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EGMR Nr. 39657/98 - Urteil vom 28. Oktober 2003 (Steur v. Niederlande, 2. Kammer)

Meinungsfreiheit von Rechtsanwälten (Bedeutung der Rechtsanwälte für das Justizwesen; Eingriff; Rechtfertigung; chilling effect; Kritik an staatlichen Bediensteten: Kritik an einer Verhörspraxis; Verhältnismäßigkeit; Gesetzesvorbehalt; legitimes Ziel; notwendig in einer demokratischen Gesellschaft; dringendes gesellschaftliches Bedürfnis); faires Verfahren (Verteidigungsrecht; Schweigerecht; Recht auf die Hinzuziehung eines unentgeltlichen Dolmetschers).

Art. 10 EMRK; Art. 6 EMRK; Art. 5 Abs. 1 GG; Art. 12 Abs. 1 GG; § 137 StPO

Leitsätze des Bearbeiters

1. Einem Rechtsanwalt darf nicht ohne hinreichenden Grund die Verletzung seiner beruflichen Standards attestiert werden, selbst wenn ihn dadurch keinerlei Sanktionen treffen. Ein derartiger Tadel kann einen einschüchternden Effekt ("chilling effect") haben, der ihn hinsichtlich der Wahl seiner tatsächlichen und rechtlichen Argumentation bei der zukünftigen Verteidigung seiner Mandanten hemmen könnte. Ein solcher Tadel stellt einen Eingriff in die Meinungsfreiheit des Rechtsanwaltes dar, der vom Staat nur dann gerechtfertigt werden kann, wenn er ein dringendes gesellschaftliches Bedürfnis für einen im Einzelfall verhältnismäßigen und auf einem Gesetz beruhenden Eingriff hinreichend darlegt.

2. Zur Beurteilung derartiger Fälle prüft der EGMR den Eingriff im Lichte des gesamten Falles einschließlich der dem Anwalt vorgeworfenen Äußerungen sowie der Umstände, unter denen sie getroffen worden sind. Hierbei prüft der EGMR, ob die von den nationalen Behörden angewendeten Standards mit den Prinzipien des Art. 10 EMRK im Einklang stehen. Ebenso prüft er, ob sich die Behörden auf eine akzeptable Würdigung der relevanten Tatsachen abstützen.

3. Die schwächere Position des Angeklagten, der von einem Polizeibediensteten wegen einer Straftat verhört wird, erfordert bei der Meinungsfreiheit einen stärkeren Schutz hinsichtlich Äußerungen, mit denen das Verhalten des Polizeibediensteten bei diesem Verhör kritisiert wird. Auch wenn Äußerungen einen pflichtbewussten Polizeibediensteten diskreditieren, ist zu beachten, dass die Grenzen der hinzunehmenden Kritik den Umständen entsprechend weiter sein können, wenn sie sich gegen Bedienstete des Staates bei der Ausübung ihrer Zwangsrechte gegenüber Privatpersonen richtet. Auch Bedienstete des Staates sind hingegen nicht von jedem Schutz gegen verletzende und missbräuchliche Angriffe hinsichtlich der Ausübung ihrer Pflichten ausgenommen. Gegen das Zurücktreten der Meinungsfreiheit spricht es jedoch, wenn die Vorwürfe nur vor Gericht und strikt auf das Verhalten im Einzelnen, nicht hingegen gegen die Person als solche gerichtet werden.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE 1

9. The applicant is a Netherlands national, born in 1951 and living in Oegstgeest. He is a practising lawyer (*advocaat en procureur*). He is not represented before the Court. 2

10. On 26 November 1992, the social security investigating officer (*sociaal rechercheur*) Mr W. took and recorded a statement from one Mr B., a person of Surinamese origin who was suspected of having unjustly received social security benefits and, in this context, of having committed forgery. Mr B. was then alone with Mr W. and did not have the assistance of either a lawyer or an interpreter. 3

11. Subsequently, Mr B. was prosecuted for social security fraud. In addition, civil proceedings were instituted against him by the social security authorities for the recovery of the excess benefits paid to him. The applicant acted as Mr B.'s counsel in both sets of proceedings. 4

12. In the civil proceedings, the applicant stated, in so far as relevant: 5

"The statement recorded in writing by Mr W. cannot have been obtained in any other way than by the application of pressure in an unacceptable manner in order to procure incriminating statements, the significance of which was not or not sufficiently understood by Mr B. given the absence of an interpreter." 6

This passage appears in pleading notes submitted to the Regional Court of The Hague at a hearing held on 27 June 1994. 7

13. After having learned of this statement in May 1995, Mr W. filed a disciplinary complaint within the meaning of Article 46c of the Act on the Legal Profession (*Advocatenwet*) against the applicant to the Dean (*deken*) of the local Bar Association (*Orde van Advocaten*). He complained that the applicant's unfounded insinuations had tarnished his professional honour and good reputation, that the applicant had transgressed the limits of decency, and that the applicant had accused him obliquely of having committed perjury in drawing up the record concerned. 8

14. Following an exchange of correspondence, the Dean forwarded Mr W.'s complaint to the Disciplinary Council (*Raad van Discipline*) of The Hague. 9

15. In its decision of 1 July 1996, following adversarial proceedings, the Disciplinary Council rejected as unfounded the complaint that the applicant had, in veiled terms, accused Mr W. of perjury. It did, however, consider that the applicant, by contending that Mr W. had exerted unacceptable pressure on Mr B., had given a qualification that was not supported by any facts. It concluded that the applicant had thus transgressed the limits of acceptable behaviour and failed to observe the standards expected from a lawyer ("*... de grenzen van het toelaatbare overschreden en heeft hij in strijd gehandeld met hetgeen een behoorlijk advocaat betaamt*"). Noting the nature and the limited degree of seriousness of the applicant's conduct in question, the Disciplinary Council considered it sufficient to declare the complaint of Mr W. partially well-founded without imposing any sanction. 10

16. The applicant lodged an appeal with the Disciplinary Appeals Tribunal (*Hof van Discipline*). He submitted that Mr B. had not had the assistance of a lawyer before he signed his written statement despite having asked for a lawyer to be present, that no interpreter had been present at the interrogation, that Mr B. was a drug addict and had told him that pressure had been brought to bear. The applicant also pointed to a statement taken by the investigating judge (*rechter-commissaris*) from Mr B. on 5 December 1994, which was in the following terms: 11

"In reply to the question why I stated to the police that I had lived together with my ex-wife during the relevant period (...) I say that I was pressured during that interrogation. This pressure consisted of kicking against the table and kicking motions in my direction. I was also verbally abused. When it came to signing the statement I asked for the chief, but he was said to have already gone home. I then asked for a lawyer because I wanted an interpreter to come and read my statement to me. The police said, however, that no lawyer could come. So in the end I just signed that statement."

17. The applicant argued that in defending his client he should be free to conclude, as he had, that his client's confession could only have resulted from unacceptable pressure brought to bear by the investigating officer. It would then have been for the court to which this conclusion was presented to decide whether or not it was proven that such unacceptable pressure had in fact been exercised. It was however not for a disciplinary tribunal to find that a statement made at a trial in defence of his client was unacceptable because it had not been sufficiently verified. 12

18. In its decision of 26 May 1997, following adversarial proceedings, the Disciplinary Appeals Tribunal rejected the applicant's appeal and upheld the decision of 1 July 1996 in its entirety. 13

19. It noted that, in the civil proceedings involving Mr B., the allegation at issue had been made in the applicant's submissions during the first instance proceedings as well as in the proceedings on appeal before the Hague Regional Court (*arrondissementsrechtbank*) (in the latter proceedings in the course of a hearing held on 27 June 1994). It did not find it established that, at the material time, the applicant had in fact been informed by Mr B. that he found that unacceptable pressure had been exerted on him when Mr W. took his statement. It further noted that the applicant's contention had remained wholly unsubstantiated at the material time. 14

20. The Disciplinary Appeals Tribunal agreed with the Disciplinary Council that a lawyer was not permitted to express reproaches of the present kind without any factual support, which implied that a lawyer, prior to raising such allegations, must seek information from his client as to the circumstances constitutive of the unacceptable pressure allegedly exerted. 15

II. RELEVANT DOMESTIC LAW AND PRACTICE 16

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THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

26. The applicant complained that the decision of the Disciplinary Appeals Tribunal implied that, during trial proceedings, a lawyer was not allowed to conclude from facts known to him that unacceptable pressure had been exerted on his client. He alleged a violation of his right to freedom of expression, as guaranteed by Article 10 of the Convention, which, in relevant part, 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. ...

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 ... for the protection of the reputation or rights of others, ..."

The Government denied that this provision had been violated.

A. Existence of an interference

27. The Government argued that the applicant had not been subject to any "formalities, conditions, restrictions or penalties" of a nature to prevent him from adequately representing the interests of his client, Mr B. He had been able to make what statements he saw fit, including the statement that his client had been put under unacceptable pressure by the social security investigating officer. The Disciplinary Council and the Disciplinary Appeals Tribunal had merely found the applicant in violation of his duty to ensure that his statements had a proper basis in fact. They had not even imposed any sanction on the applicant.

28. The applicant submitted no argument on this point.

29. The Court acknowledges that no sanction was imposed on the applicant - not even the lightest sanction, a mere admonition. Nonetheless, the applicant was censured, that is, he was formally found at fault in that he had violated the applicable professional standards. This could have a discouraging effect on the applicant, in the sense that he might feel restricted in his choice of factual and legal arguments when defending his clients in future cases. It is therefore reasonable to consider that the applicant was made subject to a "formality" or a "restriction" on his freedom of expression. The Court would draw a parallel to its findings in the case of *Nikula v. Finland*, (no. 31611/96, 21 March 2002). In that case, the Finnish Supreme Court had in fact waived the sentence imposed on the applicant but this did not prevent the Court from finding that Article 10 was applicable (loc. cit., § 30).

30. It follows that the Court may make the same finding in the present case.

B. Whether Article 10 of the Convention has been violated

31. It was not in dispute that the decisions complained of were "prescribed by law" and that they were intended to protect "the reputation or rights of others". Discussion centred on whether they could be considered "necessary in a democratic society" in pursuit of the said legitimate aim.

32. The applicant, in his observations submitted at the admissibility stage, argued in the first place that his statement that Mr B. had been placed under unacceptable pressure had been based on objective circumstances and was supported by a statement made by Mr B. to the investigating judge. Consequently, the Disciplinary Appeals Tribunal ought not to have found the applicant at fault for the sole reason that he had not been able to quote his client's statement in support already when he first made the allegation in question.

33. More generally, he expressed the view that in a democratic State an advocate should be entitled, at all stages of proceedings, to make any argument possible based on information obtained from his client.

34. The Government, relying on *Peree v. the Netherlands* (dec.), no. 34328/96, replied that it was not the Court's task, in exercising its supervisory function, to take the place of the national authorities, but rather to review under Article 10 the decisions they had taken pursuant to their power of appreciation. They also prayed in aid *Wingerter v. Germany* (dec.), no. 43718/98, in which the Court had dismissed as manifestly ill-founded the complaint of a lawyer reprimanded for a statement in written appeal submissions dismissing judges, public prosecutors and lawyers in a particular locality

collectively as incompetent.

35. Turning to the facts of the case, the Court notes that the applicant was found to have committed a disciplinary offence by stating that his client had apparently been pressured by a police officer, Mr W., into signing a confession of wrongdoing. The confession in question had been obtained in a criminal investigation for social security fraud, and was relied on by the competent authorities in parallel civil proceedings for recovering from the applicant's client the moneys paid in excess of his entitlements. It was in these latter proceedings that the applicant made the impugned statement. 31

36. In its above-mentioned *Nikula* judgment, the Court stated the applicable principles as follows (*loc. cit.*, §§ 44-45, case-law references omitted): 32

"44. In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which she made them. In particular, it must determine whether the interference in question was 'proportionate to the legitimate aims pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. 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.

45. The Court reiterates that the special status of lawyers gives them a central position in the administration of justice as intermediaries between the public and the courts. Such a position explains the usual restrictions on the conduct of members of the Bar. Moreover, the courts - the guarantors of justice, whose role is fundamental in a State based on the rule of law - must enjoy public confidence. Regard being had to the key role of lawyers in this field, it is legitimate to expect them to contribute to the proper administration of justice, and thus to maintain public confidence therein (...)."

37. The special duties of lawyers led the Court to conclude in the same judgment that, in certain circumstances, an interference with counsel's freedom of expression in the course of a trial might raise an issue under Article 6 of the Convention with regard to the right of an accused client to receive a fair trial (*loc. cit.*, § 49). 33

38. Earlier, the Court pointed out that the special nature of the profession practised by members of the Bar must be considered. In their capacity as officers of the court they are not only subject to restrictions on their conduct, as pointed out in the *Nikula* judgment (see paragraph 36 above); they also benefit from exclusive rights and privileges which may vary from jurisdiction to jurisdiction - among them, usually, a certain latitude regarding arguments used in court - but their conduct must be discreet, honest and dignified (*Casado Coca v. Spain*, judgment of 24 February 1994, Series A no. 285-A, p. 19, § 46). 34

39. The Court notes that the applicant's criticism during the trial was aimed at the manner in which evidence was obtained by an investigating officer exercising his powers to interrogate the applicant's client in a criminal case and while the latter was in custody. As the Court has noted with reference to public prosecutors (see *Nikula*, cited above, § 50), the difference between the positions of an accused and an investigating officer calls for increased protection of statements whereby an accused criticises such an officer. This applies equally in this case, where the way in which such evidence was gathered was criticised in civil proceedings in which that evidence was to be used. 35

40. It is clear that the applicant's statement was of a nature to discredit a conscientious police officer such as Mr W. claimed to be. However, the Court reiterates in this context that the limits of acceptable criticism may in some circumstances be wider with regard to civil servants exercising their powers than in relation to private individuals (see *Nikula*, cited above, § 48). 36

41. Although it cannot be said that civil servants are deprived of all protection against offensive and abusive verbal attacks in relation to the exercise of their duties (cf. *Janowski v. Poland* [GC], no. 25716/94, § 33, ECHR 1999-I), it has to be taken into account that in the present case the criticism was strictly limited to Mr W.'s actions as an investigating officer in the case against the applicant's client, as distinct from criticism focusing on Mr W.'s general professional or other qualities. Moreover, the criticism was confined to the courtroom and did not amount to a personal insult. The applicant's submission was based on the fact, as apparent, that his client had not fully understood his incriminating statement, given the absence of an interpreter during the interrogation. The submission was entirely consistent with a later statement which the applicant's client made to the investigating judge on 5 December 1994 (see paragraph 16 above), and thus before Mr W. lodged his complaint against the applicant and before the Disciplinary Council and the Disciplinary Appeals Tribunal considered the case. 37

42. The Court notes in this context, firstly, that the domestic disciplinary authorities did not attempt to establish the truth or falsehood of the impugned statement and, secondly, that they do not at any time seem to have addressed the question whether it was made in good faith; in other words, the applicant's honesty in acting as he did was never called into question. 38

43. In these circumstances the Court is not convinced by the argument of the Disciplinary Appeals Tribunal that the mere fact that the applicant was able to cite information obtained from his client only after making the impugned statement made his action blameworthy. 39

44. It is true that no sanction was imposed on the applicant but, even so, the threat of an *ex post facto* review of his criticism with respect to the manner in which evidence was taken from his client is difficult to reconcile with his duty as an advocate to defend the interests of his clients and could have a "chilling effect" on the exercise of his professional duties (see, *mutatis mutandis*, *Nikula*, § 54). 40

45. In the Court's view, therefore, no sufficient reasons have been shown to exist for the interference in question. The restriction on the applicant's right to freedom of expression therefore fails to answer any "pressing social need". 41

46. There has accordingly been a violation of Article 10 of the Convention. 42

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION 43

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FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 10 of the Convention … 45