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COUR EUROPÉENNE DES DROITS DE L'HOMME

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Systematic and indiscriminate retention of telecommunications data, amid proceedings against judge for bribery, breached privacy rights

The case Škoberne v. Slovenia (application no. 19920/20) concerned the proceedings against a former judge and his conviction in 2013 for accepting bribes. His conviction had been based on statements by his two co-defendants who had admitted to being intermediaries and on traffic and location data obtained under the data-retention regime in force at the time in Slovenia.

In today's **Chamber** judgment[1] in the case the European Court of Human Rights held, unanimously, that there had been **a violation of Article 8 (right to respect for private and family life).**

Although only telecommunications data needed for billing and commercial purposes could now be retained in Slovenia, at the time of the applicant's conviction communication service providers had been obliged to retain such data systematically and indiscriminately for a period of 14 months. The Court considered that such retention did not remain within the bounds of what was necessary in a democratic society. Consequently, the retention of, access to and processing of the data in the context of the criminal proceedings against the applicant had breached his privacy rights.

The Court also held, unanimously, that there had been **a violation of Article 6 §§ 1 and 3 (d) (right to a fair trial/right to obtain examination of witnesses)** of the European Convention on Human Rights.

The Court noted that the proceedings against the applicant and his co-defendants had been disjoined following the latter's admission of guilt and that the applicant had been denied the possibility to put questions to them in court in the separate proceedings against him that ensued. The applicant had therefore been deprived of the opportunity to effectively adduce witness evidence which would have been important in arguing his case, therefore rendering the trial proceedings unfair.

Principal facts

The applicant, Milko Škoberne, is a Slovenian national who was born in 1959 and lives in Laško (Slovenia). He is a former district-court judge.

Mr Škoberne was arrested in January 2011 following an undercover operation into his allegedly accepting bribes to intervene in proceedings against an individual, E.Ć., for fraud and prostitution-related crimes. Two others, E.R. and M.S., were arrested at the same time for acting as intermediaries.

The trial against Mr Škoberne and his two co-defendants started in February 2013. However, following the co-defendants' – E.R. and M.S.'s – admission of guilt at one of the hearings the proceedings were disjoined. E.R. and M.S. were convicted on 16 December 2013 of assisting in the bribery of an official. They were given suspended prison sentences and fined.

[1] Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

In the separate proceedings which ensued against Mr Škoberne, he said in his defence that he had had meetings with E.Ć., E.R. and his friend, M.S., and had given legal explanations, but at no point had there been any talk of money. He had received EUR 8,000 from M.S. in repayment of a loan.

On 23 December 2013, the first-instance court found Mr Škoberne guilty of accepting bribes for, among other things, promising to take over the hearing of E.Ć.'s case and to have the proceedings against him terminated, as well as other interventions with regard to his release and arrest warrants against him.

Mr Škoberne's conviction was based on, among other evidence, E.Ć.'s statements to the police, corroborated by M.S.'s statements during the investigation. His telecommunication traffic and location data – provided by telecommunications service providers and analysed by the police – also formed part of the evidence adduced by the prosecution.

Mr Škoberne's challenges to his conviction, ultimately before the Supreme Court in 2015, were all unsuccessful. He also lodged two constitutional complaints which were dismissed on the merits in 2019.

Throughout the proceedings Mr Škoberne argued that he had been denied the possibility to put questions to E.R. and M.S. in court, and that the trial judge had not stepped down, despite her having accepted his co-defendants' admission of guilt, raising doubts over her impartiality.

The higher courts essentially followed the rulings of the lower courts, finding in particular that E.R. and M.S. could not be examined as witnesses in the proceedings against the applicant as their convictions were not yet final, while the relevant law did not provide that a judge should step down in the event that he/she had accepted the co-defendants' admission of guilt.

The applicant also complained that the first-instance court had relied on data to convict him which had been obtained from electronic communication providers who had been obliged by law at the time to retain data for a period of 14 months.

The courts dismissed however that complaint, concluding in particular that the data in question had been accessed before the retention regime had been declared invalid by a Constitutional Court ruling of 2014, and the court orders authorising the access had been based on the suspicion that a serious crime had been committed.

Complaints, procedure and composition of the Court

Relying on Article 6 (right to a fair trial) and Article 8 (right to respect for private and family life), Mr Škoberne complained, in particular, that the first-instance court had refused to allow the examination of two witnesses, that the judge in the trial had been partial as she had been involved in the proceedings against those witnesses, and of the retention of his telecommunications data.

The application was lodged with the European Court of Human Rights on 21 April 2020.

Judgment was given by a Chamber of seven judges, composed as follows:

Alena **Poláčková** (Slovakia), *President*,
Marko **Bošnjak** (Slovenia),
Lətif **Hüseynov** (Azerbaijan),
Péter **Paczolay** (Hungary),
Ivana **Jelić** (Montenegro),
Erik **Wennerström** (Sweden),
Raffaele **Sabato** (Italy),

and also Liv **Tigerstedt**, *Deputy Section Registrar.*

Decision of the Court

Article 8 (right to respect for private life)

First, the Court noted that there had been no reason to call into question the court orders obtained by the police in respect of the applicant's telecommunication traffic and location data. What raised concern was the broader context, in particular the Slovenian law governing data retention in force at the time.

That law required electronic communications providers to retain communications data relating to fixed and mobile telephony for a period of 14 months for public interest purposes. The retention of the applicant's telecommunications data had therefore had a sufficiently clear legal basis. It had also been compliant with the law in force at the time as the service providers had only handed over to the authorities the data which had been stored within the 14-month time-limit.

Such interference with the applicant's rights had moreover pursued the legitimate aim of preventing crime and protecting the rights and freedoms of others.

The Court went on to note that every individual or entity using the services of telecommunications providers in Slovenia at the time could have expected that their data had been retained. That interference with privacy rights had been very serious and a stricter scrutiny was therefore called for in the Court's assessment of the case. In particular, safeguards and criteria had to be set out in law to avoid abuse and ensure proportionality of the measure.

However, the law governing data retention as in force at the time of the applicant's conviction had contained no provisions defining the scope and application of the measure. Nor had any other legislative act contained such provisions.

Such systematic, general and indiscriminate retention of communications data could not be considered to remain within the bounds of what was necessary in a democratic society and meant that the regime had not complied with the State's obligations under Article 8. Consequently, the access to and processing of such data had not complied with Article 8 either.

In coming to that conclusion, the Court pointed in particular to rulings in 2014 by both the Constitutional Court of Slovenia and the Court of Justice of the European Union[2] (CJEU) finding that such a data-retention regime had been general and indiscriminate, and therefore in breach of users' privacy rights.

As regards the applicant's particular situation, although the retention regime had been declared invalid by the CJEU and the Constitutional Court after his data had been accessed, that did not mean that it had complied with Article 8 at the time. At the time the applicant's telecommunications data had been retained, he had not enjoyed the legal protection to which he had been entitled under the Convention.

Overall, the retention, access and processing of telecommunications data at the time of the applicant's conviction had been in violation of Article 8 of the Convention.

Article 6 (right to a fair trial/right to obtain examination of witnesses)

First, the Court noted that the applicant's conviction had been based largely on conversations with M.S. and E.R. who had allegedly played a crucial role in assisting him to commit bribery. It therefore found that the applicant's request for them to be called as witnesses had been sufficiently founded and relevant.

Secondly, it ruled that the national courts had not provided sufficient reasons for refusing to call M.S. and E.R. as witnesses. In particular, the Court was not persuaded by the argument that they

[2] *Digital Rights Ireland and Others (C-293/12 and C-594/12, EU:C:2014:238)*

could not be examined because the judgment against them could still be appealed. The trial judge had to have been aware that the deadline for M.S. and E.R. to appeal had been only eight days and she could have adjourned the hearing until that short period had expired.

Lastly, as regards the overall fairness of the proceedings, the Court noted that the testimony of M.S. and E.R. could have been important, given that they had been the only witnesses who could confirm or deny the applicant's version of events in his defence statement.

The fact that the applicant had been deprived of the opportunity to effectively adduce witness evidence and to rely on it in arguing his case had therefore rendered the trial proceedings unfair. The higher courts that had dealt with the applicant's case had not redressed that shortcoming. There had accordingly been a violation of Article 6 §§ 1 and 3 (d) of the Convention.

Given that finding, the Court considered that it was not necessary to examine the merits of the complaint under Article 6 § 1 concerning the trial judge's alleged lack of impartiality.

Article 41 (just satisfaction)

The Court held that Slovenia was to pay the applicant 5,000 euros (EUR) in respect of non-pecuniary damage and EUR 5,000 in respect of costs and expenses.

The judgment is available only in English.

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