CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 73693/01
by Martin BABJAK and Others
against Slovakia

The European Court of Human Rights (Fourth Section), sitting on 30 March 2004 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr M. PELLONPÄÄ,
Mrs V. STRÁŽNICKÁ,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above application lodged on 31 August 2001,

Having deliberated, decides as follows:

THE FACTS

The first applicant, Mr Martin Babjak, is the son of the second applicant, Mr Juraj Babjak, and the third applicant, Mrs Ľudmila Babjaková. They are Slovakian nationals, who were born in 1986, 1953 and 1950 respectively and live in Košice.

A. The circumstances of the case

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

In September 1999 the first applicant, then attending a primary school, was involved in a fight with his classmate who suffered bodily injuries.

In December 1999 the mother of the injured classmate filed a criminal complaint against the first applicant to the Banská Bystrica District Police Department (*obvodné oddelenie Policajného zboru*) accusing him of having assaulted, attacked and injured her son.

On 10 December 1999 the Police interrogated the first applicant on suspicion of having committed a criminal act of bullying (*útlak*) under Article 237 of the Criminal Code. The second and third applicants were neither present at nor notified of the interrogation.

On 23 December 1999 the Police requested the Social Department (*odbor sociálnych vecí*) of the Banská Bystrica District Office (*okresný úrad*) to examine and report on the social situation in the applicants' family.

In January 2000 the Police heard the third applicant in connection with the case.

On 9 March 2000 the Police decided, in the form of a resolution under Article 159 § 2 of the Code of Criminal Procedure, not to instigate criminal proceedings against the first applicant. The decision stated that "it had been established and proven that the criminal act of bullying had been committed [by the first applicant]". With reference to Article 11 § 1 (d) of the Code of Criminal Procedure, the decision further stated that no criminal proceedings could be instituted as, due to his age, the first applicant lacked criminal responsibility. This decision has never been served officially on the applicants.

By a letter of 26 April 2000 the General Health Insurance Company (*Všeobecná zdravotná poisťovňa*) addressed the applicants with a claim for reimbursement of the injured schoolboy's medical costs. On the basis of the above Police decision, they maintained that the first applicant had caused his classmate's injury and that, consequently, he was liable for the costs of his medical treatment. The case-file contains no information as to how this claim has subsequently been dealt with.

On 4 May 2000 the third applicant filed a complaint with the Banská Bystrica District Prosecutor (*okresná prokuratúra*). She argued that her family had not been acquainted with the results of the investigation and that, despite her demands, the Police had refused to serve a copy of the decision of 9 March 2000 on them. She argued that there could not have been any legitimate basis for the conclusion that her son had committed a criminal act and requested that the prosecutor investigate the matter.

The District Prosecutor replied in a letter of 12 May 2000. She concurred with the legal and factual conclusions of the Police. She pointed out that the

first applicant did not have the status of a person charged with a criminal offence within the meaning of Article 32 in conjunction with Article 163 of the Code of Criminal Procedure. She maintained that none of the applicants was directly concerned with the Police decision or fell into any other category of persons entitled under Article 137 of the Code of Criminal Procedure to have a copy of the Police decision served on them. She further concluded that, consequently, neither the first applicant nor the second and third applicants, as the minor first applicant's legal representatives, had the right of appeal against it.

On 22 May 2000 the second applicant requested the Banská Bystrica Regional Prosecutor (*krajský prokurátor*) to review the position taken by the District Prosecutor. He repeated the complaints expressed by the third applicant on 4 May 2000. In addition, he maintained that the statement contained in the decision of 9 March 2000 that the first applicant had committed a criminal offence clearly violated his son's right to be presumed innocent. He demanded that the Regional Prosecutor quash the said decision.

The Regional Prosecutor replied in a letter of 15 June 2000. She found that the Police had failed to establish the relevant facts sufficiently and instructed them to extend the investigation. She expressed the view that, on the basis of the case-file, it could not be concluded that the actions of the first applicant had amounted to a criminal offence. She noted that the decision of 9 March 2000 had been given at the stage of investigation, i.e. prior to institution of formal criminal proceedings under Article 160 of the Code of Criminal Procedure. The Regional Prosecutor concluded that therefore, firstly, the applicants had no right to be served with a copy of the decision of 9 March 2000 (Articles 137 § 1 and 159 § 4 of the Code *a contrario*) and, consequently, to lodge an appeal against it. She also considered that therefore it was not necessary to formally quash this decision before determining anew whether or not to charge the first applicant.

On 22 June 2000 the second applicant filed a complaint with the Prosecutor General. He sought a re-examination of the Regional Prosecutor's position concerning the service and necessity to quash the decision of 9 March 2000.

On 11 July 2000 the Police decided, in the form of a resolution under Article 159 § 1 of the Code of Criminal Procedure, not to take criminal proceedings against the first applicant. Having completed the investigation, they concluded that "the actions of the first applicant did not constitute a criminal offence". This decision did not formally quash the decision of 9 March 2000 nor did it contain any reference to it. However, it bore the same file number as the decision of 9 March 2000. It has never been served on the applicants.

On 16 August 2000 the Prosecutor General decided that he was not competent to act upon the second applicant's complaint of 22 June 2000.

In a letter of 11 October 2000, in reply to the second applicant's request, the District Office informed him that, since 23 December 1999 and "in connection with his criminal activity", the first applicant's name was placed on the register of "juvenile delinquents". This register was maintained by the District Office in the framework of social prevention services provided to citizens under the Social Assistance Act.

On 27 December 2000 the applicants lodged a complaint with the Constitutional Court. They complained firstly that the criminal proceedings (investigation) against the first applicant had not been fair and that the decision of 9 March 2000, which had never been formally quashed, violated the first applicant's presumption of innocence. They further complained that the Police and the public prosecution service had violated their right to respect for private life in that they had not acquainted them with the outcome of the investigation and had failed to serve the decisions of 9 March and 11 July 2000 on them. Finally, they complained that, by keeping the first applicant's name on the register of juvenile delinquents, the District Office also violated their right to respect for private life.

In their statistical records for 2000, the public prosecution service retain information concerning the first applicant. Referring to "a criminal offence under Article 237 of the Criminal Code committed on 1 September 1999" it shows the first applicant as the perpetrator.

In January and March 2001 the applicants' lawyer supplemented their constitutional complaints and submitted their observations in reply to those of the defendants.

On 17 May 2001 the Constitutional Court declared inadmissible the part of the applicants' complaints concerning the alleged unfairness of the investigation and the violation of the presumption of innocence. It noted that the proceedings against the first applicant had been of a purely investigative nature and that they had never resulted in the institution of formal criminal proceedings against him. It further noted that the decision not to charge the first applicant was first given on 9 March 2000 and later, after re-examination of the case, on 11 July 2000. The Constitutional Court considered that, by operation of the second decision, the first one was completely replaced and deprived of any legal effect. The first decision thus could not be invoked by any party. The records kept by the prosecution service were of a purely statistical and internal nature and could by no means affect the above conclusion. As to the necessity to formally quash the first decision, the Constitutional Court noted that it was not its function to substitute its interpretation of the relevant laws for that of the Police and the prosecution service. It was only called upon to determine whether the effects of the impugned decision were not contrary to the constitution or an international instrument. No such effects were detected. In the light of

these facts, the Constitutional Court considered the relevant part of the applicants' constitutional complaints manifestly ill-founded. At the same time, it declared the remaining complaints admissible.

On 10 July 2002 the Constitutional Court decided on the merits of the admissible part of the applicants' complaints. It found that there had been a violation of the applicants' right to respect for family life and of their right not to be discriminated against in the enjoyment of that right. It found the violation on the ground that the District Office kept the first applicant's name on the register of juvenile delinquents, that the Police had failed to serve a copy of the decisions of 9 March and 11 July 2000 on the applicants and that the District Prosecutor had failed to inform the applicants of the outcome of its review of the legality of steps taken by the Police.

On 22 July 2002 the District Office informed the applicants that, pursuant to the Constitutional Court finding, it had deleted the first applicant from the list in question.

B. Relevant domestic law

The Criminal Code

Pursuant to Article 11, a person who has not attained the age of 15 at the time of carrying out the action is not criminally liable.

Article 237 provides a definition of the criminal offence of bullying (*útlak*). Pursuant to it, who forces another person to act, omit or tolerate something by taking advantage of that person's distress or addiction, is to be punished by imprisonment of up to two years or by a financial penalty.

The Code of Criminal Procedure (as in force in the relevant time)

Pursuant to Article 11 § 1 (d), a criminal prosecution cannot commence and, if already commenced, cannot continue and must be terminated if it concerns a person who, due to his or her age, is not criminally liable.

Under Article 32, a person who is suspected of having committed a criminal offence may be deemed to be charged and may be subjected to measures under this Code only after charges have been brought against him in accordance with Article 163.

Article 137 deals with notification of a decision in the form of a resolution (*uznesenie*). In accordance with its paragraph 1, such a decision must be notified to any person directly concerned with it as well as to any person who has initiated it by his or her motion. The notification is to be effected either by an announcement of the decision in the presence of the persons entitled to such notification or by serving a copy of it on them.

Chapter nine of the Code governs the procedure before the formal institution (commencement) of criminal prosecution. Under this chapter, the Police, investigation and prosecution departments *inter alia* receive and obtain relevant information and evidence and conduct investigations with a view to detecting criminal offences, establishing their perpetrators and preventing criminal activities.

Under Article 158 § 4, they obtain documents and explanations and secure traces. However, as a general rule, they have no authority to take the procedural steps to secure persons and objects in accordance with Chapter four of the Code or to take and to assess evidence in accordance with Chapter five of the Code, which acts can only be carried out after a criminal prosecution has been formally instituted.

The procedure before the formal institution of a criminal prosecution may result in a decision not to accept a criminal complaint under Article 158 § 2 (*oznámenie neprijme*), to refer a matter to the minor offences, disciplinary or other authority under Article 159 § 1 (*odovzdá vec*), to refuse to act in a matter under Article 159 §§ 1, 2 and 3 (*vec odloží*) or to institute a formal criminal prosecution (*začne trestné stíhanie*) (see below).

In accordance with Article 159 § 1, a public prosecutor, investigator or police officer is to refuse to act in a matter if there is no suspicion that a criminal offence has been committed and no other steps are appropriate, such as for example referring the matter to the competent minor offences authority or disciplinary authority.

Under Article 159 § 2, a public prosecutor, investigator or police officer is to refuse to act in a matter also if the institution (commencement) of a criminal prosecution is not permitted pursuant to Article 11.

In accordance with Article 159 § 4, a copy of the decision not to act in a matter is to be served on the aggrieved party who has a right of appeal against it. The person on the basis of whose motion the decision was given is to be notified about it.

The institution of formal criminal prosecutions is governed by Chapter ten, Section one of the Code. Under Article 160 § 1, a police officer or an investigator is to immediately instigate a criminal prosecution if the information obtained indicates that a criminal offence has been committed and if there is no reason for refusing to act in the matter pursuant to Article 159.

Article 163 governs laying charges (*vznesenie obvinenia*). In accordance with its paragraph 1, if the information obtained sufficiently justifies the conclusion that a criminal offence has been committed by a particular person, the investigator is to decide immediately in the form of a resolution that the person is to be prosecuted as a charged person.

The Civil Code

According to Article 11, any natural person has the right to protection of his or her personal integrity (*osobnosť*), in particular his or her life and health, civil and human dignity, privacy, name and personal characteristics.

Pursuant to Article 13 § 1, any natural person has the right to request that an unjustified infringement of his or her personal rights should be stopped and the consequences of such infringement eliminated, and to obtain appropriate satisfaction.

Article13 § 2 provides that in cases when the satisfaction obtained under Article 13 § 1 is insufficient, in particular because a person's dignity and position in society has been considerably diminished, the injured person is entitled to compensation for non-pecuniary damage. According to paragraph 3 of Article 13, when determining the amount of such compensation the courts have to take into account the seriousness of the prejudice suffered by the person concerned and also the circumstances under which the violation of that person's rights occurred.

COMPLAINTS

1. Relying on Article 6 § 1 of the Convention, the applicants complain that the criminal proceedings against the first applicant lacked guarantees of a fair trial. In particular, they complain that they did not have an adequate and equal opportunity to defend their rights before the Police and public prosecution authorities and that they had no access to a court with a view to refuting the allegations made against the first applicant. In the context of the complaint about the unfairness of the proceedings against the first applicant, the applicants consider the Constitutional Court's decision of 17 May 2001 declaring inadmissible the relevant part of their complaints wrongful and arbitrary and object that the Constitutional Court decided *in camera* and did not give them an opportunity to present their case orally.

2. The applicants also complain under Article 6 § 2 of the Convention that the decision of the Police of 9 March 2000 violates the first applicant's right to be presumed innocent. According to their opinion, the decision states in unqualified terms that it was established and proven that the first applicant committed a criminal offence. This decision has never been formally quashed.

THE LAW

1. The applicants complain that, in the criminal investigation proceedings against the first applicant and the subsequent proceedings before the Constitutional Court, they did not have a fair hearing within the meaning of Article 6 § 1 of the Convention which, insofar as relevant, provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ..."

The Court considers that it is not called upon to decide whether the proceedings that were conducted against the first applicant fell within the purview of the Article invoked as, in any event, this part of the application is inadmissible for the following reasons.

The proceedings against the first applicant have not resulted in a formal instigation of a criminal prosecution under Article 160 of the Code of Criminal Procedure or in the laying of charges against the first applicant pursuant to Article 163 of that Code. They ended in a decision of the Banská Bystrica District Police Department not to act in the matter. The Police gave two decisions to this effect. On the first occasion, on 9 March 2000, they based the decision on Article 159 § 2 of the Code of Criminal Procedure and found that the applicant had committed a criminal offence but could not be formally prosecuted as he was too young. On the second occasion, on 11 July 2000, after re-examination of the case, they so decided under Article 159 § 1, having found that the first applicant's actions had not amounted to a criminal offence. This second decision has not been challenged by anyone.

The Court also takes notice of the findings of the Constitutional Court in its decision of 17 May 2001 that the proceedings against the first applicant were of a purely investigative nature and that they had never resulted in the institution of formal criminal proceedings against him. By operation of the second decision, the first one was implicitly revoked in its entirety and deprived of any legal effect. The first decision thus could not be invoked by any party. As to the necessity to formally quash the first decision, the Constitutional Court noted that it was not its function to substitute its interpretation of the relevant laws for that of the Police and the prosecution service. The Constitutional Court scrutinised all the steps taken by the police and the prosecution service at this investigative stage and found no indication of a violation of the applicants' right to a fair trial under the Constitution or any international instrument. It supported this finding by convincing reasoning.

Insofar as the applicants' complaint under Article 6 § 1 of the Convention concerns the proceedings before the Constitutional Court, the Court observes that the applicants were represented by their legal counsel

throughout these proceedings. They do not raise this complaint as a separate issue but merely in the context and in support of their complaint of unfairness of the criminal investigation proceedings conducted against the first applicant.

In these circumstances, and even assuming that the investigation proceedings conducted against the first applicant fell within the purview of Article 6 in this respect, the applicants cannot claim to be victims within the meaning of Article 34 of the Convention.

It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

2. The applicants further complain that the decision of 9 March 2000 violated the first applicant's right to be presumed innocent in breach of Article 6 § 2 of the Convention which provides as follows:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

(a) The Court notes that the decision of 9 March 2000 concerned the first applicant and the actions he took in September 1999. It did not mention in any way the second or third applicants personally and it did not interfere with their right protected under Article 6 § 2 of the Convention. In these circumstances, the Court considers that the second and the third applicants cannot claim to be victims within the meaning of Article 34 of the Convention in respect of this complaint.

It follows that the complaint under Article 6 § 2 of the Convention, insofar as it is brought by the second and the third applicants, is incompatible *ratione personae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

(b) The Court has noted the above decision of 9 March 2000 in which the Police stated that they considered it established that the first applicant had committed a criminal act of bullying.

The Court has also take account of the above decision of 11 July 2000 in which the Police expressly stated that it had not been established that the actions of the first applicant had constituted a criminal offence. Although this second decision did not expressly quash the first one, the Court observes that it was given by the same police authority, namely the Banská Bystrica District Police Department, under the same file number. The contested decision of 9 March 2000 thus lost its legal effect. It can no longer by invoked by anyone.

The Court would further note the finding of the Constitutional Court in its decision of 10 July 2002 as regards entering and keeping the first applicant's name on the register of juvenile delinquents by the District Office as a result of the Police decision of 9 March 2000. The Constitutional Court found the entering and retention of the name to be in breach of the

applicants' rights and ordered the first applicant's removal from the register. His name was actually removed from the list on 22 July 2002.

It is therefore first of all questionable whether the first applicant can still claim to be a victim within the meaning of Article 34 of a violation of Article 6 § 2 of the Convention in this context. In this respect the Court recalls that "a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention" (see *Amuur v. France*, judgment of 25 June 1996, Reports of Judgments and Decisions 1996-III, p. 846, § 36; *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI; and *Rotaru v. Romania* [GC], no. 28341/95, § 35, ECHR 2000-V).

Even assuming that the substitution of the original decision of 9 March 2000 by another one concluding that the first applicant had not committed an offence and the above Constitutional Court's finding did not provide sufficient redress to the first applicant, in particular because he obtained no compensation in respect of the alleged violation, the Court notes that the first applicant had a possibility of having the position in respect of these outstanding aspects of his case remedied under domestic law.

In fact, under Article 11 et seq. of the Civil Code, the first applicant could have taken proceedings before a general court with a view to having any repercussions for his personal integrity, good name and reputation of the decision complained of established. At the same time, he could have claimed that the consequences of such interference be eliminated and that he be granted compensation for any non-pecuniary damage which he might have suffered in that context. Such proceedings could in principle be taken against the State and/or against the individual(s) responsible for issuing the decision. The Court further notes that in such proceedings the civil courts would not have been prevented from dealing with the case on the ground that they would have been called upon to review the conclusions of the investigating and prosecuting authorities, as the latter themselves acknowledged that their original decision indicating that the first applicant had committed an offence had been incorrect.

The Court considers that, in the specific circumstances of the case described above, a civil action under Article 11 et seq. of the Civil Code was, in principle, capable of remedying the first applicant's situation. It is therefore a remedy that he should have tried for the purposes of Article 35 § 1 of the Convention. However, the first applicant has not availed himself of this remedy.

It follows that this complaint must in any event be rejected under Article 35 §§ 1 et 4 of the Convention for non-exhaustion of domestic remedies.

For these reasons, the Court unanimously

Declares the application inadmissible.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President