

Part V

Case Notes

The Protection of Public Debates and the Standards of Responsible Journalism

The Case of Index.hu versus Hungary

Helga Kovács – András Koltay*

Abstract

Index.hu versus Hungary is a case which touches upon the issues of the protection of reputation, freedom of expression and of the media, and the ethical obligations of the press. These issues have been a long-standing concern of the ECtHR, and the Court has accordingly handed down a considerable number of decisions on the subject, but the case law is still not sufficiently clear and nuanced on all the details involved. The article presents the judgment itself, it then turns to the analysis of the relevant case law of the ECtHR, providing also an in-depth critique of the *Index.hu versus Hungary* decision.

Keywords: freedom of expression, media freedom, right to reputation, media ethics, responsible journalism

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1. Introduction

The limits of media freedom and the standards of responsible journalism have long been of concern to European legal systems, and naturally to the ECtHR. Relatively few 'Hungarian cases' revolving around these issues were

* Helga Kovács: presiding judge, Budapest-Capital Regional Court of Appeal, Budapest; Ph.D. student, Pázmány Péter Catholic University, Budapest, helga.m.kovacs@gmail.com.

András Koltay: research professor, Ludovika University of Public Service, Budapest; professor of law, Pázmány Péter Catholic University, Budapest, koltay.andras@jak.pp-ke.hu.

brought before the Strasbourg body. This indirectly points to soundness of the legal system and the high level of protection afforded to media freedom. However, the ECtHR recently ruled in *Index.hu versus Hungary*,¹ a case which fundamentally touches upon the issues of the protection of reputation, freedom of expression (FoE) and of the media, and the ethical obligations of the press. In Section 2, we present the judgment itself, in Section 3, we analyse the relevant case law of the ECtHR, and in Section 4, we give a critique of the decision.

2. The Judgment

In November 2014, Hungary witnessed a series of anti-government protests, followed by reports from a television news channel highlighting past wrongdoings of the protest organizers and spokespersons to discredit them. In response, a journalist at the blog *Kettős MÉRCE* initiated a ‘solidarity initiative’ to express support for the activists. This initiative encouraged people to share their minor infractions on social media using a hashtag related to the television channel.² Several media outlets covered this action. On 1 December 2014, the news portal Index.hu published an article titled “I was in jail with János Áder”,³ discussing the solidarity initiative, and summarized a post shared on Facebook by A.V., a former editor-in-chief of *Magyar Narancs*, a political weekly. In the post, A.V. recounted that Áder, President of Hungary between 2012 and 2022 and he were in the same military prison at a certain point of their compulsory military service as young adults. According to rumours circulating at the time, allegedly, Áder, having been drunk, fired his weapon at random. A.V. admitted that he could not remember the events well, but affirmed that this must have happened during the time of the football World Cup in Argentina.⁴

Following the publication of the article, Index.hu appended a comment emphasizing that A.V. himself expressed uncertainty about whether Áder had fired his weapon at random, suggesting that the story might be fabrica-

1 *Index.hu Zrt. v Hungary*, No. 77940/17, 19 February 2024.

2 *Id.* paras. 5–6.

3 Cf. Szabolcs Panyi, ‘Mi egy börtönkapcsolat vagyunk Áder Jánossal’, *Index.hu*, 1 December 2014, at https://index.hu/belfold/2014/12/01/mi_egy_bortonkapcsolat_vagyunk_ader_janossal.

4 *Index.hu v Hungary*, para. 7.

ted, as such an act would constitute a serious military offence. Index.hu's comments also underlined that they had contacted the Office of the President for comment and would update the article upon receiving a reply.⁵ Shortly after the article's publication, the Office of the President released a statement confirming that Áder had indeed been placed in military detention twice during his compulsory military service, one of which occurred during the World Cup. However, the statement clarified that the reason for his detention was not the firing of his weapon while intoxicated, but rather falling asleep on guard duty in the early hours of the morning while covertly watching a football match.⁶ On the same day, Index.hu published a separate article summarizing A.V.'s story and quoting the Office of the President's denial of the allegations. The latter half of the article focused on the online initiative launched in response to the 'character assassination' of the protest organizers by various media outlets.⁷ Subsequently, on 16 January 2015, Áder filed a civil action with the Budapest High Court against A.V. and Index.hu, alleging the spreading of false statements, and the infringement of his reputation.⁸ The Court dismissed Áder's action against Index.hu on 20 February 2015, primarily on the basis that the company had adhered to journalistic standards. However, A.V. was ordered to pay compensation.⁹ The judgment was appealed.

The Budapest-Capital Regional Court of Appeal reversed the initial judgment regarding Index.hu and ruled in favour of Áder.¹⁰ It determined that the contested statements did not concern a matter of public interest, and were not linked to the media campaign, as Áder was not involved in either the protests, or the preceding governmental actions. Consequently, there was no need to balance Index.hu's right to FoE against Áder's right to reputation. As a result, the statement was deemed injurious to Áder, and Index.hu had failed to verify the accuracy thereof. The Court of Appeal ordered Index.hu to pay 600,000 Hungarian forints (approx. €1,500 at the applicable exchange rate at the time of the decision) to Áder.¹¹ Index.hu filed a petition for review before the *Kúria* (Curia of Hungary).

5 Id. para. 8.

6 Id. para. 9.

7 Id. para. 10.

8 Id. para. 11.

9 Id.

10 Id. para. 12.

11 Id.

On 7 September 2016, the *Kúria* (the supreme court of Hungary) rejected Index.hu's petition, and upheld the second-instance court's finding that the publication in question did not involve a discussion of public interest since it did not pertain to Áder's exercise of public power but rather spread untrue statements not protected by FoE.¹² Applying the principle of objective liability, the *Kúria* held Index.hu responsible for circulating the Facebook post in question to the broader public.¹³ Whether the company acted in good or bad faith was deemed relevant only for calculating damages. However, the *Kúria* reduced the damages payable to Áder to 50,000 Hungarian forints (approx. €125 at the applicable exchange rate at the time of the decision), considering factors such as the company's expression of doubt regarding the statements, presentation of their context, and subsequent publication of Áder's response. Moreover, the *Kúria* noted that its readership could discern such 'soldiers' tales' without attaching significance to them. It concluded that no serious harm had been inflicted on Áder, and his public perception remained unchanged the publication notwithstanding.¹⁴ Subsequently, Index.hu filed a constitutional complaint, arguing that the publication concerned a matter of public interest, namely the conduct of the President of Hungary during his military service. However, on 23 May 2017, the Constitutional Court deemed the complaint inadmissible, stating that the applicant had merely contested the courts' factual assessment, which fell outside the scope of review by the Constitutional Court.¹⁵ Index.hu referred the case to the ECtHR, raising a complaint asserting that the requirement imposed by the domestic courts to compensate Áder for non-pecuniary damage constituted a violation of its right to FoE enshrined in Article 10 ECHR. The ECtHR declared the submission admissible.¹⁶

The applicant contended that Áder, as a former President of Hungary and a ruling party member, was a public figure and, therefore, a legitimate subject of criticism. They argued that the publication in question pertained to matters of public interest, specifically referencing a media campaign and the President's conduct during his military service, thus falling under the protection afforded to political speech.¹⁷ Additionally, they asserted that

¹² Id. para. 13.

¹³ Id.

¹⁴ Id.

¹⁵ Id. para. 14.

¹⁶ Id. paras. 16–17.

¹⁷ Id. para. 18.

their actions were in accordance with journalistic ethical standards, as they had sought comment from the Office of the President, and published the reply in full. The article presented all relevant circumstances, including the political and societal context, and expressed scepticism regarding the truthfulness of the story.¹⁸ Furthermore, the applicant contended that applying the rule of objective liability, which holds media outlets responsible for statements originating from third parties, was inconsistent with ECtHR jurisprudence under Article 10.¹⁹

The government argued that the domestic courts had provided adequate and pertinent justifications to warrant the interference with Index.hu's right to FoE.²⁰ It contended that the statements in question did not involve a matter of public interest as they were not related to the public actions or behaviour of the President.²¹ Instead, the publication of these statements amounted to the spreading of false information and a violation of the personality rights of a public figure. The government asserted that using offensive or hurtful statements to demean others did not constitute an exercise of FoE.²² Similarly, making statements that could be defamatory did not receive protection under FoE if the speaker either knew the statements were false or failed to exercise due diligence in verifying their accuracy.²³ According to domestic law, individuals spreading false statements were subject to objective liability. The applicant could only claim their right to FoE if they were unaware of the falsity of the information. Regardless, the applicant had published the statement without verifying its accuracy with the Office of the President prior to publication.²⁴

The ECtHR has established general principles regarding the necessity of interference with FoE and restrictions on political speech or discussions on matters of public interest.²⁵ It is to be noted that while the ECtHR acknowledges the diversity of reporting methods, it also emphasizes that editorial discretion is not unbounded. The press must adhere to ethical standards, act in good faith, base its reporting on accurate facts, and provi-

18 Id.

19 Id. para. 19.

20 Id. para. 20.

21 Id. para. 21.

22 Id.

23 Id.

24 Id. para. 22.

25 Id. para. 23; *Morice v France* (GC), No. 29369/10, 23 April 2015, paras. 124–125; *Perinçek v Switzerland* (GC), No. 27510/08, 1 October 2015, para. 198.

de reliable information. In this regard, the ECtHR recalled the *Jersild versus Denmark*²⁶ and the *Pedersen and Baadsgaard versus Denmark*²⁷ judgments, to underline that the press must respect the rights of others and act in good faith and in an accurate manner. Furthermore, it should provide reliable and precise information adhering to journalistic ethical rules.²⁸

The Court distinguishes between reporting facts – despite their controversial nature – that contribute to a debate of general public interest and making sensational allegations about an individual's private life.²⁹ While reporting on matters of public interest enjoys robust protection under Article 10 ECHR, sensational and lurid news aimed at satisfying curiosity about someone's private life receives narrower protection. Consequently, FoE requires a more limited interpretation in such cases.³⁰ The ECtHR also highlighted that news reporting based on interviews or reproducing statements of others, whether edited or not, is considered essential for the press to fulfil its role as a 'public watchdog'.³¹ Punishing journalists for spreading statements made by others in interviews would impede the press's contribution to discussions on matters of public interest unless there are compelling reasons to do so. In such cases, a distinction is made based on whether the statements originate from the journalist or are quotations from others.³²

Neither party contested that the judgments of the domestic courts constituted an 'interference' with the applicant's exercise of the right to FoE. This interference was found to be prescribed by law, specifically Article 2:45(2) of the Hungarian Civil Code [the protection of reputation] and pursued the legitimate aim of protecting the reputation or rights of others, as stated in Article 10(2) ECHR. The ECtHR was tasked with determining whether this interference was necessary in a democratic society. In doing so, it examined the decisions of the Hungarian courts, considering all the facts of the case, including the publication in question and the circumstances surrounding it.³³

26 *Jersild v Denmark* (GC), No. 15890/89, 23 September 1994, para. 31.

27 *Pedersen and Baadsgaard v Denmark* (GC), No. 49017/99, 17 December 2004, para. 78; *Index.hu v Hungary*, para. 24.

28 *Id.*

29 *Cf. Armonienė v Lithuania*, No 36919/02, para. 39; *Index.hu v Hungary*, para. 25.

30 *Index.hu v Hungary*, para. 25.

31 *Id.* para. 26.

32 *Id.*

33 *Id.* para. 27.

The first circumstance taken into consideration was that Index.hu published the contested statements alongside a description of a campaign initiated by another media outlet to counter allegedly defamatory reports targeting opposition activists.³⁴ Additionally, it clarified that the story originated from A.V., who himself was uncertain about its accuracy. Moreover, the article suggested that A.V.'s story about Áder's drunken firing of his weapon was unlikely to be true due to the lenient penalty Áder had reportedly received.³⁵ In the domestic proceedings against Index.hu, the courts treated the statements regarding Áder as unrelated to his official conduct and not pertaining to a matter of public interest, thus falling outside the scope of the right to FoE.³⁶

The Court disagreed with the domestic courts' conclusion that the right to FoE did not apply to Index.hu's actions. While A.V.'s statements could be seen as polemical, the ECtHR observed that the only statement referred to by the domestic courts as injurious to Áder's reputation was what the article described as a 'soldier's tale'.³⁷ However, the domestic courts did not analyse the article as a whole; instead, they focused solely on A.V.'s account, detached from its broader context. The Court emphasized that in cases like the present one, domestic courts should consider whether the context, public interest, or the author's intention justified the possible use of provocation or exaggeration.³⁸ However, the Court found that the national courts, in this case, improperly isolated the impugned statement from its context and apparent goal by solely focusing on the fact that it contained an allegation about Áder's private life. Consequently, they failed to take into account any considerations regarding the possible contribution of the article to the debate on a matter of public interest.³⁹

At the time, Áder was President of Hungary and a prominent politician in the governing party. Despite this, the domestic court did not find these elements relevant to their assessment, as they believed the publication did not pertain to Áder's public functions and, therefore, did not relate to a matter of public interest.⁴⁰ As previously established by the Court, although news about the private life of public figures is typically for entertainment

34 Id. para. 28.

35 Id.

36 Id. para. 29.

37 Id. para. 30.

38 Id. para. 31; cf. *Balaskas v Greece*, No. 73087/17, 5 November 2020, para. 58.

39 *Index.hu v Hungary*, para. 31.

40 Id. para. 32.

purposes, it also contributes to the variety of information available to the public and benefits from the protection of Article 10 ECHR.⁴¹ Additionally, the public interest extends to matters capable of generating controversy or addressing important social issues.⁴²

In this case, information about the President's conduct during his compulsory military service was not of intimate nature, and did not solely concern the private sphere.⁴³ Its publication was not merely to satisfy public curiosity but had political relevance, potentially arousing public interest regarding the President's approach to his responsibilities.⁴⁴ Furthermore, the Court noted that the story about the President's military service was part of reporting on a media initiative that was topical at the time, and had garnered public attention and engagement.⁴⁵ The primary reason for publishing the story was to draw attention to and illustrate that initiative, aimed at countering a perceived smear campaign against organizers of an anti-government demonstration, rather than gratuitously attacking Áder. Considering this broader context, the Court concluded that the impugned statement, when viewed in its proper context, constituted a comment on a matter of public interest.⁴⁶ Additionally, Áder, as a politician, willingly subjected himself to close scrutiny by both journalists and the public, requiring a higher degree of tolerance on his part.⁴⁷ Such tolerance did not however require him to accept factual inaccuracies and he was entitled to have his reputation protected.⁴⁸ This, in turn, should have been balanced against the public interest in an open political discussion. However, the domestic courts failed to perform this balancing act, or consider the contribution of the article to public debate or the expected scrutiny of Áder's actions.⁴⁹

Regarding the content, form and consequences of the impugned statements, the ECtHR noted that the article contained defamatory statements of fact, as determined by the domestic courts.⁵⁰ However, the *Kúria* concluded that the publication did not seriously harm Áder because of his status,

41 Id. para. 33; cf. *Dupate v Latvia*, No. 18068/11, 19 November 2020, para. 51.

42 *Index.hu v Hungary*, para. 33.

43 Id. para. 34.

44 Id.

45 Id. para. 35.

46 Id.

47 Id. para. 36.

48 Id.

49 Id.

50 Id. para. 37.

his ability to respond publicly, and the public's relatively low regard for such stories. The Court emphasized Index.hu's obligation under Article 10 to act in good faith, and provide accurate and reliable information adhering to journalistic ethics.⁵¹ In this regard, it highlighted that Index.hu clarified A.V.'s imperfect recollection of the story, explained contradictions in his statements, and published Áder's response promptly.⁵² However, the domestic courts did not consider these contextual factors or whether the applicant endorsed, approved, or supported the story's content. Instead, they held Index.hu liable based on objective liability, as per the Civil Code, for spreading a third party's untrue and injurious statement.⁵³ However, considering the extensive steps taken by the author to caution readers about the unreliability of the rumour being reported, the ECtHR found it difficult to reconcile the imposition of objective liability on the applicant with its role as a public watchdog. This imposition could impede the press's contribution to discussions on matters of public interest, contrary to established case law.⁵⁴ Given the above, the ECtHR unanimously concluded that the interference was not necessary in a democratic society; therefore, Article 10 ECHR had been violated. As the applicant did not submit any claims concerning damages, the Court considered no sum in this regard.⁵⁵

3. The Relevant Case Law of the ECtHR

3.1. Assessment of 'Necessary Interference' in the Case Law of the ECtHR

The case law of the ECtHR shows that it does not dispute that national courts have a certain margin of appreciation in assessing the necessity and scope of interference with the FoE protected by Article 10 ECHR. If it concludes that the national fora have weighed the competing interests that can be identified in the given case according to the criteria laid down by the ECtHR then "serious reasons are required to substitute its own view for

51 Id. para. 38.

52 Id. para. 39.

53 Id. para. 40.

54 Id.

55 Id. paras. 41–44.

that of the national courts”.⁵⁶ However, the ECtHR reserved for itself the ultimate power to define what necessary interference was.⁵⁷ In exercising this power, it confines itself to examining the contested interference in light of the case as a whole, and deciding whether it was “proportionate to the legitimate aim pursued”, and whether the reasons put forward by the national courts or authorities to justify it are relevant and sufficient. It also includes national legislation in its examination, and assesses its compatibility in the context of the application of the ECHR. In the ECtHR’s understanding, the level of protection is notoriously high for speech on public matters, with the consistently repeated formula that the permissibility of the expression is not precluded by any degree of malice, or by the seriousness or forcefulness of the publication.⁵⁸

It is obvious that there is also a small overlap, to a greater or lesser extent, between the cases relied on by the ECtHR for the general principles and the legal assessment of the case. In *Morice versus France*,⁵⁹ the first case cited in relation to restrictions on FoE, the ECtHR identified the adjective ‘necessary’ in the context of necessary interference with the FoE in a democratic society as referring to a “pressing social need in a democratic society”. The assessment of ‘necessary interference’ depends essentially on the way interests are balanced, the criteria taken into account, the broader context of the case and the sanction imposed for the infringement.

The ECtHR’s case law on the legal criteria of the conflict between the FoE protected by Article 10 ECHR and the right to privacy under Article 8 has evolved in a surprising number of ways, and not necessarily in the same direction.⁶⁰ Initially, the ECtHR did not treat them as ‘competing rights’ but considered the FoE to be the paramount interest, considering the protection of reputation to be a narrow exception.⁶¹ However, since 2004, it has identified reputation as part of Article 8 ECHR (right to respect

56 *MGN Ltd v United Kingdom*, No. 39401/04, paras. 150 and 155; *Palomo Sanchez and others v Spain (GC)*, Nos. 28955/06, 28957/06, 28959/06 and 28964/06, 12 September 2011, para. 57; *Bédat v Switzerland*, No. 56925/08, 29 March 2016, para. 54.

57 András Koltay, *New Media and Freedom of Expression*. Hart, Oxford, 2019, p. 28.

58 *Morice v France*, paras. 124–125.

59 *Id.*

60 The topic is discussed in detail by Tanya Aplin & Jason Bosland, ‘The Uncertain Landscape of Article 8 of the ECHR: The Protection of Reputation as a Fundamental Human Right?’ in Andrew T. Kenyon (ed.), *Comparative Defamation and Privacy Law*, Cambridge University Press, Cambridge, 2016, pp. 265–290.

61 *Lingens v Austria*, No. 9815/82, 8 July 1986, para. 38.

for private life), which already had to be balanced with the right to FoE,⁶² but only when Article 8 could be applied in the assessment of the case. Otherwise, the protection of reputation – in terms of its importance and its impact on the relevant decision – will revert to being one of the exceptions to Article 10 ECHR.

Enforcement is not automatic; the attack on reputation must attain a certain level of seriousness ('threshold test') which prevents the exercise of the right under Article 8 ECHR.⁶³ In *Karakó versus Hungary*,⁶⁴ the ECtHR distinguished private life from reputation, declaring that the latter (an external evaluation of a person) is not in itself linked to one's private life. In *Axel Springer versus Germany*⁶⁵ it clearly ruled out the applicability of Article 8 ECHR to harm to reputation as a foreseeable consequence of the person's own act, meaning where the harm was not related to an invasion of privacy in the strict sense. However, the right to privacy also implies a positive obligation of the state to protect not only the privacy of the individual but also their reputation – this way, 'privacy' also covers aspects of personal identity and reputation.⁶⁶ According to the ECtHR's approach in recent precedent-setting judgments, the protection under Article 8 can be invoked – once the threshold of seriousness is attained – if the offensive statements are capable of damaging the reputation of the person concerned, and their image in their professional and social environment.⁶⁷

The general principles relating to the fair balance between the right to privacy and FoE were set out in *Couderc and Hachette Filipacchi Associés versus France*.⁶⁸ The criteria are (i) the contribution of the article to a debate of general interest; (ii) how well-known the person concerned is, and the subject matter of the reporting; (iii) the conduct of the person concerned before the article was published; (iv) the manner in which the

62 *Radio France and others v France*, No. 53984/00, 30 March 2004, para. 31; *Chauvy and others v France*, No. 64915/01, 29 June 2004, para. 70.

63 *Roberts v United Kingdom*, No. 59703/13, 5 January 2016, para. 40; *Popovski v the former Yugoslav Republic of Macedonia*, No. 12316/07, 19 February 2007, para. 88; *A. v Norway*, No. 28070/06, 9 April 2009, para. 64; *Axel Springer AG v Germany (GC)*, No. 39954/08, 7 February 2012, para. 83.

64 *Karakó v Hungary*, No. 39311/05, 28 April 2009, para. 22.

65 *Axel Springer AG v Germany*, para. 83; later *Sidabras and Džiautas v Lithuania (dec.)*, Nos. 55480/00 and 59330/00, 1 July 2003, para. 49.

66 *Ion Cârstea v Romania*, No. 20531/06, 28 October 2014, paras. 29–30.

67 *Drousiotis v Cyprus*, No. 42315/15, 5 July 2022, para. 47.

68 *Couderc and Hachette Filipacchi Associés v France (GC)*, No. 40454/07, 10 November 2015, paras. 83–93.

information was obtained, and its veracity; (v) the content, form and consequences of its publication; and (vi) the severity of the sanction imposed. In *Abbasaliyeva versus Azerbaijan*,⁶⁹ which most recently referred back to the above-mentioned decision, the ECtHR included in particular among the relevant criteria for balancing competing interests: (i) whether the publication contributed to the debate on public affairs; (ii) the status (general public visibility) and past conduct of the applicant; (iii) the content, form and consequences of the publication (including the severity of sanctions imposed on journalists or publishers⁷⁰).

In its case law, the ECtHR distinguishes private individuals from persons acting as political or public figures. Accordingly, while a private individual unknown to the public may claim special protection of their right to privacy, this is not the case for public figures,⁷¹ for whom the limits of critical comment are broader, as they are inevitably and knowingly exposed to the public, and must therefore have a particularly reduced expectation of privacy.⁷² In the case-by-case analysis, the criteria mentioned in the previous paragraph apply.

3.2. Protection of Untrue Statements of Fact

In the case law of the ECtHR, the concept of public interest is very broad, and includes all matters regarding which the public's curiosity and interest may be justified, that arouse or significantly affect the public's interest. These matters include major debates involving a wide range of individuals, important social issues or problems that are of interest to the public.⁷³

The protection of untrue statements of fact made in relation to public affairs is the most sensitive area of protecting reputation and honour, requiring a delicate balancing act by the courts to minimize the unavoidable harm to interests arising from conflicts between FoE and other rights. The

69 *Abbasaliyeva v Azerbaijan*, No. 6950/13, 27 April 2023.

70 *Von Hannover v Germany (No 2) (GC)*, Nos. 40660/08 and 60641/08, 7 February 2012, paras. 109–113.

71 *Minelli v. Switzerland*, No. 14991/02, 14 June 2005; *Petrenco v Moldova*, No. 20928/05, 30 March 2010, para. 55.

72 *Ayhan Erdoğan v Turkey*, No. 39656/03, 13 January 2009, para. 25; *Kuliš v Poland*, No. 15601/02, 18 March 2008, para. 47; *Milisavljević v Serbia*, No. 50123/06, 25 May 2021, paras. 32–34; *Von Hannover v Germany (No 2)*, paras. 108–113.

73 *Couderc and Hachette Filipacchi Associés v France*, para. 103.

degree of liability for statements made in relation to public affairs is very low in the case law of the ECtHR, which often considers the burden of proof required by national law to be too strong an interference with the FoE. Of course, it is not excluded that the ECtHR may in some cases conclude that the statement of defamatory facts goes beyond the FoE guaranteed by Article 10 ECHR, even if it was criticism of a public figure.⁷⁴ In most cases, however, expression is given greater protection by the ECtHR than by national court judgments.

The large number of cases concerning the application of Article 10 ECHR renders the ECtHR's practice extraordinarily diverse. The individual cases involve, according to their relevance, both the permanent aspects of judgments and the particular circumstances of the case concerned. Cases can be grouped according to the source of the disputed statement. At one end of the scale are the decisions in which the ECtHR must assess national decisions on the defamer's own personal statement, and at the other end, there are decisions in which the press has relayed someone else's statement. In between the two extremes are various factual variations of the above characteristics. The assessment of cases is further nuanced by the evolving set of criteria developed by the ECtHR for the freedoms protected by the ECHR.⁷⁵

In certain cases, the ECtHR noted that the immunity of untrue statements is justified since the false fact is irrelevant in terms of the content and message of the text. In such cases, it is not necessary to prove the veracity of the fact, or the defendant cannot be expected to do so because of the circumstances of the proof required. If it has been proven that the statement is untrue, but the defamation is relatively minor and limited in scope, and its publication occurred on a matter of important public interest, and the press has also satisfied the due diligence requirements of fact-checking, FoE must prevail over the rights of the person concerned.⁷⁶

Whether the contested statement constitutes a statement of fact or a value judgement under the general distinction criterion is also related to

74 *Keller v Hungary* (dec.), No. 33352/02, 4 April 2006. The subject is discussed by András Koltay, 'The Regulation of the Defamation of Public Figures in Europe, with Special Emphasis on the Hungarian Legal System' in András Koltay (ed.), *Media Freedom and Regulation in the New Media World*, CompLex, Budapest, 2014, pp. 360–382.

75 An example for this is the criteria set out for managing the conflict of FoE with the right to privacy in *Axel Springer AG v Germany*, paras. 90–109.

76 *Tønsbergs Blad AS and Haukom v Norway*, No. 510/04, 1 March 2007, para. 101.

the provability of the statement. In many cases, the defamer is exempt from the burden of proof on the grounds that speaking on a public matter is not a statement of fact but a value judgement. Opinions are more widely protected than untrue – or disputed – facts, and their judgment is also influenced by the use of language and the way in which they are expressed. It must be assessed whether the statement was exaggerated or objective, and whether the intention was to insult, stigmatise or neither. However, the use of insulting adjectives (such as “moron”, “Nazi” or “neo-Fascist”) does not automatically result in the sanction being justified.⁷⁷

The distinction between statement of fact and value judgement formed the basis of the legal reasoning in *Makraduli versus the Former Yugoslav Republic of Macedonia*.⁷⁸ Opposition politician Jani Makraduli had been convicted twice for defamation. First, he made statements criticizing the head of the Macedonian intelligence service at an official press conference of the political parties. He alleged that the said person had abused his powers to influence the Macedonian stock market. Second, outlining his own party’s investigation, he said that some state-owned land had been acquired by people who had close links to the Prime Minister. The Court concluded from the circumstances of the case that both cases constituted speech on public affairs, that the statements were made by Makraduli as vice-president of his party and as a member of Parliament, at an official press conference, and were therefore part of political speech, therefore subject to the high level of protection afforded under Article 10 ECHR.⁷⁹ Reiterating its previous formulation, the ECtHR did not consider it incompatible with Article 10 ECHR to require the defendant in the defamation proceedings to prove (by a reasonable standard) the veracity of the statement. At the same time, however, it cited the judgments in *Kurski versus Poland* and *Braun versus Poland*.⁸⁰ As explained in the decisions, if a private individual is involved in an important public debate, “the obligation to prove the factual statements may deprive the applicant of the protection afforded by Article 10”. It found that, since Makraduli’s statements just repeated the accusations already made public in the first case, he simply “put matters that

77 Judit Bayer, ‘Az Emberi Jogok Európai Bíróságának 10. cikkével kapcsolatos joggyakorlatának egyes súlypontjai’, *Állam- és Jogtudomány*, Vol. 58, Issue 4, 2017, p. 122.

78 *Makraduli v the former Yugoslav Republic of Macedonia*, Nos. 64659/11 and 24133/13, 19 July 2018.

79 *Id.* para. 65.

80 *Kurski v Poland*, No. 26115/10, 5 July 2016; *Braun v Poland*, No. 30162/10, 4 November 2014, cited in *Index.hu v Hungary*, para. 75.

were of general interest up for public debate, which, in the Court's view, is the role of politicians and members of parliament, as representatives of the electorate". According to the ECtHR, it was "an unreasonable, if not impossible, task" to require Makraduli to prove the truth of his statement. And in the second case, Makraduli's statements "remained within the limits of admissible exaggeration or provocation", and were "fair comment on issues of legitimate public interest".⁸¹

In *Voskuil versus Netherlands*,⁸² the journalist who wrote an article on police abuse refused to reveal his internal (police) source and so was sentenced to 17 days imprisonment. The Court did not dispute the Dutch government's concern about a possible damage to the reputation of the police, especially in cases where the underlying information is false. This fear was, however, tempered by the argument that, in a democratic state governed by the rule of law, the misuse of public power is a matter on which the public has a right to be informed. Accordingly, the ECtHR established that Article 10 ECHR had been violated. The Court considers it generally acceptable that, in the case of defamatory statements, the person making the statement shall be required to prove the veracity of the statement,⁸³ and does not consider such provisions of national law to be contrary to the ECHR *per se*. However, the ECtHR does not allow the burden of proof to be interpreted strictly, at least not in the case of public affairs.⁸⁴ As an example of permissive discretion, the press may in certain circumstances rely on rumours, as long as it reports on matters of public interest in an otherwise acceptable manner.⁸⁵

The admissibility criterion for value judgements is that the statement must have some (appropriate) factual basis. If the number or the nature of the facts on which the criticism is based is sufficient, the opinion expressed on the matter does not exceed the permissible limits of expression. As long as the factual basis exists, there is also usually room for false statements of fact, which will not be relevant because of the public nature of the speech. In *Morice*, the ECtHR held that the applicant lawyer had put

81 *Makraduli v the former Yugoslav Republic of Macedonia*, paras. 78–79 and 81.

82 *Voskuil v Netherlands*, No. 64752/01, 22 November 2007, para. 70.

83 *Rumyana Ivanova v Bulgaria*, No. 36207/03, 14 February 2008, para. 39; *McVicar v United Kingdom*, No. 46311/99, 7 May 2002, para. 87.

84 Toby Mendel, *Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights*, at <https://rm.coe.int/16806f5bb3>, p. 59; *Dalban v Romania*, No. 28114/95, 28 September 1999, para. 50.

85 *Thorgeir Thorgeirson v Iceland*, No. 13778/88, 25 June 1992, para. 65.

forward a value judgement with a sufficient factual basis in the newspaper *Le Monde*, and that his comments on a matter of public interest did not exceed the right to FoE. The ECtHR therefore considered the conviction of the lawyer for defamation of two investigating judges to be contrary to Article 10 ECHR. Examining the contested passages in their context, the ECtHR found that the opinion expressed constituted a value judgement rather than a mere factual statement, since it reflected primarily an overall assessment of the conduct of the investigating judges during the investigation. Furthermore, the comments had a sufficient factual basis, and were not misleading. Nor could they be considered an unjustified attack on the reputation or integrity of the two investigating judges, since their aim was to reveal serious shortcomings in the justice system.⁸⁶

The press, in the ECtHR's view, plays a prominent role in a democratic society, and has a duty to disseminate information and ideas on political and other matters of public interest, in accordance with its duties and responsibilities.⁸⁷ However, even in the case of serious matters of public interest, Article 10 ECHR does not guarantee a completely unrestricted FoE for the press. While enjoying the protection afforded by the ECHR, in performing their duties, journalists must follow the principles of responsible journalism. In other words, they must act in good faith, provide accurate and reliable information, present the views of participants in public debate in an objective manner, and refrain from sensationalism.⁸⁸ Journalistic freedom also allows for a certain degree of exaggeration or provocation; however, insults may fall outside the scope of the protection afforded by FoE, for example, if the sole purpose of the statement is the insult itself.⁸⁹

There are also examples where the impact of a press article has a significant bearing on the limits of the exercise of expression. Ahead of the Romanian parliamentary elections, a journalist wrote an article about one of the candidates, claiming that he was willing to make any compromise in exchange for money, and that he was prepared to betray voters, his party and his country. In his opinion piece, the journalist described the details of the dispute in arbitration between the candidate and the financial institution that lent him money. The content of this article was also distributed by third parties on election leaflets, and the candidate lost his constituency

86 *Morice v France*, para. 166.

87 *Prager and Oberschlick v Austria*, No. 15974/90, 26 April 1995, para. 34.

88 *Ungváry és Irodalom Kft v Hungary*, No. 64520/10, 3 December 2013, para. 42.

89 *Id.* para. 43.

by about 100 votes. The ECtHR agreed with the national courts' view that the journalist's aim was not to criticize the candidate's activities as a public figure, but rather to expose to the public his one-sided views on the lawsuit involving two private parties. The author of the article did not comply with the minimum standard of care, namely good faith, and made a sufficiently serious attack on the candidate's reputation, in violation of his reputation and in violation of his right to privacy under Article 8 ECHR. The candidate's right to privacy therefore took precedence over the right to FoE.⁹⁰

The press is granted significant concessions in relation to the transmission of another person's statements. According to the ECtHR, when examining interviews, a distinction must also be made according to whether the disputed statements are made by the journalist or are quotes from others instead. This is important, because punishing a journalist for helping to disseminate another person's statements would seriously hamper the press in its contribution to the discussion of issues of public interest. In *Pedersen and Baadsgaard* a Danish court fined and ordered two television journalists to pay damages for defaming the Chief Superintendent in a documentary on a criminal case. The journalists claimed that the Chief Superintendent had falsified evidence to get X convicted, which the ECtHR found to be a provable factual statement. The series of questions posed by the journalists to the viewers "left the viewers with only two options, namely that the suppression of the vital part of the taxi driver's statement in 1981 had been decided upon either by the Chief Superintendent alone, or by him and the Chief Inspector of the Flying Squad jointly". The journalists based this statement on the taxi driver's testimony, took a position on its truth, and presented it to the viewers as fact. However, they did not attempt to support the accusation with other evidence. As far as the delimitation of liability between the interviewee and the journalist is concerned, the ECtHR stated that the Danish courts had convicted Jørgen Pedersen and Sten Baadsgaard for their own statements and not for the interviewed taxi driver's statement, which did not constitute a breach of Article 10 ECHR.⁹¹

There are also examples where the press makes allegations, but the ECtHR classifies these statements as value judgements rather than statements of fact. In *De Carolis and France Télévisions versus France*,⁹² Patrick de Ca-

90 *Prunea v Romania*, No. 47881/11, 8 January 2019, paras. 35–36.

91 *Pedersen and Baadsgaard v Denmark*, paras. 69 and 75–76.

92 *De Carolis and France Télévisions v France*, No. 29313/10, 21 January 2016.

rolis made a documentary on 11 September 2001, in which he accused Prince Turki Al Faisal of Saudi Arabia, one of the subjects of the documentary, of aiding and financing Al-Qaeda when he was head of intelligence in Saudi Arabia. Some of the statements criticized the prince for providing material support for Al-Qaeda at a time when the organization's terror projects were no longer in doubt, suggesting that he had personal responsibility for the September 11 attacks. According to the documentary, the implication was that only diplomatic considerations (the prince's appointment as ambassador to the United States and the diplomatic immunity he enjoyed as a result), and not the weakness of the charges against him, could explain his impunity. The prince successfully sued the documentary filmmaker and another journalist for defamation.

However, the ECtHR found that the judgment violated Article 10 ECHR. It again started from the premise that freedom of the press – often in the form of news reports – plays a fundamental and vital role in the proper functioning of a democratic society, and in particular, it highlighted the role of the media as a public watchdog. For this reason, punishing a journalist for helping to disseminate another person's statements during an interview would seriously hamper the contribution of the press to a democratic society, and hence would require serious justification. The documentary undoubtedly dealt with a matter of public interest, and the prince was a politically exposed person, so the possibility of restricting FoE was significantly reduced. The allegations made in the documentary were qualified by the ECtHR as value judgements, with the Court concluding that they had a sufficient factual basis.⁹³

Political and investigative journalism enjoys a high level of protection, in particular because investigative journalists are prevented from reporting on matters of public interest if they risk being sentenced to prison or banned from practising their profession as a sanction for unjustified attacks on the reputation of private individuals. The chilling effect of the fear of such sanctions on the exercise of journalistic freedom is obvious and harmful to society as a whole.⁹⁴ Additionally, the task of such journalists is to inform accurately, and to warn the public about undesirable social phenomena as soon as the relevant information comes into their possession.⁹⁵ However, such journalists are also subject to the standard rules of journalism, the

93 Id. paras. 44–46, 52–53 and 57.

94 *Mosley v United Kingdom*, No. 48009/08, 10 May 2011, paras. 129 and 113–114.

95 *Cumpănă and Mazare v Romania*, No. 33348/96, 10 June 2003, para. 96.

responsibility not to publish facts that they know or should have known to be dubious.⁹⁶

The case law of the ECtHR is therefore clear that to establish liability for false information published on a matter of public interest, it is essential to examine the conduct of the person who disclosed it. Liability cannot be excluded either for one's own statements or for information received from others. If the applicant acted in good faith on the basis of the information available to them and which they reasonably believed to be true, their statement of fact is protected by FoE even if it is subsequently proven to be false.⁹⁷ False claims by professional journalists are protected if they acted in good faith in order to provide accurate and reliable information to the public in accordance with journalistic ethics.⁹⁸

3.3. Public Visibility and Past Behaviour of the Public Figure Concerned

The ECtHR has consistently held from the outset that the limits of permissible criticism of public figure politicians (and certain high-ranking civil servants) are wider than those applicable to average citizens.⁹⁹ A politician inevitably and consciously exposes all their expressions, manifestations and actions to the scrutiny of journalists and public opinion alike, and must therefore show a greater degree of tolerance, especially when they make public statements that are open to criticism. Of course, politicians have the right to protect their reputation, even if they are not acting as private individuals, but this protection must be balanced against the interest of the open discussion of political issues.¹⁰⁰ Statements made in connection with politicians and their public activities are generally afforded a high level of protection.

The allegation about a high-ranking civil servant at the mayor's office in Galați, that the private taxi business he owned was incompatible with his status as a civil servant was, contrary to the national courts' judgment, a

96 *Rumyana Ivanova v Bulgaria*, para. 65.

97 *Lepojić v Serbia*, No. 13909/05, 6 November 2007, paras. 77–78.

98 *Niskasaari and Otavamedia Oy v Finland*, No. 32297/10, 23 June 2015, para. 58.

99 *Lingens v Austria*, paras. 42, 31 and 36.

100 For example, *Oberschlick v Austria (No. 1)*, No. 11662/85, 23 May 1991, para. 29; *Lopes Gomes da Silva v Portugal*, No. 37698/97, 28 September 2000, para. 30; *Unabhängige Initiative Informationsvielfalt v Austria*, No. 28525/95, 26 February 2002, para. 36.

factually unfounded allegation, not a value judgement, and its publication therefore amounted to an invasion of privacy.¹⁰¹ However, people who are considered public figures based on their profession have very little protection against criticism. A journalist criticising Turkish Prime Minister Recep Erdoğan claimed that the Prime Minister has become a “nervous wreck” and “is suffering from a psychopathic aggressive illness”. The ECtHR ruled that the Turkish courts’ convictions for defamation constituted an unnecessary interference with FoE. It explained that the applicant’s comments and views concerned current events and had a bearing on issues such as the allegedly illegal conduct and corruption of high-ranking politicians and public figures, and the Prime Minister’s alleged aggressive response to various incidents or events. There is no doubt that these were important issues in a democratic society, where the public had a legitimate interest in knowing about them, and that were part of the political debate. In this respect, the ECtHR recalled the essential function of the press in a democratic society, and that high-ranking politicians are obliged to show a higher degree of tolerance towards criticism.¹⁰²

However, offensive opinions without any factual basis are not covered by the Convention’s protection. The statement in *Petrenco versus Moldova* about the chairman of the Association of Historians, a university professor, suggesting that his university position and his subsequent career as a historian were the result of his cooperation with the security agency of the Soviet Union (CSS), could not be afforded protection. The allegation that a person cooperated with the CSS is not mere speculation but a historical fact that can and must be supported by sufficient evidence, and therefore clearly constitutes a statement of fact. The allegations were capable of seriously discrediting the applicant and his views on the question under discussion. The ECtHR made the statement of principle that a person’s status as a politician or other public figure does not remove the need for a sufficient factual basis for statements that damage their reputation, even where such statements are considered to be value judgements and not statements of fact. As there was no indication that the applicant had collaborated with the CSS, it was not appropriate to make reference to the margin for ‘provocation’ or ‘exaggeration’ permitted for press products in general. The case concerned a distorted presentation of reality, for which no factual basis

101 *Jalbă v Romania*, No. 43912/10, 18 February 2014.

102 *Tuşalp v Turkey*, Nos. 32131/08 and 41617/08, 21 February 2012, paras. 44–45.

whatsoever had been shown, therefore the allegation concerned was a mere speculation on the part of the author, whereby he overstepped the limits of acceptable comments.¹⁰³

There is also a significant difference between the protection of public and non-public figures in relation to revisiting events of the past. In its recent case law, the ECtHR, while not considering the right to be forgotten to be absolute, recognises that, in view of the passage of time, individuals must be allowed to rebuild their lives without being confronted by members of the public with their past mistakes.¹⁰⁴ It is doubtful, however, to what extent the protection against FoE would be reduced if the case involved a public issue, and the information concerned a public figure. The ECtHR also considers arguments in favour of the primacy of other rights in its case law related to Article 10 ECHR.¹⁰⁵

The protection of privacy under Article 8 ECHR prevails over the FoE when the purpose of the disclosure of private information is to satisfy the mere curiosity of the public, but even then it is essential that the matter does not have a bearing on any social discourse.¹⁰⁶ Accordingly, a politician's previous criminal conviction is an issue that, together with other public behaviour, may be a relevant factor in assessing whether they are fit to exercise political functions.¹⁰⁷

The personal moral integrity of high-ranking officials is a matter of strict public scrutiny in a democratic society. Therefore, the highest-ranking officials – elected through a political process – must accept that their past public and political conduct remains subject to ongoing public scrutiny. If the disclosure did not concern the private life of the person in question but their past public behaviour, which was to some extent related to their

103 *Petrenco v Moldova*, paras. 65–66.

104 *Hurbain v Belgium* (GC), No. 57292/16, 4 July 2023, paras. 149–157.

105 For instance, *Mediengruppe Österreich GmbH v Austria*, No. 37713/18, 26 April 2022. In this case, the media were prohibited from publishing a photograph of a former prisoner who, according to the text, was a convicted neo-Nazi. The person concerned (H.S.) served his sentence and was released sixteen years before the media outlet published an article about an Austrian presidential candidate during ongoing presidential elections, which included an old photo of H.S. among right-wing politicians.

106 *Khadija Ismayilova v Azerbaijan*, Nos. 65286/13 and 57270/14, 10 April 2019; *Armonienė v Lithuania*; *Dupate v Latvia*.

107 *Schwabe v Austria*, No. 13704/88, 28 August 1992, para. 32.

present situation, they are obliged to be more tolerant of disclosures concerning them.¹⁰⁸

4. A Critique of the ECtHR's Judgment

There is no doubt that Áder was at the time of the publication Hungary's highest ranking public official, therefore, he had to be considered a politically exposed person. Both the national courts and the ECtHR have unanimously held that the (now former) President of Hungary is obliged to show a high degree of tolerance to expressions of opinion. However, on the question of whether he should also tolerate the impugned untrue statement of fact, the national courts have ruled in the negative. The reason for this was fundamentally that, on the basis of the circumstances of the case, they did not consider the statement to be related to the debate on public affairs, therefore concluded that the level of protection of personality rights that he sought was even higher. As mentioned above, the Hungarian courts came to this decision on the basis of an analysis of the specific situation and not on the basis of the theoretical suitability of the statement to be considered as one pertaining to public affairs. Thus, the Hungarian courts may have come closer to a realistic assessment of the article than the ECtHR.

4.1. Assessment of the Link to a Case of Public Interest

When defining the general basis of a certain judgment, in the majority of the cases cited from earlier case law, the public interest nature of the published information did not require any particular reasoning either by the national courts or by the ECtHR. The classification of the massacres and deportations suffered by Armenian people as genocide or their public denial (*Mihdi Perinçek versus Turkey*¹⁰⁹), the malfunctions of the justice system (*Morice, Pedersen and Baadsgaard*), the revealing of the line of descent claiming the status of monarch of Monaco (*Couderc and Hachette Filipacchi Associés*) and the transparency of public funds being spent

108 *Ungváry és Irodalom Kft. v Hungary*, para. 64.

109 *Mihdi Perinçek v Turkey*, No. 54915/09, 29 May 2018.

(*Timpul Info-Magazine and Anghel versus Moldova*¹¹⁰) are clearly matters of public interest.

In *Index.hu*, however, the ECtHR, somewhat detaching itself from the undoubtedly important social issues mentioned above, found that information concerning the conduct of the President of Hungary during his compulsory military service was not without political importance, and could have aroused the interest of the public with regard to the way in which the President ‘approached or assumed his responsibilities’. The finding is far from conclusive, and the logical link that the ECtHR has drawn between the one-off (unproven) behaviour of the twentysomething Áder as a conscript and his professional conduct decades later is somewhat weak, as will be explained below.

The public is naturally interested in the private lives of politicians, an interest based on the assumption that, in the protected sphere of private life, everyone, including politicians, tends to be more direct and therefore more honest. Such information may even provide some insight into the credibility of the person concerned. However, it seems rather doubtful that any relevant information about the personality of a politician can be derived from his behaviour during an event occurred 36 years before, given that, by now, the basic social and existential characteristics of that personality have radically changed. The ECtHR nevertheless held that, despite the considerable distance in time, the story from decades ago could still have an influence on events in the present, meaning that, in such a highly theoretical and indirect context, there is no room for either reality or validity. The public interest, as the ECtHR itself understands it, includes matters that may give rise to controversy or concern important social issues, in which the community’s members’ exchange of ideas, and the public discourse on the subject are in themselves valuable.

The judgment conspicuously lacks a clear explanation of what makes this speech a public matter, nor does it define the public matter in question. On the one hand, the ECtHR stressed that the interest of the public in the way in which the President ‘approached or assumed his responsibilities’ has political significance. This would imply that the ECtHR classified the story as speech made concerning a public matter because of the issue of the personal credibility of politicians. On the other hand, however, the ECtHR pointed out that the communication was made against the background of

110 *Timpul Info-Magazine and Anghel v Moldova*, No. 42864/05, 27 November 2007.

a topical event, an anti-government media campaign, and concluded that the contested statement, seen ‘in its proper context’, constituted a comment on a matter of public interest.¹¹¹ However, the ECtHR did not attach any importance to the fact that the case was not related to a media campaign, the event it described as ‘proper context’. In other words, the occasion of the speech was a private initiative launched by a blogger in reaction to what he called a ‘character assassination’, as an expression of sympathy with the opposition activists, inviting people to share their own stories of minor infractions on Facebook.

The initiative did not generate a general debate; other publications and commentators did not deal with it, and only Index.hu picked it up and built its article on the part that was most interesting to it, the decades old story concerning the President of Hungary. The explicitly tabloid writing was geared towards satisfying the public’s hunger for gossip. Index.hu certainly gave the source of the news and its background, but it did not consider the story of any other person worth sharing, focusing only on the recollection regarding the President of Hungary, and thus not aiming for a comprehensive or accurate presentation or reporting. The Facebook call to action in question also raises legal concerns about the good faith of the press, as the newspaper transmitted content without any fact-checking, which encouraged its target audience to share reports of violations, in essence, to knowingly discredit themselves or others.

The ECtHR noted that the domestic courts failed to assess the contribution to the public interest debate (“they failed to include in their assessment any considerations as regards the contribution of the article to debate on a matter of public interest”¹¹²), but it itself omitted these arguments as well. The Hungarian courts also disregarded the considerations as regards the contribution to debate on a matter of public interest because they unanimously concluded that the contested statements did not constitute speech on public affairs, since the speech was unrelated to the President’s public duties, public appearance or conduct. Consequently, the public interest element was not examined in isolation from the circumstances of the case, at a theoretical level, but on the basis of the specific content of the article, and it was concluded that there was no public interest element. If a broader context had been examined, it would have left litigants vulnerable

111 *Index.hu v Hungary*, para. 35.

112 *Id.* para. 36.

to uncertain circumstances, which they should not have expected at all when they brought the action.¹¹³ Obviously, the determination of the public interest nature of a statement should not require any special consideration, as there is no need for evidence in this respect: the classification must be made by the courts on the basis of general available knowledge. The definition of the public matter must therefore be clear, and the connection of the communication to a public matter must not be vague, indirect, or require further interpretation, and thus be uncertain. The ECtHR not only failed to clarify the definition of the public matter but also disregarded the link between the communication and the public matter, and thus based its decision, essentially without justification, on the presumption of FoE standards that can be asserted with regard to public matters.

On the other hand, the ECtHR acknowledged that the national courts had assessed the contested communication as a defamatory statement, as the allegations were false. It is a general principle that communications in the public interest or that contribute to the public debate are highly protected by Article 10 ECHR, since the very concept of a democratic society is to ensure freedom of political debate and the free and open discussion of issues of public interest. According to the ECtHR, however, the protection of FoE does not extend to knowingly false statements of fact, because such statements go beyond the limits of permissible criticism.¹¹⁴ The question of how the communication contributed to the debate on public affairs is therefore even more difficult to answer. Contribution to a dispute on a matter of public interest is conceptually excluded in the case of false statements of fact, and the ECtHR circumvented this situation by not assessing the contribution in terms of its result but, unlike the national courts, in terms of its mere theoretical possibility.

The judgment held that the information could have aroused the interest of the public with regard to the way in which the President approached or assumed his responsibilities.¹¹⁵ This was sufficient justification for reporting the news, regardless of the fact that the story was untrue and damaging to the President's personal reputation, and there was no evidence brought forward in any of the lawsuits that the President's responsible conduct was of concern to anyone based on the article. The possibility for the ECtHR

113 For a similar approach, involving the risks inherent in the requirement of an extended context, see Koltay 2014, p. 383.

114 *Nilsen and Johnsen v Norway*, No. 23118/93, 25 November 1999, para. 49.

115 *Index.hu v Hungary*, para. 34.

to use the former, hypothetical consideration was opened by the fact that the information did not fall within the strictly private sphere of life (for example, it was not of sexual nature or concerning health).

As explained by the ECtHR in another case,¹¹⁶ the limits of acceptable criticism are even wider where the criticism is directed at a politician. However, when considering the limits of the right to FoE, it must also be taken into account whether the contested expression concerns the individual's private life or their conduct in an official capacity. In our view, the Hungarian courts have taken the right position on this issue and, acting consistently, have given the former the required significance. It is noteworthy that the ECtHR did not actually carry out, at least not in full, the interest balancing test it had itself previously established between the President's right to privacy protected by Article 8 ECHR and the right guaranteed by Article 10. Although the statement of reasons for the decision mentioned the public interest, the status of the politician concerned, the contribution to a debate on an issue of public interest, the classification of the statements, the specific circumstances of the case and a brief analysis of the sanction imposed, they were all from the perspective of a breach of Article 10 ECHR, while a comparison with the right to protection guaranteed by Article 8 was not made. The ECtHR did not even touch upon the aspects relating to the protection of reputation, although it had done so in other cases with similar underlying facts. In *Ruusunen versus Finland*,¹¹⁷ a Finnish court convicted the author, who previously had a secret affair with the Prime Minister, for publishing a book about their relationship, for disseminating information violating personal privacy, and fined her. The court found that the passages describing intimate details in the book unnecessarily violated the core areas of the Prime Minister's protected private life. The applicant has the right to write about her own private life, but the consent of another person is always required to disclose intimate details of their private life, respectively. The political function of the Prime Minister, his public position, is irrelevant in this respect.

The ECtHR agreed with the national court's judgment and declared that the relevant principles recently set out by it must be applied when examining the necessity of an instance of interference with the right to FoE in the interests of protecting the reputation or rights of others. When the right to FoE is being balanced against the right to respect for private life, the following criteria must be taken into account: the contribution to a debate of general interest, how

116 *Lepojic v Serbia*, No. 13909/05, 6 November 2007, para. 75.

117 *Ruusunen v Finland*, No. 73579/10, 14 January 2014.

well-known the person concerned is, what the subject of the report is, the prior conduct of the person concerned, the method of obtaining the information and its veracity, the content, form and consequences of the publication, and the severity of the sanction imposed. According to the ECtHR, the former Finnish Prime Minister was a public figure at the time the challenged book was published, and therefore had to endure more public scrutiny – which could have a negative impact on his honour and reputation – than a private individual. The book focused on the applicant's private life, but also contained elements of public interest. The publication of the book was therefore justified in so far as the public has a right to information on issues of public interest. The ECtHR also examined the severity of the sanction imposed on the applicant, which was a fine of only €300, and the fact that no entry of the conviction was made on the applicant's criminal record, and therefore found the sanction to be reasonable.¹¹⁸ Similar assessments have been made in other cases.¹¹⁹

Some have argued that the Court's practice is inconsistent, because in cases where the defamatory allegations clearly relate to the professional activities of public figures (*Karakó, Polanco Torres and Movilla Polanco versus Spain*,¹²⁰ *Pipi versus Turkey* and *Ümit Bilgiç versus Turkey*¹²¹), the ECtHR is less willing to use the framework of the balancing test of the rights under Articles 8 and 10 ECHR, as in *Morice*. Some critics describe the ECtHR's practice as vague because sometimes, as in *Von Hannover (No 2)*¹²² and *Axel Springer*,¹²³ it made assessments according to the five or six criteria set out in advance, while in other cases, it evaluates interference solely in light of Article 10 ECHR, applying different criteria, and further restricting the margin for manoeuvre of the national authorities of the defendant state.¹²⁴

118 Id. para. 42–43, 47, 49 and 53.

119 *Pfeifer v Austria*, No. 12556/03, 15 November 2007; *Saaristo and others v Finland*, No. 184/06, 12 October 2010.

120 *Polanco Torres and Movilla Polanco v Spain*, No. 34147/06, 21 September 2010.

121 *Pipi v Turkey*, No. 4020/03, 12 May 2009; *Ümit Bilgiç v Turkey*, No. 22398/05, 3 September 2013.

122 *Von Hannover v Germany (No 2)*.

123 *Axel Springer AG v Germany*.

124 Inger Høedt-Rasmussen & Dirk Voorhoof, 'A Great Victory for the Overall Profession of Lawyers', *Strasbourg Observers*, 6 May 2015, at <http://strasbourgobservers.com/2015/05/06/a-great-victory-for-the-overall-profession-of-lawyers/#more-2848>.

4.2. Assessment of Defamatory (Untrue) Facts

The ECtHR considered the contested statements in *Index.hu* to be statements of fact and accepted that they were untrue. It was therefore expressly unreasonable (unnecessary) to invoke the element of its practice on the limits of tolerance, namely, that the person concerned was not under an obligation to tolerate factual inaccuracies. That element refers to the fact that journalistic freedom implies the possibility to use a certain degree of exaggeration or even provocation.¹²⁵ However, factual inaccuracy (in other words, irrelevant factual error) and untruthful fact material are not equally judged, nor do they enjoy the same degree of protection. However, the ECtHR did not attach any importance to this, and was therefore inconsistent even in its own practice. It is then an open question whether falsehood should be considered a provocation or mere exaggeration, given that the defamatory allegation of drunken shooting had no factual basis whatsoever.

The statement “one must not lie, not even to the detriment of a public figure”¹²⁶ was the lesson of the case in which the ECtHR declared, in relation to information that was clearly false, that such a statement of fact could not be construed as permissible ‘exaggeration’ or ‘provocation’.¹²⁷ In another case, in *Flux versus Moldova*, the ECtHR developed an interpretation that FoE cannot give a newspaper the absolute right to accuse people of crimes in an irresponsible manner, without a factual basis, and without offering the possibility to refute the accusations. According to the judgment, the right to public disclosure of information has its limits, and a balance must be struck between this right and the rights of victims. The ECtHR also took into account that the newspaper had been ordered in the civil action to pay a relatively modest amount of damages and concluded that the applicant newspaper had acted with blatant disregard for the duties of responsible journalism and that the interference with FoE was justified.¹²⁸

In *Index.hu*, the President’s juvenile self was accused of a military offence without factual basis. The unfounded accusation of a criminal offence has been explicitly condemned by the ECtHR in other cases with similar facts.

125 *Dichand and others v Austria*, No. 29271/95, 26 February 2002, paras. 40–41.

126 Zoltán Tóth J., *A büntetőjogi rágalalmazás és becsületsértés*, Média tudományi Intézet, Budapest, 2017, p. 201.

127 *Radio France and others v France*, para. 38.

128 *Flux v Moldova*, No. 22824/04, 29 July 2008, paras. 31–32 and 43.

In *Filatenko versus Russia*,¹²⁹ the applicant's good faith was considered beyond doubt because there was no indication that his intention was to accuse anyone of committing a criminal offence. This could hardly be said of the interviewee or the newspaper in *Index.hu*. The Facebook call to action specifically encouraged users to disclose various minor infractions voluntarily, and the applicant newspaper published such a story. The ECtHR has denied the right of national courts to consider repeated allegations of drunken shooting to be of a nature and gravity capable of damaging honour and reputation,¹³⁰ while in other cases it has stressed that national courts are in a better position to ascertain the underlying intention of the contested passages, to assess how the public would interpret and react to such sentences,¹³¹ and to determine the relevant facts and to carry out their legal analysis.¹³²

The relevant circumstance in striking a balance between the right to privacy and FoE, as explained in *Filatenko*, namely the 'modest' (€125) compensation (similar to the €300 fine imposed in *Ruusunen* as a reasonable sanction) was also met in *Index.hu*, but again the ECtHR assessed it inconsistently. It did not take the amount of damages into account at all in balancing the conflicting rights, but inferred the extent of the harm caused from it.¹³³ It is quite likely that it would not have done so if the amount imposed by the national courts had not been such a trivial amount, but would have constituted a significant financial burden on the media outlet concerned. The argument the ECtHR used therefore lacked persuasive force.

4.3. Assessing the Ethical Responsibilities of the Press

The press must, to a certain extent, comply with certain ethical standards. Violations of these standards, mostly set in professional codes of conduct for journalists, can influence court decisions on the scope of media

129 *Filatenko v Russia*, No. 73219/01, 6 December 2007.

130 *Index.hu v Hungary*, para. 37.

131 *Jalbă v Romania*, para. 33.

132 *Ringier Axel Springer Slovakia, A.S. v Slovakia*, No. 41262/05, 26 July 2011, para. 109; *Soltész v Slovakia*, No. 11867/09, 22 October 2013, para. 52.

133 *Index.hu v Hungary*, para. 37.

freedom. It is uncertain to what extent the ‘enforced ethics’¹³⁴ by the courts impose a real obligation specifically on journalists, or whether only the press can be the addressee of these standards. The ECtHR has repeatedly taken a position on the issue, stating that

“by reason of the ‘duties and responsibilities’ inherent in the exercise of the freedom of expression, 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.”¹³⁵

According to Jan Oster, the ECtHR applies standards of ‘ethical journalism’ and ‘responsible journalism’ in its jurisprudence.¹³⁶

In *Index.hu*, the ECtHR found that the applicant had complied with the requirements of ethical, good faith journalism.¹³⁷ The applicant company specified that the source of the information did not perfectly remember the story, explained the contradictions in his statements, and published the President’s reaction on the same day.¹³⁸ The applicant has not expressed any endorsement, approval or support of its content.¹³⁹

“As part of their role of ‘public watchdog’, the media’s reporting on ‘stories’ or ‘rumours’ – emanating from persons other than the applicant – or ‘public opinion’ is to be protected where these are not completely without foundation.”¹⁴⁰

This reasoning is problematic for several reasons. (i) First, *Index.hu* did not wait for the reply from the Office of the President, which arrived within the expected timeframe, hours after the publication of the article. However, this time is not short enough to prevent the article, which was

134 Thomas Gibbons, “Fair Play to All Sides of the Truth”: Controlling Media Distortions’, *Current Legal Problems*, Vol. 1, Issue 1, 2009, p. 311.

135 See e.g. *Fressoz and Roire v France*, No. 29183/95, 21 January 1999, para. 54; *Bladet Tromsø and Stensaas v Norway*, No. 21980/93, 20 May 1999, para. 65; *Bergens Tidende v Norway*, No. 26132/95, 2 August 2000, para. 53; *Selistö v Finland*, No. 56767/00, 16 November 2004, para. 54.

136 Jan Oster, ‘The Press Freedom Jurisprudence of the European Court of Human Rights’ in Paul Wragg & András Koltay (eds.), *Global Perspectives on Press Regulation*, Vol. 1, Europe, Hart, Oxford, 2023, pp. 247–248.

137 *Index.hu v Hungary*, para. 38.

138 Id. para. 39.

139 Id.

140 Id.

left without reflection for a few hours, from having a harmful effect. It is short enough, however, to be expected under the rules of journalistic ethics, especially as the report was not on a topical public issue that would have justified extreme haste. (ii) Second, the applicant did not update the newspaper article with the President's response, but rather published it in a separate article (the original article is still available without the reflection added). (iii) Third, the applicant gave the report an attention-grabbing title, highlighted the untrue statements of fact in the lead of the article, and only expressed doubts about their veracity at the end of the article. This meant that, given general reading habits, most readers would not have been informed about them.

The truly ethical journalistic behaviour would have been for Index.hu to wait for the President's response, and to investigate the truth of the allegations, which could have been checked quite easily, using the tools of investigative journalism, and not only to repeat the allegations in the article but also to indicate the result of this investigation, which would in all likelihood have concluded that the allegations were not true.

4.4. Conclusions

The ECtHR highlighted two circumstances of the case, which it considered to be of paramount importance in its case law. In order to establish a connection with a public matter, it unduly broadened the range of circumstances that could be taken into account, and then identified the existence of a connection with a public matter without providing convincing reasons. The status of the person concerned was addressed formally, thereby placing the protection of FoE within a different framework. Departing from its previous forward-looking decisions, the ECtHR did not even seek to strike a fair balance between the interests protected by Articles 8 and 10 ECHR, and did not take any of its statements of principle on the protection of the privacy of public figures into account. It incorrectly assessed the circumstances of the publication of the contested statements, and misjudged the minimum care required of journalists, ignoring the fact that the newspaper had only formally provided the opportunity for a rebuttal. The newspaper had decided to publish the article before the expiry of a reasonable period of time for reply, and therefore its good faith could not have been established in any event. This should necessarily have been taken into account in the assessment of the case, since the ECtHR did not call into question the

facts established by the national courts. The Hungarian courts examined and assessed – in the context of the applicable sanction – the diligence of the media outlet, despite the fact that they had taken their decisions with reference to the strict liability under national law. Contrary to its well-established case law in this respect, the ECtHR did not consider the nature of the sanction applied and the amount of the financial compensation to be reasonable, though the sum of it was very low, even by national (Hungarian) standards.