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The European Human Rights Law Review presents a wide range of material as a means of promoting better understanding of European human rights law, and providing a forum for serious debate on the European Convention on Human Rights and other human rights treaties. It carries a mix of news, analytical articles and case summaries which offer a broad perspective on all the key issues in the area of human rights.

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The Confidentiality of the Lawyer-Client Relationship Under Pressure?—*Roemen and Schmit v Luxembourg*[1]

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A recent judgment of the European Court of Human Rights highlights the importance of the precious value of confidentiality between the lawyer and his client. In the case of Roemen and Schmit v Luxembourg *the Court is of the opinion that the searching of the office of a lawyer was not acceptable and was in breach of Art.8 of the European Convention on Human Rights (right to respect for private and family life). An important element of the case was that the purpose of the search carried out in the lawyer's office had been to discover a journalist's source through the intermediary of his lawyer. The Court went on to hold that the investigative measures fell within the ambit of the protection of journalistic sources and that these investigative measures violated the journalist's freedom of expression as protected under Art.10 of the European Convention.*

The Facts

Anne-Marie Schmit was the lawyer of a journalist, Robert Roemen, who had written an article in the *Lëtzëbuerger Journal* in which he revealed that a Minister was convicted of tax evasion. The article reported that the Minister had been ordered to pay a tax fine of 100,000 Luxembourg francs (nearly €2,500). This information was based on an internal document that was leaked from the Land Registry and Land Property Office. The Minister lodged a criminal complaint and an investigation was opened in order to identify the civil servant(s) who had handled the file under a breach of confidence. Apart from carrying out searches at the journalist's home and workplace, the investigative judge also ordered a search at the journalist's lawyer's office. At the lawyer's office one letter had been seized, containing a handwritten note by the Director of the Land Registry and State Property Office. This letter had been sent to the Prime Minister and to the heads of department with the notice: "Confidential information for your guidance". Because the report on the search and seizure did not contain certain observations as required by the relevant legislation regulating the legal profession, 3° of the Luxembourg law on the lawyer's profession (August 10, 1991), the District Court declared the seizure void and ordered the letter to be returned. However,

[1] App. No.51772/99, judgment of February 25, 2003.

on the same day as the letter was returned to her, a new search was carried out and the letter was seized again, this time applying the formalities that the Luxembourg law on the profession of lawyers requires with regard to the searching of the lawyers' offices.[2] Submitting that still there had been a breach of the principle that a lawyer's place of work and the secrecy of communications between a lawyer and his or her client were inviolable, Anne-Marie Schmit lodged a new application to set aside the search warrant. Her application was dismissed by the Luxembourg judicial authorities, both at first instance and on appeal. Also several applications lodged by Roemen alleging violation of the protection of journalistic sources were also dismissed. Finally, after exhaustion of all domestic remedies, both Roemen and Schmit lodged an application with the European Court of Human Rights.

The Court's judgment in the case of *Roemen and Schmit v Luxembourg*

The judgment of February 25, 2003 confirms the Court's case law that in principle the secrecy of communication between a lawyer and his or her client falls under the protection of privacy as guaranteed by Art.8 of the Convention (see also *Niemietz v Germany*[3]). The Court considered that the search carried out by the Luxembourg judicial authorities at the lawyer's office and the seizure of a document had amounted to an unacceptable interference with her right to respect for her private life.

The Court found that the search had been in accordance with Arts 65 and 66 of the Luxembourg Code of Criminal Procedure and also with Art.35, 3° of the Law of August 10, 1991, which laid down the procedure for carrying out searches and/or seizures at a lawyer's office. It was also held that the search was pursuing the legitimate aim of maintaining public order and preventing crime. The European Court, however, was of the opinion that the application of the special procedural guarantees were insufficient to protect against the interference of the lawyer's confidentiality of correspondence. According to the Strasbourg Court, the interference in Schmit's right to respect for her private life was not to be considered as necessary in a democratic society. The Court observed that the search warrant had been worded in broad terms, thereby conferring wide powers on the investigating officers. Above all, the Court emphasised that the search carried out at Ms Schmit's office clearly amounted to a breach of the journalist's source through the intermediary of his lawyer. The Court held that the search had therefore been disproportionate to the legitimate aims pursued, particularly in view of the rapidity with which the search order had been carried out. In the case of *Roemen and Schmit*, the confidentiality of the lawyer's office was awarded an additional level of protection, as the documents that were the object of the search warrant fell under the protection of journalistic sources. The Court also found that the searching of the journalist's home and office was a violation of Art.10 of the Convention. Confirming its case law, the Court decided that "having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially

[2] Art.35, 3° of the Luxembourg law on the lawyer's profession (loi sur la profession d'avocat) of August 10, 1991 requires the presence of the "Bâtonnier", the Chairman of the Bar (or his "representant"), while the report on the search and seizure must contain the observations the Chairman of the Bar or his "representant" want to make.

[3] (1992) 16 E.H.R.R. 7.

chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Art.10 of the Convention, unless it is justifiable by an overriding requirement in the public interest" (*Goodwin v United Kingdom.*[4])

In what circumstances can a search order of a lawyer's office be legitimate?

The case of *Roemen and Schmit* shows that the confidentiality of the lawyer-client relation can only be interfered with by judicial authorities under the terms of para.2 of Art.8 of the Convention. The search at the lawyer's office might only have been legitimate if the case connected to the leaked document concerned "an overriding requirement in the public interest" and in as far the searching could be considered as a last or ultimate measure, that is if no other investigative tools were available or efficient to identify the civil servant(s) who were responsible for breach of professional confidence.[5]

The perspective of the legal system, the professional organisations and the individual

The handling of cases in which lawyers are involved have different implications according to the perspective. The legal system to a large extent seems to function on a formal institutional basis in order to protect fundamental human rights. If a lawyer has been a victim of interference in his professional activity by national judicial authorities, there is still the supervisory control by the Strasbourg Court of Human Rights. The case of *Roemen and Schmit*, just as many other examples,[6] indeed demonstrate that the

[4] (2002) 35 E.H.R.R. 18 at para.39.

[5] See also Recommendation No.R (2000) 7 of the Committee of Ministers to Member States on the right of journalists not to disclose their sources of information, March 8, 2000—Principle 3 (Limits to the right of non-disclosure): a. The right of journalists not to disclose information identifying a source must not be subject to other restrictions than those mentioned in Art.10, para.2 of the Convention. In determining whether a legitimate interest in a disclosure falling within the scope of Art.10, para.2 of the Convention outweighs the public interest in not disclosing information identifying a source, competent authorities of Member States shall pay particular regard to the importance of the right of non-disclosure and the pre-eminence given to it in the case law of the European Court of Human Rights, and may only order a disclosure if, subject to para.b, there exists an overriding requirement in the public interest and if circumstances are of a sufficiently vital and serious nature. b. The disclosure of information identifying a source should not be deemed necessary unless it can be convincingly established that: i. reasonable alternative measures to the disclosure do not exist or have been exhausted by the persons or public authorities that seek the disclosure, and ii. the legitimate interest in the disclosure clearly outweighs the public interest in the non-disclosure, bearing in mind that:

- — an overriding requirement of the need for disclosure is proved,
- — the circumstances are of a sufficiently vital and serious nature,
- — the necessity of the disclosure is identified as responding to a pressing social need, and
- — Member States enjoy a certain margin of appreciation in assessing this need, but this margin goes hand in hand with the supervision by the European Court of Human Rights.

[6] *Ezelin v France* (1992) 14 E.H.R.R. 362; *Incal v Turkey* (2000) 29 E.H.R.R. 449; *EK v Turkey* App. No.28496/95, judgment of February 7, 2002; and *Nikula v Finland* App. No.31611/96, judgment of March 21, 2002.

Strasbourg supervision can be an ultimate safeguard to the protection of the lawyer's fundamental rights and freedoms and the fundamental rights of his or her client.

However, even if a lawyer makes successful use of a national remedy, or if finally the Strasbourg Court decides that there has been a violation of a fundamental right, still this is not a winning case from all perspectives. From the individual level the applicant lawyer has been through procedures probably for many years, with both financial and psychological pressures, which might have influenced his or her career as a lawyer. The violation of the lawyer's rights and privileges also risk bringing into danger the confidence citizens have in the lawyer's professional activities. Cases like these tend in general to make lawyers reluctant before taking on clients with cases including a risk of getting involved in procedures on his or her working conditions.

The lack of respect of the lawyer's rights indeed also has repercussions on the rights and freedoms of his or her client and might especially endanger the fair trial principle and the rights of defence. It is a risk that persons with controversial cases involving public authorities experience difficulties to find a competent lawyer, which might further diminish access to justice.

A Task for the National Bar and Law Societies

Apart from supporting lawyers who are actually involved in such a case, the bar and law societies have a crucial role in order to protect the basic rules of the profession, especially, the confidentiality between the lawyer and his client. Furthermore, the professional organisations of lawyers must play an active role in developing and stimulating awareness in society of the importance of keeping up high standards of lawyer's privileges. It is to be underlined that the independent functioning of lawyers is crucial for a sustainable democracy based on fundamental human rights. The judgment in the case of *Roemen and Schmit v Luxembourg* has again brought this crucial issue to attention. It might also be a signal for the bar and law societies in Europe to develop a policy to safeguard and promote the basic values of the lawyer's profession in a democratic society respecting the fundamental rights and freedoms of its citizens.