



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

CASE OF CAMENZIND v. SWITZERLAND

(136/1996/755/954)

JUDGMENT

STRASBOURG

16 December 1997

The present judgment is subject to editorial revision before its reproduction in final form in *Reports of Judgments and Decisions* 1997. These reports are obtainable from the publisher Carl Heymanns Verlag KG (Luxemburger Straße 449, D-50939 Köln), who will also arrange for their distribution in association with the agents for certain countries as listed overleaf.

List of Agents

Belgium: Etablissements Emile Bruylant (rue de la Régence 67,
B-1000 Bruxelles)

Luxembourg: Librairie Promoculture (14, rue Duchscher
(place de Paris), B.P. 1142, L-1011 Luxembourg-Gare)

The Netherlands: B.V. Juridische Boekhandel & Antiquariaat
A. Jongbloed & Zoon (Noordeinde 39, NL-2514 GC 's-Gravenhage)

SUMMARY¹

Judgment delivered by a Chamber

Switzerland – search of residential premises carried out in connection with administrative criminal law proceedings (section 48 of the Federal Administrative Criminal Law Act)

I. ARTICLE 8 OF THE CONVENTION

A. Whether there was an interference

Interference with applicant's right to respect for his home.

B. Whether the interference was justified

Interference "in accordance with the law" and pursued aim consistent with Convention: "prevention of disorder or crime".

Notion of "necessity" implies that interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued – Court took into account margin of appreciation left to Contracting States.

Contracting States may consider it necessary to resort to measures such as searches of residential premises and seizures in order to obtain physical evidence of certain offences. Court will assess whether reasons adduced to justify such measures were relevant and sufficient and whether proportionality principle has been adhered to. With regard to latter point, Court ensures that relevant legislation and practice afford individuals adequate and effective safeguards against abuse; it must be particularly vigilant where authorities are empowered under national law to order and effect searches without a judicial warrant. Court must also consider particular circumstances of each case in order to determine whether, in the concrete case, the interference in question was proportionate to the aim pursued.

In case before it, Swiss federal legislation provided safeguards and, more particularly, search had been of very limited scope.

Conclusion: no violation (eight votes to one).

II. ARTICLE 13 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 8

A. Government's preliminary objection

Government submitted that complaint under Article 13 had not been expressly raised in the application.

Convention institutions have jurisdiction to review circumstances complained of by an applicant in light of all requirements of Convention and wide discretion in determining characterisation to be given in law to facts.

Conclusion: objection dismissed (unanimously).

1. This summary by the registry does not bind the Court.

B. Merits of complaint

Federal Administrative Criminal Law Act provided a special remedy in form of a complaint to Indictment Division of Federal Court in respect of coercive measures. In case before Court, however, complaint had been dismissed pursuant to Indictment Division's settled case-law whereby only persons still affected, at least in part, by an impugned decision had *locus standi*; remedy therefore could not be termed "effective". Other procedures relied on by Government not shown to be effective.

Conclusion: violation (unanimously).

III. ARTICLE 50 OF THE CONVENTION**A. Non-pecuniary damage**

Judgment constituted sufficient just satisfaction.

B. Costs and expenses

Sum awarded on equitable basis.

Conclusion: respondent State to pay applicant specified sum for costs and expenses (unanimously).

COURT'S CASE-LAW REFERRED TO

10.12.1982, Foti and Others v. Italy; 24.3.1988, Olsson v. Sweden (no. 1); 21.2.1990, Powell and Rayner v. the United Kingdom; 24.4.1990, Kruslin v. France; 30.10.1991, Vilvarajah and Others v. the United Kingdom; 25.2.1993, Funke v. France; 25.2.1993, Crémieux v. France; 25.2.1993, Mialhe v. France; 19.12.1994, Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria; 18.12.1996, Valsamis v. Greece; 25.2.1997, Z v. Finland

In the case of Camenzind v. Switzerland¹,

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) and the relevant provisions of Rules of Court B², as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,

Mr J. DE MEYER,

Mr A.N. LOIZOU,

Mr A.B. BAKA,

Mr L. WILDHABER,

Mr G. MIFSUD BONNICI,

Mr J. MAKARCZYK,

Mr E. LEVITS,

Mr P. VAN DIJK,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 1 July and 1 December 1997,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights (“the Commission”) on 28 October 1996 and by the Government of the Swiss Confederation (“the Government”) on 14 January 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 21353/93) against Switzerland lodged with the Commission under Article 25 by a Swiss national, Mr Bruno Camenzind, on 2 October 1992.

The Commission’s request and the Government’s application referred to Articles 44 and 48 and to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46). The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 8 and 13 of the Convention.

Notes by the Registrar

1. The case is numbered 136/1996/755/954. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning States bound by Protocol No. 9.

2. In accordance with Rule 31 § 1 of Rules of Court B, the applicant designated the lawyer who would represent him.

3. The Chamber to be constituted included *ex officio* Mr L. Wildhaber, the elected judge of Swiss nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 29 October 1996, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr J. De Meyer, Mr A.N. Loizou, Mr A.B. Baka, Mr G. Mifsud Bonnici, Mr J. Makarczyk, Mr E. Levits and Mr P. van Dijk (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 § 1 and 40). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 27 March 1997 and the Government's memorial on 1 April.

5. On 16 May 1997 Mr Bernhardt granted the applicant legal aid (Rule 4 of the Addendum to Rules of Court A, *mutatis mutandis*).

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 26 June 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr F. SCHÜRMAN, Head of the Human Rights and Council of Europe Section, Federal Office of Justice,	<i>Agent,</i>
Mr T. CLÉMENT, Legal Officer, Human Rights and Council of Europe Section, Federal Office of Justice,	<i>Adviser;</i>

(b) *for the Commission*

Mr F. MARTÍNEZ,	<i>Delegate;</i>
-----------------	------------------

(c) *for the applicant*

Mr J. CREVOISIER, Bachelor of Laws,	<i>Counsel.</i>
-------------------------------------	-----------------

The Court heard addresses by Mr Martínez, Mr Crevoisier and Mr Schürmann.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

7. On 5 December 1991 the radio communications surveillance unit of the Head Office of the Swiss Post and Telecommunications Authority (*PTT*) located on a frequency reserved for civil and military aircraft a private telephone conversation being held on a telephone of an unauthorised type. The surveillance unit recorded the conversation held on the line allocated to Mr Camenzind – a lawyer living in Fribourg – and informed the appropriate *PTT* authorities.

8. The applicant was suspected of contravening section 42 of the Federal Act of 1922 “regulating telegraph and telephone communications”. On 11 December 1991 the Berne cantonal telecommunications office (*Fernmeldekreisdirektion*) of the *PTT* began an investigation concerning the applicant pursuant to the Federal Administrative Criminal Law Act 1974.

9. On 13 December 1991 the area director of the *PTT* in Berne issued a warrant to search the applicant’s home under sections 48 et seq. of the Federal Administrative Criminal Law Act. It was specified in the warrant that the purpose of the search was to find and seize the unauthorised cordless telephone.

10. At 9.50 a.m. on 21 January 1992 two *PTT* officials went to the applicant’s home. He admitted having tested a cordless telephone in the past but said that it was no longer in his possession. After being shown the search warrant, he allowed the *PTT* officials into the hall of the flat, in which he in fact occupied only one room, the other five being let. Having been told of the legal aspects of the search, he consulted the file on his case and telephoned a lawyer and a senior official at the *PTT* office in Berne.

11. The search was carried out by a single *PTT* official, as requested by Mr Camenzind, and in his presence. The official searched every room of the two-storey building, including the cellar. He did no more than check whether the telephones and television sets were *PTT*-approved. He did not touch anything, open any drawers or examine any documents. No equipment of the type sought was found. At 11.55 a.m. a record was drawn up and signed by both the applicant and the investigating official. The record indicated among other things that a complaint could be made about the search under sections 26 to 28 of the Federal Administrative Criminal Law Act.

A. Application to the Indictment Division of the Federal Court for a declaration that the search was a nullity

12. On 24 January 1992 Mr Camenzind applied to the Indictment Division of the Federal Court under section 26 of the Federal Administrative Criminal Law Act for a declaration that the search was a nullity. The Head Office of the *PTT* argued that the application was inadmissible.

13. On 27 March 1992 the Federal Court delivered a judgment dismissing the application in the following terms (translation from German):

“1. (a) The Indictment Division of the Federal Court has jurisdiction to hear complaints about coercive measures (sections 45 et seq. of the [Federal Administrative Criminal Law Act]) and related administrative acts (section 26 (1) of [that Act]). Under section 28 (1) of the Act a complaint may be lodged by anyone who is affected by the impugned investigative measure and has an interest worthy of protection in having it quashed or varied.

(b) The applicant did not dispute that he had in his possession a telephone that had not been approved in Switzerland. He even expressly said, during the course of the search, that he had used such a telephone; it had, however, proved to be unusable and had consequently been destroyed ... It was therefore not possible for any seizure to be effected as the telephone could not be found. The complaint is not, therefore, directed against a seizure (none was effected) but against the search and the interception of telephone conversations ...

(c) In so far as the complaint concerns the search as such (‘unlawful search [unlawfully entering a person’s home]’, ‘forced search’, ‘threat of the use of force’), and the interception and recording of telephone conversations, it is unnecessary to consider it, since the applicant has no present interest in invoking the protection of the courts (*aktuelles Rechtsschutzbedürfnis*) as the measures have ceased and he is no longer affected by them (*BGE [Bundesgerichtsentscheidungen – Judgments of the Federal Court]* 103 IV 117 E. 1a).

(d) That is also true in principle of the locating and recording of the telephone calls concerned here, which are closely linked to the search. Exceptionally, however, the Federal Court does not in practice require a present interest where the impugned infringement of the law is likely to recur at any time, where an application to the courts could not be heard in time in the particular case and where the issues raised could arise again in similar or comparable circumstances at any time and are, because of the importance of the principle concerned, of sufficient public interest (*BGE* 116 Ia 150 E. 2a; 116 II 729 E. 6; Ib 59 E. 2b).

These conditions are satisfied in the present case because the carrying out of a search presupposes that in the first place the person using a telephone of an unauthorised type has been located by appropriate means. That investigation will, however, already have ended by the time the search and any seizure are made. For that reason, the complaint must be upheld in so far as it is directed at the interception and recording of conversations held on the applicant’s unauthorised telephone.

...

For these reasons the Indictment Division holds:

(1) In so far as it has been declared admissible, the complaint is dismissed;

...”

B. The order of the Federal Communications Office

14. In decisions of 14 August and 26 September 1995 the Federal Communications Office imposed a fine of 150 Swiss francs on the applicant for an offence under section 42 of the Act “regulating telegraph and telephone communications” and ordered him to pay the costs and expenses.

15. On 11 October 1995 Mr Camenzind brought proceedings for review of that decision in the Saane District Court (*Bezirksgericht*), which on 18 December 1995 were dismissed on the ground that prosecution of the offence in question was time-barred (*absolute Verjährung*).

II. RELEVANT DOMESTIC LAW

A. The Federal Act of 1922 “regulating telegraph and telephone communications”

16. At the material time, section 42 of the Federal Act of 1922 “regulating telegraph and telephone communications” provided:

“(1) Anyone setting up, operating or using, without a licence or permit or in a manner contrary to the terms on which a licence or permit was granted, transmitters or receivers or any equipment for which a licence or permit is required and which is used for electric or radio transmission of signals, images or sounds,

...

shall be liable to a term of imprisonment not exceeding three months or a fine not exceeding 10,000 Swiss francs unless, under Article 151 of the Swiss Criminal Code, he is liable to a heavier sentence.

(2) The fine shall not exceed 5,000 Swiss francs where the offence has been committed through negligence.”

B. The Federal Administrative Criminal Law Act

17. Administrative criminal law procedures are governed by the Federal Administrative Criminal Law Act of 22 March 1974, as amended (“the *DPA*”).

1. The investigation

18. The federal authorities are responsible for prosecuting and trying certain offences against federal law. They are also vested with the power to conduct the investigations into such offences. The necessary interviews (of which records are made), on-the-spot inspections and coercive measures are entrusted to officials specially trained for the purpose (section 20 (1) of the *DPA*).

19. Officials called upon to conduct an investigation or to take or prepare a decision are required to stand down if they have a personal interest in the case, if they are related to the “suspect” by blood or marriage, by direct or collateral descent up to the third degree, or are linked with him through marriage, engagement or adoption and if there are circumstances such as to make them appear to be partial in the case (section 29).

20. A “suspect” is entitled, whatever the circumstances, to representation (section 32). In principle, both the “suspect” and his representative may be given leave by the investigating official to participate in the taking of evidence (section 35).

21. The investigating official may interview the “suspect” (section 39), other people “for information purposes” (section 40) and – in the presence of the “suspect” and his representative – witnesses (section 41). He may also order an expert opinion – in consultation with the “suspect” (section 43) – and an on-the-spot inspection, which the “suspect” and his representative are entitled to attend (section 44). The investigating official is in addition empowered to effect “with due regard for the person concerned and his property” seizures, searches and provisional arrests (sections 45 et seq.); these measures, known as “coercive” measures, may not be used in respect of a “breach of administrative regulations” (such a breach is a contravention which is so described in special administrative law or one for which an administrative fine can be imposed; section 3).

22. Searches in particular are governed by the following provisions of the Federal Administrative Criminal Law Act:

Section 48

“(1) Dwellings and other premises, including any adjoining enclosed area, may be searched only if it is likely that a suspect is in hiding there or if objects or valuables liable to seizure or evidence of the commission of the offence are to be found there.

- (2) A suspect may be searched if necessary. The search must be carried out by a person of the same sex or by a doctor.
- (3) Searches shall be carried out under a written warrant issued by the director or head of the authority concerned or, if the investigation is within his competence, by the area director of customs or of the *PTT*.
- (4) If there is immediate danger and a search warrant cannot be obtained in time, the investigating official may himself order a search or carry it out. Reasons for the measure must be given in the file.”

Section 49

- “(1) At the beginning of a search the investigating official shall provide evidence of identity.
- (2) The occupier of the premises must be informed of the purpose of the search and be asked to attend, if present. If he is absent, a relative or a member of the household shall be asked to attend. A public officer designated by the competent cantonal authority – or, if the investigating official is acting on his own initiative, a member of the municipal authority or an official of the canton, district or municipality – shall also be required to attend the search in order to ensure that it does not deviate from its purpose. A search may be conducted without public officers, members of the household or relatives being present where it would be dangerous to defer the search or where the occupier has consented.
 - (3) As a general rule, searches shall not be conducted on Sundays or public holidays or at night except in important cases or where there is imminent danger.
 - (4) A record of the search shall be drawn up immediately in the presence of the persons who attended; if they so request, they shall be provided with a copy of the search warrant and of the record.”

Section 50

- “(1) Searches for documents must be carried out with the greatest regard for private and confidential information; in particular, documents shall not be examined unless it is apparent that their content is important for the investigation.
- (2) Searches shall be carried out so as to preserve occupational confidentiality and the confidentiality of information given to clergymen, barristers, notaries, doctors, chemists, midwives and their auxiliaries in the exercise of their ministry or profession.
 - (3) Before a search is carried out, the person in possession of the documents shall, whenever possible, be allowed to indicate their content. If he does not agree to the search, the documents shall be placed under seal and deposited in a safe place; the Indictment Division of the Federal Court shall decide whether the search is lawful ...”

2. Remedies

(a) Judicial review of coercive measures

23. Coercive measures, including searches (sections 45 et seq. of the *DPA*), and related acts and omissions may form the subject of a complaint to the Indictment Division of the Federal Court (section 26).

Complaints are admissible for breaches of federal law – or of the Convention (see the Federal Court’s judgment of 17 August 1989 in the case of *X v. Caisse de pensions de l’Etat de Neuchâtel et tribunal administratif du Canton de Neuchâtel*, Judgments of the Swiss Federal Court, vol. 115, V, p. 253) – for inaccurate or incomplete findings of fact or for inappropriateness. A complaint may be lodged by anyone affected by the impugned investigative measure, the omission complained of or the decision on the complaint and who has an interest worthy of protection in having the measure, omission or decision quashed or varied (section 28). The Indictment Division of the Federal Court has said (*X. gegen Generaldirektion PTT*, 23 June 1977, Judgments of the Swiss Federal Court, vol. 103, IV, p. 115; translation from German):

“Only persons who are (still) affected, at least in part, by the impugned decision and as a result have an interest in its being varied have *locus standi* to lodge a complaint.”

(b) Obtaining a court judgment

24. The authorities have jurisdiction to try offences against administrative criminal law. However, where the department to which they are subordinate considers that a custodial sentence or measure must be contemplated, jurisdiction lies with the courts. A person affected by a decision of the authorities in criminal proceedings may, within ten days of being notified of the decision, ask to be tried by a court. If he does not do so, the decision is “treated as a judgment that has become final” (sections 21 and 72).

(c) Compensation in the event of a finding of no case to answer

25. A suspect who is found to have no case to answer may seek compensation from the authorities for detention pending trial and other losses sustained. Compensation may be reduced or refused if it was through the suspect’s own fault that the investigation was started or if, without reason, the suspect has hindered or delayed the proceedings. The authorities’ decision on that issue may be challenged by lodging a complaint with the Indictment Division of the Federal Court (sections 99 and 100).

PROCEEDINGS BEFORE THE COMMISSION

26. In his application (no. 21353/93) to the Commission of 2 October 1992, Mr Camenzind alleged that the search carried out at his home had infringed Article 8 of the Convention and that he had had neither a fair hearing within the meaning of Article 6 nor an effective remedy before a national authority as required by Article 13.

27. The Commission declared the application admissible on 27 February and 27 November 1995 with respect to Articles 8 and 13 only. In its report of 3 September 1996 (Article 31), it expressed the unanimous opinion that there had been no violation of Article 8, but that there had been a violation of Article 13. The full text of the Commission's opinion is reproduced as an annex to this judgment¹.

FINAL SUBMISSIONS TO THE COURT

28. In their memorial the Government asked the Court to

“conclude, like the Commission, that there has been no violation of Article 8 of the Convention in the instant case and to consider whether, as regards the search at his home, the applicant had an effective remedy before a national authority within the meaning of Article 13 of the Convention”.

29. The applicant requested the Court to

“conclude, like the Commission, that there has been a violation of Article 13 of the Convention in the instant case [and to] find a violation of Article 8 § 2 of the Convention”.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

30. Mr Camenzind submitted that the search carried out in the instant case had infringed Article 8 of the Convention, which provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1997), but a copy of the Commission's report is obtainable from the registry.

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.”

31. The Government and the Commission disagreed with that submission.

A. Whether there was an interference

32. The applicant considered that the search had interfered with his right to respect for his home, not only as regards the room he occupied in the building but also as regards the other rooms, which he had let to another person. He maintained that he had *locus standi* to act on behalf of his tenant – whom he had associated with his application to the Commission – in that, as landlord, he was contractually bound to protect his tenant “from any wrongful interference by others”.

33. The Government did not deny that there had been an interference with Mr Camenzind’s right to respect for his home. They nonetheless argued that Mr Camenzind – the sole applicant in the present case – could only claim to be a victim of a violation of Article 8 with respect to the search of that part of the flat he actually occupied.

34. The Commission did not express an opinion on the latter issue; it concluded that there had been an interference with the right concerned.

35. The Court finds it unnecessary to embark on a discussion of this issue, the outcome of which would be of no relevance in the present case. It suffices for the Court to find that in any event (and this was common ground) the search of the room occupied by the applicant amounted to an interference, within the meaning of Article 8, with his right to respect for his home.

It accordingly has to be determined whether the interference was justified under paragraph 2 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. Whether the interference was justified

1. “In accordance with the law”

36. The applicant denied that the search had been “in accordance with the law”. He argued that the act of which he had been accused was not an “offence” but a “breach of administrative regulations” within the meaning of section 3 of the Federal Administrative Criminal Law Act of 22 March

1974, as amended (“the *DPA*”). Section 45 (2) of the *DPA* therefore operated to preclude the use of any coercive measures against him. Furthermore, that Act provided, contrary to the general principles of administrative law, that coercive measures were to be ordered by public servants and not by a judicial authority. Lastly, section 48 (1) of the *DPA* provided that searches could only be carried out on premises if it was “likely” that the object sought was to be found there. However, as the applicant had informed the officials present when the search was carried out that the telephone was no longer in his possession, that statutory requirement had not been satisfied.

37. The Court reiterates that the expression “in accordance with the law”, within the meaning of Article 8 § 2 of the Convention, requires that the impugned measure should have some basis in domestic law and that the law in question should be accessible to the person concerned – who must moreover be able to foresee its consequences for him – and compatible with the rule of law (see the *Kruslin v. France* judgment of 24 April 1990, Series A no. 176-A, p. 20, § 27). In the instant case it notes, firstly, that under section 42 of the Federal Act of 1922 “regulating telegraph and telephone communications” it was an offence, *inter alia*, to “[set up, operate or use], without a licence or permit ... transmitters or receivers or any equipment for which a licence or permit is required and which is used for electric or radio transmission of signals, images or sounds” (see paragraph 16 above). The Court further notes that to enable offences under administrative criminal law to be detected, section 48 of the *DPA* provides that searches may be carried out in dwellings and other premises “if ... evidence of the commission of the offence [is] to be found there” and that the Act contains safeguards against arbitrary interference by the authorities with the right to respect for the home (see paragraphs 17–25 above and paragraph 46 below). Since the applicant did not supply any evidence in support of his allegations, the Court, like the Government and the Commission, accepts that the measure complained of was “in accordance with the law”.

2. *Legitimate aim*

38. Mr Camenzind maintained that the aim of the search – to find evidence of the offence – had become unlawful once he had informed the officials responsible that the telephone in question was no longer in his possession.

39. Neither the Government nor the Commission accepted that proposition.

40. The Court notes that the applicant was suspected of having contravened section 42 of the Federal Act of 1922 “regulating telegraph and telephone communications” by using a cordless telephone of an unauthorised type. There is, therefore, no doubt that the search of the building in which the applicant lived, with a view to finding and seizing the telephone, pursued an aim that was consistent with the Convention, namely the “prevention of disorder or crime”.

3. *“Necessary in a democratic society”*

41. Mr Camenzind argued that it had not been “necessary” for the purpose of obtaining physical proof of the offence, and hence of achieving the aim pursued, to search his property. Such proof had already existed as the conversation had been recorded by the radio communications surveillance unit of the Head Office of the Swiss Post and Telecommunications Authority (*PTT*) and he had admitted using the telephone. Other factors showed the measure to have been disproportionate: he had not used the telephone again during the six-week period the authorities had allowed to elapse between the commission of the offence and the search, the act he was accused of was “trifling” and the authorities could have taken measures that were less coercive. In short, the interference had not met a “pressing social need” within the meaning of the case-law of the Convention institutions.

42. The Government submitted that the Contracting States were permitted by the Court’s case-law to have recourse to certain coercive measures in order to obtain evidence of an offence, in so far as their relevant legislation and practice afforded adequate and effective safeguards against abuse and the resulting interference was proportionate to the legitimate aim pursued. The fact that the search had been carried out without a judicial warrant therefore did not necessarily mean that there had been a violation of the Convention. On the contrary, the statutory basis on which it had been ordered, the manner in which it had been executed and its very limited scope showed it to have been “necessary in a democratic society”.

43. The Commission reached the same conclusion.

44. Under the Court’s settled case-law, the notion of “necessity” implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued; in determining whether an interference is “necessary in a democratic society”, the Court will take into account that a margin of appreciation is left to the Contracting States (see, for example, the *Olsson v. Sweden* (no. 1) judgment of 24 March 1988, Series A no. 130, pp. 31–32, § 67).

45. The Contracting States may consider it necessary to resort to measures such as searches of residential premises and seizures in order to obtain physical evidence of certain offences. The Court will assess whether the reasons adduced to justify such measures were relevant and sufficient and whether the aforementioned proportionality principle has been adhered to (see the *Funke v. France*, *Crémieux v. France* and *Miailhe v. France* judgments of 25 February 1993, Series A no. 256-A, pp. 24–25, §§ 55–57, Series A no. 256-B, pp. 62–63, §§ 38–40, and Series A no. 256-C, pp. 89–90, §§ 36–38, respectively; and, *mutatis mutandis*, the *Z v. Finland* judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 347, § 94). As regards the latter point, the Court must firstly ensure that the relevant legislation and practice afford individuals “adequate and effective safeguards against abuse” (*ibid.*); 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. Secondly, the Court must consider the particular circumstances of each case in order to determine whether, in the concrete case, the interference in question was proportionate to the aim pursued.

46. In the present case the purpose of the search was to seize an unauthorised cordless telephone that Mr Camenzind was suspected of having used contrary to section 42 of the Federal Act of 1922 “regulating telegraph and telephone communications” (see paragraphs 7–9 above). Admittedly, the authorities already had some evidence of the offence as the radio communications surveillance unit of the Head Office of the *PTT* had recorded the applicant’s conversation and Mr Camenzind had admitted using the telephone (see paragraphs 7 and 10 above). Nevertheless, the Court accepts that the competent authorities were justified in thinking that the seizure of the *corpus delicti* – and, consequently, the search – were necessary to provide evidence of the relevant offence.

With regard to the safeguards provided by Swiss law, the Court notes that under the Federal Administrative Criminal Law Act of 22 March 1974, as amended (see paragraphs 17–25 above), a search may, subject to exceptions, only be effected under a written warrant issued by a limited number of designated senior public servants (section 48) and carried out by officials specially trained for the purpose (section 20); they each have an obligation to stand down if circumstances exist which could affect their impartiality (section 29). Searches can only be carried out in “dwellings and other premises ... if it is likely that a suspect is in hiding there or if objects or valuables liable to seizure or evidence of the commission of an offence are to be found there” (section 48); they cannot be conducted on Sundays,

public holidays or at night “except in important cases or where there is imminent danger” (section 49). At the beginning of a search the investigating official must produce evidence of identity and inform the occupier of the premises of the purpose of the search. That person or, if he is absent, a relative or a member of the household must be asked to attend. In principle, there will also be a public officer present to ensure that “[the search] does not deviate from its purpose”. A record of the search is drawn up immediately in the presence of the persons who attended; if they so request, they must be provided with a copy of the search warrant and of the record (section 49). Furthermore, searches for documents are subject to special restrictions (section 50). In addition, suspects are entitled, whatever the circumstances, to representation (section 32); anyone affected by an “investigative measure” who has “an interest worthy of protection in having the measure ... quashed or varied” may complain to the Indictment Division of the Federal Court (sections 26 and 28). Lastly, a “suspect” who is found to have no case to answer may seek compensation for the losses he has sustained (sections 99–100).

As regards the manner in which the search was conducted, the Court notes that it was at Mr Camenzind’s request that it was carried out by a single official (see paragraph 11 above). It took place in the applicant’s presence after he had been allowed to consult the file on his case and telephone a lawyer (see paragraph 10 above). Admittedly, it lasted almost two hours and covered the entire house, but the investigating official did no more than check the telephones and television sets; he did not search in any furniture, examine any documents or seize anything (see paragraph 11 above).

47. Having regard to the safeguards provided by Swiss legislation and especially to the limited scope of the search, the Court accepts that the interference with the applicant’s right to respect for his home can be considered to have been proportionate to the aim pursued and thus “necessary in a democratic society” within the meaning of Article 8. Consequently, there has not been a violation of that provision.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 8

48. Mr Camenzind also complained that he had been the victim of a violation of 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.”

A. The Government's preliminary objection

49. As they had done before the Commission, the Government raised in substance an objection concerning the fact that the present complaint, which Mr Camenzind had not expressly raised in his application, had been examined by the Commission of its own motion.

50. The Court reiterates that the institutions set up under the Convention have jurisdiction to review in the light of the entirety of the Convention's requirements the circumstances complained of by an applicant. In the performance of their task, the Convention institutions are, notably, free to attribute to the facts of the case, as found to have been established on the evidence before them, a characterisation in law different from that given by the applicant or, if need be, to view the facts in a different manner (see, for example, the *Foti and Others v. Italy* judgment of 10 December 1982, Series A no. 56, pp. 15–16, § 44).

In the present case it is not disputed that Mr Camenzind referred in his application to the judgment of 27 March 1992 of the Indictment Division of the Federal Court and to the reasoning contained in it, and alleged a violation of Article 13. Moreover, the complaint now before the Court is identical to the one the Commission considered to be valid after hearing the parties' submissions on it. Consequently, the Court, being required to give a ruling in the light of the case as it now stands (*ibid.*), holds that it has jurisdiction to consider that issue.

B. Merits of the complaint

51. Mr Camenzind's submission, which the Commission accepted, was that he had not had an "effective remedy" for his complaint under Article 8 of the Convention (even though that complaint had been "arguable" for the purposes of the case-law of the Convention institutions), because the Federal Court had refused to rule on the "legality and justification on the merits" of the search. Admittedly, once the administrative criminal law proceedings had ended, he could have used the procedure laid down by section 99 of the *DPA*, but that procedure was confined to considering whether the conditions for payment of compensation for the loss sustained as a result of the search had been satisfied; an action for damages or a criminal complaint against the *PTT* officials would have been equally inadequate.

52. The Government maintained that unless there was a finding of a violation of Article 8, the applicant did not have an "arguable" complaint under the Convention and that consequently no issue arose under Article 13. As to the merits, the Government did not deny that the Federal Court had not ruled on the lawfulness of the measure concerned. In so doing, it had followed its settled case-law whereby "only persons who are (still) affected,

at least in part, by the impugned decision and as a result have an interest in its being varied have *locus standi* to lodge a complaint". In other words, the Indictment Division had held that it was unnecessary to consider Mr Camenzind's complaint relating to the search because it had already been carried out. However, that practice would only have given rise to a problem under Article 13 if the applicant had had no other means of obtaining a decision from a "national authority" on his complaint of a breach of Article 8. In fact, several possibilities were open to him; had he sought compensation under section 99 of the *DPA*, brought an action for damages against the officials concerned or lodged a criminal complaint against them for unlawful entry into his home, he would have caused an authority to rule on the merits and lawfulness of the search as an ancillary issue.

53. Article 13 has consistently been interpreted by the Court as requiring "an effective remedy before a national authority" in respect of grievances which can be regarded as "arguable" in terms of the Convention (see, for example, the *Powell and Rayner v. the United Kingdom* judgment of 21 February 1990, Series A no. 172, p. 14, § 31).

In the instant case there is no doubt that the complaint under Article 8 was "arguable", because the Court has found that the search amounted to an interference with Mr Camenzind's right to respect for his home (see paragraph 35 above). It must accordingly be determined whether the Swiss legal system afforded him an "effective" remedy, allowing the competent "national authority" both to deal with the complaint and to grant appropriate relief (see, for example, the *Vilvarajah and Others v. the United Kingdom* judgment of 30 October 1991, Series A no. 215, p. 39, § 122).

54. The Federal Administrative Criminal Law Act provides a special remedy in respect of coercive measures – such as searches of people's homes – taken in connection with administrative criminal law proceedings: the measures and any related acts or omissions may form the subject of a complaint to the Indictment Division of the Federal Court. The complaint may be lodged by "anyone affected by the impugned investigative measure, the omission complained of or the decision on the complaint who has an interest worthy of protection in having the measure, omission or decision quashed or varied" (sections 26 and 28 of the *DPA*, see paragraph 23 above).

However, it is the settled case-law of the Indictment Division of the Federal Court that the aforementioned "interest" must be a present one. In principle, only persons who are still affected, at least in part, by the impugned decision have *locus standi* to lodge a complaint (see paragraph 23 above). The Indictment Division accordingly declared inadmissible that part of Mr Camenzind's complaint concerning the search because "[the measure had] ceased and the applicant [was] no longer affected by [it]" (see paragraph 13 above).

Thus, even though the Indictment Division considered the complaint in so far as it concerned the interception and recording of the telephone conversation in question, the remedy described above cannot be termed “effective” within the meaning of Article 13.

55. That is true also of the proceedings for review by a court which the applicant brought under section 72 of the Federal Administrative Criminal Law Act (see paragraph 24 above) and which the Saane District Court dismissed on the ground that prosecution of the offence was time-barred (see paragraph 15 above).

56. As regards the other procedures relied on, the Government referred to a case concerning a detention measure, but gave no example of a case “similar” to the present one in which such procedures had been used. The Court consequently considers that the procedures have not been shown to be effective (see, for example, the *Vereinigung Demokratischer Soldaten Österreichs and Gubi v. Austria* judgment of 19 December 1994, Series A no. 302, p. 20, § 53, and the *Valsamis v. Greece* judgment of 18 December 1996, Reports 1996-VI, p. 2327, § 48 *in fine*).

57. In short, regard being had to all the circumstances of the case, the applicant did not have “an effective remedy before a national authority” for airing his complaint under Article 8. It follows that there has been a violation of Article 13 of the Convention, taken together with Article 8.

III APPLICATION OF ARTICLE 50 OF THE CONVENTION

58. Article 50 of the Convention provides:

“If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Non-pecuniary damage

59. By way of reparation for the non-pecuniary damage he had sustained as a result of the violation of the Convention, the applicant claimed a “symbolic sum” of 100 Swiss francs (CHF).

60. The Delegate of the Commission did not express a view.

61. The Court considers that the present judgment constitutes in itself sufficient just satisfaction for the alleged non-pecuniary damage.

B. Costs and expenses

62. The applicant claimed CHF 13,755 for costs and expenses incurred before the Federal Court and the Strasbourg institutions.

63. The Government indicated that they were ready to pay the applicant CHF 5,000 if the Court were to find violations of Articles 8 and 13 of the Convention, and only half that sum if a violation was found in respect of only one of those provisions.

64. The Delegate of the Commission did not express a view.

65. Making its assessment on an equitable basis, the Court awards Mr Camenzind CHF 8,000, less 9,184 French francs paid in legal aid by the Council of Europe.

C. Default interest

66. According to the information available to the Court, the statutory rate of interest applicable in Switzerland at the date of adoption of the present judgment is 5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by eight votes to one that there has been no violation of Article 8 of the Convention;
2. *Dismisses* unanimously the Government's preliminary objection concerning the fact that the Commission examined of its own motion the complaint under Article 13 of the Convention taken together with Article 8;
3. *Holds* unanimously that there has been a violation of Article 13 of the Convention, taken together with Article 8;
4. *Holds* unanimously that the finding of a violation constitutes in itself sufficient just satisfaction in respect of the alleged non-pecuniary damage;
5. *Holds* unanimously
 - (a) that the respondent State is to pay the applicant, within three months, 8,000 (eight thousand) Swiss francs for costs and expenses, less 9,184 (nine thousand one hundred and eighty-four) French francs to be

converted into Swiss francs at the rate applicable on the date of delivery of the present judgment;

(b) that simple interest at an annual rate of 5% shall be payable from the expiry of the above-mentioned three months until settlement;

6. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 December 1997.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 55 § 2 of Rules of Court B, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Mr Wildhaber, joined by Mr Loizou and Mr Baka;

(b) partly dissenting opinion of Mr De Meyer.

Initialled: R. B.
Initialled: H. P.

CONCURRING OPINION OF JUDGE WILDHABER,
JOINED BY JUDGES LOIZOU AND BAKA

(*Translation*)

1. It is established that the Indictment Division of the Federal Court declared inadmissible the part of Mr Camenzind's complaint concerning the search because the measure had ceased and he was no longer affected by it (see paragraph 54 of the judgment). On the basis of that finding, the Court considers that being able to lodge a complaint with the Indictment Division was not an "effective" remedy within the meaning of Article 13. It goes on to say that the other procedures relied on by the Government have not been shown to be effective, as no example was given of any case similar to the present one.

2. Yet the Government cited a Federal Court judgment (ATF 103 IV 115 at p. 118 (1977)) concerning unlawful detention as authority for saying that the courts would have been able to review the lawfulness of the search in an action for damages. The Court considered that that was not a "similar" case, although the principle laid down in the Federal Court's judgment seems at first sight sufficiently broad to apply in the present case. However, it is a prerequisite in an action for damages of the type referred to that the court, independently of determining the issue of compensation, should review the lawfulness of the coercive measure.

3. Furthermore, in the *Valsamis v. Greece* case (see the judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2327, § 48) the Court held that a claim for compensation did not constitute an effective remedy since, under Greek law, a "judicial decision that the [relevant] measure ... was unlawful" – which could not have been obtained in that case – was "a prerequisite for submitting a claim for compensation". Yet in the Camenzind case the Government rightly explained that it is not a prerequisite for an award of compensation under section 99 of the *DPA* that the damage in question should have resulted from an unlawful measure: it is sufficient that the measure was unjustified.

4. The Court holds, therefore, that it was not sufficient that the Indictment Division of the Federal Court had reviewed the lawfulness of the interception and recording of the telephone conversations, that the applicant could have sought redress under section 99 and that a court could have reviewed the lawfulness of a search in an action for damages.

5. Given “the limited scope of the search” (see paragraph 47 of the judgment) we might have contemplated following the *Akdivar v. Turkey* judgment (of 16 September 1996, Reports 1996-IV, p. 1213, § 77) by confining the case to its facts and holding that the powers of review provided by the Swiss legal order, while not extensive, could be considered adequate. The reason why we nonetheless chose to vote with the majority is that the Court’s decision on this point is based on its settled case-law and it is important that that case-law be adhered to if a minimum standard for an effective and genuine protection of human rights across Europe is to be established.

PARTLY DISSENTING OPINION OF JUDGE DE MEYER

(Translation)

In itself, the search could be considered justified in the circumstances of the case.

However, it was carried out without a court order being obtained beforehand.

In this respect there has, in my opinion, been a violation of the rights protected by Article 8 of the Convention.

Furthermore, there has been a violation of Article 6 and especially of Article 13 in that the lawfulness of the search was not even reviewed by the courts *ex post facto*¹.

1. See paragraphs 12, 22 and 53 of the judgment.