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. 64054/00
by Viktor MACKO
against Slovakia

Application no. 64071/00
by Miroslav KOZUBAĽ
against Slovakia

The European Court of Human Rights (Fourth Section), sitting on 5 January 2006 as a Chamber composed of:

Sir Nicolas BRATZA, *President*,
Mr J. CASADEVALL,
Mr M. PELLONPÄÄ,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr J. BORREGO BORREGO,
Mr J. ŠIKUTA, *judges*,
and Mr M. O'BOYLE, *Section Registrar*,

Having regard to the above applications lodged on 1 June 2000,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicants,

Having deliberated, decides as follows:

## THE FACTS

Mr Viktor Macko, the applicant in application No. 64054/00 (the first applicant) is a Slovakian national who was born in 1965 and lives in Humenné. Mr Miroslav Kozubaľ, the applicant in application No. 64071/00 (the second applicant) is a Slovakian national who was born in 1963 and lives in Hanušovce. The applicants were represented before the Court by Mr I. Ilčišin, a lawyer practising in Vranov nad Topľou. The respondent Government were represented by Ms A. Poláčková, their Agent.

## A. The circumstances of the case

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

### *1. The case of the first applicant*

From 30 January 1996 to 2 September 1997 the first applicant was the sole representative of the limited liability company ILaS s.r.o. Vranov. Subsequently, from 3 September 1997 to 13 September 1998, Mr I. succeeded the first applicant in that function.

On 16 December 1998 a police investigator of the Regional Office of Investigation in Prešov accused Mr I. of unauthorised trading in foreign currency. Mr I. was accused of having authorised, as a co-owner of the company ILaS Vranov, the sale of bills of exchange in Austria without the approval of the central bank (investigation file number KÚV-80/20-98).

According to the applicant, the company submitted to the police investigator certificates issued by the central bank indicating that no formal approval had been required for the above transaction.

The police investigator convoked the first applicant to an interview as a witness in the case three times. On each occasion the applicant appeared before the investigator and indicated that he wished to avail himself of the right under Article 100(2) of the Code of Criminal Procedure to remain silent with a view to avoiding any criminal proceedings against him.

On 2 July 1999 the same investigator of the Regional Office of Investigation in Prešov accused Mr I. of fraud and money laundering (the decision had the same file number, namely KÚV-80/20-98). In it Mr I. was accused of having issued, as a member of the managing board of the private company Classinvest Slovakia, bills of exchange which had been uncovered and void. The transaction had allegedly been made in Vienna in 1997 and it had involved the same person as the above transaction of 1994.

The investigator summoned the first applicant, as a witness, to another interview for 18 November 1999. In a letter of 16 November 1999 the applicant apologised for his non-attendance as he was ill. The letter with a medical certificate arrived at the Regional Office of Investigation on 25 November 1999.

On 23 November 1999 the investigator issued a decision imposing a procedural fine of 20,000[1] Slovakian korunas (SKK) on the first applicant under Article 66(1) of the Code of Criminal Procedure on the ground that he had failed to appear for an interview on 18 November 1999. On 21 December 1999 the investigator quashed that decision noting that the applicant had been ill.

[1] The equivalent of approximately 500 euros.

On 23 November 1999 the police investigator issued another decision, under Article 66(1) of the Code of Criminal Procedure, in which he imposed a procedural fine of SKK 20,000 on the first applicant. The decision stated that the applicant had refused, on 5 October 1999, to make statements as a witness in the criminal case against Mr I. concerning fraud. The decision also stated that the applicant had relied on Article 100(2) of the Code of Criminal Procedure and that the investigator had concluded, after having considered the position in the case, that the applicant's statements as a witness could not result in the initiation of criminal proceedings against him.

On 10 December 1999 the first applicant filed a complaint against the decision. He argued that he had availed himself of his right to remain silent as he considered that a statement could give rise to criminal proceedings against himself. He had not been warned that a fine could be imposed on him, and the investigator had not informed him that the position in the case excluded the bringing of criminal proceedings against the first applicant following his statements as a witness. The first applicant also challenged the amount of the fine.

On 30 December 1999 the Prešov Regional Deputy Prosecutor dismissed the complaint. The decision stated that the first applicant had not given the reason for his refusal to make a statement. Under Article 100(2) of the Code of Criminal Procedure, a witness was obliged to inform an investigator why he or she refused to make a statement. Where the investigator did not accept the reasons invoked, the witness was obliged to answer the questions.

On 22 February 2000 the police investigator accused the applicant of conspiracy to defraud on the ground that he had been involved in the fraudulent elaboration of a contract with a view to obtaining a considerable sum of money from the State. The decision had file number KÚV-4/OVEK-2000.

On 1 August 2000 the investigator who had fined the applicant accused him, together with Mr I. and several other persons, of conspiracy to defraud. The case concerned the transfer of securities of the joint stock company Transpetrol a.s. A public prosecutor at the Regional Prosecutor's Office in Prešov quashed the investigator's decision on 7 August 2000.

In a different decision given on 1 August 2000 the investigator who had fined the applicant accused him, together with Mr I. and another person, of the preparation of money laundering (decision KÚV-83/20-98). It was imputed to the applicant that, as a company's representative he had participated in fraudulent elaboration of a contract in 1996, and that he had transferred securities of the company Transpetrol a.s. to his company. The applicant and several other persons were indicted in that context on 10 December 2001. On 3 August 2004 the Regional Court in Žilina sent the case back to the public prosecutor for further investigation.

On 2 August 2000 the police investigator joined in a single set of proceedings the above cases against Mr. I and, *inter alios*, the applicant registered under file numbers KÚV-80/20-98, KÚV-83/20-98 and KÚV-4/OVEK-2000). On 2 July 2001 the investigator discontinued the proceedings against Mr I. (file number KÚV-80/20-98) brought on 16 December 1998 as no offence had been committed.

The first applicant requested that an extra-ordinary remedy be filed against the above decisions imposing a fine for his refusal to make statements as a witness.

On 19 February 2001 a public prosecutor at the General Prosecutor's Office dismissed the request. In his letter the public prosecutor summed up the relevant facts as follows. On 5 October 1999 the applicant had to be heard as a witness in the context of criminal proceedings against Mr. I. Those proceedings concerned an unlawful sale of bills of exchange, in 1994, which resulted in the transfer of approximately SKK 19 million to the account of the company ILaS s.r.o. Vranov on 7 July 1994. The offences imputed to the accused comprised also several other actions including the misuse, in 1996, of bonds issued by a company of which Mr I. had been a director and the transfer of that company's assets to several persons among whom had been the applicant. The police investigator had joined the above proceedings, on 2 August 2000, as both the applicant and Mr I. had been accused in the case registered under file number KÚV-83/20-98. However, the actions imputed to Mr I. in proceedings KÚV-80/20-98, in the context of which the applicant had refused to make a witness statement, were wholly unrelated to the facts of the other cases.

The public prosecutor held that a witness could remain silent only to the extent that a specific part of his statement was susceptible of resulting in the introduction of criminal proceedings against the witness or his or her next of kin. As the first applicant had had no apparent reason for refusing to make a witness statement, and since he had given no specific reason for such a refusal, the decision on a procedural fine had been justified.

*2. The case of the second applicant*

Between 19 November 1993 and 29 January 1996 the second applicant was the representative of the company ILaS Vranov and he was entitled to act on the company's behalf in that capacity. At the latter date he was replaced by the first applicant as indicated above. Prior to that, on 14 August 1995, the second applicant had authorised the first applicant, then director of company ILaS Vranov s.r.o., to act on the company's behalf.

The second applicant, like the first applicant, was summoned to an interview by an investigator of the Regional Office of Investigation in Prešov in the context of criminal proceedings against Mr I. Prior to questioning the applicant the investigator informed him that he could refuse to make statements, pursuant to Article 100(2) of the Code of Criminal

Procedure, if such statements could bring about his or a close relative's prosecution for a criminal offence. The second applicant used that right and made no statement.

In a decision of 23 November 1999 the investigator imposed a procedural fine of SKK 20,000 on the second applicant under Article 66(1) of the Code of Criminal Procedure. The decision stated that the applicant had refused, without justification, to make a witness statement in a criminal case and that he had been warned that he could be fined therefor. According to the decision, the applicant had not indicated any reason for his refusal and the investigator concluded, after having considered the evidence in the case, that the making of a witness statement could not have brought about criminal proceedings against him.

On 2 February 1999 the second applicant filed a complaint. He argued, with reference to the record of the interview before the investigator, that he had remained silent as he had considered that a statement could give rise to criminal proceedings against himself. He claimed that the fine amounted to psychological pressure on him.

On 30 December 1999 the Prešov Regional Deputy Prosecutor dismissed the second applicant's complaint. The decision stated that the applicant had not given a reason for his refusal to make a statement. Under Article 100(2) of the Code of Criminal Procedure, a witness was obliged to inform an investigator why he or she refused to make a statement. Where the investigator did not accept the reasons invoked, the witness was obliged to answer the questions.

On 1 August 2000 the investigator who had fined the second applicant accused him, together with Mr I., the first applicant and several other persons, of fraud. The case related to the allegedly unlawful transfer of securities of the joint stock company Transpetrol a.s. As indicated above, a public prosecutor quashed the investigator's decision on 7 August 2000. The second applicant has not been accused of any other offences.

On 12 December 2000 the second applicant petitioned the General Prosecutor's Office for a complaint in the interest of the law to be filed on his behalf. He challenged the above procedural fine. The fact that the same investigator had accused him of an offence on 1 August 2000 proved that the fine had been imposed with a view to coercing the second applicant to make a statement on the relevant facts.

In a letter of 19 February 2001 a public prosecutor of the General Prosecutor's Office refused to file an extraordinary remedy on the second applicant's behalf for reasons similar to those set out above in respect of the petition filed by the first applicant.

On 25 July 2001 a different public prosecutor of the General Prosecutor's Office confirmed that conclusion. The letter stated, in particular, that the interview in question had concerned offences imputed to other persons and that the second applicant, therefore, had had no valid reason for refusing to

answer the questions. The offence of which the second applicant had been accused subsequently concerned facts different from those on which he had been invited to make a witness statement.

### B. Relevant domestic law

*Constitution*

Article 47(1) entitles everyone to refuse to make a statement where it would be susceptible of resulting in criminal proceedings against the person concerned or his or her next of kin.

*Code of Criminal Procedure*

Under Article 66(1), a person who, despite previous warnings, disturbs proceedings or behaves in an offensive manner in relation to a court, a public prosecutor, an investigator or a police authority or, without sufficient excuse, does not obey an order or does not comply with an instruction addressed to him or her under the Code of Criminal Procedure, can be punished with a procedural fine amounting up to SKK 50,000.

Pursuant to Article 66(4), the decision on such a procedural fine may be challenged by a complaint which has suspensive effect.

Article 100(2) provides that a witness can refuse to make a statement where such statement would entail the risk that criminal proceedings would be brought either against the witness or against a person close to him or her.

## COMPLAINTS

The applicants originally complained under Articles 6 § 1 and 13 of the Convention that they had no possibility of having the decisions on the above procedural fine reviewed by a tribunal.

## THE LAW

Having regard to the similarity of the two applications, the Court considers it appropriate to join them (Rule 42 § 1 of the Rules of Court).

1. The applicants complained under Article 6 § 1 of the Convention that they had had no possibility of having the decisions on the procedural fine reviewed by a tribunal. The Court decided to examine under this head also the question whether the applicants' rights to remain silent and to protect

themselves against self-incrimination had been violated. Article 6 § 1 in its relevant part provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law..."

**(a) The applicants' right of access to a court**

The Government contended that Article 6 of the Convention was not applicable to the proceedings leading to the imposition of a procedural fine on the applicants.

The applicants disagreed.

The Court notes that the decision by which the applicants were fined under Article 66(1) of the Code of Criminal Procedure did not concern the determination of their "civil rights and obligations" within the meaning of Article 6 § 1.

As to the question whether Article 6 § 1 is applicable under its criminal limb, the Court recalls that it has to be assessed in the light of three alternative criteria laid down in its case-law, namely the classification of the offence in domestic law, the nature of the offence and the nature and severity of the penalty (see *T. v. Austria* [GC], no. 27783/95, § 61, 14 November 2000 and *Ravnsborg v. Sweden*, judgment of 23 March 1994, Series A no. 283-B, p. 28, § 30, with further references).

The Court has earlier found that Article 6 § 1 was not applicable under its criminal limb where a court imposed a procedural fine of SKK 10,000, under Article 66(1) of the Code of Criminal Procedure, on a person who had not respected the judge's instructions and had disturbed the conduct of the hearing (see *Jurík v. Slovakia* (dec.), no. 50237/99, 18 March 2003).

In the case of *Jurík* the Court held, in particular, that the behaviour for which the applicant had been fined was not formally classified as a criminal offence in Slovakian law. The rules permitting authorities dealing with a criminal case to sanction disorderly conduct in proceedings before them were more akin to the exercise of disciplinary powers than to the imposition of a punishment for the commission of a criminal offence. The Court noted that under Article 66(1) of the Code of Criminal Procedure it was for the authority dealing with a criminal case in the context of which the misconduct had occurred to examine, of its own accord, whether the misconduct called for a fine under that provision. Finally, it noted that the maximum penalty which the applicant in the case of *Jurík* risked incurring under Article 66(1) of the Code of Criminal Procedure amounted to SKK 50,000, and that Slovakian law did not provide for the possibility of converting a fine under Article 66(1) of the Code of Criminal Procedure into a prison term.

The Court finds the above considerations to be entirely relevant also in respect of the present cases. The fact that the fines imposed on the

applicants were issued by a different authority and in a different context cannot affect the position. Furthermore, the Court finds no distinctive feature which would permit it to assess the present cases differently from the one referred to above.

Accordingly, the guarantees of Article 6 § 1 do not extend to the proceedings leading to the imposition of the fines in issue on the applicants.

It follows that this complaint is incompatible *ratione materiae* 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 applicants' right not to incriminate themselves**

The Government maintained that the applicants were to be interviewed as witnesses in the proceedings against Mr I. They underlined that the first applicant had been a close collaborator of the accused. The criminal proceedings subsequently brought against the applicants were wholly unrelated to the offence imputed to Mr I. in the proceedings brought on 2 July 1999. In addition, the criminal proceedings against the second applicant had been discontinued. The imposition of the fines in issue was not, therefore, contrary to the applicants' rights under Article 6 § 1 of the Convention to remain silent and not to incriminate themselves.

The applicants maintained that they had explicitly stated before the investigator that they had decided to remain silent with a view to avoiding the introduction of criminal proceedings against themselves. That fact was mentioned in the record of the interviews. The authorities' conclusion that they had not indicated why they had refused to make a statement was therefore arbitrary. Furthermore, the investigator who had imposed the fines had not informed the applicants of the position in the case and had offered no guarantees that they ran no risk of being prosecuted by answering the questions. According to the first applicant, the investigator had stated that he was one of the main suspects. The fact that several proceedings were brought subsequently in relation, in particular, to the first applicant's activity as a representative of the company ILaS s.r.o. showed that their fear of making statements in the above case against Mr I. had been justified.

The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination of the merits. The Court concludes therefore that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other ground for declaring it inadmissible has been established.

2. When communicating the application to the respondent Government, the Court decided to put a question as to whether the facts of the case amounted to a violation of Article 10 of the Convention the relevant part of which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The Government contended that any interference with the applicants' rights under Article 10 of the Convention in the context of the imposition of the above procedural fines had been in compliance with paragraph 2 of that Article. In particular, it had a legal basis, namely Article 66(1) of the Code of Criminal Procedure, it had pursued the legitimate aim of preventing disorder or crime, and it had been proportionate to the legitimate aim pursued.

The applicants made no submissions on this issue.

Considering that the essential issue arising in the present cases has been whether the fines imposed on the applicants were compatible with their rights under Article 6 § 1 to silence and not to incriminate themselves which the Court has examined above, and in the absence of any comments by the applicants as regards Article 10 of the Convention, the Court decides not to pursue the examination of the applications under Article 10 (see also *Quinn v. Ireland*, no. 36887/97, § 63, 21 December 2000).

3. The applicants complained that they had no effective remedy at their disposal as regards the alleged violation of their right of access to a court as guaranteed by Article 6 § 1 of the Convention. They relied on Article 13 of the Convention which provides as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The Government maintained that the complaint was manifestly ill-founded.

The applicants disagreed.

According to the Court's case-law, Article 13 applies only where an individual has an "arguable claim" to be the victim of a violation of a Convention right (see *Boyle and Rice v. the United Kingdom*, judgment of 27 April 1988, Series A no. 131, § 52).

The Court has above found that the applicants' complaint under Article 6 § 1 relating to the absence of a judicial review of the decisions on a procedural fine was inadmissible as falling outside its competence *ratione materiae.* For similar reasons, the applicants do not have an "arguable claim" in this respect and Article 13 is therefore inapplicable to their cases.

It follows that this complaint is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court unanimously

*Decides* to join the applications;

*Declares* admissible, without prejudging the merits, the complaint under Article 6 § 1 of the Convention concerning the applicants' right not to incriminate themselves;

*Decides* not to pursue the examination of the case under Article 10 of the Convention;

*Declares* inadmissible the remainder of the application.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President