

Jurius

Search of Home on the Basis of Information Bought by the German Secret Services was Lawful

ECHR – In the Chamber judgment of 6 October 2016 in the case of K.S. and M.S. v. Germany the European Court of Human Rights held, unanimously, that there had been no violation of Article 8 (right to respect for the home) of the European Convention on Human Rights. The case concerned a search of a couple's home because they were suspected of tax evasion. (Judgement 33696/11)

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[Rz 1] The proceedings against them had been triggered when information about their assets held in a Liechtenstein bank had been illegally copied by an employee of the bank and sold to the German secret services. The applicants notably complained that their home had been searched on the basis of a warrant issued on the strength of evidence which had been obtained in breach of domestic and international law.

[Rz 2] The Court found that the search had been carried out in accordance with the law. It noted in particular the settled case-law of the Federal Constitutional Court according to which there was no absolute rule that evidence which had been acquired in violation of procedural rules could not be used in criminal proceedings. That meant that the couple had been able to foresee – if necessary with the aid of legal advice – that the domestic authorities would consider basing the search warrant on the Liechtenstein data despite the fact that that information might have been acquired in breach of the law.

[Rz 3] Furthermore, the search had been proportionate: firstly, because German legislation and jurisprudence in the sphere of searches provided adequate and effective safeguards against abuse in general and had done so in the circumstances of this particular case; secondly, because tax evasion constituted a serious offence; thirdly, because nothing indicated that the German authorities had deliberately and systematically breached domestic and international law in order to obtain information for the prosecution of tax crimes; fourthly, because the warrant had been explicit and detailed as concerned both the offence being investigated as well as the items sought as evidence; and, lastly, because the couple had not alleged any repercussions on their personal reputation as a consequence of the search of their home.

[Rz 4] The applicants, Mr K.S. and Mrs M.S., husband and wife, are German nationals who were born in 1939 and 1942 respectively and live in Lauf (Germany). In 2006 the German tax authorities instigated proceedings against the applicants on suspicion of failing to declare about 50,000 euros of yearly interest in their tax returns from 2002 to 2006. The proceedings were triggered following receipt of information about the applicants' assets held in a Liechtenstein bank. The information had been illegally copied by an employee of the bank and purchased by the German secret service before finding its way to the tax authorities.

[Rz 5] Using this information, a prosecutor obtained a warrant from a court for the search of the applicants' home in order to urgently obtain further evidence. Their home was thus searched in 2008: documents and computer files concerning the applicants' capital and information on their foundations were seized. They were eventually acquitted in 2012 in the criminal proceedings brought against them.

[Rz 6] In the meantime, the applicants challenged the lawfulness of the search of their home. They argued that the warrant had been based on material which had been stolen from the Liechtenstein bank and bought by the German secret services, in breach of both international and domestic law. Their appeal was dismissed at first and second instance. The second-instance court, leaving open the question of whether the data had been obtained illegally, notably found that – according to the well-established case-law of the Federal Constitutional Court – evidence that had been illegally acquired by a third party could generally be used in criminal proceedings, unless it had been acquired through coercion or force. It also found that, in any case, the material seized did not involve the core area of the applicants' private life but their business activities. The applicants' challenge was ultimately dismissed in 2010 by the Federal Constitutional Court which found it to be settled case-law that there was no absolute rule that evidence which had been acquired in violation of procedural rules could not be used in criminal proceedings. The Federal

Constitutional Court did not find it necessary to decide on whether the data had been obtained in breach of international and domestic law, as the lower courts had based their decision on what was, for the applicants, the best possible assumption, namely that the evidence might in fact have been acquired unlawfully.

[Rz 7] Relying on Article 8 (right to respect for private and family life, the home, and the correspondence), the applicants complained in particular that their home had been searched on the basis of a warrant issued on the strength of evidence which had been obtained in breach of German domestic and international law.

[Rz 8] The Court found that the search of the applicants' home had amounted to an interference with their right to respect for their home and that that interference had been based in domestic law, namely the relevant provisions of the Code of Criminal Procedure. Furthermore, given the settled case-law of the Federal Constitutional Court (according to which there was no absolute rule that evidence which had been acquired in violation of procedural rules could not be used in criminal proceedings), the applicants had been able to foresee – if necessary with the aid of legal advice – that the domestic authorities would consider basing the search warrant on the Liechtenstein data despite the fact that that information might have been acquired in breach of the law. The search had therefore been «in accordance with the law».

[Rz 9] Moreover, the search of the applicants' home had been proportionate to the legitimate aim pursued, namely the prevention of crime. In coming to this conclusion, the Court considered the specific circumstances of the case, using a number of criteria.

[Rz 10] Firstly, as concerned whether the German legislation and practice provided adequate and effective safeguards against abuse, the Court noted that searches such as the one carried out at the applicants' home were generally only ordered by a judge under the limited conditions set out in the Code of Criminal Procedure. Furthermore, in the particular circumstances of the case at hand, the lawfulness of the search had been reviewed at both first and second instance. At second-instance there had even been an assessment of whether the basis of the search warrant, namely the Liechtenstein data, complied with the settled case-law of the Federal Constitutional Court on the use of evidence in criminal proceedings. Also of relevance was the fact that the data had been used in preliminary proceedings and not the main proceedings against the applicants.

[Rz 11] Secondly, as concerned the nature of the offence, the Court observed that it had constituted a serious offence – tax evasion – affecting State resources and its capacity to act in the collective interest.

[Rz 12] Thirdly, as concerned the manner and circumstances in which the search warrant had been issued, the search had been ordered to find further evidence and appeared to have been the only means of establishing whether the applicants had in fact been liable for tax evasion. Moreover, nothing indicated that the German authorities, at the time, had deliberately and systematically breached domestic and international law in order to obtain information for the prosecution of tax crimes.

[Rz 13] Fourthly, as to the content and scope of the order, the Court considered them to be specific, containing an explicit and detailed reference to the offence being investigated and identifying the items sought as evidence.

[Rz 14] Lastly, as concerned the possible repercussions of the search, the applicants had not alleged any adverse effect of it on their personal reputation.

[Rz 15] Accordingly, in the present case the German courts had remained within their room for manoeuvre («margin of appreciation») in regulating the conditions under which residential premises could be searched, and there had therefore been no violation of Article 8 of the Convention.

Judgement of the ECHR no. 33696/11 of 6 October 2016 in case K.S. and M.S. v. Germany

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