European Court of Human Rights: Ivashchenko v. Russia

IRIS 2018-4:1/3

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On 13 February 2018, the European Court of Human Rights (ECtHR) issued its judgment in Ivashchenko v. Russia concerning the inspection and copying of a journalist's laptop and storage devices by customs officials. The applicant in the case was a photojournalist with a photo agency, Photographer.ru. In early August 2009, the applicant travelled to Abkhazia to prepare a report (to be illustrated by photographs) on "the life of this unrecognised republic". On 27 August 2009, the applicant returned to Russia, and on arrival at the Adler customs checkpoint, presented his Russian passport, press card and a customs declaration, stating that he had electronic information devices (a laptop and flash memory cards) in his luggage. The applicant was examined by a customs officer to verify the information contained in the applicant's customs declaration by way of an "inspection procedure". After finding in the directory of the laptop an electronic folder entitled "Extremism (for RR)", which contained a number of photographs, the customs officer decided to copy it and other folders from the laptop for further examination by an expert, who could determine whether they contained any information of an extremist nature. 34 folders (containing some 480 subfolders with over 16,300 electronic files) were copied. The laptop remained with a customs officer for several hours. On 9 September 2009 the applicant was informed that a report had been commissioned from a criminal forensics expert to determine whether the data copied from his laptop contained any prohibited "extremist" content. In December 2009 a report concluded that the data contained no extremist material. According to the applicant, the DVDs with his data were handed back to him in November 2011.

The applicant applied for judicial review, challenging the actions of the customs officials. In January 2010, the Prikubanskiy District Court of Krasnodar dismissed his application, finding that the data from the applicant's laptop had been copied for the purposes of examination, in compliance with Presidential Decree no. 310 on combating fascism and political extremism. On appeal, the Krasnodar Regional Court upheld the judgment, holding that the customs inspection had been authorised and carried out according to official customs procedures and that the data had been copied in line with Russian Presidential Decree no. 310 of 23 March 1995.

The applicant made an application to the ECtHR, claiming a violation of his right to private life under Article 8 of the European Convention on Human Rights (ECHR). Firstly, the Court held that there had been an interference with the

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applicant's right to private life, noting the search of his laptop (which had lasted several hours, allegedly without any reasonable suspicion of any offence or unlawful conduct), the copying of his personal and professional data (followed by their being forwarded for a specialist assessment), and the retention of his data for some two years. In the Court's view, those actions had gone beyond what could be perceived as procedures that were "routine", relatively non-invasive and for which consent was usually given. The Court then examined whether the interference had been in accordance with the law, and in particular whether Russian law provided protection against arbitrariness and adequate safeguards. Firstly, the Court held that it did not appear that the comprehensive measure used in the present case had to be based on some notion of a reasonable suspicion that someone making a customs declaration has committed an offence - namely one arising from the anti-extremist legislation pertinent to the present case. The apparent lack of any need for reasonable suspicion relating to an offence was exacerbated by the fact that the domestic authorities (ultimately the courts at the judicial review stage) had not attempted to define and apply such notions as "propaganda for fascism", "social, racial, ethnic or religious enmity" to any of the ascertained facts. Secondly, the Court held that the domestic authorities, including the courts, had not been required to give, and had not given, relevant and sufficient reasons for justifying the "interference" in the present case. In particular, it had not been considered pertinent by the domestic authorities to ascertain whether the impugned measures had been taken in pursuance of any actual legitimate aim (for instance the ones referred to by the Government). It was merely assumed that the identification of possible "extremist material" was required by the 1995 Presidential decree. It was not considered relevant, at any stage and in any manner, that the applicant was carrying journalistic material. The Court concluded that Russian Government had not convincingly demonstrated that the relevant legislation and practice afforded adequate and effective safeguards against abuse in a situation of applying the sampling procedure in respect of electronic data contained in an electronic device. Thus, they were not "in accordance with the law", and violated Article 8 ECHR (the Court also concluded that having regard to this finding, it was not necessary to examine the complaint under Article 10 ECHR). The Court awarded the applicant EUR 3,000 in damages, and EUR 1,700 for costs.

Judgment by the European Court of Human Rights, Third Section, case of Ivashchenko v. Russia, Application no. 61064/10, 13 February 2018

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