

Unofficial translation of the verdict in the ruling Bahlbi vs. Van Reisen (appeal)

Court of Amsterdam

Department of civil rights and tax law, team I

Case number: 200.190.740/01

Case number court Amsterdam: C/13/596714 KG ZA 15-1352

Judgment of the civil judge panel of 12 December 2017

Regarding

Meseret Bahbli

[personal details omitted]

Lawyer: K. Kasem in Amsterdam

vs

Mirjam van Reisen

[personal details omitted]

Lawyer: C. Wildeman in Amsterdam

1. The appeal case

The parties will hereafter be referred to as Bahlbi and Van Reisen.

At the summons of 3 March 2016, Bahbli appealed against the ruling of the preliminary relief court of Amsterdam of 10 February 2016, on the preliminary injunction under the case number above against Bahlbi as plaintiff and Van Reisen as defendant.

The parties have submitted the following documents:

- Statement of grievances, including productions
- Statement of reply, including productions

The Parties pleaded their case through their lawyers identified above at court proceedings on 20 September 2017. Bahlbi was additionally represented by lawyer R.P. de Vries and Van Reisen by E.W. Jurjens, both lawyers in Amsterdam, all through the written pleadings that were submitted. On the side of Van Reisen, additional productions numbered 122 until 126 were submitted.

Finally, judgment was asked for.

Bahlbi asked that the court nullify the previous ruling and award his claims, with the conviction of Van Reisen to pay the costs of the court proceedings for both parties, provisionally enforceable where possible.

Van Reisen has asked, in essence, that the court upholds the ruling of the preliminary relief court and – provisionally enforceable – convicts Bahlbi to pay the costs of the appeal, including subsequent costs.

2. Facts

The preliminary relief judge summed up the facts that were considered in the judgement of the case in the ruling under point 2.1 to 2.5. Regarding grievance 2 Bahlbi alleges that the preliminary relief judge wrongly ignored that in the consideration of facts Van Reisen is the director of EEPA, a lobby organization that advocates, according to him, for the isolation of Eritrea and 'regime change' in the country. However, Bahlbi has not explained why this is of importance in the case at hand, so the court will not take this into consideration. In relation to this grievance Bahlbi had also pointed out that he is engaged in a 'writing war' with Van Reisen concerning Eritrea. The court will include this statement with the judgment of grievances 3 to 8. The facts established in the ruling have not been disputed further, so they will serve as the point of departure for the court. The facts, summarized and where needed supplemented by other facts that follow from the non-disputed statements of parties or the not (sufficiently) disputed content of productions that the parties refer to in their statements, are in essence the following:

2.1 Bahlbi was the chair of YPFDJ Netherlands (Young People's Front for Democracy & Justice) from 2012 until 7 April 2016. His brother and sister are employed as interpreters. They were associated in this capacity with the Immigration and Naturalisation Service (IND). The family of Bahlbi is originally from Eritrea.

2.2 Van Reisen is associated with Tilburg University as Professor of International Responsibility. Besides this she is – among other things – board member of the Advisory Council on International Affairs (AIV), the organization that advises the government and the States General on foreign policy.

2.3 On 21 May 2015, the website Oneworld.nl published an article by Sanne Terlingen that contained among other things the following:

'The Immigration service IND still employs interpreters that are linked to the dictatorial Eritrean regime. This is what sources within the Eritrean community have told OneWorld. This despite two integrity investigations that IND had done last year.

(...)

Among others, the brother and sister of the chair of the YPFDJ Holland (the youth department of Eritrea's only political party) are reportedly still interpreting for the IND. They are hired by the IND to translate conversations that the Eritrean refugees hold in order to be granted asylum in the Netherlands. This is contrary to the interpreter's code of conduct formulated by the services. This code provides: 'Neither you, nor your family in first or second degree are (or have been) involved with a regime with which foreigners claim to have experienced problems.'

Interpreters form a crucial pivot in the criminal activities and human trafficking conducted by the Eritrean military dictatorship.

Mirjam van Reisen, professor International Responsibility at the University of Tilburg and specialized in Eritrean human trafficking, finds it very worrying that the IND works with such interpreters. "Many Eritrean asylum seekers are immensely traumatised. When they discover that the interpreters are linked to the regime they fled from, this undermines their trust in protection from the Dutch authorities. In addition, it arouses fear. The interpreters get sensitive information about the asylum seekers through the interviews that they translate. With this information, they may threaten or extort these refugees. Relatives in Eritrea may also be threatened." According to Van Reisen, interpreters form "a crucial pivot in the criminal activities and human trafficking of the Eritrean military dictatorship." She therefore

deems it “absolutely necessary” that the IND and affiliated organisations make all the efforts necessary to “exclude the possibility that interpreters are linked to the Eritrean regime and forward information to organs of this regime, among which the Embassy and churches.”

(...)

Professor van Reizen, specialised in Eritrean human trafficking, believes the rule that first and second degree family members of regime-supporters are not supposed to interpret exists with good reasons. Members of a single (Eritrean) family are - socially and by the military regime - held accountable for one another's opinions and behaviour. Therefore, they often act from the same political framework. If they do not, this is known in the community. “The brother of the president of the YPFDJ Holland is not known as someone who is independent of the regime”, says van Reizen, “And even when someone claims to be independent of the regime, caution is still needed. Infiltration occurs, also within families.”

According to Van Reizen, it is known that the European centre of Eritrean intelligence is located in the Netherlands and that this is linked to the Embassy of Eritrea. “The youth organisation YPFDJ and the churches in Almere and Rotterdam are also connected to the regime. It is probable that this brother and sister report to the PFDJ-intelligence (possibly coerced). It is therefore surprising that they are still interpreting for the IND; thus, there exists a risk that information on the refugees will end up in the hands of the intelligence system of the Eritrean regime. Refugees and their relatives are endangered by this.

2.4 Following the previously cited article on Oneworld.nl, Van Reizen was interviewed by Roelof Hermen (following in the transcript: RH) on BNR Nieuwsradio on 21 May 2015. The interview lasted approximately two minutes. A transcription of this interview is shown below.

[RH] Interpreters connected to the dictatorial regime of Eritrea are working at the Immigration and Integration Service; this follows from an investigation of the Magazine OneWorld, a magazine about international cooperation. Worrying, says Mirjam van Reizen, professor International Responsibility at the University of Tilburg. Ms Van Reizen, let us first look at the facts and how certain it is that those interpreters at the IND are indeed connected to the regime from which the people for whom they interpret are fleeing.

[Van Reizen] Good afternoon ehm the article in OneWorld does not say that it can be stated with certainty that this is so, but it also does not say that this can be excluded and that there are strong indications that information is being passed along.

[RH] And what kind of people are those, what did those interpreters do when they were still working in Eritrea for this regime.

[Van Reizen] Ehm it is not so that these people eh were excluded in Eritrea, they are people that have been in the Netherlands for a long time, of whom the brother of the two people in question is the pivot of the intelligence services of Eritrea, the centre of which is located in the Netherlands and this is a known given and a fact.

[RH] And what does this mean for the people for whom they interpret, the refugees from Eritrea.

[Van Reizen] Yes you know ehm Eritrea, the intelligence, has a very extended network of informants which works with extortion eh and threats and which controls the groups so it would indeed be shocking facts if this were true and, yes, we also know that in practice, there are concerns about interpreters that are not translating correctly.

[RH] The IND apparently does not think that this business is a big problem they have done a review and see no reason for action, are you in agreement with this? I suspect not.

[Van Reizen] No I am not in agreement with that. I think that the IND is keeping to its own rules but the

question that should be raised is if those rules are adequate for the context of the Eritrean group and I think this is not the case.

[RH] Thank you Mirjam van Reisen, professor International Responsibility at the University of Tilburg.'

2.5 On 23 May 2015, Bahlbi filed a report with the police against Van Reisen and Terlingen for libel and slander. On this same day, Bahlbi placed a notification on his Facebook page on the topic of the interview on BNR Nieuwsradio with Van Reisen, containing a link to the interview. The notification of Bahlbi reads as follows:

Today, anyhow, I filed a police report against Mirjam van Reisen and Sanne Terlingen for libel and slander. According to van Reisen I am the pivot of the Eritrean intelligence in the Netherlands. Wow. Libel and slander is a serious offense punishable by 2 years in jail. We will see if the justice system is meant for all Dutch people... Listen to the nonsense: <http://www.bnr.nl/>...

3. Assessment

3.1 Bahlbi requested in the first instance – in essence– the following:

- I. to adjudge and declare that the statement of Van Reisen that Bahlbi is “the pivot of the intelligence services of Eritrea, of which the centre is in the Netherlands and that is a known given and a fact” constitutes a tort towards Bahlbi;
- II. to order van Reisen to halt and stop the use of this statement, in this form or modified.
- III. to order Van Reisen to place or have placed a rectification in both English and Dutch, at her own costs, over a period of four weeks on the homepage of the website www.eepa.be, as well as on the personal page of Van Reisen on the website of the University of Tilburg. The same rectification shall furthermore be publicised via the twitter account of Van Reisen over a period of three months, once a month. The text of the rectification is as published in the first writ of summons;
- IV. to order Van Reisen to have placed the same text in the newspaper “Het Parool” at her own costs;
- V. to attach a penalty payment to the claims under III and IV of € 25.000,- a day with a maximum of € 250.000,-;
- VI. to sentence Van Reisen to payment of damages of € 25.000,-;
- VII. to sentence Van Reisen to carry the costs of this lawsuit.

Bahlbi stated therefore that the interview given by Van Reisen as shown before under 2.4 contains severely criminalizing accusations that are not supported by facts. The freedom of expression of Van Reisen is limited by Bahlbi’s right of protection of privacy as well as the right to not be exposed to lightly made imputations. The statements of Van Reisen leave the listener with no other choice but to conclude that Bahlbi is the pivot of the intelligence services of Eritrea. Bahlbi adamantly disputes this. Eritrea is known as a dictatorship and as a country where torture takes place. The statement of Van Reisen – in her capacity of professor while being known as an earnest scholar – is therefore a serious allegation against Bahlbi. In the interview, Bahlbi is referred to as “the brother of the two in question” and this is enough for the interested listeners to identify him. Moreover, Van Reisen has in no way applied the right of reply. It is Bahlbi’s opinion that the allegations against him are unlawful. Because of this Bahlbi suffers material and immaterial damage, he still states.

3.2 The preliminary relief judge rejected claim I on the grounds that a declaratory judgment cannot be granted in interlocutory proceedings due to its declaratory nature. Claim VI cannot be granted,

according to the preliminary relief judge, because the claimed damages have not been underpinned. Bahlbi has not brought any grievances against these decisions, and therefore (the rejection of) these claims are not part of this appeal. Insofar as any complaint can be read in the plea of Bahlbi (written pleading under 37) against the rejection of the damages claimed, the court will not take this into consideration because there is no longer room for this in the current stage of the appeal. The preliminary relief judge rejected claims II to V on the grounds that, in summary, Van Reisen has stayed within the limits of freedom of expression within the circumstances of the interview with BNR Nieuwsradio and because the interest of her ability to publicly express herself in a critical, informing, opinion-forming and warning manner about wrongdoings that threatening civil society outweighs (the court reads: in this case) the interest of Bahlbi to not be exposed to lightly made imputations. Grievances 3 to 8 have been aimed against these decisions and against the considerations that led to this. The grievances are in essence that the challenged statement in the interview with Van Reisen should be designated as unlawful against Bahlbi. The Court will process the grievances together.

3.3 The court stated at the outset that in answering the question as to whether the statement of Van Reisen in the interview was unlawful against Bahlbi, it should be considered that the freedom of expression of Van Reisen following Article 10 EVRM can only be restricted if this is provided for by law and is necessary in a democratic society, for example for the protection of the good repute and the rights of others. Such a restriction would apply if the statements of Van Reisen were unlawful in the sense of article 6:162 of the Civil Code (BW). For the answer to the question whether this is the case, all mutual interests need to be balanced against one another. The interest of Van Reisen is in principle that she must be able to publicly express herself in a critical, informing, opinion-forming and warning manner about evils threatening civil society, while the interest of Bahlbi is in principle that he is not to be lightly exposed to imputations and that his privacy is not unnecessarily infringed upon. While balancing these interests, all circumstances of the case need to be included. One of these circumstances is the extent to which the statements of Van Reisen are supported in the available evidence. In addition, the nature of the accusations, the formulation of these and the severity of the expected consequences are of importance. Furthermore, it should be considered whether Bahlbi is a ‘public figure’, which could mean that he has to accept being the subject of more publicity than a random other person.

3.4 The court will firstly investigate in how far the statement of Van Reisen, and especially her remark that ‘the brother of the two’ is the pivot of the Eritrean intelligence, is supported by the facts available. To do this, the court considers the following.

3.5 From the productions of Van Reisen, it is sufficiently clear that there is a lot of criticism as to the functioning of the current Eritrean government. A ‘Commission of Inquiry on Human Rights in Eritrea’ assigned by the United Nations (following: the UN-Commission) concluded in 2015 that there are ‘systematic, widespread and gross human rights violations’ that are committed by the government of Eritrea. A repressive system is in place, ruled by fear and with arbitrary arrests, detentions, torture, disappearances and extrajudicial executions, according to the report of the UN-Commission. There is also attention for the situation in Eritrea in the European and Dutch parliaments as shown by motions that have been presented by Van Reisen as productions. Bahlbi does not dispute this. Indeed, he states himself, although he criticizes the results of the investigation by the UN-Commission, that Eritrea is known as a dictatorship where torture takes place.

3.6 In addition, it can be concluded as a fact that Eritrea is ruled by the PFDJ; it is a one-party state. Isaias Afewerki is president of Eritrea and Yemane Gebreab, chair of the PFDJ, is his right hand. The YPFDJ (also Young PFDJ) has, as is also shown by a press release by YPFDJ Netherlands which was presented by Bahlbi, an ideological bond with the PFDJ. Every year there is a gathering of the YPFDJ in one of the countries in Europe. Yemane Gebreab is present at these conferences and holds a speech there every year. Bahlbi is, as is shown by pictures presented by Van Reisen, present at these conferences.

3.7 According to the report mentioned before under 3.5 of the UN-Commission (Van Reisen has not presented the relevant part of this report, but Bahlbi does not dispute that she cites the report correctly in her statement of reply under 12.7), the Eritrean government spies on its population both inside the country and outside with the goal of controlling the population. Also in a resolution cited by Van Reisen of the European Parliament, it is stated that the Eritrean regime spies on the Eritrean diaspora. Van Reisen has furthermore presented a number of statements (production 24 in the first case) in which several people allege that the YPFDJ plays a role in gathering information for the Eritrean government about Eritreans living abroad. Members of the YPFDJ are allegedly in touch with embassies of Eritrea as informants and are said to report to embassy employees.

3.8 The court is of the opinion that the allegations of Van Reisen are supported by the facts present to such an extent that it can be said that the facts presented show the necessary clues that the YPFDJ partly functions as part of an intelligence network of the government of Eritrea. It is important to note that, as the preliminary relief judge correctly considered, the correctness of the statement does not have to be proven beyond any doubt. The notion that the government of Eritrea spies on Eritreans abroad is supported by the report of the UN Commission. It is notable that such a report can be commonly considered as coming from a reputable source. Several of the people that have been presented by Van Reisen with name and last name state that from their own knowledge, the YPFDJ is used for those spying activities.

3.9 The objection of Bahlbi against the interview mainly relates to the statement of Van Reisen that he, Bahlbi, is the pivot of the intelligence network of Eritrea, while there are no concrete indications that he personally engaged in spying nor the organization of spying. The court is nevertheless of the opinion that the lack of concrete evidence that Bahlbi has personally been involved in the activities described, aimed at the collection of information, in the given circumstances does not mean that the allegations of Van Reisen are unlawful against Bahlbi. The court takes into consideration that Bahlbi has been the chair of the YPFDJ Netherlands for several years and that at the time of the interview, he still was. As chair, he can be considered as the center of the YPFDJ in the Netherlands in any case, while furthermore, concrete indications exist that this organisation plays a role in the intelligence network of Eritrea. Bahlbi has therefore made himself, as 'public figure', vulnerable to accusations of involvement with the intelligence network, by becoming chair of the YPFDJ Netherlands and by his presence at yearly conferences and other meetings of that YPFDJ, whereby in addition it can be assumed that he was in touch with representatives of the government of Eritrea. Partly due to this, the court therefore considers the allegations of Van Reisen permissible.

3.10 For this verdict, the following circumstances have also been weighed in. Van Reisen was questioned by BNR Nieuwsradio following the article on the website Oneworld.nl that was cited under 2.3. In this article, it was noted that the IND was reportedly working with interpreters that were linked to the

regime in Eritrea, that this infringes upon the interpreters' code of conduct of this service and that this was reported to cause problems for the people interviewed by IND that have fled the regime in question. In the article, it is indicated that the brother and sister of the chair of the YPFDJ were employed by the IND as interpreters, without any identification of Bahlbi's name. In the article, Van Reisen points to the family relation between the interpreters and the chair of the YPFDJ. Moreover, Bahlbi has not claimed that Van Reisen was unlawful in doing so. The court is of the opinion that in this article, partly due to the reputation of the government of Eritrea, an important wrongdoing that affects the society is covered. This means that Van Reisen has a large amount of freedom to express herself on this in the interview that was held in response to this. Whilst Van Reisen has expressed herself in a less nuanced way about Bahlbi in the interview for BNR Nieuwsradio, or at any rate the chair of the YPFDJ that was not identified by name, than in the article mentioned above, this can be expected given the nature of the medium. It was a very short live broadcast interview by phone after all. Also in the interview, she does not mention the name of Bahlbi, so that for the general public the identity of the person was not apparent. Partly due to the interest of Van Reisen to freely express herself about the subject, the background of the interview and the shape of it, the court does not consider her statement unlawful against Bahlbi.

3.11 Bahlbi additionally raised that the consequences of the allegation are very serious for him. He has pointed in the first instance to the fact that the IND suspended the activity of his brother and sister a month after the interview. However, he has not further substantiated that this was a direct consequence of the interview given by Van Reisen to BNR Nieuwsradio, while the productions show that the IND has investigated their positions following the publication of an earlier article on Oneworld.nl, about which Bahlbi has not made any claim that this is unlawful against him. Moreover, all of this cannot simply be regarded as a personal interest of Bahlbi. Bahlbi has also pointed out that he had to deal with various threats on social media and that his reputation has been harmed seriously, at which he also points at his opportunities in the labour market. Again, Bahlbi has not been able to substantiate the likelihood that this issue is the direct consequence of the remark of Van Reisen in the interview that the brother of the two interpreters is the pivot of the Eritrean intelligence. Conversely, it is considered that Bahlbi profiles himself explicitly in the political discussion around Eritrea on social media, where he proclaims positions that are in line with the positions of the (Y)PFDJ. Bahlbi also confirms that he explicitly profiles himself, for example by pointing at the 'writing war' that he proclaims to have with Van Reisen. In addition, from the productions it shows that he does so using strong language. He also ensured that the interview disputed by him was spread (wider) by putting a link to the sound fragment on his Facebook page. All of this means that the arguments by Bahlbi are insufficient in contributing to his claim that the interview was unlawful.

3.12 Bahlbi points additionally to the authority of Van Reisen as Professor and that it may therefore be expected of her that she bases her statements on verifiable facts. The court is of the opinion that a higher amount of care may be demanded of Van Reisen in her role as Professor, which is announced in the interview, when giving statements (in her area of expertise) than may be expected of the average citizen. However, this point is insufficient to change the verdict given before.

3.13 The preliminary relief judge has considered that Van Reisen cannot be blamed for violating the principle of right of defense, because it was BNR Nieuwsradio that made the choice to not let Bahlbi speak as well. Bahlbi has not raised this again. The court takes this consideration as its own. This, again, does not contribute to the unlawfulness claimed by Bahlbi.

3.14 Finally, the court points out that the statement of Van Reisen with regards to the centre (of intelligence of Eritrea) being in the Netherlands does not harm Bahlbi on its own. Insofar as the allegation against Bahlbi is made more severe by this, this does not mean that this was unlawful against Bahlbi, given the other circumstances of the interview. Bahlbi has not claimed this either.

3.15 Given all of this, the court shares the conclusion of the preliminary relief judge that in this case, the interest of Van Reisen to be able to publicly express herself in a critical, informing, opinion-forming and warning manner about wrongdoings that threatening civil society outweighs the interest of Bahlbi to not be exposed to lightly made imputations and that his privacy is not unnecessarily infringed upon. Grievances 3 to 8 are therefore dismissed.

3.16 Grievance 1 has no independent meaning so the court will ignore this.

3.17 The grievances are dismissed. The ruling of this appeal will be supported. Bahlbi will be obliged to pay the costs of the proceedings in appeal as the losing party.

4. Ruling

The court:

Confirms the ruling that was appealed;

Sentences Bahlbi to pay the costs of the proceedings in appeal, so far measured on the side of Van Reisen to be € 718,- in advances and € 2.682,- for salary and € 131,- for subsequent salary, to be increased by € 68,- for subsequent salary and the costs of the writ of notification in case notification of this proceeding takes place;

Rules that the costs of proceeding are provisionally enforceable.

This ruling was issued by Mrs. D. Kingma, C.M. Aarts, R.J.F. Thiessen and was spoken publicly by the cause list judge on 12 December 2017.