

Violazione del diritto al rispetto della vita privata per notificazione tardiva dell'ordine di perquisizione domiciliare

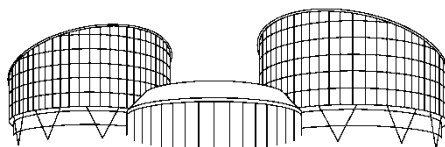
(CEDU, sez. III, sent. 21 dicembre 2021, ric. n. 69810/11)

Nel ricorso contro la Federazione Russa la Corte EDU ha dichiarato la violazione dell'art. 8 della Convenzione per perquisizione illecita ed ingiustificata eseguita presso l'abitazione privata del ricorrente, sospettato di detenere sostanze illecite. Stando ai fatti riferiti, la polizia aveva perquisito l'appartamento del Sig. XXX sulla base di un ordine emesso d'urgenza da un investigatore privato, che successivamente inoltrava istanza di conferma di legittimità alla competente autorità. Il tribunale distrettuale aveva ritenuto fondata la perquisizione, concludendo per la sua legittimità. Il ricorrente lamentava, di contro, l'infondatezza della decisione del giudice di prime cure nonché l'asserita urgenza dell'ordine di perquisizione, potendo l'investigatore chiedere ed ottenere previamente l'autorizzazione giudiziaria. Lo stesso aveva inoltre denunciato la violazione della procedura legale nazionale, dal momento che l'investigatore aveva notificato in ritardo l'ordine di perquisizione. Il Tribunale regionale confermava tuttavia la predetta decisione, ritenendo altresì giustificata l'attività perquisitoria data la sussistenza di un fondato e rilevante rischio di pregiudizio delle indagini.

Secondo la disciplina nazionale la perquisizione domiciliare richiede un mandato emesso da un tribunale sulla base di una domanda di un investigatore. In casi urgenti – “quando una ricerca non può essere rinviata” - una perquisizione può essere condotta senza previa autorizzazione giudiziaria su ordine di un investigatore. In tali casi, l'investigatore deve però notificare la perquisizione urgente al pubblico ministero e al giudice entro tre giorni dal suo svolgimento.

Nel ricorso innanzi alla Corte di Strasburgo, il Governo ha sostenuto che la perquisizione eseguita era conforme al diritto nazionale nonché fondata e “necessaria in una società democratica” secondo i requisiti dell'articolo 8 della Convenzione.

Entro tale quadro, la Corte EDU ha esaminato il caso anzitutto alla luce dei principi generali, ribadendo che l'espressione “conformemente alla legge”, presente nell'articolo 8 § 2 della Convenzione, si riferisce essenzialmente al diritto nazionale ed implica l'obbligo di conformarsi alle norme sostanziali e procedurali dello stesso. Nella specie poi, appurando che la perquisizione era stata di fatto notificata in violazione dei termini previsti dalla disciplina nazionale, ha ritenuto che - sebbene la perquisizione perseguisse uno scopo legittimo - l'ingerenza derivata non era né necessaria né “conforme alla legge” ai sensi dell'articolo 8 § 2 della Convenzione né tanto meno era stata accompagnata dalle garanzie del controllo giurisdizionale *ex-post* da parte delle autorità. E in ragione di ciò ha ritenuto violato l'art. 8 par. 2 CEDU.



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

THIRD SECTION

CASE OF XXX v. RUSSIA

(Application no. 69810/11)

JUDGMENT

STRASBOURG

21 December 2021

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of XXX v. Russia,

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

Georges Ravarani, *President,*

Georgios A. Serghides,

Dmitry Dedov,

Darian Pavli,

Peeter Roosma,

Andreas Zünd,

Frédéric Krenç, *judges,*

and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 69810/11) 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 XXX (“the applicant”), on 20 October 2011;

the decision to give notice to the Russian Government (“the Government”) of the application;

the parties’ observations;

Having deliberated in private on 30 November 2021,

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

INTRODUCTION

1. The present case concerns a search of the applicant’s home in urgent circumstances and its subsequent judicial review.

THE FACTS

2. The applicant was born in XXX and was detained in Slavyanovka, Kaliningrad Region. He was granted legal aid and was represented before the Court by Mr V.A. Filatyev, a lawyer practising in Kaliningrad.
3. The Government were represented initially by Mr M. Galperin, Representative of the Russian Federation to the European Court of Human Rights, and lately by Mr M. Vinogradov, his successor in that office.
4. The facts of the case, as submitted by the parties, may be summarised as follows.
5. On 2 February 2011 the police conducted a test purchase of drugs from a Mr S. When questioned after his arrest, between about 7 p.m. and 8 p.m., Mr S. provided the address of a man named "Kuzya" from whom he had allegedly bought the drugs.
6. On 3 February 2011 the police conducted a test purchase of drugs from the applicant, who lived at the address provided by Mr S. At about 2 p.m., they searched the applicant's flat under an urgent search order issued by the investigator in charge. The search order referred to the events of the previous day: the criminal case opened against Mr S., the test purchase of drugs from him and the interview during which Mr S. had given the applicant's address. The search order also mentioned that, according to "operational-search information", a woman was registered as living in the flat at the address indicated by Mr S., and her partner was known as "Kuzya". On the basis of the above information, the investigator concluded that there were sufficient grounds to believe that, at the above-mentioned flat, there "might be drugs, psychotic and poisonous substances, other items banned from circulation, money and valuables obtained through illegal activity, as well as other material and documents relevant to the criminal investigation and that, therefore, it was necessary to conduct the search urgently because the normal delay of twenty-four hours to obtain a court search warrant could result in the loss of material relevant to the criminal investigation".
7. On an unspecified date the investigator lodged an application with a first-instance court to have the search of 3 February 2011 declared lawful. The application was supported by copies of the investigator's search order of 3 February 2011 and the search record.
8. On 9 February 2011 the Moskovskiy District Court of Kaliningrad ("the District Court") examined the above-mentioned application. In its decision it reiterated the contents of the investigator's search order; it went on to indicate that the search order had been issued and executed on 3 February 2011 and that the investigator's application to have the search declared lawful had reached the court on 9 February 2011. The District Court, "having examined the material submitted to it", held that the investigator had had sufficient grounds to believe that "drugs, psychotropic and poisonous substances, other items banned from circulation, money and valuables obtained through illegal activity, as well as other material and documents relevant to the investigation" would be found at the applicant's residence. The District Court further noted that "the search had been conducted in urgent conditions" and concluded by declaring the search lawful.
9. The applicant lodged an appeal against the decision of 9 February 2011. He complained, in particular, that the court's decision had been unlawful and unfounded. He further asserted that the investigator had had enough time to obtain judicial authorisation prior to the search. He also

complained that the time-limit for the submission of the application to confirm the lawfulness of the urgent search had not been complied with.

10. On 6 September 2011 the Kaliningrad Regional Court (“the Regional Court”) upheld the decision of 9 February 2011. It found the investigator’s search order to be well founded and that it had been executed in urgent circumstances, with reference to “the risk of the loss of material relevant to the investigation”. The Regional Court did not address the applicant’s complaint about the failure to comply with the time-limit for applying for a judicial review of a search in urgent circumstances.

RELEVANT LEGAL FRAMEWORK

11. A search of a place of residence requires a search warrant issued by a court on the basis of an application by an investigator (Article 165 of the Code of Criminal Procedure). In urgent cases – “when a search cannot be postponed” (“*когда производство [обыска] не терпит отлагательства*”) – a search may be conducted without prior judicial authorisation on the order of an investigator. In such cases, the investigator must notify a prosecutor and a judge of the urgent search no later than three days after it has been carried out. Copies of the investigator’s search order and the search record should be joined to the above-mentioned notification. The judge must then examine the lawfulness of the search within twenty-four hours of receiving the investigator’s notification of the urgent search (Article 165 §§ 2 and 5 of the Code of Criminal Procedure).

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 8 AND 13 OF THE CONVENTION

12. The applicant complained that his flat had been unlawfully searched and that there had been no effective judicial review of the search. He relied on Articles 8 and 13 of the Convention, which read as follows:

Article 8

“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.”

Article 13

“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. Admissibility

13. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. *Submissions of the parties*

14. The applicant submitted that the investigating authorities had interviewed Mr S. on 2 February 2011 and had had enough time to plan the test purchase of drugs from the applicant for the next day, which meant that they had also had enough time to obtain judicial authorisation for the search of his flat. There had been no exceptional circumstances whatsoever justifying the urgency of the search without prior judicial authorisation. The applicant further submitted that the investigator had breached national legal procedure because he had been late in notifying a court of the urgent search. Lastly, the applicant submitted that the national courts had examined only the formal lawfulness and well-foundedness of the search, but had failed to examine whether it had been necessary in a democratic society. He considered that his rights under Articles 8 and 13 of the Convention had been violated.

15. The Government submitted that the search of the applicant's flat had been conducted in accordance with national law and had been based on sufficient grounds. The search had been "necessary in a democratic society" and, therefore, the requirements of Article 8 of the Convention had been met. The applicant had also had a real opportunity to obtain a judicial review of the search, so the requirements of Article 13 of the Convention had also been complied with.

2. The Court's assessment

16. The Court will examine the present case in the light of the general principles summarised in the recent case of *Tortladze v. Georgia* (no. 42371/08, §§ 55-58, 18 March 2021).

17. The Court reiterates that the expression "in accordance with the law" in Article 8 § 2 of the Convention essentially refers back to national law and states the obligation to conform to the substantive and procedural rules thereof (see, for instance, *Vladimir Polishchuk and Svetlana Polishchuk v. Ukraine*, no. 12451/04, § 44, 30 September 2010). However, it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, unless there is an indication that the domestic authorities applied the law in an arbitrary manner (see *Pentikäinen v. Finland* [GC], no. 11882/10, § 85, ECHR 2015, and *Amaghlobeli and Others v. Georgia*, no. 41192/11, § 33, 20 May 2021).

18. In the present case, the applicant asserted (see paragraph 9 above) that the investigator had failed to notify the first-instance court of the urgent search within the three-day statutory time-limit (see paragraph 11 above). Indeed, the search had been conducted on 3 February 2011, while the District Court received the investigator's notification of it on 9 February 2011 (see paragraph 8 above), that is to say, six days after the search, instead of three days. The applicant's allegation that there was a clear breach of domestic legal procedure therefore appears plausible enough to necessitate a reply from the national courts.

19. However, when the applicant raised this issue before the Regional Court, it failed to address it (see paragraph 10 above). In such circumstances, it is impossible to say that the domestic courts' interpretation and application of domestic law was substantiated and reasonable (compare, for instance, *Tortladze*, cited above, § 62).

20. The Court thus concludes that the interference at issue was not "in accordance with the law" within the meaning of the second paragraph of Article 8 of the Convention.

21. While the above finding alone may serve as a basis for finding a violation of Article 8 of the Convention (see, for instance, *Avaz Zeynalov v. Azerbaijan*, nos. 37816/12 and 25260/14, §§ 81-82, 22 April 2021), the Court considers it important to note, in addition, as follows (see, *mutatis*

mutandis, Siryk v. Ukraine, no. 6428/07, § 39, 31 March 2011, and *Zličić v. Serbia*, nos. 73313/17 and 20143/19, § 94, 26 January 2021).

22. There is no doubt that the search served a legitimate aim, namely to prevent crime and protect the rights of others (see *Tortladze*, cited above, § 63 with further references).

23. As to the proportionality of the interference at issue, the Court observes that the investigator's search order (see paragraph 6 above) did not set out the pressing circumstances which allegedly necessitated an urgent search without a prior judicial warrant. There was nothing to support the investigator's statement of a general character that the lack of an urgent search "could result in the loss of material relevant to the criminal investigation". The Court notes that between the interview of Mr S. from about 7 p.m. to 8 p.m. on 2 February 2011 and the search of the applicant's flat at 2 p.m. the next day, 3 February 2011, the investigative authorities planned and prepared, presumably with the necessary superiors' approval, the test purchase of drugs from the applicant. During that time, however, they failed, for reasons which remain unclear, to seek a judicial warrant for the search. In the Court's view, the Government failed, in the circumstances of the present case, to justify the recourse to the urgent procedure (see *Tortladze*, cited above, § 64).

24. Furthermore, the Court considers that the absence of a prior judicial warrant for the search was not counterbalanced by the availability of an *ex post facto* judicial review in the present case, because the domestic courts did not elaborate in their decisions on the issue of the necessity of a search in urgent circumstances (*ibid.*, § 65). Nor did they examine whether the measure had been "necessary in a democratic society" and proportionate to the legitimate aim pursued (see paragraphs 8 and 10 above).

25. The Court also observes that, other than the investigator's search order and the search record, no other documents from the investigation file were submitted to the judge carrying out the review. The Court considers that in the absence of such documents, the judge was not in a position to assess either the degree of reasonable suspicion that the authorities had had against the applicant before searching his flat, or the urgency and necessity of carrying out a search without a prior judicial warrant.

26. The Court therefore concludes that the search of the applicant's flat was not in accordance with law and was not attended by appropriate and sufficient safeguards, including an effective judicial review.

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

28. Given the findings regarding the lack of an effective judicial review in the present case (see paragraphs 24-26 above), the Court does not consider it necessary to examine whether there has also been a violation of Article 13 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

29. Lastly, the applicant complained that the search of his flat and subsequent judicial review had breached his rights under Article 6 of the Convention and Article 1 of Protocol No. 1 thereto. However, having regard to all the material in its possession, the Court finds that the above complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. This part of the application must therefore be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

30. 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

31. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage.

32. The Government submitted that if the Court were to find a violation of the Convention in respect of the applicant, he should be awarded just satisfaction, in accordance with the Court’s established case-law.

33. The Court awards the applicant EUR 2,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

34. The applicant did not submit any claims under this heading.

C. Default interest

35. The Court 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 complaints under Articles 8 and 13 of the Convention concerning the search of the applicant’s flat 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 the complaint under Article 13 of the Convention;

4. *Holds*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros), to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(b) that from the expiry of the above-mentioned three months until settlement, simple interest shall be payable on the above amount 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 21 December 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško Registrar

Georges Ravarani President

