



### ***The Reasoning of a Court Order Authorising a Search of Premises***

In Decision No. Up-1006/13, dated 9 June 2016 (Official Gazette RS, No. 51/16), the Constitutional Court decided on the constitutional complaint of a complainant who had been convicted in criminal proceedings for the criminal offences of robbery and unauthorised manufacture and sale of illicit drugs. The complainant alleged that the evidence regarding the latter criminal offence 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. The Constitutional Court reviewed the criminal case file and found that the investigating judge issued two orders authorising searches of premises against the complainant, both concerning the criminal offence of robbery. The police officers did not find any objects connected with the criminal offence of robbery during the search of the 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 were instituted against the complainant as well. Throughout the criminal proceedings the complainant claimed that the order authorising the search of the premises did not contain a sufficient reasoning, and therefore the evidence obtained during the search had to be excluded from the case file as inadmissible. In reply to the complainant's allegations that the order authorising the search of the premises did not contain a reasoning, the Supreme Court replied that not every irregularity in the execution of an investigative measure necessarily results in the inadmissibility of the evidence obtained thereby. According to the position of the Supreme Court, one of the purposes of the reasoning of a court order authorising an investigative measure is to ensure the possibility of a subsequent review of the legality of the investigative measure. The mere fact that an order authorising a search of premises contains a rather weak reasoning thus does not entail such a violation that one could claim that the search of the premises was carried out without a written court order. Although the concrete circumstances were not clarified in detail in the court order authorising the search of the premises, the Supreme Court was of the opinion that it sufficed that these circumstances were listed in the request of the police that the investigating judge referred to in the order.

Article 35 of the Constitution guarantees the inviolability of a person's physical and mental integrity, and the inviolability of his or her privacy and personality rights. 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. A search of premises entails an interference with the inviolability of the dwelling of the affected individual. 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); a search of premises may only be conducted in the presence of two witnesses (the fourth paragraph); while 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.

In accordance with the provisions of the Criminal Procedure Act, a search of a dwelling or other premises of a defendant or of other persons may only be conducted if there exist reasonable grounds for the suspicion that a person committed a criminal offence and if 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 proceedings will be found. A search of premises may be conducted without the consent of the person whose dwelling or premises are to be searched if such is ordered by a court by means of a written order containing a reasoning. If during a search of premises 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 seized as well. However, a court decision may not be based on evidence found during a search of premises if such was conducted without a written court order, or without the presence of the persons who have to be present at a search, or if the search was conducted contrary to the provisions of the Criminal Procedure Act.

The Criminal Procedure Act does not explicitly determine the content of the reasoning of an order authorising a search of premises. It is, however, clear that it must provide reasons substantiating the reasonable grounds for the suspicion that a 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. In accordance with the case law, an order authorising a search of premises must further contain information on the person against whom the search is to be conducted, and as well identify the defendant and the premises on which the search is to be conducted. The essence of prior judicial control lies in the fact that a judge deciding on the request to issue an order verifies, as a representative of the judicial branch of power, whether the constitutional and statutory conditions for the search of premises exist. In doing so, the judge assumes the role of a guarantor, i.e. a guardian of defendants' rights and a supervisor of the work of the prosecution and the police. Such entails that he or she must first review in a critical, independent, and impartial manner

whether the conditions for a search of the premises are fulfilled, and subsequently also provide an appropriate reasoning of such decision. The statutory requirement that the court order contain a reasoning is not an end in itself, but is intended to prevent the arbitrary conduct of prosecuting authorities and possible abuses, as well as to ensure subsequent judicial control. The individual against whom a search of premises is to be conducted namely does not have the possibility to participate in the decision-making on the request for ordering a search of premises and to use effective legal remedies at that point, as with regard to the execution of a search of premises it is essential that its execution be unexpected. Therefore, it is even more important that the reasoning of an order authorising a search of premises ensure the possibility of subsequent verification of whether the statutorily determined conditions for ordering a search of premises were fulfilled and whether the search was constitutionally admissible.

In accordance with established constitutional case law, the requirement that judicial decisions must contain a reasoning entails a special aspect of the right determined by Article 22 of the Constitution. In a judicial decision the court must provide the reasons on which it based its decision in a concrete manner and with sufficient clarity. The requirement that judicial decisions must contain a reasoning is also an essential part of fair proceedings, which are guaranteed by Article 22, the first paragraph of Article 23, and, as regards criminal proceedings, Article 29 of the Constitution. The duty of courts to state the reasons for their decisions also derives from Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which has also been highlighted by certain judgments of the European Court of Human Rights (e.g. the Judgment in *Dragojević v. Croatia*, dated 15 January 2015).

In the case at issue, in the reasoning of the order authorising the search of premises the investigating judge wrote that from the request there followed the reasonable suspicion that the complainant committed the criminal offence of robbery and that he deemed it to be likely that certain objects would be found. While the order for the search of premises was thus authorised with regard to the criminal offence of robbery, during the search police officers found objects that indicated the commission of another criminal offence, namely the criminal offence of the unauthorised manufacture and sale of illicit drugs. With regard to the regulation under the Criminal Procedure Act, the order authorising the search should thus have also contained a statement of the reasons on the basis of which the investigating judge deemed that there exist reasonable grounds for the suspicion that the criminal offence of robbery had been committed.

The Constitutional Court stressed that before issuing an order authorising a search of premises, the court must assess whether the constitutional and statutory conditions for a search of premises are fulfilled. The judge's assessment is reflected in the reasoning of an order authorising a search of premises. The fact that the request of the police or the prosecution for the ordering of a search of premises contains a statement of reasons does not relieve the investigating judge of the duty to review the fulfilment of the

conditions for a search of premises him- or herself and to provide a careful statement of reasons for his or her decision. 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 assessment of whether the conditions for a search of the premises are in fact fulfilled. Therefore, the judge must critically and thoroughly assess whether the submitted data justify an interference with a human right, and the reasons underlying this decision have to be evident from the reasoning of the court order. The statutory and constitutional requirements that have to be fulfilled before a search of premises may be carried out namely do not protect individuals who engage in criminal activity, but all persons with regard to whom there do not exist sufficient grounds to justify an interference with their privacy.

Therefore, the order authorising the search of premises should have contained a concrete statement of the reasons on the basis of which the investigating judge deemed that there exist reasonable grounds for the suspicion that the criminal offence of robbery had been committed. As the 82.88 g of cannabis, indicating the commission of another criminal offence, were only found during the search of the premises, it is logical that the reasoning of the order did not contain reasonable grounds for suspicion regarding the criminal offence of the unauthorised manufacture and sale of illicit drugs. However, a reasoning of the existence of reasonable grounds for the suspicion that the criminal offence of robbery had been committed 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 the search of the premises submitted by the police without himself listing the reasons that convinced him that all the conditions for ordering a search of the premises were fulfilled. Only an 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 criminal offence of robbery had been committed could have been a basis for instituting proceedings regarding a new criminal offence due to the discovered drugs. The deficient reasoning of an order authorising a search of premises cannot be remedied by means of subsequent control by a (higher instance) court carried out after the search of the premises has already been executed. The essence of subsequent control is namely not in providing a review by the Supreme Court (and previously by a Higher and a District Court) to substitute for the lack of a review by the investigating judge, but in verifying whether the review performed by the investigating judge before the search of the premises was in accordance with the Constitution and the law.

By ordering a search of premises against the complainant by means of a court order that 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 court order containing a reasoning determined by Article 22 of the Constitution. Such could also have resulted in an inadmissible violation of the complainant's right

to the inviolability of his dwelling determined by the first paragraph of Article 36 of the Constitution. Therefore, the Constitutional Court abrogated the challenged judgments of the Supreme Court, the Higher Court, and the District Court, and remanded the case to the court of first instance for new adjudication.