Annotatie bij EHRM 20 oktober 2015 (Pentikäinen / Finland), *European Human Rights Cases*, 2016-3, nr. 52.
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1. The *Pentikäinen* case presented the European Court of Human Rights with an opportunity to further develop and strengthen its existing principles concerning freedom of expression, journalism and public debate. More specifically, it presented the Grand Chamber of the Court with an opportunity to explore and expand the scope of the operational autonomy that is available to journalists when covering events which are a matter of interest to the public, such as public demonstrations.

2. However, the majority judgment returned by the Grand Chamber was described by the dissenting judges as a "missed opportunity" and it left a coalition of free speech and journalism NGOs calling on Finland and other Council of Europe member States "to adopt a clear legal framework for the treatment of journalists during protests, in order to ensure the right balance between press freedom and public order during protests and demonstrations" (The European Federation of Journalists, the International Federation of Journalists, Index on Censorship and Article 19, Media Freedom Alert, 12 November 2015, available on the Council of Europe's Platform to promote the protection of journalism and safety of journalists).

3. The divisiveness of the judgment is apparent from the voting pattern within the Grand Chamber. The difference of opinion between the majority and the dissenting judges largely concerns the final prong of the Court's standard test to determine whether there has been a violation of Article 10 of the European Convention on Human Rights (hereafter, "ECHR"), i.e., the "necessary in a democratic society" criterion. The dissenting opinion, penned by Judge Spano and joined by the (then) President of the Court, Judge Spielmann, as well as Judges Lemmens and Dedov, forcefully argues that the majority should have shown greater critical rigour when applying the necessity criterion to the facts of the case.

4. In its established case-law, the Court has repeatedly stressed the importance of journalistic and media freedom for public debate in a democratic society. Journalists and the media can play the role of "public watchdog" by monitoring the activities of governmental authorities vigilantly and publicising any wrongdoing on their part. The media can also contribute to public debate by (widely) disseminating information and ideas and thereby contributing to opinion-forming processes within society. In fact, the Court sees it as the "task" of journalists and the media to impart information and ideas on matters of public interest. Moreover, the public has a "right" to receive such information and ideas (*The Sunday Times* v. *the United Kingdom*, *(no. 1)*, 26 April 1979, Series A no. 30, para. 65). In the present judgment, the importance of the roles played by journalists and the media was taken as a given.

5. The Smash ASEM demonstration, which the applicant was covering, generated considerable public interest, not only in Finland, but also internationally. The Court underlined the "the crucial role of the media in providing information on the authorities' handling of public demonstrations and the containment of disorder" (para. 89). It added that the "'watch-dog' role of the media assumes particular importance in such contexts since their presence is a guarantee

that the authorities can be held to account for their conduct vis-à-vis the demonstrators and the public at large when it comes to the policing of large gatherings, including the methods used to control or disperse protesters or to preserve public order" (*ibid.*). These observations prompted it to conclude that "[a]ny attempt to remove journalists from the scene of demonstrations must therefore be subject to strict scrutiny" (*ibid.*).

6. Yet, the dissenting judges took the majority to task because they found that the level of scrutiny applied by the majority was not strict enough. The dissenting opinion recalls that the applicant was apprehended when the police "engaged with the last remaining protesters within the cordoned-off area, after the dispersal order had been issued" (Dissenting opinion, para. 8). It was at precisely that moment that "it became crucial for the purposes of Article 10 of the Convention for the press to be able to observe the operational choices made by the police in arresting and dispersing the remaining participants so as to secure transparency and accountability" (*ibid.*). As the police considered that by then the demonstration had degenerated into a riot (para. 108), there was accordingly a heightened public interest in journalists and the media being able to observe how the police subsequently went about trying to contain the situation.

7. Journalists and the media are, as already mentioned, suitable actors for observing, reporting on and commenting on, police conduct in such situations. This is all the more true of the applicant, who was covering the demonstration in his dual capacity as a *photographer* and a journalist. While the majority and the dissenting judges recognised the public interest in general journalistic coverage of the demonstration, they neither recognised nor explored the distinctive features of photo-journalism (or even the use of photos in journalism) as a specific form of journalistic coverage. A number of those features are relevant in the present case. For instance, if the applicant had complied with the police order to leave the cordoned-off area, he would have had to follow the unfolding events from a less proximate vantage point, which could have compromised his ability to take sharp, close-up photographs of the thick of the action. Photographic documentation of the demonstration could have provided additional transparency, verification and/or credibility for the accompanying journalistic reporting and commentary. As such, the photos taken by the applicant could have proved very valuable in clarifying the course of events in a high-octane, fast-moving situation. The public interest in obtaining accurate information, including in photographic form, about the conduct of the police in such a volatile situation, is therefore very strong.

8. This implies that there was also a very strong public interest in the applicant's decision to ignore the police dispersal order in order to be able to obtain such accurate information, including in photographic form. A central question in this connection is whether the applicant acted in accordance with the notion of "responsible journalism", as developed and understood by the Court (see further, para. 11, below).

9. In order for journalists and the media to be able to perform the roles ascribed to them in a democratic society, they must enjoy a certain operational autonomy. To this end, the Court has accepted that journalists and the media are entitled to enjoy a range of freedoms, including (just to name a few): protection of confidential sources (*Goodwin* v. *the United Kingdom*, 27 March 1996, *Reports of Judgments and Decisions* 1996-II); protection against searches of professional workplaces and private domiciles and against seizure of materials (*De Haes and Gijsels* v. *Belgium*, 24 February 1997, *Reports of Judgments and Decisions* 1997-I), and editorial and presentational autonomy (*Jersild* v. *Denmark*, 23 September 1994, Series A no. 298, para. 31). The importance of the protection of pre-publication procedures and processes for the gathering and selection of material, such as research and enquiry, has also been recognised (*Dammann* v. *Switzerland*, no. 77551/01, 25 April

2006, para. 52). Indeed, interferences with those processes can pose such a serious threat to the right to freedom of expression that they demand the highest levels of scrutiny by the Court (*ibid.*).

10. But the operational autonomy that allows journalists to carry out their functions is neither unlimited nor unconditional. In accordance with Article 10(2), the exercise of the right to freedom of expression "carries with it duties and responsibilities". The scope of those "duties and responsibilities" varies, depending on the "situation" of the person exercising the right to freedom of expression and on the "technical means" used (*Fressoz and Roire* v. *France* [GC], no. 29183/95, ECHR 1999-I, para. 52). The Court has explained that "the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism" (Bladet Tromsø *and Stensaas* v. *Norway* [GC], no. 21980/93, ECHR 1999-III, para. 65).

11. In the present case, the phrase, "the ethics of journalism", has been replaced by the phrase, "the tenets of responsible journalism" (para. 90). Whereas the Court's application of the notion of "responsible journalism" has so far tended to focus "mainly on issues relating to the contents of a publication or an oral statement", the Court held in the present case that it also concerns the (lawfulness of the) conduct of a journalist, including his/her "public interaction with the authorities when exercising journalistic functions" (*ibid.*).

11. In light of this proviso, the present judgment recalls that "notwithstanding the vital role played by the media in a democratic society, journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that, as journalists, Article 10 affords them a cast-iron defence" (para. 91). The Court often refers in its case-law to the "duty" of journalists, *in principle*, to "obey the ordinary criminal law", but the precise wording used is not always identical. In its *Fressoz & Roire* v. *France* judgment, for instance, the Court openly countenanced the possibility that there may be instances in which it would be justified to depart from the general principle, posing the question "whether, in the particular circumstances of the case, the interest in the public's being informed outweighed the 'duties and responsibilities'" (*Fressoz & Roire*, cited above, para. 52). Regardless of how it is formulated, it is imperative that such a possibility is borne in mind, otherwise the public interest can be undermined by States' rigid adherence to the letter of the law or their wilful misuse or abuse of the law (Dissenting opinion, para. 5). In the instant case, the majority accepted that the "fact that a journalist has breached the law in that connection is *a most relevant, albeit not decisive*, consideration when determining whether he or she has acted responsibly" (emphasis added, para. 90). However, the majority did not build on this statement to set out a convincing case as to why the public interest should have prevailed.

12. The dissenting judges assert that the impugned measures did not seek to address a pressing social need and therefore failed to meet the "necessary in a democratic society" criterion. They point to the finding of the Helsinki District Court, upheld on appeal, that the applicant's failure to obey the dispersal order was "excusable", arguing convincingly that such a conclusion does not support the claim that the measures interfering with the applicant's right to freedom of expression were necessary in a democratic society.

13. Another point of contention raised by the dissenting opinion is that the majority considered the interference with the applicant's right to freedom of expression from three distinct perspectives: his apprehension, detention and conviction. The majority considers each of these perspectives in turn, with a view to determining whether they, as a whole, constitute a violation

of the applicant's right to freedom of expression (para. 94). The dissenting opinion argues that it would have been more appropriate to examine "cumulatively" the impugned measures interfering with the applicant's rights (Dissenting opinion, para. 7). The dissenting opinion submits that it would have been more fruitful to apply the criteria developed in the *Stoll v. Switzerland* judgment in the present case: the interests at stake, the review of the measure by the domestic courts, the conduct of the applicant and whether the penalty imposed was proportionate (Dissenting opinion, para. 6, referencing *Stoll* v. *Switzerland* [GC], no. 69698/01, ECHR 2007-V, para. 112). In this author's opinion, the majority's choice of approach does not, of itself, explain why it did not apply the "necessary in a democratic society" criterion more rigorously to the facts of the present case.

14. The dissenting opinion does not object to the reasons for the initial apprehension of the applicant: he disobeyed the police dispersal order and he was not wearing any visible insignia or a press badge, so he was not readily identifiable as a journalist, notwithstanding his photographic equipment (c.f. *Najafli* v. *Azerbaijan*, no. 2594/07, 2 October 2012). What mattered to the dissenting judges is that even after the police became aware that the applicant was in fact a journalist, coupled with the knowledge that he was not participating in the demonstration, he was nevertheless detained (overnight) and convicted.

15. The applicant's detention prevented him from reporting expeditiously on the protest, which was his original intention. The Court has recognized in other case-law that news is "a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest" (*Observer & Guardian* v. *the United Kingdom*, 26 November 1991, Series A no. 216, para. 60 and *The Sunday Times* v. *the United Kingdom (no. 2)*, 26 November 1991, Series A no. 217, para. 51). Thus, while there was no interference with *what* the applicant wished to publish or *how* he wished to do so, there was an interference with *when* he could do so. It is therefore puzzling that neither the majority nor the dissenting judges addressed this point at length (c.f. the dissenting opinion, para. 7).

16. The majority mention that the "nature and severity of the penalty imposed are further factors to be taken into account when assessing the proportionality of the interference" (para. 112). There is, however, no reference to the Court's pertinent finding in other case-law that the "most careful scrutiny on the part of the Court is called for when … the measures taken or sanctions imposed by the national authority are capable of discouraging the participation of the press in debates over matters of legitimate public concern" (*Bladet Tromsø and Stensaas*, cited above, para. 64). A reminder of this finding in the judgment would have strengthened the "public interest" argument even further.

17. The majority plays down the nature, severity and impact of the conviction, pointing out that the applicant was not fined and no entry was made on his criminal record. Nevertheless, the dissenting judges are adamant that the conviction (as condoned by the Grand Chamber) "will have a significant deterrent effect on journalistic activity in similar situations occurring regularly all over Europe" (Dissenting opinion, para. 12). This stand-point is in line with the Court's settled case-law (which was not specifically referenced by the dissenting judges), which points to the chilling effect caused by the mere fact of a criminal conviction: "what matters is that the journalist was convicted" at all (*Jersild* v. *Denmark*, cited above, para. 35). Indeed, the Court has also noted the chilling effect that "the fear of sanction has on the exercise of freedom of expression, even in the event of an eventual acquittal, considering the likelihood of such fear discouraging one from making similar statements in the future" (*Altuğ Taner Akçam* v. *Turkey*, no. 27520/07, 25 October 2011, para. 68).

18. The penultimate paragraph of the dissenting opinion states that "it is not in the least convincing for the majority to attempt to limit their findings to the 'particular circumstances of the instant case'" for "it is quite clear that the reasoning of the majority will unfortunately allow Contracting States considerable latitude in imposing intrusive measures on journalistic activity in public settings where force is used by law-enforcement officials" (Dissenting opinion, para. 13). This should be a source of concern for journalists in the Netherlands, where there is a recent and continuing tendency for demonstrations concerning socially and politically sensitive topics to attract violent behaviour and elicit police intervention to maintain public order. The reasoning and conclusions of the majority carry the risk of collateral effects on journalists covering such demonstrations.

19. Similar criticism has been levelled against the Grand Chamber in respect of its *Delfi* judgment (*Delfi AS* v. *Estonia* [GC], no. 64569/09, ECHR 2015), for example during a major Council of Europe conference on freedom of expression that was held a week before the Court delivered its *Pentikäinen* judgment (see: T. McGonagle, 'Freedom of expression: still a precondition for democracy? – Conference report', Strasbourg: Council of Europe, 2015, p. 14). The gist of the criticism is that when a case is referred to the Grand Chamber, there is a legitimate expectation that the Grand Chamber judgment will seek to establish principles that are broadly applicable, and not limited to the "particular circumstances" of one case.

20. The concluding paragraph of the dissenting opinion sounds a pessimistic note, describing the judgment as "a missed opportunity for the Court to reinforce, in line with its consistent case-law, the special nature and importance of the press in providing transparency and accountability for the exercise of governmental power by upholding the rights of journalists to observe public demonstrations or other Article 11 activities effectively and unimpeded, so long as they do not take a direct and active part in hostilities" (Dissenting opinion, para. 14). As this case-note has documented, at various junctures in the present judgment, the Grand Chamber could have referenced pertinent findings of the Court in other judgments and attached greater precedential value to them.

21. Clearly, opportunities to explore the pressing issues in the *Pentikäinen* case – and other pressing issues affecting freedom of expression, journalism and public debate (see generally: O. Andreotti (ed.), *Journalism at risk: Threats, challenges and perspectives*, Strasbourg: Council of Europe Publishing, 2015) must be seized. So, too, must opportunities to reinforce the principles governing those issues, by legal and political measures. In this regard, it should be noted that these issues are among the focuses of a draft Recommendation of the Council of Europe's Committee of Ministers to member states on the protection of journalism and safety of journalists and other media actors, prepared by Council of Europe's (former) Committee of Experts on protection of journalism and safety of journalists (MSI-JO) at the end of 2015 (for a brief overview, see T. McGonagle, cited above, pp. 19-20). If these opportunities are not seized, the pessimistic note of the dissenting judges is sure to become a wider and louder pessimistic chorus.

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