

November 2012

Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands - 39315/06

Judgment 22.11.2012 [Section III]

Article 10

Article 10-1

Freedom to impart information

Freedom to receive information

Surveillance of journalists and order for them to surrender documents capable of identifying their sources: *violations*

Facts – The applicant company owned a newspaper which in January 2006 published articles by the second and third applicants alleging that information on pending investigations by the Netherlands secret services (AIVD) into drugs and arms dealings had fallen into criminal hands. The applicant company was then ordered by the National Police Internal Investigation Department to surrender the documents in its possession, but objected on the grounds that its source might be identifiable from fingerprints on the documents. The Regional Court rejected that argument after finding that the interference was justified to protect State secrets and that the applicant company's rights had not been violated as it had not been required actively to cooperate in the identification of the source. That decision was upheld by the Supreme Court.

In June 2006 the applicants brought civil proceedings against the State claiming that the second and third applicants had been subject to telephone tapping and observation, presumably by AIVD agents. They alleged that the measures were unlawful as they had in fact targeted the journalists' sources. However, the Supreme Court ultimately held that the protection of journalistic sources was not absolute and reached its limits where the protection of national security and confidential information were concerned.

Law – Article 8 in conjunction with Article 10

(a) *Use of special powers* – Although questions raised by surveillance measures were usually considered under Article 8 alone, they were so intertwined with the Article 10 issue in this case that the Court considered the matter under both Articles concurrently. It was undisputed that there had been "interference" with the second and third applicants' rights under those provisions and the Court was satisfied that the special powers had been used to circumvent the protection of a journalistic source, even if identifying the person or persons who had supplied the secret documents to the applicants had been subordinate to the AIVD's main aim of discovering and closing the leak of secret information from within its own ranks.

There was a statutory basis for the interference* and the law was accessible and its effects foreseeable in the sense that the applicants could not reasonably have

been unaware that publishing authentic classified information unlawfully taken from the AIVD would be likely to provoke action aimed at discovering its provenance. However, the law in question also had to protect against arbitrary interference by public authorities, especially where, as here, the risks of arbitrariness were evident because a power of the executive was exercised in secret.

Although it had not been alleged that the general supervisory and monitoring procedures in place were in themselves insufficient, the question arose as to whether the second and third applicants' status as journalists had required special safeguards to ensure adequate protection of their sources. Unlike the position in *Weber and Saravia v. Germany* in which the surveillance measures had been directed at identifying and averting danger while keeping the disclosure of journalistic sources to an unavoidable minimum, the applicants' case was characterised precisely by the targeted surveillance of journalists to determine the origin of their information. The Court reiterated that in a field where abuse was potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, supervisory control should be entrusted to a judge or an adequate independent authority. In the applicant's case, however, the use of special powers had been authorised without prior review by an independent body with the power to prevent or terminate it. Review after the event was insufficient as, once destroyed, the confidentiality of journalistic sources could not be restored. The law had thus not provided appropriate safeguards in respect of the powers of surveillance used against the second and third applicants with a view to discovering their journalistic sources.

Conclusion: violation in respect of the second and third applicants (unanimously).

(b) *Order to surrender documents* – The surrender order had constituted "interference" with the applicant company's freedom to receive and impart information. That interference had a statutory basis and procedural safeguards had been in place to protect the identity of the source until the domestic courts had decided the applicant company's objection to surrender.** The interference was thus prescribed by law and pursued the legitimate aims of "national security" and "the prevention of crime".

As to whether the interference had been necessary in a democratic society, the Court observed that without protection of journalistic sources, the vital public watchdog role of the press could be undermined and the ability of the media to provide accurate and reliable information could be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure could have on the exercise of that freedom, such a measure was not compatible with Article 10 unless it was justified by an overriding requirement in the public interest.

The surrender order could not be justified solely by the need to identify the AIVD official(s) who had supplied the secret documents to the applicants since, as the public prosecutor had admitted, that goal could have been achieved simply by studying the contents of the documents and identifying the officials who had had access to them. Further, while the Court accepted that it had been legitimate for the AIVD to check whether all documents taken had been withdrawn from circulation, it had not been sufficient to justify the disclosure of the applicant's journalistic source. In any event, such withdrawal could no longer prevent the information the documents contained from falling into the wrong hands as it was highly likely that it long been known to persons described by the parties as criminals. Finally, the actual handover of the documents taken had not been

necessary: visual inspection to verify that they were complete, followed by their destruction, would have sufficed. The Government had thus not given "relevant and sufficient" reasons for the surrender order.

Conclusion: violation in respect of the applicant company (five votes to two).

Article 41: No claim made in respect of damage.

(See *Weber and Saravia v. Germany* (dec.), no. 54934/00, 29 June 2006, [Information Note no. 88](#))

* Section 6(2)(A) of the 2002 Intelligence and Security Services Act.

** The documents had been placed in a sealed container by a notary and handed over to the investigating judge to be kept in a safe.

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