

## ECHR rules in favour of legal privilege

When the Luxembourg authorities raided the office of a lawyer in search of a journalist's source, the offended parties took their case to the European Court of Human Rights. **Inger Høedt-Rasmussen** and **Dirk Voorhoof** explain the implications of the Court's ruling

A recent judgment of the European Court of Human Rights (ECHR) has reinforced the importance of legal privilege between lawyer and client. In *Roemen and Schmit v. Luxembourg* [25 February 2003] the Court decided that searching the office of a lawyer in order to discover a journalist's source was not acceptable under Article 8 of the European Convention on Human Rights (right to respect for private and family life). The Court also decided that the investigative measures fell within the ambit of the protection of journalistic sources and that therefore they violated the journalist's freedom of expression as protected under Article 10 of the European Convention.

The facts of the case concerned Anne-Marie Schmit, a lawyer representing journalist Robert Roemen, who had written an article in the *Lëtzebuurger 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 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. In addition to carrying out searches at the journalist's home and

workplace, the investigative judge also ordered a search of the journalist's lawyer's office. At the lawyer's office a letter was seized containing a handwritten note from 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 the observations of the Vice-Chairman of the Bar as prescribed in Article 35(3) of the Luxembourg law (10 August 1991) on the lawyer's profession, the District Court declared the seizure void and ordered the letter to be returned. However, on the same day that the letter was returned to her, a new search was carried out and the letter was seized again, this time applying the formalities required by the relevant law with regard to the searching of her office. 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, Ms 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 dismissed were several applications lodged by Mr Roemen alleging violation of the protection of journalistic sources. Finally, after exhaustion of all domestic

remedies, both Mr Roemen and Ms Schmit lodged an application with the ECHR.

The judgment of 25 February 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 Article 8 of the Convention (see also ECHR 16 December 1992, *Niemietz v. Germany*). 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.

It should be noted that the search had been made in accordance with Articles 65 and 66 of the Luxembourg Code of Criminal Procedure and also with section 35(3), which laid down the procedure for carrying out searches and/or seizures at a lawyer's office. It was recognised that the search was pursuing the legitimate aim of maintaining public order and preventing crime. The Court however held that the application of the special procedural guarantees were insufficient to legitimise the interference in the lawyer's confidentiality of correspondence. According to the ECHR, the interference in Ms Schmit's right to respect of her private life was not 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 Mr Roemen and Ms 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 found that the searching of the journalist's home and office were a violation of Article 10 of the Convention.

The case of *Roemen and Schmit* shows that the confidentiality of the lawyer-client relationship can only be interfered with by judicial authorities under the terms of paragraph 2 of Article 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 as the searching could be considered as a last or ultimate measure, that is, if no other investigative tools were available or sufficient to identify the civil servant(s) who were responsible for breach of

professional confidence.

*Roemen and Schmit* once again demonstrates that the role of lawyers is under pressure in several countries. Judicial authorities seem to demonstrate a degree of negligence with regard to the crucial role of lawyers in a democratic society and the fundamental rights and freedoms of their clients.

The handling of cases in which lawyers are involved have different implications dependent upon one's 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 ECHR. The case of *Roemen and Schmit*, along with others demonstrates that

the Strasbourg supervision can be an ultimate safeguard to the protection of the lawyer's basic 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 ECHR decides that there has been a violation of a fundamental right, still this is not a winning case from all perspectives. On the individual level the applicant lawyer has been through procedures probably for many years, with both financial and psychological pressures, which might have impacted on his or her career. The violation of the lawyer's rights and privileges also risk endangering the confidence citizens have in the lawyer's professional activities. Cases like these tend in general to make lawyers reluctant to take

on clients with cases that include a risk of getting involved in procedures that impinge on his or her working conditions.

The lack of respect of lawyer's rights 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 in finding a competent lawyer, which might further diminish access to justice.

Cases like *Roemen and Schmit* demonstrate that the fundamental rights and freedoms of lawyers shall not only be known as articles in the Convention of Human Rights, but that they shall also be applied in practice and should effectively become an integrated part of the daily

practice of judicial authorities.

Apart from supporting lawyers who are actually involved in such cases, national bar and law societies have a crucial role in protecting the basic rules of the profession. Furthermore the professional organisations of lawyers must play an active role in developing and stimulating the awareness in society of the importance of keeping up high standards of lawyer/client privilege. The independent functioning of lawyers is crucial for a sustainable democracy based on fundamental human rights. The judgment in this case has brought this crucial issue to attention. ■

*Inger Høedt-Rasmussen is Research Development director at the Danish Bar & Law Society. Dirk Voorhoof is a professor of law at Ghent University, Belgium*

AC  
Law

### THE DISTINGUISHED LAW FIRM OF THE NORTH-EAST OF ITALY

*A wide network of contacts and pluriannual experience in business matters have enabled the creation of a trustworthy and competent legal pole in the commercially sophisticated and fast developing North-East of Italy*

#### PRACTICE AREAS

*Antitrust, Arbitration and ADR, Aviation, Company Law, Agency and Distributionship, Contracts, European Union Law, Environmental Law, Family Law, Franchising, Intellectual Property, International Trade Law, International and Domestic Practice, Litigation, M&A, Privatisations, Wills, Trust and Estates*

#### LANGUAGES

*Italian, English, French, German, Spanish*

www.aclaw.it

AC  
Law

### CECCON & ASSOCIATES AVVOCATI

PADOVA  
GALLERIA DEI BORROMEI, 4  
35137 PADOVA  
TEL. +39 049 8774630  
FAX +39 049 8750299  
e-mail. lawfi m@aclaw.it  
www.aclaw.it

#### Associated Offices

MILAN  
ZAMBELLI, LUZZATI,  
MEREGALLI & ASSOCIATI  
20123 MILANO VIA CARDUCCI, 15

ROME  
STUDIO LEGALE BELTRAMO  
00187 ROME - VIA V. VENETO, 84

PORDENONE  
GRAVA E ASSOCIATI  
33170 PORDENONE - VIA MAZZINI, 12