

---

HRRS 2005 Nr. 418

EGMR Nr. 41604/98 – Urteil vom 28. April 2005 (Buck v. Germany)

**Recht auf Achtung des Privatlebens und der Wohnung (Einsatz von Durchsuchungen und Beschlagnahmen bei der Aufklärung von Ordnungswidrigkeiten; Verhältnismäßigkeit: Darlegungslast der Vertragsstaaten und Prüfungskriterien bei Durchsuchungen und Beschlagnahmen; Schweigerecht und Selbstbelastungsfreiheit); Rechtsschutz gegen Grundrechtseingriffe trotz prozessualer Überholung.**

**Art. 8 EMRK; Art. 6 EMRK; Art. 13 GG; Art. 19 IV GG; § 103 StPO; § 105 StPO**

Leitsätze des Bearbeiters

1. Ein Eingriff ist nur dann im Sinne des Art. 8 Abs. 2 EMRK notwendig, wenn er einem dringenden sozialen Bedürfnis dient und zu diesem Zweck verhältnismäßig ist. Bei der Beurteilung, ob ein Eingriff in einer demokratischen Gesellschaft notwendig ist, ist den Vertragsstaaten der EMRK ein Beurteilungsspielraum einzuräumen. Die von Art. 8 Abs. 2 EMRK zugelassenen Ausnahmen sind jedoch eng auszulegen und das Bedürfnis zu ihrer Anwendung muss für den vorliegenden Einzelfall überzeugend dargetan werden.

2. Durchsuchungen und Beschlagnahmen kommen bei bestimmten Straftaten als zulässige Maßnahmen zur Erlangung von Sachbeweisen in Betracht. Der Gerichtshof prüft hier, ob die zur Rechtfertigung angeführten Gründe relevant und stichhaltig sind und ob sie das Verhältnismäßigkeitserfordernis wahren. Hinsichtlich der Verhältnismäßigkeit muss erstens gesichert sein, dass die relevante Gesetzgebung und die diesbezügliche Praxis zum Schutz der Betroffenen adäquate und effektive Schutzinstrumente gegen Missbrauch vorhalten. Zweitens berücksichtigt der Gerichtshof die besonderen Umstände jedes einzelnen Falles, um für den konkret vorliegenden Einzelfall zu entscheiden, ob der vorliegende Eingriff im Hinblick auf das angestrebte Ziel verhältnismäßig war. Bei den hiervon durch den Gerichtshof einbezogenen Kriterien handelt es sich – unter anderem – um die Schwere der von Durchsuchung und Beschlagnahme betroffenen Straftat, der Art und Weise, wie die entsprechende Anordnung erfolgt ist, im Besonderen zu dieser Zeit weiteres vorhandenes Beweismaterial, der Inhalt und der Umfang der Anordnung, die Natur der durchsuchten Räumlichkeiten und die Schutzinstrumente, die eingesetzt worden sind, um das Ausmaß der Maßnahme angemessen zu halten, sowie das Ausmaß möglicher Auswirkungen auf das Ansehen der von der Durchsuchung betroffenen Person.

3. Zum Einzelfall einer Verletzung, die insbesondere auf Grund der verfolgten geringfügigen Ordnungswidrigkeit, die von einem anderen als dem von Durchsuchung und Beschlagnahme Betroffenen begangen worden sein soll, und auf Grund der Ausdehnung auf die Privatwohnung anzunehmen ist.

4. Der Begriff Wohnung im Sinne des Art. 8 EMRK umfasst nicht nur die private Wohnung im engeren Sinne. Die Wohnung im Sinne des Art. 8 EMRK ist so auszulegen, dass sie auch die Räumlichkeiten eines von einer Privatperson betriebenen Unternehmens und von juristischen Personen umfasst.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

10. The applicant was born in 1938 and lives in Dettingen.

#### A. The initial phase of prosecution for the speeding offence

11. In August 1996, the Dettingen municipal authorities imposed a fine of 120 German marks (DEM), plus fees amounting to DEM 36, on V.B., the applicant's son, for having exceeded the speed limit of 50 kph by 28 kph in the evening of 21 May 1996, when travelling in a car belonging to the private limited company 'drink o mat' (regulations 3 § 3 (1) and 49 § 1 (3) of the Road Traffic Regulations and section 24 of the Road Traffic Act – see 'Relevant domestic law' below). The applicant is the owner and manager of that company.

12. On 4 September 1996, V.B. lodged an objection against the administrative decision imposing the fine.

13. On 12 March 1997, the trial on this matter opened before the Bad Urach District Court. V.B. pleaded not guilty, stating that about fifteen other persons could have driven the company car in question on that very day. The applicant, summoned as a witness, refused to give evidence, as he was entitled to do as a family member. The hearing was adjourned until 19 March 1997.

#### **B. The proceedings regarding the warrant of 13 March 1997**

14. On 13 March 1997 at around 10 a.m. the applicant, being asked by a policeman to give evidence about his employees for the proceedings against his son, stated again that he did not wish to do so and that none of his employees were currently working on the business premises. On the same day, a police officer, on the order of the competent judge of the Bad Urach District Court, asked the city of Dettingen to submit a passport photograph of the applicant. A police inquiry at the Dettingen trade authorities (*Gewerbeamt*) about the applicant's employees at the relevant time had been to no avail.

15. On 13 March 1997 at an unknown time, the Bad Urach District Court, in the context of the above proceedings against V.B., issued a warrant to search the business and the residential premises of the applicant. The warrant read as follows:

“In the context of the preliminary investigations against

... [V. B.] ...

concerning

a contravention of a traffic regulation,

pursuant to section 33 § 4 of the Code of Criminal Procedure without a prior hearing, in accordance with sections 94, 95, 98, 99, 100, 102, 103, 105, 106 § 1, 111 *et seq.*, 162 of the Code of Criminal Procedure and section 46 of the Act on Contraventions of Regulations,

1. the search of the business and residential premises of the father Jürgen Buck, ..., 3, (...) -street, Dettingen/Erms, company Trinkomat;

2. the seizure of documents which reveal the identity of employees of the company Trinkomat in ... Dettingen between 20 May and 22 May 1996 are ordered.

Reasons:

The son of the manager of the company Trinkomat, who is charged with having committed, on 21 May 1996, a contravention of regulation 3 of the Road Traffic Regulations with a company car, has stated at the trial hearing on 12 March 1997 that a driver employed by the company could have committed the offence.

...”

16. The search of the residential and business premises in Dettingen, a town of some 10,000 inhabitants, was effected the same day at around 2 p.m. by four police officers of the local police station. Several documents, such as personnel files and statements on working hours, were seized; they were copied and the originals were given back to the applicant the next day. The documents disclosed the names of at least six persons, four women and two men, who had been employed by the applicant's company at the relevant time, and that, furthermore, another relative of the applicant could have been the driver of the company car at the time of the speeding offence. The applicant objected to the search and, assisted by counsel, appealed the search and seizure decision on 13 March 1997, the very day on which the warrant had been made out.

17. On 21 March 1997, the Tübingen Regional Court, in a decision addressed to V.B., dismissed the appeal of 13 March 1997. It considered that the appeal against the search warrant was inadmissible as it was pointless (*prozessual überholt*), the search having been effected in the meantime. The relevance of the few documents seized could be established without further procedure. The appeal against the seizure order was ill-founded, as the documents seized were relevant for the assessment of the evidence because they could show whether, as asserted by the appellant, one of the company's employees had committed the traffic offence in question. Moreover, the seizure had not been disproportionate because copies of the originals had been filed and the originals been handed back.

18. On 21 May 1997, the Tübingen Regional Court, upon a complaint raised by the applicant's representative, dealt with the applicant's appeal, declaring it inadmissible as far as the search warrant was concerned and unfounded as to the seizure order. In these respects, the court repeated its earlier reasoning. The Regional Court added that its earlier decision of 21 March 1997 was without object and, for the sake of clarification, it was quashed.

19. On 30 June 1997, the applicant lodged a constitutional complaint with the Federal Constitutional Court. He submitted in particular that the District Court, at the hearing of 12 March 1997, was not able to establish whether the person on the radar photo was V.B. He further stated that it resulted from the documents seized that none of

the six other persons who had been working for the applicant's company at the relevant time could have been the person shown on the radar photo.

20. On 13 September 1997, a panel of three judges of the Federal Constitutional Court refused to admit the complaint. The Constitutional Court disagreed with the Regional Court's finding that the appeal against the search warrant was inadmissible for the mere reason that the search had already been carried out. According to the Constitutional Court, this view disregarded the principle of an effective legal protection as guaranteed by Article 19 § 4 of the Basic Law. To support its view, the Constitutional Court referred to its decision of 30 April 1997, which had reversed its former case-law on the point. Nonetheless, the Constitutional Court considered it inappropriate to admit the constitutional complaint. Indeed, when examining the lawfulness of the seizure order, the Regional Court had also, incidentally, addressed the question of the lawfulness of the search order. In any event, the impugned search warrant was obviously lawful. This decision was served on 24 September 1997.

### **C. The further conduct of the criminal proceedings against the applicant's son**

21. On 19 March 1997, in the resumed trial proceedings, the Bad Urach District Court rendered its judgment against V.B. It found him guilty of having negligently exceeded a speed limit, imposed a fine of DEM 120 (approximately 61.36 euros) upon him in accordance with the uniform scale of fines (*Bußgeldkatalog*) for the various road traffic regulatory offences, and ordered him to bear the costs of the proceedings.

22. As regards V.B.'s personal background, the District Court noted that V.B. had his driving licence since 1991, that he was driving between 40,000 and 50,000 km per year and that there was no record of previous traffic offences.

23. The District Court, having regard to technical expertise, found that the radar check had been properly carried out and that the measurements were correct. Moreover, having compared the photographs taken on the occasion of the radar check, in particular the enlargement prepared by the expert, and V.B.'s passport photograph taken in 1994, which had been retained in the administrative files of the Dettingen municipal authorities, the court reached the conclusion that it had been V.B. who had driven the car. In this respect, the court compared the form of the face, the nose, the position of the eyes and the eyebrows. Furthermore, whereas V.B. meanwhile had grown a beard, the lower part of the face on the radar photos and of V.B.'s face on the passport photo, showing him without a beard, were clearly matching. There were no indications that any other person with the same characteristics drove the car at the relevant time.

24. On 19 August 1997 the Stuttgart Court of Appeal dismissed V.B.'s request for leave to appeal.

## **II. RELEVANT DOMESTIC LAW**

25. The search complained of was ordered in the context of proceedings concerning an offence against the Road Traffic Act (*Straßenverkehrsgesetz*). Regulation 3 of the Road Traffic Regulations (*Straßenverkehrsordnung*) concerns speed limits, and its subsection 3 no. 1 sets a speed limit of 50 kph in towns. Under regulation 49 § 1 no. 3 it is a regulatory or petty offence (*Ordnungswidrigkeit*) to contravene regulation 3; under section 24 of the Road Traffic Act, such an offence is punishable by a fine.

26. The subject of regulatory or petty offences is governed by the Act on Contraventions of Regulations (*Ordnungswidrigkeitengesetz*). Such offences are considered to be of minor importance and have, therefore, been removed from the category of criminal offences under German law. They are partly governed by special rules other than the rules applicable to criminal offences (see, in this respect, *Öztürk v. Germany*, judgment of 21 February 1984, Series A no. 73, pp. 10 *et seq.*, and 17-18, §§ 17 *et seq.* and 49). According to section 46 § 1 of the Act on Contraventions of Regulations, the provisions of the ordinary law governing criminal procedure – in particular the Code of Criminal Procedure – are applicable by analogy to the procedure in respect of contraventions of regulations, subject to the exceptions laid down in the said Act.

27. Section 103 of the Code of Criminal Procedure (*Strafprozessordnung*) provides that the home and other premises (*Wohnung und andere Räume*) of a person who is not suspected of a criminal offence may be searched only in order to apprehend a person charged with an offence, to investigate the traces of an offence or to seize specific objects, provided always that there are facts to suggest that such a person, trace or object are to be found on the premises to be searched. Pursuant to section 105 of the Code of Criminal Procedure, searches may only be ordered by a judge or, in case of urgency (*Gefahr im Verzug*), by the Public Prosecutor's Office and its officials. If a search is carried out in residential or business premises without the judge or public prosecutor being present, a municipal officer or two inhabitants of the municipality in which the search is made shall be called in to attend.

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

28. The applicant complained that the search of his business and residential premises and the seizure of documents, which had been ordered by the Bad Urach District Court, was in breach of his right to respect for his home. He argued in particular that, in the context of investigations into a contravention of a regulation committed by a third person, the search was disproportionate. He invoked Article 8 of the Convention, the relevant parts of which provide:

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

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.”

29. The Government contested this view.

#### A. Whether there was an interference

30. The applicant claimed that the search of his business and residential premises and the seizure of several documents had interfered with his right to respect for his home as guaranteed by Article 8 § 1. In this respect, the Government agreed with the applicant's submissions.

31. The Court would point out that, as it has now repeatedly held, the notion “home” in Article 8 § 1 encompasses not only a private individual's home. It recalls that the word “*domicile*” in the French version of Article 8 has a broader connotation than the word “home” and may extend, for example, to a professional person's office. Consequently, “home” is to be construed as including also the registered office of a company run by a private individual, as well as a juristic person's registered office, branches and other business premises (see, *inter alia*, *Chappell v. the United Kingdom*, judgment of 30 March 1989, Series A no. 152-A, pp. 12-13 and 21-22, §§ 26 and 51; *Niemietz v. Germany*, judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, §§ 29-31; *Société Colas Est and Others v. France*, no. 37971/97, §§ 40-41, ECHR 2002-III).

32. In the present case, the search and seizure ordered by the Bad Urach District Court concerned the applicant's residential premises and the business premises of the limited liability company owned and managed by him. The Court, having regard to its above findings, concludes that in respect of both premises, there has been an interference with the applicant's right to respect for his home.

33. Consequently, the Court finds it unnecessary to determine whether, as it has found in several comparable cases (see, *inter alia*, *Chappell*, cited above, pp. 21-22, § 51; *Niemietz*, cited above, pp. 33-34, §§ 29-31; *Funke v. France*, judgment of 25 February 1993, Series A no. 256-A, p. 22, § 48), there had also been an interference with the applicant's right to respect for his private life as guaranteed by Article 8 § 1.

#### B. Whether the interference was justified

34. 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.

##### 1. “In accordance with the law”

35. The applicant maintained that the search warrant was not in accordance with domestic law, as it was not sufficiently reasoned and was disproportionate, which had not been examined on the merits by the Tübingen Regional Court.

36. The Government submitted that the search and seizure had been ordered by a judge on the basis of section 103 § 1 of the Code of Criminal Procedure, read in conjunction with section 46 § 1 of the Act on Contraventions of Regulations.

37. The Court recalls that an interference cannot be regarded as “in accordance with the law” unless it has, in particular, some basis in domestic law. In a sphere covered by written law, the “law” is the enactment in force as the competent courts have interpreted it (see, *inter alia*, *Société Colas Est and Others*, cited above, § 43). In this

respect, the Court reiterates that its power to review compliance with domestic law is limited, it being in the first place for the national authorities, notably the courts, to interpret and apply that law (see, *inter alia*, *Chappell*, cited above, p. 23, § 54).

38. In the instant case, the Court notes that the competent district court judge was entitled under section 103 § 1 of the Code of Criminal Procedure, taken together with section 46 § 1 of the Act on Contraventions of Regulations, section 24 of the Road Traffic Act and Regulations 3 and 49 of the Road Traffic Regulations, to order the search and seizure of the premises of a person other than the one accused of a regulatory traffic offence. It observes that both the Tübingen Regional Court – in so far as it can be considered to have examined the search order on the merits – and the Federal Constitutional Court considered the search and seizure orders to be lawful in terms of the said domestic law. In these circumstances, the Court sees no reason to arrive at a different conclusion. Consequently, the interference was “in accordance with the law”.

## 2. *Legitimate aim*

39. The applicant maintained that the search and seizure order did not pursue a legitimate aim, because it had been taken in a rush, that is, only one day after the first hearing in the proceedings against the applicant's son, and the documents seized had been irrelevant for the assessment of evidence in the judgment against the applicant's son. He suggested that the true reason for the district court judge to issue the search and seizure order had been his dissatisfaction with the applicant's refusal to give evidence against his son as a witness in the first hearing.

40. According to the Government, the search served the legitimate aims of the “protection of public order”, the “prevention of disorder or crime” and, as far as the provisions on speeding were concerned, of the “protection of the rights and freedoms of others”, i.e. the other road users.

41. The Court notes that the Bad Urach District Court, in its – albeit succinct – reasoning of the search and seizure order, pointed out that these measures were aimed at disclosing the identity of the person liable for the speeding offence in question. Any purported further motives for the order remain a matter of speculation upon which the Court does not wish to embark. It finds that the order issued with a view to finding and seizing documents which reveal the identity of the company's employees at the relevant time pursued aims which were consistent with the Convention, namely the prevention of disorder or crime and the protection of the rights of others, i.e. notably the rights of other road users to protection of their life and limb.

## 3. *“Necessary in a democratic society”*

42. The applicant argued that the search of his residential and business premises, which had to be regarded as an *ultima ratio* measure, had not been necessary to obtain the names of potential drivers. In particular, it was disproportionate to order the search of his apartment, which was clearly separated from the business premises. He should first have been asked to name the employees to be taken into consideration and to present the relevant material voluntarily. In his view, the search was disproportionate in view of the loss of his good reputation and the losses in sales. According to him, this was particularly true considering the petty nature of the contravention in question, purportedly committed by a first offender, and the fact that the District Court, in its decision, made no use of the results of the search and seizure. From the evidence obtained thereby, it emerged that a large number of employees could have driven the company car at the relevant time; however, none of them had been questioned or compared with the photograph taken on the occasion of the radar check. The applicant further contended that the Regional Court had failed to examine the lawfulness of the search and in particular to consider his position as a person other than the suspect. In this respect, he disagreed with the argument advanced by the Federal Constitutional Court that the Regional Court, while dismissing the complaint about the search warrant for procedural reasons, had in substance reviewed its lawfulness.

43. The Government submitted that the search and seizure was the only possibility for the District Court to establish who had driven the car at the relevant time. Only by means of comparing the photographs and on the basis of the documents seized was the District Court in a position to exclude that a person other than the applicant's son had driven the car.

The applicant's employees could be excluded as potential drivers at the relevant time due to their sex or age. It would not appear appropriate to discontinue the proceedings in such circumstances, considering general prevention purposes and the risks inherent in speeding for life and limb for other road users. Finally, the seizure order, which explicitly aimed at documents concerning the company's staff at the relevant time, limited the search order to the least serious interference with the applicant's rights. It would have contravened an efficient investigation if the search order had been restricted to the applicant's business premises, which were located at the same address as his residential premises. The applicant could not be regarded as an uninvolved third person, as he was the father of the person charged and had to be regarded *de facto* as the owner of the company car.

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 (see, among many others, *Camenzind v. Switzerland*, judgment of 16 December 1997, *Reports of Judgments and Decisions* 1997-VIII, p. 2893, § 44). In determining whether an interference is "necessary in a democratic society" the Court will take into account that a certain margin of appreciation is left to the Contracting States. However, the exceptions provided for in paragraph 2 of Article 8 are to be interpreted narrowly, and the need for them in a given case must be convincingly established (see, *inter alia*, *Funke*, cited above, p. 24, § 55).

45. As regards, in particular, searches of premises and seizures, the Court has consistently held that the Contracting States may consider it necessary to resort to such measures in order to obtain physical evidence of certain offences. The Court will assess whether the reasons adduced to justify such measures were relevant and sufficient and whether the aforementioned proportionality principle has been adhered to (see the *Funke v. France*, *Crémieux v. France* and *Miaillhe 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). As regards the latter point, the Court must firstly ensure that the relevant legislation and practice afford individuals adequate and effective safeguards against abuse. Secondly, the Court must consider the particular circumstances of each case in order to determine whether, in the concrete case, the interference in question was proportionate to the aim pursued (see, in particular, *Camenzind*, cited above, pp. 2893–2894, § 45). The criteria the Court has taken into consideration in determining this latter issue have been, *inter alia*, the severity of the offence in connection with which the search and seizure was effected, the manner and circumstances in which the order had been issued, in particular further evidence available at that time, the content and scope of the order, having notably regard to the nature of the premises searched and the safeguards taken in order to confine the impact of the measure to reasonable bounds, and the extent of possible repercussions on the reputation of the person affected by the search (see, *mutatis mutandis*, *Chappell*, cited above, p. 25, § 60; *Niemietz*, cited above, p. 36, § 37; *Funke*, cited above, p. 25, § 57; *Camenzind*, cited above, pp. 2894–2895, § 46).

46. With regard to the safeguards against abuse provided by German legislation and practice in the case of searches and seizures like the one in the present case, the Court notes that such measures may, except in exigent circumstances, only be ordered by a judge under the limited conditions set out in the Code on Criminal Procedure. Furthermore, pursuant to the Constitutional Court's change of jurisprudence in April 1997, the person concerned may challenge the legality of a search order also in cases in which the order has already been executed. However, the Court observes that in the instant case, the Regional Court initially ignored that the applicant, and not his son V.B., had lodged the complaint against the search and seizure order and rendered a decision concerning V.B. It subsequently served a decision on the applicant with an identical reasoning, notwithstanding that the applicant himself had not been charged with a contravention of a regulation, and rejected his complaint against the search warrant as inadmissible and pointless (*prozessual überholt*), the search having been effected in the meantime. According to the Federal Constitutional Court, it had not been decisive that the Regional Court had rejected the applicant's complaint as inadmissible contrary to its new jurisprudence as of April 1997, as the reasoning concerning the seizure order was to cover also the search order, which it regarded as obviously lawful. In these circumstances, the Court finds that there have been some procedural shortcomings in the present case. Nonetheless, the safeguards provided by German legislation and jurisprudence against abuse in the sphere of searches and seizures in general can be considered as adequate and effective.

47. As to the proportionality of the search and seizure order to the legitimate aim pursued in the particular circumstances of the case, the Court, having regard to the relevant criteria established in its case-law, observes in the first place that the offence with respect to which the search and seizure had been ordered concerned a mere contravention of a road traffic rule. The contravention of such a regulation constitutes a petty offence which is of minor importance and has, therefore, been removed from the category of criminal offences under German law (see paragraph 26 above). In addition to that, in the instant case, merely the conviction of a person who had no previous record of contraventions of road traffic rules was at stake.

48. Furthermore, the Court notes that, even though the contravention in question had been committed with a car belonging to the company owned by the applicant, the proceedings in the course of which the search and seizure had been executed had not been directed against the applicant himself, but against his son, that is, a third party.

49. With respect to the manner and circumstances in which the order had been issued, the Court observes that the search and seizure was ordered to investigate the affirmation of the applicant's son that other persons, employees of the applicant's company, could have driven the car, i.e. to verify the defence of the applicant's son. The competent judge had ordered the police to question the applicant about his company's employees at the relevant time before the search and seizure warrant was executed on the same day. Contrary to his submissions, the applicant had, therefore, been awarded an opportunity to present the relevant information voluntarily and thus to avoid the search. However, the Court equally notes that the competent judge of the Bad Urach District Court, before issuing the order, had also asked the city of Dettingen to submit a passport photograph of the applicant. It appears that the District Court, in its judgment given only six days after the search and seizure had been ordered and executed, merely relied on this photographic evidence, whereas there is no clear indication that the material seized had been taken into account when

---

assessing the evidence. Consequently, the search and seizure of documents on the applicant's business and residential premises had, in any event, not been the only way to establish who was liable for the speeding offence.

50. Considering the content and scope of the search and seizure order, the Court finds that the decision was drafted in broad terms. Whereas it is satisfied that the scope of the search order could be determined by having regard to the seizure order, which specified the material to look for on the premises, it notes that the latter order did not give any reasons why documents concerning business matters should be found on the applicant's private premises. Thereby the impact of the order was not limited to what was indispensable in the circumstances of the case.

51. Finally, having regard to possible repercussions on the reputation of the person affected, the Court observes that the attendant publicity of the search of the applicant's business and residential premises in a town of some 10,000 inhabitants was susceptible of adversely affecting his personal reputation as well as the one of the company owned and managed by him. In this respect, it is to be recalled that the applicant himself was not suspected of any contravention or crime.

52. The Court would like to stress that, as it has stated above, the States, when taking measures to prevent disorder or crime and to protect the rights of others, may well consider it necessary, for the purposes of special and general prevention, to resort to measures such as searches and seizures in order to obtain evidence for certain offences in the sphere of which it is otherwise impossible to detect the person guilty of the offence. However, having regard to the severity of the interference with the right to respect for his home of a person affected by such measures, it must be clearly established that the proportionality principle has been adhered to. Having regard to the special circumstances of this case, in particular the facts that the search and seizure in question had been ordered in connection with a minor contravention of a regulation purportedly committed by a third person and comprised the private residential premises of the applicant, the Court concludes that the interference cannot be regarded as proportionate to the legitimate aims pursued.

53. Consequently, there has been a violation of Article 8 of the Convention.

## II. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

54. The applicant further complained that the District Court's warrant ordering the search and seizure had not been properly reasoned. He invoked Article 6 § 1 of the Convention, which provides:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

55. The applicant submitted that the District Court had failed to explain why a search of the residential and business premises of a third party was necessary. In particular, no justification was given for the search of residential premises in order to seize company records. Moreover, the search ordered under item 1 of the warrant lacked an indication as to the type and contents of legal evidence; in his view, the reasons stated in the decision only applied to the seizure ordered under item 2 of the decision.

56. The Government submitted that the complaint was unsubstantiated, as the District Court had reasoned that no other means of evidence were available, the applicant and his son having availed themselves of their respective rights to refuse to give evidence. It had not been necessary to set out why a search also of the applicant's residential premises had been ordered, as they were located at the same address as the business premises. Furthermore, it was sufficient to specify solely the premises to be searched in the search order, as the pieces of evidence to be looked for emerged from the seizure order issued in connection with the search order.

57. Having already taken into consideration, in the context of Article 8, the content and scope of the search and seizure order, including the reasons given for the order (see paragraph 50 above), the Court finds that no separate issue arises under Article 6 § 1 of the Convention.

## III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

...

## FOR THESE REASONS, THE COURT

1. *Holds* by four votes to three that there has been a violation of Article 8 of the Convention;
2. *Holds* unanimously that no separate issue arises under Article 6 of the Convention;

3. *Holds* unanimously that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

4. *Holds* unanimously

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros) in respect of costs and expenses, plus any tax that may be chargeable;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 28 April 2005, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following partly dissenting opinion of Mr Hedigan, Mr Bîrsan and Ms Jaeger is annexed to this judgment.

## JOINT PARTLY DISSENTING OPINION OF JUDGES HEDIGAN, BÎRSAN AND JAEGER

We regret that we cannot agree with the majority in their finding of a violation of Article 8.

We note that the burden of proof in respect of the offences charged herein remained at all times on the prosecution. We accept that V.B., the son of the applicant, had the benefit of a right against self-incrimination. We note that he indicated that any one of about fifteen other persons employed by the company could have driven the car that day. The applicant, father of V.B., who was the employer of these fifteen others, refused to give evidence as he was entitled to do being a family member. He further refused on the day of the search to give information about his employees.

As a consequence, two ways were then left to the authorities to prove the identity of the driver. The first of these was to ascertain the identity of those fifteen. This was pursued by way of the search, seizure and copying of personnel records. The second way to prove the offence was to have an expert compare the photos taken on the occasion of the radar check with the passport photograph taken of V.B. in 1994. In his constitutional complaint to the Federal Constitutional Court, the applicant stated that at the first hearing the District Court could not establish the identity of V.B. as driver of the car from the radar photograph. He further stated that in the search of his personnel records all the other employees were excluded by either age or gender. The expert photo comparison was eventually done and in fact satisfied the District Court that V.B. was the driver at the relevant time. It is clear however that the photographic evidence might not have been conclusive particularly as V.B. had changed his appearance somewhat between the two photos and expert evidence was required.

It seems to us that notwithstanding the petty nature of the offence, it was reasonable and proportionate for the authorities to embark simultaneously upon both these ways of proving the case against V.B. We cannot overlook that the District Court could not know at the first hearing on 12 March 1997 whether expert evidence on the photo might be sufficient to satisfy the burden of proving the identity of the accused. In any event the personnel records did play a part in the proof of identity by excluding all other possible drivers.

We also note that the search of the applicant's private rooms as well as the office was reasonable and proportionate bearing in mind the nature and size of the applicant's business. This may well have been very difficult for both the authorities and the applicant but was, we believe, the inevitable consequence of the manner in which the applicant's son and the applicant chose to defend the case. On the day of the search, the applicant had the opportunity to avoid the embarrassment of the search of his premises but chose not to take it. In our view he should not complain of the action he forced upon the authorities.

We are therefore of the view that there was no violation of Article 8.

We are in full agreement with the majority in refusing to award any damages to the applicant.