



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

FIRST SECTION

CASE OF DOROŻ v. POLAND

(Application no. 71205/11)

JUDGMENT

Art 8 • Respect for home • Home search ordered by prosecutor during investigation for a petty offence • Search order drafted in broad terms • Absence of prior judicial authorisation not counterbalanced by availability of *ex post facto* judicial review • Interference disproportionate

STRASBOURG

29 October 2020

FINAL

29/01/2021

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

In the case of Doroż v. Poland,

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

Ksenija Turković, *President*,

Krzysztof Wojtyczek,

Alena Poláčková,

Péter Paczolay,

Gilberto Felici,

Erik Wennerström,

Raffaele Sabato, *judges*,

and Abel Campos, *Section Registrar*,

Having regard to:

the application (no. 71205/11) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Polish national, Mr Artur Doroż (“the applicant”), on 5 November 2011;

the decision to give notice of the application to the Polish Government (“the Government”);

the parties’ observations;

Having deliberated in private on 6 October 2020,

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

INTRODUCTION

1. The case concerns a search of the applicant’s home which was ordered by a prosecutor in proceedings concerning a petty offence.

THE FACTS

2. The applicant was born in 1983 and lives in Dąbrowa Tarnowska. The applicant, who had been granted legal aid, was represented by Ms M. Pecyna, a lawyer practising in Cracow.

3. The Government were represented by their Agent, Ms J. Chrzanowska, and subsequently by Mr J. Sobczak, of the Ministry of Foreign Affairs.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. On 3 April 2011 leaflets containing information about the salary of the mayor of Dąbrowa Tarnowska and his photograph were distributed. The leaflets were anonymous and were left in public places in three towns close to Dąbrowa Tarnowska.

6. Subsequently the police started investigating the incident. On 5 April 2011 the police were informed that the applicant might be in possession of more leaflets and that he had the technical means for printing on a large

scale. The Government submitted that the police had been warned by their source that the applicant might proceed to destroy the leaflets.

7. The Dąbrowa Tarnowska District Prosecutor opened an investigation into a petty offence of unlawful advertising (*nielegalne ogłoszenie*), proscribed by Article 63 a of the Petty Offences Code (*Kodeks wykroczeń*).

8. On 6 April 2011 the Dąbrowa Tarnowska District Prosecutor decided to conduct a search of the premises belonging to the applicant. The decision stated as follows:

“In the course of the investigation, it was established that [the applicant] might be in possession of items which could become evidence in the instant case, in particular leaflets with information about the salary of the mayor and his photograph.

Given the above, in order to verify the information and to secure any possible pieces of evidence the decision should be as stated in the operative part.”

9. On 11 April 2011 at 6.20 a.m., the police entered the applicant’s home and conducted a search. The search lasted until 7 a.m. No leaflets or other evidence were found. The Government submitted that the search had been conducted by three police officers and in the presence of the applicant.

10. On 18 April 2011 the applicant lodged an appeal against the search order. He argued that the decision had not been sufficiently reasoned and that there had been no justification for a breach of his right to respect for his private life and home.

11. The Helsinki Foundation for Human Rights in Warsaw joined the proceedings as *amicus curiae*. The foundation prepared pleadings in which it raised doubts as to the necessity and proportionality of the measure that had been applied by the authorities. It submitted that the decision of the prosecutor had not been sufficiently reasoned. The leaflets which had been under investigation contained a photograph of a public person, T.K., the mayor of Dąbrowa Tarnowska, and information about his salary, which had already been in the public domain. Such action had fallen within the scope of freedom of expression and should not be seen as a petty offence.

12. On 20 June 2011 the Dąbrowa Tarnowska District Court upheld the search order and dismissed the applicant’s appeal. The court established that the search had been lawful and justified. The police had received information that the applicant had had in his possession the leaflets which had been distributed in some towns in the municipality. The only way to verify this information had been to conduct a search of the applicant’s house.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

13. Article 63 a (1) of the Petty Offences Code states as follows:

“Whoever places in a public place which is not meant for this purpose an advertisement, poster, announcement, leaflet, inscription or drawing or publicly shows

it in another place without the agreement of the appropriate manager shall be liable to a penalty of restriction of liberty or a fine.”

14. Article 44 of the Petty Offences Code of Procedure (*Kodeks Postępowania w sprawach o wykroczenia*) states in its relevant parts as follows:

“1. In order to find and detain objects which are subject to inspection or which may constitute material evidence, the police, and also any other authorities conducting exploratory activities, may search premises and other places if there are reasonable grounds to believe that such objects or evidence are present there ...

3. Searches may be carried out by order of the public prosecutor or court.

4. In urgent situations where a search warrant could not be issued beforehand, a search may be conducted without a warrant. However, the authority shall promptly seek the subsequent approval of the search by a prosecutor. A decision in writing authorising the search shall, upon his or her request, be sent to the person whose premises were searched. A copy of the decision shall be delivered within fourteen days ...

5. Paragraphs 217, 221-234 and 236 of the Code of Criminal Procedure shall apply to searches and seizures.”

15. The relevant provisions of the Code of Criminal Procedure (*Kodeks Postępowania Karnego*) read as follows.

Article 217

“1. Objects which may serve as evidence, or which may be subject to seizure in order to secure penalties regarding property, penal measures involving property or claims to redress damage, should be surrendered when so required by the court, the State prosecutor and, in cases not amenable to delay, by the police or another authorised agency.

2. A person holding objects that are to be surrendered shall be called upon to release them voluntarily.

3. In the event of a seizure of objects, the provisions of Article 228 shall apply accordingly. A record need not be in writing if the object is appended to the files of the case.

4. If the surrender is demanded by the police or any other authorised agency acting within its sphere of competence, the person surrendering the objects has the right to submit an application without delay for the drawing-up and serving on him of an order of the court or of the State prosecutor authorising the action. The person surrendering the objects shall be informed of this right. The person shall be served, within 14 days of the seizure of the objects, with an order of the court or the State prosecutor authorising the action.

5. In the event of refusal to surrender objects voluntarily, a seizure may be effected. The provisions of Article 220 § 3 and Article 229 shall apply accordingly.”

Article 224

“1. A person on whose premises the search is to be conducted shall be notified before the commencement of the search of its objective and summoned to surrender the objects sought.

2. The person referred to in paragraph 1 above has the right to be present during the search, in addition to a person designated for that purpose by the person conducting the search. Furthermore, the search may be attended by a person designated by the occupant of the premises to be searched, provided that this will not seriously obstruct the search, or render it impossible.

3. In the event that the search is made in the absence of the owner of the premises, at least one adult member of the household or a neighbour shall be called in to attend the search.”

Article 227

“Searches or seizures of objects shall be conducted in accordance with the objective of the action, with moderation and respect for the dignity of the persons to whom the action relates, and without unnecessary damage or inconvenience.”

Article 236

“Orders regarding searches and seizures in connection with material evidence and other actions shall be subject to an interlocutory appeal by persons whose rights have been violated; an interlocutory appeal against an order issued or an action performed in the preparatory proceedings shall be examined by the district court where the proceedings are pending.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

16. The applicant complained, under Articles 6, 8 and 13 of the Convention, that the search of his house had amounted to a breach of his rights. The Court considers that the applicant’s complaints should be examined solely from the standpoint of the Article 8, bearing in mind that, since it is master of the characterisation to be given in law to the facts of the case, it is not bound by the characterisation given by an applicant or a government (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, ECHR 2018). Article 8 of the Convention provides 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

17. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

18. The applicant maintained that the decisions by the prosecutor to allow the search of his home had breached his rights protected by Article 8 of the Convention. The applicant accepted that the legal basis of the search had been Article 44 of the Petty Offences Code of Procedure; however, he contended that that provision had been applied arbitrarily in his case. In particular, when ordering the search, the prosecutor had not examined whether such a measure was proportionate and necessary. Moreover, his decision had been upheld by the regional court without providing any additional arguments justifying the interference. The applicant submitted that the domestic law did not prohibit the possession of leaflets, the more so where they contained information that was in the public domain. There had been no evidence linking the applicant with the offence of illegally distributing leaflets; thus, the real aim of the search had been to intimidate him for no particular reason. In those circumstances it could not be said that it had pursued any legitimate aim. The applicant emphasised that there had been no relationship of proportionality between the means employed and the aim sought to be realised.

19. The Government submitted that the search had been carried out in accordance with all procedural guarantees and that there had been no violation of Article 8 of the Convention. The Government acknowledged that the search of the applicant's house had amounted to an interference with his right to respect for his home but had been prescribed by law (Article 44 § 3 of the Petty Offences Code of Procedure). Different provisions of the domestic law regulated the manner in which a search should be conducted (provisions on presence of the person concerned and another designated person; prohibition of searches during the night; and the obligation to avoid damage or any unnecessary inconvenience). All those procedural guarantees had been observed in the instant case. Furthermore, the Government emphasised that the interference had pursued a legitimate aim, namely protection of public order and the rights and freedoms of others.

20. The Government also maintained that the search had been necessary in a democratic society. The leaflets had been unlawfully placed in numerous locations in three neighbouring towns. Several people had been involved, as had been confirmed by video surveillance, which had justified

a “social need” to take decisive action against violations of the law on this scale. The Government further argued that the search had been proportionate and necessary. The fact that the search had been fruitless had not deprived it of its necessity.

2. *The Court’s assessment*

21. It was not disputed that the search conducted in the applicant’s house amounted to an “interference” with his right to respect for his home, as guaranteed by Article 8 § 1 of the Convention.

22. The Court notes that the purpose of the search, as set out in the prosecutor’s decision, was to uncover physical evidence in a case being investigated by the authorities. The Court thus accepts the Government’s contention that the interference was prescribed by law, namely Article 44 of the Petty Offences Code of Procedure, and pursued the legitimate aims of maintaining public safety, preventing disorder or crime, and protecting the rights and freedoms of others. It therefore remains to be determined whether the search was “necessary in a democratic society”.

23. 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 (see, for example, *Olsson v. Sweden (no. 1)*, 24 March 1988, § 67, Series A no. 130).

24. The Court must accordingly ascertain whether, in the circumstances of the case, the entry into the applicant’s home struck a fair balance between the relevant interests, namely his right to respect for his home, on the one hand, and the prevention of disorder and crime and protecting the rights and freedoms of others, on the other (see *McLeod v. the United Kingdom*, 23 September 1998, § 53, *Reports of Judgments and Decisions* 1998-VII and *National Federation of Sportspersons’ Associations and Unions (FNASS) and Others v. France*, nos. 48151/11 and 77769/13, 18 January 2018, §§ 166 and 170). While a certain margin of appreciation is left to the Contracting States, the exceptions provided for in Article 8 § 2 are to be interpreted narrowly and the need for measures in a given case must be convincingly established (see *Funke v. France*, 25 February 1993, § 55, Series A no. 256-A). The Court will assess in particular whether the reasons adduced to justify such measures were relevant and sufficient and whether there were adequate and effective safeguards against abuse (see, for example, *Buck v. Germany*, no. 41604/98, §§ 44-45, ECHR 2005-IV).

25. As regards searches, the Court has consistently held that the Contracting States may consider it necessary to resort to such measures in order to obtain physical evidence of certain offences. The Court will assess whether the reasons adduced to justify such measures were “relevant” and “sufficient” and whether the above-mentioned proportionality principle has been adhered to. As regards the latter point, the Court must first ensure that the relevant legislation and practice afford individuals adequate and

effective safeguards against abuse. Secondly, the Court must consider the particular circumstances of each case in order to determine whether, in the case at hand, the interference in question was proportionate to the aim pursued. The criteria the Court has taken into consideration in determining this latter issue are, *inter alia*: the severity of the offence in connection with which the search and seizure were effected; the manner and circumstances in which the order was issued, in particular whether any further evidence was available at that time; the content and scope of the order, having particular regard to the nature of the premises searched and the safeguards implemented in order to confine the impact of the measure to reasonable bounds; and the extent of possible repercussions on the reputation of the person affected by the search (see *Buck*, cited above, § 45 and *K.S. and M.S. v. Germany*, no. 33696/11, § 44, 6 October 2016).

26. Turning to the present case, the Court observes that the applicant himself was not charged with, or suspected of, any offence. The search of his house was carried out in connection with the police's investigation of the petty offence of unlawful distribution of leaflets. The Court notes that domestic law and practice regulate the conditions under which the police may obtain entry to private premises, either with or without a warrant (see paragraph 14 above). In the present case, the police obtained a search order from a prosecutor, indicating that they had received information that the applicant might be in possession of the leaflets in question (see paragraph 8 above).

27. Considering the content and scope of the search order, the Court notes that the prosecutor's order of 6 April 2011 was drafted in broad terms referring to securing evidence, that is, the "leaflets with information about the salary of the mayor and his photograph" (see paragraph 8 above). In particular, it did not give any consideration to why the applicant could have been considered to be in possession of the material in question and why there had been a need to search for it since the leaflets themselves had not been illegal. There was no reference to any material evidence except for information allegedly received by the police.

28. The Court further finds that the absence of a prior judicial authorisation was not sufficiently counterbalanced by the availability of an *ex post facto* judicial review (see paragraph 12 above). In particular the Dąbrowa Tarnowska District Court did not assess whether the prosecutor had "relevant" and "sufficient" reasons for issuing a search warrant in respect of the applicant's home. The judicial review in the case at hand was limited to concluding that the order had been given in accordance with the law and had been justified. The domestic court did not weigh the competing interests at stake in the instant case. Nor did the domestic authorities take into consideration the fact that the leaflets in question contained public information concerning an elected official. Moreover, it was not argued by

the domestic authorities or the Government that the possession of those leaflets could amount to any offence proscribed by law.

29. The Court is therefore not convinced that the search of the applicant's home was justified by "relevant" and "sufficient" reasons (see *Misan v. Russia*, no. 4261/04, § 58, 2 October 2014).

30. The Court reiterates that the States, when taking measures to prevent crime and to protect the rights of others, may well consider it necessary, for the purposes of special and general prevention, to resort to measures such as searches and seizures in order to obtain evidence of certain offences in a sphere in which it is otherwise impossible to identify a person who is guilty of an offence. Such measures may also be deemed necessary in respect of petty offences. However, having regard to the severity of the interference with the right to respect for private life of persons affected by such measures, it must be clearly established that the proportionality principle has been adhered to (see *Buck*, cited above, § 52).

31. Having regard to the circumstances of this case, in particular the fact that the search of the flat inhabited by the applicant had been ordered in connection with a minor offence purportedly committed by a third person, the Court concludes that it was carried out without relevant and sufficient grounds and cannot be regarded as proportionate to the legitimate aims pursued. It was not therefore "necessary in a democratic society".

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

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. 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

34. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

35. The Government considered the claim excessive.

36. The Court awards the applicant EUR 10,000 in respect of non-pecuniary damage.

B. Costs and expenses

37. The applicant, who was represented by a lawyer and had been granted legal aid, did not make any claim in respect of costs and expenses.

C. Default interest

38. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *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, EUR 10,000 (ten thousand euros), to be converted into the currency of the respondent State at the rate applicable at the date of settlement, 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 29 October 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos
Registrar

Ksenija Turković
President