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**EGMR Nr. 24528/02 (4. Kammer) - Urteil vom 2. Juni 2009 (Borovsky v. Slowakei)**

**Verletzung der Unschuldsvermutung durch (materielle) Feststellungen einer Schuld vor Ablauf eines rechtsstaatlichen Verfahrens im Ermittlungsverfahren durch Gerichte und Amtsträger.**

**Art. 6 Abs. 1, Abs. 2 EMRK**

**Leitsätze des Bearbeiters**

**1. Art. 6 Abs. 2 EMRK verbietet es, ein faires Strafverfahren durch präjudizierende vorherige Stellungnahmen zu unterminieren, die in einer engen Verbindung mit diesem Verfahren gemacht werden. Er untersagt zum einen, dass das Gericht selbst voreilig ausdrückt, der Angeklagte sei schuldig, bevor ihm dies gesetzmäßig nachgewiesen ist. Zum anderen untersagt Art. 6 Abs. 2 EMRK auch Stellungnahmen, die von anderen Amtsträgern des Staates über laufende Strafverfahren gemacht werden, welche die Öffentlichkeit dazu animieren zu glauben, dass der Beschuldigte schuldig sei, und damit die Tatsachenwürdigung des zuständigen Gerichts vorwegnehmen.**

**2. Die Unschuldsvermutung wird verletzt, wenn eine gerichtliche Entscheidung oder die Stellungnahme eines Amtsträgers über den Angeklagten die Einschätzung äußert, dass er schuldig ist, noch bevor ihm dies in einem gesetzlichen Verfahren bewiesen worden ist. Eine Verletzung ist nicht nur bei einem ausdrücklichen Schuldvorwurf anzunehmen. Es genügen auch Ausführungen, die darauf schließen lassen, dass das Gericht oder der Amtsträger den Angeklagten als schuldig ansieht. Dabei ist zwischen Äußerungen zu unterscheiden, die nur einen Verdacht der Tatbegehung durch den Angeklagten ausdrücken, und deutlichen Äußerungen, der Angeklagte habe die Tat begangen.**

**3. Zur Anwendung auf den haltlosen Vorwurf des Betruges.**

**THE FACTS**

**I. THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1946 and lives in Košice. 1
- A. Criminal proceedings against the applicant and their coverage*
6. On 28 August 2000 and 17 April 2001 respectively police authorities in Martin and Zvolen brought two separate sets of criminal proceedings against the applicant. The applicant was accused of abuse of authority (Article 158 of the Criminal Code) on the ground that, while acting as an enforcement officer (exekútor), he had allowed the transfer of securities of two major companies to a third party, thus causing prejudice to the creditor. As the companies in issue had been involved in arms production and their transformation brought about a high rate of unemployment in the region, the events attracted the attention of the media. 2
7. The applicant received the first decision accusing him of an offence on 7 September 2000. Prior to that, two daily newspapers with nationwide distribution published information about the case. 3
8. The daily newspaper Pravda published an article on 30 August 2000 in which it stated that several persons including the applicant had been accused of an offence. The article stated that the information had been obtained from a "competent police source", indicating that there were justified reasons to believe that the accused persons had attempted to arrange for a transfer of the property of the company in issue at as low a price as possible to the detriment of other creditors. 4
9. A similar article was published in Hospodárske noviny on 4 September 2000. It indicated that the relevant information had been obtained from the police. 5

10. Subsequently, several other articles were published in the press reporting on, among other things, the criminal proceedings. They were mostly based on the facts contained in the decisions accusing the applicant of abuse of authority. 6

11. In September 2000 the magazine *Dane a právo*, specialising in tax issues, published an article, "Criminal activities related to enforcement proceedings", in the column entitled "From the reports of the Finance Police". With reference to the decision to start the criminal proceedings it described the circumstances under which enforcement proceedings had been brought against the company concerned. It indicated that the applicant, as an enforcement officer, had not proceeded in accordance with the law. The article contained the following paragraph: 7

"The facts mentioned above confirm that [the representatives of the companies concerned] acted in agreement with the enforcement officer JUDr. Ján B. [the applicant] with the intention of transferring movable and, most importantly, immovable property to company [...] at as low a price as possible and, thereby, deliberately causing prejudice to other creditors ..."

12. Another article was published by the weekly magazine *Profit* on 18 September 2000. Its author referred in detail to the investigation file kept by the police. It also contained the following quotations from the deputy director of the Office of the Finance Police: 8

"... [the applicant], without justification, made a list of securities indicating that they formed part of the movable property of [the company concerned] notwithstanding that [that company] ... did not own those securities at that time ... While the action of the accused corresponds to the constitutive elements of the offence of causing prejudice to a creditor, if considered in its entirety, it is a premeditated fraudulent action aimed at transferring the property [of the company concerned] to its daughter companies and, subsequently, [to a different company]."

The article further indicated that, according to the police, the accused had thereby caused damage to the company concerned and to a bank amounting to 900 million Slovakian korunas (SKK) and SKK 222 million respectively. Grounds existed for the police to believe that the actual damage was even higher.

13. Subsequently, on 3 November 2000, the same magazine published a text drafted by the applicant in which he commented on the article of 18 September 2000. The editor's comment on the text indicated that the author had based the article in issue on information obtained during conversations with the investigators and from the relevant police files. 9

14. On 6 October 2000 the magazine *Moment* published an article entitled "Fraud for a Billion". It covered the situation of the company in issue and also addressed the criminal proceedings. Reference was made to the police files and statements by the deputy director of the Office of the Finance Police. It contained the following paragraph: 10

"A police investigator brought criminal proceedings also against enforcement officer JUDr. Ján B. from Košice [the applicant] who had actively assisted the management [of the company concerned] in the transaction mentioned above. In June last year the District Court in Martin found that the enforcement proceedings [the applicant] had carried out had been inadmissible and decided to discontinue them. This, however, has no bearing on the fact that the three persons mentioned above had, according to the investigator, committed an offence."

15. Several other articles were published on the case in the course of 2000 and 2001. They were based on information submitted by the police. 11

16. On 30 August 2001 the District Prosecutor indicted the applicant of abuse of authority under Article 158 of the Criminal Code before the District Court in Martin. On 5 September 2002 the Supreme Court transferred the case to the Bratislava III District Court. 12

17. On 7 February 2003 the Bratislava III District Court acquitted the applicant of the above charge. It found that the applicant had neither acted contrary to the law nor intended to cause prejudice to anybody. The company concerned was referred to a civil court with its claim for damages. 13

18. The Minister of Justice challenged that decision by means of a complaint in the interest of the law. On 26 November 2003 the Supreme Court rejected the Minister's complaint. 14

#### *B. Civil action against the editor of Profit magazine*

19. The applicant sued the editor of *Profit*, arguing that the statements in the article of 18 September 2000 were false and defamatory. He relied on Articles 11 et seq. of the Civil Code. 15

20. On 31 October 2001 the Rožnava District Court granted the action but the court of appeal considered the judgment 16

unclear and quashed it.

21. On 27 September 2002 the District Court in Rožnava delivered its second judgment ordering the editor of Profit to publish an apology for the false statements contained in the article of 18 September 2000, including the allegation that the applicant's action had been deliberately fraudulent. The Court found that statements in the article contained criticism of the applicant and described his action with irony, both of which were excessive in the circumstances of the case. The judgment became final on 5 November 2002. 17

### *C. Constitutional proceedings*

22. In May 2001 the applicant filed a petition with the Constitutional Court alleging a violation, by the police authorities involved in his case, of his right to be presumed innocent. He relied, in particular, on the police officers' statements concluding that he had committed criminal offences and the fact that the content of the files was disclosed to the media. In his petition the applicant informed the Constitutional Court that in respect of inappropriate conduct of journalists he was seeking redress by means of an action pursuant to Articles 11 et seq. of the Civil Code and that the proceedings were pending before the Rožnava District Court. 18

23. The Constitutional Court declared the petition admissible and held a public hearing in the case. 19

24. On 24 January 2002 it delivered a judgment concluding that there had been no violation of Article 6 § 2 of the Convention or Article 50 § 2 of the Constitution. 20

25. The judgment comprised nineteen pages. In it the Constitutional Court analysed in detail all the statements complained of by the applicant in the overall context of the articles concerned and in the light of the Court's practice under Article 6 § 2. It concluded that in their statements to the media the police officers, in substance, had expressed the view that there were justified reasons to suspect the applicant of having committed the offences in issue. The officers had referred to the information contained in the decisions to bring criminal proceedings against the applicant. Read in the context of the articles concerned as a whole, those statements merely implied that at that time, there had been justified reasons to suspect the applicant and the other persons involved of having committed offences and that criminal proceedings had been brought against them on that ground. 21

## **II. RELEVANT DOMESTIC LAW AND PRACTICE**

### *A. The Constitution and the Constitutional Court Act 1993*

26. Pursuant to Article 50 § 2 of the Constitution, everyone who is being prosecuted is to be presumed innocent until proved guilty by a final judgment of a court. 22

27. Section 53 (1) of the Constitutional Court Act 1993 provides that a natural or legal person's complaint to the Constitutional Court is inadmissible where the plaintiff failed to use the ordinary remedies available under the law in force. 23

### *B. Criminal Code*

28. Article 158 deals with the offence of abuse of public authority by persons entrusted with its exercise. 24

29. Article 250 governs the offence of fraud. Pursuant to paragraph 1, a person who enriches himself or another person to the detriment of a third party's property, either by misleading the person concerned or by using his or her error, and who causes thereby non-negligible damage to the third party's property, is to be punished with a prison sentence of up to two years, or with prohibition on exercising a certain activity or with confiscation of an object. 25

30. Depending on the scope of the damage caused and the circumstances under which the offence has been committed a perpetrator can be punished with a prison term of up to twelve years (paragraphs 2-4 of Article 250). 26

### *C. Code of Criminal Procedure*

31. Pursuant to Article 8a § 1, prosecuting authorities inform the public of their activities by making information available to the media. In doing so they must, among other things, ensure respect for the right of the accused to be presumed innocent. 27

### *D. Civil Code*

32. The right to protection of a person's dignity, honour, reputation and good name is guaranteed by Articles 11 et seq. 28

of the Civil Code.

33. According to Article 11, any natural person has the right to protection of his or her personality, in particular of his or her life and health, civil and human dignity, privacy, name and personal characteristics. 29

34. According to Article 13 § 1, any natural person has the right to request that unjustified infringement of his or her personality rights should be stopped and the consequences of such infringement eliminated, and to obtain appropriate satisfaction. 30

35. Article 13 § 2 provides that, in cases where 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. 31

## THE LAW

### **I. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION**

#### *A. Admissibility*

36. The applicant complained that his right to be presumed innocent had been violated (i) by the contested statements and (ii) as a result of the fact that the police authorities had informed the media of the contents of the file. He relied on Article 6 § 2 of the Convention, which reads: 32

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

37. The Government objected, arguing that the applicant had not exhausted domestic remedies. In particular, he had not sought redress by means of an action under Articles 11 et seq. of the Civil Code for protection of his personal rights. He could also have requested a civil court to issue an injunction ordering the authorities to abstain from inappropriately informing the media about the case. 33

38. The applicant argued that his complaint was based on the fact that the investigators had considered him guilty. That was proven by their statements in the media. In respect of the attitude taken by the officials involved in the criminal proceedings, he could not have obtained redress by means of an action under Articles 11 et seq. of the Civil Code. 34

39. The Court notes that section 53 (1) of the Constitutional Court Act 1993 requires that a natural or legal person use the other remedies available prior to lodging a complaint with the Constitutional Court. In its judgment of 24 January 2002 the Constitutional Court, as the highest instance charged with ensuring respect for the Constitution and Slovakia's obligations resulting from international treaties, addressed the merits of the applicant's complaint corresponding to the complaint which he later made to the Court. In these circumstances the Government's objection cannot be upheld. 35

40. It is true that, as regards the article published in Profit on 18 September 2000, the applicant successfully sued the editor under Articles 11 et seq. of the Civil Code seeking protection of his personal rights. The purpose of those proceedings, however, was different from the subject matter of the present application, namely whether or not the police officers had violated the applicant's right to be presumed innocent. This is confirmed by the fact that the Constitutional Court continued its examination of the applicant's complaint under Article 6 § 2 of the Convention notwithstanding that the applicant had informed it of the proceedings concerning his civil action against the editor. 36

41. 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. It must therefore be declared admissible. 37

#### *B. Merits*

42. The applicant maintained that the statements in issue proved that the police investigators and prosecutors, at the initial stage of the criminal proceedings, had considered him guilty. 38

43. The Government contended that the authorities concerned had respected the applicant's right to be presumed innocent. The statements the applicant referred to, read as a whole and in the correct context, reflected the existing situation, namely that on the basis of evidence obtained in the course of the investigation the authorities had suspected that the action in issue met the constitutive elements of a specific offence. Those statements could not be interpreted 39

as declaring the applicant guilty. The conclusion reached by the Constitutional Court confirmed that position.

44. The Government further argued that the police authorities had informed the media of the proceedings in accordance with Article 8a § 1 of the Code of Criminal Procedure as the developments in the companies in issue had attracted public attention. In doing so they had not disclosed the applicant's full name, other information concerning his person or facts which had not been directly related to the proceedings. 40

45. The Court reiterates that Article 6 § 2, in its relevant aspect, is aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings. It prohibits the premature expression by the tribunal itself of the opinion that the person "charged with a criminal offence" is guilty before he has been so proved according to law, but also covers statements made by other public officials about pending criminal investigations which encourage the public to believe the suspect guilty and prejudge the assessment of the facts by the competent judicial authority (for a recapitulation of the relevant case-law see, for example, *Khuzhin and Others v. Russia*, no. 13470/02, § 93, 23 October 2008, with further references). 41

46. The right to presumption of innocence will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he or she is guilty before that person has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the official regards the accused as guilty. A fundamental distinction must be made between a statement that someone is merely suspected of having committed a crime and a clear declaration, in the absence of a final conviction, that an individual has committed the crime in question. The Court has consistently emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of a particular criminal offence (see *Böhmer v. Germany*, no. 37568/97, §§ 54 and 56, 3 October 2002, and *Nešták v. Slovakia*, no. 65559/01, §§ 88 and 89, 27 February 2007). 42

47. In the present case, the Court, but for one exception indicated below, shares the conclusion reached by the Constitutional Court that the relevant statements by the police officers, read in the context of the articles concerned as a whole, reflected the view that there existed justified reasons to suspect the applicant of having committed the offence in issue. 43

48. The situation is different as regards the statement by the deputy director of the Office of the Finance Police quoted at the end of the article published in *Profit* on 18 September 2000 (see paragraph 12 above). In particular, the police officer stated that the action of the accused, if considered in its entirety, was a "premeditated fraudulent action" aimed at transferring the property of the company concerned to different companies. 44

49. In the Court's view, that statement was not limited to describing the status of the pending proceedings or a "state of suspicion" against the applicant, but gave an assessment of the position as if it were an established fact, qualifying the accused persons' action as "fraudulent" and as having been "premeditated", without any reservation. 45

50. That statement, together with the ensuing indication of the amount of damage allegedly caused by the accused persons, implied that the accused had committed fraud, that is, an offence under Article 250 of the Criminal Code that the applicant was not formally accused of at that time or later (see also *Nerattini v. Greece*, no. 43529/07, § 25, 18 December 2008). 46

51. It is also relevant in this respect that in its judgment of 27 September 2002 the Rožnava District Court ordered the editor of *Profit* to apologise to the applicant for publication of, inter alia, the statement in issue, as there was no basis for it in the facts of the case. 47

52. The Court therefore considers that the above statement by the deputy director of the Office of the Financial Police ran contrary to the applicant's right to be presumed innocent. 48

53. This finding makes it unnecessary to examine separately the applicant's complaint that the disclosure of the contents of the case file to journalists was also prejudicial to his right to the presumption of innocence (see *Khuzhin and Others*, cited above, § 96). 49

54. There has accordingly been a violation of Article 6 § 2 of the Convention. 50

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. Article 41 of the Convention provides:	51
"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."	
<i>A. Damage</i>	
56. The applicant claimed 6,639 euros (EUR) in respect of non-pecuniary damage.	52
57. The Government contested the claim.	53
58. The Court considers that the applicant must have suffered certain non-pecuniary damage which cannot be sufficiently compensated by the finding of a violation alone. Ruling on an equitable basis, it awards him EUR 1,500 under that head.	54
<i>B. Costs and expenses</i>	
59. The applicant claimed EUR 300 in respect of his legal representation in the proceedings before the Court.	55
60. The Government contested that sum.	56
61. The Court considers it appropriate to award the applicant, who was represented by a lawyer, the sum claimed, namely EUR 300.	57
<i>C. Default interest</i>	
62. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.	58

**FOR THESE REASONS, THE COURT UNANIMOUSLY**

1. Declares the application admissible;
2. Holds that there has been a violation of Article 6 § 2 of the Convention;
3. Holds
  - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,500 (one thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, and EUR 300 (three hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. Dismisses the remainder of the applicant's claim for just satisfaction.