

FIRST SECTION

Application no. 61064/10
Yuriy IVASHCHENKO
against Russia

STATEMENT OF FACTS

THE FACTS

The applicant, Mr Yuriy Nikolayevich Ivashchenko, is a Russian national who was born in 1983 and lives in Krasnodar.

A. The circumstances of the case

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

In August 2009 the applicant, a photojournalist, travelled to Abkhazia where he took several photographs concerning, as he described it, “the life of this unrecognised Republic”.

On 27 August 2009 on his return to Russia he was required to pass through the Adler customs checkpoint, where he showed his Russian passport and press card.

For unspecified reasons his belongings, including a laptop and several electronic storage devices, were subjected to an inspection. A customs officer read the information contained on the storage devices and the laptop and examined the digital photographs stored on them. Some data were then copied to a customs office PC. They were subsequently copied to several CDs and the information copied onto the PC was deleted.

The copied data included the applicant’s personal correspondence, the passwords for his e-mail, Skype and Facebook accounts and private drawings, as well as photographs previously used in newspaper publications concerning extremist activities, the Ezid ethnic group and the Azov gambling zone.

On 9 September 2009 the customs authorities informed the applicant that an expert report had been commissioned to determine whether the data seized from the applicant had any prohibited extremist content. He was told that the need for such a report arose from the presence of a knife among his belongings. In October 2009 the customs authorities acknowledged that these reasons were false and that the actual reason for commissioning the forensic report was the “mere fact that the data had been seized”.

In November 2009 the expert returned the CDs to the customs office, stating that it was not possible to carry out the examination but giving no reasons.

The applicant brought court proceedings challenging the actions of the customs authorities.

By a judgment of 25 January 2010 the Prikubanskiy District Court of Kraasnodar dismissed his claims. The court held as follows:

“Laptops, storage devices, cameras and video cameras should be considered as “goods” within the meaning of Article 11 of the Customs Code. All goods should be presented for checking by customs, as required under Article 14 of the Code ... The customs authorities are authorised to take samples of the goods for examination ... and to use technical devices to speed up the checks ... The data from the applicant’s laptop were copied for the purpose of examination in compliance with Presidential Decree no. 310 on combating fascism and political extremism ... In the circumstances, the fact that the samples taken for examination constituted all the relevant data was justified ...”

On 22 April 2010 the Krasnodar Regional Court upheld this judgment, endorsing the lower court’s reasoning.

The applicant does not appear to have been prosecuted subsequently in criminal, administrative or other proceedings in connection with the data “seized” from him by the customs authorities.

B. Relevant domestic law and practice

1. Russian Constitution

Article 23 § 2 of the Russian Constitution provides that everyone has the right to secrecy of his or her correspondence, telephone communications and postal, telegraphic or other communications. Limitations may be imposed on this right under a court decision.

Article 39 protects freedom of expression and prohibits incitement to social, racial, national or religious hatred. Everyone has the right to freely search for, receive, transmit, produce and disseminate information by lawful means.

Article 55 § 3 of the Constitution provides that individuals' rights and freedoms may be limited by a federal statute in so far as it is necessary in order to protect the constitutional regime, morals, health, the rights and freedoms of others and national security and defence.

2. The Customs Code and related legal acts

Article 11 of the Custom Code defines "goods" as any movable or immovable property. Under Article 372 of the Code (in force until 1 July 2010) the goods had to be presented for checking by customs. An inspection of the goods was to be carried out when a customs declaration was submitted, or on a random basis.

As specified in the Regulations on Customs Procedures adopted by the Russian Government on 2 February 2005, "inspections" entail the examination of goods in order to prevent or stop violations of the Russian legislation or to detect prohibited goods. Such inspections may include the opening or unsealing of containers (paragraph 14 of the Regulations).

State Customs Authority Order no. 1519 of 23 December 2003, in force at the material time, provided further details about inspections but did not provide for the taking of samples of information or data.

Presidential Decree no. 310 of 23 March 1995 on combating fascism and political extremism required the competent public authorities to arrest and bring proceedings against persons who had disseminated information, photographs or video materials intended to promote fascism or social, racial, national or religious hatred. The competent authorities were also required to take measures to seize the above materials (paragraph 2 of the Decree).

State Customs Authority Order no. 677 of 10 November 2005 provides that customs officers should examine the content of printed, audio or video materials during customs inspections.

3. Other legislation

The Anti-Extremism Act (Federal Law no. 114-FZ of 25 July 2002) provided that a court could classify certain data or information as "extremist" (section 13 of the Act).

COMPLAINTS

The applicant complains under Article 8 of the Convention that the customs authorities unlawfully and without valid reasons examined the data contained on his laptop and storages devices and copied that data, thereby also breaching his copyright. He argues that access to his correspondence by the authorities required a court decision.

The applicant argues that the actions of the customs authorities also amounted to a violation of Article 10 of the Convention. He argues in particular that no sufficient procedural safeguards were in place to protect him from unjustified interference or to protect journalistic sources.

The applicant also argues in relation to the above complaints that the applicable legislation did not meet the quality-of-law requirement under the Convention and that Russian law did not provide for a clear procedure which would allow him to challenge effectively the actions of the customs authorities.

QUESTIONS TO THE PARTIES

1. Has there been interference with the applicant's right to respect for his private life and correspondence, within the meaning of Article 8 § 1 of the Convention? If so, was that interference in accordance with the law? Having regard to Articles 23 and 55 of the Russian Constitution, (i) was a court decision required and (ii) did a "federal statute" allow the customs authorities to inspect an individual's "correspondence" within the meaning of Article 8 § 1 of the Convention? Was the interference necessary in terms of Article 8 § 2 (see for comparison *Gillan and Quinton v. the United Kingdom*, no. 4158/05, §§ 63-64 and §§ 85-87, ECHR 2010-... (extracts))?

2. Has there been interference with the applicant's freedom of expression, in particular his right to impart information and ideas "regardless of frontiers", within the meaning of Article 10 § 1 of the Convention? If so, was that interference prescribed by law and necessary in terms of Article 10 § 2? Did the national authorities, including the courts, carry out a proportionality analysis, required under Article 10 § 2 of the Convention? In particular, to what extent are the duties and responsibilities inherent in the applicant's profession relevant to his claim and the State's margin of appreciation in this field? Does the Court's case-law concerning the protection of journalistic sources have any bearing on the present case?

3. In dealing with the above issues, the parties are also requested to make submissions on the following points:

- Did the relevant domestic law meet the quality-of-law requirement under the Convention? Was the classification of information and data in electronic form as “goods” for the purpose of a customs inspection and sampling foreseeable and reasonable?

- Was the applicant subjected to a random and/or selective customs inspection? Did the applicable legislation allow inspection of all printed, electronic, audio or video materials with a view to detecting any content intended to promote fascism or social, racial, national or religious hatred? Did the mere presence of such materials (printed, electronic, audio or video materials) during a customs check suffice to justify an inspection? Was any reasonable suspicion required? Did the customs authorities enjoy unfettered discretion in ordering and carrying out a customs inspection and seizing “goods”, including for further examination?

- Was the applicant's case the subject of adversarial proceedings before an independent body competent to review the reasons for the decision and the relevant evidence? Was the applicant able to challenge the executive's assertion that national security or another legitimate public interest was at stake?

4. Did the applicant have at his disposal an effective domestic remedy for his Convention complaints, as required by Article 13 of the Convention?

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