

Letter to the President of the House of Representatives from the Minister of Justice and Security on the request by the Permanent Parliamentary Committee on Justice and Security concerning the committal of a journalist by an examining magistrate (non-official translation)

Introduction

On 25 October 2019 the Permanent Parliamentary Committee on Justice and Security requested me to respond to the report 'Examining magistrate commits journalist for failure to comply with a judicial order'. I was also requested to include in my response a brief overview of the law on this point and the legislative history in this regard (the legislature's intentions), and to discuss the right to decline to give evidence in cases where a source has already been disclosed (by other means). This letter is intended to address that request.

The present case

The aforementioned report relates to the committal of journalist Robert Bas for failure to comply with a judicial order. For information on the circumstances of this case I would refer the House to the published decision of 28 June 2019 (see ECLI:NL:RBROT:2019:8331) by the examining magistrate at Rotterdam District Court and judgment of 25 October 2019 (ECLI:NL:RBROT:2019:8376) given by Rotterdam District Court.

Statutory framework and its application by the court

Following the entry into force of the Act of 4 July 2018 amending the Code of Criminal Procedure to establish the right to source protection in the free gathering of news (source protection in criminal cases) (Bulletin of Acts and Decrees 2018, 264; entry into force 1 October 2018, Bulletin of Acts and Decrees 2018, 265), the Code of Criminal Procedure now lays down, in article 218a, the right of an individual in their professional capacity as a journalist to decline to give evidence.¹ Article 218a, paragraph 1 of the Code of Criminal Procedure reads as follows:

¹ The amendment was prompted by a number of judgments by the European Court of Human Rights: the judgment of 22 November 2007 in the case of *Voskuil v. the Netherlands* (no. 64752/01), the judgment of 14 September 2010 in the case of *Sanoma Uitgevers B.V. v. the Netherlands* (no. 38224/03) and the judgment of 22 November 2012 in the case of *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands* (no. 39315/06).

'Witnesses who in their capacity as a journalist or publicist working in the context of news gathering possess information provided by persons with a view to its public disclosure may decline to answer questions about the origin of that information.'

This Act establishes the right to source protection, which a person may invoke when exercising the right to freedom of expression in a democratic society (article 10 of the European Convention on Human Rights) as interpreted by the European Court of Human Rights (ECtHR). To this end, persons engaged in reporting in a professional capacity and those who disclose information for that purpose are offered special protection to enable them to freely receive and disclose information or ideas without interference from public authorities. A democratic society has a particular interest in the gathering of news about the various elements of society. In a democratic society, the public has a right to be informed, even if the information in question is displeasing to the authorities. The exercise of freedom of expression may therefore require that, in the context of gathering related information, source protection is requested and respected. This applies not to mere opinion, which as an individual expression or assessment, is inherently unverifiable, but to news gathering based on information that would not otherwise be in the public domain.²

In its judgment on the right to decline to give evidence, Rotterdam District Court held as follows: 'The right to decline to give evidence is not absolute, but is limited to source protection in the interest of the free gathering of news. It extends not only to the name of the source but also to information concerning the factual circumstances in which the journalist obtained information from a source and the undisclosed content of the information the source provided to the journalist. (...) The case law of the ECtHR shows that the right to decline to give evidence also applies (in principle) to sources that are not (or are no longer) anonymous. It also, and in particular, comprises (...) the right of the journalist not to be obliged to provide all the details of a conversation with a source. As the ECtHR has repeatedly emphasised, an overly restrictive interpretation of what falls under source protection can have a deterrent effect in regard to the sharing of information by sources who wish to remain anonymous, and as such poses a danger to the free gathering of news.'³

Article 218a, paragraph 2 of the Code of Criminal Procedure describes the assessment that must be made as to whether the right to decline to give evidence should be set aside by compelling interests as referred to in that provision:

² See Parliamentary Papers, House of Representatives, 2014/15 session, 34 032, no. 3, p. 1ff. (Explanatory memorandum).

³ Rotterdam District Court 25 October 2019, ECLI:NL:RBROT:2019:8376.

'The examining magistrate may reject the witness's invocation [of the right to decline to give evidence] if he or she is of the opinion that if questions remained unanswered this would cause disproportionate damage to a more compelling public interest.'

The formulation of article 218a of the Code of Criminal Procedure, whereby the court is required explicitly to weigh the interests at stake, provides that the interest of source protection can be set aside only in the face of a more compelling public interest which would otherwise be subject to disproportionate harm.

In the present case the court held that it had not been satisfactorily established that there was such a compelling interest as to justify setting aside the right to decline to give evidence.

Response to aforementioned report

You requested my response to the committal of the journalist. It would be inappropriate for me to discuss the substance of this case, as it concerns a judicial assessment in an individual case. Moreover, the criminal case is still in progress.

I would conclude by emphasising once again that in the present case the journalist was not the target of an investigation. He entered the picture only as a result of the use of investigative powers against another individual. In other words, no coercive measures were employed with regard to the journalist concerned. His telephone communications were not intercepted.