

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

FOURTH SECTION

CASE OF STEFANOV v. BULGARIA

(Application no. 73284/13)

JUDGMENT

STRASBOURG

16 November 2021

This judgment is final but it may be subject to editorial revision.



In the case of Stefanov v. Bulgaria,

The European Court of Human Rights (Fourth Section), sitting as a Committee composed of:

Tim Eicke, *President,*
Faris Vehabović,
Pere Pastor Vilanova, *judges,*
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application (no. 73284/13) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 21 November 2013 by a Bulgarian national, Mr Marin Stefanov Stefanov, born in 1965 and living in Burgas ("the applicant") who was represented by Mr M. Ekimdzhiev and Mrs K. Boncheva, lawyers practising in Plovdiv;

the decision to give notice of the complaints concerning the retention and handling of the applicant's privileged digital data and the absence of related effective remedies to the Bulgarian Government ("the Government"), represented by their Agent, Ms B. Simeonova, of the Ministry of Justice, and to declare inadmissible the remainder of the application;

the parties' observations;

the decision to reject the Government's objection to examination of the application by a Committee;

Having deliberated in private on 19 October 2021,

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

SUBJECT-MATTER OF THE CASE

1. The case concerns a complaint about the absence of safeguards to ensure that the confidentiality of the applicant lawyer's privileged data seized by the authorities, is respected. The applicant, a barrister, was searched on 14 February 2013 in the context of criminal proceedings against him. A portable memory key ("the memory key") was seized from him at the end of the search, which took place without a prior judicial warrant, and without an objection from the applicant. The following day the search-and-seizure record was approved by a judge who wrote "approved!" on it and signed it. On 19 February 2013, the applicant asked the prosecutor to return the memory key to him as it contained information about his legal practice which was inviolable, and to prevent the examination, copying and checking of privileged information. The prosecutor's related refusal was quashed by the relevant court on 23 May 2013, which ordered its return to the applicant as the prosecution had had enough time to examine it.

2. On 15 May 2013, the prosecution ordered an expertise of the memory key, to be carried out by a specialised institute of the Ministry of Interior

("the institute"). The latter had to verify whether the memory key contained any files, to copy all files found on it, including from the deleted folder, and to print out a list of all the files found. The report, drawn up on 3 June 2013, noted that the memory key had been received in a sealed envelope bearing the prosecution stamp. Two copies of all the files found on the memory key had been recorded onto two disks and the objects subject of the expertise had been sealed in envelopes.

3. At a court hearing in 2018 in the criminal proceedings against the applicant, the expert who had conducted the expertise (see paragraph 2 above) stated that he had not received additional guidance in relation to it, apart from the order for the expertise itself. The expert indicated that he had first copied all the files found on the memory key onto his computer, from where he had transferred them to disks handed to the authorities. While there were no legal requirements concerning either the keeping or the destruction of such information, he had thereafter deleted the files from his computer because of the lack of sufficient storage space and in line with the usual working practice. A copy of the information should have also been kept on a digital data carrier in the institute's registry. The name of the memory key's owner had been indicated in the expertise. The expert could not recall the content of the files, even if he had seen them at the time. The files however could be viewed in their entirety as they had been recorded in full in a digital format on disks.

4. The applicant complained about the retention and subsequent handling by the authorities of his memory key containing materials related to his legal practice, and the inclusion of that information in his criminal case file. He relied on Article 8 of the Convention and on Article 13 in conjunction with Article 8 about the absence of a related effective remedy.

THE COURT'S ASSESSMENT

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

5. The Government's objection that the applicant had failed to exhaust domestic remedies cannot be accepted.

6. Given that the complaint is about the retention and subsequent handling of the seized memory key which the applicant raised with the authorities on 19 February 2013 for the first time (see paragraph 1 above), any objections which the Government advanced he might have made during the search-and-seizure operation fall out of the period of consideration in the instant case, which started on 19 February 2013.

7. As regards the Government's argument that, in the context of the criminal proceedings against him, the applicant could have sought to have the memory key excluded as unlawfully or unduly collected evidence, the Court finds that such a possibility relates to the admissibility of evidence

and might be of relevance for the determination of the applicant's criminal responsibility. However, it would not have had any effect on the essence of his complaint about a breach of his Article 8 rights as a result of the retention and handling of privileged lawyer's information (see, *mutatis mutandis*, *Goranova-Karaeneva v. Bulgaria*, no. 12739/05, § 59, 8 March 2011). Unlike in the case of *Cacuci and S.C. Virra & Cont Pad S.R.L. v. Romania* (no. 27153/07, § 101, 17 January 2017), the central issue in the present application is not about the use of allegedly unlawfully obtained evidence. In that sense, a potential *post-factum* exclusion of the information from the criminal case-file would not have remedied an alleged mishandling of that information prior to it.

8. As regards the possibility for the applicant to have sought damages under section 49 of the Contracts and Obligation Act, the Court finds as follows. The one domestic decision from among those to which the Government referred in support of their position that is relevant (see реш. № 3173/07.05.2015 г. по в.гр.д. № 12826/2014 г. на СГС, in which a claimant had been awarded damages as a result of, among other things, unlawful seizure of her computer in breach of the inviolability of lawyers' privileged information) was delivered after the facts in the present case and subsequently to the submission of the application before the Court. Accordingly, in this respect the Court finds that the Government has not discharged its burden of proving that the applicant has not used a remedy that was both effective and available at the relevant time (see *Dimitar Yanakiev v. Bulgaria (no. 2)*, no. 50346/07, §§ 53 and 61, 31 March 2016 and *Pendov v. Bulgaria*, no. 44229/11, §§ 38 – 39, and the case law cited therein).

9. Finally, on the Government's argument that the applicant could have sought damages stemming from the prolonged retention of the memory key, the Court finds that such a claim would not have remedied his complaint about the absence of safeguards related to the handling of the information on his memory key.

10. The Court further notes that the complaint under Article 8 of the Convention is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other ground. It must therefore be declared admissible.

11. The general principles concerning searches, and searches of lawyers' premises in particular, have been summarized in the case of *Kruglov and Others v. Russia* (nos. 11264/04 and 15 others, §§ 123 and 125, 4 February 2020). The requirements of Article 8 of the Convention in respect of body searches have been set out in *Gillan and Quinton v. the United Kingdom* (no. 4158/05, § 65, ECHR 2010 (extracts)).

12. In the present case, the Court does not need to determine whether the retention and subsequent handling of the memory key had been in accordance with the law (compare with *Iliya Stefanov v. Bulgaria*,

no. 65755/01, § 36, 22 May 2008) since, in any event, it considers that those measures had been incompatible with Article 8 of the Convention for the following reasons. While it could be accepted that the memory key was retained in the pursuit of the legitimate aim of prevention of crime, no effective safeguards against abuse or arbitrariness have been shown to exist, or to have been put in place and followed in practice by the authorities. In particular, the legal basis for the retention of the memory key was the same judicial decision approving the search-and-seizure record a day after it had been drawn up, and which the Government confirmed was not subject to judicial review. That decision was of indisputable brevity and it lacked precision and reasons altogether, characteristics that have already been found to be deficient by the Court (see, among others, *Gutsanovi v. Bulgaria*, no. 34529/10, § 223, ECHR 2013 (extracts)). Furthermore, no procedure has been shown to have existed providing for the handling of privileged information in a way to ensure that its confidentiality was not breached. In that connection, it has not been shown that the expert who handled the memory key had to use, or in practice used, key words to sift through the data it contained in order to limit the intrusion into the applicant's privileged information (contrast with *Iliya Stefanov*, cited above, § 42,). In addition, neither the applicant, nor his lawyer or any other person capable of ensuring that privileged information was not accessed, read, copied or otherwise disseminated, were present at the time of unsealing the seized memory key (see paragraph 2 above, and contrast with *Cacuci and S.C. Virra & Cont Pad S.R.L.*, cited above, §§ 21 and 98, 17 January 2017). Remarkably, in the present case the whole content of the memory key had been copied, initially on a computer, from where it was transferred onto at least two digital carriers (disks). No legal requirements have been referred to as regards the keeping of such data or its destruction. In the instant case, it appears to have been deleted from the expert's computer because of lack of storage space or as a result of internal practice, without any rules or guarantees about how the information had to be handled in the process. It would also appear that a digital copy might have been additionally kept in the institute which had conducted the expertise (see paragraph 3 above) and no guarantees have been shown to exist in relation to access and further handling of the data. On the basis of the above, the Court finds that no safeguards have been demonstrated to exist to ensure that the privileged nature of any information, established by the relevant authorities to be part of the memory key, was respected and protected in accordance with the requirements of Article 8.

13. There has accordingly been a violation of Article 8 of the Convention.

II. OTHER COMPLAINTS

14. The applicant also complained under Article 13 of the Convention that he had not had an effective remedy in connection with his complaints under Article 8. Article 13 reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority ..."

15. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

16. Nevertheless, having regard to its finding under Article 8 (see paragraph 13 above), the Court considers that it is not necessary to examine it separately.

III. REMAINING COMPLAINT

17. The applicant made a further complaint under Article 8 of the Convention about the authorities having included the privileged data contained in his memory key in his criminal case-file. The Court has examined that part of the application and considers that, in the light of all the material in its possession and in so far as the matters complained of are within its competence, this complaint either does not meet the admissibility criteria set out in Articles 34 and 35 of the Convention or does not disclose any appearance of a violation of the rights and freedoms enshrined in the Convention or the Protocols thereto.

18. It follows that this part of the application must be rejected in accordance with Article 35 § 4 of the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

19. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage and EUR 6,191.85 in respect of costs and expenses incurred before the Court.

20. The Government considered that those claims were unjustified and excessive.

21. The Court awards the applicant 1,500 EUR, plus any tax that may be chargeable to the applicant, under the head of non-pecuniary damage.

22. Having regard to the documents in its possession, the Court considers it reasonable to award 1,227 EUR for costs and expenses under all heads plus any tax that may be chargeable to the applicant.

23. The Court further considers it appropriate that the default interest rate 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 retention and handling of the applicant's privileged digital data, and the lack of an effective domestic remedy, admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds* that there is no need to examine separately the complaint under Article 13 of the Convention;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into Bulgarian levs at the rate applicable at the date of settlement:
      (i) EUR 1,500 (one thousand and five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,227 (one thousand two hundred and twenty-seven 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;

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

Done in English, and notified in writing on 16 November 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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Ilse Freiwirth
Deputy Registrar

Tim Eicke
President