



Italian law on searches did not provide sufficient safeguards against possible abuse of power by the authorities or arbitrariness

In today's **Chamber judgment**¹ in the case of **Brazzi v. Italy** (application no. 57278/11) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

The case concerns a search carried out by the Italian tax authorities in a house that Mr Brazzi has owned in Italy since 2009 and where his wife and children live during the school year.

The Court found in particular that the interference with Mr Brazzi's right to respect for his home had not been "in accordance with the law", within the meaning of Article 8 § 2 of the Convention, because he had not had the benefit of the effective oversight required by the rule of law in a democratic society. No judge had examined the lawfulness or necessity of the warrant for the search of his home, neither before nor after the search. Italian law did not therefore provide sufficient upstream or downstream safeguards against risks of abuse of power or arbitrariness.

Principal facts

The applicant, Marco Brazzi, is an Italian and German national who was born in 1965 and lives in Munich (Germany). He is listed on the register of Italians resident abroad. He has owned a house in Italy since 2009 and his wife and children live there during the school year.

In July 2010 Mr Brazzi was audited by the Italian tax authorities, as he was suspected of being a resident for tax purposes in Italy and of not paying income tax or VAT since 2003. On 6 July 2010, in the context of the administrative proceedings, the public prosecutor of Mantua authorised the tax police to enter Mr Brazzi's house in Italy in order to gather evidence. On 13 July 2010 tax inspectors went to the premises but Mr Brazzi was absent. Subsequently, on the same day, the Mantua public prosecutor's office opened an investigation and issued a warrant for a search of his house and vehicles in order to find and seize accounting documents and any other document that might prove he had committed the offence of tax evasion. The search took place on 6 August 2010. No document was seized as a result.

On 7 October 2010 the proceedings were discontinued, as Mr Brazzi had clarified his tax situation by proving, in particular, that he was habitually resident in Germany. He had, in the meantime, appealed to the Court of Cassation, complaining about the illegality of the search, but his appeal was declared inadmissible.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life), Mr Brazzi complained of a breach of his right to respect for his home. Under Articles 6 (right to a fair hearing) and 13 (right to an effective

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

remedy), he also alleged that there had been no effective remedy available to him in respect of his Article 8 complaints.

The application was lodged with the European Court of Human Rights on 5 September 2011.

Judgment was given by a Chamber of seven judges, composed as follows:

Linos-Alexandre **Sicilianos** (Greece), *President*,
Kristina **Pardalos** (San Marino),
Guido **Raimondi** (Italy),
Aleš **Pejchal** (the Czech Republic),
Ksenija **Turković** (Croatia),
Armen **Harutyunyan** (Armenia),
Pauliine **Koskelo** (Finland),

and also Abel **Campos**, *Section Registrar*.

Decision of the Court

Article 8 (right to respect for private and family life)

The Court found that the search in question had constituted interference by the public authorities with Mr Brazzi's right to private life. According to the Court's case-law, interference with Article 8 rights must have a sufficiently accessible and foreseeable domestic legal basis, compatible with the principle of the rule of law. In the present case, the impugned search was based on Articles 247 et seq. of the Code of Criminal Procedure, which raised no issue of accessibility or foreseeability.

As to the compatibility of these provisions with the rule of law, the Court found that the search in question had been ordered by the public prosecutor's office on the same day as the opening of a criminal investigation against Mr Brazzi, following an attempt by the tax authorities to make enquiries, earlier that day, in the context of an administrative tax audit. The search had thus taken place at a particularly early point in the criminal proceedings. The Court had previously found that a search performed at such a stage had to be surrounded by appropriate and sufficient safeguards to ensure that it was not used by the investigating authorities to obtain compromising information on persons who had not yet been identified as suspected of committing an offence². In the present case, the Italian legislation did not provide for any prior oversight of searches ordered during preliminary investigations. There was no provision for the office of the prosecutor, in his capacity as supervisor of the investigation, to seek the authorisation of a judge or even to inform the latter of his decision to order a search. That being said, the lack of any prior judicial oversight could be counterbalanced by subsequent judicial review, after the act, as to the lawfulness and necessity of the measure. In other words, the person concerned had to be able to obtain effective scrutiny by a court, in fact and in law, of the measure in question and its execution. Thus, where an operation found to be unlawful had already taken place, the remedy or remedies available had to be capable of providing the person with appropriate redress. In this connection, the Court had previously found, in certain circumstances, that a review by the criminal courts of a measure in breach of Article 8 would provide appropriate redress where the court carried out an effective review of the lawfulness and necessity of the impugned measure and, where appropriate, excluded any resulting evidence from the criminal proceedings. However, that had not been the case here, as the search had not resulted in the collection of any evidence for the prosecution and the proceedings had been discontinued by the preliminary investigations judge. In addition, that judge had not examined either the lawfulness or the necessity of the search warrant, but had merely endorsed the public prosecutor's request for the case to be closed. Nor had the applicant been able to obtain a review of

² *Modestou v. Greece*, no. 51693/13, § 44, 16 March 2017.

the measure, because the specific remedy under Article 257 of the Code of Criminal Procedure could be envisaged only where the search had resulted in the seizure of property. It followed that no judge had examined the lawfulness or necessity of the public prosecutor's warrant for the search of Mr Brazzi's home. Consequently, as there was no such examination or, if appropriate, a finding of unlawfulness, the person concerned could not obtain appropriate redress for the alleged damage.

Therefore, as there was no prior judicial oversight or any effective *ex post facto* review of the impugned investigative measure, Italian law did not provide sufficient safeguards against the risk of an abuse of power by the authorities conducting the criminal investigation. The Court accordingly found that, even if the measure had a legal basis in domestic law, the domestic legislation did not provide Mr Brazzi with the requisite safeguards against abuse or arbitrariness, before or after the search. As a result, he had not had the benefit of the "effective oversight" required by the rule of law in a democratic society. The interference with Mr Brazzi's right to respect for his home had not therefore been "in accordance with the law" within the meaning of Article 8 § 2 of the Convention. **There had thus been a violation of Article 8 of the Convention.**

Article 41 (just satisfaction)

Mr Brazzi did not make any claim by way of just satisfaction. The Court thus took the view that there was no need to award him any sum on that basis.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.