NJ 2021/13

EUROPEES HOF VOOR DE RECHTEN VAN DE MENS
8 oktober 2019, nr. 15428/16
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m.nt. E.J. Dommering

Art. 10 EVRM

ECLI:CE:ECHR:2019:1008JUD001542816

Recht op privacy versus recht op vrije nieuwsgaring pers (publieke waakhondfunctie). Afwijzing verzoek journalist om reportage te mogen maken over misstanden in Hongaarse asielzoekerscentra is in strijd met het recht op vrije informatiegaring ex art. 10 EVRM.

Klager is een journalist, die voor een Hongaarse internetnieuwssite werkt. In 2015 wilde hij een reportage maken over de werkzaamheden van een organisatie voor burgerrechten in een centrum voor opvang van asielzoekers en vluchtelingen. Hij vroeg daarvoor toestemming aan de Hongaarse immigratiedienst. Deze wees het verzoek af met als reden dat deze reportage onverenigbaar was met de privacy van de in het centrum ondergebrachte asielzoekers en naasten. Een aantal maanden later deed hij een tweede verzoek, ditmaal voor een reportage over een ander opvangcentrum. Hij wilde door middel van het interviewen van bewoners aandacht besteden aan de vermeende onmenselijke behandeling in het opvangcentrum. Ook dit verzoek werd om dezelfde reden afgewezen. Hij werd vervolgens niet-ontvankelijk verklaard in het bestuursrechtelijk beroep tegen deze afwijzing.

De journalist diende hierop een klacht in bij het EHRM, stellende dat het verbod aan de pers om asielzoekerscentra in Hongarije te bezoeken, strijdig was met de vrije informatiegaring door de pers ex art. 10 EVRM. Hij werd hierin ondersteund door diverse mensenrechten- en persorganisaties.

EHRM: Het opwerpen van belemmeringen om toegang te krijgen tot informatie van publiek belang kan in strijd zijn met art. 10 EVRM, te weten als sprake is van grote nieuwswaarde en evident maatschappelijk belang en journalisten hun essentiële taak als publieke waakhond moeilijk kunnen uitoefenen. Ook voorbereidingshandelingen om tot een dergelijke publicatie te kunnen komen (seek information), kunnen strijdig zijn met art. 10 EVRM. Dit geldt in het bijzonder als het gaat om de wijze waarop een overheid met kwetsbare personen zoals vluchtelingen omgaat. De privacy van deze kwetsbare personen en hun naasten dienen anderzijds wel degelijk beschermd te worden. De overheid heeft hierbij een zekere beoordelingsruimte. In deze zaak heeft de Hongaarse overheid de specifieke privacybelangen evenwel niet voldoende geconcretiseerd onderbouwd om beperking van het recht op vrije nieuwsgaring te kunnen rechtvaardigen. Volgt schending art. 10 EVRM.

Szurovecz
tegen
Hongarije

EHRM:

The Law

I. Alleged violation of Article 10 of the Convention

20. The applicant complained under Article 10 of the Convention that by refusing his request to enter the premises of the Debrecen Reception Centre with a view to writing a report on the living conditions of asylum-seekers the domestic authorities had interfered with his right to impart information. Article 10 reads as follows:

> '1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

A. Admissibility

Enz. (*red.*)

B. Merits

1. The parties' submissions

(a) The government

31. The Government submitted that should the Court find that Article 10 was applicable to cases concerning the denial of access to information, this was only so in situations where the lack of access to a particular piece of information effectively prevented an applicant from expressing an opinion in the absence of alternative means of obtaining that information and where the applicant was liable under civil or criminal law for the factual correctness of his or her statements.

32. Inasmuch as the applicant complained that the denial of access to the premises of the Debrecen Reception Centre had infringed his right to impart information and ideas, the Government were of the view that it was determinative that the applicant had not been prevented by the lack of access from

publishing his opinion on the shortcomings of the functioning of the asylum system in Hungary and the living conditions of asylum-seekers.

33. According to the Government access to the Reception Centre had not been necessary for the applicant to express his opinion on an issue of public interest, since he had had access to information provided by international organisations and NGOs. Thus, he could have interviewed refugees outside the premises of the Reception Centre and he could have obtained photographs taken by others. The fact that obtaining such information would have required cooperation with others and compilation of data did not refute the assertion that the information had been available from alternative sources.

34. The Government contended that the alleged interference — denying the applicant access — had had a legal basis, since the applicant had had no substantive right under domestic law to claim such access. Similarly, the Government argued that the interference had pursued the legitimate aim of protecting the rights of others, specifically the private lives of asylum-seekers, as envisaged by Article 8 of the Convention.

35. The Government highlighted the margin of appreciation enjoyed by the State in the present case and in granting access to the requested information. This margin was limited only by an applicant's overriding interest in supporting his or her statements with facts in order to fend off civil or criminal liability for statements concerning the exercise of public power and where there were no alternative means for an applicant to obtain the necessary information.

36. Moreover, there was no obligation on the State to impart information consisting of personal data when the disclosure of that information was not justified by a pressing social need. Any positive obligation under Article 10 ought to be construed in the light of the authorities' obligation to respect and ensure the enjoyment of other rights enshrined in the Convention and to strike a fair balance not only between private and public interests, but also between competing private interests — in the present case the applicant's right to receive information under Article 10 and asylum-seekers' right to respect for private life under Article 8, right to life and physical integrity under Articles 2 and 3, and right to personal liberty under Article 5 of the Convention.

37. Finally, referring to the case of *Magyar Helsinki Bizottság v. Hungary* ([GC], no. 18030/11, ECHR 2016 (*NJ* 2017/431, m.nt. E.J. Dommering; *red.*)) the Government pointed out that as far as the right to information was covered by Article 10, it did not require the information to be made available in a specific form or by specific means.

(b) The applicant

38. The applicant submitted that he had intended to report on the living conditions prevailing in Hungarian reception centres at the peak of the refugee crisis in Hungary.

39. In his understanding, the present case had not concerned the State's positive obligation to provide information of public interest but rather the question of to what extent and under which conditions States could impose physical restrictions on journalistic reporting and newsgathering. By denying the applicant access to the Reception Centre, the national authorities had stood in the way of the free flow of information. Consequently, it had become impossible for the public to become acquainted with the moral and political implications of the refugee crisis.

40. The applicant agreed that, through the reports of NGOs, he had had indirect knowledge concerning and could have accessed second-hand information on the conditions in the Reception Centre. However, civil society organisations had been granted access to the premises of the Reception Centre to provide humanitarian and legal aid whereas the press, as purveyor of information and as public watchdog, was supposed to report on newsworthy events and to afford the public a means of discovering and forming opinions and ideas. The applicant also pointed out that journalists had unique professional standards to meet before publishing material that necessitated an 'investigative mindset' to discover facts and details. Furthermore, NGOs had their own agenda and were bound by their professional obligations as regards the information they passed on to the public. Thus, it had been impossible to uncover the whole situation in the reception centres solely based on these accounts.

41. An absolute entry ban for journalists to reception centres exempted certain State actions from public scrutiny. Allowing the authorities to prohibit access to reception centres would also permit them to maintain a monopoly on information and opinion concerning these centres, depriving the public of balanced and objective information on asylum-seekers.

42. As regards the argument that he had not been prevented from publishing his opinion on the asylum system, as evidenced by the fact that he had published an article on a different reception centre, the applicant submitted that he had been systematically refused entry to reception centres and that he had been able to use only information obtained through the statements of third parties, without having a personal impression.

43. The applicant did not dispute before the Court that the restriction had had a legal basis in Hungarian law. He also accepted that the impugned measure had served the legitimate aim of protecting the privacy of people displaced from their homes owing to fear, as recognised by Article 8 of the Convention.

44. As regards the proportionality of the measure, the applicant maintained that the domestic authorities had failed to take into account the State's obligation to balance asylum-seekers' right to privacy with the respect for freedom of the press.

45. He submitted that in his request for access he had clarified that personally identifiable images and records of the residents would have been published only with their consent; however this had not been taken into consideration by the Office of Immigration and Nationality.
46. While the applicant agreed that certain restrictions should be enforced on reporting in refugee camps, in the present case a blanket, and thus disproportionate, prohibition on entry had been in place.

(c) Third-party interveners
47. The third-party interveners, Media Legal Defence Initiative, Index on Censorship, Reporters Committee for Freedom of the Press, European Publishers Council, PEN International, Hungarian Helsinki Committee, the Dutch Association of Journalists [Nederlandse Vereniging van Journalisten, *red.*], and the European Centre for Press and Media Freedom ('the interveners'), jointly argued that newsgathering, a corollary to the right to freedom of expression and freedom of the press, was afforded protection under Article 10 of the Convention.
48. They submitted that the key component of effective investigative reporting was physical access to locations. Physical access enabled journalists to understand the context in which stories were taking place and to observe directly the conditions and conduct in such locations. In their opinion it was evident from the Court's case-law that specific forms of newsgathering activity fell within the Court's jurisdiction despite the fact that the cases did not involve restrictions on publication or a conviction.
49. The interveners also noted that the fundamental importance of newsgathering to the exercise of the right to freedom of expression had been recognised in the case-law of a number of common-law jurisdictions.
50. The interveners asserted that if journalists were prevented from entering and reporting from places where important events were unfolding, they could not effectively report on those events and could not fulfil their role as 'public watchdog'. Thus, a physical restraint on journalists accessing certain places or events amounted to an interference with their newsgathering activities, and to an interference with Article 10 of the Convention.
51. As to the necessity of the interference, the interveners submitted that State restrictions on a journalist's physical access to certain places or events should be subject to close scrutiny by the Court. When assessing the question of whether a restriction on accessing certain locations was necessary, the interveners suggested that the Court should have regard to the following factors: whether a) access to the location was for the purpose of covering a matter of general public interest; b) the State had an information monopoly; c) the refusal to grant access to the location interfered with the Article 10 rights of third parties; d) access was for the purpose of promoting the rights of vulnerable individuals; e) access would cause disruption to the legitimate public-interest activities of the authorities at the location; f) less restrictive measures would be capable of protecting the other interests or rights that might be at risk; and g) sufficient safeguards were in place to prevent arbitrary abuse.

2. The court's assessment
(a) Whether there was an 'interference' with the applicant's rights under Article 10
52. The Court has previously found that gathering of information is an essential preparatory step in journalism and is an inherent and protected part of press freedom (see *Dammann v. Switzerland*, no. 77551/01, § 52, 25 April 2006). Obstacles created in order to hinder access to information which is of public interest may discourage those working in the media or related fields from pursuing such matters. As a result, they may no longer be able to play their vital role as 'public watchdogs,' and their ability to provide accurate and reliable information may be adversely affected (see *Shapovalov v. Ukraine*, no. 45835/05, § 68, 31 July 2012 and see *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, § 38, 14 April 2009).
53. The Court points out that the applicant, a journalist, was denied access to the Reception Centre, where he wanted to conduct interviews for his article on the specific subject of asylum seekers' living conditions.
54. The Court considers that the refusal to authorise the applicant to conduct interviews and take photos inside the Reception Centre prevented him from gathering information first hand and from verifying the information about the conditions of detention provided by other sources and constituted an interference with the exercise of his right to freedom of expression in that it hindered a preparatory step prior to publication, that is to say journalistic research (see, *mutatis mutandis, Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland*, no. 34124/06, § 41, 21 June 2012, where the Court came to the same conclusion in respect of the refusal to authorise a private radio and television broadcasting company to film inside a prison to prepare a television programme and interview one of the detainees).
55. The Government's objections that the applicant's complaint is incompatible *ratione materiae* and *ratione personae* with the provisions of the Convention (see paragraphs 21–26 above) must therefore be dismissed.
56. It remains to be determined whether the interference was justified under paragraph 2 of Article 10 of the Convention.

(b) Whether the interference was 'prescribed by law' and served a legitimate aim

57. The Court observes that the applicant did not dispute the lawfulness of the impugned measure. Thus, it is ready to accept that the restriction on the applicant's access to the Reception Centre was based on section 2 of Decree no. 52/2007 (XII.11) of the Ministry of Justice (see paragraph 12 above) and satisfied the requirement for the interference to be 'prescribed by law'.

58. Furthermore, it was not in dispute between the parties that the restriction on the applicant's freedom of expression pursued the legitimate aim of protecting the private lives of asylum-seekers and camp residents and the Court sees no reason to hold otherwise.

(c) Whether the interference was 'necessary in a democratic society'

59. The general principles concerning the question of whether an interference with freedom of expression is 'necessary in a democratic society' were restated in *Bédat v. Switzerland* ([GC], no. 56925/08, § 48, 29 March 2016):

'(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which … must, however, be construed strictly, and the need for any restrictions must be established convincingly …

(ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need' The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.

(iii) 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 it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'… 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 …'

60. The Court notes that the article which the applicant intended to prepare concerned the conditions in which asylum-seekers were accommodated in the Reception Centre. At the material time there were a large number of asylum-seekers entering the territory of Hungary, a situation commonly characterised as a 'refugee crisis' and widely reported in the media. The Reception Centre in question had been subject of an investigation by the Commissioner for Fundamental Rights, who had found that the living conditions therein had amounted to inhuman and degrading treatment (see paragraph 8 above).

61. The public interest in reporting from certain locations is especially relevant where the authorities' handling of vulnerable groups is at stake. The 'watchdog' role of the media assumes particular importance in such contexts since their presence is a guarantee that the authorities can be held to account for their conduct (see, *mutatis mutandis, Pentikäinen v. Finland* [GC], no. 11882/10, § 89, ECHR 2015). The matter of how residents were accommodated in State-run reception centres, whether the State fulfilled its international obligations towards asylum-seekers and whether this vulnerable group had the ability to fully enjoy their human rights was therefore undisputedly newsworthy and of great public significance.

62. The Court is therefore satisfied that the article which the applicant intended to prepare concerned a matter of public interest, where there is little scope for restrictions on freedom of expression under Article 10 § 2 of the Convention (see *Bédat,* cited above § 49).

63. In the face of these considerations, the Court finds that the domestic authorities should have paid particular attention to the public interest attached to the applicant's request, which consisted primarily in providing a first-hand report on the conditions prevailing at the facility. However, the Court cannot but note that the conclusion of the OIN in refusing the applicant access to the Reception Centre (see paragraph 9 above) was reached without any sensible consideration of his interest as a journalist in conducting his research or of the interest of the public in receiving information on a matter of public interest.

64. As regards the respondent party's interest in preventing the applicant from interviewing asylum seekers and taking photos inside the Reception Centre, the domestic authorities and the Government considered that allowing the applicant

access to the Reception Centre as a journalist might have impeded the safety and private lives of refugees and asylum seekers.

65. In the Court's view the reasons adduced by the OIN and the respondent Government were undoubtedly 'relevant' for the purposes of the necessity test to be applied under Article 10 § 2. It will next examine whether they were also 'sufficient'.

66. The Court observes in this context that from the comparative-law data available to the Court, it appears that there is a lack of European consensus with regard to media access to facilities accommodating asylum seekers (see paragraphs 17–19 above). In so far as this absence of a European consensus emanates from different perceptions concerning the way the rights of asylum-seekers are best ensured in reception centres, the Court is prepared to accept a somewhat wider margin of appreciation than otherwise accorded with respect to restrictions on publications raising a matter of major public concern. The Court also reiterates that when the question involves the entry of journalists into facilities accommodating asylum-seekers, most member States require that some limitations be placed on such visits as regards their time, place and manner for institutional considerations, as well as for the protection of the rights of the residents.

67. However, even having regard to this leeway, the Court is not persuaded that the domestic authorities gave sufficient consideration to whether the refusal of permission to access and conduct journalistic research inside the Reception Centre, for reasons concerning the private life and security of asylum seekers, was effectively necessary in practice in the present circumstances.

68. In the present case the material the applicant intended to gather, although by its very nature necessarily touching upon the private lives of others, did not concern information for sensationalist or similar purposes (see, *a contrario, Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 101 *in fine,* ECHR 2015 (extracts)), but rather those aspects of the asylum-seekers' lives that were of public interest, in particular their living conditions and their treatment by the Hungarian authorities.

69. Moreover, the applicant explained that he would only take photos of individuals who had given their prior consent and, if needed, he would also obtain written authorisation from them (see paragraph 8 above). The OIN does not appear to have taken any notice of this argument. In such conditions the reliance on the potential effects of research on the private lives of the people accommodated in the Reception Centre, although relevant, was not sufficient to justify the interference with the applicant's freedom of expression.

70. The same applies to the need to protect the safety of asylum-seekers. The Court notes that neither the domestic authorities nor the Government have indicated in what respect the safety of asylum-seekers would have been jeopardised in practice by the proposed research especially if it had taken place only with the consent of the individuals involved.

71. Lastly, the Court finds it necessary to address the Government's submission according to which the applicant might have had the possibility to gather information through further indirect sources and in another format, including taking pictures and conducting interviews outside the centre or through information published by international organisations and NGOs (see paragraph 33 above).

72. While it is true that certain information was available regarding the Reception Centre through the monitoring activities of NGOs, the Court has regard to the applicant's argument that those NGO reports necessarily focused on different subject areas and might not have covered the issues he intended to examine (see paragraph 40 above).

73. In a similar vein, information obtained outside the Reception Centre might not have had, in the eyes of the public, the same value and reliability as first-hand data that the applicant could have obtained by accessing the Reception Centre in person. Moreover, the information made available by those sources might have been gathered for purposes other than that of the applicant, without him having the possibility to verify their authenticity.

74. In any event the Court has previously held that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed. It is therefore not for the national courts or indeed for the Court to substitute their own views for those of the press as to what technique of reporting should be adopted by journalists (see *Stoll v. Switzerland* [GC], no. 69698/01, § 146, ECHR 2007-V). Thus, the existence of other alternatives to direct newsgathering within the Reception Centre did not extinguish the applicant's interest in having face-to-face discussions on and gaining first-hand impressions of living conditions there. In those circumstances the availability of other forms and tools of research were not sufficient reasons to justify the interference complained of or to remedy the prejudice caused by the refusal of authorisation to enter the Reception Centre.

75. Lastly, essentially for the reason that the decision of the OIN had not been an administrative decision within the meaning of section 12 of the Administrative Procedure Act no. CXL of 2004 (see paragraph 10 above), there was no legal possibility open to the applicant to argue for the necessity of his access to the Reception Centre in order to exercise his right to impart information; and the domestic courts were prevented from performing a proper proportionality analysis (see, *mutatis mutandis, Lombardi Vallauri v. Italy*, no. 39128/05, §§ 45–46, 20 October 2009; *Baka v. Hungary* [GC], no. 20261/12, § 161, 23 June 2016; and *Aydoğan and Dara Radyo Televizyon Yayıncılık Anonim Şirketi v. Turkey*, no. 12261/06, §§ 52–54, 13 February 2018).

76. In conclusion, the Court accepts that the domestic authorities are better placed than it is to

say whether, and to what extent, access to the Reception Centre is compatible with the authorities' obligation to protect the rights of asylum-seekers. However, in view of the importance of the media in a democratic society and of reporting on matters of considerable public interest, the Court considers that the need for restrictions on freedom of expression must be convincingly established. In the present case, considering the rather summary reasoning put forward by the OIN and the absence in its decision of any real balancing of the interests in issue, in the Court's opinion the domestic authorities have failed to demonstrate convincingly that the refusal of permission to enter and conduct research in the Reception Centre, which was an absolute refusal, was proportionate to the aims pursued and thus met a 'pressing social need'.

77. It follows that there has been a violation of Article 10 of the Convention. (…)

Noot

1. Deze Hongaarse zaak gaat over de vrijheid van nieuwsgaring. De klager, een journalist die voor een Hongaarse internetnieuwssite werkte, had in 2015 contact gelegd met een organisatie voor burgerrechten om een reportage te maken over hun werkzaamheden in een Hongaars centrum voor de opvang van asielzoekers en vluchtelingen, genaamd Vámosszabadi. Hij had daartoe een verzoek tot toegang gedaan aan de Immigratiedienst. Deze weigerde het verzoek met het argument dat de privacy van de vreemdelingen zich daartegen verzette. Een paar maanden later probeerde hij het nog een keer, ditmaal voor een bezoek aan het Debrecen Opvangcentrum. Hij gaf nu een uitvoerige motivering. Hij wilde de mensen daar interviewen en met hun toestemming foto's van ze maken. Hij koos dit centrum omdat de Commissioner for Fundamental Rights (de Hongaarse parlementaire ombudsman) als *national preventive mechanism* in de zin van het *Optional Protocol to UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* had vastgesteld dat de behandeling van vreemdelingen aldaar onmenselijk was, terwijl dit opvangcentrum in de staatsmedia werd voorgesteld als een speerpunt van de Hongaarse anti-immigratie politiek. Het voorspelbare antwoord van de Immigratiedienst was weer nee, en de argumentatie was weer bescherming van de privacy van de vreemdelingen en hun in het land van herkomst achtergebleven familieleden. Het door de klager tegen deze beslissing ingestelde administratieve beroep werd niet ontvankelijk verklaard omdat het geen op rechtsgevolg gerichte beslissing was geweest. In 2016 probeerde hij samen met een parlementslid een bezoek te brengen aan weer een ander vreemdelingenopvangcentrum (er zijn er genoeg in Hongarije!), namelijk dat in Körmend. Het parlementslid mocht naar binnen, maar hij niet. In Straatsburg was dus voldoende stof om over te klagen, zodat de journalist daar een klacht indiende. Het Hof stapt gemakkelijk heen over de barrière van niet-ontvankelijkheden die de Hongaarse regering opwierp. Het behandelde de klacht wegens schending van artikel 10 op haar merites. Inmiddels hadden acht mensenrechten- en persorganisaties (waaronder de Nederlandse Vereniging van Journalisten, NVJ) zich aan zijn zijde gevoegd (zie overweging 47).

2. De journalist had aangevoerd dat het absolute verbod aan de pers de asielcentra in het land te bezoeken tot gevolg had dat wat daar gebeurde geheel aan publieke controle werd onttrokken. De interveniërende organisaties stelden dat de toegang tot fysieke locaties een wezenlijk element van onderzoeksjournalistiek was en dat dit recht als zodanig in verschillende 'common law' landen werd erkend. Zij deden ook een suggestie aan het Hof wat relevante criteria voor een dergelijk toegangsrecht zouden moeten zijn. Ik citeer uit overweging 52: "a) access to the location was for the purpose of covering a matter of general public interest; b) the State had an information monopoly; c) the refusal to grant access to the location interfered with the Article 10 rights of third parties; d) access was for the purpose of promoting the rights of vulnerable individuals; e) access would cause disruption to the legitimate public-interest activities of the authorities at the location; f) less restrictive measures would be capable of protecting the other interests or rights that might be at risk; and g) sufficient safeguards were in place to prevent arbitrary abuse."

3. Het Hof plaatst een aantal precedenten voorop, waarvan de bekendste zijn: de arresten *Dammann/Zwitserland*, EHRM 26 november 1991, appl. 77551/01, *NJ* 1992/457, overweging 52, en *Társaság/Hongarije*, EHRM 10 december 2007, appl. 37374/05, *NJ* 2008/236, m.nt. E.J. Dommering, overweging 38. Het Hof heeft daarin als algemene regel aanvaard dat het opwerpen van belemmeringen om toegang te krijgen tot informatie van publiek belang in strijd kan zijn met artikel 10. De *voorbereidingshandeling* tot een publicatie over een onderwerp van publiek belang kan dus ook beschermd worden door artikel 10 EVRM. Het Hof leest dus in artikel 10 EVRM het in de tekst ontbrekende recht '*to seek* information' (dat wel in artikel 19 van het Handvest van de Verenigde Naties staat).

4. In overweging 61 voegt het daar als factor aan toe dat dit in het bijzonder van belang is als het gaat om het (kritisch) vastleggen van hoe de overheid met kwetsbare individuen omgaat, bijvoorbeeld vluchtelingen, een omstandigheid die ook de interveniërende partijen hadden aangevoerd. Anderzijds heeft het Hof (overweging 66) begrip voor het argument dat de privacy van de naasten en familieleden moeten worden beschermd en is het uit dien hoofde bereid een vrije beoordelingsruimte van de nationale autoriteiten te aanvaarden. Maar in het gegeven geval is het Hof niet overtuigd door de redengeving van de Hongaarse autoriteiten, die inderdaad niet erg concreet is in het benoemen van specifieke privacybelangen. Het is bovendien niet

aan de rechter zich met de vorm van de voorgenomen reportage te bemoeien, omdat die behoort tot de door artikel 10 EVRM beschermde redactionele vrijheid (overweging 74). De vorm van de voorgenomen berichtgeving kan dus geen afwegingsfactor zijn.

5. Als je de pers de toegang tot nieuwswaardige feiten ontzegt, moet je als nationale overheid dus wel overtuigende argumenten hebben. In Nederland is de kwestie vooral aan de orde geweest bij de toegang tot evenementen of gebeurtenissen in de openbare ruimte waarbij openbare-ordemaatregelen door Justitie en Politie belemmeringen voor toegang opleverden (G.A.I. Schuijt, *Vrijheid van Nieuwsgaring*, Den Haag: Boom Juridische Uitgevers 2006, hoofdstuk 8). Zij heeft ook gespeeld bij de accreditatie van de journalisten voor politieke verslaggeving en berichtgeving over het Koninklijk Huis (Schuijt, a.w. hoofdstuk 9). De Nederlandse *cause célèbre* is nog steeds die van de journalist Willem Oltmans, die in het jaar 2000 8 miljoen gulden schadevergoeding van een arbitragecommissie kreeg toegekend omdat de Nederlandse Staat hem jarenlang zou hebben gedwarsboomd bij zijn politieke nieuwsgaring. Wat het Koninklijk Huis betreft, is er het nodige te doen geweest over de in 2005 door de Rijksvoorlichtingsdienst vastgestelde 'Media Code' (https://www.koninklijkhuis.nl/onderwerpen/media-en-communicatie/bescherming-persoonlijke-levenssfeer/mediacode).

E.J. Dommering

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HOGE RAAD (CIVIELE KAMER)
14 juni 2019, nr. 19/00843
(Mrs. C.A. Streefkerk, A.M.J. van Buchem-Spapens, G. Snijders, T.H. Tanja-van den Broek, C.H. Sieburgh; plv. P-G mr. F.F. Langemeijer)
m.nt. A.I.M. van Mierlo

Art. 3:15a, 3:15c BW; art. 4, 5 lid 1, art. 16 lid 1 Wet Bopz; art. 3, 26 Verordening (EU) 910/2014

NJB 2019/1441
RvdW 2019/710
ECLI:NL:PHR:2019:362
ECLI:NL:HR:2019:957

Wet Bopz. Elektronische handtekening. Machtiging voortgezet verblijf; ondertekening geneeskundige verklaring door geneesheer-directeur; strekking. Gekwalificeerde, geavanceerde en andere elektronische handtekening; rechtsgevolg; overeenkomstige toepassing art. 3:15a BW buiten vermogensrecht. Taak rechter; geen ambtshalve onderzoek handtekening door rechter. Zelfde regels bij voorlopige machtiging.

Volgens vaste rechtspraak moet bij een verzoek om een machtiging tot voortgezet verblijf aan de verklaring van de geneesheer-directeur van het psychiatrisch ziekenhuis waarin de betrokkene is opgenomen (art. 16 lid 1 Wet Bopz) de eis worden gesteld dat zij door de geneesheer-directeur zelf wordt ondertekend, zodat blijkt van zijn instemming met en aanvaarding van zijn verantwoordelijkheid voor de inhoud van de verklaring.

De aard van de geneeskundige verklaring — waaronder begrepen de rol die deze speelt in de procedure op grond van art. 16 lid 1 Wet Bopz — verzet zich niet tegen overeenkomstige toepassing buiten het vermogensrecht (art. 3:15c BW) van art. 3:15a BW. Op grond van art. 3:15a BW, dat verwijst naar de eIDAS-Verordening (Verordening (EU) nr. 910/2014), heeft een gekwalificeerde elektronische handtekening altijd dezelfde rechtsgevolgen als een handgeschreven handtekening, terwijl dit voor de geavanceerde elektronische handtekening en de andere elektronische handtekening alleen het geval is indien de methode voor ondertekening die gebruikt is, voldoende betrouwbaar is gelet op het doel waarvoor de elektronische handtekening is gebruikt en op alle overige omstandigheden van het geval. Het doel waarvoor een geneeskundige verklaring in een procedure op grond van art. 16 lid 1 Wet Bopz wordt gebruikt brengt mee dat een elektronische handtekening onder een geneeskundige verklaring een geavanceerde of een gekwalificeerde elektronische handtekening moet zijn. De rechter dient niet ambtshalve maar indien een daarop gericht verweer is gevoerd, te onderzoeken of de geschreven of elektronische handtekening op de geneeskundige verklaring door de geneesheer-directeur zelf is geplaatst. Indien de elektronische handtekening niet een geavanceerde of gekwalificeerde elektronische handtekening is, staat het de rechter vrij de geneeskundige verklaring in aanmerking te nemen indien hij op andere wijze heeft kunnen vaststellen dat deze door de geneesheer-directeur zelf is ondertekend. Het voorgaande geldt ook voor de ondertekening van de verklaring van de psychiater bij een voorlopige machtiging (art. 4 en 5 lid 1 Wet Bopz).

[betrokkene], verzoeker tot cassatie, adv.: mr. G.E.M. Later,
tegen
De officier van justitie bij het arrondissementsparket Amsterdam, verweerder in cassatie, niet verschenen.

Rechtbank:

1. De beoordeling
Uit de overgelegde stukken, het gehouden verhoor en de verkregen inlichtingen is het volgende gebleken.

Betrokkene heeft ter zitting meegedeeld dat hij niet achter toewijzing van het onderhavige verzoek staat. Hij wil liever met een voorwaardelijke machtiging verder. Het gaat goed met betrokkene. Hij verricht regelmatig vrijwilligerswerk maar hij is opzoek naar een betaalde baan. Hij is abstinent van al-