THIRD SECTION

**CASE OF BORISOV v. RUSSIA**

*(Application no. 48105/17)*

JUDGMENT

STRASBOURG

9 July 2019

*This judgment is final but it may be subject to editorial revision.*

In the case of Borisov v. Russia,

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

 Georgios A. Serghides, *President,* Branko Lubarda, Erik Wennerström, *judges,*
and Fatoş Aracı, *Deputy Section Registrar,*

Having deliberated in private on 18 June 2019,

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

PROCEDURE

1.  The case originated in an application (no. 48105/17) 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 Aleksandr Aleksandrovich Borisov (“the applicant”), on 21 June 2017.

2.  The applicant was represented by Ms I. Khrunova, a lawyer practising in Kazan. The Russian Government (“the Government”) were represented by Mr M. Galperin, Representative of the Russian Federation to the European Court of Human Rights.

3.  On 15 November 2017 notice of the complaint concerning the alleged unfairness of the criminal proceedings against the applicant was given to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

THE CIRCUMSTANCES OF THE CASE

4.  The applicant was born in 1988 and is currently serving a prison sentence in the Tambov Region.

5.  In mid-February the Federal Drug Control Service was informed that the applicant had plans to sell amphetamines on 17 February 2016.

6.  On 16 February 2016 the Moscow City Court authorised a search of the applicant’s flat.

7.  On 17 February 2016 at approximately 8.15 p.m. the applicant and D. were stopped by the police inside a block of flats where D. lived. According to the applicant, the police officers took him up to the first floor where they searched him and found no illegal substances on him. During the search one of the police officers slipped something into the left pocket of the applicant’s jacket. Then the police officers handcuffed the applicant and put him and D. in the police car. At 9.36 p.m., when police officer G. and two lay witnesses arrived, the police officers took the applicant out of the car and searched him in the presence of the lay witnesses. G. checked the left pocket of the applicant’s jacket and took out two small white plastic bags. It was later established that the plastic bags contained amphetamines. The police also searched the flat where the applicant lived with his mother. They did not find any illegal substances. The applicant was then taken to a hospital where he underwent a medical examination which established that he had been under the influence of amphetamines and cannabis.

8.  On 18 February 2016 an investigator issued a record of the applicant’s arrest.

9.  Also on 18 February 2016 a forensic expert carried out an examination of the plastic bags allegedly found on the applicant and of the swabs taken from the applicant’s hands. The expert did not find the applicant’s fingerprints on the bags or any traces of illegal substances on the applicant’s hands.

10.  On 22 September 2016 the Timiryazevskiy District Court of Moscow found the applicant guilty of possession of illegal substances and sentenced him to four and a half years’ imprisonment. The court relied on statements made by police officers G. and M. who claimed that in February 2016 they had received information from their sources that the applicant and an unidentified person had been selling amphetamines that the applicant had been storing in his flat. They further submitted that on 17 February 2016, during a surveillance operation, they had detained the applicant. It had taken them approximately forty minutes to find lay witnesses so that they could conduct a search of the applicant, during which they had found amphetamines on him. The court also questioned P. and Ch. who had been the lay witnesses present during the search of the applicant. The court further relied on a record of the search, a report of 17 February 2016 of the medical examination of the applicant, and a forensic report identifying the substances contained in the plastic bags as amphetamines. As regards the applicant’s allegation that G. had planted the drugs on him, the court interpreted it as an attempt on the applicant’s part to avoid criminal liability.

11.  On 21 December 2016 the City Court upheld the applicant’s conviction on appeal.

THE LAW

I.  ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

12.  The applicant complained that the criminal proceedings against him had been unfair. In particular, he alleged that his conviction had been based on evidence planted by the police. He relied on Article 6 § 1 of the Convention, which reads, in so far as relevant, as follows:

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

13.  The Government contested that argument. In their opinion, the police had acted in strict compliance with the applicable legislation. During the trial, the applicant had been duly represented by counsel and had been able to present his account of the events of 17 February 2016 and challenge the evidence against him effectively. The trial court had based the applicant’s conviction on the statements of the police officers and lay witnesses and on forensic evidence. In addition, in relation to the applicant’s allegations that police officers M. and G. had planted drugs on him, the district investigative committee had conducted an inquiry which had not confirmed the applicant’s allegations.

14.  The applicant maintained his complaint. He pointed out that there was doubt as to the probative value of the evidence underlying his conviction. Following his arrest on 17 February 2016, he had spent over an hour under the control of the policemen and only after that had he been searched in the presence of lay witnesses. In his opinion, the Government had failed to submit any justification as to the delay in searching him. There was nothing in their submissions to suggest that it had not been possible to conduct a search immediately after the arrest. Nor had the applicant been provided with access to legal counsel. The police had not issued a record of his arrest on 17 February 2016, and the national courts had failed to consider his allegation that the drugs had been planted on him by the police officers.

A.  Admissibility

15.  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

16.  The Court reiterates that, according to Article 19 of the Convention, its duty is to ensure the 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 (see *Gäfgen v. Germany* [GC], no. 22978/05, § 162, ECHR 2010).

17.  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 the evidence was obtained, were fair (see, among other authorities, *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000‑V, and *Allan v. the United Kingdom*, no. 48539/99, § 42, ECHR 2002-IX).

18.  In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. In particular, it must be examined whether the applicant was given the opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (see *Khan*, §§ 35 and 37, and *Allan*, § 43, both cited above). Where the reliability of evidence is in dispute, the existence of fair procedures to examine the admissibility of the evidence takes on an even greater importance (see *Allan*, cited above, § 47, and *Bykov v. Russia* [GC], no. 4378/02, § 95, 10 March 2009).

19.  The Court reiterates that, even if the primary purpose of Article 6, as far as criminal proceedings are concerned, is to ensure a fair trial by a “tribunal” competent to determine “any criminal charge”, it does not follow that the Article has no application to pre-trial proceedings. Article 6 may therefore be relevant before a case is sent for trial if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (see *Salduz v. Turkey* [GC], no. 36391/02, § 50, ECHR 2008).

20.  Turning to the circumstances of the present case, the Court observes that the applicant’s conviction on charges of possession of illegal substances was based, predominantly, on the physical evidence obtained by the police during the search conducted after the applicant’s arrest, in the presence of two lay witnesses.

21.  Accordingly, it is the Court’s task in the present case to examine firstly the quality of the physical evidence and to determine whether the circumstances in which it was obtained cast doubt on its reliability or accuracy and secondly whether the applicant was given the opportunity to challenge its authenticity and oppose its use in the domestic proceedings (see, among recent authorities, *Sakit Zahidov* *v. Azerbaijan*, no. 51164/07, 12 November 2015, § 52).

22.  As regards the first question, the Court observes at the outset that it is undisputed by the parties that the search of the applicant was not carried out immediately after his arrest at 8.15 p.m. on 17 February 2016. It took place more than an hour later, at 9.36 p.m., on the same date. In this connection, the Court reiterates that the police’s failure to conduct a search immediately following an arrest without good reason raises legitimate concerns about the possible “planting” of evidence (ibid., § 53, and see also *Layijov v. Azerbaijan*, no. 22062/07, § 69, 10 April 2014). The Court considers that those points are relevant in the present case. For over an hour the applicant was under the control of the police officers. Moreover, there is nothing to suggest that there were any special circumstances rendering it impossible to carry out a search immediately after the applicant’s arrest. The Court does not lose sight of the fact that the applicant’s arrest was part of a planned operation against him and the police officers’ inability to ensure the lay witnesses’ presence at the crime scene cannot justify the delay in conducting the search.

23.  Nor can the Court overlook the fact that the applicant’s arrest was not immediately documented by the police. In particular, although it is undisputed by the parties that he was arrested by the police at 8.15 p.m. on 17 February 2016, an official record of the arrest was not drawn up until 18 February 2016. Moreover, the applicant was not represented by a lawyer during his arrest or the search.

24.  Having regard to the above, the Court considers that the quality of the physical evidence on which the applicant’s conviction was based is questionable and the manner in which it was obtained casts doubt on its reliability.

25.  As to the second question, the Court observes that the applicant raised the matter of the authenticity of the physical evidence and its use against him before the domestic courts. The national judicial authorities dismissed the issue, considering it to be an attempt on the applicant’s part to avoid criminal liability. They failed to examine why a search of the applicant had not been immediately conducted at the place of his arrest or whether the search had been conducted in compliance with procedural requirements (see *Layijov*, cited above, § 74). The results of the inquiry referred to by the Government in their observations were not relayed to the domestic courts.

26.  The Court considers that the foregoing considerations are sufficient to enable it to conclude that the manner in which the physical evidence used at trial against the applicant was obtained, and the domestic courts’ failure to address his objections and arguments regarding the authenticity of that evidence and its use against him, rendered the proceedings as a whole unfair.

27.  Accordingly, there has been a violation of Article 6 § 1 of the Convention.

II.  APPLICATION OF ARTICLE 41 OF THE CONVENTION

28.  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

29.  The applicant claimed 10,000 euros (EUR) in respect of non‑pecuniary damage.

30.  The Government submitted that, should the Court decide to make an award in that respect, it should do so in accordance with its case-law on the issue.

31.  Making its assessment on an equitable basis, the Court awards the applicant EUR 5,200 in respect of non-pecuniary damage.

B.  Costs and expenses

32.  The applicant also claimed the following costs and expenses incurred before the domestic courts and before the Court: (1) 100,000 Russian roubles (RUB) for his lawyer’s fee during the investigation stage; (2) RUB 25,000 for the preparation of the application to the Court; (3) RUB 70,000 for the preparation of the applicant’s observations following the Government’s notification of the application; and (4) RUB 1,170 for postal expenses. He further asked that the amount due to his representative be paid directly into her bank account.

33.  The Government did not comment.

34.  Regard being had to the documents in its possession and to its case‑law, the Court considers it reasonable to award the sum of EUR 2,711 covering costs under all heads. EUR 970 of this sum is to be paid into the bank account of Ms I. Khrunova, the lawyer who represented the applicant in the proceedings before the Court.

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 application admissible;

2.  *Holds* that there has been a violation of Article 6 § 1 of the Convention;

3.  *Holds*

(a)  that the respondent State is to pay the applicant, within three months, the following amounts,to be converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i)  EUR 5,200 (five thousand two hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii)  EUR 2,711 (two thousand seven hundred and eleven euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses. EUR 970 (nine hundred and seventy euros) of this sum is to be paid into the bank account of Ms I. Khrunova, the lawyer who represented the applicant in the proceedings before the Court;

(b)  that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4.  *Dismisses* the remainder of the applicant’s claim for just satisfaction.

Done in English, and notified in writing on 9 July 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

 Fatoş Aracı Georgios A. Serghides
Deputy Registrar President