



**Europees Hof voor de Rechten van de Mens**

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**(Nußberger (president), Potocki, O’Leary, Mits, Kucsko-Stadlmayer, Hüseyinov, Chanturia)**

**Noot: T. McGonagle**

**Bescherming van privéleven. Vrijheid van meningsuiting. Chilling effect.**

[EVRM art. 8, 10]

*Klaagster is een onderzoeksjournalist die vaak kritisch rapporteert over de regering en de president. Volgens haar is zij sinds deze kritiek regelmatig geïntimideerd en bedreigd. De zaak spitst zich toe op gebeurtenissen in 2012. Klaagster ontving toen een dreigbrief, verzonden vanuit Moskou, die vergezeld ging van enkele foto’s die met een geheime camera waren gemaakt in haar slaapkamer, waar zij seks had gehad met haar vriend; deze beelden waren ook aan twee kranten gestuurd. Later bleek dat er ook video-opnamen waren gemaakt; die werden geplaatst op een website. In de media werd een en ander zo geframed dat het videoschandaal door klaagster zelf zou zijn veroorzaakt. Naar aanleiding van deze gebeurtenissen deed klaagster aangifte en er werd een onderzoek gestart, maar dat vond weinig voortvarend plaats. Het was klaagster zelf die met hulp van vrienden de verborgen camera’s in haar slaapkamer ontdekte en die zag dat er bedrading was aangelegd waardoor de opnamen konden worden doorgestuurd. Ook werd geen uitgebreid onderzoek gedaan naar een getuige die klaagster had aangedragen van een bedrijf dat de bedrading kon hebben geplaatst. Gelet op dit alles stelt klaagster voor het EHRM allereerst dat de dreigbrief en de geheime opnamen en de verspreiding daarvan een inbreuk maken op haar privacy. Het Hof stelt vast dat art. 8 EVRM hierop zonder meer van toepassing is, maar dat nog wel de vraag is wie hiervoor verantwoordelijk is geweest en of de zaak dan moet worden onderzocht vanuit het perspectief van positieve of van negatieve verplichtingen. Klaagster zelf heeft betoogd dat de staat ook achter de opnamen en brieven zou kunnen zitten, en het Hof sluit dat gelet op de omstandigheden ook niet uit en spreekt de zorg uit dat ze hier gelijk in zou kunnen hebben. Niettemin is dit niet ‘beyond reasonable doubt’ komen vast te staan, zodat het Hof alleen kijkt of de positieve verplichting tot het doen van voldoende onderzoek is nagekomen. Het Hof wijst erop dat in dit geval sprake is van een ernstige aantasting van de privacy die de menselijke waardigheid in het gedrang heeft gebracht, zodat effectieve maatregelen en onderzoek noodzakelijk zijn. Bovendien ziet het Hof dat er een link tussen de opnamen en bedreigingen kan zijn geweest met haar journalistieke activiteiten, zodat er extra reden was om te onderzoeken of zo’n relatie er was. Het Hof merkt bovendien op dat het ging om een zorgvuldig geplande en uitgevoerde operatie, en ook dat het niet ondenkbeeldig is dat er statelijke actoren schuilgingen achter de daden. Deze extra redenen voor onderzoek hebben niet geresulteerd in een optreden van de autoriteiten dat voldoet aan de positieve verplichtingen. Verschillende bewijsrichtingen zijn onvoldoende onderzocht, ook waar dat wel voor de hand had gelegen, en het onderzoek heeft bovendien veel te lang geduurd en is in niets uitgemond. Schending art. 8 EVRM. Nog afzonderlijk en wel als een inbreuk op een negatieve verplichting onderzoekt het Hof het feit dat de autoriteiten op bepaald moment een*

*rapport over de voortgang van het onderzoek hebben gepubliceerd, waarin haar adres en een heel aantal ander persoonlijke gegevens met zoveel woorden waren opgenomen. Ook de publicatie van dergelijke gegevens maakt duidelijk inbreuk op het privéleven. Daarvoor is geen enkel legitiem doel aangevoerd, noch is dit noodzakelijk. Weliswaar kan het nuttig zijn het publiek te informeren over een lopend onderzoek, maar er is geen enkele reden waarom daarvoor de adresgegevens en andere persoonlijke gegevens van het slachtoffer moeten worden gepubliceerd. Tot slot onderzoekt het Hof of de gebeurtenissen een schending opleveren van art. 10 EVRM. Daarbij slaat het acht op de algehele context van bedreiging van kritische journalisten in Azerbeidzjan en de opmerkingen daarover in openbare rapporten en van de interveniënten. Klaagster heeft duidelijk angst gehad voor de bedreigingen en inbreuken op haar privacy en het is denkbaar dat dit een chilling effect heeft gehad. Tegelijkertijd is het juist dan nodig dat staten actief maatregelen treffen om de vrijheid van meningsuiting te garanderen. Nu dat hier niet voldoende is gebeurd, zoals het Hof bij art. 8 al heeft vastgesteld, is ook art. 10 EVRM geschonden.*

*Khadija Ismayilova*  
tegen  
*Azerbeidzjan*

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1. These are very grim times for the protection and safety of journalists and other media actors who contribute to public debate. The murders of investigative journalists Daphne Caruana Galizia in Malta on 16 October 2017 and Ján Kuciak in the Slovak Republic on 21 February 2018 have been well-publicized and have led to public outcry and outrage. So, too, has the murder of Jamal Khashoggi after he entered the Saudi Arabian Consulate in Istanbul, Turkey, on 2 October 2018. These killings are part of a sinister, growing trend of attacks on the physical safety and integrity of journalists in Europe (see: Partner Organisations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists, *Democracy at risk: threats and attacks against media freedom in Europe*, Annual Report 2019, pp. 7 *et seq.*; see also the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists: <https://www.coe.int/en/web/media-freedom>).

2. This growing trend is not new. The pattern of attacks on journalists and other media actors across the 47 Member States of the Council of Europe and the 57 participating States of the Organization for Security and Co-operation in Europe (OSCE) is an enduring one. It is interwoven with a similar pattern of threats, intimidation and harassment (see, for example, Parliamentary Assembly of the Council of Europe (PACE), Resolution 2141 (2017), ‘Attacks against journalists and media freedom in Europe’, 24 January 2017). These patterns cause a chilling effect on freedom of expression and media freedom and can lead to fear and self-censorship among journalists (see, generally, Marilyn Clark and Anna Grech, *Journalists under pressure: Unwarranted interference, fear and self-censorship in Europe*, Strasbourg: Council of Europe, 2017, and in respect of the Netherlands, M.W.A. Odekerken and A.F.M. Brenninkmeijer, *Een dreigend klimaat*, 2017). In such scenarios, society as a whole loses out because there is an interference with the journalistic task of imparting information and ideas about matters of general interest and with the public’s right to receive such information and ideas (*The Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, § 65, Series A no. 30, ECLI:CE:ECHR:1979:0426JUD000653874).

3. Journalists can therefore use all the help they can get, and they are sure to welcome any ratcheting up of the existing legal standards that guarantee them protection, and/or stricter implementation of those standards. The European Court of Human Rights has consolidated and strengthened its approach to the protection and safety of journalists in its *Khadija Ismayilova v. Azerbaijan* judgment of 10 January 2019. The Court was unanimous in its finding of violations of Articles 8 and 10 of the European Convention on Human Rights.

4. The applicant, Khadija Ismayilova, is an internationally renowned investigative journalist whose reporting focuses in particular on issues relating to corruption in Azerbaijan. She has received numerous awards for her work, including Human Rights Watch's The Alison Des Forges Award for Extraordinary Activism (2015) and the UNESCO/Guillermo Cano World Press Freedom Prize (2016). The applicant's reporting is often critical of the government and in the period preceding the events at the centre of the present case, she had published articles about alleged business interests of the presidential family.

5. The applicant's first complaint concerned a set of facts, summarized succinctly by the Court as follows: "the applicant, a well-known investigative journalist, received a threatening letter demanding that she cease her activities, had hidden cameras installed in her flat by unknown persons without her knowledge and consent, and had intimate videos of her taken secretly and disseminated on the internet, which fact was subsequently further publicised by the media" (para. 105). The applicant alleged that her right to private life, as guaranteed under Article 8 of the European Convention on Human Rights, had been violated. The applicability of Article 8 was not in dispute: the scope of the right covers an individual's physical and moral integrity, sexual life and respect for his/her home. The Court moreover recognized "the extraordinary intensity of an intrusion into a person's home of the type complained of" (para. 107).

6. The applicant alleged that the State was in breach of its negative or/and in any event its positive obligations under Article 8 (paras. 108 *et seq.*). The Court therefore had to decide which type of State obligations should form the basis of its examination of the applicant's complaint. The State's positive and negative obligations under Article 8 are situated along a continuum; there is no precise demarcation line between them and in both cases, the applicable principles are similar, e.g. the need for a fair balance to be struck between the competing interests at play (para. 112). The requisite standard of proof for an examination of an alleged breach of the negative obligation, i.e., that there was an unjustified interference attributable to the State, is "beyond reasonable doubt" (para. 111). The Court found that it was not possible – on the basis of the material available – to meet that evidentiary standard in the present case. It thus proceeded to examine the complaint in light of the State's positive obligations (para. 114).

7. Significantly, the Court did "emphasise that it has concerns as regards the answer to" the "open" question whether those who committed the acts complained of by the applicant "were linked to State agents abusing their official power" (para. 113). A number of factors weighed heavily with the Court and served to ground its concerns: "the applicant's credible allegations, the contextual information provided by the third party interveners and the careful planning and execution of the covert surveillance operation" (para. 113).

8. In its examination, the Court did not mince its words. It considered that the acts complained of were "grave and an affront to human dignity: an intrusion into the applicant's home in the form of unauthorised entry into her flat and installation of wires and hidden video cameras inside the flat; a serious, flagrant and extraordinarily intense invasion of her

private life in the form of unauthorised filming of the most intimate aspects of her private life, which had taken place in the sanctity of her home, and subsequent public dissemination of those video images; and receipt of a letter threatening her with public humiliation” (para. 116).

9. Given the “plausible link” between these intrusions and the applicant’s professional activities and given that the purpose of the intrusions was “to silence her”, the Court insisted that the “absence of such a motive could be demonstrated only if it was conclusively and convincingly ruled out as a result of an effective investigation” (para. 119). Drawing on a growing cluster of case-law, in particular *Huseynova v. Azerbaijan* (no. 10653/10, 13 April 2017, ECLI:CE:ECHR:2017:0413JUD001065310) and *Mazepa and Others v. Russia* (no. 15086/07, 17 July 2018, ECLI:CE:ECHR:2018:0717JUD001508607), the Court stated that in the circumstances of the instant case, it was “of the utmost importance to investigate whether the threat was connected to the applicant’s professional activity and by whom it had been made” (para. 120).

10. In short, due to “significant flaws” in the investigation of the case and the overall length of the proceedings, the Court found that the State authorities had failed to comply with their positive obligation under Article 8 to carry out an effective criminal investigation into the very serious interferences with the applicant’s private life.

11. The applicant’s second complaint, again under Article 8, concerned the public disclosure of extensive (sensitive) personal information in the status report on the investigation into her case. The personal information had been collected in the course of the investigation; the applicant’s complaint did not concern its collection for that purpose, but its disclosure in a press release by the prosecution authorities, by way of update on progress on the investigation. The disclosure included, among other things, “the applicant’s home address, the fact of her relationship with her then boyfriend and his full name and occupation, the full names of her landlord and her family members, and the full names and occupations of her friends and colleagues” (para. 142).

12. The Court’s assessment was clear, sound and straightforward: the authorities could have informed the public about the nature of the steps taken in the investigation, while still respecting the applicant’s right to privacy (para. 147). It added that the situation “called for the authorities to exercise care in order not to compound further the already existing breach of the applicant’s privacy” (para. 148). It accordingly found a violation of Article 8.

13. The applicant furthermore alleged that her right to freedom of expression, as safeguarded by Article 10, had been violated. The Court recalled its seminal statement about States’ positive obligations under Article 10, which it first enunciated in its *Dink v. Turkey* judgment: States are required “to create, while establishing an effective system of protection of journalists, a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear, even if they run counter to those defended by the official authorities or by a significant part of public opinion, or even irritating or shocking to the latter” (para. 158; *Dink v. Turkey*, nos. 2668/07 and 4 others, § 137, 14 September 2010, ECLI:CE:ECHR:2010:0914JUD000266807; for analysis, see: Tarlach McGonagle, “Positive obligations concerning freedom of expression: mere potential or real power?”, in Onur Andreotti, Ed., *Journalism at risk: Threats, challenges and perspectives*, Strasbourg: Council of Europe Publishing, 2015, pp. 9-35).

14. The Court referred to the exacerbated chilling effect on freedom of expression that arises in cases of serious crimes against journalists and again stressed that it is of “utmost

importance” for State authorities to “check a possible connection between the crime and the journalist’s professional activity” (para. 159). It again followed the line set out in its *Huseynova* and *Mazepa and Others* judgments.

15. The Court then dwelt on the general situation concerning freedom of expression and safety of journalists in Azerbaijan, as described by the Commissioner for Human Rights of the Council of Europe (para. 71) and third-party interveners in the case (paras. 74-78). Those reports painted a very troubling picture of physical attacks and alleged persecution of journalists and a perceived climate of impunity for such acts. The Court considered that “such an environment may produce a grave chilling effect on freedom of expression, including on the “public watchdog” role of journalists and other media actors and on open and vigorous public debate, all of which are essential in a democratic society” (para. 161). In this connection, it explicitly referenced Recommendation CM/Rec(2016)4 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 (adopted on 13 April 2016).

16. The reference to Recommendation CM/Rec(2016)4 is significant as it evidences a welcome openness on the part of the Court to embrace a political standard-setting instrument in a way that serves to reinforce its own case-law. However, the Recommendation is grounded firmly and explicitly in the principles that the European Court of Human Rights has identified and developed in its case-law in respect of: freedom of expression; enabling environment; safety, security, protection; contribution to public debate and chilling effect. The Court’s reference to the Recommendation means that things have gone full circle – from case-law to policy-making back to case-law.

17. Against the backdrop of the general situation in Azerbaijan, and in light of the particular circumstances of the present case, the Court considered that “the threat of public humiliation and the acts resulting in the flagrant and unjustified invasion of the applicant’s privacy were either linked to her journalistic activity or should have been treated by the authorities when investigating as if they might have been so linked” (para. 163). The State was required under Article 10 to take positive measures to protect the applicant’s “journalistic freedom of expression”, as well as her privacy (*ibid.*). The Court found that the State had not complied with its positive obligation, leading to a violation of Article 10.

18. In light of persistent and worsening patterns of threats and violence against journalists, there is a growing sense of urgency about the need for States to take meaningful measures to ensure what the Court has now for the first time called “the spirit of an environment protective of journalism” (para. 165). Various international bodies have called on States to implement effectively or fully the Guidelines that are appended to Recommendation CM/Rec(2016)4. Those bodies include the Parliamentary Assembly of the Council of Europe (see: Resolution 2179 (2017) Political influence over independent media and journalists, 29 June 2017, para. 7.1; Resolution 2213 (2018) The status of journalists in Europe, 25 April 2018, para. 6.2) and the European Parliament (see: Resolution of 3 May 2018 on media pluralism and media freedom in the European Union (2017/2209(INI)), para. 7). The Tallinn Guidelines on National Minorities and the Media in the Digital Age, issued by the OSCE High Commissioner on National Minorities in February 2019, also draw on CM/Rec(2016)4 (as documented in the Explanatory Note to the Guidelines, pp. 31 – 35).

19. The Council of Europe has meanwhile devised an Implementation strategy for Recommendation CM/Rec(2016)4 (see: <https://www.coe.int/en/web/freedom-expression/implementation-of-recommendation-cm/rec-2016-4>). Amongst other things, the

strategy envisages a comparative study of the implementation of the Recommendation at the national level. The Netherlands is mentioned in this connection, which is not surprising, given that significant research in this area has already been undertaken (see: M.W.A. Odekerken and A.F.M. Brenninkmeijer, *Een dreigend klimaat*, 2017 and Geert Lokhorst and Leon Trapman, *Securing a favourable environment for journalists in the Netherlands* (forthcoming, May 2019, via: <https://www.ivir.nl/projects/auditoffreedomofexpression/>)).

20. *Khadija Ismayilova v. Azerbaijan* is a landmark judgment for the protection of journalists against threats and smear campaigns that aim to, or have the effect of, thwarting the ability of journalists to conduct their public watchdog role in a democratic society. It is also a resounding and timely shout-out to the value of political standard-setting, monitoring and awareness-raising activities for the Court's ongoing interpretation of the European Convention on Human Rights as a living instrument that is in tune with the grim realities of our times.

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