

## CASE TRANSLATION: BELGIUM

Case citation:

**4 februari 2020 P.19.1086.N/1**

Name and level of the court:

**Hof van Cassatie, tweede kamer (Court of Cassation, second chamber)**

Date of decision:

**4 February 2020**

### ***Belgium; encrypted data; right to silence; refusal to reveal key to authorities; criminal offence; article 6(2) European Court of Human Rights***

ATTORNEY GENERAL AT THE COURT OF APPEAL OF GHEENT

claimant,

against

M A,

defendant.

#### I. LITIGATION BEFORE THE COURT

The appeal in cassation is directed against the judgment of the Court of Appeal in Ghent, Correctional Chamber, of 15 October 2019.

The claimant puts forward a plea in a memorandum attached to this judgment.

On 21 January 2020, Advocate General Bart De Smet submitted a written conclusion to the Court Registry.

At the court session of 4 February 2020, Judge Erwin Francis gave his report and the aforementioned Advocate General delivered his opinion.

#### II. DECISION OF THE COURT

Review

1. The plea alleges infringement of Article 88quater, § 1 and § 3 of the Code of Criminal Procedure: the judgment acquits the defendant from charge B, by which the latter was prosecuted for refusing to comply with the order of the investigating judge to provide the access code for the mobile telephones found in his possession; it considers that such an obligation is incompatible with the defendant's right to remain silent and the prohibition of forced self-incrimination, as derived, among other things, from

the presumption of innocence contained in Article 6.2 ECHR and Articles 14.2 and 14.3.g IVBPR and further explained in the Articles 6 and 7, as well as recitals 25 and 27 of the preamble of the Directive (EU) 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings;<sup>1</sup> however, the right to remain silent and not to incriminate oneself, as interpreted by the European Court of Human Rights, does not prohibit the imposition on a suspect of an obligation to provide information with a view to obtaining material evidence that, as in the present case, are static, and exist independently of one's will, and, as such, are not self-incriminating in nature; this is comparable to obtaining biometric data on the basis of which evidence can be found.

2. Article 88quater, § 1, of the Code of Criminal Procedure provides that the investigating magistrate shall disclose to any person whom he suspects of having special knowledge of:

- the IT system which is the subject of the search or extension thereof as referred to in Article 88ter or
- services to secure or encrypt data that is stored, processed or transmitted by means of an IT system, may order information to be provided on its operation and how to gain access to it, or to gain access in an intelligible form to the data that is stored, processed or transmitted through it.

Paragraph 3 of that article shall penalise the person who refuses such cooperation.

3. These provisions penalise, among other things, a suspect who, although he knows the access code of an IT system to be searched such as a mobile telephone, refuses to communicate it despite an order to do so by the investigating judge. It is required that, at the time of the information requested, the investigating authority has already detected the device without the

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<sup>1</sup> OJ L 65, 11.3.2016, p. 1–11.

use of coercion on the person and that the prosecuting authority demonstrates that the person in question knows the access code without reasonable doubt.

4. Article 6.2 ECHR provides that anyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

5. Article 14.2 of the ICCPR has the same scope. Article 14.3.g ICCPR adds that when determining the merits of a criminal prosecution against him or her, everyone has the right not to be compelled to testify against themselves or to make a confession.

6. The listed directive (EU) 2016/343 provides:

- in Article 6.1: "Member States shall ensure that the burden of proof for establishing the guilt of suspects and accused persons is on the prosecution. This shall be without prejudice to any obligation on the judge or the competent court to seek both inculpatory and exculpatory evidence, and to the right of the defence to submit evidence in accordance with the applicable national law."

- in Article 7:

"1. Member States shall ensure that suspects and accused persons have the right to remain silent in relation to the criminal offence that they are suspected or accused of having committed.

2. Member States shall ensure that suspects and accused persons have the right not to incriminate themselves.

3. The exercise of the right not to incriminate oneself shall not prevent the competent authorities from gathering evidence which may be lawfully obtained through the use of legal powers of compulsion and which has an existence independent of the will of the suspects or accused persons.

4. Member States may allow their judicial authorities to take into account, when sentencing, cooperative behaviour of suspects and accused persons.

5. The exercise by suspects and accused persons of the right to remain silent or of the right not to incriminate oneself shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned."

That directive also provides in the preamble:

- in recital 24: "The right to remain silent is an important aspect of the presumption of innocence

and should serve as protection from self-incrimination";

- in recital 25: "The right not to incriminate oneself is also an important aspect of the presumption of innocence. Suspects and accused persons should not be forced, when asked to make statements or answer questions, to produce evidence or documents or to provide information which may lead to self-incrimination."

- in recital 27: "The right to remain silent and the right not to incriminate oneself imply that competent authorities should not compel suspects or accused persons to provide information if those persons do not wish to do so. In order to determine whether the right to remain silent or the right not to incriminate oneself has been violated, the interpretation by the European Court of Human Rights of the right to a fair trial under the ECHR should be taken into account";

- in recital 29: "The exercise of the right not to incriminate oneself should not prevent the competent authorities from gathering evidence which may be lawfully obtained from the suspect or accused person through the use of legal powers of compulsion and which has an existence independent of the will of the suspect or accused person, such as material acquired pursuant to a warrant, material in respect of which there is a legal obligation of retention and production upon request, breath, blood or urine samples and bodily tissue for the purpose of DNA testing."

7. Neither those treaty provisions and considerations, nor any general legal principle based on them, prevent the criminalisation and punishment of a suspect on the basis of Article 88quater, § 1 and § 3, Code of Criminal Procedure, as explained above.

8. In doing so, account must be taken of the following, among other things:

- the reasons given in the judgment of the appeal judgment show that there were indications that the defendant came to sell drugs in Belgium. He had two mobile telephones for which he refused to give the access code;

- it is not apparent from the documents that it was disputed before the appellate courts that the police found the mobile telephones without coercion on the defendant, that the defendant knew the access codes in question or that the information requested from the defendant was proportional to the investigation of the facts mentioned;

- the right not to incriminate oneself and the presumption of innocence are not absolute and must be balanced against other rights such as the right to liberty and security guaranteed by Article 5 ECHR and the prohibition of abuse of rights stated in Article 17 ECHR;
- the main purpose of the right not to incriminate oneself is to safeguard the right to a fair trial by excluding false statements made under duress;
- the access code to an IT system exists independently of the will of the person who has knowledge of that code. The latter remains unchanged regardless of its communication and is eligible for immediate control. There is no risk of unreliable evidence;
- the access code is neutral and distinguishable from any incriminating data that can be retrieved by means of the computer system;
- the information requested, even if its communication is punishable by substantial imprisonment, and the use of that information is limited. They only reflate to the access code of an already discovered IT system that is unreadable without the information requested. Moreover, it must be shown that the accused knew that code. The right of the accused to fully defend the obsolete data remains unaffected;
- the current state of technology makes it very difficult or even impossible to gain access to an IT system that is protected by an encryption application, while such applications are generally available. Consequently, the information requested is necessary for the purpose of establishing the truth.

9. The judgment, as stated in the plea, therefore does not justify the decision according to law.

The plea is well founded.

Officially inquiring for the remainder

The substantive legal forms prescribed on pain of nullity have been observed and the decision has been made in accordance with the law.

Operative part of the judgment

The Court,

Set aside the judgment under appeal, except in so far as it declares the appeals admissible and determines the scope of the appeal.

The remainder of the appeal is dismissed.

Recommends that this judgment be mentioned on the side of the partially annulled judgment.

Leave one-tenth of the costs at the expense of the State.

Reserves the decision on the remaining costs and leaves this to the court upon referral.

The case is referred to the Antwerp Court of Appeal.

Determines the costs at 165.52 euros.

This judgment was delivered in Brussels by the Court of Cassation, second chamber, composed of counsel Filip Van Volsem, acting president, Judges Peter Hoet, Antoine Lievens, Erwin Francis and Sidney Berneman, and at the public court hearing session on 4 February 2020 by acting president Filip Van Volsem, in the presence of Advocate General Alain Winants, with the assistance of Registrar Kristel Vanden Bossche.

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