

# Judgment

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## COURT OF THE HAGUE

Civil Law Division

Casenummer: 200.290.085/01

Casenummer of the preceding court: C/09/607056 / KG ZA 21-118

### Final judgment in summary proceedings of 26 February 2021

Concerning

**The State of the Netherlands**  
**(Ministry of General Affairs and Ministry of Justice and Security),**

seat in The Hague,

appellant,

hereinafter referred to as: the State,

lawyer: mr. R.W. Veldhuis in The Hague,

against

**1. Stichting Viruswaarheid.nl,**

settled in Rotterdam

**2. [geïntimeerde 2],**

living in [living place]

**3. [geïntimeerde 3],**

living in [living place]

respondents,

hereafter jointly referred to as: Viruswaarheid,

lawyer: mr. G.C.L. van de Corput in Breda.

## 1 The procedure

1.1. The course of the proceedings is apparent from:

- The documents of the first instance and the judgment of the preliminary relief judge in the District Court of The Hague of 16 February 2021 (hereinafter: the judgment)<sup>1</sup>;
- The writ of summons on appeal (after emergency appeal leave) of 16 February 2021;
- The official report of the oral hearing of the incident on the basis of article 351 of the Code of Civil Procedure (Rv) of 16 February 2021;
- The decision in application of Article 30p Rv in the incident on the basis of article 351 Rv of 16 February 2021;
- The statement of appeal with the exhibits;
- The response with the exhibits.

1.2. The oral hearing in the main case took place on 19 February 2021. At that hearing, the parties explained the case to the State in part through mr. J. Bootsma, lawyer in The Hague. Both parties have brought productions into question on that occasion. An official report has been drawn up of the oral hearing .

## 2 About what is the case?

2.1. In short, this case on appeal concerns the question whether the curfew should be lifted, as the preliminary relief judge did in the judgment. According to Viruswaarheid, the State has chosen an inadequate legal basis for the curfew. Moreover, according to Viruswaarheid, the introduction of the curfew violates various human rights, without sufficient justification.

## 3 The facts

- 3.1. Since mid-March 2020, the cabinet has taken various measures in connection with the outbreak of the SARS-Cov-2 virus (hereinafter: the virus or the Covid-19 virus). The cabinet is advised by the Outbreak Management Team (hereinafter: OMT) in combating the virus. The OMT consists of (partly changing) experts from various disciplines who provide advice independently of the State.
- 3.2. On January 19, 2021, the OMT issued an advisory report stating, among other things, that there are new variants of the virus (including the British variant) that are much more contagious than the old variant, which will increase the number of infections and the long-term prospects are very worrisome. The OMT has therefore advised, among other things, to set a curfew.
- 3.3. As a result, the House of Representatives held an emergency debate on 21 January 2021 and the majority of the House approved the Cabinet's intention to introduce a temporary curfew based on the Extraordinary Powers of Civil Authority Act (hereinafter: Wbbbg).
- 3.4. Subsequently, by Royal Decree of 22 January 2021, on the recommendation of the Prime Minister, article 8, paragraphs 1 and 3, Wbbbg was put into effect<sup>2</sup>. Subsequently, in accordance with article 8, paragraphs 1 and 3, Wbbbg, the Temporary regulation national curfew covid-19 (hereinafter: the Temporary regulation) has been published<sup>3</sup>. This shows that the curfew applies with effect from 23 January daily from 9 pm to 4.30 am until February 10, 2021. At the same time as the curfew, it is strongly advised not to receive more than one person per day (hereinafter: the visit restriction).
- 3.5. On 2 February 2021 (in accordance with article 1 paragraph 2 of the Wbbbg) a bill was sent to the House of Representatives on the continuation of the curfew (hereinafter: the Continuation Act). This bill was passed by the House of Representatives on 11 February 2021. The Senate has yet to decide on this.
- 3.6. In a letter of 3 February 2021, Viruswaarheid wrote to the State with a request to immediately lift the curfew. The State has indicated that it is not prepared to do so.
- 3.7. On February 7, 2021, the OMT issued a new advice to the government. In it, it advised extending the curfew, because the British variant of the virus is on the rise. The R-number (which indicates how many new infections on average are caused by an infected person) of the British variant is higher than that of the original variant. According to the OMT, this means that the British variant is more contagious. According to the OMT, the curfew can be a valuable addition to the other measures already in force. After an urgent debate about an extension of the curfew in the House of Representatives, it turned out that there was a majority in the House for extension.
- 3.8. Subsequently, an extension of the curfew was announced until March 3, 2021 at 4:30 AM. It was also announced that an interim evaluation will be carried out on 23 February 2021 to determine whether the measure is still necessary.
- 3.9. A technical briefing of 16 February 2021 shows that RIVM expects at that time that the new variants (the British and the South African variant) will affect almost 100% of the cases by April 2021. The displacement of the old variant is due to the higher contamination rate of the new variants than that of the old variant. The infection rate is 37% higher for the British variant and 47% higher for the South African variant. The number of hospital and intensive care

admissions will increase rapidly without curfew and visit restrictions. This increase is expected to be much more limited if the curfew and the visit restriction are maintained with the other measures, still according to the OMT.

## 4 De proceedings at first instance

- 4.1. Viruswaarheid filed a claim in the first instance to order the State to cancel the Royal Decree of 22 January 2021 and the associated Temporary Regulation.
- 4.2. Viruswaarheid has argued that by introducing the curfew, the State is acting unlawfully via the Wbbbg. According to Viruswaarheid, there is no exceptional and urgent emergency situation that is a prerequisite for use of the Wbbbg. Moreover, the curfew is a far-reaching curtailment of citizens' fundamental rights. The reasons given by the State for taking a far-reaching measure such as a curfew are insufficient. Curfew is not proportional. Other less far-reaching measures could also have been taken, Viruswaarheid said.
- 4.3. The Preliminary Relief Judge has awarded Viruswaarheid's claim. The Preliminary Relief Judge was of the opinion that under the given circumstances a compelling measure such as a curfew should not have been introduced via the Wbbbg and the resulting ministerial regulation. The 'super speed' required for this by the preliminary relief judge as justification for not being able to wait for a normal (urgent) legislative process is insufficiently substantiated. The possibility of a curfew has already emerged as one of many possible options before its actual implementation. It shows that the special requirements for activation of the Wbbbg are not met. In addition, prior to the entry into force of article 8 Wbbbg, an urgent debate took place in the House of Representatives. The fact that there was scope for this makes it clear that there was no actual emergency situation as referred to in the Wbbbg in this case. By submitting the Continuation Act, the incorrect choice for the Wbbbg cannot be justified afterwards.
- 4.4. In the opinion of the Preliminary Relief Judge, the State has also given insufficient reasons that the institution of the curfew meets the requirements of proportionality and subsidiarity. The pressure on healthcare is currently less than was previously the case. Even when healthcare was previously running at maximum capacity, a curfew was not considered necessary. The State now considers a curfew necessary because of the occurrence of mutations in the virus, which appear to be more contagious than the original virus. However, it is currently not clear that the mutations of the virus will lead to an untenable situation.
- 4.5. The government should prepare for new developments, but before a far-reaching restriction such as a curfew is introduced, it must be clear that there are no other less far-reaching measures available and that the introduction of the curfew will actually have a substantial effect. In the opinion of the preliminary relief judge, this has proved insufficient. The OMT says it has no evidence that the curfew makes a substantial contribution to reducing the virus. The fact that some countries have reported positively about it is not convincing. After all, the question is whether the situation in the Netherlands is one-on-one comparable to that in other countries. In addition, it has been established that at the same time as setting the curfew, an urgent advice was given no more than one person per day at home. In its forecasts about the effects of measures, the OMT has not made a distinction between the curfew on the one hand and the one-person visiting arrangement on the other. This significantly distorts the picture with regard to the usefulness and necessity of the curfew. The statement of the State that a curfew is inevitable is, according to the preliminary relief judge, insufficiently convincingly motivated.
- 4.6. The Preliminary Relief Judge has therefore ordered the State to immediately inactivate article 8, paragraphs 1 and 3 of the Wbbbg, as a result of which the Temporary Regulation also lapses.

## 5 The appeal procedure

- 5.1. The State has filed an urgent appeal and, on the basis of Article 351 DCCP, as a preliminary injunction to suspend the contested judgment until the court of appeal has rendered final judgment in the main case. This provision was granted by the court on the same day<sup>5</sup>.

- 5.2. In the main action, the State has demanded to annul the judgment and yet reject Viruswaarheid's claim. According to the State, the introduction of the curfew is indeed necessary for the safety and health of citizens, and should be based on the Soil Protection Act. In any case, according to the State, it cannot be said that the curfew is unmistakably non-binding.
- 5.3. Viruswaarheid has put up a motivated defense. The further arguments of the parties will be discussed where necessary in the assessment of the appeal.

## 6 The assessment of the appeal

### *General starting-points*

- 6.1. The State submits the full extent of the dispute to the Court of Appeal with its grounds of appeal. The court assesses the dispute on the basis of the facts that were known at the time of the close of the hearing (on February 19, 2021 around 2.30 p.m.) and that were based on their assertions and defenses by parties.
- 6.2. At stake in this appeal is the question whether the Wbbbg could be used in this situation for the introduction of the curfew.
- 6.3. The question of which measures must be taken to combat the corona crisis and whether those measures are proportional and subsidiary requires primarily political consideration. The fact that this political consideration has also taken place with regard to the introduction of the curfew is evident from both the explanatory notes to the Continuation Act and the decision by the cabinet to consult the House of Representatives prior to the introduction of the curfew. The civil court - and certainly the judge for interim relief - must therefore exercise restraint in assessing the choices the State makes within the limits of its discretion and policy discretion. Only if it is evident that the State is making incorrect choices and the State has therefore not reasonably been able to opt for the policy pursued, or if the State exercises a power without there being a legal basis in the given circumstances, is there room for judicial intervention. Moreover, the judge in summary proceedings has only in the case of an unmistakably non-binding regulation the power to invalidate the relevant provisions. It may not order the State to enact legislation with a particular, specific content<sup>6</sup>.

### *The system of the Wbbbg*

- 6.4. The Wbbbg is a law in a formal sense and provides for the possibility, when exceptional circumstances make this necessary, to assign certain powers to the public authorities. One of those powers is to impose a curfew (article 8 Wbbbg). Pursuant to article 1 paragraph 1 of the Wbbbg, these powers exist in addition to the general and limited emergency situation as referred to in the Exceptional Situations Coordination Act (Cwu). The emergency situation referred to in the latter act is currently not an issue in the Netherlands, not even in fact as stated by Viruswaarheid.
- 6.5. The Wbbbg can be activated by Royal Decree (RD) on the recommendation of the Prime Minister. After the Royal Decree, a bill on the continuation of the provisions that have been put into effect (the Continuation Act) is immediately sent to the House of Representatives. If the House of Representatives and the Senate do not agree with this, the provisions that have been put into effect will be rendered ineffective again by Royal Decree and the effect of the provisions will come to an end before that moment (article 1, paragraphs 2 and 3). Wbbbg).

### *The standard for application of the Wbbbg*

- 6.6. In this procedure, the question is whether there are extraordinary circumstances that necessitate the introduction of the curfew.
- 6.7. The term extraordinary circumstances is not defined in the law or in the legislative history of the Wbbbg. In the opinion of the Court of Appeal it is absolutely clear that there are extraordinary circumstances. The Netherlands has been dealing with a pandemic for almost a year. This has now spread all over the world and has caused large numbers of fatalities, including in the Netherlands. Despite many (often far-reaching) measures, the Covid-19 virus has still not been extinguished and is mutating into (often) even more infectious variants. In the end, we have to wait for sufficient vaccination options, but we have not yet reached that stage, and it is also uncertain whether the existing vaccines will work unabated with the new variants.

- 6.8. According to the government, the situation is very worrying, because two epidemiological situations are developing side by side, namely the 'old' Covid-19 virus and the much more contagious foreign variants that are expected to predominate. Everything must be done to keep the number of infections as low as possible and thus prevent the Netherlands from being flooded with a third wave on top of the second. The government relies in this regard on the OMT (with specific expertise), which urgently recommends the introduction of the curfew because no equivalent alternatives are available.
- 6.9. In the opinion of the Court of Appeal, the cabinet may in principle rely on the advice of the OMT. It is not without reason that this body is responsible for providing the best possible professional advice on the crisis measures to be taken<sup>7</sup>. The fact that it is not possible to weigh exactly to what extent the also urgently recommended restriction on visits also has an effect, does not mean that the necessity of the curfew is absent or has disappeared. The State has sufficiently substantiated that the curfew also has an effect, at least that it can reasonably assume that this is the case.
- 6.10. Viruswaarheid has also stated that the introduction of the curfew is not necessary because the number of infections is decreasing, as well as the hospital and IC-occupation, while the number of infections does not equate to just as many people and it is a 'fairly harmless' virus. Viruswaarheid thus ignores the fact that despite the reduced pressure on healthcare, the OMT has explained extensively and scientifically that further intervention is necessary, especially in connection with the increase in the new variants. This is to prevent the risk - this is not a certainty and does not need to and cannot be a certainty - of accelerated serious infections and thus (over) burden on healthcare. The statement that the 'dark cloud' outlined by the OMT 'has never produced rain' is a disregard of the actual situation in which the Netherlands has been in for about a year and which the cabinet may judge to be such that aggravation must be avoided.
- 6.11. All in all, the State could therefore reasonably rule that there were exceptional circumstances that necessitated the introduction of the curfew. The use of the Wbbbg is therefore in principle justified and the Cabinet could adopt the Temporary Regulation on the basis of article 8, paragraphs 1 and 3. Contrary to what Viruswaarheid has argued, the Wbbbg does not require that the requirements for the declaration of a state of emergency have been met and therefore does not require that the external or internal security of the State can no longer be guaranteed in any other way. The Court of Appeal rejects Viruswaarheid's argument (and in line with that the judgment of the Preliminary Relief Judge) that the Wbbbg is only intended for situations that literally cannot tolerate any postponement, because there are acute emergency situations, such as an unexpected dike breach. This 'bar' thus formulated is too high and does not follow from the law or legal history. Even though the legal requirement of 'extraordinary circumstances' will often involve some urgency, this cannot mean, however, that (outside the legal text and without clear indications in legal history) the introduction of the curfew is subject to requirements of urgency such as the preliminary relief judge has adopted. These high requirements would also, without good reason, severely limit the usefulness of the power given in article 8 paragraph 1 of the Wbbbg. After all, it would be undesirable and not logical to be able to use this emergency power only after 'a dike breach' and not already in the event of an imminent 'dyke breach'. With this, the Court of Appeal also rejects the argument of Viruswaarheid and the judgment of the Preliminary Relief Judge that the Wbbbg could not be used because prior to the introduction of the curfew, consultations with the House of Representatives took place. Legally, the State was not bound to such prior consultation. After all, the Wbbbg is based on a review by parliament immediately after the special powers have been exercised. The fact that the cabinet has asked the House of Representatives for approval in advance is careful, but it does not, of course, mean that the existing power to act independently was canceled. Nor does the (theoretical) possibility of an emergency act prevent the State from using the powers of the Wbbbg. After all, with the Wbbbg, parliament has in advance given the government the power to impose a curfew for situations such as those currently under discussion. For the same reason, it is also irrelevant that the curfew was discussed earlier in 2020. At that earlier moment, introduction was not considered appropriate by the cabinet; the OMT's advice to impose a curfew on the basis of which the State decided to act dates from January 19, 2021. It is unclear what kind of legislative process should have been initiated at the time in the view of Viruswaarheid (and in imitation thereof the Preliminary Relief Judge), and it is also unclear how this could have resulted in anything other than a regulation as currently laid down in the Wbbbg. Naturally, the principles of proportionality and subsidiarity must be observed in the actual use of the Wbbbg. The court will review these aspects below.

### *Proportionality and subsidiarity*

- 6.12. It is not in dispute that with the introduction of the curfew various fundamental rights are limited, which are enshrined in international treaties, among other things. This concerns the right to freedom of movement (article 2 Fourth Protocol ECHR), the right to respect for privacy (article 8 ECHR and article 10 Constitution - Constitution) and indirectly the freedom of assembly, demonstration and the practice of religion and belief. (article 9 and article 10 ECHR and article 6 and article 9 of the Constitution).
- 6.13. These fundamental rights offer scope for limiting them (among other things) if this is necessary for the protection of public health. The State is obliged to provide this protection on the basis of article 22 of the Constitution and articles 2 and 8 ECHR. Such containment is possible to the extent that it (i) serves a legitimate purpose, (ii) is provided for by law, and (iii) is necessary in a democratic society. The latter criterion implies that the curtailment of fundamental rights must be proportional and that there must be no other (lighter) means to achieve the intended goal. The State has great discretion in this respect (*a wide margin of appreciation*).
- 6.14. It is established that the curtailment (i) serves a legitimate purpose and (ii) is provided for by law. The State has argued (iii) that the measure is also proportional. Less severe measures are not enough. To the extent that curfew restricts the exercise of fundamental rights, it is only in the late evening and night. At those times, mobility is less high anyway. The mobility data was considered. This shows that most trips take place between 5 a.m. and 8 p.m. Fundamental rights can be exercised during the day. The choice of a curfew that applies between 9 p.m. and 4.30 a.m. also leaves enough space for everyone to play sports and for children to play outside. All kinds of exceptions have been made to the curfew in the Temporary Regulation, so that customization is possible and strictly necessary travel movements are not affected by the curfew, according to the State.
- 6.15. In the opinion of the Court of Appeal, in view of the dire situation that the State could assume from the foregoing, the measure of this curfew (iii) is proportional and also meets the requirements of subsidiarity. Waiting to see how the situation develops, as Viruswaarheid (in summary) argues, the State did not want and need to do in all reasonableness. The State could also reasonably have found it too risky to simply give the 'urgent advice to stay at home'. In that judgment, the court takes into account that the curfew is indeed limited to the extent that, unlike in other countries within Europe, it does not apply until 9 p.m., and that exceptions have been made for those for whom it is necessary to go outside the home.
- 6.16. This means that the grievances succeed and do not need to be discussed further.

### *Other arguments*

- 6.17. For the sake of completeness, the court further considers as follows. Viruswaarheid has also stated that the State may only deviate from the aforementioned fundamental rights if a state of emergency has been declared, while the State must thereby adhere to the criteria formulated for this in article 15 ECHR, article 4 ICCPR and the so-called Siracusa Principles<sup>8</sup>. The court rejects this statement. As considered in consideration 6.4, there is no question of a state of emergency in a legal sense, not even factual. After all, extraordinary powers have only been applied to a limited extent. Article 15 ECHR, article 4 ICCPR and the so-called Siracusa Principles are therefore not applicable. Viruswaarheid cannot therefore derive any rights from it for that reason. In this case, therefore, the possibility of limiting the fundamental rights discussed above does not follow from article 15 ECHR, but from the limitation possibility that the relevant fundamental rights themselves have.
- 6.18. Incidentally, the basic principle of state emergency law is that the State opts for the lightest possible measure and only declares a (limited or general) state of emergency if other means are not sufficient. In this case, the State has rightly ruled that it would suffice to introduce a curfew, without having to declare a state of emergency. The Wbbbg provides sufficient basis for this.
- 6.19. Unlike during a state of emergency, when using a limited emergency power such as the introduction of the curfew, the State may not deviate from the human rights guaranteed in the constitution and international treaties, but limit them only to the extent provided for in the relevant provisions. Compliance with human rights is therefore better guaranteed in the current situation than if the State had declared a state of emergency. For that reason, there is no

place for application of article 15 ECHR or the Siracusa Principles.

6.20. Viruswaarheid has further argued that the current situation is primarily governed by the WHO's International Health Regulations (IHR) and the Public Health Act (Wpg). After all, its purpose is to prevent society from being disrupted by a virus outbreak. According to Viruswaarheid, both the IGF and the Wpg are based on stressing rather than compulsion. The coercive measures referred to in the Wpg may only be used in individual cases and not generically. They therefore stand in the way of introducing a coercive measure such as curfew, still according to Viruswaarheid.

6.21. The court reasons as follows. The IHR regulates international cooperation to combat cross-border infectious diseases. However, the recommendations contained therein are not binding and do not have direct effect. Viruswaarheid cannot therefore enforce any rights on the basis of the IHR. It cannot be ruled out from the Wpg that the coercive measures referred to therein to combat infectious diseases and more specifically to combat the virus may only be used in individual cases and should not be used generically. Even if that were different, this cannot lead to a different judgment because the State has not based the curfew on the Wpg and has not had to base it on it. The mere fact that a particular power that the State wishes to use to combat an infectious disease is not included in the Wpg does not justify the conclusion that that power should not be based on another law.

### *Conclusion*

6.22. The conclusion of the foregoing is that the verdict will be quashed and that Viruswaarheid's claim will still be dismissed. With the introduction of the curfew, the State has been allowed to use the separate emergency authority in the Wbbbg. The principles of proportionality and subsidiarity have not been lost sight of.

6.23. Viruswaarheid, as the unsuccessful party, will be ordered to pay the costs of both instances, including those of the incident on appeal.

## **Decision**

The Court of Appeal :

- annuls the judgment of the preliminary relief judge in the court of The Hague of 16 February 2021; and again justifying
- dismisses the claim.
- orders Viruswaarheid to pay the costs of the proceedings in first instance, estimated on the part of the State to date at € 667 in court fees and € 1,016 in lawyer's salary;
- orders Viruswaarheid to pay the costs of the appeal proceedings, estimated on the side of the State to date at € 103.83 in costs for the appeal summons, € 772 in court fees and € 3,342 in attorney's salary, and at € 163 to post-salary for the attorney, to be increased by € 85 if not within fourteen days after registration this judgment has been amicably complied with and this judgment has subsequently been served, and provides that these amounts must be paid within 14 days of the date of the judgment or, as regards the amount of € 85, after the date of service , failing which these amounts will be increased by the statutory interest as referred to in Article 6: 119 of the Dutch Civil Code from the end of the aforementioned period of 14 days;
- declares this judgment provisionally enforceable with regard to court costs orders.

This judgment was given by mrs. M.A.F. Tan-de Sonnaville, S.A. Boele and J.J. van der Helm and was pronounced in public on February 26, 2021 in the presence of the Registrar.

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1. Published on [www.rechtspraak.nl](http://www.rechtspraak.nl) under number ECLI: NL: RBDHA: 2021: 1100.

2. Stb. 2021, 24.

3. Dutch Government Gazette. 2021, no. 4191.

4. Technical briefing from Prof. Dr. Van Dissel of 16 February 2021 to the MCC.

5. The oral decision is published on [www.rechtspraak.nl](http://www.rechtspraak.nl) under number ECLI: NL: GHDHA: 2021: 252.

6. HR July 1, 1983, ECLI: NL: HR: 1983: AD5666 (NJ 1984, 360). HR December 20, 2019, ECLI: NL: HR: 2019: 2006 (Urgenda).

7. House of Representatives 2000-2001 session, 25 295, no. 3 (letter from the Minister of Health, Welfare and Sport of 22 June 2001).

8. The Siracusa Principles on the limitation and derogation provisions in the International Covenant on Civil and Political Rights, E / CN.4 / 1985/4.

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