

## European Court of Human Rights, 20 September 2016, Van Beukering & Parool v The Netherlands



### PUBLICATION

The publication of R.P.'s portrait was necessary in a democratic society

34. Turning to the facts of the case, the Court sees no reason to doubt that the newspaper article – which announced the trial of R.P. for having stabbed three members of the staff of a shelter for the homeless in Amsterdam with a knife, killing one and seriously injuring the two others – was a matter of serious public concern. The same may be said about the violent subculture to which R.P. belonged and R.P.'s personal circumstances in so far as they were typical of members of that social group. Nor is there any reason to doubt that R.P. enjoyed a certain notoriety, which he had actively encouraged by giving his cooperation to the 2007 television documentary and the rap clip made available on YouTube; that the article published by the applicants in the newspaper Het Parool and on their web site was true and correct; and that adding the portrait image enhanced the article's expressive power.

However, the ECHR considers that it was not unreasonable for the Court of Appeal to consider that reticence is appropriate when publishing a portrait of someone who is suspected of a serious crime

35. In the view of the Court of Appeal, however, these features of the case did not outweigh R.P.'s right to respect for his private life. R.P. was, at the time, suspected of a very serious crime, for which he had yet to be tried; in the words of the Court of Appeal, "in publishing portraits of persons suspected of criminal acts reticence [was], in principle, appropriate."

Source: [HUDOC](#)

## European Court of Human Rights, 20 September 2016

(Luis López Guerra, Helena Jäderblom, Helen Keller, Branko Lubarda, Pere Pastor Vilanova, Alena Poláčková, Georgios A. Serghides, Stephen Phillips (registrar))

### THIRD SECTION DECISION

Application no. 27323/14

Barbara VAN BEUKERING and HET PAROOL B.V. against the Netherlands

The European Court of Human Rights (Third Section), sitting on 20 September 2016 as a Chamber composed of:

Luis López Guerra, President,

Helena Jäderblom,

Helen Keller,

Branko Lubarda,

Pere Pastor Vilanova,

Alena Poláčková,

Georgios A. Serghides, judges,

and Stephen Phillips, Section Registrar,

Having regard to the above application lodged on 3 April 2014,

Having deliberated, decides as follows:

### THE FACTS

1. The first applicant, Ms Barbara van Beukering, is a Netherlands national born in 1966 and resident in Amsterdam. She was, at the relevant time, the chief editor of the newspaper Het Parool.

2. The second applicant, Het Parool B.V., is a limited liability company under Netherlands law with its seat in Amsterdam. It publishes the newspaper Het Parool.

3. Het Parool is a newspaper focusing on news relevant to the Amsterdam region. Its readership is likewise to be found mostly in the Amsterdam region, although nationwide circulation is claimed for it.

4. The applicants were represented before the Court by Mr J.P. van den Brink, a lawyer practising in Amsterdam.

#### A. The circumstances of the case

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

#### 1. Factual background

6. In 2007 the public-service television broadcaster NPS aired a series of five television documentaries entitled Vrije Radicalen (Free Radicals), each episode being devoted to a young person who had made radical choices that set them apart from mainstream society. One episode focused on R.P., a young man born in 1988. It mentioned his lifestyle as an active member of a street gang and as a performer of rap music and his troubled relationship with his mother. R.P. himself was shown recognisably and his name was mentioned. The episode was broadcast twice, in November 2007 and June 2008, and was available for downloading from the internet free of charge until late 2009.

7. In 2009 a video clip was published on YouTube that showed R.P. performing rap music in memory of a fellow rapper who had been killed in a fight. This video clip was, apparently, removed on an unknown date.

8. In 2009 R.P. was admitted to a shelter for the homeless in Amsterdam. On 15 June 2009 R.P. was warned that he would have to leave because of his aggressive behaviour. He drew a knife and stabbed three staff members, killing one and inflicting serious injury on the two others.

9. On 19 September 2009, shortly before the trial of R.P. was to open, Het Parool published an article with the heading "Rap artist with a short temper" (Rapper met een kort lontje) announcing that R.P. was due to appear in court on charges related to the above-

mentioned stabbing. The article described R.P.'s personal circumstances and background. The information was taken from the documentary described above. The article, which did not state R.P.'s full surname, was accompanied by a portrait image of R.P., a still picture likewise taken from the documentary. The picture was taken at an angle, showing a prominent scar – stated in the article to have resulted from a fight – next to one of R.P.'s eyes. The article and the portrait image were published both in the newspaper itself and on its internet web site.

10. The portrait image was removed from the newspaper's web site on 30 December 2009. The text of the article remains online to this day.

11. On 12 June 2012 R.P. was convicted on appeal of manslaughter and attempted manslaughter and of lesser additional crimes. He was sentenced to twelve years' imprisonment and placed at the disposal of the Government (terbeschikkingstelling, "TBS order") with confinement in a custodial clinic (bevel tot verpleging van overheidswege).

12. The trial was covered by other newspapers, television news broadcasters and internet web sites. Some included a drawing stated to be of R.P. in court; others used still pictures copied from the documentary before it was taken offline.

## 2. Proceedings in the domestic courts

13. On 28 December 2009 R.P., through his lawyer, wrote to the first applicant demanding removal of the portrait image from the newspaper's web site and payment of 5,000 euros (EUR). Relying on section 21 of the Copyright Act (Auteurswet; see below), he stated that his reasonable interests were affected by the publication: he was recognised in the remand prison where he was being held and feared that he would not be able to find a job after his release.

14. R.P. summoned the applicants before the Amsterdam Regional Court (rechtbank), seeking a declaration that the publication of his portrait image in the newspaper on 19 September 2009 and on the newspaper's web site from 19 September 2009 until 30 December 2009 was unlawful; an order requiring the applicants to ensure that the portrait image no longer be available on the internet at all; and compensation for non-pecuniary damage in an amount of EUR 10,000.

15. On 29 December 2010 the Regional Court gave judgment dismissing R.P.'s claims. It held that since the portrait image was appropriate to the newspaper article and had been published in a television documentary in which R.P. had cooperated of his own volition, there was no unlawful interference with R.P.'s rights. R.P. appealed.

16. On 20 March 2012 the Amsterdam Court of Appeal (gerechtshof) overturned the judgment of the Regional Court and held in favour of R.P. The Court of Appeal recognised that the case raised questions under both Article 8 of the Convention, in that it concerned R.P.'s right to respect for his private life, and Article 10, in that it concerned the applicants' freedom of journalistic expression. Its reasoning included the following:

*"3.10 Although it can be conceded to [the applicants] that the image does not contain details of [R.P.'s] private life [English in the original], strengthens the expressive power of the article and is relevant in itself, the Court of Appeal considers that publication of the image of his face with the article constitutes an interference with R.P.'s private life. It should be remembered in this connection that it appears from the article that R.P. is suspected of a (very serious) crime. The next question that needs an answer is whether, taking into account [the applicants'] freedom of expression, this interference constitutes an unlawful act vis-à-vis R.P."*

*3.11 The Court of Appeal takes the view that this is the case. It takes the view that R.P. is not required to suffer publication of the recognisable portrait with the article. It would have been possible for [the applicants] to publish a less recognisable portrait of R.P. without significantly detracting from the expressiveness of the article, for example by placing a black rectangle over the eyes. [The applicants] have argued in this connection that it has been held in other cases that this measure has an even more criminalising effect, but that does not apply in this case, because the article concerned the suspicion of a crime of violence and the impending trial thereof by a criminal court. The Court of Appeal takes the view that in publishing portraits of persons suspected of criminal acts reticence is, in principle, appropriate."*

*3.12 The circumstance that in 2007 R.P. gave his active cooperation to a documentary that was broadcast on television in 2007 and 2009 and could be viewed on the internet until the end of 2009 does not justify publishing a recognisable portrait together with the article about that documentary and the impending trial. R.P. has not, by cooperating in that documentary (and the rap clip published on YouTube), become a public figure to the extent that he must for that reason suffer his recognisable portrait to be published in the newspaper with nationwide coverage Het Parool and on the website www.hetparool.nl, the less so because he is thereby recognisably connected to a (very serious) crime. As held above, a less recognisable portrait could have limited the interference with his private life without doing any real harm to the expressiveness of the article. It makes no difference that portraits of R.P. (derived from the documentary and the rap clip) can still be found in the internet. What is important is that [the applicants] at the time published an image in the newspaper, which – unlike in the case of use of the internet – can be seen in one glance and without any further manipulations. The freedom [the applicants] have, in principle, to determine in accordance with their own views in what way they will inform the public of a newsworthy fact does not go so far that in the specific circumstances of the present case they were at liberty to publish a recognisable portrait of R.P. with the article."*

*3.13 Taking all circumstances into account, the Court of Appeal therefore finds that R.P.'s right to respect of his privacy outweighs [the applicants'] freedom of*

*expression. The wrongful nature of [the applicants'] acts vis-à-vis R.P. is therefore established. ..."*

The applicants were held jointly and severally liable and ordered to pay EUR 1,500 to R.P. in respect of non-pecuniary damage.

17. The applicants lodged an appeal on points of law (cassatie) with the Supreme Court (Hoge Raad), arguing, as relevant to the case, that the Court of Appeal had overlooked R.P.'s own responsibility through having cooperated with the documentary and the rap clip, combined with his having stabbed one staff member of the homeless shelter to death and severely wounded two others, from which it followed, in their submission, that R.P. could not claim the same protection of his private life to which he would otherwise have been entitled. They submitted in addition that the Court of Appeal's position was tantamount to an absolute prohibition of publication of a recognisable photograph of any criminal suspect who was not a public figure.

18. The Supreme Court gave judgment on 4 October 2013 dismissing the appeal. Its reasoning included the following:

*"3.3.2 ... The Court of Appeal has rightly taken as its starting point that the question whether R.P.'s right to respect for his private life should weigh more heavily in the balance than [the applicants'] freedom of expression should be answered in the light of all the circumstances of the case, and taking into account the necessity and proportionality test of Articles 10 § 2 and 8 § 2 of the Convention respectively (see, among other authorities, the Supreme Court's judgment of 5 October 2012, ECLI:NL:HR:2012:BW9230, Netherlands Law Reports (Nederlandse Jurisprudentie) 2012/571). In the light of this standard, it does not reflect an incorrect understanding of the law that the Court of Appeal has held that publication of a recognisable portrait, taken from [the 2007 documentary], is not justified by the circumstance that R.P. has cooperated with the documentary about his person and the rap clip. Nor is the finding of the Court of Appeal that publication was wrongful vis-à-vis R.P. based on incomprehensible reasoning. As is shown by paragraph 3.12 of its judgment, the Court of Appeal has in so finding taken into account the nature and content of that documentary and the circumstance that it was made before the crimes were committed of which R.P. was suspected at the time the portrait was published. The Court of Appeal has, furthermore, taken into account that [the applicants] had other means at their disposal than complete recognisable publication of the image, which would not have harmed the expressiveness of the publication and would have constituted a lesser interference with R.P.'s right to respect for his private life. The Court of Appeal has thus expressed the view that publishing the unmodified image was neither necessary for the expressiveness of the article, taking into account all the circumstances of the case, nor proportionate to the aim pursued, namely informing the public. This finding does not amount to an absolute prohibition as suggested in the ground of appeal."*

## **B. Relevant domestic law and practice**

19. Section 21 of the Copyright Act provides as follows:

*"If a portrait has been made without having been commissioned by the person portrayed or for that person's benefit, then the person to whom the copyright to that portrait belongs shall not be allowed to publish it in so far as a reasonable interest of the person portrayed, or after that person's death, one of that person's surviving kin weighs against publication."*

20. In its judgment of 5 October 2012, ECLI:NL:HR:2012:BW9230, Netherlands Law Reports 2012/571 (Peter R. de Vries/Koos H.), the Supreme Court, citing [Axel Springer AG v. Germany \[GC\], no. 39954/08, 7 February 2012](#), and [Von Hannover v. Germany \(no. 2\) \[GC\], nos. 40660/08 and 60641/08, ECHR 2012](#), gave its approval to reasoning of the Amsterdam Court of Appeal summarised in the following terms:

*"In the event of a conflict between on the one hand the right to freedom of expression and on the other the right to respect for private life the answer to the question which of these two rights prevails in the specific case must be found by weighing all relevant circumstances of the case. In this connection the position of the press is of particular significance in view of, on the one hand, the duty of the press to spread information and ideas of public importance and to fulfil its vital role of public watchdog, and on the other hand, of the right of the public to receive information and ideas. In this weighing process, the starting point is not that the right to freedom of expression, guaranteed by Article 7 of the Constitution and Article 10 of the Convention, takes precedence. The same applies to the rights guaranteed by Article 8 of the Convention. The test must be applied in one go, the finding that one of the two rights, taking into consideration all relevant circumstances, weighs more heavily in the balance than the other implying that the interference with the other right meets the necessity test of Article 10 § 2 or Article 8 § 2 of the Convention as the case may be. If use is made of recognisable images, it is of no importance for the purposes of this weighing process whether the claim is based not only on a violation of private life but additionally on a violation on the right to oppose publication of one's portrait."*

## **C. Recommendation by the Committee of Ministers of the Council of Europe**

21. The Appendix to the Recommendation Rec(2003)13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings (adopted by the Committee of Ministers on 10 July 2003 at the 848th meeting of the Ministers' Deputies) contains the following principle of particular interest to the present case:

### **Principle 8**

Protection of privacy in the context of on-going criminal proceedings

*"The provision of information about suspects, accused or convicted persons or other parties to criminal*



*proceedings should respect their right to protection of privacy in accordance with Article 8 of the Convention. Particular protection should be given to parties who are minors or other vulnerable persons, as well as to victims, to witnesses and to the families of suspects, accused and convicted. In all cases, particular consideration should be given to the harmful effect which the disclosure of information enabling their identification may have on the persons referred to in this Principle."*

#### COMPLAINT

22. The applicants complained under Article 10 of the Convention about the finding that publication of the unmodified portrait of R.P. had been unlawful and the award to R.P. of a sum in respect of non-pecuniary damage.

#### THE LAW

Complaint under Article 10 of the Convention

23. The applicants alleged violations of Article 10 of the Convention, which provides 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."*

24. The applicants pointed out the severity of the crime of which R.P. was suspected at the time of publication, which was undoubtedly a matter of grave public concern. A feature of the case was that the suspect not only had a history of violent crime, but actually took pride in it, as was witnessed by the documentary in which he had participated. This attitude within groups of youths such as that to which R.P. belonged was a subject of considerable public debate in Amsterdam.

25. The image was an important part of the information which the article sought to convey, since the scar next to R.P.'s eye, which was the result of an injury incurred in a fight, was a vivid illustration of how violent and dangerous the youth culture was to which R.P. belonged. Publication of the complete image did not, therefore, serve solely to satisfy the prurience of individuals but reinforced the expressiveness of the article.

26. R.P. was not a public figure, but had willingly entered the public domain by cooperating in the documentary of 2007 devoted exclusively to him. This had reduced his entitlement to protection of his private life. It was from the public domain that the applicants

had retrieved the image. In any case, R.P. had neither denied the truth of the information stated in the documentary and the article nor denied the applicants' right to point out the identity of the perpetrator of the crime in issue with the subject of the 2007 documentary. This meant that there could have been no effect on the fairness of the criminal proceedings either. 27. It was unlikely that publication of the picture had had any effect on the conditions in which R.P. was being detained, or that he was harassed by prison staff or inmates to any greater degree than would otherwise be the case; at all events, R.P. had offered no evidence of such harassment. Moreover, R.P. could not expect speedy release, and so the picture was unlikely to have any effect on his chances on the job market. Any interference with R.P.'s rights under Article 8 was, accordingly, minimal.

28. Other media had also published images of R.P. in connection with the crime in issue. R.P. had only demanded that the applicants remove the image from their web site three months after publication – which suggested that R.P. and his advisers had seen no urgent need to act. Moreover, the applicants had taken down the image immediately after the request had been made.

29. Finally, the sanction imposed – an award of damages to R.P. in an amount of EUR 1,500 – was in itself disproportionate, despite its lack of magnitude, since it could not fail to produce a "chilling effect" on serious news reporting.

30. The Court notes at the outset that there has undeniably been an interference with the applicants' freedom of expression. The applicable test is accordingly to be found in Article 10 § 2 of the Convention, without it being necessary for the Court to consider whether the interference was in the form of a "formality, condition, restriction or penalty".

31. The applicants do not suggest that the interference in issue was not "prescribed by law" and that it did not pursue a "legitimate aim". For its part, the Court finds a sufficient legal basis in section 21 of the Copyright Act; the "legitimate aim" pursued was "the rights of others", to wit, R.P.'s right under the statutory provision mentioned.

32. It remains to be considered whether the interference was "necessary in a democratic society". This requires the applicants' right to freedom of expression under Article 10 to be weighed in the balance against R.P.'s right to respect for his private life under Article 8.

33. The Court has already had occasion to lay down the relevant principles which must guide its assessment in this area. It has thus identified a number of criteria in the context of balancing the competing rights. The relevant criteria thus defined are: contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, the content, form and consequences of the publication and, where appropriate, the circumstances in which the photographs were taken. Where it examines an application lodged under Article 10, the Court will also examine the way in which the information was

obtained and its veracity, and the severity of the penalty imposed on the journalists or publishers (see *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 93, ECHR 2015 (extracts); *Axel Springer AG*, cited above, §§ 90-95; and *Von Hannover v. Germany (no. 2)*, cited above, §§ 109-113).

34. Turning to the facts of the case, the Court sees no reason to doubt that the newspaper article – which announced the trial of R.P. for having stabbed three members of the staff of a shelter for the homeless in Amsterdam with a knife, killing one and seriously injuring the two others – was a matter of serious public concern. The same may be said about the violent subculture to which R.P. belonged and R.P.’s personal circumstances in so far as they were typical of members of that social group. Nor is there any reason to doubt that R.P. enjoyed a certain notoriety, which he had actively encouraged by giving his cooperation to the 2007 television documentary and the rap clip made available on YouTube; that the article published by the applicants in the newspaper *Het Parool* and on their web site was true and correct; and that adding the portrait image enhanced the article’s expressive power.

35. In the view of the Court of Appeal, however, these features of the case did not outweigh R.P.’s right to respect for his private life. R.P. was, at the time, suspected of a very serious crime, for which he had yet to be tried; in the words of the Court of Appeal, “in publishing portraits of persons suspected of criminal acts reticence [was], in principle, appropriate.”

36. The Court does not consider that the Court of Appeal acted unreasonably in deciding thus. It considers this view to be supported not only by Principle 8 set out in the Appendix to the Recommendation Rec(2003)13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings (see paragraph 21 above) but by its own case-law (see, in particular, *Egeland and Hanseid v. Norway*, no. 34438/04, § 62, 16 April 2009, and *Bédat v. Switzerland* [GC], no. 56925/08, §§ 59-60, 80 and 81, ECHR 2016).

37. The award of EUR 1,500 to R.P. in respect of non-pecuniary damage was, as the applicants concede, relatively modest. It does not incline the Court to any different view.

38. Accordingly, the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Done in English and notified in writing on 13 October 2016.

[signatures]

---