Hurbain v Belgium: Navigating the Intersection of Privacy and Press Freedom in the Digital Age

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In the wake of the digital revolution, questions surrounding the right to privacy and the right to be forgotten have come to the fore. With the digitalisation of press archives, what once required extensive archival research can now be discovered – even sometimes accidentally – through a simple online search. This is what led the Belgian Courts to order that Mr Hurbain anonymise an article in the online archive of the *Le Soir* newspaper. Before the European Court of Human Rights (the Court, ECtHR) Mr Hurbain argued that this order had violated his right to freedom of expression.

On the 4th of July, the Grand Chamber delivered its ruling in *Hurbain v Belgium*, finding that no violation had occurred. It echoed the previous findings of the Third Chamber but adopted a different approach, developing new criteria to be applied in cases concerning the modification of online archives. This post focuses on the Grand Chamber ruling, arguing that its outcome reflects a fair balancing of competing interests. It further discusses the criteria developed by the Court and the subsidiarity approach it adopted.

Facts

Hurbain v. Belgium concerned a civil judgment issued against the applicant, Mr Hurbain, in his capacity as editor of the newspaper, *Le Soir* which ordered him to anonymise an article in its electronic archive. The article reported on a series of fatal accidents which occurred within a few days of each other. It mentioned the full name of G., one of the responsible drivers, who had been under the influence of alcohol at the time. In 2000, G. was convicted and sentenced to a suspended term of two years imprisonment. He was rehabilitated in 2006.

The article in question first appeared in the print edition of the paper in 1994. In 2008, *Le Soir* created an electronic version of its archives from 1989 onwards, making this article freely available online. Two years later, G. applied to the newspaper asking that the article be anonymised or removed from the online archives. The request mentioned his profession as a medical doctor and the fact that the article immediately appeared when his name was entered into several search engines. *Le Soir* refused to remove the article from its archives but explained to G. that it had given notice to the administrator of the search engine Google to de-reference the article.

In 2012, G. successfully sued Mr. Hurbain to obtain anonymisation of the article. Mr. Hurbain was unsuccessful on appeal and in 2016 the decision became final. Relying on Article 10, Mr. Hurbain argued that the order to anonymise the article violated his right to

freedom of expression.

Chamber Decision

In assessing the proportionality of the anonymisation order, the Chamber emphasised the wide margin of appreciation available to the Contracting State in balancing competing interests under Articles 8 (right to privacy) and 10 (freedom of expression). Provided that this balancing act was undertaken in accordance with the criteria set out in the Court's previous case law, it would require 'strong reasons' to overrule the decision of the domestic courts. Applying the criteria set out in *Axel Springer v Germany,* the Chamber endorsed the domestic courts' review and found that Article 10 had not been violated. For a more complete summary of the Chamber decision, see Sarah de Heer's post.

Grand Chamber Decision

In its proportionality assessment, the Grand Chamber adopted a slightly different approach than the Chamber. It specified that the criteria to be considered in balancing the competing interests in this case were:

- the nature of the archived information;
- the time that has elapsed since the events and since the initial and online publication;
- the contemporary interest of the information;
- whether the person claiming entitlement to be forgotten is well known and his or her conduct since the events;
- the negative repercussions of the continued availability of the information online;
- the degree of accessibility of the information in the digital archives; and
- the impact of the measure on freedom of expression and more specifically on freedom of the press.

These criteria were not the same as those applied by Chamber or in previous judgments where press freedom clashed with the right to privacy. They were developed by the Grand Chamber in response to the specific issue raised by this case – the anonymisation of information in a digital archive. In setting out the general principles, the Grand Chamber emphasised the importance of freedom of information and preserving the integrity of news archives. Its role was to examine whether the 'assessment carried out by the Liége Court of Appeal was consistent with that resulting from [these] criteria.' (para 213) If so, the Court would require strong reasons to substitute its own view for that of the Court of Appeal.

The Grand Chamber examined each of the criteria in turn, focusing its attention on how they had been considered at the domestic level. It did not find reason to call the findings of the Court of Appeal into question and concluded that:

> …the national courts took account…the nature and seriousness of the judicial facts reported on in the article in question, the fact that the article had no topical, historical or scientific interest, and the fact that G. was not well known…they attached importance to the serious harm suffered by G. as a result of the continued online availability of the article with unrestricted access, which was apt to create a "virtual criminal record", especially in view of the length of time that had elapsed since the original publication of the article. Furthermore, after reviewing the measures that might be considered in order to balance the rights at stake – a review whose scope was consistent with the procedural standards applicable in Belgium – they held that the anonymisation of the article did not impose an excessive and impracticable burden on the applicant while constituting the most effective means of protecting G.'s privacy (para 255).

Thus, the order to anonymise the article did not violate Article 10. (para 257)

Commentary

The case of *Hurbain* raises interesting questions about the right to privacy in the digital era. As press archives are digitalised, we are moving into an age where a simple search for someone's name can reveal sensitive information that would once have required extensive archival research to uncover. How then to balance competing rights? In the paragraphs that follow, I will briefly explain why I support the outcome reached by the Court and reflect on the guidelines it developed and the deferential approach it adopted.

It should be acknowledged that the Chamber ruling in this case was already controversial. Writing on this blog, one of its proponents, Sarah de Heer, favourably compared the Chamber ruling to that of the European Court of Justice (ECJ) in the *Google Spain* case. While the ECJ's ruling made it clear that the rights of the data subject will generally prevail over the rights of the search engine operator and the general public, the Chamber ruling in *Hurbain* requires national courts to conduct a true balancing exercise between Articles 8 and 10. These cases involve very different actors however – the applicant in Google Spain was a search engine operator, while Mr Hurbain is the editor of a newspaper. This distinction was emphasised by Christopher Docksey in his more critical post on Verfassungsblog. He noted that the Chamber rulings in *Hurbain* and *Biancardi v Italy* are significant because they change the balance between Articles 8 and 10 and permit complainants to 'address their requests directly to the *primary publisher*, the website of the news organisation concerned, not the *search engine* even though it would be sufficient for the search engine to carry out the dereferencing.' Docksley argues that these rulings could have a chilling effect on the press and accelerate 'the erosion of democracy both in Europe and abroad due to the decline of local press. Docksley's comments align with those made by dissenting Grand Chamber Judge Ranzoni, who was joined by Kūris, Grosez, Eicke and Schembri Orland. These judges argued that the majority had considered the case through an unduly narrow perspective and that their approach risks 'considerably weakening the freedom of the press.'

While the importance of press freedom cannot be overstated, it may be that these fears are. For one thing, as noted by Judge Krenc in his concurring opinion, the scope of the judgment is limited: it does not require newspapers to systematically anonymise their archives. Any measure concerning the amendment of digital press archives can only be taken in response to an express request which must be duly substantiated. An individual must show that a certain 'threshold of severity' has been reached in order to claim a violation of Article 8 and then there is still a balancing act to be conducted – their rights will be weighed against relevant Article 10 claims. Furthermore, throughout its ruling, the Grand Chamber clearly emphasised the importance of maintaining the integrity of press archives, noting that this should be the guiding principle in any such cases. The Court can only deal with the facts of cases as they appear before it. It was the specific circumstances of this case that led it to conclude that the anonymisation order did not violate Article 10. And with this, I am in agreement. It is not disputed that there is a legitimate public interest in maintaining the integrity of press archives nor that the article, when first published, contributed to a debate of public interest. It can be questioned, however, whether the continued inclusion of G's full name in the archive is of such contemporary or historical interest that it outweighs his right to privacy and indeed, his right to be forgotten. Furthermore, the online nature of the archive should be recognised. There is a difference between the continued availability of information about an individual's involvement in a road traffic accident 10 years previously in a physical archive and the inclusion of this information amongst the 'top hits' when an unrelated party searches for their business address. It seems deeply unjust that G's reputation would be tarnished permanently and his name forever linked to a crime he had committed, even after he served his sentence and was fully rehabilitated. Most importantly, it is not clear that the continued inclusion of his name in the article is actually that significant for public or historical debate.

Even as we commend the decision of the Grand Chamber, we can still reflect on the manner in which it was reached. In previous posts on this blog (see here, here and here), I have written about the increased prevalence of procedural review in the Court's jurisprudence in recent years. When this approach is adopted, the Court adopts a more subsidiary position and grants greater deference to domestic authorities who can show that they completed a Convention-compliant balancing exercise between competing rights. In some areas, the Court has developed very clear criteria to guide domestic authorities in this. This can be seen, for example, in cases on defamation where the criteria developed in *Von Hannover no. 2* and *Axel Springer* are applied. With regard to the subsidiary role of the Court, it is striking to note that in this case, in his concurring opinion, Judge Krenc explicitly stated that he may have taken a different decision than that reached by the Belgian courts. However, as a judge at the ECtHR, his role was not to decide how the conflict between Articles 8 and 10 should have been resolved, but to assess if the domestic courts' decision complied with ECHR criteria and fell within the State's margin of appreciation. His statement is not extraordinary – but it is unequivocal. It is very clear that Judge Krenc has accepted the arrival of former President of the Court, Róbert Spano's, 'age of subsidiarity.'

Not everyone shared his enthusiasm for the Grand Chamber's approach, however. The dissenting judges were critical of the 'minimalist approach' taken by the majority which did not include a thorough examination of the novel issues arising in this context, nor the principles to be applied. Without expanding on the shortcomings, they identified in the majority's reasoning, these judges suggested an alternative approach to be taken which focused on the (non-)existence of a pressing social need for the anonymisation order and the proportionality thereof. Regardless of your opinions on the proper role of the Court and the role of procedural review in its jurisprudence more generally, it is interesting to note that the Court adopted a deferential approach in *Hurbain* as it concerned issues that it had never ruled on before. Here, even while setting out a new set of criteria to be applied in such cases, the Court continued to defer to the outcome of the domestic court's assessment – not because it had explicitly applied these novel criteria but because it had met them 'in substance.' Of course, given the novelty of the criteria, it's hard to argue that the domestic courts could be faulted for not explicitly applying them. We can ask, however, if more explicit engagement with these standards will be required in future cases now that they have been defined.

With regard to these criteria themselves, it is submitted that their explicit enumeration is to be welcomed. Firstly, because they recognise the particular nature of the publication of information online and, secondly, because the Court has now provided a clear blueprint to domestic authorities as to how such cases should be adjudicated. If the Court wishes to fully embrace its subsidiary role in the ECHR system and apportion greater responsibility to domestic authorities, then it must offer them clear guidance as to how they should proceed. The criteria developed by the Grand Chamber in this case recognise the particularities of the online context, the archived nature of the material and the importance of both press freedom and the rights of the individual under Article 8. These criteria allow for a real balancing exercise to be conducted between Articles 8 and 10 and provide valuable guidance for domestic authorities in an area where cases are likely to arise with increasing frequency as news media moves ever-more online.

Conclusion

Digitalised press archives have ushered in an age where a simple online search can unearth once-buried information. In this context, achieving a balance between competing interests under Articles 8 and 10 is a challenging endeavour. Despite concerns about a potential chilling impact on the press, the limited scope of the judgment and the emphasis placed on the importance of maintaining the integrity of press archives are reassuring. It is interesting to see that the Court adopts a deferential approach in this case while still developing new criteria to be applied by domestic courts. Irrespective of your position on how the case was handled however, these criteria are to be welcomed as they acknowledge the distinct nature of the online realm and offer a roadmap for domestic authorities in future cases.