



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

SECOND SECTION

CASE OF POTAPENKO v. HUNGARY

(Application no. 32318/05)

JUDGMENT

STRASBOURG

1 February 2011

FINAL

01/05/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Potapenko v. Hungary,

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

Françoise Tulkens, *President*,

Ireneu Cabral Barreto,

Danutė Jočienė,

András Sajó,

Nona Tsotsoria,

Işıl Karakaş,

Kristina Pardalos, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 11 January 2011,

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

PROCEDURE

1. The case originated in an application (no. 32318/05) against the Republic of Hungary lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mr Alexandr Vlagyimirovics Potapenko (“the applicant”), on 31 August 2005.

2. The Hungarian Government (“the Government”) were represented by Mr L. Hölzl, Agent, Ministry of Public Administration and Justice.

3. On 24 March 2009 the President of the Second Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

4. The Ukrainian Government did not exercise their right under Article 36 § 1 of the Convention and Rule 44 of the Rules of Court to intervene in the proceedings.

THE FACTS**THE CIRCUMSTANCES OF THE CASE**

5. The applicant was born in 1962 and lives in Békéscsaba.

6. On 15 September 1998 criminal proceedings were instituted against the applicant – who had lived in Hungary since 1986 – and his accomplices on charges of aggravated fraud and other offences.

7. On 8 March 1999 the police withdrew the applicant's passport in view of the pending prosecution. The applicant did not appeal against an administrative decision of 15 April 1998 confirming this measure, which thus became final on 18 May 1999.

8. In 1999, and then on 15 August and 12 December 2000 and 16 December 2002 the applicant requested that his passport be returned to him; the last occasion related to his attending his grandmother's funeral in the Ukraine. His requests were to no avail. In pursuit of his subsequent request of 17 October 2005, on 11 January 2006 he was informed that the authority in charge was unable to locate his passport. The passport was found and returned to him only on 11 September 2006.

9. Meanwhile, on 24 July 2002 the Budapest Public Prosecutor's Office preferred a bill of indictment in the case.

10. After several hearings, on 26 April 2007 the applicant was acquitted.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

11. The applicant complained that the length of the proceedings had been incompatible with the “reasonable time” requirement of Article 6 § 1 of the Convention. The Government contested that argument.

12. The period to be taken into consideration lasted over eight years and seven months for one level of jurisdiction. In view of such lengthy proceedings, this complaint must be declared admissible.

13. The Court has frequently found violations of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present application (see, among many other authorities, *Pélissier and Sassi v. France* [GC], no. 25444/94, § 67, ECHR 1999-II). Having examined all the material submitted to it, the Court considers that the Government have not put forward any fact or convincing argument capable of persuading it to reach a different conclusion in the present circumstances. Having regard to its case-law on the subject, the Court considers that the length of the proceedings was excessive and failed to meet the “reasonable time” requirement.

There has accordingly been a breach of Article 6 § 1.

II. ALLEGED VIOLATION OF ARTICLE 2 § 2 OF PROTOCOL NO. 4 TO THE CONVENTION

14. The applicant also complained that the protracted withdrawal of his passport had amounted to a violation of his freedom of movement. The Court considers that this complaint falls to be examined under Article 2 of Protocol No. 4 which provides as relevant:

“2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

15. The Government contested this argument.

A. Admissibility

16. The Government submitted that the applicant had not appealed the decision of 15 April 1999. Moreover, until 30 June 2003 he had had a possibility under the law to request the authorities to re-examine the grounds for the withholding of his passport. Had he done so, the resultant administrative decision could have been appealed and eventually subjected to judicial review. After 1 July 2003 he could have submitted a similar request to the criminal court trying his case. In sum, in their view, the applicant had not exhausted domestic remedies.

17. The applicant contested these views in general terms.

18. The Court observes that the applicant requested at least on four occasions that his passport be returned to him (see paragraph 8 above) but in vain. It is therefore satisfied that he pursued such remedies as could reasonably be expected in the circumstances. The obligation to exhaust domestic remedies requires only that an applicant make normal use of remedies which are effective, sufficient and accessible in respect of his Convention grievances (see *Balogh v. Hungary*, no. 47940/99, § 30, 20 July 2004, and *John Sammut and Visa Investments Limited v. Malta* (dec.), no. 27023/03, 28 June 2005). When there is a choice of several domestic remedies open to the applicant, Article 35 must be applied to reflect the practical realities of that individual's position in order to ensure the effective protection of the rights guaranteed (see *Yağiz v. Turkey*, no. 19092/91, Commission decision of 11 October 1993, Decisions and Reports (DR) 75, p. 207). It follows that the complaint cannot be rejected for non-exhaustion of domestic remedies.

19. The Court moreover notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further

notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

20. The applicant submitted that it was unacceptable that he had been prevented from leaving Hungary for some seven and a half years – and this despite several individual relief requests. The Government did not put forward any particular argument on the merits of this complaint.

21. The Court reiterates that Article 2 of Protocol No. 4 guarantees to any person a right to liberty of movement, including the right to leave any country for another country to which he or she may be admitted. Any measure restricting that right must be lawful, pursue one of the legitimate aims referred to in the third paragraph of the above-mentioned Convention provision and strike a fair balance between the public interest and the individual's rights (see *Baumann v. France*, no. 33592/96, § 61, ECHR 2001-V).

22. The Court is satisfied that the interference with the applicant's right under Article 2 of Protocol No. 4 – whose existence and lawfulness was not in dispute between the parties – pursued the legitimate aim of securing his availability for trial, and hence the maintenance of public order.

23. As regards proportionality, the Court notes that the applicant's passport was withdrawn on 8 March 1999 and returned on 11 September 2006. His four requests for interim relief, including the one related to the funeral of a close relative, were turned down. Thus, the prohibition against his leaving the country remained unchanged for over seven and a half years. The Court reiterates that, even where a restriction on the individual's freedom of movement was initially warranted, maintaining it automatically over a lengthy period of time may become a disproportionate measure, violating the individual's rights (see *Riener v. Bulgaria*, no. 46343/99, § 121, 23 May 2006; *Luordo v. Italy*, no. 32190/96, ECHR 2003-IX; and, *mutatis mutandis*, *İletmiş v. Turkey*, no. 29871/96, ECHR 2005-XII).

24. In the Court's view, the travel ban in question amounted in reality to an almost automatic, blanket measure of indefinite duration (see *Földes and Földesné Hajlik v. Hungary*, no. 41463/02, §§ 32 to 36, ECHR 2006-XII). The Court considers that this ran counter to the authorities' duty under Article 2 of Protocol No. 4 to take appropriate care to ensure that any interference with the right to leave a country remains justified and proportionate throughout its duration, in the individual circumstances of the case.

25. It follows that there has been a violation of the applicant's right to leave Hungary, as guaranteed by Article 2 § 2 of Protocol No. 4 to the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

26. 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

27. The applicant claimed altogether 520,000 euros (EUR) in respect of pecuniary and non-pecuniary damage.

28. The Government contested the claim.

29. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, it considers that the applicant must have sustained some non-pecuniary damage. Ruling on an equitable basis, it awards him EUR 12,500 under that head.

B. Costs and expenses

30. The applicant made no costs claim.

C. Default interest

31. 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.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* there has been a violation of Article 2 § 2 of Protocol No. 4 to the Convention;
4. *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 12,500 (twelve thousand five

hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Hungarian forints at the rate applicable at the date of settlement;

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

Done in English, and notified in writing on 1 February 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Françoise Tulkens
President