Protection of Journalists' Sources in the Recent Case Law of the ECtHR

Analysis of the ECtHR's Judgment in Csikós v Hungary

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Abstract

Protecting journalists' sources is important in its own right as part of the institutional guarantee of press freedom. In order for the press to fulfil its public watchdog function, it is crucial that its staff can access information from a wide range of sources. This paper examines the extent to which this protection is upheld in Hungarian law, both generally and in the specific context of the Csikós v Hungary case, which was decided by the ECtHR in 2024.

Keywords: Csikós, ECtHR, freedom of expression, journalists' sources, Hungary

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1. Introduction

The protection of journalists' sources is important in its own right as part of the institutional guarantee of press freedom. For the press to fulfil its *public watchdog* function, it is essential that its staff can obtain information from the widest possible range of sources. Particular attention should be given to information that is not (yet) available to the public. Conversely, for sources to provide journalists with credible information, it is also essential that they must be confident that their names will not be published or brought to the attention of the authorities against their will. Without this institutional trust, it would be difficult to expect whistleblowers to regularly provide substantive information to assist the press in performing their duties. However, source protection is not absolute. For exceptional reasons relating to *e.g.* national security, public order, criminal law considerations, or secrecy reasons, authorities may access journalists' sources, but only through a procedure secured by several safeguards.

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2. The Regulation of Protection of Journalists' Sources in Hungary – An Overview

In Hungary, source protection is regulated by Article 6 of Act CIV of 2010 on freedom of the press and fundamental rules on media content. At the time of its adoption in 2010, the wording of this Act obliged press staff (journalists) to protect sources of information, with the exception that "the right to confidentiality does not extend to the protection of the source of information which has disclosed classified information without authorization" and that "a court or authority may, in exceptional and justified cases, in order to protect national security and public order or to detect or prevent the commission of criminal offences, order the media or its staff to disclose the source of information".[1]

In practice, the provision was applied first (and perhaps only) time to Tamás Bodoky, editor-in-chief of the *Átlátszó* online journal. He was questioned by the police as a witness and ordered to reveal the source of information for a newspaper article. This case, known as the *Brokernet case* (which became famous because of this very procedure), in which unknown perpetrators approached Brokernet Zrt. to access its computer databases and obtained the details of several individuals connected to the company. An article about the crime was published by *Átlátszó,*[2] which also showed some of the files obtained. Following the publication of the article, Mr Bodoky was summoned as a witness by the police and ordered to reveal the source of the information. Bodoky refused and submitted a complaint, which was dismissed by the prosecution on the grounds that there was no public interest in the present case that could justify the protection of the journalist's source.[3] Moreover, according to the prosecutor's standpoint, there is no legal basis in the Hungarian legal system for refusing to testify in the specific case.[4] Bodoky lodged a constitutional complaint against the de-

1 Act CIV of 2010 on the freedom of the press and the fundamental rules of media content, Section 6(3) (no longer in force).

2 'Magyarleaks: meghackelték a brokernetet', *Átlátszó,* 6 July 2011, at https://atlatszo.hu/kozpenz/2011/07/06/magyarleaks-meghackeltek-a-brokernetet/.

3 The prosecutor justified their position by stating that the information in question constituted a trade secret of the company. *Átlátszó,* however, considered it to be in the public interest for the company's customers to be aware that their data could have been obtained by unauthorized persons.

4 *See* (in Hungarian) at https://atlatszo.hu/wp-content/uploads/2011/11/ugyesz1111071.pdf.

cision of the prosecutor's office,[5] which was examined by the Constitutional Court (together with other motions) in *Decision No. 165/2011 (XII. 20.) AB*.

In its decision, the Constitutional Court referred to *Goodwin,*[6] the leading case of the ECtHR. According to the ECtHR,

> "Protection of journalistic sources is one of the basic conditions for press freedom [...] 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 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest."[7]

The Constitutional Court concluded that legislation which generally prioritizes the protection of classified documents over the disclosure of potentially related offences (*e.g.,* corruption) is a disproportionate restriction on freedom of expression. It is also a disproportionate restriction on freedom of expression if the burden is on the press to prove the public interest invoked to deny disclosure of the source rather than on the authority (or prosecutor) to prove the need to know the journalist's source. This is of particular concern where the reason for investigating a crime may itself justify an authority's access to the journalist's sources, as implied by Section 6(3) of the Act.[8] The Constitutional Court found that there had been a legislative omission, since, in its view,

> "the institution of source protection becomes a genuine defence when a journalist may refuse to make a statement or provide information, at least with a view to protecting his sources, in proceedings conducted by the investigating authority or by any other authority, and the procedural laws

5 *See* (in Hungarian) at https://atlatszo.hu/wp-content/uploads/2011/12/11–12-alapjogipanasz1.pdf.
6 *Goodwin v the United Kingdom (GC),* No. 17888/90, 27 March 1996.
7 Id. para. 39.
8 Decision No. 165/2011. (XII. 20.) AB, ABH 2011, 478.

clearly regulate the exceptional cases in which they are nevertheless obliged to cooperate with the authorities, subject to judicial review."[9]

Following the decision, the Parliament has revised the Hungarian rules on the protection of journalists' sources. According to Act XC of 2017 on criminal procedure, in force at the time of writing this paper, a journalist may refuse to testify if it would reveal the identity of the source to whom (*i.e.,* to reveal the source) can only be ordered by a court if *(i)* the information is essential for the investigation of a sufficiently serious intentional crime, *(ii)* no other evidence can replace it, and *(iii)* the public interest in the investigation of the crime (in particular with regard to its gravity) is so overriding that it clearly outweighs the interest in keeping the source of the information confidential.[10]

3. The Factual Background of Csikós v Hungary

In November 2015, *Blikk,* one of Hungary's leading tabloid newspapers, reported the murder of an elderly couple in their home in Érd, a municipality in Hungary. The police only issued a press release about the crime after *Blikk* had reported it.[11] The *Blikk* article did not contain any further information other than the fact that a serious crime had occurred. Later, the National Defence Service *(Nemzeti Védelmi Szolgálat)* suspected a police officer of having informed the *Blikk* journalist Klaudia Csikós about the crime.[12] Documents from the criminal proceedings against the policeman revealed that, before the *Budai Központi Kerületi Bíróság* (Central District Court of Buda) authorized secret surveillance (wiretapping) of the policeman, the journalist, Klaudia Csikós, had also been wiretapped to identify the source of the information (*i.e.,* the policeman's name). This could be inferred from the fact that the interception documents included a note that the conversation

9 Id. 521, 527. For more on the decision of the Constitutional Court, *see* András Koltay & Gábor Polyák, 'Az Alkotmánybíróság határozata a médiaszabályozás egyes kérdéseiről', *Jogesetek Magyarázata,* Vol. 3, Issue 1, 2012, pp. 38 and 41–42.

10 Regarding the practical application of this rule, *see* Tamás Matusik & Kristóf Csépány, 'Az újságírói forrásvédelem határa a büntetőeljárásban – jogalkalmazói szempontok az európai alapjogi elvárások tükrében', *Eljárásjogi Szemle,* 2017/1, pp. 19–23.

11 *See* (in Hungarian) at https://www.blikk.hu/aktualis/tragedia-agyonvertek-az-idos-erdi-hazaspart-kutyajukkal-egyutt/tzjf3ht.

12 Criminal proceedings were ultimately initiated against the police officer (the source of the journalist) on suspicion of abuse of office and bribery, but he was eventually acquitted.

with Csikós was "identified by voice",[13] which would only have been possible if the interceptors had already been familiar with Csikós' voice (especially since the phone was not registered in her name). Under the relevant Hungarian law[14] the secret surveillance (wiretapping) of Csikós was not subsequently approved by a judge. The journalist was not questioned either as a suspect or as a witness. The alleged wiretapping was carried out by the National Security Service *(Nemzetbiztonsági Szakszolgálat)* on the instructions of the National Defence Service. In light of the circumstances of the case, the authorities were likely to have considered that the journalist could only have obtained information about the crime from a police officer. They also believed that the officer's identity could only be revealed through the journalist, which is why Csikós was subjected to preliminary wiretapping.

Csikós lodged a complaint against the interception under the Police Act,[15] which was rejected by the National Defence Service on the grounds that there was no room for a complaint against the use of the wiretapping. However, the National Defence Service also noted that the use of the special tool had otherwise been carried out in accordance with the law, but that no further information had been given to Csikós in view of the ongoing criminal proceedings.[16] Csikós also lodged a complaint with the Minister of Interior under the National Security Act,[17] but the Minister of Interior in his reply only made a general statement on the legality of the operation of the national security services and stated that the actions of the National Defence Service could not be challenged under the National Security Act.[18] Csikós also submitted a petition to the National Security Committee of the Parliament, which concluded that no violation had occurred in the specific case.[19] Csikós also brought an action against the National Defence Service under the law on the protection of classified information, but the court came to the

13 *See* (in Hungarian) at https://www.blikk.hu/aktualis/krimi/titkosszolgalati-modszerrel-figyeltek-meg-kollegankat/nf1cze8.

14 Act XXXIV of 1994 on the police, Section 72(1) as in force in 2015. The head of the investigating authority could order the use of a special instrument (in this case, wiretapping) for up to 72 hours in order to ensure the effectiveness of the investigation. According to the case file, the secret surveillance presumably took place between 3 and 6 November 2015.

15 Id. Section 92(1).

16 The National Defence Service thus *de facto* confirmed the fact of the wiretapping.

17 Act CXXV of 1995 on national security services, Section 11(5).

18 *Csikós v Hungary,* No. 31091/16, 28 November 2024, para. 15.

19 Id. para. 16.

final conclusion that Csikós was not entitled to know the identity of the person on whom the secret information was ordered to be collected, and that, failing this, he could not rely on the protection of privacy or the protection of journalistic sources.[20]

4. Procedural Considerations

Even in the context of well-developed case law, cases involving secret services present many procedural difficulties, since proving *victim* status is difficult. In the case of a properly conducted secret service operation, it is almost impossible for the victim to prove that they were involved (because of the absence of credible information). In the present case, however, the circumstances (in particular the criminal proceedings initiated and the available documents) enabled Csikós to prove that his phone had indeed been tapped.[21] In accordance with the ECtHR's established case law, the *'reasonable probability'* test is satisfied in similar cases.[22]

Another interesting question for the assessment of victim status is who qualifies as a 'victim' in the case of a secret service action: the person against whom the action is ordered or potentially everyone affected by the action. The question is relevant to the right to privacy and family life, and in particular to telephone interceptions, since each telephone conversation necessarily requires the simultaneous presence of at least two people (the caller and the recipient of the call). In the present case, this was not relevant because, on the basis of the case file, Csikós was able to establish that the investigative authority had specifically authorized the interception of her telephone for 72 hours. Generally, however, a regular telephone interception is likely to satisfy the requirements of necessity and proportionality from the point of view of those around the person concerned. From the point of view of ECtHR case law, those around the person intercepted are also unlikely to have suffered serious harm (disadvantage),[23] which is one of the conditions for complaints to be admissible.

In the present case, the question arose as to whether Csikós should have resorted to other forums in addition to the remedies mentioned above, such

20 Id. para. 18.
21 Id. para. 31.
22 *See* in detail *Practical guide on admissibility criteria,* Council of Europe, Strasbourg, 2025, para. 48 and the case law cited therein.
23 Article 35(3)(b) ECHR.

as initiating a damages action or proceedings with the National Authority for Data Protection and Freedom of Information (hereinafter: NAIH). Regarding the NAIH's procedure, the ECtHR has previously ruled in *Hüttl v Hungary* that NAIH's procedure is necessarily limited in similar cases as it can only access certain information through the Minister.[24] This calls into question whether the procedure is "sufficiently precise, effective and comprehensive as to the ordering, executing and potential redressing of surveillance measures."[25] As for the other (damages action) procedures raised by the Government in the present case, the ECtHR has stressed that the Government has not in any way suggested that these forums would constitute an effective remedy, *i.e.,* that Csikós would have had a realistic chance of winning the case on the basis of the relevant legislative context and case law.[26] This is all the more true because, if we accept that the 72-hour wiretap order against Csikós was lawful (as established by all authorities in Hungary), one of the fundamental legal grounds for awarding damages, namely the unlawfulness of the conduct, is clearly absent.

It is interesting to note that there is no indication in the case file that Csikós initiated proceedings before the Constitutional Court. According to the ECtHR's well-established case law, however, constitutional complaint procedure constitutes an effective remedy that must be exhausted before an application can be submitted to the ECtHR.[27] This is true even though the ECtHR only ruled it only in 2019, in *Szalontai,*[28] that the Constitutional Court's procedure (constitutional complaints) can be considered an effective remedy, and exhausting this remedy is a prerequisite for the ECtHR to proceed. Although Csikós submitted her application on 17 May 2016 (years before the *Szalontai* decision), the ECtHR has applied this requirement retroactively to complaints lodged prior the *Szalontai* decision.[29] Therefore, it

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24 This is the so-called *'Section 23 exemption',* which refers to Section 23 of the Act CXI of 2011 on the commissioner for fundamental rights. The application of this act is provided for by Act CXII of 2011 on the right of informational self-determination and on freedom of information.

25 *Hüttl v Hungary,* 58032/16, 29 September 2022, para. 18; *Szabó and Vissy v Hungary,* 37138/14, 12 January 2016, para. 89. *Csikós v Hungary,* para. 35.

26 Id. para. 36.

27 Péter Paczolay, 'The ECtHR on constitutional complaint as effective remedy in the Hungarian legal order', *Hungarian Yearbook of International Law and European Law,* Vol. 8, Issue 1, 2020, pp. 157–168.

28 *Szalontai v Hungary (dec),* 71327/12, 12 March 2019.

29 *See e.g. Kiss v Hungary (dec),* 39448/14, 4 June 2019. In that case, the application was lodged on 20 May 2014 (almost five years before the *Szalontai* case was decided) and the case was declared inadmissible solely because the constitutional complaint was an effec-

is reasonable to question why the ECtHR failed to consider that Csikós did not initiate proceedings before the Constitutional Court. While there may have been procedural circumstances in this specific case that would have rendered proceedings before the Constitutional Court ineffective (similar to the excessive length of national proceedings cases), the ECtHR should still have explained its legal standpoint.

5. Merits of the Case

In its judgment, the ECtHR ruled that the wiretapping of journalists in relation to their work, including access to their sources by the authorities, falls within the scope of both Article 8 (right to private and family life) and Article 10 (freedom of expression).[30] *(i)* From the perspective of privacy and family life, wiretapping may be considered lawful if accompanied by a rigorous system of procedural safeguards, including regulations on the grounds and procedures for authorization, the duration of interception, and the handling of data obtained.[31] *(ii)* Given that Article 10 (freedom of expression, in this case the protection of journalists' sources) is involved, an even stricter system of guarantees is required:

> "the protection of journalistic sources is one of the cornerstones of freedom of the press. Without such protection, sources may be deterred from assisting the press in informing the public about 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 effected."[32]

In this case, the ECtHR could not establish that Csikós had indeed been wiretapped. One reason for this was that Hungarian law does not stipulate that the person intercepted must be informed afterwards.[33] Without such notification, however, the legal remedies available to the wiretapped person are necessarily limited. This is because the applicant (the person who was

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tive remedy under the *Szalontai* case which the applicant should have exhausted. *See* paras. 11–12.

30 *Csikós v Hungary,* paras. 49 and 52.

31 *Roman Zakharov v Russia (GC),* 47143/06, 4 December 2015, para. 231.

32 *Csikós v Hungary,* para. 52; *Goodwin v the United Kingdom,* para. 39; *Sanoma Uitgevers B.V. v the Netherlands (GC),* No. 38224/03, 14 September 2010, para. 50.

33 *Csikós v Hungary,* para. 60. *See also Szabó and Vissy v Hungary,* paras. 83, 86, and 88.

allegedly wiretapped) must prove before the court that they were wiretapped. However, the essence of a properly conducted interception is that the person being intercepted is unaware of the proceedings against them.

While it is understandable that a third party should not be able to inspect the records of criminal proceedings against another person (even if their telephone was intercepted during those proceedings), it is hardly acceptable for a person to have no legal remedy against a wiretap specifically targeting them. In the present case, it is probable that the head of the investigating authority ordered a 72-hour wiretap between 3 and 6 November 2015 specifically to obtain Csikós' sources. This procedure did not provide any guarantees to protect the journalist's sources, such as judicial control, balancing of interests or an obligation to state reasons.[34] The ECtHR therefore found a violation of both Articles 8 and 10, ordering Hungary to pay compensation.

6. Epilogue

The case of *Csikós v Hungary* is especially interesting from the point of view of protecting journalists' sources. *(i)* On the one hand, the Constitutional Court clearly stated the constitutional importance of protecting journalists' sources in *Decision No. 165/2011. (XII. 20.) AB.* However, in this case, the authorities tapped Csikós' phone to obtain journalists' sources, clearly circumventing the spirit of the Constitutional Court's decision. In light of the Constitutional Court's findings, this procedure could not be justified as constitutional under Hungarian law, even though the interception formally complied with the relevant legislation. *(ii)* Conversely, under the current Police Act rules, similar interceptions may only be carried out with judicial authorization.[35] In other words, Hungarian law now provides procedural guarantees that allow for the reconciliation of journalistic source protection and the public interest of law enforcement. However, the legislator still does not provide for the person subject to secret information gathering to be informed of the surveillance afterwards, which is an obvious prerequisite for the exercise of truly effective legal remedies.

Finally, the case's specific procedural details cannot be ignored, namely the fact that Csikós did not initiate proceedings before the Constitutional

34 *Csikós v Hungary,* para. 70.

35 Act XXXIV of 1994 on the police, currently in force, Section 72(1).

Court. This was undoubtedly a precondition for initiating proceedings before the ECtHR at the time the application was examined by the ECtHR, as it follows from *Szalontai.* Csikós brought legal proceedings in Hungary, in which she was the plaintiff. She could have claimed before the Constitutional Court that the judgment and legislation applied in the case (Section 72 of the Police Act in force at the time) were contrary to the Fundamental Law. Therefore, it may be assumed that the Hungarian Constitutional Court, rather than the ECtHR, should have ruled on the case. While, from a journalistic perspective, it is commendable that the ECtHR found a violation of the ECHR,[36] it is nevertheless legitimate to question whether, in this case, the ECtHR,[37] which is usually so strict in enforcing procedural aspects, turned a blind eye.

36 This is confirmed by the commentary in the case. *Csikós v Hungary (case analysis),* Global Freedom of Expression, Columbia University, at https://globalfreedomofexpression.columbia.edu/cases/csikos-v-hungary/.

37 The ECtHR has recently ruled on several cases of exceptional importance. Notably, the KlimaSeniorinnen case and Ukraine and the Netherlands v. Russia stand out as being of outstanding historical significance. For more on this case, see Marcel Szabó: *The War Between Ukraine and Russia: From the Perspective of the ECtHR* (forthcoming, 2025).