



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

FIRST SECTION

CASE OF MASTEPAN v. RUSSIA

(Application no. 3708/03)

JUDGMENT

STRASBOURG

14 January 2010

FINAL

14/04/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Mastepan 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 Hajiyev,

Dean Spielmann,

Sverre Erik Jebens, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 15 December 2009,

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

PROCEDURE

1. The case originated in an application (no. 3708/03) 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 Yevgeniy Sergeyevich Mastepan (“the applicant”), on 17 December 2002.

2. The applicant, who had been granted legal aid, was represented by Mr Y. Turushchukov, a lawyer practising in Barnaul. The Russian Government (“the Government”) were represented by Mr P. Laptev and subsequently by Ms V. Milinchuk, former Representatives of the Russian Federation at the European Court of Human Rights.

3. Relying on Articles 5, 6, 8 and 13 of the Convention and Article 1 of Protocol No. 1, the applicant complained that he had been incited to commit a crime, that the police squad and the investigator had unlawfully entered his flat, carried out an unauthorised search, removed all valuable property and detained him at the police station.

4. On 11 January 2007 the Court declared the application partly inadmissible and decided to communicate the complaint under Article 8 concerning the entry into, and inspection of, the applicant’s home by the investigating officer to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1975 and lives in Rubtsovsk, a town in the Altay Region.

6. On an unspecified date the economic crimes bureau of the Barabinsk Town Police (*Отдел по борьбе с экономическими преступлениями Барабинского городского ОВД по Новосибирской области* – “the economic crimes bureau”) obtained information concerning the circulation of counterfeit money in town. Based on the above information and pursuant to Section 10 of the Operational-Search Activities Act the economic crimes bureau instituted operational proceedings (*дело оперативного учета*).

7. In the course of the operational proceedings at issue the economic crimes bureau discovered incidents of forgery of official documents.

8. Following the approval of the report on the operational-search activities conducted within the framework of the operational proceedings at issue, on 9 February 2002 in accordance with Section 8 of the Operational-Search Activities Act the Deputy Head of the Barabinsk Town Police decided to carry out a test purchase in the applicant’s flat. The reason for that decision had been the information that the applicant was involved in unlawful activity consisting in forgery of banknotes and official documents entitling its holders to certain benefits or exonerating them of duties and obligations. On the same day criminal proceedings were instituted against the applicant on suspicion of counterfeiting.

9. On 10 February 2002 two plain-clothes police officers, K. and B., came to the applicant’s flat to carry out the test purchase. The officers said that they were a husband and wife wishing to obtain a copy of a high-school graduation certificate. The applicant invited the visitors to come in, scanned the documents handed over by the “husband”, then, at the “clients”’ request, changed the name of the holder and certain grades. Then he made colour printouts and asked for 500 Russian roubles by way of payment.

10. According to the applicant, when the “clients” were on their way out, a police squad and an investigator who had been waiting outside in the meantime burst into the applicant’s flat.

11. According to the Government, after the test purchase had been completed the applicant saw the “clients” to the door, opened it, and the police officers who had been waiting outside in the meantime entered the flat. They showed their identification documents and informed the applicant of the purpose of their visit. After that the forgery of a document was reported to an investigator of the investigative department of the Barabinsk Town Police. When the investigator arrived to the applicant’s flat, the applicant’s wife opened the door. Upon her permission the investigator

entered the flat. The applicant did not object to the investigator's presence. After the attesting witnesses had been invited the investigator explained to the applicant and those present that there were reasons to believe that the applicant had committed forgery of an official document and expressed his will to conduct an investigative action – inspection of the crime scene. The applicant and his wife gave their consent.

12. The investigator inspected the applicant's flat as a crime scene and seized material evidence. In accordance with Article 182 of the RSFSR Code of Criminal Procedure he drew up a record of the inspection. The record attests to the fact that on 10 February 2002 from 6 p.m. to 9 p.m. in accordance with Articles 178-179 of the Code and in the presence of two attesting witnesses, the applicant and his wife, the investigator carried out the inspection of the applicant's flat. The record set out in detail the descriptions of the flat and the seized evidence (computer gear).

13. Thereafter the applicant was taken to the police station where he was detained until 2 a.m. on 11 February 2002.

14. On 15 February 2002 the investigator opened another criminal case against the applicant and charged him with forgery of official documents.

15. The applicant brought a complaint against the police squad and the investigator, alleging that they had conducted an unlawful search of his premises, thus violating his right to respect for his home, and that they had frisked him and seized his belongings. In particular, the applicant complained that when police officers K. and B. were on their way out an armed squad burst into his flat, shouting and threatening. He was thrown to the floor his hands tightly tied behind his back and dealt several blows to his side and the lower part of his back. The squad frisked him and handcuffed him. Afterwards the applicant was informed that the armed persons were police. The attesting witnesses were called, and what the applicant believed to have been a search began, without any prior approval by the prosecutor. The "search" lasted about three hours. From the conversation of the police officers the applicant understood that they were searching for drugs and arms. After the "search" was over some of the applicant's belongings were put in boxes and seized. Later the applicant was informed with the record of the investigative action in question, from which he learned that it had been an inspection of the crime scene.

16. On 3 July 2002 the Barabinskiy District Court of the Novosibirsk Region rejected the applicant's complaint as unsubstantiated. The court found as follows:

"... On 10 February 2002 the investigator [name] arrived at [the applicant's address] in connection with information about the crime, where he conducted, with attesting witnesses, the inspection of the scene of the crime. The investigative action in question was registered in the record of inspection of the crime scene ... The above circumstance is confirmed by the record dated 10 February 2002; a statement by [the head of the police squad] in which he confirmed that ... following a signal from [police officer K.] the police squad arrested [the applicant]. [The investigator] arrived

ten to fifteen minutes later and inspected the scene of the crime. [The above circumstance is further confirmed] by: statement of [police officer K.] in which he confirmed that after the test purchase was completed he informed the police squad accordingly through a radio transmitter, following which he came to the door, opened it, the police squad entered the flat and arrested [the applicant]; then [the investigator] was called and conducted the inspection of the scene of the crime; a statement by [a member of the police squad] who confirmed that on 10 February 2002 a test purchase was carried out; he and [two other members of the squad] were waiting for a signal from [police officer K.] to arrest [the applicant]. After the signal was received they entered the flat, then called the investigator, who entered the flat and conducted the inspection of the scene of the crime five minutes later; statements of [two attesting witness] who assisted at the inspection of [the applicant's] flat.

On the basis of the above, taking into account that [the investigator] arrived at [the applicant's address] at the scene of the crime, the actions of [the investigator] do not indicate that there was an unlawful entry to a dwelling.

The RSFSR Code of Criminal Procedure did not oblige the investigator to hand over the record of the inspection to [the applicant].

In accordance with Articles 178 and 179 of the RSFSR Code of Criminal Procedure during the inspection [the investigator] had the right to seize the uncovered traces of crime and other physical evidence. At that [the applicant's] participation was not obligatory.

It has not been established that [the investigator] body-searched [the applicant].

...”

As regards the applicant's allegations in so far as they concerned the actions of the police squad, the court indicated that the applicant had failed to follow the procedure established by law for challenging police actions (namely, the Police Act and the Law on complaints about actions and decisions impinging upon the rights and freedoms of citizens) and refused to examine the relevant part of the complaint on the merits.

17. On 11 September 2002 the Novosibirsk Regional Court upheld the decision of 3 July 2002 on appeal.

18. On 23 August 2007 the Barabinskiy District Court of the Novosibirsk Region convicted the applicant. It is unclear whether the applicant appealed against the judgment.

II. RELEVANT DOMESTIC LAW

19. The *Constitution of the Russian Federation* establishes that the home is inviolable. No one shall enter a dwelling against the will of those living there, unless otherwise established by a federal law or in accordance with a court order (Article 25).

20. The Constitution further provides that everyone shall be guaranteed judicial protection of his rights and freedoms. Decisions and actions (or

inaction) of bodies of state authority and local self-government, public associations and officials may be appealed against in court (Article 46).

21. *The RSFSR Code of Criminal Procedure* (Law of 27 October 1960, in force until 1 July 2002) replicated the constitutional principle that no one should penetrate into a home against the will of those living there without legal grounds. Search, seizure and inspection of residential premises could be carried out only on the grounds, and in accordance with the procedure, provided by the Code (Article 12).

22. The Code provided specifically that an investigator could carry out an inspection of a crime scene, location, premises, physical objects or documents in order to detect traces of a crime or other physical evidence, to clarify the scene of the crime and other relevant circumstances. In urgent cases the inspection could be carried out before opening a criminal case. In such cases, the case was to be opened immediately after the inspection of the crime scene (Article 178).

23. The inspection of the crime scene had to be carried out in the presence of attesting witnesses. The investigator could also solicit the participation of an accused, a suspect, a victim, a witness and an expert. When carrying out the inspection the investigator could take measurements, photos, use video recording, draw plans and schemes, and make moulds and take impressions of footprints. If necessary, the investigator could seize the evidence discovered (Article 179 of the Code).

24. A record of the inspection had to be drawn up by the investigator and signed by all persons who took part in the investigative measure (Articles 141 and 182 of the Code).

25. *The Code of Criminal Procedure of the Russian Federation* (Law no. 174-FZ of 18 December 2001, in force as from 1 July 2002) provides for judicial review of decisions of investigators that might infringe the constitutional rights of participants in the proceedings or prevent a person's access to court (Article 125).

26. *The Operational-Search Activities Act* (Law no. 144-FZ of 12 August 1995) lists a number of techniques that may be used by law-enforcement or security authorities for the purposes of, *inter alia*, investigating and preventing offences (section 6). In particular, the police may carry out a "test purchase" (*проверочная закупка*) where, *inter alia*, a criminal case has been opened or information concerning the preparation or commission of an offence has become known to the police and the available data are insufficient to bring criminal proceedings (section 7). The taking of operational-search measures which interfere with individuals' constitutional rights to respect for their correspondence, telephone communications and home is allowed if authorised, as a general rule, by a court (section 8). The "test purchase" of goods, the free sale of which is prohibited, and certain undercover operations by agents or persons assisting them, are carried out on the basis of a decision sanctioned by the head of an agency engaged in

operational-search activities (section 8). The agencies charged with operational-search activities may create and use information systems and institute operational proceedings. The operational proceedings are instituted on the grounds listed in section 7 of the Act for the purposes of collection and systematisation of information, verification and evaluation of the results of the operational-search activities, and taking the relevant decisions by the agencies charged with operational-search activities. The institution of operational proceedings may not serve as a ground for restriction of constitutional rights and freedoms and lawful interests of an individual and a citizen (section 10). Results of operational-search activities can serve as a basis for bringing criminal proceedings and can be used as evidence in accordance with the legislation on criminal procedure (section 11).

27. *The Police Act* (Law no. 1026-I of 18 April 1991) provides that the police may enter the dwelling against the will of those living there if there is a reason to believe that a crime has been committed there (section 11). Actions or inaction on the part of a police officer can be appealed against to a higher police official, a prosecutor or a court (section 39).

28. *The Law on complaints about actions and decisions impinging upon the rights and freedoms of citizens* (Law no. 4866-I of 27 April 1993) provides that a court of general jurisdiction may hear complaints about actions or decisions of State and public officials which infringe citizens' rights or freedoms or prevent citizens from exercising their rights and freedoms. It is incumbent on the officials concerned to demonstrate the lawfulness of their actions or decisions (section 2).

THE LAW

ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

29. The applicant complained that the investigator had unlawfully entered and searched his flat and thereby breached his right to respect for his home. He relied on Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for ... his home ...

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.”

30. The Government contested that view.

A. Admissibility

31. 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

32. The Government accepted that the exercise of the right to enter the applicant's home by the investigating officer had amounted to an interference with the applicant's right to respect for his home within the meaning of Article 8 of the Convention. They considered however that the interference had been justified under Article 8 § 2 of the Convention: the investigator had acted in accordance with Articles 178 and 179 of the RSFSR Code of Criminal Procedure, which laid down the scope and manner of exercise of the power conferred on the investigator to inspect the scene of the crime; that his actions pursued the legitimate aim of investigating the incident of forgery of an official document; and that they were necessary in a democratic society.

33. The applicant maintained his complaint.

34. The Court observes that upon receipt of information as to the applicant's involvement, *inter alia*, in forgery of official documents, the deputy head of the town police decided to carry out a test purchase at the applicant's flat in order to verify the information at hand. When the results of the test purchase confirmed the suspicion, the police squad was notified accordingly and entered the applicant's home to arrest the applicant. They subsequently informed the investigating officer, who arrived at the scene to secure the traces of the crime and other physical evidence and to determine other relevant circumstances. The investigating officer acted without a judicial warrant and prior to institution of the criminal proceedings against the applicant on the charges of forgery. The Court's analyses will be aimed at the examination of the lawfulness of the entry into, and inspection of, the applicant's home by the investigating officer.

35. The Court notes that the parties' accounts of events as to whether the applicant had voluntarily consented to the investigator's entry into his home diverge significantly. The Court will therefore depart from the assumption that the investigating officer entered the applicant's flat against the latter's will.

36. The fact of the interference with the applicant's right to respect for his home as such was undisputed by the parties and the Court sees no reason to hold otherwise. Thus, the Court has next to determine whether the interference in question 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.

37. The Court reiterates that an interference cannot be regarded as “in accordance with the law” unless, first of all, it has some basis in domestic law. In accordance with the case-law of the Court, in relation to paragraph 2 of Article 8 of the Convention, the term “law” is to be understood in its “substantive” sense, not its “formal” one. In a sphere covered by the written law, the “law” is the enactment in force as the competent courts have interpreted it (see *Société Colas Est and Others v. France*, no. 37971/97, § 43, ECHR 2002-III).

38. The Court observes that under the Russian Constitution the right to respect for a person’s home may be interfered with on the basis of a federal law or a judicial decision. The RSFSR Code of Criminal Procedure – which had the status of federal law in the Russian legal system – provided that in urgent cases an investigator could inspect the crime scene prior to institution of criminal proceedings; the Code did not require an investigator to obtain a judicial warrant (see paragraphs 19 and 22 above). The Court therefore concludes that the interference was “in accordance with the law”.

39. The Court further observes that the purpose of the interference with the applicant’s right to respect for his home was to examine the scene of the crime and to secure the traces of the crime and other physical evidence that might be instrumental for the criminal investigation into the forgery of official documents. The interference was manifestly in the interests of “the prevention of crime”. It remains to be determined whether the interference was “necessary in a democratic society”.

40. Under the Court’s settled case-law, the notion of “necessity” implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. In determining whether an interference is “necessary in a democratic society” the Court will take into account that a certain margin of appreciation is left to the Contracting States. However, the exceptions provided for in paragraph 2 of Article 8 are to be interpreted narrowly, and the need for them in a given case must be convincingly established (see *Société Colas Est and Others*, cited above, § 47, and *Smirnov v. Russia*, no. 71362/01, § 43, 7 June 2007, with further references).

41. The Court considers that although the scale of the inspection that was conducted at the applicant’s home with the view of securing the traces of the crime and other physical evidence justified the impugned interference with the applicant’s right to respect for his home, the relevant legislation and practice should nevertheless have afforded adequate and effective safeguards against abuse (see *Société Colas Est and Others*, cited above, § 48).

42. The Court must therefore verify whether in the present case the restrictions and conditions provided for in domestic law were appropriate.

43. In this respect the Court observes that the domestic law in force at the material time permitted an investigator to penetrate into a home against the will of those living there for the purpose of carrying out an inspection of a crime scene. The domestic law defined the scope of the inspection as “finding and securing the traces of the crime and other physical evidence, clarifying the crime scene and other relevant circumstances”. The inspection of a crime scene was supplemented by a power of seizure and did not require prior judicial approval. The criminal proceedings could be opened either before the inspection or shortly afterwards (see paragraphs 21-22 above). The domestic law further provided that the inspection was to be conducted in the presence of attesting witnesses. Whether it was necessary for an accused, a suspect, a victim, a witness or an expert to take part was left to the discretion of the investigator. A record of the inspection had to be drawn up (see paragraphs 23-24 above). A person could *ex post facto* challenge the lawfulness of the investigator’s actions before a court (see paragraph 25 above). The Court is satisfied that the above restrictions and conditions of the domestic law were sufficient to exclude arbitrary intrusions into people’s homes.

44. Turning to the circumstances of the present case the Court observes that the inspection of the applicant’s home implied a certain urgency and for that reason was carried out prior to institution of the criminal proceedings against the applicant. The Court further observes that the investigator did not overstep the scope of the inspection as defined in the domestic law. The inspection was conducted in the presence of two attesting witnesses. The record of the inspection was drawn up thereafter. Shortly afterwards, within a matter of a few days, criminal proceedings were instituted against the applicant on suspicion of forgery of official documents. The applicant used his right to challenge the lawfulness of the applied investigative measure.

45. Regard being had to the above, the Court considers that the interference with the applicant’s right to respect for his home had been proportionate to the legitimate aim pursued.

46. There has therefore been no violation of Article 8 of the Convention in the present case.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the complaint concerning the entry into, and inspection of, the applicant's flat by the investigation officer admissible;
2. *Holds* by five votes to two that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 14 January 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges Rozakis and Spielmann is annexed to this judgment.

C.L.R.
S.N.

DISSENTING OPINION OF JUDGES ROZAKIS AND SPIELMANN

1. We are unable to share the majority view that there has been no violation of Article 8 of the Convention.

2. We would like to observe that after the “test purchase operation”, at the moment when the applicant saw the “clients” to the door, police officers who had been waiting outside entered the flat. They were followed by an investigator. The exact circumstances of the entry into the flat are disputed. According to the applicant, the police squad and the investigator burst into the flat, whereas according to the Government, the investigator was granted permission to enter the flat by the applicant, who did not object to the investigator’s presence and the inspection of the crime scene.

3. The majority rightly depart from the assumption that the investigating officer entered the applicant’s flat against the latter’s will (see paragraph 35 of the judgment).

4. In paragraph 41 of the judgment, the Court rightly emphasises that the relevant legislation and practice should nevertheless have afforded adequate and effective safeguards against abuse (see *Société Colas Est and Others v. France*, no. 37971/97, § 48, ECHR 2002-III).

5. However, that was not the case in this instance. Indeed, in our view, the whole operation was inconsistent with Article 8 of the Convention because of the lack of sufficient safeguards. The conditions for instituting a search and seizure, as well as the rules governing such a significant intrusion into the rights guaranteed under Article 8 of the Convention, appear too lax and full of loopholes for the interferences with the applicant’s rights to have been strictly proportionate to the legitimate aim pursued. The investigating officer acted without a judicial warrant and prior to the institution of the criminal proceedings against the applicant for forgery. In addition, the domestic legislation left it to the discretion of the investigator to determine whether it was necessary for an accused, a suspect, a victim, a witness or an expert to take part (see paragraph 43 of the judgment).

6. In contrast with the majority view, we are therefore of the opinion that the conditions laid down in the domestic law were not sufficient to exclude arbitrary, and hence disproportionate, intrusions into people’s homes. In addition, in the present case, the lack of procedural safeguards (see paragraph 22 of the judgment), on account of the alleged urgency of the matter, made the intrusion a disproportionate interference under Article 8.

7. Consequently, we are of the opinion that the entry into, and inspection of, the applicant’s home by the investigating officer did not comply with Article 8 of the Convention.