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Europees Hof voor de Rechten van de Mens
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(Bratza *(*President), Garlicki, Mijović, Björgvinsson, Hirvelä, Bianku, Vučinić)
Noot A.W. Hins

Vrijheid van meningsuiting. Interview met politicus. Nationale wet verbiedt citeren zonder goedkeuring van geïnterviewde. Strafrecht niet het juiste instrument.

[EVRM art. 10, 35, 41]

In Polen bepaalt de nationale Perswet dat journalisten die een interview hebben afgenomen, hun gesprekspartner niet zonder meer mogen citeren. Zij moeten de publicatie eerst ter goedkeuring aan de geïnterviewde voorleggen. Gaat deze niet met de tekst akkoord, dan mag de journalist alleen in eigen woorden beschrijven wat er naar zijn mening gezegd zou zijn. Het publiceren van beeld- en geluidsopnamen van een interview is eveneens afhankelijk van goedkeuring door de betrokkene. Overtreding van beide voorschriften is een strafbaar feit. Tegenwoordig wordt de wet geacht het recht op eer en goede naam te beschermen, alsmede de journalistieke ethiek. De geschiedenis van de wet gaat echter terug tot 1984, toen Polen een communistische staat was. Individuele grondrechten hadden weinig betekenis en de pers was onderworpen aan censuur.

Klager Wizerkaniuk is hoofdredacteur en mede-eigenaar van een lokale krant. Op 24 februari 2003 hebben twee journalisten met een parlementslid gesproken. Het gesprek werd op de band opgenomen en uitgeschreven in een transcript van 40 pagina's. Een bureaumedewerker maakte hiervan een korte samenvatting. Wizerkaniuk legde de voorgenomen publicatie een maand later voor aan de politicus. Na het interview had deze verwezen naar zijn recht op controle. De politicus liet nu weten niet akkoord te gaan met het concept. Hij vond dat enkele belangrijke uitspraken ten onrechte waren geschrapt. Niettemin besloot Wizerkaniuk tot publicatie in de krant van 7 mei 2003. In een inleidend kopje boven het artikel werd uitgelegd dat het parlementslid geen toestemming had verleend voor de publicatie, maar dat de krant de nieuwswaarde groot achtte. Het definitieve artikel verschilde in twee opzichten van het concept. De door de krant interessant geachte uitspraken waren nu nog exacter geciteerd, inclusief grammaticale fouten. Bovendien ging het artikel vergezeld van foto's die tijdens het interview waren gemaakt.

Nadat het parlementslid aangifte had gedaan, startte het Openbaar Ministerie een strafzaak tegen Wizerkaniuk. De plaatselijke rechtbank stelde vast dat twee strafbare feiten hadden plaats gevonden. In de eerste plaats was het interview gepubliceerd ondanks het veto van de geïnterviewde en in de tweede plaats was voor het publiceren van de foto's zelfs geen toestemming gevraagd. Omdat Wizerkaniuk de bedoeling had gehad het publiek goed voor te lichten, besloot de rechtbank tot een lichte sanctie. Hij moest 1000 zlotys (€ 256,-) betalen aan een goed doel en werd veroordeeld in de kosten van de procedure. Als hij zich verder goed zou gedragen, was de strafzaak

hiermee geëindigd. De uitspraak werd bekrachtigd door het regionale hof, welke uitspraak op 15 november 2004 aan hem werd uitgereikt.

Wizerkaniuk diende op 14 mei 2005 een klacht in bij het Europese Hof voor de Rechten van de Mens, hoewel er nog een rechtsgang open stond bij het Constitutionele Hof die hij ook zou benutten. Ruim drie jaar later, op 29 september 2008, deed het Constitutionele Hof uitspraak. De klacht van Wizerkaniuk dat de Perswet in strijd zou zijn met de vrijheid van meningsuiting en het evenredigheidsbeginsel werd ongegrond verklaard. Gezaghebbende instanties, te weten de Ombudsman, de voorzitter van het Parlement en de voorzitter van het Openbaar Ministerie, hadden geadviseerd de gewraakte bepalingen van de Perswet in strijd te verklaren met het evenredigheidsbeginsel. Zij vonden dat het burgerlijk recht voldoende bescherming bood tegen een mogelijke aantasting van het recht op privacy en reputatie. Bij een dreigende inbreuk op deze rechten heeft een geïnterviewde de mogelijkheid een publicatieverbod te vragen. Als het kwaad geschied is kan de burgerlijke rechter een rectificatie bevelen. Eén rechter van het Constitutionele Hof was het met deze adviezen eens. Hij voegde een dissenting opinion aan het arrest toe, waarin hij onder meer benadrukte dat journalisten door de Perswet werden ontmoedigd indringende vragen te stellen.

Voor de meerderheid van het Constitutionele Hof waren andere argumenten belangrijker. De meerderheid overwoog dat privacyrechten goed beschermd moeten worden tegen de media, omdat deze een grote invloed hebben op de publieke meningsvorming. Voorkomen is beter dan genezen, dus was het gerechtvaardigd dat de Perswet controle vooraf verplicht stelt. Bovendien dient de wet een algemeen belang. Dankzij de verificatieplicht weet het publiek zeker dat geciteerde uitspraken authentiek zijn. Ten slotte was de beperking van de vrijheid van meningsuiting volgens de meerderheid niet erg groot. Als een geïnterviewde bij nader inzien spijt heeft van zijn uitspraken en geen goedkeuring aan de publicatie geeft, kan de journalist altijd nog in eigen woorden vertellen wat zijn indrukken waren van het gesprek. Zolang niet letterlijk wordt geciteerd, bestaat er geen verplichting om vooraf toestemming te vragen. De Perswet was daarom niet in strijd met de Grondwet, zo luidde de conclusie van de meerderheid.

Het EHRM gaat eerst na of de klacht ontvankelijk is. Op het moment van indiening stond immers nog een nationale rechtsgang open. Omdat de klachten van Wizerkaniuk bij het Constitutionele Hof en het Hof in Straatsburg identiek aan elkaar waren, overweegt het Hof dat de nationale autoriteiten geen mogelijkheid is ontnomen de beweerde schending zelf op te lossen. De klacht is dus ontvankelijk. Wat betreft de inhoudelijke beoordeling sluit het Hof zich aan bij de enige dissenter in het Constitutionele Hof. Het Hof stelt dat het vereiste van een voorafgaande goedkeuring een 'chilling effect' heeft op de persvrijheid. In casu hebben de nationale rechters niet onderzocht of de publicatie daadwerkelijk schadelijk was voor de privacy van de geïnterviewde politicus. Er zijn bovendien andere manieren om diens rechten te beschermen, bijvoorbeeld door een rectificatie achteraf. Ten slotte vindt het Hof het paradoxaal dat een journalist meer risico loopt bestraft te worden naarmate hij zijn

gesprekspartner nauwkeuriger citeert. Unaniem oordeelt het Hof dan ook dat artikel 10 EVRM is geschonden.

Wizerkaniuk
tegen
Polen

The Law

I. Alleged violation of Article 10 of the Convention

1. The applicant complained that his criminal conviction for having published the interview amounted to a breach of Article 10 of the Convention. This provision 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."

II. The government's preliminary objection

2. The Government argued that the applicant had failed to exhaust relevant domestic remedies. Before bringing his application to the Court, he should have awaited the outcome of the proceedings concerning the constitutional complaint which he had lodged with the Constitutional Court.

The applicant submitted that in the circumstances of the present case the judgment of the Constitutional Court should be regarded as a final decision determining the outcome of the case.

3. The Court has already dealt with the question of the effectiveness of the Polish constitutional complaint (see *Szott-Medyńska v. Poland* (dec.), no. 47414/99, 9 October 2003; *Pachla v. Poland* (dec.), no 8812/02, 8 November 2005; and *Wypych v. Poland* (dec.), no. 2428/05, 25 October 2005). It examined its characteristics and in particular found that the constitutional complaint was an effective remedy for the purposes of Article 35 § 1 of the Convention in situations where the alleged violation of the Convention resulted from the direct application of a legal provision considered by the complainant to be unconstitutional.

4. The assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with the

Court. However, as the Court has held on many occasions, this rule is subject to exceptions, which may be justified by the particular circumstances of each case (see *Baumann v. France*, no. 33592/96, § 47, 22 May 2001; and *Brusco v. Italy* (dec.), no. 69789/01, ECHR 2001-IX). In this context, the Court must also take into consideration that the rationale for the exhaustion rule is to afford the national authorities, primarily the courts, the opportunity to prevent or put right the alleged violations of the Convention. It is based on the assumption, reflected in Article 13, that the domestic legal order will provide an effective remedy for violations of Convention rights. This is an important aspect of the subsidiary character of the Convention machinery: see, among many authorities, *Selmouni v. France*, [GC], no. 25803/94, ECHR 1999-V, § 74; and *Rogoziński v. Poland* (dec.), no. 13281/04, 3 November 2009).

In the present case the Court notes that the applicant availed himself of this remedy and lodged a constitutional complaint with the Constitutional Court, challenging the compatibility with the Constitution of the provisions of the Press Act 1984 on which his criminal conviction had been based. That court declared his constitutional complaint admissible and gave a judgment on its merits. The Court notes that the substance of the applicant's constitutional complaint was identical with the complaint under Article 10 of the Convention which the applicant had previously brought before the Court.

5. In the Court's opinion, in these circumstances and with due regard being had to the principle of subsidiarity operating in the context of exhaustion of domestic remedies, referred to above, the fact that the substance of the applicant's complaint was examined by the Constitutional Court after he had lodged the present application is sufficient to justify the departure from the principle that the assessment of compliance with the requirement of exhaustion of domestic remedies is made by reference to the date when the application was brought to the Court.

It follows that the Government's preliminary objection must be dismissed.

6. The Court concludes therefore that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established. It must therefore be declared admissible.

III. Merits

A. The parties' submissions

1. The Government

7. The Government argued that it was a fundamental principle of all democratic States that where a person provided information to be presented or quoted in the media, he or she had a right to review the final version of the final text to be published and to grant or refuse authorisation for the dissemination thereof. Without that right, editors of newspapers, or television producers, would be free to shape the final message in any way they pleased, thereby taking advantage of the co-operation of the person concerned.

8. In the case at hand the M.P. had given an interview of his own free will and provided information about his activities as a parliamentarian and entrepreneur. He

had subsequently refused to consent to the publication of the text proposed by the applicant as he felt that it did not properly reflect the true nature of his statements. However, he had told the applicant that he was prepared to grant authorisation, provided that certain changes were introduced. The applicant had chosen to publish the unchanged text.

9. By publishing it the applicant had not only taken advantage of T.M.'s willingness to co-operate with the press, and possibly jeopardised his reputation, but had also misled the readers by presenting an untruthful picture. Hence, the penalty subsequently imposed on him had been necessary as it had reminded him, as well as other journalists and editors of newspapers, that the provisions of the Press Act were to be respected at all times since they served the purpose of protecting not only the person providing information, but also the public. It was the State's duty to protect society from misinformation and infringement of individuals' rights.

10. The Government referred to the Court's case-law to the effect that there could be no doubt Article 10 § 2 imposed on individuals an obligation to protect the reputation of others. This protection extended to politicians too, even when they were not acting in their private capacity. In such cases the requirements of such protection had to be weighed in relation to the interests of open discussion of political issues (*Dąbrowski v. Poland*, no. 18235/02, § 28, 19 December 2006). It had therefore been necessary to counterbalance the interest of open discussion – although it was open to doubt whether well-informed debate could indeed be held if it was based on erroneous presuppositions – with the interest of protecting the M.P.'s reputation. Admittedly, freedom of expression constituted one of the essential foundations of a democratic society. However, it could not be perceived as the right of the public to receive information at all times and under any condition. The rights of the majority could not prevail unconditionally over the rights of an individual. In any case, even if the right of the public to receive information were to be construed as an absolute right, it could not also encompass a right to receive misleading or incorrect information.

11. The Government submitted that the purpose of section 49 in conjunction with section 14 of the Press Act was to protect persons providing information from being taken advantage of by having information they gave to the press presented in a manner distorting their message. Such protection was particularly important where the individuals concerned held public office, where the publications could portray them in a negative manner inconsistent with the truth. Such persons were particularly exposed to having their statements manipulated through, for instance, omission of parts of their statements. In the particular circumstances of the present case, the interest of protecting the reputation of an M.P. who had willingly participated in an interview should prevail over the interest of an open discussion.

12. The Government further argued that the nature and severity of the penalty imposed on an individual were factors to be taken into account when assessing the proportionality of the interference with the right to freedom of expression. In the present case the penalty imposed on the applicant had by no means been severe. The District Court had merely ordered the applicant to pay a pecuniary benefit (*świadczenie pieniężne*) in the amount of PLN 1,000 to a charity and conditionally discontinued the criminal proceedings. The court had not imposed a fine on him. The decision to conditionally discontinue the criminal proceedings had resulted in the applicant not being convicted. Admittedly, his name had been entered in the National Criminal Register (*Krajowy Rejestr Karny*), but not as a convicted person, rather as a

person against whom proceedings had been conditionally discontinued. Moreover, that situation had lasted for only one year. Afterwards, the entry had been deleted.

13. The Government further argued that the applicant had in no way been impeded from publishing. Moreover, he had not been prosecuted for publishing the text concerned, but for his failure to obtain authorisation. Accordingly the purpose of the penalties imposed on him had not been to discourage him from criticising public officials in the future, nor had they been likely to deter journalists from contributing to public discussion of important issues affecting the life of the community.

14. The Government concluded that the limitation on the applicant's freedom of expression had been proportionate to the legitimate aim pursued, bearing in mind the interest of the protection of the reputation of the interviewed person, as well as the need to prevent the spreading of misinformation. Untruthful messages, disseminated at the expense of an individual, did not constitute a contribution to the formation of public opinion worth safeguarding in a democratic society.

2. The applicant

15. The applicant disagreed with the argument that the requirement to obtain the authorisation, strengthened as it had been at the material time and remained afterwards, served only the purposes of good journalistic practice. He stressed that the legal requirement to ask for authorisation and obtain it, reinforced by a criminal sanction, did not exist in the legislation of any other Council of Europe countries. Such a requirement amounted in itself to a disproportionate interference with freedom of expression; all the more so when it was, in addition, protected by a criminal sanction. Such a sanction had been imposed on the applicant in the instant case.

16. The applicant was of the view that this requirement could not possibly be seen as being necessary in a democratic society. It gave too much leeway to the interviewed persons, allowing them to distort and change what they had actually said in interviews. Disclosing information to the press and giving interviews was a special form of public activity, particularly in the case of persons holding public office. The mere requirement to obtain the interviewee's authorisation threatened the essence of an interview as one of the fundamental tools of journalism. It was difficult to imagine an interview in any form other than the questions asked and the answers given. The public could legitimately be interested not only in the mere content of the interviews, but also in the personal style of public figures as reflected in the way they spoke.

17. The applicant further argued that the application of this legal requirement could result in censorship of free debate. It could also have negative consequences even prior to publication, in that it was capable of making journalists avoid putting searching questions for fear that their interlocutors might later block the publication of the entire interview.

18. He submitted that this requirement also resulted in slowing down the flow of information from the press to the public and burdened journalists with additional work and costs. Journalists could not simply report the statements made during an interview; they were obliged, in addition, to have the report accepted by the interviewee. The time devoted to obtaining this consent could be more usefully spent in verifying the facts.

19. There were other ways to protect individuals' reputations under domestic law, which could always be used when a person was of the view that a press publication breached his or her personal rights.

20. The applicant asserted that the courts which had examined the present case had not investigated whether the applicant had in any way manipulated or distorted his statements, because criminal responsibility under the contested provisions of the Press Act arose irrespective of the journalist's professional diligence or lack of it.

21. The applicant submitted that the fact that the criminal sanction imposed on him had not been particularly severe was of no particular relevance for the assessment of the circumstances of the case, given that free speech was of the utmost importance in a democratic society. Last but not least, as a result of the criminal conviction the applicant had been listed in the National Criminal Register as having been found guilty of a criminal offence.

22. Pursuant to the Court's case-law, while exercising their freedom of expression journalists should act in good faith, provide reliable information reflecting the factual situation and follow the rules of journalistic ethics. The applicant referred to the Court's judgments in the cases of *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I; *McVicar v. the United Kingdom*, no. 46311/99 ECHR 2002-III; and *Tønsbergs Blad A.S. and Haukom v. Norway*, no. 510/04, ECHR 2007-III. He concluded that the interference complained of in his case, namely imposing a punishment on a journalist who had reliably quoted a politician's statement, had grossly breached Article 10 of the Convention.

B. The Court's assessment

1. General principles

23. According to the Court's well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10 § 2, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among many other authorities, *Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I; *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII; and *Lingens v. Austria*, 8 July 1986, § 41, Series A no. 103).

24. The press plays an essential role in a democratic society. Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see, among many authorities, The Observer *and* Guardian *v. the United Kingdom*, judgment of 26 November 1991, Series A no. 216, pp. 29-30, § 59, and Bladet Tromsø and *Stensaas v. Norway* [GC], no. 21980/93, § 59, ECHR 1999-III).

25. In this context, the safeguards to be afforded to the press are of particular importance (*Janowski v. Poland* [GC], no. 25716/94, § 30, ECHR 1999-I). Not only does the press have the task of imparting information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" in imparting information of serious public concern (see,

among other authorities, The Observer *and* Guardian *v. the United Kingdom*, cited above, § 59, and *Gawęda v. Poland*, no. 26229/95, § 34, ECHR 2002-II).

26. However, Article 10 of the Convention does not guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern. Under the terms of paragraph 2 of the Article the exercise of this freedom carries with it "duties and responsibilities", which also apply to the press. By reason of the "duties and responsibilities" inherent in the exercise of freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see the *Goodwin v. the United Kingdom*, judgment of 27 March 1996, *Reports of Judgments and Decisions* 1996-II, p. 500, § 39; *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I; and *Wołek, Kasprów and Łęski v. Poland* (dec.), no. 20953/06, 21 October 2008).

2. Application of the principles to the circumstances of the present case

27. In the present case the domestic authorities instituted proceedings against the applicant for breach of his obligation to seek and obtain the consent of the interviewed person prior to publishing the interview. Ultimately, a criminal sanction provided for by section 14 read together with section 49 of the Press Act was imposed on him. It is not in dispute that this sanction amounted to an interference with his right to freedom of expression. Nor has it been disputed that this interference was prescribed by the relevant provisions of that Act.

(a) Whether the interference served a legitimate purpose

28. The Court must now examine whether the interference served a legitimate purpose. It notes the Government's argument that it was aimed at protecting the reputation of the M.P. (see paragraphs 44-46 above) and that it had therefore served the purpose of the "protection of the reputation or rights of others"**.** The Court does not find this argument persuasive as it has never been argued, either in the domestic proceedings or before the Court, that the interview published by the newspaper contained any information or opinions capable of damaging the M.P.'s reputation. The domestic courts in their decisions did not criticise the applicant for tarnishing it. Indeed, they did not even refer to the substance of the interview. Nor was it argued that the M.P.'s words were distorted and quoted out of context or conveyed in the manner which could have misled readers or depicted the M. P. in a negative light. The applicant's criminal conviction was based exclusively on a breach of a technical character, namely on the fact that he had published the interview despite the M.P.'s refusal to give his authorisation.

However, the Court is prepared to assume for the purposes of the instant case that the interference complained of served a legitimate purpose.

(b) Whether the interference was necessary in a democratic society

29. The Court must now examine whether this interference was "necessary in a democratic society". The Court reiterates that this depends on whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see Bladet Tromsø *and*

Stensaas, cited above, § 58). The Court's task is not to take the place of the national courts but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (ibid., § 60, and see also *Fressoz and Roire v. France,* cited above, § 45). In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298, and *Veraart v. the Netherlands*, no. 10807/04, § 61, 30 November 2006).

The Contracting States have a certain margin of appreciation in assessing whether in the circumstances of a concrete case a pressing social 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 (see, among many other authorities, *Perna v. Italy* [GC], no. 48898/99, § 39, ECHR 2003-V, and *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 88, ECHR 2004-XI).

30. In the present case the authorities applied the 1984 Press Act when examining the criminal case against the applicant. That Act imposed on the applicant, as an editor-in-chief, an unequivocal obligation to seek and to obtain the authorisation of the interviewed person before publishing an interview, regardless of the subject-matter of that interview and its content. That authorisation amounted to certifying that the text proposed for publication corresponded to what had actually been said during the interview.

In this connection, the Court reiterates that while it is true that Article 10 of the Convention does not in terms prohibit the imposition of prior restraints on publications, the dangers inherent in prior restraints call for the most careful scrutiny on the Court's part (see *Chauvy and Others v. France*, no. 64915/01, § 66, ECHR 2004-VI; and *Társaság a Szabadságjogokért v. Hungary*, no. 37374/05, § 36, ECHR 2009-...; *Gawęda v. Poland*, no. 26229/95, § 35, ECHR 2002-II; and The Observer *and* The Guardian, cited above, p. 30, § 60). Where freedom of the press is at stake, the national authorities have only a limited margin of appreciation to decide whether there is a "pressing social need" to take such measures (*Editions Plon v. France*, no. 58148/00, § 44, ECHR 2004-IV).

31. It is not in dispute that the applicant published the *verbatim* excerpts from the interview concerned without obtaining the authorisation of the interviewed person.

The Court is of the view that an obligation to verify, before publication, whether a text based on statements made in the context of an interview and quoted *verbatim* is accurate can be said to amount, for the printed media, to a normal obligation of professional diligence. It can be expected, in the interests of responsible reporting, that a journalist will make appropriate efforts to ensure that his or her rendering of the interview corresponded to what was actually said and that such efforts constitute a natural part of the journalist's work. The impugned provisions of the Polish Press Act were aimed at ensuring compliance with journalists' professional obligations. Their essential objective was to avoid the potential adverse effect of inaccurate reporting on the reputation of persons whose statements were reported by the press.

32. However, in the present case it is not only the obligation imposed under section 14 of the Press Act which constituted the legal background of the case, but the

criminal sanction imposed for the applicant's failure to comply with that obligation, expressly provided for by section 49 of the same Act.

33. The Court reiterates that it must exercise caution when the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern (see *Standard Verlags GmbH v. Austria*, no. 13071/03, § 49, 2 November 2006; *Kuliś and Różycki v. Poland*, no. 27209/03, § 37, ECHR 2009-...). The chilling effect that the fear of criminal sanctions has on the exercise of journalistic freedom of expression is evident (see, *mutatis mutandis*, *Wille v. Liechtenstein* [GC], no. 28396/95, § 50, ECHR 1999-VII; *Nikula v. Finland*, no. 31611/96, § 54, ECHR 2002-II; *Goodwin*, cited above, p. 500, § 39; and *Elci and Others v. Turkey*, nos. 23145/93 and 25091/94, § 714, 13 November 2003). This effect, which works to the detriment of society as a whole, is likewise a factor which goes to the proportionality, and thus the justification, of the sanctions imposed on media professionals.

34. The Court has repeatedly stated that the nature and severity of the penalties imposed on media professionals are also factors to be taken into account when assessing whether the interference with their freedom of expression was necessary in a democratic society (see *Skałka v. Poland*, no. 43425/98, 27 May 2003, § 41-42; *Cumpana and Mazare v. Romania*, cited above, §§ 111-124; and *Sokołowski v. Poland*, no. 75955/01, § 51, 29 March 2005).

35. In the present case the first-instance court, when determining the sanction to be imposed on the applicant, observed that he had been motivated by his wish to fulfil his duty as a journalist by communicating to the public the interview given by the local M.P. The court accordingly concluded that the offence concerned could not be regarded as serious.

36. However, in the Court's view, the mere fact that the domestic courts' approach to the determination of the penalty to be imposed on the applicant was cautious cannot overshadow other considerations of a more fundamental character relating, in the first place, to the subject-matter of the publication concerned. In this connection, the Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest (see *Bączkowski and Others v. Poland*, no. 1543/06, § 98, ECHR 2007-VI; and *Wojtas-Kaleta v. Poland*, no. 20436/02, § 46, 16 July 2009).

37. The applicant interviewed the local M.P. about his political and business activities (see paragraph 7 above). His views and comments were indisputably a matter of general interest to the local community which the applicant was entitled to bring to the public's attention and the local population was entitled to receive information about such matters (see, *mutatis mutandis*, *Cumpănă and Mazăre v. Romania* [GC], cited above, §§ 94-95).

38. The Court notes the Government's argument that the interest of open discussion should be weighed against the interest of protecting the M.P.'s reputation (see paragraph 46 above). However, even assuming that private life issues were raised in the interview, the Court reiterates that the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his words and deeds by journalists and the public at large, and he must consequently display a greater degree of tolerance (see *Lingens*, cited above, § 42; *Incal v. Turkey*, judgment

of 9 June 1998, *Reports* 1998-IV, p. 1567, § 54; and *Scharsach and News Verlagsgesellschaft v. Austria*, no. 39394/98, § 30, ECHR 2003-XI).

39. Moreover, the Court observes that the M.P. chose to request that criminal proceedings against the applicant be instituted and that the applicant was ultimately convicted. In the assessment of the case it should not be overlooked that the bill of indictment against the applicant was lodged by the public prosecutor, whereas the domestic law provided for the possibility of lodging private bills of indictment with the courts in cases concerning less serious offences. Hence, the national legislator was of the view that the offence defined by Section 14 read together with Article 49 of the Press Act was serious enough to warrant the involvement of the public prosecutor in the proceedings.

40. The Court further notes that the domestic courts imposed a criminal sanction on the applicant despite the fact that it was not in dispute that there had been no attempt at subterfuge on his part when he had tried to obtain the interview. The interviewee had expressed his consent to the interview and the applicant's newspaper had published it. In so far as the Government argued that the M.P. had given the interview although not obliged to do so, the Court fails to see how this factor should be construed as justifying a restriction on the applicant's right to freedom of expression. Indeed, a transparent and responsible exercise of a political mandate would normally necessitate that the local population be informed via the media by M.P.s about their public activities, if need be by way of interviews.

41. The Court further observes that in its case-law to date it has normally been called upon to examine whether interferences with freedom of expression were "necessary in a democratic society" with reference to the substance and content of statements of fact or value judgments for which the applicants had ultimately been penalised, by way of civil or criminal law. The essential difference between all such cases examined to date and the present one is that, here, the courts punished the applicant and imposed a criminal penalty on grounds which were completely unrelated to the substance of the impugned article.

42. At no stage of the proceedings was it shown that either the content of what had been said by the M.P. or the form of his remarks, published *verbatim* by the applicant's newspaper, had been distorted in any way. There is nothing to suggest that the rendering of the interviewee's words was not accurate. Nor was it ever disputed that the published article contained his statements quoted *verbatim*. Despite this, the mere fact that the applicant had published the text without the authorisation required by section 14 of the Press Act automatically entailed the imposition of the criminal sanction provided for under section 49 of that Act.

43. Moreover, the impugned provisions applied across the board, regardless of the status of the interviewee. It was sufficient for the court to establish a failure on the applicant's part to seek and obtain authorisation. The content of the article was, in any event, establishing irrelevant for the criminal offence.

44. As a result, the domestic courts, when examining the criminal case against the applicant, were not required to give any thought to the relevance of the fact that the interviewed person was an M.P. with political responsibilities towards his constituents. Indeed, the courts did not have any regard either to the substance of the statements published by the applicant's newspaper or to whether they had corresponded to what had been said during the interview. This approach alone does not appear compatible with the established case-law of the Court, which consistently

emphasises that protection granted to politicians against criticism is much narrower than that applicable to all other persons (see paragraph 73 above). Moreover, the Court notes that the refusal of authorisation for the publication of the interview was of a blanket character as under the impugned provisions the M.P. was not obliged to provide any grounds for his refusal.

45. The Court can accept that an interviewed person may be anxious that his or her actual comments are faithfully rendered and conveyed to the public. This also applies where the interviewed person is a politician. Exposure to the public eye of reckless or awkward utterances made by a politician in the context of an interview may have a negative impact on his or her further career and, indeed, their political existence.

46. However, the provisions applied in the present case give interviewees *carte blanche* to prevent a journalist from publishing any interview they regard as embarrassing or unflattering, regardless of how truthful or accurate it is. They can do so either by refusing authorisation or by unreasonably delaying the granting of authorisation. The relevant provisions do not fix any time-limit within which the authorisation is to be granted or refused. Furthermore, it cannot be excluded that their application may also result in slowing down the flow of information from the press to the public and burden journalists with additional work and costs. The Court reiterates in this context that news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest (see, for example, Observer *and* Guardian, cited above, p. 30, § 60; Sunday Times *v. the United Kingdom (no. 2)*, judgment of 26 November 1991, Series A no. 217, pp. 29 et seq., § 51; and *Association Ekin v. France*, no. 39288/98, § 56, ECHR 2001-VIII). Consequently, a journalist cannot in principle be required to defer publishing information on a subject of general interest without compelling reasons relating to the public interest or the protection of the rights of others (see, for example, *Editions Plon*, cited above, § 53, with further references).

47. Moreover, the legal provisions concerned in the present case could have other negative consequences prior to publication, in that they were capable of making journalists avoid putting probing questions for fear that their interlocutors might later block the publication of the entire interview by refusing to grant authorisation, or choose interlocutors known for being co-operative, to the detriment of the quality of the public debate. The Court shares the view expressed by Justice Rzepliński in his dissenting opinion (see paragraph 26 above) that these provisions were therefore capable of having a chilling effect on the exercise of the journalistic profession by going to the heart of decisions on the substance of press interviews and shares [*sic*, red.].

48. The Court has had regard to the Government's argument that the interference complained of was aimed at the protection of the reputation of the interviewed person. However, the Court notes that under domestic law there existed an array of available civil law instruments specifically intended for that purpose (see paragraphs 30-32 above). It also reiterates that in its examination to date of the measures in place at domestic level to protect Article 8 rights in the context of freedom of expression (and even assuming that such rights were at issue in the present case), the Court has so far accepted that *ex post facto* damages provide an adequate remedy for violations of Article 8 rights arising from the publication by a newspaper of private information (see *Von Hannover v. Germany*, no. 59320/00, §§ 72-74, ECHR 2004-VI; *Armonienė v. Lithuania*, no. 36919/02, §§ 45048, 25 November 2008). Moreover, the provisions

of the Press Act itself afforded additional protection against inaccurate rendering of statements and judgments made in the context of an interview. Section 31 of that Act provided, at the material time, for the obligation for a newspaper to publish a disclaimer submitted by a person who wished to have inaccurate information published about him or her rectified, or a more elaborate reply if his or her personal rights had been breached by an article (paragraph 29 above). It has not been argued, let alone shown, that these instruments were generally ineffective or that in the specific circumstances of the present case recourse to them would not have offered a sufficient level of protection. In these circumstances, recourse to a criminal sanction was not, in the Court's opinion, justified.

49. The Court observes that the Press Act was adopted in 1984, twenty-seven years ago. It was adopted before the collapse of the communist system in Poland in 1989. Under that system, all media were subjected to preventive censorship. The Press Act 1984 was extensively amended on twelve occasions (see paragraph 29 above). However, the provisions of sections 14 and 49 of that Act, on which the applicant's conviction was based, were never subject to any amendments, in spite of the profound political and legal changes occasioned by Poland's transition to democracy. It is not for the Court to speculate about the reasons why the Polish legislature has chosen not to repeal those provisions. However, the Court cannot but note that, as applied in the present case, the provisions cannot be said to be compatible with the tenets of a democratic society and with the significance that freedom of expression assumes in the context of such a society.

50. It is also relevant for the assessment of the case that, in the proceedings before the Constitutional Court, the compatibility of the impugned obligation with the freedom of expression enshrined in the Polish Constitution was negatively assessed by the Ombudsman, the Speaker of Parliament and the Prosecutor General, who were all of the view that the restrictions imposed by the Press Act breached the principle of proportionality enshrined in Article 31 of the Polish Constitution of 1997. What is more, they all referred to the availability of civil law instruments to secure effective protection of personal rights (see paragraph 19 above). This remarkable unanimity of leading national legal authorities in the assessment of the provisions which had served as a legal basis for the interference concerned in the present case cannot be overlooked by the Court.

51. In so far as the Constitutional Court stressed that journalists were not obliged to seek authorisation (and, consequently, did not run the risk of criminal proceedings) where they chose to summarise or otherwise convey the content of statements made in the context of interviews (see paragraph 22 above), the Court is of the view that this approach was, in fact, paradoxical. The more faithfully journalists rendered the statements of interviewed persons, the more they were exposed to the risk of criminal proceedings being brought against them for failure to seek authorisation. In the same vein, it is also paradoxical that section 14 of the Press Act obliges journalists to seek authorisation only in respect of interviews recorded in a phonic or visual form whereas no such obligation is imposed where a journalist only makes notes of an interview. In any event, the Court is of the view that the mere fact that the applicant was free to paraphrase words used by the interviewed person – but chose to publish his statements *verbatim* and was penalised for it - does not make the criminal penalty imposed on him proportionate.

52. The Court concludes that the criminal proceedings brought against the applicant and the criminal sanction imposed on him, without any regard being had to the accuracy and subject-matter of the published text and notwithstanding his unquestioned diligence in ensuring that the text of the published interview corresponded to the actual statements made by the M.P., was disproportionate in the circumstances.

53. There has therefore been a violation of Article 10 of the Convention.

IV. Application of Article 41 of the Convention

54. 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."

A. Damage

55. The applicant claimed 150,000 and 165,000 zlotys (PLN) in respect of pecuniary and non-pecuniary damage respectively. He referred to the stress and humiliation which he had suffered as a result of his criminal conviction, and to the income he had lost in connection with the judgments given in his case. He further claimed PLN 1,000, equivalent to EUR 256, in respect of pecuniary damage, representing the fine imposed on him by the domestic court.

56. The Government considered that the applicant's claims were excessive and bore no causal link with the circumstances of the case.

57. The Court finds that in the circumstances of the case there is a causal link between the violation found and the alleged pecuniary damage in respect of the EUR 256 fine he was ordered to pay by the domestic courts (see *Busuioc v. Moldova*, no. 61513/00, § 101, 21 December 2004). Although the applicant claimed this amount under costs and expenses (see paragraph 94 below), the Court considers that it should be granted under the head of pecuniary damage and awards the applicant the sum claimed in respect of the fine.

58. The Court also accepts that the applicant suffered non-pecuniary damage – such as distress and frustration resulting from the conviction and sentence – which is not sufficiently compensated by the finding of a violation of the Convention. Making its assessment on an equitable basis, the Court awards the applicant EUR 4,000 under this head.

B. Costs and expenses

59. The applicant also claimed PLN 15,000 for costs and expenses incurred before the domestic courts. This amount included PLN 1,000, equivalent to EUR 256, for the fine imposed on him in the proceedings; PLN 4,000, equivalent to EUR 1,124 for domestic court fees; PLN 5,200 in legal fees, equivalent to EUR 1,331 and PLN 1000, equivalent to EUR 256 for travel costs incurred in connection with the appellate proceedings.

He further claimed PLN 5,500, equivalent to EUR 1,408 in reimbursement of legal fees incurred in connection with the proceedings before the Court.

60. The Government reiterated that the claims were excessive.

61. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. As regards the fine paid by the applicant, this has been awarded under the head of pecuniary damage (see paragraph 92 above). As to the remaining claims concerning costs incurred in connection with the domestic proceedings, the Court awards the applicant the sum of EUR 4,119 covering costs under all heads.

C. Default interest

62. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

For these reasons, the court unanimously

1. *Declares* the application admissible;

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

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Polish zlotys at the rate applicable at the date of settlement:
      (i) EUR 256 (two hundred and fifty six euros) in respect of pecuniary damage, plus any tax that may be chargeable;
      (ii) EUR 4,000 (four thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;
      (iii) EUR 4,119 (four thousand one hundred and nineteen euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicant;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Joint concurring opinion of judges Bratza and Hirvelä

We fully concur with the view of the Chamber that Article 10 of the Convention was violated in the present case.

The central problem which gives rise to a violation lies, in our view, in the legislation in question which makes it a criminal offence to publish or disseminate any information provided by a person and recorded in audio or visual form, without the authorisation of the person concerned. As is demonstrated by the facts of the present case, the offence is committed by the mere fact of publication without authorisation, irrespective of the accuracy of the reproduction of the statements made by the individual concerned, irrespective of whether the words spoken are distorted or quoted out of context or conveyed in a misleading manner, irrespective of the identity or position of the individual concerned or the context in which his words were recorded and irrespective of the reasons, if any, given for refusing authorisation. In our view, such a provision cannot be reconciled with the right to freedom of expression guaranteed by Article 10 of the Convention.

Where we have hesitations about the reasoning in the judgment is in relation to paragraph 74 which implicitly, if not expressly, suggests that the outcome might have been different had the prosecution of the applicant been brought by the M.P. himself, rather than by the public prosecutor. It is the fact of the applicant's prosecution and conviction under the Press Act and not the identity of the prosecutor which is important in the present case and our view that Article 10 was violated would have been exactly the same even if the M.P. had himself brought the prosecution which resulted in the applicant's conviction.

Joint concurring opinion of judges Garlicki and Vučinić

1. We are ready to accept that there has been a violation of Article 10 of the Convention in this case. However, it seems that the judgment could have been drafted in more precise terms. In particular, it is not clear whether the violation results only or mostly from the severity of the sanction or whether the position of the majority should be interpreted as a total rejection of any form of the authorisation requirement.

In our opinion, the finding of a violation should have been based – clearly and exclusively – on three narrower grounds.

First, the authorisation requirement is overbroad in its scope since it applies not only to the text to be published but also to photographs taken in the course of the interview. It should not be forgotten that the applicant's conviction also referred to the publication of "unauthorised" photographs of the member of parliament who was the subject of the interview.

Second, the authorisation requirement is overbroad since it entails a blanket ban on the publication of any "unauthorised" verbatim quotations. Thus, criminal responsibility arises from the very fact of publication, independently of whether the published quotations were accurate and whether they truly reflected what was actually said by the person interviewed.

Third, while the use of criminal procedure is not fundamentally incompatible with the Court's understanding of the freedom of the press (see *Radio France and Others v. France*, no. 53984/00, § 40, ECHR 2004-II, and *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 59, ECHR 2007-XI), this assessment is more difficult to apply in cases such as the present one, in which the procedure is initiated by a public prosecutor and not upon a private action brought by the person affected (see *Raichinov v. Bulgaria*, no. 47579/99, § 50, 20 April 2006;

Rumyana Ivanova v. Bulgaria, no. 36207/03, § 68, 14 February 2008; and *Długołęcki v. Poland*, no. 23806/03, § 47, 24 February 2009).

2. The Court attached considerable weight to the severity of the sanction in the applicant's case. It is true that, according to our case-law, an overly severe sanction can tip the balance and lead to a violation of Article 10, even if the conduct of the journalist concerned fell short of the requirements of professional ethics (see, in particular, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 116, ECHR 2004-XI).

In this instance, however, the applicant's case was conditionally discontinued and he was obliged to pay 1,000 zlotys (equivalent to approximately 250 euros) to a charity. In our opinion, it is difficult to describe this sanction as a severe one.

3. The fact that we have all agreed that there was a violation in the applicant's case should not be interpreted as a total rejection of any form of the authorisation requirement. It is true that authorisation constitutes a prior restraint on publications and that the Court should apply the most careful scrutiny in assessing any restriction of such nature. But, as was also noted by the majority, Article 10 does not in terms prohibit the imposition of prior restraints and, therefore, a reasonably tailored restriction has a chance of surviving the Court's scrutiny.

In our opinion there are three considerations that may be used in defence of the authorisation requirement.

First, the requirement applies not to every publication or every interview, but only to texts in which a journalist chooses to include verbatim statements by the interviewed person. Therefore (as was also observed by the Polish Constitutional Court), the authorisation requirement can easily be avoided if a journalist decides to publish his or her own presentation of what was said by the interviewed person.

Second, even verbatim quotations are not always free from the danger of inaccuracy. In the present case, the original transcript ran to forty pages and the published text amounted to only three pages. This is usual practice: a journalist prepares a selection of what has been said and publishes only what he or she considers relevant. But selection may also mean manipulation and it is not difficult to recall situations in which several quotations have been merged into one statement with the content completely distorted. It seems that there is some force in the Constitutional Court's argument that once an interview is going to be edited, it may be reasonable to allow the interviewed person to have a look at the final version of his – purported – statements.

Finally, we should not ignore the dangers of journalistic abuse. In Poland, as in many other countries, journalists are not always angels. There have been numerous situations in which, particularly in the course of a political debate, a person's statements have been quoted in a malevolently inaccurate manner. It is, unfortunately, not uncommon for journalists to denigrate political opponents and we must be aware that political journalism sometimes degenerates into an instrument of annihilation rather than of information. The authorisation requirement attempts to address at least one aspect of that process by preventing inaccurate or manipulated – in short, false – quotations.

Thus, the authorisation requirement may serve such legitimate aims as providing the general public with accurate information and contributing to a practice of responsible journalism.

The above-mentioned considerations make us hesitant in accepting that the authorisation requirement, if correctly framed, cannot be regarded as a reasonable limitation of journalistic freedom. We no longer live in a world in which the press can always assume the position of a victim. More and more often, the press abuses its powerful position and, deliberately and malevolently, undermines the good name and integrity of other persons. We have no alternative but to address this new situation.

NOOT

1. De procedure die leidde tot bovenstaand arrest is een spiegelbeeld van de zaak *Mosley* t. *Verenigd Koninkrijk* (EHRM 10 mei 2011, nr. 48009/08, «EHRC» 2011/108 m.nt. Hins). Mosley had het Verenigd Koninkrijk aangeklaagd wegens een beweerde schending van artikel 8 EVRM. De staat zou een positieve verplichting hebben geschonden door geen regeling te hebben die de media verplicht mensen die gedupeerd kunnen worden door een publicatie vooraf te waarschuwen. De klacht werd ongegrond verklaard. In bovenstaand arrest ligt de situatie omgekeerd. In Polen bestaat een wet die journalisten verplicht citaten uit een interview ter goedkeuring voor te leggen aan degene die de uitspraken heeft gedaan. Op die manier kan schade aan zijn of haar reputatie worden voorkomen. Publicatie zonder goedkeuring is een strafbaar feit. Dat zal als muziek in de oren klinken van mensen die slechte ervaringen hebben met slordige journalisten, maar voor de pers is het een gruwel. Wizerkaniuk is als hoofdredacteur veroordeeld voor het publiceren van een interview met een parlementslid, dat geweigerd had toestemming te verlenen. In Straatsburg klaagt hij over schending van artikel 10 EVRM. Dezelfde Kamer die twee maanden eerder het arrest *Mosley* had gewezen, beslist nu dat de Poolse wet een onevenredige beperking van de vrijheid van meningsuiting vormt.

2. De feitelijke achtergrond maakt de uitkomst bijna vanzelfsprekend. Wizerkaniuk was gestraft vanwege het enkele feit dat hij het interview zonder toestemming van de geïnterviewde had gepubliceerd. Het is niet aangetoond dat de publicatie echt schadelijk was voor de reputatie van het parlementslid. Zijn woorden waren niet verdraaid of uit hun verband gehaald (r.o. 63 en 77). De publicatie betrof een onderwerp van algemeen belang, waardoor de uitingsvrijheid veel gewicht krijgt. Bovendien moet een politicus meer kritiek over zijn kant laten gaan dan een gewone burger. Sommige overwegingen lijken te zijn gekopieerd uit *Mosley*, al wordt dit arrest niet als bron genoemd. Wederom overweegt het Hof dat preventieve beperkingen van de uitingsvrijheid zeer zorgvuldig getoetst moeten worden, met name als zij zich richten tegen een persorgaan (r.o. 65). En net als in *Mosley* herinnert het Hof eraan dat het recht op privacy goed kan worden beschermd door maatregelen *ex post facto*, zoals een veroordeling tot rectificatie of schadevergoeding (r.o. 83). De conclusie is dat Polen een verkeerd middel heeft ingezet om de privacy van de politicus te beschermen.

3. Interessanter is een principiële vraag. Is het in beginsel wenselijk dat journalisten mensen over wie ze schrijven vooraf de tekst van hun artikel toesturen? In *Mosley* heeft het Hof al gewezen op een belangrijk nadeel van een wettelijke verplichting daartoe. Nieuws is een ‘perishable commodity’ en vertragende procedures kunnen de

waarde ervan wegnemen. Het Hof voegt daar nu aan toe dat een algemene verplichting om citaten te laten goedkeuren extra werk en kosten impliceert (r.o. 81). In de daarop volgende overweging spreekt het Hof zelfs van een 'chilling effect' voor de persvrijheid. Sommige journalisten zullen ervan afzien pijnlijke vragen te stellen uit vrees dat de ondervraagde persoon publicatie van het hele interview zal blokkeren. Anderen zullen hun gesprekspartners zo uitkiezen dat de kans op gezeur zo klein mogelijk is. Dit alles leidt tot schade aan de kwaliteit van het maatschappelijk debat. Men zou de uitspraak van het Hof zo kunnen lezen dat een wettelijk 'authorisation requirement' altijd uit den boze is.

4. De rechters Garlicki en Vučinić nemen in hun *concurring opinion* een genuanceerder standpunt in. Zij stellen voorop dat de strafrechtelijke regeling in Polen 'overbroad' was, maar sluiten niet uit dat een beperkte verplichting voor journalisten om citaten te laten goedkeuren toelaatbaar zou zijn. Zij noemen daarvoor drie argumenten. In de eerste plaats vinden zij het positief dat de Poolse wet alleen betrekking heeft op letterlijke citaten. Een journalist kan de goedkeuringsplicht dus vermijden door in eigen woorden verslag te doen van het interview. In tweede plaats kunnen zelfs letterlijke citaten een verkeerd beeld oproepen. Door zinnen weg te laten kan een verslag worden gemanipuleerd. Ten slotte wijzen de twee rechters erop dat journalisten niet altijd lieverdjes zijn. Soms hebben zij hun eigen politieke agenda en zijn ze erop uit tegenstanders zwart te maken. Een verdedigingsmiddel voor de geïnterviewde is dus welkom. Hoe een goede regeling eruit ziet, zeggen zij niet met zo veel woorden. Uit hun bezwaren tegen de veroordeling van Wizerkaniuk valt echter op te maken dat hun voorkeur uitgaat naar een privaatrechtelijke norm. Zij suggereren bovendien dat geen sanctie mag worden opgelegd wanneer de journalist op een andere manier kan aantonen dat de citaten accuraat waren en 'truly reflected what was actually said by the person interviewed'.

5. Het is in ieder geval nuttig onderscheid te maken tussen twee deelvragen. Moet een journalist zijn voorgenomen publicatie voorleggen aan de geïnterviewde? En is de journalist verplicht om bezwaren van de geïnterviewde te honoreren? Nederland heeft geen wettelijke regeling zoals de Poolse Perswet. Hier wordt de relatie tussen partijen beheerst door het privaatrecht. Een interview berust op een al dan niet stilzwijgende afspraak, inhoudende dat hetgeen de geïnterviewde zegt door de journalist gepubliceerd mag worden, mits hij dat zo getrouw mogelijk doet. Daarbij kunnen allerlei extra voorwaarden worden gesteld. Zo kan de geïnterviewde bedingen dat hij de tekst voorafgaand aan de publicatie mag lezen en van commentaar voorzien. Een verdergaande afspraak is dat de geïnterviewde een vetorecht krijgt. Vaak wordt niets op papier gezet, maar er zijn uitzonderingen. Denk bijvoorbeeld aan een interview met de Koningin, waarbij de kleinste details zijn geregeld. Bij onenigheid zal de rechter zich laten leiden door de algemene uitgangspunten van burgerlijk recht met betrekking tot de uitleg van overeenkomsten. Hij zal op grond van artikel 6:248 BW onder meer kijken naar de aard van de overeenkomst, de wet, de gewoonte en de eisen van redelijkheid en billijkheid (zie G.A.I. Schuijt, *Vrijheid van nieuwsgaring*, Den Haag: Boom Juridische Uitgevers 2006, p. 122).

6. Wat houden de ‘gewoonte’ en ‘de eisen van redelijkheid en billijkheid’ volgens de Nederlandse rechter in bij het publiceren van interviews? Een bekende uitspraak is die van de rechtbank Amsterdam in de zaak Huibregtsen tegen De Volkskrant. De voorzitter van NOC/NSF, Huibregtsen, zou tijdens een interview hebben gezegd dat prins Willem-Alexander – destijds net benoemd in het Internationaal Olympisch Comité − een ‘judas’ was. Volgens de rechtbank was Huibregtsen onzorgvuldig geciteerd, maar in de uitspraak komt onder meer de volgende overweging voor: ‘Een verplichting om elk bericht voor publicatie aan degene aan wie de inhoud ervan wordt ontleend ter verificatie voor te leggen vindt geen grondslag in het recht’ (Rb. Amsterdam 28 oktober 1998, *NJ* 1999, 440 en *Mediaforum* 1999-1, nr. 5 m.nt. G.A.I. Schuijt). Het wordt anders wanneer de journalist inzage heeft toegezegd. Als de journalist een dergelijke afspraak maakt behoort hij deze na te komen. Dat wordt geïllustreerd door een recente uitspraak van de Raad voor de Journalistiek, waarin de Raad overweegt dat alleen bijzondere omstandigheden kunnen rechtvaardigen de belofte te schenden (Raad voor de Journalistiek 10 maart 2011, Stichting het Nederlands Bont Instituut t. hoofdredacteur LINDA, *www.rvdj.nl/2011/17*).

7. Stel dat de afspraak is gemaakt dat de publicatie ter inzage zal worden opgestuurd, dan moet de geïnterviewde de gelegenheid krijgen daarop commentaar te geven en om correcties te verzoeken. Dat is iets anders dan een vetorecht. De Leidraad van de Stichting Raad voor de Journalistiek, te vinden op *www.rvdj.nl*, is op dat punt volstrekt helder. Artikel 2.8.1 bepaalt: “De journalist die een interview of een ander artikel vooraf ter inzage geeft aan degene over wie het artikel gaat, is vrij te bepalen hoe hij eventuele op- en aanmerkingen in het artikel verwerkt. Tenzij vooraf anders is afgesproken, biedt inzage vooraf de betrokkene de mogelijkheid te verzoeken om feitelijke onjuistheden te corrigeren en onduidelijkheden weg te nemen.” Een andersluidende afspraak is dus mogelijk. Daarvoor zijn echter twee partijen nodig. De Koningin heeft een sterke onderhandelingspositie en dat geldt ook voor de vrouw die een vijfling heeft gebaard. Gewone mensen, zoals eenvoudige wetenschappers, kunnen minder hoog van de toren blazen, want dan gaat het interview niet door. Daar zit een element van ongelijkheid in. Toch verdienen contractuele afspraken mijns inziens de voorkeur boven een publiekrechtelijke regeling, zelfs al die wat meer op maat zou zijn gesneden dan de Poolse.

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