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Please cite the abstract as follows:

Abstract of the German Federal Constitutional Court's Order of 4 April 2006, 1 BvR 518/02 [CODICES]

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Abstract

First Senate

Order of 4 April 2006

1 BvR 518/02

Headnotes:

1. Preventive police electronic profile searching of the type defined in § 31 of the North-Rhine/Westphalia Police Act is only compatible with the fundamental right to informational self-determination (Article 2.2 in conjunction with Article 1.1 of the Basic Law) if there is a specific danger to a person's life, limb or freedom. Such electronic profile searching may not be carried out in advance of acts averting danger.

2. A general situation of threat such as has existed without interruption with regard to terrorist attacks since 11 September 2001, or tense situations in foreign policy, are not sufficient for a court order authorising electronic profile searching. Instead, it is necessary for further facts to be present which give rise to a specific danger, for example a danger that terrorist attacks will be planned or carried out.

Summary:

I.

Electronic profile searching is a search method which uses electronic data processing. The police authority arranges for other public or private agencies to transmit personal data to it in order to compare these electronically with other data. This procedure is followed in order to determine a subset of persons who match specific characteristics which are laid down in advance and are regarded as important for the further course of the investigations. After the terrorist attacks of 11 September 2001, the police authorities of the German states, in cooperation with the Federal Criminal Police Office carried out electronic profile searching coordinated throughout Germany for Islamic extremist terrorists. The objective, in particular, was to detect "sleepers". The state Offices of Criminal Investigation collected data for example from universities, residents' registration offices and the Central Aliens Registry und screened the data according to the following criteria: male, age 18 to 40 years old, (former) student, Islamic religion, country of birth. The data obtained were then compared with further data collected by the Federal Criminal Police Office. The electronic profile searching did not succeed in discovering "sleepers".

In October 2001, the Düsseldorf Local Court, on the application of the police authority, ordered electronic profile searching to be introduced in North-Rhine/Westphalia. The court order was based on § 31 of the Police Act of the State North-Rhine/Westphalia as amended on 24 February 1990 (hereinafter: "the Act"). Under subsection 1 of this Act, the police may require personal data of particular groups of persons to be supplied by public or private agencies for the purpose of electronic comparison with other data. For this to be permitted, the requirement is that it is necessary to avert a present danger to the existence or the safety of the federation or a state or to life, limb or freedom of a person.

The complainant, who was born in 1978, is a Moroccan citizen of Islamic faith and was a student at the date when the court order for electronic profile searching was made. He filed appeals against the order of the Local Court which were unsuccessful at the Regional Court and the Higher Regional Court.

II.

In response to the constitutional complaint, the First Senate of the Federal Constitutional Court held that the orders challenged violate the complainant's fundamental right to informational self-determination. The proceedings were referred back to the Regional Court for a new decision.

The decision is largely based on the following considerations:

The challenged orders of the Regional Court and the Higher Regional Court are based on a constitutional foundation for the interference with rights. § 31.1 of the Act restricts the fundamental right of informational self-determination. It satisfies constitutional standards if it is interpreted to include the requirements of a specific danger based on facts.

Electronic profile searching, which is dealt with in § 31 of the Act, serves to protect important interests (the existence and security of the federal government and of a state, and the life, limb and freedom of a person). In order to protect these interests, the provision authorises substantial interference with the right to informational self-determination. The severity of the interference follows from the very scope of the authorisation and from the possibility it creates of linking data from separate collections held by public and private agencies. In addition to the identification data, which are stated separately, that is, name, address, date and place of birth, all other "data needed in the individual case" may be included in the search. By combining and comparing the data supplied and other data, a wide variety of new information can be obtained.

In addition, electronic profile searching creates an increased risk that the persons affected will be subject to further official investigative actions. The fact that electronic profile searching has been carried out in accordance with particular criteria may also in itself reproduce prejudices and the groups involved may be stigmatised in the public perception.

Finally, it is significant that § 31.1 of the Act provides for interferences with fundamental rights without any suspicion. All persons who satisfy the selection criteria may be included, and there are no requirements as to the proximity of these persons to danger or to suspicious persons. The extent to which the measure is applied without the existence of suspicion is increased even more if – as in the case of terrorist "sleepers" – it is precisely the unobtrusiveness and conformism of behaviour that is chosen as a decisive search criterion.

In view of the weight of the interferences with fundamental rights that accompany electronic profile searching, this method is reasonable only if the legislature satisfies the requirements imposed by a state under the rule of law by providing that the interference should be made only at or above a minimum level of sufficiently *specific* danger to the threatened objects of legal protection. Before such a specific danger arises, electronic profile searching is out of the question, even if the adverse effect on the object of legal protection is of the greatest possible weight.

The principle of proportionality requires that the legislature may provide for severe interferences with a fundamental right only at or above particular levels of suspicion or danger.

§ 31 of the Act names *present* danger as the threshold requirement for interference. This satisfies the constitutional standards, but it is not a mandatory requirement from a constitutional point of view. If this were the requirement, electronic profile searching would as a matter of course be carried out too late to be effective. It is constitutionally sufficient if the legislature makes electronic profile searching admissible only subject to the existence of a *specific* danger to the important objects of legal protection involved. According to this, it is a requirement that in the specific case there be sufficient probability that a danger for these objects of legal protection will arise in the foreseeable future. A specific danger in this sense includes an on-going danger. However, sufficiently well-founded specific facts are necessary for the assumption of a specific on-going danger arising from what are known as terrorist sleepers. A general situation of threat such as has existed without interruption with regard to terrorist attacks since 11 September 2001, or tense situations in foreign policy, are not

sufficient for a court order of electronic profile searching. Instead, there must be specific facts that indicate that terrorist attacks are being planned or carried out.

The challenged decisions do not satisfy the constitutional requirements. They are based on a broad interpretation of § 31 of the Act that conflicts with these principles. The Regional Court even regards it as sufficient if “the possibility of the occurrence of particularly serious harm is not excluded”, and the Higher Regional Court goes as far as to regard it as sufficient if there is the “distant possibility of the occurrence of harm”. If – as the Higher Regional Court states with regard to the situation at that time – “specific indications of terrorist attacks in Germany [are] not known of”, but a mere “possibility of such attacks” based on surmise exists, then the electronic profile searching carried out despite this is a measure taken before any danger needs to be averted, but not the averting of a specific danger itself.

III.

One member of the Senate presented a dissenting opinion on the decision. The member sees no reason to object to the Higher Regional Court's interpretation and application of § 31.1 of the Act on constitutional grounds. According to this dissenting opinion, the Higher Regional Court correctly proceeded on the basis of a sufficient factual foundation for a terrorist danger. In view of the situation of threat to a large number of innocent persons, in this opinion, no objection can be made to attributing more weight to the interest of all citizens in the guarantee of security and freedom than to the interference to be suffered by the complainant.