



Number: Up-1006/13

Date: 9. 6. 2016

DECISION

At a session held on 9 June 2016 in proceedings to decide upon the constitutional complaint of Jože Vincetič, Murska Sobota, represented by Igor Vinčec and Andreja Tratnjek, attorneys in Lendava, the Constitutional Court

decided as follows

1. Point II of the operative provisions of Supreme Court Judgment No. I Ips 10713/2010, dated 12 September 2013, Maribor Higher Court Judgment No. II Kp 10713/2010, dated 19 December 2012, and Murska Sobota District Court Judgment No. II K 10713/2010, dated 29 February 2012, are abrogated insofar as they refer to Jože Vincetič with regard to the criminal offence of the unauthorised manufacture and sale of illicit drugs.

2. The case is remanded to the Murska Sobota District Court for new adjudication.

REASONING

A

1. The Murska Sobota District Court convicted the complainant of the criminal offence of robbery under the first paragraph of Article 206 of the Criminal Code (Official Gazette RS, Nos. 50/12 – official consolidated text, 6/16 – corr., 54/15, and 38/16 – hereinafter referred to as the CC-1) in conjunction with Article 20 of the CC-1, and the criminal offence of the unauthorised manufacture and sale of illicit drugs under the first paragraph of Article 186 of the CC-1. It imposed on him a total sentence of two years and four months of imprisonment. The Maribor Higher Court granted the appeal filed by the State Prosecutor and increased the complainant's sentence to two years and ten months of imprisonment; it dismissed the appeal filed by the complainant. The Supreme Court subsequently partially granted the complainant's request for the protection of legality and abrogated the challenged judgment with regard to the criminal offence of robbery; it remanded the case in the relevant part to the court of first instance for new adjudication. It also abrogated the decision on the total sentence and imposed on the complainant the sentence determined [by the challenged judgment] for the criminal offence of the unauthorised manufacture and sale of illicit drugs under the first paragraph of Article 186 of the CC-1.

2. The complainant alleges violations of the rights determined by Articles 35 and 36 of the Constitution, and 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). He states that the evidence regarding the criminal offence under the first paragraph of Article 186 of the CC-1 was obtained in a search of premises that was carried out on the basis of a court order that did not contain a reasoning and was therefore illegal and unconstitutional. It allegedly clearly follows from the second paragraph of Article 36 of the Constitution that a dwelling may not be entered against the will of the resident without a court order. The complainant maintains that an order that does not contain a reasoning, and therefore cannot be reviewed, cannot even be considered an order at all. He claims that an order for a search of premises must be such as to enable a review of the legality of the ordered interference. Therefore, it allegedly has to contain a substantiation of the statutory conditions for the search – i.e. the substantiated reasons for the suspicion that a criminal offence has been committed, and a substantiation as to why the search will enable the discovery of evidence of the criminal offence or objects that are important for the criminal proceedings. The complainant alleges that the judge performs the function of a guarantor in the procedure for issuing an order for a search of premises, and therefore he or she must verify whether a request for the execution of investigative measures contains all the necessary elements and whether it is sufficiently convincing, and he or she must also provide a substantive reasoning of such decision. In the complainant's opinion, such reasoning has to be the result of the judge's own thoughts and intellectual effort, while references to the request filed by the police are inadmissible. As the reasoning of the order authorising the search of premises in the complainant's case contained only four sentences, of which only two allegedly referred to the statutory conditions, the complainant maintains that all evidence found during the search of premises that was carried out on the basis of such an unsubstantiated order has to be excluded as inadmissible, as it was allegedly obtained through a violation of constitutionally determined human rights.

3. The complainant further claims that at the time when the search of premises was decided on there existed no substantiated reasons for suspicion and the statutory conditions for ordering a search of premises were not fulfilled. He states that the order was based solely on the statement of an anonymous source, and its evidentiary value had not been adequately verified and confirmed. As regards the source, the police allegedly provided no circumstances that would have indicated the manner in which the police officers ascertained its reliability and the truthfulness of the information. They allegedly merely verified who the persons whom the source mentioned by aliases as those participating in the robbery were. In their request for the issuance of the order the police allegedly also misled the court, as they falsely claimed that the complainant had been living with one of his co-defendants. There thus allegedly existed no evidence that would have linked the complainant to his co-defendants. The statements of the police regarding communication between the complainant and his

co-defendants in the time leading up to and following the robbery claiming that the complainant was a “street dealer” and that some electric cables had been found during an inspection of the complainant’s car two years before the robbery are allegedly completely unsubstantiated. On the contrary, subsequent verification allegedly showed that there had been no communication between the complainant and his co-defendants. The complainant therefore maintains that there existed no substantiated reasons for suspicion at the time of the issuance of the order authorising the search of premises, and consequently his right to the inviolability of dwellings was violated.

4. In reply to the complainant’s allegations that the order authorising the search of premises was unsubstantiated, the Supreme Court replied that, in accordance with established case law, not every irregularity with regard to the execution of an investigative measure necessarily results in the inadmissibility of the evidence obtained thereby. The types of violations that necessarily result in such are allegedly expressly determined by Article 219 of the Criminal Procedure Act (Official Gazette RS, Nos. 32/12 – official consolidated text, 47/13, and 87/14 – hereinafter referred to as the CrPA).¹ According to the position of the Supreme Court, the purpose of the reasoning of a court order authorising an investigative measure is to ensure the possibility of the subsequent review of the legality of the investigative measure. Therefore, the mere fact that an order authorising a search of premises contains a rather weak reasoning allegedly does not entail such a violation with regard to the execution of an investigative measure that one could claim that the search of premises had been carried out without a written court order and that the sanction determined by Article 219 of the CrPA applies. In the assessment of the Supreme Court, the deficient reasoning entails a violation of Article 215 of the CrPA, and therefore such practice must be limited or eliminated. However, in its assessment, a judgment of conviction cannot be based on evidence obtained during a search of premises only if due to a deficient search order, request, or the documents attached thereto one cannot conclude that there exist reasonable grounds for the suspicion that a specific person committed a criminal offence. When assessing the case at issue, the Supreme Court confirmed the positions of the lower courts that according to the information contained in the request for the search of premises and the official notes of the police attached thereto there existed substantiated reasons for the suspicion that the complainant, acting together with the other suspects, committed the criminal offence of robbery. The Supreme Court deemed that although the order authorising the search of premises contains neither the concrete circumstances that gave rise to the substantiated reasons for suspicion, nor does it substantiate such, these circumstances are included in the request of the police for the issuance of the order which the court referred to in the order.

¹ The Criminal Procedure Act was amended several times during the course of the criminal proceedings against the complainant, however the provisions of Articles 214–219 remained essentially the same.

5. By Order No. Up-1006/13, dated 16 June 2015, the Constitutional Court accepted the constitutional complaint for consideration. In accordance with the first paragraph of Article 56 of the Constitutional Court Act (Official Gazette RS, Nos. 64/07 – official consolidated text, and 109/12 – hereinafter referred to as the CCA), it informed the Supreme Court of the acceptance of the constitutional complaint.

B – I

6. In the proceedings to decide on the constitutional complaint the Constitutional Court reviewed Murska Sobota District Court case file No. II K 10713/2010.

7. It follows from the criminal case file that the investigating judge issued two orders authorising searches of premises against the complainant. Order No. Kpd 11378/2009, dated 15 December 2009, authorised a search of premises at the address Vrtna Street 3 in Murska Sobota, and Order No. 11782/2009, dated 16 December 2009, a search of apartment No. 13 at the address Staneta Rozmana 2, Murska Sobota. Both orders contain the same reasoning, which reads as follows: “From the request of the Criminal Sector of the Police Directorate in Murska Sobota No. [...] there follows a reasonable suspicion that Vincetič Jože committed a criminal offence under Art. 206/II CC-1. On the basis of the findings contained in the request the court deems it likely that during the search of premises evidence of the criminal offence will be discovered and objects that are important for the criminal proceedings for evidentiary purposes will be found, including in particular plastic cable ties, electric cables, dark caps with cut-outs for eyes, an electric stun gun, and insulating tape. Therefore, all statutory conditions for the issuance of this order are fulfilled.”

8. Police officers only executed Order No. Kpd. 11782/2009 and carried out a search of premises against Jože Vincetič in apartment No. 13 at the address Staneta Rozmana 2, Murska Sobota. The police officers did not find any objects connected with the criminal offence of robbery during the search of premises, they did, however, find 82.88 g of cannabis. Consequently, criminal proceedings for the criminal offence of the unauthorised manufacture and sale of illicit drugs under the first paragraph of Article 186 of the CC-1 were instituted against the complainant as well. The subject matter to be decided on in these constitutional complaint proceedings only concerns the judicial decisions that refer to that criminal offence.

B – II

9. It further follows from the criminal case file that on 8 November 2013, acting upon the request of the complainant’s defence attorney, the Supreme Court issued a corrective order rectifying Point I of the operative provisions of its Judgment No. I Ips 10713/2010, dated 12 September 2013, by adding the text “in the abrogated part the

case is remanded to the court of first instance for new adjudication” at the end of that Point. Despite this, the operative provisions of the Supreme Court judgment remain deficient, as they do not show how the Supreme Court decided on the complainant’s request for the protection of legality insofar as it referred to the criminal offence under the first paragraph of Article 186 of the CC-1. Based on the fact that the Supreme Court pronounced a sentence for this criminal offence (Point II of the operative provisions) and on the statement in Paragraph 25 of the reasoning of the Supreme Court Judgment that it partially granted the complainant’s request for the protection of legality, the Constitutional Court deems that the Supreme Court dismissed the complainant’s request for the protection of legality in the mentioned part.

B – III

10. Throughout the criminal proceedings the complainant claimed that the order authorising the search of premises was not sufficiently substantiated, and therefore the evidence obtained during the search had to be excluded from the case file as inadmissible. In the complainant’s opinion, the reasoning of a court order authorising a search of premises is intended to enable a subsequent review of whether the interference with the complainant’s right to the inviolability of his or her privacy and dwelling was legal and in accordance with Articles 35 and 36 of the Constitution.

11. Article 35 of the Constitution guarantees the inviolability of the physical and mental integrity of every person and their privacy and personality rights. The right to privacy determines the area of an individual’s own activity in which he or she is the one who decides which intrusions he or she will allow. The more the sphere of an individual’s private life is intimate, the greater the legal protection he or she must enjoy. This is even truer when it is admissible that the state or competent state authorities interfere therewith.² In addition to this general provision regarding the protection of privacy, the first paragraph of Article 36 of the Constitution contains a special provision that specifically protects the inviolability of dwellings or the so-called spatial aspect of privacy.³ In accordance with established constitutional case law, an individual is protected from having his or her conduct revealed where he or she

² Cf. Constitutional Court Decisions No. U-I-272/98, dated 8 May 2003 (Official Gazette RS, No. 48/03, and OdlUS XII, 42), Paragraph 20 of the reasoning, and No. U-I-40/12, dated 11 April 2013 (Official Gazette RS, No. 39/13, and OdlUS XX, 5), Paragraph 14 of the reasoning.

³ A substantive connection between the right to privacy and the right to the inviolability of dwellings is also indicated by the first paragraph of Article 8 of the ECHR, which reads as follows: “Everyone has the right to respect for his private and family life, his home and his correspondence.” The first paragraph of Article 17 of the International Covenant on Civil and Political Rights (Official Gazette SFRY, No. 7/71, and Official Gazette RS, No. 35/92, and MP No. 9/92 – ICCPR) contains essentially the same guarantee, namely: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”

legitimately expects to be left alone. His or her dwelling is the first but not the only such place. The individual is protected everywhere he or she can reasonably expect that he or she will not be exposed to the eyes of the public and where this is also evident to others.⁴ The Constitution thus does not protect the dwelling as an object, but an individual's privacy in such a place.⁵ What is protected is the dwelling as a home, i.e. as privacy on residential premises where an individual reasonably expects privacy and deems such premises to be his or her residential premises.⁶

12. The decision to order a search of premises and the ensuing search entail a decision on an interference with an individual's right to the inviolability of his or her dwelling, i.e. on an interference with his or her right to spatial privacy determined by the first paragraph of Article 36 of the Constitution. The following paragraphs of Article 36 of the Constitution determine special conditions for interferences with this right: no one may, without a court order, enter the dwelling or other premises of another person, nor may they search such, against the will of the resident (the second paragraph), any person whose dwelling or other premises are searched has the right to be present or to have a representative present (the third paragraph), such a search may only be conducted in the presence of two witnesses (the fourth paragraph), and the fifth paragraph of Article 36 determines the conditions, subject to statutory regulation, under which an official may enter the dwelling or other premises of another person without a court order, and may in exceptional circumstances conduct a search in the absence of witnesses. Despite the fact that the conditions for conducting a search of premises are determined by the Constitution in considerable detail, the reference to statutory regulation indicates that the constitution framers did not intend to regulate all aspects of searches of premises exhaustively and exclusively in the Constitution. The provisions of the CrPA that regulate searches of premises therefore constitute the statutory basis for interferences with the right to the inviolability of dwellings.

13. In accordance with the first paragraph of Article 214 of the CrPA, a dwelling or other premises of a suspect or of third persons may only be searched if there exist reasonable grounds for the suspicion that a specific person committed a criminal offence and it is likely that during the search the suspect will be apprehended or evidence of the criminal offence or objects that are important for the criminal

⁴ Constitutional Court Decision No. U-I-25/95, dated 27 November 1997 (Official Gazette RS, No. 5/98, and OdlUS VI, 158), Paragraph 75 of the reasoning. Cf. also Constitutional Court Decisions No. Up-430/00, dated 3 April 2003 (Official Gazette RS, No. 36/03, and OdlUS XII, 57), No. U-I-40/12, and No. U-I-115/14, Up-218/14, dated 21 January 2016 (Official Gazette RS, No. 8/16).

⁵ Cf. Paragraphs 23, 24, and 31 of the reasoning of Decision No. U-I-115/14, Up-218/14. Cf. also Š. Horvat, *Zakon o kazenskem postopku s komentarjem* [The Criminal Procedure Act with Commentary], GV Založba, Ljubljana 2004, p. 507, and 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.

⁶ Constitutional Court Decision No. Up-3381/07, dated 4 March 2010 (Official Gazette RS, No. 25/10).

proceedings will be found. A search of premises may only be conducted without the consent of the person whose dwelling or premises are to be searched if so ordered by a court by means of a written order containing a reasoning (the first paragraph of Article 215 of the CrPA) or if the conditions determined by the first paragraph of Article 218 of the CrPA are met.⁷ If during a search of premises or a personal search objects are found that are not connected to the criminal offence regarding which the search has been ordered, but they indicate that another criminal offence that is prosecuted *ex officio* has been committed, they shall be recorded in the minutes and seized in accordance with Article 217 of the CrPA. However, in accordance with Article 219 of the CrPA, a court decision may not be based on evidence found during a search of premises if such was conducted without a written court order (the first paragraph of Article 215), or without the presence of the persons who have to be present at a search (the first and third paragraphs of Article 216), or if the search was conducted contrary to the provisions of the first, third, and fourth paragraphs of Article 218 of the CrPA.

14. The CrPA does not explicitly determine the content of the reasoning of an order authorising a search of premises. However, in light of the first paragraph of Article 214 of the CrPA, it is clear that it must provide reasons substantiating the reasonable grounds for the suspicion that a specific person committed a 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.⁸ It follows from the case law that an order authorising a search of premises must also contain information on the person against whom the search is to be conducted and it must identify the suspect and the premises that will be searched.⁹ The essence of prior judicial control is in ensuring that the judge who decides on the request for a search order verifies, as a representative of the judicial branch of power, whether the constitutional and statutory conditions for the search of premises are fulfilled. In doing so, the judge plays the role of a guarantor, i.e. the guardian of suspects' rights and the supervisor of the work of the prosecution and the police. Such entails that the judge must first review in a critical, independent, and impartial manner whether the conditions for a search of premises are fulfilled, and subsequently also provide an appropriate reasoning of that decision. The statutory requirement that the court order has to contain a reasoning is namely not an end in

⁷ In accordance with the first paragraph of Article 218 of the CrPA police officers may “[...] enter someone’s dwelling or other premises also without a court order and conduct a search if necessary, provided the resident so requests, someone is calling for help, such is necessary for the apprehension of a flagrant perpetrator of a criminal offence, or such is necessary for the safety of persons and property, if according to the order of a competent state authority the person has to be detained or brought in or if the person fled onto such premises.”

⁸ Cf. Š. Horvat, *op. cit.*, pp. 509–510, and K. Šugman Stubbs, P. Gorkič, *Dokazovanje v kazenskem postopku* [Evidence in Criminal Proceedings], GV Založba, Ljubljana 2011, pp. 129–130.

⁹ Cf., e.g., Supreme Court Judgments No. I Ips 214/97, dated 28 November 2002, and No. I Ips 11861/2010, dated 11 July 2012.

itself, but is intended to prevent arbitrary conduct by the prosecuting authorities and possible abuses, as well as to ensure subsequent judicial control. The reasoning of the order thus plays a double role: it enables the verification of the fulfilment of the constitutional and statutory conditions for ordering a search of premises as well as the development of case law regarding the situations in which interferences of prosecuting authorities with the privacy of individuals are admissible.¹⁰ As it is essential for the execution of a search of premises that the search is ordered and executed in an unexpected manner, the individual against whom a search of premises is to be conducted does not have the possibility to participate in the procedure to decide on the request to order the search of premises or to use effective legal remedies at that point. Therefore, it is even more important that the reasoning of an order authorising a search of premises ensures the possibility to subsequently verify whether the statutorily determined conditions for ordering the search were fulfilled and whether the search was constitutionally admissible.

15. The Constitutional Court already considered the question of how detailed the reasoning of a court decision entailing an interference with human rights has to be in Decision No. Up-2094/06, dated 20 March 2008.¹¹ It initially drew attention to the fact that “[t]he consistent application of statutory provisions regulating the procedure for ordering secret surveillance measures is not merely a formalistic requirement. It is a mechanism that courts must apply in order to prevent abuses in the collection of evidence. Thus the fact that the request of the police and the request of the state prosecutor contain a reasoning does not relieve the investigating judge of the duty to substantiate the existence of the statutory conditions for authorising a measure. In the orders, the investigating judge should have stated the facts and circumstances from which follow substantiated grounds for the suspicion that criminal offences [...] were committed and the reasonable suspicion that these criminal offences were committed by certain means of communication, and should have substantiated that the use of the measure was absolutely necessary in relation to the collection of evidence by other means (i.e. the necessity of collecting evidence in such manner). Instead, the investigating judge merely referred to the request of the prosecutor and assessed that it meets such requirements.” However, according to the Constitutional Court, this deficiency did not entail a violation of Articles 35 and 37 of the Constitution, and therefore the constitutional complaint was dismissed. The mentioned violation could have existed “if the courts proceeded from the standpoint that a review of whether the statutory conditions for ordering a measure that interferes with the right of the affected person determined by the first paragraph of Article 37 of the Constitution was not necessary, because the reasons for authorising the measure follow from the request

¹⁰ Cf. Paragraph 16 of the reasoning of Constitutional Court Decision No. Up-2094/06, dated 20 March 2008 (Official Gazette RS, No. 37/08, and OdlUS XVII, 28).

¹¹ The subject of review was the order by which the investigating judge authorised the implementation of a secret surveillance measure (i.e. surveillance of telecommunications, including interception and recording), but the positions adopted therein are generally applicable to the reasoning of orders that interfere with human rights.

of the state prosecutor (the person representing the interests of criminal prosecution).” However, as in that case the investigating judge deemed that the request of the state prosecutor contained all of the elements determined by the first paragraph of Article 152 of the CrPA, and she also established the existence of the conditions for ordering measures in accordance with point 1 of the first paragraph of Article 150 of the CrPA, she thus performed a review of whether the statutory conditions for ordering secret surveillance measures were fulfilled and satisfied the standards in the absence of which a trial cannot be deemed fair.

16. In accordance with established constitutional case law, the reasoning of a court decision entails a specific aspect of the right determined by Article 22 of the Constitution.¹² Already in Decision No. U-I-18/93, dated 11 April 1996 (Official Gazette RS, No. 25/96, and OdlUS V, 40),¹³ the Constitutional Court adopted the position that any decision of a court must contain a concrete (and not an abstract or general) reasoning with regard to every essential point that enables a review of whether the state observed to a sufficient degree all the requirements imposed on it by statutory provisions regarding the burden of allegation and the burden of proof. Such entails that the reasons on which a court based its decision have to be provided in a concrete manner and with sufficient clarity.¹⁴ The requirement that court decisions must contain a reasoning is also an essential part of the right to a fair trial, which is guaranteed by Article 22, the first paragraph of Article 23, and, as regards criminal proceedings, Article 29 of the Constitution.¹⁵ An appropriate reasoning is concurrently also a precondition for a review of whether an adopted decision is reasonable.¹⁶

17. The duty of courts to state the reasons for their decisions also derives from Article 6 of the ECHR, as the European Court of Human Rights (hereinafter referred to as the ECtHR) has also highlighted in its judgments. The scope of such duty is conditional upon the nature of the decision and the circumstances of the individual case.¹⁷ The ECtHR *inter alia* highlighted the importance of the reasoning of a court

¹² Cf. e.g. Decisions No. Up-399/05, dated 15 May 2008 (Official Gazette RS, No. 55/08, and OdlUS XVII, 32), and No. Up-2442/06, dated 4 December 2008 (Official Gazette RS, No. 119/08, and OdlUS XVII, 95).

¹³ See Paragraph 73 of the reasoning.

¹⁴ See, e.g., Constitutional Court Decision No. Up-195/00, dated 15 November 2001 (Official Gazette RS, No. 96/01, and OdlUS X, 230), Constitutional Court Order No. Up-189/02, dated 21 May 2002 (OdlUS XI, 130), and Constitutional Court Decisions No. Up-150/03, dated 12 October 2005 (Official Gazette RS, No. 101/05, and OdlUS XIV, 100), No. Up-147/09, dated 23 September 2010 (Official Gazette RS, No. 83/10), and No. Up-162/09, dated 16 December 2010 (Official Gazette RS, No. 3/11).

¹⁵ See Constitutional Court Decision No. Up-729/03, U-I-187/04, dated 8 July 2004 (Official Gazette RS, No. 83/04, and OdlUS XIII, 81).

¹⁶ Constitutional Court Decision No. Up-1381/08, dated 23 September 2009 (Official Gazette RS, No. 80/09).

¹⁷ Cf., e.g., the ECtHR Judgments in *Ruiz Torija v. Spain*, dated 9 December 1994, *Hiro Balani v. Spain*, dated 9 December 1994, *Garcia Ruiz v. Spain*, dated 21 January 1999, *Helle v. Finland*, dated 19 December 1997, *Hirvisaari v. Finland*, dated 27 September 2001, and *Salov v. Ukraine*, dated 6 September 2005.

order in its Judgment in *Dragojević v. Croatia*, dated 15 January 2015.¹⁸ It considered the case from the perspective of the right to respect for private and family life determined by Article 8 of the ECHR; it established a violation of that right, and in the reasoning of its decision it also adopted positions regarding the reasoning of court orders that interfere with human rights. In that case the order authorising the investigative measure of secret surveillance namely did not contain any concrete details or circumstances that would have enabled the conclusion that there existed the required degree of suspicion that a specific person committed a criminal offence and that the investigation could not be conducted by other means entailing a less severe interference with human rights. The ECtHR stressed that judicial control of the fulfilment of the conditions for issuing an order (i.e. the required degree of suspicion as well as the fact that the measure was necessary and proportionate in the light of the circumstances of the concrete case) ensures that secret surveillance measures will not be ordered arbitrarily, in an unequal manner, and without due reflection.¹⁹ The ECtHR characterised as unacceptable the position adopted by the Croatian Supreme Court and the Croatian Constitutional Court that, regardless of the clear statutory requirement that the measure of surveillance may only be carried out on the basis of a prior court order containing a reasoning, the lack of a reasoning in such order could be remedied by means of a subsequent review and a reasoning provided during later stages of the criminal proceedings.²⁰ In the opinion of the ECtHR, in a situation where the legislature envisaged detailed and prior judicial control, such requirement cannot be circumvented by subsequent judicial control, as such does not provide adequate and sufficient safeguards against potential abuses, but rather opens the door to arbitrary interferences, which explicitly contradicts the procedure clearly determined by law.²¹

18. With regard to the requirement that a court decision must contain a reasoning, the Constitution provides essentially the same scope of protection as the ECHR, while with regard to interferences with spatial privacy the requirements determined by Article 36 of the Constitution are even stricter. Therefore the Constitutional Court reviewed the allegations of the complainant from the perspective of the requirements determined by Articles 22 and 36 of the Constitution.

¹⁸ The Judgment refers to a case wherein surveillance of the complainant's telephone was ordered by a court order containing a weak reasoning in which the investigating judge only referred to the prosecution's request to order the measure, and added a transcript of the statutory text stating that "the investigation cannot be carried out by other means."

¹⁹ Cf. Paragraph 94 of the reasoning, as well as the ECtHR Judgment in *Klass and others v. Germany*, dated 6 September 1978, Paragraph 51 of the reasoning.

²⁰ It follows from the Judgment that by Decision No. U-III-857/2008, dated 1 October 2008, the Croatian Constitutional Court first adopted the position that a court order that was insufficiently reasoned violated the right to the inviolability of privacy, but subsequently amended such position by Decision No. U-III-2781/2010, dated 9 January 2014 (see Paragraphs 93 and 96 of the reasoning).

²¹ Cf. in particular Paragraphs 97 and 98 of the reasoning.

B – IV

19. In the case at issue, in the reasoning of Order No. Kpd 11782/2009 authorising a search of premises, dated 16 December 2009, the investigating judge referred to the request of the police to issue an order, to which three official notes had been attached. He further wrote that from the request there follows the reasonable suspicion²² that the complainant committed the criminal offence of robbery and that he deems it to be likely that certain objects will be found. As has already been mentioned, while the order for the search of premises was authorised with regard to the criminal offence of robbery, during the search police officers found objects that indicated the commission of another criminal offence that is prosecuted *ex officio*, namely the criminal offence of the unauthorised manufacture and sale of illicit drugs under the first paragraph of Article 186 of the CC-1. The case thus concerned the situation regulated by Article 217 of the CrPA. Thus the order authorising the search should have (*inter alia*) contained a reasoning clarifying the grounds for the assessment of the investigating judge that there existed reasonable grounds for the suspicion that the complainant had committed the criminal offence of robbery. However, Order No. Kpd 11782/2009, dated 16 December 2009, on the basis of which the police officers carried out the search of premises does not contain an assessment of the conditions determined by the first paragraph of Article 214 of the CrPA, although the first paragraph of Article 215 of the CrPA clearly determines that a court shall order a search of premises by a written order containing a reasoning.

20. As stated in Paragraphs 11 and 12 of the reasoning of this Decision, a search of premises entails a severe interference with the human right to privacy determined by the first paragraph of Article 36 of the Constitution. Therefore, the court must review in advance, i.e. before issuing an order authorising a search of premises, whether the conditions for a search of premises are fulfilled. A judge's consideration of a case is reflected in the reasoned order authorising a search of premises, in which the judge must clarify on what basis he or she deems that there exist reasonable grounds for the suspicion that a specific person committed a criminal offence as well as why he or she deems that it is likely that the objects sought will be found precisely in the possession of a specific person and at a specific address.²³ The fact that the request

²² This is an evident error, as the Act Amending the Criminal Procedure Act (Official Gazette RS, No. 43/04 – CrPA-F), which entered into force on 23 May 2004, lowered the standard of suspicion for searches of premises to reasonable grounds for suspicion. Consequently, also in accordance with the first paragraph of Article 214 of the CrPA in force at that time (the search of premises was ordered on 16 December 2009) the authorisation of a search of premises was conditional upon the existence of reasonable grounds for the suspicion that a specific person committed a criminal offence, and not (or, to be precise, no longer) on a reasonable suspicion thereof.

²³ As has already been stated, in accordance with the case law, in the reasoning of a search order the judge must also define or determine the scope, limits, and aims of the search, meaning that he or she has to state what premises are to be searched and what objects are to be seized or what evidence is to be sought (*cf.* Supreme Court Judgment No. I Ips 17128/2010, dated 31 January 2013, Paragraph 8 of the reasoning).

to order a search of premises contains a reasoning does not relieve the investigating judge of the duty to review the fulfilment of the conditions for ordering a search of premises and to provide a thorough reasoning of the decision thereon. In doing so, the judge may refer to the documents submitted by the police or the prosecution, as these documents are usually the only source of information for the investigating judge, however, such reference cannot replace the judge's own consideration of whether the conditions for a search of premises are in fact fulfilled. The decision on the interference with the inviolability of dwellings is namely reserved for the judge as a representative of the judicial branch of power and not for the prosecution or the police. Therefore, the judge must critically and thoroughly consider whether the submitted information justifies an interference with a human right, and the reasons underlying this decision have to be evident from the reasoning of the court order. Only in such a manner is it possible to prevent unjustified interferences with the inviolability of dwellings in instances where the relevant (statutory and) constitutional conditions are not fulfilled, taking into account that, at the moment they are ordered, the presumption of innocence determined by Article 27 of the Constitution still applies.²⁴ The statutory and constitutional requirements that have to be fulfilled for a search of premises are namely not intended to protect individuals who engage in criminal activity, but to protect all persons with regard to whom sufficient reasons to justify an interference with their privacy do not exist.

21. In light of the above statements and the position from the ECtHR Judgment in *Dragojević v. Croatia*, the Constitutional Court has amended its position from Decision No. Up-2094/06. Namely, If we accept that a mere reference to the request of the prosecution or the police to order a search of premises constitutes a sufficient reasoning of such an order and if our consideration of the judge's assessment is based solely on the fact that he or she ordered the search, we would thereby renounce not only the judge's function as guarantor, which has become increasingly important in the course of the development of criminal procedure, but also effective subsequent review of whether the interference was in accordance with the CrPA and the Constitution. Therefore, the judge must state the reasons or circumstances that were the basis for ordering a search of premises in a concrete and definitive manner already in the search order, i.e. before the interference with the right to the inviolability of a dwelling occurred, whereby the reasoning has to be such as to convince a reasonable person that the conditions determined by the first paragraph of Article 214 of the CrPA were fulfilled. Only such a reasoning of an order authorising a search of premises also enables effective subsequent review (by a higher instance court). Retrospective substantiation of the existence of the conditions for a search of premises namely does not provide adequate safeguards from potential abuses. This is particularly true if objects that are linked to criminal offences are found during a search of premises, as the discovered objects have a psychological effect that

²⁴ Article 27 of the Constitution determines as follows: "Any person charged with criminal conduct shall be presumed innocent until found guilty by a final judgement."

prevents an independent assessment of whether the conditions for a search of premises were fulfilled at the moment when the request of the police was decided on.²⁵

22. Therefore, the order authorising the search of premises in the case at issue should have contained a concrete reasoning with regard to the conclusion that there existed reasonable grounds for the suspicion that the complainant had committed the criminal offence of robbery as well as a substantiation of the basis on which the judge formulated his or her assessment. The police namely suspected that the complainant was involved in the criminal offence of robbery. The 82.88 g of cannabis, indicating the commission of another criminal offence, was only found during a search of premises. It is therefore logical that the reasoning of the search order did not contain reasonable grounds for suspicion with regard to the criminal offence under the first paragraph of Article 186 of the CC-1, and the complainant does not challenge such. The interference with the complainant's spatial privacy, i.e. the search of the apartment in which the complainant lived, was only authorised on the basis of the court order authorising a search of premises with regard to the criminal offence of robbery. However, a reasoning of the existence of reasonable grounds for the suspicion that the complainant had committed the criminal offence of robbery cannot be found in the reasoning of the order authorising the search of the premises. With regard to such, the investigating judge namely only referred to the request for ordering a search of the premises submitted by the police without himself listing the reasons that convinced him that all of the conditions for ordering a search of the premises were fulfilled. Although in the light of such one cannot confirm the complainant's statement that this is equivalent to a situation where no order had been issued at all, it is possible to conclude that such an order does not contain a reasoning establishing that the conditions for the severe interference with privacy at issue here were fulfilled. Consequently, as the order authorising the search of premises was substantively empty, the courts that decided on the complainant's allegation that the order lacked an adequate reasoning could not assess the possible violation of the right to privacy determined by the first paragraph of Article 36 of the Constitution in a constitutionally consistent manner. Such consideration would only have been possible if the investigating judge had provided a substantive reasoning of his decision to authorise the search of the complainant's premises. Proceedings regarding a new criminal offence due to the discovered drugs could only have been instituted on the basis of a constitutionally consistent interference with the complainant's right to spatial privacy that was based on a prior court order elaborating the reasonable grounds for the suspicion that the complainant had committed the

²⁵ The case law of the Supreme Court also requires that the grounds that substantiate the required standard of proof that a person committed a criminal offence (or that he or she is in the process of committing a criminal offence) have to be established already by the moment when the investigative measure is authorised, and they may not be substantiated retrospectively by evidence obtained through the investigative measure. *Cf.*, e.g., Judgment No. I Ips 333/2005, dated 3 November 2005.

criminal offence of robbery. Evidence that is accidentally discovered by the police during a search of premises with regard to another criminal offence may namely only be used if these conditions are fulfilled.²⁶

23. Although the Supreme Court held that the deficient reasoning undoubtedly entailed a violation of the first paragraph of Article 215 of the CrPA, according to its position, this deficiency does not entail that the evidence produced by the search is inadmissible.²⁷ It highlighted that the deficiencies that have such an effect are determined by Article 219 of the CrPA. However, according to the position of the Supreme Court, the mere fact that an order authorising a search of premises contains a “rather weak” reasoning does not entail such a violation that it can be claimed that the search of the premises was carried out without a written court order and that the consequence determined by Article 219 of the CrPA would ensue. In the assessment of the Supreme Court, a judgment of conviction cannot be based on evidence obtained during a search of premises only if due to a deficient search order, request, or the documents attached thereto it cannot be concluded that there exist reasonable grounds for the suspicion that a specific person committed a specific criminal offence. According to the information contained in the request for the search of premises and the official notes of the police attached thereto, the Supreme Court held that there existed reasonable grounds for the suspicion that the complainant, acting together with the other suspects, committed the criminal offence of robbery.

24. As the Supreme Court already established in the challenged judgment, an order authorising a search of premises that does not contain a reasoning entails a violation of the first paragraph of Article 215 of the CrPA. However, the right to a reasoned court order is not merely a statutory right, but is also a constitutionally determined and protected human right enshrined in Article 22 of the Constitution. The fact that the reasoning of an order authorising a search of premises is substantively empty constitutes not only a breach of the statutory requirement of a reasoned order determined by the first paragraph of Article 215 of the CrPA, but also a violation of the constitutional human right determined by Article 22 of the Constitution. The first category of evidence that a judicial decision may not be based on is defined by the first part of the second paragraph of Article 18 of the CrPA as evidence obtained through a violation of constitutionally determined human rights and fundamental freedoms. The Constitutional Court does not have to establish whether the Constitution requires precisely such statutory regulation of the exclusion of evidence in instances of violations of human rights or fundamental freedoms as the regulation contained in the mentioned Article of the CrPA. In accordance with the fifth paragraph of Article 15 of the Constitution, the legislature may enact a higher level of protection

²⁶ Cf. Constitutional Court Order No. Up-366/05, dated 19 April 2007, Paragraph 22 of the reasoning.

²⁷ In this regard, it relied on its established case law as follows from Supreme Court Judgment No. I Ips 17128/2010.

of a human right than that determined by the Constitution.²⁸ It may proceed in such a manner provided that it does not inadmissibly interfere with any other constitutionally protected value. It has not been demonstrated that the case at issue concerns such a constitutionally disputable regulation. It does, however, concern a situation that requires a review of the constitutionality of the position that a piece of evidence that is marred by a violation of a constitutionally guaranteed human right does not have to be excluded. The court namely authorised an interference with the complainant's spatial privacy without stating in the court order the reasons for the conclusion that the (statutory and) constitutional conditions for an interference with the complainant's right to spatial privacy were fulfilled. Thereby it violated the complainant's right to a reasoned judicial decision determined by Article 22 of the Constitution. The reasoning of a court order is intended to enable a review of the judge's assessment of whether the conditions for an interference with the right to the inviolability of dwellings determined by the first paragraph of Article 36 of the Constitution were fulfilled and thus to enable subsequent control, including from the perspective of the right to appeal determined by Article 25 of the Constitution. Therefore, an order authorising a search of premises containing a deficient reasoning cannot be remedied by means of subsequent control (by a higher instance court) that is carried out by the courts after the search of premises has already been executed. The essence of subsequent control namely does not lie in a review by the Supreme Court (and previously by a Higher and a District Court) substituting for the lack of a review by the investigating judge, but in verifying whether the review performed by the investigating judge in advance, i.e. before the search of the premises, was in accordance with the provisions of the CrPA and the Constitution. If the order does not contain the reasons underlying such review of the investigating judge, it cannot be replaced by a review that the Supreme Court performs instead of him or her and in retrospect. The requirement of a prior reasoned judicial decision namely cannot be circumvented by subsequent judicial control, as such does not provide adequate and sufficient safeguards against potential abuses, but it opens the door to arbitrary interferences, which explicitly contradicts the procedure determined by law, as was also highlighted by the ECtHR in the cited judgment.

25. By ordering a search of premises against the complainant by means of the challenged court order, which did not contain the reasons underlying the assessment of whether the conditions for an interference with spatial privacy were fulfilled, the investigating judge thus violated the complainant's right to a reasoned judicial decision determined by Article 22 of the Constitution. In light of Paragraphs 20 and 24 of this reasoning, the execution of the search of the premises on the basis of an order that did not contain a reasoning could also have resulted in an inadmissible violation of the complainant's right to the inviolability of his dwelling determined by the first

²⁸ The provision determines that no human right or fundamental freedom regulated by legal acts in force in Slovenia may be restricted on the grounds that this Constitution does not recognise that right or freedom or recognises it to a lesser extent. "Legal acts in force in Slovenia" are not only international instruments but also laws.

paragraph of Article 36 of the Constitution. The positions expressed by the Supreme Court, the Higher Court, and the District Court in the challenged judgments entail the same violation, as the courts deemed that they could replace the explicit statutory requirement of a prior reasoned court order with subsequent judicial control of whether the conditions for a search of premises were fulfilled. As the mentioned human rights were not observed in the authorisation of the search of premises with regard to the criminal offence of robbery, the evidence of the other criminal offence that was inadvertently discovered by the police when executing the search of the premises is thus marred by the same violations. Therefore, the Constitutional Court abrogated the challenged judgments insofar as they referred to the complainant with regard to the criminal offence under the first paragraph of Article 186 of the CC-1 (Point 1 of the operative provisions), and remanded the case to the court of first instance for new adjudication (Point 2 of the operative provisions).

C

26. The Constitutional Court reached this Decision on the basis of the first paragraph of Article 59 of the CCA, composed of: President Mag. Miroslav Mozetič, and Judges Dr Mitja Deisinger, Dr Dunja Jadek Pensa, Dr Etelka Korpič – Horvat, Dr Ernest Petrič, Jasna Pogačar, and Dr Jadranka Sovdat. Judge Jan Zobec was disqualified from deciding on the case. The Constitutional Court adopted the Decision by five votes against two. Judges Jadek Pensa and Pogačar voted against. Judge Jadek Pensa submitted a dissenting opinion.

Mag. Miroslav Mozetič
President