SECOND SECTION

**CASE OF TILLACK v. BELGIUM**

*(Application no. 20477/05)*

JUDGMENT

STRASBOURG

27 November 2007

**FINAL**

*27/02/2008*

**In the case of Tillack v. Belgium,**

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

András Baka, *President*,
Françoise Tulkens,
Rıza Türmen,
Mindia Ugrekhelidze,
Vladimiro Zagrebelsky,
Antonella Mularoni,
Danutė Jočienė, *judges*,
and also of Sally Dollé, *Section Registrar*,

Having deliberated in private on 6 November 2007,

Delivers the following judgment, which was adopted on that date:

## PROCEDURE

1. The case originated in an application (no. 20477/05) against the Kingdom of Belgium, lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Hans Martin **Tillack** ("the applicant"), on 30 May 2005.

2. The applicant was represented by Mr I. Forrester and Mr T. Bosly, lawyers practising in Brussels. The Belgian Government ("the Government") were represented by their Agent, Mr D. Flore, Senior Adviser, Federal Justice Department. The German Government, having been informed of their right to take part in the proceedings (Article 36 § 1 of the Convention and Rule 44 § 1 of the Rules of Court), did not respond.

3. In his application, Mr **Tillack** alleged in particular that search and seizure operations carried out at his home and at his place of work had violated Article 10 of the Convention.

4. On 29 August 2006 the Court decided to give notice of the application to the Government. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1961 and lives in Berlin.

6. He is a journalist on the German weekly magazine *Stern*. From 1 August 1999 until 31 July 2004 he was assigned to Brussels to report on the policies of the European Union and the activities of the European institutions.

7. On 27 February and 7 March 2002 *Stern* published two articles by the applicant based on confidential documents from the European Anti-Fraud Office (OLAF). The first article reported on allegations by a European civil servant concerning irregularities in the European institutions. The second concerned the internal investigations OLAF had carried out into those allegations.

8. A rumour began to circulate within OLAF that the applicant had paid 8,000 euros (EUR) or German marks (DEM) to a European civil servant in exchange for this information.

9. On 12 March 2002 OLAF, suspecting the applicant of having bribed a civil servant in order to obtain confidential information concerning investigations in progress in the European institutions, opened an internal investigation to identify the person who had disclosed the information to the applicant.

10. The minutes of an OLAF Supervisory Committee meeting held on 9 and 10 April 2002 stated in particular:

> "The members of the Supervisory Committee noted that the journalist's articles were not at all aggressive in tone but hinted at the real situation, as was often the case with individuals. They were surprised that OLAF's press release referred to a payment for such information. Consequently, they wished to be informed whether such a payment had been made and whether any serious evidence existed in this regard."

11. In a letter of 24 March 2003 written in the course of his inquiry into a complaint (no. 1840/2002/GG) filed by the applicant against OLAF, the European Ombudsman indicated that the suspicions that the applicant had bribed an OLAF official had originated from "information from reliable sources, including members of the European Parliament".

12. On 30 September 2003 OLAF issued a press release entitled "OLAF clarification regarding an apparent leak of information". The press release was worded as follows:

> "On 27 March 2002, the European Anti-Fraud Office (OLAF) issued a press release announcing that it had opened an internal investigation under Regulation 1073/1999 into an apparent leak of confidential information included in a report prepared within OLAF. It stated that according to information received by the Office, a journalist had received a number of documents relating to the so-called '... affair', and that it was not excluded that payment might have been made to somebody within OLAF (or possibly another EU institution) for these documents. OLAF's enquiries have not yet been completed but to date, OLAF has not obtained proof that such a payment was made."

13. On 30 November 2003 the European Ombudsman issued his decision. He had already submitted a draft recommendation to OLAF on 18 June 2003. The decision, which essentially reproduced the conclusions set out in the draft, stated in particular:

> "...
>
> 1.7 ... by publishing this press release, OLAF has not adequately implemented the Ombudsman's draft recommendation. Instead of withdrawing the allegations of bribery, OLAF simply states that 'to date' it has not found sufficient evidence to support these allegations. The wording of this press release thus implies that OLAF considers it possible that evidence supporting these allegations could still emerge. In these circumstances, the action taken by

OLAF is manifestly inadequate to remedy the instance of maladministration that the Ombudsman has identified. A critical remark will therefore be made in this respect.

...

**4. Conclusion**

4.1 On the basis of the Ombudsman's inquiries into this complaint, it is necessary to make the following critical remark:

By proceeding to make allegations of bribery without a factual basis that is both sufficient and available for public scrutiny, OLAF has gone beyond what is proportional to the purpose pursued by its action. This constitutes an instance of maladministration."

14. On 11 February 2004 OLAF lodged a complaint with the Belgian judicial authorities, submitting a report on the internal investigation it had carried out. It also referred the matter to the German judicial authorities.

15. Consequently, on 23 February 2004, an investigation was opened in respect of a person or persons unknown for breach of professional confidence and bribery involving a civil servant.

16. On 19 March 2004, at the request of the investigating judge, the applicant's home and workplace were searched by the Belgian judicial authorities. Almost all of the applicant's working papers and tools were seized and placed under seal (sixteen crates of papers, two boxes of files, two computers, four mobile telephones and a metal cabinet). It appears that the search warrant was not handed to the applicant but was read out to him. No inventory of the items seized was drawn up. On that occasion, the criminal investigation department apparently led the applicant to believe that the search was in response to a complaint lodged by OLAF, which suspected him of having bribed a European civil servant in order to obtain confidential information. According to the applicant, the authorities subsequently lost a whole crate of papers, which was not found until more than seven months later, in November 2004.

17. On 29 March and 15 April 2004 the applicant applied to the Principal Public Prosecutor at the Brussels Court of Appeal for leave to consult the investigation file. His application was refused in a letter dated 17 June 2004.

18. The applicant applied again on 28 June 2004, to no avail.

19. In the meantime, on 24 March 2004, he had applied to the investigating judge to have the measures relating to the seizure discontinued.

20. By an order of 8 April 2004 the investigating judge rejected his application.

21. The applicant appealed, alleging, *inter alia*, a breach of Article 10 of the Convention.

22. The Indictment Division upheld the order on 22 September 2004, holding as follows:

"The question whether or not protection of the confidentiality of sources of information used by journalists constitutes a right inherent in press freedom, and, if so, whether that right has an absolute value or is subject to restrictions, has not yet been established in law.

The actual wording of Article 10 of the European Convention on Human Rights does not recognise the protection of journalistic sources, a right which has developed through the case-law of the European Court of Human Rights, albeit without having been enshrined as an absolute value according to legal authorities (see, to this effect, the judgment of the European Court of Human Rights in the case of *Ernst and Others v. Belgium*, 15 July 2003, no. 33400/96, *Human Rights Information Bulletin* no. 60, July-October 2003, pp. 4-5).

Recent legislative initiatives tend to acknowledge that journalists are entitled to protect their sources of information, although the exercise of this right does not give rise to immunity from prosecution or from civil liability (see in this connection the Bill granting journalists the right not to disclose their sources of information, passed by the Belgian House of Representatives on 6 May 2004, and the opinion of the National Council of Justice on the legislative proposals to grant journalists the right to protect their sources of information, approved by the General Assembly on 4 February 2004).

The investigative measure complained of is, admittedly, an interference in the rights guaranteed by Article 10 of the ECHR. It was, however, lawfully ordered by the competent investigating judge in connection with the matter referred to him.

It pursues legitimate aims since, in the context of the information in the case file brought to the attention of the

court, whereby the applicant is charged as principal or joint principal in a case of bribery intended to secure the disclosure of confidential information, its purpose is to 'verify whether the protection of confidentiality applies to a lawful or unlawful source; the latter must be overridden by a superior value, namely the prevention of crime' (written application by the Principal Public Prosecutor of 18 June 2004, p. 14).

As is rightly noted by the investigating judge, it is not acceptable that the right to protect sources can be used to cover up offences, since this would deprive that right of its purpose, notably the provision of accurate and reliable information to the public, and would be likely to jeopardise public safety by creating *de facto* impunity (see to this effect the judgment of the European Court of Human Rights of 15 July 2003, *JLMB*, 2003, p. 1524).

...

In the instant case, as the investigating judge noted in the order appealed against, in particular on page 3, paragraph 2.3.1, the requirements of the investigation still dictate that the orders for items to be seized and placed under seal should be maintained, being justified by the ongoing duty to investigate, the sole manifest aim of which is to verify the good faith of the applicant in seeking to establish the truth in the context of the preventive measures underlying the referral to the investigating judge.

The arguments advanced by the applicant in his submissions to this court, which cannot substitute its own findings for those of the court below, do not give rise to any doubt in this respect.

It follows that the appeal is unfounded."

23. The applicant appealed on points of law. Relying in particular on Articles 6, 8 and 10 of the Convention, he submitted that freedom of expression included the freedom to seek out and collect information, essential aspects of journalistic activity. According to the applicant, that meant that journalists' sources were to be protected and kept confidential and that the judicial authorities were prohibited from taking measures or decisions intended to force journalists or organs of the press to reveal their sources. The applicant also complained that since he had not had access to the investigation file, he had been unable to inspect the evidence deemed to be serious and relevant which had been used to justify the search.

24. By a judgment of 1 December 2004 the Court of Cassation dismissed the appeal. It held that Article 10 of the Convention authorised restrictions on freedom of expression, that the search and seizure were provided for by the Code of Criminal Procedure and that the Indictment Division had given sufficient and adequate reasons for its decision. The Court of Cassation further held that the lawfulness of a search was not dependent upon the existence of strong evidence of the guilt of the person at whose home or workplace the search was carried out. It was sufficient for the investigating judge to have evidence suggesting that that these premises might be harbouring documents or items useful in establishing the truth concerning the offences mentioned in the search warrant. Consequently, the objection raised by the applicant was outside the scope of the review of the lawfulness of the investigation and did not constitute a ground permitted by law to support an appeal on points of law under Article 416 § 2 of the Code of Criminal Procedure, and was therefore inadmissible.

25. In the meantime, on 1 and 4 June 2004, the applicant had lodged two applications with the Court of First Instance of the European Communities. The first sought the annulment of the complaint filed by OLAF and compensation for the harm allegedly caused to the applicant's career and reputation. The second sought a temporary injunction prohibiting OLAF from inspecting any document seized during the searches at issue. By an order of 15 October 2004 the President of the court dismissed the applications. The President ruled that OLAF's decision to forward the report on the internal investigation had no binding legal effect and could not therefore be the subject of an action for annulment. He stressed in particular that OLAF's conclusions set out in a final report could not automatically give rise to the opening of judicial or disciplinary proceedings, given that the competent authorities remained free to decide on the action to be taken in relation to the report. As regards the applicant's application for interim measures, he ruled that there was no causal link between the alleged harm and OLAF's action and that it had not been established that OLAF had acted in breach of the principles of good administration and proportionality.

26. The applicant appealed. By an order of 19 April 2005 the President of the Court of Justice of the European Communities upheld the order.

27. In the context of those proceedings, the applicant received a copy of OLAF's complaint but not of

the other documents in the criminal file. At that time, he had not been charged in Belgium. On 17 November 2006 the Hamburg public prosecutor informed the applicant's counsel that the investigation in Germany had been closed without any charges being brought.

28. On 12 May 2005 the European Ombudsman drafted a special report for the European Parliament following the draft recommendation he had addressed to OLAF in connection with a fresh complaint filed by the applicant (2485/2004/GG). In the complaint the applicant alleged that during the inquiry into complaint no. 1840/2002/GG, OLAF had provided incorrect information that was prone to mislead the Ombudsman; he requested the latter to conduct a new inquiry.

29. In his above-mentioned report, the Ombudsman stated that the alleged remarks by the members of the European Parliament (see paragraph 11 above) had probably never been made. They were rumours circulated by another journalist, Mr G., which the Director General of OLAF had not bothered to check with the members of the European Parliament concerned.

30. In his recommendation, the Ombudsman concluded that OLAF should acknowledge that it had made incorrect and misleading statements in its submissions to the Ombudsman in the context of the latter's inquiry into complaint no. 1840/2002/GG.

## II. RELEVANT DOMESTIC AND EUROPEAN LAW

31. Article 458 of the Belgian Criminal Code provides:

> "Medical practitioners, surgeons, health officers, pharmacists, midwives and all other persons who, by reason of their status or profession, are guardians of secrets entrusted to them and who disclose them, except where they are called to give evidence in legal proceedings (or to a parliamentary commission of inquiry) or where the law requires them to do so, shall be liable to imprisonment for between eight days and six months and a fine ranging from one hundred to five hundred francs."

32. The relevant provisions of the Code of Criminal Procedure read as follows:

**Article 87**

> "The investigating judge may, if required to do so or of his own motion, visit the home of the accused to search papers, effects and, in general, any items that may be deemed useful in establishing the truth."

**Article 88**

> "Similarly, the investigating judge may visit any other places at which he suspects that the items referred to in the preceding paragraph may have been hidden."

33. Article 8 of Regulation EC No. 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by OLAF provides as follows in respect of confidentiality and data protection:

> "1. Information obtained in the course of external investigations, in whatever form, shall be protected by the relevant provisions.
>
> 2. Information forwarded or obtained in the course of internal investigations, in whatever form, shall be subject to professional secrecy and shall enjoy the protection given by the provisions applicable to the institutions of the European Communities.
>
> Such information may not be communicated to persons other than those within the institutions of the European Communities or in the Member States whose functions require them to know, nor may it be used for purposes other than to prevent fraud, corruption or any other illegal activity.
>
> ..."

34. Article 16 of the same Regulation provides that it is binding in its entirety and directly applicable in all Member States.

35. Paragraph 4 of Article 280 of the EEC Treaty states as follows;

> "The Council, acting in accordance with the procedure referred to in Article 251, after consulting the Court of

Auditors, shall adopt the necessary measures in the fields of the protection of and fight against fraud affecting the financial interests of the Community with a view to affording effective and equivalent protection in the Member States. These measures shall not concern the application of national criminal law or the national administration of justice."

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

36. The applicant alleged that the searches and seizures carried out at his home and place of work had violated his right to freedom of expression as provided under Article 10 of the Convention, the relevant part of which reads as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society ... for the prevention of disorder or crime, ... for the protection of the reputation or rights of others, [or] for preventing the disclosure of information received in confidence ..."

### A. Admissibility

37. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that it is not inadmissible on any other ground. Accordingly, it must be declared admissible.

### B. Merits

#### *1. Arguments of the parties*

#### (a) The applicant

38. Firstly, the applicant maintained that the proceedings had not been directed against him in any way. Criminal law must be interpreted strictly and, since it had not been shown that the conditions for application of Article 458 of the Criminal Code had been met, the Government's contention that that Article was applicable in the instant case had to be rejected. Furthermore, professional secrecy as enshrined in Article 8 of Regulation EC No. 1073/1999 did not equate to professional secrecy for the purposes of Article 458 of the Criminal Code, since the latter Article was intended to protect the interests of individuals and concerned personal data which had come to a person's knowledge in the performance of his or her duties. The professions satisfying the relevant criteria were those which, owing to the nature of their activities, placed those who carried them out in a situation in which they would become aware of hidden aspects of private life (for example, medical practitioners, ministers of religion, lawyers or notaries). The information allegedly disclosed by the OLAF official, assuming that it was covered by professional secrecy under the Regulation, had in no way concerned personal matters relating to the private life of an individual for the purposes of Article 458 of the Criminal Code.

39. European civil servants were not explicitly covered by Article 458, as was manifestly obvious from the text itself.

40. The Regulation, despite being directly applicable in the Belgian legal order, had been adopted on the basis of Article 280 of the EEC Treaty (see paragraph 35 above), from which it followed that the Regulation in question did not seek to define or redefine any particular provision of the Belgian Criminal Code. This simply confirmed that failure to observe the professional secrecy by which OLAF officials were bound did not constitute an offence under Belgian criminal law.

41. Article 8 § 2 of the Regulation, which dealt with professional secrecy, provided that the information covered by such secrecy "shall enjoy the protection given by the provisions applicable to the institutions of the European Communities". Accordingly, no reference was made to the provisions of domestic law. A breach of the duty of non-disclosure to which the Staff Regulations of Officials of the European Communities referred or of the professional secrecy to which European civil servants were subject by virtue of the Regulation was punishable in disciplinary rather than criminal proceedings.

42. The applicant challenged both the lawfulness and the legitimacy of the searches complained of. Relying on the case-law as it had stood at the time of the searches, he argued firstly that although the Protection of Journalists' Sources Act of 7 April 2005 had been passed after the searches had been carried out, it was applicable by analogy in the instant case. In his submission, that Act had set forth in law the principles reaffirmed on many occasions by the Court, which had already been applied in the Belgian legal system. The applicant further argued that the searches had been unlawful as they had not been carried out in pursuit of any of the aims referred to in paragraph 2 of Article 10, but merely in order to discover the applicant's source, that is to say, the name of the OLAF official who had breached professional secrecy, or evidence of possible bribery.

43. As to whether the interference had been necessary, the applicant pointed out that no charges had ever been brought against him, the searches having been carried out in respect of a person or persons unknown. In his submission, the fact that the published articles contained confidential information proved at most that an OLAF official had probably disclosed confidential information. However, that fact did not provide evidence of any offence by a third party, let alone by the applicant. Moreover, the judicial authorities had failed to check the information referred to in OLAF's interim report before conducting the searches complained of. Such an attitude constituted unacceptable negligence. The report could in no way be treated as a criminal complaint, but merely as the transmission of information by OLAF to the Belgian authorities. The forwarding of this report had not given rise to any obligation on the part of the judicial authorities, which had to assume full responsibility for checking the accuracy of the information contained therein and determining whatever action they considered appropriate to take on it. The report was not in itself sufficient proof of the lawfulness and legitimacy of the searches.

44. The applicant added that the report had been worded in hypothetical terms and based exclusively on rumours. A simple reading of the text showed that OLAF had obtained only one witness statement, that of J.G., who had said that for the sum of EUR or DEM 8,000, the applicant had obtained confidential information from an OLAF official working at the material time for a European Commissioner and for the Commission spokesperson, who had both been criticised in the articles published by the applicant. Faced with the clear lack of impartiality of the only witness statement on which the OLAF report was based, the investigating judge should, at the very least, have questioned J.G. to confirm his allegations before ordering the searches. In the applicant's view, such checks had been all the more necessary since the searches had not concerned an ordinary individual but a journalist. Moreover, the Belgian courts had taken the view that the conviction of a journalist for handling information disclosed in breach of professional confidence or for aiding and abetting such a breach should be regarded as contrary to Article 10.

45. The applicant further complained that the seizures carried out had been disproportionate. In support of his argument, he pointed out that the judicial authorities had not been able, either during the searches or subsequently, to provide him with an inventory of the items seized, on the pretext that it would be too burdensome to draw up a full list. Moreover, the authorities had lost a crate of documents, which the police had not found until more than seven months later, in November 2004.

46. The applicant lastly contended that to cooperate with the investigating judge and provide documents possibly revealing the identity of his source would have been inconsistent with his obligations as a journalist, as laid down in the Declaration of the Rights and Duties of Journalists adopted in Munich on 25 November 1971 by the International Federation of Journalists, the Code of the Principles of Journalism adopted by the Belgian Association of Newspaper Publishers, the National Federation of Weekly Newspapers and the Belgian General Association of Professional Journalists, and the Resolution on journalistic freedoms and

human rights adopted in December 1994 at the fourth European Ministerial Conference on Mass Media Policy.

**(b) The Government**

47. Referring to the relevant provisions of the Code of Criminal Procedure and to the Court's conclusions in its *Ernst and Others v. Belgium* judgment (no. 33400/96, 15 July 2003), the Government submitted that it was futile for the applicant to contest the legal basis for the interference. As regards the applicant's claim that the breach of professional secrecy by a European civil servant did not constitute an offence under Belgian law, the Government pointed out that Article 458 of the Criminal Code imposed a duty of professional secrecy on "all ... persons who, by reason of their status or profession, are guardians of secrets entrusted to them". European civil servants, including OLAF officials, were guardians, by reason of their profession, of secrets entrusted to them; Article 458 of the Criminal Code therefore applied expressly to them. Furthermore, and above all, Article 8 of Regulation (EC) No. 1073/1999, directly applicable in the Member States, made OLAF officials subject to professional secrecy, and the crucial issue in the present case was that there was an obligation on OLAF officials to observe professional secrecy. As regards the applicant's initial allegation that the searches complained of were illegal on the ground that bribery could not justify either a search or a seizure, the Government noted the applicant's subsequent statement that "corruption constitutes a crime which, from a theoretical point of view, and in certain conditions defined by law, may justify searches under Belgian law".

48. The Government further submitted that the legitimacy of the interference had been established; the measures complained of had been intended to prevent the disclosure of information received in confidence and to prevent disorder and crime. Since the searches and seizures had been carried out in the context of the investigation conducted by the judicial authorities, it could not be disputed that they had pursued a legitimate aim.

49. As to whether the interference had been necessary, the Government drew the Court's attention to one factor that in their submission fundamentally set this case apart from other cases dealt with by the Court concerning the protection of journalistic sources, namely the applicant's conduct. In the instant case, the purpose of the searches and seizures had been not only to reveal the identity of the person who had breached the duty of professional secrecy by which he was bound, but also to find evidence that the applicant had offered and accepted bribes as principal or joint principal. The protection of sources could not be relied upon to cover up offences committed by journalists and to grant them immunity from prosecution. In *Fressoz and Roire v. France* ([GC], no. 29183/95, §§ 52 and 55, ECHR 1999-I), the Court itself had stressed that the press must not go beyond certain limits and must obey the criminal law and act in accordance with professional ethics.

50. In the Government's submission, observance of criminal laws and the fight against corruption constituted an "overriding public interest" that had to prevail over the protection of sources. In the instant case, the articles published by *Stern* magazine and written by the applicant contained confidential information based on confidential documents emanating from OLAF. The investigating judge had had serious and precise information leading him to presume that the applicant had bribed a civil servant in order to obtain additional information. This presumption had been all the more legitimate since the information in question came from OLAF, a European agency with a sound reputation specifically engaged in the fight against corruption.

51. OLAF had taken care to carry out an internal investigation before lodging its criminal complaint. The investigating judge had therefore had every reason to believe that the offences complained of by OLAF were not merely allegations made and circulated recklessly. The measures at issue had therefore not been intended as a means of "fishing" for offences as yet unknown, but had sought to reveal the truth as to the applicant's alleged misconduct. The national courts had furthermore approved the choice made by the investigating judge. The Court of Cassation had remarked that in order to assess the lawfulness of a search, "it [was] sufficient for the investigating judge to have evidence suggesting that the premises might be harbouring documents or items useful in establishing the truth concerning the offences mentioned in the search warrant".

The obvious conclusion was that at the material time there had been relevant evidence to justify the impugned measures.

52. Lastly, the Government submitted that the impugned measures had complied with the principle of proportionality. They contended that the national courts were better placed than the Court to assess the proportionality of such measures and that it was extremely tricky to rule on questions of this nature, which were entirely dominated by the factual circumstances of each case. They concluded that the Court's supervision could only be marginal. They further submitted that no criticism could be attached to the fact that the search had lasted eight hours since it would clearly be unreasonable to expect the authorities to survey the premises in a short period of time. They pointed out that a cabinet had been sealed at the scene following the applicant's refusal to hand over the key to open it. The authorities had even suggested that the applicant tell them which documents he needed most so that they could examine them first.

*2. The Court's assessment*

**(a) General principles**

53. Freedom of expression constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to the press are of particular importance. 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 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, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest (see *Goodwin v. the United Kingdom*, 27 March 1996, § 39, *Reports of Judgments and Decisions* 1996-II; *Roemen and Schmit v. Luxembourg*, no. 51772/99, § 57, ECHR 2003-IV; and *Ernst and Others*, cited above).

54. The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see *De Haes and Gijsels v. Belgium*, 24 February 1997, § 37, *Reports* 1997-I, and *Fressoz and Roire*, cited above, § 45).

55. As a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established. Admittedly, it is in the first place for the national authorities to assess whether there is a "pressing social need" for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In cases concerning the press, such as the present one, the national margin of appreciation is circumscribed by the interest of a democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under paragraph 2 of Article 10, whether the restriction was proportionate to the legitimate aim pursued (see, *mutatis mutandis*, *Goodwin*, cited above, § 40, and *Worm v. Austria*, 29 August 1997, § 47, *Reports* 1997-V).

**(b) Application of the above-mentioned principles in the instant case**

56. In the present case, the Court considers that the searches at the applicant's home and place of work undoubtedly amounted to an interference with his rights under paragraph 1 of Article 10. The Government admitted as much.

57. Such interference will breach Article 10 unless it was "prescribed by law", pursued one or more legitimate aims under paragraph 2 and was "necessary in a democratic society" to achieve those aims.

*(i) Prescribed by law*

58. The Court, reiterating that it is primarily for the national authorities to interpret and apply domestic law, considers that the searches were indeed prescribed by law, namely by the various provisions of the

Code of Criminal Procedure referred to by the Government (see paragraph 32 above). The way in which these provisions were applied in the present case may affect the Court's assessment of the necessity of the measure (see *Ernst and Others*, cited above, § 97).

*(ii) Legitimate aim*

59. In the Court's opinion, the interference pursued the "legitimate aim" of preventing disorder and crime and also sought to prevent the disclosure of information received in confidence and to protect the reputation of others.

*(iii) Necessary in a democratic society*

60. The main issue is whether the impugned interference was "necessary in a democratic society" to achieve that aim. It must therefore be ascertained whether the interference met a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it were relevant and sufficient.

61. The Court notes that the facts of the case are similar to those in the cases of *Roemen and Schmit* and *Ernst and Others* cited above. The Government submitted that this case differed from the others on account of the conduct of the applicant, who had not been a passive party in the leak of confidential information but had brought it about himself by bribing the OLAF official. The Court notes that OLAF opened an internal investigation to reveal the identity of the official who had disclosed this information to the applicant and published a press release in which it informed the public that it could not be ruled out that a payment might have been made to one of its officials (see paragraphs 9 and 12 above). OLAF even told the European Ombudsman, in the course of the inquiry into complaint no. 1840/200 GG filed by the applicant against OLAF, that the suspicions of bribery had arisen out of information from reliable sources, including members of the European Parliament (see paragraph 11 above). In his decision of 30 November 2003 the European Ombudsman concluded that by proceeding to make allegations of bribery without a factual basis that was both sufficient and available for public scrutiny, OLAF had gone beyond what was proportional to the purpose pursued by its action, which constituted an instance of maladministration (see paragraph 13 above).

62. Since the internal investigation was not able to determine who was responsible for the leak, OLAF filed a complaint against the applicant on 11 February 2004 with the Belgian judicial authorities, which opened an investigation into bribery of a civil servant (see paragraphs 14-15 above). On 19 March 2004 the applicant's home and place of work were searched (see paragraph 16 above).

63. It is clear that, at the time when the searches in question were carried out, their aim was to reveal the source of the information reported by the applicant in his articles. Since OLAF's internal investigation did not produce the desired result, and the suspicions of bribery on the applicant's part were based on mere rumours, as revealed by the European Ombudsman's inquiries on two occasions in 2003 and 2005, there was no overriding requirement in the public interest to justify such measures.

64. They therefore undoubtedly impinged on the protection of journalists' sources. The fact that the searches and seizures apparently proved unproductive did not deprive them of their purpose, namely to establish, for the benefit of OLAF, the identity of the person responsible for disclosing the confidential information (see, *mutatis mutandis*, *Ernst and Others*, cited above, § 100).

65. The Court emphasises that the right of journalists not to disclose their sources cannot be considered a mere privilege to be granted or taken away depending on the lawfulness or unlawfulness of their sources, but is part and parcel of the right to information, to be treated with the utmost caution. This applies all the more in the instant case, where the suspicions against the applicant were based on vague, unsubstantiated rumours, as was subsequently confirmed by the fact that he was not charged (see paragraph 27 above).

66. The Court further notes the amount of property seized by the authorities: sixteen crates of papers, two boxes of files, two computers, four mobile telephones and a metal cabinet. No inventory of the items seized was drawn up. The police even apparently lost a whole crate of papers, which were not found until more than seven months later (see paragraph 16 above).

67. The Court is thus of the opinion that while the reasons relied on by the national courts may be regarded as "relevant", they were not "sufficient" to justify the impugned searches.

68. It concludes that the measures complained of are to be considered disproportionate and, accordingly, that they breached the applicant's right to freedom of expression enshrined in Article 10 of the Convention.

## II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

69. The applicant complained of a violation of his right to a fair trial. He relied on Article 6 § 1 of the Convention, the relevant part of which reads as follows:

> "In the determination ... of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal."

70. The applicant submitted that there had been a breach of the principle of equality of arms both before the Indictment Division and before the Court of Cassation, since those courts, in refusing to discontinue the seizures complained of, had ruled that the complaint by OLAF was well-founded. He also complained that he had not had access to the investigation file.

71. The Court reiterates that equality of arms requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent. The Court cannot see anything in the complaint, as formulated by the applicant, that might undermine this equality. Furthermore, according to the information in the case file, the applicant was never charged or committed for trial. On the basis of the information produced, the Court finds no appearance of a violation of this provision of the Convention.

72. It follows that this complaint must be dismissed as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

## III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

73. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

### A. Non-pecuniary damage

74. The applicant submitted that he had suffered damage not only as a result of having been deprived of his working documents and information media that had been removed by the police but also as a result of his loss of credibility in the eyes both of the public and of anyone who might be able to provide him with information as a journalist. Confidence in his ability to protect the anonymity of his sources, a vital part of a journalist's profession, had been irrevocably shaken. He maintained that as a result, he was no longer in a position to cover the work of the European Commission as he had done in the past, since his potential sources of information no longer had any confidence in his ability to keep their identities secret. Furthermore, the searches carried out at his home and place of work had damaged his honour. Lastly, he submitted that he was unable to carry on his work in decent conditions, since approximately one thousand pages of documents useful for his work had been seized.

He claimed 25,000 euros (EUR) *ex aequo et bono* in respect of the non-pecuniary damage thus sustained.

75. The Government submitted as their main argument that if the Court were to find that a violation could be attributed to the Belgian State, it would be for the applicant to establish before the national courts the damage he had sustained. It followed from the settled case-law of the Court of Cassation that by virtue of the principles governing redress for damage arising out of a legislative error ranking as a tort, reparation must be

made for the fault committed by the State. In the alternative, the Government submitted that the applicant had furnished no evidence to support his claims.

76. The Court has no doubt that in the circumstances of the case, the searches and seizures carried out at the applicant's home and place of work caused him anxiety and distress. Ruling on an equitable basis, as required by Article 41, the Court awards him the sum of EUR 10,000 in respect of non-pecuniary damage.

**B. Costs and expenses**

77. The applicant asserted that the costs and fees of his lawyers relating to his representation amounted to EUR 116,422.43, although the services actually provided by his counsel were considerably in excess of that amount. His employer had agreed to advance that sum. He submitted that half of the services provided related to his representation before the Belgian courts and before the Court. He sought a lump sum of EUR 50,000.

78. The Government submitted that the applicant had not explained in sufficient detail how he had arrived at that exact figure.

79. The Court reiterates that costs and expenses will not be awarded under Article 41 unless it is established that they were actually incurred, were necessarily incurred and were also reasonable as to quantum (see *Iatridis v. Greece* (just satisfaction) [GC], no. 31107/96, § 54, ECHR 2000-XI). Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see *Van de Hurk v. the Netherlands*, 19 April 1994, § 66, Series A no. 288).

80. The Court notes that the applicant has submitted three invoices to it (amounting to a total of EUR 98,864.66) in relation to steps taken by his lawyers in 2004 and his representation before the Belgian authorities. The Court does not doubt that the purpose of such steps was essentially to secure redress for the Convention violations alleged before the Court. It further notes the applicant's statement that a large part at least of his lawyers' fees has been advanced by *Stern* magazine.

81. Having regard to the circumstances of the case and ruling on an equitable basis as required by Article 41 of the Convention, the Court finds it reasonable to award EUR 30,000, plus VAT, in respect of all costs incurred in Belgium and in Strasbourg.

**C. Default interest**

82. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 10 of the Convention admissible and the remainder of the complaint inadmissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 10,000 (ten thousand euros) in respect of non-pecuniary damage and EUR 30,000 (thirty thousand euros) in respect of costs and expenses, plus any tax that may be chargeable on the above amounts;

(b) that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in French and notified in writing on 27 November 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé András Baka
Registrar President

CASE OF **TILLACK** v. BELGIUM

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