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Telegraaf judgment on protection of journalists' sources. Security and intelligence services must also respect protection of journalistic sources,

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For the third time in a short period, the European Court of Human Rights has found that the Netherlands authorities have disrespected the right of journalists to protect their sources. Since the judgment in the ***Voskuil case*** (ECHR 22 November 2007) and especially since the Grand Chamber judgment in the ***Sanoma case*** (ECHR 14 September 2010, see also ***ECHR Blog***) it has become clear that the legal framework in the Netherlands and some of the practices by its public authorities are not sufficiently guaranteeing the right of journalists to protect their sources.

In the judgment of 22 November 2012 in the case of ***Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands*** (Appl. No. 39315/06), the Court is of the opinion that the telephone tapping and surveillance of two journalists by the Netherlands security and intelligence services lacked a sufficient legal basis as the law did not provide safeguards appropriate to the use of powers of surveillance against journalists with a view to discovering their journalistic sources. There has therefore been a violation of Articles 8 and 10 of the Convention (§ 102). Also an order to surrender leaked documents belonging to the security and intelligence services is considered as a violation of the journalists' rights as guaranteed by Article 10 of the Convention. The Court is of the opinion that the Netherlands authorities could not provide relevant and sufficient reasons to justify the interference with the journalists' rights in this case. According to the Court, there was no "overriding requirement in the public interest" justifying the order to surrender the documents (§ 131-132).

The ruling of the European Court in De Telegraaf case does also have consequences outside the Netherlands. The judgment implicates that intelligence and security services in each of the 47 member states of the European Convention cannot interfere with the rights of journalists to have their sources protected under Article 10 of the Convention, unless an overriding requirement in the public interest can pertinently justify such an interference. Any coercive measures against journalist must be prescribed by law in a sufficiently precise and transparent way and effective procedural safeguards must exist to protect journalists against abuse of power by secret services. Most importantly, the Court confirms that the procedural guarantee of an *ex ante* review by a judge or another independent body is also applicable to targeted

surveillance or telephone tapping of journalists undertaken by security and intelligence authorities. A review *post factum*, whether by a Supervisory Board, a Parliamentary Committee on the Intelligence and Security Services or the National Ombudsman cannot restore the confidentiality of journalistic sources once it is destroyed. As a consequence of this judgment, the legal framework and the operational practices of many security and intelligence services in Europe will need to be modified, in order to guarantee the rights of journalists under Article 10 of the Convention. Without guarantees of an *ex ante* review by a judge or an independent body, coercive measures against journalists by security and intelligence services are inevitably to be considered as breaches of the rights of journalists covered by Article 10.

The facts

The case concerns the actions taken by the domestic authorities against two journalists, De Haas and Mos, of the national daily newspaper De Telegraaf after having published articles about the Netherlands secret service AIVD (*Algemene Inlichtingen- en Veiligheidsdienst – General Intelligence and Security Service*) suggesting that highly secret information had been leaked to the criminal circuit, and more precisely to the drugs mafia. The journalists were ordered by the National Police International Investigation Department to surrender documents pertaining to the secret services' activities. The two journalists had also been subject to telephone tapping and observation by AIVD agents. Their applications in court regarding these measures failed, as well at the level of the Regional Court in The Hague as at the level of the Supreme Court (*Hoge Raad*). According to the domestic courts, neither the order to surrender the documents nor the telephone tapping and observations violated the right to protect sources covered by Article 10 of the European Convention. It has been argued – both in a decision of the Minister of the Interior and a report from the Supervisory Board of the Intelligence and Security Services – that the use of special powers against the journalists was lawful and necessary in a democracy. It was emphasized that the AIVD investigation was intended to make an assessment of the leaked AIVD-files and, within that framework, it was considered necessary and proportionate to use special powers against the journalists in possession of the leaked files. Also the phone tapping was considered to meet the criteria of necessity, proportionality and subsidiarity.

When later questioned as witnesses in criminal proceedings against persons suspected of leaking secret AIVD information, the two journalists refused to answer the questions before the investigative judge, arguing that the judicial order to reveal information might lead to the identification of the person from whom they had received secret AIVD documents. As the journalists at a later hearing before the investigative judge persisted in their refusal to answer his questions, they were detained in prison for failure to comply with a judicial order to reveal information. A few days later however the journalist were released by judgment of the Regional

Court of The Hague recognizing the importance of the protection of journalistic sources. The Regional Court also found that no issue of State security could arise since the availability of the documents outside the AIVD had been common knowledge in the media.

The complaint in Strasbourg

Relying on Article 8 (right to respect for private and family life) and Article 10 (freedom of expression and information), the publishing company of De Telegraaf and the two journalists De Haas and Mos together with the Netherlands Association of Journalists (*Nederlandse Vereniging van Journalisten*) and the Netherlands Society of Editors-in-Chief (*Nederlands Genootschap van Hoofdredacteuren*) complained in Strasbourg about the order to surrender documents which may identify journalistic sources and about the use of special powers by the Netherlands authorities organizing telephone tapping and surveillance. They argued that the use of special powers against the journalists, who were not themselves "targets", could not be covered by section 6 § 2, a, of the Intelligence and Security Services Act and therefore lacked the basis in law required by the second paragraphs of Articles 8 and 10 of the Convention. Conversely, be it the case that the two journalists were in fact "targets", then the domestic courts would wrongly have held the interest in the protection of journalistic sources to be outweighed by the interest of State security, again in violation of Article 10 of the Convention. Art. 6 § 2, a, of the 2002 Intelligence and Security Services Act stipulates that the AIVD can carry out investigations "*relative to organisations and persons who, by the aims which they pursue or their activities, give rise to serious suspicion that they constitute a danger to the continued existence of the democratic legal order or to the security or other weighty interests of the State*".

In a partial decision on the admissibility, the third section of the Court decided on ***18 May 2010*** (Appl. No. 39315/06) to declare the application by the *Netherlands Association of Journalists* and the *Netherlands Society of Editors-in-Chief* inadmissible, as these applicant-associations had not themselves been affected by the matters complained of under Articles 8 and 10 of the Convention. Consequently, neither association could claim to be a 'victim' of a violation of these provisions in the sense of Article 34 of the Convention (compare ***ECtHR decision of 25 June 2002*** in the case of *Martine Ernst et autres v. Belgique* (Appl. No. 33400/96) also declaring, for the same reason, the application of the *General Association of Professional Journalists of Belgium* inadmissible *ratione personae).*

The Court's judgment

The Court makes a separate analysis of the use of special powers by the AIVD against the journalists on the one hand, and the order to surrender the documents on the other hand. The

first issue on the use of the special powers is undoubtedly the most important and interesting one.

The Court disagrees with the argument of the Netherlands' Government disputing the journalists' position that the protection of journalistic sources was in issue. According to the Government, the AIVD resorted to the use of special powers not to establish the identity of the journalists' sources of information, but solely to identify the AIVD staff member who had leaked the documents. The Court's understanding of the concept of a journalistic "source" is indeed a broader one, referring to "*any person who provides information to a journalist*". The Court understands "*information identifying a source*" to include 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*" as far as they are likely to lead to the identification of a source. Therefore, the Court finds that the AIVD sought, by the use of its special powers, to circumvent the protection of a journalistic source (§ 86-87). As the issues of privacy protection and telephone tapping under Article 8 are intertwined with the Article 10 issue, the Court finds it appropriate to consider the matter under Articles 8 and 10 concurrently.

The next question is whether the interference with the journalists' right is in accordance or prescribed by law. 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 with the rights safeguarded by Article 8 § 1 and Article 10 § 1. The risks of arbitrariness are evident – especially in cases as this, where a power of the executive is exercised in secret.

According to the Court, the legal provisions regarding the special powers of the AIVD were accessible and foreseeable. The journalists could not reasonably be unaware that the information, which had fallen into their hands, was authentic, classified information that had unlawfully been removed from the keeping of the AIVD and that publishing this information was likely to provoke action aimed at discovering its provenance. The crucial issue is, however, that the status as journalists required special safeguards to ensure adequate protection of their journalistic sources. The Court is of the opinion that the present case is characterized by the targeted surveillance of journalists in order to determine from whence they have obtained their information (§ 97). Furthermore, in the field of security and intelligence services where abuse is potentially so easy in individual cases and could have such harmful consequences for a democratic society as a whole, it is in principle desirable to entrust supervisory control to a

judge. The Court refers to its finding in the Sanoma case, which involved a disclosure order of journalistic sources that was given by a public prosecutor. In that case, the Grand Chamber emphasized the necessity of the "*ex ante*"-character of independent review by a judge, a court or another independent body, as the police or a public prosecutor cannot be considered to be objective and impartial so as to make the necessary assessment of the various competing interests. 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.

The Court applies this approach also in the instant case, as the use of special powers against the journalists appeared to have been authorised by the Minister of the Interior and Kingdom Relations, if not by the head of the AIVD or even a subordinate AIVD official, but in any case without prior review by an independent body with the power to prevent or terminate it. Moreover, review *post factum*, whether by the Supervisory Board, the Parliamentary Committee on the Intelligence and Security Services or the National Ombudsman cannot restore the confidentiality of journalistic sources once it is destroyed. For these reasons, the Court finds that the law did not provide safeguards appropriate to the use of powers of surveillance against journalists with a view to discovering their journalistic sources. There has therefore been a violation of Articles 8 and 10 of the Convention (§ 100-102).

Regarding the second issue, the Court agrees that the order to surrender the leaked documents to the AIVD was prescribed by law and pursued a legitimate aim ('national security' and 'prevention of crime'), but it estimates the interference with the right of journalists to protect their sources *in casu* not necessary in a democratic society. Referring to its case law since *Goodwin v. the United Kingdom* (1996), an interference with a journalist's sources can only be justified by an overriding requirement in the public interest. In its reasoning the Court also emphasized 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. As none of the reasons invoked by the AIVD are considered relevant and sufficient by the European Court, the conclusion is that the order to surrender the documents was not justified and that this interference amounted to a violation of Article 10 of the Convention.

Comment

The judgment in De Telegraaf case and the finding of a double violation of Article 10 of the Convention, both regarding the order to surrender the documents as with regard the coercive measures by the AIVD against the journalists, are fully consistent with the Court's earlier case law applying Article 10 in cases of protection of journalists' sources.

In the Sanoma case, the Court in its Grand Chamber judgment of 14 September 2010 emphasized the importance of source protection based on Article 10 of the Convention, noting that "*orders to disclose sources potentially have a detrimental impact, not only on the source, whose identity may be revealed, but also on the newspaper or other publication against which the order is directed, whose reputation may be negatively affected in the eyes of future potential sources by the disclosure, and on members of the public, who have an interest in receiving information imparted through anonymous sources*" (§ 89). In the judgment of 22 November 2012 in the case of ***Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands,*** the European Court reiterates that "*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 (..). Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. As a result the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may 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 has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest*" (§ 127).

It would have been very surprising if the Court had neglected these principles in a case concerning the interference with journalists' sources by security and intelligence services. As the Grand Chamber has explicitly stated in *Sanoma v. the Netherlands* on 14 September 2010, procedural safeguards proscribed by law should inherently be part of the protection of journalistic sources in application of Article 10 ECHR. According to the Court, "*first and foremost among these safeguards is the guarantee of review by a judge or other independent and impartial decision-making body*" (§ 90). The Court is of the opinion that "*given the preventive nature of such review the judge or other independent and impartial body must thus be in a position to carry out this weighing of the potential risks and respective interests prior to any disclosure and with reference to the material that it is sought to have disclosed so that the arguments of the authorities seeking the disclosure can be properly assessed*" (§ 90). The Grand Chamber emphasized that "*the requisite review should be carried out by a body separate from the executive and other interested parties, invested with the power to determine whether a requirement in the public interest overriding the principle of protection of journalistic sources exists prior to the handing over of such material and to prevent unnecessary access to information capable of disclosing the sources' identity if it does not*" (§ 90). It is clear in the Court's view, "*that the exercise of any independent review that only takes place subsequently to the handing over of material capable of revealing such sources would undermine the very essence of the right to confidentiality*" (§ 91). The Court continued in Sanoma to emphasize the

necessity of the "ex ante"-character of such independent review: "*Given the preventive nature of such review the judge or other independent and impartial body must thus be in a position to carry out this weighing of the potential risks and respective interests prior to any disclosure and with reference to the material that it is sought to have disclosed so that the arguments of the authorities seeking the disclosure can be properly assessed. The decision to be taken should be governed by clear criteria, including whether a less intrusive measure can suffice to serve the overriding public interests established. It should be open to the judge or other authority to refuse to make a disclosure order or to make a limited or qualified order so as to protect sources from being revealed, whether or not they are specifically named in the withheld material, on the grounds that the communication of such material creates a serious risk of compromising the identity of journalist's sources (..). In situations of urgency, a procedure should exist to identify and isolate, prior to the exploitation of the material by the authorities, information that could lead to the identification of sources from information that carries no such risk"* (§ 92).

The Court has now in its judgment of 22 November 2012 fully applied this approach in relation to coercive measures by the security and intelligence services. As a consequence of this judgment, the legal framework and the operational practices of many security and intelligence services in Europe will need to be modified. Without guarantees of an *ex ante* review by a judge or an independent body, coercive measures such as telephone tapping, registration of telecommunications or other forms of surveillance of journalists by security and intelligence services are inevitably to be considered as breaches of the rights of journalists covered by Article 10. An *ex ante* judicial review is necessary to guarantee that the reasons invoked by security and intelligence services to have access to journalists' sources are pertinently and sufficiently motivated. A lack of such a guarantee is *as such* a breach of Article 10 of the Convention.