



REPUBLIKA SLOVENIJA
USTAVNO SODIŠČE

Up-2530/06-26
15 April 2010

D E C I S I O N

At a session held on 15 April 2010 in proceedings to decide upon the constitutional complaint of Miha Kozinc, Ljubljana, represented by Odvetniška družba Čeferin, o. p., d. o. o., [the law firm Čeferin], Grosuplje, the Constitutional Court

d e c i d e d a s f o l l o w s:

The constitutional complaint against the second paragraph of the operative provisions of Supreme Court Decision No. Dsp 2/2006, dated 27 October 2006, in conjunction with Decision of the Disciplinary Court of the Bar Association of Slovenia No. Ds 4/2005, dated 27 March 2006, is dismissed.

R e a s o n i n g

A.

1. By the contested decision, the Disciplinary Court of the Bar Association of Slovenia (hereinafter referred to as the Disciplinary Court) held the complainant responsible for a violation of the professional duties of a lawyer pursuant to the sixth paragraph of Article 77.a of the Statutes of the Bar Association of Slovenia (Official Gazette RS, No. 15/94 et sub. – hereinafter referred to as the Statutes), in conjunction with Article 18 of the Lawyers Professional Code of Conduct, as on 26 July 2005 he unjustifiably refused to carry out the duty to be present during the search of a lawyer's office. It imposed upon him a disciplinary measure, i.e. a warning. The Supreme Court rejected the complainant's appeal, and dismissed the appeals of his defence counsel and of the Disciplinary Court prosecutor.

2. The Disciplinary Court rejected the allegations of the complainant that the warrant of the investigating judge had not been drawn up in accordance with the Lawyers Act (Official Gazette RS, Nos. 18/93, 24/01, 54/08, and 35/09 – hereinafter referred to as the LA), and stated that the warrant contains all the essential elements required for the search pursuant to the provisions of the Criminal Procedure Act (Official Gazette RS, No. 63/94 et sub. – hereinafter referred to as the CPA) and Article 8 of the LA (it stated, however, that the files and objects that the search had been ordered for could have been indicated more precisely in the operative provisions of the judgment), and assessed the complainant's refusal to be present during the search of the lawyer's office as unjustified. This was confirmed also by the Supreme Court, which stated that a representative of the Bar Association is obliged to be present during the search of a lawyer's office due to the protection of the secrecy of files which are not the

subject of such search, and that the lawyer's departure from the premises of the search may result in the search being carried out without supervision by a lawyer. It also held that a representative of the Bar Association has the right to assess whether the search warrant was drawn up in accordance with the law, but he does not have the right to refuse to be present during the search on the basis of his own assessment regarding the (in)completeness of the warrant.

3. The complainant alleges a violation of Articles 36 and 137 of the Constitution. He states that as a representative of the Bar Association he refused to cooperate in the search of the lawyer's office as the search warrant was unlawful. According to the allegations of the complainant, the files and objects subject to the search were not listed in the operative provisions of the warrant but only in its reasoning. He refers to Article 8 of the LA, which is *lex specialis* with respect to the general provisions of the CPA regarding the search of premises. Due to the special status enjoyed by lawyers in the legal order, the LA allegedly determines in greater detail the conditions for the conduct of a search of the premises of lawyers' offices as it allegedly specifies that in the warrant it must be stated which files and objects are to be searched. The complainant states that a lawyer and his clients are linked by a special relationship, which has the nature of confidentiality and secrecy. Therefore in a search, law enforcement authorities should not intrude into case files that are not connected with the criminal case in question. If law enforcement authorities were allowed to conduct a search of the entire premises of a lawyer's offices, these confidential relations would be irreparably damaged. In legal theory there allegedly exists a generally accepted standpoint that it is merely the operative provisions of a legal act that become final and executable, whereas the reasoning allegedly serves only to ensure the right to a legal remedy. In the opinion of the complainant, the statements stated in the reasoning of the warrant in question are not sufficient since the addressees of the legal act are bound only by the operative provisions. The operative provisions of the type of warrant in question should allegedly contain instructions to the police officers who are to perform the search on how to act in a specific case. The police officers should allegedly act in accordance with the operative provisions of the search warrant as they are allegedly not even obliged to read the reasoning. The complainant believes that in the case at issue the police officers were entitled to search the entire premises and all the case files of the lawyer's office, which is in complete contradiction to the constitutional and statutory rights of the complainant as a lawyer. The complainant stresses that the attorneyship is an independent and autonomous service within the system of justice, regulated by law, and that, owing to the particularities of their profession, lawyers are in a special position as parties in criminal proceedings, which should be taken into account when such procedures are carried out. The complainant therefore opposes the standpoint of the Supreme Court according to which representatives of the Bar Association do not have the right to refuse to be present during the search of a lawyer's office if they assess that such is unlawful since the search warrant was not drawn up in accordance with Article 8 of the LA.

4. The complainant opposes the standpoint of the Supreme Court that a search may be conducted also in the absence of a representative of the Bar Association. He believes that the presence of a representative of the Bar Association is a necessary condition for a search to be conducted. The role of the representative of the Bar Association in the search is allegedly not to protect secrecy but to see to it that the

search is conducted in accordance with the law. The complainant was allegedly aware that as a representative of the Bar Association he must ensure that the search of a lawyer's office is conducted in accordance with the law and the Constitution. However, as in his opinion it was not possible to ensure such, he allegedly acted out of necessity so as to avert an immediate danger (i.e. an unlawful search) which he did not cause himself and which allegedly could not have been averted in any other way (before leaving, the complainant allegedly urged the court to amend the warrant), whereby the harm thus incurred did not exceed the harm which threatened him (the right of the inviolability of dwellings was allegedly more important than an expeditious performance of a search, which would have occurred if the court had issued an accurate warrant). The complainant was allegedly punished only because he had observed the relevant provisions of the LA, the Criminal Procedure Act, and the Constitution, and due to this the independence of the attorneyship was allegedly put in jeopardy.

5. In proceedings pursuant to the third paragraph of Article 55.c of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text – hereinafter referred to as the CCA), the Constitutional Court accepted the constitutional complaint for consideration by its Order No. Up-2530/06, dated 6 April 2009. In accordance with the first paragraph of Article 56 of the CCA, it informed the Supreme Court thereof.

B. – I.

6. The Constitutional Court consulted case files Nos. Ds 4/2005 and Dsp 2/2006 of the Disciplinary Courts of the first and second instances. As follows therefrom, the search of the lawyer's office was conducted in the following manner: On the basis of Warrant No. Kpd 462/05, dated 25 July 2005, issued by the investigating judge of the Koper District Court, the detectives of the Koper Police Directorate intended to conduct a search of the office of lawyer D. A. on 26 July 2005. The complainant came to the site of the intended search as a representative of the Bar Association and established that in the warrant the objects and case files subject to the search were not precisely defined. In a telephone conversation with the investigating judge and later with the President of the Koper District Court, he requested that the scope of the search be precisely defined in the warrant in accordance with Article 8 of the LA. As both of them continued to maintain that there was nothing wrong with the warrant as such, the complainant addressed a written complaint against the conduct of the investigating judge to the President of the Koper District Court. To protect the interests of the lawyer's clients, he refused to cooperate in such a search and reasoned his refusal in the annex to the record of the search. In a written statement he indicated that he refused to cooperate in the conduct of the search as he believed that the conditions for such were not fulfilled. The warrant issued by the investigating judge was allegedly inconsistent with the first paragraph of Article 8 of the LA, pursuant to which only a search of case files and objects specifically mentioned in the warrant is permitted. In the complainant's view, the case files and objects should have been precisely indicated in the operative provisions of the search warrant. Due to the unfulfilled formal requirements (the absence of the Bar Association representative), the police did not conduct the search. The detectives sealed the lawyer's office and ordered the lawyer into police custody. After the investigating

judge was informed of the event, he ordered that the search warrant be executed on the following day, i.e. on 27 July 2005. On that day the complainant and the President of the Regional Assembly [of the Bar Association] were present during the search. As is apparent from the oral defence given by the complainant, the search was conducted in such a manner that the lawyer's defence counsel and the head of the criminal police squad agreed to set apart the files subject to search. Those case files were taken to a special room where they were examined by the detectives.

B. – II.

7. The inviolability of a lawyer's office is ensured within the framework of the spatial aspect of privacy determined by Article 36 of the Constitution.[1] The search of a lawyer's office entails a severe interference with this constitutionally protected living space. Due to the weight of the interference and the constitutional significance of the protection of spatial privacy, only the judicial branch of power may order a search (the second paragraph of Article 36 of the Constitution). In a search of a lawyer's office it is not possible to observe only this aspect of privacy but also the aspects related to the nature of the lawyer-client relationship. As an independent and autonomous adviser and assistant, a lawyer is bound to engage in legal acts for the benefit of his clients within the limits of the law. A prerequisite for the performance of this task is a confidential relationship between a lawyer and his client.[2] In criminal proceedings, the right to confidential contact between the defendant and his defence counsel is an essential element of the right to legal counsel. [3] Confidential contact between a defence counsel and a defendant (or a detained person) is protected within the framework of the third paragraph of Article 19 of the Constitution and the second indent of Article 29 of the Constitution. This relationship is protected irrespective of whether the information is intended to be used in the criminal proceedings by the defence. Due to the fact that in a search of a lawyer's office there exists a risk that the police will obtain documents and objects not related to the criminal offence which is the subject of investigation, the legal order must ensure the protection of the rights determined by Article 35, the first paragraph of Article 37, and the first paragraph of Article 38 of the Constitution.[4] Therefore, this does not concern protection of the lawyer's interests (or his privilege), but his duty to protect professional secrets[5] and the protection of the human rights and fundamental freedoms of his clients. Legal protection of this confidential relationship encourages clients to communicate freely with their lawyer or defence counsel, i.e. without fear that a potential subsequent disclosure of confidential data will jeopardise their legal position.[6]

8. The violations of third party privacy rights which might occur in a search of a lawyer's office would be irreparable. Due to the protection of the confidential relationship and privacy of the lawyer's clients, an act must determine the conditions under which a search of a lawyer's office is admissible. These conditions are determined by Article 8 of the LA, which stipulates the conditions for a search of a lawyer's office that supplement those contained in the CPA. Pursuant to the first paragraph of Article 8 of the LA, a search of a lawyer's office is permitted only on the basis of a warrant issued by a competent court, and only regarding the case files and objects which are explicitly stated in the search warrant. The same paragraph also stipulates that in a search the secrecy of other documents and objects must not be

compromised. Pursuant to the second paragraph of Article 8 of the LA, a representative of the Bar Association of Slovenia must be present during a search of a lawyer's office. The presence of a representative of the Bar Association is intended to protect the human rights of third parties who in the situation referred to in the first paragraph of Article 8 of the LA reasonably expect that the protection of their privacy will be ensured. The position of such representative differs from the usual position of solemn witnesses. The latter observe closely how the search is conducted and make objections, if any, to the contents of the record (the third paragraph of Article 216 of the CPA). The representative of the Bar Association, on the other hand, must ensure that the secrecy of documents and objects which are not the subject of the search is respected. It follows also from the case-law of the European Court of Human Rights (hereinafter referred to as the ECtHR) that national law must regulate searches of lawyers' offices by providing for special safeguards.

9. The complainant challenges the standpoints of the courts which were the basis for disciplinary punishment. He alleges a violation of the spatial aspect of privacy determined in the first paragraph of Article 36 of the Constitution, but there is manifestly no such violation. The warrant in question namely did not refer to a search of his office. Nor can the complainant succeed by alleging a violation of the first paragraph of Article 137 of the Constitution, which regulates the institutionalized position of the attorneyship – it defines such as an independent and autonomous service within the system of justice. The Constitutional Court agrees with the complainant that an independent and autonomous attorneyship is of particular importance for the functioning of a state governed by the rule of law, in which human rights and fundamental freedoms are respected. However, the Constitution does not directly regulate human rights or fundamental freedoms in this provision, therefore the complainant cannot substantiate the constitutional complaint by referring to this provision.

10. The allegations of the complainant that he was punished because he observed the provisions of the Constitution and that he acted out of necessity in order to avert an immediate danger which he did not cause himself and which allegedly could not have been averted in any other way, could be taken into consideration in light of the right to personal dignity determined in Article 34 of the Constitution. This right would have been violated if it were established that the bases for his disciplinary punishment included an unconstitutional standpoint. Therefore, the Constitutional Court had to evaluate the allegations in the light of the constitutionality of the standpoints on which the challenged court decisions are based.

11. When a search is conducted on the premises of a lawyer's office, the scope of the search must be strictly limited in the warrant to the case files and objects which, in order to provide evidentiary material relating to a particular criminal offence, make the search of the lawyer's office admissible.[9] The reasoning of the warrant must not lead one to conclude that all the documentation in the lawyer's office should be searched or that one should search in the lawyer's office for whatever one wishes to find. The Supreme Court based the challenged decision on the standpoint of the case-law according to which a warrant must include: the data on the person whose premises are to be searched; the reasons which lead to the justified suspicion that a criminal offence has been committed if a search is conducted before the initiation of the judicial investigation; an indication of the person, traces, or objects to which the

search relates, and an indication of the circumstances that demonstrate the likelihood that the defendant will be apprehended or that the traces and objects that are important for the criminal proceedings will be revealed; and a specific indication of the premises where the search is to be conducted.[10] It stated that comparing a warrant to a judgment, which the law prescribes what its operative provisions must contain, is inappropriate, and it agreed with the standpoint of the court of first instance that the reasoning of the warrant clearly stated which objects and documents were to be searched and which clients the case files that may be subject to search refer to.

12. The complainant does not contest the fact that the case files and objects subject to search were defined in the warrant, but he alleges that it was insufficient that they were defined only in its reasoning. Police officers are allegedly not obliged to read the reasoning. [The Court finds, however, that] he cannot substantiate the alleged violation thereby. It would indeed be clearer and more correct if the case files and objects regarding which the search of the lawyer's office had been ordered were stated in the operative provisions, as was already established by the court of first instance. However, this is irrelevant from the viewpoint of the protection of the privacy of the persons who are in a confidential relationship with the lawyer (Articles 35, 37, and 38 of the Constitution) – what is essential is that the subject of the search is described in sufficient detail, and one cannot imagine how the judge could have written the warrant in any more detail. From the warrant it clearly follows that only the documents connected to the matter should be searched for and examined, without the police officers being permitted to examine all other documents in the lawyer's office as well; such is also the standpoint that follows from the decision of the Supreme Court.

13. A court warrant must enjoy respect for the authority of a decision issued by the judicial power equal to any other court decision; an individual is obliged to comply therewith. If the decision is not executable and if legal remedies are available to the individual, he or she may contest it. If legal remedies are not available, the decision is binding. The binding power of court decisions is an element of a state governed by the rule of law determined by Article 2 of the Constitution, and an element of the right to effective judicial protection determined by the first paragraph of Article 23 of the Constitution. It can be stripped of this binding power only in highly exceptional cases due to which this power should be considered "invalid". The case at issue is not such a case. Considering the significance of the authority of a court decision, a representative of the Bar Association does not have the right to assess whether the warrant was drawn up in accordance with the law, moreover, he has even less right to oppose it. Therefore, the Supreme Court's central standpoint, according to which the complainant does not have the right to refuse to be present during a search of a lawyer's office which is to be conducted on the basis of a court warrant cannot be deemed unconstitutional. The position of the Supreme Court according to which such conduct is contrary to the established legal order (Article 2 and the first paragraph of Article 23 of the Constitution) is namely relevant from the point of view of constitutional law. This position is decisive for a review of the contested decisions; the complainant, however, does not state any arguments against it that are relevant from the point of view of constitutional law.

14. As regards the aforementioned, a violation of Article 34 of the Constitution is not demonstrated, therefore the Constitutional Court dismissed the constitutional complaint.

C.

15. The Constitutional Court reached this decision on the basis of the first paragraph of Article 59 of the CCA, composed of: Vice President Mag. Miroslav Mozetič, Judges Mag. Marta Klampfer, Mag. Marija Krisper Kramberger, Mag. Jadranka Sovdat and Jan Zobec. Judges Jasna Pogačar, Dr. Mitja Deisinger, Dr. Ernest Petrič, and Jože Tratnik were disqualified from deciding in the case. The decision was adopted unanimously. Judge Sovdat submitted a concurring opinion.

Mag. Miroslav Mozetič
Vice President

Endnotes

[1] The first and second paragraphs of Article 36 of the Constitution read as follows: "Dwellings are inviolable. No one may, without a court order, enter the dwelling or other premises of another person, nor may he search the same, against the will of the resident."

"In the context of 'reasonably expected privacy', the word dwelling should not be understood only as dwelling in the narrow sense but also as hotel rooms and all premises in general where a citizen has the right to the privacy he or she may reasonably expect." See B. M. Zupančič in: L. Šturm (ed.), *Komentar Ustave Republike Slovenije* [Commentary on the Constitution of the Republic of Slovenia], Fakulteta za podiplomske državne in evropske študije, Ljubljana 2002, p. 388. Some authors interpret the term "other premises of another person" as referring to business premises, premises of undertakings, and other legal persons (G. Klemenčič, *Hišna preiskava* [Search of Premises]; in: G. Klemenčič, B. Kečanović, M. Žaberl, *Vaše pravice v policijskih postopkih* [Your Rights in Police Procedures], Založba Pasadena, Ljubljana 2002, p. 157). A provision similar to the one in the Slovene Constitution is also contained in the German Constitution, which in Article 13 explicitly refers only to the inviolability of dwellings and does not mention any other premises. It follows from the commentary on Article 13 of the German Constitution that the object of protection also includes business premises, with the exception of those which are generally accessible. H. D. Jarass, B. Pieroth, *Grundgesetz für die Bundesrepublik Deutschland*, 3. Auflage, Verlag C. H. Beck, München 1995, p. 310.

[2] The privilege of the confidential relationship between a lawyer and his client is one of the oldest acknowledged privileges relating to confidential communications. The purpose of the privilege is "to foster full and open communication between lawyers and their clients, and thereby foster broader public interest in respect for the law and judiciary". See US Supreme Court judgment in the case *Upjohn Co. v. United States*, 449 U. S. 383, 389 (1981). See also the judgments in the cases *Fisher v. United*

States, 425 U. S. 391 (1976), and *Swidler & Berlin v. United States*, 524 U. S. 399 (1998).

[3] Defence counsels cannot perform any of their duties well unless the persons deprived of their freedom can present to them without reservations the circumstances of their case and how they have been treated. Constitutional Court Order No. Up-101/96, dated 1 October 1998 (OdlUS VII, 249).

[4] Privilege refers to confidential communication between clients and their legal advisers when such is intended for obtaining or providing legal advice or for its application in proceedings which have already been or are to be initiated. This privilege is essential for the adequate and dignified arrangement of personal matters in a social environment poisoned by interferences with privacy. The individual must be enabled to obtain legal advice and legal assistance without fearing that his communication will be subject to investigation and seizure on the basis of a court order. "Denying the privilege against a search warrant would have a minimal effect in securing convictions but a major damaging effect on the relationship between the legal profession and its clients. It would engender an atmosphere in which citizens feel that their private papers are insecure and that relationships they previously thought confidential are no longer safe from police intrusion." See judgment of the High Court of Australia in the case *Baker v. Campbell*, (1983) 153 CLR 52.

[5] In accordance with the first paragraph of Article 6 of the LA, a lawyer must protect what his client has confided in him as a secret. A violation of the duty to protect a professional secret is defined as a severe violation of a lawyer's duty in practicing the legal profession (the first paragraph of Article 77.b of the Statutes).

[6] "The objective significance of legal practice and the legally protected confidential relationship between a lawyer and his client is in any case affected when, due to the risk of unlimited access to data, the lawyer-client relationship is burdened from the beginning with uncertainty regarding its confidentiality. With the extent of the potential knowledge of confidential statements that state authorities may acquire, the probability increases that in pursuing their interests even those who are not suspects will no longer trust the persons who are normally entrusted with professional secrets." See paragraph 94 of Order of the Second Senate of the German Federal Constitutional Court 2 BvR 1027/02, dated 12 April 2005.

[7] The CPA does not contain any detailed provisions regarding the manner of conducting a search of a lawyer's office.

[8] A search of a lawyer's office entails an interference with the right to respect for privacy determined by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Official Gazette RS, No. 33/94, MP, No. 7/94 – hereinafter referred to as the ECHR); see the case of *Niemietz v. Germany*, judgment dated 16 December 1992. Such interference is admissible if it is provided for by the law and is necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. According to the standpoints of the ECtHR, the search and seizure of documents in the office of a lawyer undoubtedly interfere with the

professional secrecy which is the basis for a confidential relationship between a lawyer and his client. The protection of professional secrecy [in the lawyer-client relationship] is related to the right of the client against self-incrimination, which presupposes that the authorities obtain evidence without force or pressure, i.e. against the will of the defendant. If national law envisages the possibility of a search of a lawyer's office, the search must be consistent with special safeguards (*garanties particulières*). The ECHR does not prohibit the imposition of certain duties on lawyers that may relate to the relationship with their clients if there are reasonable indications that a lawyer has participated in a criminal offence, or within the framework of combating certain forms of conduct. Such measures must, however, be strictly limited as lawyers have a central role in the administration of justice, and, due to their mediatory role between clients and courts, they could be defined as courts' assistants. Paragraphs 41 and 42 of judgment in the case *André et al. v. France*, dated 24 July 2008.

[9] The protection of the confidential relationship between a lawyer and his client does not entail an impediment to obtaining communications which were used for a criminal offence. Communications lose the nature of confidentiality if they were made with a view to obtaining legal advice to facilitate the commission of a criminal offence. See, for example, the judgment of the Supreme Court of Canada in the case *Descôteaux et al. v. Mierzewski*, [1982] 1 S. C. R. 860.

[10] See Judgment of the Supreme Court No. 1 Ips 214/97, dated 28 November 2002