

Recent jurisprudence of the ECtHR

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Matrix

- *Hassan v UK* (Art 5 (2/3))
- *McHugh & Ors v UK* (Art 3 P1)
- *Lambert & Ors v France* (Art 2 (8))
- *Delphi AS v Estonia* (Art 10)
- *Parillo v Italy* (Art 8)

Hassan v UK (GC)



- Iraqi non-combat briefly interned by UK in US facility (Camp Bucca)
- Art 5 applied (Arts 2/ 3 not in play on the evidence)
- Application of Art 5, however, modified by context: active international armed conflict
- Art 5 not breached notwithstanding non-application of any express justification for detention within Art 5
 - and notwithstanding failure to derogate

- Strongly critical of reliance on state practice – triumph of politics over law? (§ 13)
- A harmonious approach to IHL did not permit the accommodation of powers to intern within Art 5 – exceptions to this had always been interpreted narrowly and to do otherwise robbed Art 15 of effect
 - on the facts of this case, the powers of internment under the Third and Fourth Geneva Convention, relied on by the Government as a permitted ground for the capture and detention of Tarek Hassan, are in direct conflict with Article 5, § 1 of the Convention. (...) By attempting to reconcile the irreconcilable, the majority's finding today does not, with respect, reflect an accurate understanding of the scope and substance of the fundamental right to liberty under the convention' (§ 19)

Hassan v UK - comment



- The majority avoided displacement of IRHL by IHL in the context of armed conflict – symbiotic approach
- Equally avoided the rendering obsolete of IHL

McHugh & Ors v UK – the saga continues



- *Hirst (no 2) v UK* (2005)
 - 2 x Labour Govt consultations – no legislation
 - December 2010 announcement (but no draft) of legislation
- 2011 UK given 6 mths by ECtHR in *Greens & MT* – extended for *Scoppola v Italy* (GC 2012) – 6 mths from May 2012
- Nov 2012 draft Bill – December 2013 JC recommended vote for prisoners serving less than 12 months
- *R (Chester) v SSJ* (2013, SC): “Apply the bloody Convention”
- *Firth & Ors v UK* (2014)

- UK still in breach on prisoner voting – A3P1
- No damages – just satisfaction
- No costs – no legal assistance necessary
- (*Delvigne* [2015] CJEU C-650/13)

Ambert & Ors v France (GC)



- Withdrawal of nutrition & hydration to PVS patient
- Conflict between doctors & wife/ other family members
- Challenge to law permitting withdrawal
- French legislation did not require “unreasonable obstinacy”
 - Reports about medical condition
 - Ascertainment of patient’s wishes
 - Consultation

Lambert & Ors v France



- Standing – no direct interest but next of kin (notwithstanding possible conflict with V)
- Substance
 - Positive not negative obligation
 - Art 8 as well as Art 2 engaged – personal autonomy
 - New territory – neither right to die (*Pretty*) nor withdrawal of treatment (*Glass, Burke*)
 - Wide MoA
 - Safeguards in place, and followed
- 5 dissenters required “absolute certainty”

Delphi AS v Estonia (GC)



€320 fine against commercial internet news provider for failure to remove offensive comment in advance of complaint:

- “let’s do as in 1905, let’s go to [K]uressaare with sticks and put [L.] and [Le.] in a bag”
- “burn in your own ship, sick Jew!”
- “go ahead, guys, [L.] into the oven!”

Art 10 challenge failed

Delphi AS v Estonia (GC)



§ 110 “while the Court acknowledges that important benefits can be derived from the Internet in the exercise of freedom of expression, it is also mindful that liability for defamatory or other types of unlawful speech must, in principle, be retained and constitute an effective remedy for violations of personality rights”

§ 112 (citing Estonia’s SC): “the portal operator is not the person to whom information is disclosed. Because of [their] economic interest in the publication of comments, both a publisher of printed media and an Internet portal operator are publishers/disclosers as entrepreneurs”.

Delphi AS v Estonia (GC)



§ 113 “differentiated and graduated approach [that] requires that each actor whose services are identified as media or as an intermediary or auxiliary activity benefit from both the appropriate form (differentiated) and the appropriate level (graduated) of protection and that responsibility also be delimited in conformity with Article 10 [ECHR] and other relevant standards developed by the Council of Europe”

because of the particular nature of the Internet, the ‘duties and responsibilities’ that are to be conferred on an Internet news portal for the purposes of Article 10 may differ to some degree from those of a traditional publisher, as regards third-party content.”

Delphi AS v Estonia (GC)



“the majority of the impugned comments amounted to hate speech or incitements to violence and as such did not enjoy the protection Article 10” (§ 140);

“Delfi was a professionally managed Internet news portal run on a commercial basis which sought to attract a large number of comments on news articles published by it” (§ 144);

Delphi “must be considered to have exercised a substantial degree of control over the comments published on its portal” (§ 145);

Delphi’s” involvement in making public the comments ... went beyond that of a passive, purely technical service provider” (§ 146)

Delphi AS v Estonia (GC)



§ 153 “the imposition on [Delphi] of an obligation to remove from its website, without delay after publication, comments that amounted to hate speech and incitements to violence, and were thus clearly unlawful on their face [did not] amount[], in principle, to a disproportionate interference with its freedom of expression”;

§ 156 “the automatic word-based filter used by [Delphi] failed to filter out odious hate speech and speech inciting violence posted by readers and thus limited its ability to expeditiously remove the offending comments”;

§ 158 “the ability of a potential victim of hate speech to continuously monitor the Internet is more limited than the ability of a large commercial Internet news portal to prevent or rapidly remove such comments”;

Damages awarded not disproportionate.

Delphi AS v Estonia (GC)



§ 159 “If accompanied by effective procedures allowing for rapid response, [a take-down] system can in the Court’s view function in many cases as an appropriate tool for balancing the rights and interests of all those involved. However, in cases such as the present one, where third-party user comments are in the form of hate speech and direct threats to the physical integrity of individuals... the Court considers ... that the rights and interests of others and of society as a whole may entitle Contracting States to impose liability on Internet news portals, without contravening Article 10 [ECHR], if they fail to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties”.

Parillo v Italy (GC)



- Unsuccessful challenge to Italian ban on embryo research from would-be donor
- Dissenting judge Sajó saw the ban as an unacceptable and unforeseeable restriction on the right to self-determination” – the right to primary control over her genetic contribution to the future
- The majority decision:
 - Art 8 applicable – right to respect for private life (*cf* dissenters – embryos as constituent elements of the parent’s right to self-determination?)
 - The issue at stake was not a core aspect of the right
 - No evidence as to deceased partner’s views
 - Wide MoA – lack of European and international consensus



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