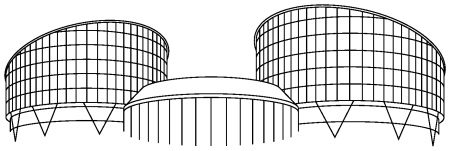

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF KIRAKOSYAN v. ARMENIA (No. 2)

(Application no. 24723/05)

JUDGMENT

STRASBOURG

4 February 2016

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Kirakosyan v. Armenia (No. 2),

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

Mirjana Lazarova Trajkovska, *President,*
Ledi Bianku,
Kristina Pardalos,
Aleš Pejchal,
Robert Spano,
Armen Harutyunyan,
Pauliine Koskelo, *judges,*
and André Wampach, *Deputy Section Registrar,*

Having deliberated in private on 12 January 2016,

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

PROCEDURE

1. The case originated in an application (no. 24723/05) against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Armenian national, Mr Lavrenti Kirakosyan ("the applicant"), on 14 January 2005.

2. The applicant was represented by Mr M. Muller, Mr T. Otty and Mr K. Yildiz, lawyers of the Kurdish Human Rights Project (KHRP) based in London, Mr T. Ter-Yesayan, a lawyer practising in Yerevan, and Mr A. Ghazaryan, a non-practising lawyer. The Armenian Government ("the Government") were represented by their Agent, Mr G. Kostanyan, Representative of the Republic of Armenia at the European Court of Human Rights.

3. The applicant alleged, in particular, that his house was subjected to an unlawful search, both as regards the grounds and the manner of execution, and that its results were used as evidence in the ensuing criminal proceedings against him.

4. On 20 January 2009 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1960 and lives in the village of Karakert, Armenia.

A. The applicant's administrative detention

6. The applicant has been a member of an opposition political party, the National Democratic Union, since 1995. Since 1997 he has headed the party's local offices in the Baghramyan area.

7. In March and April 2004 a series of protest rallies were organised in Yerevan by the opposition parties who voiced their criticism of the alleged irregularities which had taken place during the presidential election of February-March 2003 and challenged the legitimacy of the re-elected President. It appears that the applicant participated in these rallies. He alleged that the authorities retaliated by arresting, harassing and searching opposition supporters.

8. On 10 April 2004 at 5.10 p.m. the applicant was arrested and taken to a police station where an administrative case was initiated against him for disobeying the lawful orders of police officers.

9. On the same date the Armavir Regional Court sentenced the applicant to ten days' administrative detention.

10. The running of the ten-day administrative sentence was to be calculated from 10 April 2004 at 5.10 p.m. The applicant was taken to a detention facility in the town of Ejmiatsin where he served his sentence.

B. The search of the applicant's home

11. On 20 April 2004 at an unspecified hour, the Armavir Regional Court examined and granted an investigator's motion, which had apparently been lodged on the same date, seeking to have the applicant's home searched. The judicial warrant stated:

> "The investigating authority has found it substantiated that on 27 March 2004 at around 12 noon the residents of the village of Myasnikyan of the Armavir Region [K.K. and B.K.] inflicted violence dangerous for health in the pasture located in the administrative area of Lernagogh village in the Armavir Region on representatives of the authorities performing their official duties, [namely] the head of Lernagogh village [S.M.] and head of staff of the Village Council [A.M.]. According to operative information, [B.K. and K.K.] had a weapon during the incident[. F]or the purpose of hiding the mentioned weapon, they gave it to the resident of Karakert village, member of the Union of Yezidis of the Baghramyan area, [the applicant], who may have hidden the mentioned weapon in one of his homes in Karakert village.

> On 27 March 2004 the Armavir Regional Prosecutor's Office instituted criminal proceedings no. 65200604 ... concerning this fact.
>
> In view of the fact that the facts of the criminal case provide sufficient grounds to believe that an illegally possessed weapon and ammunition may be found in [the applicant's] home situated in Karakert village in the Armavir Region, as well as other objects and valuables having significance for the criminal case, the court therefore finds that the motion is well-founded and must be granted."

12. It was stated in the warrant that it could be contested within 15 days before the Criminal and Military Court of Appeal.

13. The applicant alleged that on that day, several hours before the expiry of his administrative sentence, he was taken from the Ejmiatsin detention facility to the Baghramyan Police Department. From there he was escorted home by at least ten police officers.

14. According to the search record, the search was conducted from 5.10 p.m. to 6.55 p.m. by seven police officers of the Baghramyan Police Department, E.M., B.M., M.G., A.Ge., S.M., G.E. and A.Ga. Two neighbours, G.G. and M.S., were asked by the head of the police team to participate in the search as attesting witnesses. The applicant was asked to surrender the illegal weapon allegedly hidden in his house. The applicant stated that he had no illegal objects at home. As a result of the search, a plastic bag containing a cannabis-like herb was found in the boiler situated in the hallway. The applicant stated that he did not know what it was and who it belonged to. It was mentioned at the end of the record that the applicant had refused to sign the record without providing any reasons.

15. According to the applicant and the statements of the two attesting witnesses which were appended to the application form, the search was conducted in the following manner. Upon his return home, accompanied by police officers, the applicant found his pregnant wife in a critical condition, apparently suffering a miscarriage, and his one-year-old son crying beside her. On seeing him, the applicant's wife fainted. A doctor was called and a number of female neighbours came to help. At that point the head of the police team informed the applicant that his house was to be searched, briefly showing him the relevant search warrant. The applicant alleged that attesting witnesses G.G. and M.S. were asked to participate only after the search had already begun. It appears that G.G. was a war veteran who had suffered concussion and was seriously disabled, while M.S. was seventy-four years old. The search was conducted by more than ten police officers who also used two specially trained dogs. Having searched the house and not found anything, the police officers started searching the yard and the adjacent buildings. The applicant alleged that during the search of the outside premises, the front door of his house was left open and people, including police officers, were coming and going. Moreover, a group of police officers was standing by the front door while the others continued the search. Having found nothing outside the house, the head of the police team

announced that they would again search inside the house, to which attesting witness G.G. objected. Following the additional search the police officers found the above-mentioned plastic bag. The attesting witnesses submitted that their objections were not recorded. Moreover, they were persuaded and bullied by the police officers to sign the search record.

16. The applicant alleged that he was taken back to the police station where the chief of police promised that, if he renounced his political convictions and resigned from the party, no further action would be taken in relation to the cannabis. The applicant refused to make such a deal.

17. The applicant further alleged that he was kept at the police station overnight. There he was given a meal, including a hamburger. About 15 to 20 minutes after having eaten the meal he felt sick, started vomiting and lost consciousness. An ambulance was called and some injections were administered. According to the applicant, his meal had been laced with a drug.

C. Criminal proceedings against the applicant

18. On 21 April 2004 criminal proceedings were instituted against the applicant under Article 268 § 2 of the Criminal Code on account of illegal drug possession. On the same date at 11.18 p.m. the applicant was formally arrested.

19. On the same date the investigator decided to subject the applicant to a forensic toxicological examination. The applicant alleged that he did not receive a copy of this decision. He was taken to the Republican Centre for Narcotics where a urine sample was taken.

20. It appears that on the same date, a lawyer was engaged in the case. It further appears that the applicant was questioned and denied the drug possession allegations.

21. On an unspecified date the plastic bag and the herbal substance, weighing approximately 59 grams, were examined by a forensic expert and the substance was found to be cannabis.

22. On 23 April 2004 the applicant was formally charged with illegal drug possession and detained by a court order.

23. On the same date, a toxicological expert opinion was produced, according to which the applicant’s urine sample contained traces indicating cannabis consumption.

24. On the same date the lawyer filed a motion with the Armavir Regional Prosecutor seeking to stop the prosecution on the ground that, *inter alia*, the search had been conducted with numerous procedural violations. A similar complaint was lodged on 27 April 2004.

25. According to the applicant, on an unspecified date his lawyer requested a further examination of the cannabis and the plastic bag by a forensic expert. This request was rejected. He further alleged that, during

the investigation, the police officers put pressure on the two attesting witnesses not to attend confrontations which had apparently been requested by the applicant.

26. On 7 May 2004 the applicant's lawyer applied to the Armavir Regional Prosecutor, challenging the investigator's impartiality and complaining in detail about the unlawful manner in which the search had been executed, alleging, *inter alia*, that the bag containing cannabis had been planted by the police officers conducting the search.

27. On 9 June 2004 the applicant's lawyer complained to the Armavir Regional Prosecutor that the search warrant had lacked proper grounds and that the search had been conducted with numerous procedural violations. The lawyer argued that the investigator had failed to obtain any evidence when investigating his allegations of irregularities. Such evidence could have been obtained by questioning the applicant's neighbours and the doctor who had provided first aid to his wife, who had been present during the search, and by holding confrontations between the applicant and the attesting witnesses.

28. On an unspecified date the applicant's criminal case was brought before the Armavir Regional Court.

29. It appears that, in the proceedings before the Regional Court, the applicant's lawyer filed a motion seeking to exclude the results of the search as unlawfully obtained evidence. It further appears that the Regional Court did not take any decision on this motion.

30. Attesting witnesses M.S. and G.G. both testified before the trial court. In reply to the questions put by the applicant's lawyer M.S. stated, *inter alia*, that he and G.G. were watching the police officers as much as they could while entering and going out of the rooms together with the police officers. When giving his account of the events G.G. stated among other things that he helped one of the police officers to reach the water boiler from which a plastic bag and a plate were taken out. He further stated that both the plastic bag and the plate were covered with dust. However, the plate was dustier compared to the plastic bag. Both M.S. and G.G. stated that they did not remember whether they were informed of their right to have the objections that they might have included in the search record and that the applicant refused to sign it stating that the discovered bag did not belong to him.

31. On 22 June 2004 the Armavir Regional Court found the applicant guilty as charged and sentenced him to one and a half years' imprisonment. In doing so, the Regional Court relied on, *inter alia*, the witness testimony of the police officers who had conducted the search, including E.M., A.Gh., M.G., M.M., L.F. and A.Ga., and of the two attesting witnesses, as well as the results of the analysis of the applicant's urine sample.

32. On 29 June 2004 the applicant's lawyer lodged an appeal. The lawyer argued, *inter alia*, that the search of the applicant's home had been

conducted with a number of procedural violations and therefore its results could not be used as evidence. In particular, he claimed that the search warrant was not presented to the applicant to get acquainted with it, no signature was obtained from him in this respect and that his objections were not included into the record of the search. He further argued that the search had been authorised by the court on the basis of fabricated police materials and therefore lacked any valid grounds. He also submitted that, according to the Code of Criminal Procedure, the Regional Court should not have relied on the testimony of the police officers, since they had been summoned and examined solely in connection with the performance of their procedural duties and not in connection with the irregularities alleged by the applicant. Furthermore, the Regional Court had failed to take into account the submissions of the attesting witnesses which confirmed the applicant's allegations of irregularities.

33. On 10 August 2004 the Criminal and Military Court of Appeal upheld the applicant's conviction finding, *inter alia*, that no significant procedural violations had taken place during the investigation of the case. The Court of Appeal relied on the same evidence, except for the testimony of the police officers.

34. No appeal was lodged against this judgment within the ten-day statutory time-limit, so it became final.

35. On 6 September 2004 the applicant was released on parole.

36. On 15 November 2004 an advocate holding a special licence lodged an appeal on points of law on behalf of the applicant against the final judgment of the Court of Appeal. He requested that the judgment of the Court of Appeal be quashed and the case be remitted for further investigation due to the procedural violations taken place during the investigation, including the execution of the search.

37. On 10 December 2004 the Court of Cassation examined the appeal on the merits and decided to dismiss it finding that, *inter alia*, no significant violations of the procedural law had taken place which required the case being remitted for further investigation.

II. RELEVANT DOMESTIC LAW

The Code of Criminal Procedure (in force from 12 January 1999)

38. The relevant provisions of the Code, as in force at the material time, provide:

Article 105: Materials inadmissible as evidence

"1. The [following] materials cannot constitute the basis for charges and be used as evidence in criminal proceedings: ... (5) [materials obtained] in violation of the procedure for carrying out an investigative or [any] other procedural measure..."

Article 106: Establishment of inadmissibility of evidence

"1. The inadmissibility of factual data as evidence, and the possibility of their limited use in the proceedings, shall be established by the authority dealing with the case of its own motion or upon the request of a party.

2. The obligation to substantiate the admissibility of evidence is laid on the party having obtained the evidence. If the requirements of this Code were upheld when the evidence was obtained, the obligation to substantiate its inadmissibility lies with the party contesting its admissibility."

Article 225: Grounds for conducting a search

"1. The investigator, having sufficient grounds to believe that on some premises or in some other place or in somebody's possession there are instruments of crime, objects and valuables acquired by criminal means, as well as other objects and documents which may be important for the case, shall conduct a search in order to find and take such objects.

...

3. The search of a home is conducted only with a judicial warrant."

Article 227: Persons present during a search or a seizure

"1. A search or a seizure shall be conducted in the presence of attesting witnesses.

2. If necessary, an interpreter and an expert shall take part in the search or the seizure.

3. The presence of the person and an adult family member, in whose presence the search or the seizure is being conducted, must be ensured when conducting the search or the seizure. If their presence is impossible, a representative of the apartment maintenance office or the local authority shall be invited.

...

5. The persons whose premises are being searched or whose items are being seized, as well as the attesting witnesses, specialists, interpreters, representatives and lawyers are entitled to be present during all the actions of the investigator and to make statements which must be entered into the record."

Article 228: Procedure for conducting a search or a seizure

1. The investigator shall be entitled to enter any dwellings or other premises on the basis of the search or seizure warrant.

2. Before starting the search or the seizure the investigator shall be obliged to present the search warrant to the person whose premises are being searched or whose items are being seized. This should be confirmed by his signature.

3. When conducting a search, the investigator or the specialist can use technical tools. [This fact] should be indicated in the search record.

4. The investigator shall be obliged to take measures to prevent the fact of a search or a seizure, including their results and the personal circumstances of the person whose premises are being searched, from being made public.

5. The investigator shall be entitled to prohibit the persons present at the premises, which are being searched or where a seizure is being conducted, from leaving or from communicating with each other and others before the investigative measure is over.

...

7. When conducting a search, after presenting and making public the search warrant, the investigator shall advise the surrender of the objects and documents subject to seizure or of a person in hiding. If such items are surrendered voluntarily, a relevant entry shall be made in the record. If the sought objects, documents or a person in hiding are not surrendered or not fully surrendered, [then] the search shall be conducted.

8. All objects and documents taken shall be presented to the participants in the investigative activity, described in detail in the record and, if necessary, sealed by the investigator's seal.

9. When conducting a search or a seizure the investigator shall be entitled to open closed buildings and storage, if their owner refuses to open them voluntarily...”

Article 230: The record of a search or a seizure

“1. When the search or the seizure is over, the investigator shall draw up appropriate records which must indicate the place where the investigative measure was carried out, the time, whether the sought items and persons were surrendered voluntarily, the name, surname and the position of the person who conducted the search, the names, surnames and addresses of the attesting witnesses, as well as the names, surnames, the positions and the legal status of other participants in the search.

2. All the seized objects must be indicated in the record of the investigative measure, with an accurate indication of their quantity, size, weight, individual features and other peculiarities.

3. If attempts were made to eliminate or hide the disclosed objects or documents during the investigative measure, this fact shall be indicated in the record.

4. The investigator shall be obliged to familiarise all the participants in the investigative measure with the record. [The participants], having familiarised themselves with it, shall sign the record and shall be entitled to demand that their comments are incorporated in it.”

Article 231: Mandatory service of a copy of the search or the seizure record

“1. A copy of the search or the seizure record shall be served against a receipt on the person in whose premises the investigative measure was carried out or on his adult family members or, if none of them is present, on the representative of the apartment maintenance office or the local authority in whose area the investigative measure was carried out...”

Article 278: Sphere of judicial supervision

“1. The courts shall examine motions seeking to have investigative and operative-search measures carried out...

...

3. The judicial warrants issued in accordance with the first paragraph of this article can be reviewed by a higher court on the basis of an appeal filed by the prosecutor, the

authority which has filed the motion or the persons or their representatives whose interests have been affected."

Article 289: Appeals against judicial warrants [authorising] the implementation of investigative and operative-search measures and the application of measures of judicial restraint and their review

"Appeals against judicial warrants [authorising] the implementation of investigative and operative-search measures and the application of measures of judicial restraint and their review shall be made in accordance with the rules contained in articles 287 and 288 of this Code, [which prescribe that appeals shall be lodged with the court of appeal]."

Article 290: Lodging an appeal against unlawful and groundless decisions and actions of the body of inquiry, the investigator, the prosecutor and the authority carrying out operative-search measures

"1. The suspect, the accused, the advocate, the victim, the participants in criminal proceedings and other persons whose rights and lawful interests have been violated by decisions and actions of the body of inquiry, the investigator, the prosecutor or the authority carrying out operative and investigative measures envisaged by this Code which are unlawful and groundless, can lodge a complaint against the unlawfulness and groundlessness of these decisions and actions with a court, if their complaint has not been granted by a prosecutor.

...

3. The complaint can be lodged with the court situated in the same district as the authority dealing with the case within one month from the date of being informed about its dismissal or, if no reply has been received, within one month after the expiry of one month from the date of lodging the complaint.

4. The complaint shall be examined by a single judge within ten days from the date of its receipt, the applicant and the authority dealing with the case being informed of this. Failure of the applicant or [the representative of] the authority dealing with the case to appear shall not prevent the examination of the case, but the judge may require the presence of the above-mentioned persons. The authority dealing with the case shall be obliged to present to the court materials concerning the complaint. [The representative of] the authority dealing with the case and the applicant shall be entitled to give explanations.

5. If the complaint is found to be well-founded, the judge shall decide to order the body of inquiry to remedy the violation of the person's rights and freedoms. If the contested actions are found to be lawful and the person's rights or freedoms not violated, the court shall decide to dismiss the complaint. A copy of the judge's decision shall be sent to the applicant and to the authority dealing with the case."

III. RELEVANT DOMESTIC REPORTS

Annual Report: Activities of the Republic of Armenia's Human Rights Defender, and on Violations of Human Rights and Fundamental Freedoms in Armenia During 2004

39. Chapter 3.10 of this Report, which concerned the issue of inadmissibility of unlawfully obtained evidence, included an overview of the applicant's particular case. The relevant extract provides:

> "In the famous case of Lavrenti [Kirakosyan], for instance, the [defence] moved to declare inadmissible the narcotic substance that was used as evidence. The motion was based on the evidence obtained by an apartment search that failed to comply with the procedural requirements, namely as to the presence of a sufficient number of search witnesses and the searching officers not being visible to the two search witnesses who were present.
>
> The court delayed the review of this motion; the court never came back to this issue.
>
> This practice contradicts the letter and spirit of the law, because the very idea of evidence inadmissibility implies that it should result in the charges being dropped, or the ordering of a different preventive measure, or the ordering of an additional investigation, or the termination of court proceedings."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

40. The applicant complained that the search warrant and the manner of its execution violated his rights guaranteed by Article 8 of the Convention, which reads as follows:

> "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."

A. Admissibility

The Government's objection as to non-exhaustion and failure to comply with the six-month rule

(a) The parties' submissions

(i) The Government

41. The Government submitted that the applicant had failed to exhaust the domestic remedies and to lodge his complaints within six months from the date of the final decision as required by Article 35 § 1 of the Convention.

42. The Government claimed that the applicant had failed to lodge an appeal against the search warrant issued by the Armavir Regional Court on 20 April 2004. He had merely complained about the grounds of the search warrant and its manner of execution before the courts determining the criminal charge against him. Also, the applicant had failed to institute separate proceedings under Article 290 of the Code of Criminal Procedure (CCP) against the search warrant and its manner of execution. Had the applicant lodged an appeal against the search warrant or disputed its legality in separate proceedings, it could have been possible for the courts to order the body of inquiry, in the present case the police, to remedy the violations of the applicant's rights if such were found to have taken place. In the circumstances where the applicant had failed to challenge the search warrant before the Court of Appeal and the criminal proceedings against the applicant were not the proper avenue for determination of the lawfulness of the warrant or its manner of execution, the six-month time-limit should be considered to have started to run from 20 April 2004, the date when the search warrant was issued.

(ii) The applicant

43. The applicant submitted that recourse to the right of appeal against the search warrant or instituting separate proceedings against it could not have afforded him an effective remedy. Contesting the validity of the warrant would have been redundant after the search had been undertaken, and could not have addressed the manner of its execution. The applicant contested the legality of the search warrant and its execution before the domestic courts determining the criminal charge against him and thereby exhausted the domestic remedies available to him since, in his view, this avenue was capable of securing him declaratory relief in respect of the alleged violations. Correspondingly, the decision of the Court of Cassation of 10 December 2004, the final decision in the criminal proceedings against him, was the starting point for the running of the six-month period.

(b) The Court's assessment

44. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges those seeking to bring a case against the State before an international judicial body to use first the remedies provided by the national legal system, thus dispensing States from answering before an international body for their acts before they have had an opportunity to put matters rights through their own legal systems. In order to comply with the rule, normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged (see, among other authorities, *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, §§ 70 and 71, 25 March 2014; *Assenov and Others v. Bulgaria*, 28 October 1998, § 85, *Reports of Judgments and Decisions* 1998-VIII).

45. The only remedies to be exhausted are those which are effective. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. Once this burden of proof has been satisfied, it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that special circumstances existed which absolved him or her from this requirement (see *Kalashnikov v. Russia* (dec.), no. 47095/99, ECHR 2001-XI (extracts) and *Melnik v. Ukraine*, no. 72286/01, § 67, 28 March 2006).

46. The Court further points out that if no remedies are available or if they are judged to be ineffective, the six-month time-limit contained in Article 35 § 1 of the Convention in principle runs from the date of the act complained of (see, *Bayram and Yıldırım v. Turkey* (dec.), no. 38587/97, ECHR 2002-III). Thus, the time-limit only starts to run from the final decision resulting from the exhaustion of remedies which are adequate and effective to provide redress in respect of the matter complained of. In this respect the exhaustion requirement and the six-month rule are interconnected.

47. In the present case, the search warrant was issued on 20 April 2004 by the Armavir Regional Court. Under Article 289 of the CCP judicial warrants authorising the implementation of investigative measures, searches being one type of them, are subject to review by the Court of Appeal. It appears that such appeals can only deal with the substance of the judicial warrant and not the manner of its execution. Although the search warrant prescribed a time-limit of fifteen days to lodge an appeal, no time-limits are prescribed by the relevant provisions of the CCP for lodging such appeals. The applicant did not lodge any appeals against the search warrant but

rather contested its legality and the manner of execution before the courts determining the criminal charge against him.

48. In the circumstances where the applicant's complaint under Article 8 concerns both the grounds of the search and the manner of its execution, the Court considers that the two aspects of the complaint should be distinguished for the purposes of exhaustion since different considerations come into play.

49. Concerning the grounds of the search warrant, the Court notes that the search was conducted on the day when the search warrant was issued. Moreover, the search was executed immediately after the applicant was taken to his house on the last day of his administrative detention, and there is no mention in the record of the search about the applicant having been acquainted with the warrant prior to the beginning of the search. This in itself raises doubts as to whether it would, in practice, have been feasible for the applicant to lodge any appeals to contest the grounds of the warrant. The Court notes, however, that despite the fact that the Government have not provided any examples of use, whether successful or not, of the remedy on which they rely, the Court of Appeal did have the competence to carry out further judicial review of the grounds of the search warrant. In any event, the Court is not willing to speculate on what the outcome of the appeal proceedings might have been and whether this remedy could indeed have been effective in the particular circumstances of the present case, since it remains to be established whether contesting the legality of the search warrant in the course of the judicial proceedings against the applicant was a proper avenue of exhaustion for this type of complaint. The Court notes in this regard that the domestic courts examining the applicant's case were called to determine the charge against him and not the lawfulness of the search warrant. The Court further observes that most of the applicant's complaints concerned the manner of execution of the search warrant and that, in any event, the courts examining the criminal case did not have the power to invalidate it. In these circumstances, the Court considers that it has not been established that raising the issue of the alleged invalidity of the grounds of the search warrant before the courts determining the criminal charge against the applicant was an effective remedy to exhaust. Accordingly, and in the circumstances where the applicant himself claims that recourse to the right of appeal was not an effective remedy, the six-month period in relation to the complaint concerning the grounds of the search warrant should be calculated from 20 April 2004, the date when the warrant was issued and executed. The application having been lodged with the Court on 14 January 2005, the applicant has not satisfied the requirements of Article 35 § 1 of the Convention in relation to this part of his complaint.

50. Turning to the manner of execution of the search warrant, the Court notes that, as indicated above, an appeal under Article 289 of the CCP could

not have applied to this issue. The Court further notes, however, that Article 290 of the CCP provides a possibility to lodge complaints with courts about unlawful actions of the body of inquiry or the investigator after having first unsuccessfully complained about such actions to a prosecutor. Under the same provision an application can be submitted to courts within two months from the date on which a complaint was lodged with the prosecutor and no reply has been received. It appears from the case file that the applicant did not lodge any complaints with the courts in this regard.

51. Thus, the applicant lodged complaints with the prosecutor concerning the manner of execution of the search warrant on 23 and 27 April, 7 May and 9 June 2004 (see paragraphs 24, 26 and 27 above) but no formal decisions appear to have been taken in relation to his complaints. The Court observes that the applicant's case was brought before the Armavir Regional Court in early June 2004 whereas the applicant had to apply to the courts within two months from the dates on which he had lodged his complaints with the prosecutor. The Court further observes that the issue of the manner of execution of the search warrant was closely and inextricably linked to the evaluation and admissibility of evidence against the applicant, including the results of the search. Therefore, it can be accepted that, having lodged a number of complaints at the close of the investigation and these having remained unanswered before the case was transferred to the trial court for examination on the merits, it was not unreasonable for the applicant to raise this issue before the trial court (see, *mutatis mutandis*, *Romanova v. Russia*, no. 23215/02, § 172, 11 October 2011). In such circumstances, and notwithstanding the fact that the Regional Court did not in any way address the applicant's arguments relating to the manner of execution of the search warrant, it cannot be considered that the applicant made use of an ineffective remedy by raising this issue before the courts determining the criminal charge against him. Accordingly, and in the specific circumstances of the present case, the applicant can be considered to have complied with his obligations under Article 35 § 1 of the Convention as regards his complaint concerning the manner of execution of the search warrant.

52. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

53. The applicant submitted that the search of his home was carried out with numerous procedural violations of domestic law. In particular, he was

not given adequate opportunity to peruse the search warrant, contrary to Article 228 of the CCP. The attesting witnesses, who were both of advanced years, were not present when the main house where the cannabis was found was re-searched and their comments were not noted in the search record, in breach of the requirements of Article 227 of the CCP. Lastly, the applicant was not present in all locations of the property being searched and the applicant's remarks were not entered into the search record as required by Article 230 of the CCP.

54. The Government acknowledged that the search of the applicant's home interfered with his right to respect for his private life. They submitted that it was justifiable under the second paragraph of Article 8 of the Convention as being necessary in a democratic society for the prevention of disorder or crime. The Government further submitted that the search warrant was executed in compliance with the procedural requirements set out in Articles 227, 228 and 230 of the CCP.

2. The Court's assessment

55. The Court notes that it is not in dispute that the search of the applicant's home by the police amounted to an interference with the applicant's right to respect for his private life under Article 8 § 1 of the Convention. The principal issue is whether this interference was justified under Article 8 § 2 of the Convention, notably whether it was "in accordance with the law" and "necessary in a democratic society", for one of the purposes enumerated in that paragraph.

56. With reference to its previous findings (paragraphs 49 and 51 above) the Court will only examine the execution of the search warrant.

57. The Court reiterates that the expression "in accordance with the law" requires, firstly, that the impugned measure should have some basis in domestic law; secondly, it refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and that it is compatible with the rule of law. It also requires that the measure under examination comply with the requirements laid down by the domestic law providing for the interference (see, *Perry v. the United Kingdom*, no. 63737/00, § 45, ECHR 2003-IX (extracts).

58. The Court notes that Articles 227, 228, 230 and 231 of the CCP lay down the procedural rules for conducting searches and seizures. There was, therefore, a legal basis for the interference in domestic law. In fact, the applicant does not contest that the measures complained of had a basis in domestic law but rather complains that the implementation of the search warrant was in violation of the procedural law. The Court observes that the applicant raised his complaints concerning the procedural irregularities during the execution of the search before the domestic courts which, although without providing detailed reasoning, came to the conclusion that

the procedural violations pointed out by the applicant could not be considered as significant rendering the search unlawful under the domestic law (see paragraphs 33 and 37 above). The Court is unable to arrive at a different conclusion. It recalls that the Court's power to review compliance with domestic law is limited, it being in the first place for the national authorities, notably the courts, to interpret and apply that law (see, among many other authorities, *Barthold v. Germany*, 25 March 1985, § 48, Series A no. 90). The Court consequently finds that the matters relied on by the applicant do not suffice to establish that the interference was not in conformity with the Armenian law. It will rather address these matters below in its examination of the necessity of the interference. The Court finally notes that no issue arises as to the accessibility or foreseeability of the relevant legal provisions which moreover have not been questioned by the applicant.

59. The Court notes that the applicant's house was searched since, based on intelligence information, it was believed that a weapon could be hidden there by suspects in another set of criminal proceedings. Accordingly, the Court finds that the search of the applicant's home pursued an aim that was consistent with the Convention, namely the "prevention of disorder or crime". It remains to be examined whether the manner of the implementation of the search was proportionate to this legitimate aim.

60. The applicant argued that the implementation of the search was flawed due to the following factors:

a) he had no adequate opportunity to peruse the search warrant;

b) the attesting witnesses, who were both of advanced years, were not present when the main house where the cannabis was found was re-searched;

c) his remarks and the comments made by the attesting witnesses were not noted in the search record;

d) he was not present in all locations of the property that was being searched.

61. With regard to factor (a), the Court notes that Article 228 of the CCP requires that the search warrant be presented to the person whose premises are to be searched, which should be confirmed by a signature. The applicant did not sign the warrant, but it appears from the search record that he refused to sign it without giving reasons (see paragraph 14 above).

62. The Court observes with respect to factor (b) that according to Article 227 (1) of the CCP, a search should be conducted in the presence of attesting witnesses. The Court notes that the applicant complained that the search of his home was monitored by two neighbours one of whom was of advanced age and the other was a war veteran who had suffered concussion. The Court notes, however, that the law does not specify who can act as an attesting witness and that it does not appear that the applicant objected to G.G. and M.S. participating in the search operation on the ground that they

were not fit to effectively fulfil their duties as attesting witnesses. Moreover, nothing suggests that the advanced age of M.S. or G.G.'s health condition made them incapable of identifying any episodes of possible abuse by the police officers. As for the allegation that the attesting witnesses were not present in the house when the impugned evidence was discovered, this fact was not established during the proceedings against the applicant. On the contrary, both M.S. and G.G. stated before the trial court that they had personally witnessed the discovery of the plastic bag from the water boiler in the hallway (see paragraph 30 above).

63. As to factor (c), the Court observes that, as far as the attesting witnesses are concerned, both stated before the trial court that they could not recall whether they had been informed by the police officers conducting the search that they were entitled to have their objections, if any, included in the search record (see paragraph 30 above). They did not, however, state that they had any objections which were not recorded. As far as the applicant is concerned, he claimed that he had protested his ignorance of the plastic bag which was discovered, and stated that it had been planted by the police. The Court notes that G.G. confirmed before the trial court that the applicant had indeed made such a statement (ibid.). At the same time the Court observes that although the search record mentioned that the applicant did not sign it without explaining the reasons for his refusal, nevertheless the applicant's statement that he had had no knowledge of the discovered items was recorded therein (see paragraph 14 above). It cannot be excluded, however, that the applicant might have had other objections that were not reflected in the search record which fact remains unknown to the Court.

64. Lastly, as for factor (d), the applicant did not specifically raise this issue during the proceedings against him. In any event, as noted above, M.S. and G.G. confirmed before the trial court that they had witnessed the discovery of the plastic bag from the boiler in the hallway of the applicant's house (see paragraph 62 above).

65. Referring to its observations in the preceding four paragraphs, the Court notes that the applicant may have had only limited opportunity to peruse the search warrant, and his objections possibly were not reflected with complete accuracy in the record of the search. These factors, however, are not in its opinion of sufficient weight to warrant a finding of disproportionality.

66. In the light of the above, the Court is of the opinion that the execution of the order cannot, in the circumstances of the case, be regarded as disproportionate to the legitimate aim pursued.

67. In conclusion, no breach of Article 8 has been established in the circumstances of the present case.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

68. The applicant complained that he was convicted on the basis of evidence obtained as a result of an illegal search of his house. He relied on Article 6 § 1 of the Convention, which, in so far as relevant, provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

Admissibility

1. The parties' submissions

69. The applicant maintained that his conviction had been based on illegally obtained evidence and that the trial court had failed to address his application to have the evidence ruled inadmissible.

70. The Government submitted that the admission as evidence of the results of the search of the applicant's home did not impair the fairness of his trial.

2. The Court's assessment

71. The Court reiterates that its duty, according to Article 19 of the Convention, is to ensure observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law (see *Schenk v. Switzerland*, 12 July 1988, §§ 45-46, Series A no. 140 and *Teixeira de Castro v. Portugal*, 9 June 1998, § 34, *Reports of Judgments and Decisions* 1998-IV).

72. It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where violation of another Convention right is concerned, the nature of the violation found (see, *inter alia*, *Bykov v. Russia* [GC], no. 4378/02, § 89, 10 March 2009; *Jalloh v. Germany* [GC], no. 54810/00, §§ 94-95, ECHR 2006-IX; *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V and *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX).

73. As regards the examination of the nature of the Convention violation found, the Court observes that notably in the cases of *Khan* (cited above, §§ 25-28) and *P.G. and J.H.* (cited above, §§ 37-38) it has found the use of covert listening devices to be in breach of Article 8 since recourse to such devices lacked a legal basis in domestic law and the interferences with those applicants' right to respect for private life were not "in accordance with the law". Nonetheless, the admission in evidence of information obtained thereby did not in the circumstances of the cases conflict with the requirements of fairness guaranteed by Article 6 § 1 (see, *Jalloh*, cited above, § 98).

74. The Court further observes that the use at trial of material obtained without a proper legal basis or through unlawful means will not generally offend the standard of fairness imposed by Article 6 § 1 where proper procedural safeguards are in place and the nature and source of the material is not tainted, for example, by any oppression, coercion or entrapment which would render reliance on it unfair in the determination of a criminal charge. The obtaining of such information is rather a matter which calls into play the Contracting State's responsibility under Article 8 to secure the right to respect for private life in due form (see *Chalkley v. the United Kingdom* (dec.), no. 63831/00, 26 September 2002). This approach was recently reaffirmed by the Grand Chamber in *Bykov* (cited above, §§ 94-105).

75. Turning to the circumstances of the present case, the Court notes that the cannabis was found at the applicant's home as a result of a search conducted pursuant to a judicial warrant. The Court also notes that procedural violations of the domestic law took place during the search.

76. The Court further notes that, although other evidence such as the results of the examination of the applicant's urine sample and expert conclusions were cited in the trial court's judgment, the contested evidence was in effect the only evidence against the applicant in relation to the charge of drug possession. The Court notes, however, that the relevance of the existence of evidence other than the contested matter depends on the circumstances of the case (see, *Khan*, cited above, § 37).

77. It is true that, strikingly, the domestic courts failed to make a detailed assessment of the applicant's allegations of unlawful conduct of the search – a fact which was also pointed out by the Ombudsman (see paragraph 39 above). The Court notes, however, that the applicant had ample opportunity to examine the attesting witnesses, G.G. and M.S., who were both present at the trial but maintained their initial statements that they had personally witnessed the discovery of cannabis during the search. Although the applicant submitted statements by the attesting witnesses that they were persuaded and bullied by the police officers to sign the search record (see paragraph 15 above), these allegations were raised for the first time before the Court. The attesting witnesses did not make any such statements before the trial court. In such circumstances, and in the absence

of any strong evidence to the contrary, the Court cannot find that the proceedings against the applicant fell short of the requirements of Article 6 of the Convention due to the use of the impugned evidence and the resultant findings.

78. Lastly, the Court cannot overlook the nature and scope of the provisions of domestic law which were breached (see, *mutatis mutandis*, *Parris v. Cyprus* (dec.), no. 56354/00, 4 July 2002) and the fact that the contested evidence was not obtained through methods of coercion or oppression (see, *a contrario*, *Jalloh*, cited above, §§ 103-108).

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

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

80. The applicant further raised a number of complaints under Articles 3, 5, 6, 10, 11, 13 and 14 of the Convention and Article 2 of Protocol No. 7.

81. Having regard to all the material in its possession, and in so far as these complaints fall within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint under Article 8 as regards the manner of execution of the search warrant admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 8 of the Convention.

Done in English, and notified in writing on 4 February 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

André Wampach
Deputy Registrar

Mirjana Lazarova Trajkovska
President