



Annotatie bij Europees Hof voor de Rechten van de Mens, 20 september 2016 (Van Beukering & Het Parool / Nederland), *European Human Rights Cases* 2017-1, nr. 21. R. Ó Fathaigh & K. de Beer

1. In *Parool*, the European Court was called upon to consider a claim under a provision in copyright law that limited a newspaper's freedom to publish an accused person's photograph. The Court held, in effect, that a person charged with a violent homicide may seek damages from a newspaper for publishing his photograph, even where the article is "true and correct," (*Parool*, par. 34) concerns a matter of "serious public concern," (*id.*) where the photograph "does not contain details" of his private life (*id.*, par. 16), and was not obtained using "subterfuge or other illicit means" (*Von Hannover v. Germany (No. 2)* (ECtHR 7 February 2012 (GC), no. 40660/08, par. 113, «EHRC» 2012/72 case comment De Lange and Gerards). Given the significance of the decision for the potential liability of newspapers when reporting on criminal proceedings, it seems curious that the Court considered it sufficient to dismiss the application as "manifestly ill-founded." In light of this, a number of points should be made concerning the Court's reasoning.

2. First, the Court states that it had laid down the "relevant principles" which "must guide its assessment" in balancing the right to freedom of expression and the right to respect for private life (*Parool*, par. 33). It refers to the criteria established in *Axel Springer AG v. Germany* (ECtHR 7 February 2012 (GC), no. 39954/08, «EHRC» case comment De Lange and Gerards), where the Court held a ban on publication of two articles, accompanied by photographs, reporting the arrest, trial and conviction of a television actor violated Article 10. The Court in *Parool* listed the criteria to be applied, namely (a) contribution to a debate of public interest, (b) the degree of notoriety of the person affected and the subject of the news report, (c) the prior conduct of the person concerned, (d) the content, form and consequences of the publication, (e) the circumstances in which the photographs were taken, (f) the way in which the information was obtained and its veracity, and (g) severity of the penalty imposed. In several aspects *Parool* and *Axel Springer* are quite similar, but the Court comes to differing conclusions. When these criteria are applied to *Parool* it seems surprising the Court ends up concluding there is no violation of Article 10.

3. First, in both cases the Court established the offence reported on was a matter of public interest. Second, while R.P. may not have enjoyed the same status as the actor in *Axel Springer*, the Court did establish that he did enjoy a "certain notoriety". Third, the Court stated that R.P. "actively encouraged" this notoriety by participating in a documentary and posting rap videos on YouTube (*id.*, par. 34). The Court in *Axel Springer* also expressly stated that the fact a photograph has "already appeared in an earlier publication," must also "be taken into consideration" (*id.*, par. 92). Curiously, the Court in *Parool* nowhere mentions this principle, and its application would weigh heavily in favour of a violation of Article 10. Fourth, and similar to *Axel Springer*, there was nothing questionable about the way the information was obtained. Interestingly, the Court in *Parool* seems to omit taking into consideration that the photograph was taken from a documentary made with R.P.'s permission. Fifth, the information published by *Parool* was "true and correct" (*id.* par 34). Furthermore, in both cases the claims that the publications could have serious consequences were not really substantiated. Sixth, although the Court stated in *Axel Springer* that the sanctions imposed were "lenient," it did conclude that the sanctions could "have a chilling effect" (*Axel Springer*, par. 109). The sanctions in both cases are comparable.

4. While *Parool* and *Axel Springer* are quite similar, what seemed to have tipped the scale towards Article 8 is the assessment that R.P. is not well known. However, that is not as clear cut as the Court as well as the domestic courts make it seem. The Court itself reaches the conclusion that – even without participation on the documentary – R.P. enjoyed a “certain notoriety,” which he had “actively encouraged” (*id.*, par. 34). It follows from *Axel Springer* that there is a connection between the way you actively seek out attention and the “legitimate expectation” you can have of your private life being protected (*Axel Springer*, par. 101). It would be fair to say that R.P.’s legitimate expectation of having his private life protected would be less than a completely unknown person. Furthermore, the Court seems to neglect the biggest difference with *Axel Springer*, which is the seriousness of the offence. In *Axel Springer* the Court agreed with the assessment of the domestic courts that the offence that was committed probably would not have been interesting if it had been committed by an unknown person, and was “of medium, or even minor, seriousness.” (*Axel Springer*, par. 100). The same cannot be said about the crimes R.P. had been charged with. The stabbing of three people which resulted in the death of one is a serious offence. This is a matter of public interest no matter who committed the crime, and the Court itself admits it was of “serious public concern” (*Parool*, par. 34). Moreover, in *Axel Springer* the Court also held that was a public interest in “X’s arrest,” not merely his conviction (*id.* par. 99). Finally, the Court in *Parool* fails to address the Court of Appeal’s point that “a less recognisable portrait” should have been used, such as “placing a black rectangle over the eyes” (*Parool*, par. 16). It is difficult to see how this squares with the principle in *Axel Springer* that a court should not “substitute its own views for those of the press as to what techniques of reporting should be adopted in a particular case” (*Axel Springer*, par. 81). If the Court strictly applied the *Axel Springer* criteria it should arguably have reached the conclusion Article 10 had been violated.

5. The second issue concerns the Court appearing to apply a particularly weak standard of review, holding that the Court of Appeal had not acted “unreasonably” (*Parool*, par. 36). But this is a highly questionable standard of review: the Court offers no authority for such a standard, and arguably stands in direct opposition to the seminal *Sunday Times v. UK (No. 1)* (ECtHR 26 April 1979, no. 6538/74) judgment, where the Court, sitting in a 20-judge plenary court, rejected the idea that the Court’s supervision was limited to determining if domestic courts acted “reasonably, carefully and in good faith” (*id.*, par. 59). Indeed, the Court continues to reject any “reasonableness” standard of review, as confirmed in *Axel Springer*, that even where Article 8 is being balanced with Article 10, any restriction on freedom of expression must be “construed strictly,” and “established convincingly” (*Axel Springer*, par. 78). It is worth noting the majority in *Axel Springer* rejected the dissenting opinion’s application of a reasonableness-type test, that domestic court judgments should only be set aside where they are “manifestly unreasonable” (*id.*, dissenting opinion, par. 6). Notably, the author of the dissenting opinion in *Axel Springer* was Judge Luis López Guerra, who was president of the Third Section for *Parool*.

6. It could be suggested that the Court in *Parool* sought to apply a weak standard of review given that both the Court of Appeal and Supreme Court had dismissed the appeal, and reflected a degree of deference to the Dutch courts. However, it is important to remember that in *Axel Springer*, the Court disagreed with the unanimous view of three levels of German courts, including the Federal Court of Justice, and in *Couderec and Hachette Filipacchi Associés v. France* (ECtHR 10 November 2015 (GC), no. 40454/07 «EHRC» 2016/32 case comment De Lange), the Court disagreed with three levels of French courts, including the Court of Cassation.

7. The third point relates to the Court citing two cases as “supporting” the Court of Appeal’s view that the newspaper’s Article 10 right “did not outweigh” the accused person’s Article 8 right: *Egeland and Hanseid v. Norway* (ECtHR 16 April 2009, no. 34438/04, «EHRC» 2009/75 case

comment Gerards) and *Bédât v. Switzerland* (ECtHR 29 March 2016 (GC), no. 56925/08, «EHRC» 2016/147 case comment De Lange). However, it is arguable that neither of these authorities are on point. First, *Egeland* involved a specific Norwegian law which criminalised photographing suspects or convicted persons on their way “to, or from, the hearing or when he or she is staying inside the building in which the hearing takes place” (Section 131A, Administrative of Courts Act 1915). Notably, the law was limited to the “immediate vicinity of the court premises,” and “photographing beyond that point was not prohibited” (*id.*, par. 45). Two newspaper editors had been convicted under section 131A for publishing photographs of a woman “in tears and great distress” leaving a courthouse (*id.*, par. 61), having just been convicted of aiding a homicide. However, the Court held that the editors’ convictions did not violate Article 10 because the photographs showed the woman “at her most vulnerable psychologically,” and “emotionally shaken” (*id.*). The Court held that she was “in a state of reduced self-control,” which was a “core” situation the law “was intended” to protect (*id.*).

8. In contrast, there is nothing in *Parool* suggesting the photograph showed the accused at his “most vulnerable psychologically,” and the domestic courts explicitly stated that the photograph “does not contain details” of his private life (*Parool*, par. 16). Indeed, not only is *Egeland* arguably not applicable to the facts in *Parool*, it seems to support the opposite conclusion in *Parool*, given the photograph was simply a “still picture” taken from a documentary in which the accused had given “his active cooperation” (*id.*, par. 16).

9. Second, it is also curious that the Court cites *Bédât* as supporting the Court of Appeal’s ruling. *Bédât* concerned the prosecution of a journalist under the Swiss law prohibiting “publication of secret official deliberations” (Article 293, Swiss Criminal Code). The journalist had published an article based on confidential information from an ongoing criminal investigation, including “records of interviews and correspondence” and “statements by the accused’s wife and doctor” (*id.*, par. 66). The journalist was convicted under Article 293, and the Court subsequently reviewed the conviction, concluding there had been no violation of Article 10. The Court applied the *Axel Springer* criteria, noting (a) the article’s “sensationalist” and “mocking tone,” describing the accused’s “repeated lies” (*id.*, par. 60), (b) it could not “have contributed to any public debate” (*id.*, par. 66), (c) “entailed an inherent risk of influencing the course of proceedings” (*id.*, par. 69), and (d) information disclosed was “highly personal, and even medical,” including statements by the accused person’s doctor, which “called for the highest level of protection under Article 8” (*id.*, par. 76).

10. Similar to *Egeland*, it is difficult to see how *Bédât* supports the Court of Appeal’s conclusion in *Parool*, given that unlike *Bédât*, the article was “true and correct,” not “sensationalist,” concerned a matter of “serious public concern,” there was no allegation it was prejudicial to the criminal proceedings, and the information disclosed “did not reveal details” of the accused’s private life. Again, *Bédât* arguably points to the opposite conclusion in *Parool*. Indeed, the confidential information published in *Bédât* did not include photographs. While the article did include the suspect’s photograph, nowhere does the Court hold that this photograph violated, or even implicated, the suspect’s Article 8 right. Indeed, the Court only mentions the photograph in relation to it contributing to the article’s “mocking” and “sensationalist” tone (*id.*, par. 60). Notably, it was not the suspect who initiated the proceeding against the journalist, but a public prosecutor, and as such there was no claim about the photograph, and whether it was taken with consent or not.

11. The Court’s reliance on a case concerning a law criminalising photographing persons in the vicinity of court buildings (*Egeland*) and another case concerning publication of confidential investigation documents which did not include photographs (*Bédât*) seems somewhat curious

given that there is authority which deals directly with the facts in *Parool*, namely *Eerikäinen and Others v. Finland* (ECtHR 10 February 2009, no. 3514/02, «EHRC» 2009/42).

12. In *Eerikäinen*, a journalist had been convicted under Chapter 27, Article 3a of Finland's Penal Code, which criminalises publication of "an image depicting the private life of another person which was liable to cause him or her damage or suffering." The journalist had published an article and photograph of a non-public figure being prosecuted for fraud offences. Similar to *Parool*, the photograph had been published previously, when the accused had given an interview to a magazine eight years earlier about his small business. However, the Court held that the journalist's conviction had violated Article 10, holding that Finland's Supreme Court had failed to "analyse the significance of the fact that the photographs had been taken with the applicant's consent and with the intention of their being published, albeit in connection with an earlier article and a different context" (*id.*, par. 70). The Court reiterated that "freedom of expression also extends to the publication of photos," and applied the principle from *Jersild* that a court should not "substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists." (*id.*, par. 65, *Jersild v. Denmark*, ECtHR 23 September 1994, no. 15890/89). The Court also noted the report was "a matter of legitimate public interest," based on "facts," with nothing "excessive or misleading." Importantly, the Court cited with approval the principle from *Krone Verlag GmbH & Co. KG v. Austria* (ECtHR 26 February 2002, no. 34315/96) that "particular importance" should be attached to the fact a photograph did "not disclose any details of the private life" of the person concerned (*id.*, par. 62).

13. Notably, *Eerikäinen* was unanimous, presided over by a former president of the Court, Judge Nicolas Bratza, and cited on three separate occasions in *Axel Springer*, including as authority for the principle that a court should not "substitute its own views for those of the press as to what techniques of reporting should be adopted in a particular case" (*Axel Springer*, par. 81). There is a strong argument that *Eerikäinen* is a controlling authority for *Parool*, and given the factors in *Parool*, namely the article is "true and correct," concerns a matter of "serious public concern," includes a photograph from a documentary he had previously "cooperated with" (*Parool*, par. 18), and the photograph "does not contain details" of his private life, seems to point to a violation of Article 10.

14. It is also worth noting the similarities in legal positions in Finland and the Netherlands. Finnish legislation contained no provision which required the accused person's consent prior to publication of their name or picture, while "publication of names had never been usual in news reports on offences." (*Eerikäinen*, par. 51). Second, the Finnish Union of Journalists guidelines stated that "the publication of a name and other identifying information in the context of reporting on offences was justified only if a significant public interest was involved." (*id.*, par. 32). Similarly, there is no Dutch legislation that specifically deals with publishing photographs of accused persons to protect their anonymity. In fact, the reason why the Dutch press in most cases uses initials of suspects and convicts is an agreement by Dutch editors in 1953. The reasoning behind this was that editors and politicians at the time were of the opinion that the press is there "to inform, not to judge". A similar rule can be found in the guidelines of the Dutch Council of Journalism ("de Raad voor Journalistiek"). One of the principles laid down is that journalists should prevent information or images being published which make it easy for the public to identify suspects and convicts. Similar to the Finnish guidelines, there are exceptions to that rule. In general, the guidelines state that an invasion of privacy should be proportionate to the public interest served by the publication. Considering the similarities of the facts and legal positions it is remarkable the Court does not refer to *Eerikäinen* in *Parool*.

15. Finally, it is also informative to mention the Dutch case law on Article 21 of the Copyright Act, which is used to file a complaint about publishing an image without consent. Article 21 states that a portrait cannot be published if the reasonable interests of the portrayed are affected by the publication. Interference with someone's personal life can be qualified as affecting someone's reasonable interests. A few aspects stand out about the case law on Article 21 and photographs in criminal cases. First, the courts allow the publication of the photo if it is meant to help solve the crime. If showing a suspect's photograph aids tracking down accomplices or witnesses, courts will be more inclined to approve making public an image (Rb. Amsterdam 29 November 2004, LJN AR6898 (*foto Mohammed B.*)). Second, the courts look at the context in which the photo is presented. If the information in the publication is true and presented in a factual manner the courts will be more inclined to rule in favour of Article 10. However, if the showing of the image of a suspect is also aimed at putting him in a bad light and thereby entertaining the public there is a good chance courts will let Article 8 prevail (Rb. Amsterdam (vzr.) 24 March 2012, LJN BW0619) Finally, the seriousness of the offence plays an important part in the assessment whether using the photo is lawful. If the crime is a serious offence, like murder or manslaughter, freedom of expression may prevail. (Rb. Amsterdam 29 November 2004, LJN AR6898 (*foto Mohammed B.*) and HR 21 January 1994 (*Ferdi E.*)). Therefore, based on Dutch case law, it is arguable that in *Parool* the content and form of the publication and the seriousness of the offence should have weighed more strongly in balancing Article 10 and Article 8.

16. In light of the discussion above, it is hoped that the analysis demonstrates that, at the very least, *Parool* should have been declared admissible by the Third Section, with a full judgment considering all the appropriate principles highlighted in this article.