EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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Extraction and use by investigating judge of personal data from lawyer's mobile phone, overstepping of judge's remit, failure to apply procedural safeguards in respect of lawyers and their professional privilege, inadequate judicial scrutiny: violation of Article 8

In today's **Chamber** judgment[1] in the case of **Bersheda and Rybolovlev v. Monaco** (application nos. 36559/19 and 36570/19) the European Court of Human Rights held, unanimously, as follows:

With regard to Mr Rybolovlev's application, it considered that the messages and conversations extracted in the context of the court-appointed expert's assignment did not concern his personal data and correspondence or his exchanges with T.B., whether in a private context or that of the lawyer-client relationship. Consequently, it found that he could not claim to be a victim within the meaning of Article 34 of the Convention. His **application was therefore declared inadmissible.**

With regard to Ms Bersheda's application, it was admissible and there had been, in respect of that applicant:

a violation of Article 8 (right to respect for private life) of the European Convention on Human Rights.

The case concerned the conduct of a judicial investigation directed by a French judge seconded to the Monegasque courts.

The Court took the view that the investigations undertaken by the investigating judge involving a lawyer's mobile phone and the massive, indiscriminate recovery of personal data – including those that had previously been erased by the applicant – had exceeded that judge's remit, which had been confined to accusations of invasion of privacy, and had not been accompanied by safeguards to ensure due respect for the applicant's status and professional privilege as a lawyer.

Principal facts

The applicant, Tetiana Bersheda, is a Swiss and Ukrainian national who was born in 1984 and lives in London; Mr Dmitriy Rybolovlev is a Russian national who was born in 1966 and lives in Monaco.

A judicial investigation into infringements of privacy was entrusted to E.L., a French judge seconded to the Monegasque judiciary.

Ms Bersheda, a lawyer registered with a Swiss bar who had Mr Rybolovlev as a regular client, was charged with having secretly recorded a conversation of just under ten minutes with T.R. during a private meal on 23 February 2015.

In the context of her defence, Ms Bersheda handed over her mobile phone to the police to allow the offending recording to be examined and to prove her good faith.

The investigating judge, whose remit did not go beyond the investigation of a specific set of facts – by verifying whether the recording was authentic and examining the content of the conversation in

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.

the light of Monegasque criminal law – nevertheless decided to commission a vast telecommunications report from a court-appointed expert, with no real limits as to dates or scope of inquiry, thereby authorising a "fishing expedition" that clearly exceeded the judge's remit.

The expert's assignment, which was to identify all calls, text exchanges or emails even "indirectly" related to the ongoing case, thus led to the recovery from Ms Bersheda's mobile phone of tens of thousands of text messages, MMSs, iMessages and emails, plus telephone calls, covering a period of over three years.

One of the particularities of the case was that, before spontaneously handing over her phone (which she used for both private and professional purposes as a lawyer), Ms Bersheda had taken care to have an IT professional erase considerable quantities of data that were entirely unrelated to the invasion-of-privacy proceedings in the context of which she had been charged.

Alleging that the investigating judge had exceeded the bounds of the investigations warranted by his remit and that the expert's IT searches had been conducted in breach of the right to professional privilege that Ms Bersheda enjoyed as a lawyer, she and Mr Rybolovlev lodged several applications challenging the conduct of the investigation, in particular that of the telecommunications assessment and the manner in which its findings were handled. Those challenges were all rejected by the Pre-Trial Division of the Court of Appeal and, subsequently, by the *Cour de révision*.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private life), the applicants complained of the massive, indiscriminate and disproportionate collection of all "visible" – but also erased and therefore "invisible" – data. They submitted that these unjustified investigations had been conducted without protecting the professional privilege to which Ms Bersheda (hereinafter "the applicant") was entitled as a lawyer.

The two applications were lodged with the European Court of Human Rights on 5 July 2019.

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

Mattias **Guyomar** (France), *President*,
Carlo **Ranzoni** (Liechtenstein),
Mārtiņš **Mits** (Latvia),
Stéphanie **Mourou-Vikström** (Monaco),
María **Elósegui** (Spain),
Mykola **Gnatovskyy** (Ukraine),
Stephane **Pisani** (Luxembourg),

and also Victor **Soloveytchik**, *Section Registrar.*

Decision of the Court

Article 8

First, examining the question whether there had been an interference, the Court found, in particular, that the notion that the applicant would have handed over her mobile phone if she had thought that the data erased from its memory would be recovered and used could not reasonably be entertained. Even though she was a lawyer and therefore a legal professional, she had had a legitimate expectation that messages and conversations that she had rendered "invisible" with the help of a professional would be protected by absolute confidentiality. For the purposes of Article 8 of the Convention, the applicant was therefore justified in submitting that she had been the victim of

infringements of her right to respect for her private life and correspondence which, in their intrusiveness and effects, could be compared to searches and seizures.

The Court concluded that there had indeed been an interference with the applicant's Article 8 rights.

Next, the Court noted that there were legal bases in national criminal procedure that applied to searches and seizures with regard to lawyers. Despite the obvious similarity between the effects of such measures and those of the searches undertaken by the expert at his request, the investigating judge – backed up by the appellate courts – had decided not to apply any of the provisions of these protective frameworks to the applicant, even though she used her mobile phone for both private and professional purposes. The Court understood that the particular nature of the facts explained why they were not covered by a provision of the Code of Criminal Procedure corresponding specifically to a lawyer handing over her phone after having purged it of thousands of messages and calls; however, it did not conclude from this that a basis in law had been lacking. The similarity between the effects of searches and seizures and the investigation of the mobile phone ought to have led the investigating judge to provide the applicant with safeguards appropriate to her status as a lawyer, especially as she was the defendant in the case.

While acknowledging the particularities of the present case, the Court reiterated that States had an obligation to protect the confidentiality of exchanges between lawyers and their clients and legal professional privilege. It therefore had to ascertain whether sufficient procedural safeguards had been afforded by the supervisory courts to compensate for the weakness of the legislative references initially cited by the investigating judge. Thus, in the Court's view, it was not the legal basis as such that was questionable, in the abstract, but the particular circumstances of its implementation.

Having noted that the interference had pursued a legitimate aim, the Court found that its necessity was called into question by shortcomings in the conduct of the investigation. While this investigation had clearly been confined to a technical analysis of the recording and a substantive assessment of the words exchanged over a very brief period of time (under ten minutes), the assignment entrusted to the expert by the investigating judge had been designed from the outset to overstep and expand the scope of the judge's remit. The decision commissioning the expert had been drafted in extremely broad and imprecise terms, a fact which had been apt to give rise to risks of abuse and arbitrariness. In addition, the examinations of the civil party showed that the initial investigation had deviated towards acts of corruption having nothing to do with the charges of invasion of privacy to which the judge's investigations ought to have been confined. It thus appeared that investigations had been undertaken which were far too broad in scope and only distantly and artificially related to the judge's remit. Since domestic law did not provide that the expert's assignment should initially be subject to adversarial proceedings and therefore to a potential challenge from the parties, it had been particularly important to implement strict guarantees and rigorous judicial scrutiny. Such safeguards were especially important since the applicant was a lawyer and the data she had wished to keep secret had been collected from a mobile phone she used for professional purposes.

The Court deplored the fact that the investigating judge had not, from the outset, deployed a framework to protect legal professional privilege in the present case, especially when domestic law required guarantees for measures that were admittedly different but had comparable consequences, like searches and seizures. It noted, moreover, that this initial shortcoming had not been rectified by any subsequent judicial scrutiny. In particular, the fact that the investigating judge had been aware of the existence of erased messages liable to contain information covered by professional privilege – since the phone was used for both private and professional purposes – ought at the very least to have justified implementing appropriate protection in view of the applicant's status as a lawyer. This had not been the case, however, even though domestic law expressly provided for various safeguards.

In conclusion, the Court found that the investigating judge had extended the scope of his investigation too broadly and that the supervisory judicial authorities had failed to redefine the bounds of the expert's assignment and of the investigation, in order to comply with the judge's remit. These inadequate investigative boundaries were compounded by the failure to implement the protective procedural framework to which the applicant's status as a lawyer entitled her and which she ought to have enjoyed irrespective of her membership of a foreign bar. These shortcomings in the conduct of the judicial investigation had not been remedied by the supervisory judicial bodies. The interference with the applicant's right to respect for her correspondence and her private life had therefore not been proportionate to the legitimate aims pursued and, accordingly, had not been "necessary in a democratic society".

There had therefore been a violation of Article 8 of the Convention.

The judgment is available only in French.

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