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

THIRD SECTION

CASE OF VOSKUIL v. THE NETHERLANDS

(Application no. 64752/01)

JUDGMENT

STRASBOURG

22 November 2007

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 Voskuil v. the Netherlands,

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

Mr B.M. ZUPANČIČ, *President*,
Mr C. BÎRSAN,
Mrs E. FURA-SANDSTRÖM,
Mrs A. GYULUMYAN,
Mr DAVID THÓR BJÖRGVINSSON,
Mrs I. BERRO-LEFÈVRE, *judges*,
Mrs W. THOMASSEN, ad hoc *judge*,
and Mr S. QUESADA, *Section Registrar*,

Having deliberated in private on 23 October 2007,

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

PROCEDURE

1. The case originated in an application (no. 64752/01) 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 Netherlands national, Mr Koen Voskuil, on 26 October 2000.

2. The applicant was represented by Mr R.S. le Poole, an advocate practising in Amsterdam. The Netherlands Government ("the Government") were represented by their Agent, Mr R.A.A. Böcker of the Ministry for Foreign Affairs.

3. The applicant, a journalist, alleged in particular that an order for his detention intended to compel him to disclose the identity of an informant violated Article 10 of the Convention. He also complained under Article 5 § 1 of the Convention that his detention had not been ordered in accordance with the procedure prescribed by law.

4. On 25 November 2004 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

5. Mr E. Myjer, the judge elected in respect of the Netherlands, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mrs W. Thomassen to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Particular circumstances of the case

6. The applicant was born in 1975 and lives in Amsterdam.

7. On 30 March 2000 the Amsterdam Regional Court (*arrondissementsrechtbank*) convicted three accused, Messrs K., Van S. and H., of arms trafficking. In the criminal investigation into the offences at issue, the Amsterdam police had stated that an arsenal of weapons had been found by chance: the caretaker of a building situated on the Nachtwachtlaan in Amsterdam had contacted the police when water was leaking from one of the flats in the building, whose occupants were absent. With the aid of two locksmiths, the police had gained entry to the flat and in the subsequent search for the source of the leak, the weapons had been found.

8. The accused lodged an appeal against the judgment of the Regional Court.

9. On 12 and 13 September 2000 the daily newspaper *Sp!ts* published two articles, written by the applicant and his colleague Ms S., in which doubts were expressed about the amount of coincidence allegedly involved in the finding of the weapons. The article of 13 September 2000, entitled "Chance Hit or Perfect Shot?" ("*Toevalstreffer of loepzuiver schot?*"), quotes an unnamed policeman of the Amsterdam force as commenting in respect of the flooding, "That is what we made out of it. Sometimes you just need a breakthrough in an investigation" ("*Dat hebben we er maar van gemaakt. Soms heb je net even een doorbraak nodig in je onderzoek*").

10. In the proceedings on appeal against K., Van S. and H., the applicant and Ms S. were summonsed to appear as witnesses at the request of the defence. At the first hearing before the Amsterdam Court of Appeal (*gerechtshof*) on 22 September 2000 in the cases against Van S. and K., the applicant – who was assisted by counsel – stated *inter alia* that he knew that the policeman, whom he had quoted verbatim in the article of 13 September 2000, had been involved in a previous investigation against K. When the applicant was asked whether that policeman was also involved in the investigation of the flat or was aware of that investigation, he invoked his right of non-disclosure (*verschoningsrecht*). Counsel for the defence argued that both the individual interest of the accused – on whom a custodial sentence had been imposed as a result of the investigation carried out by the police – and the interest of criminal justice in the Netherlands outweighed the applicant's interest in not disclosing his source. The Advocate General also expressed as his opinion that the applicant could not

invoke a right of non-disclosure. He stated in addition that the source, if his name was made known, had nothing to fear from either the police or the public prosecution service.

11. After having deliberated, the Court of Appeal considered that, if the statement made by the police officer to the applicant was correct, this might affect the conviction of the accused. It also affected the integrity of the police and judicial authorities. For these reasons, the Court of Appeal held that the applicant was to reply to the question whether his source had been involved in the investigation of the flat and had been aware of that investigation. The President of the court further reminded the applicant that the court was empowered to order his detention for failure to comply with a judicial order (*gijzeling*). Upon this, the applicant replied that his source had both been aware of, and involved in, the investigation of the flat.

12. Asked by counsel for the accused to reveal the identity of his source, the applicant once again invoked his right of non-disclosure. Counsel for the applicant submitted that he was justified in so doing, given that disclosing the identity of his source would render it impossible for the applicant to work as a journalist in the future since sources would no longer approach him. The interests of the journalist and of freedom of expression outweighed other interests. Moreover, as the criminal charges at issue concerned only arms trafficking and not, for example, a multiple homicide, it was disproportionate to require the applicant to name his source. It also went against the principle of subsidiarity, since there were other ways in which the identity of the source could be discovered.

13. In reply, the Advocate General stated that journalists exposed obvious wrongs (*kennelijke misstanden*) in society. Where they chose to do so, they should also face the consequences. The applicant was the only witness who could clarify whether or not the three accused had been wrongly convicted. In the present case, where official records, drawn up on oath of office (*ambtseed*) by police officers, and the integrity of the judicial authorities were at stake, the applicant must reveal the identity of his source. It could not be the case that, in order to trace this identity, every member of the Amsterdam police force should be heard, bearing in mind that all officers in the case against K. had already been heard by the investigating judge (*rechter-commissaris*).

14. Having deliberated, the Court of Appeal decided that the applicant was to reveal the identity of his source, for the same reasons as it had held that he had to reply to the question of his source's involvement in the investigation. The applicant invoked his right to remain silent (*zwijgrecht*), upon which the court ordered his immediate detention for a maximum of 30 days. No legal remedy lay against the decision to detain the applicant (Article 294 § 3 of the Code of Criminal Procedure – *Wetboek van Strafvordering*, “CCP”).

15. When questioned by counsel for the accused, the applicant's colleague, Ms S., stated that she was aware of the identity of the source, but that she had never met him in person. Having regard to this last fact, as well as to the fact that the journalist who had had direct contact with the source – i.e. the applicant – had already been placed in detention, the Court of Appeal considered that Ms S. was not obliged to reveal the identity of the source.

16. The applicant was served with an unreasoned decision on 25 September 2000. On 27 September 2000 he was handed a copy of the record of the hearing of 22 September, containing the decisions made by the Court of Appeal at that hearing and the reasons for them.

17. Late on 22 September 2000 the applicant lodged a request with the Court of Appeal to be released from detention. Prior to the examination of this request on 27 September 2000, the applicant was able to consult his lawyer only once, namely in the evening of 25 September. Requests to visit the applicant on 22, 23, 24, (the afternoon of) 25, 26 and 27 September were refused. The request for release was dealt with by the Court of Appeal in chambers (*raadkamer*), by the same judges who had ordered his detention.

18. At the hearing in chambers on 27 September 2000, the Advocate General reported that, following the applicant's statements at the hearing on 22 September, a police inspector had carried out an internal investigation, which had revealed that only eight police officers had been involved in both the first and the second investigation into the accused K. All these officers had made sworn affidavits to the effect that they had never been in contact with the applicant.

19. Informed of the outcome of the internal police investigation, the applicant insisted that he did not want to reveal the identity of his source. He stated that he was a journalist and that he might as well give up on that career if he started revealing his sources; no sources wanting to remain anonymous would any longer be willing to provide him with tip-offs. The applicant was informed by the President of the Court of Appeal that the right of non-disclosure was not absolute, and that more weighty interests could be at stake. In the present case, long prison sentences had been imposed on the three accused, partly on the basis of official records drawn up by police officers. The applicant replied that he was willing to state only that his source was not one of the police officers who had made sworn affidavits in the internal police investigation.

20. Counsel for the applicant argued that the journalist should be the last, rather than the first, means of arriving at the truth. The witnesses, whose examination had been requested by the three accused, ought to be heard first. Those witnesses could be confronted with the articles published in *Sp!ts* as well as with the article which had appeared in the weekly news magazine *Vrij Nederland* on 8 January 2000. This latter article had also suggested that the flooding of the flat had been staged, and the author had

informed counsel for the applicant that the information contained in the article had not come from the same source as the one relied on by the applicant. Counsel for the applicant further posited that the State Criminal Investigation Department (*Rijksrecherche*) could carry out an investigation of the police force. Finally, it was for the Court of Appeal to assess the value of the article written by the applicant – that court could also decide to disregard it.

21. By decision of 28 September 2000, the Court of Appeal refused the applicant's request for his detention to be lifted. It repeated that the interests of the accused and of the integrity of the police and the judicial authorities outweighed the interest of the applicant in not having to disclose the identity of his source. Having regard to the outcome of the internal police investigation, as well as to the fact that an appeal made by the police commissioner for the applicant's source to come forward had not produced any results, the Court of Appeal considered it unlikely that an investigation by the State Criminal Investigation Department would clarify, within a reasonable time, the cause of the flooding, quite apart from the fact that such an investigation would seriously delay the criminal proceedings against K., Van S. and H. The Court of Appeal similarly rejected the suggestion to hear the witnesses proposed by the defence first, given that those witnesses had already been heard extensively about the point in issue. For these reasons, it could not be held that the detention of the applicant breached the principles of proportionality and subsidiarity.

22. The Court of Appeal further considered that the applicant's objections against the order for his detention as given at the hearing of 22 September 2000 did not require examination since no appeal lay against such order. It also rejected the argument that the order had not been served on the applicant within 24 hours, since – as appeared from the record of that hearing of 22 September – he had been informed of the order orally. Finally, the Court of Appeal held that the possibilities for contact between the applicant and his counsel were laid down in penitentiary legislation. It was not for the Court of Appeal to assess the application of that legislation.

23. The applicant lodged an appeal on points of law to the Supreme Court (*Hoge Raad*) against the decision of the Court of Appeal.

24. A second hearing before the Court of Appeal in the criminal proceedings against Van S. and H. took place on 9 October 2000. The applicant once again refused to reveal the identity of his source. Upon this, the Court of Appeal decided to lift the order for the applicant's detention. It considered that no support for, or confirmation of, the applicant's statement that he had received information from a police officer who had been involved in both investigations against the accused K. could be found in statements made by other persons and/or in the contents of documents. On the contrary, the applicant's statement had been contradicted by ten police

officers. Therefore, no credence could be attached to his statement. This being the case, the applicant's detention no longer served any purpose.

25. At the same hearing on 9 October 2000, and following the Court of Appeal's decision to lift the applicant's detention, counsel for the accused K. challenged (*wraken*) the Court of Appeal. A different chamber of the Court of Appeal upheld that challenge, also on 9 October 2000. It held that the opinion that the applicant's statement was not credible, as expressed by the Court of Appeal in the criminal proceedings against Van S. and H., might have a bearing on decisions which that court would be called upon to take in the criminal proceedings against K. This constituted an exceptional circumstance, providing an important indication for the conclusion that the accused's fear of a judge being prejudiced against him was objectively justified.

26. The criminal proceedings against the three accused continued on 30 October 2000 before the Court of Appeal in a new composition. The applicant was again heard as a witness, as were seven other journalists who had also published articles about the case against K. and the possibility of the flooding having been staged. The Court of Appeal also heard two plumbers and the caretaker of the building.

27. Subsequent to the decision to lift the order for his detention, the applicant withdrew his appeal on points of law as his release had rendered that appeal devoid of interest.

28. According to the Government, the criminal proceedings against K., Van S. and H. have been brought to a conclusion.

B. Other press reports

29. The applicant has submitted photocopies of two cuttings from print media.

30. The first is of a report in the mass circulation daily newspaper *De Telegraaf*, dated 24 September 1999. It is therein stated that following reports of flooding from a second flat in Amsterdam, police had found another large quantity of weaponry. Messrs K., Van S. and H., the accused in the applicant's case, were not at that time suspected of involvement; the weapons were thought to belong to a terrorist organisation. The report drew attention to the similarity between the Nachtwachtlaan case and this new case as regards the circumstances in which the weapons were found. It cited "police sources" as suggesting that intelligence services, possibly foreign, had engineered events in order to protect their informants.

31. The second, which is incomplete, is of an article that appeared on 8 January 2000 in the weekly magazine *Vrij Nederland*. It links the two events and cites an unnamed source as stating that they had in fact been engineered by the then Netherlands National Security Service (*Binnenlandse Veiligheidsdienst* – "the BVD").

32. It appears that the report in *De Telegraaf* and the article in *Vrij Nederland* were both written by journalists other than the applicant.

33. The applicant has also submitted a printout of a page taken from the internet web site of the Amsterdam daily newspaper *Het Parool*, dated 27 September 2000. It quotes the two plumbers who were called in to repair the water leak as dismissing as nonsense all allegations that the damage had been caused deliberately; in actual fact, such leaks were very common in older buildings.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW

A. The Netherlands Code of Criminal Procedure

34. Provisions of the Code of Criminal Procedure relevant to the case provide as follows:

Article 218

> “Persons who, by virtue of their position, their profession or their office, are bound to secrecy may ... decline to give evidence or to answer particular questions, but only in relation to matters the knowledge of which is entrusted to them in that capacity.”

Article 294

> “1. If during the interrogation the witness refuses, for no lawful reason, to answer the questions put to him or to take the required oath or affirmation, the court shall, if the investigation urgently so requires, order his detention (*gijzeling*).
>
> 2. The witness and his counsel shall be heard about the reasons for his refusal before the order is given.
>
> 3. The detention order shall be valid for no more thirty days; the court shall at the same time order the time at which the witness is to be presented before it anew. No remedy shall lie against the order.
>
> 4. The court shall order the witness released from detention as soon as he has fulfilled his obligations or the investigation at the hearing is closed. It shall however have competence to order the witness released from detention whatever the state of the investigation, including at the request of the witness. Article 223 § 3 shall apply.
>
> 5. Articles 224 and 225 shall apply.”

35. Articles 223, 224 and 225, which are thus declared applicable to witnesses at the trial hearing, *per se* apply to witnesses heard by an investigating judge.

36. Article 223 § 3 provides, in relevant part, that the detained witness may appeal within three days after the official notification in writing of the decision against any refusal to order his release from detention and may

appeal on points of law to the Supreme Court against any such refusal given on appeal.

37. Article 224 provides that the witness shall receive notification in writing within twenty-four hours of all decisions to order or extend his detention or to refuse his release from detention.

38. Article 225 provides that the witness shall have the right to consult counsel. His counsel shall have unrestricted access (*vrije toegang*) to him, be allowed to see him in private and exchange confidential correspondence with him, subject to detention rules and provided that the criminal investigation in which his evidence was sought not be delayed. Counsel shall also have access to any official records relating to the questioning of the witness and, if the criminal investigation admits of it, the remainder of the case file.

39. Although these provisions by their wording apply to proceedings at first instance before the Regional Court, by virtue of Article 415 they apply by analogy to appeal proceedings before the Court of Appeal.

B. The Guidelines on the position of the press in relation to police action

40. The Guidelines on the position of the press in relation to police action (*Leidraad over de positie van de pers bij politieoptreden*) were issued by the Minister of Justice (*Minister van Justitie*) on 19 May 1988. At the time of the events complained of, they provided, in relevant part:

> "7. Seizure of journalistic material
>
> Journalistic material may be seized in cases described in the Code of Criminal Procedure. Journalists may be faced with seizure in two ways.
>
> A. The police may, on the instructions of a public prosecutor (*officier van justitie*) or an assistant public prosecutor (*hulpofficier van justitie*) 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.
>
> There must then be a direct connection between a particular criminal act and the journalistic material with which that act has been committed. In this situation, the journalist is arrested like any ordinary citizen.
>
> If a prosecution ensues, it will be for the independent judge eventually to decide what is to be done with any seized – and unpublished – material.
>
> B. Journalistic material may also be seized on the orders of an independent judge (the investigating judge), if such material may – in the judge's opinion – serve to clarify the truth in a preliminary judicial investigation (*gerechtelijk vooronderzoek*).
>
> ..."

41. This section of the Guidelines was replaced with effect from 1 April 2002 by the “Directive on the application of coercive measures to journalists” (*Aanwijzing toepassing dwangmiddelen bij journalisten*), issued by the Board of Procurators General (*College van procureurs-generaal*). This directive makes extensive reference to the Court's case-law. If the protection of a journalist's source is at issue, the use of coercive measures must be in accordance with Article 10 § 2 with due regard to requirements of proportionality and subsidiarity.

C. Relevant domestic case-law

42. In a civil case – brought by persons named in connection with alleged bribery against two journalists who had allegedly made use of information leaked by officials – the Supreme Court, reversing earlier case-law, held (judgment of 10 May 1996, *Nederlandse Jurisprudentie* (Netherlands Law Reports) 1996, no. 578):

> “It follows from the said judgment [i.e. *Goodwin v. the United Kingdom*, judgment of 27 March 1996, *Reports of Judgments and Decisions* 1996-II] that it must be accepted that it follows from Article 10 § 1 of the Convention that in principle a journalist has the right to refuse to answer a question put to him if he were thus to risk disclosing his source, but that the court does not have to honour a claim based on this right when it considers that in the particular circumstances of the case disclosing the source is necessary in a democratic society in pursuit of one or more of the aims referred to in the second paragraph of the said Convention provision, which must be stated and for which, if necessary, a *prima facie* case must be made out by the person who calls the journalist as a witness.
>
> ...
>
> It is apparent from the decision of the Court of Appeal and the other documents contained in the case file that the present case is characterised in that, as stated by [the plaintiffs], the 'leaked' information relates to a criminal investigation into alleged bribery of a number of local government officials in the province of Limburg, in that information relating to the supposed involvement of [the plaintiffs] in such cases of bribery has already been made public and that [the plaintiffs] have sued [the newspaper] *De Limburger* for damages which they claim resulted therefrom (...). Accordingly, [the plaintiffs] have claimed no other interest in the disclosure of [the defendants'] sources than that they wish to know who has 'leaked', because they wish eventually to sue the State and the persons concerned themselves for damages and also to obtain an injunction against the persons concerned to restrain them from any further 'leaking'. However, the said judgment of the European Court of Human Rights compels the Supreme Court to find that this interest in itself is insufficient to counterbalance the weighty public interest which belongs to the protection of [the defendants'] sources.”

D. Recommendation No. R(2000) 7 on the right of journalists not to disclose their sources of information

43. 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. It states, in relevant part:

"[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.”

44. For the precise application of the Recommendation, the explanatory notes clarify the meaning of certain terms. As regards the term “sources” the explanation reads as follows:

“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

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

45. The applicant complained of the denial of his right as a journalist not to disclose his source of information and the order to detain him in order to compel him to do so. He relied on Article 10 of the Convention, which 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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.”

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

A. Admissibility

47. The Government initially objected *in limine* that since the applicant had failed to pursue his appeal on points of law to a conclusion (see paragraph 27 above) it followed that he had not exhausted the domestic remedies available. However, by a letter of 2 March 2006 they withdrew that objection on the ground that the Supreme Court would have dismissed the appeal as inadmissible given that the applicant had already been released.

48. The Court notes that the applicant's complaint under Article 10 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. Whether there has been an "interference" with the applicant's rights under Article 10 of the Convention

49. Both parties agreed that there had been an interference with the applicant's rights under Article 10 of the Convention. Indeed it is clear that the applicant was subjected to "formalities, conditions, restrictions or penalties" in that his refusal to name his source led the Court of Appeal to order his detention in an attempt to compel him to speak.

2. Whether the interference was "prescribed by law"

50. The Government argued that the applicant's detention had a statutory basis in the form of Article 294 of the Code of Criminal Procedure as clarified by the case-law of the Supreme Court. Moreover, procedural safeguards were sufficient.

51. The applicant disagreed: in his view the Court of Appeal had failed to establish any real need for his detention, let alone an "urgent" need, even though Article 294 § 1 made urgency a precondition for any decision to detain a witness on grounds of refusing to give evidence.

52. The Court considers that the applicant's argument does not concern the lawfulness of the interference so much as the question of its "necessity in a democratic society". It is more appropriately considered under that head.

53. The Court further notes that the applicant's detention was ordered on the basis of Article 294 § 1 of the Code of Criminal Procedure. For the purposes of Article 10 of the Convention, the Court finds that the basis in domestic law for the applicant's detention was adequate.

3. *Whether the interference pursued a "legitimate aim"*

54. The Government stated that the interference was intended for "the protection of the reputation or rights of others", namely the integrity of the judiciary and the Amsterdam police. They also referred to legitimate purposes such as "public safety" and "the prevention of disorder or crime".

55. The applicant argued that in the circumstances of his case, the integrity of the judiciary and the Amsterdam police required him to expose abuses of official authority while keeping the identity of his source a secret. Moreover, he had been called as a witness in criminal proceedings at the request of the defence; the integrity of the judiciary or the police had not in themselves been at issue in the proceedings.

56. The Court is satisfied that the interference was intended at any rate to further the prevention of crime.

4. *Whether the interference was "necessary in a democratic society"*

57. The Government referred to the exception mentioned in principle 3 of Committee of Ministers Recommendation No. R(2000) 7 on the right of journalists not to disclose their sources of information (see paragraph 43 above) and argued that it applied. In particular, they submitted that the requirements of subsidiarity and proportionality therein contained had been met.

58. Firstly, as to subsidiarity, they stated that no reasonable alternative means to obtain disclosure of the information concerned was available to them. There had been an investigation by the judicial authorities in the wake of allegations of police misconduct made by the defence in Mr K.'s case long before the applicant had been ordered detained. This, however, had not provided any information. When the applicant was ordered detained, an investigation into the conduct of police officers involved in the investigations against Mr K. was launched as a precautionary measure. This had not yielded any information either, as was only to be expected: the applicant's informant – if there ever was an informant – had necessarily been a police officer who could expect to face "grave repercussions" for having made such serious allegations in an important criminal investigation. Any further investigations by the State Criminal Investigation Department (*Rijksrecherche*), the official body created to investigate alleged cases of police wrongdoing, would have held up the trial of Mr K. unacceptably.

59. Secondly, as to proportionality, the applicant's statements had a direct bearing on the integrity of the police and the judiciary in the Amsterdam region. If the applicant's published allegations were correct, the effect on the rule of law in the Netherlands would be catastrophic. Moreover, the applicants' allegations had a direct impact on the conviction of the accused, who had been sentenced to long terms of imprisonment and

who had an interest in obtaining an enquiry into the alleged unfairness of the investigation against them.

60. Thirdly and finally, the applicant had been kept detained for no longer than 17 days and had been released as soon as the court no longer considered his detention needful.

61. The applicant disagreed. He contended that the Amsterdam Court of Appeal had failed to balance his Article 10 rights against any interest, whether the rights of the defence or any other. In addition, arms trafficking was not among the crimes listed in the Committee of Ministers Recommendation as serious enough to justify compelling a journalist to disclose his source. At all events, the weapons found in the Nachtwachtlaan building had been seized as soon as they had been found and had therefore posed no danger to the public by the time of the events complained of.

62. In the second place, the requirement of subsidiarity had not been met. Of the fourteen witnesses called by the defence, only three (including himself) had been summonsed at that time; the Court of Appeal had refused to summons the other eleven. Moreover, although a second investigation had been held as the Government stated, this had been done only after the applicant had been ordered detained. Similarly, only after the applicant had been detained did the Court of Appeal hear other journalists who had reported on the flooding matter. Finally, the Government's admission that an investigation by the State Criminal Investigation Department had been considered but decided against for reasons of expediency showed that that possibility had in fact existed.

63. The Court has stated the principles generally applicable as follows (see, among many other authorities, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, §§ 88-91, ECHR 2004-XI, case-law references omitted):

> “88. 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 (...).
>
> 89. 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, including the content of the comments held against the applicants and the context in which they made them (...).
>
> 90. 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 (...).”

64. Since 1985 the Court has frequently made mention of the task of the press as purveyor of information and “public watchdog” (see, among many other authorities, *Barthold v. Germany*, judgment of 25 March 1985, Series A no. 90, p. 26, § 58; *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 27, § 44; *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, Series A no. 239, p. 27, § 63; more recently, *Cumpănă and Mazăre*, cited above, § 93).

65. 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 43 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 (see *Goodwin v. the United Kingdom*, judgment of 27 March 1996, *Reports of Judgments and Decisions* 1996-II, p. 500, § 39; more recently and *mutatis mutandis*, *Roemen and Schmit v. Luxembourg*, no. 51772/99, § 46, ECHR 2003-IV).

66. As the Court understands the Government's argument, the applicant was required to identify his source for two reasons: firstly, to guard the integrity of the Amsterdam police; and secondly, to secure a fair trial for the accused.

67. The Court sees no need on this occasion to consider whether under any conditions a Contracting Party's duty to provide a fair trial may justify compelling a journalist to disclose his source. Whatever the potential significance in the criminal proceedings of the information which the Court of Appeal tried to obtain from the applicant**,** the Court of Appeal was not prevented from considering the merits of the charges against the three accused; it was apparently able to substitute the evidence of other witnesses for that which it had attempted to extract from the applicant (see paragraph 26 above). That being so, this reason given for the interference complained of lacks relevance.

68. That leaves the Court to consider the other interest relied on by the Government, which was to identify the applicant's source for their own purposes.

69. The Court is not in a position to establish whether or not there was any truth in the allegations published by the applicant. It notes that both the Advocate General and the Court of Appeal took them seriously enough for the applicant's detention to be ordered for more than two weeks, and that similar allegations were aired in print media other than the newspaper *Sp!ts*, but that the Court of Appeal eventually dismissed the report published by the applicant as implausible.

70. On the one hand the Court understands the Government's concern about the possible effects of any suggestion of foul play on the part of public authority, especially if it is false. On the other hand, however, it takes the view that in a democratic state governed by the rule of law the use of improper methods by public authority is precisely the kind of issue about which the public have the right to be informed (compare, for example, *Thorgeir Thorgeirson*, cited above, p. 28, § 67, and *Cumpănă and Mazăre*, cited above, § 95). It is in this light that the Court views the Government's admission (apparently contradicting the Advocate General – see paragraph 10 above) that the applicant's source faced “grave repercussions” if exposed.

71. Whatever the consequences might have been for the source, the Court is struck by the lengths to which the Netherlands authorities were prepared to go to learn his or her identity. Such far-reaching measures cannot but discourage persons who have true and accurate information relating to wrongdoing of the kind here at issue from coming forward and sharing their knowledge with the press in future cases.

72. The Court finds that the facts to be considered tip the balance of competing interests in favour of the interest of democratic society in securing a free press. On the facts of the present case, the Court does not find that the Government's interest in knowing the identity of the applicant's source was sufficient to override the applicant's interest in concealing it (compare *Goodwin*, cited above, p. 502, § 45).

73. This finding dispenses the Court from considering the Government's remaining argument, namely that the length of the applicant's detention was not disproportionate when viewed in relation to the interests involved.

74. In conclusion, there has been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

75. The applicant complained that, contrary to domestic law, he had not been provided with a copy of the order for his detention in writing within twenty-four hours; he also complained that the written copy, when he eventually received it, contained no reasoning. He relied on Article 5 § 1 of the Convention, which, in relevant part, reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save ... in accordance with a procedure prescribed by law ..."

76. The Government denied that the applicant had been a victim of the violation alleged.

A. Admissibility

1. The Government's preliminary objection

77. The Government took the view that the applicant had suffered no actual adverse consequences as a result of the facts complained of. There was, after all, no doubt that the applicant was aware of the sanction taken against him and the reasons for it: the Court of Appeal had explained the reasons for the order in question orally to the applicant in person. It followed that the applicant could not claim to be a "victim" within the meaning of Article 34 of the Convention.

78. The applicant repeated that he had not been given a reasoned detention order within twenty-four hours as required by domestic law.

79. As the Court has held many times, the existence of a violation is conceivable even in the absence of prejudice or damage; the question whether an applicant has actually been placed in an unfavourable position is not a matter for Article 34 of the Convention and the issue of damage becomes relevant only in the context of Article 41 (see, among many other authorities, *Marckx v. Belgium*, 13 June 1979, Series A no. 31, p. 13, § 27; as a recent example, *The Moscow Branch of the Salvation Army v. Russia*, no. 72881/01, § 65, ECHR 2006-...). Absent any measure favourable to the applicant, let alone any acknowledgement of a violation by the domestic authorities (see, among many other authorities, *Ždanoka v. Latvia* [GC], no. 58278/00, § 69, ECHR 2006-...), the Court sees no reason to come to any different decision in the present case. The Government's preliminary objection must therefore be dismissed.

2. Conclusion as to admissibility

80. The Court notes that this complaint 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

81. The Government did not attempt to argue that domestic law had been complied with.

82. As the Court has held many times, on the question whether detention is "lawful", including whether it complies with "a procedure prescribed by law" the Convention refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof (see, among many other authorities, *Wassink v. the Netherlands*, judgment of 27 September 1990, Series A no. 185-A, p. 11, § 24; *Öcalan v. Turkey* [GC], no. 46221/99, § 83, 12 May 2005; and *Nakach v. the Netherlands*, no. 5379/02, § 37, 30 June 2005).

83. The Court observes that, although the decision ordering the applicant detained on the ground of refusing to give evidence was not required to be reasoned as the applicant suggested, domestic law did provide for notification in writing of the detention order within twenty-four hours (Article 224 of the Code of Criminal Procedure – see paragraph 37 above). The Government do not deny that the applicant was only provided with a written copy of the order some three days later. The Court therefore finds that the procedure prescribed by law has not been followed. There has accordingly been a violation of Article 5 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

84. The applicant raised under Article 6 of the Convention the same complaints as he had made under Article 5. Article 6, in relevant part, provides as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal..."

85. The Government did not comment.

86. The Court observes that the duty to give evidence in criminal proceedings is ordinarily a normal civic duty in a democratic society governed by the rule of law. An order to give evidence does not involve the determination of the witness's "civil rights and obligations" (see *British Broadcasting Corporation v. the United Kingdom*, no. 25798/94, Commission decision of 18 January 1996); nor does it involve the determination of a "criminal charge" against the witness. This complaint is therefore incompatible *ratione materiae* with Article 6 of the Convention within the meaning of Article 35 § 3 and must be declared inadmissible in accordance with Article 35 § 4.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

87. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

88. The applicant submitted no claim for damages.

89. He claimed EUR 23,104.77 including value-added tax for the costs and expenses incurred before the Court.

90. The Government considered these claims excessive.

91. According to the Court's case-law, costs and expenses are recoverable under Article 41 provided that they were incurred by the injured party in order to seek, through the domestic legal order, prevention or rectification of a violation, to have the same established by the Court or to obtain redress therefor. Furthermore, it has to be established that the costs and expenses were actually incurred, were necessarily incurred and were also reasonable as to quantum (see, among many other authorities, *Dudgeon v. the United Kingdom (former Article 50)*, judgment of 24 February 1983, Series A no. 59, p. 9, § 20).

92. The invoices for the applicant's representation have been made out to *Telegraaf Media Groep N.V.*, the proprietor of the newspaper *Sp!ts*. It has not been shown that the applicant is himself liable for any costs. That being so the Court rejects his claims (see *Dudgeon (former Article 50)*, cited above, p. 10, § 22).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares admissible* the applicant's complaints under Articles 10 and 5 § 1 of the Convention;

2. *Declares* the remainder of the application *inadmissible*;

3. *Holds* that there has been a violation of Article 10 of the Convention;

4. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

5. *Dismisses* the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 November 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago QUESADA Registrar

Boštjan M. ZUPANČIČ President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following concurring opinion of Mrs Thomassen is annexed to this judgment.

B.M.Z.
S.Q.

CONCURRING OPINION OF JUDGE WILHELMINA THOMASSEN

I fully agree with the judgment in this case. However, I find it appropriate to make some additional observations with regard to the lack of domestic remedies against the detention order which was imposed on the applicant.

Article 294 § 3 of the Code of Criminal Procedure provided that no remedy lay against the detention order which had been imposed on the applicant. Article 223 § 3 however provided the applicant with an appeal against the refusal to release him and with an appeal on points of law to the Supreme Court (*Hoge Raad*) against any such refusal given on appeal. The applicant in fact made use of his right to appeal against the refusal to release him. This appeal was rejected by the very judges of the Court of Appeal who had given the detention order. Subsequently the applicant lodged an appeal on points of law with the Supreme Court, but withdrew it after he was released and before the Supreme Court could give its judgment.

Initially the Government argued that the applicant, having withdrawn his appeal to the Supreme Court, had failed to exhaust domestic remedies. They later withdrew this preliminary objection, having come round to thinking that the Supreme Court would have declared the appeal on points of law inadmissible because the applicant would no longer have been in detention by the time it could have considered his case (Government's letter to the Court of 2 March 2006).

Apparently the Government took the view that it was beyond any doubt that the Supreme Court would have dismissed the appeal on points of law on the ground of being devoid of interest because of the applicants' release[1].

If this presumption is correct, then the protection at the domestic level has been deficient. It would mean that the lawfulness of the applicants' detention could not be challenged before any other court than the Court of Appeal which itself had imposed the detention order (if at all). It would mean that the Supreme Court would not have been in a position to rule on points of law either as to the lawfulness of the detention or as to its compatibility with Article 10, for the sole reason that the applicant had been released in the meantime.

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[1] In this respect the Supreme Court’s judgment of 31 May 2005, LJN AS 2748, *Nederlandse Jurisprudentie* 2005, 531, is interesting. The appeal on points of law in that case, lodged by a woman who had been detained because she had not wanted to give evidence against her partner, was declared inadmissible because she had been released by the time the Supreme Court got round to deciding her appeal. However, at the same time and in an *obiter dictum* the Supreme Court gave its opinion on the compatibility of the applicants’ detention with Article 8 in conjunction with Article 14 of the Convention.

Since fundamental rights require effective protection at the domestic level more than at any other, this case raises the question what possible solutions for the future can be found there. The European Court of Human Rights should only intervene in the national system as a subsidiary means of protection. Moreover, an effective protection at the domestic level is necessary in view of the Court's ever-increasing workload (see also Resolution Res(2004)3 on judgments revealing an underlying systemic problem, adopted by the Committee of Ministers of the Council of Europe on 12 May 2004).

In my view one such possible solution could be to allow an appeal on points of law against a detention order and have the Supreme Court examine complaints regarding the lawfulness of someone's detention even after his or her release, either by way of a further review by the Supreme Court of its tasks with regard to the Convention or perhaps by the introduction of a statutory provision which explicitly sets out the Supreme Court's tasks in this respect.

In this context it should be noted that the applicants' detention dates from 22 September 2000, which is more than seven years before the Court decided on the well-foundedness of his complaints. Had the Supreme Court examined the arguable claims under Articles 5 and 10 of the Convention, the applicant could have had a judgment on points of law most probably in 2000 or at any rate no later than 2001. Moreover, such a judgment could have made a contribution to an informed national debate at a time when this issue was a live topic.

If a national court had been able to conclude that the applicant's detention had violated both Article 5 and Article 10 of the Convention, the applicant would have had a remedy within a reasonable time and any application to the Court could have been declared inadmissible for non-exhaustion of domestic remedies.