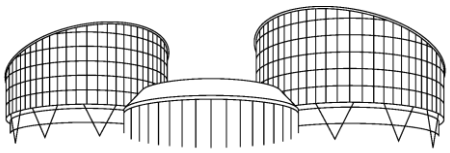

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF KILYEN v. ROMANIA

(Application no. 44817/04)

JUDGMENT

STRASBOURG

25 February 2014

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kilyen v. Romania,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Josep Casadevall, *President,*
Alvina Gyulumyan,
Ján Šikuta,
Dragoljub Popović,
Kristina Pardalos,
Johannes Silvis,
Iulia Antoanella Motoc, *judges,*
and Santiago Quesada, *Section Registrar,*

Having deliberated in private on 4 February 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 44817/04) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Romanian national, Mr Laszlo Kilyen ("the applicant"), on 25 November 2004.

2. The applicant was represented by Mr V. Ghere, a lawyer practising in Târgu-Mureş. The Romanian Government ("the Government") were represented by their Agent, Mr R.-H. Radu, of the Ministry of Foreign Affairs.

3. The applicant alleged that the search carried out at his home by police officers in his absence constituted a breach of his right to respect for his home as guaranteed by Article 8 of the Convention.

4. On 29 April 2008 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant, Mr Laszlo Kilyen, was born in 1972 and lives in Murgeşti.

6. On 10 May 2003 police officers T.M. and L.C.V. were carrying out an investigation into the theft of two cars in the village of Murgeşti. The applicant, who lived alone in a house with a yard, was away from home on a

trip abroad. On the same day at around 4 p.m., the two officers entered the applicant's yard by breaking the main gate which had a closing system made by the applicant from metal wires. The officers took note of the chassis series of two cars found in the applicant's shed. They also looked in several boxes which contained spare parts for cars.

7. After a certain period of time, the applicant's neighbour, K.M., entered the yard and questioned the two officers about the reason for their presence there. T.M. and L.C.V. disclosed their identities and informed K.M. that they were carrying out an investigation into the theft of two cars. Before leaving the yard, the officers informed K.M. that the two cars found in the applicant's shed were not the ones reported stolen and left him a summons ordering the applicant to report to the police station as soon as possible.

8. On 15 May 2003, upon his return home, the applicant lodged a complaint with the Prosecutor's Office of the Mureş County Court against the two police officers for the crime of trespassing under Article 192 of the Criminal Code. He alleged that the officers had entered his yard in his absence and without his consent. He also sought civil damages from the two alleged perpetrators.

9. In his statement given before the prosecutor on 1 July 2003, the applicant mentioned that he was a car mechanic and that he often travelled to Hungary to buy spare parts. He alleged that he felt harassed by local police officers working in the Car Theft Department who, on several occasions, had entered his yard in his absence in order to check whether he was hiding stolen cars. The applicant also alleged that, although the police never found stolen cars in his possession, the frequent police checks gave him a reputation in the village of being a car thief.

10. The two officers declared before the prosecutor that they had found K.M. in the applicant's yard and had entered believing that he was the owner and assuming that they had his permission.

11. On 8 July 2003 the Prosecutor's Office of the Târgu Mureş Court of Appeal decided to discontinue the proceedings against T.M. and L.C.V. The prosecutor investigating the case noted that the two officers had entered the applicant's yard in his absence and without his permission. However, when K.M. had arrived at the scene, they had immediately disclosed their identities. Moreover, they had been on duty and had only noted the chassis series of the applicant's cars. The prosecutor therefore concluded that the officers had had no intention of committing a crime. On 29 October 2003 a complaint by the applicant against this decision was rejected by the superior Prosecutor from the Prosecutor's Office of the Târgu Mureş Court of Appeal.

12. On 27 January 2004 the applicant appealed against the prosecutors' decisions before the Târgu Mureş Court of Appeal. He alleged that the two officers had illegally entered his home in his absence, without his

consent and without a search warrant. He also complained that his rights as guaranteed by Article 8 of the Convention had been breached by the unlawful search carried out by the two police officers.

13. The Court of Appeal rejected the applicant's appeal on 27 February 2004 holding that T.M. and L.C.V. had acted in accordance with their duties as provided for by articles 41, 42 and 43 of Law no. 360/2002 on the Status of Police Officers. The court underlined that the officers had disclosed their identities and the purpose of their presence on the premises as soon as the applicant's neighbour enquired. It was further held that they had been on duty and carrying out an investigation, and therefore it could not be held that they had intended to commit a crime.

14. The appeal by the applicant on points of law (*recurs*) against this decision was dismissed on 28 May 2004 by a final judgment of the High Court of Cassation and Justice which held that the officers had acted in accordance with the provisions of the Law no. 218/2002 on the Organisation of the Romanian Police. The court held that the officers had been in the presence of a witness and that they had disclosed their identities, and therefore had no intention of illegally entering the applicant's home.

II. RELEVANT DOMESTIC LAW

15. Article 192 of the Criminal Code, in force at the relevant time, reads as follows:

> "Entering, in any way and without having the right, a residence, a room, a shed or a surrounding area of any of these, without the consent of the person using them, or refusing to leave these places at the person's request, is punishable by a term of imprisonment of six months to four years.
>
> If the action is committed by an armed person or a group of two or more persons ... the punishment is a term of imprisonment of three to ten years."

16. The pertinent Articles of the Code of Criminal Procedure concerning searches, in force at the relevant time, before the reform of the latter by Law no. 281 of 24 June 2003 and Government Ordinances no. 66 of 10 July 2003 and no. 109 of 24 October 2003, read as follows:

Article 100

> "Where a person who is asked to hand over an object or a document as referred to in Article 98 denies its existence or denies having it, or where it is necessary for the discovery and collection of evidence, the authorities in charge of the investigation, or the court, may order a search.
>
> There may be a body search or a home search."

Article 101

> "The authorities in charge of the investigation can perform home searches only on the basis of an authorisation from the prosecutor.

The home search may be performed without the prosecutor's authorisation only when the person whose home shall be searched gives his or her written consent to the search.

Where the perpetrator is caught in the act of committing a crime, the search is performed without the prosecutor's authorisation."

Article 104

"Before starting the search, the authorities in charge of the investigation are obliged to disclose their identity and, in the cases provided for by law, to present the authorisation given by the prosecutor.

The seizure of objects or documents, as well as the search, are carried out in the presence of the person whose home is searched, or in case he or she is absent, in the presence of a representative, a member of the family or a neighbour with full capacity.

These operations carried out by the authorities in charge of the investigation require the presence of witnesses."

17. Articles 41 and 42 of Law no. 360/2002 on the Status of Police Officers provide for obligations of police officers such as loyalty towards the institution and the principles of the rule of law and respect towards citizens. Police officers must also continuously improve their professional skills, be polite, professional and respectful towards their superiors and their colleagues, support their colleagues in their work duties, maintain professional secrecy and not abuse their official powers or compromise the prestige of their position or the institution to which they belong. Article 43 of the same Law lists the rules imposed on police officers such as: not to ask for or receive bribes, not to use force unless this is provided for by law, not to cause physical suffering for the purpose of obtaining information and not to be involved in politics or immoral activities.

18. Law no. 218/2002 on the Organisation of the Romanian Police regulates the structure of the police force, the organisation of the local police units and their relationship with the central unit, the duties of the police force and the general rights and obligations of all categories of persons working for the police (police officers, public servants and contractual staff). Article 31 (1) (e) of Law no. 218/2002 provides as follows:

"e) if a crime has been committed, in the course of pursuing criminals or investigating a terrorist act, police officers may enter homes, commercial premises company offices, public or private institutions, political or social organisations irrespective of their owner, and board any means of Romanian transportation, under the conditions provided for by law."

In its second paragraph Article 31 also provides the following:

"(2) In exercising their rights under this law, the policemen have the duty to respect the fundamental human rights and liberties provided by law and the European Convention of Human Rights."

19. The relevant provisions of the Code of Criminal Procedure, in force at the relevant time, concerning the victim's request for civil damages within the criminal trial are as follows:

Article 20
Special conditions to resolve civil claims

"A victim who has sought civil damages during a criminal trial may submit his or her request before the civil courts if the criminal court has left the matter undecided."

Article 22
The force of a criminal judgment before the civil court ...

"The final judgment delivered in a criminal trial is binding on the civil court with respect to the existence of the act, the person who committed it and his or her guilt. ..."

20. The relevant provisions concerning civil liability, namely Articles 998-999 of the Civil Code, in force at the relevant time, are described in *Iambor v. Romania (no. 1)* (no. 64536/01, § 142, 24 June 2008).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

21. The applicant complained that the unlawful search carried out at his home by two police officers had violated his rights under Article 8 of the Convention, which reads as follows:

"1. Everyone has the right to respect for 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."

A. Admissibility

22. The Government raised an objection of non-exhaustion of domestic remedies. In particular, the applicant had not pursued a civil action for damages against the two police officers based on the general provisions concerning civil damages provided for in Articles 998-999 of the Civil Code, in force at the relevant time. They maintained that, since the criminal courts had left the applicant's request for damages unresolved, he could have brought a separate action in this respect before the civil courts. They

also submitted that the intention to commit a crime was an element required only to establish criminal responsibility, while before the civil courts negligence was enough to establish a person's civil liability. The Government did not submit examples of relevant domestic case-law in this respect. They further contended that in the case *Lazzarini and Ghiacci v. Italy* ((dec.), no. 53749/00, 7 November 2002) the Court had held that the applicants had a civil remedy available, which, following the rejection of their criminal complaint, they had failed to pursue.

23. The applicant submitted that a civil action based on the general provisions of the Civil Code would have had no prospects of success in his particular case. He underlined that, although the criminal investigation concluded that the police officers had not had the intention to commit a crime, the criminal courts held that the two officers had acted in accordance with the law. Therefore, since the civil court was bound by the judgment of the criminal court, the former could not have established any liability of persons who were considered to have been acting within their duties as provided for by law.

24. The Court points out that it is incumbent on the Government claiming non-exhaustion to prove that the remedy was an effective one, available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the complaints invoked and offered reasonable prospects of success (see *Akdivar and Others v. Turkey*, 16 September 1996, § 68, *Reports of Judgments and Decisions* 1996-IV).

25. In the case *Lazzarini and Ghiacci* invoked by the Government the applicants complained that their son had lost his life on account of medical negligence. In deciding that the applicants had failed to exhaust the domestic remedies in that case, the Court took into account the fact that the availability and effectiveness of domestic remedies as regards the doctor's responsibility was not disputed and proceedings were pending in this respect following a complaint lodged by the applicants. It was also taken into consideration that in the course of the said proceedings the applicants had already received a considerable amount of civil damages. Therefore, the Court concluded that, in the circumstances, it could not be held that the above-mentioned proceedings did not offer reasonable prospects of success for the applicants.

26. The Court considers that the current case is different from the one cited by the Government which refers to the specific situation of medical negligence, a situation which created, and continues to create, extensive case-law in all member States. The case at hand concerns a situation of alleged police abuse for which a civil action for damages based on Articles 998-999 of the Civil Code would theoretically have been available to the applicant. However, the Court reiterates, as the Government also pointed out, that at the time of the events civil liability had a subjective

character in Romanian law, requiring proof of negligence on the part of the person complained against (see *Eugenia Lazăr v. Romania*, no. 32146/05, § 90, 16 February 2010). Therefore, bearing in mind that the criminal courts excluded any type of intention or negligence on behalf of the police officers and decided that they had acted within their duties as provided for by law and that these judgments are binding on the civil courts, the Court considers that it is highly unlikely that an action for compensation under the Civil Code would have had any prospects of success in the current case. In addition, the Court notes that the Government did not submit any examples of relevant domestic case-law in support of their allegations.

27. In view of the above, the Court considers that the Government have failed to show, with reference to demonstrably established consistent case-law in cases similar to the applicant's, that a request for civil damages based on the provisions of Articles 998-999 of the Civil Code, at the material time, offered at least some prospects of success, not only in theory but also in practice. The Government's objection as to the exhaustion of domestic remedies must therefore be rejected.

28. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

29. The applicant alleged that two police officers had carried out an unlawful search at his home, in his absence, without his consent and without having prior authorisation from the prosecutor. He further submitted that the investigation and trial carried out subsequently had not provided him with any redress for the violation of his right to respect for his home.

30. The Government admitted that the search carried out at the applicant's home constituted an interference with his right to respect for his home. However, the interference was in accordance with the law within the meaning of Article 8 § 2 of the Convention, it was proportionate to the legitimate aim of preventing crime and was accompanied by the appropriate procedural safeguards.

31. The Court notes that it was not disputed that the police entering the applicant's home on 10 May 2003 constituted an interference with his right to respect for his home. The Court sees no reason to hold otherwise (see *Varga v. Romania*, no. 73957/01, § 67, 1 April 2008). Accordingly, it 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.

32. The Court reiterates that the expression "in accordance with the law", within the meaning of Article 8 § 2, requires firstly that the impugned measures should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V).

33. In respect of the domestic law on which the interference was based in the current case, the Court notes that the domestic authorities retained as a legal basis articles 41-43 of the Law no. 360/2002 on the Status of Police Officers and, in general terms, the Law no. 218/2002 on the Organisation of the Romanian Police.

34. The Court observes that articles 41-43 of Law no. 360/2002, quoted by the Târgu Mureş Court of Appeal, are general rules concerning the rights and duties of police officers and contain no specific and clear provisions regarding home searches (see paragraph 17 above). With respect to Law no. 218/2002, cited in general terms by the High Court of Cassation and Justice, the Court notes that, while vesting wide powers in State agents to carry out searches in situations of flagrant crimes, pursuit of criminals or anti-terrorist operations, that Law does not define with sufficient clarity the scope of those powers and the manner of their exercise, so as to afford an individual adequate protection against arbitrariness (see paragraph 18 above). Reference to that Law in general terms cannot replace an individual authorisation of a search, delimiting its object and scope and drawn up in accordance with the relevant legal provisions either beforehand or afterwards (see, *mutatis mutandis*, *Imakayeva v. Russia*, no. 7615/02, §§ 188-189, ECHR 2006-XIII (extracts), and *Esmukhambetov and Others v. Russia*, no. 23445/03, § 176, 29 March 2011).

35. The Court considers that the provisions cited as a legal basis for the search of the applicant's home were formulated in vague and general terms and cannot serve as a sufficient legal basis for the interference in the present case. They therefore did not offer adequate and effective safeguards against abuse.

36. It also notes in this respect that the Government did not submit any document specifically authorising the two officers to carry out the search. It appears that no such warrant was drawn up, the officers having acted directly within their wide powers under the above-mentioned legal provisions.

37. The Court thus concludes, in view of the above-mentioned considerations and in the absence of a decision adapted to the applicant's case which would clearly indicate the purpose and scope of the search, and which could have been appealed against in a court, that the interference with

the applicant's rights was not "lawful". It is thus not necessary to examine whether the interference pursued a legitimate aim and was proportionate.

38. Accordingly, there has been a violation of Article 8 of the Convention on account of the search of the applicant's home on 10 May 2003.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

39. Article 41 of the Convention provides:

> "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."

A. Damage

40. The applicant claimed 100,000 euros (EUR) in respect of non-pecuniary damage.

41. The Government submitted that there was no link between the alleged violation and the non-pecuniary damage requested. They contended that the amount claimed was excessive and that a finding of a violation would constitute sufficient just satisfaction for the applicant in the current case.

42. The Court accepts that the breach of the applicant's right to respect for his home must have caused him distress. Making its assessment on an equitable basis, the Court awards the applicant EUR 4,500 in compensation for non-pecuniary damage.

B. Costs and expenses

43. The applicant also claimed the reimbursement of costs and expenses incurred before the domestic courts as well as those incurred before the Court, without specifying the amount and without providing any supporting documents.

44. The Government requested that the Court reject the applicant's request for costs and expenses as being unsubstantiated.

45. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the applicant's failure to provide any supporting documents and to the above criteria, the Court rejects the claim for costs and expenses (see *Alkaya v. Turkey*, no. 42811/06, § 48, 9 October 2012).

C. Default interest

46. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 8 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 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, in respect of non-pecuniary damage;
   (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;

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

Done in English, and notified in writing on 25 February 2014, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar

Josep Casadevall
President