Nr. 1 De Telegraaf e.a./Nederland

Europees Hof voor de Rechten van de Mens 22 november 2012
Application no. 39315/06

Op 25 maart en 11 juli 2008 wees de Hoge Raad twee arresten waarin het recht op journalistieke bronbescherming centraal stond. In beide zaken werd Uitgeversmaatschappij De Telegraaf BV – later omgedoopt in Telegraaf Media Nederland Landelijke Media BV – geheel of grotendeels in het ongelijk gesteld.

Het arrest van 25 maart 2008 was de afsluiting van een beklagprocedure in de zin van artikel 552a en 552d van het Wetboek van Strafvordering. 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 hadden toegezegd 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 voorraden wapens te bezitten en zaken te doen met terroristische organisaties. Gesteld werd dat deze geheime documenten circuleerden in het Amsterdamse 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 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 de afgifte van de originele documenten. De Telegraaf had daar bezwaar tegen, omdat forensisch onderzoek naar vingerafdrukken zou kunnen leiden tot identificatie van de bron. Een aanbod om de stukken in het bijzijn van de officier van justitie te vernietigen werd echter door het OM afgewezen. Tenslotte werden de originele documenten onder protest afgegeven in een verzegelde enveloppe, die door het OM niet zou worden geopend voordat de rechtbank op het beklag tegen de inbeslagneming zou hebben beslist. De rechtbank te 's-Gravenhage besliste op 31 maart 2006 dat het beklag ongegrond was en het cassatieberoep daartegen werd door de Hoge Raad verworpen.

Het arrest van de Hoge Raad van 11 juli 2008 heeft dezelfde feitelijke achtergrond, maar werd gewezen in een kort geding tegen de Staat der Nederlanden. De procedure was aangespannen door De Telegraaf, de reeds genoemde Joost de Haas en Bart Mos, de Nederlandse Vereniging van Journalisten en het Nederlands Genootschap van Hoofdredacteuren. Uit het dossier van de strafrechtelijke procedure kon worden opgemaakt dat de AIVD een eigen onderzoek was gestart tegen de twee journalisten. Daarin kon de AIVD gebruik maken van de bijzondere bevoegdheden bedoeld in de artikelen 20 en 25 van de Wet op de inlichtingen- en veiligheidsdiensten (observeren, registreren, volgen, aftappen en afluisteren). Ook op die manier zou de overheid erin kunnen slagen het lek binnen de geheime dienst te achterhalen. De eisers achtten deze handelwijze onrechtmatig, mede gezien artikel 10 EVRM.

De voorzieningenrechter van de rechtbank te 's-Gravenhage wees de vordering op 21 juni 2006 vrijwel volledig toe. Hiertegen ging de Staat met succes in hoger beroep. Het Hof te 's-Gravenhage oordeelde op 31 augustus 2006 dat de handelwijze van de AIVD gerechtvaardigd was op grond van artikel 10, tweede lid, EVRM. Slechts op één onderdeel kwam het Hof De Telegraaf tegemoet. Vanaf het moment dat de AIVD een persoon in beeld kreeg die de geheime documenten zou hebben gelekt, had de dienst de inzet van bijzondere bevoegdheden jegens de journalisten moeten staken. Zowel De Telegraaf c.s. als de Staat stelden beroep in cassatie in, maar de Hoge Raad verwierp beide beroepen.

De klacht in Straatsburg wordt ingediend door De Telegraaf, Joost de Haas, Bart Mos, de Nederlandse Vereniging van Journalisten en het Nederlands Genootschap van Hoofdredacteuren. Zij voeren aan dat Nederland de artikelen 10 en 8 EVRM heeft geschonden. Op 18 mei 2010 beslist het Europese Hof dat de NVJ en het Nederlands Genootschap van Hoofdredacteuren niet ontvankelijk zijn, omdat deze verenigingen niet zelf zijn getroffen door de maatregelen. Een beslissing over de ontvankelijkheid van de overige drie partijen wordt aangehouden tot de hoofdzaak. In onderstaand arrest blijken op dat punt geen problemen. Het Hof gaat eerst in op de bijzondere bevoegdheden van de AIVD (HR 11 juli 2008) en daarna op de inbeslagneming van originele documenten met mogelijke vingerafdrukken (HR 25 maart 2008).

In the case of Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands

The European Court of Human Rights (Third Section), sitting as a Chamber composed of Josep Casadevall, President, Egbert Myjer, Corneliu Bîrsan, Alvina Gyulumyan, Ineta Ziemele, Luis López Guerra, Kristina Pardalos, judges, and Marialena Tsirli, Deputy Section Registrar,

Having deliberated in private on 19 June and 23 October 2012,
Delivers the following judgment, which was adopted on that last-mentioned date:

PROCEDURE

(...)

THE FACTS

(...)

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLES 8 AND 10 OF THE CONVENTION

63. Articles 8 and 10 provide as follows:

Article 8

"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."

Article 10

"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."

A. The use of "special powers" against the second and third applicants

64. The applicants argued that the use of special powers against the second and third applicants had not been "in accordance with the law", as required by Article 8 § 2 of the Convention, or "prescribed by law", as required by Article 10 § 2 of the Convention.
65. The Government denied that there had been a violation of either Article.

1. Admissibility

66. 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

67. The Government recognised that the second and third applicants had been under investigation and that special powers had been used against them, including the power to intercept and record telecommunications. This had undoubtedly entailed interference with their right to respect for their private and family life, protected by Article 8; it could also be construed as an interference with their freedom to receive and impart information and ideas, protected by Article 10.
68. The statutory basis for the interference had been constituted by section 6(2)(a) of the 2002 Intelligence and Security Services Act, which – along with its drafting history – was at all times accessible to the public.

69. Referring to the Court's case-law, in particular *Weber and Saravia v. Germany* (dec.), 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 year ahead. 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 cases such as the present, had a connotation different from its primary meaning derived from criminal law.

70. 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 which it served. The present case was one such.

71. 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 was 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).

72. Statutory 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.

73. 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 criminal courts where an official was called to account as a defendant or was summoned as a witness;

g) the Supervisory Board.

These various supervisory and monitoring bodies did not exclude one another. However, the supervision and monitoring by each of the bodies was subject to limitations depending on the type of authority and the stage of the investigation. These limitations followed from the intrinsically secret nature of the activities of intelligence and security services.

74. The use of special powers required the prior authorisation of the Minister of the Interior and Kingdom Relations. The request for authorisation had to mention the particular status, if any, of the person under investigation – for example, the status of journalist.

75. The interference complained of had had a "legitimate aim" in that it served the interests of national security, which had been directly compromised by the leaking of secret classified information.

76. As to "necessity in a democratic society", the Government pointed out that protecting national security was one of the main functions of the State. If it was found that secret classified information had been leaked from the AIVD, its ability to operate reliably was at stake and hence national security as well. In this case, moreover, the nature and content of the leaked information had been such that an investigation into the leak had been necessary, taking into account the statutory duty of care in respect of the security of persons with whose help data were collected and the secrecy of the relevant data and sources. For example, the operational names of two sources had been published in *De Telegraaf* together with contextual information capable of enabling dangerous criminals to discover the true identity of the persons concerned. There had therefore been a statutory duty to take action.

77. An alternative to the use of special powers had not been available, given that those responsible for the leak had a vested interest in concealing the facts and circumstances.

78. The AIVD's purpose had not been to identify the applicants' journalistic sources; source protection was therefore not in issue.

79. Domestic law itself – to wit, sections 31 and 32 of the 2002 Intelligence and Security Services Act – laid down the requirements of subsidiarity and proportionality, subject to monitoring by the Supervisory Board and with the possibility of lodging a complaint with the National Ombudsman.

(b) Applicants

80. The applicants agreed with the Government that the use of special powers against the second and third applicants constituted an "interference" with their rights under Articles 8 and 10. They suggested, however, that the Government's admission that they had been "targets" within the meaning of section 6(2)(a) of the 2002 Intelligence and Security Services Act was inconsistent with the position taken by the domestic courts, in particular the Court of Appeal (see paragraph 31 above).

81. If the second and third applicants had *not* themselves been "targets" within the meaning of section 6(2)(a), then the use of special powers against them had lacked a statutory basis. If, on the contrary view, the second and third applicants *had* been targets – a position which the applicants described as "preposterous", since it would imply that they constituted a menace to the continued existence of the democratic legal order –, then a statutory basis had to be admitted.

82. However, safeguards against abuse were insufficient given that there was no prior judicial review of the use of special powers. Authorisation given by the Minister of the Interior and Kingdom Relations was not sufficient, since the Minister was hardly independent and impartial.

83. A necessity in a democratic society for the interference had not been shown. The AIVD documents received by the applicants related to the period 1997-2000; the newspaper articles concerned had all been published in 2006, approximately six years later. In the applicants' submission, there was no appearance of any danger to informants, 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

84. 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.

85. 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.

86. The Court is prepared to accept that the AIVD's purpose in seeking to identify the person or persons who had supplied the secret documents to the applicants was subordinate to its main aim, which was to discover and then close 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. 38224/03, § 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. 33400/96, § 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 so intertwined 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

10) – expressions which, although they differ in the English text of the Convention (both correspond to *prévue(s) par la loi* in the French version), are identical in meaning (see *The Sunday Times v. the United Kingdom (no. 1)*, 26 April 1979, § 48, Series A no. 30, and *Silver and Others v. the United Kingdom*, 25 March 1983, § 85, Series A no. 61).

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 with 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 individuals 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. 58243/00, §§ 62-63; 1 July 2008; *Kennedy v. the United Kingdom*, no. 26839/05, § 152, 18 May 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) show that the use of special powers against the second and third 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, at least for an initial period. 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 a precise statutory prescription. 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 had 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.

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.

95. Rather, it is the applicants' contention that their status as journalists required special safeguards to ensure adequate protection of their journalistic sources. The Court will now turn to this issue.

96. In *Weber and Saravia*, the interference with the applicants' rights under Articles 8 and 10 consisted of the interception of telecommunications 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 the authorities would know only when examining the intercepted telecommunications, if at all, that a journalist's conversation had been monitored. Surveillance measures were, in particular, not directed at uncovering journalistic sources. The interference with freedom of expression by means of strategic monitoring could not, therefore, be characterised as particularly serious (*loc. cit.*, § 151). Although admittedly there was no special provision for the protection of freedom of the press and, in particular, the non-disclosure of sources once the authorities had become aware that they had intercepted a journalist's conversation, the safeguards in place, which had been found to satisfy the requirements of Article 8, were considered adequate and effective for keeping the disclosure of journalistic sources to an unavoidable minimum (*loc. cit.*, § 151).

97. The present case is characterised precisely by the targeted surveillance of journalists in order to determine from whence they have obtained their information. It is therefore not possible to apply the same reasoning as in *Weber and Saravia*.

98. The Court has indicated, when reviewing legislation governing secret surveillance in the light of Article 8, that in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society 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 G 10 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 (*mutatis mutandis*, *Klass and Others*, §§ 21 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 or had held high judicial office and experienced lawyers which 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 a basis in law and his advice was not binding. 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. In the instant case, as the Agent of the Government admitted at the hearing in reply to a question from the Court, the use of special powers would appear 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 (section 19 of the 2002 Intelligence and Security Services Act, see paragraph 51 above).

101. Moreover, review *post factum*, whether by the Supervisory Board, the Committee on 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.

102. The Court thus 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.

B. The order to surrender the documents

103. The applicants argued that the order to surrender the original documents, 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, as purveyors of news, to impart information as guaranteed by Article 10 of the Convention.

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

1. Admissibility

105. 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

106. Under the head of "duties and responsibilities", the Government raised two points.

107. Firstly, the Government considered the present case different in essential respects from *Voskuil v. the Netherlands*, no. 64752/01, 22 November 2007. The primary purpose 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 immediately; had they done so at the outset, there would have been no need for the surrender order.

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.

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., 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. They pointed to 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. of 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 overode 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).

(b) Prescribed by law

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 unopened pending the outcome of objection proceedings in the Regional Court (see paragraph 20 above). The applicants agreed to this procedure with the public prosecutor. Moreover, as the Government correctly point out, it had a statutory basis, namely Article 552a of the Code of Criminal Procedure, which moreover empowers the Regional Court to give any orders needed (see paragraph 50 above; compare and contrast *Sanoma*, §§ 96-97).

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, The Sunday Times, cited above, § 62). In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10 (see, among many other authorities, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 88, ECHR 2004-XI; *Voskuil*, cited above, § 63; and *TV Vest AS and Rogaland Pensjonistparti v. Norway*, no. 21132/05, § 58, ECHR 2008 (extracts)).

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 their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" and whether it was "proportionate to the legitimate aim pursued". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts (see, among many other authorities, *Hertel v. Switzerland*, 25 August 1998, § 46, *Reports* 1998-VI; *Cumpănă and Mazăre*, cited above, § 90; *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, §§ 68-71, ECHR 2004-XI; *Steel and Morris v. the United Kingdom*, no. 68416/01, § 87, ECHR 2005-II; *Mamère v. France*, no. 12697/03, § 19, ECHR 2006-XIII; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-IV; *Voskuil*, 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; *Thorgeir Thorgeirson v. Iceland*, 25 June 1992, § 63, Series A no. 239; *Cumpănă and Mazăre*, cited above, § 93; *Voskuil*, cited above, § 64; and *Financial Times Ltd. and Others v. the United Kingdom*, no. 821/03, § 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 (*Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I; *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, § 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

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 (see *Goodwin*, cited above, § 39; *Voskuil*, cited above, § 65; *Financial Times Ltd. and Others*, cited above, § 59; and *Sanoma*, cited above, § 51).

128. 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, § 63).

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 them to the AIVD, although if the opportunity arose to examine them for usable traces it would 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). That being so, 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* Bluf! *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 18 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 complained of have not been given. There has therefore been a violation of Article 10 of the Convention.

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* by five votes to two 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	Josep Casadevall
Deputy Registrar	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

Drie maal is scheepsrecht. Voor de derde keer is Nederland door het Hof in Straatsburg veroordeeld wegens schending van het recht op bronbescherming, dat besloten ligt in artikel 10 EVRM. De eerste keer gebeurde dat in het *Voskuil*-arrest (EHRM 22 november 2007, *Mediaforum* 2008-2, nr. 6 m.nt. W.F. Korthals Altes). De tweede keer in het *Sanoma*-arrest (EHRM GK 14 september 2010, *Mediaforum* 2010-11/12, nr. 29 met begeleidend artikel van G.A.I. Schuijt). Bovenstaand arrest maakt het drietal vol. De klacht van De Telegraaf e.a. richtte zich tegen twee arresten van de Hoge Raad, die ook in *Mediaforum* zijn geannoteerd (HR 25 maart 2008, *Mediaforum* 2008-5, nr. 18 m.nt. G.A.I. Schuijt en HR 11 juli 2008, *Mediaforum* 2008-11/12, nr. 36 m.nt. F. Fernhout). Het eerstgenoemde arrest had betrekking op de inbeslagneming door het OM van documenten met mogelijke vingerafdrukken van een vertrouwelijke bron. Het tweede arrest betrof het gebruik van bijzondere bevoegdheden door de AIVD jegens journalisten.

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 c.s. 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 gecharmeerd van de wijze waarop Nederland is omgegaan met het recht op bronbescherming. Over de maatregelen van de AIVD oordeelt het Hof unaniem dat deze een schending opleverden van de artikelen 8 en 10 EVRM. Over de inbeslagneming van de documenten door het OM oordeelt het Hof met een meerderheid van 5 tegen 2 dat artikel 10 EVRM is geschonden.

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 overweegt 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*' (r.o. 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 vooraf door 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 ombudsman, omdat deze alleen achteraf toezicht houden. Dat is te laat, want een reeds onthulde bron kan nooit meer geheim worden (r.o. 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-

schijnlijk de reden waarom het Bureau van het Hof heeft besloten het nieuwe arrest slechts te kwalificeren als van '*medium importance*' (level 2). Volgens de website van het EHRM vallen onder level 2 '*judgments, decisions and advisory opinions which, while not making a significant contribution to the case-law, nevertheless go beyond merely applying existing case-law*'. Zij staan in de hiërarchie achter Case reports en uitspraken van high importance (level 1), maar boven uitspraken van low importance (level 3). Het Bureau, dat de kwalificaties vaststelt, wordt gevormd door de president en de vice-presidenten, alsmede de sectievoorzitters van het Hof.

Wat voegt dit arrest toe aan *Sanoma*? Een mogelijk antwoord is te vinden in de overwegingen met betrekking tot de inbeslagneming. Overeenkomstig een beleidslijn van het College van procureurs-generaal, neergelegd in een circulaire van 3 juni 2002 en gepubliceerd in *Mediaforum* 2009-5, p. 207, had het OM de journalisten in de gelegenheid gesteld de documenten verzegeld over te dragen en zich tegelijk te beklagen bij de rechtbank. Zou de rechtbank oordelen dat de inbeslagname onrechtmatig was, dan zou het OM de stukken niet zien. Sedert 2012 is deze praktijk opgenomen in de herziene Aanwijzing Toepassing dwangmiddelen bij journalisten (*Stcrt.* 2012, nr. 3656), besproken door O. Volgenant in *Mediaforum* 2012-4, p. 117. De procedure van verzegeling is een elegante oplossing, maar men zou kunnen stellen dat een beleidsregel onvoldoende is. Een beleidsregel van het OM is immers geen wet, terwijl de Grote Kamer van het EHRM in r.o. 96-98 van het *Sanoma*-arrest een wettelijke grondslag eist. Enerzijds moet het OM wettelijk verplicht zijn een rechter in te schakelen. Anderzijds moet de rechter de wettelijke bevoegdheid hebben kennisneming door het OM te verhinderen.

De Kamer blijkt nu minder streng. Hoewel het handelen van het OM slechts genormeerd was door een circulaire, oordeelt het EHRM dat de casus in belangrijke opzichten verschilt van Sanoma. Volgens r.o. 120 waren er voldoende procedurele waarborgen, omdat de documenten in verzegelde vorm waren afgestaan en uitsluitend beoordeeld zouden worden door de rechtbank. De beperking van artikel 10 EVRM was daarmee '*prescribed by law*'. Dat De Telegraaf c.s. toch aan het langste eind trok komt doordat het Hof in meerderheid van oordeel is dat de inbeslagneming niet noodzakelijk was in een democratische samenleving, een criterium dat in het *Sanoma*-arrest niet meer aan de orde kwam. Opvallend is dat de Nederlandse rechter Myjer zich bevond onder de twee dissenters. Zij meenden dat de AIVD recht had op teruggave van de originele documenten. Dat daar misschien de vingerafdrukken op zitten van een crimineel doet daar niet aan af. '*It is in our view wrong to weigh against the rights of the owner of the documents the possibility that the documents may be examined for traces capable of identifying the person who committed the original crime*', zo overwogen Myjer en zijn collega.

Het betoog 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 snijdt geen hout, nu de redactie had aangeboden de documenten in aanwezigheid van een officier van justitie te vernietigen. Tenslotte is relevant dat het eigendom van de AIVD niet wordt beschermd door artikel 1 van het Eerste Protocol bij het EVRM. De overheid kan zich tegenover burgers niet beroepen op eigen grondrechten. De kernvraag is dus dezelfde als in andere zaken van bronbescherming: weegt de persvrijheid het zwaarst of de staatsveiligheid?

Hoe nu verder?

Kort na het *Voskuil*-arrest nam de Nederlandse regering het besluit een wet voor te bereiden tot wijziging van het Wetboek van Strafvordering, welke wet aangehaald zou worden als Wet bronbescherming in strafzaken. Een voorontwerp is gepubliceerd in *Mediaforum* 2008-11/12, p. 466-472. De Raad van State bracht begin 2010 advies uit, maar tot een indiening bij de Tweede Kamer is het nooit gekomen. Minister Plasterk van Binnenlandse Zaken en Koninkrijksrelaties heeft op 7 december 2012, mede namens de minister van Veiligheid en Justitie, een brief aan de Tweede Kamer geschreven over de gevolgen die 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 (artikel 23 Wiv), zal de rechtbank te 's-Gravenhage toestemming moeten geven voor de inzet van bijzondere bevoegdheden jegens journalisten waarbij de inzet gericht is op het – direct of indirect – achterhalen van journalistieke bronnen. Opmerkelijk is dat minister Plasterk het begrip 'journalisten' beperkter wil uitleggen dan gebeurde in het voorontwerp 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 genomen. Iemand die in het maatschappelijk verkeer dezelfde 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 aangevuld met een bepaling die voorziet in rechterlijke toetsing van justitieel optreden tegen 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*-zaak. De minister van Veiligheid en Justitie zal nu 'op zeer korte termijn' het gewijzigde ontwerp aan de Raad van State voorleggen. Dat werd tijd.