case in question, the fact that a person had stated to be the source of the journalist has no impact on the above-mentioned provision. Moreover, according to the applicant, the approach of the national Courts would put at risk the protection of other sources whose identity could be discovered by obliging a journalist to testify. The risk of such an approach is to discourage potential sources to play their role due to the fear of being investigated by the police with obvious chilling effects<sup>17</sup>.

On the other side, the Government agreed with the majority opinion of the Supreme Court without, however, denying that the order to testify was an interference of the applicants' freedom of expression. But, the Government argued that this limitation was prescribed by law as the Supreme Court explained by providing its interpretation of Art. 125. Moreover, according to the Government, the Court order pursued a legitimate aim (i.e. the prevention of disorder and crime) and it aimed to protect the right of listed companies and investors. Regarding the order to testify, the Government observed that, in this case, the source have already disclosed his nature and the scope of the order was only limited to understand whether the applicant had a contact with the defendant. Indeed, in this case, since the source disclosed voluntarily his nature, the order to testify could not affect the position of other potential sources<sup>18</sup>.

Focusing on these standpoints, it is possible to understand how the decision of the Court guarantee a high protection of journalistic sources. Indeed, the evident fact that the source had disclosed his identity was not the most significant element in the proportionality assessment. On the contrary, the fact that the testimony was not necessary in order to allow the Court to convict the defendant played a crucial role in the reasoning of the Court.

As a result, from this case, it is possible to learn that, independently from compelling legitimate interests, national Courts cannot order a journalist to testify when they can obtain the same information which the journalist can provide about his or her source by relying on other witnesses or evidence. This is why the right of the journalist deserves to be protected even in the case in which the source comes forward.

Moreover, the distinguishing of the Court in the protection of journalistic sources

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<sup>15</sup> See para. 3.

<sup>16</sup> Council of Europe, Parliamentary Assembly, Recommendation 1950 (2011), The protection of journalists' sources, 25 January 2011; Recommendation No. R (00) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information, 8 March 2000.

<sup>17</sup> ECtHR, *Becker*, cit., § 48-52.

<sup>18</sup> *Ibid.*, § 53-58.



depending on the fact of their anonymity or behaviour to come forward deserves further attention. Indeed, although the Court expressly recognised that the conduct of the source cannot undermine the protection of journalistic sources, however, the introduction of a differentiated layer of protection of Art. 10 according to this criterion could lead to a broad margin of discretion for national authorities, as observed by Judge Tsotoria in its concurring opinion. According to this opinion, it is not clear why the Strasbourg Court decided to afford a lesser level of protection to freedom of expression in this case introducing a «dichotomy of degree of protection in relation to journalists under Art. 10 of the Convention who have been assisted by persons unknown and whose source came forward during the investigation». The risk of such an approach is to increase the level of fragmentation in the protection of journalistic sources.

Even more importantly, it is interesting to look at the last statement of Judge Tsotoria's concurring opinion where she referred to the "modern digital era" as a threat to the protection of journalistic sources<sup>19</sup>. From this perspective, it cannot be neglected the role of police and intelligence services in redefining press freedom and, especially, the protection of journalistic sources<sup>20</sup>. The main risk of this trend is the use of new technologies of surveillance to detect not only crimes already committed but to prevent them through the interception and monitoring of the modern channels of communications and, especially, the Internet<sup>21</sup>. The increasing use of law enforcement and surveillance programmes especially deriving from national answers to public security concerns such as terrorism constitutes a risk for journalistic information and, in general, freedom of expression<sup>22</sup>.

The result of this risk can produce chilling effects for press freedom undermining public interest journalism which relies on confidential sources.

A recent decision of the Strasbourg Court confirms these considerations. In particular, in *Big Brother Watch and Others v. the United Kingdom*<sup>23</sup>, 16 applicants, as journalists and human rights organizations, claimed that the UK intelligence services have likely intercepted or obtained their electronic communications and data and, as a result, the complained a violation of their fundamental rights under arts 8 and 10 of the Convention.

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<sup>19</sup> See, in particular, J. Posetti, *Protecting Journalism Sources in the Digital Age*, UNESCO report, in [www.unesdoc.unesco.org](http://www.unesdoc.unesco.org), 8 May 2017; C.F. Kleberg, *The Death of Source Protection? LSE Polis*, 13 August 2015; G.E. Vigevani, *La protezione del segreto del giornalista al tempo di Internet*, in G. D'Elia – G. Tiberi – M.P. Viviani Schlein (eds.), *Scritti in memoria di Alessandra Concaro*, Milan, 2012, 781 ss.; K.N. Dörr - K. Hollnbuchner, *Ethical Challenges of Algorithmic Journalism*, in *Digital Journalism*, 5, 2005, 404 ss.

<sup>20</sup> J. Podkowik, *Secret surveillance, national security and journalistic privilege – in search of the balance between conflicting values in the age of new telecommunication technologies*, in *IX World Congress of Constitutional Law (Oslo, 16-20 June 2014). Contributions by Polish Scholars*, Warsaw, 2015, 171 ss.

<sup>21</sup> D. Banisar, *Speaking of terror. A survey of the effects of counter-terrorism legislation on freedom of the media*, Europe Media and Information Society Division Directorate General of Human Rights and Legal Affairs, Council of Europe, 2008.

<sup>22</sup> Regarding the topic of the relationship between surveillance or public enforcement activities and freedom of expression in the EU see, in particular, CJEU, C-293/12 and C-594/12, *Digital Rights Ireland Ltd* (2014); C-203/15 and C-698/15, *Tele2 Sverige* (2016); C-207/16, *Ministerio Fiscal* (2018).

<sup>23</sup> ECtHR, *Big Brother Watch and Others v. the United Kingdom*, app. 58170/13, 62322/14 and 24960/15 (2018).

Without dealing with all the issues at stake in this landmark decision about surveillance in the post-Snowden era, it is enough to underline that the complaints regarding the interference of the intelligence services programmes with freedom of expression were relating with the protection of journalist sources. Indeed, as the Strasbourg Court observed, the risk of this surveillance mechanisms was to produce «potential chilling effect that any perceived interference with the confidentiality of journalists' communications and, in particular, their sources might have on the freedom of the press»<sup>24</sup>. This decision confirms the significant role of journalistic sources and the concerns of Judge Tsotoria about the risk to leave unjustified margins of appreciation to national authorities which, as briefly seen in the aforementioned example, rely increasingly on surveillance measures in order to detect and, especially, prevent crimes in the digital era.

## **5. Conclusion**

The above-mentioned analysis shows how there is no doubt about the significant role of the protection of journalistic sources to ensure press freedom. In *Becker*, the decision of the Strasbourg Court is along these lines. The Court recognised the violation of Art. 10 of the Convention in a case where the effect of an order to testify would have been mitigated by the voluntary disclosure of the source and not have affected likely the public trust in press freedom. However, this ruling shows how the protection of the journalistic sources is relevant in a democratic society with the result that, as any restriction of freedom of expression, limitations to this fundamental rights are subject to the narrow scrutiny of the Strasbourg Court.

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<sup>24</sup> *Ibid.*, 495.