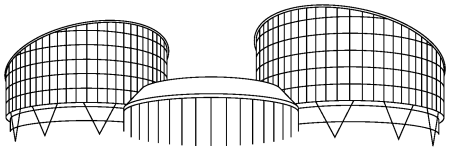

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF BRAMBILLA AND OTHERS v. ITALY

(Application no. 22567/09)

JUDGMENT
(Extracts)

STRASBOURG

23 June 2016

FINAL

23/09/2016

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Brambilla and Others v. Italy,

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

Mirjana Lazarova Trajkovska, *President*,
Guido Raimondi,
Kristina Pardalos,
Linos-Alexandre Sicilianos,
Paul Mahoney,
Aleš Pejchal,
Robert Spano, *judges*,
and Abel Campos, *Section Registrar*,

Having deliberated in private on 31 May 2016,

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

PROCEDURE

1. The case originated in an application (no. 22567/09) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Italian nationals, Mr C. Brambilla, Mr D. De Salvo and Mr F. Alfano ("the applicants"), on 21 April 2009.

2. The applicants were represented by Mr C. Melzi D'Eril and Mr G.E. Vigevani, lawyers practising in Milan. The Italian Government ("the Government") were represented by their Agent, Ms E. Spatafora, and their co-Agent, Ms P. Accardo.

3. The applicants alleged that the measures taken against them, namely the search of their vehicle and their editorial office, the seizure of their radio equipment and their conviction, had constituted disproportionate interference with their freedom of expression under Article 10 of the Convention, particularly in view of the fact that they had been acting in their professional capacity as journalists.

4. On 7 November 2010 the Government were given notice of the application.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1954, 1976 and 1971 respectively and live in Lecco.

6. The first applicant is the editor of a local online newspaper in the province of Lecco. The other two applicants are journalists working for the newspaper.

7. In the course of their activities, the applicants used radio equipment to access frequencies used by the police or the *carabinieri*. This enabled them to learn of any communications transmitted in that way, so that they could arrive quickly on the scene when wishing to report on specific incidents.

8. On 1 August 2002 the applicants listened in on a conversation during which the Merate *carabinieri* operations centre decided to send a patrol to a location where, according to anonymous sources, weapons had been stored illegally.

9. The *carabinieri* accordingly went to the location mentioned, and the second and third applicants arrived on the scene immediately afterwards.

10. Having obtained a search warrant, the *carabinieri* searched the applicants' car, finding two frequency-modulation transmitter/receivers that were capable of intercepting police radio communications.

11. The *carabinieri* then went to the two journalists' editorial office and seized two fixed radio receivers, which were tuned to the frequencies used by the *carabinieri*. Other frequencies used by police operations centres were stored in the devices' memory.

A. The criminal proceedings against the applicants at first instance

12. Criminal proceedings were instituted against the first and second applicants for illegally installing equipment designed to intercept communications between law-enforcement agencies' operations centres and patrols (Articles 617, 617 *bis* and 623 *bis* of the Criminal Code). The third applicant was charged with accessing the aforementioned communications (Articles 617 and 623 *bis* of the Criminal Code).

13. On 9 November 2004 the Lecco District Court acquitted the applicants. It held that the relevant Articles of the Criminal Code were to be interpreted in the light of Article 15 of the Constitution, which only protected communications of a confidential nature.

14. The District Court observed that the radio device used by the law-enforcement agencies was unable to ensure the confidentiality of the information it transmitted. Accordingly, the interception of the communications in question did not constitute an offence. Moreover, the possession and use of radio receivers were not prohibited as such.

B. Proceedings on appeal

15. The Milan principal public prosecutor and the Lecco public prosecutor appealed. They argued that the Lecco District Court's interpretation was inconsistent with the Court of Cassation's case-law in such

matters (citing in particular judgment no. 12655 of 23 January 2001) and that the communications in issue were clearly confidential, bearing in mind the aims of ensuring public safety and protecting public order. In addition, the communications concerned the initial investigations following the commission of an offence. They were therefore subject to a confidentiality requirement pursuant to Article 329 of the Code of Criminal Procedure.

16. The confidential nature of the communications was also obvious from the fact that the *carabinieri* used coded language for communications concerning the location and the type of intervention, clearly seeking to ensure that no third parties had knowledge of the information being exchanged. In addition, the radiofrequencies involved had been exclusively assigned to operations centres by the Ministry of Defence.

17. Furthermore, in order to listen in on the conversations, the applicants had had to purchase special radio equipment, as ordinary equipment could not be used for this purpose. On the other hand, the fact that such devices were freely available on the market did not justify their use for intercepting conversations between law-enforcement officers.

18. In addition, in accordance with Presidential Decree no. 447/2001, as in force at the material time, devices of this kind were intended to be purchased by amateur radio operators but could not be used to intercept police radiofrequencies. Lastly, the Ministry of Communications' decree of 11 February 2003 had expressly prohibited amateur radio operators from intercepting communications which they were not entitled to receive.

C. Judgment of the Milan Court of Appeal

19. In a judgment of 15 May 2007 the Milan Court of Appeal found the first and second applicants guilty and sentenced them to one year and three months' imprisonment. The third applicant was sentenced to six months' imprisonment. The Court of Appeal suspended the applicants' sentences.

20. It observed that Article 623 *bis* of the Criminal Code, as amended by Law no. 547 of 23 November 1993, had extended the scope of criminal responsibility to cover all remote data transmission, thus including the interception of conversations between the law-enforcement agencies' operations centres and patrols.

21. Such communications were, moreover, clearly confidential. Reiterating all the arguments put forward by the Milan and Lecco public prosecutors, particularly regarding the aims of ensuring public safety and protecting public order, the Court of Appeal held that Article 329 of the Code of Criminal Procedure was also at issue in the present case.

D. Proceedings in the Court of Cassation

22. The applicants appealed to the Court of Cassation. They contended that the communications in question had been transmitted on unencrypted frequencies and thus could not be treated as confidential. Furthermore, they had been acting in a professional capacity as journalists, and their actions were therefore justified under Article 51 of the Criminal Code and in terms of freedom of the press.

23. In a judgment of 28 October 2008 the Court of Cassation found against the applicants, upholding the Court of Appeal's position as to the confidential nature of the communications and reiterating that this interpretation was consistent with its own approach in similar cases, particularly in judgments no. 25488 of 6 May 2004 and no. 5299 of 15 January 2008.

24. Addressing the applicants' argument concerning freedom of the press, the Court of Cassation stated that the right to impart information, which they had relied on, might have prevailed over the public interests protected by criminal law in a case of alleged defamation. However, that right could not take precedence in a case concerning the illegal interception of communications between law-enforcement officers.

...

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

32. Relying on Article 10 of the Convention, the applicants complained about the search of their vehicle and their editorial office, the seizure of their radio equipment and their conviction. They submitted that these measures had constituted disproportionate interference with their freedom of expression, particularly in relation to their access to information as journalists. This Article 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 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, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

...

B. Merits

1. The parties' submissions

47. The applicants submitted that the measures taken against them had not been proportionate to the aims referred to by the respondent Government and that the right to impart information should prevail in their case. They further contended that the custodial sentences imposed on them had been excessive.

48. The Government observed that, even assuming that there had been interference with the right relied on by the applicants, it had pursued legitimate aims, namely the protection of national security and public safety and the prevention of disorder and crime, and had been proportionate to those aims.

2. The Court's assessment

(a) Whether there has been an interference "prescribed by law" and the legitimate aims pursued

49. The Court reiterates its doubts as to whether there was an interference with the applicants' freedom of expression in the present case. Even assuming that Article 10 was applicable, it observes that the search and seizure operation and the custodial sentences imposed on the applicants were prescribed by law, namely by Article 247 of the Code of Criminal Procedure and Articles 253, 617, 617 *bis* and 623 *bis* of the Criminal Code.

50. The Court considers that the measures in question pursued legitimate aims for the purposes of Article 10 § 2 of the Convention, in particular the protection of the rights of others and, concerning more specifically the interception of police communications, the protection of national security and the prevention of disorder and crime.

(b) Whether the measures taken against the applicants were necessary in a democratic society

(i) General principles

51. The general principles concerning the necessity of an interference with freedom of expression were summarised in *Pentikäinen* [*v. Finland* [GC], no. 11882/10, §§ 87-91, ECHR 2015].

52. In that judgment the Court reiterated that the protection afforded by Article 10 of the Convention to journalists was subject to the proviso that they acted in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism (see, *mutatis mutandis*, Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 65, ECHR 1999-III; *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-

I; *Kasabova v. Bulgaria*, no. 22385/03, §§ 61 and 63-68, 19 April 2011; and *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*, nos. 3002/03 and 23676/03, § 42, ECHR 2009).

53. Furthermore, the concept of responsible journalism is not confined to the contents of information which is collected and/or disseminated by journalistic means. It also embraces, *inter alia*, the lawfulness of journalists' conduct, including their public interaction with the authorities when exercising journalistic functions (see *Pentikäinen*, cited above, § 90).

54. It should also be reiterated that "notwithstanding the vital role played by the media in a democratic society, journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that, as journalists, Article 10 affords them a cast-iron defence (see, among other authorities, *mutatis mutandis*, *Stoll* [*v. Switzerland* [GC], no. 69698/01, § 102, ECHR 2007-V]; Bladet Tromsø *and Stensaas*, cited above, § 65; and *Monnat v. Switzerland*, no. 73604/01, § 66, ECHR 2006-X). In other words, a journalist cannot claim an exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising the right to freedom of expression, the offence in question was committed during the performance of his or her journalistic functions" (see *Pentikäinen*, cited above, § 91).

55. Furthermore, all persons, including journalists, who exercise their freedom of expression undertake "duties and responsibilities", the scope of which depends on their situation and the technical means they use (see, for example, *Handyside v. the United Kingdom*, 7 December 1976, § 49 *in fine*, Series A no. 24). Thus, notwithstanding the vital role played by the press in a democratic society, journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection. Paragraph 2 of Article 10 does not, moreover, guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern (see *Stoll*, cited above, § 102, and *Pentikäinen*, cited above, § 110).

56. Lastly, the Court reiterates that in assessing the necessity of a specific interference with the exercise of freedom of expression, it has regard to several criteria, namely the assessment of the competing interests, the applicants' conduct, the review carried out by the domestic courts and the proportionality of the penalty imposed (see *Stoll*, cited above, § 153; *Pentikäinen*, cited above, §§ 112-13; and *Boris Erdtmann v. Germany* (dec.), no. 56328/10, 5 January 2016).

(ii) Application of these principles in the present case

57. It should be noted at the outset that, unlike other cases where journalists have applied to the Court under Article 10 of the Convention (including, among many other examples, *Stoll*, cited above), the present case does not concern the prohibition of a publication but the taking of measures

against journalists for actions that, according to the Italian legal system, contravened criminal law.

58. In order to assess the necessity of these measures, the Court observes that the interests to be weighed up in the present case are, firstly, the public interest in the proper functioning of the law-enforcement agencies, and secondly, the interest of readers in receiving information.

59. Although both these interests may be regarded as public in nature (see, *mutatis mutandis*, *Stoll*, cited above, §§ 115-16), it should nevertheless be pointed out that the public interest in knowing about local news items cannot carry the same weight as the public interest in obtaining information about a matter of general and historical concern or of considerable media interest, subjects which the Court has already had occasion to examine.

60. In this connection, it notes that the *Stoll* case (cited above) concerned the dissemination of information about the compensation due to Holocaust victims for unclaimed assets deposited in Swiss bank accounts. The *Pentikäinen* case (cited above) concerned the dissemination of information about a demonstration taking place on an exceptional scale in national terms in protest against an Asia-Europe meeting.

61. In the present case, the Court observes that the applicants were not prohibited from bringing news items to the public's attention. Their conviction was based solely on the possession and use of radio equipment in order to obtain relevant information more rapidly by intercepting police communications, which were confidential under domestic law. The limits of the prohibition are an important consideration in the assessment of its proportionality.

62. In this context, the Court considers that the decisions of the Milan Court of Appeal and the Court of Cassation to the effect that communications between law-enforcement officers were confidential and that the applicants' actions were therefore to be classified as criminal conduct, were properly reasoned. The decisions, relying on settled case-law of the Court of Cassation, accorded substantial weight to the protection of national security and the prevention of disorder and crime.

63. The Court further notes that, as it has previously held (see *Stoll*, cited above, § 153, and *Pentikäinen*, cited above, §§ 112-13), the severity of the penalty imposed on the applicants is also a factor to be taken into consideration in assessing the proportionality of the interference complained of. In the present case, the penalty consisted of custodial sentences of one year and three months for the first two applicants and six months for the third, together with the seizure of their radio equipment.

64. The Court reiterates that the concept of responsible journalism requires that whenever a journalist's conduct flouts the duty to abide by ordinary criminal law, the journalist has to be aware that he or she is liable to face legal sanctions, including of a criminal character (see *Pentikäinen*, cited above, § 110).

65. In the present case, while seeking to obtain information for publication in a local newspaper, the applicants acted in a manner that, according to domestic law and the settled approach of the Court of Cassation, contravened criminal law, which lays down a general prohibition on a person's interception of any conversations not intended for him or her, including those between law-enforcement officers. The applicants' actions, moreover, involved a technique which they used routinely in the course of their activities as journalists (see paragraph 7 above).

66. Lastly, the Court notes that in its judgment of 15 May 2007 the Milan Court of Appeal suspended the applicants' sentences and that there is no evidence in the case file to show that they served them. Accordingly, the penalties imposed on the applicants do not appear disproportionate.

67. The courts made an appropriate distinction between the applicants' duty to abide by domestic law and their pursuit of their activities as journalists, which was not otherwise restricted.

68. Having regard to the above factors, the Court concludes that there has been no violation of Article 10 of the Convention in the present case.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

...

2. *Holds* that there has been no violation of Article 10 of the Convention.

Done in French, and notified in writing on 23 June 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos Registrar	Mirjana Lazarova Trajkovska President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Spano is annexed to this judgment.

M.L.T.
A.C.

CONCURRING OPINION OF JUDGE SPANO

I

1. The applicants, the director of a local news portal and two of its journalists, were convicted of illegally accessing radio channels used by the police during the latter's activities, as the information so obtained by the journalists was considered confidential under the Italian Criminal Code. The Court finds no violation of Article 10 of the Convention. I concur in the judgment. However, I am writing separately as I consider the reasoning adopted by the Court to be somewhat too broad in substance.

2. Investigative journalism is an important feature of democratic societies. As history has demonstrated, responsible journalism can, if pursued effectively, uncover information of great value for the public interest and thus promote and strengthen the fundamental democratic values of accountability and transparency. As the Court has previously held, the concept of responsible journalism, as a professional activity which enjoys the protection of Article 10 of the Convention, is not confined to the content of information which is collected and/or disseminated by journalistic means. That concept also embraces, *inter alia*, the lawfulness of the conduct of a journalist, including his or her public interaction with the authorities when exercising journalistic functions. Importantly, the mere fact that a journalist has breached the law in his or her journalistic activity is a highly relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly.

3. As the Court held in its Grand Chamber judgment *in Stoll v. Switzerland* ([GC], no. 69698/01, § 102, ECHR 2007-V), although it may be undisputed that a journalist has violated the criminal law – for example, as in *Stoll*, by publishing information that was confidential – the mere fact that a journalist has acted in breach of a criminal-law provision is not the end of the matter for the purposes of the necessity and proportionality assessment which must be carried out under Article 10 § 2 of the Convention. Otherwise, Contracting States would be free to subject journalists to criminal sanctions whenever they came close to uncovering activities that cast those in power in an unfavourable light, and would thereby subvert the vital role of the press in the functioning of a democratic society.

4. But it is clear that journalists cannot claim exclusive immunity from criminal liability for the sole reason that, unlike other individuals exercising the right to freedom of expression, they committed the offence in question during the performance of their journalistic functions. All persons, including journalists, who exercise their freedom of expression undertake "duties and responsibilities", the scope of which depends on their situation and the technical means they use (see *Pentikäinen v. Finland* [GC], no. 11882/10, §§ 90-91, ECHR 2015, and *Stoll*, cited above, § 102).

II

5. The applicants complain that the seizure of their vehicle and radio equipment, and their subsequent conviction, constituted a disproportionate interference with their freedom of expression within the context of their attempts to access information as journalists.

6. The Court begins its inquiry by leaving open the question whether the applicants suffered an interference within the meaning of Article 10 § 1 of the Convention, as the Court finds, in any event, that even assuming that such an interference occurred, it was justified on the facts (see paragraph 45 of the [French version of the] judgment). This may be a prudent course of action as it can be difficult to determine whether pre-publication activity, as part of investigative journalism, is *conduct* which in itself triggers the protections of Article 10 of the Convention. However, on the particular facts of this case, I would have been comfortable in finding that Article 10 was indeed applicable and that an interference occurred. Here, I consider, differently from my colleagues (see paragraph 43 of the [French version of the] judgment), that such a finding would have been logically consistent with the recent findings of the Grand Chamber in *Pentikäinen*, cited above, § 83, where the Court considered that the applicant, in the "exercise of his journalistic functions had been adversely affected as he was present at the scene as a newspaper photographer in order to report on the events" when he was apprehended by the police, detained for 18 hours and later charged and found guilty by the domestic courts of the crime of disobeying the police.

7. I agree with the findings of the Court on the issues of lawfulness and whether the interference pursued a legitimate aim (see paragraphs 49-50 of the judgment). At paragraph 56 the Court then correctly refers to the following *Stoll* criteria as the framework for the analysis of the facts (see my dissenting opinion in *Pentikäinen*, cited above, § 6): the interests at stake, the review of the measure by the domestic courts, the conduct of the applicant and whether the penalty imposed was proportionate (see *Stoll*, cited above, § 112). However, it is in the application of these criteria to the facts of the case that I find the reasoning problematic and overly broad in scope. I would have applied a narrower, more fact-sensitive analysis in the following manner.

8. Firstly, although I agree that the facts do not disclose the same kind of public interests as those at stake in *Stoll* or *Pentikäinen*, the assessment should not have been limited to stating in abstract terms that the interest in the present case was limited to the public's right to be informed of trivial items of a general nature on a local news portal (see paragraph 59 of the judgment). The public-interest inquiry should rather have been directed more intensely at the *nature* of the confidential information that the journalists were actually seeking to obtain so as to be able to inform the public. Indeed, and very importantly, there are situations where journalists may be justified under Article 10 of the Convention in deciding to pursue aggressive investigatory strategies in their work, even accessing confidential information, if the public

interest in disseminating the information in question is strong, for example in the case of efforts to uncover corruption or illegal activities by government officials or elected representatives. Also, the fact that the newspaper is published for the benefit of a local community is irrelevant in my view, also considering that the content of the news portal in question was published online.

9. Having said that, even analysing the case through this narrower, more fact-sensitive prism, it nonetheless transpires that the nature of the information obtained by the applicants was not paramount from the perspective of the public interest. The applicants accessed the police radio channel and used the information so obtained in order to be present at the scene of an everyday law-enforcement operation. The applicants have to bear the burden under Article 10 § 2 of the Convention for having resorted to illegal means in obtaining confidential information without their actions being justified by the existence of a strong public interest.

10. The second issue I find problematic relates to the fact that the Court considers correctly that the Italian courts applied a rule of domestic criminal law which proscribes in a general manner the interception of confidential conversations, including police communications (see paragraph 65 of the judgment). In other words, the domestic courts did not engage in a balancing of the conflicting interests at stake as is normally required in Article 10 cases of this nature under the second of the *Stoll* criteria, which concerns the review of the measure by the domestic courts. In my view, the Court should have recognised this problematic nature of the domestic courts' review, having already rejected the Government's non-exhaustion of domestic remedies argument that the applicants had not invoked their right to freedom of expression at domestic level (see paragraph 40 of the [French version of the] judgment).

11. However, taking account of the applicants' complaint viewed as a whole on the basis of the *Stoll* criteria, and in particular the relatively little weight that can be attached to the public interest at stake when balanced against the applicants' criminal behaviour in obtaining the information in question, I concur in the judgment.