[NL] Judgment on use hidden-camera footage in investigative programme

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On 12 November 2021, the *Rechtbank Amsterdam* (District Court of Amsterdam – the Court) issued an important judgment on the broadcast of hidden-camera footage used during an investigative programme. The Court also laid down important principles on when a broadcast may be prohibited before it is broadcast.

The case involved the well-known Dutch television programme *Undercover in Nederland,* which is produced by Noordkaap TV productions, and broadcast by the commercial Dutch broadcaster SBS6. At issue was an upcoming broadcast of the programme, which was to feature reports of serious irregularities at a care home for the elderly. The programme included interviews with former employees of the care home, and family members of residents. Notably, the programme had sent two of its own journalists to work undercover at the care home, using fictious names, and had recorded footage from the home using hidden-cameras.The programme included serious allegations against the care home, including that there were too few personnel, with incorrect medicine dosages being administrated to residents; that the quality of care was substandard, with bedsores and poor hygiene; and that there was poor administration. Before the broadcast, the care home initiated legal proceedings against Noordkaap TV, seeking an order to have the broadcast prohibited, or as an alternative, to prohibit the broadcast of the hidden-camera footage, and identifying the care home, its employees and residents, with the care home arguing there would be a violation of privacy. Furthermore, the care home argued that the programme was “biased”, and pointed to how one of the undercover journalists, when revealing themselves to the care home manager, stated “We are going to make sure” the home “is closed”.

At the outset, the Court noted that the proceedings involved an urgent request to prohibit a planned broadcast, which could only be granted by a court in “exceptional circumstances”, as Article 7 of the Dutch Constitution prohibits “prior supervision of the content of a radio or television broadcast”. In this regard, the Court viewed the intended broadcast at the hearing, and held that it must weigh up the interests of the programme makers’ freedom of expression, especially the right to “warn about abuses that affect society”, under Article 10 of the European Convention on Human Rights (ECHR); and the care home’s interest in protecting

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its reputation and the privacy of its residents and employees, under Article 8 ECHR.

Firstly, the Court noted that the programme conducted its journalistic investigation with “sufficient care”, relying on information from a family member of a resident, three former employees, and two undercover journalists that worked at the care home for a number of days, and kept diaries and recorded footage using hidden cameras. Crucially, the Court held that the use of the hidden camera was “justified”, given that a number of irregularities at the care home “would not have come to light” without such reporting. Secondly, the Court held that the programme had uncovered “sufficient factual material” to broadcast the allegations, and the Court agreed that the programme must be able to “contribute to public debate”. In this regard, the Court attached a “great deal of weight” to the programme’s freedom of expression. Notably, the Court did recognise that the programme did contain some “factual inaccuracies”, and that conditions at the home “may have improved” since the recordings. Furthermore, the Court held that the care home will “suffer reputational damage as a result of the broadcast”. However, “in view of the abuses that are (or have been)”, the home only has itself to blame to a certain extent for this damage. Furthermore, the Court noted that the “privacy interests” of employees and residents are “sufficiently met”, as the programme made their faces and voices unrecognisable.

In conclusion, the Court held that the strict requirements set for a “preventive broadcasting ban” had not been met, and the Court rejected the care home’s request for a prohibition order against the programme.

Rechtbank Amsterdam, ECLI:NL:RBAMS:2021:6086, 12 november 2021

https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBAMS:2021:6086

District Court of Amsterdam, ECLI:NL:RBAMS:2021:6086, 12 November 2021

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