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

THIRD SECTION

CASE OF SANOMA UITGEVERS B.V. v. THE NETHERLANDS

(Application no. 38224/03)

JUDGMENT

STRASBOURG

31 March 2009

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Sanoma Uitgevers B.V. v. the Netherlands,

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

Josep Casadevall, *President,*
Corneliu Bîrsan,
Alvina Gyulumyan,
Egbert Myjer,
Ineta Ziemele,
Luis López Guerra,
Ann Power, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 10 March 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 38224/03) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a limited liability company (*besloten vennootschap met beperkte aansprakelijkheid*) incorporated under Netherlands law, Sanoma Uitgevers B.V. ("the applicant company"), on 1 December 2003.

2. The applicant company were represented initially by Ms E.Z. Perez and later by Mr D.R. Doorenbos, both at relevant times lawyers practising in Amsterdam. The Netherlands Government ("the Government") were represented by their Agents, Mr R.A.A. Böcker and Ms J. Schukking of the Ministry for Foreign Affairs.

3. The applicant company alleged, in particular, that their rights under Article 10 had been violated as a result of their having been compelled to give up information that would allow sources of journalistic information to be identified.

4. On 23 March 2006 the President of the Third Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Factual background

5. The applicant company are based in Hoofddorp. Their business is publishing and marketing magazines, including the weekly *Autoweek* which caters to those who are interested in motor cars.

6. The facts of the case, as submitted by the parties and apparent from documents available to the public, may be summarised as follows.

7. On 12 January 2002, an illegal street race was held in an industrial area on the outskirts of the town of Hoorn. Journalists of *Autoweek* attended this race at the invitation of its organisers. The journalists were given the opportunity to take photographs of the street race and of the participating cars and persons. Before they were given permission to take photographs, the journalists were made to guarantee the participants that the latter's identity would remain undisclosed. The street race was ended by the police, who were present and eventually intervened. The police did not make any arrests.

8. The applicant company intended to publish an article about illegal car races in *Autoweek* no. 7/2002 of 6 February 2002. This article would be accompanied by photographs of the car race held on 12 January 2002. These photographs would be edited in such a manner that the participating cars and persons were unidentifiable, thus guaranteeing the anonymity of the participants in the race. The original photographs were stored by the applicant company on a CD-ROM, which was kept in the editorial office of a different magazine published by the applicant company (not *Autoweek*).

B. The seizure of the CD-ROM and ensuing proceedings

9. In the morning of Friday 1 February 2002, a police officer contacted the *Autoweek* editorial office by telephone, summoning the editors to surrender to the police all photographic materials concerning the street race of 12 January 2002. This police officer was informed by the staff member whom she had called, i.e. the features chief editor (*chef reportage*), that this request could not be met as the journalists had only been given permission to take photographs of the street race after having guaranteed the anonymity of the participants in the race. He further told this police officer that he thought that the press was reasonably protected against this kind of [police] actions and advised her to contact the editorial office in writing.

10. In the afternoon on 1 February 2002, two police detectives visited the *Autoweek* editorial office and, after having unsuccessfully tried to obtain a surrender of the photographs, issued to the *Autoweek* editor-in-chief a summons within the meaning of Article 96a of the Code of Criminal Procedure (*Wetboek van Strafvordering*). This summons was issued by the Amsterdam public prosecutor and ordered the applicant company to surrender, in the context of a criminal investigation into offences defined in Articles 310-312 of the Criminal Code (*Wetboek van Strafrecht*) against an unspecified person, the photographs taken on 12 January 2002 during the illegal street race in Hoorn and all pertaining materials. On behalf of the applicant company, the *Autoweek* editor-in-chief Mr B. refused to surrender the photographs, considering this to be contrary to the undertaking given by the journalists to the street race participants as regards their anonymity.

11. Later that day, a telephone conversation was held between, on the one side, two public prosecutors and, on the other, the lawyer of the applicant company. The lawyer was told by the public prosecutors that "it concerned a matter of life and death". A further explanation was not given and the lawyer's request to amend the summons was not entertained.

12. The police detectives and the public prosecutors threatened to detain Mr B. during the weekend of 2 and 3 February for having acted in violation of Article 184 of the Criminal Code, i.e. the offence of failure to comply with an official order (*ambtelijk bevel*), and to close and search the applicant company's premises if need be for the entire weekend period. The latter action would entail considerable financial damage for the applicant company as, during that weekend, articles were to be prepared for publication on the subject of the wedding of the Netherlands Crown Prince, due to take place on 2 February 2002.

13. At 6.01 p.m. on 1 February 2002, Mr B. was arrested on suspicion of having violated Article 184 of the Criminal Code. He was not taken to the police station but remained on the applicant company's premises. After the Amsterdam public prosecutor had arrived on these premises and after Mr B. had been brought before the prosecutor, Mr B. was released at 10 p.m.

14. The applicant company then consulted their own lawyer and a second lawyer. The latter spoke with the public prosecutors involved, after which the duty investigating judge (*rechter-commissaris*) of the Amsterdam Regional Court (*arrondissementsrechtbank*) was contacted by telephone. After having spoken with one of the lawyers assisting the applicant company, and after having been briefed by one of the public prosecutors, the investigating judge expressed the view that the needs of the criminal investigation outweighed the applicant company's journalistic privilege. On 2 February 2002 at 1.20 a.m., the applicant company, through their lawyer, surrendered the CD-ROM containing the photographs under protest to the public prosecutor, who formally seized it.

15. On 15 April 2002 the applicant company filed a complaint under Article 552a of the Code of Criminal Procedure, seeking the lifting of the seizure and restitution of the CD-ROM, an order to the police and prosecution department to destroy copies of the data recorded on the CD-ROM and an injunction preventing the police and prosecution department from taking cognisance or making use of information obtained through the CD-ROM.

16. On 5 September 2002 a hearing was held before the Regional Court during which the public prosecutor explained why the surrender of the photographs had been necessary. The summons complained of had been issued in the context of a criminal investigation of serious criminals who had pulled cash dispensers out of the wall with the aid of a shovel loader, and there was reason to believe that a car used by participants in the street race could lead to the perpetrator(s) of those robberies.

17. In its decision of 19 September 2002 the Regional Court granted the request to lift the seizure and to return the CD-ROM to the applicant company as the interests of the investigation did not oppose this. It rejected the remainder of the applicant company's complaint. It found the seizure lawful and, on this point, considered that a publisher/journalist could not, as such, be regarded as enjoying the privilege of non-disclosure (*verschoningsrecht*) under Article 96a of the Code of Criminal Procedure. Statutorily, the persons referred to in Article 218 of the Code of Criminal Procedure and acknowledged as enjoying the privilege of non-disclosure were, amongst others, public notaries, lawyers and doctors. It considered that the right to freedom of expression, as guaranteed by Article 10 of the Convention, included the right freely to gather news (*recht van vrije nieuwsgaring*) which, consequently, deserved protection unless outweighed by another interest warranting priority. It found that, in the instant case, the criminal investigation interest outweighed the right to free gathering of news in that, as explained by the public prosecutor during the hearing, the investigation at issue did not concern the illegal street race, in which context the undertaking of protection of sources had been given, but an investigation into other serious offences. The Regional Court was therefore of the opinion that the case at hand concerned a situation in which the protection of journalistic sources should yield to general investigation interests, the more so as the undertaking to the journalistic source concerned the street race whereas the investigation did not concern that race. It found established that the data stored on the CD-ROM had been used for the investigation of serious offences and that it had been made clear by the prosecutor that these data were relevant to the investigation at issue as all other investigation avenues had led to nothing. It therefore concluded that the principles of proportionality and subsidiarity had been complied with and that the interference had thus been justified. The Regional Court did not find that the seizure had been rash, although more tactful action on the part of the police

and the public prosecutor might have prevented the apparent escalation of the matter.

18. The applicant company's subsequent appeal in cassation was declared inadmissible by the Supreme Court (*Hoge Raad*) on 3 June 2003. The Supreme Court held that, as the Regional Court had accepted the applicant company's complaint in so far as relating to the request to lift the seizure and to return the CD-ROM, the applicant company no longer had an interest in their appeal against the ruling of 19 September 2002. Referring to its case-law (Supreme Court, 4 October 1988, *Nederlandse Jurisprudentie* (Netherlands Law Reports; "NJ") 1989, no. 429, and Supreme Court, 9 January 1990, NJ 1990, no. 369), it held that this finding was not altered by the circumstance that the complaint – apart from a request to return the CD-ROM – also contained a request to order that any print-outs or copies of the CD-ROM were to be destroyed and that data collected with the aid of the CD-ROM could not be used, as neither Article 55a nor any other provision of the Code of Criminal Procedure provided for the possibility to obtain, once a seized item has been returned, in a procedure like the present one a declaratory ruling that the seizure or the use of the seized item was unlawful.

C. Factual information submitted by the Government

19. In their observations on the admissibility and merits of the application, the Government stated the following:

> "6. To supplement the summary of the facts appended to the Court's letter of 28 March 2006 [giving notice of the application to the respondent Contracting Party under Rule 54 § 2 (b) of the Rules of Court], the Government would make the following observations
>
> 7. The order in question, issued under Article 96a of the Dutch Code of Criminal Procedure (..., 'CCP'), requiring the surrender for seizure of a CD-ROM containing photographs was closely related to a criminal investigation initiated following a series of ram raids in which cash machines were pulled from the wall with a shovel loader. These ram raids took place on 20 September 2001, 6 November 2001 and 30 November 2001. A group of men was suspected of perpetrating the ram raids and two members of the group ('A' and 'M') were the main suspects. A telephone conversation involving M, tapped in the context of the investigation on 12 January 2002, revealed that M and A had participated in an illegal street race in Hoorn with an Audi RS4 that day. The investigation team knew that journalists from the weekly magazine *Autoweek* had taken photographs of the illegal street race.
>
> 8. On 1 February 2002 another ram raid took place. During the incident, a bystander was threatened with a firearm. After ramming a cash machine, the perpetrators hauled it off in a lorry, which was followed closely by an Audi. The police, who had already been informed of the incident, saw the lorry stop and the driver get into an Audi, which then drove away with three people inside. The police followed, but the Audi accelerated to over 200 kilometres per hour and disappeared from view.

9. The police suspected that the Audi used in the illegal street race in Hoorn on 12 January 2002 was the same Audi observed at the ram raid on 1 February 2002. With that in mind, the public prosecutor decided that day (1 February 2002) to issue an order under Article 96a of the CCP in order to obtain the photographs taken at the street race.

10. The course of events is summarised below:

24 July, 26 July and 30 November 2001:

- ram raids perpetrated;

12 January 2002:

- illegal street race in Hoorn, in which A and M participated with an Audi RS4;
- later that day: the public prosecutor learns from a tapped conversation that A and M took part in the street race with an Audi RS4;

1 February 2002:

- new ram raid, involving an Audi;
- later that day, at approximately 14.30: order issued under Article 96a of the CCP."

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. Relevant domestic law

1. Relevant provisions of the Code of Criminal Procedure and the Criminal Code

20. Under Article 96a of the Code of Criminal Procedure, every civil servant invested with investigative powers (*opsporingsambtenaar*) may – in case of suspicion of an offence attracting a prison sentence of four years or more – such as for instance the offences defined in Articles 310-312 of the Criminal Code (theft; theft under aggravating circumstances; robbery) – or of a number of other specified criminal acts not relevant to the present case (Article 67 § 1 of the Code of Criminal Procedure) – order any person who is reasonably believed to hold an item eligible for seizure to surrender it for that purpose. Article 96a of the Code of Criminal Procedure entered into force on 1 February 2000. Prior to this date, only the investigating judge was competent to issue an order to surrender items for the purpose of seizure (former Article 105 of the Code of Criminal Procedure).

21. A failure to comply with such an order constitutes an offence as defined in Article 184 (failure to comply with an official order) or Article 193 (failure to make available documents) of the Criminal Code. Pursuant to Article 96a §§ 1 and 2 of the Code of Criminal Procedure, no such order may be given to the suspect or to a person who, by virtue of Articles 217-219 of the Code of Criminal Procedure, enjoys the privilege of non-disclosure. Such persons are an accused's relatives, (former) spouse and (former) registered partner (Article 217); persons who, by virtue of their position, profession or office, are bound to secrecy albeit that their privilege of non-disclosure only covers matters the knowledge of which has been entrusted to them in that capacity (Article 218; for further details about this category, see *Mulders v. the Netherlands*, no. 23231/94, Commission decision of 6 April 1995, and *Aalmoes and Others v. the Netherlands* (dec.), no 16269/02, 25 November 2004), and persons who, by giving evidence, expose themselves, their relatives to the second or third degree, their (former) spouse or their (former) registered partner to the risk of a criminal conviction (Article 219).

22. Any interested person can lodge an objection against the seizure of an object, the refusal to return a seized object, or the examination (*kennisneming*) or use of electronic data. Such an objection is heard in public by the Regional Court, which has the power to give whatever orders the situation may require (Article 552a of the Code of Criminal Procedure).

2. Relevant domestic case-law and other non-statutory materials

23. Until 11 November 1977, the Netherlands Supreme Court did not recognise a journalistic privilege of non-disclosure. On that date, it handed down a judgment in which it found that a journalist, when asked as a witness to disclose his source, was obliged to do so unless it could be regarded as justified in the particular circumstances of the case that the interest of non-disclosure of a source outweighed the interest served by such disclosure. This principle was reversed by the Supreme Court in a landmark judgment of 10 May 1996 on the basis of the principles set out in the Court's judgment of 27 March 1996 in the case of *Goodwin v. the United Kingdom* (*Reports of Judgments and Decisions* 1996-II). In this ruling, the Supreme Court accepted that, pursuant to Article 10 of the Convention, a journalist was in principle entitled to non-disclosure of an information source unless, on the basis of arguments to be presented by the party seeking disclosure of a source, the judge was satisfied that such disclosure was necessary in a democratic society for one or more of the legitimate aims set out in Article 10 § 2 of the Convention (NJ 1996, no. 578). In a judgment given on 2 September 2005 concerning the search of premises of a publishing company on 3 May 1996 (*Landelijk Jurisprudentie Nummer* [National Jurisprudence Number] LJN AS6926), the Supreme Court held *inter alia*:

> "The right of freedom of expression, as set out in Article 10 of the Convention, encompasses also the right freely to gather news (see, amongst others, *Goodwin v. the United Kingdom*, judgment of 27 March 1996, NJ 1996, no. 577; and *Roemen and Schmit v. Luxembourg*, judgment of 25 February 2003 [ECHR 2003-IV]). An interference with the right freely to gather news – including the interest of protection of a journalistic source – can be justified under Article 10 § 2 in so far as the conditions set out in that provision have been complied with. That means in the first place that the interference must have a basis in national law and that those national legal rules must have a certain precision. Secondly, the interference must serve one of the aims mentioned in Article 10 § 2. Thirdly, the interference must be necessary in a democratic society for attaining such an aim. In this, the principles of subsidiarity and proportionality play a role. In that framework it must be weighed whether the interference is necessary to serve the interest involved and therefore whether no other, less far-reaching ways (*minder bezwarende wegen*) can be followed along which this interest can be served to a sufficient degree. Where it concerns a criminal investigation, it must be considered whether the interference with the right freely to gather news is proportionate to the interest served in arriving at the truth. In that last consideration, the gravity of the offences under investigation will play a role."

24. On 1 April 2002, in the light of the case-law developments in this area and Recommendation No. R(2000) 7 adopted on 8 March 2000 by the Committee of Ministers of the Council of Europe on 8 March 2000 (see below under "Relevant international materials"), the Board of Procurators General (*College van procureurs-generaal*) adopted an Instruction within the meaning of Article 130 § 4 of the Judiciary (Organisation) Act (*Wet op de Rechterlijke Organisatie*) on the application by the Public Prosecution Department of coercive measures in respect of journalists (*Aanwijzing toepassing dwangmiddelen bij journalisten*; published in the Official Gazette (*Staatscourant*) 2002, no. 46), which entered into force on 1 April 2002 for a period of four years. This Instruction defines who is to be considered as a "journalist" and sets out the pertinent principles and guidelines as regards the application of coercive measures, such as *inter alia* an order under Article 96a of the Code of Criminal Procedure, in respect of a journalist.

25. On 4 December 2000, the boards of the Netherlands Society of Editors-in-Chief (*Nederlands Genootschap van Hoofdredacteuren*) and the Netherlands Union of Journalists (*Nederlandse Vereniging van Journalisten*) set up a commission to investigate and take stock of problems arising in relation to the protection of journalistic sources and seizure of journalistic materials. This commission – which was composed of a professor of criminal law, the secretary of the Netherlands Union of Journalists, a Regional Court judge and an editor of a national daily newspaper – concluded in its report of 30 October 2001, *inter alia*, that specific legislation was not necessary and that by way of making certain procedural changes – such as a preliminary assessment procedure, where it concerns the application of coercive measures in cases where the protection of sources is in issue – a number of problem areas could be resolved.

26. Already in 1993, Mr E. Jurgens – at the time a member of the Netherlands Lower House of Parliament (*Tweede Kamer*) – had submitted a private member's bill (*initiatiefwetsvoorstel*) to amend the Code of Criminal Procedure and the Code of Civil Procedure in order to secure the protection of journalistic sources and the protection of journalists as regards disclosing information held by them. On 2 March 2005, after having remained dormant, this bill was eventually withdrawn without having been taken up in parliament.

27. The Court's judgment in the *Voskuil* case (*Voskuil v. the Netherlands*, no. 64752/01, 22 November 2007) has prompted the Government to introduce new legislation. A bill now pending before Parliament proposes to add a new Article to the Code of Criminal Procedure (Article 218a) that would vouchsafe a right to refuse to give evidence or identify sources of information to "witnesses to whom information has been entrusted within the framework of the professional dissemination of news (*beroepsmatige berichtgeving*) or the gathering of information for that purpose, or the dissemination of news within the framework of participation in the public debate as the case may be". Such a right would be more limited than that enjoyed by the categories enumerated in Articles 217, 218 and 219 of the Code of Criminal Procedure; it would be subject to the finding of the investigating judge that no disproportionate harm to an overriding public interest (*zwaarderwegend maatschappelijk belang*) would result from such refusal. However, persons covered by the proposed new Article 218a would not be among those entitled to refuse to surrender items eligible for seizure: the bill does not propose to include them in the enumeration contained in Article 96 § 2 (paragraph 21 above).

B. Relevant international materials

28. Several international instruments concern the protection of journalistic sources; among others, the Resolution on Journalistic Freedoms and Human Rights, adopted at the 4th European Ministerial Conference on Mass Media Policy (Prague, 7-8 December 1994) and the Resolution on the Confidentiality of Journalists' Sources by the European Parliament (18 January 1994, Official Journal of the European Communities No. C 44/34).

29. Moreover, Recommendation No. R(2000) 7 on the right of journalists not to disclose their sources of information was adopted by the Committee of Ministers of the Council of Europe on 8 March 2000 and states, in so far as relevant:

> "[The Committee of Ministers] Recommends to the governments of member States:
>
> 1. to implement in their domestic law and practice the principles appended to this recommendation,

2. to disseminate widely this recommendation and its appended principles, where appropriate accompanied by a translation, and

3. to bring them in particular to the attention of public authorities, police authorities and the judiciary as well as to make them available to journalists, the media and their professional organisations.

Appendix to Recommendation No. R (2000) 7

Principles concerning the right of journalists not to disclose their sources of information

Definitions

For the purposes of this Recommendation:

a. the term 'journalist' means any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication;

b. the term 'information' means any statement of fact, opinion or idea in the form of text, sound and/or picture;

c. the term 'source' means any person who provides information to a journalist;

d. the term 'information identifying a source' means, as far as this is likely to lead to the identification of a source:

i. the name and personal data as well as voice and image of a source,

ii. the factual circumstances of acquiring information from a source by a journalist,

iii. the unpublished content of the information provided by a source to a journalist, and

iv. personal data of journalists and their employers related to their professional work.

Principle 1 (Right of non-disclosure of journalists)

Domestic law and practice in member States should provide for explicit and clear protection of the right of journalists not to disclose information identifying a source in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the Convention) and the principles established herein, which are to be considered as minimum standards for the respect of this right.

Principle 2 (Right of non-disclosure of other persons)

Other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information, should equally be protected under the principles established herein.

Principle 3 (Limits to the right of non-disclosure)

a. The right of journalists not to disclose information identifying a source must not be subject to other restrictions than those mentioned in Article 10, paragraph 2 of the Convention. In determining whether a legitimate interest in a disclosure falling within the scope of Article 10, paragraph 2 of the Convention outweighs the public interest in not disclosing information identifying a source, competent authorities of member States shall pay particular regard to the importance of the right of non-disclosure and the pre-eminence given to it in the case-law of the European Court of Human Rights, and may only order a disclosure if, subject to paragraph b, there exists an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature.

b. The disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that:

i. reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and

ii. the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that:

- an overriding requirement of the need for disclosure is proved,

- the circumstances are of a sufficiently vital and serious nature,

- the necessity of the disclosure is identified as responding to a pressing social need, and

- member States enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights.

c. The above requirements should be applied at all stages of any proceedings where the right of non-disclosure might be invoked.

Principle 4 (Alternative evidence to journalists' sources)

In legal proceedings against a journalist on grounds of an alleged infringement of the honour or reputation of a person, authorities should consider, for the purpose of establishing the truth or otherwise of the allegation, all evidence which is available to them under national procedural law and may not require for that purpose the disclosure of information identifying a source by the journalist.

Principle 5 (Conditions concerning disclosures)

a. The motion or request for initiating any action by competent authorities aimed at the disclosure of information identifying a source should only be introduced by persons or public authorities that have a direct legitimate interest in the disclosure.

b. Journalists should be informed by the competent authorities of their right not to disclose information identifying a source as well as of the limits of this right before a disclosure is requested.

c. Sanctions against journalists for not disclosing information identifying a source should only be imposed by judicial authorities during court proceedings which allow for a hearing of the journalists concerned in accordance with Article 6 of the Convention.

d. Journalists should have the right to have the imposition of a sanction for not disclosing their information identifying a source reviewed by another judicial authority.

e. Where journalists respond to a request or order to disclose information identifying a source, the competent authorities should consider applying measures to limit the extent of a disclosure, for example by excluding the public from the disclosure with due respect to Article 6 of the Convention, where relevant, and by themselves respecting the confidentiality of such a disclosure.

Principle 6 (Interception of communication, surveillance and judicial search and seizure)

a. The following measures should not be applied if their purpose is to circumvent the right of journalists, under the terms of these principles, not to disclose information identifying a source:

i. interception orders or actions concerning communication or correspondence of journalists or their employers,

ii. surveillance orders or actions concerning journalists, their contacts or their employers, or

iii. search or seizure orders or actions concerning the private or business premises, belongings or correspondence of journalists or their employers or personal data related to their professional work.

b. Where information identifying a source has been properly obtained by police or judicial authorities by any of the above actions, although this might not have been the purpose of these actions, measures should be taken to prevent the subsequent use of this information as evidence before courts, unless the disclosure would be justified under Principle 3.

Principle 7 (Protection against self-incrimination)

The principles established herein shall not in any way limit national laws on the protection against self-incrimination in criminal proceedings, and journalists should, as far as such laws apply, enjoy such protection with regard to the disclosure of information identifying a source."

For the precise application of the Recommendation, the explanatory notes specified the meaning of certain terms. As regards the term "sources" the following was set out:

"c. Source

17. Any person who provides information to a journalist shall be considered as his or her 'source'. The protection of the relationship between a journalist and a source is the goal of this Recommendation, because of the 'potentially chilling effect' an order of source disclosure has on the exercise of freedom of the media (see, Eur. Court H.R., Goodwin v. the United Kingdom, 27 March 1996, para. 39). Journalists may receive their information from all kinds of sources. Therefore, a wide interpretation of this term is necessary. The actual provision of information to journalists can constitute an action on the side of the source, for example when a source calls or writes to a journalist or sends to him or her recorded information or pictures. Information shall also be regarded as being 'provided' when a source remains passive and consents to the journalist taking the information, such as the filming or recording of information with the consent of the source."

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

30. The applicant company complained of a violation of Article 10 of the Convention in that they had been compelled to hand over information capable of revealing the identity of journalistic sources. Article 10 reads as follows:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

31. The Government denied that there had been any such violation.

A. Admissibility

32. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Argument before the Court

a. The applicant company

33. Relying in particular on the Court's judgment in *Goodwin v. the United Kingdom*, 27 March 1996, *Reports of Judgments and Decisions* 1996-II, the applicant company claimed to have been a victim of an unwarranted limitation of their rights to obtain information and protect their journalistic sources through having been compelled to hand over the CD-ROM containing photographs that would allow persons who had supplied information to be identified. The attendant threat of a search of the applicant company's offices and the detention of the editor-in-chief Mr B., if not already interferences with the applicant company's Article 10 rights *per se*, compounded this violation.

34. The article in *Autoweek* magazine describing the illegal street race had been published several days after the applicant company had been forced to hand over the CD-ROM; neither the article nor the accompanying photographs identified individuals who had actually taken part in the street race.

35. In the applicant company's submission, domestic law was deficient in that journalists were not among the categories of persons named as enjoying a right to refuse to give evidence. Although such a right had been recognised to journalists by the Supreme Court's judgment of 10 May 1996, the lack of a codified basis meant that the law on this point was ambiguous and unforeseeable.

36. Moreover, Article 96a of the Code of Criminal Procedure had removed the decision whether or not to honour a journalist's refusal to give evidence from the investigating judge and transferred it to the public prosecutor and the police. An important safeguard against abuse had thereby been lost.

37. The public prosecutor and the police had failed to give accurate and detailed reasons when ordering the applicant company to hand over the CD-ROM. Such information had been given only at the hearing of the Amsterdam Regional Court, after the CD-ROM had been seized; even then, it was not made apparent that the crimes in question concerned “a matter of

life and death" as alleged earlier. It could therefore not be said that the seizure served any of the "legitimate aims" enumerated in Article 10 § 2, and especially not the prevention of crimes yet to be committed.

38. The need for the measure complained of had not been convincingly established. Police officers had actually attended the illegal street race but had failed to identify the participants. The information supplied to the applicant company had been insufficient to enable them to make a proper assessment of the need to hand over the information demanded. The pressure exerted – the detention of the editor-in-chief Mr B. and the threat to close down the offices not only of *Autoweek* magazine's editors, but of the editors of other mass-circulation publications as well, for a whole week-end – had been grossly disproportionate.

39. Finally, it could not be decisive that the information sought by the police and the prosecution authorities pertained to crimes other than the illegal street race. It was not the information itself which enjoyed the protection of Article 10 but its sources.

b. The Government

40. The illegal street race had taken place in public; anyone present could have taken photographs. That being so, the Government argued that no duty of confidentiality could possibly arise and hence, no right to claim protection of journalistic sources. The Government relied on *British Broadcasting Corporation v. the United Kingdom*, no. 25798/94, Commission decision of 18 January 1996, Decisions and Reports (DR) 84 b, pp. 129 et seq.

41. Moreover, even assuming there to have been a journalistic source deserving of protection, the promise of the journalists to keep the identity of the participants in the street race secret pertained only to the magazine article in *Autoweek*; the criminal investigation for which the information concerned was required to be handed over was unrelated to the street race. In fact the "duties and responsibilities" weighing on the applicant company were such that the applicant company ought to have warned the participants that the promise of confidentiality covered only their participation in the race, leaving it to them to decide whether or not to run the risk of disclosure of their identities for other purposes.

42. The Government accepted, nonetheless, that the order under Article 96a of the Code of Criminal Procedure could be construed as an "an interference" with the applicant company's rights under Article 10 of the Convention. In their view, however, this interference had been justified in terms of the second paragraph of that Article.

43. The legal basis for the interference in question was Article 96a of the Code of Criminal Procedure. As applicable to journalists, this provision had been clarified in the case-law of the Supreme Court and in a policy rule that had been published. An interested party could lodge a complaint which

would be heard in open court. This satisfied the requirements of accessibility and foresee ability and provided adequate procedural safeguards.

44. The aim pursued by the interference was a legitimate one, namely the prevention of disorder or crime. In addition, it served public safety since the crimes under investigation had been committed by individuals who did not shrink from armed violence and were prepared to endanger the public by driving at excessively high speeds; moreover, the cash machines were located in busy public places.

45. Although in *Goodwin v. the United Kingdom*, 27 March 1996, *Reports of Judgments and Decisions* 1996-II, the Court had recognised the importance of protecting journalists' sources, it remained necessary to balance the interests involved; the right of journalists to decline to give evidence could be overridden by an even more compelling public interest.

46. The public prosecutor had had no alternative means of connecting the Audi car to the suspects A and M who had been observed at the scene of the ram raids. In fact, their participation in the street race had only become known from telephone conversations intercepted after the race had taken place; the police attending the street race had had no means of knowing beforehand that two of the ram-raid suspects intended to take part.

47. As regards the nature of the coercive measures applied, the Government contrasted the present case with the cases of *Ernst and Others v. Belgium*, no. 33400/96, 15 July 2003, and *Roemen and Schmit v. Luxembourg*, no. 51772/99, ECHR 2003-IV, in which the applicants' offices had been searched, and *Voskuil v. the Netherlands*, no. 64752/01, 22 November 2007, in which the applicant had been kept detained for seventeen days.

48. At all events, the needs of the criminal investigation into the ram raids and attendant crimes clearly outweighed the applicant company's journalistic interests; the public prosecutor and the investigating judge had attempted to make this clear to the applicant company. It could not be considered necessary for journalists to be given all the information available in order to make for themselves an assessment properly reserved to competent authority.

2. The Court's assessment

a. Whether there has been an "interference" with a right guaranteed by Article 10

49. In the Court's view, the illegal street race in this case cannot be compared to a public demonstration. A demonstration, by its nature, is intended to disseminate information and ideas; the street race was plainly meant to take place out of sight of the public. The Government's reference

to the Commission's decision in the case of *British Broadcasting Corporation v. the United Kingdom* is therefore inapposite.

50. Whatever may have been published in *Autoweek* after the seizure of the CD-ROM, the Court accepts that at the time when the CD-ROM was handed over the information stored on it was not yet known to the public prosecutor and the police. It follows that the applicant company's rights under Article 10 as a purveyor of information have been made subject to an interference in the form of a "restriction" and that Article 10 is applicable. This finding is not affected by the presence at the street race of police officers, since they apparently did not secure the information concerned.

b. Whether the interference was "prescribed by law"

51. A privilege allowing journalists to refuse to give evidence in criminal proceedings has been recognised by domestic case-law. This privilege is qualified, albeit that any interferences with it are explicitly made subject to the requirements of the second paragraph of Article 10 of the Convention (see paragraph 23 above). More detailed guidance for the police and the prosecution authorities exists in the form of an Instruction issued by the Board of Procurators General (see paragraph 24 above). It is true, as the applicant company state, that there is no statutory regulation of journalists' rights in this regard as yet; legislation of such kind has only recently been introduced (see paragraph 27 above). For the purposes of the present case, the Court is satisfied that the interference complained of had a statutory basis, namely Article 96a of the Code of Criminal Procedure.

52. While it is true that, as the applicant company state, that provision did not set out a requirement of prior judicial control, in this case the Court must have regard to the involvement of the investigating judge in the process (see paragraph 15 above) which would appear to have been decisive. Notwithstanding its concerns expressed below (see paragraph 62), the Court sees no need on this occasion to rule on the question of statutory procedural safeguards.

c. Whether the interference pursued a "legitimate aim"

53. The Court is satisfied that the interference complained of was intended at the very least to prevent disorder or crime. This finding is not affected by the authorities' refusal to make detailed information available to the applicant company when demanding the handover of the CD-ROM.

d. Whether the interference was "necessary in a democratic society"

i. Applicable principles

54. The applicable principles are the following (see, as a recent authority, *Voskuil v. the Netherlands*, no. 64752/01, §§ 63-65, 22 November 2007, with further references):

(a) The test of "necessity in a democratic society" requires the Court to determine whether the interference complained of corresponded to a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

(b) The Court's task in exercising its supervisory function is not to take the place of the competent domestic courts but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully or in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole.

(c) In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were "relevant and sufficient" and whether the measure taken was "proportionate to the legitimate aims pursued". In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10.

(d) Protection of journalistic sources is one of the basic conditions for press freedom, as is recognised and reflected in various international instruments including the Committee of Ministers Recommendation quoted in paragraph 28 above. Without such protection, 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 may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.

ii. Application of these principles

55. The Court notes at the outset that unlike in other comparable cases – *Ernst and Others*, *Roemen and Schmit* and *Voskuil*, referred to above – there was no search of the applicant company's premises. It does not follow, however, that the interference with the applicant company's rights can be dismissed as insignificant as the Government argue. Had the applicant company not bowed to the pressure exerted by the police and the prosecuting authorities, not only the offices of *Autoweek* magazine's editors but those of other magazines published by the applicant company would have been closed down for a significant time; this might well have resulted in the magazines concerned being published correspondingly late, by which time news of current events (see paragraph 12 above) would have been stale. News is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest (see, for example, *Observer and Guardian v. the United Kingdom*, 26 November 1991, § 60, Series A no. 216; *Sunday Times v. the United Kingdom (no. 2)*, judgment of 26 November 1991, Series A no. 217, § 51; and *Association Ekin v. France*, no. 39288/98, § 56, ECHR 2001-VIII). This danger, be it recalled, is not limited to periodicals that deal with a topical issue (cf. *Alınak v. Turkey*, no. 40287/98, § 37, 29 March 2005). The threat was plainly a credible one; the Court must take it as seriously as it would have the authorities' actions had the threat been carried out.

56. That, however, is not sufficient for the Court to find that the interference complained of was in itself disproportionate. The present case is dissimilar to cases such as *Ernst and Others*, *Roemen and Schmit* and *Voskuil* in important respects.

57. In the present case the action complained of was not intended to identify the applicant company's sources for prosecution. Rather, the seizure of the CD-ROM was intended to identify a vehicle used in crimes quite unrelated to the illegal street race. The Court does not dispute that a compulsory handover of journalistic material may have a chilling effect on the exercise of journalistic freedom of expression. However, it does not follow *per se* that the authorities are in all such cases prevented from demanding such handover; whether this is the case will depend on the facts of the case. In particular, the domestic authorities are not prevented from balancing the conflicting interests served by prosecuting the crimes concerned against those served by the protection of journalistic privilege; relevant considerations will include the nature and seriousness of the crimes in question, the precise nature and content of the information demanded, the existence of alternative possibilities to obtain the necessary information, and any restraints on the authorities' obtention and use of the materials concerned (compare *Nordisk Film & TV A/S v. Denmark* (dec.), no. 40485/02, ECHR 2005-XIII).

58. The crimes were serious in themselves, namely the removal of cash dispensers by ramming the walls of buildings in public places with a shovel loader. Not only did they result in the loss of property but they also had at least the potential to cause physical danger to the public. At a ram raid perpetrated on 1 February 2002 the perpetrators made use of a firearm to facilitate their crime (see paragraph 19 above). It was only after the threat of potentially lethal violence was made that the police and the public prosecutor were moved to demand from the applicant company the information which was known to be in their possession.

59. The Court is satisfied that the information contained on the CD-ROM was relevant to these crimes and, in particular, capable of identifying their perpetrators.

60. Given that the participation of the suspected vehicle in the street race only became known to the police after the race had taken place, the Court is satisfied that no reasonable alternative possibility to identify the vehicle existed at any relevant time.

61. It has not been stated, nor indeed is it apparent, that the authorities made use of the information obtained for any other purpose but to identify and prosecute the perpetrators of the ram raids. It may therefore be concluded that the applicant company's sources were never put to any inconvenience over the street race.

62. Finally, the Court has had regard to the extent of judicial involvement in the case. It is disquieting that the prior involvement of an independent judge is no longer a statutory requirement (paragraph 20 above). As it was, the public prosecutor obtained the approval of the investigating judge even without being so obliged by domestic law (paragraph 13 above); the Court considers this, as an addition to the applicant company's entitlement under statute of review *post factum* of the lawfulness of the seizure by the Regional Court (paragraphs 15, 16 and 22 above), to satisfy the requirements of Article 10 in the present case.

63. The Court is bound to agree with the Regional Court that the actions of the police and the public prosecutors were characterised by a regrettable lack of moderation (paragraph 16 above). Even so, in the very particular circumstances of the case, the Court finds that the reasons advanced for the interference complained of were “relevant” and “sufficient” and “proportionate to the legitimate aims pursued”. There has accordingly been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the application admissible;

2. *Holds* by four votes to three that there has been no violation of Article 10 of the Convention.

Done in English, and notified in writing on 31 March 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada	Josep Casadevall
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge Power joined by Judges Gyulumyan and Ziemele is annexed to this judgment.

J.C.M.
S.Q.

DISSENTING OPINION OF JUDGE POWER JOINED BY JUDGES GYULUMYAN AND ZIEMELE

The protection and confidentiality of journalistic sources is one of the cornerstones of freedom of the press and is thus protected by Article 10. In view of the potentially "chilling effect" which an order for non-voluntary disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 of the Convention unless it is justified by an overriding requirement in the public interest.[1] To be so justified, State interference with press freedom and the confidentiality of its sources must be strictly "necessary", implying the existence of a "*pressing social need*".[2] Any restriction thereon calls for "the most careful scrutiny" of the Court.[3]

This Court has never disputed that a compulsory handover of journalistic research material may have as chilling an effect upon the exercise of journalistic freedom of expression as may an order for source disclosure and it considers that this matter can only be addressed, properly, in the circumstances of a given case.[4] The facts of the instant case stand in marked contrast to the facts in *Nordisk Film and TV A/S v Denmark* in which the Court found that the applicant's complaint was manifestly ill-founded. In *Nordisk,* a request for disclosure of journalistic materials made by the Danish police in the context of an investigation into sexual assaults upon children was heard before the Copenhagen City Court, the High Court and the Supreme Court. Following a detailed consideration of the competing public interests in issue the Court ordered the handover of a limited number of the materials requested but exempted from its order any recordings or notes that would entail a risk of revealing the identity of the applicant's sources.

By contrast, the police in this case, without any prior judicial assessment or authorisation, arrived at the one of the applicant's editorial offices, ordered the editors to surrender all photographic and other materials required for an investigation, declined to give details as to the necessity for the demand, refused to entertain any objection based on journalistic undertakings of confidentiality, threatened, arrested and detained the editor in chief and further threatened to close and search all of the applicant company's premises for an entire weekend (§§ 10-13). What occurred in this case, in my opinion, is not far removed from (and in certain respects goes beyond) the type of "drastic measure" previously criticised by this Court in

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[1] *Goodwin v. the United Kingdom*, 27 March 1996, § 39, Reports of Judgments and Decisions 1996-II.

[2] *Lingens v. Austria*, 8 July 1986, §§ 39-40, Series A no. 103; *Sunday Times v. the United Kingdom (no. 2)*, 26 November 1991, § 50, Series A no. 217.

[3] *Roemen and Schmit v. Luxembourg*, no. 51772/99, § 46, ECHR 2003-IV; *Goodwin v. the United Kingdom*, 27 March 1996, §§ 39-49, *Reports of Judgments and Decisions* 1996-II.

[4] *Nordisk Film & TV A/S v. Denmark* (dec.), no. 40485/02, ECHR 2005-XIII.

finding a violation of Article 10 of the Convention.[1] The absence of any statutory requirement for *prior* judicial involvement in a case such as this, is, in my view, somewhat more than "disquieting" (as the majority considers) and the actions of the police are a great deal more than "regrettable" (§§ 62, 63).

The distinction between a journalist's "sources" and his or her "materials" (such as, notes, recordings, photographs) forms part of the rationale relied upon by the majority in its finding of no violation in this case (see §§ 57, 61). To my mind, great caution should be exercised before the law draws too sharp a distinction between such matters. The purpose of the legal of protection of sources is founded upon an important point of principle. This protection is granted to ensure that those who (for reasons of fear or otherwise) disclose, secretly, to journalists matters that are of public interest are not discouraged from so doing by the risk that their identities may be revealed. If legal protection is to be limited, strictly, to non-disclosure of "sources" then such sources may suddenly "shut up", fearful that their identities will be ascertainable once the journalist to whom confidential data has been given is no longer its sole custodian. Such a risk of indirect disclosure is likely to discourage an otherwise courageous "source" from bringing matters of vital interest into the public domain. In my view, it is not of pivotal significance that the intention behind a given interference is to identify evidence rather than individuals. It is the fact of interference (with its attendant risk of source identification) that undermines and weakens the worth of a journalist's undertaking. Thus, this Court imposes a high threshold of "necessity" before finding that such interference can be compatible with Article 10.

The public interest in maintaining confidentiality of press sources is constant. Without confidential sources, journalists would be fettered in the discharge of their important function as 'public watchdog'. Disclosure is always contrary to the public interest and the question for consideration in any given case is whether there is an overriding alternative public interest, amounting to a "pressing social need", to which the need to keep press sources confidential should yield. To establish that a "pressing social need" exists, sufficient reasons for the otherwise unlawful interference must be shown. The respondent State, to my mind, has failed, entirely, to show that the police would not have been able to identify the vehicle in any other way. No evidence has been adduced to indicate that even one alternative effort was made (such as a search of motor taxation records or ongoing surveillance of suspects or questioning on suspicion of involvement) in order to obtain the evidence they required. It would appear that once the police had lost the car chase earlier in the day, their first port of call was to the applicant company's offices with their "immoderate" demand for the

[1] *Roemen and Schmit v. Luxembourg*, no. 51772/99, § 57, ECHR 2003-IV.

surrender of photographic and other materials. Because of the importance of the principle at stake, the journalist should be the last, rather than the first, means of arriving at evidence required.

Where, in the public interest, a pressing social need to interfere with journalistic confidentiality is asserted then the determination of whether relevant and sufficient reasons have been adduced to substantiate that claim should be made by a competent court having "heard" the competing public interest. Otherwise, the police become judges in their own cause and a fundamental right protected under Article 10 of the Convention is thereby undermined to the detriment of democracy.

It is telling to note that the police authorities in this case operated under Guidelines that issued in May 1988.[1] Their provisions on the seizure of journalistic material might best be described as draconian.[2] ("*The police may, on the instructions of a public prosecutor ... or not as the case may be, arrest a journalist on suspicion of a criminal act and seize everything he has with him on the spot.*") With effect from 1 April 2002, some two months after the events in this case, those provisions were replaced by a new Directive on coercive measures by the police in respect of journalists.[3] This Directive contained extensive reference to this Court's case law[4] and provided, *inter alia*, that where "the protection of a journalist's source is at issue, the use of coercive measures must be in accordance with Article 10 § 2".[5] These facts confirm me in my view that the actions of the police in this case were in violation of Article 10 of the Convention.

In finding no violation, the majority merely wags a judicial finger in the direction of the Netherlands authorities but sends out a dangerous signal to police forces throughout Europe, some of whose members may, at times, be tempted to display a similar "regrettable lack of moderation". To my mind the judgment will render it almost impossible for journalists to rest secure in the knowledge that, as a matter of general legal principle, their confidential sources and the materials obtained thereby are protected at law.

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[1] These Guidelines are cited and the relevant provisions thereof are set out in § 40 of the Court's judgment in *Voskuil v. the Netherlands*, no. 64752/01, 22 November 2007.

[2] Section 7 of 1988 Guidelines sets out provisions on the seizure of journalistic material and is cited in *Voskuil v. the Netherlands*, no. 64752/01, § 40, 22 November 2007.

[3] On 1st of April 2002 The Directive on the Application of Coercive Measures to Journalists came into force; see § 41 of *Voskuil.*

[4] *Voskuil v. the Netherlands*, no. 64752/01, § 41, 22 November 2007.

[5] *Voskuil v. the Netherlands*, no. 64752/01, § 41, 22 November 2007.