

Media & Entertainment - Switzerland

Denial of protection of journalist's source

Contributed by **Pestalozzi Attorneys at Law**

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Criminal proceedings

Public interest

European Court of Human Rights

On October 9 2012 journalist X published an article entitled "Visit at a drug dealer's home" in the newspaper *Basler Zeitung*. The journalist visited the flat of 'Roland', a drug dealer in Basel and provided an insight into his work. Roland explained that he had been dealing soft drugs, such as marijuana and hashish, for 10 years and made an annual profit of approximately Sfr12,000.

Criminal proceedings

Roland was hitherto unknown to the police, but based on the newspaper article the Basel state attorney office initiated criminal proceedings against unknown individuals due to qualified infringement of the Federal Statute on Narcotics and called X as a witness. X was asked to inform the state attorney of Roland's true identity. X refused to supply a witness statement based on the protection of a journalist's source.

The state attorney office denied such protection in the matter and ordered X to provide a witness statement. On appeal, the Basel Court of Appeal rejected the state attorney office's decision. The state attorney office then filed a complaint with the Federal Court.

Public interest

The protection of a journalist's source is an important element of the freedom of the press (Articles 17 (1) and (3) of the Constitution).

Article 28a of the Criminal Code and Article 172 of the Criminal Procedure Code detail and limit the protection of a journalist's source. Protection does not apply if:

- the witness statement is necessary to save an individual who is in immediate life-threatening danger; or
- a qualified crime pursuant to a catalogue contained in the provisions cannot be solved without the witness statement.

However, the interest in solving such a qualified crime must prevail over the protection of a journalist's source. Trade in soft drugs with a profit of over Sfr10,000 is a qualified crime.

If a journalist's witness statement is the only evidence which can successfully identify a criminal who has committed an alleged qualified crime, there must be substantial public interest in the publication of the article to warrant protection of the journalist's source.

The court held that the crime could not be solved without X's witness statement. There was no other evidence that would allow Roland to be identified. The court admitted that the crime attributed to Roland was not that serious when compared with the other crimes mentioned in the catalogue. However, it held that the newspaper article demonstrated that Roland was not just a small-time Basel drug dealer; in the article Roland mentioned that he was part of a bigger organisation.

Pursuant to the Federal Court, an overriding interest in publication of the article would exist, for example, if the journalist discovered evidence of serious misbehaviour in politics, the economy or public administration through the drug dealer's statements. The court ruled that out in this case. It held that the article simply described the drug dealing structure in Basel and provided Roland with a platform to promote his drug sales as a harmless second job.

However, the court explicitly mentioned that the protection of a journalist's source was upheld in a previous case of an alleged qualified crime because the article revealed misconduct in a public hospital. Further, it held that the protection of X's source would have been upheld if the drugs sales had not qualified as serious (ie, if the sales profits had been below Sfr10,000).

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European Court of Human Rights

Basler Zeitung has appealed the Federal Court decision to the European Court of Human Rights. The proceeding is pending.

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