

CASE NOTE: SLOVENIA

CASE CITATION NO:
Up-106/05-27

NAME AND LEVEL OF COURT:
Constitutional Court of the Republic of Slovenia

APPELLANT:
Nedžad Pajaziti, Macedonia (represented by barrister Miha Kozinc)

DATE OF DECISION:
2 October 2008

Seizure of mobile telephone; admissibility of data stored on an SIM card; constitutional right to privacy of communication

Facts

The appellant was convicted by a first instance criminal court for illegal drug trafficking in the territory of the Republic of Slovenia (the appellant is a Macedonian citizen). The court, comprising a panel of one judge and two jurors, imposed a sentence of six years imprisonment, and a special sentence of deportation from the Republic of Slovenia for the period of ten years after the term of imprisonment is served. In the appeal procedure, the Higher Court, comprising three judges, agreed with the decision of the court of first instance, and the Supreme Court of the Republic of Slovenia, comprising five judges, refused the appellant's request for protection of legality.¹ The appellant filed a constitutional complaint after exhausting the appeal procedure.

The appellant's complaint related to the data recorded on an SIM card (Subscriber Identity Module), that is the SIM card included in a mobile telephone and used to store information. The police seized the appellant's mobile telephone and subsequently obtained access to and read the information stored on the SIM card, where it was discovered that relevant evidence was stored. From the beginning of the criminal procedure, the appellant claimed that the data stored in the SIM card could not be used as evidence, or as grounds for the conviction, because the data was acquired without a court order, and the evidence was therefore not admissible in the criminal proceedings. The first instance court ignored this argument, and admitted data from SIM card as relevant evidence.

The members of the Higher Court reached the conclusion that the data on the SIM card was the

equivalent of information recorded on letters or diaries in paper format, which meant that a court order is neither necessary to seize the mobile telephone with the SIM card, or to read the content of the SIM card. It was not the appellant's case, however, that the mobile telephone with the SIM card was seized illegally. At issue was that when the police obtained access to the data on the SIM card (which recorded the telephone numbers that were connected to the telephone and SMS messages that were sent from and received by the telephone), this violated his constitutional right to the privacy of communication. The members of the Higher Court did not share this view, and judged that there was no violation of the right to the privacy of communication in this case. The members of the Supreme Court of Republic of Slovenia agreed with the decision of the Higher Court.

The appellant filed a constitutional complaint for violation of the following articles of the of the Slovene Constitution:²

21. člen

(varstvo clovekove osebnosti in dostojanstva)

Zagotovljeno je spostovanje clovekove osebnosti in njegovega dostojanstva v kazenskem in v vseh drugih pravnih postopkih, in prav tako med odvzemom prostosti in izvrsevanjem kazni.

Prepovedno je vsakršno nasilje nad osebami, ki jim je prostost kakorkoli omejena, ter vsakršno izsiljevanje priznanj in izjav.

Article 21

(Protection of Human Personality and Dignity)
Respect for human personality and dignity shall be

¹ Protection of legality is special legal remedy in Slovenia that can be filed against final judgement. In this case, the judgement became final after the Higher Court's decision. Although the person is

convicted and already serving the sentence in prison, he has three extra legal remedies, one of which is protection of legality.

² Official Gazette RS, Nos. 33/91-1, 42/97, 66/2000,

24/03, 69/04 and 68/06.

guaranteed in criminal and in all other legal proceedings, as well as during the deprivation of liberty and enforcement of punitive sanctions.

Violence of any form against any person whose liberty has been restricted in any way is prohibited, as is the use of any form of coercion in obtaining confessions and statements.

29. clen

(pravna jamstva v kazenskem postopku)

Vsakomur, ki je obdolzen kaznivega dejanja, morajo biti ob popolni enakopravnosti zagotovljene tudi naslednje pravice:

1. da ima primeren cas in možnosti za pripravo svoje obrambe;
2. da se mu sodi v njegovi navzočnosti in da se brani sam ali z zagovornikom;
3. da mu je zagotovljeno izvajanje dokazov v njegovo korist;
4. da ni dolzan izpovedati zoper sebe ali svoje bliznje, ali priznati krivde.

Article 29

(Legal Guarantees in Criminal Proceedings)

Anyone charged with a criminal offence must, in addition to absolute equality, be guaranteed the following rights:

- the right to have adequate time and facilities to prepare his defence;
- the right to be present at his trial and to conduct his own defence or to be defended by a legal representative;
- the right to present all evidence to his benefit;
- the right not to incriminate himself or his relatives or those close to him, or to admit guilt.

35. clen

(varstvo pravic zasebnosti in osebnostnih pravic)

Zagotovljena je nedotakljivost clovekove telesne in dusevne celovitosti, njegove zasebnosti ter osebnostnih pravic.

Article 35

(Protection of the Rights to Privacy and Personality Rights)

The inviolability of the physical and mental integrity of every person and his privacy and personality rights shall be guaranteed.

37. clen

(varstvo tajnosti pisem in drugih obcil)

Zagotovljena je tajnost pisem in drugih obcil.

Samo zakon lahko predpise, da se na podlagi odlocbe sodisca za določen cas ne uposteva varstvo tajnosti pisem in drugih obcil in nedotakljivost clovekove zasebnosti, ce je to nujno za uvedbo, ali potek kazenskega postopka ali za varnost drzave.

Article 37

(Protection of the Privacy of Correspondence and Other Means of Communication)

The privacy of correspondence and other means of communication shall be guaranteed.

Only a law may prescribe that on the basis of a court order the protection of the privacy of correspondence and other means of communication and the inviolability of personal privacy be suspended for a set time where such is necessary for the institution or course of criminal proceedings or for reasons of national security.

Decision of the Constitutional Court

The members of the Constitutional Court concentrated on considering whether the right to the privacy of

communication had been violated in this case. The provisions of article 37 of the Slovene Constitution provide a guarantee to all for the privacy of correspondence and other means of communication. This right can only be relaxed where it is prescribed by law or on the basis of a court order (provided that such limitation is necessary for the course of criminal proceedings or for reasons of national security). The members of the Higher Court and Supreme Court took the view that in the preliminary phase of criminal proceedings, the police are allowed to obtain the data legally from a telecommunication device that has been seized without a court order (in this case the data was extracted from the memory of the SIM card). However, the members of the Constitutional Court took a different view.

In their judgment, the members of the Constitutional Court stressed that privacy of communications includes the written word, sound, picture and similar messages with a subjective informative value. Other circumstances and facts connected to the communication are protected by the provisions of article 37, as well as the content of the communication. In the case of a telephone conversation, not only the content of the conversation is protected, but other data connected to the conversation is also protected. In addition, the jurisprudence of the European Court of Human Rights indicates that data about telephone numbers comprise part of a telephone communication, and *Malone v United Kingdom*³ was referred to in this context. The Constitutional Court concluded that reading the content of the SMS messages, and searching for and acquiring the data about the most recent telephone calls that were made and those telephone calls that were not answered, are to be treated as the examination of the content and circumstances of the communication. For the police to search the mobile telephone and SIM card, it is necessary to abide by the provisions of article 37 of the Slovene Constitution. One of these conditions is to obtain a court order. Because the police did not have a court order to examine the content of the appellant's SIM card, the admission by the court of first instance of the data was a violation of article 37 of Slovene Constitution. The judgement of first instance criminal court was therefore annulled, as were the decisions of the Higher Court and the Supreme Court. The first instance court was required to hear the case again, this time without the admission of evidence from the SIM card.

Commentary

This decision of the Constitutional Court is one of a number of decisions connected to the right to privacy of communications. This right has become increasingly sensitive, because of the speed of development of modern communication technologies. In 1997, the Slovene Constitutional Court abolished a number of articles of the Criminal Procedure Act that regulated secret investigative measures in connection with the interception of telephone conversations and other forms of communication. In 2003, the Constitutional Court abolished a number of articles of the Police Act regulating similar matters. The reasons were similar in both cases – the legislation was too broad and not sufficiently defined, and its effect was to encroach upon the constitutional right to privacy and a number of other rights in a wider extent that were permitted in accordance with the Constitution. Both acts were amended, so now the use of secret investigative measures, including measures dealing with digital technology, is very restricted in Slovenia.

However, in comparison with cases dealing with the validity of legislation within the Constitution, this particular case brought before the Constitutional Court had to deal with a question connected to a specific form of digital evidence, that is, data on the SIM card. This is the first decision in respect of this kind of electronic evidence, but there are a number of similar cases connected to the use of interception as evidence. It has to be stressed that such cases are rarely brought before the Constitutional Court. In the present case, the Constitutional Court confirmed the fact that the right to privacy is highly protected in Slovenia, and the Court has adapted the provisions of the Constitution to include newer forms of communication. The decisions of the Constitutional Court are binding on the legislator, all other courts, and the Constitutional Court itself. This implies that it can be expected that future decisions will be decided in a similar way.

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³ Series A, No. 82, (1985) 7 E.H.R.R. 14, ECHR.