



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

FOURTH SECTION

CASE OF HARJU v. FINLAND

(Application no. 56716/09)

JUDGMENT

STRASBOURG

15 February 2011

FINAL

15/05/2011

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

In the case of Harju v. Finland,

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

Nicolas Bratza, *President*,

Lech Garlicki,

Ljiljana Mijović,

Päivi Hirvelä,

Ledi Bianku,

Nebojša Vučinić,

Vincent A. de Gaetano, *judges*,

and Lawrence Early, *Section Registrar*,

Having deliberated in private on 25 January 2011,

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

PROCEDURE

1. The case originated in an application (no. 56716/09) against the Republic of Finland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Finnish national, Ms Anu Orvokki Harju (“the applicant”), on 21 October 2009.

2. The applicant was represented by Mr Markku Fredman, a lawyer practising in Helsinki. The Finnish Government (“the Government”) were represented by their Agent, Mr Arto Kosonen of the Ministry for Foreign Affairs.

3. The applicant alleged, in particular, that her right to respect for home under Article 8 of the Convention had been violated and that she had had no access to a court or an effective remedy in this respect under Articles 6 and 13 of the Convention.

4. On 12 January 2010 the President of the Fourth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1967 and lives in Helsinki.

6. The applicant was under suspicion of having organised illegal immigration (*laittoman maahanmuuton järjestäminen, ordnande av olaglig inresa*). The pre-trial investigation in her case was conducted by the criminal investigators of the Finnish Border Guard (*Rajavartiolaitos, Gränsbevakningsväsendet*) who, *inter alia*, conducted a search at her domicile on 9 July 2009 at 10 p.m. The applicant was not at home at the time of the search. She was not contacted about the search nor was her counsel informed about the search. During the search her computer, among other items, was seized.

7. When the applicant returned home later that night, she found a handwritten note indicating that the Finnish Border Guard criminal investigators had searched her apartment and that some items had been seized.

8. According to the records of the search and seizure, dated 11 July 2009, the seized materials, with the exception of the computer, were returned to the applicant on that same date.

9. The applicant was later questioned as a suspect.

II. RELEVANT DOMESTIC LAW

A. Constitution

10. According to Article 10 of the Finnish Constitution (*perustuslaki, grundlagen*, Act no. 731/1999), the sanctity of everyone's home is guaranteed. Measures derogating from this right, and which are necessary for the purpose of guaranteeing basic rights and liberties or for the investigation of crime, must be laid down by an Act.

B. Border Guard Act

11. According to section 41, subsection 1, of the Border Guard Act (*rajavartiolaki, gränsbevakningslagen*; Act no. 578/2005), the Border Guard is a pre-trial investigation authority under the Pre-Trial Investigation Act. According to subsection 2, with the exception of undercover activities, undercover transactions, telecommunications interception and telecommunications monitoring, the provisions of the Police Act, the Pre-Trial Investigation Act, the Coercive Measures Act or any other Act on the powers of police officers to prevent and investigate offences and to bring charges apply to border guards within their competence to prevent and investigate offences and to bring charges.

12. Under section 42, of the Border Guard Act, facilitation of illegal entry within the meaning of Chapter 17, section 8, subsection 1, of the Penal Code (*rikoslaki, strafflagen*, Act no. 563/1998 as modified by Act

no. 650/2004) is among the offences that may be investigated by the Border Guard.

C. Coercive Measures Act

13. Chapter 5, section 1, subsection 1, of the Coercive Measures Act (*pakkokeinolaki, tvångsmedelslagen*, Act no. 646/2003) provides that a search may be conducted, *inter alia*, if there is reason to suspect that an offence has been committed and provided the maximum sentence applicable exceeds six months' imprisonment.

14. According to Chapter 5, Section 3, of the Coercive Measures Act, an official with the power of arrest shall decide on a search of premises. However, a police officer may carry out a search of premises without a warrant when the purpose of the search is to locate a person to be apprehended, arrested, detained, brought to court or subjected to a bodily search, or to seize an object, when continuously followed or monitored since the commission of the offence. A police officer may carry out a search of the premises also in other urgent cases.

15. The person whose domicile is being searched, or in his or her absence someone else, must be given the opportunity to be present at the search and to call a witness, unless this causes delay. If none of the above-mentioned persons was present at the search, the person whose domicile has been searched must be immediately informed (Chapter 5, section 4, subsection 2).

16. A search at domicile cannot be conducted between 9 p.m. and 6 a.m. unless there are special reasons (Chapter 5, section 5, subsection 4).

D. Penal Code

17. According to Chapter 17, section 8, subsection 1, of the Penal Code, a person can be sentenced for organising illegal immigration to a fine or imprisonment for a maximum of two years.

E. Remedies

18. Chapter 4, section 13, of the Coercive Measures Act provides that, at the request of a person whom the case concerns, the court shall decide whether the seizure of any materials shall remain in force. A request which has been submitted to the court before its examination of the charges shall be considered within a week of its reception by the court. The court shall provide those with an interest in the matter an opportunity to be heard, but the absence of any such person shall not preclude a decision on the issue. A decision reviewing a seizure is subject to a separate appeal (Chapter 4, section 16, subsection 1).

19. According to section 118, subsection 3, of the Constitution everyone who has suffered a violation of his or her rights or sustained loss through an

unlawful act or omission by a civil servant or other person performing a public function shall have the right to request that the civil servant or other person in charge of the public function be sentenced to a punishment and that the public organisation, official or other person in charge of a public function be held liable for damages, as provided in more detail by an Act.

20. Chapter 40, section 9, subsection 1, of the Penal Code (as modified by Act no. 604/2002) provides that if a public official, when acting in office, intentionally in a manner other than that provided above in this Chapter violates or neglects to fulfil his official duty based on the provisions or regulations to be followed in official functions, and the act, when assessed as a whole, taking into consideration its detrimental and harmful effect and the other circumstances connected with the act, is not a petty offence, he shall be sentenced for violation of official duties to a fine or to imprisonment for a maximum of one year.

21. Chapter 40, section 10, of the Penal Code (as modified by Act no. 604/2002) provides that if a public official, when acting in office, through carelessness or lack of caution, in a manner other than that referred to in section 5, subsection 2, violates or neglects to fulfil his or her official duty based on the provisions or regulations to be followed in official functions, and the act, when assessed as a whole, taking into consideration its detrimental and harmful effect and the other circumstances connected with the act, is not a petty offence, he shall be sentenced for negligent violation of official duties to a warning or to a fine.

22. According to Chapter 1, section 14, of the Criminal Procedure Act (*laki oikeudenkäynnistä rikosasioissa, lagen om rättegång i brottmål*, as modified by Act no. 647/2003), an injured party may bring a private prosecution only if the public prosecutor has decided not to press charges.

23. Under Chapters 3 and 4 of the Tort Liability Act (*vahingonkorvauslaki, skadeståndslagen*, Act no. 412/1974) proceedings may be brought against the State in respect of damage resulting from fault or neglect by its employees in the performance of their duties.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

24. The applicant complained of a violation of her right to respect for home 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.”

25. The Government contested that argument.

A. Admissibility

26. The Government argued that the applicant had not exhausted domestic remedies as the applicant had not requested a court under Chapter 4, section 13, of the Coercive Measures Act to decide whether the seizure should remain in force. There appeared to be no specific reasons absolving the applicant from exhausting this remedy. As she had not done so, in the Government's view the application should be declared inadmissible under Article 35 §§ 1 and 4 for non-exhaustion of domestic remedies.

27. The applicant disagreed and pointed out that the application did not concern the seizure but the search itself. There existed no legal remedies under Finnish law against a search. Even though there existed an effective remedy in relation to a seizure, a possible favourable outcome of such proceedings could not have had any effect on the search. The applicant had thus fulfilled the criteria for exhaustion of domestic remedies as no such remedies had been available against the search.

28. The Court considers, in the light of the parties' submissions, that this objection is closely related to the merits of the applicant's complaint. It will therefore examine this preliminary objection together with the merits of the case. The Court concludes therefore that this complaint raises questions of fact and law which are sufficiently serious that their determination should depend on an examination of the merits, and that no other grounds for declaring it inadmissible have been established. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

29. The applicant noted that there had clearly been an interference with her right to respect for home and that that interference had had a basis in Finnish law. However, the quality of that law was problematic. There existed no legal safeguards whatsoever in this respect. Since very strict limits were called for as regards the conduct of searches without a warrant, the law in question did not fulfil the “in accordance with law” requirements, as established by the Court. According to Finnish law, a search might be conducted if there was reason to suspect that an offence had been

committed. The threshold for “reason to suspect” was very low and was always considered to be fulfilled when the investigative authority so decided. There existed no possibility to challenge a decision to open an investigation and to obtain a decision from a court finding that there had been no reason to suspect a person of an alleged crime following a search of his home. Moreover, the applicant's telephone number had been and still was listed in the public telephone directory. However, the authorities did not try to contact her and she had thereby been deprived of her right to be present at the time of the search. Accordingly, it had not been performed in accordance with the national law.

30. The applicant agreed that the interference had pursued a legitimate aim. She stressed that the application concerned the lack of any safeguards to challenge the search conducted at her home and thus the arbitrary nature of the measure.

31. The Government agreed that the search and seizure at the applicant's home constituted an interference within the meaning of Article 8 of the Convention. Because of the urgency of the matter, the search had been conducted on the basis of an order given orally by an officer with power of arrest only a few hours after the arrival in Finland of persons suspected of illegally entering the country. It had been necessary to conduct the search immediately to verify whether there had been other such persons in the applicant's home, and to ensure that no evidence of an offence had been destroyed. Therefore, in the Government's view, there had been a justified reason, as required by Chapter 5, section 5, subsection 2, of the Coercive Measures Act, to conduct the search at 10 p.m. The search had been performed for the purposes of the prevention of crime and it had therefore pursued a legitimate aim. It had not been possible to inform the applicant about the possibility to be present during the search as neither her telephone number nor that of her counsel had been known to the officers. The applicant had, however, been immediately informed about the search by a hand-written note left in her apartment, mentioning, *inter alia*, the contact details of the officers who had carried out the search. The written search warrant and the records of the seizure had been communicated to the applicant as soon as she had been located for the purposes of questioning, namely a day and a half after the search. The search and seizure had thus been carried out in accordance with the law.

32. As to the necessity requirement, the Government maintained that the interference had been necessary in a democratic society. Due to the nature of the suspected crime, it had not been possible to delay the search.

2. *The Court's assessment*

(a) **Whether there was an interference**

33. The parties agree that there was an interference in respect of the applicant's right to respect for her home. The Court sees no reason to differ on that point.

34. The Court must therefore examine whether this interference was in conformity with the requirements of the second paragraph of Article 8, in other words whether it was “in accordance with the law”, pursued one or more of the legitimate aims set out in that paragraph and was “necessary in a democratic society” to achieve the aim or aims in question.

(b) **Was the interference justified?**

(i) *Was the interference “in accordance with the law”?*

35. The Court notes that the expression “in accordance with the law”, within the meaning of Article 8 § 2 requires firstly that the impugned measure should have some basis in domestic law. Second, the domestic law must be accessible to the person concerned. Third, the person affected must be able, if need be with appropriate legal advice, to foresee the consequences of the domestic law for him, and fourth, the domestic law must be compatible with the rule of law (see, among many other authorities, *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V; *Liberty and Others v. the United Kingdom*, no. 58243/00, § 59, 1 July 2008; and *Kennedy v. the United Kingdom*, no. 26839/05, § 151., ECHR 2010-).

(α) *Was there a legal basis in Finnish law?*

36. The Court reiterates that, in accordance with the case-law of the Convention institutions, in relation to Article 8 § 2 of the Convention, the term “law” is to be understood in its substantive sense, not its formal one. In a sphere covered by written law, the “law” is the enactment in force as the competent courts have interpreted it (see, *inter alia*, *Société Colas Est and Others v. France*, no. 37971/97, § 43, ECHR 2002-III). In this respect, the Court notes that its power to review compliance with domestic law is limited, it being in the first place for the national authorities, notably the courts, to interpret and apply that law (see, *inter alia*, *Chappell v. the United Kingdom*, 30 March 1989, § 54, Series A no. 152-A).

37. The Court notes that both parties appear to agree that the search and seizure had a basis in the Coercive Measures Act. The Court is therefore satisfied that the interference complained of had a basis in Finnish law.

(β) “Quality of the law”

38. The second requirement which emerges from the phrase “in accordance with the law” – the accessibility of the law – does not raise any problems in the instant case. The Court assumes that the same is true also for the third requirement, the “foreseeability” of the consequences of the domestic law for the applicant.

39. As to the fourth requirement, the Court reiterates that Article 8 § 2 requires the law in question to be “compatible with the rule of law”. In the context of search and seizure, the domestic law must provide some protection to the individual against arbitrary interference with Article 8 rights. Notwithstanding the margin of appreciation which the Court recognises the Contracting States have in this sphere, it must be particularly vigilant where, as in the present case, the authorities are empowered under national law to order and effect searches without a judicial warrant. If individuals are to be protected from arbitrary interference by the authorities with the rights guaranteed under Article 8, a legal framework and very strict limits on such powers are called for (see *Camenzind v. Switzerland*, 16 December 1997, § 45, *Reports of Judgments and Decisions* 1997-VIII).

40. The Court must examine the “quality” of the legal rules applicable to the applicant in the instant case. It notes in the first place that under Chapter 5 of the Coercive Measures Act, a search may be conducted, *inter alia*, if there is reason to suspect that an offence has been committed and provided the maximum sentence applicable exceeds six months’ imprisonment. The search warrant is issued by the investigative organs themselves. A search may be carried out without a warrant in urgent cases.

41. With regard to the safeguards against abuse existing in Finnish legislation, the Court observes that, in the absence of a requirement for prior judicial authorisation, the investigation authorities had unlimited discretion to assess the expediency and scope of the search and seizure. Moreover, in cases of urgency, a search could be carried out even without a warrant. The Court notes that in such cases the officer conducting the search was thus competent to assess alone whether or not to conduct the search and to determine its scope.

42. The Court would emphasise in this connection that measures of search and seizure represent a serious interference with Article 8 rights and must accordingly be based on a law that is particularly precise. It is essential to have clear, detailed rules in this area, setting out safeguards against possible abuse or arbitrariness (see *Sorvisto v. Finland*, no. 19348/04, § 118, 13 January 2009).

43. Turning to the present case, the Court reiterates that it has already found in the case of *Sallinen and Others v. Finland* (no. 50882/99, § 89, 27 September 2005) that there was no independent or judicial supervision of the issuance of the search warrant as the decision to authorise the order was taken by the police themselves (see also, *mutatis mutandis*, *Kruslin v.*

France, 24 April 1990, §§ 34-35, Series A no. 176-A; *Silver and Others v. the United Kingdom*, 25 March 1983, § 90, Series A no. 61; and *Sorvisto v. Finland*, cited above, § 117). The same is true in the present case where the search was ordered and conducted by Border Guard officers.

44. The Court notes that the absence of a prior judicial warrant may be counterbalanced by the availability of an *ex post facto* judicial review (see, *mutatis mutandis*, *Smirnov v. Russia*, no. 71362/01, § 45, ECHR 2007-VII). However, in the present case the applicant did not have any effective access, *a posteriori*, to a court to have both the lawfulness of, and justification for, the search warrant reviewed. The applicant's right to respect for her home was thus violated by the fact that there was no prior judicial warrant and no possibility to obtain an effective judicial review *a posteriori* of either the decision to order the search or the manner in which it was conducted (see *Varga v. Romania*, no. 73957/01, § 73, 1 April 2008; and *Işıldak v. Turkey*, no. 12863/02, § 52, 30 September 2008).

45. The Court therefore concludes that, even if there could be said to be a general legal basis for the measures provided for in Finnish law, that law does not provide sufficient judicial safeguards either before the granting of a search warrant or after the search. The applicant was thus deprived of the minimum degree of protection to which she was entitled under the rule of law in a democratic society.

46. The Court finds that in these circumstances it cannot be said that the interference in question was “in accordance with the law” as required by Article 8 § 2 of the Convention.

47. There has therefore been a violation of Article 8 of the Convention. For the above reasons, the Court dismisses the Government's preliminary objection based on non-exhaustion of domestic remedies.

(ii) Legitimate aim and necessity of the interference

48. Having regard to the above conclusion, the Court does not consider it necessary to review compliance with the other requirements of Article 8 § 2 in this case (see, for example, *Kopp v. Switzerland*, 25 March 1998, *Reports of Judgments and Decisions* 1998-II, § 76).

II. ALLEGED VIOLATION OF ARTICLES 6 AND 13 OF THE CONVENTION

49. The applicant complained under Articles 6 and 13 of the Convention about the lack of access to a court and lack of an effective remedy in this respect. The Court notes that, although the applicant invoked both Articles 6 and 13 of the Convention, her complaint is more properly examined under the latter Article alone. Article 13 of the Convention 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.”

50. The Government contested that argument.

A. Admissibility

51. The Court notes that this complaint is linked to the one examined above and must therefore likewise be declared admissible.

B. Merits

1. The parties' submissions

52. The applicant reiterated that her application only concerned the search of her home, not the seizure of items. There were no explicit or, for that matter, any provisions or case-law even suggesting that a person subject to a search could have access to a court in order to challenge that search. It was true that the civil liability of the officers conducting the search could be invoked but this possibility was neither effective nor capable of providing redress for the interference with her right to respect for her home as she would have to show that she had actually suffered damage. None of the private prosecutions initiated against officers having conducted or ordered a search had been successful. This remedy was therefore theoretical as well as illusory. The same was true for lodging a complaint with the Parliamentary Ombudsman (*eduskunnan oikeusasiamies, riksdagens justitieombudsman*) and the Chancellor of Justice (*oikeuskansleri, justitiekanslern*). There had been a violation of Article 13 taken together with Article 8 of the Convention.

53. The Government maintained that, according to the Court's case-law, it was not required that there must exist a possibility to challenge the legality of a search before it was conducted but that there should exist a possibility to rely on effective remedies after the search. Although there was no explicit possibility to challenge a search before a court, this did not mean that there was no effective remedy. Under Chapter 4, section 13, of the Coercive Measures Act the legality of a seizure could be examined by a court. An unlawful search could also result in the civil or criminal liability of the State or the officer carrying out the search. Moreover, an injured party could bring a private prosecution if the public prosecutor had decided not to press charges. Also, the possibility for the Parliamentary Ombudsman and the Chancellor of Justice to control the legality of measures taken by authorities should be taken into account. In the Government's view the applicant had thus had access to a court in respect of the search and seizure

conducted at her home. She had had several effective remedies at her disposal but had failed to use any of them.

2. The Court's assessment

54. Having regard to the finding relating to Article 8 of the Convention (see paragraph 47 above), the Court considers that it is not necessary to examine separately whether, in this case, there has been an additional violation of Article 13 of the Convention (see *Liberty and Others v. the United Kingdom*, cited above, § 73).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. 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

56. The applicant claimed 3,000 euros (EUR) in respect of non-pecuniary damage.

57. The Government found the applicant's claim excessive as to quantum and considered that the total amount of compensation for non-pecuniary damage should not exceed EUR 1,500.

58. The Court considers that the applicant must have sustained non-pecuniary damage. Ruling on an equitable basis, it awards the applicant the full sum claimed.

B. Costs and expenses

59. The applicant also claimed EUR 2,701.08 for the costs and expenses incurred before the Court.

60. The Government found the applicant's claim excessive as to quantum and considered that the total amount of compensation for costs and expenses should not exceed EUR 2,000 (inclusive of value-added tax).

61. 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 were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,500 (inclusive of value-added tax) for the proceedings before the Court.

C. Default interest

62. 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. *Decides* to join to the merits of the case the Government's objection based on non-exhaustion of domestic remedies and *declares* the application admissible;
2. *Holds* that there has been a violation of Article 8 of the Convention and *dismisses* in consequence the Government's above-mentioned preliminary objection;
3. *Holds* that there is no need to examine separately the complaint under Article 13 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable to her, in respect of costs and expenses;
 - (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;
5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 15 February 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Lawrence Early
Registrar

Nicolas Bratza
President