



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

THIRD SECTION

CASE OF VEEBER v. ESTONIA (No. 1)

(Application no. 37571/97)

JUDGMENT

STRASBOURG

7 November 2002

FINAL

07/02/2003

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 Veeber v. Estonia (no. 1),

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

Mr G. RESS, *President*,
Mr I. CABRAL BARRETO,
Mr L. CAFLISCH,
Mr R. TÜRMEŇ,
Mr B. ZUPANČIČ,
Mrs H.S. GREVE,
Mr R. MARUSTE, *judges*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 19 September and 17 October 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 37571/97) against the Republic of Estonia lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Estonian national, Mr Tiit Veeber ("the applicant"), on 4 July 1997.

2. The applicant was represented by Mr C. Wegelius, a lawyer practising in Lappers, Finland. The Estonian Government ("the Government") were represented by their Agents, Ms M. Hion, First Secretary of the Human Rights Division of the Legal Department of the Ministry of Foreign Affairs, and Mr E. Harremoes, Special Advisor to the Mission of the Republic of Estonia to the Council of Europe.

3. The applicant alleged that the search and seizure by the police of documents in his company's premises violated his rights under Article 8 of the Convention. He also complained of a lack of access to a court in relation to the police actions, in violation of Article 6 of the Convention. He further submitted that he did not have an effective remedy before the national authorities against the police search and seizure of documents, as required by Article 13 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that

would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. By a decision of 14 March 2000 the Court declared the application admissible.

7. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Third Section.

8. The applicant and the Government each filed further observations (Rule 59 § 1). The parties replied in writing to each other's observations.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The search and seizure

9. The applicant was born in 1948 and lives in Tartu, Estonia. He is the owner of the company *AS Giga*, with a registered office in Tartu. The company has been involved in reconstructing the public heat supply of the city.

10. On 14 November 1995 the Tartu police initiated criminal proceedings against the head of the Energy Department of the Tartu City Government. The proceedings concerned the alleged abuse of his position in contracting a loan with the Ministry of Finance for reconstructing the city's heat supply in an amount higher than approved and guaranteed by the City Council. In the context of these criminal proceedings the Tartu Public Prosecutor (*Tartu prokurör*) approved a search of the applicant's company's premises on 14 November 1995 in order to determine whether there were any original bookkeeping documents which might provide information with regard to the unauthorised use of the loan.

11. On 15 and 20 November 1995 the Tartu police searched the company's premises and seized respectively 36 and 50 files of documents, which comprised practically all of the company's bookkeeping records from the years 1994 and 1995. The documents seized were recorded by the files and not individually. The applicant estimates that their total number amounted to approximately 10,000.

All seized files were placed in a separate room in the Tartu Police Prefecture for examination by the State auditors, who were assisted by staff of the financial department of the Tartu City Government.

12. On 16 November 1995 the applicant filed a complaint with the Tartu Public Prosecutor alleging that the police search and seizure of documents had been unlawful. On 17 November 1995 he complained also to the State Public Prosecutor (*Riigiprokurör*), submitting that the wholesale nature of the seizure and the failure to make an individual record of the seized items were inconsistent with the requirements of Articles 139 and 140 of the Code of Criminal Procedure.

13. On 22 November 1995 the police informed the applicant that he was free to consult the seized documents at the police station for the continued activities of his company.

14. On 23 November 1995 the Tartu Public Prosecutor instructed the police to make a record of the individual characteristics of the seized documents and to return the documents irrelevant to the criminal investigation.

15. On 24 November 1995, in response to the applicant's complaint, the Tartu Public Prosecutor informed him of his instructions to the police to correct the deficiencies in the recording of documents and pointed out that the police had given the applicant access to the documents with the possibility of making photocopies. The prosecutor also stated that his action was open to appeal to the State Public Prosecutor.

16. On 27 November 1995 the applicant filed a complaint with the State Public Prosecutor. On the same day the police returned to the applicant's company three previously seized files.

17. By a letter of 30 November 1995 the Deputy State Public Prosecutor informed the applicant that he had examined the complaint. He noted that the searches had been approved by the prosecutor, but acknowledged that, due to the large number of documents, their recording had been deficient. He further noted that the Tartu Public Prosecutor had ordered the police to remove the shortcomings. He accepted the measures of the Tartu Public Prosecutor and the reply issued to the applicant on 24 November 1995. It was also noted that the applicant was free to use the documents during their examination by the State auditors.

18. On 10 January 1996 the applicant's company filed a complaint with the Tartu Administrative Court (*Tartu Halduskohus*) asking it to declare unlawful the measures of the Tartu City Council in connection with the inspection of the company's records as well as the police search and seizure of documents.

19. By a judgment of 13 September 1996 the Administrative Court dismissed both parts of the company's complaint. Regarding the impugned police acts the court found that, according to Article 3 § 2(3) of the Code of Administrative Court Procedure, it lacked competence to deal with complaints which fell under civil and criminal procedure. The Administrative Court could not interfere with criminal proceedings and

examine the lawfulness of the acts of the bodies of preliminary investigation.

20. In an appeal against the judgment the applicant argued that the police had abused its powers and that its actions violated the provisions of the Code of Criminal Procedure, the Constitution and the Convention.

21. On 22 November 1996 the Tartu Court of Appeal (*Tartu Ringkonnakohus*) confirmed the lack of competence to review police actions in criminal proceedings. It held that in the administrative proceedings it could not be examined whether the police, in effecting the search and seizures, had acted contrary to the Code of Criminal Procedure, the Constitution or the Convention. According to Article 120 of the Code of Criminal Procedure, supervision over the lawfulness of measures taken by the police in the context of criminal proceedings rested with the public prosecutor, not with the administrative court. The Court of Appeal quashed in part the judgment of the first instance court and terminated the administrative proceedings in respect of the complaint concerning the police actions.

22. On 15 January 1997 the Supreme Court (*Riigikohus*) refused to grant the company leave to appeal.

23. In the meantime, on 23 October 1996, the police decided to return twelve previously seized files. The applicant refused in writing to accept them, stating that their seizure had not been documented and that the act of return did not describe each document individually.

On 22 November 1996 these documents were sent to the Tartu City Court (*Tartu Linnakohus*), where the applicant's criminal case was pending (see paragraph 26 below). The applicant agreed to accept the documents in 1997.

Of the 86 files seized from the applicant's company on 15 and 20 November 1995, 28 files have been returned to the company. The applicant estimates that at least 5000 – 6000 documents are still not returned.

B. Criminal proceedings against the applicant

24. On 4 December 1995, following the seizure of documents, the Tartu police initiated criminal proceedings against the applicant on the suspicion of having misused his official position in the company.

On 22 March 1996 the applicant was formally charged with misusing his position as well as with tax evasion and falsification of documents, but on 28 June 1996 the charge concerning misuse of position was dropped.

On 1 July 1996 a further charge of fraud was brought against the applicant.

25. On 31 October 1996 the preliminary investigation was complete and the case was sent to the Tartu City Court for trial.

26. By a judgment of 13 October 1997 the City Court convicted the applicant of the charges and imposed a suspended sentence of 3 years and 6 months' imprisonment. It did find that in seizing of documents from the applicant's company the preliminary investigation authorities had infringed upon the procedural requirements stipulated in Article 140 of the Criminal Code. In particular, they had seized documents which were not relevant as evidence in the criminal case, had failed to record the documents individually and had taken away entire files. This had hampered the preliminary investigation of the case as well as its examination by the court.

27. On 18 October 1997 the applicant lodged an appeal against the judgement with the Tartu Court of Appeal. He contended, *inter alia*, that the indiscriminate seizure of documents from his company *AS Giga* on 15 and 20 November 1995 violated his rights of defence since he was deprived of the opportunity to submit necessary documents which were in the hands of the police.

28. By a judgment of 12 January 1998 the Tartu Court of Appeal rejected the applicant's appeal on the procedure and upheld his conviction. As regards the procedure, it found that the seizure of documents was conducted in accordance with the requirements of Article 140 of the Criminal Code. The records contained a description of the seized files, their number and the number of pages therein. The documents were thus sufficiently individualised.

29. On 17 September 1998 the applicant lodged an appeal with the Supreme Court, challenging his conviction as well as the procedure, claiming that the manner in which the seizure had been carried out had adversely affected his defence rights.

30. On 8 April 1998 the Supreme Court upheld the judgments of the lower courts with regard to the applicant's conviction. It acknowledged that in effecting the seizure of documents the procedural norms were not strictly followed, but found that such infringement was not substantial and did not hinder the thorough, complete and objective examination of the case or prevent the court from rendering a lawful and substantiated judgment. It considered that a detailed description of documents in the record of seizure was necessary only when they were used as evidence in the criminal case.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution of Estonia of 1992 (*Eesti Vabariigi põhiseadus*)

31. Article 15 of the Constitution guarantees everyone whose rights and freedoms are violated the right of recourse to the courts. Everyone has the right, while his or her case is before the court, to petition for any relevant law, other legal act or measure to be declared unconstitutional. The courts

shall observe the Constitution and shall declare unconstitutional any law, other legal act or measure which violates the rights and freedoms under the Constitution or which is otherwise in conflict with the Constitution.

32. Article 25 of the Constitution provides that everyone has the right to compensation for moral and material damage caused by the unlawful action of any person.

33. Article 26 of the Constitution stipulates that everyone has the right to the inviolability of private and family life. State agencies, local governments and their officials shall not interfere with the private or family life of any person, except in cases and pursuant to a procedure provided for by law in order to protect health, morals, public order, or the rights and freedoms of others, to prevent a criminal offence, or to apprehend a criminal offender.

34. Article 33 of the Constitution provides for the inviolability of the home. It stipulates that no one's dwelling, real or personal property under his or her control, or workplace shall be forcibly entered or searched, except in the cases and pursuant to procedure provided for by law to protect public order, health or the rights and freedoms of others, to prevent a criminal offence, to apprehend a criminal offender, or to ascertain the truth in criminal proceedings.

B. Law on the Public Prosecutor's Office of 1993 (*Prokuratuuri seadus*)

35. The law provides that the Public Prosecutor's office is an agency of the executive power, which is under the administration of the Minister of Justice and has the status of an independent agency. It supervises the lawfulness of the preliminary investigation in criminal cases as well as the lawfulness of the police activities. In the exercise of their duties public prosecutors are independent and act according to law and their convictions.

C. Code of Administrative Court Procedure of 1993 (*Halduskohtumenetluse seadustik*)

36. According to Article 3 § 2(3) of the Code, the Administrative Court is not competent to deal with claims and complaints which fall under civil and criminal procedure. Article 4 § 1(1) of the Code provides that the Administrative Court is competent to deal with appeals against the organs of the executive State power or the legal acts or action by one of its officials.

37. The Supreme Court has stated in respect of Article 4 § 1(1) of the Code that legal acts and actions by the State Public Prosecutor, as a Government official, can be appealed to the Administrative Court and, since an appeal against his/her decisions is not provided for in the Code of Criminal Procedure, control of such acts and action falls within the competence of the Administrative Courts. In exercising this function, the

Administrative Court does not interfere with the criminal proceedings in question and does not exercise supervision over the lawfulness of the actions of the organs of preliminary investigation. The Administrative Court examines only whether the State Public Prosecutor dealt lawfully with the complaint submitted (decision of the Administrative Chamber of the Supreme Court of 3 November 1995, *Riigi Teataja* III 1995, 17, 217).

D. Code of Criminal Procedure of 1961 as amended
(*Kriminaalmenetluse koodeks*)

38. Under Article 22(3) of the Code, the public prosecutor exercises his powers independently and is guided only by law.

39. According to Article 120 paragraph 1 of the Code supervision of the lawfulness of activities of the organs of preliminary investigation rests with the public prosecutor.

Under paragraph 2 of this Article the public prosecutor has the power, *inter alia*, to annul the unlawful and unfounded orders of investigators, to give written instructions to the investigators, to approve searches and to remove a investigator from further investigation if the investigator has acted unlawfully.

Paragraph 3 provides that the written instructions of the Prosecutor are binding on the authorities carrying out preliminary investigation.

40. Under Articles 182 and 183 of the Code, complaints regarding the activities of the police investigator and the police examiner are submitted to the public prosecutor whose decisions and actions concerning the complaints can be appealed against to the higher level public prosecutor.

41. Article 139 of the Code stipulates that if an investigator has sufficient reason to believe that in a certain room, location or in a person's possession there might be items of significance to a criminal case he conducts a search to find them. A search may be conducted on the basis of the decision of an examiner or investigator and only upon the authorisation of the public prosecutor or his deputy. If an investigator knows the exact location of an item, which is of significance to a criminal case, he conducts the seizure of that item.

42. According to Article 140 of the Code, an investigator, in performing a search and a seizure, can take away only those items and documents which are relevant to a criminal case. Each seized item and document must be entered in a record indicating their exact amount, format, weight and individual characteristics.

E. General Principles of the Civil Code of 1994 (*Tsiviilseadustiku üldosa seadus*)

43. Sub-chapter 4 of Chapter 2 of the Code deals with the protection of personal rights. It cites specifically defamation (Article 23), protection of private life (Article 24) and protection of a person's name (Article 25).

Article 24 paragraph 1 of the Code provides that a person has the right to demand termination of a violation of the inviolability of his or her private life and to demand compensation for moral and material damage caused thereby.

Paragraph 2 lists 6 acts which constitute a violation of the inviolability of private life, if performed without legal basis or against a person's will. These acts include a) entry into the dwelling or onto the property of a person; b) search of a person or of objects in his or her possession; c) use of a person's manuscripts, correspondence, notes or other personal documents or information.

Paragraph 3 stipulates that a court may also declare that an act not indicated in section 2 violates the inviolability of a person's private life if the intrusion is effected without a legal basis or against the person's will.

Article 26 of the Code states that, in cases provided for by law, a person may also demand termination of the violation of his or her personal rights which are not specified in Articles 23 to 25 as well as compensation for moral and material damage caused thereby.

44. According to Article 112 of the Code, measures for the protection of civil rights include: a) recognition of rights; b) elimination of violations and prevention of further violations; c) restoration of the situation that existed prior to violation; d) compensation for damage.

45. Article 172 paragraph 2 of the Code provides that moral damage caused to a person shall be compensated for by the person who caused the damage. The latter person is released from the obligation to compensate for moral damage if the person proves that he or she is not at fault for causing the damage.

Paragraph 3 of this Article states that if there has been a violation of personal rights, a court will decide on the basis of the facts of the case whether the violation caused any moral damage.

Paragraph 4 stipulates that in determining the amount of compensation, a court shall take into account the extent and nature of the caused moral damage as well as the degree of fault of the person who had caused the damage.

F. Examples of case-law provided by the Government concerning civil remedies

46. In a civil case between two individuals concerning eviction from a residence, in which the plaintiff had asked the competent civil court to declare his eviction unlawful, the Tallinn Court of Appeal held that in so far as the applicant's action concerned the alleged violation of personal rights,

his claim fell to be considered under the General Principles of the Civil Code. The Housing Act was not relevant in deciding on an action concerning the protection of personal rights. Although the request of the applicant to declare his eviction unlawful was not a civil claim which would fall under Article 112(2) of the above Code, the question of lawfulness of the impugned measure was relevant in determining whether there had been a violation of personal rights (judgment of the Tallinn Court of Appeal of 7 September 2000, case no. II-2/829/00).

47. In a case which concerned an action for damages against the Government in connection with a search by the police of the applicant's home and the seizure of personal objects, the Tallinn Court of Appeal found that the claim fell to be considered under Article 24 of the General Principles of the Civil Code. It held however, that there had been no violation of the inviolability of the applicant's private life within the meaning of Article 24 as the search and seizure had been lawful under Articles 139 and 140 of the Code of Criminal Procedure (judgment of the Tallinn Court of Appeal of 1 July 1999, case no. II-2/637/99).

48. In a case concerning a compensation claim for moral damage suffered as a result of the unlawful acts of the police, which included a search of the plaintiff's personal belongings on suspicion of shoplifting, the Tallinn Court of Appeal found that the plaintiff's personal rights had been violated and ordered the Government to pay damages. The court relied, *inter alia*, on Article 25 of the Constitution and Articles 24 (2), 26, and 172 (2) and (3) of the General Principles of the Civil Code (judgment of the Tallinn Court of Appeal of 20 February 2001, case no. II-2/253/2001).

49. The civil courts have also considered claims of violation of personal rights presented, *inter alia*, in connection with unlawful detention and conviction, opening of prisoners' correspondence and defamation.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

50. The applicant complained that the search and seizure by the police of documents in his company's premises violated his rights under Article 8 of the Convention. In this connection, he submitted that a number of documents were still retained by the police.

Article 8 of the Convention provides:

“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.”

51. The Government submitted two preliminary objections.

A. Lack of jurisdiction *ratione temporis*

52. The Government argued in the first place that in so far as the complaint related to the initial search and seizure conducted by the police prior to the entry into force of the Convention in respect of Estonia on 16 April 1996, it was outside the Court's jurisdiction *ratione temporis*. The police measures were instant acts and could not be viewed as constituting a continuing situation.

53. The applicant contended that the violation of Article 8 was of a continuous nature since a large number of documents had still not been returned to his company and remained in the hands of the police. The seizure of documents had a long-term influence on the functioning of the company, so the interference was not limited to a single act. Accordingly, the impugned measures fell within the Court's jurisdiction *ratione temporis*.

54. The Court reiterates that in accordance with the generally recognised rules of international law, the Convention is binding on each of the Contracting States only in respect of facts occurring after its entry into force in respect of that Party. The Convention entered into force in respect of Estonia on 16 April 1996. The Court also recalls that it has endorsed the notion of a continuing violation of the Convention and its effects as to temporal limitations of the competence of Convention organs (see, for example, *Papamichalopoulos and Others v. Greece*, judgment of 24 June 1993, Series A no. 260-B, pp. 69-70, §§ 40-46, and *Loizidou v. Turkey*, judgment of 18 December 1996 (*merits*), *Reports of Judgements and Decisions* 1996-VI, p. 2230, § 41).

55. In the present case the search of the applicant's company's premises and the seizure of documents by the police took place on 15 and 20 November 1995, i.e. prior to the entry into force of the Convention in respect of Estonia on 16 April 1996. The judgments in the administrative proceedings dismissing the applicant's company's appeal for review of the police actions were handed down after that date.

The Court considers that the search and seizure of documents in question were instantaneous acts which, despite their ensuing effects, did not, in themselves, give rise to any possible continuous situation of a violation of Article 8 of the Convention. Divorcing the domestic courts' judgments from the events which gave rise to these proceedings would amount to giving retroactive effect to the Convention which would be contrary to general

principles of international law (see *Stamoulakatos v. Greece*, judgment of 30 September 1993, Series A no. 271, p. 14, § 33, and *Kefalas and Others v. Greece*, judgment of 8 June 1995, Series A no. 318-A, pp. 19-20, § 45).

Accordingly, the Court finds that the Government's objection *ratione temporis* concerning the search and seizure of documents is well-founded.

B. Failure to exhaust domestic remedies

56. The Government further submitted that the applicant had failed to exhaust domestic remedies, as required by Article 35 of the Convention, both with respect to the initial search and seizure and the subsequent retention of the documents.

57. As regards the initial search and seizure of documents, there were three kinds of avenues of redress which the applicant had failed to use. First, it was open to him to appeal against the act of the State Public Prosecutor to the administrative courts, which would have had the power to examine the lawfulness of the prosecutor's act, according to Article 4 § 1(1) of the Code of Administrative Court Procedure as confirmed and interpreted by the Supreme Court. Second, under Article 15 of the Constitution, the applicant could have raised before the administrative courts the question of constitutionality of the relevant law and practice. Third, it was possible for him to bring an action for damages in the civil courts.

58. Regarding the retention of the documents by the police, the Government pointed out that the applicant had never disputed the non-restitution of documents before a domestic court or other authority. As it was the public prosecutor who directly oversaw the lawfulness of police measures, it was, first of all, open to the applicant to file a complaint with the competent public prosecutor and then, if need be, with the higher level prosecutor, under Articles 182 and 183 of the Code of Criminal Procedure. The office of the public prosecutor was independent of the police authorities. It was administratively linked, but not subordinate, to the Ministry of Justice, whereas the police was administratively subordinated to the Ministry of the Interior. According to the Law on the Public Prosecutor's Office and the Code of Criminal Procedure (Article 22(3)), the public prosecutors exercised their powers independently and were only guided by the law. The powers of the public prosecutor, stipulated in Article 120 of the Code of Criminal Procedure, allowed him to invalidate decisions taken by the police, both as to their legality and appropriateness.

Following recourse to the public prosecutors it was possible to file an appeal with the administrative courts.

In addition, the applicant could have availed himself of the constitutional and civil remedies.

59. The applicant submitted that he had exhausted all domestic remedies. He had complained about the police actions to the competent

prosecutors, in accordance with Articles 182-183 of the Code of Criminal Procedure. The Code did not provide for the possibility of submitting a complaint against an act of the prosecutor to a court. He also submitted that the State Public Prosecutor did not adequately examine his complaint, but issued only a formal reply. As an agency of the executive power the public prosecutor's office could not objectively deal with complaints against the police which also formed part of the executive branch of power.

The administrative courts could, according to national case-law, only examine the lawfulness of the manner in which the State Public Prosecutor dealt with the complaint, not the substance of his complaint, which concerned the question of lawfulness of the police acts. Therefore, contrary to what was suggested by the Government, an appeal to the administrative court challenging only the prosecutor's act would not have been capable of remedying the situation.

As regards the constitutional remedy, the applicant contended that, in the proceedings before the administrative court, he raised the question of a violation of his constitutional rights, presuming that the court would apply the provisions of the Constitution over ordinary law in case of conflict. According to Article 15 of the Constitution, all courts were competent to review the constitutionality of laws and procedures. However, in his case, the courts exercised restraint and did not do so.

The applicant further contested the existence of the civil law remedy suggested by the Government.

60. The Court, having regard to the conclusion that the initial search and seizure of the documents was outside its jurisdiction *ratione temporis*, does not consider it necessary to examine whether the applicant has exhausted domestic remedies, as required by Article 35 § 1 of the Convention, in respect of those measures. However, it will consider whether this requirement was fulfilled with regard to the retention of the seized documents after the entry into force of the Convention in respect of Estonia.

61. In this connection, the Court recalls that under the terms of Article 35 § 1 of the Convention it can only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law. The purpose of Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court. Consequently, States are dispensed from answering for their acts before an international body before they have had the opportunity to put matters right through their own legal systems (see, for example, *Remli v. France*, judgment of 23 April 1996, *Reports* 1996-II, p. 571, § 33, and *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V).

62. However, the only remedies which must be tried under Article 35 § 1 of the Convention are those that relate to the breaches alleged

and which at the same time are available and adequate. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they lack the requisite accessibility and effectiveness (see, among other authorities, *Akdivar and Others v. Turkey*, judgment of 16 September 1996, *Reports* 1996-IV, p. 1210, § 66, and *Selmouni* cited above, § 75). Nevertheless, if there exists a doubt as to the effectiveness of a domestic remedy, that remedy must be tried (see, for example, *Raif v. Greece*, no. 21782/93, Commission decision of 26 June 1995, DR 82, p. 5).

63. Furthermore, the Court reiterates that in the area of exhaustion of domestic remedies the burden of proof is on the Government to satisfy the Court that the remedy was an effective one, available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. Once this burden of proof is satisfied, it falls to the applicant to show that the remedy advanced by the Government was in fact exhausted, or was for some reason inadequate and ineffective in the particular circumstances of the case, or that there existed special circumstances absolving him or her from the requirement (see, for example, *Akdivar and Others*, cited above, p. 1211, § 68, and *Selmouni* cited above, § 76).

64. The Court notes that the applicant has not contested the retention by the police of the seized documents before any domestic body. Nor has he submitted any reasons for his omission to use the remedies suggested by the Government.

It would appear that it was open to the applicant, under the provisions of the Code of Criminal Procedure, to file a complaint with the public prosecutor and subsequently with the higher-level prosecutor, competent to review the police measures and to take remedial action, if necessary. There is no indication that such an appeal would have no prospect of success. Nor does the Court find any special circumstances which might have absolved the applicant from exhausting this remedy.

The Court therefore finds that the Government's objection of failure to exhaust domestic remedies in respect of the retention of documents is also well-founded.

65. Having regard to the above conclusions, the Court cannot deal with the merits of the applicant's complaint under Article 8.

Thus, the Court's examination on the merits in the present case will be limited to the applicant's complaints under Articles 6 and 13 of the Convention that he was denied access to a court and an effective remedy in respect of the police search and seizure of documents.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

66. The applicant complained that the refusal of the courts to examine his complaints concerning the police measures violated his right of access to court under Article 6 § 1 of the Convention, the relevant part of which provides:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by [a] ... tribunal ...”

67. The Government argued that the applicant had access to a court with his complaint. It was open to him to lodge an appeal with the administrative courts against the State Public Prosecutor as a public official. Furthermore, the applicant's complaint concerning the lawfulness of the seizure of documents was examined by the criminal courts in the context of criminal charges against him. In addition, the applicant had the possibility of bringing a civil action for damages against the State in connection with the alleged breach of his personal rights. In support of their assertion the Government relied on Articles 25, 26 and 33 of the Constitution and Articles 23-26, 112, 172 and 173 of the General Principles of the Civil Code as well as on examples from case-law of domestic courts. It was submitted that the civil courts would have been able to award damages, if appropriate, if the applicant had shown that the interference with his right to private life and inviolability of the home had been effected without legal basis or against his will. In deciding on the award of compensation for moral damage, liability of the defendant was presumed. Furthermore, it was not necessary for the filing of a civil claim to obtain first a decision of the public prosecutor or an administrative court concerning the lawfulness of the police actions. The civil courts could evaluate evidence independently and decide whether in a particular case there had been an infringement of one's personal rights.

68. The applicant contended that a review by the administrative courts was limited to the lawfulness of the prosecutor's acts and did not encompass the police measures which he sought to challenge.

As regards recourse to the civil courts, the applicant submitted that they had no power to assess the lawfulness of a police measure taken in the context of criminal proceedings.

Admittedly, under Article 24 of the General Principles of the Civil Code, it was possible to bring a civil claim for damages for the protection of personal rights. However, this Article dealt only with the rights of natural persons and did not cover intrusions into a place of employment. Inviolability of the latter, specifically referred to in Article 33 of the Constitution, was thus not protected by Article 24 of the above Code. The Government had submitted no examples from the case-law which would demonstrate that a civil law protection of the inviolability of a workplace existed at all.

69. The Court notes that the proceedings brought before the administrative court concerned the claim of abuse of powers by the police in effecting the search and seizure of documents. It considers that the claim was covered by the civil limb of Article 6 § 1 of the Convention, seeing that it was designed to seek protection of individual rights from the interference by the executive authorities. Article 6 § 1 is therefore applicable.

70. The Court recalls that Article 6 § 1 secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the “right to a court”, of which the right of access, that is, the right to institute proceedings before courts in civil matters, constitutes one aspect only (see *Waite and Kennedy v. Germany* [GC], no. 26083/94, § 50, ECHR 1999-I, and *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, p. 18, § 36).

It also recalls that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective. This is particularly true for the right of access to courts in view of the prominent place held in a democratic society by the right to a fair trial (see, for example, *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, pp. 12-13, § 24).

Furthermore, only an institution that has full jurisdiction, including the power to quash in all respects, on questions of fact and law, the challenged decision, merits the description “tribunal” within the meaning of Article 6 § 1 (see, for example, *Umlauf v. Austria*, judgment of 23 October 1995, Series A no. 328-B, pp. 39-40, §§ 37-39).

71. The Court notes that in the present case the administrative courts had declined jurisdiction to examine the applicant's company's complaint about the police search and seizure of documents on the ground that the police acts were criminal investigation measures, the lawfulness of which could not be assessed in the administrative proceedings. Supervision over the lawfulness of such measures rested with the public prosecutor and the State Public Prosecutor, whose acts were open to appeal to the administrative courts, pursuant to Article 4 § 1(1) of the Code of Administrative Court Procedure and its interpretation by the Supreme Court (see paragraphs 36-37 above).

However, according to the position of the Supreme Court, the scope of review by the administrative courts was limited to the assessment of the lawfulness of the State Public Prosecutor's act. These courts were not empowered to examine questions of fact and law in respect of the police measures contested by the applicant. Nor could they order that these measures be quashed, if appropriate. Therefore, seizure of these courts with a complaint challenging the prosecutor's act would not have been capable of affording redress to the applicant.

72. The Court next notes the Government's submission that the applicant's complaint concerning the police actions was examined by the criminal courts.

It observes that, following the seizure of documents, the police initiated criminal proceedings against the applicant on charges relating to tax evasion. During the subsequent trial the applicant contested the lawfulness of the seizure of documents and argued that this had adversely affected his defence rights.

It is true that the criminal courts had the opportunity to, and indeed did, assess the lawfulness of the police measures and its impact on the fairness of the criminal proceedings. However, this assessment was only relevant to the determination of the criminal charge against the applicant. The criminal courts could not quash the impugned police acts or grant appropriate relief. They accordingly lacked the powers, required under Article 6 § 1.

73. As regards the possibility of instituting civil proceedings for damages against the State, suggested by the Government, the Court notes that Estonian law, in particular the Constitution and the General Principles of the Civil Code, provided an avenue for filing with the civil courts an action for damages for breach of personal rights.

In the present case, the applicant has not attempted to file a civil action believing that it lacked prospects of success.

The Court recalls that the existence of a remedy must be sufficiently certain not only in theory but also in practice, failing which they lack the requisite accessibility and effectiveness (see, *mutatis mutandis*, *Akdivar and Others*, cited above, p. 1210, § 66).

In support of their submission concerning the availability of the civil court remedy the Government relied on examples drawn from the case-law of domestic courts showing that the civil courts have examined claims of breach by the police of personal rights in connection with a search of a home and seizure of personal belongings (see paragraphs 47-48 above). The Court observes, however, that these examples concern claims of interference with private life and home in the context other than a workplace. They do not deal with professional or business activities or premises, which are included in the wider notion of "private life" and "home" in Article 8 of the Convention (see *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, §§ 29-31, and *Société Colas Est and Others v. France*, no. 37971/97, § 40, ECHR 2002-III). Furthermore, the examples relate to a period from 1999 to 2001, whereas the applicant's complaint concerns the situation in 1996-1997.

In view of the lack of practice demonstrating that a civil action for damages was an adequate remedy capable of effectively challenging the police measures in the applicant's business premises, the Court considers that the existence of the remedy before the civil courts at the material time has not been established with sufficient certainty.

74. In sum, in the light of the above circumstances, the Court considers that the applicant lacked effective access to a court, contrary to the requirements of Article 6 § 1.

75. It follows that there has been a violation of Article 6 § 1.

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

76. The applicant further complained that he did not have an effective remedy before the national authorities against the police search and seizure of documents, as required by Article 13 of the Convention, which provides:

“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.”

77. Having regard to its finding of a violation of Article 6 § 1, the Court does not consider it necessary to rule on this complaint. It recalls in this respect that the requirements of Article 13 are less strict than, and are here absorbed by, those of Article 6 (see, among other authorities, the *Osman v. the United Kingdom* judgment of 28 October 1998, *Reports* 1998-VIII, p. 3172, § 158).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

78. 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. Pecuniary damage

79. The applicant maintained that as a result of the seizure of documents his company sustained damage in the amount of 4,286,000 Estonian kroons (EEK).

80. The Government contested the claim, submitting that it related to the alleged losses suffered by the applicant's company, not him personally. They further regarded the claim excessive and unsubstantiated.

81. The Court considers that no causal connection has been established between the damage alleged and the violation it has found.

Consequently, it rejects the applicant's claim under this head.

B. Non-pecuniary damage

82. The applicant claimed EEK 500,000 for distress caused by his fruitless efforts to gain judicial protection of his rights.

83. The Court agrees with the Government that the finding of a violation constitutes in itself adequate just satisfaction for any non-pecuniary damage as alleged by the applicant.

C. Costs and expenses

84. The applicant sought reimbursement of EEK 54,960 for lawyer's fees incurred in the domestic and Strasbourg proceedings.

85. The Government did not dispute this sum.

86. The Court recalls that in order for costs and expenses to be included in an award under Article 41, it must be established that they were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, for example, *Nielsen and Johnson v. Norway* [GC], no. 23118/93, § 43, ECHR 1999-VIII).

Having regard to the bill of particulars submitted by the applicant and noting that the costs incurred did not exclusively relate to the breach of Article 6 § 1 of the Convention, the Court considers it reasonable to award the applicant the sum of EUR 1,600 under this head.

D. Default interest

87. The Court considers that the default interest should be fixed at an annual rate equal to the marginal lending rate of the European Central Bank plus three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that the complaint under Article 8 of the Convention, in so far as it concerns the police search and seizure of documents, lies outside the Court's jurisdiction *ratione temporis*;
2. *Holds* unanimously that in so far as the complaint under Article 8 of the Convention concerns the retention of documents the applicant has failed to exhaust domestic remedies;
3. *Holds* by six votes to one that there has been a violation of Article 6 § 1 of the Convention;

4. *Holds* unanimously that it is unnecessary to examine the complaint under Article 13 of the Convention.
5. *Holds* unanimously that the finding of a violation of Article 6 § 1 in itself constitutes adequate just satisfaction for the non-pecuniary damage alleged by the applicant;
6. *Holds* unanimously
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 1,600 (one thousand six hundred euros) in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
 - (b) that simple interest at an annual rate equal to the marginal lending rate of the European Central Bank plus three percentage points shall be payable from the expiry of the above-mentioned three months until settlement;
7. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 7 November 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Georg RESS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Mr Türmen is annexed to this judgment.

G.R.
V.B.

SEPARATE OPINION OF JUDGE TÜRMEEN

I agree with the majority that there is no violation of Article 8 of the Convention for the reasons that the complaint lies outside the Court's jurisdiction *ratione temporis* and that the applicant has failed to exhaust domestic remedies.

However, I am unable to agree with the majority's opinion of finding a violation of Article 6 § 1 of the Convention.

It is true that the administrative courts had declined jurisdiction to examine the applicant's company's complaint about the police search and seizure of documents on the ground that the police acts were criminal investigation measures, the lawfulness of which could not be assessed in the administrative proceedings. The courts relied on Article 3 § 2(3) of the Code of Administrative Court Procedure under which they are not competent to deal with complaints which fell under civil or criminal procedure.

However, the applicant has not attempted to file an action with the civil courts to contest the alleged interference with his rights under Article 8 of the Convention. The Estonian law, in particular the Constitution and the General Principles of the Civil Code, provided an avenue for filing with the civil courts an action against the State for breach of personal rights. According to Article 112 of the General Principles of the Civil Code, the civil courts are empowered to order elimination of violations, restoration of the situation that existed prior to violation or to award compensation. There is no indication that the bringing of civil proceedings would be dependant on the outcome of an examination of the lawfulness of the impugned measure by other authorities.

As regards the applicant's argument that the civil law protection did not extend to a workplace, since the relevant part of the General Principles of the Civil Code dealt only with the rights of natural persons, it is to be noted that the applicant complained under Article 8 of the Convention that he was personally affected by the acts of the police. Furthermore, the inviolability of the home under Article 33 of the Constitution explicitly includes the workplace.

It is true that the case-law examples provided by the Government post-dated the events at issue and did not deal with professional or business activities or premises. However, this is not a sufficient basis to conclude that a civil action would have had no prospect of success. At the material time, the relevant constitutional and statutory provisions were still in force. If there exists a doubt as to the effectiveness of a domestic remedy, that remedy must be tried (see, *mutatis mutandis*, *Raif v. Greece*, no. 21782/93, Commission decision of 26 June 1995, DR 82, p. 5).

On the other hand the Court has stated in the *Niemietz v. Germany* case that "the search of the applicant's office constituted an interference with his

rights under Article 8” (*Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, §§ 29-31).

In these circumstances, I consider that it was open to the applicant to pursue the matter before the civil courts.

What is more, the applicant's complaint concerning the police actions was examined subsequently by the criminal courts which had the opportunity to, and indeed did, assess the lawfulness of the seizure of documents and its impact on the fairness of the criminal proceedings against the applicant.

It follows that the applicant has not been denied access to a court, contrary to Article 6 § 1. Accordingly there has been, in my opinion, no breach of Article 6 § 1 of the Convention.