

HR-2015-2308-A

Instance	Supreme Court of Norway - Ruling
Date	20-11-2015
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Keywords	Criminal process. Protection of source. Documentary film.
Summary	<p>During investigation of a case concerning infringement of Section 147d of the Norwegian General Civil Penal Code of 1902 the police seized unpublished film material at a documentary film maker, cf. Section 197, second paragraph, second sentence of the Norwegian Criminal Procedure Act. The film maker was working on a film to depict why Norwegian citizens enlist as foreign fighters in Syria. The Supreme Court revoked the seizure. It would be possible for the material to reveal unidentified sources, so that Section 125 of the Criminal Procedure Act would apply. On consideration in accordance with Section 125, third paragraph, the Supreme Court upheld that important public interests warranted that the prosecuting authority have access to the material. On the other hand, it was shown how there was a particularly strong need for protection of sources, and that any doubt concerning the application of protection of sources should favour the protection of sources. On the basis of a weighing of interests and the broad protection set up by ECtHR for unpublished material that can reveal unidentified sources, there was no basis to set aside the protection of sources.</p> <p>References: The Norwegian Criminal Procedure Act (1981) Section 125, Section 197.</p>
Case process	Oslo District Court TOSLO-2015-95059 - Borgarting Court of Appeal LB-2015-108377 - HR-2015-2308-4, (case no. 2015/1462), criminal case, appeal against ruling.
Parties	A (Attorney Kim Gerdtts - proceeding) and Association of Norwegian Editors (intervener) (Attorney Vidar Strømme) versus the Norwegian Public Prosecution Authority (Chief Public Prosecutor Jan F. Glent).
Author	Ringnes, Webster, Stabel, Tønder, Skoghøy.
References in the text	The Norwegian General Civil Penal Code (1902), Section 147d, Section 49 the Norwegian Courts of Justice Act (1915), Section 5 the Norwegian Criminal Procedure Act (1981), Section 203, Section 204, Section 205, Section 387, Section 388 the Norwegian Human Rights Act (1999), ECHR A10 the Norwegian Dispute Act (2005) Section 15-7, Section 15-8, Section 22-11.

- (1) Judge **Ringnes**: The case concerns the protection of sources in accordance with Section 125 of the Norwegian Criminal Procedure Act and Article 10 of the European Convention on Human Rights (ECHR). The question is whether the seizure of film material from a documentary film maker by the Norwegian Police Security Service (PST) should be upheld.
- (2) In April 2015, PST initiated covert investigations to prevent several persons, including B, born on 0.0.1997 and C, born on 0.0.1985, from infringing Section 147d of the Norwegian General Civil Penal Code by taking part in a terror organisation and/or recruiting members of such a group. The investigation showed that B was increasingly more radicalised, and that he planned to travel to Syria.
- (3) Via the preventive investigation, PST was also aware that A was working on a film on extreme Islamism and the recruitment of foreign fighters, and that in this regard film recordings were being made in which B and C participated. A, who heads the production company X AS, is a well-known Norwegian film maker, who among other things has directed and produced documentary and feature films about the Norwegian immigrant environment. The film photographer was D, who is also a journalist.
- (4) On 7 June 2015, B travelled to Gothenburg in a car owned by X AS. D and C were in the car. On the following morning, 8 June, B was arrested at Landvetter airport outside Gothenburg, when he was about to travel to Syria. He was charged with infringement of Section 147d, cf. Section 49, of the Norwegian General Civil Penal Code and taken into custody. The charge was that B was attempting to join the ISIS terror organisation, and that he had acquired various equipment for this purpose. C is also charged.
- (5) On Monday, 8 June 2015, at around 17:00 hours, via surveillance of communication PST monitored that C called D. In this conversation, C asked D to look after his "things, memory sticks, and so on ... give it to A or someone". In a later telephone conversation on the same day, C also said that "they must not get hold of these things there". PST interpreted this to mean that the memory sticks held important evidence in the criminal case against B, and probably also important information about C's role in B's attempt to travel to Syria. PST suspected that the memory sticks were held by A and believed that there was a risk of loss of evidence.
- (6) On this basis, on the same day, the head of the Norwegian national Public Prosecuting Authority decided to search the home of A, where his film studio was also located. This decision was taken under Section 197, second paragraph, second sentence of the Norwegian Criminal Procedure Act, which gives access to search editorial premises or the equivalent without waiting for a court decision, if it is likely that the investigation would otherwise be substantially impaired.
- (7) The decision concerning the search was related to the charges against B and concerned "information of significance as evidence".
- (8) The search and seizure took place at A on the evening of 8 June 2015. A himself found and handed over memory sticks and a hard disc with all of the recordings concerning B, and for this reason the police did not search A's storage media. A received permission from PST to keep a copy of the material, and was thus not prevented from continuing to work on the film. The material that was seized constitutes six to eight hours of recording, and is therefore only a small part of the overall film material comprising around 400 hours of recording. On the next day, the seized material was sealed and handed over to the District Court. It was not reviewed by PST.
- (9) On 9 June 2015, PST made a request to the Oslo District Court to maintain the seizure pursuant to Section 205, third sentence of the Norwegian Criminal Procedure Act, cf. Section 203 and Section 204. A contested the seizure.

- (10) On 26 June 2015, the Oslo District Court ruled as follows:
1. The police's petition to maintain the seizure from A is upheld.
 2. As the costs in the case the State, represented by the Ministry of Justice, will pay A 83,581.25 - eighty three thousand five hundred and eighty one - Norwegian kroner and 25 - twenty five - øre, within 2 - two - weeks from the promulgation of this ruling, with the addition of the ordinary late payment interest from the expiry of the deadline for fulfilment until payment takes place."
- (11) The District Court stated that A, as a documentary film maker, is a person who can invoke protection of sources in accordance with Section 125 of the Norwegian Criminal Procedure Act. The District Court upheld, however, that the seized recordings solely concern sources known to PST and that for this reason Section 125 could not be applied. The District Court also concluded that in this case Article 10 of ECHR could not provide protection of unpublished material that does not identify unknown sources.
- (12) A appealed to the Borgarting Court of Appeal. The Association of Norwegian Editors submitted a written intervention petition to the Court of Appeal in accordance with an analogy from Section 15-8, first paragraph, of the Norwegian Dispute Act.
- (13) On 17 July 2015, the Court of Appeal gave its ruling [LB-2015 -108377] with this conclusion:
- "The appeal is refused."
- (14) For the Court of Appeal it was not contested that A falls within the group of persons who are protected in accordance with Section 125. The Court of Appeal reviewed most of the seized material and noted that small film sequences show a couple of unidentified persons, and that the material would be able to reveal unidentified sources. The actual circumstances of the case were therefore different than for the District Court, and Section 125 in principle prevented seizure. After an overall assessment the Court of Appeal nonetheless concluded that "subject to significant doubt" there was a basis to make an exception from the protection of sources.
- (15) A appealed to the Norwegian Supreme Court. The appeal concerned the application of the law and the consideration of the case. The Association of Norwegian Editors has declared representative intervention assistance to a party by analogy with Section 15-7, first paragraph, item b of the Norwegian Dispute Act.
- (16) The Supreme Court's appeals committee has decided that the appeal in its entirety will be decided by a division of the Supreme Court with five judges, and that a verbal procedure will be held, cf. Section 5, first paragraph, second sentence of the Norwegian Courts of Justice Act and Section 387 of the Norwegian Criminal Procedure Act.
- (17) C - who was not a party covered by the ruling of the Court of Appeal - also appealed the ruling to the Supreme Court. In the Supreme Court's appeal committee's ruling of 18 September 2015 [HR-2015-1909-U] this appeal was refused.
- (18) The appealing party - A - has, in brief terms, stated:
- (19) A's film project is to illustrate why Norwegian citizens allow themselves to be enlisted as foreign fighters in Syria and for ISIS. This concerns a closed environment, and his access to the sources is based on trust. This requires effective protection of sources.
- (20) The Court of Appeal's ruling is incorrect because the court did not assess the legality of the seizure in accordance with Section 125, third paragraph, second sentence. According to this provision, the protection of sources is virtually absolute, cf. Rt-2004-1400.
- (21) The Court of Appeal's assessment in accordance with Section 125, third paragraph, first sentence is incorrect.
- (22) It is not contested that important public interests warrant that the information is given, cf. the first basic term of the legal clause. The second basic term is not fulfilled, however, since

- the Court of Appeal's grounds state that the information is not decisive to the clarification of the case. PST also has a number of other vehicles of evidence available, and the investigation was not discontinued when the seizure was made.
- (23) In the overall assessment to be performed in accordance with Section 125, third paragraph, it is central that A's work is of important public interest. As a consequence of the seizure, A has lost access to the sources, and the seizure has therefore actually had the negative consequence which the protection of sources is intended to counteract.
- (24) The Court of Appeal has found that the seized material contains the identities of unknown sources. This in itself is decisive. But also known sources may be protected under Section 125 and Article 10 of ECHR. This applies especially if the identities have been revealed during the investigation and the source has not come forward voluntarily. The protection of sources under Article 10 of ECHR also applies to unpublished material.
- (25) The prosecuting authority's subsidiary claim of separation cannot be upheld as it must be assumed that it will not be possible to separate the elements which concern known sources without also risking revealing the identities of unknown sources.
- (26) A furthermore supports the submissions from the Association of Norwegian Editors.
- (27) A has made the following claims:
 "Principal: The seizure made at A must be withdrawn.
 Subsidiary: The Court of Appeal's ruling must be set aside.
 In all instances: A is awarded the costs in the case before the Court of Appeal and the Supreme Court."
- (28) The intervening party - the *Association of Norwegian Editors* - has, in brief, stated:
- (29) The Association of Norwegian Editors supports the submissions by A. It is also submitted that:
- (30) Section 125, third paragraph, of the Norwegian Criminal Procedure Act must be applied in line with the practice of the European Court of Human Rights (ECtHR) and the recommendations of the Committee of Ministers of the Council of Europe. On this basis, the protection of sources in accordance with Article 10 of ECHR has been extended in recent years. According to ECtHR's practice, the vital aspect is the real effect of disclosure and the real need for the protection of freedom of expression. The protection is not limited to unknown sources. Unpublished material is also protected, cf. *inter alia* ECtHR's ruling of 8 December 2005 in *Nordisk Film & TV A/S versus Denmark* [ECtHR-2002-40485] and the Grand Chamber ruling of 14 September 2010 in *Sanoma Uitgevers B.V. versus the Netherlands* [ECtHR-2003-38224-2]. When unpublished material may reveal other possible sources, the protection of sources applies, cf. ECtHR's ruling of 18 April 2013 in *Saint-Paul Luxembourg S.A. versus Luxembourg* [ECtHR-2010-26419] and ruling of 16 July 2013 in *Nagla versus Latvia* [ECtHR-2010-73469].
- (31) For the Association of Norwegian Editors it is significant that this concerns the seizure of unpublished material during a broadly based search without any specification of what was being looked for, and that the search took place in editorial premises. This is very alarming, and a new practice by the police, which has a "chilling effect" for journalists' access to information, and has the mark of prior censorship.
- (32) It is also significant that sources expose themselves to special danger if they are not ensured full anonymity when they describe terror, the recruitment of foreign fighters and the violent activities of individual persons. This advocates an especially high threshold for exemption from the protection of sources.
- (33) The Association of Norwegian Editors has made the following claim
 "1. The claim made by A is acceded to.

2. The Association of Norwegian Editors is awarded the costs in the case before the Supreme Court.”

(34)The *Prosecuting Authority* has stated, in brief:

(35)The Court of Appeal has made a correct weighing in accordance with Section 125, third paragraph of the Norwegian Criminal Procedure Act, and the ruling is in accordance with the guidelines given in Rt. 2013-1290 and by ECtHR.

(36)The case is very unusual and relates to matters which are significantly more serious than has been the situation in previous protection of source cases before the Supreme Court. Terror organisations are assessed to be a major threat to society's security and democratic values. Involvement in and recruitment for a terror organisation is an activity that is particularly dangerous to society. The Appendix to Recommendation No. R (2000) 7 from the Committee of Ministers of the Council of Europe states that "crimes against national security" are considered to be "major crime" that may justify revealing a journalist's source.

(37)It must be upheld that the information concerning the recordings will make significant contributions to the investigation, cf. the Court of Appeal's statement that the film recordings can give PST "very important clues". This concerns unique information that it is not possible to obtain via interrogation or other investigation. The condition in Section 125, third paragraph, that the evidence must be of vital significance to the clarification of the case is thereby fulfilled.

(38)In the overall assessment in accordance with Section 125, third paragraph, it is furthermore of central importance that most of the sources are known to PST. It is not significant that this knowledge has been obtained via investigation. The fact that the sources are known is decisive to the subsidiary claim concerning the separation of the material, but is also significant to the assessment of whether the unknown sources to which the Court of Appeal refers must be protected. The protection in accordance with Section 125 does not apply to unknown sources, cf. Rt-2011-1266.

(39)The source's own circumstances also play a central role. The film recordings are related to the criminal circumstances of the sources - the accused - and the protection of sources is thus weaker than the protection that applies to a source who provides information concerning other persons' circumstances that are worthy of criticism.

(40)There is no basis to criticise the search, as it took place on a secure and considerate basis, and A handed over the material voluntarily. The Association of Norwegian Editors is over-dramatising the case when it states that the search of the film studio indicates a new practice in terms of searches of editorial premises. The criminal case is very special and very serious and the search and the seizure were necessary in order to facilitate the investigation.

(41)On assessment of whether PST's seizure has a "chilling effect" for journalists' access to information, it is significant that PST's review of the material cannot take place until after the courts have considered the seizure. This gives security for the sources, to which ECtHR also gives weight. The purpose of the search was not to reveal the sources, and the seizure was specific and concentrated.

(42)The communication surveillance of the telephone conversation between C and D on 8 June 2015 shows unfortunate involvement and confusion of roles on the part of D. He does not act as an impartial and independent journalist at a distance from the sources, and the protection of sources is weaker if the journalist does not perform his or her tasks on a professional and credible basis.

(43)The prosecuting authority contests that the matter is subject to Section 125, third paragraph, second sentence. The criteria of being "revealed" is not fulfilled when the information was known to the police.

- (44) Subsidiarily, PST submits that the seizure must only be cancelled for the elements which concern covert sources. An approach of this type was indicated by ECtHR in the Nordisk Film case, and can also be practised in this case.
- (45) The prosecuting authority has made the following claims:
 "Principal: The appeal must be refused.
 Subsidiary: The Police Security Service's petition to maintain the seizure at A must be sustained, with the exception of the part of the material which reveals or identifies unknown sources."
- (46) **My view of the case**
- (47) In accordance with Section 388, first paragraph, item four of the Norwegian Criminal Procedure Act, the Supreme Court holds full authority. The parties have agreed, however, that on deciding the question of seizure the Supreme Court must uphold the Court of Appeal's description of the content of the material.
- (48) Section 125, first paragraph, of the Norwegian Criminal Procedure Act gives the editor of a printed publication the right to refuse to disclose the source of the information in an article, or the source of other information entrusted to him or her. According to the fifth paragraph of the provision, the protection of sources likewise applies to employees of another media enterprise which in general terms has the same purpose as newspapers and broadcasting.
- (49) It is not contested that A's film project is subject to this purpose, and that A is included in the group of persons protected under the section of the Act. I am in agreement with this.
- (50) Section 125 likewise applies to the right of seizure in accordance with Section 203, cf. Section 204, of the Norwegian Criminal Procedure Act. I can also state that Section 22-11 of the Norwegian Dispute Act includes a parallel provision for civil cases.
- (51) The central question in the case is whether the Court of Appeal's weighing of the various considerations in Section 125, third paragraph, of the Norwegian Criminal Procedure Act is correct, against the background that the seized film will be able to reveal unidentified sources.
- (52) However, the case also raises the question of whether the protection of sources gives protection from search and seizure of unpublished journalistic material in the form of notes, sound recordings and film that have not been edited in order to anonymise sources. Before considering the weighing in accordance with Section 125, third paragraph, I would like to say something about this.
- (53) In Norwegian legal practice it has been upheld that Section 125 of the Norwegian Criminal Procedure Act does not protect the content of the information obtained by the journalist, but solely gives the right to refuse the issue and seizure of journalistic material if it can directly or indirectly reveal the sources used by the journalist. I hereby refer to the Supreme Court's Appeals Committee's decisions in Rt-1996-1375, Rt-1997-1734 and Rt-1999-532. In Rt-2011-1266, the majority upheld that a journalist cannot refuse to make a statement concerning the contact with a source who was publicly known after the source himself or herself has come forward. The majority furthermore upheld that the same must probably apply when it has been established who the source is on another basis, without reasonable doubt. The case has been appealed to ECtHR and the appeal has not yet been decided.
- (54) According to ECtHR's practice, Article 10 of ECHR - which *inter alia* protects the freedom of the press - gives a rather wider framework for the protection of journalistic material, since according to this provision the protection of sources is not limited to protection from identifying the source by name, picture or other personal identification. If the journalist's sources can be revealed, the protection according to Article 10 of ECHR also includes unedited and unpublished material, such as raw film recordings. In Appendix to Recommendation No. R (2000) 7 from the Committee of Ministers of the Council of Europe,

Article 1, it is stated that the protection of sources concerns "the right of journalists not to disclose information identifying a source". Subject to the condition that the information "is likely to lead to the identification of a source" the protection of sources also includes "the factual circumstances of acquiring information from a source by a journalist" and "the unpublished content of the information provided by a source to a journalist". In the ruling of 16 July 2013 in *Nagla versus Latvia* [ECtHR-2010-73469], section 81, ECtHR refers to this recommendation. The central aspect regarding the extent of the protection of source, according to ECtHR's practice is, as I understand it, whether the seizure can have a dampening - and thereby detrimental - effect on the press's access to sources.

- (55) PST has stated that the search and seizure were not intended to reveal A's sources. This is not decisive, however, see ECtHR's Grand Chamber ruling of 14 September 2010 in *Sanoma Uitgevers B.V. versus the Netherlands* [ECtHR-2003-38224-2], section 66. As maintained in section 72 of this ruling, it can just as well concern "an order for the compulsory surrender of journalistic material which contained information capable of identifying journalistic sources". According to ECtHR's practice, search and seizure are considered to be a more drastic measure than a requirement to disclose the name of a source, because in this way the police can obtain access to all of the documentation held by the journalist. I refer in particular to the ruling of 18 April 2013 *Saint-Paul Luxembourg S.A. versus Luxembourg* [ECtHR-2010-26419], section 54, in which ECtHR states: "The Court notes that the case file does not indicate that any sources were found other than those already published in the article. Nevertheless, in the light of the Court's understanding of information likely to identify a source, and in view of the extent of the power bestowed by the search on the authorities searching the registered office of the applicant company, the Court considers that in the present case the police officers were capable, thanks to the warrant in issue, of accessing information which the journalist did not wish to publish and which was liable to disclose the identities of other sources."
- (56) This statement also shows that it is not decisive whether the material actually contains information about the source, if the decision to search was drawn up so that the seizure could have revealed the journalist's sources.
- (57) According to ECtHR's practice, in special cases unpublished material that does not contain information that might lead to a source's identity being revealed may also enjoy a certain degree of protection. In this respect the ruling of 8 December 2005 in *Nordisk Film & TV A/S versus Denmark* [ECtHR-2002-40485] is of central importance. This concerned an unedited film recording which identified a person who had been filmed without their knowledge, and who thus did not appear as a source. ECtHR determined that even though the material did not contain details of sources, and the identity of the suspect was known to the police, the actual duty of disclosure could have detrimental effects - a "chilling effect" for the freedom of the press. In a situation like this, however, the protection is weaker than the traditional protection of sources.
- "On the other hand, the Court is not convinced that the degree of protection under Article 10 of the Convention to be applied in a situation like the present one can reach the same level as that afforded to journalists, when it comes to their right to keep their sources confidential, notably because the latter protection is two-fold, relating not only to the journalist, but also and in particular to the source who volunteers to assist the press in informing the public about matters of public interest."
- (58) ECtHR concluded in this respect that the Danish Supreme Court had made a responsible assessment of proportionality in accordance with Article 10, no. 2 by limiting the disclosure to the elements that could not identify traditional sources.

- (59) In the present case, the Court of Appeal has noted that the raw film seized might reveal unidentified sources. There is thus no doubt that Section 125 will apply and it is not necessary to further consider how far Article 10 of ECHR protects unpublished material.
- (60) Whether the seizure should be maintained must be assessed according to Section 125, third paragraph, of the Norwegian Criminal Procedure Act, which states:
 "When information should be disclosed due to important public interests and the information is of vital significance to the clarification of the case, based on an overall assessment the court may nonetheless require the witness to disclose the name. If the author or the source has revealed matters that it was in the public interest to disclose, the witness can only be required to disclose the name when this is particularly necessary."
- (61) I find it to be clear that important public interests indicate that the prosecuting authority should have access to the material. This is not contested by A either. The police investigation of recruitment for and participation in terror organisations is necessary in order to ensure the security of society and to prevent vulnerable young people from becoming involved in acts of war.
- (62) Based on the Court of Appeal's description of the significance as evidence of the seized material, on the other hand, I find it hard to see that the condition that the seized material must be "of vital significance to the clarification of the case" is fulfilled.
- (63) According to the preparatory work - NOU 1988:2, page 18 - the information concerning the source's identity must be of vital significance "to resolving the actual case". As stated by Aarli in the article "*Massemedienes kildevern*" (The mass media's protection of sources), included in "*Bevis i straffesaker – utvalgte emner*" (Evidence in criminal cases - selected topics) (2015), page 436, this must concern vital information that cannot be obtained in any other practical way. Concerning legal practice I refer in particular to Rt-2010-1381, section 50 and Rt 2013-1290, section 24.
- (64) Concerning the assessment of evidence the Court of Appeal states:
 "With regard to the film recording showing the car journey from Oslo to Gothenburg, in the view of the Court of Appeal it is uncertain how much PST will get out of this. The Court of Appeal nonetheless assumes that there might be matters in this part of the material that would give PST valuable information, especially when this film recording is seen in the light of film recordings made prior to the journey to Gothenburg, including recordings showing B's equipment and interview with him. Based on the information stated in document 04,04 - especially page 6 - the Court of Appeal believes that the film recordings mentioned here can give PST very valuable clues."
- (65) Even though in the view of the Court of Appeal the seized material "can give PST very valuable clues" in my view the Court of Appeal assumes a threshold which is too low for the seizure to be accepted when it also states that "it is uncertain how much PST will get out of" the film recording showing the car journey from Oslo to Gothenburg.
- (66) It can also be seen that the Court of Appeal has been in doubt concerning the value of the information to the investigation. Since in my view access to the seizure must be refused in any circumstances in accordance with the overall evaluation that must be made pursuant to Section 125, third paragraph, first sentence, I do not find it necessary to further consider the Court of Appeal's assessment of the significance of the seized material as evidence.
- (67) If the basic terms in Section 125, third paragraph, of the Norwegian Criminal Procedure Act to make an exemption from the protection of sources are fulfilled, the various interests must be weighed, and the assessment must be made in accordance with Article 10 of ECHR and ECtRH's practice. Here, I refer solely to Rt-2013-1290, sections 25 to 27, which describe the guidelines drawn up by ECtRH. The key aspect is that the protection of sources can only be waived if there is "an overriding requirement in the public interest". In Rt-2004-

1400, section 46, it was stated that if the information given by the source is of importance to the public interest, the protection of sources is "to a large extent [...] absolute". If the case concerns serious crime, however, there can be reason to make an exemption from the protection of sources, cf. Rt-2013-1290, section 32, which states:

"On the other hand there is reason to note the Appendix to Recommendation No. R (2000) 7 'Principles concerning the right of journalists not to disclose their sources of information' from the Committee of Ministers of the Council of Europe. Under the item 'Limits to the right of non-disclosure' it is stated that in the case of the 'prevention of major crime', the protection of sources may have to be waived. Examples of crimes that fall under 'major crime' are stated to be 'murder, manslaughter, severe bodily injury, crimes against national security, or serious organised crime'. If such crimes can be prevented, this might 'possibly justify the disclosure of a journalist's source'. [...]"

- (68) Crimes under anti-terror legislation fall within this list. In the concrete assessment of whether exemptions must be made from the protection of sources, it must on the other hand also be taken into consideration that sources of information concerning such activities might expose themselves to particularly great danger if their identity were to become known.
- (69) The object of A's film project is to show what motivates Norwegian citizens to go to war in Syria and how C and his fellow believers in the Prophet's Ummah communicate with fellow believers. A has stated that the film is to give insights into the terror organisation Islamic State and its attempts to Islamise the world. I can state that the film project receives financial support from the Norwegian Film Institute and Fritt Ord.
- (70) In my view, A's film project is at the heart of investigative journalism; it addresses a central and urgent problem in society about which the general public and authorities have a need for knowledge and insight. The investigations were possible because A has special access, based on trust, to a closed Islamic environment. I must assume that effective protection of sources is vital to achieving the film. As far as I understand, as a consequence of the police's search and seizure, the sources have withdrawn.
- (71) On this basis an especially strong need to protect sources exists. Considerations relating to the investigation of such a serious matter also carry great weight. However, the police have a number of investigation methods available in cases such as this one, and it is unclear how necessary the information in the seized film material is to the investigation. Another aspect of the overall assessment is that B's journey to Syria was prevented when the search took place.
- (72) The Court of Appeal was in considerable doubt as to whether the protection of sources should be waived. This doubt should, however, be to the benefit of the protection of the source, see Ot.prp. (parliamentary bill) no. 55 (1997-1998), page 25, which states:
"In cases of doubt which may be decided by the courts, a primary viewpoint - in line with the basic idea behind the protection of a source - should be that serious doubt must result in not being made subject to a duty to testify, rather than the opposite."
- (73) PST has stated that there has been an unfortunate confusion of roles between journalist and source, and that photographer D did not exercise the required distance and objectivity in relation to the sources.
- (74) According to ECtHR's practice it is of significance to the proportionality assessment whether the journalist has shown the required objectivity. I refer to the ruling of 22 November 2012 in *Telegraaf Media Nederland Landelijke Media B.V. et al. versus the Netherlands* [ECtHR-2006-39315-21], section 126, which states:
"Under the terms of Article 10, Section 2, the exercise of freedom of expression carries with it duties and responsibilities which also apply to the press. Article 10 protects a journalist's

right - and duty - to impart information on matters of public interest provided that he is acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism..."

- (75) In this respect reference can also be made to the ruling of 27 May 2014 in *Stichting Ostade Blade versus the Netherlands*, which states that the protection of sources is weaker when a person, under cover of anonymity, uses the press as a vehicle to achieve publicity for his or her own crimes.
- (76) PST's submission relates to a telephone conversation between C and D in which D makes statements which indicate that he is reassuring C that compromising statements will be removed. As it stands, the content of the conversation may indicate that D does not fulfil the journalistic requirements justifying strict protection of sources. The statements were, however, made in a special situation. The conversation can also be understood to reflect the relationship of trust between the journalist and the source, which is a precondition for information of a particularly sensitive nature to be revealed. The prosecuting authority has not submitted anything to indicate that this was not the case. I therefore find no reason to give decisive weight to what D expresses in the conversation.
- (77) PST has furthermore stated that weight must be given to the fact that B and C are charged in the case. I cannot see that this is of any significance. It is correct that it may be of significance whether the source acts unlawfully or in a way that can be criticised when information is given. Yet this in itself will not be decisive, and this case concerns a different situation. I refer to Rt-2013-1290, section 30.
- (78) I have previously described how ECtHR sets up broad protection for unpublished material that may reveal unidentified sources. On this basis, as well as the weighing of interests that I have made, I have concluded that there is no basis for the protection of sources to be waived in accordance with Section 125, paragraph three, first sentence.
- (79) The parties have disagreed as to whether Section 125, paragraph three, second sentence will be applied. Since this provision solely provides a guideline for the weighing of interests in accordance with the first sentence, I do not find it necessary to consider it. Even though the terms in Section 125, paragraph three, second sentence are not fulfilled, the threshold for exemptions from the protection of sources will increase with the importance to society of the journalist's work, cf. Rt-2004-1400, section 46.
- (80) It remains to consider the prosecuting authority's subsidiary claim that the material must be separated so that PST has access to the elements that solely concern the known sources.
- (81) In my view this claim cannot be upheld. The extent of the protection of sources in accordance with Article 10 of ECHR in a case like this one is unclear, and must depend on concrete assessment. The precondition for B's involvement in the film recordings was that he was to be anonymous. The fact that his identity was known to PST was solely due to the investigation. The considerations on which the protection of sources is based also require restraint towards accepting seizure in such a situation. In this respect I refer to what I have said about the protection for unpublished material in accordance with Article 10 of EHRC. In this regard I furthermore give weight to how this concerns film recordings where what is said may reveal other sources, and that it must be assumed to be difficult to make a separation. As I have previously pointed out, the value of the material as evidence is also uncertain.
- (82) On this basis I have determined that the seizure must be set aside.
- (83) In the ruling of the District Court A was awarded the costs in the case before the District Court. Before the Supreme Court A has free legal representation. By analogy with the rules of the Norwegian Dispute Act he has required the costs before the Court of Appeal to be

covered. These costs amount to NOK 57,235 including value added tax. I find that the claim must be upheld.

(84)The Association of Norwegian Editors has claimed NOK 431,466 as the costs in the case before the Supreme Court, including value added tax, of which NOK 300,000 is legal fees. This claim must also be upheld.

(85)I vote for this

ruling:

1. The seizure at A's premises is cancelled.

2. As the costs in the case before the Court of Appeal, the State, represented by the Ministry of Justice and Public Security, will pay A NOK 57,235 - fifty seven thousand two hundred and thirty five - Norwegian kroner within 2 - two - weeks of the promulgation of this ruling.

3. As the costs in the case before the Supreme Court, the State, represented by the Ministry of Justice and Public Security, will pay the Association of Norwegian Editors 431,466 - four hundred and thirty one thousand four hundred and sixty six - Norwegian kroner within two - 2 - weeks of the promulgation of this ruling.

(86)Judge **Webster**: I am essentially and in the result in agreement with the first voter.

(87)Judge **Stabel**: Likewise.

(88)Judge **Tønder**: Likewise.

(89)Judge **Skoghøy**: Likewise.

(90)After voting the Supreme Court pronounced the following

ruling:

1. The seizure at A's premises is cancelled.

2. As the costs in the case before the Court of Appeal, the State, represented by the Ministry of Justice and Public Security, will pay A NOK 57,235 - fifty seven thousand two hundred and thirty five - Norwegian kroner within 2 - two - weeks of the promulgation of this ruling.

3. As the costs in the case before the Supreme Court, the State, represented by the Ministry of Justice and Public Security, will pay the Association of Norwegian Editors 431,466 - four hundred and thirty one thousand four hundred and sixty six - Norwegian kroner within two - 2 - weeks of the promulgation of this ruling.