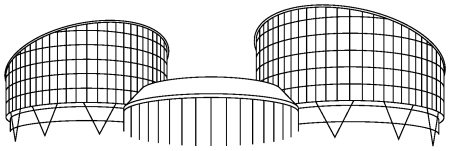

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF WOLLAND v. NORWAY

(Application no. 39731/12)

JUDGMENT

STRASBOURG

17 May 2018

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

In the case of Wolland v. Norway,

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

Angelika Nußberger, *President,*
Erik Møse,
André Potocki,
Síofra O'Leary,
Mārtiņš Mits,
Gabriele Kucsko-Stadlmayer,
Lado Chanturia, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 10 April 2018,

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

PROCEDURE

1. The case originated in an application (no. 39731/12) against the Kingdom of Norway lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Norwegian national, Mr Steingrim Wolland, on 17 May 2012.

2. The applicant was represented by Mr A. Ryssdal, a lawyer practising in Oslo. The Norwegian Government ("the Government") were represented by Mr C. Reusch of the Attorney General's Office (Civil Matters) as their Agent.

3. The applicant alleged that the prosecuting authority and the Oslo City Court, in connection with a search of the applicant's premises, had collected and kept – over a lengthy period of time – a large number of documents (papers as well as mirror copies of the applicant's computer and hard disk) without taking a formal decision on seizure. While awaiting such a decision, the applicant had not had access to any procedure of judicial review, either to examine whether reasonable grounds for suspicion still remained, or to examine the collected material's relevance as evidence. He submitted, in particular, that this contravened his rights to respect for his private life, his home and his correspondence as provided in Article 8 of the Convention.

4. On 27 January 2014 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant, Mr Steingrim Wolland, was born in 1961 and lives in Oslo, Norway. He ran a law firm in his own name in Oslo until his licence to practice was suspended as a result of the opening of bankruptcy proceedings against him personally in April 2009.

A. Proceedings before the City Court

6. On 9 March 2010, the prosecuting authority (*Økokrim* – The National Authority for Investigation and Prosecution of Economic and Environmental Crime) issued charges *(siktelse*) against the applicant for aiding and abetting fraud in connection with art sales (*kunstbedrageri*), an application for a bank loan (*lånebedrageri*), and forgery of documents in connection with the latter.

7. On 10 March 2010 the Oslo City Court (*tingrett*), finding that there were reasonable grounds for suspicion (*skjellig grunn til mistanke*) in respect of the charges, decided at the request of the prosecuting authority to authorise that a search be carried out at the applicant's premises, including his office. The applicant did not lodge an appeal against the City Court's decision.

8. On 23 March 2010 the police were at the applicant's premises – his home and office. In accordance with Article 205 § 3 of the Code of Criminal Procedure (see paragraph 37 below) a third party – a lawyer acquaintance of the applicant – was present. As there was a presumption that some material would be covered by the applicant's statutory legal professional privilege as a lawyer, and therefore be exempt from seizure pursuant to Article 204 § 1 (ibid.), documents were put in sealed bags instead of being searched for evidence by the police. The police also collected a hard disk and a laptop. The third party had no objections as to how the police had proceeded.

9. Mirror copies (*speilkopier*) of the hard disk and laptop were taken; the hard disk and laptop were returned to the applicant two days later.

10. On 3 May 2010, at the prosecuting authority's office, the applicant went through the paper documents that had been collected and sorted out those which he considered to be covered by legal professional privilege. This material was stored separately and placed under seal.

11. On 5 January 2011 the prosecuting authority applied to the City Court to examine the paper material that had been collected at the applicant's premises and to have those documents that could lawfully be seized made available to it for search. As to the mirror copies, the prosecuting authority proposed that the City Court authorise a staff member

at *Økokrim*'s computer department to acquaint him or herself with the material. The prosecution authority would thereafter return to the City Court with an application for a decision on whether specific documents would be exempt from seizure owing to legal professional privilege. The City Court accepted this procedure (see, however, paragraph 31 below). Subsequently, the prosecuting authority, upon discussions with the applicant as to which keywords (*søkeord*) should be used when looking for documents on the mirror copies, made keyword-searches which gave results in 2,309 files.

12. By a letter of 16 February 2011 the applicant's lawyer disputed the lawfulness of what he categorised as the "seizure" ("*beslag*"), arguing that there had been no reasonable grounds for suspicion against the applicant and requested that the City Court quash the "seizure" decision and order that the collected material be returned to him.

13. On 6 May 2011 the prosecuting authority submitted the 2,309 files from the mirror copies to the City Court for examination.

14. In response to the letter from the applicant's lawyer of 16 February 2011 (see paragraph 12 above), the City Court wrote a letter of 11 May 2011, pointing out that the procedure applicable to material allegedly covered by legal professional privilege had been set out by the Supreme Court (*Høyesterett*) in its decision of 3 March 2011, reported in *Norsk Retstidende* (*Rt.*) 2011 page 296 (see paragraphs 38-39 below). In line with that procedure, there were no grounds on which the City Court could at that time hold a court hearing devoted to the discontinuation of any "seizure" and return of the material. No seizure had been decided – the court was at the time carrying out the task of reviewing the material collected in order to decide on what should be made available to the prosecuting authority for it to search. The City Court would obtain the views of the parties in a hearing before making a formal decision as to whether to authorise the search of the prosecution. Its decision would be amenable to appeal. Since the handling of the case so far had taken considerable time, the City Court's examination would be expedited.

15. The applicant and his lawyer disagreed with the City Court's description of the procedure to be followed. After further exchanges between the parties, the City Court reiterated in a letter of 22 July 2011 – which was formally a judicial decision amenable to appeal (see paragraphs 16-24 below) – that a decision on seizure had not yet been taken. There was a presumption to the effect that documents and other materials in the office of a private lawyer were subject to legal professional privilege. In such cases the court would first go through the material in order to examine what could be made available to the prosecuting authority for it to search. The City Court also informed the parties that it was about to complete this task, having examined each document. It also reiterated its disagreement with the applicant's view that before carrying out its perusal of the material it ought to consider anew whether there were reasonable grounds for

suspicion against him, failing which its examination of the material would be unlawful, and that in the absence of such grounds it ought to return all the material to him with the seals intact.

B. Appeal proceedings

16. On 19 August 2011 the applicant appealed against the City Court's decision of 22 July 2011 not to examine the merits of his request to quash what was in his view a "seizure", and to return the material.

17. On 9 November 2011 the Borgarting High Court (*lagmannsrett*) dismissed the appeal.

18. The High Court, as had the City Court, reiterated that the relevant procedure for the search and seizure of material allegedly subject to legal professional privilege had been thoroughly examined by the Supreme Court in *Rt.* 2011 page 296 (see paragraphs 14 above and 38-39 below). The City Court was at the time in the process of sorting out which documents could be lawfully searched by the prosecuting authority, and there had been no decisions on seizure taken.

19. From the above it was apparent, in the High Court's view, that the applicant was not at that stage of the procedure entitled to have the question of whether to maintain the "seizure" in force (*spørsmålet om opprettholdelse av beslaget*) under Article 208 reviewed (see paragraph 37 below), and it could not see how him disputing the existence of reasonable grounds for suspicion in his case could lead to a different result. The Supreme Court's decision contained no statements suggesting that the procedure should be different in such cases. Nor could the High Court find that there were other grounds, even if regard were had to Articles 6, 8, 10 and 13 of the Convention, as invoked by the applicant, suggesting that the accused had a wider right to judicial review in cases where he or she disputed the grounds for suspicion.

20. The High Court also noted that the Code of Criminal Procedure contained several provisions conferring on the accused a right to judicial review in respect of enforcement measures taken in the form of search and seizure, *inter alia* could a decision by a court to the effect that documents were to be handed over to the prosecution authorities after perusal of the documents in accordance with Article 204 (see paragraph 37 below) – which was what the City Court was doing at the time – be appealed against. The High Court considered that the Convention did not give the applicant any rights to have the legality of searches and seizures judicially reviewed beyond what followed from the Code of Criminal Procedure. The search had been authorised by the City Court on 10 March 2010, finding that there were reasonable grounds for suspicion against the applicant. The applicant had not filed any timely appeals against the decision and the search had been effectuated.

21. From the reasoning above it also followed that the applicant's alternative submission that he ought to have a right to judicial review of whether there was a legal basis for an "ongoing search" (*om det er grunnlag for en "pågående ransaking"*) could not succeed.

22. It was also clear that the accused did not on a general basis have a right to judicial review of the reasons for the charges brought against him, whether there were reasonable grounds for suspicion or not, regardless of the use of any enforcement measures. The existence of such reasons could be examined again but then only in connection with, for instance, future investigative measures where the latter were required. The Convention provisions relied on could not lead to any different result.

23. Against this background, the High Court concluded that the City Court's procedure had suffered from no defects. Its decision of 22 July 2011 had been based on a correct approach to the handling of the material gathered at the applicant's premises.

24. On 20 December 2011 the Appeals Leave Committee of the Supreme Court (*Høyesteretts ankeutvalg*), whose jurisdiction was limited to reviewing the High Court's procedure and interpretation of the law, rejected the applicant's appeal in both respects.

C. Further proceedings

1. The handing over of materials

25. On 25 January 2012 the City Court held a hearing (see paragraph 14 above) on the issue of which materials could be sent to the prosecuting authority for it to search. In the court records it was registered that the court had informed the parties that it was desirable if a decision could be reached as soon as possible and preferably within a month. In a decision of 11 May 2012, it ruled that 1,264 documents collected from the data carriers could be handed over. The applicant accepted the decision with respect to 858 of the documents, but appealed in respect of the remaining 406 and some of the paper documents. The prosecuting authority also appealed.

26. On 4 September 2012 the High Court dismissed the prosecuting authority's appeal and rejected the applicant's appeal except for one issue relating to a bank account transcript.

27. On 26 October 2012 the Supreme Court quashed the High Court's decision in so far as it had rejected the applicant's appeal (*Rt.* 2012 page 1639). It found, in essence, that the High Court had applied a too narrow understanding of what was lawyer's work (*egentlig advokatvirksomhet*) that could bring legal professional privilege into play.

28. During its reconsideration of the case, the High Court, on 8 January 2013, concluded that thirty-six of the disputed 406 documents could be submitted to the prosecuting authority for it to search. On 22 May 2013 the

Supreme Court rejected an appeal by the applicant against the High Court's decision.

2. The mirror copies

29. On 11 June 2012 the applicant applied to have some of the material, including the mirror copies, returned to him. The City Court, on 18 September 2012, refused his application in so far as it concerned the mirror copies, but granted the other parts thereof.

30. The applicant appealed against the decision to the High Court, which on 8 January 2013 ordered that the mirror copies were to be returned to the applicant unless the prosecuting authority promptly (*relativt omgående*) requested that the City Court examine them. It referred, *inter alia*, to the general obligation to ensure progress in investigations, as reflected in Article 226 of the Code of Criminal Procedure (see paragraph 37 below).

31. Upon an appeal by the prosecuting authority, the Supreme Court, on 27 June 2013 (*Rt.* 2013 page 968) agreed with the High Court that the prosecuting authority's continued possession of and searches on the mirror copies (see paragraph 11 above) had been unlawful. The mirror copies should, like the paper documents, have been placed under seal and transferred to the City Court without the prosecution authority having accessed material on them through keyword-searches. Unlike the High Court, however, the Supreme Court did not for that reason find that the copies should necessarily be returned to the applicant. It quashed the High Court's decision in order for that court to further assess the prosecuting authority's submissions that the copies should instead be kept with the City Court, as the High Court had not sufficiently considered that possibility.

32. The prosecuting authority transferred the mirror copies to the City Court on 2 September 2013.

33. When, on 20 May 2014, the High Court contacted the prosecuting authority, its decision concerning the mirror copies having been quashed by the Supreme Court (see paragraph 31 above), the authority responded by informing the High Court of the developments in the criminal case against the applicant (see paragraph 35 below). It moreover stated that the seizure had been lifted on 28 May 2014 and requested that the case therefore be dismissed. The material could be deleted by the court or the data carrier could be handed over to the applicant. The applicant argued that the case should not be dismissed and requested that the High Court examine the merits of his application to have the mirror copies returned, in order for him to have a judicial review of whether his Convention rights had been violated.

34. In a letter of 25 June 2014 the High Court set out its views on the matter. It stated, *inter alia*, that the case concerned the applicant's application to have the mirror copies returned. This request would be met if the copies were actually returned, which was what the prosecuting authority

had proposed. This made it difficult to see why the applicant should have legal standing to require that the courts examine his application. Moreover, the court assumed that the applicant could obtain a review of his Convention claims in other ways. The case as concerned the mirror copies was ultimately dismissed on 22 August 2014. There is no information about the applicant having appealed against this decision.

3. The criminal proceedings against the applicant

35. On 10 January 2013 the City Court acquitted the applicant of having obtained credit by way of fraud (*lånebedrageri*) (see paragraph 6 above). On 12 June 2013 the High Court convicted him for having shown gross negligence in that respect. This judgment became final when the Supreme Court's Appeal Committee refused leave to appeal on 18 October 2013. The charges concerning forgery of documents (ibid.) were dropped on 11 February 2013. Some of the charges concerning aiding and abetting art fraud (*kunstbedrageri*) (ibid.) were dropped on 16 February 2011 and the remainder on 21 August 2013.

II. RELEVANT DOMESTIC LAW AND PRACTICE

36. Chapters 10 (Witnesses), 13a (Coercive measures – General) and 15 (Search) of the 1981 Code of Criminal Procedure (*straffeprosessloven*), as in force at the relevant time, included the following relevant provisions:

Article 119

"Without the consent of the person entitled to the preservation of secrecy, the court may not receive any statement from clergymen in the state church, priests or pastors in registered religious communities, lawyers, defence counsel in criminal cases, conciliators in matrimonial cases, medical practitioners, psychologists, chemists, midwives or nurses about anything that has been confided to them in their official capacity.

...

This prohibition no longer applies if the statement is needed to prevent an innocent person from being punished.

..."

Article 170a

"A coercive measure may be used only when there is sufficient reason to do so. The coercive measure may not be used when it would be a disproportionate intervention in view of the nature of the case and other circumstances."

Article 192

"If any person is suspected on reasonable grounds of an act punishable under statute by imprisonment, a search may be made of his residence, premises or storage place in

order to undertake an arrest or to look for evidence or objects that may be seized or on which a registered charge [*heftelse*] may be created.

A search may be made of any other person's premises when there are reasonable grounds for suspecting such an act, and

1) the act has been committed or the suspect arrested there,

2) the suspect has been there while being pursued on having been caught in the act or on finding fresh clues, or

3) there are otherwise special grounds to assume that the suspect can be arrested, or that there may be found evidence or objects there that may be seized or on which a registered charge may be created."

Article 195

"If any person is suspected on reasonable grounds of an act punishable under statute by imprisonment, he may be subjected to a personal search if there are grounds to assume that it may lead to the discovery of evidence or of objects that may be seized or on which a registered charge may be created.

A personal search may be made of individuals other than the suspect when the suspicion relates to an act punishable under statute by imprisonment for a term exceeding six months, and special circumstances warrant the making of such a search."

Article 197

"Without the written consent of the person concerned, a search under Articles 192, 194 and 195 may only be made on the basis of a court decision.

If delay entails any risk, the decision may be made by the prosecuting authority. In the event of a search of editorial offices or the like, the decision shall be made by the public prosecutor, and only if it is probable that the investigation will be substantially impaired by waiting for a court decision.

Any decision pursuant to the first or second paragraph shall as far as possible be in writing and specify the nature of the case, the purpose of the search, and what it shall include. An oral decision shall be noted down in writing as soon as possible."

37. Chapters 16 (Seizure and surrender order), 18 (Investigation) and 26 (Interlocutory appeal) contain the following relevant provisions:

Article 203

"Objects that are deemed to be significant as evidence may be seized until a legally enforceable judgment takes effect. The same applies to objects that are deemed to be liable to confiscation or to a claim for surrender by an aggrieved person.

..."

Article 204

"Documents or any other items whose contents a witness may refuse to testify about under Articles 117 to 121 and 124 to 125, and which are in the possession either of a person who can refuse to testify or of a person who has a legal interest in keeping them secret, cannot be seized. In so far as a duty to testify may be imposed in certain cases under the said provisions, a corresponding power to order a seizure shall apply.

The prohibition in the first paragraph does not apply to documents or any other items that contain confidences between persons who are suspected of being accomplices to the criminal act [in question]. Nor does it prevent documents or any other items being removed from an unlawful possessor to enable them to be given to the person entitled thereto."

Article 205

"A decision relating to the seizure of an object that the possessor will not surrender voluntarily may be taken by the prosecuting authority. The decision shall as far as possible be in writing and specify the nature of the case, the purpose of the seizure, and what it shall include. An oral decision shall as soon as possible be rendered in writing. The provisions of Article 200, first paragraph, shall apply correspondingly.

When the prosecuting authority finds that there are special grounds for doing so, it may bring the question of seizure before a court. The provisions of the second to the fourth sentences of the first paragraph of this Article and of Article 209 shall apply correspondingly to the court's decision relating to seizure. The provisions of the first and third paragraphs of Article 208 shall also apply when seizure has been decided on by the court pursuant to this paragraph.

Documents or any other item in respect of which the possessor is not obliged to testify except by special court order may not be seized without a court order unless such a special order has already been made. If the police wish to submit documents to the court for a decision as to whether they may be seized, the said documents shall be sealed in a closed envelope in the presence of a representative of the possessor."

Article 206

"Without a decision of the prosecuting authority a police officer may effect a seizure when he carries out a decision for search or arrest, and otherwise when delay entails a risk. Seizures may be effected by any person when the suspect is caught in the act or is being pursued when so caught or on finding fresh clues.

The seizure shall immediately be reported to the prosecuting authority. If the latter finds that the seizure should be maintained, it shall issue a written decision containing such information as specified in the second sentence of the first paragraph of Article 205."

Article 207

"All objects seized shall be accurately recorded and marked in such a way as to avoid confusion.

As far as possible, a receipt shall be given to the person who had the object in his possession."

Article 208

"Any person who is affected by a seizure may immediately or subsequently demand that the question of whether it should be maintained be brought before a court. The prosecuting authority shall ensure that any such person shall be informed of this right.

The provision of the first sentence of the first paragraph shall apply correspondingly when any person who has voluntarily surrendered any object for seizure demands that it be returned.

The decision of the court shall be made by an order."

Article 226

"...

The investigation shall be carried out as quickly as possible and in such a way that no one is unnecessarily exposed to suspicion or inconvenience."

Article 377

"An interlocutory appeal may be brought against a court order or decision by any person who is affected thereby unless it may be the subject of an appeal under Chapter 23 or may serve as a ground of such an appeal by the said person, or it is by reason of its nature or a specific statutory provision unchallengeable.

..."

38. On 3 March 2011 (*Rt.* 2011 page 296) the Supreme Court made a decision concerning a search of the home and office of a lawyer suspected of having committed together with clients, *inter alia*, fraud. It stated that although the procedures relating to search and seizure of documents that were allegedly covered by legal professional privilege had not been solved expressly in the Code of Criminal Procedure, in practice Article 205 § 3 had been applied by analogy, in line with its decision of 14 October 1986 (*Rt.* 1986 page 1149). By way of this analogy, such documents should not be immediately examined by the police. Instead they should first be submitted to the City Court for that court to decide whether they may in principle be seized (as had also been stated in *Rt.* 2008 page 645) – following which they would be made available to the prosecution for search – or whether they would be exempt from seizure due to legal professional privilege – following which they would be returned to the lawyer without having been searched. Under the Code of Criminal Procedure, the primary competence to decide on seizures lay with the prosecuting authority; it was, accordingly, also for that authority to first search materials with respect to whether they could have evidentiary value. The court's examination of legal professional privilege was in reality a step in the search-process; only after the court's initial filtering had been completed could the prosecution authority begin its proper searching of the material for evidence.

39. The Supreme Court added that the procedure would have to be somewhat different if the City Court found that a document fell within legal professional privilege, but the exception in Article 204 § 2 of the Code of Criminal Procedure – for documents that contain confidences between individuals who are suspected of being accomplices to the criminal act – could come into play (see paragraph 37 above). In these situations the City Court would also have to examine the relevance of the document as part of its examination of what should be made available to the prosecution. Lastly, the Supreme Court examined Articles 6 and 8 of the Convention. It had already (in *Rt.* 2008 page 158, where reference had been made to *Sallinen and Others v. Finland*, no. 50882/99, 27 September 2005) been established that Article 8 applied to searches and seizures of a lawyer's materials. As to

the proportionality-test, the Supreme Court noted that the case before it concerned evidence in relation to a suspicion that a lawyer and a client had cooperated in serious financial crime. Even where the exception in Article 204 § 2 applied, it would not be a matter of making a complete exception from the duty of confidentiality, only from the rule that documents containing confidences between lawyers and clients could not be seized. It would be for the court to decide on which documents that were subject to legal professional privilege, and, where Article 204 § 2 applied, which documents that were to be seized.

40. On 9 August 1996 (*Rt.* 1996 page 1081) the Supreme Court found that an individual affected by a decision to authorise a search was entitled under Article 377 of the Code of Criminal Procedure to appeal against that decision also after documents had been collected and brought to the City Court in accordance with the third paragraph of Article 205 (see paragraph 37 above).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

41. The applicant complained that the authorities' search at his premises, including the collection of material, and that they subsequently kept it absent a formal decision on seizure, had entailed a violation of his rights to respect for his private life, his home and his correspondence as provided in 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

1. The parties' submissions

42. The Government argued that the applicant had failed to exhaust "all domestic remedies" in accordance with Article 35 § 1 of the Convention, and that his application should therefore be declared inadmissible.

43. Firstly, they maintained that the applicant had not appealed against the City Court's decision of 10 March 2010, in which the search had been authorised (see paragraph 7 above). Secondly, he had been entitled to

appeal, under Article 208 of the Code of Criminal Procedure (see paragraph 37 above), against the prosecuting authority's decision to seize documents that had been made available to it by the City Court.

44. The Government also set out that according to the case-law of the Supreme Court (*Rt.* 1996 page 1081; see paragraph 40 above), the applicant could have challenged the authorities' impugned possession of the collected documents as long as the search was in progress. Moreover, they argued that a distinction had to be made between documents seized on an "individual" and a "collective" level, respectively. Under Article 208 of the Code of Criminal Procedure (see paragraph 37 above), the applicant could have challenged the "collective seizure" that had been made when the police had removed the documents from the applicant's premises, although an "individual seizure" of documents could only have been carried out subsequent to the City Court's examination of which documents could lawfully have been seized.

45. The applicant disagreed and submitted in particular that it would have been pointless to appeal against the decision to authorise the search after the police had already been at his premises and removed material, and added that at that time he had wanted to cooperate with the police. Moreover, it had not been only the initial authorisation of the search, but the continued possession of the documents without a formal seizure decision, that had been the subject of his complaint. There had not been any review procedure available because no formal decision on seizure had been given.

2. The Court's assessment

46. The Court notes that parts of the applicant's complaint under Article 8 of the Convention relate to the initial authorisation of the search on 10 March 2010 and the circumstances when the police were at his premises and removed the material on 23 March 2010 (see paragraphs 7-8 above). It accepts the Government's argument that the applicant could have appealed against the authorisation of the search also after the documents had been removed from his premises and were to be submitted to the City Court for it to decide what was to be made available to the prosecution authority. Accordingly, in so far as the applicant's complaint relate to the extent of the search and collection of documents – for example by arguing that the police could have used keywords to search for documents instead of mirror copying the whole data carriers – the Court finds it inadmissible because domestic remedies have not been exhausted.

47. However, parts of the applicant's complaint are directed against the prosecuting authority and the City Court's possession of the collected material subsequent to its removal from his premises, and in particular to the fact that the applicant could not avail himself of legal remedies in order to have that continued possession and the question of reasonable grounds

for suspicion judicially reviewed until a formal decision on seizure had eventually been made.

48. On these points, the Court has had regard to the Government's arguments that the documents when removed from the applicant's premises had been "collectively seized" and that the applicant could have lodged an application for a review of this "collective seizure" under Article 208 (see paragraph 37 above). Yet, the Court has noted that in the instant case, the applicant's complaints to the City Court, starting with that of 16 February 2011 (see paragraph 12 above), were not – by particular reference to *Rt.* 2011 page 296 (see paragraphs 38-39 above) – examined on the merits (see paragraphs 14-15 above). On 9 November 2011 the High Court upheld that decision upon appeal, and on 20 December 2011 the Supreme Court's Appeals Leave Committee rejected the applicant's appeal against the High Court's decision (see paragraphs 17-23 and 24, respectively). The High Court expressly held that Article 208 of the Code of Criminal Procedure did not afford the applicant the right to legal review of the question of whether to uphold the "seizure" at that stage of the proceedings (see paragraph 19 above). The reason was that the prosecuting authority had not formally issued a decision on a seizure. Nor could, according to the High Court, the applicant succeed in his submission that he had been entitled to a review of whether there had been grounds for an "ongoing search" (see paragraph 21 above).

49. Based on the above, the Court finds that the applicant must be considered to have exhausted domestic remedies in so far as his complaint to the Court addresses the prosecuting authority's and the City Court's continued possession of the material collected at his premises and the decisions taken in relation to his complaints that this continued possession could not be examined on their merits in the absence of a formal decision on seizure. Exhaustion extends to his submission that he could not apply for review of whether reasonable suspicion still existed.

50. Accordingly, the Court finds that the applicant's complaint in so far as it relates to the authorisation of the search, decided by the City Court on 10 March 2010, which led to the materials being collected, should be declared inadmissible because the applicant did not exhaust domestic remedies in accordance with Article 35 § 1 of the Convention. For the remainder of the applicant's complaint under Article 8, the Court dismisses the Government's objection.

51. The Court further notes that the remainder of this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. In so far as domestic remedies have been exhausted, the applicant's complaint under Article 8 must therefore be declared admissible.

B. Merits

52. The Government did not dispute that there had been an "interference" with the applicant's right to respect for his "private life", his "home" and his "correspondence" under Article 8 § 1 of the Convention. The Court sees no reason to hold otherwise. The Court observes that the applicant's complaints (as outlined in paragraphs 41 and 45 above) relate to the procedure provided under domestic law in respect of search and seizure and recognises the existence of an interference.

53. It was moreover common ground that the handling of the material collected at the applicant's premises pursued a legitimate aim, as they were adopted for the purpose of "the prevention of disorder and crime". The Court will therefore examine whether the interference was "in accordance with the law" and "necessary in a democratic society", in line with Article 8 § 2 of the Convention.

1. The parties' submissions

(a) The applicant

54. The applicant submitted that even if the initial authorisation of the search had at first been in accordance with the law, the prosecuting authority's subsequent "indefinite" possession of the material, absent a formal decision to seize, had not. He further maintained that it had not been in accordance with the law to refuse him a judicial review of the legality of that continued possession, regardless of whether the material had been in the prosecuting authority's or the City Court's possession. The formal distinction between "search" and "seizure", and the legal situation described by the Supreme Court in its decision of 13 March 2011 (*Rt*. 2011 page 296), had not been foreseeable to him.

55. Furthermore, the interference concerning the material on the applicant's data carriers had been unnecessarily burdensome. The prosecuting authority, having had modern technology to hand, could have extracted only those documents believed to have had evidentiary value, for example by way of a keyword search. Since the prosecutor had not done so, hundreds of the applicant's clients had been exposed to unnecessary serious risk. Under no circumstances had it been necessary to mirror copy all the contents of the data carriers, which had contained a vast volume of private documents as well as business-related documents.

56. The applicant also submitted that the prosecuting authority's preliminary search using keyword searches on the data carrier had been unjustified. This method, the applicant alleged, had been in direct conflict with the procedure prescribed in Article 205 § 3 of the Code of Criminal Procedure (see paragraph 37 above), in which only the City Court had the authority to review documents covered by legal professional privilege.

57. The applicant had not had safeguards available under domestic law to refute the grounds on which the suspicion against him had rested. The charges had not provided him with the details of the nature and cause of the accusation against him. Therefore, he had been deprived of the opportunity to refute the accusations and to provide counter-evidence.

(b) The Government

58. The Government submitted that the impugned measures had clearly had a legal basis in domestic law. The search had been justified with reference to Article 192 of the Code of Criminal Procedure, which had provided that "a search may be made of his residence, premises or storage place in order to ... look for evidence or objects that may be seized" (see paragraph 36 above). The legal basis for seizures had been Article 203, which had provided that "objects that are deemed to be significant as evidence may be seized until a legally enforceable judgment takes effect" (see paragraph 37).

59. Articles 192 and 203 had been clearly accessible. As to foreseeability, the provisions had been formulated with sufficient precision to enable the applicant to regulate his conduct.

60. On the question of proportionality, the Government submitted that the reasons adduced to justify the impugned measures had been relevant and sufficient. The use of a coercive measure had been necessary to obtain evidence in the criminal proceedings against the applicant for crimes of which he had been later convicted, and had not in any way been arbitrary. Moreover, the Code of Criminal Procedure afforded adequate and effective safeguards against abuse. Seizure could only be decided when there was a reasonable suspicion that a crime had been committed (Article 203) and when it was necessary and proportionate to the aim pursued (Article 170a). Furthermore, it was the prosecuting authority and not the police that decided whether or not an object should be seized (Article 205), except in matters of urgency (Article 206). A written report had to be drawn up after the search, with accurate information about the seized objects. The seizure decision could be brought before the courts. Pursuant to Article 204 documents which contained information covered by legal professional privilege could not be seized.

61. In most cases, search and seizure were carried out within a fairly short time. In the present case, almost three years had passed from the initial search until the seized objects had been returned. However, this delay had been caused by the applicant, not the authorities; the delay had in large part been caused by the legal proceedings instigated and the appeals lodged by the applicant. The Government lastly pointed out that the search had been carried out with an independent witness present.

2. The Court's assessment

(a) Was the interference "in accordance with the law"?

62. As to the question of whether the measure was in accordance with the law, the Court's case-law has established that a measure must have some basis in domestic law, with the term "law" being understood in its "substantive" sense, not its "formal" one. In a sphere covered by statutory law, the "law" is the enactment in force as the competent courts have interpreted it. Domestic law must further be compatible with the rule of law and accessible to the person concerned, and the person affected must be able to foresee the consequences of the domestic law for him or her (see, for example, *Roman Zakharov v. Russia* [GC], no. 47143/06, § 228, ECHR 2015; and *K.S. and M.S v. Germany*, no. 33696/11, § 34, 6 October 2016). The Court reiterates, moreover, that in the context of searches and seizures, the domestic law must provide some protection to the individual against arbitrary interference with Article 8 rights. Thus, the domestic law must be sufficiently clear in its terms to give citizens an adequate indication as to the circumstances in and conditions on which public authorities are empowered to resort to any such measures (see *Sallinen and Others*, cited above, § 82). Furthermore, "[g]iven that search and seizure represent a serious interference with rights protected under Article 8, they must be based on a law that is particularly precise" (ibid., § 90).

(i) Basis in Norwegian law

63. The Court observes that Article 205 of the Code of Criminal Procedure, including its third paragraph, which prescribed the procedure of placing documents under seal and bringing them to the City Court for it to sort out whether they could be searched for evidence did not expressly regulate searches of lawyer's offices (see paragraphs 37 above). However, from the decision in *Rt.* 2011 page 296 it is apparent that the application by analogy when faced with questions of possible confidential documents due to legal professional privilege had been a practice of long standing (see paragraph 38 above).

64. Based on the above, the Court is satisfied that the procedure followed in the instant case had a basis in domestic law.

(ii) "Quality" of the law

65. As to the requirements that the law be accessible and foreseeable, the Court finds that these have been met, in so far as the analogous application of Article 205 § 3 to cases such as the present one had been a common practice of long standing (see paragraphs 38 and 63 above). The Court cannot, accordingly, agree with the applicant's complaint concerning the way the domestic courts had drawn a distinction between search and seizure and had found that a "seizure" – as that term had to be interpreted when

used in Article 208 – had not been decided, effectively making the applicant's application for review under Article 208 premature (see paragraphs 37 and 54 above).

66. Turning to the domestic law's compatibility with the rule of law, the Court has taken note of the presumption that there will be confidential documents among the material collected if a lawyer's hard disks are copied and his or her papers are taken in circumstances such as those in the present case (see paragraph 15 above). In the context of Article 8 of the Convention, the Court has held that the fundamental rule of respect for lawyer-client confidentiality may only be derogated from in exceptional cases and on condition that adequate and sufficient safeguards against abuse are in place (see, for instance, *M v. the Netherlands*, no. 2156/10, § 88, ECHR 2017 (extracts)).

67. In the instant case, the Court has taken note of Article 197 § 3 of the Code of Criminal Procedure, which provides that a court's decision in which an authorisation to carry out a search has been granted, "shall as far as possible be in writing and specify the nature of the case, the purpose of the search, and what it shall include" (see paragraph 36 above). The search was thus subject to prior judicial authorisation, which included an examination of whether reasonable suspicion existed.

68. Furthermore, it is undisputed that the applicant could have appealed under Article 377 of the Code of Criminal Procedure (see paragraph 37 above) against the decision in which the search of his premises had been authorised, and that he could have done so also after the documents and data carriers in question had been removed from his premises (see paragraphs 40, 44 and 46 above). In addition, the material was to be placed under seal and thus made inaccessible before it arrived with the City Court, pursuant to Article 205 § 3 (see paragraph 37 above).

69. Following that, if the City Court had completed its examination and found that one or more documents were to be made available to the prosecuting authority in order for the authority to search them for information and decide on whether they had relevance as evidence and hence should be seized, a decision to that effect could have been appealed against by the applicant (see paragraph 37 above), according to the High Court in its decision of 9 November 2011 (see paragraph 20 above).

70. Lastly, had the prosecuting authority, following the City Court's authorisation (see paragraph 69 above), decided to seize any of the documents, the applicant would have had a right to have that decision tried judicially in accordance with Article 208 (see paragraph 37 above).

71. Viewing the system in the Code of Criminal Procedure as a whole, the Court considers that the law afforded sufficient legal safeguards as concerned the search, collection and eventually seizure, both with respect to the extents of these measures – the amount of documents collected and copied – and including the protection of legal professional privilege. The

Court adds that this is so regardless of whether there was any additional judicial action available under the heading of a "collective seizure", as argued by the Government in the context of the admissibility question (see paragraph 44 above).

72. As to the applicant's complaints concerning how domestic law did not afford him a right to bring a judicial action in order to verify whether reasonable grounds for suspicion still existed, Article 8 of the Convention does not prescribe a general requirement that a suspect must have the right to take action on the question of reasonable suspicion during an ongoing investigation, even if the investigation includes a search and seizure process such as that in the present case. It is not for the Court to take position on whether reasonable suspicion against the owner of the material is a condition for seizure under domestic law and whether a review of a seizure under Article 208 would, accordingly, have had to include an examination of those issues at the stage demanded by the applicant in the present case.

73. Given the above, the Court is satisfied that the relevant domestic law, as interpreted by the courts, was compatible with the rule of law, accessible and foreseeable (see paragraph 62 above) and provided sufficient safeguards subsequent to the initial authorisation to search the applicant's premises.

(b) Was the interference "necessary in a democratic society"?

74. With respect to the question of whether an interference is "necessary in a democratic society" in pursuit of a legitimate aim, the Court has consistently held that the notion of "necessity" implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued (see, for example, *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 181, ECHR 2017 (extracts)).

75. When considering the necessity of an interference, the Court must be satisfied that there were sufficient and adequate guarantees against arbitrariness, including the possibility of effective control of the measure at issue (see, for instance, *Sommer v. Germany*, no. 73607/13, § 56, 27 April 2017; and *M.N. and Others v. San Marino*, no. 28005/12, § 73, 7 July 2015). Moreover, the Court has previously acknowledged the importance of specific procedural guarantees when it comes to protecting the confidentiality of exchanges between lawyer and client and of legal professional privilege (see, *inter alia*, *Sommer*, cited above, § 56; and *Michaud v. France*, no. 12323/11, § 130, ECHR 2012). It has emphasised that, subject to strict supervision, it is possible to impose certain obligations on lawyers concerning their relations with their clients, for example in the event that there is plausible evidence of the lawyer's involvement in a crime and in the context of the fight against money-laundering. The Court has further elaborated that the Convention does not prevent domestic law allowing for searches of a lawyer's offices as long as proper safeguards are

provided, for example the presence of a representative (or president) of a bar association (see, for example, *Sommer*, cited above, § 56; with references to *André and Another v. France*, no. 18603/03, 24 July 2008 (see, in particular, §§ 42-43); *Roemen and Schmit v. Luxembourg*, no. 51772/99, § 69, ECHR 2003-IV; and *Xavier Da Silveira v. France*, no. 43757/05, §§ 37 and 43, 21 January 2010).

76. Turning to the present case, the Court reiterates that the search had been preapproved by the City Court (see paragraph 7 above). The applicant did not appeal against the City Court's decision, and in so far as his complaints address that decision, they are therefore inadmissible (see paragraphs 7 and 46 above). Furthermore, there is no information that the prosecuting authority may have overstepped any limits drawn up by that court in its decision. The Court cannot, accordingly, find that there have been any violations of Article 8 in this respect. The Court adds in passing that, as there was a reason for the indiscriminate collection of documents, namely that of protecting legal professional privilege, the case differs from that of *Miailhe v. France* (no. 1), 25 February 1993, § 39, Series A no. 256-C.

77. As to the further process, the prosecuting authority applied to the City Court for an authorisation to carry out searches on the mirror copies, a request which was wrongfully granted (see paragraph 11 above). The applicant did not address this issue at the time. However, this procedural error was subsequently rectified when the Supreme Court declared in *Rt.* 2013 page 968 that the prosecuting authority's handling of those copies had not been lawful and that the courts should instead examine the material (see paragraphs 30-31 above) and, against that background, the Court cannot now find that the domestic authorities violated the applicant's rights under Article 8 for reason of this original mistake alone.

78. Turning to the applicant's submission that the prosecuting authority and the domestic courts sat with the material – making it, seen from the applicant's side, effectively "seized" – without taking any decisions that could be subjected to judicial review or would be amenable to appeal, the Court notes that it took some eight months, from 3 May 2010 to 5 January 2011, for the prosecution to submit the material to the City Court after the applicant had gone through it at the prosecuting authority's office (see paragraphs 10-11 above). In their submissions, the parties have not specifically focussed on this delay, which therefore is largely unexplained. However, the Court has also taken note of how the City Court in its letter of 11 May 2011 – of its own motion – set out that it would ensure an expedite inspection of the documents since considerable time had already passed (see paragraph 14 above). It is thus apparent that the City Court sought to compensate for the delay in the prosecuting authority's transmission of the material, and on 22 July 2011 – some six months after it had received the

material – it stated that it was in the process of completing the work (see paragraph 15 above).

79. The City Court's conclusion of its perusal of the material submitted to it was interrupted by the applicant's unsuccessful appeals to the High Court and the Supreme Court (see paragraphs 16 and 24 above). Upon the Supreme Court having rejected the applicant's appeal on 20 December 2011 (see paragraph 24 above), the City Court held a hearing approximately one month later, on 25 January 2012 (see paragraph 25 above). Its decision was made on 11 May 2012 (ibid.), after slightly less than four months, and the applicant applied to the Court approximately one week thereafter (see paragraph 1 above). Furthermore, the Court notes that proceedings on the handing over of material to the prosecution continued at appellate levels after the complaint to the Court had been lodged (see paragraphs 25-28 above), in addition to other proceedings subsequently instigated by the applicant in order to have materials returned to him (see paragraphs 29-34 above).

80. The Court accepts that the City Court needed some time to scrutinise the large amount of documents brought to it. It notes that the police, by using key-word searches, decided to send 2,309 of the electronic documents to the City Court, and paper files came in addition. The proceedings subsequent to the City Court's decision on which documents that were to be made available to the prosecution authority, were not characterised by delays. The electronic documents were available to the applicant while the search process was ongoing, in so far as the hard disk and the laptop were returned to him two days after the initial search at his premises (see paragraph 9 above). In the circumstances of the instant case, viewed in conjunction with the scope of the applicant's complaints, the Court does not therefore find that the extent of the interference of which the applicant was victim exceeded what was "necessary in a democratic society".

81. The foregoing is sufficient to conclude that there has been no violation of Article 8 of the Convention.

II. ALLEGED VIOLATIONS OF ARTICLES 6 AND 10 OF THE CONVENTION

82. The applicant further relied on Articles 6 and 10 of the Convention. Under Article 6 he argued that his right to be presumed innocent had been infringed because the charges against him had been insufficiently detailed. Under Article 10 he maintained that there had been a breach of his right to possess information. He also made an additional complaint that there had been an unlawful interference with his reputation.

83. As to these points, the Court finds that the case, even assuming that the applicant has exhausted domestic remedies, discloses no appearances of violations, and, hence, that these complaints are "manifestly ill-founded"

within the meaning of Article 35 § 3 (a) of the Convention and therefore to be declared inadmissible.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

84. The applicant additionally complained that there had been a violation of the right conferred upon him by Article 13 of the Convention, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

85. The Government contested that Article 13 of the Convention had been violated.

86. The Court reiterates that Article 13 requires that a remedy be available in domestic law only in respect of grievances which can be regarded as "arguable" in terms of the Convention. It does not compel States to allow individuals to challenge domestic laws before a national authority on the grounds of being contrary to the Convention, but seeks only to ensure that anyone who makes an arguable complaint of a violation of a Convention right will have an effective remedy in the domestic legal order (see, for example, *De Tommaso v. Italy* [GC], no. 43395/09, § 180, ECHR 2017 (extracts)).

87. Furthermore, the effectiveness of a remedy within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the "authority" referred to in that provision necessarily have to be a judicial authority. Nevertheless, its powers and the procedural guarantees which it affords are relevant in determining whether the remedy before it is effective. The expression "effective remedy" used in Article 13 cannot be interpreted as a remedy that is bound to succeed; it simply means an accessible remedy before an authority competent to examine the merits of a complaint (see, for example, *M.R.A. and Others v. the Netherlands*, no. 46856/07, § 114, 12 January 2016).

88. Having regard to the above findings relating to Articles 6 and 10 of the Convention (see paragraphs 82-83 above), the Court considers that the applicant did not have an "arguable" claim under Article 13 when examined in conjunction with those provisions. As concerns the complaint under Article 8 in so far as declared admissible (see paragraphs 50-51 above), the Court finds it in the circumstances sufficient under Article 13 to observe that the High Court examined the applicant's claim under that provision (see, in particular paragraphs 19 and 20 above).

89. Consequently, this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints concerning Article 8 of the Convention admissible in so far as they do not relate to the City Court's decision of 10 March 2010 to authorise the search, 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 17 May 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Angelika Nußberger
President