

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 16616/90

Vereniging Weekblad "Bluf!"

against

the Netherlands

REPORT OF THE COMMISSION

(adopted on 9 September 1993)

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I. INTRODUCTION	

1. The following is an outline of the case as submitted to the European Commission of Human Rights and of the procedure before the Commission.

A. The application

2. The applicant association whose seat is in Amsterdam used to issue a weekly newspaper called "Bluf!". In the proceedings before the Commission it was represented by Mrs. Ties Prakken, a lawyer practising in Amsterdam.

3. The application is directed against the Netherlands. The respondent Government were represented by their Agent, Mr. K. de Vey Mestdagh of the Netherlands Ministry of Foreign Affairs.

4. The application concerns the seizure and subsequent withdrawal from circulation of one of the issues of "Bluf!" containing information about the Dutch Internal Security Service. The applicant association complains under Article 10 of the Convention.

B. The proceedings

5. The application was introduced on 4 May 1988 and registered on 22 May 1990.

6. On 6 March 1991 the Commission decided that notice should be given to the Government of the Netherlands of the application and that they should be invited to submit written observations on the admissibility and merits of the application.

7. The Government submitted their observations on 6 June 1991. The applicant association submitted observations in reply on 28 June 1991.

8. On 23 October 1992 the applicant association was granted legal aid.

9. On 29 March 1993 the Commission declared the application admissible as to the complaint about the interference with the applicant association's freedom of expression and inadmissible as to the remainder.

10. At the Commission's request the parties submitted additional factual information - the applicant association on 7 May 1993 and the Government on 24 May 1993.

11. After declaring the case admissible, the Commission, acting in accordance with Article 28 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

12. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. C.A. NØRGAARD, President  
S. TRECHSEL  
A. WEITZEL  
E. BUSUTTIL  
A.S. GÖZÜBÜYÜK  
J.-C. SOYER

H. DANELIUS  
Mrs. G.H. THUNE  
MM. F. MARTINEZ  
C.L. ROZAKIS  
Mrs. J. LIDDY  
MM. L. LOUCAIDES  
J.-C. GEUS  
M.P. PELLONPÄÄ  
G.B. REFFI  
M. NOWICKI  
I. CABRAL BARRETO  
N. BRATZA

13. The text of this Report was adopted on 9 September 1993 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

14. The purpose of this Report, pursuant to Article 31 of the Convention, is:

- i) to establish the facts, and
- ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

15. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application as Appendix II.

16. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

## II. ESTABLISHMENT OF THE FACTS

### A. The particular circumstances of the case

17. In the spring of 1987, the newspaper "Bluf!" got hold of an almost six year old quarterly survey of the Internal Security Service (Binnenlandse Veiligheidsdienst, B.V.D.). The survey was classified with the lowest classification: "confidential". It showed that the B.V.D. was interested in, inter alia, the Dutch Communist Party, the Anti Nuclear Movement (Anti Kern Beweging) and the Arab League. "Bluf!" published this survey with an editorial comment in its issue No. 267 of 29 April 1987. Before the issue could be sent out to the subscribers, the head of the B.V.D., in a letter of 29 April 1987 to the Public Prosecutor (Officier van Justitie), stated that the planned distribution by "Bluf!" was likely to constitute a criminal offence under Articles 98 and 98a of the Criminal Code (Wetboek van Strafrecht) (see below, Relevant domestic law and practice).

18. On 29 April 1987 the Public Prosecutor issued an order to have the association's premises searched and to seize (inbeslagneming) issue No. 267. The police subsequently entered the premises, seized all copies, except one which escaped their attention, and arrested three persons. However, as the Public Prosecutor formulated his demand for preliminary investigations (gerechtelijk vooronderzoek) against unknown suspects, the arrested persons were released the next day. Preliminary investigations were opened but as the Investigating Judge (Rechter-Commissaris) saw no grounds to proceed with them, they were closed by decision of 6 May 1987. No criminal charges were subsequently brought.

19. Meanwhile, the editors of "Bluf!" managed to reprint the issue during the night from 29 to 30 April 1987, and sold approximately

2500 copies in the streets of Amsterdam on 30 April 1987, the Dutch national day. Although the Dutch authorities were aware of "Bluf!" selling copies of issue No. 267, they did not intervene in order not to disturb the public order in view of the important number of people gathered in Amsterdam to celebrate the national day. Distribution by mail to the subscribers was renounced since it was expected that the Post Office would seize the issue.

20. On 1 May 1987 "Bluf!" filed an appeal (beklag) against the seizure of issue No. 267 to the Amsterdam Regional Court (Arrondissementsrechtbank), claiming a breach of its freedom of expression and in particular its right to receive and impart information and ideas without interference by the public authorities as guaranteed by Article 7 of the Dutch Constitution (Grondwet) and by Article 10 of the Convention. It also requested the Court to be given the seized copies back in order to send them in time to the subscribers.

21. The Amsterdam Regional Court rejected the appeal on 1 May 1987 on the ground that it was not unlikely that the criminal court, which was to deal with the case at a later stage, would impose the measure of withdrawal from circulation (onttrekking aan het verkeer). On 17 November 1987 the Supreme Court (Hoge Raad) dismissed the applicant association's plea of nullity.

22. On 11 May 1987 "Bluf!" lodged another appeal (beklag) with the Amsterdam Regional Court claiming that the seizure was unlawful as it violated its right under, inter alia, Article 10 of the Convention. At the hearing before the Court on 30 June 1987 the applicant association, invoking Article 6 of the Convention, requested the Court to make the hearing public. This request was acceded to on the ground that the proceedings involved a determination of the applicant association's civil rights. The Court declared the appeal inadmissible on 11 January 1988 holding that the newspaper had already filed the same complaint on 1 May 1987. Since it had not adduced any new evidence, its claim was not to be re-examined.

23. By letter of 2 June 1987 the Public Prosecutor informed the applicant association that the three persons arrested during the seizure of issue No. 267 would not be prosecuted as, on the one hand, there was insufficient evidence against them and, on the other hand, the involvement of one of them was so minimal that, having regard also to the fact that the actual perpetrators remained unknown, prosecution was not indicated.

24. On 25 March 1988 the Public Prosecutor requested the Amsterdam Regional Court that issue No. 267 be withdrawn from circulation. At its hearing of 27 May 1988 the Court, upon the applicant association's request, held a public hearing. On 21 June 1988 the Court held that the possession and the planned distribution of the confidential material held by "Bluf!" was aimed at perpetrating a criminal offence under Article 98 and/or Article 98a of the Criminal Code. It further found that the uncontrolled possession of the issue was unlawful and contrary to the general interest. Therefore the Court granted the Public Prosecutor's request pursuant to Articles 36b and 36c of the Criminal Code whilst noting that there was no suspect person, either legal or physical, that no criminal charges had been brought against "Bluf!" or anybody else and that no criminal court had established any infringement of Articles 98 ff. of the Criminal Code.

25. "Bluf!" lodged a plea of nullity with the Supreme Court which the latter rejected on 18 September 1989 holding, inter alia, that the measure complained of was justified in the interests of national security within the meaning of Article 10 para. 2 of the Convention.

26. Throughout the proceedings, "Bluf!" was not admitted as a party to the proceedings but was considered as an interested party as the Public Prosecution department constantly held that "Bluf!" lacked legal personality, since it had not appeared that "Bluf!" was a legal person and as "Bluf!" could not be considered as being one of the other subjects of law mentioned in Article 528 of the Code of Criminal Procedure.

B. Relevant domestic law

27. Articles 98 and 98a of the Criminal Code (CC - Wetboek van Strafrecht) make it a punishable offence to disclose information, the confidentiality of which is required by the interest of the State or of its allies, or to commit any preparatory act to that effect.

28. According to Article 94 of the CC, any object which may help to disclose the truth ("de waarheid aan de dag brengen") or is liable to be confiscated ("verbeurdverklaring") or to be withdrawn from circulation ("onttrekking aan het verkeer") can be seized ("inbeslagneming"). In general, a seizure is carried out by investigating officers, such as the police, on the orders of the Public Prosecutor.

29. Any interested party can file an appeal against the seizure with the Regional Court (Article 552a of the Code of Criminal Procedure (CCP) - Wetboek van Strafvordering). Article 552d of the CCP provides for an appeal in cassation against the Regional Court's decision.

30. The withdrawal from circulation of seized objects can be pronounced by a separate judicial order upon request of the Public Prosecutor (Article 36b, 4° of the CC). Liable to withdrawal from circulation are all objects designed to be used for committing an offence insofar as their uncontrolled possession is unlawful or contrary to the general interest (Article 36c, 5° of the CC).

31. The legal ownership of goods withdrawn from circulation passes to the State which can then dispose of them. This can result in the destruction of the goods.

32. However, this measure does not presuppose a finding of guilt, it is not a penalty or a substitute for a penalty and it can even be ordered in the absence of any suspect.

33. The Supreme Court has found (see e.g. Hoge Raad, 8 September 1987, Nederlandse Jurisprudentie 1988/453) that the withdrawal from circulation of a person's goods in these circumstances determines his civil rights as owner of those goods.

III. OPINION OF THE COMMISSION

A. Complaint declared admissible

34. The Commission has declared admissible the applicant association's complaint that the seizure and subsequent withdrawal from circulation of issue No. 267 of 29 April 1987 of the newspaper "Bluf!" violated its right to impart information.

B. Point at issue

35. Accordingly, the issue to be determined is whether there has been a violation of Article 10 (Art. 10) of the Convention.

C. The alleged violation of Article 10 (Art. 10) of the Convention

36. Article 10 (Art. 10) of the Convention provides, insofar as

relevant:

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

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

37. The applicant association complains that the seizure and the subsequent withdrawal from circulation of issue No. 267 violated its right to impart information and ideas under Article 10 (Art. 10) of the Convention.

38. It argues in particular that the measures complained of were not "in accordance with the law" within the meaning of para. 2 of Article 10 (Art. 10-2) since they could only be ordered if an offence had been committed and that Dutch criminal law does not provide for such measures as sanctions for offences against national security.

39. The applicant association further submits that the above interferences did not serve "the interests of national security". The quarterly survey of the B.V.D. published by "Bluf!" was almost six years old and merely bore the qualification "confidential". Moreover, "Bluf!" managed to reprint the entire issue following the seizure and sold it in the streets of Amsterdam without any intervention by the authorities. In these circumstances there was no longer any question of disclosure of state secrets when the issue was subsequently withdrawn from circulation.

40. The applicant association finally argues that, should the interference have been in accordance with the law and served the interests of national security, it was not "necessary in a democratic society". According to the case-law of the European Court of Human Rights Article 10 (Art. 10) also protects ideas or information that offend, shock or disturb the State and the press has a watchdog function in a democratic society. As throughout the eighties the functioning of the Dutch secret services was the object of public debate, "Bluf!" exercised a democratic function by publishing the B.V.D. survey in its issue No. 267.

41. The Government submit that the seizure of issue No. 267 was based on Articles 98a and 98c of the Criminal Code and was thus "in accordance with the law". The proper functioning of a democratic system based on the rule of law and the security of the State require institutions such as the B.V.D. To be effective, such services must operate in secrecy. As issue No. 267 contained confidential information affecting the interests of the State, the seizure was necessary in a democratic society in the interests of national security and public safety. In assessing the necessity of an interference under Article 10 (Art. 10) Contracting States have a certain margin of appreciation.

42. The Commission finds that the seizure of issue No. 267 and its subsequent withdrawal from circulation interfered with the applicant association's freedom of expression and in particular with its right

to impart information and ideas within the meaning of Article 10 para. 1 (Art. 10-1) of the Convention.

43. The Commission must then examine whether these measures were "prescribed by law", whether they had an aim or aims that is or are legitimate under Article 10 para. 2 (Art. 10-2) and whether they were "necessary in a democratic society" for the aforesaid aim or aims (see e.g. Eur. Court H.R., Observer and Guardian judgment of 26 November 1991, Series A no. 216, p. 27, para. 49).

44. The Commission is satisfied that, being based on Articles 98a and 98c of the Criminal Code, the seizure and the withdrawal from circulation of issue No. 267 were prescribed by law.

45. The Commission further agrees with the Government that the proper functioning of a democratic society based on the rule of law may require institutions such as the B.V.D. which, in order to be effective, must operate in secrecy and receive the necessary protection. The Commission therefore accepts that the legitimate aim of the measures complained of was the protection of national security.

46. The question remains whether these measures were necessary in a democratic society. The Commission recalls that, according to the Convention organs' case-law, the adjective "necessary", within the meaning of Article 10 para. 2 (Art. 10-2), implies the existence of 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 a European supervision, embracing both the law and the decisions applying it, even those given by independent courts (Observer and Guardian judgment, loc. cit., p. 30, para. 59(c)).

47. The Commission notes that, by classifying its quarterly survey as "confidential", the B.V.D. had indicated that the issue should not be made generally available. In view of the character of the tasks entrusted to the B.V.D., it is natural that the institution should enjoy a high degree of protection as regards dissemination of information about its activities. On the other hand, the survey published by the B.V.D. was several years old and it can be questioned whether the information which it contained was, at least at the time of publication, of such a sensitive nature as to require protection against publication in mass media.

48. However, the Commission is not required to determine whether the seizure of issue No. 267 of "Bluf!" on 29 April 1987 was, if looked at separately, justified under para. 2 of Article 10 (Art. 10-2), since it must also take into account the subsequent developments in order to determine whether the measures taken against the applicant association could be considered as "necessary in a democratic society".

49. The Commission recalls in this respect that, subsequent to the seizure, the editors of "Bluf!" managed to reprint approximately 2500 copies of issue No. 267 in the night of 29 to 30 April 1987 and that these copies were publicly sold in the streets of Amsterdam on 30 April 1987 without any intervention by the authorities.

50. As a result of this unimpeded sale of the publication on 30 April 1987, the information which it contained must be considered to have been so widely disseminated that it could no longer be regarded as "necessary in a democratic society" to prevent further distribution in the interest of national security (cf. Eur. Court H.R., Weber judgment of 22 May 1990, Series A no. 177, para. 51 and Sunday Times (No. 2) judgment of 26 November 1991, Series A no. 217, para. 54). The further interferences with the applicant association's freedom of expression, in particular the decision to withdraw issue No. 267 from circulation, were therefore not justified under para. 2 of Article 10

(Art. 10-2).

Conclusion

51. The Commission concludes, by 16 votes to 2, that there has been a violation of Article 10 (Art. 10) of the Convention.

Secretary to the Commission

President of the Commission

(H.C. KRÜGER)

(C.A. NØRGAARD)

(Or. English)

DISSENTING OPINION OF  
MM. F. MARTINEZ AND I. CABRAL BARRETO

To our regret, we are unable to share the view of the majority of the Commission that the measures against the applicant association, taken as a whole, amount to a violation of Article 10 of the Convention (paras. 48-51). We consider in addition that a distinction should be drawn between the seizure of issue No. 267 of "Bluf!" and its subsequent withdrawal from circulation.

With regard to the seizure of issue No. 267 of "Bluf!", we note that by classifying its quarterly survey as "confidential", the B.V.D. had clearly indicated that it objected to its further distribution. We accept that the prevention of imparting information so classified, such as the information contained in issue No. 267, constituted a pressing social need and that the seizure of this issue could therefore reasonably be regarded as necessary in a democratic society in the interest of national security.

As to the subsequent withdrawal from circulation, the same grounds, which justified the seizure of the issue of "Bluf!", also justify the withdrawal from circulation. The fact that the editors of "Bluf!", having managed to reprint the issue during the night of 29 to 30 April 1987, could distribute a certain number of copies in the streets of Amsterdam on 30 April 1987 does not change this justification. Within their margin of discretion the Government were free to consider that the risks involved in handing out pamphlets in the street would not justify the effort and expenses of stopping it, especially as much of the distribution must have taken place before the authorities were informed about it.

We therefore consider that there has been no violation of Article 10 of the Convention, either in respect of the seizure or in respect of the withdrawal from circulation.

APPENDIX I

HISTORY OF PROCEEDINGS

Date	Item
4 May 1988	Introduction of application
22 May 1990	Registration of application
Examination of admissibility	
6 March 1991	Commission's decision to invite the Government to submit their observations on the admissibility and merits

	of the application
6 June 1991	Government's observations
28 June 1991	Applicant association's observations in reply
23 October 1992	Commission's decision to grant the applicant association legal aid
29 March 1993	Commission's decision to declare the application admissible in respect of the applicant association's complaint under Article 10 of the Convention
Examination of the merits	
29 March 1993	Parties invited to submit further observations on the merits
7 May 1993	Applicant association's further observations
24 May 1993	Government's further observations
31 August 1993	Commission's deliberations on the merits and final vote
9 September 1993	Adoption of the Report