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

THIRD SECTION

DECISION

Application no. 40969/21
Petrus Cornelis SCHOUTEN
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 24 September 2024 as a Committee composed of:

Peeter Roosma*, President*,
Jolien Schukking,
Diana Kovatcheva*, judges*,
and Olga Chernishova, *Deputy Section Registrar,*

Having regard to:

the application (no. 40969/21) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 9 August 2021 by a Dutch national, Mr Petrus Cornelis Schouten, who was born in 1957 and lives in Breda ("the applicant");

the decision to treat as confidential documents deposited with the Registry (Rule 33 § 1);

Having deliberated, decides as follows:

SUBJECT MATTER OF THE CASE

1. The case concerns the question whether the applicant, a lawyer, can claim to be a victim of a violation of the right to protection of legal professional privilege ("LPP") under Article 8 of the Convention.

2. On 29 June 2020, N.B., a suspect in a criminal trial in which he was also a crown witness, appointed the applicant as his lawyer.

3. Prior to that, in February 2018, when N.B. was detained on remand, he gave a mobile telephone, which he had in his possession in breach of prison regulations, to his then lawyer ("D.W.") prior to being transferred to another cell.

4. After D.W. was killed in September 2019, this telephone – turned off and locked by a pin code – was handed over *via* the Dean of the local Bar

Association to the successor lawyer ("A.A."). After N.B. dismissed A.A. as his lawyer on 11 March 2020, A.A. gave the telephone back to the Dean where it was seized after authorisation by the investigating judge on 17 March 2020 and placed in a safe. The investigating judge invited the Dean and A.A. to express their views on the question whether the telephone and the data it contained were covered by LPP. Both indicated that they did not know what information was on the telephone, but they considered it quite conceivable that it was data covered by LPP. To properly assess this claim, the investigating judge deemed it necessary to have the contents of the telephone examined.

5. On 8 April 2020 the investigating judge therefore asked forensic investigators to force access to the telephone, to make a mirror-image copy of the data on it and to examine if it included any communication covered by LPP. After being informed of the results of the forensic investigation (the data mainly concerned WhatsApp messages exchanged in the period from September 2017 to February 2018 and several exchanges between N.B. and D.W.), the investigating judge immediately ordered that all communication between N.B. and D.W. and any associated data be deleted from the data carrier on which the information derived from the telephone had been copied. These LPP covered communications between N.B. and D.W. were not the subject of the subsequent domestic proceedings.

6. On 2 July 2020 the investigating judge decided that the seizure of the telephone and the examination of the data on the mirror-image copy had been lawful, noting that A.A. and the Dean did not have LPP in respect of the data on the mirror-image copy.

7. On 16 July 2020 the applicant and the Dean lodged a complaint against this decision.

8. On 9 October 2020 the Regional Court dismissed the applicant's and the Dean's complaints. The court held that the investigating judge had acted correctly by not seeking the applicant's views prior to his decision 2 July 2020 because the data had not been entrusted to him, and he had never communicated with his client through this telephone. The court further held that it had been necessary for the investigating judge to have (the contents of) the telephone examined to assess the plausibility of Dean and A.A.'s claim. There was no evidence that D.W. had had access to the telephone and the data on it. In view of this, the court held that the telephone had not been entrusted by the crown witness to his then lawyer in the exercise of his legal profession. It added that the data was also not intended to be communicated unconditionally to A.A. In view of this, the court concluded that the data on the mirror-image copy was not covered by LPP.

9. Both the applicant and the Dean lodged an appeal on points of law. The applicant complained about the Regional Court's finding that the investigating judge had acted correctly by not seeking the applicant's views

prior to his decision 2 July 2020 and about its finding that the data were not covered by LPP.

10. On 9 February 2021 the Supreme Court dismissed the applicant's and the Dean's appeals on points of law. As regards the applicant's complaints the Supreme Court held that although the Regional Court had indeed wrongly decided that the investigating judge did not have to seek the applicant's views prior to his decision of 2 July 2020, the applicant had been able to put forward his views in the complaint procedure. It further held that in view of the facts and circumstances as established by the Regional Court, it had been reasonable and correct for that court to find that the mirror-image copy did not contain data covered by LPP.

11. The applicant complained under Article 8 of the Convention that procedural guarantees relating to the protection of the right to LPP had been lacking during the seizure and the examination of N.B.'s telephone. In that connection he noted that he should have been heard prior to the investigating judge's decision of 2 July 2020 and that he should have been given access to the mirror-image copy to assess whether it contained privileged information. The applicant relied, *inter alia*, on *Saber v. Norway* (no. 459/18, § 51, 17 December 2020).

THE COURT'S ASSESSMENT

12. In the light of the applicant's complaints under Article 8 of the Convention and the autonomous meaning given to the notion of "victim" in the Court's case-law (see *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, § 35, ECHR 2004-III), the Court considers it appropriate to examine whether the applicant can claim to be a victim of a violation of the right to LPP.

13. The Court reiterates at the outset that LPP extends only to "exchanges" or "communication" between lawyers and their clients in the context of legal assistance (see *Michaud v. France*, no. 12323/11, §§ 118-19, ECHR 2012; *Altay v. Turkey (no. 2)*, no. 11236/09, § 49, 9 April 2019; and *Saber,* cited above, § 51).

14. In several cases the Court has found that a lawyer or client was the victim of a violation of the right to LPP as protected under Article 8 of the Convention on account of the seizure and/or examination of electronic devices such as computers, laptops, USB sticks, hard drives or mobile telephones (see, for example, *Petri Sallinen and Others v. Finland*, no. 50882/99, 27 September 2005; *Kırdök and Others v. Turkey*, no. 14704/12, 3 December 2019; *Saber*, cited above; and *Särgava v. Estonia*, no. 698/19, 16 November 2021).

15. For the reasons set out below, the Court considers that the applicant in the present case cannot be regarded a victim of the alleged violation of Article 8 of the Convention.

16. The applicant's complaints originate from the investigating judge's decision to seize N.B.'s telephone from the Dean and to have it forensically examined in April 2020, when the applicant had not yet been appointed as N.B.'s lawyer. After the applicant had been so appointed, the investigating judge decided on 2 July 2020 that A.A. and the Dean did not have LPP in respect of the data on the mirror-image copy.

17. The Court notes further that the applicant did not claim that he had ever been in possession of N.B.'s telephone or that he had any knowledge of its contents. Moreover, the mirror-image copy no longer contained any communication between N.B. and D.W. (see paragraph 5 above; this was not contested by the applicant) and the applicant did not claim that it contained any communication between him and N.B. or, for that matter, any of his other clients. Finally, the seizure of the telephone did not take place in the applicant's home, business premises or means of transportation (compare and contrast *Niemietz v. Germany*, 16 December 1992, §§ 27-33, Series A no. 251-B; *Särgava*, cited above, § 85; and *Wolland v. Norway*, no. 39731/12, §§ 7-8 and 52, 17 May 2018).

18. In the light of the above, the Court concludes that the applicant was not a victim – in the sense of being "directly affected" (see *Lambert and Others v. France* [GC], no. 46043/14, § 89, ECHR 2015 (extracts)) – of any interference with the right to respect for LPP and, more generally, the right to respect for his private life, home or correspondence under Article 8 of the Convention.

19. In the same vein, the Court notes that, even if it were to assume that N.B.'s former lawyer or the Dean could have claimed to be a victim of a violation of Article 8 of the Convention, it has not been presented with a "good reason" which would justify it from departing from its well-established case-law that the rights protected by this provision are in principle considered to be strictly personal and non-transferable (see *Jakovljević v. Serbia* (dec.), no. 5158/12, §§ 29-30, 13 October 2020, with further references).

20. Lastly, it does not appear, nor has this been alleged, that there is a law which violates the applicant's rights in the absence of an individual measure of implementation, that he was required to modify his conduct at risk of being prosecuted, or that he is or was a member of a class of people at risk of being directly affected by the legislation (contrast *Michaud*, § 52, cited above). For this reason, the Court is of the view that the applicant cannot be considered a potential victim in respect of an alleged violation of Article 8 of the Convention.

21. In the light of the above, the Court concludes that the applicant has no victim status in respect of an alleged violation of Article 8 of the Convention. The complaint is therefore incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be declared inadmissible in accordance with Article 35 § 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 17 October 2024.

Olga Chernishova Deputy Registrar	Peeter Roosma President