Hof van Justitie van de Europese Unie
14 februari 2019, zaak C-345/17, ECLI:EU:C:2019:122
(Lenaerts (president), Prechal, Toader, Rosas, Ilešič)
Noot: T. McGonagle

Bescherming persoonsgegevens. Vrijheid van meningsuiting. Video-opname. Belangenafweging.

[EVRM art. 8; Hv art. 7, 8; Rl. 95/46/EG art. 3, 9]

Buivids heeft op een politiebureau van de nationale politie op een video vastgelegd hoe hij een verklaring aflegt in het kader van een administratieve procedure wegens een overtreding. Op deze video zijn politieagenten en hun werkzaamheden op het bureau te zien. Buivids heeft deze beelden vervolgens via YouTube gepubliceerd. Nadat de beelden op internet waren gepubliceerd, heeft de dienst gegevensbescherming zich op het standpunt gesteld dat Buivids inbreuk had gemaakt op artikel 8, lid 1, van de wet op de bescherming van persoonsgegevens, aangezien hij de politieagenten, als betrokkenen, in strijd met die bepaling niet had geïnformeerd over het doel van de verwerking van hun persoonsgegevens. Daarover heeft Buivids vervolgens een procedure gestart, in het kader waarvan de nationale rechter een aantal vragen heeft voorgelegd aan het HvJ. In de eerste plaats wil hij weten of de beelden binnen de werkingssfeer van de richtlijn vallen. Het HvJ beslist dat dit het geval is, omdat het gaat om een video-opname van mensen die doorlopend is vastgelegd in het geheugen van de camera. Het plaatsen van persoonsgegevens op een website moet ook als verwerking van dergelijke gegevens worden aangemerkt. Er zijn op deze situatie ook geen uitzonderingsbepalingen van toepassing. In de tweede plaats is de vraag of hier sprake is van verwerking voor journalistieke doeleinden. Daarbij is van belang dat de richtlijn beoogt enige verzoening te bieden tussen de bescherming van de persoonlijke levenssfeer en de vrijheid van meningsuiting. Om met het belang van de vrijheid van meningsuiting rekening te houden is het nodig om het begrip journalistiek ruim uit te leggen en het toe te passen op alle personen die journalistieke activiteiten ontplooien. Volgens de rechtspraak van het Hof zijn dit activiteiten die de bekendmaking aan het publiek van informatie, meningen of ideeën tot doel hebben, ongeacht het overdrachtsmedium. Het feit dat Buivids geen professioneel journalist is en dat hij de opnames op YouTube heeft gezet, kunnen dan ook niet uitsluiten dat het hier gaat om een verwerking voor uitsluitend journalistieke doeleinden. Het is aan de verwijzende rechterlijke instantie om na te gaan of uit de betrokken video valt af te leiden dat het uitsluitende doel van de opname en de publicatie ervan was, informatie, meningen of ideeën aan het publiek bekend te maken. Met het oog daarop kan de verwijzende rechterlijke instantie in het bijzonder in overweging nemen dat de betrokken video volgens Buivids op een website is gepubliceerd om de aandacht van de bevolking te vestigen op vermeende onregelmatige praktijken van de politie die zouden hebben plaatsgevonden toen hij een verklaring aflegde. Wanneer blijkt dat met de opname en de publicatie van deze video niet uitsluitend het doel werd nagestreefd informatie, meningen of ideeën aan het publiek bekend te maken, kan daarentegen niet worden vastgesteld dat de verwerking van persoonsgegevens in de onderhavige zaak „voor uitsluitend journalistieke [...] doeleinden" is geschied. Ook is

een evenwichtige belangenafweging nodig tussen de bescherming van de persoonlijke levenssfeer van de betrokkenen en de vrijheid van meningsuiting. De begrenzingen van de bescherming van de gegevens moet dan ook binnen het strikt noodzakelijke blijven. Dit vloeit ook voort uit art. 7 Hv zoals uitgelegd in het licht van art. 8 EVRM. Daarbij geldt dat het EHRM een aantal criteria heeft ontwikkeld die in dit licht relevant zijn voor de beoordeling door de nationale rechter.

Buivids

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1. This case is located in the blurred zone of intersection between the rights to privacy and data protection and the right to freedom of expression and information. It arose out of an incident at a police station in Latvia. Mr. Buivids made a video recording of administrative proceedings against him in the police station and published the video on YouTube. The video contained footage of police officers performing their duties at the station, but Mr. Buivids had not informed the officers of the purpose of the recording. The National Data Protection Agency found in a decision that Mr. Buivids had infringed the Latvian Personal Data Protection Law and requested him to remove the video from YouTube. Mr. Buivids then initiated legal proceedings before the administrative courts and stated in his application that his aim was to draw attention to what he considered to be "unlawful conduct on the part of the police". The District and Regional Administrative Courts found against Mr. Buivids, who then lodged an appeal in cassation before the Latvian Supreme Court (see para. 4, below).

2. The case concerns the interpretation of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31), which was still in force at the operative time, but has since been repealed by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (OJ 2016 L 119, p. 1, hereafter the General Data Protection Regulation or GDPR). More specifically, it concerns the interpretation of Article 9 of the Directive, which read: "Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression."

3. Article 85 is the equivalent provision in the GDPR. Article 85(1) GDPR reads: "Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression". This should be achieved by way of exemptions or derogations, where necessary (Article 85(2)). Article 9 of Directive 95/46/EC and Article 85 GDPR are congruent, but not identical. A key difference is that the adverb "solely" has not been retained in the wording of Article 85. The Court's judgment thus remains of interest and still holds a certain relevance, despite the formal redundancy of the Directive.

4. The Latvian Supreme Court referred two questions to the Court of Justice of the European Union for a preliminary ruling. First, does the recording, in a police station, of police officers

carrying out procedural measures, and the publication of the video via YouTube, count as an activity that comes within the scope of Directive 95/46? Second, are such activities to be regarded as the processing of personal data for journalistic purposes, within the meaning of Article 9 of the Directive?

5. While answering the first question, the Court recalled its earlier case-law (judgment of 11 December 2014, *Ryneš*, C-212/13, EU:C:2014:2428, para. 22), in which it had held that the image of a person recorded by a camera constitutes personal data insofar as it renders the person in question identifiable. In the video in the present case, it is possible to see and hear the police officers, which means the recorded images should be regarded as personal data (paras. 31 and 32 of the present case).

6. The Court found it relevant that the video had been recorded on a digital photo camera, which was stored on the memory of the camera, i.e., a continuous recording device. In keeping with earlier case-law on video surveillance, storage on a continuous recording device amounts to automatic processing of personal data (para. 34, referencing judgment of 11 December 2014, *Ryneš*, C-212/13, EU:C:2014:2428, paras. 23 and 25). The act of uploading personal data onto an internet page also constitutes such processing (para. 37, following judgments of 6 November 2003, *Lindqvist*, C 101/01, EU:C:2003:596, para. 25, and of 13 May 2014, *Google Spain and Google*, C-131/12, EU:C:2014:317, para. 26). By extension, the uploading of a video containing personal data onto YouTube, which the Court described as "a video website on which users can send, watch and share videos", also constitutes "processing of those data wholly or partly by automatic means" (paras. 38 and 39).

7. As Mr. Buivids published the video on YouTube without restricting access to it, an indefinite number of people had access to the personal data in the video. This meant that the act of publication did not "come within the context of purely personal or household activities", which would have put the act outside the scope of the Directive, in accordance with Article 3(2) (para. 43).

8. The Court observed that the act of recording police officers in their professional capacity "is not capable of excluding such a type of processing of personal data" from the scope of the Directive (para. 44). Conversely, just because information is provided in the course of a professional activity, does not preclude it from being considered personal data (para. 46).

9. This line of reasoning led the Court to conclude that the activities in question did fall under the scope of Article 3 of the Directive.

10. In answering the second question, the Court took a deliberately broad understanding of the notion of journalism, pointing to the legislative history of Directive 95/46/EC, which shows that "the exemptions and derogations provided for in Article 9 of that directive apply not only to media undertakings but also to every person engaged in journalism" (para. 52, referencing judgment of 16 December 2008, Satakunnan Markkinapörssi and Satamedia, C 73/07, EU:C:2008:727, para. 58). The Court was more focused on the nature of the activity than on a precise description of the actor who performs the activity. It described "journalistic activities" as activities having the purpose of "disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them" (para. 53). Insofar as Mr. Buivids' actions could be covered by such a description, the fact that he was not a professional journalist was not determinative. This approach is in line with the approach

taken by the European Court of Human Rights, which has recognised the importance of YouTube as a medium that has, by virtue of "its characteristics, its accessibility and above all its potential impact", fostered the emergence of citizen journalism (*Cengiz and Others v. Turkey*, nos. 48226/10 and 14027/11, § 52, ECHR 2015ECLI:CE:ECHR:2015:1201JUD004822610 – note, however, that the Court did not refer to this particular judgment in the instant case).

11. The Court found that the particular medium used is not determinative as to whether an activity is undertaken "solely for journalistic purposes" either - due to "the evolution and proliferation of methods of communication and the dissemination of information" (para. 57). On the other hand, the Court also heeded the cautionary observation of the Advocate General that not all information published on the internet, involving personal data, will amount to "journalistic activities" for the purposes of Article 9 of the Directive (para. 58).

12. The Court left it to the referring court to resolve the second question, but it did state that the exemptions and derogations foreseen under Article 9 must only be applied when (strictly) necessary to reconcile the fundamental rights to privacy and freedom of expression, in a manner that is consistent with the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights, as interpreted by the European Court of Human Rights. It recalled, in the latter connection, the relevant criteria developed by the Strasbourg Court, including: "contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, the content, form and consequences of the publication, and the manner and circumstances in which the information was obtained and its veracity" (para. 66, referring to *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 165, 27 June 2017, CE:ECHR:2017:0627JUD000093113).

13. Whereas the Court in the present case necessarily had to focus on whether "the sole objective" of the recording and publication of the video was the disclosure to the public of information, opinions or ideas, it will not be so circumscribed if and when it has to consider Article 85 GDPR in the future (see para. 3 of the present note, above). This is an important shift of focus because a publication can have multiple purposes and, more generally, the nature of public debate has changed. While professional journalists and institutional media are still influential voices in public debate, the voices of other actors are increasingly being heard, and the European Court of Human Rights has recognized the valuable contributions that those actors – including NGOs, individuals and bloggers – can make (see, for example, *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, 8 November 2016, ECLI:CE:ECHR:2016:1108JUD001803011, EHRC 2017-2, nr. 36, note by T. McGonagle). On the one hand, this points up the need to understand journalism as an activity which sustains public debate and which can be carried out by a range of actors. On the other hand, it points up the need to understand that public debate can also be well served by non-journalistic contributions.

14. Finally, whereas the 'Luxembourg' Court has in the past not always taken due account of the European Court of Human Rights' case-law on freedom of expression (see, for example, *Google Spain and Google*, C-131/12, EU:C:2014:317), it does cross-reference some relevant 'Strasbourg' jurisprudence in the present case. In doing so, it enters into the spirit of Article 52(3) of the EU Charter, which aims to ensure that rights enshrined in the Charter that are

also safeguarded by the European Convention on Human Rights, are interpreted consistently with the jurisprudence of the European Court of Human Rights.

Tarlach McGonagle, Institute for Information Law, University of Amsterdam