



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

DECISION

Application no. 8406/06
STICHTING OSTADE BLADE and F.J. KALLENBERG
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 5 February 2013 as a Chamber composed of:

Josep Casadevall, *President*,

Alvina Gyulumyan,

Corneliu Bîrsan,

Luis López Guerra,

Nona Tsotsoria,

Johannes Silvis,

Valeriu Grițco, *judges*,

and Marialena Tsirli, *Deputy Section Registrar*,

Having regard to the above application lodged on 1 March 2006,

Having deliberated, decides as follows:

THE FACTS

1. The first applicant, Stichting Ostade Blade (hereafter “the applicant foundation”), is a foundation (*stichting*) possessing legal personality under Netherlands law and domiciled in Amsterdam, Netherlands. The second applicant, Mr Frederik Jan Kallenberg, is a Netherlands national, who was born in 1964 and lives in Amsterdam. They were represented before the Court by Ms T. Prakken and Mr M.J.G. Uiterwaal, lawyers practising in Amsterdam.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicants, may be summarised as follows.

1. The search of the magazine's premises

3. At the relevant time, the applicant foundation was responsible for the publication of a magazine called "*Ravage*" (hereafter: "the magazine") which appeared once every two weeks. The second applicant was, at that time, one of the magazine's editors.

4. Three bomb attacks took place in Arnhem in October 1995, January 1996 and April 1996 respectively. The responsibility for the last bomb attack on 16 April 1996 was claimed by the "Earth Liberation Front" (hereafter "ELF") in a letter received by the magazine on 25 April 1996.

5. On 2 May 1996 the magazine issued a press announcement in which it announced the upcoming issue of the magazine, to be released the following day, which would include the letter of the ELF claiming responsibility for the bomb attack of 16 April 1996 ("ELF's letter"). ELF's entire letter was quoted in the press announcement.

6. On 3 May 1996 a search of the magazine's premises took place following the issuance of a search warrant by the Arnhem Regional Court (*rechtbank*). The search took place under supervision of an investigating judge (*rechter-commissaris*) and was carried out in the context of criminal investigations against the perpetrators of the three bomb attacks that had occurred in Arnhem.

7. On the day of the search the second applicant was present. Before the start of the search, the investigating judge informed him that the judicial authorities were in search of ELF's letter. In reply, the second applicant stated that ELF's letter was not present on the premises. It appeared later that the letter had been destroyed by the editorial staff directly after processing it, which was usual practice with regard to letters which might be searched for by the judicial authorities. When asked, the second applicant further stated that the subscriber database was not located on the magazine's premises either. This statement later proved to be false; the subscriber database was found on the magazine's computers.

8. Following the second applicant's statement that both ELF's letter and the subscriber database were not on the premises, the investigating judge announced that, since there was uncertainty about the letter's location, it was necessary that there should be a search for it as well as for possible links between the organisation that had claimed responsibility for the bomb attack and the magazine. At the second applicant's request, the investigating judge offered him the possibility to call his lawyer.

9. When it became apparent that it would take much time to make copies of all the relevant materials, the investigation judge asked the second

applicant whether he wished the copying to continue at the magazine's premises or whether he preferred the police to take the relevant materials away to continue copying somewhere else. The second applicant chose the latter. He was subsequently informed by the investigation judge that the digital files (*geautomatiseerde bestanden*) would be returned to the magazine on 6 May 1996. In relation to the other materials taken by the police it was agreed that, in so far as they were irrelevant to the investigation, they would be returned to the magazine on 9 May 1996. These agreements were confirmed in the presence of the second applicant's lawyer, who had arrived by this time.

10. The police took four computers which included the subscriber database as well as lists of addresses, a large number of application forms of new subscribers, address wrappers, a diary (*agenda*), a phone index (*telefoonklapper*), a typewriter, data of contact persons and other editorial materials as well as private data of the editors.

11. At the moment that the police wanted to leave the premises with the seized materials, the front door was locked. The second applicant was asked to open it but he replied that he had to look for the keys first. Thereupon, the police kicked open the door. In the meantime, people opposing the search had gathered outside the magazine's offices. As the investigating police officers were leaving the building, some of the seized materials were snatched from them by bystanders.

12. The seized computers, documents and disks were returned to the magazine on 6 May and 10 May 1996 respectively. All the information on those materials had been copied. The typewriter was returned on a later date.

13. On 10 June 1996 the investigation judge ordered the police to destroy all copies made.

2. *Proceedings before the Regional Court*

(a) **Summary injunction proceedings**

14. On 25 September 1996 the Minister of Justice (*Minister van Justitie*) rejected a claim for compensation lodged by the magazine. Thereupon, the applicants instituted summary injunction proceedings (*kort geding*). On 4 December 1996 the president of the Regional Court of The Hague considered, *inter alia*, that the State's aim to find ELF's letter had been the direct reason for the search and that neither the magazine nor its editors had been considered to be suspects. He awarded the applicant foundation compensation to the amount of 10,000 Netherlands guilders (NLG) for its pecuniary loss (*materiële schade*). The applicants' claims for compensation regarding non-pecuniary damages (*immateriële schade*) were dismissed.

(b) Proceedings on the merits

15. On 15 November 1996 the applicants brought proceedings before the Regional Court of The Hague claiming NLG 99,811.71 for pecuniary and non-pecuniary loss suffered by the applicant foundation and an amount of NLG 10,000 for non-pecuniary loss suffered by the second applicant, resulting from a violation of their right to freedom of expression, their right to respect for their privacy and a violation of the principle that the public burden should be borne equally (*égalité devant les charges publiques*, “the principle of equality”).

16. On 4 February 1998 the Regional Court of The Hague dismissed the applicants’ claims. It held that when ELF’s letter was not handed over to the judicial authorities there had been an overriding requirement in the public interest to search for the letter and for other indications on the magazine’s premises regarding links between the magazine and the perpetrators of the bomb attacks. It went on to note that it appeared from the facts that there had been no unjustified interference with the applicants’ right to freedom of expression, including their right freely to receive information and the right to non-disclosure of a journalistic source, or an unjustified interference with their right to respect for their private life. The court concluded that the mere fact that the State refused to compensate for pecuniary damage suffered by the applicants did not make the State’s actions unlawful since these actions were part of the risks the recipient of such a letter took when failing to report it or to hand it over to the investigating authorities.

3. Proceedings before the Court of Appeal of The Hague

17. On 16 April 1998 the applicants lodged an appeal with the Court of Appeal (*gerechtshof*) of The Hague restating their complaints under Articles 8 and 10 of the Convention and arguing a violation of the principle of equality.

18. On 11 December 2003 the Court of Appeal of The Hague dismissed the applicants’ appeal holding, *inter alia*, that:

“10.3 It is not contested that the search to seize (*huiszoeking ter inbeslagnamen*) on the [applicant foundation’s] premises constituted an interference with the right to freedom of expression protected by Article 10 § 1 of the Convention.

...

10.7 ... the [applicant foundation] did not substantiate its allegation that the judicial authorities had the possibility to find the perpetrators of the bomb attacks by other means, thus the question whether, in the light of the importance of free access to information, it would have been up to the State to challenge this, does not need to be answered. Nor can it be said that the manner in which the search and the seizure took place had been disproportionate. The computers were, as it is not denied by [the applicants] seized after [the second applicant], given the choice, expressed the preference that the computers be taken instead of allowing the materials on them to be

copied at the editorial office (*redactie*). Regarding the other seized materials it cannot be said that on 3 May 1996 it should already have been clear to the investigating judge that their seizure was unnecessary. The court considers it comprehensible that it was decided to secure as much material as possible for examination at the police office.

...

10.9 In relation to the [applicants'] complaint about an interference with their right to respect for their private life, the court considers that, in so far as there was such an interference, this was lawful on the grounds of Article 8 § 2 of the [Convention]. The same considerations which led the court not to find an unlawful interference with the right to freedom of expression [§10.7], also apply in this regard."

19. The Court of Appeal further held that the second applicant had not demonstrated that he had suffered any damage by the State's actions.

4. First round of proceedings before the Supreme Court

20. The applicants lodged an appeal on points of law (*cassatie*) with the Supreme Court (*Hoge Raad*) complaining that the Court of Appeal had found that the search had not violated their rights protected by Articles 8 and 10 of the Convention. They further complained that the Court of Appeal had placed the burden of proof on them instead of on the Government. The second applicant did not complain about the finding of the Court of Appeal that he had not suffered any damage.

21. On 2 September 2005 the Supreme Court held that in relation to the complaint under Article 10 of the Convention the Court of Appeal had failed to place the burden of proof regarding the question whether the search had respected the requirement of subsidiarity on the State and that its judgment had lacked reasoning as to why the search had not been disproportionate. The Supreme Court further held that the Court of Appeal had not specified the interference that the search and the seizure would have made on the applicants' rights under Article 8 of the Convention. Lastly, considering the applicants' complaint under Article 8, the Supreme Court referred to its findings regarding Article 10 of the Convention and held that it was therefore also unclear whether there had existed less invasive means to accomplish the State's aim and whether the search and the seizure had been disproportionate.

22. The Supreme Court dismissed the applicants' other complaints, including their complaint that the principle of equality had been violated, and remitted the case to the Amsterdam Court of Appeal for further examination.

5. Proceedings before the Amsterdam Court of Appeal

23. In its judgment of 29 November 2007 the Amsterdam Court of Appeal pointed out that the second applicant had not challenged before the Supreme Court the finding of the Court of Appeal of The Hague that he had

not actually suffered any damage. His claim being solely for compensation for damage, it accordingly fell to be dismissed.

24. In its examination of the complaint under Article 10, the Court of Appeal differentiated between the two aims of the search: firstly, to find ELF's letter, and secondly, to find possible links between the organisation that had claimed responsibility for the bomb attack and the magazine.

25. In relation to the State's aim to find ELF's letter, the court held that the applicant foundation had not challenged the State's claims that they had needed more evidence on the bomb attacks and that "every possible trace that could have led to the perpetrators was more than welcome". It further held that the requirement of subsidiarity had been respected because there had been no other way to find the letter than to search for it, and that the requirement of proportionality had also been respected because the search related to the identification of perpetrators of serious criminal offences who could realistically be expected to reoffend. In relation to the seizure of the computers, the court noted that the possibility that ELF's letter was saved as a digital document warranted the search in the applicant foundation's computers. Even though the search had not taken place in the presence of (a functionary of) the applicant foundation, this had been a deliberate choice attributable to the applicant foundation.

26. In relation to the State's aim to search for possible links between the organisation that had claimed responsibility for the bomb attack and the magazine, the court held that the State had not specified the grounds on which those links were the subject of investigation, nor had the State pointed to circumstances that would lead to the conclusion that there had been no less invasive means available to investigate those links. The court further held that the list of seized objects clearly specified objects that related to this aim and not to the finding of ELF's letter. The court concluded that the search connected to the aim of finding possible links between the organisation that had claimed responsibility for the bomb attack and the magazine had violated the applicant foundation's rights under Article 10 of the Convention.

27. Referring to its findings under Article 10, the Amsterdam Court of Appeal also found a violation of Article 8 of the Convention regarding the State's aim to find links between the organisation and the magazine and dismissed the Article 8 complaint regarding the State's aim to find ELF's letter.

28. As to the damage allegedly suffered by the applicant foundation the court held that it could not be said that the applicant foundation would not have suffered any pecuniary damage if the State had limited itself to the lawful part of the search. In relation to the front door that had been kicked open, the court held that the applicant foundation had failed to substantiate its claim for damage, and lastly, that there was no appearance of damage of the applicant foundation's honour or good name or that the number of its

subscribers had dropped as a result of the search. The court thus dismissed all the applicant foundation's claims for compensation. Moreover, the Amsterdam Court of Appeal held that since the applicant foundation's complaints had been dismissed for the greater part it had to pay the costs of the proceedings.

6. Second round of proceedings before the Supreme Court

29. On 18 September 2009 the Supreme Court dismissed the applicant foundation's appeal on points of law and, consequently, the State's conditional cross appeal as well.

COMPLAINTS

30. Invoking Article 10 of the Convention the applicants complain that the search of the magazine's premises violated their right to receive and impart information.

31. Invoking Article 13 in conjunction with Articles 8 and 10 of the Convention they complain that they did not receive any compensation consequent to the partial acknowledgement by the domestic courts of a violation under Articles 8 and 10. According to the applicants, this lack of compensation violates their right to an effective remedy.

THE LAW

A. As regards the second applicant

32. As to the question whether the applicants have exhausted all domestic remedies the Court notes that the complaints intended to be subsequently made to the Court should have been made to the domestic courts at least in substance (see, among many other authorities, *Van Oosterwijck v. Belgium*, 6 November 1980, § 39, Series A no. 40; *Cardot v. France*, 19 March 1991, § 34, Series A no. 200; *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports of Judgments and Decisions* 1996-IV; *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III; *Paksas v. Lithuania* [GC], no. 34932/04, § 75, ECHR 2011 (extracts); and as a recent example, *Hvalica v. Slovenia* (dec.), no. 25256/05, 22 May 2012).

33. In the present case, the Court of Appeal of The Hague held on 11 December 2003 that the second applicant had failed to make a plausible

case that he had suffered any damage as a result of the search (see paragraph 19 above). The Court notes that the second applicant did not challenge this ruling in his appeal on points of law. The Amsterdam Court of Appeal therefore dismissed his claim since it had been solely a claim for compensation for damage (see paragraph 23 above). Accordingly, the second appeal on points of law to the Supreme Court was lodged by the applicant foundation alone (see paragraph 29 above).

34. Having regard to these circumstances the Court finds that the application of the second applicant must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

B. As regards the applicant foundation

35. The Court considers that it cannot, on the basis of the case file, determine the admissibility of the complaints of the applicant foundation and that it is therefore necessary, in accordance with Rule 54 § 2 (b) of the Rules of Court, to give notice of this part of the application to the respondent Government.

For these reasons, the Court unanimously

Decides to adjourn the examination of the complaints of the applicant foundation;

Declares the application inadmissible in respect of the second applicant.

Marialena Tsirli
Deputy Registrar

Josep Casadevall
President