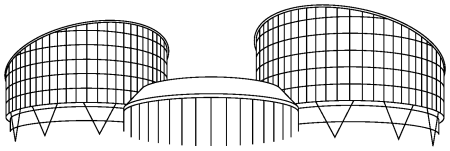

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Application no. 8406/06
STICHTING OSTADE BLADE
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 27 May 2014 as a Chamber composed of:

Alvina Gyulumyan, *President,*
Ján Šikuta,
Dragoljub Popović,
Luis López Guerra,
Johannes Silvis,
Valeriu Griţco,
Iulia Antoanella Motoc, *judges,*

and Marialena Tsirli, *Deputy Section Registrar,*

Having regard to the above application lodged on 1 March 2006,
Having regard to the decision of 5 February 2013,
Having deliberated, decides as follows:

## THE FACTS

1. The applicant, Stichting Ostade Blade (hereafter "the applicant foundation"), is a foundation (*stichting*) possessing legal personality under Netherlands law and domiciled in Amsterdam, Netherlands. It was represented before the Court by Ms T. Prakken and initially also by Mr M.J.G. Uiterwaal, lawyers practising in Amsterdam. After the Court's partial decision on admissibility of 5 February 2013 Mr A.W. Eikelboom, also a lawyer practising in Amsterdam, replaced Mr Uiterwaal. The respondent Government were represented by their Agents, Mr R.A.A. Böcker and Ms L. Egmond of the Ministry for Foreign Affairs.

## A. The circumstances of the case

2. The facts of the case, as submitted by the parties, may be summarised as follows.

### *1. The search of the magazine's premises*

3. At the relevant time, the applicant foundation was responsible for the publication of a magazine called "*Ravage*" which appeared once every two weeks.

4. Three bomb attacks took place in Arnhem in October 1995, January 1996 and April 1996 respectively.

5. On 2 May 1996 the magazine's editors issued a press release in which it announced the upcoming issue of the magazine, to be released the following day, which would include the letter of the Earth Liberation Front ("ELF") claiming responsibility for the bomb attack of 16 April 1996 ("ELF's letter"). The press release included the following:

> "ATTACK ON BASF CLAIMED IN WRITING
>
> Responsibility for the bomb attack of 16 April on the Arnhem branch of the chemical company BASF has been claimed in writing by the action group Earth Liberation Front. This is reported by the editors of the militant magazine *Ravage* in its latest issue, which was published this week.
>
> The editorial board received the press statement on 25 April, nine days after the bomb attack on BASF. The press statement, signed by the action group Earth Liberation Front (ELF), further contains a brief text. 'Arnhem. The polluter pays. Even old accounts [are settled].' (*Arnhem. De vervuiler betaalt. Ook oude rekeningen.*), as ELF states. The statement ends with the cryptic text '17 Oct. 4.5.V4.' This may be an indication that the ELF is also claiming responsibility for the bomb attack, which as it happened was unsuccessful, on the French bank Crédit Lyonnais in Arnhem on 17 October 1995. ..."

6. On 3 May 1996 a search of the magazine's premises took place following the issuance of a search warrant by the Arnhem Regional Court (*rechtbank*). The search took place under supervision of an investigating judge (*rechter-commissaris*) and was carried out in the context of criminal investigations against the perpetrators of the three bomb attacks that had occurred in Arnhem.

7. On the day of the search one of the magazine's editors, Mr K., was present. Before the start of the search, the investigating judge informed him that the judicial authorities were in search of ELF's letter. In reply, the editor stated that ELF's letter was not present on the premises. When asked, Mr K. further stated that the subscriber database was not located on the magazine's premises either. This statement later proved to be false; the subscriber database was found on the magazine's computers.

8. Following Mr K.'s statement that neither ELF's letter nor the subscriber database were on the premises, the investigating judge

announced that, since there was uncertainty about the letter's whereabouts, it was necessary that there should be a search for it as well as for possible links between the organisation that had claimed responsibility for the bomb attack and the magazine. At Mr K.'s request, the investigating judge offered him the possibility to call his lawyer.

9. When it became apparent that it would take much time to make copies of all the relevant materials, the investigating judge asked Mr K. whether he wished the copying to continue at the magazine's premises or whether he preferred the police to take the relevant materials away to continue copying somewhere else. Mr K. chose the latter. He was subsequently informed by the investigating judge that the digital files (*geautomatiseerde bestanden*) would be returned to the magazine on 6 May 1996. In relation to the other materials taken by the police it was agreed that, in so far as they were irrelevant to the investigation, they would be returned to the magazine on 9 May 1996. These agreements were confirmed in the presence of Mr K.'s lawyer, who had arrived by this time.

10. The police took four computers which included the subscriber database as well as lists of addresses, a large number of application forms of new subscribers, address wrappers, a diary (*agenda*), a telephone index (*telefoonklapper*), a typewriter, data of contact persons and other editorial materials as well as private data of the editors.

11. At the moment that the police wanted to leave the premises with the seized materials, the front door was locked. Mr K. was asked to open it but he replied that he had to look for the keys first. Thereupon, the police kicked open the door. In the meantime, people opposing the search had gathered outside the magazine's offices. As the investigating police officers were leaving the building, some of the seized materials were snatched from them by bystanders.

12. The seized computers were returned to the magazine on 6 May and 9 May 1996.

13. Also on 9 May 1996, the investigating judge informed the applicant foundation's lawyer that all of the items seized from the applicant foundation would be returned, with the exception of a typewriter ribbon. The police were planning to examine in greater depth the copies made. The investigating judge was due to make a decision on the copies on 10 June 1996. The investigating judge informed the applicant foundation's lawyer that the computer files would not be shared with third parties without his permission, and that the police and public prosecutor were aware of this. Moreover, the investigating judge promised that he would provide the lawyer with a list of all computer files. On 14 May 1996, the investigating judge responded to a letter from the lawyer, informing him that a certain file had not been copied, and that the subscriber database was not included among the seized items. The investigating judge also stated that the typewriter would be returned on 15 May 1996, with a new ribbon. The old

ribbon would be examined. The typewriter was returned on 15 May 1996. On 20 May 1996, the lawyer was provided with a list of printouts from computer files. On 14 June 1996, the investigating judge provided the lawyer with a list of all goods destroyed by the police on 6, 11 and 12 June 1996. On 18 June 1996, in a letter to the lawyer, the investigating judge stated that all the documents had been destroyed. On 26 June 1996, the investigating judge stated that the typewriter ribbon and the official report concerning information found on the typewriter ribbon had been destroyed on 20 June 1996.

14. *Ravage* published a report of the search in which the following passage appears:

> "Once inside, ... [the investigating judge] asks for the ELF claim letter. But that letter is not present on the premises. Not any more, that is. It was destroyed by the editors on the day it was received. That is the usual way of proceeding in the editorial offices of *Ravage*. Press statements and claim letters in which responsibility is claimed for particular direct action (*actie*) are always destroyed after processing. The editorial board refuses to function as an aid to judicial investigations into any direct action whatsoever. If we had kept the claim letter and handed it over to the prosecution service (*justitie*), we would have been making our work as an independent medium impossible. In that case, militant groups (*actiegroepen*) would from then on avoid us with their press statements. Where would that leave us as a militant magazine (*Waar blijf je dan als actieblad*)?"

### *2. Proceedings before the Regional Court*

#### (a) Summary injunction proceedings

15. On 25 September 1996 the Minister of Justice (*Minister van Justitie*) rejected a claim for compensation lodged by the magazine. Thereupon, the applicant foundation and Mr K. instituted summary injunction proceedings (*kort geding*). On 4 December 1996 the president of the Regional Court of The Hague considered, *inter alia*, that the State's aim to find ELF's letter had been the direct reason for the search and that neither the magazine nor its editors had been considered criminal suspects. He awarded the applicant foundation compensation to the amount of 10,000 Netherlands guilders (NLG) for its pecuniary loss (*materiële schade*). Claims for compensation regarding non-pecuniary damages (*immateriële schade*) were dismissed.

#### (b) Proceedings on the merits

16. On 15 November 1996 the applicant foundation and Mr K. brought proceedings before the Regional Court of The Hague claiming NLG 99,811.71 for pecuniary and non-pecuniary loss suffered by the applicant foundation and an amount of NLG 10,000 for non-pecuniary loss suffered by Mr K., resulting from a violation of their right to freedom of expression, their right to respect for their privacy and a violation of the

principle that the public burden should be borne equally (*égalité devant les charges publiques*, "the principle of equality").

17. On 4 February 1998 the Regional Court of The Hague dismissed the claims of the applicant foundation and Mr K. It held that there had been an overriding requirement in the public interest to search for the letter and for other indications on the magazine's premises regarding links between the magazine and the perpetrators of the bomb attacks. It went on to note that it appeared from the facts that there had been no unjustified interference with the applicant foundation's and Mr K.'s right to freedom of expression, including their right freely to receive information and the right to non-disclosure of a journalistic source, or an unjustified interference with their right to respect for their private life. The court concluded that the mere fact that the State refused to compensate for pecuniary damage suffered by the applicant foundation and Mr K. did not make the State's actions unlawful since these actions were part of the risks the recipient of such a letter took when failing to report it or hand it over to the investigating authorities.

*3. Proceedings before the Court of Appeal of The Hague*

18. On 16 April 1998 the applicant foundation and Mr K. lodged an appeal with the Court of Appeal (*gerechtshof*) of The Hague restating their complaints under Articles 8 and 10 of the Convention and arguing a violation of the principle of equality.

19. On 11 December 2003 the Court of Appeal of The Hague dismissed the appeal. Its reasoning included the following:

> "10.3 It is not contested that the search for the purpose of seizure *(huiszoeking ter inbeslagname*) on the [applicant foundation's] premises constituted an interference with the right to freedom of expression protected by Article 10 § 1 of the Convention.
>
> ...
>
> 10.7 ... the [applicant foundation] did not substantiate its allegation that the judicial authorities had the possibility to find the perpetrators of the bomb attacks by other means, thus the question whether, in the light of the importance of free access to information, it would have been up to the State to challenge this, does not need to be answered. Nor can it be said that the manner in which the search and the seizure took place had been disproportionate. The computers were, as it is not denied by [the applicant foundation and Mr K.], seized after [Mr K.], given the choice, expressed the preference that the computers be taken instead of allowing the materials on them to be copied at the editorial office (*redactie*). Regarding the other seized materials it cannot be said that on 3 May 1996 it should already have been clear to the investigating judge that their seizure was unnecessary. The court considers it understandable that it was decided to secure as much material as possible for examination at the police office.
>
> ...
>
> 10.9 In relation to the [applicant foundation's and Mr K.'s] complaint about an interference with their right to respect for their private life, the court considers that, in so far as there was such an interference, this was lawful on the grounds of Article 8 § 2 of the [Convention]. The same considerations which led the court not to find an

unlawful interference with the right to freedom of expression [§10.7], also apply in this regard."

20. The Court of Appeal further held that Mr K. had not demonstrated that he had suffered any damage as a result of the State's actions.

*4. First round of proceedings before the Supreme Court*

21. The applicant foundation and Mr K. lodged an appeal on points of law (*cassatie*) with the Supreme Court (*Hoge Raad*) complaining about the Court of Appeal's finding that the search had not violated their rights protected by Articles 8 and 10 of the Convention. They further complained that the Court of Appeal had placed the burden of proof on them instead of on the Government.

22. On 2 September 2005 the Supreme Court held that in relation to the complaint under Article 10 of the Convention the Court of Appeal had failed to place the burden of proof regarding the question whether the search had respected the requirement of subsidiarity on the State and that its judgment had lacked reasoning as to why the search had not been disproportionate. The Supreme Court further held that the Court of Appeal had not specified the interference with the applicant foundation's and Mr K.'s' rights under Article 8 of the Convention supposedly constituted by the search and the seizure. Lastly, considering the complaint under Article 8, the Supreme Court found that in referring to its findings regarding Article 10 of the Convention the Court of Appeal had failed to recognise the difference between the interests protected by the two Articles; accordingly, it was also unclear whether there had existed less invasive means to accomplish the State's aim and whether the search and the seizure had been disproportionate for the purposes of Article 8.

23. The Supreme Court dismissed the other complaints, including the complaint that the principle of equality had been violated, and remitted the case to the Amsterdam Court of Appeal for further examination.

*5. Proceedings before the Amsterdam Court of Appeal*

24. In its judgment of 29 November 2007 the Amsterdam Court of Appeal pointed out that Mr K. had not challenged before the Supreme Court the finding of the Court of Appeal of The Hague that he had not actually suffered any damage. His claim being solely for compensation for damage, it accordingly fell to be dismissed.

25. In its examination of the complaint under Article 10, the Court of Appeal differentiated between the two aims of the search: firstly, to find ELF's letter, and secondly, to find possible links between the organisation that had claimed responsibility for the bomb attack and the magazine.

26. In relation to the State's aim to find ELF's letter, the court held that the applicant foundation had not challenged the State's claims that they had

needed more evidence on the bomb attacks and that "every possible trace that could have led to the perpetrators was more than welcome". It further held that the requirement of subsidiarity had been respected because there had been no other way to find the letter than to search for it, and that the requirement of proportionality had also been respected because the search related to the identification of perpetrators of serious criminal offences who could realistically be expected to reoffend. In relation to the seizure of the computers, the court noted that the possibility that ELF's letter was saved as a digital document warranted the search of these. Even though the search had not taken place in the presence of (a functionary of) the applicant foundation, this had been a deliberate choice attributable to the applicant foundation itself.

27. In relation to the State's aim to search for possible links between the organisation that had claimed responsibility for the bomb attack and the magazine, the court held that the State had not specified the grounds on which those links were the subject of investigation, nor had the State pointed to circumstances that would lead to the conclusion that there had been no less invasive means available to investigate those links. The court further held that the list of seized objects clearly specified objects that related to this aim and not to the finding of ELF's letter. The court concluded that the search connected to the aim of finding possible links between the organisation that had claimed responsibility for the bomb attack and the magazine had violated the applicant foundation's rights under Article 10 of the Convention.

28. Referring to its findings under Article 10, the Amsterdam Court of Appeal also found a violation of Article 8 of the Convention regarding the State's aim to find links between the organisation and the magazine and dismissed the Article 8 complaint regarding the State's aim to find ELF's letter.

29. As to the damage allegedly suffered by the applicant foundation, the court held that it could not be said that the applicant foundation would not have suffered any pecuniary damage if the State had limited itself to the lawful part of the search. In relation to the front door that had been kicked open, the court held that the applicant foundation had failed to substantiate its claim for damage, and lastly, that there was no appearance of damage of the applicant foundation's honour or good name or that the number of its subscribers had dropped as a result of the search. The court thus dismissed all the applicant foundation's claims for compensation. Moreover, the Amsterdam Court of Appeal held that since the applicant foundation's complaints had been dismissed for the greater part it had to pay the costs of the proceedings.

*6. Second round of proceedings before the Supreme Court*

30. On 18 September 2009 the Supreme Court dismissed the applicant foundation's appeal on points of law and, consequently, the State's conditional cross-appeal as well.

### B. Other developments

*1. The disbanding of the police investigation team*

31. The Government state that the police investigation team set up to identify the person or persons responsible for the bomb attacks was disbanded in February 1997 and that no charges were brought against "any of the suspects".

*2. The arrest and conviction of T.*

32. On 22 March 2006, an armed bank robbery took place in the town of Leiden. The robber was captured on camera and recognised as one T. The police subsequently seized goods related to the suspect, including an autobiography. In the autobiography the police found indications that T. had been involved in crimes including the murder, in 2005, of a political activist and the three attacks referred to above.

33. On 16 March 2007 T. was arrested in Spain; he was surrendered to the Netherlands. T. confessed to the police that he had committed the attacks alone. He also confessed to having sent the letter claiming responsibility for the attacks to *Ravage* by fax. On 7 March 2008, the Arnhem Regional Court convicted T. of the said murder, various bank robberies, arson attacks including the bomb attacks referred to above and a further attempt at such an attack. It sentenced T. to life in prison. This judgment became final and unappealable on 22 March 2008.

## II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

### A. The Netherlands Code of Criminal Procedure

34. At the relevant time, provisions of the Code of Criminal Procedure relevant to the case were the following:

**Article 98**

"1. In the case of persons who may decline to give evidence, as referred to in article 218, no letters or other written documents covered by their duty of confidentiality may be seized, except with their permission.

2. The premises of such persons may be searched without their permission only if it does not infringe the duty of confidentiality to which they are subject by virtue of

their status, profession or office, and the search only extends to letters or other written documents that are the subject-matter of the offence or facilitated its commission."

**Article 99**

"1. Unless the interests of the investigation so require, no property is to be seized in a dwelling until the occupant or, if he is absent, a member of his household who is present has been heard and has failed to comply with a request voluntarily to hand over the object to be seized.

2. In so far as the interests of the investigation do not militate against it, the investigating officer must give the occupant or, if he is absent, a member of his household who is present the opportunity to make a statement about the objects seized at that location. The same applies with respect to the suspect, if he is present.

3. The suspect has the right to be represented by counsel during a search."

**Article 111**

"1. The investigating judge is authorised to search premises for the purpose of seizing property with the permission of the Regional Court, granted at his request or on the application of the public prosecutor. In the latter case, the public prosecutor may demand that the investigating judge give effect to the permission to conduct a search.

2. In the event of urgent necessity, however, the investigating judge may, on his own initiative or the application of the public prosecutor, search the dwellings, premises and places designated in Article 97, § 1, no. 1, without such permission."

**Article 113**

1. Except in the case of Article 111, § 2, a search of premises does not extend to letters or other written documents that are neither the subject matter of the offence nor facilitated its commission, unless the Regional Court explicitly authorises this.

2. Article 98, § 2 applies."

**Article 218**

"Persons who, by virtue of their position, their profession or their office, are bound to secrecy may ... decline to give evidence or to answer particular questions, but only in relation to matters the knowledge of which is entrusted to them in that capacity."

## B. The Guidelines on the position of the press in relation to police action

35. The Guidelines on the position of the press in relation to police action (*Leidraad over de positie van de pers bij politieoptreden*) were issued by the Minister of Justice on 19 May 1988. At the time of the events complained of, they provided, in relevant part:

"7. Seizure of journalistic material

Journalistic material may be seized in cases described in the Code of Criminal Procedure. Journalists may be faced with seizure in two ways.

A. The police may, on the instructions of a public prosecutor (*officier van justitie*) or an assistant public prosecutor (*hulpofficier van justitie*) or not as the case may be, arrest a journalist on suspicion of a criminal act and seize everything he has with him on the spot.

There must then be a direct connection between a particular criminal act and the journalistic material with which that act has been committed. In this situation, the journalist is arrested like any ordinary citizen.

If a prosecution ensues, it will be for the independent judge eventually to decide what is to be done with any seized – and unpublished – material.

B. Journalistic material may also be seized on the orders of an independent judge (the investigating judge), if such material may – in the judge's opinion – serve to clarify the truth in a preliminary judicial investigation (*gerechtelijk vooronderzoek*).

..."

36. This section of the Guidelines was replaced with effect from 1 April 2002 by the "Directive on the application of coercive measures to journalists" (*Aanwijzing toepassing dwangmiddelen bij journalisten*), issued by the Board of Procurators General (*College van procureurs-generaal*). This directive makes extensive reference to the Court's case-law. If the protection of a journalist's source is at issue, the use of coercive measures must be in accordance with Article 10 § 2 with due regard to requirements of proportionality and subsidiarity.

### C. Relevant domestic case-law

37. In a civil case – brought by persons named in connection with alleged bribery against two journalists who had allegedly made use of information leaked by officials – the Supreme Court, reversing earlier case-law, held (judgment of 10 May 1996, *Nederlandse Jurisprudentie* (Netherlands Law Reports) 1996, no. 578):

"It follows from the said judgment [i.e. *Goodwin v. the United Kingdom*, judgment of 27 March 1996, *Reports of Judgments and Decisions* 1996-II] that it must be accepted that it follows from Article 10 § 1 of the Convention that in principle a journalist has the right to refuse to answer a question put to him if he were thus to risk disclosing his source, but that the court does not have to honour a claim based on this right when it considers that in the particular circumstances of the case disclosing the source is necessary in a democratic society in pursuit of one or more of the aims referred to in the second paragraph of the said Convention provision, which must be stated and for which, if necessary, a *prima facie* case must be made out by the person who calls the journalist as a witness.

...

It is apparent from the decision of the Court of Appeal and the other documents contained in the case file that the present case is characterised in that, as stated by [the plaintiffs], the 'leaked' information relates to a criminal investigation into alleged bribery of a number of local government officials in the province of Limburg, in that information relating to the supposed involvement of [the plaintiffs] in such cases of

bribery has already been made public and that [the plaintiffs] have sued [the newspaper] *De Limburger* for damages which they claim resulted therefrom (...). Accordingly, [the plaintiffs] have claimed no other interest in the disclosure of [the defendants'] sources than that they wish to know who has 'leaked', because they wish eventually to sue the State and the persons concerned themselves for damages and also to obtain an injunction against the persons concerned to restrain them from any further 'leaking'. However, the said judgment of the European Court of Human Rights compels the Supreme Court to find that this interest in itself is insufficient to counterbalance the weighty public interest which attaches to the protection of [the defendants'] sources."

## D. Recommendation No. R(2000) 7 on the right of journalists not to disclose their sources of information

38. Recommendation No. R(2000) 7 on the right of journalists not to disclose their sources of information was adopted by the Committee of Ministers of the Council of Europe on 8 March 2000. It states, in relevant part:

"[The Committee of Ministers] Recommends to the governments of member States:

1. to implement in their domestic law and practice the principles appended to this recommendation,

2. to disseminate widely this recommendation and its appended principles, where appropriate accompanied by a translation, and

3. to bring them in particular to the attention of public authorities, police authorities and the judiciary as well as to make them available to journalists, the media and their professional organisations.

Appendix to Recommendation No. R (2000) 7

*Principles concerning the right of journalists not to disclose their sources of information*

*Definitions*

For the purposes of this Recommendation:

*a.* the term 'journalist' means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication;

*b.* the term 'information' means any statement of fact, opinion or idea in the form of text, sound and/or picture;

*c.* the term 'source' means any person who provides information to a journalist;

*d.* the term 'information identifying a source' means, as far as this is likely to lead to the identification of a source:

*i.* the name and personal data as well as voice and image of a source,

*ii.* the factual circumstances of acquiring information from a source by a journalist,

*iii.* the unpublished content of the information provided by a source to a journalist, and

*iv.* personal data of journalists and their employers related to their professional work.

*Principle 1 (Right of non-disclosure of journalists)*

Domestic law and practice in member States should provide for explicit and clear protection of the right of journalists not to disclose information identifying a source in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) and the principles established herein, which are to be considered as minimum standards for the respect of this right.

*Principle 2 (Right of non-disclosure of other persons)*

Other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information, should equally be protected under the principles established herein.

*Principle 3 (Limits to the right of non-disclosure)*

*a.* The right of journalists not to disclose information identifying a source must not be subject to other restrictions than those mentioned in Article 10, paragraph 2 of the Convention. In determining whether a legitimate interest in a disclosure falling within the scope of Article 10, paragraph 2 of the Convention outweighs the public interest in not disclosing information identifying a source, competent authorities of member States shall pay particular regard to the importance of the right of non-disclosure and the pre-eminence given to it in the case-law of the European Court of Human Rights, and may only order a disclosure if, subject to paragraph *b*, there exists an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature.

*b.* The disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that:

*i.* reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and

*ii.* the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that:

- an overriding requirement of the need for disclosure is proved,

- the circumstances are of a sufficiently vital and serious nature,

- the necessity of the disclosure is identified as responding to a pressing social need, and

- member States enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights.

*c.* The above requirements should be applied at all stages of any proceedings where the right of non-disclosure might be invoked.

*Principle 4 (Alternative evidence to journalist' sources)*

In legal proceedings against a journalist on grounds of an alleged infringement of the honour or reputation of a person, authorities should consider, for the purpose of

establishing the truth or otherwise of the allegation, all evidence which is available to them under national procedural law and may not require for that purpose the disclosure of information identifying a source by the journalist.

*Principle 5 (Conditions concerning disclosures)*

*a.* The motion or request for initiating any action by competent authorities aimed at the disclosure of information identifying a source should only be introduced by persons or public authorities that have a direct legitimate interest in the disclosure.

*b.* Journalists should be informed by the competent authorities of their right not to disclose information identifying a source as well as of the limits of this right before a disclosure is requested.

*c.* Sanctions against journalists for not disclosing information identifying a source should only be imposed by judicial authorities during court proceedings which allow for a hearing of the journalists concerned in accordance with Article 6 of the Convention.

*d.* Journalists should have the right to have the imposition of a sanction for not disclosing their information identifying a source reviewed by another judicial authority.

*e.* Where journalists respond to a request or order to disclose information identifying a source, the competent authorities should consider applying measures to limit the extent of a disclosure, for example by excluding the public from the disclosure with due respect to Article 6 of the Convention, where relevant, and by themselves respecting the confidentiality of such a disclosure.

*Principle 6 (Interception of communication, surveillance and judicial search and seizure)*

*a.* The following measures should not be applied if their purpose is to circumvent the right of journalists, under the terms of these principles, not to disclose information identifying a source:

*i.* interception orders or actions concerning communication or correspondence of journalists or their employers,

*ii.* surveillance orders or actions concerning journalists, their contacts or their employers, or

*iii.* search or seizure orders or actions concerning the private or business premises, belongings or correspondence of journalists or their employers or personal data related to their professional work.

*b.* Where information identifying a source has been properly obtained by police or judicial authorities by any of the above actions, although this might not have been the purpose of these actions, measures should be taken to prevent the subsequent use of this information as evidence before courts, unless the disclosure would be justified under Principle 3.

*Principle 7 (Protection against self-incrimination)*

The principles established herein shall not in any way limit national laws on the protection against self-incrimination in criminal proceedings, and journalists should, as far as such laws apply, enjoy such protection with regard to the disclosure of information identifying a source."

39. For the precise application of the Recommendation, the explanatory notes clarify the meaning of certain terms. As regards the term "sources" the explanation reads as follows:

> "c. Source
>
> 17. Any person who provides information to a journalist shall be considered as his or her 'source'. The protection of the relationship between a journalist and a source is the goal of this Recommendation, because of the 'potentially chilling effect' an order of source disclosure has on the exercise of freedom of the media (see, Eur. Court H.R., Goodwin v. the United Kingdom, 27 March 1996, para. 39). Journalists may receive their information from all kinds of sources. Therefore, a wide interpretation of this term is necessary. The actual provision of information to journalists can constitute an action on the side of the source, for example when a source calls or writes to a journalist or sends to him or her recorded information or pictures. Information shall also be regarded as being 'provided' when a source remains passive and consents to the journalist taking the information, such as the filming or recording of information with the consent of the source."

## COMPLAINTS

40. Invoking Article 10 of the Convention the applicant foundation complained that the search for the letter on the magazine's premises had violated its right to receive and impart information.

41. Invoking Article 13 in conjunction with Articles 8 and 10 of the Convention it complained that it had not received any compensation consequent to the partial acknowledgement by the domestic courts of a violation under Articles 8 and 10. According to the applicant foundation, this lack of compensation violated its right to an effective remedy.

## THE LAW

### A. Victim status

42. The Court, of its own motion, put the following question to the parties:

> "Given that the domestic courts acknowledged violations of the applicant foundation's rights under Articles 8 and 10 of the Convention in relation to the search – aiming to find links between the organisation that claimed responsibility for the bomb attack and the magazine –, can the applicant foundation still claim to be a 'victim' for purposes of Article 34 of the Convention?"

43. The Government did not address this question separately. The applicant foundation argued at length that it was still entitled to claim the status of "victim".

44. The Court sees no need to rule separately on this issue since the application is in any event inadmissible for the reasons set out below.

## B. Complaint under Article 10 of the Convention

45. The applicant foundation alleged a violation of its right to protect its journalistic sources. It relied on Article 10 of the Convention, which provides 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."

The Government denied that there had been any such violation.

### *1. Argument before the Court*

46. The Government argued primarily that the present case did not concern the protection of journalistic sources. In their contention, a person claiming responsibility for an attack was not entitled to the same protection as a source supplying information on a matter of public interest.

47. In the alternative, the Government were prepared to recognise that there had been an interference with the applicant foundation's rights under Article 10. In their view, however, this interference had been justified in the light of Article 10 § 2.

48. The interference in issue had been "prescribed by law": its statutory basis was Articles 111 § 1 and 113 § 1 of the Code of Criminal Procedure, as in force at the relevant time.

49. The "legitimate aim" pursued had been the protection of public order and the prevention of crime.

50. The interference had, moreover, been "necessary in a democratic society" for the purposes invoked. Serious crimes had been committed, namely three bomb attacks in a row, and more such attacks were feared. The letter published by *Ravage* had been the only potential lead for the criminal investigation. The editors of *Ravage* could reasonably have been expected to hand it over for examination. Yet they had destroyed it, thus failing to live up to their "duties and responsibilities". The applicant foundation's

allegation that the letter had been quoted verbatim was unverifiable in the absence of the original document.

51. Even assuming that the issue in the present case was one of protection of journalistic sources, the public interest in preventing the commission of further dangerous crimes in the Government's submission overrode any interest the applicant foundation might have had. The offender had been acting with what the Government described as terrorist intent, and the attacks had been on a scale unaccustomed in the Netherlands at that time.

52. The applicant foundation countered that the interference had not been "prescribed by law". Referring to the Court's case-law, in particular *Sanoma Uitgevers B.V. v. the Netherlands* [GC], no. 38224/03, 14 September 2010 and *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands*, no. 39315/06, 22 November 2012, it argued that the law, as it stood at the time, did not provide for any balancing of the relevant interests; the quality of the law had therefore been deficient.

53. The judgment of the Arnhem Regional Court convicting T. did "add a hint of terrorism to the case", but that should be disregarded. The bomb attacks carried out by the person convicted, T., had caused material damage only and not personal injury. They had moreover been intended to strike at the interests of their particular targets, not to instil fear in the general public.

54. The Government's admission that the investigation was terminated without charges being brought against "any of the suspects" suggested that "suspects" had been identified. This – as the Court understands the argument – in turn suggested that raiding the offices of the magazine *Ravage* was not the only investigatory measure attempted, so that it could not be established that no alternative measures could have been chosen.

55. The applicant foundation described *Ravage* as a "protest magazine, published for an activist and politically engaged audience". It enjoyed the trust of its readership precisely because it offered "action and pressure groups" the possibility to take part "freely and, if necessary, anonymously" in discussions of interest to them. *Ravage* did not concern itself solely with illegal activities, but "the interest in political non-parliamentary activism" implied that the magazine published about "actions that were sometimes accompanied by breaches of the law", varying from demonstrations for which no prior permission had been given to the bomb attacks here in issue. Not to respect the confidence of its contributors would have destroyed the trust of its entire readership, including the less militant, and thus the reason for the magazine to exist. It was for this reason that the applicant foundation considered it self-evident that the ELF's claim letter should be destroyed.

56. Moreover, the search of *Ravage*'s editorial offices constituted a serious breach of the confidentiality of all others who had entrusted original materials to the editorial board on the understanding that these would not be allowed to fall into the hands of public authority.

57. A requirement in the public interest sufficient to outweigh the interest in non-disclosure of the source had not been established. It was not apparent that the various interests involved had been weighed in the balance by the investigating judge. In particular, the letter had been quoted verbatim; no reason was apparent why criminal investigators found it necessary to secure possession of the original. In any case, the bomb attacks had caused damage to property only, not loss of life or injury; there had been no injury of loss of life.

*2. The Court's decision*

58. The Court finds that the order to hand over the letter, which was followed by a search of the applicant foundation's premises when it was not obeyed, constituted an interference with the applicant foundation's right to "receive and impart information", as set out in Article 10 § 1 (see, among other authorities, *Roemen and Schmit v. Luxembourg*, no. 51772/99, § 47, ECHR 2003-IV; and *Sanoma*, cited above, § 72).

59. Before proceeding to the question whether this interference was justified in terms of Article 10 § 2, the Court must determine the nature of the interference.

60. The applicant foundation bases its argument on the premise that the case concerns the protection of journalistic sources and that the relevant case-law is that developed by the Court in *Goodwin v. the United Kingdom*, 27 March 1996, *Reports of Judgments and Decisions* 1996-II; *Roemen and Schmit*, cited above; *Ernst and Others v. Belgium*, no. 33400/96, 15 July 2003; *Voskuil v. the Netherlands*, no. 64752/01, 22 November 2007; *Tillack v. Belgium*, no. 20477/05, 27 November 2007; *Financial Times Ltd and Others v. the United Kingdom*, no. 821/03, 15 December 2009; *Sanoma*, cited above; and *Telegraaf*, cited above.

61. In all of the above-mentioned judgments the Court has stated the importance of the press as "public watchdog" and the concomitant importance of ensuring that individuals remain free to disclose to the press information which, in a democratic society, should properly be accessible to the public (see *Goodwin*, § 39; *Roemen and Schmit*, § 46; *Ernst and Others*, § 91; *Voskuil*, § 65; *Tillack*, § 53; *Financial Times*, § 59; *Sanoma*, § 50; and *Telegraaf*, § 127).

62. It does not follow, however, that every individual who is used by a journalist for information is a "source" in the sense of the case-law mentioned.

63. In *Nordisk Film & TV A/S v. Denmark* (dec.), *Reports* 2005-XIII, the Court declared inadmissible a television producer's complaint about an order to hand over to the police film recordings which it had covertly made and which were capable of identifying individuals suspected of criminal activity. Referring to the definition given by the Committee of Ministers in the explanatory note to its Recommendation No. R (2000) 7 (see paragraph

38 above), it distinguished the persons thus identified from "sources in the traditional sense", who freely assisted the press to inform the public about matters of public interest or matters concerning others.

64. It is undeniable that, even though the protection of a journalistic "source" properly so-called is not in issue, an order directed to a journalist to hand over original materials may have a chilling effect on the exercise of journalistic freedom of expression. That said, the degree of protection under Article 10 of the Convention to be applied in a situation like the present one does not necessarily reach the same level as that afforded to journalists when it comes to their right to keep their "sources" confidential. The distinction lies in that the latter protection is twofold, relating not only to the journalist, but also and in particular to the "source" who volunteers to assist the press in informing the public about matters of public interest (see *Nordisk Film*, cited above).

65. In the present case the magazine's informant was not motivated by the desire to provide information which the public were entitled to know. On the contrary, the informant, identified in 2006 as T. (see paragraph 32 above), was claiming responsibility for crimes which he had himself committed; his purpose in seeking publicity through the magazine *Ravage* was to don the veil of anonymity with a view to evading his own criminal accountability. For this reason, the Court takes the view that he was not, in principle, entitled to the same protection as the "sources" in cases like *Goodwin*, *Roemen and Schmit*, *Ernst and Others*, *Voskuil*, *Tillack*, *Financial Times*, *Sanoma*, and *Telegraaf*.

66. Having established that "source protection" is not in issue, the Court must now consider whether the interference complained of is justified under Article 10 § 2. This will be the case if the interference is "prescribed by law", pursues one or more of the "legitimate aims" enumerated in that provision, and can properly be considered "necessary in a democratic society" in order to pursue the legitimate aim or aims identified.

67. The Court accepts as sufficient for present purposes the statutory basis cited by the Government, namely Articles 111 § 1 and 113 § 1 of the Code of Criminal Procedure, as in force at the relevant time.

68. The Court also accepts that the "legitimate aim" pursued was, at the very least, "the prevention of ... crime".

69. Turning now to the question of "necessity in a democratic society", the Court notes that the original document received by the editorial board of the magazine *Ravage* was sought as a possible lead towards identifying a person or persons unknown who were suspected of having carried out a plurality of bomb attacks.

70. The Court is not persuaded by the applicant foundation's argument that these attacks had caused damage only to property. Nor does it see the relevance of the question whether these attacks could be labelled "terrorist" or not. It cannot but have regard to the inherent dangerousness of the crimes

committed, which in its view constitutes sufficient justification for the investigative measures here in issue. At all events, the dangerousness of the perpetrator in the present case is sufficiently demonstrated, if further proof be needed, by his subsequent conviction of other crimes including bank robbery, arson and murder (see paragraph 33 above).

71. Nor can it be decisive that the statement claiming responsibility for the bomb attack in April 1996 was quoted literally and in its entirety, as the applicant foundation alleges, or that other investigatory leads were available, as the applicant foundation insinuates. Even assuming such to be the case, the Court cannot find that the original document, whether on its own or in conjunction with other evidence, was incapable of yielding useful information. Indeed, if that be so then it cannot be seen what prevented the editors of the magazine from handing it over of their own accord.

72. There remains the applicant foundation's complaint that the search destroyed the confidentiality of information entrusted to the magazine's editors. Nothing is known about this information, nor has the applicant foundation suggested that it, its informants and contributors or its readership suffered as a result. It is not denied that all materials seized were returned, with the exception of a typewriter ribbon which was destroyed, and that all information not relevant to the investigation was likewise destroyed (see paragraph 13 above). In the circumstances, which are further characterised by the fact that the search was occasioned by the wilful destruction of the letter, the Court is not disposed to lay the blame on the authorities.

73. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

### C. Complaint under Article 13 of the Convention taken together with Articles 8 and 10

74. The applicant foundation further complained of the failure by the domestic courts to award it compensation consequent on the partial finding of a violation of its Convention rights. It relied on Article 13 of the Convention together with Articles 8 and 10.

Article 13 provides as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Article 8 provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society

in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

75. The substance of the applicant's complaint was examined by the Court of Appeal, and it had the power to afford him the relief he sought (see paragraphs 27-29 above). The fact that it did not do so is not a material consideration since the effectiveness of a remedy for the purposes of Article 13 does not depend on the certainty of a favourable outcome for the applicant (see, among many other authorities, *Hilal v. the United Kingdom*, no. 45276/99, § 77, ECHR 2001-II). For the remainder, in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols.

76. It follows that this complaint too is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court by a majority

*Declares* the remainder of the application inadmissible.

Marialena Tsirli
Deputy Registrar

Alvina Gyulumyan
President