[DE] Federal High Court on Prohibition of Seizure and on Search of Premises of Freelance Journalists

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In January this year, the Federal High Court (BGH) dismissed the proceedings brought by a freelance journalist against a search and seizure order.

In the course of the preliminary investigation of a person suspected of having supported a terrorist organization, the BGH committing magistrate ordered a search of the editorial offices of a daily newspaper. The purpose was to look for and seize an "open letter" to the Rote Armee Fraktion (RAF), presumed to be there, from a co-defendant. In the letter there were statements to the effect that the defendant had been aware of a RAF bomb attack carried out later. The letter was the subject of an article which the applicant journalist had published in the newspaper, containing in part direct quotations from the letter. After it transpired that the document was not in the editorial offices, but in the personal possession of the applicant, no search was carried out on the newspaper's premises. Because of the danger in delaying, the federal prosecutor in charge of the investigation ordered on the spot a search of the freelance contributor's work area in an office he shared with other journalists. The applicant handed in the letter at issue as a fax. The BGH found the seizure to be lawful on the grounds that the exemption from seizure of information material received by journalists and held in their possession, as laid down in the code of criminal procedure (StPO), was dependent on the extent of journalists' right to refuse to give evidence in accordance with § 53 para. 1 No.5 (StPO). An independent contributor could indeed, in principle, rely on this right but the right to refuse to give evidence would not always hold good if the identity of the informant were revealed in the actual press report on the information passed to the journalist and the contents of the information were otherwise known. Then the exemption from seizure under press law would also be inapplicable.

Constitutionally, no exemption from seizure under press law would arise either, in the case at issue. The preservation of a confidential relationship between a representative of the press and his informant was indeed of paramount importance for the press to be able to function properly in a democratic state under the rule of law. For the performance of its public duties, the press was dependent on information communicated privately, which could only be expected in sufficient degree if informants could fully rely on editorial confidentiality. However, in the case at issue, it was particularly noteworthy that the protection of

the relationship of confidentiality was not an absolute right but one of which the press and its members might avail themselves. Where, as in this case, the identity of the informant and the content of his communication were revealed with his evident knowledge and consent, it would not be a matter for concern that seizure under the criminal code of procedure might lead to such sources of information drying up.

In addition the BGH held that the search ordered by the prosecutor was also lawful, so that the seizure was not unlawful on those grounds. The responsibility for an order to search editorial offices and publishing houses (which applies to broadcasting stations too) lies solely with the magistrate, as is the case here with a seizure order in accordance with § 98 para. 1 subpara. 2 (StPO). However, the applicant's office was not considered as ranking among the premises subject to the magistrate's discretion. In particular, it is not to be viewed as an editorial office within the meaning of § 97 para. 5 subpara. 1 and § 98 para. 1 subpara. 2 (StPO), which is understood to refer to the spatially limited and organizationally circumscribed area in which editorial staff (in the press law sense) together with their assistants produce, under their own authority as to make-up and editing, material to be featured in a publication appearing on a regular basis. There could be no question of equating one with the other. The purpose of the special rule on editorial offices was chiefly to take account of the intensified level of vulnerability to which the press was subject. The distinction could be inferred from the law. It distinguished between the area of persons protected against seizure via the right to refuse to give evidence (§ 97 para. 1 No. 5 in conjunction with § 53 para. 1 No. 5 (StPO)), and the area for which the magistrate's discretion held good (§ 98 para. 1 subpara. 2). In the latter, there was no mention of items in the custody of journalists as against those in the custody of an editorial office or publishing house.

Beschluß des 3. Strafsenats des Bundesgerichtshofs vom 13. Januar 1999, Az.: StB 14/98.

Decision by the 3rd Criminal Division of the Court of Appeal of the Federal High Court dated 13 January 1999, reference StB 14/98.