

Right to Request the Disclosure of Personal Data of an Entity Accused of Infringing Personal Rights on the Internet as a Part of the Right to a Fair Trial

Resolution of the Supreme Court of 6 August 2020, III CZP 78/19

Thesis of the Supreme Court's resolution: The court is entitled – according to art. 159.2.4. of the Act of 16 July 2004, Telecommunications Law (unified text: Journal of Laws 2019, item 2460, with amendments) – to request information from an entity bound by telecommunications secrecy to verify a claimant's claim that the act infringing personal data has been committed by the defendant in the case.

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Commentary

It is worth pointing out that this glossed resolution has not yet been provided with reasons for judgment by the Supreme Court until the text is sent for printing. Nevertheless, due to its great importance, it is worth paying attention to the legal issue raised in it. The resolution of the Civil Chamber of the Supreme Court significantly influences the understanding of the right to a fair trial, implemented as the right to a properly constituted court procedure, and of that element which emphasizes, above all, the procedural dimension of the right to a fair trial.¹ The resolution was issued as a result of the determination of a legal issue presented by the Court of Appeal in Gdańsk, while considering case III CZP 89/18 and may constitute an important step in establishing the liability of persons violating personal rights on the internet.

The issue presented to the Supreme Court arose on the basis of the following facts. The conflict arose in a housing cooperative in Gdańsk and concerned the plans to

¹ Z. Czeszejko-Sochacki, "Prawo do sądu w świetle Konstytucji Rzeczypospolitej Polskiej (Ogólna charakterystyka)," *Państwo i Prawo* 1997, vol. 11–12, p. 102.

build a large sports and entertainment hall. As a result, there was a court dispute in which the plaintiff demanded protection of her personal rights. In the course of the appeal proceedings, the Court of Appeal summoned the company that ran the neighborhood website to provide the personal data of subscribers to the internet access service under specific IP numbers. These people used nicknames which made them anonymous. The company refused to disclose this data, referring to the telecommunications confidentiality that was binding on it. The plaintiff's attorney requested to ask a question to the Polish Supreme Court. After accepting this request, the Court of Appeal formulated the following question: "Is the entity providing an internet access service – an entity bound by telecommunications confidentiality according to art. 160.1 of the Telecommunications Act – entitled to refuse to present a subscriber's personal data in a case of infringement of personal data, if it is the content presented via the internet that may constitute the basis for this violation, and if, in this case, the basis for disclosing such data at the request of a civil court is art. 159.2.4. of the Telecommunications Law?"

Article 160.1. of the Telecommunications Law² imposes on an entity that participates in the performance of telecommunications activities in public networks and entities cooperating with it the obligation to maintain telecommunications confidentiality. However, art. 159 of the Telecommunications Law indicates admissible exceptions to the general rule and indicates an exception to the prohibition of reading, recording, storing, and transmitting content or data covered by telecommunications confidentiality by persons other than the sender and recipient of the message in a situation where it is necessary for reasons provided for in the Act or separate regulations (art. 159.2.4). Moreover, this prohibition, in the terms set out in par. 4 of this article, does not apply to messages and data that are public or disclosed by a court decision issued in criminal proceedings, by a prosecutor's order, or under separate provisions.

The understanding of the above-mentioned provisions has raised doubts and discrepancies so far.³ As a rule, the waiver of telecommunications confidentiality has been considered permissible only in criminal proceedings. Therefore, the basic legal problem has become whether the indication in art. 159.4 as an exception to the data rule resulting from a court order issued in criminal proceedings, excludes the possibility of requesting disclosure of such data in civil proceedings too. The question whether the reference to, for example, a criminal procedure as one that allows the waiving of telecommunications confidentiality excludes the possibility of its suspension in civil proceedings, should be answered negatively. The provision of art. 159 of the Telecommunications Law does not contain a closed list of exceptions; so it should not be in-

² Act of 16 July 2004, Telecommunications Law (unified text: Journal of Laws 2019, item 2460, with amendments).

³ See: judgment of the Court of Appeal in Białystok of 6 April 2011, I ACz 279/11, LEX nr 787378; judgment of the Supreme Administrative Court of 20 February 2013, I OSK 368/12, LEX nr 1354099; A Krasuski, "Komentarz do art. 159" [in:] *Prawo telekomunikacyjne. Komentarz*, LEX/el.; contrary: judgment of the Supreme Administrative Court of 21 February 2014, I OSK 2324/12, LEX nr 1475200; judgment of the Supreme Administrative Court of 22 March 2018, I OSK 454/16, LEX nr 2482989.

terpreted narrowly. Otherwise, the possibility of seeking legal protection through civil proceedings, and, thus, of exercising the individual's right to a fair trial, will be significantly limited. In this matter the judgement of the Supreme Administrative Court⁴ is significant, in which the Court stated that: telecommunications confidentiality is not unlimited. First of all, it does not apply to online activities that violate the applicable legal order. Therefore, making possible actions to remedy this situation, including prosecution, not only *ex officio*, but also by way of a private indictment or by demanding the protection of personal rights in civil proceedings, is an action within the law, allowing exemption from this protection. This is permitted by the provisions of art. 159.2.4. and art. 161.1 of the Telecommunications Law. The Court referred to the value protected by this interpretation. People infringing the law on the internet must not be allowed to go unpunished, and their actions should be assessed in terms of their legality. The confidentiality of communication in telecommunications networks is not absolute. Its boundaries are determined by other values protected by law, such as the protection of personal rights in the form of good name, individual image, and honor. When there is a suspicion that activities contrary to these values are protected by telecommunications confidentiality, these values should be given priority because they constitute a higher good. Such an interpretation alone corresponds to the changing conditions of the functioning of modern society and the state. There is no doubt that the legislator is not able to keep up with all changes occurring in the contemporary communication world. Hence, since a phenomena such as hate on the internet is socially unacceptable, the practice of applying the law should aim at facilitating the protection of victims of such attacks.

The legal issue presented here is also important for an understanding of the constitutional right to a fair trial (art. 45.1 of the Constitution) and the right to privacy and information-related autonomy of an individual (art. 47 and art. 51 of the Constitution). This was pointed out by the Polish Ombudsman (Commissioner for Human Rights), who took a position in the proceedings. This position stated that an entity that is the supplier of an internet access service (thus, an entity bound by telecommunications confidentiality pursuant to art.160.1 of the Telecommunications Law) is not entitled to refuse to provide a subscriber's personal data in a case of infringement of personal rights, if content represented via the internet may give rise to this infringement.⁵

Article 45.1 of the Constitution of the Republic of Poland⁶ regulates a civil personal right,⁷ the right to a fair trial, which is considered as a public subjective right, creating

⁴ Judgment of the Supreme Administrative Court of 21 of February 2014, I OSK 2324/12, LEX nr 1475200.

⁵ Rzecznik Praw Obywatelskich, Stanowisko RPO dla SN: Dostawca internetu może ujawniać dane abonenta na potrzeby procesu o ochronę dóbr osobistych z 4 sierpnia 2020 r., www.rpo.gov.pl (accessed: 31.08.2020).

⁶ The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483 with amendments).

⁷ W. Jakimowicz, *Publiczne prawa podmiotowe*, Zakamycze 2002, p. 174.

a claim on the part of an individual against the state and its organs.⁸ According to , everyone has the right to a fair and public hearing of his/her case, without undue delay, before a competent, impartial, and independent court. The proper understanding of this law has been determined primarily by the jurisprudence of the Polish Constitutional Tribunal. The law is currently considered to consist of the following elements: 1) the right of access to a court; 2) the right to an appropriately constituted court procedure; 3) the right to a court judgment;⁹ 4) the right to enforce a court decision;¹⁰ and 5) the right to an appropriate structure and position with regard to the bodies examining the cases.¹¹ The law is often supplemented in doctrine by, for example: 6) forfeiture of items only on the basis of a court judgment.¹²

The issue that raises doubts on the basis of the glossed resolution of the Supreme Court is the limitation of the court's right to demand information making it possible to verify a plaintiff's claim that the act infringing personal rights was committed by the defendant in the case. This means that the court cannot claim the data of the infringer of personal rights if he/she is not a defendant in the case. Such a statement of the Supreme Court may be justified by the differences that are reserved for criminal and civil proceedings. The purposes of criminal proceedings include, *inter alia*, detecting a perpetrator and bringing him/her to justice (art. 2 par. 1 of the Code of Criminal Procedure¹³). The result of the development of modern communication methods is the necessity of using new methods of prosecuting torts and their perpetrators under criminal procedure. Such methods certainly include the possibility of waiving telecommunications confidentiality, when that is justified by an important social interest. By definition, civil proceedings are of a different nature. As a rule, when the plaintiff decides to take civil action with a request for protection of personal rights, he/she must indicate the defendant whom the claims relate to. The court issues a judgment on the validity of these claims. The permissible procedural differences occurring in civil and criminal proceedings are to ensure faster and more effective protection of the rights and interests of entities claiming their rights before the court.¹⁴ The Supreme Court resolution applies to a situation where the defendant has already been indicated and is a party to court proceedings. The court's right to act in the manner described concerns only the confirmation that the right person has been the defendant. Thus, the claimant is under the obligation to indicate the identity of the defendant who infringed the

⁸ Z. Czeszejko-Sochacki, *Prawo do sądu w świetle...*, p. 89.

⁹ Judgment of Constitutional Tribunal of 9 June 1998, K 28/97, OTK 1998, no. 4, item 50.

¹⁰ M. Jabłoński, S. Jarosz-Żukowska, *Prawa człowieka i systemy ich ochrony. Zarys wykładu*, Warszawa 2010, p. 133; , *Zasady ustroju III Rzeczypospolitej Polskiej*, ed. D. Dudek, Warszawa 2009, p. 85.

¹¹ See: judgment of the Constitutional Tribunal of 24 October 2007, SK 7/06, OTK-A 2007, no. 9, item 108; J. Sobczak, *Przepisy płacowe sędziów sądów powszechnych a wzorce konstytucyjne* [in:] *Państwo i Prawo* 2008, vol. 11, p. 85; A. Kubiak, *Konstytucyjna zasada prawa do sądu w świetle orzecznictwa Trybunału Konstytucyjnego*, Łódź 2006, p. 103.

¹² A. Młynarska-Sobaczewska, *Wolności i prawa człowieka i obywatela* [in:] *Polskie prawo konstytucyjne*, ed. D. Górecki, Warszawa 2009, p. 94.

¹³ Act of 6 June 1997, Code of Criminal Procedure (unified text: Journal of Laws 2020, item 30).

¹⁴ Judgment of the Constitutional Tribunal of 16 January 2006, SK 30/05, OTK-A 2006, no. 1, item. 2.

plaintiff's personal rights on the internet. Access to other data must be sought in other appropriate proceedings, e.g. in administrative proceedings.

The resolution of the Supreme Court confirms the understanding of the right to a fair trial, which includes the proper shaping of the court procedure aimed at resolving the case. In the jurisprudence of the Constitutional Tribunal, the understanding of a case as an imperative intervention by a court, an examination by a court, and a court's coming to a decision whether the behavior of other entities violates those interests protected by law, has become established.¹⁵ A fair court procedure is to provide the parties with procedural rights adequate to the subject of the proceedings.¹⁶ Procedural justice in civil proceedings is not achieved in the same way as in judicial-administrative or criminal proceedings. In each of them, however, the participants of the proceedings must have a real opportunity to present their arguments. It is the court's duty to consider them.¹⁷ Moreover, the adversarial principle presupposes the active participation of the parties in the proceedings and refers to a party's right to quote the facts and evidence supporting its/his/her conclusions or to counter the conclusions and statements of the opposing party until the hearing is closed. Court proceedings are aimed at resolving a dispute arising between parties, providing the plaintiff with the possibility of requesting a court authorization to hear the case and to issue a ruling in accordance with the results of the evidentiary proceedings and in accordance with substantive law. The defendant has the opportunity to defend him/herself by means of the available procedural means. It can, therefore, be concluded that the essence of the right to a fair trial implies that a provision of civil procedure should allow a telecommunications company to disclose a telecommunications secret in accordance with art. 159.2.4 of the Telecommunications Law, if that is the only way to prove certain facts or statements. The proper exercise of this right should be guaranteed by the court which, in the circumstances of a given proceeding, decides whether to file such a request or not, as it is not necessary for a fair settlement of the case.

From the thesis of the resolution of the Supreme Court it is not clear what the legal basis was that the Court was thinking of. According to art. 159.2.4 of the Telecommunications Law, the court is entitled to request specific information, but this provision imposes an obligation to indicate a "separate provision" justifying such a request. Can art. 248 par. 1 of the Code of Civil Procedure be treated as a separate provision within the meaning of art. 159.2.4 of the Telecommunications Law? In the light of the circumstances of those cases in which the Court of Appeal in Gdańsk decided to put a question to the Supreme Court, the answer should be in the affirmative.¹⁸ Accord-

¹⁵ Z. Czeszejko-Sochacki, *Prawo do sądu w świetle...*, p. 93.

¹⁶ Judgment of the Constitutional Tribunal of 10 May 2000, K 21/99, *OTK* 2000, no. 4, item 109; A. Góra-Błaszczkowska, "Rzetelne postępowanie przed sądem" według Trybunału Konstytucyjnego (na podstawie wybranych orzeczeń)" [in:] *Ius et remedium. Księga jubileuszowa Profesora Mieczysława Sawczuka*, eds A. Jakubecki, J.A. Strzępka, Warszawa 2010, p. 171; P. Grzegorzczak, K. Weitz, "Komentarz do art. 45" [in:] *Konstytucja. Komentarz*, eds M. Safjan, L. Bosek, vol. I, Warszawa 2016.

¹⁷ Judgment of the Constitutional Tribunal of 13 May 2002, SK 32/01, *OTK-A* 2002, no. 3, item 31.

¹⁸ Contrary ex.: A. Krasuski, "Komentarz do art. 159"...

ing to art. 248 par. 1 of the Code of Civil Procedure everyone is obliged to present, upon the court's ordering this, at a specified time and place, a document in his/her possession and constituting evidence of a fact essential for the resolution of a case, unless the document contains classified information. The aforementioned provision enables the court to obtain knowledge about the validity of the plaintiff's statements in court proceedings. Often only in this way will it be possible in civil proceedings to obtain information on the entity infringing the personal rights of the plaintiff on the internet. The resolution of the Supreme Court does not constitute a general authorization for the court to demand data covered by telecommunications confidentiality, but only an authorization to make such a request in order to verify the fact that the defendant is the infringer of personal rights in any pending proceedings. Therefore, it is not intended to obtain general knowledge but to obtain an answer to a specific question about the identity of an infringer/defendant. Therefore, it will only take place when, in the course of the proceedings, the court comes to the conclusion that information obtained in this way constitutes evidence of a fact significant for the resolution of the case.

Finally, it should be stressed that the world is changing; realities and ways of communicating are changing. Especially the experience of forced isolation related to the Covid-19 pandemic has made us realize that we are facing a completely new reality, a new organization of the life of the individual, state, and society as a whole. The internet has become the primary medium of communication. Therefore, in order to meet the changing socio-political conditions, one should look differently at the mechanisms protecting persons against so-called hate, against the dissemination of untrue information or of information infringing the personal rights of an individual. Hence, a positive assessment should be given of the resolution of the Supreme Court granting a court in civil proceedings the right to request information from an entity bound by telecommunications confidentiality in order to verify a plaintiff's claim that an act infringing personal rights was committed by the defendant in the case. At the same time, it can be hoped that this judgment will open a discussion on the need for even wider protection of the rights of persons whose personal rights are violated on the internet, and will open up the possibility of obtaining information on violators not only in criminal or administrative proceedings, but also in civil proceedings.

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Summary

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Right to Request the Disclosure of Personal Data of an Entity Accused of Infringing Personal Rights on the Internet as a Part of the Right to a Fair Trial

The gloss refers to the resolution of the Civil Chamber of the Supreme Court of 6 August 2020, III CZP 78/19, which significantly influences the understanding of the right to court realized as the right to a properly formed court procedure. From now on, the entity bound by telecommunications secrecy cannot refuse to provide a subscriber's personal data in a case of infringement of personal rights, if it is the content represented via the internet that may constitute the basis for this infringement. However, this only applies to information that makes it possible to verify the claim that the act infringing personal rights was committed by the defendant in the case and only if it is the only way to prove these facts.

Keywords: protection of personal rights on the internet, the right to a fair trial, revealing telecommunications secrets

Streszczenie

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Prawo żądania ujawnienia danych osobowych podmiotu naruszającego dobra osobiste w Internecie jako element prawa do sądu

Glosa odnosi się do uchwały Izby Cywilnej Sądu Najwyższego z dnia 6 sierpnia 2020 r., III CZP 78/19, która w istotny sposób wpływa na rozumienie prawa do sądu realizowanego jako prawo do prawidłowo ukształtowanej procedury sądowej. Od tej pory podmiot związany tajemnicą telekomunikacyjną, nie może odmówić przedstawienia danych osobowych abonenta tej usługi

w sprawie o naruszenie dóbr osobistych, jeżeli treści udostępniane za pośrednictwem Internetu mogą stanowić podstawę tego naruszenia. Jednak dotyczy to wyłącznie informacji pozwalających zweryfikować twierdzenie, że czynu naruszającego dobra osobiste dopuścił się pozwany w sprawie, i tylko wtedy, gdy jest to jedyny sposób udowodnienia tych faktów.

Słowa kluczowe: ochrona dóbr osobistych w Internecie, prawo do sądu, uchylenie tajemnicy telekomunikacyjnej