

## Imprisoning a Journalist for Refusing to Disclose Confidential Sources in Court a Violation of the Right to Freedom of Expression

*Voskuil v The Netherlands* [2007] ECHR 64752/01 (22 November 2007)

The European Court of Human Rights recently held that the imprisonment of a journalist for refusing to disclose the identity of a confidential source constituted a violation of the right to freedom of expression under art 10 of the *European Convention*.

### Facts

Voskuil, a journalist in Amsterdam, wrote an article concerning an incident in which police found an arsenal of weapons at a property and charged three people with arms trafficking. Voskuil's article quoted an unnamed police officer who suggested that police had staged a flood at the property to provide a basis for the search. The article raised serious questions about police conduct.

Voskuil was called to give evidence at the trafficking trial and asked to identify the police officer referred to in his article. Voskuil refused to answer questions that would identify the source. Although Voskuil had a prima facie right to refuse to disclose the source under domestic law, the Court had the power to compel disclosure if necessary in the interests of a democratic society.

Voskuil was ordered to answer the questions but refused to do so and was imprisoned for 17 days.

Voskuil appealed to the European Court of Human Rights claiming that his right to freedom of expression included the right to protect a confidential source, and that his imprisonment constituted a violation of this right.

### Decision

A journalist's right to protect confidential sources stems from the right to freedom of expression enshrined in art 10 of the *European Convention*, particularly as interpreted in light of Recommendation R(2000) 7 on the right of journalists not to disclose their sources of information (adopted by the Committee of Ministers of the Council of Europe on 8 March 2000).

These instruments provide journalists with a right to refuse to disclose a confidential source. However, this right may be curtailed by laws necessary in a democratic society in the interests of national security or public safety, for the prevention or disorder of crime, for the protection of health or morals or for the protection of the rights and freedoms of others. The circumstances justifying curtailment of the journalist's right must be of a sufficiently vital and serious nature.

Voskuil argued that the domestic court's reasons for compelling him to disclose a source were not sufficient under the *Convention* to warrant curtailment of his rights.

In assessing the journalist's rights, the European Court found that protection of journalistic sources is one of the basic conditions for press freedom:

Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected.

The Court found that such a right could only be curtailed where it is 'justified by an overriding requirement in the public interest'.

The Court found that such overriding requirements did not exist in this case. To the contrary, the Court found that compelling disclosure could only inhibit future sources from coming forward. This would prevent the journalist from exposing impropriety by Government authorities, which is exactly the type of issue about which society should be informed.

The Court found that the interests of a democratic society did not override the interests of the journalist in maintaining the confidentiality of the source in this case.

### **Implications for the Victorian *Charter***

Under Victorian law, there is currently almost no protection for journalists who refuse to disclose the identity of sources in the witness box. A journalist must answer questions put to him or her at trial where those questions are relevant to the proceeding, even where the answers to those questions may identify a confidential source. Failure to do so amounts to contempt of court and may result in imprisonment.

Recent amendments to uniform evidence legislation allow courts to permit non-disclosure if satisfied that the potential harm to a confidential source outweighs the desirability of the evidence being given. However, this is unlikely to provide any real protection where the identity of the source is important evidence in the case.

Does the *Voskuil* case indicate that the *Charter* will result in greater protection for journalists in Victoria? Possibly, but perhaps not to the extent that it does in Europe.

While s 15 of the Victorian *Charter* enshrines the right freedom of expression in similar terms to art 10 of the *European Convention*, there is no Victorian equivalent to 'Recommendation R(2000) 7 on the right of journalists not to disclose their sources of information provision'. Accordingly, the principles articulated in this important instrument would need, in effect, to be read directly into s 15 of the *Charter*.

Further, freedom of expression must be balanced against the right to receive a fair trial. The European Court did not consider this issue in *Voskuil*, as it was ultimately unnecessary to do so. However, it is possible in future cases that the right of an accused to a fair trial will circumscribe the power of journalists to protect sources – particularly where the journalist's evidence is likely to have strong influence on the conviction or acquittal of the accused.

Nevertheless, the case is promising. In June 2007, two *Herald Sun* journalists were convicted of contempt of Court for failing to disclose the identity of a confidential source under examination at a criminal trial. Although they escaped jail sentences the case highlighted the lack of protection for journalists in Victoria and Australia generally.

The journalists ultimately pleaded guilty to the charges because they had no clear defence available at common law. Had the case been run with the Victorian *Charter* in force, there is every chance a defence along the lines of the *Voskuil* case would have been raised. Whether it would have been successful is another matter.

Although Victorian human rights law has not developed to the extent that it has in Europe, this case demonstrates the potential reach of the *Charter* to the protection of journalists' sources.

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