

### **Convicted killers lose 'right to be forgotten' claim over media archives**

The public's right to access archived news stories outweighs the "right to be forgotten" of people convicted of criminal offences, the European Court of Human Rights has held.

The Fifth Section chamber of the Strasbourg court upheld the decision of Germany's Federal Court of Justice to refuse to ban three media outlets from continuing to allow internet users access to material relating to the murder convictions of the two applicants.

The pair, half-brothers identified only as ML and WW, were convicted in 1993 of murdering a popular actor, WS, and given life sentences. They were released on probation in 2007 and 2008.

In 2007 they launched a series of proceedings in which they persuaded Hamburg Regional Court to order three news organisations - Deutschlandradio, the weekly magazine *Der Spiegel* and the daily newspaper *Mannheimer Morgen* - to make them anonymous in coverage about them on their websites.

The court said the brothers' interest in no longer being confronted with their past actions so long after their conviction prevailed over the public interest in being informed.

The Court of Appeal upheld those judgments.

But the Federal Court of Justice quashed the decisions, saying the Court of Appeal had failed to take sufficient account of the radio station's right to freedom of expression and, with regard to its mission, the public's interest in being informed.

After the Federal Constitutional Court decided against hearing appeals lodged by the brothers, they complained to the Strasbourg court.

The fifth section chamber of the European Court of Human Rights said the applications required an examination of the fair balance which had to be struck between the applicants' right to respect for their private life under Article 8 of the Convention, the rights under Article 10 of the radio station and press to freedom of expression and of the public to be informed.

It was primarily search engines which meant that internet users could easily obtain information made available by the media, the court said.

But the interference complained of by ML and WW resulted from the decision by the media concerned to publish and conserve the material on their websites.

The Federal Court of Justice had recognised that ML and WW had a considerable interest in no longer being confronted with their convictions - but had also emphasised that the public had an interest in being informed about a topical event, and also in being able to conduct research into past events, the fifth section chamber said.

The Federal Court had also reiterated that one of the media's tasks was to participate in creating democratic opinion by making available to the public old news items which were preserved in their archives - and it agreed entirely with this conclusion, the fifth section court said.

The Federal Court of Justice had also referred to the risk that granting requests to remove identifying elements from the reports could have a chilling effect on the press's freedom of expression.

An obligation to examine the lawfulness of a given news report following a request from the individual concerned entailed the risk that the press would abstain from putting archives online or would omit individualised information in news reports that could subsequently give rise to such requests, the court said.

The rights of a person who had been the subject of an internet publication had to be balanced against the public's right to be informed about past events and contemporary history, particularly using digital press archives.

The court noted that ML and WW were not asking for removal of the reports in question, but only that they be anonymised, which was a less restrictive measure in terms of press freedom.

But, it said, the approach to covering a given subject was a matter of journalistic freedom - and Article 10 left it to journalists to decide what details ought to be published, provided that these decisions corresponded to the profession's ethical norms.

Including information such as the full name of the person concerned in a news report was an important aspect of the press's work, especially when reporting on criminal proceedings which had attracted considerable attention. The availability of the impugned reports on media websites at the time that the applications were lodged by ML and WW continued to contribute to a debate of general interest which had not been diminished by the passage of time, the fifth section court said.

In addition, ML and WW were not simply private individuals who were unknown to the public at the time they requested anonymity - the reports in question concerned either the conduct of their criminal trial, or one of their attempts to reopen that trial, and thus constituted information capable of contributing to a debate in a democratic society.

As to the brothers' conduct since their conviction, the fifth section court said they had lodged every possible judicial appeal to reopen the criminal proceedings against them.

During their most recent attempts, in 2004, they had contacted the press, sending them documents while inviting journalists to keep the public informed - so less weight was to be attached to their interest in no longer being confronted with their convictions through archived material on the internet. Their legitimate hope of obtaining anonymity in the reports, or even a right to be forgotten online, was thus very limited, the court said.

Like the Federal Court of Justice, it considered that the contested documentation concerned - texts which described a judicial decision in an objective manner, the original truthfulness or lawfulness of which had never been challenged. Equally, the articles in *Der Spiegel* did not reflect a wish to denigrate ML and WW or to harm their reputation.

The court also followed the findings of the Federal Court of Justice in noting that the dissemination of the material was limited in scope, especially as some of the material was subject to restrictions such as paid access or a subscription.

Finally, ML and WW had provided no information about any attempts they had made to contact search-engine operators with a view to making it harder to trace information about them. There were no substantial grounds for it to substitute its view for that of the Federal Court of Justice, the court added.

*Case of ML and WW v. Germany*

*Applications Nos. 60798/10 and 65599/10*  
*Decision: Strasbourg, June 28, 2018.*

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