European Court of Human Rights: Sanoma Uitgevers B.V. v. the Netherlands

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On 31 March 2009 the Chamber of the Third Section of the European Court of Human Rights (ECtHR) delivered a highly controversial judgment in the case of Sanoma Uitgevers B.V. v. the Netherlands. In a 4/3 decision, the Court was of the opinion that the order to hand over a CD-ROM with photographs in the possession of the editor-in-chief of a weekly magazine claiming protection of journalistic sources did not amount to a violation of Article 10 of the European Convention of Human Rights. The finding and motivation of the majority of the Chamber was not only strongly disapproved of in the world of media and journalism, but was also firmly criticised by the dissenting judges. Sanoma Uitgevers B.V. requested a referral to the Grand Chamber, this request being supported by a large portion of the media, NGOs advocating media freedom and professional organisations of journalists. On 14 September 2009, the panel of five Judges decided to refer the case to the Grand Chamber in application of Article 43 of the Convention. By referring the case to the Grand Chamber the panel accepted that the case raised a serious question affecting the interpretation or application of Article 10 of the Convention and/or concerned a serious issue of general importance.

On 14 September 2010, the 17 judges of the Grand Chamber unanimously reached the conclusion that the order to hand over the CD-ROM to the public prosecutor was a violation of the journalists' rights to protect their sources. It noted that orders to disclose sources potentially had a detrimental impact, not only on the source, whose identity might be revealed, but also on the newspaper or publication against which the order was directed, whose reputation might be negatively affected in the eyes of future potential sources by the disclosure, and on members of the public, who had an interest in receiving information imparted through anonymous sources. Protection of journalists' sources is indeed to be considered "a cornerstone of freedom of the press, without which 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 to the public may be adversely affected". In essence, the Grand Chamber was of the opinion that the right to protect journalistic sources should be safeguarded by sufficient procedural guarantees, including the guarantee of prior review by a judge or an independent and impartial decision-making body, before the police or the public prosecutor have access to information capable of revealing such sources. Although the public prosecutor, like any other public

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official, is bound by the requirements of basic integrity, in terms of procedure he or she is a “party” defending interests potentially incompatible with journalistic source protection and can hardly be seen as being objective and impartial so as to make the necessary assessment of the various competing interests. Since in the case of Sanoma Uitgevers B.V. v. the Netherlands an ex ante guarantee of a review by a judge or independent and impartial body was not in existence, the Grand Chamber was of the opinion that “the quality of the law was deficient in that there was no procedure attended by adequate legal safeguards for the applicant company in order to enable an independent assessment as to whether the interest of the criminal investigation overrode the public interest in the protection of journalistic sources”. Emphasizing the importance of the protection of journalistic sources for press freedom in a democratic society, the Grand Chamber of the European Court found a violation of Article 10 of the Convention. The judgment implies that member states of the Convention should build procedural safeguards into their national law in terms of judicial review or other impartial assessment by an independent body based on clear criteria of subsidiarity and proportionality and prior to any disclosure of information capable of revealing the identity or the origin of journalists’ sources.

Judgment by the European Court of Human Rights (Grand Chamber), case of Sanoma Uitgevers B.V. v.The Netherlands, No. 38224/03 of 14 September 2010

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