



REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

Case No.:
Up-106/05-27

Date:
2 October 2008

DECISION

At a session held on 2 October 2008 in proceedings to decide upon the constitutional complaint of Nedžad Pajaziti, Macedonia, represented by Miha Kozinc, lawyer in Ljubljana, the Constitutional Court

decided as follows:

Supreme Court Judgment No. I Ips 117/2004, dated 11 November 2004, Koper Higher Court Judgment No. Kp 359/2003, dated 22 October 2003, and Nova Gorica District Court Judgment No. K 27/2003, dated 5 May 2003, are annulled in the parts which refer to the complainant, and the case is remanded to Nova Gorica District Court for new adjudication.

Reasoning

A.

1. The complainant was convicted before Nova Gorica District Court of the criminal offence of the illicit manufacture and trade of narcotic drugs in accordance with the first paragraph of Article 196 of the Penal Code (Official Gazette RS, No. 63/94 *et sub.*). He was sentenced to six years imprisonment and to banishment from the territory of the Republic of Slovenia for a period of ten years. The Higher Court dismissed the appeal lodged by his defence counsel as unfounded. The Supreme Court dismissed a request for the protection of legality.
2. In the criminal proceedings the complainant claimed that the data that was on his seized SIM card was obtained without the court order of an investigating

judge, and therefore such data was inadmissible evidence. The court in the first instance did not specifically address the question as to the admissibility of the disputed evidence, but it admitted such evidence at the main hearing. The Higher Court assessed that there is no doubt that the disputed evidence was lawfully obtained and taken. The Higher Court stated that the seizure of objects was carried out in accordance with Article 220 of the Criminal Procedure Act (Official Gazette RS, No. 63/94 *et sub.* – hereinafter referred to as the CPA) and that the police acted on the basis of the first paragraph of Article 164 of the CPA. The complainant allegedly did not object to the report on the seizure and did sign it. The Higher Court adopted the standpoint that it is admissible to examine the objects seized in such manner as well as their content or read the saved message, as this is allegedly an identical situation as in cases of the seizure of any other object which contains the personal messages of a defendant, either his personal communication with other persons (e.g. correspondence) or his private accounts (e.g. a diary). The review of whether the seizure of the object was lawful and well-founded is allegedly inevitably connected to the informative value of the text which such object contains, as only after learning of its content is it allegedly possible to conclude what is its evidential value in the criminal proceedings. The Higher Court stated that the SIM card or the telephone were seized in order to establish the possible telephone contacts of the complainant with other persons possibly involved and that the role and conduct of the complainant were being clarified in such manner. These were allegedly objects which could be used as evidence in criminal proceedings in accordance with the first paragraph of Article 220 of the CPA. The purpose of the seizure at issue was, in the opinion of the Higher Court, to examine and establish the saved telephone numbers and dialled numbers of the complainant. Such allegedly did not require a court order. The Higher Court also dismissed the complainant's allegations that this entailed an unlawful interference with his communication privacy. It stated that the statutory provisions which regulate the interception of communications within the meaning of Article 150 of the CPA are not applicable when reviewing the lawfulness of the measure of the seizure of objects on the basis of which data on the dialled or saved telephone numbers of the complainant or on the received short text message (SMS) were discovered. The Supreme Court upheld the standpoint of the Higher Court and decided that the objects were obtained lawfully and that they are admissible evidence in criminal proceedings.

3. The complainant alleges the violation of Articles 21, 29, 35, and 37 of the Constitution. He alleges that the judgment of conviction is based on unlawfully obtained evidence. In his opinion, the violation of the provisions on proceedings is such that it also entails a violation of human rights and fundamental freedoms. The evidence which the court allegedly took by reading the list of telephone numbers and the telephone memory record was allegedly not obtained in compliance with the CPA provisions. Reading short text messages and conducting surveillance of telecommunications (even if only numbers recorded on the SIM card) allegedly entailed an interception of communications and one of the measures determined within the meaning of Articles 150 and 151 of the CPA. That this indeed entailed an interception of communications allegedly follows from the letter of the Swiss Federal

Department of Justice and Police. Law enforcement authorities allegedly monitored the defendant's mobile telephone communication without the court order of the investigating judge also after the telephone was seized. In the opinion of the complainant, the evidence was obtained contrary to Article 154 of the CPA and should be excluded from the court file in accordance with the first paragraph of Article 83 of the CPA. By reading the short text messages the court allegedly interfered with the complainant's right to privacy and his legal guarantees in criminal proceedings, above all with his privilege against self-incrimination. The complainant alleges that reading the short text messages was of key importance for the outcome of the criminal proceedings. He opposes the standpoint of the Supreme Court that the examination of the content of the seized objects (i.e. the list of dialled telephone numbers and the telephone memory record) is completely analogous to a situation wherein other objects are seized which entail the communication of an alleged offender with other persons, such as correspondence or a diary. He refers to the standpoint of the Constitutional Court in Decision No. U-I-92/96, dated 21 March 2002 (Official Gazette RS, No. 32/02 and OdlUS XI, 45), and states that the court should ensure that all unlawfully obtained evidence is excluded from the court file. He proposes that the Constitutional Court annul the challenged judgments and remand the case for new adjudication.

4. By Order No. Up-106/05, dated 27 March 2008, the Constitutional Court panel accepted the constitutional complaint for consideration. In accordance with the first paragraph of Article 56 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA), the Supreme Court was notified thereof.
5. The Constitutional Court inspected the court file of the case in which the challenged judicial decisions were issued.

B.

6. In the case at issue the Higher and Supreme Courts adopted the standpoint that in police proceedings the police may obtain the data saved in the seized telecommunication equipment (i.e. the telephone memory record) without a court order. The Constitutional Court had to establish whether the challenged judgments are based on a standpoint which is not in compliance with the right determined in the first paragraph of Article 37 of the Constitution.
7. The first paragraph of Article 37 of the Constitution, which guarantees the privacy of correspondence and other means of communication, protects the freedom of communication. This right ensures the protection of the individual's interest that no one learns of the content of the message which he conveys over any means that allow the exchange or conveying of information without his consent, as well as the individual's interest to decide freely to whom, to what extent, in what manner, and under what conditions he will convey a certain message. This is the protection of free and unsupervised communication and thereby the protection of the confidentiality of the relations into which an individual enters when communicating.¹

8. The field of the protection of communication privacy is extended to correspondence and other means of communication (e.g. telephone, fax, computer) and includes conveying written, sound, or image messages or other messages with a subjective informative value.ⁱⁱ The field of communication privacy first of all includes data which refer to the content of the message. Regarding the interception and recording of telephone conversations, the Constitutional Court has already adopted the standpoint that such is admissible only if the conditions determined in the second paragraph of Article 37 of the Constitution are met (Decision No. U-I-25/95, dated 27 November 1997, Official Gazette RS, No. 5/98 and OdlUS VI, 158). Legal theory supports the position that not only the content of the communication but also the circumstances and facts connected to the communication are protected.ⁱⁱⁱ When using a telephone not only the content of the conversation deserves protection, but also other data connected to the telephone conversation.^{iv} It follows from the case law of the European Court of Human Rights (hereinafter referred to as the Court) that information on the telephone numbers dialled are considered an integral element of telephone communications.^v In the opinion of the Court, the release of that information to the police without the consent of the subscriber amounts to an interference with the right guaranteed by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, IT, No. 7/94).^{vi} In view of the above-mentioned, the scope of the protection of communication privacy must be interpreted more broadly such that it also includes information on telephone calls which are an integral element of the communication. Data in the telephone memory record must be, regarding their nature, considered to be an integral element of communication privacy. Therefore, obtaining data on the last dialled and last unanswered calls as well as the examination of the content of the short text messages entail an examination of the content and circumstances of the communication and consequently an interference with the right determined in the first paragraph of Article 37 of the Constitution.
9. The conditions [that need to be fulfilled] for a limitation of the right to the privacy of correspondence and other means of communication are determined in the second paragraph of Article 37 of the Constitution. An interference with the freedom of communication is admissible if the following conditions are met: 1) the interference is prescribed by a law, 2) the interference is allowed on the basis of a court order, 3) the duration of the interference is precisely determined, and 4) the interference is necessary for the institution or course of criminal proceedings or for reasons of national security.
10. In accordance with the second paragraph of Article 37 of the Constitution, an interference with the freedom of communication is thus not allowed without a prior court order. The standpoint that in police proceedings the police may obtain data which are part of the constitutionally protected communication privacy without a court order does not meet the conditions determined in the second paragraph of Article 37 of the Constitution. Therefore, the challenged Higher and Supreme Court judgments are based on a standpoint which is inconsistent with the right determined in the first paragraph of Article 37 of the Constitution. Also the judgment rendered in the first instance is indirectly based on such standpoint. Therefore, the Constitutional Court annulled the

challenged judgments in the parts which refer to the complainant and remanded the case to Nova Gorica District Court for new adjudication.

11. In light of the fact that the challenged judgments had to be annulled due to the violation of the right determined in the first paragraph of Article 37 of the Constitution, the Constitutional Court did not need to review whether also other alleged violations of [the complainant's] human rights exist.

C.

12. The Constitutional Court reached this decision on the basis of the first paragraph of Article 59 of the CCA, composed of: Jože Tratnik, President, and Judges Mag. Marta Klampfer Mag. Marija Krisper Kramberger, Mag. Miroslav Mozetič, Dr Ernest Petrič, Jasna Pogačar, Dr Ciril Ribičič, and Jan Zobec. Judge Dr Mitja Deisinger was disqualified from deciding in the case. The decision was reached unanimously.

Jože Tratnik
President

ⁱ Klemenčič, G., L. Šturm (Editor), *Komentar Ustave Republike Slovenije*, Fakulteta za podiplomske državne in evropske študije, Ljubljana, 2002, p. 391.

ⁱⁱ *Ibidem*, p. 396.

ⁱⁱⁱ *Ibidem*.

^{iv} *Ibidem*.

^v Judgment in the case of *Malone v. the United Kingdom*, dated 2 August 1984, A 82, paragraph 84; the same in the judgment in the case of *P. G. and J. H. v. United Kingdom*, dated 25 September 2001, paragraph 45.

^{vi} Judgment in the case of *Malone v. the United Kingdom*, paragraph 84.