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

FIFTH SECTION

DECISION

Application no. 46176/14
Zlaten SIMOVSKI
against North Macedonia

The European Court of Human Rights (Fifth Section), sitting on 24 June 2021 as a Committee composed of:

Mārtiņš Mits, *President,*
Stéphanie Mourou-Vikström,
Ivana Jelić, *judges,*

and Martina Keller, *Deputy Section Registrar*,

Having regard to the above application lodged on 17 June 2014,

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

Having deliberated, decides as follows:

THE FACTS

1. The applicant, a Macedonian/citizen of the Republic of North Macedonia, was born in 1954 and lives in Skopje. The applicant was represented by Mr I. Spirovski, a lawyer practising in Skopje.

2. The Government were represented by their Agent, Mrs D. Djonova.

A. The circumstances of the case

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

4. The applicant is a collector of ancient coins and since 1993 has been a member of "Paionon", a numismatic society based in Skopje. Until 2005 he ran an antique shop in Skopje.

5. In 2008 the applicant requested that the Museum of the City of Skopje proceed with the valuation of his collection of ancient coins, which comprised some 800 pieces.

1. Search of the applicant's home

6. On 23 June 2010 an investigating judge of the Skopje Court of First Instance ("the trial court") issued a warrant to have the applicant's home searched. The warrant was issued at the request of the Ministry of the Interior on the grounds of reasonable suspicion that the applicant had committed the following criminal offences: criminal conspiracy; bribery; damage or destruction of cultural heritage; appropriation of cultural heritage; and the exportation of cultural heritage.

7. The warrant stated that it was probable that evidence relating to the above-mentioned criminal offences or objects relevant to the criminal proceedings would be uncovered in the course of the search of the applicant's home.

8. On 24 June 2010 the search was conducted in the presence of the applicant and one witness. They both signed the search record without raising any objections. No reasons were given in the search record for the absence of a further witness, as required under Article 216 §§ 3 and 4 of the Code of Criminal Procedure.

9. As a result of the search, the police seized a mobile phone, a computer, a digging tool, photographs of coins, several old coins, three metal boxes containing a coin collection, a request for valuation of the coin collection and a suitcase with documents in Turkish and Greek belonging to the applicant's father, who had worked as a historian.

10. On the same day a document was issued to the applicant, certifying the temporary seizure of the objects found during the search of his home, including some additional objects that had not been noted in the search record.

2. Criminal proceedings against the applicant

11. On 26 June 2010 the investigating judge heard the applicant in the presence of his lawyer. The applicant was informed that he was being investigated for criminal conspiracy (Article 394 § 2 of the Criminal Code) and for withholding archaeological artefacts (Article 261 § 3 read in conjunction with Article 45 of the Criminal Code). On that occasion the applicant learned that investigative measures had been taken against several other individuals for illegal trade in archaeological artefacts.

12. All the objects seized during the search of the defendants' homes had been passed on to the Bureau for the Protection of Cultural Heritage (*Управа за заштита на културното наследство*), part of the Ministry of Culture, for identification, classification (in terms of dating) and determination of authenticity. For this purpose, several documents entitled "expert identification" and one document entitled "draft opinion" had been prepared by experts (museum curators, inspectors employed by the Bureau and academics).

13. On 20 September 2010 the applicant, together with twenty-two other individuals, was indicted before the trial court on charges of criminal conspiracy and of withholding archaeological artefacts. It was alleged that, between 2007 and 2010 he had been part of a criminal group that had engaged in illegally digging for, and then withholding and trading in, archaeological artefacts, which were "objects under temporary protection" (*добра под привремена заштита*) and which constituted cultural heritage.

14. The applicant alleged that the objects had been acquired legally and that some of them were part of a family inheritance. Parts of his coin collection had been acquired in around 2001 from third parties. Although the applicant had initiated the procedure for having his coin collection valued, the process had not been completed. He further alleged that before the entry into force of the Protection of Cultural Heritage Act of 2004 (*Закон за заштита на културното наследство*, Official Gazette nos. 20/2004 and 115/07), there had been no legal impediments to collecting antiquities.

15. At a hearing held on 29 March 2011, one of the defence lawyers challenged the lawfulness of the search of the defendants' homes (including that of the applicant) on the ground that they had been carried out in the presence of only one witness, contrary to the requirements of domestic law. His objection was supported by the other defendants.

16. At a hearing held on 17 May 2011 the trial court stated that, as a result of procedural shortcomings in the search records of the defendants' homes, those records would not be taken into account by the court as evidence. However, the trial court dismissed a request lodged by the defence seeking the exclusion from the case file of all evidence originating from the search of the defendants' homes (namely all objects seized and the expert identification of those objects). The trial court stated that although the search records were formally deficient, the search of the defendants' homes itself had been lawful. It based its decision on the following factors: the search warrant had been issued by an investigating judge; the warrant had been presented to the defendants; the search had been carried out in the presence of the defendants; no objections had been raised by either the witnesses or the defendants; and it had not been disputed that the objects seized during the search belonged to the defendants. It relied on the Court's case-law (*Schenk v. Switzerland*, 12 July 1988, Series A no. 140, and *Khan v. the United Kingdom*, no. 35394/97, ECHR 2000-V) and concluded that allowing such evidence would not render the trial unfair.

17. At hearings held between May and June 2011, four experts who had participated in the identification of the objects were questioned in the presence of the applicant and his lawyer.

18. On 21 October 2011 the trial court gave judgment – running to 220 pages – finding the applicant and the other defendants guilty. The applicant was convicted of criminal conspiracy, contrary to Article 394 § 2,

and of withholding illegally acquired artefacts, contrary to Article 261 § 3 taken in conjunction with Article 45 of the Criminal Code. He was sentenced to three years and six months' imprisonment. The trial court also ordered the confiscation of the artefacts discovered during the search of the applicant's home, as objects acquired, contrary to Article 100-a of the Criminal Code, through crime.

19. The trial court established that between 2007 and 2010 the applicant had been part of a criminal group involved in illegal excavations and in trading archaeological artefacts. He had exchanged some valuable objects of cultural heritage with another defendant in 2009 and he had been storing illegally acquired artefacts in his home. The trial court relied on witness statements by officials employed in the National Conservation Centre and other relevant institutions to determine the statutory framework for possession of archaeological artefacts and objects of cultural heritage, as provided for by the Protection of Cultural Heritage Act. It also relied on telephone-surveillance records as evidence that the applicant had been involved in the illegal trade in artefacts.

20. The trial court carried out an extensive and detailed analysis of the statements given by the experts at the trial. Although it observed that there were some inconsistencies, it accepted the written reports of the experts as relevant and conclusive evidence, given that the methodology used was in line with professional standards, as confirmed by other witnesses (including a defence witness) examined at the trial. Moreover, it concluded that a chemical analysis of the objects would be inconclusive in the absence of information regarding the soil and other geographical elements determining where the objects had been excavated, as confirmed by several scientific institutions in the country.

21. The applicant appealed against the first-instance judgment. He complained, *inter alia*, that the conviction was based on evidence collected during the unlawful search of his home on 24 June 2010, in violation of his right to private life and protection of his home.

22. On 18 June 2012 the Skopje Court of Appeal held a public session in the presence of the applicant and his lawyer. It dismissed the appeals of all the defendants and upheld the first-instance judgment. Having examined all of the complaints raised by the applicant and the other defendants, the appellate court upheld the decisions and the reasoning of the first-instance court.

23. The applicant lodged a request with the Supreme Court for extraordinary review of the final judgment, reiterating the complaints he had made before the appellate court.

24. On 28 November 2013 the Supreme Court upheld the facts established and the reasoning put forward by the lower courts, and dismissed all of the defendants' requests, including those of the applicant.

The applicant's representative received a copy of that judgment on 29 January 2014.

B. Relevant domestic law

25. Article 216 § 3 of the Code of Criminal Procedure (Official Gazette no. 15/2005) provides that two adults must be present as witnesses during any search of a home or a person.

Article 216 § 4 of the same Code provides that a search may be carried out in spite of the absence of witnesses if their attendance cannot be secured immediately and their absence risks causing a delay. The search record must state the reasons for carrying out the search in the absence of witnesses.

26. Article 146 § 2 of the Criminal Code provides that any official who, while performing his or her duty, conducts an unlawful search will be liable to a term of imprisonment of between six months and five years.

COMPLAINTS

27. The applicant complained under Article 8 and Article 6 § 1 of the Convention, both in relation to the search of his home as part of a criminal investigation and in relation to the subsequent use of the objects seized in the criminal proceedings.

THE LAW

A. Complaint under Article 8 of the Convention

28. The applicant complained under Article 8 of the Convention that the search of his home on 24 June 2010 had been unlawful, in that only one witness had been present and no reasons had been given for the absence of a second witness, contrary to the requirements of domestic law. Article 8 of the Convention, in so far as relevant, reads:

> "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."

1. The parties' submissions

(a) The Government

29. The Government submitted that the applicant had not complied with the six-month time-limit, which had started to run when he had become aware or ought to have become aware of the circumstances complained of.

According to the Government, the search of the applicant's home had been carried out on 24 June 2010, four years before the application was lodged with the Court.

30. Alternatively, the Government maintained that the applicant had not made use of effective domestic remedies, as the impugned domestic proceedings could not be considered an appropriate forum for his complaint under Article 8 of the Convention. In particular, the alleged unlawfulness of the search was not the essence of the impugned domestic proceedings. In this context, the Government noted that the applicant had been able to avail himself of an effective remedy as provided for in Article 146 of the Criminal Code (see paragraph 26 above). Such a claim, if successful, would have served as a firm legal basis for filing a compensation claim. Since, however, the applicant had failed to do so, it followed that his complaint was to be rejected on the grounds of non-exhaustion.

31. As to the merits, the Government fully endorsed the reasoning contained in the domestic courts' decisions. There had been an interference with the applicant's right to respect for his home, but that interference had been in accordance with the law, had pursued a legitimate aim, namely to expose and prevent large-scale crime, and had also been proportionate, given the severity of the criminal offences in question.

32. Although there had been procedural shortcomings in the search record (that is, the search record had contained no explanation as to why only one witness had been present, rather than two), it had been possible under domestic law to conduct a search in spite of the absence of any witnesses, and in any event the applicant had not objected to the lawfulness of the search operation, after attending more than ten hearings.

33. Finally, the Government submitted that all the documents referred to by the applicant had been seized from his home, which he shared with other family members. It would have been disproportionately cumbersome for the search warrant to name all the objects expected to be found, or for the police to carry out an on-the-spot assessment of the relevance of every object seized.

(b) The applicant

34. The applicant disagreed with the Government as regards admissibility. He argued, firstly, that the trial court in its decision of 17 May 2011 had in fact decided the question of lawfulness by dismissing his claims, stating that the search of his home had been lawful (see paragraph 16 above). Secondly, under Article 146 of the Criminal Code (see paragraph 26 above), the unlawfulness of a search carried out by State agents was only liable to prosecution by the State acting of its own motion, which made that remedy ineffective.

35. As to the merits of the complaint, the applicant maintained that the search warrant had been too vague and had lacked proper reasoning. He also

contended that the search and seizure operation itself had been carried out in an arbitrary fashion, namely by seizing objects that had no connection with the investigation, such as a suitcase with documents belonging to his late father and other personal documents belonging to his mother.

36. The applicant further submitted that although the Code of Criminal Procedure required the presence of two witnesses during the search, only one witness had been present. The applicant therefore submitted that the trial court had erred in concluding that while the search records were formally deficient the search itself had been lawful.

2. The Court's assessment

37. The Court does not consider it necessary to examine all of the issues regarding admissibility raised by the Government, since this complaint is in any event inadmissible for the following reasons.

38. The general principles regarding the search of an applicant's residential premises are set out in *Dragan Petrović v. Serbia* (no. 75229/10, §§ 69-73, 14 April 2020, with further references, in particular to *Buck v. Germany*, no. 41604/98, §§ 31 and 32, ECHR 2005-IV).

39. The Court considers that the search of the applicant's apartment amounted to an interference with his "home" within the meaning of Article 8 of the Convention, which makes it unnecessary to determine whether it also involved his "private life" in the context of his complaints before the Court (see, for example, *Buck*, cited above, §§ 32 and 33).

40. It is also clear that the search had a general basis in domestic law, as interpreted by the national courts in the present case, having, *inter alia*, been ordered by an investigating judge on the grounds of reasonable suspicion that the applicant had committed the criminal offences of criminal conspiracy, bribery, damage or destruction of cultural heritage, appropriation of cultural heritage and the exportation of cultural heritage (see paragraph 6 above). This is quite separate from the issue of the absence of a second witness during the search (see paragraph 15 above), a matter which should be considered in connection with the procedural safeguards referred to below in paragraph 42 (see also *Dragan Petrović*, cited above, § 74). The search in question was ordered with a view to uncovering physical evidence of serious offences, and thus in pursuit of a "legitimate aim", namely the prevention of crime and the protection of the rights of others (see the case-law cited in paragraph 38 above). What remains to be resolved, therefore, is whether the interference with the applicant's home was "necessary in a democratic society" within the meaning of Article 8 of the Convention – that is, whether the interference was proportionate to the legitimate aim pursued.

41. Turning to the search warrant, the Court notes that it was couched in relatively broad terms. Although limiting the search operation to the applicant's home, it did not describe in detail the items which could be

searched for and seized, but instead referred in more general terms to "evidence relating to the ... criminal offences", or "objects relevant to the criminal proceedings" as specified in paragraph 7 above. The specificity of the items subject to seizure varies from case to case depending on the nature of the offence being investigated (see *Sher and Others v. the United Kingdom*, no. 5201/11, § 174, ECHR 2015). In this case, the police, who had to act promptly as the case concerned a criminal conspiracy, could not have known in advance who the objects belonged to, or what specific items could provide evidence of illegal digging for, and withholding and trading of, archaeological artefacts, offences of which the applicant and twenty-two other individuals were suspected (see paragraph 13 above). Although it might have been feasible to frame the warrant in more precise terms, it was sufficient, in the circumstances, that its scope was limited by reference to the nature of the alleged offences, and that the applicant was subsequently provided with a document certifying the seizure of all the objects found (including those belonging to his parents) during the search, together with some additional objects that had not been noted in the search record (see paragraph 10 above; see also, *mutatis mutandis*, *Posevini v. Bulgaria*, no. 63638/14, § 72, 19 January 2017).

42. Finally, in respect of the procedural safeguards, the Court notes that while only one witness was present during the search, rather than two, the applicant himself was also present. Moreover, he also signed the official record of the search-and-seizure operation and the seizure certificate, and raised no objections either to the search procedure as such or to the reasoning of the search warrant. Likewise, the witness who was present during the search also signed the official record of the search-and-seizure operation and made no objections to the search while it was carried out (see paragraph 8 above). The Court is thus of the opinion that the applicant was afforded adequate and effective safeguards against any abuse during the search itself (see the case-law cited in paragraph 38 above, in particular *Dragan Petrović*, § 77).

43. In view of those circumstances, the Court cannot but conclude that the interference with the applicant's "home" was "in accordance with the law", was undertaken in pursuit of a legitimate aim, and was "necessary in a democratic society", for the purposes of Article 8 of the Convention.

44. Accordingly, this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Complaint under Article 6 of the Convention

45. The applicant also complained under Article 6 § 1 of the Convention that his conviction had been based on unlawfully obtained evidence,

collected during the search of his home. Article 6 § 1 of the Convention reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

1. The parties' submissions

46. The Government maintained that during the proceedings before the domestic courts, the applicant had had every opportunity to examine, in adversarial proceedings, the evidence obtained during the search of his home, and to object to its use. The items admitted had not been the key evidence and the domestic courts' decisions had also been based on other evidence, such as intercepted communications which had been considered in detail in the first-instance judgment, the expert identification reports, and statements from experts and witnesses.

47. The applicant contended that he had not had a fair trial because the evidence admitted had been unlawfully obtained, in violation of his right to respect for his private life under Article 8 of the Convention. He maintained that he was the lawful owner of the coin collection and that the trial court had based its decision solely on the unlawfully obtained evidence and on the expert reports identifying that evidence. He submitted that the recordings obtained by telephone surveillance had not revealed any crime. The manner in which the evidence had been obtained had been contrary to the relevant rules on admissibility of evidence under the Code of Criminal Procedure and had rendered his trial unfair.

2. The Court's assessment

48. The general principles are summarised in *Khan v. the United Kingdom* (no. 35394/97, § 34, ECHR 2000-V), with further references, in particular to *Schenk v. Switzerland* (12 July 1988, §§ 45-46, Series A no. 140) and, in the context of admissibility of evidence, *Teixeira de Castro v. Portugal* (9 June 1998, § 34, *Reports of Judgments and Decisions* 1998-IV) and *P.G. and J.H. v. the United Kingdom* (no. 44787/98, § 76, ECHR 2001-IX).

49. The Court notes at the outset that the applicant has put forward arguments, asserting that the evidence admitted had been unlawfully obtained and was used illegally during the proceedings, but that he did not challenge its authenticity. In fact, the applicant did not disagree with the experts' conclusions regarding the authenticity of the artefacts: rather, he denied that some of them were of any value (compare *Khan*, cited above, § 38; *P.G. and J.H. v. the United Kingdom*, cited above, § 79; and *Bykov v. Russia* [GC], no. 4378/02, § 95, 10 March 2009).

50. He also had an effective opportunity to challenge the allegedly unlawful manner in which the evidence was collected and to oppose its use.

Indeed, he made use of that opportunity during the proceedings before the trial court, in his appeal and before the Supreme Court (see paragraphs 14, 21 and 23 above). The domestic courts examined his arguments on the merits and provided reasons for their decisions (see paragraphs 19, 20, 22 and 24 above). The fact that the applicant was unsuccessful at each step does not alter the fact that he had an effective opportunity to challenge the evidence and oppose its use (see *Schenk*, § 47, and *Khan*, § 38, both cited above).

51. The Court further notes that the objects seized in the applicant's home were not the only evidence on which the conviction was based (compare *Schenk*, cited above, § 48). In convicting the applicant, the courts took into account the applicant's statements and those of his co-accused, and examined them against the statements of other witnesses, evidence obtained in numerous searches and seizures, and experts' reports (see paragraph 12 above), as well as the telephone-surveillance records which had been considered in detail in the first-instance judgment (see paragraph 19 above).

52. In view of these considerations, the Court considers that there is nothing to substantiate the conclusion that the applicant's defence rights were not properly protected in respect of the evidence adduced, or that the domestic courts' evaluation of that evidence was arbitrary (see *Bykov*, cited above, § 98). In conclusion, the Court finds that the use of the impugned evidence did not as such deprive the applicant of a fair trial.

53. Accordingly, this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 15 July 2021.

Martina Keller	Mārtiņš Mits
Deputy Registrar	President