

#25: Taking notice of opinions

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An infringement to your private life is easily made by the authorities, especially in criminal cases. Whether it is a telephone tap or a house search, both qualify in principle as an infringement to your right to privacy. This can only be qualified as rightful when this interference is in accordance with the law. It has to have a legitimate aim and it has to be necessary in a democratic society. A lot of jurisprudence on these criteria has been produced over the years. Two years ago we addressed this topic in [Lawlunch #01](#). A fairly recent case – [Dragos Ioan Rusu v. Romania](#) – gives reason to address this topic again, especially the relationship between the right to privacy of article 8 of the European Convention for Human Rights (ECHR) and the right to a fair trial of article 6 (1) ECHR.

The case is as follows: In January 2005 a post office in Bacău informed the police about envelopes containing suspicious items. The police examined the envelopes and found that they contained Diazepam, a prohibited drug. The prosecuting authorities directly ordered the seizure of the envelopes under an urgent procedure provided for under Romanian domestic law. The envelopes were seized and Mr. Rusu, a pharmacist, was being suspected of trying to sell medicines while these were classified as drugs. It led to the conviction of Mr. Rusu for drugs trafficking. The domestic Court relied on different types of evidence including the seized envelopes. Mr. Rusu complained about the seizure of the envelopes during the procedure. The reason for his complaint was that the seizure of the envelopes was unlawful since the prosecutor ordered the urgent seizure of the envelopes without a Court authorization while there were no urgent reasons to follow this procedure.

The Court in Romania dismissed the complaints about the unlawfulness of the interception of his correspondence.

Relying on article 8 ECHR, more specifically the right to respect for (private) correspondence, Mr. Rusu stated that the interception of his correspondence had been unlawful. He also argued a breach of the right to a fair trial under article 6 (1) ECHR, as his conviction was based on unlawfully obtained evidence.

With regard to article 8 ECHR the European Court examined that there was no indication that urgency had been required to seize the envelopes. There was no explanation on why the prosecutor could not have used the normal procedure and ask for a Court authorization. Nor did the domestic courts examined whether or to what extent it had been urgent to enact the urgent procedure to seize the envelopes. Consequently, the use of the urgent procedure for confiscating Mr. Rusu's correspondence had not been adequately safeguarded and it had therefore not been "in accordance with the law". The Court therefor concluded of a breach of article 8 ECHR.

Unfortunately the Court came to a different conclusion with regard to article 6 ECHR and concludes that the right to a fair trial had not been breached. Even though the evidence against Mr. Rusu had been found unlawful under article 8 ECHR because of a lack of adequate safeguards for the confiscation procedure, the Court found that the criminal proceedings overall had been fair. The Court considers that the use of unlawfully obtained evidence by the domestic courts does not automatically entail a breach of the principle of fairness of proceedings. In particular since Mr. Rusu had the possibility to question the validity of the seized envelopes and the courts had addressed his objections. Nor was there anything in the case file which casted doubt on the reliability or accuracy of the evidence. Even Mr. Rusu himself had not contested the results of the expert evaluation of the envelopes or the assertion that he had sent the correspondence

abroad.

Thus we can conclude that it is in principle up to the domestic courts to decide whether they allow to use unlawfully obtained evidence as long as the evidence is reliable and accurate and the suspect had the ability to contest the evidence.

Nothing new under the sun. Also in The Netherlands a breach of your right to privacy is no reason to exclude evidence. In [Lawlunch #05](#) we explained how the system for compensation due to procedural errors works. In short: article 359a of the Dutch Criminal Procedural Code (DPC) provides the basis to decide what kind of implications a procedural error should have. The Court can decide that an irreparable procedural error during the criminal investigations of the proceedings should result in the inadmissibility of the prosecution, exclusion of evidence or a reduction of the sentence. To decide upon one of these consequences the Court has to weigh three factors. The first factor is the interest they violated 'rule' aims to protect. The second factor is the seriousness of the infringement and the third factor is what disadvantage the omission has for the suspect.

With respect to the last factor the Dutch Supreme Court decided that the interest of a defendant that the crime is not detected is not regarded as an interest of the defendant. Furthermore, an infringement of the right to privacy does not have to resort into any legal effect as long as the right to a fair trial is guaranteed. This means that the measure of exclusion of evidence is in principle only applied in case where an infringement of the right to a fair trial occurred. Thus also in the Netherlands a breach of article 8 ECHR does not mean that the unlawfully obtained evidence will be excluded.

In our opinion the partially concurring opinion to the judgement of [Dragos Ioan Rusu v. Romania](#) shows wisdom. The

opinion quotes several judges who criticize the attitude of the Court with regard to rejecting the argument that proceedings leading to a conviction on the basis of evidence collected in breach of article 8 ECHR were unfair and, that consequently, there had also been a violation of Article 6 (1) ECHR. For example:

In [Khan v. the United Kingdom](#), Judge Loucaides, in his partially concurring, partly dissenting opinion, stated the following:

“I cannot accept that a trial can be ‘fair’, as required by Article 6, if a person’s guilt for any offence is established through evidence obtained in breach of the human rights guaranteed by the Convention. It is my opinion that the term ‘fairness’, when examined in the context of the European Convention on Human Rights, implies observance of the rule of law and for that matter it presupposes respect of the human rights set out in the Convention.”

Although the partially concurring opinion does not claim that every breach of the Convention should lead to an infringement of article 6 ECHR, he does state that the Court should address clearly when it is permissible to use evidence obtained in breach of any other human right in the Convention, since it is of general importance for the effective protection of human rights and fundamental freedoms guaranteed by the Convention. For this purpose he conclude that a revisiting of the Court’s existing jurisprudence on the admissibility of illegally obtained evidence would be welcome. We could not agree more.

Do you have any questions about this subject or are you confronted with a related issue and would you like to discuss this with us? Please feel free to contact us via boezelman@hertoghsadvocaten.nl and boer@hertoghsadvocaten.nl.