

THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 63164/16

FOURTH SECTION

Between:

MÁNDLI and others

Applicant

v

HUNGARY

Respondent Government

THIRD- PARTY INTERVENTION SUBMISSION BY THE CIVIL LIBERTIES UNION
FOR EUROPE IN ACCORDANCE WITH RULE 44 (3) OF THE RULES OF COURT

INTRODUCTION

1. This is a third party intervention submitted by the Civil Liberties Union for Europe with the contribution of 10 human rights organisations¹ and 7 parliamentary information departments or press galleries² across Europe by the leave of the President of the Court granted on 24 July 2017 pursuant to Rule 44 § 3 of the Rules of the Court.

2. The Civil Liberties Union for Europe is a non-governmental, non-partisan human rights organisation promoting the civil liberties of everyone in the European Union. The Civil Liberties Union for Europe is built on a network of 11 national civil liberties non-governmental, non-partisan human rights NGOs from across the EU.

3. The Civil Liberties Union for Europe conducted a piece of exploratory research focusing on the rights of journalists exercising their profession in national Parliaments. It collected information on the following contracting parties to the Convention: Belgium, Bulgaria, Croatia, the Czech Republic, Finland, France, Germany, Hungary, Ireland, Italy, Lithuania, the Netherlands, Norway, Poland,

¹ Belgian League of Human Rights (Belgium), Bulgarian Helsinki Committee (Bulgaria), Centre for Peace Studies - Croatia (Croatia), Human Rights Monitoring Institute (Lithuania), Italian Coalition for Civil Liberties and Rights (Italy), JUMEN e.V. - Legal Human Rights Work in Germany (Germany), Polish Helsinki Foundation for Human Rights (Poland), Reporters Without Borders (France), The Association for the Defense of Human Rights in Romania – the Helsinki Committee (Romania), The League of Human Rights (Czech Republic).

² That of the European Parliament, Denmark, Finland, Ireland, Norway, Sweden and the United Kingdom.

Romania, Sweden, Switzerland and the United Kingdom. The regulations concerning journalists working on the premises of the European Parliament were also examined.

4. The Civil Liberties Union for Europe sought answers to the following questions:

- Is it necessary for journalists to obtain accreditation in order to be able to access the Parliament's premises?
- Who or which office decides whether a journalist can be denied accreditation?
- Who or which office decides whether a journalist's behaviour warrants an official warning, removal from the Parliament's premises, or a suspension of their accreditation?
- On what grounds can accreditation be suspended?
- Is there an opportunity to challenge such a decision?
- Is there an opportunity to appeal to a court (either directly or to contest the outcome of some internal dispute-resolution procedure)?

5. The Civil Liberties Union for Europe is of the opinion that three fundamental human rights are engaged in the case of *Mándli and others v Hungary*: First, the freedom of expression as provided for in Article 10 of the Convention (I) second, the right to an effective remedy as provided for in Article 13 of the Convention (II), and third, - to be recognised - the right to impart information as a right which is 'civil' in nature for purposes of Article 6 (1) of the Convention (III).

6. The Civil Liberties Union for Europe is of the opinion that the lack of adequate procedure for journalists to challenge their getting banned from parliamentary premises or challenge other sanctions issued by press departments violates Article 6 (1) of the Convention. The ECtHR's decision in *Mackay and BBC Scotland*³ rejected the applicants' complaint under Article 6 (1) referring to the Commission's decision in *Hodgson and others*⁴, saying that the right to report from the open court is not a civil right. While the Convention *expressis verbis* allows that "the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society" such exclusion does not apply to the parliamentary premises. The right to report on the parliamentary premises is the right of the press and the public to receive first-hand information about the work of the legislative branch. This specific circumstance establishes the civil nature of this right for purposes of Article 6 (1). Therefore, if the Court finds this right to be of a civil nature, the interests of legal certainty, foreseeability and equality before the law will not be infringed.

³ *Mackay and BBC Scotland v. UK*, no. 10734/05, §22, 7 December, 2010.

⁴ *G. Hodgson, D. Woolf Productions Ltd. and National Union of Journalists v. UK*, no. 11553/85, and *Channel Four Television Co. Ltd. v. UK*, no. 11658/85, 15 July 1988.

7. In assessing the proportionality of the interference to the above rights, the Court should consider five aspects of the case: (a) the role of the press, (b) the impact on the press, (c) the process applied by national decision makers to determine the application of the interference, (d) the sanctions imposed and (e) the availability of an effective remedy against the decisions of decision makers.

I. Freedom of expression

Article 10 of the European Convention on Human Rights (ECHR)

8. Press freedom is a precondition for a functioning democracy. The European Court of Human Rights (ECtHR) and other regional Human Rights Courts have consistently recognised the fundamental importance of press freedom, a freedom that includes both the freedom of expression and the right of the public to receive information of general interest.⁵

9. As parliaments are unique fora for political debate in democratic societies, there can be no doubt it is in the essential interest of the public that the press have appropriate access to parliamentary premises. If the press cannot enter parliamentary premises and contact members of parliament (MPs) directly and regularly, the press will not be in a position to exercise its duty. That is, it will not be able to impart information and ideas on all matters of public interest. According to the case law of the ECtHR, journalists should be allowed to obtain first-hand and direct knowledge based on their personal experience of events unfolding on the parliamentary premises.⁶

10. The rights of journalists to exercise their profession in the Parliament should be interfered with only when there is a compelling reason to do so, and the interests at stake are on balance weightier than the right to freedom of expression of the press and the freedom of the public to receive information. For example when the interest of the authority of the Parliament or the order in Parliament would be seriously affected if the rights in question were not interfered with.⁷

11. In assessing the interferences with journalists' freedom to exercise their profession on the parliamentary premises there are three points to be considered.

- a) Limitations on free movement within the premises of the Parliament may be proportionate. It is justifiable to require certain forms of accreditation for journalist to enter the parliamentary premises. In certain cases, it may well be justified when journalists are not allowed to enter closed sittings of

⁵ *Sunday Times (no. 1) v. the United Kingdom*, Series A no. 30, § 65, 26 April 1979, *Observer and Guardian v. the United Kingdom*, Series A no. 216, § 59, 26 November 1991, and *Thorgeir Thorgeirson v. Iceland*, Series A no. 239, § 63, 25 June 1992.

⁶ *Selmani and others v. The Former Yugoslav Republic of Macedonia*, no 67259/14, § 84, 9 February 2017.

⁷ *Karácsony and others v Hungary*, Grand Chamber, no. 42461/13. and 44357/13, § 85, 17 May 2016.

parliamentary committees. It may also be justified to put restrictions on the circumstances under which journalists may make recordings, for example, when such a restriction is meant to protect the right to privacy of others.⁸

- b) One should draw a distinction between sanctioning individual journalists and whole media outlets. While there are circumstances where the former might be in line with the values of democracy, the latter creates collective sanctions that are unacceptable. Collective sanctions as such are unacceptable as by their nature they are disproportionate in their scope (for applying to individuals other than the offending journalists) and in their impact (removing an entire source of information for the public). When journalists seriously break the codes of conduct of a Parliament or other laws, then proportionate sanctions are acceptable. However, it is important to note that “any impairment of public order that is invoked as a justification to limit freedom of expression must be based on real and objectively verifiable causes that present the certain and credible threat of a potentially serious disturbance of the basic conditions for the functioning of democratic institutions. Consequently, it is not sufficient to invoke mere conjecture regarding possible disturbances of public order, nor hypothetical circumstances derived from the interpretations of the authorities in the face of events that do not clearly present a reasonable threat of serious disturbances”.⁹
- c) Disciplinary measures against journalists should be applied proportionately. Warnings and reprimands are less intrusive than banning or withdrawing accreditation for breaking rules. If journalists are excluded from the premises of the Parliament then transparent time limits are essential. The possibility to exclude journalists from the Parliament is the “censorial power of an information monopoly” that essentially concerns an interference with the exercise of the functions of the press.¹⁰

⁸ The limitation to record in bathrooms, when occupied, is proportionate. However, showing traces of cocaine in bathrooms of the Parliament is considered to be of general interest according to the decision of the Administrative Court of Berlin, Germany. See case: VG Berlin, 18 June 2001, 2001, 27 A 344.00 -, juris.

⁹ Office of the Special Rapporteur for Freedom of Expression, Inter American Commission on Human Rights, The Inter-American Legal Framework regarding the Right to Freedom of Expression, OEA/Ser.L/V/II CIDH/RELE/INF. 2/09, § 82.

¹⁰ *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, § 36, 14 July 2009.

Findings in relation to Article 10

12. According to the findings of the research conducted by the Civil Liberties Union for Europe, in most of the investigated member States journalists need to obtain some form of accreditation in order to work in the national Parliament. However, in Denmark and Bulgaria journalists can, under certain circumstances, practice their profession on the parliamentary premises without accreditation.

13. In most of the member States investigated in the present research, there are three types of accreditations issued. These accreditations may be one-time accreditations, short- or long-term periodic accreditations or permanent accreditations.

14. Typically, accreditations are issued by the press departments of the national Parliaments, although in some cases they are issued by press organisations. In Italy, for example, media accreditations are issued by the Associazione Stampa Parlamentare (ASP - Parliamentary Press Association) and the Associazione Fotografi Parlamentari (AFPA - Parliamentary Photographers Association).

15. The Civil Liberties Union for Europe found that the process of accreditation is not unduly burdensome in any of the member States studied.¹¹ Typically journalists may file a request for accreditation by email and after a relatively fast security check up, the accreditation is issued. The press departments adequately fulfil their role in granting access for journalists to work in Parliaments, especially in member States where permanent and long-term passes are issued in order to ensure that the journalists are able to avoid unnecessary obstacles to performing their task of informing the public on matters of public interest. In Denmark, for example, the Parliament issues a set number of special access cards to journalists that will provide access to the Parliament through the main entrance without a security check.

16. While the States involved in the present research seem to agree on the need of an accreditation process, their understanding of the justified sanctions for breaching the code of conduct in Parliament varies to a great extent. The Civil Liberties Union for Europe notes that although disciplinary measures may pursue the legitimate aims of preventing disruption to the work of Parliament by ensuring its effective operation, and may in certain cases protect the rights of MPs, certain sanctions, such as a permanent or indefinite ban from the premises, are unlikely to satisfy the necessity and proportionality test under Article 10 § 2 of the Convention. This is because first, a permanent or indefinite ban is unlikely, because of its absolute nature, to be tailored to the particular disruption in question. And second, such a ban interferes with the right to freedom of

¹¹ It should be noted, however, that in the framework of this research the Civil Liberties Union for Europe did not investigate how media organizations that are not well established, such as civil journalists or bloggers, can access the parliamentary premises; as in the present case, this issue did not arise.

expression of a journalist in a way that has significant consequences for the ability of the public to access information of public interest.

II. The right to an effective remedy Article 13 of the ECHR

17. The Venice Commission's 'Report on the Rule of Law' states that everyone should be able to challenge governmental actions and decisions adverse to their rights.¹² In accordance with the principle of the rule of law, individuals must be protected from the arbitrary use of power by the State."¹³

18. According to the Venice Commission, the 'rule of law'¹⁴ incorporates the following elements: (1) Legality, including a transparent, accountable and democratic process for enacting law (2) Legal certainty (3) Prohibition of arbitrariness (4) Access to justice before independent and impartial courts, including judicial review of administrative acts (5) Respect for human rights (6) Non-discrimination and equality before the law. All these six elements are seriously harmed in cases where the press is banned from the national parliament for indefinite time under an arbitrary decision process, without proper reasoning, and without the opportunity to challenge the decision or without the right to an effective remedy.

19. In the case *Karácsony and others v Hungary*¹⁵ the Grand Chamber of the ECtHR confirmed that MPs are required to respect parliamentary rules of conduct. However, it further stated that imposing a fine for breach of these rules without a hearing violates MPs' rights.¹⁶ In this case the ECtHR found a breach of Article 13, since the parliamentary procedure was not capable of redressing the injustice caused either in theory or in practice.¹⁷ The lack of effective remedy means the lack of effective legal safeguards.

Findings in relation to Article 13

20. From the information collected by the Civil Liberties Union for Europe it appears that in all the member States examined, there is a system to discipline media workers who engage in improper conduct. A number of sanctions may be imposed on journalists breaching parliamentary rules, the most serious being a temporary or permanent ban from the premises. As argued in paragraph 11, such

¹² European Commission for Democracy Through Law (Venice Commission) Report on the Rule of Law, adopted (Venice, 25-26 March 2011), CDL-AD(2011)003rev.

¹³ Ibid § 52.

¹⁴ Ibid § 41.

¹⁵ *Karácsony and others v. Hungary*, Grand Chamber, no. 42461/13, and 44357/13, 17 May 2016.

¹⁶ In *ibid* §174, the Grand Chamber concluded that it was not necessary to examine separately the applicants' complaint under Article 13 read in conjunction with Article 10.

¹⁷ *Ibid* § 166.

sanctions may be justified. It is important, however, that journalist should have an opportunity to dispute the alleged breach of the rules of Parliament.

21. In some member States journalists may file an appeal in connection with the disciplinary sanctions imposed on them to an internal parliamentary organ first. They may also have the opportunity to contest the decisions of this organ before the national courts. In Belgium, when the Parliament's internal services and press syndicates cannot settle a dispute over alleged misconduct, the administrative decision of the ban can be challenged in front of the Council of State (Conseil d'Etat).

22. In Italy, appeals against the sanctions imposed by the Parliamentary Press Association's Directive Council can be filed with the Board of Arbitrators of the Parliamentary Press Association. Article 23 of the Italian Civil Code states that decisions can be challenged before Rome's Tribunale Amministrativo Regionale (TAR - Administrative Regional Court).

23. In Poland, there is no direct appeal measure against the withdrawal of accreditation. Nevertheless, if journalists were banned from entering the Parliament without a legitimate cause they could try reporting that to the police as a press law crime of "impeding press criticism" (Article 44 of the Press Law Act). It should be noted, however, that even a successful action taken on the basis of Article 44 would lead only to the imposition of sanctions on the person responsible for the decision and would not of itself revoke the ban.

24. In the European Parliament, journalists who allegedly engage in misconduct are informed by letter of the date of the committee meeting that will hear their case and they are entitled to attend (accompanied by a person of their choice) to defend themselves. They (and their professional association) are informed afterwards of the committee's decision and its reasons, and they may appeal to an appeal committee. Even though no such case has been recorded so far, journalists or media outlets may also appeal to the Court of Justice of the European Union (CJEU) for review the legality of the act of the European Parliament intended to produce legal effects to journalists and to the fundamental rights of the press.¹⁸ The Civil Liberties Union for Europe is of the opinion that the CJEU would have jurisdiction in such cases.

25. In some member States, journalist may appeal directly to the courts. In Germany, for example, there is no special appeal procedure mentioned in the rules of the Parliament, therefore the general administrative law is applicable. The appeal is heard by the Administrative Court of Berlin.

¹⁸ Treaty on European Union and the Treaty on the Functioning of the European Union - *OJ C 326*, 26/10/2012 P. 0001 - 0390, § 263.

III. The right to a fair trial in civil proceedings, Article 6 (1) of the ECHR

26. Limitations concerning the activity of the press within parliamentary premises can be designed in such a way as to constitute a proportionate restriction on the freedom of expression. However, for such limitations to be acceptable under human rights law, an affected journalist must also have a procedural right giving her/him access to a fair trial to contest such decisions.

27. The right to a fair trial originates in the requirement that the rule of law be upheld as part of the common heritage of member States of the Council of Europe. One of the elements of the rule of law is the principle of legal certainty.¹⁹

28. Article 6 (1) recognises the ‘right of access to a court’ or tribunal when their civil law rights are at stake. Both under international agreements created under the Council of Europe and in EU legislation, non-judicial procedures, including before non-judicial bodies and alternative dispute resolution methods, are considered as potentially acceptable means of satisfying the requirements of Article 6(1), under certain conditions.

29. Tribunals must be ‘established by law’. They can include a body set up to determine a limited number of specific issues if appropriate guarantees are provided. “If an administrative body does not afford the guarantees of Article 6 (1), there must be a right of appeal to a judicial body that does.”²⁰

30. According to the practice of the ECtHR, there is also a requirement that the tribunal in question may not undertake both judicial and executive functions.²¹

31. Under EU law, Article 47 of the EU Charter of Fundamental Rights guarantees the right to a fair hearing before a tribunal. The proceedings before the body must be intended to lead to decisions of a judicial nature. In a case decided by the CJEU, one of the reasons the court found that a decision-making body could not constitute a tribunal was that it had ministerial links, which meant it was not acting as a third party in relation to the interests at stake.²²

32. According to the Council of Europe’s Guide on the civil law element of Article 6, the effective right means that parties have the right to present their observations, which they regard as relevant to their case.²³ The “tribunal” has a duty to conduct a proper examination of the submissions, arguments and evidence

¹⁹ *Sovtransavto Holding v. Ukraine*, no. 48553/99, § 72, 25 July 2002.

²⁰ *Belilos v. Switzerland*, no. 10328/83, § 64 29 April 1988.

²¹ *Bentham v. the Netherlands*, no. 8848/80, § 43, 23 October 1985.

²² Guarantees are set out in the decision of CJEU, C-363/11, *Epitropos tou Elegktikou Synedriou sto Ypourgeio Politismou kai Tourismou v Ypourgeio Politismou kai Tourismou - Ypiresia Dimosionomikou Elenchou*, §§ 19-31, 19 December 2012.

²³ Council of Europe/ European Court of Human Rights, Guide on Article 6 of the Convention – Right to a fair trial (civil limb) § 172. 2013.

adduced by the parties.²⁴ The guarantees include the obligation for tribunals to give a reasoned decision that shows the parties that their case has truly been heard.²⁵

Findings in relation to Article 6 (1)

33. The Civil Liberties Union for Europe found that in some of the member States where the regulations were examined, there is a real dialogue between journalists and the acting bodies, such as the parliamentary press departments. This is a means of implementing the requirement for adversarial proceedings.²⁶

34. In Belgium, for example, when certain violations of the code of conduct are disputed, the Parliament's internal services (Service PRI and Service de la Communication) and the press syndicates attempt to settle the matter. In the Netherlands, the director of the Operations of the House of Representatives invites the media worker in question for an explanatory interview. In Finland, the Parliament Information Office tries to settle the matter by conducting a conversation about the perceived misconduct with the reporter and/or the media she/he represents. In other member States such exploratory and conciliatory procedures are absent – media accreditations can be withdrawn without prior consultations with the journalist concerned.

IV. Closing remarks

35. The Civil Liberties Union for Europe notes that access to the relevant rules is very problematic in almost all the member States investigated. There are two reasons for that. First, the regulations are not directly accessible for the public. Second, while most parliamentary press offices provide information regarding the regulations when asked, in many cases the field is simply not adequately regulated – they do not know e.g., whether an appeal to the administrative court against the decision to withdraw certain journalists' accreditation would be possible. In many countries, the whole process of accreditation and the decision to issue a ban is based on a history of customary practices, rather than on an exact code of conduct. It may well be that in the majority of member States this practise works well for the time being. Nevertheless, the Civil Liberties Union for Europe is of the opinion, that the *Mándli and others v. Hungary* case shows that the lack of adequate regulations with proper safeguards may endanger the right to freedom of expression.

36. The Civil Liberties Union for Europe is of the opinion that the European Court of Human Rights (ECtHR) decision in the *Mándli* case is likely to create a

²⁴ *Kraska v. Switzerland*, no. 13942/88, § 30, 19 April 1993; *Van de Hurk v. the Netherlands*, no. 16034/90, § 59, 19 April, 1994; *Perez v. France* [GC], no. 47287/99, § 80, 12 February 2004.

²⁵ *H. v. Belgium*, no. 8950/80 . § 53, 30 November 1987.

²⁶ Council of Europe/ European Court of Human Rights, Guide on Article 6 of the Convention – Right to a fair trial (civil limb), §§ 198 200, 2013.

precedent for minimum requirements concerning journalists' ability to report on parliamentary activities in the public interest, and that the ECtHR's decision has the potential to influence not only Hungarian practice, but also that of other national Parliaments.

37. Based on the research conducted, the Civil Liberties Union for Europe is of the opinion that in order to ensure that journalists can play the vital role of keeping the public informed of matters of public interest, the following criteria should to be met with regard to the regulations concerning the rights of journalists exercising their profession in national Parliaments:

1. Member states should have in place legal regulations concerning the rights and obligations of journalists with access to Parliamentary premises and reporting on parliamentary affairs. These regulations should be clear and accessible to all. The sanctions for violating these rules should be set out clearly and the conditions under which conduct will be considered to violate the rules should be foreseeable.
2. There should be separate legislative, executive and judicial bodies dealing with matters regarding the journalists right to practise their profession on parliamentary premises.
3. In situations where accreditation is denied, suspended or withdrawn, a written justification should be provided by the relevant parliamentary body.
4. The regulation should not be disproportionately restrictive. When journalists receive bans, this should be limited to the minimum period of time necessary to redress the violation in question. Bans on media outlets should be impermissible.
5. Journalists / editors should be involved in the disciplinary decision-making process.
6. There should be an opportunity to appeal to a court or other body through a process that satisfies the criteria established under Article 6(1) of the ECHR.

Berlin, 1 September 2017

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