European Court of Human Rights: *Sedletska v. Ukraine*

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The right for journalists to protect their sources also prohibits the judicial authorities to have access to journalists' data stored on the server of a mobile telephone operator. That is the essence of a judgment recently delivered by the European Court of Human Rights (ECtHR). The ECtHR found a violation of the protection of journalistic sources as part of the right to freedom of expression under Article 10 of European Convention on Human Rights (ECHR). In an early stage of the procedure the ECtHR, by way of an interim measure, had already requested the Ukrainian authorities to abstain from accessing any of the data received from the journalist's mobile telephone operator on the basis of two court orders that were complained about in this case.

The applicant, Ms. Nataliya Yuriyivna Sedletska, is a journalist at the Kyiv office of Radio Free Europe/Radio Liberty. She is also the editor-in-chief of a television programme that focuses on corruption. In 2017 Sedletska was summoned to the Prosecutor General's Office (PGO) for questioning about a meeting she allegedly had with Mr. S., the head of the National Anticorruption Bureau of Ukraine (NABU), who was charged for violation of privacy (of Ms. N.) and disclosure of confidential information concerning an ongoing criminal investigation against a prosecutor (Mr. K.). Sedletska informed the PGO that, as a journalist, she communicated with many law-enforcement officials, including with the head of the NABU, Mr. S, and she claimed that she could not be interviewed as a witness if it would lead to the identification of her journalistic sources. For the same reason, she refused to answer questions related to the alleged meeting with S. and to either confirm or deny her presence at that meeting. Half a year later the PGO submitted a request to a District Court in Kyiv for access to Sedletska's communications held by her mobile service provider JSC "Kyivstar", over a period of 16 months. The requested data included dates, times, call durations, telephone numbers, sent and received text messages (SMS, MMS), and the location of Sedletska at the time of each call or message. The same day an investigating judge of the District Court issued an order authorising the collection of the requested data. This order was confirmed but narrowed in territorial scope by a judgment of a Kyiv City Court of Appeal. In the meantime the PGO investigator wrote a letter to the mobile service provider JSC "Kyivstar" clarifying that data was only required about the dates, times and locations of the mobile telephones of Sedletska and one other person, near six specified streets and places in Kyiv. It was also indicated that this information should be provided without any other data being disclosed. Sedletska and her

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lawyer asked JSC “Kyivstar” and the PGO whether the investigation had had access to Sedletska’s mobile telephone data. The request was refused on the basis of the confidentiality of the ongoing investigation.

However, already a few weeks earlier Sedletska had applied for an interim measure by the ECtHR under Rule 39 of the Rules of the Court. Promptly the ECtHR indicated to the Ukraine Government that, in the interests of the parties and the proper conduct of the proceedings, they should ensure that the public authorities abstain from accessing any of the data specified in the order of the District Court concerning Sedletska. A few weeks later, the ECtHR extended the interim measure indicating to the Government of Ukraine to ensure that the public authorities abstain from accessing any data mentioned in the ruling of the Kyiv City Court of Appeal concerning Sedletska, until further notice. Half a year later, in February 2019, the PGO informed the Government’s Agent that they had not carried out any of the actions authorised by the court orders in Sedletksa’s case, taking into account the requirements imposed under Rule 39.

In her application lodged before the ECtHR, Sedletska complained that the court orders allowing the PGO to access her mobile telephone communications data had constituted an unjustified interference with her right to the protection of journalistic sources, violating Article 10 of the ECHR. She also argued that her rights under Article 13 had been violated, due to the absence of effective remedies for her complaints under Article 10 of the ECHR. Sedletska submitted that both the measure of interference authorised by the domestic courts and the persistent uncertainty as to whether or not the respective court orders had been enforced and whether the confidentiality of her sources could be compromised had had a prohibitive chilling effect on her activity as an investigative journalist. In third-party interventions Media Legal Defence Initiative and Human Rights Platform submitted that the confidentiality of journalistic sources posed new legal challenges in view of technological advances and the emergence of new types of media, communications and information processing. They suggested that that pre-eminence of the protection of journalistic sources in the broadest sense was crucial to the preservation of the public watchdog function of the modern media. According to the Ukraine Government, Sedletska’s allegations that the disputed measure could result in the identification of her journalistic sources and that her communications data could be used for ulterior motives were unsubstantiated and did not violate her rights under the ECHR.

The ECtHR holds that the impugned authorisation, regardless of whether either of the two relevant court orders had been enforced, had amounted to an interference with Sedletska’s rights under Article 10 of the ECHR. Next, the ECtHR focuses on the crux of Sedletska’s argument concerning the relevance and sufficiency of the reasons provided by the judicial authorities for authorising the interference with her protected data. It reiterates that limitations on the confidentiality of journalistic sources calls for the most careful scrutiny, having

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regard to the importance of the protection of journalistic sources for press freedom in a democratic society. The Court also emphasises that any interference potentially leading to the disclosure of a source cannot be considered “necessary” under Article 10 § 2 unless it is justified by an overriding requirement in the public interest. It refers to a series of cases concerning searches of journalists’ homes and workplaces and the seizure of journalistic material, including communications data, in which the Court recognised that such measures, even if unproductive, constituted a more drastic type of interference than a targeted order to divulge the source’s identity, since such measures had allowed the relevant authority to obtain access to a broad range of the material used by the journalists in discharging their professional functions. The ECtHR finds the scope of the data access authorisation in the first court order was grossly disproportionate to the legitimate aims of investigating a purported leak of classified information by S. and protecting Ms. N.’s private life. The Court agrees that the new data access authorisation given by the Court of Appeal, which replaced the District Court’s authorisation and was limited essentially to the collection of her geolocation data over a sixteen-month period, could remove the aforementioned threat of identification of Sedletska’s sources unrelated to the proceedings against S., assuming that the PGO had not previously received any such data from Sedletska’s mobile operator, as alleged by the Government. But the court order gave access to Sedletska’s data precisely to test an assumption that S. had met with her in order to provide her with confidential information relevant to her activity as an investigative journalist and, if so, to use her data as evidence in criminal proceedings against S. The fact that the name of Sedletska’s source was known to the authorities and that he was implicated in a criminal offence did not as such remove Sedletska’s own protection under Article 10 of the ECHR. To justify such an interference with the journalist's rights the Court of Appeal should have indicated why the interest in obtaining Sedletska’s geolocation data sought by the PGO was of a vital nature for combatting serious crime and should have ascertained that there were no reasonable alternative measures for obtaining the information sought by the PGO. The order should also have demonstrated that the legitimate interest in the disclosure clearly outweighed the public interest in the non-disclosure. As the Court of Appeal’s order did not sufficiently respond to these requirements, the ECtHR is not convinced that the data access authorisation given by the domestic courts was justified by an “overriding requirement in the public interest” and, therefore, necessary in a democratic society. There has accordingly been a violation of Article 10 of the ECHR. In view of its relevant findings under Article 10 of the ECHR, the ECtHR does not find it necessary to address the complaint under Article 13.

Judgment by the European Court of Human Rights, Fifth Section, in the case of Sedletska v. Ukraine, Application no. 42634/18,1 April 2021

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