200281D
ECLI:NL:TAHVD: 2021:101

COURT OF DISCIPLINE

Decision in the case under number: 200281D

DECISION
of 21 May 2021
in the case of 200281D
following the appeal by :
defendant
against
the Dean

1 THE PROCEEDINGS BEFORE THE COUNCIL

The Court refers to the decision of 16 November 2020 of the Board of Discipline (hereinafter: the Board) in the District of Amsterdam (case number: 20-167/A/A/D). In this decision part a) of the Dean's objection was upheld and parts b) and c) were declared unfounded. The measure of warning was imposed on the defendant and an order that the defendant pay the costs of the proceedings. The complaint of the head of the Zeeland-West Brabant Regional Criminal Investigation Department was declared inadmissible (case number 20-166/A).
The decision in both cases is published on tuchtrecht.nl under ECLI:NL:TADRAMS:2020:261.

2 THE PROCEEDINGS AT THE COURT OF APPEAL

2.1 The respondent's notice of appeal against this decision was received on 16 December 2020 by the Registry of the Court.

2.2 Furthermore, the file of the court contains:
- the documents of the council;
- the Respondent's email of 15 March 2021 with attachments;
- the Dean's statement of defense.

2.3 The Court heard the case orally at the public hearing of 26 March 2021. There the defendant, his authorized representative and the Dean, mr E.J. Henrichs, appeared. The parties explained their positions, the authorized representative of the of the defendant on the basis of written pleadings, which are also part of the court's file.

3 FACTS

3.1 The court notes the following facts.

3.2 On 6 April 2017, the defendant was present as one of two lawyers at the fifth police interrogation of his client, at the time a lawyer and also a suspect (hereinafter: the client). At that time, the client had been deprived of his liberty by law pursuant to a detention order and all restrictions had been imposed on him. On 10 April 2017 an official report was drawn up of the interrogation, based on the audio recording of the interrogation (hereafter: the report of interrogation).

3.3 On 10 April 2017, an official report of findings on the interrogation was also drawn up (hereinafter: the report of findings). It states, inter alia: "During the interrogation, it appeared that [defendant] could not conform to the guidelines of 2017 for a counsel to behave at the interrogation. [Respondent] explained that he was going to comply with the Directive 2013/48/EU and that he was of the opinion that he should actively participate in the interrogation. Further, there were a number of unusual actions by [Respondent] during the interrogation:
(...)
- [Defendant] deliberately disrupted the interrogation. He gave answers to questions that were meant for the defendant, asked unnecessary clarification questions to the reporting officers, encouraged the defendant when he did not answer the question, read aloud what he wrote down, and repeatedly reminded defendant to keep his mouth shut;
- [Defendant] told defendant in a commanding tone of voice to "sit down and shut up"

3.4 In addition to the record of interrogation and the record of findings a report was drawn up by the reporting officers which states, among other things, that the reporting officers felt that they were deliberately prevented to conduct a professional interrogation, that they felt insulted and not taken seriously by the Defendant, that their attempts to create a mutually workable situation failed and that on rehearing the interrogation a count was made of the number of times the Defendant has interrupted the interrogation in a certain way and has been warned or corrected by the reporting officers.

3.5 In a letter dated April 19, 2017, the sector head of the Regional Investigation Department - Zeeland-West Brabant Unit (hereinafter: the Sector Head) wrote to the defendant, inter alia:

"On Thursday, April 6, 2017, you were present at the police station (...) as counsel during an interrogation of the suspect [the client].
The interrogating officers have reported to me that during that interrogation you seriously misbehaved. (...)
During the interrogation, you repeatedly made it clear that you did not wish to conform to the rules for the organization and order during the police interrogation in which the legal counsel participates, which have been laid down in the Decree on organization and order of the police interrogation of 26 January 2017.
You have indicated in this regard that you rely on Directive 2013/48/EU (...) which would show that you are allowed to actively participate in the interrogation as legal counsel. It appears from the official records that you disrupted the interrogation by, inter alia the fact that you kept answering questions that were meant for the suspect, kept asking

unnecessary questions for clarification, read out loud when you wrote something down, and condescending in the direction of your client and the interrogating officers. During the interrogation you interrupted the interrogation undesirably 25 times. Despite the fact that the interrogating officers have given you a warning a total of 10 times, this did not change your behavior. During the entire interrogation, the interrogating officers had the feeling that it was deliberately made impossible for them to interrogate the suspect in a professional way and to keep control over the interrogation. For this, they felt insulted and not taken seriously.
The reporting officers saw no other possibility than to end the interrogation.
After reading the official report and listening to the recording, I can only conclude that you, without any justifiable reason, have deliberately obstructed the entire interrogation.

From your behavior, I can only conclude that any future contact with my staff will be in an escalating, disrespectful and disruptive manner. I therefore consider the taking of immediate action to be appropriate.
Out of concern for my staff, from the point of view of professionalism that could be expected from you as counsel, as well as within the framework of an orderly conduct of investigations, I hereby immediately deny you access to the buildings and premises which are in use by the Regional Investigation Department of the Zeeland-West Brabant unit.
The measure will take effect from the date of this letter and is provisionally valid for a period of six months."

3.6 In a letter dated 25 April 2017, the Dean informed the Defendant that he had been informed by the Sector Head about the course of the hearing on 6 April 2017 and that he takes the notification from the Sector Head as a signal of the Defendant's actions that will be investigated in the usual way.
3.7 By letter of 13 November 2017, the Dean informed Defendant that the Sector Head views his report to the Dean as a complaint and the Dean has informed Defendant of an additional complaint from the Sector Head.

4 THE DEAN'S COMPLAINT
4.1 The Dean's complaint, in essence and for so far still relevant on appeal, holds that the defendant acted in a way that was culpable under disciplinary law, as meant in Article 46 of the Advocates Act. The Dean accuses Defendant the following.
(a) During the interrogation of the client on 6 April 2017, Defendant, as counsel, did not comply with the rules applicable to such an interrogation, only with the intent to ensure that a substantive interrogation of the client was made very difficult and has disrupted the interrogation, as a result of which substantive questions were hardly addressed. The Defendant 's conduct consisted of the following elements:
- During the interrogation the Defendant repeatedly showed that he did not want to conform to the rules as laid down in the Decree on the organization and order of the police interrogation of 26 January 2017 (hereinafter also: the Decree);
- The Defendant indicated in this respect that he relies on Directive 2013/48/EU (hereinafter also: the Directive), from which it would appear that he may actively participate as a counsel in the interrogation;

- The defendant disrupted the interrogation by among other things the fact that he constantly answered questions that were meant for the defendant, he constantly asked unnecessary clarification questions, read out loud when he wrote something down and condescended in the direction of his client and the defendant.
- During the interrogation, the defendant interrupted the interrogation in an undesired manner 25 times in total. Despite the fact that the interrogating officers gave him a total of 10 warnings, this did not change defendant's behaviour;
- The interrogating officers had the feeling during the entire interrogation that they were being deliberately prevented from engaging with the client in a professional way and to maintain control of the interrogation. They felt insulted and not taken seriously. The police officers saw no other option than to end the interrogation.
b) (...)
c) (...)

5 ASSESSMENT

considerations of the Council
5.1 The council declared the Dean's objection admissible. The Council upheld complain item (a)with the following considerations.
"It follows from the transcript and the audio recording of the interrogation of 6 April 2017 - listened to by the Council at the hearing - that Defendant interrupted the interrogation several times; among other things, he answered questions that were intended for [the client], asked a number of (at least: at that time, unnecessary) clarification questions and read aloud while writing something down. During the interrogation the reporting officers asked Defendant several times to follow the rules for an interrogation, as laid down in the Decree. They also asked the defendant several times during the interrogation about his intention with his interruptions, but he did not give a concrete answer. In all of this, Defendant put on a denigrating tone towards the officers. - as the Council could observe during the listening to the audio recording at the hearing. He said among other things "That's not interesting", "I think it's a cute question to a suspect", "small talk, personal jabber, skip it", "If I can be honest, I'd prefer to go back to Amsterdam and play billiards or golf or something" and "let the lady babble".
Defendant, by his attitude, including the above-mentioned conduct and remarks and the tone in which Defendant expressed himself, in relation to each other and in coherence, disrupted the proper course and progress of the interrogation unnecessarily and ensured that the interrogating reporters lost the control over the interrogation, as a result of which they were eventually forced to end the interrogation.
Defendant‘s attitude does not contribute to the creation of a fruitful climate in which all involved can do their jobs. Defendant has not been able to make clear to the Council what reasonable interest of his client he was serving. Nor has Defendant substantiated that and why any interest protected by the Directive compelled him to act (in a manner), nor has Defendant made it clear in concrete terms that and why he could not comply with the Decree. In so far as that interest entailed that [the client] would not incriminate himself, Defendant could also have achieved that interest in another, less burdensome way, namely by making [the client] invoke his right to remain silent from the beginning of the interrogation and to make this clear to the officers in a neutral way. Then the interrogation could have been terminated immediately and the interrogating officers

(and Defendant) could have spent their time more usefully. Also at later moments in the interrogation, especially when the officers expressly asked Defendant what his intention was with his attitude, Defendant could have made this known. Defendant has not been able to make it clear to the Council that there were compelling reasons to behave the way he did by saying he had to protect the interests of [the client] as a defendant as well as the interests of [the client] as a confidential and that those interests might not run parallel. Moreover, Defendant stated at the hearing that the tone which he expressed himself during the interrogation was partly explained by the fact that he had had to wait a long time against his will before the interrogation could begin, which had been scheduled at an earlier time. This also does not provide a reasonable interest as meant above nor an excuse for his transgressive behavior.
By acting as Defendant did, without being able to explain to the Council that he was serving a reasonable interest of his client, Defendant has unnecessarily affected the police interrogation in a disproportionate manner. Now that it has not become apparent that Defendant served a reasonable interest of his client with his attitude, the question of whether the Directive has been correctly implemented by the Netherlands in the Decree can remain unanswered, not to mention the question of whether the disciplinary court is the right body to adjudicate this matter for lawyers. In this connection, the Council again notes that Defendant has not substantiated or concretized which interest protected by the Directive he served with his attitude."

grounds for appeal

5.2 Defendant has, in essence, put forward the following grounds for appeal:
1. The Council included one of the existing transcripts of the interrogation of 6 April 2017 as part of the facts. It is not clear which one. The accuracy of what was said has, however, not been investigated at all. The same applies to the record of findings of 10 April 2017 and the letter of the sector head of 19 April 2017, parts of which have been quoted and the content of which has been disputed by Defendant.
2. The Sector Head did not issue a signal, but filed a concrete complaint with the Dean. The Council erred in declaring the Dean admissible in the Dean's complaint, since this complaint was not submitted to the Council outside the case of a complaint in accordance with Section 46f of the Advocates Act.
3. The Council has declared the Sector Head inadmissible in all parts of the complaint and this is a final decision in accordance with Section 47b (1) of the Advocates Act. The Dean cannot be declared admissible in the same complaints on the basis of the principle ne bis in idem.
4. The Dean has not demonstrated that his complaint serves the public interest. It is true that the Dean has stated that both criminal lawyers and the Public Prosecution Service seems to want more clarity about this issue (providing legal assistance during a police interrogation), but that does not show up from anything and has not been determined by the Council either. Objection of Defendant is and remains that no investigation by the Dean took place.
5. This entire issue is about the question of, the meaning of and the interpretation of "actual participation" in an interrogation by the lawyer and the bottlenecks that have arisen because the Dutch regulations are not in accordance with the Directive. The Council erred in considering that Defendant could not explain that he was serving a

reasonable interest of his client during the police interrogation, now that Defendant has already explained this in the written documents. Moreover, the client was also a confidentiality holder, which capacity also had to be safeguarded. The reasonable interests of the client included that he was and remained aware of his right to remain silent and his obligation of secrecy, that he was informed about applicable statutory legal regulations and that the interrogation stopped at some point.
6. The Council erred in finding that Defendant's activities during the police interrogation need not be tested against EU Directive 2013/48. The Council also applied an incorrect, or at least incomplete, disciplinary standard. The interrogating officers are also not counterparties as referred to in the standard to be applied. Contrary to the Council's judgement Defendant provided professional and expert legal assistance, did not disrupt the interrogation, and it was Defendant who, in consultation with the client, terminated the interrogation. It was not due to Defendant that the officers lost control, if at all this was the case.
7. It is not for the disciplinary judge to interpret the EU Directive, but for the CJEU by asking preliminary questions about the meaning and interpretation of the meaning to "actual participate" by a lawyer in an interrogation.
8. Defendant considers that the officers should be heard as witnesses on the police expertise on the (amended) interrogation rules and interrogation techniques in the spring of 2017.
9. Defendant believes that, as an attorney for a confidentiality holder as a defendant, he is entitled to immunity and also disciplinary immunity for his professional activities of the time.
10. Defendant objects to the measure imposed and the order of costs.

admissibility of the dean's complaint
5.3 The Court will first discuss grounds for appeal 2 through 4 and 9 as they concern the admissibility of the Dean's complaints. The Court agrees with the Council and is of the opinion that the appeal is admissible. Furthermore, the Court is of the opinion that the Dean has the authority to bring his complaints to the attention of the council besides the complaints (see also HvD 30 June 2014, 7057,
ECLI:NL:TAHVD:2014:237). Also, the Dean had sufficient grounds to submit his complaint now that both criminal lawyers as the Public Prosecution Service as the police seems to have the need for more clarity on the conduct of criminal lawyers during the police interrogation. In conclusion, the Court cannot follow Defendant in his appeal to (disciplinary) immunity. Defendant does not substantiate why his conduct during the police interrogation in question should not be subject to disciplinary review.
Together with the Council, the Court is of the opinion that Defendant as an attorney at law remains subject to the disciplinary rules for attorneys at law. Based on that, the Dean may raise objections about his actions. The foregoing means that the grounds of appeal put forward with respect to the admissibility of the Dean's complaints fail. The Court will hereafter discuss the actions of the defendant and the standard to be applied.

standard
5.4 The Council has applied the correct standard for assessment, namely that it is paramount that an attorney at law is entitled to a large degree of freedom to promote his client's interests in a way that he deems appropriate. This relates to the core value

of partiality. The Court adds that the principles of a fair criminal trial entail that an attorney in criminal cases may be expected to take an active stance in the interest of his client, whereby he will defend the (defense) rights of his client in a professional and functional manner. This applies all the more when the client is in pre-trial detention and is subject to police interrogation. In this case, the lawyer may make an active contribution to the interrogation, he may intervene during the police interrogation if necessary and insofar as it is in his client's interest.
However, in doing so, the attorney must not use means that are, in themselves unlawful or - in this case: within the context of a police interrogation - lead to disproportionate interference in the police interrogation without providing any significant benefit to his client.
considerations of the court
5.5 Unlike the Council, the Court is of the opinion that Defendant did not unnecessarily and/or disproportionately disrupt the police interrogation. In explanation thereof the Court considers the following.
5.6 The freedom of action of an attorney is paramount. In this respect it is of first importance that Defendant 's client was remanded in custody, was suspected of various of several criminal offenses and did not have access to the complete police file. It was agreed between Defendant and the client that in anticipation of the complete case file no more questions would be answered during a police interrogation. This agreement is not impermissible and Defendant 's interventions fit in this line. In the opinion of the Court, Defendant has sufficiently demonstrated in his written appeal on the basis of the transcripts, which reasonable interests of his client, who also had a secrecy status as an attorney, were served by defendant's active contribution in the interrogation to guard his client's rights.
The Court has noticed from reading the transcripts and from listening to the audio recording of the police interrogation in the presence of the parties at the hearing that in the course of the interrogation irritations arose between the officers and the defense, apparently inspired by the biased attitude of Defendant and the reaction of the reporting officers to that. The fact that the officers have experienced the conduct of the defendant as annoying does not make it unlawful.
5.7 The Court is of the opinion that given the circumstances Defendant did not behave in such a way that he exceeded the limits of what is proper and reasonable. Also not with or by the remarks cited by the Council that the Council has qualified as denigrating. As far as the contents of those statements are concerned Defendant has made it sufficiently clear which defensive interest was served by this. As far as the choice of words is concerned, it is conceivable that this was also inspired by the irritation that had already arisen from both sides. In any case it has not appeared that Defendant was only out to sabotage the interrogation nor that invoking the Directive was intended to frustrate the police interrogation. Finally, the interruptions made by Defendant did have the effect of conferring some significant advantage on his client, namely to obtain the missing part of the police file before further questions would be answered.
5.8 The Court therefore concludes that Defendant has not violated the standard under 5.4. This means that the Court will declare complaint part a) unfounded and that the decision of the Council on this part must be set aside. This judgment means that the entire complaint of the Dean is unfounded and that therefore the order to pay the costs of the proceedings of the Council cannot be upheld either.

5.9 Now that the Court has declared the part of the Dean's complaint that is subject to its judgment unfounded, the remaining grounds for appeal and requests need no further discussion for lack of interest.

DECISION

The Court of Discipline:

- Sets aside the decision of 16 November 2020 of the Council of Discipline in the Amsterdam District Court, rendered under number 20-167/A/A/D, insofar as part of the objection a) was upheld and Defendant was ordered to pay the costs of the proceedings; and restores justice:
- Declares that part of the complaint (a) is unfounded;
- upholds the Council's decision as to the remainder.

This decision has been rendered by J. Blokland, chairman, C.A.M.J. Raymakers, T.E. van der Spoel, M.A. Wabeke and G.J.K. Elsen, members, in the presence of N.A.M. Sinjorgo, Registrar, and pronounced in public on 21 May 2021.

registrar chairman

The decision was sent on 21 May 2021.