



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

FIRST SECTION

CASE OF KOLESNICHENKO v. RUSSIA

(Application no. 19856/04)

JUDGMENT

STRASBOURG

9 April 2009

FINAL

09/07/2009

This judgment may be subject to editorial revision.

In the case of Kolesnichenko v. Russia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Elisabeth Steiner,

Khanlar Hajiyeu,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 19 March 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 19856/04) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Mr Aleksey Petrovich Kolesnichenko (“the applicant”), on 4 May 2004.

2. The Russian Government (“the Government”) were represented by Mr P. Laptev, former Representative of the Russian Federation at the European Court of Human Rights.

3. The applicant alleged, in particular, a violation of the right to respect for his home.

4. On 12 September 2006 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

5. The Government objected to the joint examination of the admissibility and merits of the application. Having examined the Government’s objection, the Court dismissed it.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1962 and lives in Perm. At the material time he was a practising advocate and member of the Perm Regional Bar.

7. On 10 June 2003 the prosecutor of the Sverdlovskiy District of Perm opened an investigation into theft of property by a Mr S. The theft had been allegedly committed through the use of forged documents. The applicant acted as counsel for Mr S. in the criminal proceedings against him.

8. The investigator suspected that the documents allegedly forged by Mr S. and a procedural application made by the applicant in the criminal proceedings against Mr S. had been printed on the same device. He commissioned an expert to study those documents. On 21 August 2003 the expert reported that the allegedly forged document and the applicant's application could have been printed "on the same printing device or on different devices having the same or higher resolution..." The expert specified that it was impossible to make any conclusive findings because "the documents did not contain any singularities that could permit identification of the printing device".

9. On 9 February 2004 the investigator asked the Sverdlovskiy District Court of Perm to issue search warrants for the applicant's home in Gorky Street and his late parents' flat in Kuybyshev Street.

10. On 12 February 2004 the Sverdlovskiy District Court of Perm granted the investigator's request and issued two warrants authorising searches at the applicant's and his late parents' flats. The entire reasoning of the first warrant concerning the Gorky Street reads as follows:

"The investigator... has submitted an application for a search warrant at the address... which is the place of residence of Mr Kolesnichenko, an advocate with the Perm Regional Bar Association. The investigator argues that certain documents allegedly prepared by Mr G.S. had not in fact been drafted by him but rather fabricated by an electrophotographic process with the probable use of the same device as that used for preparing an application by the advocate Mr Kolesnichenko. This fact is confirmed by an expert report; accordingly, the investigation believes that certain objects of relevance for the investigative acts and the criminal case may be located at that address.

Having studied the materials produced at the hearing, the court considers that the application should be granted because it is reasoned. Since no criminal proceedings have been instituted against the advocate Mr Kolesnichenko and no charges have been levelled against him, the investigator's application for a search warrant was lodged in accordance with law.

Sufficient information was submitted to the court in support of the application and, in these circumstances, there are grounds for authorising a search in Mr Kolesnichenko's residence located at [the address on Gorky Street]."

The reasoning of the second warrant concerning Kuybyshev Street was identical, save for the mention that the address in Kuybyshev Street was the registered place of residence of the applicant's late parents and also the registered address of the applicant's office.

11. At 9.40 p.m. on the same day the investigator, accompanied by police officers and two attesting witnesses (*ponyatye*), came to the

applicant's home in Gorky Street. He asked the applicant to hand over the copying device, which the applicant did.

12. The investigator and officers then searched the applicant's flat and seized two computers containing the applicant's private and professional data, a printer, his personal notebook, certain documents relating to the criminal case against Mr S. and to other cases, three business card holders, and other items.

13. The search at the applicant's residence ended at 4 a.m. on 13 February 2004. The investigator and the police then proceeded to search the flat in Kuybyshev Street.

14. According to the search and seizure report of 12 February 2004, the purpose of the search was to find and seize "copying devices (printers, copiers) [and] documents relevant to the criminal case".

15. On 16 February 2004 the applicant lodged a complaint with the Sverdlovskiy District Court. He submitted that the investigator had unlawfully seized belongings of his which were not referred to in the search warrants of 12 February 2004. As a consequence he had been unable to carry on his professional activities and his clients' right to defence had also been impaired.

16. On 3 March 2004 the Sverdlovskiy District Court of Perm dismissed the applicant's complaint, finding as follows:

"The judicial decision of 12 February 2004 authorised a search of the flat in Gorky Street. It follows from the [investigator's] application for a search warrant and the judicial decision that the search was necessary because there were sufficient reasons to believe that certain objects relevant to the criminal case could be found at the advocate Mr Kolesnichenko's home. The judicial decision did not contain any concrete list of objects or documents. Thus, the claimant's argument that the investigator seized objects and documents which had not been listed in the judicial decision, is unsubstantiated."

17. It appears that on 26 March, 1, 14 and 27 April 2004 certain seized objects and documents were returned to the applicant.

18. On 27 April 2004 the Perm Regional Court upheld the District Court's decision on appeal. It noted that on 12 February 2004 the District Court authorised search and seizure of unspecified objects and documents and for that reason the investigator had the discretion to determine which objects and documents were relevant to the criminal case. The objects and documents which had been found to be irrelevant had been returned to the applicant.

II. RELEVANT DOMESTIC LAW

19. Article 25 of the Constitution establishes that the home is inviolable. No one may penetrate into the home against the wishes of those who live there unless otherwise provided for in a federal law or a judicial decision.

20. The Code of Criminal Procedure of the Russian Federation establishes that a search may be carried out if there are sufficient grounds to believe that instruments of a crime, objects, documents or valuables having relevance to a criminal case could be found in a specific place or on a specific person (Article 182 § 1). A search of a place of residence requires a judicial warrant issued on the basis of an application by the investigator (Article 165).

21. Investigative actions, such as a search, may not be carried out at night except in emergency situations (Article 164 § 3). Night is defined as the period between 10 p.m. and 6 a.m. local time (Article 5 (21)).

22. Prior to starting the search, the investigator offers the residents the opportunity to surrender voluntarily objects, documents or valuables which are of relevance to the criminal case. If such objects have been handed over voluntarily the investigator may decide not to proceed with the search (Article 182 § 5).

23. Upon permission of the investigator, counsel and/or advocate for the person in whose premises the search is being carried out may be present during the search (Article 182 § 11).

24. Residential and professional premises of an advocate may only be searched on the basis of a judicial decision. The information, objects and documents obtained during the search may be used in evidence only if they are not covered by the attorney-client privilege in a given criminal case (section 8 § 3 of the Advocates Act, Law no. 63-FZ of 31 May 2002).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

25. The applicant complained that the search at his home and office had been carried out in breach of his right to respect for his home guaranteed under Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Admissibility

26. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions by the parties

27. The applicant emphasised that the domestic authorities had been aware of his special status as an advocate because it had been mentioned in the search warrant. That awareness notwithstanding, they had proceeded to search his residence and his office and to seize his files, which had interfered with his professional activities. The applicant pointed out that the search had begun at 9.40 p.m. and obviously could not be completed by 10 p.m., whereas the domestic law prohibited night-time searches, the night time being defined as after 10 p.m.

28. The Government submitted that the search had been conducted in accordance with law since the domestic law did not contain a prohibition on searching the advocate's premises, on condition that there existed a judicial warrant, since the procedure for conducting the search had been complied with, and since the search had begun before the onset of night time. The investigation had had valid grounds to suspect the applicant of having been involved in fraud; that suspicion had been corroborated by an expert report.

2. The Court's assessment

29. The Court observes that the search was carried out at two addresses: firstly in the flat on Gorky Street where the applicant had his registered residence and subsequently in the flat on Kuybyshev Street where the applicant had a registered office. The Court has consistently interpreted the notion of "home" in Article 8 § 1 as covering both private individuals' homes and professional persons' offices (see *Buck v. Germany*, no. 41604/98, § 31, ECHR 2005-IV, and *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, §§ 29-31). It follows that in the present case both searches amounted to an interference with the applicant's right to respect for his home.

30. The Court has next to determine whether the interference was justified under paragraph 2 of Article 8, that is, whether it was "in accordance with the law", pursued one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" to achieve that aim or those aims. Given that the searches were authorised by the

judicial decisions as required by Article 165 of the Code of Criminal Procedure, and purported to uncover evidence in a fraud case, the Court is prepared to accept that they were lawful in domestic terms and pursued the legitimate aim of the prevention of crime. What remains to be examined is whether they were “necessary in a democratic society”.

31. The Court has repeatedly held that persecution and harassment of members of the legal profession strikes at the very heart of the Convention system. Therefore the searching of lawyers’ premises should be subject to especially strict scrutiny (see *Elci and Others v. Turkey*, nos. 23145/93 and 25091/94, § 669, 13 November 2003). To determine whether these measures were “necessary in a democratic society”, the Court has to explore the availability of effective safeguards against abuse or arbitrariness under domestic law and to check how those safeguards operated in the specific case under examination. Elements taken into consideration in this regard are the severity of the offence in connection with which the search and seizure have been effected, whether they were carried out pursuant to a warrant issued by a judge or a judicial officer – or subjected to after-the-fact judicial scrutiny –, whether the warrant was based on reasonable suspicion and whether its scope was reasonably limited. The Court must also review the manner in which the search was executed, and – where a lawyer’s office is concerned – whether it was carried out in the presence of an independent observer to ensure that material subject to legal professional privilege is not removed. The Court must finally take into account the extent of the possible repercussions on the work and the reputation of the persons affected by the search (see *Camenzind v. Switzerland*, 16 December 1997, § 45, *Reports of Judgments and Decisions* 1997-VIII; *Buck*, cited above, § 45; *Smirnov v. Russia*, no. 71362/01, § 44, ECHR 2007-...; and *Wieser and Bicos Beteiligungen GmbH v. Austria*, no. 74336/01, § 57, ECHR 2007-...).

32. Turning to the present case, the Court observes that the search warrants of 12 February 2004 were issued by the District Court on an application by the investigator. It follows from the text of the search warrants that the only piece of evidence submitted by the investigator in support of his application was the report by an expert who had been commissioned to compare the documents prepared by Mr S. and by the applicant with a view to determining whether they could have been prepared on the same printing device. The report indicated that no reliable finding could be drawn because the documents lacked any distinctive marks which could have permitted identification of the printing device (see paragraph 8 above). In his application, the investigator did not explain how the seizure of the printing device from the applicant’s home or office could have furthered the investigation in the absence of any distinctive marks on the documents capable of ensuring identification of the specific device. The investigator did not refer to any evidence which could have corroborated his conjecture that the applicant was involved in the printing of the documents

allegedly forged by Mr S. The District Court, for its part, merely acknowledged the existence of the report without analysing its contents and findings. Whilst acknowledging that the applicant was an advocate and that he had not been charged or accused of any criminal offence or unlawful activities, the District Court did not examine whether the material gathered by the investigation was capable of founding a reasonable suspicion that he was implicated in the fraud allegedly organised by Mr S. The Court finds therefore that the search warrants were not founded on “relevant and sufficient” reasons.

33. The Court further notes that the search warrants did not specify what objects or documents were expected to be found at the applicant’s home or office or how they would be relevant to the investigation. They allowed the investigative authorities to carry out searches in the applicant’s home and office in general and broad terms (compare *Niemietz*, cited above, § 37; *Smirnov*, cited above, § 47; and *Ernst and Others v. Belgium*, no. 33400/96, § 116, 15 July 2003). The subsequent judicial review confirmed that the search warrants had not referred to “any concrete list of objects or documents” and that the investigator therefore had unrestricted discretion in determining which documents were “of interest” for the criminal investigation (see paragraphs 16 and 18 above). Moreover, in issuing the warrant the judge did not touch upon the issue of whether privileged material was to be safeguarded, although he was aware – as was mentioned in the text of the search warrants – that the applicant was a bar member and could have possessed documents given to him by his clients. According to the Court’s case-law, search warrants have to be drafted, as far as practicable, in a manner calculated to keep their impact within reasonable bounds (see *Iliya Stefanov v. Bulgaria*, no. 65755/01, § 41, 22 May 2008, and *Van Rossem v. Belgium*, no. 41872/98, § 45, 9 December 2004). This requirement was manifestly disregarded in the present case.

34. The Court finally observes that the warrant’s excessive breadth was reflected in the way in which it was executed. After the applicant had voluntarily handed over the copying device at the request of the investigator, the latter nevertheless proceeded with a thorough search of the premises at both Gorky and Kuybyshev Streets, and seized the applicant’s computers with peripherals, personal and professional records, business cards and other objects. The Court notes that during the search there was no safeguard in place against interference with professional secrecy, such as, for example, a prohibition on removing documents covered by lawyer-client privilege or supervision of the search by an independent observer capable of identifying, independently of the investigation team, which documents were covered by legal professional privilege (see *Sallinen and Others v. Finland*, no. 50882/99, § 89, 27 September 2005, and *Tamosius v. the United Kingdom* (dec.), no. 62002/00, ECHR 2002-VIII). The presence of two attesting witnesses obviously could not be considered a sufficient safeguard,

given that they were laymen who had no legal qualification and were unable to detect privileged material (see *Iliya Stefanov*, cited above, § 43). Moreover, as regards the electronic data contained in the applicant's computers which were seized by the investigator, it does not seem that any sort of sifting procedure was followed during the search (see *Wieser and Bicos Beteiligungen GmbH*, cited above, § 63).

35. Having regard to the materials that were inspected and seized, the Court finds that the search impinged on professional secrecy to an extent that was disproportionate to whatever legitimate aim was pursued. The Court reiterates in this connection that, where a lawyer is involved, an encroachment on professional secrecy may have repercussions on the proper administration of justice and hence on the rights guaranteed by Article 6 of the Convention (see *Smirnov*, § 48, and *Niemietz*, § 37, both cited above).

36. In sum, the Court considers that the search carried out, without relevant and sufficient grounds and in the absence of safeguards against interference with professional secrecy, at the flat and office of the applicant, who was not suspected of any criminal offence but was representing the defendant in the same criminal case, was not "necessary in a democratic society". There has therefore been a violation of Article 8 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

37. Lastly, relying on Articles 3, 6, 10 and 13 of the Convention, the applicant complained that carrying out the search during the night was inhuman, that the examination of his complaint was unfair, that he had been persecuted for expressing an opinion on the lawful actions of the police, and that there was no effective remedy for his grievances.

38. However, having regard to all the material in its possession, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

40. The applicant claimed 1,000,000 euros (EUR) in respect of non-pecuniary damage.

41. The Government submitted that the claim was ill-founded and evidently excessive.

42. The Court accepts that the applicant has suffered non-pecuniary damage, such as distress and frustration in connection with a breach of his right to respect for his home, which is not sufficiently compensated for by the finding of a violation of the Convention. However, it finds the amount claimed by the applicant excessive. Making its assessment on an equitable basis, the Court awards the applicant EUR 3,000 under this head, plus any tax that may be chargeable on that amount.

B. Costs and expenses

43. The applicant also claimed 332.70 Russian roubles for postal expenses. He produced copies of postal receipts.

44. The Government submitted that the claim was unfounded.

45. On the basis of the material produced before it, the Court is satisfied that the expenses claimed were actually incurred and are reasonable as to quantum. Accordingly, the Court awards the applicant the entire amount claimed, that is EUR 10, plus any tax that may be chargeable to him.

C. Default interest

46. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint concerning the search at the applicant's premises admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into Russian roubles at the rate applicable at the date of settlement:

- (i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
- (ii) EUR 10 (ten euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 April 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President