EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Forced disclosure of foreign bank account documents did not amount to disrespect of privilege against self-incrimination

In today's **Chamber** judgment[1] in the case of De Legé v. the Netherlands (application no. 58342/15) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights.

The case concerned tax fines imposed on the applicant, a Dutch national, following his failure to comply with his legal obligation to provide all relevant information for the purpose of tax levying, including documents relating to a bank account he held in Luxembourg. As those documents had eventually been obtained from him under threat of substantial penalty payments, the applicant alleged disrespect of the privilege against self-incrimination, the *nemo tenetur* principle.

The Court found that the use of the bank statements and portfolio summaries concerning the applicant's foreign bank account that had been obtained from him by a judicial order did not fall within the scope of the protection of the privilege against self-incrimination. The Court therefore concluded that it could not be said that, due to the use of those documents, Mr de Legé had been deprived of a fair trial.

A legal summary of this case will be available in the Court's database HUDOC (link).

Principal facts

The applicant, Levinus Adrianus de Legé, is a Dutch national who was born in 1934 and lives in El Campello (Spain). He and his wife were residents of the Netherlands until 2000 when they moved to Spain.

In the course of an investigation into Dutch residents holding foreign bank accounts, Mr de Legé and his wife were asked in 2007 to declare any past and/or present foreign bank accounts held by them after 1994, and to submit copies of all bank statements of the account(s) concerned for the period 1995 - 2000. They refused to comply, invoking their privilege against self-incrimination under Article 6 of the European Convention. The Tax Inspector then informed them both that, as they had failed to submit the information and materials requested, tax adjustments for income tax and/or capital tax would be issued on the basis of estimated figures.

In November 2007 the Tax Inspector wrote to Mr de Legé to say that it appeared that one or more bank accounts in his and his wife's names were being or had been held with X Bank in Luxembourg, and that he had data on the balances of the account(s) on different dates between 1994 and 1996. He notified him of his intention to increase Mr de Legé's taxable income for 1995 on the basis of estimated returns on investments and on interest rate figures obtained from the national statistical office, and to increase his capital on 1 January 1996 in line with the average increase of balances on accounts held by a large number of account holders at X Bank in Luxembourg between 1994 and 1996. He would then issue corresponding tax adjustments for income tax and for contributions to national social security schemes in respect of 1995 and for capital tax in respect of 1996 and impose

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

statutory defined tax fines amounting to 100% of those tax adjustments for having wilfully acted in breach of the General State Taxes Act.

As Mr de Legé did not reply, his 1995 income tax/social security contributions and 1996 capital tax were adjusted (10,142 Dutch guilders (NLG) and NLG 1,928 respectively) and also included interest on tax arrears (NLG 4,035 and NLG 726 respectively). As a consequence, fines for the same amount as the adjustments were also issued (10,142 NLG (about 4,600 euros (EUR)) in respect of 1995 and 1,928 NLG (about EUR 875) in respect of 1996).

While objections by Mr de Legé challenging the lack of evidentiary value of the documents relied on by the Tax Inspector and refuting the conclusion that he had wilfully acted in breach of the General State Taxes Act were pending, he was summoned to appear in summary injunction proceedings and was ordered to declare if he had held bank accounts abroad after 31 December 1995 and, if so, to provide information about those accounts and provide copies of all bank statements of the account(s) concerned covering the years 1996 to 2000. He had 14 days to comply with the order; failing that a penalty payment of EUR 5,000 for each day or part-day of non-compliance thereafter would be due, up to a maximum of EUR 50,000.

Mr de Legé did not appeal. He and his wife declared that they had held a bank account together at X Bank in Luxembourg after 1994 and submitted the corresponding bank statements and portfolio summaries. Subsequently, in the decisions on the objections lodged by Mr de Legé, the tax due, the interest on arrears and the tax fines were adjusted accordingly based on the real figures. Revised fines of NLG 3,067 (about EUR 1,400) corresponding to 1995 and NLG 1,816 (about EUR 825) corresponding to 1996 were issued. As a consequence, Mr de Legé lodged an appeal with the Tax Chamber of the Breda Regional Court, protesting against the way the information that he had submitted had been used to determine fines.

The Regional Court found that the fiscal authorities had used the data in a lawful manner. Its conclusion was based on a judgment of the Supreme Court which had relied on the Court's case-law to the effect that the right not to incriminate oneself did not extend to the use in criminal proceedings of material obtained from the accused through the use of compulsory powers when this material had an existence independent of the will of the accused. It further held that the fines were justified, appropriate and necessary. Nevertheless, as the "reasonable time" requirement contained in Article 6 § 1 of the Convention had been breached, the Regional Court reduced the tax fines by 5% (to NLG 2,913 (about EUR 1,325) and NLG 1,725 (about EUR 780), respectively).

Mr de Legé lodged further appeals against the Regional Court's judgments with the Tax Chamber of the Court of Appeal, arguing that as a result of having been coerced into submitting the bank documents, he had provided evidence against himself in breach of the principle of n*emo tenetur*.

In December 2013 the Court of Appeal found that the bank documents submitted by the applicant fell to be qualified as material existing independent of the will of the accused and that the principle of *nemo tenetur* was therefore not violated. It further held that neither the tax adjustments nor the fines were too high, as the Tax Inspector had adjusted them in view of the data provided by Mr de Legé. Nevertheless, because of the length of the proceedings, the appellate court further reduced the tax fines to NLG 2,606 (about EUR 1,180) and to NLG 1,543 (about EUR 700).

Mr de Legé lodged an appeal on points of law with the Tax Chamber of the Supreme Court, again invoking the privilege against self-incrimination, relying on Article 6 of the Convention. The Supreme Court dismissed the appeal, holding, amongst other things, that no support was to be found in the Court's case-law for Mr de Legé's claim that the *nemo tenetur* principle extended to all documents the surrender of which was dependent on the will of the accused.

Complaints, procedure and composition of the Court

Relying on Article 6 § 1 (right to a fair trial), the applicant complained that he had been coerced into submitting bank documents concerning a foreign bank account for use in tax proceedings which led to his being fined by the tax authorities. He alleged that he had been made to provide evidence against himself in disrespect of the privilege against self-incrimination (*nemo tenetur*).

The application was lodged with the European Court of Human Rights on 19 November 2015.

Judgment was given by a Chamber of seven judges, composed as follows:

Gabriele **Kucsko-Stadlmayer** (Austria), *President*,
Tim **Eicke** (the United Kingdom),
Yonko **Grozev** (Bulgaria),
Armen **Harutyunyan** (Armenia),
Pere **Pastor Vilanova** (Andorra),
Jolien **Schukking** (the Netherlands),
Ana Maria **Guerra Martins** (Portugal),

and also Ilse **Freiwirth**, *Deputy Section Registrar*.

Decision of the Court

The Court noted that although the order issued in the injunction proceedings was only for the disclosure of information on bank accounts held abroad after 31 December 1995, Mr de Legé had provided account information from 31 December 1994. The Tax Inspector had therefore used the bank statements and portfolio summaries relating to 1995 to assess the actual amount due – rather than an estimated amount – for income tax and for contributions to national social security schemes in respect of 1995 and to re-set the corresponding tax fine. However, as Mr de Legé had not been obliged to provide that information, it could not be said that the tax fine imposed in relation to the 1995 fiscal year was based on evidence that had been provided by him under coercion. Therefore, the part of his complaint concerning that particular fine was rejected.

The Court's case-law holds that in order for an issue to arise from the perspective of the privilege against self-incrimination, there must be some form of coercion or compulsion exerted on the person concerned, who must be subject to existing or anticipated criminal proceedings. Further, the right not to incriminate oneself primarily concerns respecting the will of an accused person to remain silent although, in principle, the privilege against self-incrimination can also apply in situations of coercion to supply documents. Nevertheless, where the use of documentary evidence obtained under threat of penalties in the context of financial law matters is concerned, it may be deduced from the Court's case-law that such use does not fall within the scope of protection of the privilege against self-incrimination where the authorities are able to show that the aim is to obtain specific pre-existing documents – thus, documents that have not been created specifically for the criminal proceedings – that are relevant to the investigation and that the authorities know exist, and so long as the information is not obtained by methods in breach of Article 3 (prohibition of inhuman or degrading treatment). The Court thus proceeded to look into whether the privilege against self-incrimination applied in the case.

The Court observed that Mr de Legé had been ordered by a judge to disclose documents relating to bank accounts held by him abroad after 31 December 1995, at a time when a tax fine for his failure to comply with his obligations under section 47 of the Act in respect of capital tax for 1996 had already been issued – there had thus been compulsion and he had been subject to criminal proceedings. Secondly, the Court had no doubt that the bank statements and portfolio summaries were pre-existing documents and that the authorities had been aware of their existence since they

knew that Mr de Legé had held a bank account in Luxembourg at the time. Moreover, the order that was subsequently issued specifically indicated what documents he was to supply. Lastly, the imposition of penalty payments which he was to incur if he failed to comply with the order cannot be considered to amount to inhuman or degrading treatment.

The Court found that the use of the bank statements and portfolio summaries concerning Mr de Legé's account in Luxembourg did not fall within the scope of the protection of the privilege against self-incrimination. The Court therefore concluded that it could not be said that, due to their use, Mr de Legé had been deprived of a fair trial.

Accordingly, the Court found that there had been no violation of Article 6 § 1 of the Convention.

The judgment is available only in English.

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