



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

FOURTH SECTION

CASE OF ZUBAL v. SLOVAKIA

(Application no. 44065/06)

JUDGMENT

STRASBOURG

9 November 2010

FINAL

09/02/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Zubaľ v. Slovakia,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Ljiljana Mijović,

Ján Šikuta,

Mihai Poalelungi,

Nebojša Vučinić,

Vincent Anthony de Gaetano, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 20 October 2010,

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

PROCEDURE

1. The case originated in an application (no. 44065/06) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Slovak national, Mr Ivan Zubaľ ("the applicant"), on 23 October 2006.

2. The applicant was represented by Mr I. Segeš, a lawyer practising in Bratislava. The Slovak Government ("the Government") were represented by their Agent, Mrs M. Pirošíková.

3. The applicant alleged, in particular, that his house had been searched in breach of Article 8 of the Convention.

4. On 28 January 2010 the President of the Fourth Section decided to give notice of the application to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1939 and lives in Bratislava.

6. On 20 June 2005 a judge of the Trenčín District Court issued a warrant for a search of the applicant's home under Articles 82 § 1 and 83 § 1 of the Code of Criminal Procedure.

7. The decision was issued at the request of a public prosecutor. It stated that criminal proceedings had been brought in January 2004 against several persons suspected of having produced and sold forged paintings. The

applicant had bought one such painting in 2003. It was therefore considered likely that he had it in his house. Accordingly, there was a suspicion that there was an object on the premises which was important for the purposes of the criminal proceedings.

8. The police arrived at the applicant's house at 6 a.m. on 22 June 2005 to carry out the search. The applicant was on holiday in Egypt. His partner's son, who was eighteen years old, was present and, according to the police record, he was requested under Article 84 of the Code of Criminal Procedure to hand over the painting. He informed the police that the painting was unlikely to be in the house and expressed the view that it might be at the premises of the applicant's company, that is, at a different address. All the rooms of the applicant's house were visually searched between 6.10 and 6.45 a.m. by four policemen, in the presence of the applicant's partner's son and a third person who was not involved in the case. The painting in issue was not found.

9. Upon his return on 24 June 2005, the applicant complained to the Ministry of the Interior, the Ministry of Justice and the General Prosecutor's Office, alleging that the search had been inappropriate. He argued, in particular, that he had purchased the painting through an auction house and that it had been open to the prosecuting authorities to ask him for it. The search had interfered with his right to respect for his private life, as he had been on holiday and had had to make the necessary arrangements through his lawyer, and because his reputation had been compromised at his place of residence. The applicant also complained that the police had damaged his good name in that they had interviewed the employees of his company about his private collection of paintings.

10. On 20 July 2005 the applicant lodged a complaint with the Constitutional Court. Relying on Article 8 of the Convention, he argued that he was an injured party and that he had no interest in concealing the painting, which he had bought at an auction. He was himself interested in having its origin established. He would have cooperated with the prosecuting authorities if requested. However, those authorities had not contacted him prior to the search. The applicant alleged a breach of Article 84 of the Code of Criminal Procedure. He also complained that the police who had searched his flat had later attempted, without authorisation, to search his private art collection, which was held at a different location, and had interviewed the employees of the applicant's company, thereby damaging his good name and reputation.

11. On 9 August 2005 the police contacted the applicant and requested, under Article 78 of the Code of Criminal Procedure, that the painting be handed over to them. The applicant complied with the request immediately.

12. On 29 March 2006 the Constitutional Court dismissed the applicant's complaint on the following grounds. To the extent that the applicant complained about the warrant and the search, he should have sought redress

within the framework of the criminal proceedings in which he had the standing of an injured party. The question of the justification for the search was within the scope of the powers of the criminal court dealing with the case. The applicant could have asked that court to conclude, in its reasons for the decision on the merits of the case, that the warrant and the search had breached his fundamental rights and freedoms. Such a finding would have entitled the applicant to claim damages under Act no. 514/2003, which governed liability for damage caused in the context of the exercise of public authority.

13. As to the complaint about the conduct of the police involved, the Constitutional Court held that the applicant should first have sought redress by means of a petition to a public prosecutor, pursuant to the Public Prosecution Act 2001.

14. In a letter of 28 June 2006 a public prosecutor of the General Prosecutor's Office concluded, in reply to the applicant's complaint, that the search had complied fully with the relevant law. The letter explained that a police operation had been planned for 22 June 2005, in the context of which the suspected persons had been arrested and their homes searched. For tactical reasons, the police had planned to secure all of the paintings presumed to have been forged on the same day. The search had consisted of a purely visual examination of the premises. It had been necessary as there had been a risk that the injured parties would refuse to hand over the paintings to the prosecuting authorities. In particular, they might have denied ownership of the paintings after learning that they had been forged, out of fear that they would be unable to obtain compensation from the perpetrators.

15. On 21 December 2006 the investigator concluded that no offence had been committed and discontinued the criminal proceedings concerning the alleged forgery of works of art. On 29 December 2006 the applicant lodged a complaint against that decision. He withdrew his complaint on 15 January 2007.

16. On 8 February 2007 the Trenčín Regional Prosecutor's Office ordered that new criminal proceedings concerning forged paintings should be brought in the same context. In a decision of 9 March 2007 the police started these proceedings. A witness was heard on 25 June 2007. On 29 June 2007 the criminal proceedings were stayed as no facts had been established that could have led to the prosecution of a specific person.

II. RELEVANT DOMESTIC LAW

17. The following provisions of the Code of Criminal Procedure are relevant to the present case.

18. Article 78 § 1 states that all persons who are in possession of an object which is important for the purposes of criminal proceedings are

obliged to show it to the investigator or police. Where it is necessary to secure such an object for the purposes of the criminal proceedings, the person in possession of the object must hand it over to the authorities in charge of the case.

19. In the event of a refusal, the authorities are entitled to seize the object, subject to approval by a judge, or a public prosecutor in preliminary proceedings (Article 79 § 1).

20. Pursuant to Article 82 § 1, the search of a person's home is permissible where there is a justifiable suspicion that an object which is important for the purposes of criminal proceedings is located therein or that a person suspected of an offence is hiding there.

21. Under Article 83 § 1, the search of a person's home must be ordered by a judge. The warrant must be issued in writing and indicate the reasons. It must be served on the person whose premises are to be searched. If it is not possible to do so immediately, the warrant must be served within twenty-four hours of the removal of the obstacle preventing the service of the warrant.

22. Article 84 allows for the search of premises only when it has been impossible to attain the purpose of the search by means of a prior request addressed to the person whose premises are to be searched.

23. Article 85 § 1 requires that the person whose premises are to be searched, or an adult member of his or her household, should be allowed to be present during the search. Pursuant to paragraph 2 of Article 85, the presence of a third person without any involvement in the case should also be ensured during a search.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

24. The applicant complained about the search of his house. As in the proceedings before the Constitutional Court, he alleged a breach of his rights as a result of (i) the court's decision to order the search and the search as such, and (ii) procedural shortcomings in the way in which the police had proceeded. He relied on Article 8 of the Convention, which in its relevant part provides:

“1. Everyone has the right to respect for his ... his home ...

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.”

25. The Government contested those arguments.

26. The Court notes that the Constitutional Court addressed separately the above two complaints by the applicant, which, according to him, had given rise to separate breaches of his rights under Article 8 of the Convention. It considers it appropriate to proceed likewise in the circumstances.

A. Admissibility

1. Complaint about the search order

27. The Government objected that, as regards the justification for the search order and the search of the applicant's house on the basis of it, it was open to the applicant to seek redress before the criminal court dealing with the case, as indicated in the Constitutional Court's decision of 29 March 2006. The fact that the newly brought criminal proceedings had been stayed did not affect the position as it would still be possible for the applicant to seek redress either before the criminal court involved at a later stage or, should the proceedings not reach the trial stage, before the Constitutional Court.

28. The applicant disagreed. He argued, in particular, that he had no practical possibility of obtaining redress before the Slovakian authorities.

29. The Court notes that the original criminal proceedings were discontinued at the pre-trial stage. It was therefore impossible for the applicant to claim any redress before a criminal court as suggested in the Constitutional Court's decision of 29 March 2006. Similarly, the newly started criminal proceedings were stayed because no facts had been established that could have led to the prosecution of a specific person. Admittedly, it cannot be excluded that the proceedings will be resumed later if the evidence available so permits. However, given the period of time which has elapsed since the search complained of and the unpredictability of further developments in those criminal proceedings, the Court does not accept the Government's argument that this part of the application should be rejected for the applicant's failure to exhaust domestic remedies (for the relevant principles see also *Aksoy v. Turkey*, 18 December 1996, §§ 52 and 53, *Reports of Judgments and Decisions* 1996-VI).

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

2. Complaint about the alleged failure by the police to comply with the relevant law

31. The Government argued that the applicant had failed to exhaust domestic remedies. It had been open to him to complain to a public prosecutor about the conduct of the police and any procedural shortcomings during the search and, ultimately, he could have sought redress before the Constitutional Court in that respect.

32. The applicant disagreed.

33. The Court accepts that, to the extent that the applicant was complaining of procedural shortcomings in the way in which the police had acted in the context of the search of his house, it was open to him to seek redress before the Constitutional Court after he had unsuccessfully complained to the public prosecutors. In its decision of 29 March 2006 the Constitutional Court expressly referred the applicant to remedies under the Public Prosecution Act 2001 which he was required to use prior to lodging a constitutional complaint in respect of the facts in issue. Subsequently, on 28 June 2006, a public prosecutor of the General Prosecutor's Office concluded, in reply to the applicant's complaint, that the search had complied with the relevant law. The applicant has not shown that he subsequently sought redress before the Constitutional Court.

34. It follows that this part of the application must be rejected under Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

B. Merits

35. The applicant maintained that there existed no relevant justification for the search of his house. The criminal proceedings had been brought in January 2004. The police had not heard the applicant in connection with those proceedings prior to the search. He had the standing of an injured party and he had no reason for refusing to co-operate with the police or to put the painting at their disposal.

36. The Government argued that the court's order had set out in detail the reasons for the search and the way in which it was to be carried out. The relevant provisions of the Code of Criminal Procedure had been complied with in that respect. The search had pursued the legitimate aim of protecting public order and preventing crime. The search had been synchronised with the arrest of the suspected perpetrators and it had been necessary with a view to preventing any complications in obtaining the paintings in issue from the persons who had purchased them.

37. The Court notes, and it has not been disputed between the parties, that the search of the applicant's house amounted to an interference with his right under Article 8 § 1 to respect for his home. Such interference gives

rise to a breach of Article 8 unless it can be shown that it was “in accordance with the law”, pursued one or more legitimate aim or aims as defined in paragraph 2, and was “necessary in a democratic society” to achieve those aims.

38. The search had a basis in the domestic legal system, namely Articles 82 et seq. of the Code of Criminal Procedure.

39. The search was carried out in the context of an investigation into the alleged forgery of works of art. The Court is satisfied that it pursued the legitimate aim of preventing crime.

40. The principal point in issue has been the justification for the search. Under the Court's settled case-law, 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; in determining whether an interference is “necessary in a democratic society”, the Court will take into account that a margin of appreciation is left to the Contracting States. The Contracting States may consider it necessary to resort to measures such as searches of residential premises and seizures in order to obtain physical evidence of certain offences. The Court will assess whether the reasons adduced to justify such measures in the present case were relevant and sufficient and whether the aforementioned proportionality principle has been adhered to (for a recapitulation of the relevant principles see, for example, *Camenzind v. Switzerland*, 16 December 1997, §§ 44-45, *Reports* 1997-VIII or *Smirnov v. Russia*, no. 71362/01, 7 June 2007, §§ 43-44, ECHR 2007-VII, with further references).

41. In the present case the search was carried out in the context of criminal proceedings concerning the suspected forgery of works of art. The applicant was in the position of an injured party as he was the owner of the painting. There is no indication that the authorities suspected him at any time of involvement in any unlawful action in that context.

42. The search was considered necessary with a view to securing the painting for the purposes of further criminal proceedings. In particular, the authorities presumed that the applicant might deny possession of the painting out of fear that he would be unable to obtain damages from the perpetrators of the crime. The Court is not persuaded by such an argument. The applicant, who is a collector of works of art, had bought the painting at an auction. The way in which he had acquired it was therefore easily verifiable. He had a genuine interest in having the matter elucidated and, as appropriate, claiming compensation for damage from those liable. The applicant had no apparent reason for refusing to co-operate with the prosecuting authorities and thus exposing himself to the risk of a sanction, possibly a criminal one.

43. The subsequent developments are in line with the above consideration. In particular, after the painting had not been found in the applicant's house, the prosecuting authorities did not apply for a new

warrant to search the premises of the applicant's company, where, as the son of the applicant's partner informed them, the painting was likely to be. Instead, one and a half months later, the police contacted the applicant and requested, under Article 78 of the Code of Criminal Procedure, that the painting be handed over to them. The applicant complied with the request immediately. The Court sees no reason why the authorities could not have proceeded in the same manner earlier without having recourse to a search of the applicant's house.

44. It is true that the scope of the search was, reasonably, limited to a visual examination of the premises, and that it was carried out in the presence of a third person who was not involved in the case. The Court nevertheless considers relevant the applicant's argument that the presence of the police at his house at 6 a.m. had repercussions for his reputation. At the relevant time the applicant was abroad. His holiday was disturbed by the news of the search and the immediate arrangements which he considered it necessary to make with a view to protecting his rights.

45. The Court considers that the search of the applicant's house, carried out without sufficient grounds, when the applicant was not suspected of any criminal offence but was an injured party in the criminal case in issue, was not "necessary in a democratic society".

There has accordingly been a violation of Article 8 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. 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

47. The applicant claimed compensation for non-pecuniary damage. He left the award to the discretion of the Court.

48. The Government also left any award in respect of non-pecuniary damage to the Court's discretion.

49. The Court awards the applicant 3,000 euros (EUR) in respect of non-pecuniary damage.

B. Costs and expenses

50. The applicant claimed EUR 637.20 for the costs and expenses incurred before the Court. That sum was determined on the basis of scales

indicated in the Regulation of the Ministry of Justice on Advocates' Remuneration for Legal Services.

51. The Government considered that the Court should award the applicant compensation only for reasonably incurred expenses relating to his legal representation.

52. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the absence of any evidence indicating that the sum claimed has been actually incurred, no award is made under this head.

C. Default interest

53. The Court considers it appropriate that the default interest 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* admissible the complaint under Article 8 of the Convention about the search order and the search of the applicant's house carried out on the basis of it, and declares inadmissible the remainder of the application;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount 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 November 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President