

## **HEADNOTES**

to the Order of the Second Senate of 24 May 1977  
2 BvR 988/75

1. The seizure of client records from an institution operating an addiction counselling agency recognised under public law within the meaning of § 203(1) no. 4 of the Criminal Code violates that institution's fundamental right under Article 2(1) of the Basic Law and the fundamental rights of its clients under Article 2(1) in conjunction with Article 1(1) of the Basic Law if it impairs public health interests to such a degree that the damage caused by the interference is disproportionate to the outcome that is intended and can reasonably be expected of the seizure.
2. The seizure of such records violates the principle of proportionality if it is merely based on the general suspicion that clients of the counselling agency may have committed criminal acts relating to the acquisition and possession of drugs and may have acquired such drugs illegally.

## **FEDERAL CONSTITUTIONAL COURT - 2 BvR 988/75 -**

### **IN THE NAME OF THE PEOPLE**

In the proceedings  
on the constitutional complaint of

1. the Caritas Association for the regions Aachen-Stadt and Aachen-Land e. V., represented by Father G... and Father L..., 2. Father G..., 3. Professor Dipl.-Psych. G..., 4. Ms G..., 5. Ms K..., 6. Ms K..., 7. Mr R...,

– authorised representatives: ...

against        a) the Order of the Aachen Regional Court of 7 November 1975  
                  - 15 Qs 32/75 -,  
  
                  b) the Order of the Aachen Local Court of 29 October 1975 - 41 Gs 3446/75-,  
  
                  c) the Order of the Aachen Local Court of 16 October 1975 - 41 Gs 3313/75 -  
                  and the applications for preliminary injunction

the Federal Constitutional Court – Second Senate –  
with the participation of Justices

Vice-President Zeidler,  
Rinck,  
Wand,

Hirsch,  
Rottmann,  
Niebler,  
Steinberger

held on 24 May 1977:

1. The Order of the Aachen Local Court of 16 October 1975 - 41 Gs 3313/75 - violates the fundamental right of complainant no. 1 under Article 13(1) of the Basic Law in conjunction with the Basic Law's principle of the rule of law.
2. The Order of the Aachen Local Court of 29 October 1975 - 41 Gs 3446/75 - violates the fundamental right of complainant no. 1 under Article 2(1) of the Basic Law and the fundamental rights of complainants nos. 4 to 7 under Article 2(1) in conjunction with Article 1(1) of the Basic Law.

Insofar as the Aachen Regional Court rejected the appeal against that order, its Order of 7 November 1975 - 15 Qs 32/75 - also violates the above-mentioned fundamental rights; it is reversed. [...]

3. [...]
4. [...]

## REASONS:

### A.

The constitutional complaints concern the search of the premises of a drug counselling agency operated by the Caritas Association and the seizure of records from the premises for the purpose of criminal investigations. 1

### I.

1. The Caritas Association for the Regions Aachen-Stadt and Aachen-Land e. V. (complainant no. 1) [...] operates an addiction counselling agency [...] in Aachen. The counselling agency is recognised as a model institution by the Federation and the *Land* and receives public subsidies [...]. In 1975, it had 25 staff members, including two psychologists and five social workers, employed on a permanent basis. It has a 'tearoom' and other premises. Its objective is both to prevent drug abuse and to help drug users overcome their addiction. For these purposes, it offers different forms of assistance, such as outpatient counselling and treatment. The 'tearoom' serves as a gathering place where young people can meet each other and the counsellors several nights a week. It is intended to facilitate counselling and treatment. For every client, the counselling agency creates a record containing the counsellor's notes on conversations, tests and therapeutic measures, but also the client's own statements. A 'problem questionnaire' to be completed by the clients requests information on an array of personal circumstances. The counselling agency assures its clients that any information will be kept confidential. 2

2. [...] 3-4

a) On 16 October 1975, the public prosecution office sent files to the Local Court requesting 5

an order for the search of the drug counselling agency “pursuant to §§ 102, 103 and 105 of the Code of Criminal Procedure”. [...]

[...] 6-7

The search took place on the evening of 24 October 1975. It began at 8:00 p.m. and ended at some point after 9:00 p.m. At the same time, the police raided the premises. [...] 8

b) [...] 9-13

c) [...] 14-17

## II.

The constitutional complaints [...] are directed against the search and seizure orders as well as against the decision of the Regional Court upholding these orders. They are also directed against the police raid that – in the complainants’ opinion – was carried out “under the protection and cover” of the search order, and against the time chosen to carry out the search. [...] 18

[...] 19-25

## III.

[...] 26-37

## B.

The constitutional complaints are admissible to the extent that complainant no. 1 challenges the search order and complainants nos. 1 and 4 to 7 challenge the seizure order and the decision of the Regional Court upholding it. To the extent that the constitutional complaints concern the police raid and the time chosen for the search, there are considerable doubts as to whether they are admissible; however, the Senate does not need to address these given that the constitutional complaints are in any case manifestly unfounded in this respect. For the rest, the constitutional complaints are inadmissible. 38

[...] 39-52

## C.

The constitutional complaints, which are admissible to the extent set out above, are well-founded, except where they are directed against the police raid and the time chosen for the search. 53

## I.

The search order of 16 October 1975 - 41 Gs 3313/75 - issued by the Aachen Local Court violates complainant no. 1’s fundamental right under Art. 13(1) of the Basic Law in conjunction with the Basic Law’s principle of the rule of law. 54

1. As a registered association, complainant no. 1 can be a holder of the fundamental right under Art. 13(1) of the Basic Law. [...]. The counselling agency’s premises are covered by the protection of Art. 13(1) of the Basic Law; the term ‘home’ also includes work, commercial 55

and business premises (BVerfGE 32, 54 <69 *et seq.*>; 42, 212 <219>).

2. At least in cases where providing such information is entirely feasible based on the results of the investigation and where it does not impede the aims of law enforcement, a written search order issued on the basis of § 102 of the Code of Criminal Procedure that neither contains any factual information about the charge nor indicates the type or possible content of the evidence being sought does not meet the requirements of the principle of the rule of law (BVerfGE 42, 212 <220>). This legal principle also applies in the present case. [...]

3. The challenged search order does not meet the minimum requirements arising from the principle of the rule of law. Not only is it missing a specific description of the charge but also any information on the evidence the search was supposed to provide, even though these elements were available according to the results of the investigation and would not have impeded the aims of law enforcement. No other circumstances in this case can be ascertained outside of the search order that could exceptionally take on the function of the principle of the rule of law, which the content of such an order must normally fulfil (cf. BVerfGE 20, 162 <227 and 228>; 42, 212 <222>).

## II.

The seizure order of 29 October 1975 issued by the Local Court and the decision on appeal of the Regional Court upholding it violate the fundamental right under Art. 2(1) of the Basic Law of complainant no. 1 and the fundamental rights under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law of complainants nos. 4 to 7; they violate the principle of proportionality in respect of these fundamental rights.

1. a) Art. 2(1) of the Basic Law protects the general freedom of action of complainant no. 1 as a registered association (cf. BVerfGE 29, 260 <265 and 266>). This protection encompasses not only the right to establish an addiction counselling agency, but also the right to carry out its intended work in accordance with the law.

b) The clients of the counselling agency, including complainants nos. 4 to 7, are holders of the fundamental right to respect of their intimate and private spheres (Art. 2(1) in conjunction with Art. 1(1) of the Basic Law). While the client records kept by the counselling agency, including counsellors' notes on conversations, tests, therapeutic measures and the clients' own written statements, do not belong to the inviolable intimate sphere of the clients, they do belong to their private sphere. Thus, similar to medical index cards (medical records), they are also covered by the protection that the fundamental right under Art. 2(1) in conjunction with Art. 1(1) of the Basic Law affords individuals against intrusions of state authority (cf. BVerfGE 32, 373 <379>).

c) Yet intrusions of state authority upon the scope of protection of these fundamental rights are not excluded *per se*. The significance and scope of their protection cannot be determined irrespective of other interests that equally merit protection. Rather, in case of conflict, a balance must be struck with the principle of proportionality serving as the applicable constitutional standard for weighing the conflicting interests. It sets limits to state interference both with regard to the general freedom of action (Art. 2(1) of the Basic Law) and with regard to the more specific private sphere of individuals (Art. 2(1) in conjunction with Art. 1(1) of the Basic Law), and thus also determines the scope of the fundamental rights in question (BVerfGE 32, 373 <379>; 34, 238 <246>). Such limits must be set out by balancing the interests at issue. Where the outcome of the balancing suggests that the interests conflicting with the interferences in the specific case are evidently of significantly

greater weight than the interests the state measures serve to protect, carrying out [the measure giving rise to] the interference anyway violates the principle of proportionality.

Interferences by way of seizures in criminal proceedings cannot simply be justified on the grounds that the public prosecution office is generally obliged, in accordance with the principle of legality, to take action against all criminal offences that can be prosecuted where there is a sufficiently strong suspicion and, in this regard, to make use of all coercive measures available under procedural law within the limits of the statutory provisions; this is because the constitutional principle of proportionality must also be observed in this respect. 62

2. The challenged decisions in respect of the seizure failed to balance the relevant interests in accordance with constitutional law. 63

a) On the one hand, the balancing must take into account the interest of the public in a properly functioning criminal justice system, including the tasks of prosecuting and punishing criminal offences that breach the Narcotics Act; depending on the specific circumstances of the individual case, the organs of the criminal justice system must be able to make use of the coercive measures set out in the Code of Criminal Procedure to that end. 64

[...] 65-67

b) On the other hand, public health interests, which are also essential to the common good, must be taken into account [in the balancing of interests]; these include providing effective assistance to persons with drug addiction or at risk of addiction and the guarantee that the work of drug counselling agencies will be carried out without disruption. 68

[...] 69-71

c) For the proper weighing of the interests to be balanced against one another, the following general aspects must be stressed: 72

aa) While the seizure of the client records of an addiction counselling agency is a suitable means to investigate drug-related offences, it is only one of several instruments available to law enforcement authorities to investigate such criminal offences. 73

bb) The seizure of records generally does not yield important evidence that could be used to investigate and prosecute illegal drug dealers. [...] 74

cc) Generally, the seizure of client records will only have prospects of contributing to the success of an investigation insofar as the investigation concerns the clients' own criminal offences relating to the illegal acquisition and possession of drugs. In this respect, it must be taken into account that when it comes to investigating and punishing offences breaching the Narcotics Act, the legal interests involved are not all of the same weight. Illegal dealers face the most severe punishment, whereas drug users face less severe criminal sanctions [...]. Thus, interests of law enforcement have greater weight when it comes to prosecuting illegal dealers than when it comes to enforcing the state's power to punish drug users. 75

dd) Applicable law protects clients' trust in the confidentiality of statements they made in the context of a counselling relationship. [...] 76

d) These general considerations show that, in the fight against drug abuse, the interests in 77

a properly functioning criminal justice system do not generally take precedence over the public interest in addiction counselling. If the seizure of client records of an addiction counselling agency in accordance with the requirements set out in the Code of Criminal Procedure were always permissible, it would regularly destroy the relationship of trust required for the work of the affected agency and at the same time jeopardise the work of all other counselling agencies. In the interest of effective public health in the field of addiction counselling, this cannot be tolerated.

However, the above-mentioned circumstances do not provide grounds for generally giving precedence to public health interests over the interests of the criminal justice system. Not every addiction counselling agency merits constitutional protection against seizure of its client records, and this privilege cannot be invoked without consideration of the individual case. Rather, whether client records of such a counselling agency can be seized depends not just on those general considerations, but also on the circumstances of the specific case that may give precedence to one interest in one case and to the other interest in another. A violation of the fundamental rights of affected agencies can only be found in this context if the seizure of client records impairs public health interests to such a degree that the damage caused by the interference is disproportionate to the outcome that can reasonably be expected of the seizure. It cannot be definitively decided for all cases what circumstances are to be taken into account in the specific case and what weight they must be given. To make a decision in the present case, the following considerations are sufficient: 78

aa) Only counselling agencies that are officially recognised pursuant to § 203(1) no. 4 of the Criminal Code merit protection against seizure of their client records. Without such recognition, there is a risk that organisations could be established under the guise of counselling agencies with the sole purpose of qualifying for protection against seizure in order to shield certain information from access by law enforcement authorities. 79

bb) Yet even the seizure of client records from an officially recognised drug counselling agency does not violate constitutional law *per se*. A counselling agency may only invoke protection against seizure if it has taken all reasonable precautions to avoid the impression that the agency or its staff are suspected of participating in drug trafficking or of condoning it. In particular, this requires that the institution operating the counselling agency carefully select and supervise its staff. 80

[...] 81-82

cc) Accordingly, the seizure of client records from an addiction counselling agency officially recognised pursuant to § 203(1) no. 4 of the Criminal Code violates the principle of proportionality where it is based solely on the general suspicion that clients of the counselling agency have committed criminal acts relating to the acquisition and possession of drugs and have acquired such drugs illegally. 83

3. In the case at hand, the seizure of client records cannot be upheld under constitutional law because the severe detriment arising from the interference with the complainants' fundamental rights is disproportionate to the outcome that can reasonably be expected with regard to the seizure. 84

a) The requirement of official recognition is satisfied given that the Catholic Church recognises the drug counselling agency of the Caritas Association [...]. 85

b) In the present case, the seizure of the client records is based only on the general 86

suspicion that clients of the counselling agency committed criminal acts relating to the acquisition and possession of drugs and acquired such drugs from illegal dealers.

In its seizure order, the Local Court declared the measure permissible “given that it follows from the records that the persons designated therein have continuously committed offences breaching the Narcotics Act”; it apparently only took into consideration that the clients of a drug counselling agency are addicted to drugs and – because of their addiction – acquire and possess drugs. 87

Likewise, the appellate decision of the Regional Court does not go beyond this suspicion that already arises from the very existence of a functioning counselling agency. [...] 88

Regarding the prosecution of illegal dealers, too, the Regional Court limits itself to assumptions that – declared as general experience – do not go beyond general and abstract observations. [...] 89

Finally, the Regional Court points out that drug trafficking in a ‘tearoom’ belonging to a counselling agency could not be prevented and that it could attract dealers without the counselling agency intending to do so; this argument only emphasises a fact that is generally part of the operational risk of any counselling agency that runs a ‘tearoom’ or a similar contact centre. 90

The challenged seizure orders do not contain any indication that – in the view of the Local Court or the Regional Court – staff members of the drug counselling agency themselves were suspected of criminal offences and that such a suspicion would have justified the seizure of the client records. The public prosecution office based its application for a seizure order only on the grounds that the documents to be seized concerned “persons addicted to drugs”. At no point did it attempt to link the suspicion – which, in its opinion, existed initially, but was dropped already before the application for a seizure order was submitted – against “persons responsible” for the drug counselling agency with the client records. In addition, the inspection of the client records would hardly have provided information in this regard because it could not be expected that the “persons responsible” for the drug counselling agency would use these records to confess in writing to criminal acts they committed. 91

4. Thus, the challenged seizure decisions violate the fundamental right to the general freedom of action (Art. 2(1) of the Basic Law) of complainant no. 1 and the fundamental right to the respect for their private sphere (Art. 2(1) in conjunction with Art. 1(1) of the Basic Law) of complainants nos. 4 to 7. A decision as to whether they violate other provisions of the Basic Law is thus no longer required. 92

#### D.

[...]

93-100

Zeidler  
Hirsch

Rinck  
Rottmann  
Steinberger

Wand  
Niebler