

**Case number:**

Up-326/14

ECLI:

ECLI:SI:USRS:2018:Up.326.14

Challenged act:**Operative provisions:****Abstract:****The Constitutionality of the Actions of a State Prosecutor**

In case No. Up-326/14 (Decision dated 6 December 2017, Official Gazette RS, No. 6/18), the Constitutional Court decided on the constitutional complaint of a complainant who was found guilty by a final judgment of the criminal offence of unlawful trade in illicit drugs. In the constitutional complaint the complainant alleged, *inter alia*, that his right stemming from Article 22 of the Constitution was violated, as the order of the office of the district state prosecutor that allowed the execution of covert investigative measures against his co-defendant did not contain a reasoning and did not establish reasonable grounds for suspicion, which is a statutory condition for ordering such measures. He alleged that – as fruits of a poisoned tree – all subsequent orders concerning covert investigative measures against all of his co-defendants and all evidence obtained in the course of their execution were illegal and therefore had to be excluded.

The Supreme Court dismissed the complainant's allegations that the prosecution's order did not contain a reasoning and that the evidence obtained on its basis was therefore illegal. It adopted the position that the express statutory requirement of a prior court order containing a reasoning and an order of the state prosecution for a covert investigative measure can be substituted for by subsequent judicial control as part of which a court establishes whether the conditions for ordering the investigative measure were fulfilled. In the assessment of the Supreme Court, a judicial decision cannot rely on evidence obtained through such an investigative measure only if due to the deficient reasoning of the order authorising the measure, the request for the measure, or the documents attached thereto one cannot conclude that there existed reasonable grounds for the suspicion that a criminal offence has been committed. It held that the evidence obtained on the basis of the ordered investigative measures was not inadmissible and it was thus not necessary to exclude it from the case file.

When deciding, the Constitutional Court proceeded from the established constitutional case law, according to which the reasoning of a court order authorising an investigative measure (e.g. a search of premises) must clearly substantiate, i.e. state in a concrete manner and in clear terms, the reasonable grounds for the suspicion that a specific person committed a specific criminal offence as well as the likelihood that during the search the suspect will be apprehended or evidence of the criminal offence or objects that are important for the criminal proceedings will be found. However, the situation at issue concerned a case where the order was issued by a district state prosecutor and not by a court. Therefore, the Constitutional Court first had to assess whether such an order is also subject to the requirements stemming from Article 22 of the Constitution.

In the assessment of the Constitutional Court, the ordering and execution of covert investigative measures of secret surveillance, undercover operations, and fictitious purchases entail interferences with the constitutionally protected sphere of privacy, i.e. at least with the right to privacy determined by Article 35 of the Constitution. With regard to deciding whether these investigative measures should be allowed, the state prosecutor acts as a state authority that decides on the admissibility of an interference with an individual's human right, and therefore, as with any other state authority, the state prosecutor must also act in accordance with the Constitution.

The Constitutional Court held that a state prosecutor's order authorising covert investigative measures in accordance with Articles 149a, 155a, and 155 of the Criminal Procedure Act is subject to the same constitutional requirements concerning its reasoning as apply to court orders. Therefore, also the reasoning of such an act must comply with the safeguards stemming from Article 22 of the Constitution. It adopted the position that in the reasoning of an order authorising the execution of covert investigative measures a state prosecutor must state the facts and circumstances that substantiate the conclusion that there existed reasonable grounds for suspicion already prior to the interference with the individual's right to privacy. In doing so, the state prosecutor also supervises the work of the police. The purpose of the reasoning is also to enable a judge to subsequently verify whether the decision on the existence of the conditions for an interference with the individual's right was in conformity with the Constitution.

In light of such, the Constitutional Court held that the challenged position of the Supreme Court, i.e. that it is irrelevant whether an order of a state prosecutor contains a reasoning that fulfils the relevant constitutional requirements as long as the Supreme Court can subsequently establish whether the conditions for its adoption were fulfilled, violated the complainant's right stemming from Article 22 of the Constitution.

Thesaurus:

Legal basis:

Cases joined:

Full text:

Type of procedure:

ustavna pritožba

Type of act:

posamični akt

Applicant:

Srđan Berić, Radeče

Date of application:

25. 4. 2014

Date of Decision:

6. 12. 2017

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Outcome of proceedings:

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