
Het arrest van 25 maart 2008 was de afsluiting van een beklagprocedure in de zin van artikel 52a en gezag van het Wetboek van Strafvoorziening. De journalisten Joost de Haas en Bart Mos bezaten documenten van de Algemene Inlichtingen- en Veiligheidsdienst (AIVD) en/of zijn voorganger de Binnenlandse Veiligheidsdienst. De stukken waren ontvangen van een bron aan wie de journalisten toen toegewezen zijn of haar identiteit niet te zullen onthullen. In een artikel op de voorpagina van De Telegraaf van 21 januari 2006 gaven zij een weergave van de inhoud. Uit de stukken zou blijken dat de AIVD onderzoek deed naar de crimineel Mink K., omdat deze ervan verdacht werd ambtenaren om te kopen, grote voorraad wapens te bezitten en zaken te doen met terroristische organisaties. Gesteld werd dat deze geheime documenten ciruleren in het Amsterdams criminele circuit. Vlak voor de publicatie gaf De Telegraaf kopieën van de documenten aan de AIVD.

Dat was voor de overheid niet genoeg. De AIVD deed aangifte van de strafbare feiten om beheer in de artikelen 98 en 98c Sr (scheiding en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie vorderde op grond van artikel 96a Sv bare feiten omschreven in de artikelen 98 en 98c Sr (schending en bezit van een staatsgeheim) en het Openbaar Ministerie.
Referring to the Court’s case-law, in particular Weber and Saravia v. Germany [GC], no. 54934/00, ECHR 2006-XI, the Government stated that the situations which might attract the use of the AIVD’s special powers were set out in section 6 of the 2002 Intelligence and Security Services Act. Moreover, the AIVD published annual reports in which it identified the areas on which it had focused in the past year and the areas on which it would focus in the future year. The duty to publish an annual report had been expressly included in the legislation precisely to enhance the transparency of the AIVD’s use of its powers. The nature of the “offences” which might give rise to the interference in question was thus as foreseeable as it could be. The Government asked the Court to bear in mind that the expression “offence” in the context of such matters had such a connotation different from its primary meaning derived from criminal law.

Even so, situations were bound to occur which were not foreseeable, but in which action by the AIVD was clearly necessary in view of its task and the interests it served. The present case was one such.

Safeguards were in place. As the Supervisory Board had established, the use of special powers had not continued any longer than was permissible in the light of the applicable provisions. The processing – examination, use and storage – of data subject to the statutory requirements set out in section 12 of the 2002 Intelligence and Security Services Act. Shortcomings identified by the Supervisory Board had been addressed and the data wrongly recorded had been removed and destroyed (see paragraph 43 above).

The requirements set out in section 38 of the 2002 Intelligence and Security Services Act governed the transmission of information to the Public Prosecution Service. As was reflected in the Minister’s letter of 6 December 2006 to the applicants’ counsel (see paragraph 43 above), these had been complied with.

A monitoring and control system was in place, consisting of the following bodies:

(a) the Upper and Lower Houses of Parliament, and insofar as the covert operations of the intelligence and security services are concerned, the Committee on the Intelligence and Security Services of the Lower House;

(b) the Court of Audit and – in the case of the secret budget items of the intelligence and security services – the president of the Court of Audit personally;

(c) the National Ombudsman;

(d) the administrative courts in the case of decisions subject to judicial review, such as requests for access to data;

(e) the civil courts where an intelligence or security service has committed an unlawful act in respect of a person or organisation;

(f) the National Security Board, whose identity the newspaper publications did not reveal; nor had the AIVD’s operating procedures been divulged. At all events, the information itself contained in the documents had all been in the hands of criminals for a long time already.

3. The Court’s assessment

(a) Interference

The applicant and respondent parties agree that there has been an “interference” with the rights of the second and third applicants under Articles 8 and 10 of the Convention, but disagree on its precise nature.

84. The Government dispute the applicants’ position that the protection of journalistic sources is in issue. They argue that the AIVD resorted to the use of special powers not to establish the identity of the applicants’ journalistic sources of information, but solely to identify the AIVD staff member who had leaked the documents.

The Court notes that the applicants did not themselves consider it necessary to identify the person person who had leaked the secret classified information. From the applicants’ standpoint, it was the AIVD’s interest in discovering and then closing the leak of secret information from within its own ranks. However, that is not decisive (see Sanoma Uitgevers B.V. v. the Netherlands [GC], no. 58244/03, § 66, 14 September 2010). The Court’s understanding of the concept of “journalistic source” is “any person who provides information to a journalist”; it understands “information identifying a source” to include, as far as they are likely to lead to the identification of a source, both “the factual circumstances of acquiring information from a source by a journalist” and “the unpublished content of the information provided by a source to a journalist” (see Recommendation No. R(2000) 7 on the right of journalists not to disclose their sources of information (quoted in paragraph 61 above); compare also Sanoma, §§ 65-66, and Weber and Saravia, §§ 144-45).

87. As in Roemen and Schmit v. Luxembourg, no. 51772/99, § 52, ECHR 2003-IV; Ernst and Others v. Belgium, no. 33406/96, § 100, 15 July 2003; Tillack v. Belgium, no. 20477/05, §§ 64, 27 November 2007; and Sanoma, loc. cit., the Court must therefore find that the AIVD sought, by the use of its special powers, to circumvent the protection of a journalistic source (compare and contrast Weber and Saravia, cited above, § 151).

88. Although questions raised by surveillance measures are usually considered under Article 8 alone, in the present case they are interwoven with the Article 10 issue that the Court finds it appropriate to consider the matter under Articles 8 and 10 concurrently.

(b) “In accordance with the law” (prescribed by law)

89. The Court must now decide whether the interference was “in accordance with the law” (Article 8) or “prescribed by law” (Article
90. The Court reiterates its case-law according to which the expression “in accordance with the law” not only requires the impugned measure to have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects. The law must be compatible with the rule of law, which means that it must provide a measure of legal protection against arbitrary interference by public authorities as well as against breaches of the rights safeguarded by Article 8 (§ 1 and Article 10 § 1. Especially where, as here, a power of the executive is exercised in secret, the risks of arbitrariness are evident. Since the implementation in practice of measures of secret surveillance is not open to scrutiny by the individual concerned or the public at large, it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference (see Weber and Saravia, cited above, §§ 93-95 and 145; Segerstedt-Wiberg and Others v. Sweden, no. 62332/00, § 76, ECHR 2006-VII; Liberty and Others v. the United Kingdom, no. 38243/00, §§ 62-63; July 2008; Kennedy v. the United Kingdom, no. 62895/09, § 152, 14 October 2010).

91. There is no suggestion that the law was not accessible.

92. The letters which the Minister of the Interior and Kingdom Relations sent on 6 December 2006 to the lower House of Parliament (paragraph 41 above) and to the applicants’ counsel (paragraph 43 above) were not covered by a statutory basis. However, the applicants was considered lawful for the purposes of section 6(2)(a) of the 2002 Intelligence and Security Services Act. The Supreme Court’s judgment (§ 3-5.3, see paragraph 33 above) is based on the same view, as is also the judgment (§ 3.5.3, see paragraph 33 above) of the Court of Appeal. The Court therefore finds that the statutory basis for the interference in question was section 6(2)(a) of the 2002 Intelligence and Security Services Act.

93. The possibility that the applicants might be placed under surveillance was not predictable in the sense that their situation corresponded to the categories of persons targeted by section 6(2)(a) of the 2002 Intelligence and Security Services Act. The use of special powers against journalists was in issue (see Segerstedt-Wiberg and Others v. Sweden, no. 62332/00, § 76, ECHR 2006-VII; Liberty and Others v. the United Kingdom, no. 38243/00, §§ 62-63; July 2008; Kennedy v. the United Kingdom, no. 62895/09, § 152, 14 October 2010).

94. As to the available safeguards, the applicants do not allege that the array of supervisory and monitoring procedures described by the Government (see paragraph 73 above) is in itself insufficient. The second applicant conceded that the safeguards were not sufficient in itself insufficient. Nevertheless, even though the second and third applicants may resent the suggestion that their actions constituted a threat to the Netherlands democratic legal order, they could not reasonably be unaware that the information which had fallen into their hands was authentic classified information that was likely to provoke action aimed at discovering its provenance. On its own reading of section 6(2)(a) and (c) of the 2002 Intelligence and Security Services Act, the Court is prepared to accept that the interference complained of was, in that sense, foreseeable, § 96(1).

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96. In Weber and Saravia, the interference with the applicants’ rights under Articles 8 and 10 consisted of the interception of telephone communications in order to identify and avert dangers in advance, or “strategic monitoring” as it is also called. The first applicant in that case being a journalist, the Court found that her right to protect her journalistic sources was in issue (loc. cit., §§ 144-45). However, the aim of strategic monitoring was not to identify journalists’ sources. Generally speaking, authorities would have no need to have unlawfully been removed from the keeping of the AIVD and that publishing it was likely to provoke action aimed at discovering its provenance. On its own reading of section 6(2)(a) and (c) of the 2002 Intelligence and Security Services Act, the Court is prepared to accept that the interference complained of was, in that sense, foreseeable, § 96(1).

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98. The Court has indicated, when reviewing legislation governing secret surveillance in the light of Article 8, that in a field where there is potentially so easy a basis in law as advice on how to protect the confidentiality of journalistic sources as a whole, it is in principle desirable to entrust supervisory control to a judge (see Klass and Others v. Germany, 6 September 1978, § 56, Series A no. 28, and Kennedy, cited above, § 167). However, in both cases the Court was prepared to accept as adequate the independent supervision available. In Klass and Others, this included a practice of seeking prior consent to surveillance measures of the G10 Commission, an independent body chaired by a president who was qualified to hold judicial office and which moreover had the power to order the immediate termination of the measures in question (see Klass and Others, §§ 31 and 51; see also Weber and Saravia, §§ 25 and 117). In Kennedy (loc. cit.) the Court was impressed by the interplay between the Investigatory Powers Tribunal (“IPT”), an independent body composed of persons who held high judicial office and experienced lawyers who had the power, among other things, to quash interception orders, and the Interception of Communications Commissioner, likewise a functionary who held or had held high judicial office (Kennedy, § 57) and who had access to all interception warrants and applications for interception warrants (Kennedy, § 56).

99. In contrast, in Sanoma, an order involving the disclosure of journalistic sources was given by a public prosecutor. The Court dismissed as inadequate in terms of Article 10 the involvement of an investigating judge, since his intervention, conceded voluntarily by the public prosecutor, lacked the necessary degree of judicial impregnable. Judicial review post factum could not cure these failings, since it could not prevent the disclosure of the identity of the journalistic sources from the moment when this information came into the hands of the public prosecutor and the police (loc. cit., §§ 96-99).

100. Moreover, review post factum, whether by the Supervisory Board, a parliamentary committee, the Intelligence and Security Services of the Lower House of Parliament or the National Ombudsman, cannot restore the confidentiality of journalistic sources once it is destroyed. The Court thus finds that the law did not provide safeguards appropriate to the use of powers of surveillance against journalists with respect to their journalistic sources. There has therefore been a violation of Articles 8 and 10 of the Convention.

B. The order to surrender the documents

101. The applicants argued that the order to surrender the originals, ostensibly for the purpose of restoring the documents to the AIVD, had in fact been intended to make possible the positive identification of the journalistic source. The applicants alleged a violation of their freedom of expression, as purveyors of news, to impart information as guaranteed by Article 10 of the Convention.

102. The Government denied that there had been any such violation.

1. Admissibility

103. The Court considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3(a) of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

2. Argument before the Court

(a) Government

104. Under the heading of “duties and responsibilities”, the Government raised two points.

105. Firstly, the Government considered the present case different in essential respects from Voikuli v. the Netherlands, no. 64752/04, 22 November 2007. The Article 8, wereopposite of the surrender order had not been to identify the applicants’ journalistic sources, nor even the leak from within the AIVD – who was identifiable simply by studying the content of the information unlawfully leaked – but to withdraw the documents from public circulation. It was moreover found that the applicants had not returned all of the documents. It is therefore not possible to apply the same reasoning as in Weber and Saravia.
108. Secondly, the Government submitted that although the fact itself that secret classified documents had fallen into the hands of the criminal classes was a matter of public interest and therefore newsworthy, the applicants had gone beyond what was necessary in publishing information which they contained. Details published had included the code names of two informants and contextual information capable of identifying them, which had compromised both their safety and that of their families and others in their immediate circle of acquaintance) and national security.

109. The surrender order undoubtedly constituted an “interference”.

110. The interference had been “prescribed by law”. The crucial difference between the present case and Sanoma was that the lawfulness of the surrender order was assessed by a court by virtue of its statutory power before the documents were handed over for inspection. As regards the procedural safeguards available, the Court so finds (see paragraph 20 above).

111. The “legitimate aims” pursued by the interference had been “national security” and “the prevention of crime”.

112. Finally, the interference had been “necessary in a democratic society” for the furtherance of these aims. As stated above, it was necessary to ensure that all the documents should be returned to the AIVD. It was also important to investigate whether it was possible to determine if there had been access to the documents and if so, by whom (other than the second and third applicants and H., but by then already a suspect). Again as already mentioned, the safety of two informants and members of their families and their immediate circle was in jeopardy as well.

113. A surrender order had been the least intrusive measure available, and therefore to be preferred to a search of the applicants’ premises such as those carried out by the authorities in the cases of Roemen and Schmit and Ernst and Others, cited above.

114. Finally, and again as already noted, there had been an independent review by a court before the documents were passed on to the National Police Investigations Department.

(b) Applicants

115. The applicants complained that although ostensibly the primary purpose of the surrender order had been to withdraw the documents from public circulation, in fact the intention had been to subject them to technical examination and identify the applicants’ source. This pointed to a failure on the public prosecutor’s admission (see paragraph 22 above) and that of the Government that the identity of the AIVD official who leaked the documents had already been known simply from studying the content of the documents and identifying the AIVD officials who had had access to them, and also to the judgment convicting H. for the leaks (see paragraph 37 above), which reflected the fact that the documents had actually been examined.

116. The documents obtained by the second and third applicants contained relatively old information, which moreover had already become known in criminal circles. The Government’s interest in keeping the information secret had therefore not been prejudiced by the publications in De Telegraaf, but by the leak from within the AIVD; it followed that the action taken against the applicants could have had no other purpose than to trace the path followed by the documents back to the leak.

117. Referring to the above-mentioned Sanoma judgment, they argued that orders to disclose sources might have a detrimental impact, not only on the source, but also on the newspaper itself, which would no longer be trusted by potential sources, and on the public, who had an interest in receiving information imparted through anonymous sources. In addition, they argued, referring to the same judgment, that there was no procedure attended by adequate legal safeguards for them to enable an independent assessment as to whether the interest of the criminal investigation overrides the public interest in the protection of journalistic sources.

3. The Court’s assessment

(a) Interference

118. All agree that there has been an “interference” with the first applicant’s freedom to receive and impart information. The Court so finds (see Sanoma, cited above, § 72).

119. It is not in dispute that the surrender order had a statutory basis, namely Article 96a of the Code of Criminal Procedure (see paragraph 50 above). The Court so finds (see Sanoma, cited above, § 86).

120. As regards the procedural safeguards available, the Court finds that the present case differs in essential respects from Sanoma. The documents were placed in a container by a notary and sealed, after which the container with the documents was handed over to the investigating judge to be kept in a safe under the control of the Court to determine whether the “interference” complained of corresponded to 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 are relevant and sufficient (see, among many other authorities, France [GC], nos. 33348/96, § 88, ECHR 2004-XI; Vorkui, cited above, § 63; and Ny Vest AS and Ragnabo Pensjonatsspari v. Norway, no. 21132/05, § 58, ECHR 2008 (extracts)).

121. The interference complained of was therefore “prescribed by law”.

(c) Legitimate aim

122. It is not in dispute that the aims pursued by the interference were, at the very least, “national security” and “the prevention of crime” as the Government state. The Court so finds.

(d) Necessary in a democratic society

123. The test of “necessity in a democratic society” requires the Court to determine whether the “interference” complained of corresponded to 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 are relevant and sufficient (see, among many other authorities, Campálná and Mazář v. Romania [GC], no. 33348/96, §§ 68-71, ECHR 2004-XI; Steel and Morris v. the United Kingdom, no. 68/416/01, § 87, ECHR 2006-II; Mantere v. France, no. 12679/03, § 10, ECHR 2006-XIII; and West and Stensaas v. Norway [GC], nos. 21172/02 and 36482/04, § 45, ECHR 2007-IV; Vorkui, cited above, § 63; and Guja v. Moldova [GC], no. 14277/04, § 69, ECHR 2008).

124. The Court’s task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to national legislation. The Court is to examine whether the interference complained of is reconcileable with freedom of expression as protected by Article 10 (see, among many other authorities, Campálná and Mazář v. Romania [GC], no. 33348/96, §§ 68-71, ECHR 2004-XI; Steel and Morris v. the United Kingdom, no. 68/416/01, § 87, ECHR 2006-II; Mantere v. France, no. 12679/03, § 10, ECHR 2006-XIII; and West and Stensaas v. Norway [GC], nos. 21172/02 and 36482/04, § 45, ECHR 2007-IV; Vorkui, cited above, § 63; and Guja v. Moldova [GC], no. 14277/04, § 69, ECHR 2008).

125. Since 1985 the Court has frequently made mention of the task of the press as purveyor of information and “public watchdog” (see, among many other authorities, Barthold v. Germany, 25 March 1985, § 58, Series A no. 90; Lingens v. Austria, 8 July 1986, § 44, Series A no. 103; Thorgan Thorgeirsson v. Iceland, 23 June 1992, § 63, Series A no. 239; Campálná and Mazář, cited above, § 93; Vorkui, cited above, § 64; and Financial Times Ltd. v. Belgium, 8 October 1998, § 59, 15 December 2009).

126. Under the terms of Article 10 § 2, the exercise of freedom of expression carries with it duties and responsibilities which also apply to the press. Article 10 protects a journalist’s right – and duty – to impart information on matters of public interest provided that he is acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (Frezos and Rothe v. France [GC], no. 29185/95, § 54, ECHR 1999-I; Bladder Trouns and Stensaas v. Norway [GC], no. 21810/93, § 65, ECHR 1999-III; and Financial Times Ltd. and Others, cited above, § 62).

127. Protection of journalistic sources is one of the basic conditions for press freedom, as is recognised and reflected in various international instruments including the Committee of Ministers Recommendation quoted in paragraph 61 above. Without such protection sources may be deterred from assisting the press in informing the
10 of the Convention as regards the use by the AIVD of special powers.

2. While it may be true that the public perception of the principle of non-disclosure of sources would suffer no real damage where it was overridden in circumstances where a source was clearly acting in bad faith with a harmful purpose (for example, by intentionally fabricating false information), courts should be slow to assume, in the absence of compelling evidence, that these factors are present in any particular case. In any event, given the multiple interests in play, the Court emphasises that the conduct of the source can never be decisive in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into consideration in carrying out the balancing exercise required under Article 10 § 2 (Financial Times Ltd. and Others, cited above, § 65).

129. Turning to the facts of the case, the Court notes that before the Regional Court the public prosecutor stated that the primary purpose of the surrender order was to return to them the AIVD, although in journalism, where the task is to examine the truth of the information, evidence needs to be taken. However, as the public prosecutor admitted, even without detailed technical examination of the documents the culprits could be found simply by studying the contents of the documents and identifying the officials who had had access to them (see paragraph 22 above). Hence the need to identify the AIVD official concerned cannot alone justify the surrender order.

130. Although the full contents of the documents had not come to the knowledge of the general public, it is highly likely that that information had long been circulating outside the AIVD and had come to the knowledge of persons described by the parties as criminals. Withdrawing the documents from circulation could therefore no longer prevent the information which they contained – including the code names and other information identifying AIVD informants – from falling into the wrong hands (see the Sunday Times v. the United Kingdom (no. 2), 26 November 1991, § 54, Series A no. 217; Observer and Guardian v. the United Kingdom, 26 November 1991, § 68, Series A no. 216; and Vereniging Weekblad Bluff v. the Netherlands, 9 February 1995, § 45, Series A no. 306-A).

131. There remains the need for the AIVD to check whether all the documents removed from its keeping had been withdrawn from circulation. The Court accepts that this is a legitimate concern. However, that is not sufficient to find that it constituted “an overriding requirement in the public interest” justifying the disclosure of the applicant’s journalistic source. The Court takes the view that the actual handover of the documents taken was not necessary: since – as appears from the Minister’s letter of 20 December 2006 to the Lower House (see paragraph 22 above) – these were copies not originals, visual inspection to verify that they were complete, followed by their destruction (as was in fact proposed by the first applicant, see paragraph 22 above), would have sufficed.

132. In sum, “relevant and sufficient” reasons for the interference have sufficed.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

(…)

FOR THESE REASONS, THE COURT

1. Declares unanimously the remainder of the application admissible;

2. Holds unanimously that there has been a violation of Articles 8 and 10 of the Convention as regards the use by the AIVD of special powers against the second and third applicants;

3. Holds unanimously that there has been a violation of Article 10 of the Convention as regards the order for the surrender of documents addressed to the first applicant;

4. Holds unanimously (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 60,000 (sixty thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses; (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. Dismisses unanimously the remainder of the applicants’ claim for just satisfaction.

Done in English, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 November 2012.

Marialena Tsirli
Deputy Registrar

José Casadevall
President

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

Noot

Wouter Hins


Soms hebben annotaties in Mediaforum een voorspellende waarde. Schuijt was zeer kritisch in zijn noot bij HR 25 maart 2008 inzake de inbeslagneming. ‘Niet te begrijpen’ noemde hij de redenering van de Hoge Raad. Ook Fernhout was ontevreden. De Hoge Raad had in zijn arrest van 11 juli 2008 het belangrijkste cassatiemiddel van De Telegraaf e.a. opgevat als zou dit een absoluut recht op bronbescherming bepleiten. Vervolgens werd het cassatiemiddel afgewezen, omdat artikel 10, tweede lid, EVRM wel uitzonderingen mogelijk maakt. Die uitleg van de Hoge Raad was naar de mening van Fernhout ‘erg flauw’. Het Hof is evenmin gecompliceerd die welke wijze waarop Nederland in 2008 met Fernhout het eerstgenoemde arrest maakte niet op de motion of documenten met mogelijke vingeradrukken van een vertrouwelijke bron. Het tweede arrest betrof het gebruik van bijzondere bevoegdheden door de AIVD jegens journalisten.

Belangrijk in bovenstaand arrest is de toepassing van het criterium ‘prescribed by law’ (artikel 10, tweede lid, EVRM), respectievelijk ‘in accordance with the law’ (artikel 8, tweede lid, EVRM). Op dit criterium sneuvelen de maatregelen van de AIVD. Net als in het Sanoma-arrest overwogen het Hof dat het nationale recht waarborgen moet bieden tegen ‘arbitrary interference by public authorities with the rights safeguarded by Article 8 § 1 and Article 10 § 1’ (t.o.v. 90). Het Hof legt de lat hoog, nu de AIVD het oogmerk had de vertrouwelijke bron van journalisten op te sporen. Vereist is een toetsing voor dan een onafhankelijke autoriteit, die onderzoekt of het belang van de staatsveiligheid zwaarder weegt dan het belang van journalistieke bronbescherming. Artikel 19 van de Wet op de inlichtingen- en veiligheidsdiensten (Wiv) voorziet in controle vooraf door of namens de minister van Binnenlandse Zaken en Koninkrijksrelaties, maar deze autoriteit is niet ‘onafhankelijk’. Het gebrek kan niet worden gerepareerd door de Commissie van toezicht betreffende de inlichtingen- en veiligheidsdiensten, een vaste commissie van de Tweede Kamer of de Nationale ombudsmannen, omdat deze alleen achteraf toezicht houden. Dat is te laat, want een reeds onthulde bron kan nooit meer geheim worden (t.o.v. 100 en 101).

Anders dan Sanoma?

Sedert het Sanoma-arrest van de Grote Kamer van het EHRM van 14 september 2010 is bovenstaande redenering bekend. Dat is waar-


schiervrij de reden waarom het Bureau van het Hof heeft besloten het
nieuw arrest slechts te kwalificeren als van ‘medium importance’ (level 2).
Volgens r.o. was het arrest niet meer van onmiddellijke betekenis en de
ongepaste inbmitingen tot rechtsvervinding onwenselijk. De minister van Binnenlandse Zaken
en Veiligheidszaken heeft op 7 december 2012, mede namens de minister van Veiligheid en
Justitie, een brief aan de Tweede Kamer geschreven over de gevolgen
de regering verbindt aan de recente veroordeling door het EHRM
(Kamerstukken II, 2012/13, 30 977, nr. 49). De regering legt zich neer
bij de uitspraak en zal geen verzoek indienen om intern appel bij de
Grote Kamer. Daarnaast heeft de regering besloten op twee punten te
streven naar een wetswijziging.

In de eerste plaats zal een wetsvoorstel worden voorbereid tot wijziging van de Wet op de
inlichtingen- en veiligheidsdiensten. Naar analogie van de huidige procedure voor het openen van brieven (arti-
kel 17 Wiv) kan de officier van justitie te 's-Gravenhage toestemming moeten
geven voor de inzet van bijzondere bevoegdheden jegens journalists
waarbij de inzet gericht is op het – direct of indirect – achterha-
len van journalistieke bronnen. Opmerkelijk is dat minister Plasterk
het begrip ‘journalisten’ beperker wil uitleggen dan gebeurde in het
voornemen van de Wet bronbescherming in strafzaken. In de brief
van 7 december 2012 staat:

Wie behoort bronbescherming te genieten? Een ongelimiteerde mogelijkheid
voor iedere berichtgever om voor zichzelf een verschoningsrecht te creëren
achten wij vanuit het oogpunt van de persvrijheid onnodig en mede
gelet op het belang van de nationale veiligheid en de strafvorderlijke
waarheidsvinding onwenselijk. De minister van Binnenlandse Zaken en
Koninkrijksrelaties zal daarom bij de wijziging van de Wiv 2002 deze groep
beperken tot degenen die beroepsmatig als journalist informatie verzamelen,
verspreiden of publiceren. Hopelijk zal het woord ‘beroepsmatig’ niet letterlijk worden geno-
men. Iemand die in het maatschappelijk verkeer deel uitmaakt van de functie
vervult als een journalist verdient dezelfde bescherming.

In de tweede plaats lijkt er weer schot te komen in de behandeling van
het wetsvoorstel bronbescherming in strafzaken. Na het arrest Sanoma
Nederland uit 2010 is het ontwerp-wetsvoorstel aangevoerd met een
bepaling die voorziet in rechterlijke toetsing van justitieel optreden
gegen journalisten, zo staat in de brief van 7 december 2012. Met het
vragen van een nader advies van de Raad van State is echter gewacht
totdat het Hof uitspraak zou hebben gedaan in de Telegraaf-zak. De
minister van Veiligheid en Justitie zal nu ‘op zeer korte termijn’ het
gewijzigde ontwerp aan de Raad van State voorleggen. Dat werd

Het hoed van de dissenters zou overtuigender zijn wanneer een kunstwerk
in beslag was genomen. De eigenaar heeft er dan een
belang bij het origineel terug te krijgen en niet een kopie. In dit geval
was echter slechts sprake van ambtelijke documenten, waarbij alleen
de inhoud van betekenis is. Het argument dat er geen staatsgeheimen
mogen rondslingeren bij De Telegraaf schijnt geen hout, zo de redac-
tie had aangeboden de documenten in aanwezigheid van een officier
van justitie te vernietigen. Tenslotte is relevant dat het eigendom van

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