



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

**CASE OF BECKER v. NORWAY**

*(Application no. 21272/12)*

JUDGMENT

STRASBOURG

5 October 2017

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Becker v. Norway,**

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Angelika Nußberger, *President*,

Erik Møse,

Nona Tsotsoria,

Yonko Grozev,

Síofra O’Leary,

Mārtiņš Mits,

Lətif Hüseynov, *judges*,

and Milan Blaško, *Deputy Section Registrar*,

Having deliberated in private on 11 July 2017,

Delivers the following judgment, which was adopted on that date:

## PROCEDURE

1. The case originated in an application (no. 21272/12) against the Kingdom of Norway lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Norwegian national, Ms C. Langum Becker, on 13 March 2012. The applicant was born in 1980 and lives in Oslo. She is represented before the Court by Mr V. Strømme, a lawyer practising in Oslo.

2. The Norwegian Government (“the Government”) were represented by Mr C. Reusch of the Attorney General’s Office (Civil Matters) as their Agent.

3. The applicant alleged that she had been compelled to give evidence that would have enabled one or more journalistic sources to be identified, in violation of her right under Article 10 of the Convention to receive and impart information.

4. On 23 October 2013 the application was communicated to the Government.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

5. The applicant is a journalist for *DN.no*, a Norwegian internet-based version of the newspaper *Dagens Næringsliv* (“*DN*”), published by the company *DN Nye Medier AS*.

6. On 23 June 2010 Mr X was indicted for market manipulation and insider trading under the 1997 Act on the Trade of Financial Assets (*verdipapirhandelloven*). He was accused of having requested Mr Y, an attorney, to draft a letter concerning the Norwegian Oil Company (“DNO”), a limited liability company quoted on the stock exchange. The letter, addressed to a trustee company representing the interests of bond holders in DNO (“the bond trustee company”), gave the impression that it had been written on behalf of a number of bond holders who were seriously concerned about the company’s liquidity, finances and future. In fact, it had been written only on Mr X’s behalf. He had owned only one bond, which he had acquired the same day as he had asked attorney Y to draft the letter.

7. Mr X had sent a copy of the above-mentioned letter by fax to the applicant on Friday 24 August 2007, and in this connection he had a telephone conversation with her. The following day, on Saturday 25 August 2007, the applicant wrote an article entitled “Fears of DNO collapse” (*“Frykter at DNO rakner”*), in which she expressed strong concerns about the content of Attorney Y’s letter, a central feature in the article.

8. The price of DNO stock decreased by 4.1% on Monday 27 August 2007, the first trading day after the contents of the letter had become known in the press. On the same day, a new article on the topic was published in *DN*. Other media also reported on the first article, including an online newspaper (*Hegnar online*) which on 28 August 2007 reported that an analyst had stated that he would not be surprised if the letter had been sent by a person with a short-position or who wanted cheap stocks. The Oslo stock exchange (*Oslo børs*) suspected market manipulation and, upon having looked into the matter, forwarded the case to the Financial Supervisory Authority (*Kredittilsynet*) with suspicions that Mr X had infringed the Act on the Trade of Financial Assets. During subsequent questioning by the Financial Supervisory Authority, Mr X confirmed that he had initiated the letter and been the source of the article in *DN*.

9. The applicant was questioned by the police on 19 June 2008. They informed her that Mr X had told the police that he had given her the letter. She was handed a signed declaration from Mr X in which he confirmed this. The applicant was willing to say that she had received the letter on which the article was based by fax on Friday 24 August 2007, at 5.35 p.m. She also stated that the article had been published on *DN.no* at 3 a.m. on 25 August 2007. The applicant further explained that she had considered the information in the letter as price-sensitive. She had no particular thoughts as to how many persons were behind the letter, beyond the fact that it had been signed on behalf of several bond holders. The applicant refused to give additional information, referring to the journalistic principles on protection of sources.

### A. Order on the applicant to testify

10. During the criminal case against Mr X in February 2011 before the Oslo City Court (*tingrett*), the applicant was summoned as a witness. She refused to answer questions about possible contacts between her and Mr X and other sources, if any, related to the publication by *DN.no* on 25 August 2007. Relying on Article 125 of the Code of Criminal Procedure and Article 10 of the Convention, she argued that she was under no obligation to give evidence on those points.

11. The prosecutor requested that the court impose on the applicant an order to testify. In the court records ("*rettsboken*"), his arguments in favour of issuing such an order are restated as having included the following:

"The prosecutor rose to speak and argued that the witness had an obligation to give testimony about her contact with the defendant in connection with the letter to [the bond trustee company] of 24 August 2007 and asked the court to make a decision on the matter. The prosecutor further justified the obligation of the witness to make a statement and argued that undoubtedly in this case it is desirable to hear her explanation, even if the prosecuting authority finds the case adequately disclosed ("*fullgodt opplyst*") even without her statement. The press is sometimes abused by investors to take actions liable to affect the share price. The element of abuse should suggest that in a case like this the press would also have an interest in making a statement in order to avoid being abused in this way. Whether or not consent has been given by the source to the witness making her statement has no bearing on the obligation to give evidence. ..."

12. From the same records, it appears that Mr X, by his counsel and co-counsel, had submitted that he had described his contact with the applicant and that she could contribute nothing further of interest.

13. By a decision of 15 February 2011, the City Court held that the applicant had a duty to give evidence about her contacts with Mr X in relation to the letter of 24 August 2007 from Attorney Y to the bond trustee company. As to the scope of that duty, the City Court held:

"The obligation to make a statement is, however, 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 eventually would be protected by the protection of sources."

14. The prosecutor then stated, according to the hearing protocol, "that he would not ask for postponement of the case as the prosecuting authority considers the case to be sufficiently disclosed ("*tilstrekkelig opplyst*") even without the statement of the witness [the applicant]". It was then clarified that the applicant's appeal against the order would not be forwarded to the High Court until after the City Court's judgment in the case against Mr X had been delivered.

## **B. Mr X's conviction at first instance**

15. On 3 March 2011 the City Court convicted Mr X in accordance with the indictment and sentenced him to one year and six months' imprisonment, of which nine months were suspended for a trial period of two years.

16. The judgment contains the following passage:

“One of the witnesses pleaded, as a journalist, the protection of sources under Article 125 of the Code of Criminal Procedure and was not willing to explain about her potential contact with the accused. The court held that the witness had an obligation to explain about her contact with the accused since he, as the source of the *DN.no* article, was known and the court ruled accordingly. An appeal was immediately made against the decision. No motion for extension was made (pending a final decision) as according to the prosecutor the case was sufficiently disclosed (“*tilstrekkelig opplyst*”) even without the statement by [the applicant] and this was used as a basis by the court.”

17. On 28 March 2011 Mr X appealed to the Borgarting High Court (*lagmannsrett*) against the City Court's assessment of the evidence and application of the law in relation to the issue of guilt, its procedure and the sentence (see paragraphs 34 to 36 below).

## **C. Applicant's appeal against the order to testify**

18. The applicant appealed against the City Court's order of 15 February 2011 to the Borgarting High Court. It rejected the appeal by a decision of 28 April 2011, finding it generally decisive whether the source was known. In this case, it had been established beyond reasonable doubt that Mr X had been the applicant's source.

19. An appeal by the applicant to the Supreme Court was rejected by three votes to two on 30 September 2011 (*Norsk Retstidende – Rt.* 2011 page 1266). The appeal had targeted the High Court's assessment of evidence as well as its application of the law. The disagreement in the Supreme Court concerned primarily the interpretation of the first paragraph of Article 125 of the Code of Criminal Procedure, according to which, *inter alia*, journalists may refuse to answer questions concerning who is the source of information confided to them for use in their work (see paragraph 37 below). The two factions of the Supreme Court disagreed, in particular, as to whether this provision was applicable if the source had stepped forward or the identity of the source had otherwise been established.

### *1. The majority*

20. The majority observed that it did not appear from the wording of Article 125 § 1 of the Code of Criminal Procedure that it was relevant whether the source had disclosed his or her role or that this role had in other

ways become known. However, the wording could not be given decisive weight. It emerged from the preparatory works that the legislator had not, with the chosen formulation, taken a stance on the issue at stake in the present case. There was therefore greater reason to assess whether the rationale underpinning the main rule, namely the right not to answer questions concerning the identity of the source, could also be given significant weight when the person, who had been the source of the information, had given evidence concerning his or her role and had confirmed being the source. It was difficult to see that this should be the case.

21. If the imposition of an obligation on the press to give evidence was limited to cases where the source had come forward, the person who was considering giving information to the press would know that it was up to him or her to determine whether the person who received the information would have an obligation to give evidence. There was thus no cogent reason why such a conditional obligation to give evidence should lead to increased scepticism towards providing information to the press. The same would, to a great extent, be true if the obligation to give evidence also applied when the identity of the source had become known in some other way. While the possibility that the identity of the source might be disclosed might well constitute a deterrent, it would hardly make much difference whether information already known was also confirmed by the recipient of the information.

22. An obligation on the press to give evidence in such cases was not thought likely to weaken the public's general trust that the press would protect its sources. The situation under review did not concern the disclosure of sources but rather whether the person's role had become known by other means.

23. The majority further disagreed with the applicant's view that there was no reason to treat a situation, where the informant had identified himself or herself as the source, differently from those cases where the source had consented to being identified. A person who so consented could do so, trusting that the recipient of the information would respect the protection of sources as long as the identity of the source was unknown. Once an informant had confirmed that he was the source, this fact would become known. Should the recipient of the information then refuse to give evidence, this would normally appear futile. In such a situation, an exemption from the obligation to give evidence would in reality not constitute a protection against having to disclose the source, but rather a right to avoid contributing to the elucidation of a criminal case.

24. Interpreting Article 125 § 1 of the Code of Criminal Procedure in the light of certain statements made in the preparatory works (*Ot.prp. nr. 55 (1997-1998)*, pp. 17 and 18) as followed up in the Supreme Court's case-law (*Rt. 1995 page 1166 and 2003 page 28*), the majority held that this

provision did not apply when the source had come forward and had confirmed his or her role. The same ought probably to apply when the identity of the source had been established beyond reasonable doubt by other means. If the state of the evidence was such that confirmation by the journalist of the identity of the source could not be said to assist in identifying the source, it seemed unquestionable to maintain the obligation to testify.

25. As to whether a more wide-reaching protection of journalistic sources followed from Article 10 of the Convention, the majority had regard to the Strasbourg Court's case-law, including *Goodwin v. the United Kingdom* (27 March 1996, *Reports of Judgments and Decisions* 1996-II), *Financial Times Ltd and Others v. the United Kingdom* (no. 821/03, 15 December 2009) and the Chamber judgment in *Sanoma Uitgevers B.V. v. the Netherlands* (no. 38224/03, 31 March 2009 – noting that the Grand Chamber had decided the latter case on a different ground). It observed that in the two British cases, a violation had been found under the necessity test even though strong countervailing arguments had been present. The majority further noted that there was no decision where the Court had examined the situation where the source had come forward and where in this sense there was no source to protect (“*ingen kilde å beskytte*”). The principal justification for source protection, as elaborated by the Court in its case-law, was based on the consequences that the disclosure of a source's identity might have for the free flow of information. However, these considerations did not apply when the source had confirmed his or her participation.

26. Against this background, one could safely assume that no violation of the Convention would arise where a source had come forward and the obligation of the witness to give evidence had been expressly limited so as not to include questions that might lead to other sources being revealed. Also, the charge in this case had been based on the fact that the journalist had allowed herself to be used by the source in his efforts to manipulate the bonds market in a criminal manner. It was a serious criminal case, where it seemed likely that the applicant's evidence might significantly assist in elucidating the concrete circumstances of the defendant's contact with her.

## 2. *The minority*

27. The minority observed that, should the applicant be ordered to testify concerning her possible contact with Mr X about Attorney Y's letter of 24 August 2007 to the trustee company, she would have to confirm or deny that Mr X was the source for her article on *DN.no* on 25 August 2007. By making a statement on this matter, she might also inadvertently reveal other potential sources. The legal question at hand was whether a journalist might rely on source protection if the source, without the journalist having



revealed it, could be identified with more or less certainty by other evidence.

28. The wording of Article 125 of the Code of Criminal Procedure was absolute and granted members of the press, broadcasting and other media the right to “refuse to answer questions concerning who is ... the source”. The provision made no exception for cases where the identity could be established with more or less certainty in some other way.

29. The protection of sources by journalists was, according to the European Court’s case-law, “one of the basic conditions for press freedom” (*Goodwin*, cited above, § 39). The purpose was not to protect the source, but rather the public interest in free communication of news and opinions (*Rt.* 2010 page 1381). If journalists were allowed to protect their sources, they would obtain information enabling them to uncover matters in society that were worthy of criticism more easily than they would otherwise. The fact that it was for the journalist to decide to what extent he or she would rely on such protection reflected that it was not the source who was protected. If the journalist was willing to reveal the source, the source could not prevent it.

30. If it were a precondition for the protection of journalistic sources that no other proof of the source had been presented, such protection would be undermined. This would enable a source to be tracked down, even if a requirement for waiver of source protection was that the source be identified with a criminal standard of proof. If the hearing of evidence on the identity of a source were to be allowed, the media’s working conditions would become considerably more constricted and society’s interest in free communication of information and opinions would suffer.

31. If consent to source disclosure by a potential source should have the effect of removing source protection, the actual source might easily be identified and source protection would be undermined. In the present case Mr X had stated that he was the source. A situation where someone claimed to be the source ought to be considered in the same way as where the source consented to disclosure of his or her identity. A person might incorrectly claim to be the source so that the actual source might be identified by a process of elimination. And even if it were true that this person was the source, it would erode the journalist’s right to source protection should the person who was the source be able to cancel the journalist’s right. In addition, journalists often had several sources. If a journalist could be ordered to describe his or her contact with a person who claimed to be the source, his or her contact with other sources might also be revealed.

32. Equally, a combination of someone claiming to be the source and other evidence confirming this, should not lead to source protection being removed. Effective source protection was necessary in order to ensure free communication of information and opinions. It should not be permissible for press journalists to confirm or deny that a person claiming to be the

source was in fact the source, even where there was weighty evidence to this effect. As mentioned above, it was not the source, but society's interest in free communication of news and opinions, which was to be protected.

33. The prosecutor had argued that Mr X had used the applicant as a tool to commit serious crimes, and this would have constituted a relevant argument, had the case been one concerning a possible individual exception from the right to non-disclosure of sources made under the third paragraph of Article 125. However, the prosecutor had not relied on that paragraph of the provision, and the source's motive could not render the principle of source protection as such inapplicable. Within the ambit of Article 10 of the Convention, the freedom of speech did not protect only information and views that are positively received, but also those which offend, shock or disturb the State or parts of the population. Therefore, journalists' fundamental right to protect their sources could not be dependent on the sources' motives.

#### **D. Appeal proceedings in the criminal case against Mr X**

34. Mr X's appeal against the City Court's judgment of 3 March 2011 (see paragraph 17 above) was examined by the High Court, which summoned and heard the applicant as a witness on 13 January 2012. She answered certain questions but affirmed that she still would not reply to questions about her contacts with Mr X. The court records contain the following passage:

“When heard as a witness [the applicant] stated that she had received Attorney [Y]'s letter by fax on 24 August 2007 at 5.35 p.m. She does not wish to answer questions about who she had received the letter from or on her possible contact with Mr [X] during the period before or after this point in time. The presiding judge pointed out to the witness that after a legally enforceable decision by the Supreme Court she was obliged to give evidence about her contacts with Mr [X]. The presiding judge underlined that an omission to reply to such questions could constitute a ground for the imposition of a fine for an offence against the good order of court proceedings [*rettergangsbot*]. It was emphasised that the duty to reply lay on the witness personally and that a possible fine would be imposed on her personally.”

35. On account of her refusal to comply, the High Court, by a decision of 25 January 2012, ordered the applicant to pay a fine of 30,000 Norwegian kroner (NOK), approximately 3,700 euro (EUR) for an offence against the good order of court proceedings, failing which she would be liable to ten days' imprisonment. The applicant did not appeal against that decision.

36. By a judgment of the same date, the High Court convicted Mr X on the charges and sentenced him to one year and six months' imprisonment.

## II. RELEVANT DOMESTIC AND INTERNATIONAL MATERIAL

### A. Domestic law

37. The relevant articles of the Code of Criminal Procedure of 22 May 1981 (*straffeprosessloven*) read:

“Article 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.

Article 125. The editor of a printed publication may refuse to answer questions concerning 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 concerning 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.”

There is extensive Supreme Court case-law concerning the main rule in Article 125 § 1 about the protection of journalists’ sources and the exception clause in Article 125 § 3 (see, for instance, paragraph 24 above). The Supreme Court interprets the provision in the light of Article 10 of the Convention.

38. Section 205 § 1 of the Act Relating to the Courts of Justice of 13 August 1915 (*domstolloven*) read:

“Where a witness refuses to give evidence or give affirmation and provides no grounds or provides only those grounds that are dismissed by a legally enforceable ruling, said witness may be penalised by fines and ordered to compensate, in whole or in part, for the costs incurred. A party may also be penalised by fines in cases concerning attachment or garnishment of earnings, where he/she wilfully fails to provide the enforcement authority with the information said party is obligated to provide pursuant to the Enforcement Act, § 7-12.”

## B. International material

39. In 2011, the UN Human Rights Committee adopted General Comment no. 34 concerning Article 19 of the Covenant (CCPR/C/GC/34), which reads, *inter alia*, (footnote omitted):

“States parties should recognize and respect that element of the right of freedom of expression that embraces the limited journalistic privilege not to disclose information sources.”

40. On 8 September 2015 the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression submitted a report to the UN General Assembly (A/70/361), which stated, *inter alia* (footnotes omitted):

“C. Nature and scope of protection

21. Some authorities refer to a journalistic “privilege” not to disclose a source’s identity, but both reporter and source enjoy rights that may be limited only according to article 19 (3). Revealing or coercing the revelation of the identity of a source creates disincentives for disclosure, dries up further sources to report a story accurately and damages an important tool of accountability. In the light of the importance attached to source confidentiality, any restrictions must be genuinely exceptional and subject to the highest standards, implemented by judicial authorities only. Such situations should be limited to investigations of the most serious crimes or the protection of the life of other individuals.

22. National laws should ensure that protections apply strictly, with extremely limited exceptions. Under Belgian law, journalists and editorial staff may be compelled by a judge to disclose information sources only if they are of a nature to prevent crimes that pose a serious threat to the physical integrity of one or more persons, and upon a finding of the following two cumulative conditions: (a) the information is of crucial importance for preventing such crimes; and (b) the information cannot be obtained by any other means. The same conditions apply to investigative measures, such as searches, seizures and telephone tapping, with respect to journalistic sources.”

41. Other international instruments concerning the protection of journalistic sources include the Resolution on Journalistic Freedoms and Human Rights, adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994), and Recommendation No. R (2000) 7 on the right of journalists not to disclose their sources of information, adopted by the Committee of Ministers of the Council of Europe on 8 March 2000. Relevant parts of the Recommendation, with explanatory report, are quoted in *Voskuil v. the Netherlands*, no. 64752/01, §§ 43-44, 22 November 2007, *inter alia*:

“Principle 3 (Limits to the right of non-disclosure)

a. The right of journalists not to disclose information identifying a source must not be subject to other restrictions than those mentioned in Article 10, paragraph 2 of the Convention. In determining whether a legitimate interest in a disclosure falling within the scope of Article 10, paragraph 2 of the Convention outweighs the

public interest in not disclosing information identifying a source, competent authorities of member States shall pay particular regard to the importance of the right of non-disclosure and the pre-eminence given to it in the case-law of the European Court of Human Rights, and may only order a disclosure if, subject to paragraph b, there exists an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature.

b. The disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that:

i. reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and

ii. the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that:

- an overriding requirement of the need for disclosure is proved,

- the circumstances are of a sufficiently vital and serious nature,

- the necessity of the disclosure is identified as responding to a pressing social need, and

- member States enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights.

c. The above requirements should be applied at all stages of any proceedings where the right of non-disclosure might be invoked.”

In the present case, the following paragraphs of the explanatory report are also of relevance:

“d. Information identifying a source

18. In order to protect the identity of a source adequately, it is necessary to protect all kinds of information which are likely to lead to the identification of a source. The potential to identify a source therefore determines the type of protected information and the range of such protection. As far as its disclosure may lead to an identification of a source, the following information shall be protected by this Recommendation:

i. the name of a source and his or her address, telephone and telefax number, employer’s name and other personal data as well as the voice of the source and pictures showing a source;

ii. ‘the factual circumstances of acquiring this information’, for example the time and place of a meeting with a source, the means of correspondence used or the particularities agreed between a source and a journalist;

...”

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

42. The applicant complained that the Supreme Court's decision of 30 September 2011, rejecting her appeal against the judicial order that she give evidence about her contacts with Mr X, had given rise to an unjustified interference with her right not to be compelled to disclose her journalistic sources as inherent in Article 10 of the Convention, which reads as follows:

“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 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.”

43. The Government disputed that there had been a violation of that provision.

#### **A. Admissibility**

44. The applicant appealed against the City Court's ruling of 15 February 2011 about her duty to testify to the High Court and the Supreme Court (see paragraphs 13, 18 and 19 above). She did not appeal against the High Court's decision of 25 January 2012 ordering her to pay a fine because of her refusal to testify about her contact with Mr X (see paragraph 35 above). The Government have understood the application as addressing the order to give evidence. The Court is of the same view and simply notes that the issue of non-exhaustion has not been raised by the Government.

45. As regards specifically the impugned order to give evidence, the Court notes that the case does not appear before it in entirely the same way as it did before the Supreme Court. The applicant's appeal to the Supreme Court was directed against the High Court's assessment of evidence and the application of the law. The parties' submissions before the Supreme Court and its reasoning concerned primarily the interpretation and applicability of the first paragraph of Article 125 of the Code of Criminal Procedure (see paragraphs 19 to 33 above).

46. At the same time, the Court has taken into account that the Supreme Court did examine in substance whether the order to give evidence could be upheld in the light of Article 10 of the Convention, based on arguments by the parties, including arguments relating to the proportionality test under the second paragraph of that provision. The Supreme Court accordingly examined relevant factors such as the conduct of the source, the seriousness of the criminal case and to what degree testimony from the applicant would assist in that case (see paragraph 26 above).

47. Finding that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds, it must be declared admissible.

## **B. Merits**

### *1. The parties' submissions*

#### **a) The applicant**

48. The applicant submitted that the decision ordering her to reveal her source was an interference under Article 10 which was not prescribed by law. It followed from Article 125 of the Criminal Procedure Code that journalists could not be obliged to do so. The wording contained no exception for situations in which the source was allegedly known, and no domestic case-law supported a different interpretation. The fact that a person had stated that he was the source, or a court's own assessment of whether this was probable, could – according to Article 125 – not oblige the journalist to confirm or disprove the identity of the source.

49. It was clear that if an order to give evidence were issued, a journalist might disclose other sources. However, it would be flawed to attempt to assess an exact risk for such disclosure, and the Supreme Court had, at this point, in reality resorted to a 'paradoxical' reasoning: the Supreme Court had been wrong to base its decision on the ground that "the" source had stepped forward – and that there was, hence, no risk of other sources being revealed – inasmuch as the applicant had in fact refused to give testimony about her source or sources. The alleged absence of risk of other sources being disclosed could in reality not be properly evaluated beforehand and could therefore not form an argument in favour of ordering such disclosure. On the other hand, had the Supreme Court been correct to base its decision on the same ground – that "the" source had stepped forward – there could not be any need for the applicant to testify on the matter.

50. If future potential sources learnt that their identity might be investigated by the police and that they could subsequently be the subject of great interest in court, this would have an obvious chilling effect. In addition, a rule not protecting the "probable" source could easily lead to wrong decisions, as the press would not participate in such proceedings and

it would be left to the parties of the case to choose evidence to present to the courts on the question of who might be sources.

51. When assessing the necessity of the interference, account had to be taken of the fact that in the present case the applicant's testimony would not have had any real significance. The prosecutor before the City Court had positively stated that there was no need for the applicant to give evidence in order for the prosecutor to be capable of fulfilling the burden of proof against Mr X, and there was no indication that the source's identity was any more uncertain at the time when the Supreme Court examined the impugned order than when the City Court had dealt with the case. Mr X had maintained that he was the source throughout.

52. While it was correct that the order to give evidence had not directly specified a duty to confirm Mr X's identity, it was clear to the applicant that statements describing what he had said would immediately reveal whether he actually was a source, the only source, or not at all a source. If there were other sources, it was also highly probable that a detailed statement from the applicant would reveal this.

**b) The Government**

53. Accepting that the court order to testify amounted to an interference under Article 10 of the Convention, the Government submitted that it was prescribed by law. They recognised that the wording of Article 125 § 1 of the Criminal Procedure Code, viewed in isolation, might indicate that journalistic privilege included a right to refuse to deny that an identified individual had been a source, or the source. However, the Supreme Court's majority had interpreted that provision in the light of the legislative documents and Supreme Court case-law to the effect that Article 125 § 1 did not reach so far as to exempt journalists in situations where the identity of the source was already known. That interpretation had been accessible and foreseeable.

54. The Government further argued that the court order against the applicant pursued a legitimate aim – the prevention of disorder and crime – and also pointed to the protection of the rights of others, namely the rights of listed companies and actual or potential investors in the market.

55. It should be recalled that the subject-matter of the case was not an explicit order of source disclosure insofar as Mr X, during the City Court hearing, had conceded that he was the source. The scope of the court order had been limited to testimony with regard to the applicant's contact with Mr X.

56. The principle of source protection had a two-fold basis, protecting the role filled by the journalist as such, but also protecting actual and future sources. When one of them had been willingly waived, the Government contended that an important, but by no means decisive reason for the degree of protection had failed to materialise. Given the voluntary waiver of the



source, the Government could not see that a limitation of the degree of protection would have had any chilling effect on the willingness of future sources to confide in journalists. Nor could it, in the Government's view, prove detrimental to the journalistic role as such.

57. Although the Government recognised the general relevance of the argument that a journalist may disclose sources by denying that a person is the source, this had not been an issue in the present case, as Mr X had confirmed that he was the source. The applicant, in her limited statement, had also in fact corroborated that Mr X was the source by stating that she had received the fax from her unnamed source at approximately 5.35 p.m., which coincided with Mr X's statement that he had received the fax from lawyer Y at around 5 p.m.

58. The Government emphasised the gravity of Mr X's market manipulation. That type of offence attained an inherent risk of vast financial repercussions and wide-reaching consequences also, as investor confidence was at stake. Another important aspect of this type of criminal offence was the difficulty in disclosing it. Moreover, a fundamental characteristic of the case was the role that the applicant had unwillingly played in the criminal offence. Without questioning the journalistic methods employed by the applicant when assessing the veracity of the letter commissioned by Mr X, the Government maintained that where the journalistic effort in itself is an unwitting part of the criminal offence, the overriding aim behind the interference arguably had to attain greater weight, namely the interest of the investigation of the offence itself. An obligation to give evidence as imposed in the present case could also be held to be in the interest of journalists, in order to avoid journalistic privilege being used by third parties as a means to conceal criminal actions. It would relieve the journalist of having to make the difficult choice between concealing a source where it is evident that the journalist has been used for fraudulent purposes, or voluntarily giving up the source with the detrimental effect that this might have for the confidence of future sources.

## *2. The Court's assessment*

59. The parties agreed that there had been an "interference" with the applicant's rights under Article 10 § 1 of the Convention and the Court sees no reason to hold otherwise. It must therefore examine whether the interference was justified under the second paragraph of that provision.

60. It was moreover undisputed that the order to give evidence had been issued for the purpose of "the prevention of ... crime", and the Court is of the same view. It does not find it necessary to decide whether the interference also pursued another legitimate aim – the "rights of others", which was pointed to by the Government (see paragraph 54 above). Below the Court will examine whether the interference was "prescribed by law" and "necessary in a democratic society".

**(a) Was the interference “prescribed by law”?**

61. The applicant principally argued that the order to give evidence ran contrary to Article 125 of the Code of Criminal Procedure, as that provision did not make any exceptions for situations in which the source’s identity was known (see paragraph 48 above). The Government pointed out that the majority of the Supreme Court had interpreted that provision in line with relevant legal sources under domestic law (see paragraph 53 above).

62. The Court reiterates its settled case-law according to which the expressions “prescribed by law” and “in accordance with the law” in Articles 8 to 11 of the Convention not only require that the impugned measure should have some basis in domestic law, but also refer to the quality of the law in question. 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 (see, for example, *Sanoma Uitgevers B.V.*, cited above, § 81). Furthermore, the Court reiterates that it is primarily for the national authorities to interpret and apply domestic law (see, as a recent example, *De Tommaso v. Italy* [GC], no. 43395/09, § 108, 23 February 2017).

63. In the instant case, the order to give evidence was clearly based on Articles 108 and 125 of the Code of Criminal Procedure (see paragraph 37 above). The case before the Supreme Court focused on the interpretation and application of the latter. In reaching its decision, that court availed itself of its case-law, as well as preparatory works to the provision (see paragraph 24 above). It concluded that, as the first paragraph of Article 125 was inapplicable, the applicant was obliged to give evidence in accordance with Article 108.

64. Against the above background, the Court is satisfied that the interference was “prescribed by law”.

**(b) Was the interference “necessary in a democratic society”?**

*(i) General principles and case-law*

65. The Court has developed the principles governing the protection of journalistic sources in a series of judgments. Already in 1996, the Grand Chamber stated in *Goodwin*, cited above, § 39:

“Protection of journalistic sources is one of the basic conditions for press freedom, as is reflected in the laws and the professional codes of conduct in a number of Contracting States and is affirmed in several international instruments on journalistic freedoms ... Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible

with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.”

66. In *Sanoma Uitgevers B.V.*, cited above, § 51, the Grand Chamber reiterated:

“The Court has always subjected the safeguards for respect of freedom of expression in cases under Article 10 of the Convention to special scrutiny. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society, an interference cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest ...”

67. Furthermore, in *Financial Times Ltd and Others*, cited above, § 63, the Court stated the following:

“In the case of disclosure orders, the Court notes that they have a detrimental impact not only on the source in question, whose identity may be revealed, but also on the newspaper against which the order is directed, 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 ... While it may be true that the public perception of the principle of non-disclosure of sources would suffer no real damage where it was overridden in circumstances where a source was clearly acting in bad faith with a harmful purpose and disclosed intentionally falsified information, courts should be slow to assume, in the absence of compelling evidence, that these factors are present in any particular case. In any event, given the multiple interests in play, the Court emphasises that the conduct of the source can never be decisive in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into consideration in carrying out the balancing exercise required under Article 10 § 2.”

68. In the same Chamber judgment, the Court considered, however, that “there may be circumstances in which the source’s harmful purpose would in itself constitute a relevant and sufficient reason to make a disclosure order” (*ibid.*, § 66).

69. In *Voskuil*, cited above, § 67, the Court, in response to the Government’s argument that source disclosure had been necessary in order to secure a fair trial for the accused, stated:

“The Court sees no need on this occasion to consider whether under any conditions a Contracting Party’s duty to provide a fair trial may justify compelling a journalist to disclose his source. Whatever the potential significance in the criminal proceedings of the information which the Court of Appeal tried to obtain from the applicant, the Court of Appeal was not prevented from considering the merits of the charges against the three accused; it was apparently able to substitute the evidence of other witnesses for that which it had attempted to extract from the applicant ... . That being so, this reason given for the interference complained of lacks relevance.”

70. Issues concerning source disclosure have not only arisen with respect to disclosure orders, but also in cases dealing with investigative searches, including *Görmüş and Others v. Turkey*, no. 49085/07, 19 January 2016 and *Nagla v. Latvia*, no. 73469/10, 16 July 2013. In the latter, the

Court noted that there was a fundamental difference between that case and other cases, where disclosure orders had been served on journalists, requiring them to reveal the identity of their sources. However, the distinguishing feature lay not, as the Government in that case had suggested, in the fact that the source's identity had been known to the investigating authorities prior to the search. According to the Court, that fact "[did] not remove the applicant's protection under Article 10 of the Convention" (*Nagla*, cited above, § 95).

(ii) *Application of those principles in the present case*

71. At the outset, the Court observes that the sentencing of Mr X – the alleged source of the applicant's incorrect article – was based on the assumption that he had wanted the information to be spread as news. Accordingly, the present case does not involve allegations of unlawful activity by the applicant, or criminal investigations of or proceedings against her, beyond those related to her refusal to give evidence on her contact with Mr X. In this context, the Court also notes that the Government have not questioned the journalistic methods employed by the applicant.

72. The Court, moreover, notes that the applicant was not expressly ordered to reveal the identity of the source or sources of the information in her news article. The City Court's ruling of 15 February 2011 (see paragraph 13 above) was limited to ordering her to testify on her contact with Mr X, who himself had declared that he was the source. However, while not formally a matter of a journalist assisting in the identification of anonymous sources, the Court considers that the possible effects of the order were nonetheless of such a nature that the general principles developed with respect to orders of source disclosure are applicable to the case. The concrete framing of the order is instead a factor in the overall assessment (see paragraph 82 below).

73. In its decision of 30 September 2011, the majority of the Supreme Court observed that there was no case-law from the Court about the situation where the source had come forward. It went on to state that in such a situation there was thus no source to protect, and that the disclosure of the source's identity would have no consequences for the free flow of information (see paragraph 25 above).

74. The Court confirms that it has not previously had an occasion to consider the specific question arising in the present case. At the same time the Court recalls that in cases where a source was clearly acting in bad faith with a harmful purpose, it held that the conduct of the source can never be decisive in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into account in the balancing exercise under Article 10 § 2 of the Convention (see, paragraphs 67-68 above quoting *Financial Times Ltd and Others*, cited above, §§ 63 and 66, and also *Telegraaf Media Nederland Landelijke Media*

*B.V. and Others v. The Netherlands*, no. 39315/06, § 128, 22 November 2012). Consequently, a journalist's protection under Article 10 cannot automatically be removed by virtue of a source's own conduct. In the Court's view, these considerations are also relevant in a situation when a source comes forward, as in the present case. The Court recalls, moreover, that it has previously held that source protection under Article 10 applied also when a source's identity was known to the investigating authorities before a search (see paragraph 70 above).

75. The Court further notes that the Supreme Court was primarily called upon to decide on the correct interpretation of Article 125 § 1 of the Code of Criminal Procedure (see paragraph 37 above), and in particular to clarify whether that provision was applicable in situations where the source has come forward (see paragraphs 19-33 above). The exception clause in Article 125 § 3, where the domestic courts have to balance source protection against other important interests ("important social interests" and "the clarification of the case") had not been relied upon by the prosecutor (see paragraph 33 above). However, the Court's task is broader. When assessing whether the interference was "necessary" under Article 10 § 2 it has to examine whether relevant and sufficient reasons were adduced for the concrete judicial order to give testimony which was imposed on the applicant. Circumstances concerning Mr X's identity are only one element in that assessment. While agreeing with the Supreme Court in its general consideration that a source's coming forward might be apt to mitigate some of the concerns intrinsic to measures implying source disclosure, the Court maintains that the knowledge of Mr X's identity cannot be decisive for its proportionality assessment.

76. That being said, the Court has held that protection afforded to journalists when it comes to 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" (see *Nordisk Film & TV A/S v. Denmark* (dec.), no. 40485/02, ECHR 2005-XIII and, for example, *Stichting Osade Blade* (dec.), no. 8406/06, § 64, 27 May 2014). Accordingly, the circumstances with respect to both Mr X's motivation for presenting himself as a "source" to the applicant and his coming-forward during the investigation suggest that the degree of protection under Article 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.

77. The fact that Mr X was charged with having used the applicant as a tool to manipulate the market was, as observed by the Supreme Court, relevant to the proportionality assessment (see paragraph 26 above). Yet, source disclosure became, in the instant case, an issue first in the criminal

investigations of Mr X at a point in time when there were no questions of, for example, preventing further injury to the company dealt with in the letter that had been faxed to the applicant (DNO) or to its shareholders (contrast, for instance, *Goodwin*, cited above, § 41, where an urgent order for source disclosure had been made primarily to prevent severe damage to a company before a subsequent injunction). In the present case, the source's harmful purpose therefore carried limited weight at the time when the order to testify was imposed.

78. In the Court's view, the decision on whether the order against the applicant was "necessary" under Article 10 § 2 mainly had to turn on an assessment of the need for her evidence during the criminal investigation and subsequent court proceedings against Mr X. It notes that Mr X himself did not argue that it was necessary that the impugned order be imposed on the applicant for the purpose of safeguarding his rights. Through his counsel he stated that he had described his contact with the applicant (see paragraph 12 above) and he never denied that he was the source.

79. In assessing the necessity for the "prevention of crime and disorder" (see paragraph 60 above) account must be taken of the gravity of the offences of which Mr X was suspected, as emphasised by the Supreme Court (see paragraph 26 above), and for which he was ultimately sentenced to one year and six months' imprisonment. Although market manipulation was not the only count on which Mr X had been indicted, it formed an important part of the criminal case.

80. On the other hand, the Court notes that the applicant's refusal to disclose her source or sources did not at any point in time hinder the investigation of the case or the proceedings against Mr X. At first, the prosecuting authority lodged its indictment against Mr X without having received any information from the applicant that could reveal her source or sources (see paragraph 6 above). Thereafter, neither the City Court nor the High Court was prevented from considering the merits of the charges (see paragraphs 15 and 36 above). On the contrary, it emerges from the court records as well as the City Court judgment that that court had been informed by the prosecutor that he considered that the case would be sufficiently elucidated, even without the applicant's testimony (see paragraphs 11 and 16 above). After the applicant had appealed against the order, the prosecutor stated that he would not submit a petition for postponement of the case as the prosecuting authority still considered the case to be adequately disclosed without the statement of the applicant (see paragraph 14 above). Finally, it was then clarified that the applicant's appeal against the order would not be forwarded to the High Court until after the City Court's judgment in the case against Mr X had been delivered (see paragraph 14 above). In that judgment the City Court stated that no motion of extension had been made (pending a final decision) as, according to the prosecutor, the case had been sufficiently disclosed even without the statement by the applicant (see

paragraph 16 above). Neither the City Court's nor the High Court's judgments against Mr X gives any indication that the applicant's refusal to give evidence attracted any concerns of those courts as regarded the case or the evidence against Mr X.

81. In the case concerning whether the applicant had a duty to testify about her contact with Mr X, the Supreme Court remarked that it seemed likely that the applicant's statement might significantly assist in elucidating the further circumstances around the defendant's contact with her (see paragraph 26 above). In the criminal case against Mr X, however, the applicant's refusal to disclose her source or sources did not at any point in time hinder the progress of the case (see paragraph 80 above). In this context, the Court recalls that in *Voskuil*, cited above, it found the potential significance in criminal proceedings of the information sought from a journalist insufficient under Article 10 as a reason to justify compelling him to disclose his source or sources. It took into account that the domestic court was not prevented from considering the merits of the case (see paragraph 69 above). While that finding was made in response to an argument that source disclosure had been necessary in order to ensure a fair trial for the accused (*ibid.*, § 69), the Court considers that it must have bearing also in the present case (see paragraphs 78-80 above).

82. The Court has previously emphasised that a chilling effect will arise wherever journalists are seen to assist in the identification of anonymous sources (see *Financial Times Ltd. and Others*, cited above, § 70). In the present case the disclosure order was limited to ordering the applicant to testify on her contact with Mr X, who himself had declared that he was the source. While it may be true that the public perception of the principle of non-disclosure of sources would suffer no real damage in this situation (see similarly *ibidem.*), the Court considers that the circumstances in the present case were not sufficient to compel the applicant to testify (see paragraphs 78-81 above).

83. Consequently, while being aware that the Supreme Court was only to a limited degree invited to carry out a proportionality test under Article 10 § 2 of the Convention (see paragraph 75 above), the Court – having regard to the importance of the protection of journalistic sources for press freedom – finds that the reasons adduced in favour of compelling the applicant to testify on her contact with Mr X, though relevant, were insufficient. Thus, even bearing in mind the appropriate level of protection applicable to the particular circumstances of the case (see paragraph 76 *in fine* above), it is not convinced that the impugned order was justified by an “overriding requirement in the public interest” (see paragraphs 65 and 66 above) and, hence, necessary in a democratic society.

84. The Court accordingly concludes that there has been a violation of Article 10 of the Convention.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

85. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

### A. Damage

86. The applicant did not claim compensation for non-pecuniary damage. She claimed 30,000 NOK, approximately 3,700 EUR, in respect of pecuniary damage.

87. The Government contested that claim on the ground that the applicant had not adduced any evidence to show whether the fine had actually been paid by the applicant or by her employer.

88. The Court notes that a fine of 30,000 NOK was imposed on the applicant as a personal, non-alienable, liability. While phrased as a claim for just satisfaction, her claim is in reality one of reimbursement of that fine. Although the applicant did not appeal against the fine, the Court, having regard to the violation found above (see paragraphs 83 and 84 above) and the principle of *restitutio in integrum*, finds in the circumstances that neither considerations concerning the directness of the causal link or the applicant’s possibilities to mitigate losses, nor her possibilities of further domestic remedies against the fine viewed in isolation, alter the consideration that the fine should not have to be paid, or if it has been paid, should be reimbursed by the respondent Government (see, in comparison, as regards Article 6 of the Convention, *Sace Elektrik Ticaret ve Sanayi A.Ş. v. Turkey*, no. 20577/05, § 39, 22 October 2013). It thus rules accordingly.

### B. Costs and expenses

89. The applicant also claimed 158,399 NOK, approximately 17,000 EUR, for the costs and expenses incurred before the Court.

90. The Government contested that claim. It noted that the applicant had not adduced any evidence to show that she had paid any costs or expenses. It appeared from the printouts of fees and costs that the applicant’s employer had been billed.

91. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, no invoices have been presented. From the printouts of fees and costs it emerges, however, that the billable client was *Dn Nye Medier AS*, the proprietor of the newspaper *Dagens næringsliv*. It



has not been shown that the applicant is herself liable for any costs. That being so, the Court rejects her claims (see, in comparison, *Voskuil*, cited above, § 92).

### **C. Default interest**

92. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 10 of the Convention;
3. *Holds* that in the event of the fine imposed on the applicant having been paid, the respondent State is to reimburse it within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 5 October 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško  
Deputy Registrar

Angelika Nußberger  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Tsotsoria is annexed to this judgment.

A.N.  
M.B.

## CONCURRING OPINION OF JUDGE TSOTSORIA

I wholeheartedly agree that there has been a violation of Article 10 in this case. I am not convinced, however, by some of the arguments advanced in the judgment. In particular, the point made in paragraph 76 that because of Mr X's motivation and the fact of his *coming forward during the investigation*, “*the degree of protection under Article 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*” (emphasis added).

The notable question that derives from this paragraph is whether the level of protection of a journalist's right not to disclose a source, in the framework of Article 10 of the Convention, diminishes in situations where the source himself/herself comes forward and cooperates with the investigation. I consider that the majority's approach to this issue may cause discomfort and lead to divergence in the case-law, weakening the protection of Article 10. Moreover, my belief is that the majority's line of reasoning as to this question does not stem from the case-law of the Court.

It is well-established in the case-law – and the judgment also affirms this – that freedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance (see, among other authorities, *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 71, ECHR 2004-XI) especially in view of the specific role of the media in exercising public scrutiny over public and private sectors in society and in increasing accountability and transparency<sup>1</sup>. Protection of journalistic sources is one of the basic conditions of press freedom (see *Goodwin v. the United Kingdom*, 27 March 1996, § 39, *Reports of Judgments and Decisions* 1996-II) and a key aspect of journalistic work. Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result, the vital public-watchdog role of the press may be undermined and the ability to provide accurate and reliable information may be adversely affected (see *Sanoma Uitgevers B.V. v. the Netherlands* [GC], no. 38224/03, § 89, 14 September 2010). In the light of the above,

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<sup>1</sup> The protection of journalists' sources, Recommendation 1950 (2011), Council of Europe Parliamentary Assembly – Assembly debate on 25 January 2011 (4th Sitting) (see Doc. 12443, report of the Committee on Culture, Science and Education, rapporteur: Mr Johansson). Text adopted by the Assembly on 25 January 2011 (4th Sitting), paragraph 1. Available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17943&lang=en>.

limitations on the confidentiality of journalistic sources call for the most careful scrutiny by the Court. Interference cannot be compatible with Article 10 of the Convention unless it is justified by an overriding interest of democratic society in securing a free press (see *Roemen and Schmit v. Luxembourg*, no. 51772/99, § 46, ECHR 2003-IV, and *Goodwin*, cited above, §§ 39-40, 45).

The applicant, as a journalist, was not requested to reveal the identity of an anonymous source. Nonetheless, the possible effects of the order of the Oslo City Court were of such a nature that, according to the Court, the general principles developed with respect to orders of source disclosure are applicable to the case (see paragraph 72) (in this respect see also the statement of the minority of the Supreme Court of Norway arguing that “should the applicant be ordered to testify concerning her possible contact with Mr X ... she would have to confirm or deny that Mr X was the source for her article .... By making a statement on this matter, she might also inadvertently reveal other potential sources”, paragraph 27). The journalistic methods employed by the applicant have not been questioned (paragraph 71) and there have been no criminal proceedings against her. Moreover, requirement for source disclosure was not intended to prevent any harmful activities (paragraph 77), nor it was necessary for the purposes of investigation, conviction or fair trial guarantees (paragraphs 77-81) and overall, there was no public interest in compelling the applicant to testify about her contact with Mr X (paragraph 83). The judgment also rightly acknowledges that X’s identity cannot be decisive for the proportionality assessment (paragraph 75) as, according to the case-law, the fact that the source’s identity is known does not remove a journalist’s protection under Article 10 of the Convention (*Nagla v. Latvia*, no. 73469/10, § 95, 16 July 2013).

The Supreme Court concluded that it seemed likely that the applicant’s statement might significantly assist in elucidating the further circumstances surrounding Mr X’s contact with her (paragraph 26). The applicable test in this regard is to assess whether the public interest invoked by the investigating or prosecuting authorities outweighs the general public interest of source protection and whether a less intrusive measure could suffice to serve the overriding public interests (see *Sanoma Uitgevers B.V.*, cited above, §§ 91-92). The necessity of the disclosure order does not stem from the circumstances of the case. Moreover, the offences for which Mr X was indicted (paragraph 6) do not correspond to those with regard to which the issuance of a disclosure order could be justified according to the Council of

Europe recommendations<sup>2</sup>. All the above totally excludes any justification for the possibility of affording lesser protection to the applicant.

Against this backdrop, I find it difficult to comprehend the rationale behind the suggested dichotomy of degree of protection in relation to journalists under Article 10 of the Convention who have been assisted by persons unknown and whose source came forward during the investigation. Such an argument neither derives from the case-law nor is called for by the circumstances of the case.

The relevant case-law used to support the disputed statement in paragraph 76 is *Nordisk Film & TV A/S v. Denmark* (dec.), no. 40485/02, ECHR 2005-XIII, and *Stichting Osade Blade* (dec.), no. 8406/06, § 64, 27 May 2014. The first case concerned an order to disclose material gathered by undercover activities of a journalist making a documentary on paedophilia in Denmark. The Court concluded that as a result of the journalist's undercover method of gathering such information, individuals were unaware that they were being recorded. Consequently, they could not be regarded as "sources of journalistic information in the traditional sense". The applicant company was requested to hand over only part of its research material. In this respect, the identity of the journalistic sources in the traditional sense was adequately protected. The handing over of the research material in relation to an alleged perpetrator was not deemed disproportionate to the legitimate aim pursued and the reasons given by the national authorities were considered to be relevant and sufficient.

*Stichting Osade Blade* (cited above) concerned the search of a magazine's premises following a press release it issued announcing that it had received a letter from an organisation claiming responsibility for a series of bomb attacks. As established by the Court, the magazine's informant's purpose was to don the veil of anonymity with a view to evading his own criminal accountability. It was further noted that the original document received by the editorial board of the magazine was sought as a possible lead towards identifying a person or persons unknown who were suspected of having carried out several bomb attacks. Importantly, the Court held that the author of the letter was not a "journalistic source", stating that not "*every individual who is used by a journalist for information is a 'source'*" and therefore was not entitled to the same protection as that ordinarily accorded to "sources".

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<sup>2</sup> In this respect, see the Explanatory Memorandum to 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 (Adopted by the Committee of Ministers on 8 March 2000 at the 701st meeting of the Ministers' Deputies), in particular, §§ 38-40, available at: <https://rm.coe.int/16805e2c13>.

A brief overview of these two cases shows that the basis for the Court’s conclusion in affording a lesser level of protection to certain journalists under Article 10 significantly differs from the facts of the given case. It is not the aim of this opinion to challenge that standard as such. Rather the question is whether the concrete situation calls for using a standard that allows lesser protection to journalists’ rights under Article 10. While the Court arrived at the right outcome in the present case, its approach, affording an unjustified wide margin of appreciation to States, may eventually lead to a finding of no violation in similar circumstances – a daunting prospect. The uncertainties derived from paragraph 76 are further exacerbated by the concluding statement in paragraph 83 that “*even bearing in mind the appropriate level of protection applicable to the particular circumstances of the case ...*, [the Court] is not convinced that the impugned order was justified by an ‘overriding requirement in the public interest’ ... and, hence, necessary in a democratic society” (emphasis added).

Applying Convention principles developed under other circumstances, without explanation or context, does no good either to the consistency of the case-law or in general, the protection of freedom of expression. This is particularly troubling in the framework of the present case, which concerns a novel issue for the Court – the situation where the source identifies himself/herself and cooperates with the authorities. It should be recalled that the right of journalists not to disclose their sources is not “a mere privilege to be granted or taken away ..., but is part and parcel of the right to information, to be treated with the utmost caution” (see *Tillack v. Belgium*, no. 20477/05, § 65, 27 November 2007). The Court has previously found that Article 10 does not only protect anonymous sources assisting the press in informing the public about matters of public interest (see *Nordisk Film & TV A/S*, cited above). A journalist’s protection under Article 10 cannot automatically be removed or diminished by virtue of the source’s own conduct. In this regard, while on the one hand the judgment, in paragraph 74, concludes (and rightly so!) that all previously developed standards for source protection are also relevant in a situation where a source comes forward, on the other hand, two paragraphs below, this very standard is unjustifiably called into question. Nor am I convinced by the statement that “it may be true that the public perception of the principle of non-disclosure of sources would suffer no real damage in this situation” (paragraph 82).

The unanimous conclusion as to a violation of Article 10 is commendable indeed. Nonetheless, we are living in the modern digital era where the legal framework of the protection of journalistic sources is under significant strain. This expands the risk of erosion, restriction and compromise in the work of journalists, with an impact on freedom of

expression, the media and investigative journalism in particular<sup>3</sup>. The Court has been a frontrunner and an advocate of judicial protection of journalists and their sources and in so doing it has also served as an inspiration for many other jurisdictions<sup>4</sup>. This path should not be reversed.

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<sup>3</sup> See generally, *Protecting Journalism Sources in the Digital Age*, UNESCO publication 2017

<http://en.unesco.org/news/unesco-releases-new-publication-protecting-journalism-sources-digital-age>

<sup>4</sup> See, for example, *Burundi Journalists Union v. Attorney General of the Republic of Burundi*, EACJ, Judgment of 15 May 2015, §§ 107–111, and *Prosecutor v. Radoslav Brdjanin and Momir Talic* (IT-99-36-AR73.9), ICTY, AC, Decision on Interlocutory Appeal, 11 December 2002. Importantly, this latter decision, which concerns war correspondents reporting from conflict zones, states that: “in order to do their jobs effectively, war correspondents must be perceived as independent observers rather than as potential witnesses for the Prosecution... Problems remain ... even if the testimony of war correspondents does not relate to confidential sources” (§ 42). The decision further notes that: “the legal differences between confidential sources and other forms of evidence are likely to be lost on the average person in a war zone who must decide whether to trust a war correspondent with information. To publish the information obtained from an interviewee is one thing -- it is often the very purpose for which the interviewee gave the interview -- but to testify against the interviewed person on the basis of that interview is quite another” (§ 43). While the context of this case is different, the applicable principles should still be the same.