CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 71362/01
by Mikhail SMIRNOV
against Russia

The European Court of Human Rights (First Section), sitting on 30 June 2005 as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,
Mrs S. BOTOUCHAROVA,
Mr A. KOVLER,
Mrs E. STEINER,
Mr K. HAJIYEV,
Mr D. SPIELMANN,
Mr S.E. JEBENS, *judges*,
and Mr S. QUESADA, *Deputy Section Registrar*,

Having regard to the above application lodged on 27 November 2000,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Mikhail Vladimirovich Smirnov, is a Russian national who was born in 1956 and lives in St. Petersburg. The applicant is a lawyer; at the material time he was a member of the St. Petersburg United Bar Association (*Санкт-Петербургская объединенная коллегия адвокатов*). The respondent Government are represented by Mr P. Laptev,

Representative of the Russian Federation at the European Court of Human Rights.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

1. Search at the applicant's place of residence

On 20 January 1999 the St. Petersburg town prosecutor opened criminal case no. 7806 against Sh., G. and fifteen other persons who were suspected of forming and participating in an organised criminal enterprise and of other serious offences.

On 7 March 2000 Mr D., an investigator with the Department for especially serious crimes of the prosecutor's office, issued a search warrant worded as follows:

> "Taking into account that at the [applicant's] place of residence at the address: [the applicant's home address] there might be objects and documents that are of interest for the investigation of criminal case [no. 7806]... I order to search the premises at the address [the applicant's home address] where [the applicant] permanently resides and to seize objects and documents found during the search."

On the same day a deputy prosecutor of St. Petersburg approved the search and countersigned the warrant.

The Government submit that the applicant was not a party to criminal case no. 7806 and did not represent anyone involved. The applicant replies that at the material time he was a representative of:

(a) Mr S. who was first a suspect and later a witness in criminal case no. 7806. On 21 February 2000 the applicant represented S. before the Oktyabrskiy Court of St. Petersburg in the proceedings concerning a complaint about the investigator D.'s decision. The applicant was also S.'s representative in unrelated civil proceedings on the basis of a power of attorney of 25 May 1999;

(b) Mr Yu. who was a defendant in criminal case no. 7806 and whom the applicant represented from 10 July to 25 December 1998;

(c) Mr B. who was the victim in a criminal case concerning the murder of his son. Subsequently that case was joined to criminal case no. 7806. The applicant represented B. from 11 February to 23 March 2000;

(d) Mr Sh. who was a defendant in criminal case no. 7806 and whom the applicant represented before the Court (application no. 29392/02).

On 9 March 2000 the investigator D., in the presence of the applicant, assisted by police officers from the District directorate for the fight against the organised crime (*РУБОП*) and two attesting witnesses (*понятые*), searched the applicant's flat. According to the search record, the applicant was invited to "voluntarily surrender... documents related to the public

company TNKhK and federal industrial group RossCo". The applicant responded that he had no such documents and signed under that statement.

The investigator found and seized over twenty documents which the applicant declared to be his own and the central unit of the applicant's computer. According to the search record, the applicant had no complaints about the way the search was carried out, yet he objected to the seizure of the central unit because it contained two hard-disks and was worth 1,000 US dollars. The applicant submits that the seized documents included, in particular, S.'s power of attorney of 25 May 1999 and extracts of a memorandum prepared in B.'s case.

On the same date the investigator D. held a formal interview with the applicant in the framework of criminal case no. 7806.

On 17 March 1999 the investigator L. issued an order to attach the documents seized at the applicant's flat and the central unit of his computer as "material exhibits" in criminal case no. 7806.

2. Judicial review of the search and attachment orders

The applicant complained to a court. He sought to have the search and seizure of documents declared unlawful. He claimed, in particular, that the central unit of the computer, as well as his personal notebook and his clients' files and records, were not related to the criminal case and could not be attached as exhibits because the seizure had impaired his clients' defence rights.

On 19 April 2000 the Oktyabrskiy Court of the Admiralteyskiy District of St. Petersburg heard the applicant's complaint. The court found that the search had been approved and carried out in accordance with the applicable provisions of the domestic law and had therefore been lawful. As to the attachment of the computer, the court ruled as follows:

> "...the purpose of the search was to find objects and documents in connection with a criminal case. During the search a number of documents and a computer central unit were seized; they were thoroughly examined by the investigator which is evident from the record of the examination of the seized items and print-outs of the files contained in the central unit.
>
> Thus, the above shows that the aim of the search has been achieved, however, the order to attach the seized objects and documents as exhibits to the criminal case amounts to forfeiture of the [applicant's] property which was taken from him and never returned. While [the applicant] was neither a suspect, nor a defendant in the criminal case and he was interviewed as a witness.
>
> Under such circumstances, the constitutional rights of the applicant who was deprived of his property were violated. Having achieved the purpose of the search and recorded the results received, the investigator, without any valid and lawful grounds, declared [the applicant's property] to be exhibits..."

The court ordered that the applicant's documents, his notebook and the central unit be returned to him.

On 25 May 2000 the St. Petersburg City Court quashed the judgment of 19 April 2000 and remitted the case for a new examination by a differently composed court. The City Court pointed out that the first-instance court erroneously assimilated the order on the attachment of objects as exhibits to forfeiture of the applicant's property.

On 17 August 2000 the Oktyabrskiy Court of St. Petersburg held a new hearing on the applicant's complaint. The court ruled that the search of the applicant's flat had been justified and lawful and that the remainder of the applicant's complaints were not amenable to judicial review.

On 12 September 2000 the St. Petersburg City Court quashed the judgment of 17 August 2000 and remitted the case for a new examination by a differently composed court. The City Court found that the first-instance court had failed to examine, in a sufficiently thorough manner, whether the investigator had had sufficient grounds to search the flat of the person who had not been charged with any criminal offence.

On 17 November 2000 the Oktyabrskiy Court of St. Petersburg delivered the final judgment on the applicant's complaint. As regards the lawfulness of the search, the court found as follows:

> "The search warrant was issued because there were sufficient reasons [to believe] that [at the applicant's home address] where [the applicant] lived there could be objects and documents that could be used as evidence in one of the episodes of criminal case no. 7806. This fact was established by the court and confirmed by the materials in the case-file, in particular, a statement by the investigator D[.] of 16 November 2000, the decision to bring charges of 22 February 1999, the decision to lodge an application for an extension of detention on remand of 10 July [? - unclear] 2000, letter no. 200409 of 22 September 1998 and other materials; therefore, the court comes to the conclusion that the search in [the applicant's] flat was justified under Article 168 of the RSFSR Code of Criminal Procedure..."

The court further established that the search had been carried out in strict compliance with the laws on criminal procedure. As regards the remainder of the applicant's claims, the court decided that it was not competent to examine them, but it was open to the applicant to complain about the investigator's decisions to a supervising prosecutor.

On 19 December 2000 the St. Petersburg City Court dismissed the applicant's appeal. It upheld the first-instance court's findings to the effect that the search at the applicant's flat had been justified and procedurally correct and that the order to attach objects as exhibits was not amenable to judicial review because such an avenue of appeal was not provided in the domestic law.

According to the applicant, he only received the printed text of the city court's judgment on 28 May 2001.

B. Relevant domestic law

Grounds for a search

Article 168 of the RSFSR Code of Criminal Procedure ("Grounds for carrying out a search") provided that an investigator could carry out a search to find objects and documents that were of relevance to the case, provided that he had sufficient grounds to believe that such objects and documents could be found in a specific place or on a specific person. The search could be carried out on the basis of a reasoned warrant issued by an investigator and approved by a prosecutor.

Complaints about an unlawful search

According to Article 218, a complaint against the actions of an investigator could be brought either directly to a prosecutor or through the person against whom the complaint was lodged. In the latter case such person was to forward the complaint to the prosecutor within twenty-four hours, together with his explanations.

On 23 March 1999 the Constitutional Court of the Russian Federation ruled that decisions and actions of investigators and prosecutors relating to a search, forfeiture of property, suspension of proceedings and extension of time-limits for preliminary investigation should be amenable to judicial review by the persons whose rights were violated.

Under Article 219 the prosecutor was to examine the complaint within three days and give a reasoned decision to the complainant.

Material evidence

Article 83 defined material evidence as "any objects that... carried traces of a criminal offence... and any other objects that could be instrumental in detecting a crime, establishing the factual circumstances of a case, identifying perpetrators or rebutting the charges or extenuating the punishment". Pursuant to Article 84, material evidence was to be described in detail, photographed and attached to the criminal case as exhibits by a special order of the investigator or by a court decision. Article 85 provided that material evidence was to be kept until the conviction came into force or the time-limit for appeal expired. However, it could be returned to the owner before that if such return would not harm on-going criminal proceedings. Under Article 86 the court was to order the return of material evidence to its legal owner in the final decision closing the criminal proceedings.

COMPLAINTS

The applicant complains under Article 6 § 3 (c) of the Convention that the seizure of the central unit of his computer and of his notebook impaired his clients' defence rights.

The applicant complains under Article 8 of the Convention that an interference with his right to respect for his home was not necessary in a democratic society because it was not proportionate to the aims pursued.

The applicant complains under Article 1 of Protocol No. 1 that he was deprived of his computer in breach of his property rights.

The applicant complains under Articles 1 and 13 of the Convention that he had no effective remedy.

THE LAW

1. The applicant complained under Article 6 § 3 (c) of the Convention that the taking away of his computer and notebook had been detrimental for his clients' rights. Article 6 § 3 reads as follows:

> "3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing..."

The Court notes that the applicant was not charged with a criminal offence and that he complains about a violation of other persons' rights rather than his own. He is therefore not a "victim" of the alleged violation.

It follows that this complaint is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

2. The applicant complained under Article 8 of the Convention that the search at his place of residence was an unjustified interference with his right to respect for his home. Article 8 of the Convention 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."

The Government submit that the decision to search the applicant's flat was based on testimony by witnesses and that the search was necessary because "objects and documents having importance for the investigation of criminal case no. 7806" could have been found in the applicant's flat. The

interference pursued the legitimate aim of the protection of rights and freedoms of others. The applicant did not object to the search.

The applicant avers that his flat was searched with a view to obtaining evidence against his clients, including S., Yu., B. and many others, and getting access to the clients' files stored in his computer. The search violated the attorney-client privilege and it was followed by a formal interview: the investigator D. questioned him about the circumstances of which he had become aware as a representative of his clients. The applicant further submits that the search was authorised by a deputy prosecutor and not by a court, as the Russian Constitution requires.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

3. The applicant complained under Article 1 of Protocol No. 1 about a violation of his property rights resulting from the seizure of his materials and computer. Article 1 of Protocol No. 1 provides as follows:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The Government submit that the central unit of the applicant's computer was sealed and attached as a material exhibit to criminal case no. 7806 in order to prevent loss of data. The examination of the criminal case is not yet complete. The applicant's documents and central unit will be stored in the St. Petersburg City Court until such time as the judgment has been passed. Accordingly, the applicant's right to use his property was restricted in the public interest, that is the establishment of the truth in criminal case no. 7806. Moreover, on 12 April 2000 the St. Petersburg town prosecutor invited the applicant by mail to come to the office for his notebook and certain documents, but the applicant never showed up.

The applicant considers that the seizure of the central unit was a disproportionate interference with his property rights and imposed an excessive burden on him. The central unit proper cannot be used as an exhibit in the criminal case because it has not been an instrument, object or product of a crime and it does not carry any traces of a crime. Furthermore, the data contained therein cannot have any evidentiary value either, because the unit has been for a long time in possession of the prosecution and the

date could have been erased or modified. The applicant agrees with the reasons exposed in the judicial decision of 19 April 2000. In his view, the prosecution should have abided by that decision and should not have contested it on appeal. The applicant claims that the real purpose of the seizure was to hinder his professional activities as an advocate. The unlawful withholding of his computer has deprived him of access to more than two hundred files of his clients and it has been detrimental for his legal practice as a whole. Finally, the applicant does not dispute that on 6 June 2000 he received his notebook and some documents back.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

4. The applicant complained under Articles 1 and 13 of the Convention that he did not have an effective remedy for the alleged violations of his rights. The Court considers that this complaint falls to be examined under Article 13 which provides as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

(a) Insofar as the complaint under Article 13 may be understood as having been invoked in conjunction with Article 8, the Court notes that the applicant has had an opportunity to obtain judicial review of his complaints relating to the allegedly unlawful search. The requirement of effectiveness does not mean that the outcome of the proceedings should correspond to the applicant's objectives (see *Kaijalainen v. Finland*, no. 24671/94, Commission decision of 12 April 1996).

It follows that this part of the complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

(b) Insofar as the applicant complained that he did not have an effective remedy for the allegedly unlawful restriction on his property rights, the Government submit that the applicant challenged the contested decision to a court which considered and dismissed his complaints (on 19 December 2000 in the final instance). Moreover, his civil claim for damages against the St. Petersburg town prosecutor and the Ministry of Finance is now pending before the Oktyabrskiy Court of St. Petersburg.

The applicant submits that the scope of review by the domestic courts was limited to the lawfulness of the search. As to his property complaints, the courts decided that these issues were not amenable to judicial review. In his view, the ruling of the Constitutional Court of 23 March 1999 should have been interpreted as opening a way for judicial review of all decisions

affecting the person's property rights. Furthermore, he submits that his civil claim for damages has not been examined under various pretexts for more than four years, since it was lodged on 2 August 2000.

The Court considers, in the light of the parties' submissions, that this part of the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

For these reasons, the Court unanimously

Declares admissible, without prejudging the merits, the applicant's complaints concerning the search at his place of residence, seizure of his belongings and his ability to challenge the seizure;

Declares the remainder of the application inadmissible.

Santiago QUESADA
Deputy Registrar

Christos ROZAKIS
President