European Court of Human Rights: Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands

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For the third time in a short period, the European Court of Human Rights has found that the Netherlands authorities have disrespected the right of journalists to protect their sources. This time the Court is of the opinion that the telephone tapping and surveillance of two journalists by the Netherlands security and intelligence services (AIVD) lacked a sufficient legal basis as the law did not provide safeguards appropriate to the use of powers of surveillance against journalists with a view to discovering their sources. Also an order to surrender leaked documents belonging to the security and intelligence services is considered as a violation of the journalists' rights as guaranteed by Article 10 of the Convention.

The case concerns the actions taken by the domestic authorities against two journalists of the national daily newspaper De Telegraaf after having published articles about the Netherlands secret service AIVD, suggesting that highly secret information had been leaked to the criminal circuit, and more precisely to the drugs mafia. The journalists were ordered by the National Police International Investigation Department to surrender documents pertaining to the secret services' activities. The two journalists had also been subject to telephone tapping and observation by AIVD agents. Their applications in court regarding these measures failed, at the level of the Regional Court in The Hague as well as at the level of the Supreme Court (Hoge Raad). It was emphasized that the AIVD investigation was intended to make an assessment of the leaked AIVD-files and, within that framework, it was considered necessary and proportionate to use special powers against the journalists in possession of the leaked files. Also the phone tapping was considered to meet the criteria of necessity, proportionality and subsidiarity.

The European Court however disagrees with this approach by the Netherlands' authorities. Referring to its earlier case law regarding the protection of journalists' sources, the European Court reemphasized the necessity of the "ex ante" character of a review by a judge, a court or another independent body, as the police or a public prosecutor cannot be considered to be objective and impartial so as to make the necessary assessment of the various competing interests. The Court applies this approach also in the present case, as the use of special powers

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of surveillance and telephone tapping against the journalists appeared to have been authorised by the Minister of the Interior, or by an official of the AIVD, without prior review by an independent body with the power to prevent or terminate it. Therefore, the Court finds that the law did not provide safeguards appropriate to the use of powers of surveillance against journalists with a view to discovering their sources. Regarding the second issue, the Court agrees that the order to surrender the leaked documents to the AIVD was prescribed by law, that the lawfulness of that order was assessed by a court and that it also pursued a legitimate aim. The Strasbourg Court however estimates the interference with the right of journalists to protect their sources in casu not necessary in a democratic society, as none of the reasons invoked by the AIVD are considered relevant and sufficient by the European Court.

As a consequence of this judgment, the legal framework and the operational practices of many security and intelligence services in Europe will need to be modified, in order to guarantee the rights of journalists under Article 10 of the Convention. Without guarantees of an ex ante review by a judge or an independent body, surveillance or telephone tapping or other coercive measures against journalists by security and intelligence services are inevitably to be considered as breaches of the rights of journalists covered by Article 10.

Judgment by the European Court of Human Rights (Third Section), case of Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands, nr. 39315/06 of 22 November 2012

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